SOCIOLOGY OF CRIME, LAW AND DEVIANCE
VOLUME 6

ETHNOGRAPHIES OF LAW AND SOCIAL CONTROL

STACY LEE BURNS
Editor

ETHNOGRAPHIES OF LAW AND SOCIAL CONTROL

SOCIOLOGY OF CRIME, LAW AND DEVIANCE

Series Editor: Mathieu Deflem
(Volumes 1–4: Jeffery T. Ulmer)

Recent Volumes:

Volume 1: Edited by Jeffery T. Ulmer, 1998

Volume 2: Edited by Jeffery T. Ulmer, 2000

Volume 3: Legal Professions: Work, Structure and Organization. Edited by Jerry Van Hoy, 2001

Volume 4: Violent Acts and Violentization: Assessing, Applying, and Developing Lonnie Athens' Theories. Edited by Lonnie Athens and Jeffery T. Ulmer, 2003

Volume 5: Terrorism and Counter-Terrorism: Criminological Perspectives. Edited by Mathieu Deflem, 2004

SOCIOLOGY OF CRIME, LAW AND DEVIANCE VOLUME 6

ETHNOGRAPHIES OF LAW AND SOCIAL CONTROL

EDITED BY

STACY LEE BURNS

Department of Sociology, Loyola Marymount University, USA

2005

ELSEVIER

JAI

Amsterdam – Boston – Heidelberg – London – New York – Oxford
Paris – San Diego – San Francisco – Singapore – Sydney – Tokyo

ELSEVIER B.V.
Radarweg 29
P.O. Box 211
1000 AE Amsterdam
The Netherlands

ELSEVIER Inc.
525 B Street, Suite 1900
San Diego
CA 92101-4495
USA

ELSEVIER Ltd
The Boulevard, Langford
Lane, Kidlington
Oxford OX5 1GB
UK

ELSEVIER Ltd
84 Theobalds Road
London
WC1X 8RR
UK

First edition 2005

British Library Cataloguing in Publication Data
A catalogue record is available from the British Library.

ISBN: 0-7623-1128-2
ISSN: 1521-6136 (Series)

♾ The paper used in this publication meets the requirements of ANSI/NISO Z39.48-1992 (Permanence of Paper). Printed in The Netherlands.

CONTENTS

LIST OF CONTRIBUTORS

Stacy Lee Burns	Department of Sociology, Loyola Marymount University, USA
Judge David J. Dreyer	Marion Superior Court, Indianapolis, Indiana, USA
Jill DuDeck-Biondo	Department of Sociology, California State University, Northridge, USA
Kerry O. Ferris	Department of Sociology and Social Work, Bradley University, USA
Kathryn J. Fox	Department of Sociology, University of Vermont, USA
Robert Garot	Department of Sociology, Bowling Green State University, USA
Peter R. Ibarra	Department of Justice Studies, Kent State University, USA
Vickie Jensen	Department of Sociology, California State University, Northridge, USA
Martha Komter	Department of Dutch Language and Culture, Vrije Universiteit, The Netherlands
Aaron Kupchik	The School of Justice & Social Inquiry, Arizona State University, USA
Jeffrey A. Modisett	Bryan Cave, LLP, USA
John S. W. Park	Department of Asian American Studies, University of California, Santa Barbara, USA
Michael Petrunik	Criminology Department, University of Ottawa, Canada

This Page Intentionally Left Blank

INTRODUCTION TO ETHNOGRAPHIES OF LAW AND SOCIAL CONTROL

Stacy Lee Burns

ABSTRACT

Until recently, collections of qualitative research on law and social control included only a narrow range of approaches, with almost no ethnomethodologically-informed ethnographies. The chapters in the volume exemplify the distinctive contributions that ethnographic and ethnomethodologically-informed studies have to offer research on law and social control from theoretical, substantive, and methodological viewpoints. The discussions address a timely and usefully broad selection of themes and provide detailed access to the unfolding dynamics of how various informal and official actors and social control institutions respond to and manage a variety of troubles, crimes, cases, and other social control problems.

This volume brings together distinguished scholars and cutting-edge experts in the fields of ethnography, law, and social control to present a comprehensive, insightful, and state-of-the-art overview of the everyday work and activities of legal and social control professionals, functionaries, and participants. Generally, collections of qualitative research on law and social control include only a narrow range of approaches, with little or no ethnomethodologically-informed ethnographies. The practical terms through which people involved in law and social control organize their activities, carry out their tasks, and make their interactions meaningful have not been central to most studies (but see

Ethnographies of Law and Social Control
Sociology of Crime, Law and Deviance, Volume 6, 1–6

ISSN: 1521-6136/doi:10.1016/S1521-6136(04)06001-4

Lynch & Sharrock, 2003 for some exceptions). This volume emphasizes the need to consider the organizationally and institutionally specific features and competencies that comprise the legal and social control work under investigation. The chapters bring to the fore the distinctive contributions that ethnographic and ethnomethodologically-informed studies have to offer research on law and social control from theoretical, methodological, and substantive viewpoints.

SITUATED STUDIES OF LAW AND SOCIAL CONTROL

Informal and formal social control has expanded its influence in contemporary society. Formal social control institutions like the courts, police, and prisons have extended their domain, such that social control has become an increasingly bureaucratic phenomenon involving public officials (Emerson, 1992). But there has also been a corresponding proliferation of informal modes of social control, including private security and "threat management" industries, victims' advocacy groups, community crime prevention strategies (e.g. neighborhood watch, amber alerts, "America's Most Wanted," and other crimestopper programs), as well as corporate "watchdog" organizations, to name just a few. This volume explores how a range of informal actors and official social control personnel and institutions respond to, process, and manage a variety of troubles, cases, offenses, crimes, and other social control problems (Emerson & Messinger, 1977).

Early ethnomethodologically-informed ethnographies of legal and social control work and institutions, such as those of Emerson (1969), Garfinkel (1967, 1988), Garfinkel et al. (1988), Bittner (1967, 1974), Lynch (1982), Peyrot (1982), Pollner (1974, 1979), Sacks (1972), Sudnow (1965, 1978), and Wieder (1974), formed the groundwork for later situated and naturalistic studies of formal and informal social control. This sociological research was directed toward explicating the everyday work activities, interactions, and decision-making practices of social control agents and participants. The discussions in this volume draw upon and are influenced by these prior sociological investigations, and also relate to a more recent body of ethnographic and ethnomethodological research on legal and social control activities, "negotiations," and responsibility attributions (Burns, 1998, 2000, 2001, 2004; Burns & Peyrot, 2003; Emerson, 1992, 1994; Garfinkel, 1996; Holstein, 1992, 1993; Lynch, 1997; Lynch & Sharrock, 2003; Miller, 1994; Peyrot & Burns, 2001; Pollner & Stein, 2001).

Ethnomethodology brings a distinctive "productional perspective" to ethnographic field studies of law and social control. It examines in material detail the daily problems, practical tasks, and routine activities of social control workers and professionals, to account for the "local orderliness" and produced regularities

of their work (Garfinkel, 1988, 1996). The contributions in this collection pursue a naturalistic and ethnomethodological interest in a "variety of highly local, very practical work concerns" (Emerson, 1983, p. 454), and in discovering:

> what local people consider meaningful, making their concerns accessible to readers who are unfamiliar with their social world (Emerson et al., 1995, p. 108).

The chapters in the volume hopefully exemplify such an approach, and provide more profound access to the unfolding, indigenous dynamics of legal and social control work (see Emerson et al., 1995; Pollner & Emerson, 2001).

AN OVERVIEW OF THE CONTRIBUTIONS

The contributions in this collection are presented in three parts. In Part I, the chapters focus on the social control of interpersonal "offenses" and "offenders." The chapters discuss the rise of laws and procedures targeting specified categories of offenses and offenders and how these operate to deter, pre-empt and manage the risks such persons are perceived to pose. Kerry Ferris' insightful and nuanced chapter investigates the formal and informal social control of celebrity stalking. Ferris shows how recent developments in the control of celebrity stalking not only increasingly involve official third parties (like police, probation and courts), but also pit these officials against a growing "threat management" industry of private security providers who argue that public handling of the problem is counterproductive. Next, the fascinating chapter by Peter Ibarra describes the work of probation officers in the surveillance and supervision of clients facing or convicted of domestic violence charges. The introduction of electronic monitoring technology into this social control work mediates the shared understandings and locally organizes the horizons of consequential relevancies. Ibarra highlights how the incorporation of such technology transforms the work of probation officers and furnishes a resource for doing human supervision. Then, Michael Petrunik addresses key changes in law and criminal justice policy during the 1980s and 1990s involving the development of crime control strategies directed toward designated high risk sex offenders. Petrunik examines the emergence of community protection legislation and a range of community crime prevention strategies targeting persons classified as sex offenders, along with the narratives of fear and danger that underlie these developments.

In Part II, we offer chapters that touch on the social control work of official bureaucracies and total institutions. While officials in these settings may see themselves as engaged in a rule-governed decision-making process of applying written rules, regulations, and other pre-determined criteria to the

circumstances at hand, several ethnographic and ethnomethodological studies suggest that organizational rule use is a highly practical, situated, and contingent accomplishment (see Bittner, 1974; Emerson, 1983; Garfinkel, 1967). Relying on this prior research, the chapter by Robert Garot describes the work of federal officials in a Section 8 housing office, and demonstrates how officers practice "suspicion" and use the "regs" as a reflexive resource in (dis)qualifying applicants for benefits. Garot finds that the exercise of discretion is an unavoidable and irremediable feature of their skilled work practice and competency. Next, in the vein of several recent studies of "self-change" in various self-processing settings (Gubrium & Holstein, 2001; Pollner & Stein, 2001), Kathryn Fox's chapter explores how treatment programs for violent offenders in prison fit and diverge from the more pragmatic characterization of post-modern penology prevalent in the socio-legal literature (e.g. Garland, 2001). Fox argues that such rehabilitation programs are part of a larger culture of (self) control directed at reforming not only offenders' misconduct, but also their values and selves. The following chapter by Vickie Jensen and Jill DuDeck-Biondo pursues a similar interest in the construction of troubled identities in total institutions. Jensen and DuDeck-Biondo usefully analyze how female inmates in jail construct and manage motherhood while incarcerated, and how addressing constraints on their ability to practice parenthood can enhance the quality of parenting and serve as a resource for change in the lives of incarcerated mothers.

The contributions in Part III discuss the formal social control work of legal professionals and functionaries, including attorneys, judges, and police. The unique and engaging chapter by Jeffrey Modisett (former Attorney General of Indiana) and Judge David Dreyer draws on their active experience "in the field" as prosecutors in the famous Mike Tyson rape case. Modisett and Dreyer describe how management of the intense media scrutiny was a central task for prosecutors, apart from their legal handling of the case, and was highly consequential to the result. The next chapter by John Park considers the impact of both private and formal legal controls on the contemporary practice of immigration law. Park demonstrates how immigration rules in practice give private corporate entities – not just the state – the authority to determine who is legally allowed to remain and work in the United States. The following chapter by Aaron Kupchik examines courtroom interactions and dispositions in juvenile court, and how judges, prosecutors, and defense attorneys variously negotiate compromises between concerns of future welfare and punishment in responding to troublesome youth. The final chapter by Martha Komter also considers interrogation and record-making by officials in legal cases, this time in an interpreter-mediated police interrogation and the case of a suspect charged with carrying false identification, theft, and other crimes. In a contribution reminiscent of Moerman and Sacks (1988) "on 'understanding' " as

an interactional accomplishment, Komter closely demonstrates how participants in this interactionally-mediated and multi-cultural context ongoingly manage problems of "understanding."

REFERENCES

Bittner, E. (1967). The Police on skid row: A study of peace keeping. *American Sociological Review*, *32*, 699–715.

Bittner, E. (1974). The concept of organization. In: R. Turner (Ed.), *Ethnomethodology* (pp. 69–81). Harmondsworth: Penguin.

Burns, S. (1998). The name of the game is movement: Concession-seeking in judicial mediation of large money damage cases. *Mediation Quarterly*, *15*, 359–367.

Burns, S. (2000). *Making settlement work: An examination of the work of judicial mediators*. Aldershot, UK: Dartmouth/Ashgate.

Burns, S. (2001). Think your blackest thoughts and darken them: Judicial mediation of large money damage disputes. *Human Studies*, *24*, 227–249.

Burns, S. (2004). Pursuing 'deep pockets': Insurance-related issues in judicial settlement work. *Journal of Contemporary Ethnography*, *33*, 111–153.

Burns, S., & Peyrot, M. (2003). Tough love: Nurturing and coercing responsibility and recovery in California drug courts. *Social Problems*, *50*, 416–438.

Emerson, R. (1969). *Judging delinquents: Context and process in juvenile court*. Chicago: Aldine.

Emerson, R. (1983). Holistic effects of social control decision-making. *Law and Society Review*, *17*, 425–455.

Emerson, R. (1992). Disputes in public bureaucracies. In: S. Silbey & A. Sarat (Eds), *Studies in Law, Politics and Society: A Research Annual* (Vol. 12, pp. 3–29). Greenwich, CT: JAI Press.

Emerson, R. (1994). Constructing serious violence and its victims: Processing a domestic violence restraining order. *Social Problems*, *6*, 3–28.

Emerson, R., & Messinger, S. (1977). The micro-politics of trouble. *Social Problems*, *25*, 121–315.

Emerson, R., Fretz, R., & Shaw, L. (1995). *Writing ethnographic fieldnotes*. Chicago: University of Chicago Press.

Garfinkel, H. (1967). *Studies in ethnomethodology*. Englewood Cliffs, NJ: Prentice-Hall.

Garfinkel, H. (1988). Evidence for locally produced, naturally accountable phenomena of order, etc.: An announcement of studies. *Sociological Theory*, *6*, 103–109.

Garfinkel, H. (1996). Ethnomethodology's program. *Social Psychology Quarterly*, *59*, 5–21.

Garfinkel, H., Livingston, E., Lynch, M., Macbeth, D., & Robillard, A. (1988). *Respecifying the natural sciences as discovering sciences of practical action*. Unpublished Manuscript, UCLA Department of Sociology.

Garland, D. (2001). *The culture of control: Crime and social order in contemporary society*. Chicago: University of Chicago Press.

Gubrium, J., & Holstein, J. (Eds) (2001). *Institutional selves: Troubled identities in a post-modern world*. Oxford: Oxford University Press.

Holstein, J. (1992). Producing people: Descriptive practice in human service work. In: G. Miller (Ed.), *Current Research on Occupations and Professions* (Vol. 7, pp. 23–40). Greenwich, CT: JAI Press.

Holstein, J. (1993). *Court-ordered insanity*. New York: Aldine de Gruyter.

Lynch, M. (1982). Closure and disclosure in pre-trial argument. *Human Studies*, *5*, 285–318.

Lynch, M. (1997). Preliminary notes on judges' work: The judge as a constituent of courtroom 'hearings.' In: M. Travers & J. Manzo (Eds), *Law in Action* (pp. 99–130). Aldershot, UK: Dartmouth/Ashgate Press.

Lynch, M., & Sharrock, W. (Eds) (2003). *Harold Garfinkel*. London: Sage.

Miller, G. (1994). Toward ethnographies of institutional discourse. *Journal of Contemporary Ethnography*, *23*, 280–306.

Moerman, M., & Sacks, H. (1988). On 'understanding' in the analysis of natural conversation. In: M. Moerman (Ed.), *Talking Culture* (Appendix B, pp. 180–86). Philadelphia: University of Pennsylvania Press.

Peyrot, M. (1982). Understanding ethnomethodology: A remedy for some common misconceptions. *Human Studies*, *5*, 261–283.

Peyrot, M., & Burns, S. (2001). Sociologists on trial: Theoretical competition and juror reasoning. *The American Sociologist*, *32*, 42–69.

Pollner, M. (1974). Mundane reasoning. *Philosophy of the Social Sciences*, *4*, 35–54.

Pollner, M. (1979). Explicative transactions: Making and managing meaning in traffic court. In: G. Psathas (Ed.), *Everyday Language* (pp. 227–253). New York: Irvington.

Pollner, M., & Emerson, R. (2001). Ethnomethodology and ethnography. In: P. Atkinson, A. Coffey, S. Delamont, L. H. Lofland & J. Lofland (Eds), *Handbook of Ethnography* (pp. 118–135). London: Sage.

Pollner, M., & Stein, J. (2001). Doubled over in laughter: Humor and the construction of selves in alcoholics anonymous. In: J. Gubrium & J. Holstein (Eds), *Institutional Selves: Troubled Identities in a Post-Modern World* (pp. 46–63). Oxford: Oxford University Press.

Sacks, H. (1972). Notes on Police assessment of moral character. In: D. Sudnow (Ed.), *Studies in Interaction* (pp. 280–293). New York: Free Press.

Sudnow, D. (1965). Normal crimes: Sociological features of the penal code. *Social Problems*, *12*, 255–276.

Sudnow, D. (1978). *Ways of the hand*. Cambridge, MA: Harvard University Press.

Wieder, D. L. (1974). Telling the code. In: R. Turner (Ed.), *Ethnomethodology* (pp. 144–172). Harmondsworth: Penguin.

PART I:
SOCIAL CONTROL OF INTERPERSONAL "OFFENSES" AND "OFFENDERS"

This Page Intentionally Left Blank

THREAT MANAGEMENT: MORAL AND ACTUAL ENTREPRENEURSHIP IN THE CONTROL OF CELEBRITY STALKING

Kerry O. Ferris

ABSTRACT

Celebrity stalking has increased exponentially in the past 20 years, and has generated a growth industry in "threat management" and personal security for media figures. States have instituted anti-stalking legislation, and law enforcement agencies have adapted their procedures accordingly. Current debates pit official third parties such as police and courts against private security providers who argue that public handling of these cases is dangerous and counterproductive. This paper uses a wide range of qualitative data to argue that the threat management industry engages in competitive moral entrepreneurship as different parties struggle to define and control a seemingly intractable problem.

When Jonathan Norman was arrested in 1997 outside the Malibu home of director Steven Spielberg, he was carrying handcuffs, duct tape, and a knife. He was high on methamphetamines, claimed he was Spielberg's adopted son, and believed that the director wanted to be raped by him. Luckily, the director and his family were not home at the time. Norman was pursued by private security guards, arrested by police, and convicted of felony stalking. Because of California's three-strikes rule and Norman's two prior felony convictions, he was sentenced to 25 years to life

Ethnographies of Law and Social Control
Sociology of Crime, Law and Deviance, Volume 6, 9–29

ISSN: 1521-6136/doi:10.1016/S1521-6136(04)06002-6

in prison. Spielberg called the man "a danger to society" and said, "if he's out on the street, I will live in fear" (Errico, 1998).

This is just one of the many cases of celebrity stalking that have made news recently. Though extreme, it is not unique. Many high-profile public figures (including Madonna, Halle Berry, Elton John and Courteney Cox Arquette) have faced threats such as those endured by the Spielberg family. Some have been injured (like Theresa Saldana and Monica Seles) or killed (like John Lennon and Rebecca Shaeffer) by obsessed fans. And while celebrity stalking is a specialized, recently identified, and relatively infrequent crime problem, it is also a well-known, well-publicized, and oft-sensationalized one.

According to an unpublished National Institute of Justice report (Dietz, 1989 as quoted in Lane, 1992), there have been more attacks on public figures in the past 25 years than in the 175 years preceding. With the recent rise in celebrity stalking comes a related rise in legislative, security and law enforcement activities meant to control it. Once celebrity stalking was identified as a social problem and a crime, the opportunity arose for public law enforcement agencies and private security contractors to struggle over whose response strategies would be accepted as authoritative. Tensions between public and private "threat management" projects present classic issues of moral entrepreneurship and rule enforcement (Becker, 1963). This paper examines the current state of and tensions between these "threat management" industries. At stake: legitimacy, authority, and money, as celebrity clients devote extraordinary resources toward efforts to stop stalkers.

CELEBRITY STALKING: AN OVERVIEW

> It's not 'if' a celebrity has a stalker – it's 'how many,
>
> – Park Dietz (Toufexis, 1999, p. 4).

Celebrity stalking is a distinctive subtype of the larger social problem of stalking (which, since the early 1990s, has also been a crime). Celebrity stalking involves the unwanted pursuit of a public figure by a fan or detractor, and can take a variety of forms. Celebrity stalkers fantasize relationships with public figures and then seek contact with them by sending letters and gifts, attempting to call or visit, and using a variety of other approaches. Opinions vary as to whether celebrity stalkers are mentally ill – Zona et al. (1993) argue that celebrity stalkers suffer from delusional disorders, while others (Ferris, 2001; Johnson, 2002) contend that celebrity stalking is an extreme variant of ordinary fanship and courtship behaviors.

How is celebrity stalking different from other types of stalking? It can be argued that there is little difference between celebrity stalking and other forms

of stalking – "intimate" (Dunn, 2002) or "relational" (Emerson et al., 1998) stalking and celebrity stalking each feature similar, if not identical strategies of pursuit, and their management is equally daunting. Following, spying, "popping up" at homes, workplaces, and recreation sites, sending letters or making phone calls, and threatening or initiating violence – these are tactics used by those who stalk celebrities as well as "civilians," and by those who know their targets as well as those who do not. Though celebrity stalking is a higher-profile crime, relational stalking is far more common (Tjaden & Thoennes, 1998). But the primary distinctions are in the identities of the respective targets (famous persons vs. ordinary folks) and the types of relationship possible between stalker and target (mediated/fantasized vs. past or present actual connection). However, even these distinctions do not hold in all cases, as celebrities can be the victims of relational stalking (as was *NYPD Blue's* Andrea Thompson), and ordinary folks can be stalked by strangers. The unique features of contemporary celebrity (Ferris, 2001, 2004) mean that the relationships between celebrities and their stalkers feature asymmetrical awareness contexts and a lack of conventionally-defined reciprocity and mutuality that the stalking is often undertaken to remedy. Celebrities are likely to know their stalkers only through the stalking process – which is often the point, from the stalker's perspective. This seems to be the one clearest characteristic distinguishing celebrity stalking from other types, and becomes the most confounding aspect of attempts to understand and control the problem. "It matters little whether you are stalked by a fan, an ex-partner, an amorous stranger or an angry client; in each situation the disruption and fear induced can be corrosive . . ." (Mullen et al., 2001, p. 14).

There are very few studies that specifically address celebrity stalking. Besides my own work (Ferris, 2001, 2004) and Gamson's discussion of the "hunting" of celebrities by fans (1994), there is no sociology of celebrity stalking. Few studies in any scholarly discipline address celebrity stalking directly – those that mention it usually do so tangentially. However, some studies present general findings that can be used to support inferences about celebrity stalking. For example, most non-celebrities are stalked by a known other (Tjaden & Thoennes, 1998), while celebrity-type stranger stalkings are rarer, although Sheridan et al. (2003, p. 154) state that "people in highly visible jobs (e.g. politics, media, public services)" are at especially high risk for stalking. Unsupported "guesstimates" are that about 20% of all stalking cases involve celebrities or other public figures, with Dietz, as quoted above, noting that 100% of celebrities are stalked. Gavin deBecker claims that a media figure can have up to 60 threats outstanding at any given time. Dietz himself has had several stalkers (Keiger, 1994), and deBecker further maintains that "as many as 150,000 Americans are currently pursuing some kind of unwarranted and inappropriate contact with celebrities" (Goodwin, 1997). In

non-celebrity stalking, rates of violence (including assault and rape) are demonstrably higher where a previous intimate relationship is present (Dunn, 2000; Meloy, 1998; Tjaden & Thoennes, 1998), which seems to indicate that violent outcomes are less likely for celebrities, who are generally stalked by strangers (though again, fans' mediated relationships with celebrities make any stranger-versus-intimate comparison tricky).

These assumptions about celebrity stalking are difficult to verify – reliable data about celebrity stalking is difficult to come by because of celebrities' unique privacy concerns and the fact that many employ private security firms to deal with the problem. Unless official law enforcement is involved, cases are unlikely to be entered into the public record, and even then, celebrity cases receive special privacy protection within public law enforcement agencies.[1]

Among the only existing published studies that specifically examine celebrity stalking are those performed by Park Dietz and his associates. They examined "inappropriate" letters written to media celebrities (Dietz et al., 1991a) and members of Congress (1991b). Their data came from the files of a prominent private threat management consultant (deBecker) and the Capitol Police archives, respectively. In addition to records of communications directed at celebrity and congressional targets, Dietz and his associates obtained information about attempts at face-to-face contact made by each letter writer. Of the 214 prolific pursuers in the celebrity study, "approach behavior" was correlated not with any explicit threats made in letters or other communications, but rather with other variables, including corresponding for periods over one year; forming detailed, plausible plans for how contact would occur; telephoning in addition to writing their victims; and sending letters originating from more than one location. The findings were similar in the Congressional study, in that those letter writers who made overt threats were significantly less likely to pursue a face-to-face encounter with the target, though other variables were found to increase the likelihood of approach behavior.

The only other research to address celebrity stalking specifically was also done from a forensic perspective, this time by team of psychiatrists and a police lieutenant attached to the Los Angeles Police Department's Threat Management Unit or "stalker squad." Zona, Sharma and Lane (1993) support the Dietz teams' assertions that overt threats do not necessarily correlate with actual attempts at harm. As noted earlier, they also make the additional claim that celebrity stalkers may be mentally ill, classifying them under the broad categories of erotomania and "love-obsessional" diagnoses, both delusional disorders in which the sufferer believes he or she is passionately loved by someone unattainable, powerful or famous.

The findings of the Dietz and Zona research teams are significant in their identification of variables that indicate increased risk – and especially in their

finding that an explicit threat does not indicate increased risk. As the researchers state, the fact that explicit threat is written into many laws used to combat stalking is a serious lapse that needs to be addressed, since "harassment without threats . . . often poses an equal or greater danger of harm to persons or property" in celebrity stalking cases than do overt threats of harm (Dietz et al., 1991a, p. 208).

Finally, some researchers who address celebrity stalking do so by way of criticizing public and media attention to this phenomenon, which they argue overshadows the more common daily terrors of ordinary stalking victims. Tjaden and Thoennes make the explicit recommendation that future research "focus on intimate and acquaintance stalking rather that 'celebrity' stalking" (1998, p. 2). Johnson (2002) complains that both law-enforcement-based studies and mass media coverage of stalking focus on the most extreme cases rather than the everyday experience of stalking, and do not represent the extent to which the stalking process permeates everyday life for many ordinary people. In defense of celebrity stalking research, Sheridan et al. (2003) identify celebrity stalking as an important subtype of stalking, no more or less significant than other subtypes, and call for fully developed research on all types of stalking.

DATA AND METHODS

Since ethnographers are often drawn to extreme cases as a way of illuminating more mundane social processes (Katz, 1997), celebrity stalking would seem a fruitful topic for ethnographic sociologists to pursue. To date, however, we have failed to do so. The few studies that focus strictly on celebrity stalking (Dietz et al., 1991a, b; Zona et al., 1993) approach it from a forensic perspective, using quantitative methods and content analysis of letters and threats. Although there are ethnographic and interview studies of non-celebrity stalking done by sociologists (Dunn, 2002; Emerson et al., 1998; Johnson, 2002), it is difficult to conceive of a methodology that would make systematic, useful qualitative data on celebrity stalking available or practical to gather. We must rely on media accounts to glean the descriptive details ethnographers require, and selectively identify stalking-related data in ethnographic studies with other stated topics. For this reason, a wide range of data are utilized in this analysis, including ethnographic accounts of fans who pursue celebrities and published interviews with threat management professionals.

The ethnographic accounts used in this article are from a prior project on fan-celebrity relationships (see Ferris, 1997, 2001, 2004). The published interviews are with Los Angeles-based leaders in both public law enforcement and private

threat management work. They include experts associated with the Los Angeles Police Department's Threat Management Unit (Detectives Robert Martin, John Lane and Jeff Dunn, and psychiatrist Michael Zona) and the attorney who heads the Los Angeles District Attorney's Stalking and Threat Assessment Team, Deputy DA Rhonda Saunders. Additional interviews include those with heads of leading private firms, also located in the Los Angeles area, including Gavin deBecker of GDB and Associates in Studio City, Park Dietz of the Threat Assessment Group in Newport Beach, and John Lane in his role as a principal of Omega Threat Management in Century City. It is worth noting that both Lane and Robert Martin (who is now a vice president at deBecker's firm) began their careers as police officers and moved into private threat management after they left the LAPD.

Twenty-two published interviews were utilized from a variety of sources, including newspapers such as the *New York Times* and the *San Francisco Chronicle*, and magazines such as the *New Yorker, Los Angeles Magazine, People Weekly*, and *Rolling Stone*. The majority of the interviews (12) were with Dietz and Lane, who have the highest public profiles in the industry. Due to geographical constraints, conducting my own interviews was not possible (a problem I would like to remedy in future research). For now, my data collection in this area is filtered through the interests and purposes of other interviewers. While this is not so different from researchers who use quantitative data gathered by others, or content analysis of media texts, it is not strictly ethnographic. These data are, however, qualitative and diverse, and have been analyzed inductively, which increases the methodological quality of a data pastiche (Katz, 1988). In addition, given that the analysis focuses on claims-making, it seems appropriate to use these interviews, as they come from precisely the public forums in which such claims are generally made and defended, and in which the debates analyzed here are played out.

I'LL BE WATCHING YOU: WHERE DO THE THREATS COME FROM?

Celebrities both benefit and suffer from the "illusion of intimacy" (Horton & Wohl, 1956) created by electronic media. The attachments formed between viewers and characters in mass-mediated relationships can fuel fans' desire to know more about and make contact with celebrities. Some fans will take this desire to extremes, and these are the potentially dangerous stalkers that celebrities must protect themselves against.

Celebrity stalking centers on the acquisition and use of access information (Emerson et al., 1998; Gardner, 1988). While ordinary stalking also requires this information, it is a special challenge for celebrity stalkers to gain access

information, as celebrities routinely protect this information in ways that ordinary civilians do not. However, for the especially dedicated celebrity stalker, access information is available from a variety of sources. Celebrity stalkers glean useful access information from sources the rest of us might overlook.

The "star-maker machinery" requires at least a nod toward accessibility on the part of celebrities – media profiles often seek to make stars appear more ordinary, and in doing so, reveal useful information to potential stalkers. This, according to Dietz, is "one of the biggest mistakes celebrities make . . .":

> They allow photo shoots in their homes, even in their bedrooms and bathrooms; they send fans autographed pictures. All that serves to support viewers with a delusional relationship with the celebrity . . . They appear approachable" (Toufexis, 1999, p. 4).

DeBecker agrees: "Media figures are presented as intimate acquaintances in our lives . . . If you look at an actress in a romantic setting in a television close-up, you are nearer to her than you could ever be in person, unless you were about to kiss her or hit her" (Goodwin, 1997). Former LAPD expert John Lane, also sees this pseudo-intimacy as a disturbing by-product of our mass-mediated age: "In the early years, Hollywood stars were much more protected . . . Now they are brought into our homes" (Goodwin, 1997).

Some media figures – especially "up and coming" young stars – try to manage access information informally, through their families, friends, agents or publicists. While this strategy is economical, it is also ineffective. For example, one stalker posed as a *USA Today* reporter to entice a number of female college athletes to "give interviews" in which they revealed personal information. The lure of publicity was strong for these young achievers and their families; the stalker gained access to them mostly through their parents, who served as amateur managers for their young athletes. ". . . I was so in awe," said one of the women. "This big-time reporter really wants to talk to me?" (Fainaru-Wadu, 2002). The drive for success in sports, media, politics or the arts requires a willingness to "sell" oneself to potential fans and supporters. However, this salesmanship has serious risks, as well. Since even professional publicists have no special expertise or coercive power to wield against dangerous fans, using an informal information conduit such as an agent or family member can often mean that stars don't even know they're being pursued.

Maggie Begley, a media publicist herself, worries about the information that seemingly innocuous publicity spreads can provide to attentive stalkers:

> You can look at *InStyle* or any other magazine, and you will find whole sections of where so-and-so got her peasant blouse on Montana Avenue, or where Kate Capshaw buys her fat-free pastries. They don't realize that what you are doing is providing information to a very small, dangerous segment of society . . . (Leff, 2000, p. 2).

Celebrity stalkers can use this information about a celebrity's routine to gain even more access information. After haunting the bakery (or wherever) until Kate Capshaw (or whomever) arrives, the stalker can then follow the celebrity further into his or her everyday life, gaining knowledge of home and work locations, automobile types and licenses, and identities of friends and family members as well. Former NFL wide receiver, Jimmy Cefalo, acquired a stalker who was able to penetrate his everyday routine by knowing where his team, the Miami Dolphins, held practice. Once she had this piece of access information, Cefalo says, "it was bizarre. She was everywhere. At practice, at the parking lot, when I was grocery shopping" (Lipsyte, 1997).

In my earliest study of fan behavior (Ferris, 1997, pp. 194, 195), interview respondents told stories of astonishing resourcefulness in pursuing celebrities; they eavesdropped, greased palms, used serendipity and proprietary information in search of authentic, "real world" contact with their favorite actors. In this lengthy excerpt, one fan tells of her perseverance in tracking a soap opera actor after a personal appearance where she presented him with gifts and asked him about his travel plans. The actor was reluctant to divulge his plans to his fans; however, with persistence, the fan was still able to see him off at the airport gate:

> I said, "John, American? Or United?" He said, "Yeah, ummmm . . . I don't know" . . . We ran to our car and drove around to the back. We followed the limo to the airport, but instead of going into the terminals, it exited and went into what looked like a parking lot. The sign said "Limos and taxicabs only", but we weren't about to give up yet. We were fine until we had to go through some kind of security gate. I heard the chauffeur say something about "following" and then the security guy looked at us. He let the limo through and then closed the gate on us. He walked over to our car, and I tried my best to look like I was telling the truth. Before the security guy said anything, I said, "How do we get out of here? I have a plane to catch in an hour." He said I had to back up. By this time there were [about] six or seven limos behind me so they ALL had to back up . . . we parked the car, and noticed all these little flags from other countries. We were in the INTERNATIONAL terminal! We went in and looked around, and decided to check out American Airlines first . . . We got to gate H3, and Annie said, "There he is!" But it wasn't him! We looked around, and this time, we did see him! . . . He looked up and saw us. He was carrying a brown paper bag. I asked about the gifts and he opened the bag and said, "Yes, I have the gifts!!!" and we laughed. Annie just grabbed him and hugged him, and I said I needed a hug. I hugged him quickly (darn!) and he got on the plane and left.

The fans above began their pursuit at a publicly advertised personal appearance and followed the actor from his workplace into his private life. Even though this fan professed no ill intent, such experiences can be disconcerting for celebrities. After being pursued by fans in this way, says actress Susan Ward, "you never feel safe in your own home. I'm always very wary, I never go anywhere by myself. Yeah, I'm scared a lot of the time, but that's the way it is . . ." (Ward, 2003).

Celebrity stalking has both the intractable qualities of all stalking, and the unique feature of famous public figures as targets. Like non-celebrity stalking, celebrity stalking generally includes a collection of individual activities that are technically legal and unremarkable, but which when viewed together constitute a pattern or syndrome that is perceived as threatening and may be legally actionable. Stalking victims may seek legal recourse (such as calling for police intervention or obtaining orders of protection) or other forms of protection from their pursuer (such as changing phone numbers, acquiring a weapon, or moving to another city). In celebrity stalking cases, high profile public figures may have additional concerns (such as privacy issues), as well as additional resources with which to address those concerns. The economic and reputational power of celebrity can increase access to the resources provided by the growing threat management industry.

THREAT MANAGEMENT: PUBLIC AND PRIVATE APPROACHES

The term "threat management" covers a set of investigative and strategic practices that can be used by both public and private law enforcement experts to identify, evaluate, and control the risks associated with stalking.[2] Threat management professionals use forensic research, criminal and psychological profiling techniques, policing tactics, legislative tools, and other methods in combination to help their clients avoid the negative consequences of being stalked. In addition, some members of the threat management industry have become high-profile public figures themselves, as they advocate for increased awareness of and effective response to stalking. As the threat management approach has developed over the past 10–15 years, conflicts have arisen between public agencies and private practitioners, pitting the police against private security firms in attempts to gain the advantage in defining and responding to celebrity stalking.

Stalking Laws and Public Threat Management Approaches

Stalking laws are the basic tools of public threat management approaches. Stalking legislation and the conceptualization of stalking as a social problem were originally spurred by high profile celebrity stalking cases – before the Rebecca Shaeffer killing in 1989, there was little recognition that the collection of behaviors now known as stalking were part of an identifiable syndrome, or that this syndrome was suffered by ordinary people as well as the rich and famous (Best, 1999; Lowney & Best, 1995). As awareness of the problem increased, calls for specific

anti-stalking legislation emerged. Before the institution of stalking laws, says former Los Angeles police detective Robert Martin, it was difficult for police to effectively intervene in celebrity stalking cases:

> Those fans would write letters, they would send flowers, they would stand in public places and watch for the person they were stalking. None of it was against the law. At the time, there was really nothing we could do for them until it was too late (Toobin, 1997, p. 74).

While celebrity stalkers can be and often are prosecuted for other related crimes, laws specifically targeting stalking now provide additional tools for victims, police and prosecutors.

Not surprisingly, given its highly concentrated population of Hollywood celebrities and other public figures, California was the first state to pass an anti-stalking law in 1990; this law specifies penalties of up to three years in prison, with the violation of a restraining order adding an extra year. Subsequently, all 49 other states passed anti-stalking laws, as did the federal government. How does an anti-stalking law address the distinctive nature of stalking in ways that are different from existing laws? It attempts to confront the issue of persistent, pervasive fear and threat through legal language – specifically, the controversial language of "credible threat" and "specific intent" to harm. After multiple amendments in California (Jordan, 1995), these concepts came to be expressed in such a way that only the victims' reasonable perception of threatening intent is necessary for the law to be applied. This is part of what makes stalking legislation unique – it is pre-emptive (Jordan, 1995), and prescribes intervention before injury or damage occurs.

In 1990, the same year that California's stalking law was passed, the Los Angeles Police Department created the first local Threat Management Unit (TMU) in the nation. While the Secret Service has been monitoring threats against government figures for decades and a loosely organized police unit exists in Manhattan to patrol Times Square and protect Broadway stars, local police departments had not engaged in systematic attempts to control celebrity stalking until the LAPD TMU was established. The Los Angeles District Attorney's office later created an associated division, the Stalking and Threat Assessment Team (STAT). But even with the specialized legal tools now available, it is not easy to control celebrity stalking – for many of the same reasons that relational and intimate stalking seem intractable and difficult to manage.

Wood and Wood (2002) suggest that, despite the introduction of special laws and law enforcement units specifically dedicated to controlling stalking, such tools still tend to be underutilized. Researchers' consensus is that less than half of ordinary stalking victims report their problems to the police at all (Jordan et al., 2003); of those cases that are reported to the police, even fewer are criminally prosecuted

(Tjaden & Thoennes, 1998); and just over half of those prosecuted resulted in convictions. Finally, these convictions do not necessarily involve stalking laws at all – stalkers can be charged with a variety of other offenses, "including harassment, menacing or threatening, vandalism, trespassing, breaking and entering, robbery, disorderly conduct, intimidation, and assault" (Tjaden & Thoennes, 1998). Still, the LAPD TMU handles around 300 stalking cases each year, of which approximately 45 involve celebrities, and Detective Jeff Dunn reports:

> . . . there's been a 40% increase in reports of celebrity stalking in the past one to two years for two main reasons: celebrities are more inclined to come forward now because there are anti-stalking laws in place, and police have become far more sensitive to threats . . . (Davis, 2003).

While there have been a number of high-profile stalking prosecutions with well-known celebrities as plaintiffs and petitioners, many celebrities avoid the public law enforcement route altogether, and instead make use of private threat management services.

Private Threat Management Approaches

Parallel with the developments in public threat management has been rapid growth in the private threat management industry. Some policing and forensic experts who began their careers in official law enforcement roles have moved into the private sector, setting up security firms that offer anti-stalking consulting and protection services to celebrities. The leading firms are all located in the greater Los Angeles area, and these firms provide a variety of services for celebrity clients, including evaluating fan mail, profiling and surveilling specific fans, supplying bodyguards, and augmenting home and workplace security equipment and procedures. De-Becker provides celebrity clients with a boilerplate "Privacy and Safety" clause to attach to their contracts, which obligates employers to notify celebrities of any inappropriate behavior by fans.

Private threat management consultants seek to control accessibility in a number of ways – by limiting the amount of public information about a celebrity, and by providing actual physical security in case the strategy of information management is insufficient. Stars can spend up to $1000 per day on bodyguards and hundreds of thousands annually on other security measures (Leff, 2000). And while it seems to be an extreme measure, deBecker maintains that the only real cure for stalking in general is for the victims to "disappear" – Dietz too advocates and often facilitates these disappearances. They are difficult, complicated and unfair, even for ordinary victims. They are practically impossible for public figures.

PUBLIC VS. PRIVATE THREAT MANAGEMENT STRATEGIES: DEBATES ABOUT EFFECTIVENESS

Both public and private threat management strategies have their advantages and disadvantages, and it is these pros and cons that have become part of an ongoing debate about which sector offers the most effective means of controlling celebrity stalking. Public threat management agencies claim that they offer the power of the state, legal force, and coercive sanctions to back their interventions – power which private security firms lack. The private firms, however, claim that they are not bound by the same legal constraints as the public agencies, and can for that reason offer specialized individual treatment to their clients that cops and courts may be restricted from providing. Private practitioners also claim that the criminal justice system cannot generally ensure the same level of privacy to celebrity clients that private firms can. These claims drive the debate over whose tactics are superior.

Legal Authority vs. Legal Constraint

> What really makes me angry is [that the authorities] won't do anything about it until [the stalker] gets you.
>
> – Pop singer and stalking victim Lisa Germano (Ali, 1996).

> Gone are the days when stalking and threat complaints are ignored. The laws now support the victim and allow the police and prosecutors to help you.
>
> – Actress and stalking victim Andrea Thompson (LA County DA's Office website, 2003).

These comments from celebrities illustrate the fundamental claims made in the debate about legal authority and legal constraint within the threat management industry. Public agencies can legitimately use criminal laws and state-backed sanctions to intervene in celebrity stalking cases and punish offenders. However, these legal strategies require particular kinds of violations in order to act – stalkers' actions must fit into specifically defined statutory categories in order to trigger police response. Private firms argue that, while they do not have the legal authority of police and courts, they are not bound by the same constraints, and can respond to a wider range of celebrity stalking behavior with a greater variety of sanctions and management techniques.

Because of the slippery nature of stalking behavior, it is difficult to effectively legislate. Los Angeles DA Rhonda Saunders notes this when she comments, "There really is no way you can make it a crime to do most of the stuff that stalkers usually do – the letters, the phone calls, the gifts" (Toobin, 1997, p. 80). And even

with legislation that attempts to alleviate the inchoate fear and threat generated by stalking behaviors, Gavin deBecker told a California congressional hearing in 1995 that "the vast majority of these cases offered law enforcement no way to effectively manage the situation" (Jordan, 1995).

When the actions of celebrity stalkers do fall into legally enforceable categories, it is still arguable whether the criminal sanctions attached to their violations have any deterrent effect. While there are no studies that examine the effectiveness of legal sanctions in celebrity stalking cases, Dietz observes that "restraining orders work only on rational people who have something to lose," and celebrity stalkers are, in his assessment, not rational (*Washingtonian*, 1995). Barbara E. Smith, co-author of a study on restraining order effectiveness (Harrell & Smith, 1996), agrees: "if it's celebrity stalking, it [a restraining order] probably won't do any good" (Toobin, 1997, p. 83).

Private threat managers turn to the criminal justice system only when successful prosecution seems a sure thing: "We'll recommend going to the cops if we see a stalking case where we're confident we can get a felony arrest, pretrial detention, and a probability of incarceration for more than two years – that may happen once a year" says Dietz (Toobin, 1997, p. 80). But advocates for public intervention continue to argue that avoiding police and courts is a mistake. Actress Thompson testifies on the Los Angeles DA's stalking website (2003):

> The biggest mistake I made was not calling the police. I felt ashamed, embarrassed. I thought it was my fault . . . I wish I had called them sooner. I was able to work with the police and the district attorney and my stalker was convicted. But the most important thing I got was a sympathetic ear. They listened to me. They helped me. They didn't laugh at me, doubt me or tell me I was over-reactive.

So the war is waged over these questions. Does "a justice system based on the prosecution of discrete criminal acts" (Toobin, 1997, p. 83) make the control of celebrity stalking unattainable? Does a private threat management industry without any legal authority really offer an alternative? Without definitive research on the topic, the answer rests on whose claims are most persuasive.

Personal vs. Impersonal Treatment

> Every case is unique. It's not a matter of looking for statistical predictors so much as it is trying to understand the particular person and what motivates them.
>
> – Park Dietz in *Rolling Stone* (Ali, 1996).

> . . . unlike the options available to private security, there are many occasions when police intervention is mandated by law.
>
> – John Lane, in *The Police Chief* (1992, p. 29).

A related issue in this debate is that of the personal treatment private firms offer celebrity stalking victims, compared to their treatment by law enforcement agencies which must proceed according to legally prescribed procedures that are similar, if not the same, in every case. Using law enforcement formulas, argue Dietz and deBecker, discounts the problem of mental disorder in celebrity stalkers – in other words, stalkers may not respond rationally or predictably to criminal penalties, and may continue to seek out their target even when those penalties are applied (Toobin, 1997, p. 81). This means that prosecutions and restraining orders may make things worse for the victim rather than better – however, they are the primary tools for law enforcement to work with. Private agencies claim they offer more delicate, personal treatment to celebrity clients.

As an example (Keiger, 1994), Dietz is described as he deals with a celebrity stalker ("John") who graduated from writing fan letters to following his actor-target around the country. He arranges to keep the fan under surveillance and plans a set of meetings and negotiations that he hopes will "wean 'John' from traveling and get him back to simply sending fan mail" (Keiger, 1994, p. 7). This kind of finesse and de-escalation without the application of legal remedies (remedies which are, in fact, unavailable, as John has not actually broken a law) may draw celebrities to private agencies instead of public law enforcement. So far, at least, Dietz's strategies in this case have avoided creating additional confrontations between the stalker and his celebrity target, something that legal remedies often require. Dietz laments in Snead (1996) that "hauling stars into court with their stalker often cements the relationship" in problematic ways.

This was the case for Madonna during the 1996 trial of her stalker, Robert Dewey Hoskins. Hoskins fantasized that he was married to the singer, made threats against her and her young daughter, and broke into the star's home several times (he was shot by a bodyguard on his final attempt). However, Madonna openly resisted law enforcement intervention in the case, and testified at trial only after being threatened with a $5 million fine. She vehemently stated her objections on the stand, accusing the court of giving Hoskins exactly what he wanted: contact with her (Leff, 2000). ". . . The man who threatened my life is sitting across from me," she protested, "and we have somehow made his fantasies come true" (Saunders, 1998, p. 40). Although it can mean forfeiting the option of legal sanctions, utilizing private threat management services is a way for celebrities to avoid these kinds of confrontations – and the publicity that inevitably surrounds them.

Privacy vs. Publicity

> The amount [of celebrity stalking] that is publicly known is the tip of the iceberg.
> – Entertainment lawyer Jay Lavely (Leff, 2000).

Both deBecker and Dietz argue that the risk of media exposure makes public remedies hazardous. DeBecker (1997) claims that less than 1% of the cases he's handled (over 20,000) have ever become public, and Dietz argues that media coverage can incite copycats (Toufexis, 1999). John Lane, who when he was with the LAPD urged celebrities to use legal sanctions, seek restraining orders and testify in court, now runs a private firm and acknowledges that some cases merit private treatment. "Law enforcement has a role where once you make a crime report, that is public information, so you can't deal with it as delicately . . ." (Toufexis, 1999).

Prosecuting celebrity stalking cases on the public record may actually exacerbate the problem by making case information publicly available to celebrity journalists, paparazzi, and the stalkers themselves. This is the primary criticism of public law enforcement's threat management activities by advocates of private threat management, as Mullen, Pathé and Purcell note (2000, p. 56):

> The media can promote stalking of public figures by its reporting of these cases, glamourizing them and fulfilling the stalker's dreams of a relationship of sorts with their victim. The attention accorded to these individuals, especially those who ultimately become assassins, may fulfill one of the stalker's objectives: to achieve fame, or at least notoriety, their behaviour culminating in the biggest and most important day of their life. Forensic psychiatrist Park Dietz observed: 'In their quest for attention and identity, these individuals go "to the people who have the most identity to spare: famous people" (cited in deBecker, 1997, pp. 259–260).

Stalkers who see their own names linked in the press with those of their celebrity targets may see this as a reinforcement of the stalking relationship.

Even those law enforcement officials charged with maintaining the privacy of celebrity stalking victims may succumb to the seductive nature of access information on famous people. A police officer assigned to LAPD TMU cases involving Halle Berry, Jennifer Anniston and Dylan McDermott was fired in October, 2003, for accessing confidential information in their files (*ABC News*, November 11, 2003). It may be these and other problems which have driven the upsurge in private threat management firms, and which have attracted celebrities to their services.

Private threat management remedies – including profiling, monitoring, and surveilling fans – keep celebrity stalking out of the press and off the public record, and advocates argue that this is critical in reducing its prevalence. A question that has yet to be addressed empirically is that of backlash: does the "no publicity" policy advocated by deBecker, Dietz and others mean that those stories which do go public get even more sensationalistic coverage, thereby exacerbating the very problem they hope to avoid?

The debates about effectiveness that permeate the southern California threat management industry center on issues of legal authority, personal treatment, and

publicity, and the degree to which these factors influence the effectiveness of celebrity stalking interventions. Can safety and justice be pursued simultaneously, or are they mutually exclusive? Each party makes claims to superiority, but without definitive data these claims cannot be evaluated, supported or refuted.

DISCUSSION: THE INTERSECTION OF MORAL AND ACTUAL ENTERPRISE

Stalking is a newly identified and defined social problem, and responses to it continue to develop. Celebrity stalking in particular has spawned a growth industry in "threat management" whose private, entrepreneurial practitioners have clashed with traditional law enforcement regarding the most appropriate strategies for controlling celebrity stalking. The tensions between public agencies and private firms reveal an interesting case of competitive moral entrepreneurship in the identification of and response to this "new" crime problem. Each party engages in claims-making, both about their own superiority and the other party's inadequacy, seeking to establish their distinctive tactics as the most correct and effective solution to the problem.

The competition is personal, philosophical, and commercial (Toobin, 1997, p. 74). Despite the fact that both parties appear to work toward the same goals, tactics and ideologies differ, and they struggle for control over the definition of and response to the problem of celebrity stalking.

It is easy to identify the first set of moral entrepreneurs in this case study – the police, Becker's principal example of rule enforcers (1963). It is their responsibility to enforce the law passed by the state, whatever their personal or philosophical relationship to the content of the law. As enforcers of anti-stalking legislation and protectors of public figures, police may, as Becker predicts, approach celebrity stalking from an instrumental perspective, as expressed by then-head of the LAPD TMU John Lane: "We're cops. We arrest people. That's what we do . . . we always take action" (Toobin, 1997, p. 79).

It is important for police to be seen as having successfully fulfilled their responsibilities, which include enforcing anti-stalking laws and protecting high profile individuals (as well as the general public safety). But especially in the case of units such as the LAPD TMU, it is also important to be able to justify the continued existence of their occupational niche by arguing the perniciousness of the problem they've been hired to solve. This is not hard to argue in the case of celebrity stalking – the insidiousness and tenacity of celebrity stalkers makes it clear that the need for protection will not go away. So it would seem that the cops have a lock on the business of threat management in the control of celebrity stalking. The

only thing that could jeopardize the continued necessity of public intervention is private competition.

Private threat managers cut into cops' jobs and their ability to justify those jobs and gain respect for their work by arguing that non-public strategies are better.[3] Privatization and its different tactics represent a rejection of legal remedies and an implication that the moral crusaders who instituted stalking legislation were wrong (or at least that the specifics of the legislation, if not the impulse behind it, are wrong), and that the agencies who enforce it are ineffective. The competition for both actual clients and moral high ground advances.

Becker wrote that "[e]nterprise, generated by personal interest, armed with publicity" is the central element of rule enforcement (1963, p. 128), and these variables could not be more obvious in the case of the threat management industry. Each party, police agencies and private security firms alike, takes advantage of an occupational opportunity provided by other moral entrepreneurs. The rule creators who established the presence of a heretofore unidentified social problem, and the crusaders both in and out of legislative bodies who campaigned for the passage of a new law, created the enforcement niches now occupied by enterprising threat managers. The presence of an ever-growing pool of wealthy celebrity stalking victims creates the prospect of private competition for a "market" that might otherwise have been the sole province of the police as society's official rule enforcers.

Personal interest is also evident in this case, as the competition for authority, influence, money and fame drives both public and private threat management professionals to make claims about the superiority of their respective methods. Even in police agencies, where financial remuneration is not linked to the number of celebrity stalking cases taken on, the prospect of future entry into the private security market may contribute to the parties' competitive drive; other, more intangible rewards (power, reputation, distinction) are also valuable to both public and private threat managers. Finally, publicity is inherent to this particular social problem, given the involvement of already-famous media figures and the sometimes shocking details of their cases. The higher the profile of the crime, the more attention it must receive from enforcers, and celebrity stalkings are among the widely publicized crimes in contemporary culture. The control of celebrity stalking as a moral enterprise provides both impetus and reward for those willing to take on the venture.

Are threat management practitioners crusading moral entrepreneurs, or are they more self-interested and instrumental about their tasks? Becker argues that rule enforcers such as the police orient to their moral enterprise largely as a source of occupational security, and may care little for the moral content of the enterprise itself. But given that public and private threat managers grapple for

preeminence within the industry, there are elements of the crusader in each. Making and defending the argument that one's own strategy is most effective is both a righteous and an instrumental line of reasoning. If one party's strategy is good, right, and best, then more clients, reporters, experts and specialists should come his way, sustaining his occupational interests and undermining those of the competition.

Moral and financial enterprise intersect in the case of celebrity stalking and threat management. The intractability of celebrity stalking demonstrates that legislation does not always solve crime problems, and there is not necessarily a practical consensus about what does. Other concerns, seemingly unrelated to effectiveness of social control, shape law, policy and enforcement processes – in the case of celebrity stalking and threat management, the wealth and fame of the targets are considerable, and these factors combine with the persistence of the problem to influence public and private responses. In such situations, opportunities for innovation, privatization and entrepreneurship, moral and actual, arise.

AFTERWORD: DOES IT MATTER WHO'S RIGHT?

> Now those who use fear as a weapon have something to fear themselves.
>
> – Ed Royce, California congressman and author of state and federal stalking laws (Fields-Meyer & Scheff-Cahan, 1998).

> I've got the same clients I've had for 20 years. I'm grateful to have some of the longest relationships in Hollywood history".
>
> Gavin deBecker (Lenkert, 1998, p. 106).

Debates about effectiveness may mask a more basic question: is celebrity stalking (or non-celebrity stalking, for that matter) really controllable? Can the threats posed by stalkers be managed at all? Legal definitions of stalking seem to defy its experiential aspects (Johnson, 2002), in both celebrity and non-celebrity cases – perceptions of risk may have little to do with the "credible threat" specified in the statutes, and more to do with interpretation, context, and meaning-making on the part of both stalker and target (Emerson et al., 1998). Sociological findings about the effectiveness of stalking intervention strategies are inconclusive, leaving open the critical question: is anything really predictably effective at deterring stalkers? If a restraining order, a police escort, a bodyguard or even a prosecution mean something different to the stalker than they do to the rest of us, then there can be no real guarantee. Official or informal

interventions, public or private remedies – will either truly dissuade celebrity stalkers?

NOTES

1. For example, Spielberg was referred to as "John Doe" in some of the court documents associated with his stalker's case, though other details clearly identified him as the target.
2. Increasingly, "threat management" is used to describe other sorts of pre-emptive violence abatement activities as well, and organizations originally formed to address stalking from this perspective have since branched out into non-celebrity threat management as well – for example, the LAPD now uses their threat management expertise to address school shootings, gang activity, and workplace violence as well as celebrity stalking.
3. Interestingly, it seems that the private competition predated public threat management – people like Dietz and deBecker helped set up the LAPD TMU, but later tussled over tactics (Toobin, 1997, p. 79).

REFERENCES

ABCNews.com (2003, November 11). *Crime blotter. The stalking Police Officer*. Accessed 2–16–04.

Ali, L. (1996). Stalkers: Is the threat to rock stars growing? *Rolling Stone*, *7*(47), 29–30.

Becker, H. S. (1963). *Outsiders: Studies in the sociology of deviance*. New York: Free Press.

Davis, C. (2003). Scary tales of star stalkers. *Cosmopolitan*, *234*(1, January).

deBecker, G. (1997). *The gift of fear: Survival signals that protect us from violence*. London: Bloomsbury.

Dietz, P. E. (1989, October 18). Public figures as victims of harassment, threats and attacks. Presented by Gavin deBecker to the National Conference of Personal Managers.

Dietz, P. E., Matthews, D. B., Martell, D. A., Stewart, T. M., Hrouda, D. R., & Warren, J. (1991a). Threatening and otherwise inappropriate letters to members of the United States Congress. *Journal of Forensic Sciences*, *36*(5), 1445–1468.

Dietz, P. E., Matthews, D. B., Van Cuyne, C., Martell, D. A., Parry, C. D. H., Stewart, T. M., Warren, J., & Crowder, J. D. (1991b). Threatening and otherwise inappropriate letters to Hollywood Celebrities. *Journal of Forensic Sciences*, *36*(1), 185–209.

Dunn, J. (2002). *Courting disaster: Intimate stalking, culture and criminal justice*. Hawthorne, NY: Aldine deGruyter.

Emerson, R. M., Ferris, K. O., & Gardner, K. B. (1998). On being stalked. *Social Problems*, *45*(3), 289–314.

Errico, M. (1998). Spielberg stalker sent away. *Eonline.com* (July 27).

Fainaru-Wadu, M. (2002). Impostor targets female athletes. *San Francisco Chronicle* (June 30), A1.

Ferris, K. O. (1997). *Starstruck: The social world of serial television fans*. Unpublished doctoral dissertation. University of California, LA.

Ferris, K. O. (2001). Through a glass, darkly: The dynamics of fan-celebrity encounters. *Symbolic Interaction*, *24*(1), 25–47.

Ferris, K. O. (2004). Seeing and being seen: The moral order of celebrity sightings. *Journal of Contemporary Ethnography*, *33*(3), 1–29.

Fields-Meyer, T., & Scheff-Cahan, V. (1998). The defenders. *People Weekly*, *50*(14), 145–151.

Gardner, C. B. (1988). Access information: Public lies and private peril. *Social Problems*, *35*, 384–397.

Goodwin, C. (1997, July 6). Someone to watch over me. *Sunday Times* (*London*).

Harrell, A., & Smith, B. E. (1996). Effects of restraining orders on domestic violence victims. In: Buzawa & Buzawa (Eds), *Do Arrests and Restraining Orders Work?* (pp. 214–242). Thousand Oaks, CA: Sage.

Horton, D., & Wohl, R. R. (1956). Mass-communication and para-social interaction: Observations on intimacy at a distance. *Psychiatry*, *19*(3), 215–230.

Johnson, J. M. (2002). The stalking process. In: J. A. Kotarba & J. M. Johnson (Eds), *Postmodern Existential Sociology* (pp. 183–197). Walnut Creek, CA: Alta Mira Press.

Jordan, C. E., Logan, T. K., Walker, R., & Nigoff, A. (2003). Stalking: An examination of the criminal justice response. *Journal of Interpersonal Violence*, *18*(2), 148–165.

Jordan, T. (1995). The efficacy of the California stalking law: Surveying its evolution, extracting insights from domestic violence cases. *Hastings Law Review*, *6*(2). Accessed at http://w3.uchastings.edu/womenslj/previous_volumes/jordan.pdf.

Katz, J. (1988). *Seductions of crime: Moral and sensual attractions in doing evil*. New York: Basic Books.

Katz, J. (1997). Ethnography's warrants. *Sociological Methods and Research*, *34*(5), 391–423.

Keiger, D. (1994). The dark world of Park Dietz. *Johns Hopkins Magazine* (November).

Lane, J. C. (1992). Threat management fills void in police services. *The Police Chief*, *59*(August), 27–31.

Leff, L. (2000). I'll be watching you. *Los Angeles Magazine*, *37*(3). Accessed at http://www.findarticles.com/p/articles/mi_m1346/is_3_45/ai_59570354.

Lenkert, E. (1998). Stalker stopper. *Los Angeles Magazine*, *43*(3), 106–111.

Lipsyte, R. (1997). The dangerously thin line of fanaticism. *The New York Times* (June 29), Section 8, p. 1.

Los Angeles District Attorney's Office (2003). Love me not anti-stalking website. www.lovemenot.org.

Lowney, K., & Best, J. (1995). Stalking strangers and lovers: Changing media typifications of a new crime problem. In: J. Best (Ed.), *Images of Issues: Typifying Contemporary Social Problems* (pp. 33–57). New York: Aldine deGruyter.

Meloy, J. R. (Ed.) (1998). *The psychology of stalking: Clinical and forensic perspectives*. San Diego: Academic Press.

Mullen, P. E., Pathé, M., & Purcell, R. (2000). *Stalkers and their victims*. Cambridge: Cambridge University Press.

Saunders, R. (1998). The legal perspective on stalking. In: J. R. Meloy (Ed.), *The Psychology of Stalking* (pp. 25–49). San Diego: Academic Press.

Sheridan, L. P., Blaauw, E., & Davies, G. M. (2003). Stalking: Knowns and unknowns. *Trauma, Violence and Abuse*, *4*(2), 148–162.

Snead, E. (1996). Fanatic attraction. *USA Today* (Aug. 29), 1D.

Tjaden, P., & Thoennes, N. (1998). Stalking in America: Findings from the national violence against women survey. National Institute of justice centers for disease control and prevention. *Research in Brief* (April).

Toobin, J. (1997). Stalking in L. A. *The New Yorker* (February 24/March 3), 72–83.

Toufexis, A. (1999). Dancing with devils: Forensic psychiatrist Park Dietz track's America's serial killers, bombers and mass murderers. *Psychology Today* (May).

Ward, S. (2003). The price of fame. *Self Defense for Women* (Fall).
Washingtonian Magazine (1995). What to do if you're a stalking victim, *30*(6), 72.
Wood, R. A., & Wood, N. L. (2002). Stalking the stalker: A profile of offenders. *FBI Law Enforcement Bulletin*, *71*(2).
Zona, M. A., Sharma, K., & Lane, J. (1993). A comparative study of erotomanic and obsessional subjects in a forensic sample. *Journal of Forensic Sciences*, *38*(4), 894–903.

This Page Intentionally Left Blank

RED FLAGS AND TRIGGER CONTROL: THE ROLE OF HUMAN SUPERVISION IN AN ELECTRONIC MONITORING PROGRAM☆

Peter R. Ibarra

ABSTRACT

This study examines a probation department's electronic-monitoring (EM) based supervision of clients facing domestic violence charges. Of greater significance than the technology per se *is its anchoring within a regime of restrictions and set of relevancies. These organize the probation officer's (PO) supervision practices, including the interaction strategies adopted with clients. Clients are presumed to be susceptible to various triggers that can imperil "victim safety," and the PO's activities are oriented toward identifying and managing these risks. Thus, EM is less a technological accomplishment than an interpretive one. Technology furnishes a resource for doing human supervision rather than supplanting it.*

☆This study was supported under award number 97-IJ-CX-K014 from the Office of Justice Programs, National Institute of Justice, Department of Justice. Points of view in this document are those of the author and do not necessarily represent the official position of the U.S. Department of Justice. Direct correspondence to the author, Department of Justice Studies, 113 Bowman Hall, Kent State University, Kent, OH 44122.

Ethnographies of Law and Social Control
Sociology of Crime, Law and Deviance, Volume 6, 31–48

ISSN: 1521-6136/doi:10.1016/S1521-6136(04)06003-8

INTRODUCTION

The criminal justice system's use of electronic monitoring (EM) has grown steadily since its initial adoption in the mid-1980s (Vollum & Hale, 2002, p. 2). EM is customarily used as an alternative to incarceration ("house arrest"), as an intermediate sanction (e.g. as part of intensive probation), or as a condition of release from jail (i.e. as a form of pretrial supervision). A commonly cited rationale for using EM is that it alleviates jail/prison overcrowding while not sacrificing public safety (Crowe et al., 2003). Another is that it offers offenders an opportunity to maintain "productive" lives in the community. EM is especially attractive to administrators in times of strained budgets and trimmed supervisory staff. Presumably, EM promises to offer a means for handling "problem" populations in spite of such limited resources (Vollum & Hale, 2002).

EM is usually studied in the context of evaluation research, often with a quantitative focus on documenting patterns of recidivism among participants (Black & Smith, 2003; Crowe, Syndey, Bancroft & Lawrence, 2002; Payne & Gainey, 1998; Vollum & Hale, 2002). Rarely entailing field observations or intensive interviewing, these studies gloss over how the anchoring of EM technology in specific social problems work contexts (Holstein & Miller, 2003) shapes its implementation. Further, these studies typically focus on EM as an alternative sanction, rather than as an instrument in pre-trial circumstances, neglecting to consider the distinctive issues that emerge when defendants[1] rather than convicted offenders are subjected to liberty restrictions. Finally, research has neglected the use of EM where the offenses are of an interpersonal nature (understandably so, since EM is rarely used as such). "Unilateral" electronic monitoring (UEM) is studied and "bilateral" electronic monitoring (BEM) is not. Where UEM involves the control of an offender alone, BEM tethers both defendants and complainants into systems of surveillance (Erez, Ibarra & Lurie, 2004).

Unlike most previous research on EM, this study is based on fieldwork methods; most of the program's clients await adjudication; and the program targets persons in problematic interpersonal relationships involving "domestic violence." When EM enrolls both alleged batterers as well as their putative victims, an agenda is incorporated into the design and implementation of the program anchoring the technology that is unusual. The focus is not on promoting "public safety" but on insuring "victim safety." This injects an interpretive relevancy onto the technology that is decisive for the construction of the "problem" posed by EM clients.

THEORETICAL PERSPECTIVE

The "social problems work" perspective (Holstein & Miller, 2003) informs this study of how supervision is organized in a BEM program for DV cases. This

orientation represents an extension of the societal reaction perspective (Cicourel, 1968; Kitsuse, 1962; Kitsuse & Cicourel, 1963) and its progeny (e.g. Emerson, 1969; Sudnow, 1965). This approach sought to identify the interpretive and interaction practices "in use" as "deviants" are organizationally "produced." Work in this tradition favored close observation of social control agents whose work was consequential for the institutional processing of putative deviants, permitting understanding of how people are sorted and classified into "officially" deviant groupings.

Studies of social problems work analyze how categories of social problems are reified and used in everyday life, particularly in the identification and handling of social problems "instances." These studies elucidate the situated use of problem categories, often focusing on "human service organization" settings (Holstein & Miller, 2003, p. 75), including criminal justice agencies. Such studies examine the "practices and resources" through which members of society animate and render relevant social problems categories in their ordinary activities.

The social problem category of interest in this study is "domestic violence" encompassing a discourse that includes such social problem person categories (Loseke, 1999) as "batterer," "abuser" and "victim" (Loseke, 1992). The themes and motifs (Ibarra & Kitsuse, 2003) of this discourse are expressed in the myriad encounters that unfold between service workers and the clients who they supervise, evaluate, and/or assist. The social problems work approach gives special analytic value toward discerning the interpretive practices through which this discourse is affirmed, elaborated, and adjusted in particular settings, for these constitute the methods through which the "reality" of the social problem is constructed.

This study focuses on how the problem category "domestic violence" undergirds the relevancies informing the PO's case supervision practices, including his interaction strategies with clients. The presumption that "domestic violence" may underlie the present case shapes how personnel interact with and interpret the troubles that clients pose. This "work" occurs not by virtue of the technological regime that the clients are enrolled in (i.e. the EM), but rather by way of sense-making practices that are immersed in the discourse on domestic violence. EM technology is a resource for sense making in the context of dealing with specific and alleged DV cases, rather than a substitute for it.

METHODS

Data were collected over a two and a half year period at the probation department in River County, the central region of a large metropolitan area

in the Midwest. Fieldwork methods used included participant-observation and intensive interviewing. Semi-structured interviews were conducted with victims, defendants and convicted offenders; criminal justice personnel; and victim assistance professionals. Interviews were either with focus groups or individuals. For a five-month period I resided nearby the courthouse for ease of daily access to probation office work activities, including meetings with staff, appearances in court, and encounters with victims and clients.

Ethnographic interviews were done with personnel in the course of "tailing" or "shadowing" them. These interviews were "follow-ups" to events observed *in situ*. In the course of observing them, I asked staffers to talk about their actions, focusing on matters that seemed especially significant to them, or instructive of the considerations operative during casework. Interviewing done in this manner is predominantly unstructured, as it is a complement to participant-observation.

Two members of the probation department operate the BEM program and were the key informants for the "shadowing" portion of the study. One is a PO in his thirties; the other is a woman in her fifties with the title of "investigating officer" (IO). The pair shares the caseload (averaging about 25 cases), dividing its duties so that the PO works primarily with the clients and the IO works primarily with the complainants. They also step in for each other when one of them is away (as do others in the department when neither is available). The pair is otherwise in close contact, keeping each other apprised of concerns they have with their shared caseload.

THE PROGRAM: ORIGINS, STAFF, AND CLIENTS

River County adopted BEM for DV cases nine years ago, at the urging of the court-led Domestic Violence Coordinating Committee (DVCC). The DVCC, whose members include judges, police, prosecutors, social workers, and victim services providers, studied the court's use of protective orders in bonds and sentences, and had serious concerns about victim safety in the absence of a method for surveilling compliance with these orders (cf. Harrell & Smith, 1996). Lacking an enforcement mechanism, a client could evade the order if so inclined, as could a complainant seeking out the client, possibly imperiling her or undermining the prosecution's efforts. The DVCC viewed the post-arrest period as especially volatile, during which further abuse (e.g. intimidation, harassment, stalking) was possible. Further, prosecutors were concerned that defendants were often pressuring complainants to recant or fail to appear in court. Protective orders were viewed as perfunctory in some cases, since it was virtually an open secret that parties who wanted to contact one another could do so without the court's knowledge and therefore its sanctions.

Having used EM in traditional contexts, the court turned to using it as a protective technology in DV cases.

The Contact Guard (CG) monitoring system appealed to the court because it provided a means to tether clients to their homes in ways that went beyond traditional, radio frequency-based monitoring technologies. Historically, such tethering technologies were considered by court officials to be of limited value in DV cases. Court employees could ascertain whether clients were at home as required during curfew hours. However, the UEM system could not independently register whether the client was in range of the victim's home during his "out hours," i.e. when he was allowed to leave his residence. CG was adopted to deter clients from violations of "exclusion zones" (or off-limit areas).

The client on CG wears a tamper-proof ankle bracelet synchronized by radio frequency to a home base unit. The base unit, operating by telephone lines, sends transmissions to a monitoring facility several times per minute, reporting the presence or absence of the worn device. The facility thereby determines when the client remains in range of the home unit or moves out of range. Range readings can be flagged as curfew or exclusion zone violations. The latter are key, for what makes CG relevant to the "problem" of DV is the second base unit, placed in the complaining witness's dwelling. The client's anklet is synchronized to this second home unit, so just as the first unit indicates when the client is in or out of his home range, so this second unit transmits readings of the anklet wearer's presence within the radius of the victim's home. In the event of such a breach, the victim and police are alerted by the monitoring center, enabling them to take protective action (For a more detailed discussion, see Erez et al., 2004). BEM, therefore, provides both a buffer between client and complainant, and a system of control for the court over the client. Assuming equipment is functioning properly and worn as required, it creates a spatial and temporal buffer for victims, and seems to deter clients from contacting the victim. By keeping track of when the client enters and returns home, CG seeks to ensure that he will be home unless he is at work, thus limiting the threat he can directly pose to the complainant.

For reasons discussed below, BEM technology alone cannot fully address the problem that the court has defined as the object of this program; thus, clients are assigned to human supervision from the probation department's EM unit as well. EM personnel differ from regular POs in that their work emphasizes enforcement of EM program rules. Thus, probationers who participate in EM programs are assigned to two POs, a general PO relatively more focused on treating the "underlying causes" of clients' "deviance," and an enforcement officer more focused on ensuring the client is in compliance with the EM program. However, defendants (at 90% the overwhelming majority of BEM clients) see only the

enforcement officer who oversees the Contact Guard; not having been convicted, they are not subject to court ordered probation.[2]

Program enrollment is premised on the client's ability to establish a residence apart from the victim (assuming the two had been cohabitating before the arrest).[3] The rules and liberty restrictions the client must observe are relayed to him during his initial meeting with the PO. In the following field note excerpt, the PO explains to Vic, a 42 year old probationer, the terms of participating in the program. These restrictions ultimately derive their relevance in response to the problem of victim protection, where the victim is understood to be in a current or former "battering relationship."

> "You're on curfew. You must be inside your house when you are not scheduled to be out. In your house means in your house – not in the backyard, on the front porch, in the stairwell, in another apartment in the building. The box goes off once you go out the front door." "Can I be in the garage?" asks Vic. "If it is attached to your home, yes. Then it's part of your house." Continuing, the PO says "any departures from scheduled hours must be for emergency only, involving life or property, a visit to the hospital. If so, someone should call me and notify me of what is happening. The doctor must sign if it is at the hospital. Not nurses. Everyone knows nurses. You can get them to sign anything" (. . .).
>
> Vic must agree to grant the PO access to his living quarters for inspection. He is prohibited from having weapons, and he is under a "gun disability. Do you have any guns?" No, he replies. "Do you have any weapon?" Vic thinks about it for a minute, and says, "No. Unless you mean like a knife." PO says that a knife is not a weapon, but that it depends on how you use it. "If when I get there [during a home visit] you have a knife and are cutting through meat, then that's okay. But you have to make sure you put it down." The use of drugs or alcohol is not permitted. "No going out for a beer with your friends. You will be tested. If you are on prescription medicine you must provide me with documentation. Are you on any medications?" Vic says he is taking medicine for dizziness. The PO asks to see the bottle, and Vic pulls it out of his pocket. After examining it and making a note in his log, the PO tells Vic he . . . must notify the PO about any changes to his work hours or work status. He is restricted to one change in residence during his time on the program. He must see the PO for a weekly meeting. Vic is personally responsible for the equipment . . . BEM "violations can be used against you in court . . ."
>
> Finally, and "most important, you can't go within a one mile radius of the prosecuting witness. I want to make sure you understand it. I never want to be put in a position where you can say, 'but judge, I didn't know.' " As he goes over the "stay away" order, he highlights certain points, such as the fact that there will be "no use of go betweens" to send messages to the victim. "Don't flip her off if you run into her. Just walk away. No muttering. Where will you be living?" "With my mother." "Well, mother cannot be trying to get in touch with her either. If she does, you are the one I'm going to come after, since you are the one who is bound by the stay away order."

The PO does not explicitly state that these various restrictions have been developed in light of "the problem of domestic violence," both in the sense that they reflect a concern to defuse the "volatility" of these relationships, and to advance the prosecutorial goal of preventing witness backpedaling. In other words, they reflect

a conception of "the cycle of domestic violence," and propose an interruption in that cycle through forcible means. Instead, the PO emphasizes that he is "neutral," does not "know what happened" between the client and prosecuting witness, and that "what matters is that you stay away from her and follow the rules." Having agreed to observe the restrictions, the client's routes to work are reviewed and approved or altered so as to preclude his entering the exclusion zone. A weekly curfew schedule is drawn up, granting him one hour travel time each way to work per day, plus five hours "free time" per week, during which the client is expected to take care of personal needs, including going to church or receiving medical care. The client is outfitted with an ankle bracelet whose signal has been synchronized with two base units (one for his home, one for the victim's home). He is taken home, and after further conversation with the client and any co-residents present, he is informed that his curfew has begun; he must remain indoors until scheduled out hours.

Only a small minority of River County's DV cases are considered for the program; cases are typically screened for participation when a judge accepts the prosecuting witness's claim that she will be in peril if the defendant is released without the added layer of protection provided by the CG (Representatives of a victim advocacy organization, present during bond setting, apprise victims of the existence of the CG). Candidates for the program are drawn from couples that hope to reunite at some later date, couples that are in the midst of separating, as well as parties who have formally separated and who have no desire to reconcile. As a result, the program enrolls many participants whose lives are still enmeshed with one another, emotionally, materially, and socially. BEM programs need not define selection criteria so broadly. A second study site took another approach (Erez et al., 2004). Here, those deemed suitable for enrollment are drawn strictly from cases in which victims are judged to have no desire for further relations with the accused, as evidenced by some form of permanent separation such as divorce, a new boyfriend or husband, or whether one of the parties had already moved out. As a result, supervision is far more nominal there.[4]

Probationers are typically *ordered* to participate as a condition of sentencing, while defendants are usually *offered* the choice of participating. Defendants are presented with an incentive at bond setting – release from jail, often with a reduced or no cash bond dollar amount – in exchange for agreeing to participate. Thus, where convicted offenders are compelled to participate, defendants *consent* to participate.[5] However, once enrolled, the restrictions and demands that clients must abide come as a surprise (cf. Lobley & Smith, 2000), since the program is typically characterized as merely entailing obeying an order to stay away from the prosecuting witness. Consequently, some defendants believe their consent was not truly informed. One defendant expressed it as follows:

> See, this is what they told me, and this is why I agreed to take the (CG): "Stay away from her house (. . .). We don't care what you do, go to work, go see your kids, whatever. But just stay away from her house." Okay, cool, give it to me. I'll take it. But when you get, when you get over here (to the probation department), that's not what it is. You have to deal with all these different situations, you know. *Everything's a test* (. . .). They tell you right off the bat that you're not allowed around her, whatever. If you do it, yeah, violate me. That's my own fault. I didn't follow the rules. But to give me restricted orders to add on to it, I think that's very wrong (*Emphasis added*).

Though initially relieved at being released from jail, clients grow increasingly frustrated by the CG program afterwards, coming to view its restrictions as highly onerous and unreasonable, although not nearly as restrictive as jail. Regardless of the frustrations that the program may generate, when interacting with the PO, most clients (like Vic, see above) usually do not convey anything other than acceptance of the program's regime. They do not protest the stipulations, and they are rarely other than compliant during the PO's home visits on field nights, even when they secretly resent these visits as "intrusive." Some clients, however, do not conceal resentment of the supervision of their lives, and thus become subjects of additional interest to the PO.

THE PRACTICE OF TRIGGER CONTROL AND THE INTERPRETATION OF RISK

The PO knows, though the client presumably does not, that if the bracelet is cut off while he is out of range from the home transmitter, the monitoring facility will fail to detect it; consequently, the possibility that he might ambush or cause serious, even lethal, harm to the prosecuting witness is an ongoing concern. This is the worst-case scenario. Although personnel impress on the victim that the CG is not "fool proof," the PO nevertheless tries to anticipate breaches of the CG by his clients. The PO's task, as he sees it, entails considering each client's threat horizon, and this means attending to the "red flags" and "triggers" that point to such peril. The program's tight supervision is put in service of "trigger control." Trigger control entails monitoring clients for risk factors associated with domestic violence in the literature and acting to contain them. The program "identifies the triggers that stimulate violence in the offender" and takes steps to reconcile those triggers with a "more balanced lifestyle," according to personnel (see Ibarra and Erez (forthcoming) for more on the program's efforts in the latter area).

"Radius penetrations" by the clients are infrequent (Erez et al., 2004): During the five-month period of observation, only one such instance was detected by the monitoring facility; over a two-year period, 11 such acts were committed,

by seven persons. Staffers hold that most such incidents are "informational"[6] or "unintentional" violations, typically done under the influence of alcohol or drugs, when the deterrent effect of the equipment apparently declines. Staff hold that such substances increase the possibility that a client will become emboldened to contact the victim, hence their use represent a source of increased risk that requires pre-emptive action.

> "Risk factors" are really important. Drugs and alcohol are often associated with battering, and if these are present, you know that they "increase the risk" that the client "will violate the one mile radius" and seek contact.

The PO views his clients more broadly as representing higher or lower degrees of risk vis-à-vis his primary concern: the safety of the prosecuting witness. Clients referred for a BEM eligibility assessment are officially considered neither "high risk" (i.e. likely to cause lethal harm) nor "low risk"; rather they are considered "medium risk," therefore problematic and possibly "heading for trouble" (Spencer, 1983, p. 579) or recidivism. An initial concern of the PO is to discern what "type" of threat a newly assigned client represents. The PO can consult a pre-sentence investigation report, which will contain a clinical assessment of the client, to anticipate the circumstances that presumably motivate a client's deviance, but such reports are only prepared for convicted offenders, who are a minority of his caseload. The PO is initially limited to the client's arrest report and rap sheet as a basis for inferring the defendant's "risk profile" prior to the first meeting. Thus, the PO may review the arrest report, with particular interest in noting whether weapons were allegedly used in the "instant offense," since this may indicate, "how dangerous or violent the client is," as the IO put it.

> We are trying to get these things found out – each step is an initial risk factor – we want to be on the bottom step. We look for what's going to set this person off," says the PO. Thus, if there is mention in an arrest report that the client was under the influence of drugs or alcohol, the PO tailors his supervision to regularly testing for the presence of those substances.

Although the case file is important as a source of background information, the PO more fundamentally seeks to "get a feel for" the client and estimate his "degree of risk" by "trying to read" him during the intake meeting, and then to update those impressions during subsequent office and home visits (in tandem with a consideration of the developing case file, including the client's program-relevant conduct post-enrollment).

> Every time you see these guys, you're judging them. Their state of mind, their physical appearance, their emotional states, changes in their lifestyle. You want to keep an eye out" for anything that might indicate an increased risk.

Electronic monitoring per se is incapable of gauging the *specific* risks a client may pose for a victim; such assessments are made primarily during the PO's face-to-face encounters with the client. Both during the intake and in subsequent visits (in the office or in the client's home), the PO appears to be engaging the client in seemingly innocuous banter, but he is actually doing risk assessment in the service of trigger control. Open-ended questions like, "how's it going?" or "what's going on?" generate conversations that ultimately furnish information pertinent to interpreting the risk that the client represents.

Clients who seem inclined to "test" rules, or who seem prepared to challenge the PO's right to enforce them, stand out and are easily discerned by the PO in interaction, both because of their non-deferential manner as well as their gripes about various program elements. An initial problem posed by a new client is determining whether he is likely to accept both the rules and the PO's authority to enforce the rules. The PO believes that he must impress upon such clients how serious he is about his charter. An overt or subtle challenge to either the rules or the PO's authority, represent a glaring "red flag" to the PO, i.e. an alarm (Goffman, 1971) indicative of a source of risk that should be closely monitored. The following field note excerpt depicts a visit paid to the PO's office during his weekly reporting hours:

> Leo, a 35 year old man, swaggers into the office and his facial expression is serious … "Schedule's the same and I need the band switched," he announces tersely as he walks in and takes his seat, not waiting for the PO to call him into the office … The PO responds, "Hold on buddy, how are you doing? You're going back to court on the 14th right?" Leo murmurs what sounds like agreement … The PO asks, "where are those forms I asked you to sign?" He is holding up a copy of an "Employee Verification" form. "I already filled out two of those," Leo replies, in an exasperated tone. The PO tells him that he needs more of these forms filled out, one for every week. "I don't see why I need to do this every week, I already gave you two." "Because I want you to," replies the PO. Leo makes a "sssss" sound under his breath, looks away, and then back, glaring at the PO. After a silent, eye-to-eye standoff, and sounding a bit agitated, Leo asks the PO, "Is there anything else I should do?" The PO replies, "Show me your ankle and get a urine test." "What if I don't?" "Then I will lock you up for refusal. Makes no difference to me." Leo doesn't say anything and the PO gives him the form to sign that attests that the urine sample truly belongs to him.

The PO viewed Leo as a "hard ass." He did not abide the PO's conversational style, and their encounters often appeared to be a struggle for control. "That's why he doesn't like me," said the PO, "I won't relinquish control." Leo was a "type" that the PO claimed to come across among his clientele. It was not unusual for the PO to raise the specter of "violating out" a recalcitrant client, as he often did with Leo, with the understanding that bond would be revoked, or a suspended sentence would be reinstated.

Not all clients stand out like this, however, so the PO uses other methods to "detect" dimensions of risk. The PO can allow cues of interest to emerge spontaneously from the back and forth of a meeting with a client; sometimes the PO deliberately "sets up" an exchange that will bring clients' "inclinations" or "intentions" into the open. The following excerpt details how the PO can pursue a supervisory agenda in the course of a meeting with Dan, a middle-aged client, who had recently failed blood alcohol tests given during surprise home visits:

> "Dan, what's going on?" "Doing pretty good, Boss. I meant to call you last Saturday and I apologize. I had some left over deliveries. I got off work early on Saturday and I left an hour early. So if the machine read that . . ." "It did," the PO says, interrupting Dan. "I'm going to give you a written warning for the alcohol. You're telling me your doing good, but I don't want to have to violate you." He whips out a "Violation Report" and starts filling it out, as Dan looks down to the ground. The PO asks, "Who is your judge?" He tells him, and the PO responds, "I can tell you right now she won't be happy to hear about this." Filling out the report, he notes the failed Breathalyzer readings. The PO tells Dan that this is a "warning." He reads it and asks Dan to sign it. "Stay off the alcohol. I'm telling you it's going to get you locked up. If you have a problem with it, let's deal with it, put you in treatment, AA, whatever." "It's not a problem, I'm just bored." The PO disagrees. "These are high readings, 0.18 this time, 0.25 last time – these are the readings of someone who is drinking a lot."

Although the PO initiates his meeting with an open-ended question, he gives the client a chance to address a topic he wants covered during the meeting, which Dan evades. Instead, the client offers a misplaced apology (it is not a program violation to return home from work early). He thereby cues the PO that he is not acknowledging (and perhaps under-appreciating) the seriousness of his actual program violations: the blood-alcohol readings obtained during two surprise home visits.[7] The risk the PO detects here is not that the client is drinking (he already knew this and the client knew that he knew this), but that Dan's gambit implies that the PO need not consider it important, and that he could be easily distracted from addressing it. The PO therefore "officially" warns the client that he has taken note of his conduct and that it stands to get him into difficulties with his judge. He also does not allow the client to give a non-problematic interpretation of his drinking (a form of boredom relief), citing the high blood-alcohol reading he obtained, and documenting in the case file that he had urged the client to seek treatment. Finally, the PO implicitly warns Dan that he is testing his patience and is keeping an eye on him, and should not assume that he can carry on as before when the PO is not around.

The PO will often give a client an opportunity to inadvertently engage in deception, and so make the client's deception itself the object of the meeting. Such a strategy is also consistent with an effort at extending the PO's control of the client when he leaves the office. In the following excerpt, the PO is doing an intake with a new client, Clay, just released from jail:

> The PO turns his attention to the plastic bag containing the personal possessions Clay had upon arrest, just now about to be returned to him. The PO points to the "drug paraphernalia," taking out a pipe and asking him what it is for. "It's a marijuana pipe. Not crack." "If I were to take a urine test today, would it come back dirty for any drugs?" Clay says he hasn't smoked anything in two weeks. "I'm trying to see what category of user you are. Any drugs in your system will disappear after seven days, so I guess your urine will come back clean," the PO explains, reaching into his desk to pull out a plastic container. Seeing the cup, Clay quickly interjects that maybe he did have some dope more recently, in the last two days. "It was an honesty question. I wanted to see if you're going to be honest with me. I don't care what's in your system right now, but I do care what you do from here on out. Listen, I will work with you, but you have to be honest with me. I won't stand for someone trying to play me." Clay appears chastened and nods his head, signaling his understanding, immediately followed by an almost whispered, "Sorry."

Such signs of contrition rarely impress the PO, for "one of the worst things a client can do is bold-faced lie to you." His practice is to quickly establish whether the client is reliable or likely to "play him," i.e. falsify documentation about "out hours," use banned substances, or covertly attempt to contact the victim. The "truth test" is used to impress upon the client that the PO is scrutinizing him closely, and will "tighten the screws" if the client is unreliable. Intakes failing the test are flagged as requiring follow-up.

The PO considers an "ideal client" to be "someone you don't have to watch all the time." Such clients "don't need to be watched as closely" for compliance or reliability. They are likelier to receive cursory consideration, enabling the PO to invest his supervision more heavily elsewhere. Ideal clients are recipients of quick office visits, less frequent testing for banned substances, minimal "out hour" investigation, and are not as likely to be visited at home. In effect, they fall off the PO's radar, while unreliable clients assume more prominence as objects of ongoing interest in the aforementioned respects. The PO's caseload averages 25 clients, but he holds office visits for two to four hours per week in total, and makes home visits just one night per week.[8] Thus, the PO allocates the time he spends interacting with each client based upon whether he sees him as *presently or prospectively* posing a risk to the victim. Since the PO can only accommodate about six home visits per field night, for example, he limits his visits to clients who may be "up to something" and who need reminding that he is "on to them," even if the PO may not know what it is exactly that the client is "up to."[9]

The PO, however, does not assume that all clients act strategically towards him, i.e. in cat-and-mouse fashion. Indeed, the "most difficult" clients are those with "emotional" or "mental problems," either in a long-standing sense, or due to the recent destabilization of their home and family life, or the terms of their employment. Such clients are also monitored for lifestyle conditions that presumably can either induce or counteract desires to seek out or harm the

complainant. In the following excerpt, the PO meets with a client for the first time since an initial intake a few days before.

> Lawrence, a 45-year-old laborer living with his sister and her family while his case is pending, was arrested for "attempting to cause physical harm" to his wife. He and his wife got into a fight after disagreeing about how to grieve over the death of their son, who overdosed on cocaine in Lawrence's presence a few months ago. Lawrence attempted suicide three times afterwards, and he remains distraught – he was in tears when he enrolled into the program three days ago. Today, Lawrence comments on living with his sister, saying it is "different." The PO asks, "Oh yea, how was it for you this weekend, how did it go?" "It was nice. Hadn't lived with a family for a long time. Had some good dinners. Everything fell apart when my son died." The PO tells Lawrence that this is a good environment for him to be in; he needs to be around people. Lawrence replies that he is thinking about getting his own apartment, possibly in Hill County. The PO replies quickly: Although this is not necessarily a bad idea, right now it is better for him to live in a more family environment. "Hill County can be good or bad, depending on where you live," some areas have lots of drugs. "It might be worth hanging out at your sister's place for a while. You're in a situation where you need to be around people." Lawrence says he needs to move out of the area, he "can't live with her anymore" (The PO must approve the move, so it will not happen just now). Reflecting on the case afterwards, the PO says, Lawrence "is dealing with serious issues (including drug abuse). With him I am putting the emphasis equally on him and his victim . . . The fear I have with someone who's suicidal is he can become homicidal." He doesn't think Lawrence hates his wife, but he might become suicidal and take someone with him, such as his wife.

The trigger in this case (suicidal feelings) led the officer to reject out of hand the proposal that the client move out of a "family environment" and live on his own, since his current home counteracts the trigger, whereas the proposed neighborhood is known for activity that constitutes yet another possible trigger (Indeed, the client had previously been arrested on drug-related charges). The PO's strategy is "to keep people in their place" (i.e. at an even keel) and "watch what elevates their level of irritation." If you can "figure out what kinds of things" make the client "uneasy," you can anticipate what living situations are likely to trigger risks.

In the PO's view, the home environment potentially harbors bad influences and shelters deviant behavior; the electronic monitoring equipment cannot detect such conditions, they must be discerned through personal or indirect observation. This is why the home environment is a predominant topic during meetings with clients. The case of Billy, a 19-year-old high school drop out is illustrative. Billy faces charges of having threatened and stalked a former neighbor for whom he had unrequited feelings.

> "You're not getting into any trouble over in Hill County, are you?" the PO asks Billy. "No. Been helping around the house, watching the kids, washing dishes," his voice trails off. "And nobody's calling Karen, correct? Not Mom, not Dad? No dirty looks?" Billy shakes his head, murmuring "no, no. I told them about that, I'll be the one taking the pain, jail, for it." "You are absolutely right, and I'd make sure you get every bit of it." "No, no," says Billy, "I've been good. I wouldn't do anything" (. . .).

> The PO launches into the subject of how Billy uses his time while on the program. "You need to think about going to school or going to work. You're not just going to be helping your brother" (baby-sitting his kids) for the rest of your life. Billy should pursue his GED. "For three weeks you have been sitting on your butt. That's got to stop. You need to be doing something with your time. Go back to school, cause you're not going to be doing nothing all day." Billy nods in a non-committal way (. . .) "Next week when you come in here I want something from you about school."

This excerpt reveals how the PO manages triggers in the client's environment. The IO alerted the PO of a complaint by the victim that Billy's parents were "flipping her off" and "throwing dirty looks" (Billy's parents remained neighbors with the victim). He is concerned that Billy's family may goad him to a contact violation. The PO is satisfied by Billy's assurances (though the PO nevertheless paid home visits fairly regularly to remind the family of the no-contact-by-proxy rule), so the PO steers the topic to Billy's getting a job and returning to school. The PO believes Billy has to live on his own, so noxious does he consider the family's influence. He fears that babysitting will bore Billy; he will start using drugs or alcohol, and so become receptive to his family's stirring of the pot.

"Field nights" enable the PO to update his assessment and management of the client's "risk level" through more direct observational means. Although all clients must submit to office visits, only a minority of clients are subjected to home visits. Clients likely to be visited at home are those for whom the PO has developed suspicions regarding risk or reliability during office visits. Thus, clients may be visited for diagnostic purposes, because the PO wants to warn clients that he is watching them, or because the PO thinks he will catch the client in a compromised position. Home visits can have slightly different dynamics to them, depending on whether the PO is looking for "bad influences" or looking for elements that skirt or run afoul of program rules. For example, the PO may repeatedly visit clients who have generated the most suspicion, but who the PO has been unable to capture in a program violation. In the following excerpt the PO updates me on some of the clients he will be visiting that evening:

> The PO tells me that he will be paying another visit to Dan. He passed two breath tests since last week. The PO says he isn't "giving up, we will go see him tonight. He will be tanked by the time we get there." Regarding Fred, the PO says, "I'm gonna do another search" (for drugs), this time coordinating it with the EM supervisor so that both the home and the car are searched. The plan is to be more thorough this time.

The PO senses that some clients are trying to outfox him, so the element of surprise is of strategic value. At the same time, these visits can be tense affairs, as clients (or co-residents) may resent the repeated intrusions. Over time, as they are repeatedly visited, clients' chances of getting caught up in some kind of violation, even if not related to the PO's initial hunch, increase. Thus, it becomes increasingly possible

that a client will be violated out of the program, and even that an arrest will be made during a home visit.

In spite of such tenaciousness, receptivity to the fallibility of one's initial interpretations of client risk estimates and program-relevant conduct is important. According to the PO, "The biggest thing is to maintain an open mind. Be open to the possibility that sometimes you may not be able to explain or accept that a violation" was committed by a client you trusted. Indeed, the PO often brings a fundamentally skeptical attitude to much that his clients say, an attitude that regularly receives enough affirmation so as to become part of the common sense of the job. The following is drawn from an affidavit, filled out by a defendant, against himself, after having called his PO and admitting that he had used cocaine.

> My wife hurt me by sleeping with my best friend. After the domestic violence I didn't do a good job of processing my feelings – The first time that I used cocaine I woke up a monster – I was acting out of character behavior wise. I've been in recovery I am an addict I was in transitional living to help maintain my focus in the House of Hope.
>
> I contacted my PO because he told me if I have a problem to contact him. The reason I contacted him is because I didn't like what I seen in the mirror I know I'm a better man and if I'm not right there's nothing I can do for my son.
>
> My goal is to get back into the House of Hope for 6 months to a year to regain my focus with God's help and a lot of praying.

The PO initially assumed that this was a routine case of a client who had failed a drug test, although it was rare for a client to turn himself in. Follow-up questioning revealed that the client had stepped up with the goal of being "violated out." Sam was being pursued by people to whom he owed money. They had been to his wife's house and made off with his car, and were still seeking him out. Sam turned himself in because he believed he would be safer in jail rather than at home.

CONCLUSION

This study has looked at the "specialized" social problems work (Loseke, 1999, p. 154) done by personnel in a "troubled persons industry" (Loseke, 1999, p. 147). This work entails using varying interpretive and interaction strategies to discern the present and prospective dangers posed by clients to prosecuting witnesses. The "cycle of violence" discourse underlies and informs the structure and management of this supervision, and in that sense the program represents an institutionalized response to the problem of "domestic violence." Electronic offender monitoring predates the present program and was pursued as a "solution" element in other contexts. The BEM program developed by River County represents an evolution and extension of this resource to another "problem": the safety of victims of

domestic violence after the criminal justice system takes an interest in their cases (Erez et al., 2004). This extension of EM resulted in River County's creation of a unit entrusted with the task of essentially patrolling estranged and possibly abusive relationships.

Personnel in River County's BEM unit "process and respond to cases with relation to, or as part of some large, organizationally determined whole" (Emerson, 1983, p. 425). Given the program's construction of the problem and the broad range of participants who qualify for enrollment (including couples who still wish to reunite), victim safety is clearly the organizationally determined and overriding concern. Short of constantly accompanying the parties in these troubled relationships, personnel are usually limited to making inferences and decisions based on the cues those participants present to them. This is something that the monitoring technology itself cannot do. The technology allows the PO to know whether or not the client is at home when he is supposed to be, but it does not let him know what the client is *doing*, either at or away from home, or what he is *thinking*. Supervision proceeds by way of the PO's efforts to determine whether and to what extent a convicted or (more commonly) alleged abuser is inclined to conduct or ideation that will culminate in danger to a prosecuting witness. EM facility alerts are relatively infrequent and not central to the *active* control of the clients. The ancillary elements – urine tests, out hours verification, home and office visits – are more important to how the PO updates his understanding of the client's risk horizon.

The definitional and organizational contexts in which EM technology is used must be therefore taken into account in order to understand its role in social problems work. Definitions of the problematic condition and the problem population influence the categorical relevancies that emerge out of these contexts, and these in turn shape the products or outcomes that emerge from these sites of social control. Because defendants are likelier than probationers to have difficulties with the onerous nature of the supervision to which they are subjected, for example, they often are more overt about their resentment at the program. Expressions of resentment, however, can stand as cues of elevated risk, resulting in instances where non-convicted clients are more tightly controlled than are those who have in fact been convicted, namely probationers.

NOTES

1. The term "client" is used interchangeably with "defendant" and "probationer." The term "victim" is used interchangeably with "complainant" and "prosecuting witness" (Technically, the term "victim" should be understood to be a putative status in cases involving

defendants). The term "participants" refers to participating clients and complainants both. The feminine pronoun is used throughout in reference to the complainant, since women are far likelier to be the injured party in cases that come to the court's attention. The masculine case is used in reference to the defendant/probationer for the analogous reason. *Pseudonyms are used for all identifiers*(*names and places*) *cited in the text*.

2. Defendants' pre-trial release status enables the court to attach conditions to their release, violation of which can result in forfeiture of the surety guaranteeing the bond and removal to jail pending adjudication of the case, or even prosecution on the new offenses.

3. The victim must also consent to having a base unit placed in her residence.

4. The second site was not examined using participant-observation, therefore is not included in this ethnographic treatment.

5. Some offenders are offered a shorter jail term in exchange for BEM participation, but BEM typically extends their sentence beyond straight jail time. The calculus involves whether an unreduced prison/jail term is preferable, especially when inmates are eligible for early release for good behavior whereas BEM clients receive no such dispensation.

6. An "informational violation" consists of the client's driving-by the victim's residence, typically because he wants to know whether she is entertaining another male in her home.

7. The PO views Breathalyzer tests taken during surprise home visits as more accurate gauges of the client's out of his sight conduct: tests and samples taken in the office are less likely to come back "dirty" because clients anticipate having to give samples there, hence have a dry spell in the days before office meetings.

8. The PO has other duties, among which the most demanding, time-wise, concern appearances in court related to defendants on his caseload.

9. The victim can also influence the PO's assessment of the client's risk horizon. When harboring unconfirmed suspicions, the PO may contact her for insight into the client, such as his "drug of choice." BEM's tethering of the victim thereby constitutes an additional resource in its system of social control.

REFERENCES

Black, M., & Smith, R. G. (2003). Electronic monitoring in the criminal justice system. *Trends and Issues*, *254*(May), Canberra, ACT, Australia: Australian Institute of Criminology.

Cicourel, A. V. (1968). *The social organization of juvenile justice*. New York: Wiley.

Crowe, A. H., Sydney, L., Bancroft, P., & Lawrence, B. (2002). *Offender supervision with electronic technology*. Lexington, KY: American Probation and Parole Association.

Emerson, R. (1969). *Judging delinquents*. Chicago: Aldine.

Emerson, R. (1983). Holistic effects in social control decision-making. *Law and Society Review*, *17*, 425–455.

Erez, E., Ibarra, P. R., & Lurie, N. A. (2004). Applying electronic monitoring to domestic violence cases: A comparison of two bilateral programs. *Federal Probation*, *68*(1), 15–20.

Goffman, E. (1971). *Relations in public: Micro-studies of the public order*. New York: Basic Books.

Harrell, A., & Smith, B. E. (1996). Effects of restraining orders on domestic violence victims. In: E. Buzawa (Ed.), *Do Arrests and Restraining Orders Work?* (pp. 214–242). Thousand Oaks, CA: Sage.

Holstein, J. A., & Miller, G. (2003). Social constructionism and social problems work. In: J. A. Holstein & G. Miller (Eds), *Challenges and Choices: Constructionist Perspectives on Social Problems* (pp. 70–91). Hawthorne, NY: Aldine de Gruyter.

Ibarra, P. R., & Erez, E. (forthcoming). Victim-centric diversion? The electronic monitoring of domestic violence cases. *Behavioral Sciences and the Law*.

Ibarra, P. R., & Kitsuse, J. I. (2003). Claims-making discourse and vernacular resources. In: J. A. Holstein & G. Miller (Eds), *Challenges and Choices: Constructionist Perspectives on Social Problems* (pp. 17–50). Hawthorne, NY: Aldine de Gruyter.

Kitsuse, J. I. (1962). Societal reaction to deviance: Problems of theory and method. *Social Problems*, *9*, 247–256.

Kitsuse, J. I., & Cicourel, A. V. (1963). A note on the uses of official statistics. *Social Problems*, *11*, 121–139.

Lobley, D., & Smith, D. (2000). *Evaluation of electronically monitored restriction of liberty orders*. Edinburgh: Scottish Executive Central Research Unit.

Loseke, D. (1992). *The battered woman and shelters: The social construction of wife abuse*. New York: State University of New York Press.

Loseke, D. (1999). *Thinking about social problems*. Hawthorne, NY: Aldine de Gruyter.

Payne, B. K., & Gainey, R. R. (1998). A qualitative assessment of the pains experienced on electronic monitoring. *International Journal of Offender Therapy and Comparative Criminology*, *42*, 149–163.

Spencer, J. W. (1983). Accounts, attitudes, and solutions: Probation officer-defendant negotiations of subjective orientations. *Social Problems*, *30*, 570–581.

Sudnow, D. (1965). Normal crimes: Sociological features of the penal code. *Social Problems*, *12*, 255–276.

Vollum, S., & Hale, C. (2002). Electronic monitoring: A research review. *Corrections Compendium*, *27*, 1–26.

DANGEROUSNESS AND ITS DISCONTENTS: A DISCOURSE ON THE SOCIO-POLITICS OF DANGEROUSNESS

Michael Petrunik

ABSTRACT

This article examines the socio-politics of legislation and policy for offenders, notably sex offenders, who are viewed as so harmful to vulnerable members of society such as children, that special measures are required to curtail their risk. Particular attention is given to the rise of community protection legislation in the United States since the 1980s and the narratives of danger, fear, and loathing that underlie such legislation.

INTRODUCTION

In a body of work going back to the 1980s (Petrunik, 1982, 1984, 1994a, b, 2002, 2003; Petrunik & Weisman, forthcoming), I have developed a "socio-politics of dangerousness" perspective toward the analysis of policy for offenders variously designated by a variety of labels suggesting unusually high risk or dangerousness. The sense I give to the term "socio-politics," in combination with the terms "dangerousness" and "high-risk," involves a focus on struggles of power in defining who is and who is not dangerous or "high-risk" and how those so designated should

Ethnographies of Law and Social Control
Sociology of Crime, Law and Deviance, Volume 6, 49–74

ISSN: 1521-6136/doi:10.1016/S1521-6136(04)06004-X

be handled. Such struggles are based on competing claims constructed in terms of particular interests, values, and material and symbolic resources. I look at the role played by politicians, criminal justice and mental health officials, the media, civil libertarians, and victims advocacy groups in the development of a community protection model (CPM) for sex offenders. This model which emerged in the 1980s came to supersede the forensic clinical model (FCM) and the justice model (JM) which were popular in earlier decades. The FCM stressed clinical diagnosis and prognosis indeterminate incapacitation and treatment for dangerous offenders to achieve public safety; the JM had an aversion to indeterminate controls based on assessments of dangerousness and disorder and stressed due process concerns and the rights of accused persons and the mentally ill; the CPM placed public safety and the public's right to know over concerns with offenders' rights, treatment, and reintegration.

My understandings of dangerousness, risk, and disorder, the persons who receive such designations, and the measures deemed necessary to contain them have been shaped by my involvement as a "participant-observer" in several professional and volunteer contexts. From 1975 to 1984, while with Canada's Ministry of the Solicitor General, I did comparative research on dangerous offender legislation as part of the development and implementation of dangerous offender legislation. Over the past decade, I have continued to research dangerous offender issues and had the opportunity to interview legislators, correctional and mental health officials and individuals designated as dangerous. I have also been a volunteer in support groups for high-risk offenders.

The notions of dangerousness, and risk are not objective, stable, and uniform constructs. Rather, they are subjective and protean (Rennie, 1978, p. 4). Perceptions of the degree of individual risk shift with a variety of contextual factors including levels of community tolerance, political ideology, and the ways in which the offense, the offender, and the victim are typified. A key feature of notions of risk and danger is that they are a function not simply of the statistical likelihood that a harmful event will occur but also of the perceived seriousness and salience of the harm(s) thought likely to occur and perceptions of the nature of the perpetrator. The perceived seriousness and salience of the harm(s) often vary in terms of perceived characteristics of victims (vulnerability, dependency, and innocence) that are linked to statuses such as age, sex, and disability. The younger and more vulnerable the victim is perceived to be, the more serious the harm (Best, 1990). With regard to perceptions of the perpetrator a key factor is the sense that the perpetrator lacks control over his actions due to a difficult to treat disorder. Particularly iconic with reference to dangerousness (Surette, 1994) are notions such as psychopathy, sociopathy, and anti-social personality disorder. These notions are often taken to imply that the perpetrator is callous and indifferent to the consequences of his

actions and that his condition may be incurable or intractable (Hare, 1998; Petrunik & Weisman, forthcoming).

For many members of contemporary society, particularly women and parents of young children, sex offenders are the type of criminal that provokes the strongest emotions (Finkelhor, 1984, pp. 75–84 reported in Pryor, 1996, p. 303). Although the offense that arouses the greatest public and political concern, sexual homicide of a child victim, is extremely rare (Lieb, Quinsey & Berliner, 1998, pp. 52–53; The Violence Research Group, 1996, pp. 148–151), the emotional impact on the public of such crimes has been enormous. Sexual homicides where the victims have been children or youth have been the driving force behind most dangerous offender legislation and special initiatives for sex offenders in twentieth century America. In part, this is because there is a deep-seated fear that if predatory sex offenders who target young people are not kept under the strictest possible control, parents' worst nightmares might become a reality (Petrunik & Weisman, forthcoming). Politicians understand this fear and know that if they do not respond to it in a fashion that is satisfactory to their constituents they may soon find themselves out of office.

Sex offenses such as rape and child sexual abuse are distinguishable from other violent crimes in terms of their personal invasiveness and potential for serious psychological damage. Lieb, Quinsey and Berliner cite several studies that indicate sex offenses are more likely than other violent offenses to cause serious and lasting psychological trauma. The relatively less common sex offenses perpetrated by extra-familial offenders, particularly those that are violent or involve child victims, tend to arouse more public concern than the much more commonly occurring sex offenses by family members or acquaintances. There are several reasons why this is so. First, perpetrators of intra-familial offenses are felt to be more of a threat to their own families than to the entire community. Second, research shows that extra-familial offenders (especially those with male victims) tend to be more persistent in their offending than are intra-familial offenders, and less deterred by public identification, arrest and conviction. Third, access to victims (and hence recidivism) is likely easier to control for exclusively intra-familial offenders than it is for exclusively or primarily extra-familial offenders, certainly once an arrest has been made (Lieb, Quinsey & Berliner, 1998, p. 54).

THE COMMUNITY PROTECTION MODEL (CPM): WHAT IT IS AND HOW IT CAME TO BE

The CPM, which originated during the late 1980s in concert with the rise of various populist social movements, places greater priority on public safety and

victims' rights than on the treatment of mental disorder or on principles of equity, proportionality and due process. Community protection advocates called for longer sentences for sex offenders and more resources to police them, increased rights for victims and their families, increased government attention to citizens' fears about crime, and increased community participation in crime control (Petrunik, 1994a, b, 2002, 2003). Below, I explore several major social forces that shaped this movement.

The movement toward community protection developed out of the conjuncture of several major social trends in late twentieth century industrial societies. In the United States, there was a shift to the political right under not only the Republican presidencies of Reagan and Bush Sr. but also the democratic presidency of Bill Clinton. The Republican administrations in particular have favored aggressive criminal justice policies stressing punishment, incapacitation, and intensive surveillance rather than rehabilitation. Military metaphors such as the "war on crime" the "war on drugs" and more recently the "war on terrorism" along with phrases such as "zero tolerance" have abounded in political discourse on crime and justice and public security (Beckett & Sasson, 2000, pp. 61–84). Coinciding with this shift to the right in national politics and a corresponding shift in major states such as California, moral conservatism and social movements such as the new religious right emerged as an influential force.

A second impetus for community protection has been the development of new computer technology for collecting and analyzing information as well as enhanced forms of mass communication through television and the Internet. Advances in computer software enabled the state to set up large scale statistical data bases on offenders and to develop an actuarial approach for managing categories of offenders based on assessments of their perceived level of risk (Feeley & Simon, 1992, 1994). A panoptic form of social control (where the eyes of the few keep the many under surveillance) was now possible on an electronic level, expanding the state's capacity to keep track of those categories of person considered most dangerous. Panoptic social control involved a changed relationship between the state and the public through the ubiquity of mass media technology in every area of life. In addition to the extension of the state's capacity for social control through computer technology, increased public access to state data bases (particularly through the Internet), and community consumption of mass media coverage of crime has promoted a synoptic form of social control. Mathiesen (1997) describes this situation as one where the eyes of the many survey the few.

A third impetus for community protection has been the rise of populist advocacy movements for women, children, crime victims, and community safety along the entire range of the ideological spectrum. By the end of the 1980s, these movements,

particularly those espousing a social conservative world-view, had developed considerable political clout and were able to significantly influence criminal justice policy (Weed, 1995).

Socially "progressive" movements and "conservative" movements each espouse different notions of danger, its causes and its remedies. Feminist advocates, for example, saw the locus of danger as inherent in a patriarchal social order. The most radical feminist advocates took a totalitarian view in which all post-pubertal males were potential rapists, abusers, and batterers and all females, whatever their age and social circumstances, were at high risk of being victimized. By the late 1980s, however, there was a reaction against the sweeping claims of feminism's most radical proponents with regard to the causes, extent, and consequences of male violence against females and the kinds of solutions being advocated. There was also controversy over claims that at least some allegations of male sexual violence were due to false accusations and the scientifically and ethically dubious use of recovered memory therapies (Jenkins, 1998, pp. 164–188).

At the same time, there were new movements to protect children, and families against external threats – both on the streets and in cyber-space – in the form of predatory offenders and producers of child pornography (Jenkins, 1998, pp. 189–214). With the emphasis on the problems of the patriarchal social order now on the wane, the focus of policy reform shifted once again from problematic institutions to particular categories of problem individuals. The problem category par excellence was the predatory sex offender (Surette, 1994). The predator threatened not only those members of the community considered most vulnerable but also the community at large through the vicarious experience of fear and the sense that typical settings such as parks, and streets were not safe. Even schools, child welfare institutions, churches, and sport and other recreational settings could not be viewed as safe because predators might infiltrate them, take on positions of trust, and endanger children and vulnerable young adults. Over the course of the 1980s and 1990s sexual abuse, by teachers, clergy, workers in social services and youth corrections, therapists, and coaches, came to be recognized as a significant social problem.

A COMPREHENSIVE APPROACH TO SEXUAL PREDATORS: THE WASHINGTON MODEL

In the 1970s and early 1980s, the state of Washington was haunted by the specter of the serial sexual predator in the shape of Ted Bundy and the "Green River" serial killer. An unsettling fear developed among members of the public that monsters walked the land undetected and little was being done to effectively stop them

(Jenkins, 1998). Indeed, the Green River Killer, Gary Ridgway, was only identified and apprehended in 2003.

By the late 1980s, Washington was one of the primary sites of a shift in criminal justice policy, specifically designed to protect the community from crimes of sexual violence, that spread through the United States like a brush fire over the following decade. In 1989, the major catalyst occurred for a specific manifestation of this movement – Washington's Community Protection Act. The following account is based on a re-construction of key events by Boerner (1992), Lafond (1992) and Jenkins (1998).

On May 20, 1989, a seven-year-old boy riding his bike in a park near Tacoma, Washington was abducted by a stranger, later described by the boy as a bizarre looking man with a large nose and a pockmarked face. After being orally and anally raped, strangled, his penis cut off, and left for dead, the boy was found alive and badly traumatized with one tennis shoe missing. The following day, on the basis of the boy's description, police arrested Earl Shriner, a man with a long history of sexual violence against children.

Shriner had a troubled background: he was mildly retarded, possibly suffering from brain damage, and almost illiterate; he had bad skin and an unusual appearance that led him to be ridiculed by others; and he had been repeatedly abused as a child both sexually and emotionally (Lafond, 1992, p. 678). At the age of 16, Shriner had been committed, without being charged, to a psychiatric facility as a "defective delinquent" after choking a seven-year-old girl and leading police to the body of a 15-year-old girl who had been strangled. There were also reports that Shriner may have been responsible for the death of a male classmate, but no charges were laid in this incident as well (Jenkins, 1998, p. 191).

In 1977, Shriner was sentenced to prison for 10 years after abducting and assaulting two 16-year-old girls. During Shriner's last months in prison, correctional officials found plans he had made to maim or kill children. Shriner also apparently told a cell-mate he wanted to customize a van with cages in which he could confine children and then rape and kill them (Lieb, 1996, p. 1). After the expiry of his prison term and his release without supervision in 1987, Shriner was acquitted of two charges of assaulting young women and in two other instances served jail terms for second-degree assault and unlawful imprisonment. The charges were reduced from felonies to misdemeanors because the prosecutors could not get the children who were victims to testify. Another unlawful imprisonment charge was pending at the time of Shriner's arrest.

Shriner was known to police and school officials in the neighborhood where he resided and some precautions were taken to reduce the risk he posed to children who passed by his residence on the way to school. Although school officials wanted to send out letters with Shriner's picture warning parents about him, the police

constrained them from doing so because they felt that this would violate privacy laws.

Although correctional officials and psychiatrists considered Shriner to be extremely dangerous, and he had been involuntarily committed as a youth, legislative changes in the mid-1980s meant that. Shriner could no longer be civilly committed upon his release from prison. Washington had prospectively abolished its sexual psychopath legislation in 1984 and an attempt to involuntarily commit him as a psychiatric patient under civil mental health law was unsuccessful. The judge in the commitment hearing ruled that, despite the fact that prison officials had found elaborate plans in Shriner's possession for abducting and maiming children, he did not meet the "imminent danger" criterion of the legislation. This criterion called for evidence of "recent and overt acts" that might put oneself or the community at risk of serious harm. There was thus, in the opinion of the court, apparently no lawful way for the state to restrict Shriner's freedom.

The reasons for this state of affairs go back to the early 1980s when widespread sentencing reforms occurred across the United States in response to criticisms of the ineffectiveness of rehabilitation in corrections and the emergence of a justice model (JM) of social control (Cayley, 1998, pp. 45–46). The JM called for the abolition of indeterminate sentencing (and consequently parole) in criminal law and its replacement by "truth-in-sentencing": penalties fixed in law that took discretion away from judges (but not prosecutors). The sentencing reforms that occurred based on this model followed earlier reforms in civil mental health law spawned by innovations in pharmacological treatment, criticisms of the economic and social costs of the long-term warehousing of psychiatric patients in large state hospitals, and the mental patients' rights movement. The restrictions introduced by these mental health reforms now made involuntary commitment to psychiatric hospitals and involuntary treatment much more difficult even for persons considered to be at a danger of harming themselves or others. The criterion for involuntary commitment was no longer simply mental disorder combined with danger to self or others but rather mental disorder and evidence of recent and overt acts indicating an "imminent danger" to self or others (Lafond & Durham, 1992).

Washington's criminal justice reforms in the 1980s led to the replacement of indeterminate sentences with determinate ones and involuntary treatment for sex offenders with treatment requiring informed consent (Lafond, 1992, p. 671). The unintended result of these reforms was that a small number of dangerous sex offenders who had completed their determinate sentences were being released unsupervised into the community, in many instances after refusing or unsuccessfully participating in treatment. With the abolition of the sexual psychopath legislation and restrictions on the involuntary commitment of mentally ill persons, civil commitment as a solution to control these dangerous sexual offenders became difficult

in many cases (Boerner, 1992, pp. 542–544). While it is likely, given what is known about the statistical probability of such events, that most sex offenders released from criminal or civil controls did not sexually re-offend, a few, like Shriner, did so spectacularly.

Media and public response to the assault of the young boy by Earl Shriner was overwhelming. By May 26, 1989, over 1,000 calls and letters had been made to Governor Booth Gardner demanding that action be taken to protect the community and avoid more innocent victims. A victims advocacy group called SAVUS (Stop All Violent Unnecessary Suffering) or the Tennis Shoe Brigade was started by the young boy's mother, Helen Harlow. The name Tennis Shoe Brigade was based on the image of the small "forlorn" tennis shoe found near the brutalized boy's body and became a symbol of his helplessness in the face of his attacker. Soon, SAVUS combined forces with another advocacy group, Friends of Diane. This group was led by Ida Ballasiotes, the mother of a young woman who had been raped and murdered a year earlier by a sex offender who was on a work release program after serving 13 years for attacking two women (Lieb, 1996, p. 1). On June 15, 1989, Governor Gardner issued an executive order setting up a Community Protection Task Force which Boerner, 1992, pp. 552–553) described as "a windbreak to protect . . . [state officials] . . . from the raw force of public passion."

Victims' advocates and many members of the community held the state accountable for failing to create a system that would have allowed officials to contain Shriner. Not only was there outrage on behalf of Shriner's young victim, but also there was fear for all the other children who Shriner and others like him might victimize because of the perceived failures or misguided priorities of the state. David Boerner, one of the primary drafters of Washington's VSP legislation, argued that the issue was not just public concern about sexual violence. Rather, it was the "predatory" tendencies of Shriner and similar offenders and the seemingly "random" nature of their crimes that aroused such widespread fear and anger.

> All sex offenses involve violence, but not all sex offenses are the same. Most sex offenses, in fact, occur between persons who know one another. These crimes as serious and damaging as they are, were not what produced the public outrage that led to the creation of the Task Force. The very randomness of Earl Shriner's act produced the sense of vulnerability that was at the core of the public's fear (Boerner, 1992, pp. 568–569).

This "sense of vulnerability" and random danger connected to the specter of the predatory, sexually deviant stranger was further fueled later in 1989. During the midst of the Task Force's deliberations, Westley Alan Dodd, described as a sadistic pedophile with a long history of sexual assault and abduction, was apprehended trying to abduct a six year old boy from a movie theatre. Dodd confessed to killing two young boys who had been riding their bikes in a park and a four year old

boy he found playing in a school yard (Lieb, 1996, p. 1). He also admitted to molesting over 100 other children. Like Shriner, Dodd had been convicted several times of sex offenses against children but was outside the reach of both criminal justice and mental health systems after serving a sentence for "attempted unlawful detainment" and being released in 1987. Diaries in Dodd's possession were filled with plans for kidnapping, molesting, and killing children (Jenkins, 1998, p. 192).

The Governor's Task Force, in some key respects, was unlike the committees that had been set up to develop sexual psychopath laws in some states between the 1930s and 1950s (Freedman, 1987; Galliher & Tree, 1985). With only three representatives, a clinical perspective was not so heavily represented on the Task Force as it had been on the committees set up by many states during the earlier period of sexual psychopath laws. What was innovative this time, however, was the presence of three representatives of crime victims including Helen Harlow and Ida Ballasiotes.

In February, 1990, after only a few small amendments, legislation creating a sex offender registry, provisions for community notification, and civil commitment for Violent Sexual Predators was passed and soon became an important model for other states (State of Washington, 1989).

Washington's registration provision requires all adult and juvenile sex offenders convicted of specified sex offenses to register with the police and to provide various kinds of identifying information within 24 hours of release from a correctional or psychiatric facility and within ten days of any subsequent move. A post-sentence review process was created to rate all sex offenders on a three-tiered risk continuum: low, moderate, and high. Information on offenders, including risk assessments, are stored in a data bank and can be used in civil commitment proceedings for dangerous mentally ill persons or violent sexual predators. They can also be used to notify law enforcement agencies, community organizations, or members of the public about particular sex offenders depending on their risk classification.

Washington's community notification provision specifies who can access the information contained in the registry, what kinds of information can be accessed, and the procedures for doing so. Public officials are allowed to release to the community names, photographs and other information identifying sex offenders as long as such information is considered "relevant and necessary for community protection." Notification takes place in the following manner. First, correctional or mental health officials carry out a pre-release review of the offender's criminal and psychiatric records and behaviour and issue bulletins to law enforcement officials with pertinent information from this review. Second, law enforcement agencies (sometimes working with interagency committees) rank offenders on a risk continuum from low (level one), to moderate (level two), to high (level three). In the case of level one offenders, information is distributed only to and between

law enforcement agencies. In the case of level two offenders, selected community groups and schools are notified as well. For level three offenders, the public is notified via media bulletins, flyers, and posters, community meetings, and door to door visits by police officers of homes within a certain radius of the offender's residence (Poole & Lieb, 1995).

Washington's Violent Sexual Predator (VSP) statute defines a VSP as "a person, previously convicted of and/or currently charged with one or more of several specified crimes of sexual violence who is deemed to have a mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence." In keeping with the community protection model's focus on predatory strangers, the VSP statute specifically excludes offenses by family members or by acquaintances of the victim. An exception is made if it is determined that the offender's relationship with the victim was cultivated primarily for the purpose of victimization (Lieb, Quinsey & Berliner, 1998, p. 44).

To determine if someone should be committed as a VSP, there must be a trial by a judge or jury using a "beyond a reasonable doubt" standard. Persons found to meet the criteria for a violent sexual predator are indefinitely confined at the state's high security Special Commitment Center (SCC). The initial legislation had no provision for conditional release. The only way release was possible under the law was through a court decision, after trial by judge or jury, that the individual no longer met the criteria for a violent sexual predator. In 1993, when I visited the SCC and spoke to staff and "residents," many of the residents flocked around me, vying with each other to express their views of the unfairness of the VSP legislation, particularly the absence of parole and the lack of a meaningful treatment program.

National attention was drawn to Washington's comprehensive package of measures to protect communities from sex offenders by continuing media coverage of the case of child rapist and murderer Westley Alan Dodd. As with Earl Shriner, Dodd's diaries contained bizarre fantasies of sexual assault, torture and murder. Like Shriner, Dodd also had fallen between the cracks of the criminal justice and mental health systems despite numerous offenses and despite the fact that some clinicians had detected warning signs that he posed an exceptional danger to children. However, unlike Shriner with his bizarre appearance and subnormal intelligence, Dodd's appearance was unremarkable and his intelligence was normal. His family background was middle class with no indications of child abuse, bullying, financial hardship, developmental disability or psychosis. He was described by one of his former high school teachers as "quiet, reliable and responsible" and impressed observers during his murder trial with his clean-cut demeanor and the way he spoke in an articulate, intelligent manner without bravado. When it came to his crimes, however, Dodd expressed no remorse. In a court brief, he stated, "I

like molesting children, and did what I had to do to avoid jail so I could continue molesting . . . If I do escape, I promise you I will kill and rape again, and I will enjoy every minute of it" (Leo, 1996, p. 21).

In 1991, the CBS television show *48 Hours* did three stories on predatory sex offenders: "Serial Killer" which included excerpts from Westley Dodd's diary, "Crime in the Dark" on rapists, and "Predators" on Washington's controversial new civil commitment measure. Dodd also featured prominently in PBS Television's *Front Line* story "Monsters Among us" on November 10, 1992, which examined the phenomenon of sexual predators and discussed the merits of Washington's legislation in preventing individuals like Dodd from offending. Dodd continued to receive intensive media coverage until his execution in 1993 (Jenkins, 1998, pp. 193, 196).

A consequence of media horror stories about both the innocuous-looking Dodd and the scary-looking Shriner was the typification of the extra-familial sex offender as a predatory and highly dangerous stranger. Such an offender was viewed as monstrous: an alien, subhuman being from whom the community needed protection even if it took extraordinary measures (Simon, 1998). It mattered little that research had shown that most sex offenses occurred between family members and acquaintances (Lieb, Quinsey & Berliner, 1998, p. 50).

Such offenders, however distasteful their offenses, were considered to be a threat primarily to their own families and close acquaintances and less of a concern to the community at large. It was the offender who was unknown to his victims or who cultivated relationships with a predatory intent, who had to be identified, his freedom to prey on potential victims curtailed, his movements tracked, his whereabouts made known to the community. If necessary, he had to be confined indefinitely not just because he had committed serious violent offenses but because of something aberrant in his psychological make-up that compelled him to strike, whether randomly or by perversely calculated design, against vulnerable children or women throughout the community.

In 1993, Washington was again a pioneer in developing special legislation for dangerous offenders. An advocacy group called Washington Citizens for Justice succeeded in putting an initiative on the election ballot calling for a "three strikes" law. This law mandated life without parole for any individual convicted of a third "most serious offense" who has at least two prior convictions, on separate occasions, for specified sex, violent, and weapons offenses (Schram & Milloy, 1998, p. 7; Surette, 1996, p. 179). Voters approved the initiative by a wide majority and legislation was enacted the following year. Over the next two years, the law was twice amended (Lieb, Quinsey & Berliner, 1998, p. 70) to create a "two strikes" measure to cover offenders convicted of two violent sexual offenses or two child rapes.

In October 1993, just before the vote on the Washington initiative, the fear of predatory sex offenders escalated with national media coverage of the abduction of 12 year old Polly Klaas from her home in Petaluma, California. Klaas was sexually assaulted and murdered by Richard Davis, a man with multiple convictions for sexual assault, murder and weapons offenses who had spent 14 of the previous 20 years in prison.

The murder of the young girl who became known as "America's child" was widely covered on television and in newspapers and popular magazines like *Time* and *Newsweek*. In January 1994, ABC's *Primetime Live* did a story cataloguing a litany of failures of the justice system in its dealings with Davis (Jenkins, 1998, pp. 196–197). That same year, Marc Klaas, Polly's father, set up the Klaas Kids Foundation, an advocacy group concerned with the protection of children against violent offenders that publishes an on-line newsletter (www.klaaskids.org) and acts as a resource group for families in which children have been the victims of predatory violence. Also in 1994, President Clinton, responding to the Klaas incident, endorsed three strikes legislation in his State of the Union address (Jenkins, 1998; Surette, 1996, p. 179).

While Washington's 1990 community protection legislation and two and three strikes legislation clearly pioneered a community protection approach to sex offenders, a series of events in other states were crucial in making this a nation-wide movement. Public advocacy in response to highly publicized incidents involving child victims was a major impetus behind the enactment of sex offender registration and community notification statutes across the United States by the late 1990s (Jenkins, 1998, p. 200). Kansas and California were among the first states to follow Washington's lead in establishing civil commitment statutes for sexually violent predators and it was the 1997 Supreme Court decision in *Kansas vs. Hendricks* upholding the Kansas statute, that paved the way for widespread adoption of civil commitment statutes.

THE RAPID SPREAD OF SEX OFFENDER REGISTRATION ACROSS THE UNITED STATES

In 1994, the movement to register offenders became a national one when the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (JWA) was enacted as an amendment to the federal Violent Crime Control and Law Enforcement Act. The JWA was named after Jacob Wetterling, an 11-year-old Minnesota boy abducted at gunpoint by a stranger in 1989 who is still listed as missing today. Jacob's parents founded the Jacob Wetterling Foundation (JWF) in February 1990 not only to locate their son but also to prevent child abduction and

help other victimized families. The JWF played a major advocacy role in lobbying Congress to pass a law requiring the registration of all sex offenders across the United States (Lewis, 1996).

On September 13, 1994, President Bill Clinton signed the JWA into law. This amendment outlined standards for setting up sex offender registries and required all states to do so within a three year period or face a 10% reduction in federal law enforcement funds which would be reallocated to states complying with the legislation (Coflin, 1997, p. 4; Matson & Lieb, 1996, p.1; Matson & Lieb, 1997, p. 3). The JWA targeted two categories of sex offenders, those convicted of an offense against a minor and those convicted of a "sexually violent offense," and stipulated that they be required to register for a minimum of 10 years. The JWA also required states to release relevant information from the registry (minimally, name, address, fingerprints and photograph) "as necessary" to protect the public. The JWA was further amended in 1996 and 1998 and the *Final Guidelines* for the application of the law issued in 1999 (Logan, 1999, p. 1173).

State sex offender registries are premised on the claim that sex offenders require special monitoring because of their propensity to repeatedly engage in sex offenses. Preambles to legislation providing for registries make no distinction between types of sex offenders nor is there reference to research indicating that rates of re-conviction differ considerably between incest offenders and extra-familial child sexual abusers, heterosexual pedophiles and homosexual pedophiles, adult-victim rapists and those with child-victims. A common preamble introducing legislation requiring registration is a statement such as the following (*emphasis my own*):

> *The legislature finds that sex offenders present a high risk of re-offense* and that efforts of law enforcement agencies to protect their communities, conduct investigations and quickly apprehend offenders who commit sex offenses are impaired by the lack of information available about individuals who have pled guilty or been found guilty of sex offenses who live within their jurisdiction (Idaho Revised Statutes, § 18–8302 cited in Coflin, 1997, p. 1).

In 1996, legislation named after Pam Lychner, a crime victims' advocate who died in a plane crash, was passed amending the JWA. The Lychner Act required lifetime registration for offenders convicted of one or more sexual offenses involving penetration of victims below the age of 12 or any penetrative sex act involving the use of force or threat. The Lychner Act also mandated the FBI to create, within three years, a national sex offender registry (NSOR) that would link the registries of individual states and enable the tracking of sex offenders across state lines (Lieb, Quinsey & Berliner, 1998, p. 73; Logan, 2000, p. 600).

In 1998, the *Commerce, Justice and State, the Judiciary and Related Agencies Appropriation Act*, was passed as an amendment to the JWA. This amendment mandated states to identify which sex offenders might be considered to be "sexually

violent predators," that is those offenders convicted of a sexually violent offense who suffer from a mental abnormality or personality disorder that makes them likely to engage in sexually violent offenses. Individuals designated as sexually violent predators are required to provide additional information on registering (including information on treatment they have received or are receiving), to verify their address information on a quarterly basis, and to be subject for life to state and federal registration requirements. All states were required to comply with this legislation by November 25, 2000 or face a 10% reduction in federal law enforcement funding (Logan, 2000, pp. 588–592). The requirement that sex offenders register with the state has generally stood up to constitutional challenge with regard to such issues as retroactive application (Logan, 1999; www.klaaskids.org, April, 2001).

The United States now has close to 500,000 registered sex offenders. California leads with 95,401 registrants (as of 6/7/02), followed by Michigan with 32,424 (as of 7/1/03), Texas with 28,728 (as of 6/21/04), Florida with 25,000 (as of 2/26/04), Washington with 18,032 (as of 2/29/04), Wisconsin with 15,200 (as of 8/8/03), and New York with 14,432 (as of 7/121/02). See <www.klaaskids.org/pg-legmeg.htm>.

THE RAPID SPREAD OF COMMUNITY NOTIFICATION PROVISIONS ACROSS THE UNITED STATES

In Washington, the inability of police and school officials to notify families about the risk posed to young children by Earl Shriner was a major factor in the state's decision in 1990 to create a formal mechanism to notify the community about the presence of sex offenders. This theme of community members' "right to know" about the presence of sex offenders in their neighborhoods was central in the spread of this type of legislation across the United States, following events in New Jersey in 1994. On July 1, 1994, a seven-year-old New Jersey girl named Megan Kanka was found raped and strangled after being reported missing by her parents. Megan was one of four little girls in New Jersey who were sexually assaulted and murdered within an 18-month period (Wright, 1995, p. 68).

Megan's assailant, Jesse Timmendaquas, had apparently used a puppy to lure her to come with him. Timmendaquas lived with two other sex offenders in a house on the same street as the Kanka family, who along with most residents in their suburban neighbourhood, were apparently unaware of the backgrounds of Timmendaquas and his housemates. Timmendaquas, described by a judge as "a compulsive, repetitive, sexual offender," had been convicted of sexual assaults of children in 1979 and 1981. He served seven years in the sex offender facility in

Avenel, New Jersey, but had not co-operated with attempts to provide him with treatment (Jenkins, 1998, p. 197; Wright, 1995, p. 68).

Within a few days of Megan's murder, an estimated 1,000 people turned out for a vigil in a park near her home and within a few weeks over 200,000 New Jersey residents signed a petition demanding that community notification legislation be enacted (Kanka, March 28 2000). Within a month, the tremendous outcry produced by Megan's death led New Jersey politicians to introduce a comprehensive package of measures to control sex offenders modeled largely after Washington's legislation. At the heart of these measures, collectively referred to as Megan's Law, was community notification. Megan's mother, Maureen Kanka, became a passionate campaigner on behalf of the legislation, which was signed by New Jersey's governor 89 days after Megan's death. Understandably, politicians and public officials were quick to support a statute memorializing a child-victim who had become a martyr (Wright, 1995, p. 68).

Maureen Kanka was the primary spokesperson for the Megan Nicole Kanka Foundation set up in her daughter's name. With the support of New Jersey Congressman Dick Zimmer and television personalities such as Oprah Winfrey and John Walsh, a national Megan's Law movement developed. The main objective of the movement was the demand that citizens had the right to know about sex offenders in their midst (Kanka, March 28 2000; April 27 2000). Kanka told a British journalist: "If I had not started the movement I would have died . . . I needed a purpose to go on; in a way, this campaign has been a blessing . . . I have come to feel that it was Megan's destiny to die, and mine to campaign in her name, so other children will be saved" (Laurence, 1997, p. A4).

The child protection campaigns of the Kanka, Wetterling and Klaas families had national political consequences. In his 1994 State of the Union address, President Bill Clinton referred to the tragic slaying of Polly Klaas in supporting the Lychner Act registry (Jenkins, 1998, p. 194). In 1996, when Clinton signed a federal community notification provision called Megan's Law, he was surrounded by members of the Kanka family, Congressman Zimmer, and "America's Most Wanted" television host John Walsh (himself the father of a child abducted and killed by a sex offender). Said President Clinton on this occasion: "America is circling the wagons around its children" (Laurence, 1997, p. A4). Speaking generally of sex offenders and repeating the questionable claim that they were especially prone to recidivate, Clinton called for extraordinary measures of surveillance both locally and nationally.

> We have taken decisive steps to help families protect their children, especially from sex offenders, people who, according to study after study, are likely to commit their crime again and again . . . the law should follow those who prey on America's children where ever they go, state to state, town to town (cited in Lieb, Quinsey & Berliner, 1998, p. 73).

The Megan's Law amendment to the JWA contained clearer and stronger language with regard to community notification than did the 1994 legislation, stating that all states "shall release relevant information" necessary to protect the public. The amendment provided penalties for all states failing to comply, within three years, with the new notification requirement in the form of a 10% reduction in federal law enforcement funds.

While U.S. federal law now clearly requires all states to carry out community notification and has set general standards for doing so, individual states can elect to carry out this requirement in different ways. In those states following the Washington model, officials control the flow of information; in other states, citizens can access information themselves. In 1994, Indiana added a new dimension to sex offender registration when it enacted Zachary's law in memory of Zachary Snider, a child homicide victim of a sexual predator. Zachary's law mandated the creation of a SOR web site providing information on sex offenders that the public could access. Other states, including Minnesota quickly followed with web sites of their own. The Minnesota web site provided names, mug shots, and offense information for all sex offenders known to authorities (Jenkins, 1998, p. 200).

SOR web sites provide the public with direct access to a variety of kinds of detailed information including (depending on the state) criminal history, photographs, vehicle descriptions, and maps showing where sex offenders reside. Over 30 states now provide access to sex offender registries on the Internet (www.klaaskids.org). Some states, for example Alaska (Mercer, 1997, p. B6) and California, also have unofficial web sites maintained by concerned citizens (Logan, 1999, p. 1189; National Criminal Justice Association, 1999, pp. 12, 62).

In addition to those states with web sites, at least one state (California) provides official access to information on sex offenders through a CD-ROM database. At least four states allow access to their registries through 800/900 phone numbers, either with a toll-free number (Tennessee) or a fee for this service (California and New York). To gain access one must provide exact information (for example, name, street address, birth date, and social security number) on the person about whom one is inquiring (National Criminal Justice Association, 1999, pp. 13–14).

In Louisiana, offenders are required to identify themselves to community members and at their own expense. Each registrant is required to give notice of his name, address, and the crime(s) for which he was convicted to the superintendent of the school district in which he resides. The registered offender must also inform at least one person in every residence or business within an area of three square blocks if he lives in an urban or suburban area or a one-mile radius if he lives in a rural area. In addition, the sentencing court or parole board has the discretion

to require offenders to notify community members by the use of signs, handbills, vehicle bumper stickers, or labels on their clothing (Logan, 1999, p. 1174).

Opinion polls taken in Washington and Georgia in 1997 show strong public support for community notification (Hansen, 1997 cited in Lieb, Quinsey & Berliner, 1998, p. 73; Phillips & Troyano, 1998). In Washington, 89% of a sample of adults supported Washington's notification legislation; in Georgia, a statewide newspaper poll found 79% of those contacted agreed that "the public has a right to know of a convicted sex offender's past, and that right is more important than the sex offender's privacy rights."

Court challenges to notification laws have thus far generally upheld such laws on the basis that they are not intended to punish sex offenders, but rather are regulatory measures designed to protect the public. In Washington, two court decisions (*State vs. Taylor*, 1992 and *State vs. Ward*, 1994) found that any stigma resulting from notification stemmed from the offender's past crimes (which are a matter of public record) and not the state's registration and notification requirements.

In a few cases, particular state laws have been found to be unconstitutional on specific procedural grounds. These include failure to provide adequate due process (for example, the right to contest a notification decision) or retroactive application of the law in the case of offenders designated to be at a low risk to re-offend. Following remedy of such flaws, the laws have been allowed to stand (Lieb, Quinsey & Berliner, 1998, pp. 76–79; Logan, 1999).

VIOLENT SEXUAL PREDATOR STATUTES WITHSTAND CONSTITUTIONAL CHALLENGE

Washington's 1990 Violent Sexual Predator statute (VSP) was narrower in its ambit than its 1947 sexual psychopath statute and similar statutes in other states which were broad enough in their criteria to include individuals who had never been convicted of anything more serious than flashing, peeping or non-aggressive sexual touching. The VSP was designed as a measure for "a small but extremely dangerous group" of violent sex offenders. These were offenders considered highly likely to re-offend who were being released from prison after completing their sentence. The statute also applied to sex offenders released from a psychiatric hospital after they were no longer regarded to meet the criteria for hospitalization on the basis of a diagnosis of mental disorder and imminent dangerousness (Lieb & Matson, 1998, p. 1).

The VSP legislation was controversial because it appeared to some critics to be essentially criminal and not civil. These critics argued that the law punished individuals who had already paid their debt to society by completing their sentences.

It did so by depriving them of their liberty not on the basis of a new offense but on the basis of their alleged enduring propensity for sexual violence. Furthermore, while regular civil legislation for mentally disordered persons was generally applied to acutely psychotic or seriously developmentally disabled individuals, it was clear that most sex offenders did not meet such a standard. Indeed, the Washington statute, by using the terms "personality disorder" and "mental abnormality" (the latter a catch-all term not recognized in psychiatric parlance) was primarily targeting individuals who (however aberrant and dangerous they might be), could not be confined, except perhaps for short periods, under civil mental health law. Despite its controversial elements, Washington's VSP legislation became a model for other states. In 1994, Kansas followed Washington's lead when it enacted its own VSP statute.

From the outset, VSP statutes have been subject to legal challenge and a number of rulings have been made in state and district courts on their constitutionality. Generally, these rulings have been favourable to post-sentence civil commitment in keeping with a body of jurisprudence legitimating preventive detention under a variety of circumstances that has been developing in the United States over the last few decades (Richards, 1989). Thus far, two cases have made their way to the United States Supreme Court: *Seling vs. Young* (originally *Weston vs. Young*) in Washington and *Kansas vs. Hendricks*.

In the Washington case, Andre Brigham Young, a six times convicted rapist who was civilly committed as a VSP after his release from prison in 1990, argued among other things that, because the VSP statute was criminal in purpose and effect, his confinement after completing his sentence constituted double jeopardy. In 1993, the Washington Supreme Court upheld the statute. In 1995, the U.S. District Court struck it down on the grounds that it was not a legitimate exercise of the state's power of involuntary civil commitment and because it violated the *ex post facto* prohibition against increasing punishment after the fact (Lafond, 1998, p. 474).

On January 17, 2001 Washington's VSP statute was found to be constitutional in an 8–1 decision by the U.S. Supreme Court. Essentially, the court ruled that whether that statute was civil or criminal depended on the intent of the legislature. If it was the case that a civil statute was being administered in an unduly punitive fashion, the appropriate remedy was not to invoke double jeopardy but rather to challenge the punitive conditions through a civil suit in state court. The Court also noted that Young and others detained under the Washington statute could present their claim as part of an ongoing federal civil rights suit under which the Special Commitment Center had been ordered to improve its treatment program (Greenhouse, 2001).

In the Kansas case, 62-year-old Leroy Hendricks was committed under the state's VSP statute after he had served 10 years in prison for attempting to molest

two 13-year-old boys who had walked into the store where he worked. Hendricks had a long history of convictions for sex offenses against children dating back to a conviction for exposing himself to two girls when he was 21. His 12 known victims included his stepdaughter and stepson.

While Hendricks had been diagnosed as a pedophile and had previously received psychiatric treatment, he did not have a mental disorder such as a chronic psychosis that would have enabled him to be committed indefinitely to a mental hospital. At his trial, Hendricks agreed with the physician testifying for the state that he suffered from pedophilia and he conceded that he continued to have sexual desires for children he was unable to control when under stress (Winick, 1998, p. 516). Hendricks was not motivated to undergo treatment and was reported to have told his physician that "treatment is bullshit" (Lieb, Quinsey & Berliner, 1998, p. 68). He furthermore stated that he was aware what he had done was wrong but that he could not guarantee he would not molest again. Nonetheless, Hendricks challenged the constitutionality of his commitment. He based his challenge on the grounds that the statute used to commit him was more criminal than civil in its intent and that adequate due process had not been provided to him. Hendricks also challenged the statute on the grounds that his commitment violated the double jeopardy and ex post facto provisions of the Constitution (Winick, 1998, p. 508).

In 1996, the Kansas Supreme Court ruled 4–3 that the law violated the constitutional guarantee of due process. This ruling was appealed and heard by the U.S. Supreme Court in December 1996. On June 23 1997, the Supreme Court found the Kansas statute constitutional in the case of *Kansas vs. Hendricks*. In a 5–4 ruling, the Court took the view that Hendricks' pedophilia was a mental abnormality so severe that he could not control his urges to molest children. This condition in concert with evidence (including his own testimony) that he posed a high risk to re-offend justified his indefinite incapacitation by the state even if there was no evidence at present that his condition could be effectively treated (Winick, 1998, pp. 519–520). The court also took the view that the legislation was civil and not criminal in nature in that its intention was not to punish Hendricks for his condition but rather to protect the public from the serious risk that he posed.

The Hendricks decision clearly encouraged other states to proceed with their own legislation. By the summer of 1998, violent sexual predator statutes had been enacted in 12 states (with over 520 successful commitments since their inception) and legislative proposals for post-release confinement of sexual predators had been introduced in over 20 other states (Lieb & Matson, 1998, p. i). By the year 2001, the number of states with civil commitment provisions for sex offenders had reached 16.

DISCUSSION AND CONCLUSION

Since the late 1980s, the United States and, increasingly, other countries such as Canada and the United Kingdom have been moving away from forensic clinical and justice models for dealing with sex offenders toward a model based on community protection/ risk management principles. Central to this shift have been the notions not only that sex offenders as a general category pose inherent risks to re-offend, but also that this risk of re-offending is so unacceptable to the community that drastic means are necessary to manage it. If this is not the case, why are sex offenders being treated differently than other kinds of offender? There is no hue and cry for burglars, robbers, polluters of the environment or perpetrators of fraud to be registered and tracked, to be identified on web sites, to be made subject to community notification, to have their movements limited by judicial restraint, and to be subject to post-sentence detention.

A comparative look across societies and over time indicates that while sex offenses have often been the subject of great concern this is not always the case (Jenkins, 1998; Krivacska, 1994). The panic in the United States during various times over the last century over the danger sex offenders pose to children and women has not been present at other places and other times. Just to give a personal example, during the fall of 2000, I spoke to criminologists, lawyers, and university students in Italy about North American and British sex offender policy. Many of those to whom I spoke were puzzled by the strong community and policy response to sex offenders in these societies. They could not conceive that sex offenders were such a serious social problem that special measures such as registries and community notification were required to contain them.

Where concern about sex crimes is high, as in contemporary North America and parts of Europe, such crimes (even when they are non-violent) tend to be viewed by many people (and supported by much research) as more psychically damaging to victims than most other crimes. This is particularly so when the victims are children. No other offenders are as vilified as child-victim sex offenders. In prison, they are at the bottom of the inmate hierarchy, held in such contempt by other inmates and singled out for such serious abuse that they may require protective custody (Akerstrom, 1986; Presser & Gunnison, 2001). In the community, no other category of offender is subject to the level of vigilantism that sex offenders encounter. It is not uncommon for them to be harassed and occasionally they are physically assaulted or hounded out of the neighborhoods where they live (Reed, 2003; Schroeder, 1997, p. B6; Van Biema, 1993, p. 58).

What is striking about the panoply of special measures for sex offenders that post-industrial English-speaking jurisdictions have developed is that they invariably have been inspired by outrage over the some of the worst, but definitely

atypical, cases one can find. It is sometimes said that building policies or laws around the worst rather than typical cases results in bad laws. In the case of sex offender policy, laws designed to contain persistent violent offenders like Earl Shriner may result in serious losses of liberty and privacy for non-violent offenders or one-time offenders tarred by the stigma of conviction as a sex offender. The effort to avoid the tragic and sensational false negative may lead to overly strict and even counter-productive controls for the many low-risk offenders that statistical research suggests would inevitably turn up as false positives if they were given the opportunity to be released.

But, of course, risk assessment so often tends to be much more about politics and public perception than it is about statistics. It is not hard to understand the pressures policy-makers experience to enact special measures to protect children and women whatever the costs to liberty and privacy rights. By enacting such measures (even though they may be aware that public safety is unlikely to be significantly increased), politicians and legislators are demonstrating responsiveness to widely held and deeply felt concerns. They are sending a message that they accept some responsibility for assuaging public fears about predatory violence sexual and the serious harm suffered both by victims of such violence and, vicariously, by the community at large. In this sense, even measures that are arguably largely symbolic are important in their affirmation of collective values with regard to the protection of children and women.

In the development of a community protection model, populist social movements have played a major role. Various groups concerned with victims' rights and the protection of children and women from sexual violence have effectively used communications media to influence governments to enact a range of special controls specifically designed for sex offenders. Nowhere has this occurred more rapidly and with greater effect than the United States since 1990.

The community protection measures introduced in the United States are so new that relatively little has been done to assess their consequences. Community protection measures, however, do not come cheaply. For example, Lafond's study of the costs of VSP laws estimated the cost to the state of each VSP confined in 1997. These estimates ranged from a low of $60,300 in Wisconsin to a high of $127,500 in Minnesota with Washington at $98,381 and California at $107,000 somewhere in the middle (Lafond, 1998, pp. 478, 482). Lafond argued that money being spent in the commitment of sexually violent predators might better be allocated elsewhere and that there are likely to be several "generations" of costly constitutional litigation.

With regard to sex offender registration and notification, there is a lack of reliable information on their cost-effectiveness. SOR's were apparently introduced on the assumption that they could be implemented and maintained through existing

state budgets and resources but this is clearly not the case. Money and personnel allocated to SOR's and notification procedures has often meant that there is less for other law enforcement and crime prevention needs (Coflin, 2001, p. 67).

While little is known about compliance with registration and notification requirements, a telephone survey of officials in 32 states found high levels of non-compliance, with California at an estimated 44% level of non-compliance and Massachusetts an estimated 56% (Matravers, 2003, p. 25). In addition, state officials and criminal justice practitioners note the sheer magnitude and cost of the tasks involved. Some officials commented that law enforcement staff could spend virtually all their time on registration and notification issues and still not do all that they were legally required to do (Coflin, 2000, pp. 58–59; National Criminal Justice Association, 1999, p. 44).

Community notification has resulted in housing for released sex offenders emerging as a major issue. Indeed some offenders unable to find accommodations have been forced to live in trailers on the grounds of correctional facilities or in special state-provided rooming houses for sex offenders (Moran, 2003; Morin, 2003; Reed, 2003). At least one state (New Jersey) has issued a "Megan's Law disclaimer." Its function is to advise potential buyers or renters of the existence of the law and to invite them to check with law enforcement officials about the possible existence of registered sex offenders in the neighborhood to which they are considering moving (National Criminal Justice Association, 1999, p. 31). Another major housing-related issue has been the ability of registered offenders, following community notification, to settle in a neighborhood and obtain accommodations and access to community services. In Wisconsin, a 60-year-old offender confined to a wheelchair was forced to move from the apartment he had previously lived in when his landlord refused to honor his lease and let him return. As a result of community protests, he was forced to relocate eight times between 1997 and 1999 and now lives in isolation. In addition, he was shunned by neighbors and not welcomed in local churches. He was even discouraged from using publicly funded transport for disabled persons (National Criminal Justice Association, 1999, p. 32).

In assessing the socio-politics of contemporary community protection measures, the problems now being identified can be traced to simplistic solutions in mental health and criminal justice policy that had iatrogenic consequences. In the mental health system, the shift to a standard of imminent danger and other reforms made it increasingly difficult to involuntarily commit mentally ill persons. In addition, psychiatric hospitals came to be seen as inappropriate places for mentally disordered persons not suffering from acute psychosis (for example, those afflicted with paraphilias and psychopathy). In the realm of criminal justice, fixing penalties in terms of the gravity of particular offenses without regard to differences in propensity to offend, meant that a small number of persistent and sometimes

violent sex offenders could not be controlled by the state once they had served their sentences.

The public response to this slightly increased but highly salient risk was a demand that community protection should take precedence over mental health and justice concerns. Some critics, however, have already predicted that it may not be long before the speedily introduced community protection measures of the 1990s will also be recognized as a failure (Edwards & Hensley, 2001; Lafond, 1992, 1998; Presser & Gunnison, 2001; Simon, 1997). The pendulum may then swing back to the search for new and more effective forms of treatment and prevention or to the protection of fundamental rights.

For policy makers in the United States, finding the right balance of clinical, justice, and community protection concerns certainly has not been easy to accomplish and if the past is any indication a solution satisfactory to most Americans is highly unlikely. In such a complex and controversial realm of social policy, it is wise to be wary of panaceas and sweeping reforms and to be mindful of the need to protect fundamental rights. It is important, too, to assess the costs and benefits of particular measures and to be attentive to the possibility of unanticipated negative consequences both in the short and long term. Considering community sentiments does not mean pandering to them. Enacting new measures should not be done primarily to placate the anger of interest groups and the public but with forethought and caution taking into account a variety of considerations. In an imperfect world, perhaps the best that can be done is to strive to judiciously balance the interests of community safety, the concerns and rights of victims, offender rehabilitation, and offenders' rights.

REFERENCES

Akerstrom, M. (1986). Outcasts in prison: The cases of informers and sex offenders. *Deviant Behavior*, *7*, 1–12.

Beckett, K., & Sasson, T. (2000).The war on crime as a hegemonic strategy: A neo-Marxian theory of the new punitiveness in U.S. criminal justice policy. In: S. Simpson (Ed.), *Of Crime and Criminality* (pp. 61–84). Thousand Oaks, CA: Pine Forge Press.

Best, J. (1990). *Threatened children: Rhetoric and concern about child victims*. Chicago: University of Chicago Press.

Boerner, D. (1992). Confronting violence in the word and in the word. *University of Puget Sound Law Review*, *15*, 525–577.

Cayley, D. (1998). *The expanding prison: Crisis in crime and punishment and the search for alternatives*. Toronto: Anansi.

Coflin, J. (1997). *Sex offender registration and community notification legislation, policy and procedures*. Ottawa: Solicitor General of Canada.

Coflin, J. (2001). *Sex offender registries: A status report*. Ottawa: Ministry of the Solicitor General.

Edwards, W., & Hensley, C. (2001). Contextualizing sex offender management legislation and policy: Evaluating the problem of latent consequences in community notification. *International Journal of Offender Therapy and Comparative Criminology*, *45*, 83–101.

Feeley, M., & Simon, J. (1992). The new penology: Notes on the emerging strategy of corrections and its implications. *Criminology*, *30*, 449–474.

Feeley, M., & Simon, J. (1994). Actuarial justice: The emerging new criminal law. In: D. Nelkin (Ed.), *The Futures of Criminology* (pp. 173–201). London: Sage.

Freedman, E. (1987). Uncontrolled desires: The response to the sexual psychopath, 1920–1960. *Journal of American History*, *74*, 83–106.

Galliher, J., & Tree, C. (1985). Edward Sutherland's research on the origins of sexual psychopath laws: An early case study of the medicalization of deviance. *Social Problems*, *33*, 100–113.

Greenhouse, L. (2001). Justices allow states to hold sexual predators. *The New York Times on the Web* (January 18), 3 pages.

Hare, R. (1998). Psychopaths and their nature: Implications for the mental health and criminal justice systems. In: T. Millon, E. Simonsen, M. Birket-Smith & R. Davis (Eds), *Psychopathy: Anti-Social, Criminal, and Violent Behavior*. New York: Guilford Press.

Jenkins, P. (1998). *Moral panic: Changing concepts of the child molester in modern America*. New Haven: Yale University Press.

Kanka, M. (2000, March 28). How Megan's death changed us all: The personal story of a mother and anti-crime advocate. Megan Nicole Kanka Foundation (on-line).

Kanka, M. (2000, April 27). Child advocate in the making: Lessons in the struggle for Megan's law. Megan Nicole Kanka Foundation (on-line).

Krivacska, J. (1994). Paraphilic prevention: Social and legal implications. In: J. Krivacska & J. Money (Eds), *The Handbook of Forensic Sexology: Biomedical and Criminological Perspectives* (pp. 397–421). Amherst, NY: Prometheus Books.

Lafond, J. (1992). Washington's sexually violent predator law: A deliberate misuse of the therapeutic state for social control. *University of Puget Sound Law Review*, *15*, 655–703.

Lafond, J. (1998). The costs of enacting a sexual predator law. *Psychology, Public Policy and Law*, *4*, 468–503.

Lafond, J., & Durham, M. (1992). *Back to the asylum: The future of mental health law and policy in the United States*. New York: Oxford University Press.

Laurence, C. (1997). A mother's campaign for Megan's law. *The Citizen* (February 2), A4.

Leo, J. (1996). Changing the rules of a deadly game. *U.S. News and World Report* (December 23), 21.

Lewis, C. (1996). The Jacob Wetterling crimes against children and sexually violent offender registration act: An unconstitutional deprivation of the right to privacy and substantive due process. *Harvard Civil Rights and Civil Liberties Law Review*, *39*, 89–118.

Lieb, R. (1996). *Washington's sexually violent predator law: Legislative history and comparisons with other states*. Olympia, Washington: Washington State Institute for Public Policy.

Lieb, R., & Matson S. (1998). *Sexual predator commitment laws in the United States*: 1998 Update. Olympia, Washington: Washington State Institute for Public Policy.

Lieb, R., Quinsey, V., & Berliner, L. (1998). Sexual predators and social policy. In: M. Tonry (Ed.), *Crime and Justice: A Review of Research* (Vol. 23, pp. 43–114).

Logan, W. (1999). Liberty interests in the preventive state: Procedural due process and sex offender community notification laws. *The Journal of Criminal Law and Criminology*, *89*, 1167–1231.

Logan, W. (2000). A study in 'actuarial justice': Sex offender classification practice and procedure. *Buffalo Criminal Law Review*, *3*, 593–637.

Mathiesen, T. (1997). The viewer society: Michel Foucault's 'panopticon' revisited. *Theoretical Criminology*, *1*, 215–234.

Matravers, A. (2003). Setting some boundaries: Rethinking responses to sex offenders. In: A. Matravers (Ed.), *Sex Offenders in the Community; Managing and Reducing the Risk* (pp. 1–29). Cullompton, UK: Willan.

Matson, S., & Lieb, R. (1996). *Sex offender community notification: A review of laws in 32 states*. Olympia, Washington: State Institute of Public Policy.

Matson, S., & Lieb. R. (1997). *Megan's Law: A review of state and federal legislation*. Washington Institute of Public Policy.

Mercer, J. (1997). Web site puts child molesters on view. *The Citizen* (May 1), B6.

Moran, G. (2003). Public incensed as sex offender goes free-state rethinks how to confine predators. *San Diego Union Tribune* (August 17).

Morin, M. (2003). Plan to house molester in Soledad delayed after outcry from city. *Los Angeles Times* (August 9), B5.

National Criminal Justice Association (1999). *Sex offender registration and notification: Problem avoidance and barriers to implementation & sex offender registration and notification costs survey results*.

Petrunik, M. (1982). The politics of dangerousness. *International Journal of Law and Psychiatry*, *5*, 225–253.

Petrunik, M. (1984). *The making of dangerous offenders: The origins, diffusion, and uses of legislation for dangerous offenders in Europe and North America*. Ottawa: Ministry of the Solicitor General, Programs Branch.

Petrunik, M. (1994a). *Models of dangerousness: A cross-jurisdictional review of dangerousness legislation and practice*. Ottawa: Policy Branch, Ministry of the Solicitor General.

Petrunik, M. (1994b). Modelès de dangerosité: Les contrevenants sexuels et la loi. *Criminologie*, *27*, 87–125.

Petrunik, M. (2002). Managing unacceptable risk: Sex offenders, community response, and social policy in the United States and Canada. *International Journal of OffenderTherapy and Comparative Criminology*, *46*, 483–511.

Petrunik, M. (2003). The hare and the tortoise: Dangerousness and sex offender policy in the United States and Canada. *Canadian Journal of Criminology and Criminal Justice*, *45*, 43–72.

Petrunik, M., & Weisman, R. (forthcoming). Constructing Joseph Fredericks: Competing narratives of a child sex murderer. *International Journal of Law and Psychiatry*.

Poole, C., & Lieb, R. (1995). *Community notification in Washington State: Decision-making and costs*. Olympia: Washington State Institute of Public Policy.

Presser, L., & Gunnison, E. (2001). Strange bedfellows: Is sex offender notification a form of community justice? In: R. Holmes & S. Holmes (Eds), *Current Perspectives on Sex Crimes* (pp. 320–330). Thousand Oaks, CA: Sage.

Pryor, D. (1996). *Unspeakable acts: Why men sexually abuse children*. New York: University Press.

Reed, D. (2003). Fragile freedom awaits molester: If Judge gets move, DeVries to face hostile neighbours, heavy restrictions. *San Jose Mercury News* (August 10).

Rennie, Y. (1978). *The search for criminal man: A conceptual history of the dangerous offender*. Toronto: Lexington.

Richards, E. (1989). The jurisprudence of prevention: The right of societal self-defense against dangerous individuals. *Hastings Consitutional Law Quarterly*, *16*, 329–392.

Schroeder, E. (1997). California notification law gives a boost to vigilantes, encourages hysteria. *The Gazette* (February 15), B6.

Simon, J. (1998). Managing the monstrous: Sex offenders and the new penology. *Psychology, Public Policy and Law*, *4*, 452–467.

State of Washington (1989). *Task force on community protection: Final report*. Olympia: Department of Health and Social Services.

Surette, R. (1994). Predator criminals as media icons. In: G. Barak (Ed.), *Media, Process, and the Social Construction of Crime* (pp.131–158). New York: Garland.

Surette, R. (1996). News from nowhere, policy to follow: Media and the social construction of three strikes and you're out. In: D. Shichor & D. Sechrest (Eds), *Three Strikes and You're Out: Vengeance as Public Policy* (pp. 177–203). Thousand Oaks, CA: Sage.

The Violence Research Group (1996). *Statistical handbook on violence in America*. Phoenix, AZ: Oryx Press.

Van Biema, D. (1993). Burn thy neighbour. *Time* (July 26), 58.

Weed, F. (1995). *Certainty of justice: Reform in the crime victim movement*. Hawthorne, NY: Aldine de Gruyter.

Winick, B. (1998). Sex offender law in the 1990s: A therapeutic jurisprudence analysis. *Psychology, Public Policy and Law*, *4*, 505–570.

Wright, L. (1995). A rapist's homecoming. *The New Yorker* (September 4), 56–62, 64–69. www.caveat.org; www.jwf.org; www.klaaskids.org.

PART II:
SOCIAL CONTROL IN OFFICIAL BUREAUCRACIES AND TOTAL INSTITUTIONS

This Page Intentionally Left Blank

BIASES FORGED THROUGH SUSPICION: THE GATEKEEPER IN PUBLIC HOUSING RECONSIDERED

Robert Garot

ABSTRACT

This paper examines housing eligibility officers' practices of suspicion, which contribute to the systematic and historic appearance of bias in their rationing of housing subsidies. Through developing expectations based on racial/ethnic categorization, and perceiving anomalies in applicants' documents, appearance, demeanor, and family obligations, housing officers justify reasons for some applicants to receive a housing subsidy, and others to be excluded. Housing officers judge each others' competence based on the use of such practices, and train novices in them, even as they reflexively note that such practices may be discriminatory and are not to be found in regulatory guidelines.

Deutscher's (1968) classic study shows how a housing gatekeeper uses the demeanor of applicants, family constellation, and the race of applicants for determining their desirability for public housing. The use of such criteria would seem to simply indicate the gatekeeper's personal bias, based in the dominant middle-class values of the time. As Lipsky (1980, p. 109) notes, "one of the most well-grounded generalizations that can be made concerning client processing," is that "street-level bureaucrats respond to general orientations towards clients'

Ethnographies of Law and Social Control
Sociology of Crime, Law and Deviance, Volume 6, 77–104

ISSN: 1521-6136/doi:10.1016/S1521-6136(04)06005-1

worthiness or unworthiness that permeate society and to whose proliferation they regularly contribute." This study also finds that housing gatekeepers use such criteria in rationing housing to applicants, yet the reasoning behind such orientations differs dramatically in this study, as it is not merely the result of personal bias. Rather, such discriminatory actions are the result of carefully cultivated practices of suspicion, by which gatekeepers judge their colleagues' competence and train novices.

Workers' noticings which elicit suspicion have been an enduring topic in sociological research. Sacks (1972), for example, wrote of how police officers suspect persons who appear to deviate from the policeman's conception of the "normal ecology" of an area. Whalen and Zimmerman (1990) explore how emergency calls to the police may elicit suspicion from the call-taker if the caller's stance (their account of their ability to see and hear) towards an event appears to the call-taker to insufficiently warrant the caller's depictions of the trouble. Furthermore, Emerson (1997) shows how interviewers who are usually not suspicious of women applying for temporary restraining orders may become suspicious of a client's motivations if a third party supporter becomes overzealous in their advocacy for the client. Each of these studies probes the grounds for how workers respond to clients suspiciously "with good reason." In the Ferndale (pseudonym) Section 8 Housing Program, these grounds rest in perceiving deviations from: routine paperwork, applicants' appearance and demeanor, assumptions regarding family obligations, and applicants' perceived racial/ethnic categorization.

According to federal regulations, Section 8 tenants must meet certain eligibility guidelines, verified with proper documentation, as discussed below. A Section 8 worker who makes decisions based merely on such criteria, however, would be considered dubious, or at least a dupe of savvy applicants. Knowing when to become suspicious, and how to act based on suspicion, are central skills by which many social control and human service workers judge the competence of their fellow workers. To not be suspicious when an experienced worker would find suspicion warranted is to be either inexperienced or incompetent. Such a worker wastes precious resources and is an embarrassment to colleagues, as they allow criminal activity to escape attention, or allow wealthy applicants to receive government subsidies. Regulations, however, are hopelessly inadequate for specifying the details of such work. For example, when police officers suspect those who deviate from the "normal ecology" of an area (Bittner, 1967; Rubinstein, 1973; Sacks, 1972), they must know what is "normal" (see Sudnow, 1965) in their ecology, and what might deviate from it, which are processes requiring years of watching an area and developing relationships with members. Similarly, many housing eligibility officers take pride in their ability to question applicants

in order to reveal ways they may try to make themselves eligible, or even commit fraud.

While such skills may be appreciated among the police, housing eligibility officers are not particularly noted for their practices of suspicion. Instead, studies commonly focus on how workers deny services to the needy, rather than how they prevent the well-off from seeking funds intended for the destitute. For instance, Lidstone (1994) examines how housing workers formally ration housing by determining eligibility, and informally ration housing by withholding information, deterrence, and discretion, but she does not examine how such practices may potentially prevent fraud. Sahlin (1995), like Deutscher, also looks at practices of exclusion from public housing, using Foucault's (1979) concepts of border control and discipline, to show how the former is accomplished through the sorts of strategies Lidstone describes, while the later is accomplished through individual contracts, supervision, and expulsion, all rationalized as "for the client's own good" (p. 397). As in Deutscher's and Lidstone's papers, such housing officers exclude or discipline because they morally disapprove of behaviors such as drug use and alcoholism, not, as in the current study, of those with a middle-class demeanor and income who are trying to unfairly qualify for a subsidy. Others look at how applicants are discriminated against on the basis of race and class (Henderson & Karn, 1987), and age (Clapham & Munro, 1990). Such research is undoubtedly vital in the attempt to insure a fair and equitable provision of a vital human service, and provides a resounding chorus of fault-finding.

Lempert and Monsma (1994) broaden the dialogue concerning discriminatory housing allocation, providing quantitative data that Hawaiian housing eviction boards discriminate against Samoans, and qualitative data that reveals the processes behind such outcomes. Namely, eviction board members are aware of Samoan cultural practices of providing money to their clan (aida) or church, often before paying their rent, yet they do not excuse such practices. Rather, they expect Samoans to accommodate to the social system from which they are receiving welfare support. In one especially revealing interview which prefigures some of the practices of suspicion analyzed in this paper, a Samoan public housing manager asked the Samoan tenant who cannot pay his rent due to the death of an uncle, for the name of that uncle. Only after the tenant provides the name of the same uncle and uses his death as a second excuse for missing his rent, does the manager begin to evict. Such an analysis provides a richer portrait of discriminatory behavior, whose ultimate definition and resolution will be determined, the authors note, through political struggle.

This paper builds from Lempert and Monsma's approach, in an attempt to understand the skills of housing allocation specialists from their perspective. Such an approach follows from a long tradition of studies of work in symbolic

interactionism (Becker et al., 1984; Harper, 1992, 2001; Hughes, 1984) and ethnomethodology (Garfinkel, 1984, 1986; Sudnow, 1978; Zimmerman, 1969), which aim to capture the meanings and artfulness of workers' practices. It is hoped that as we probe housing officer's practices of suspicion, we will gain a deeper understanding of the historic and notorious recalcitrance of such officers to change their biased practices.

THE SETTING[1]

The Section 8 Program is the largest housing program in the United States, subsidizing approximately 5% of the rental units in most metropolitan areas, for a total of over 2.5 million units nationwide at an annual cost of over $10.5 billion, at the time of the fieldwork (U.S. Department of Commerce, 1993). When Nixon claimed that the Section 235 Home Ownership program and the Section 236 Rental Program, which provided interest subsidies on loans, were, "inequitable, wasteful, and ineffective," in their service to the poor (Lazin & Aroni, 1983, p. 2), the Section 8 Program was pioneered through HUD, the Department of Housing and Urban Development. Providing direct subsidies to landlords who rent to Section 8 tenants within a locally determined ceiling on rents, called the fair market rent (or FMR), tenants on Section 8 typically pay 30% of their income towards rent, and the federal government pays the balance. Such tenants may take their voucher to any municipality with Section 8 landlords, who ultimately determine their suitability for a unit. The program has endured throughout the past 30 years as an alternative to "warehousing" the poor in large projects, and shows no sign of being discontinued, despite limitations. As Logan and Molotch (1987, p. 170) state, "Use value goals like racial integration, energy conservation, or environmental amenity cannot be shaped by a national housing policy in which government passively writes checks to be spent in the marketplace."

Ferndale is a well-established coastal community of about 50,000, adjacent to a large metropolitan area. The city is ethnically and racially diverse, with both a substantial affluent population and a large number of homeless. The office manages approximately 900 tenants on the program, providing each of three caseworkers with a load of about 300 cases to review, or recertify over the course of a year. The caseworkers are (all names used, beside the author's, are pseudonyms, with gender and ethnic background retained): Maria, a Latina; Ed, an African-American male; and Sidney, a European-American male. Four other officers staff the office full-time besides the specialists: the manager, Joe, a European-American male; the supervisor, Sara, an African-American

woman; the waiting list coordinator, Carol, an African-American woman; and an administrative assistant, Tom, a European-American male.

In order to qualify for Section 8, a person must first be a resident in the municipality to which they are applying, meaning they either live there, work there full time (35 or more hours a week), or are homeless. Second, they must fall within the limits of the annual income criteria.[2] Third, they must be either a family,[3] elderly (over 62), or disabled (as defined by Social Security). These are the standard criteria for eligibility, but due to the high demand for the program, an additional condition has been established called "federal preferences," or, more colloquially by Section 8 workers, "desperate need." In order to qualify for a federal preference, a tenant must either: (a) pay more than 50% of their income towards rent; (b) live in substandard housing; or (c) have been involuntarily displaced or homeless for reasons other than eviction with cause. Approximately 9,000 persons are on the waiting list for Section 8 at this setting alone, and if they meet all the above criteria, they will be moved to the top of the waiting list by a computerized point system in roughly one to two years. Applicants on the wait list could call on Thursday afternoon between one and four to find their position. Many who appeared from their application to not live in substandard or overcrowded housing, or reside outside of Ferndale, called weekly only to find that their position had not improved, or had dropped as others with preferences moved ahead of them.

Most importantly, an applicant's eligibility for each of the above criteria must be "verified." For example, the identity of each person in the house must be documented with an ID and a social security card; one's work must be verified with an employee verification form; one's income must be verified with at least five paycheck stubs; one's residence must be verified with a lease and utility bills; one's rent must be verified with check stubs; one's assets must be verified with a divestiture of assets form; government support, bank statements, and school attendance must be verified with the proper forms, and if one is unable to provide such verification one must sign a legally certified statement to that effect.

Despite the fact that all applicants were convinced of their need for a housing subsidy, few managed to convince Section 8 workers. In fact, in a batch of 50 scheduled interviews, typically only one or two would be eligible. Some had moved and not notified the office, some did not attend their appointment for unknown reasons, and many could not prove that they qualified for a federal preference. Workers' typical stance towards applicants is one of skepticism and suspicion, especially if an applicant appears not to be destitute. For such applicants, eligibility workers are adept at finding warranted grounds for doubting verification, asking "dubious" applicants to return repeatedly with further verification, until the applicant tires of the process or the worker accepts their claims.

THE FIELD WORK

As a case study of a single office, this paper offers an in-depth investigation of the workers' practices, afforded by the rapport that develops with members when an extended amount of time is spent at one setting (Feagin et al., 1991; Harper, 1992; Ragin & Becker, 1992). While each Section 8 office differs in terms of such factors as the geography of the area, the ethnic mix of applicants and tenants, and the "working culture" of the office, each office is faced with similar federally mandated tasks to which they are held accountable by HUD inspectors. Thus, the details of workers' practices at one office may be highly similar to, or provide a useful contrast to descriptions of such practices in other offices, a point future research may well address.

Prior to this study, I had initially worked in the office as a temporary administrative assistant for two weeks, before Tom was hired. In the initial stages of the fieldwork, I worked as a "floater," reacquainting myself with the work and personalities of each officer and assisting in any way possible. After about two months, I proposed that I become part of what I called the "Intake Interview Team." Thereafter, I worked closely with Sara and Carol to assist with the pre-interview and post-interview paperwork, in exchange for being allowed to take field notes during the intake interviews, and to tape record in-depth interviews following their intake interviews. I was not allowed to tape record or videotape intake interviews due to federal privacy provisions. After completing over 100 hours of observations over the course of six months, I coded and analyzed my data according to the traditions of grounded theory (see Charmaz, 1983) and analytic induction (see Emerson et al., 1995; Katz, 1988).

MAKING DECISIONS

When a Section 8 worker conducts an intake interview, it is likely to be the first time an applicant and a worker have met in a face-to-face interaction. The applicant's prior contact with the program typically does not consist of more than completing an application one or two years prior to the interview, and perhaps calling the office to determine their location on the wait list. As described above, the program has strict criteria for which applicants may or may not be qualified. The clear guidelines in Section 8 for determining eligibility may be seen as analogous to those of a Social Security Survivors program, a "highly routinized administrative program" which Handler (1986, p. 3) contrasts to a special education program in which "decisions should be discretionary." In the former, according to Handler, "there is little room for interpretation or choice. It is a rule-bound system rather than

a discretionary system." In this report, however, even such a "rule-bound" system will be shown to have important discretionary elements. For instance, workers may vary in terms of the time they take to determine if an applicant is qualified, or how readily they perceive an applicant's claims with suspicion.

Scheff (1966, pp. 105–127), borrowing from statistics, speaks of such proclivities in terms of Type I and Type II errors. In statistics, a Type I error is to reject a hypothesis that is true, while a Type II error involves accepting a hypothesis that is false. In the justice system, a Type I error would be to find an innocent person guilty, while a Type II error would be to find a guilty person innocent. In medicine, a Type I error would be to not treat a patient who is ill, while a Type II error would be to treat a patient who is not ill. While in each of the above cases, a Type II error will be risked so that a Type I error will be avoided, the preference for a Type I or a Type II error varies from setting to setting.

In the Section 8 Program, such "errors" involve locally recognized "bad decisions" based on qualities of an applicant as perceived by the interviewer. Such "bad decisions" would be: to find a "qualified" person to be unqualified (a Type I error) or to find an "unqualified" person qualified (a Type II error). The quotation marks connote members' practices for perceiving and responding to applicants (to be discussed below), which use and elaborate upon the regulatory specifications of whether an applicant is qualified or not. As Pollner (1974, p. 39) states, "while creating meanings by his actions, he [the member] encounters the meanings as the pre-existing cause of his actions."

A recurrent theme in the ensuing text will be how officers' versions of "qualified" or "unqualified" rest on typified notions of applicants' traits. Such traits as "desperate need" or "homelessness," discussed below, occur "within a horizon of familiarity and pre-acquaintanceship which is, as such just taken for granted," and comprise "the way of life considered to be the natural, the good, the right one by the members of the 'in-group' " (Schutz, 1962, pp. 7,13). When such expectancies are breached, a strong correlation may be found between a members' "subscription to the 'natural facts' as a normative ordering of knowledge" and their level of anxiety (Garfinkel, 1984, pp. 57–67). Similar practices were found among public defenders (Sudnow, 1965, p. 275), who routinely utilize "practically tested criminological wisdom" of "normal crimes" in order to decide how to prosecute in a particular case.

While workers share many typified notions of applicants' traits, they do not share a sense of which type of error is more important to avoid. Unlike fields such as statistics, law and medicine, which clearly prioritize Type I and Type II errors, some Section 8 workers are more concerned to ensure that all qualified applicants receive a subsidy (to avoid Type I errors), while others are oriented towards ensuring that no applicants commit fraud (to avoid Type II errors). Such priorities in a Section 8 office may vary according to the "politics" or practices

in a particular office, or among different workers. The manager at the Ferndale Office makes his preference for avoiding Type I errors clear to me on my first day of fieldwork, stating, "What I say is, if we get 10 people on the program and one of them's lying, at least we got nine people on the program." A local Legal Aid lawyer reflects the opinion of many of the city's human service professionals towards this office, stating, "here they're very good, they're very client oriented."

From a strictly cost/benefit point of view, such a policy is also lucrative for an office, as each is financially rewarded for every spot filled. As a manager from an office in a northern county informed me, "Our administrative fees are 7.65% of the fair market rent. That's the bottom line. Until they create an incentive for catching people doing fraud, most offices aren't going to find it worth their while to pursue it."

Nevertheless, some offices did have a reputation among workers as being more "fraud-oriented" (that is, to avoid Type II errors), especially those located in areas known for their conservatism. As the manager of the Ferndale office said in contrast to the purported liberalism of his office, "In South County they have fraud investigators who go to people's houses in the middle of the night and follow people around. They spend all their time doing this so they can't do anything else. We don't do that here."

Workers also recognize individual differences concerning which sort of error is most important for them to prevent. According to Sara, "Ed's hard, but I'm easy. Unless I have some reason to suspect they're not telling the truth, I believe them." This difference is evident in Ed's comment about a man who owns multiple drugstores, while he and Sara are collating papers at a conference table.

> He was charging his mother thousands of dollars for drugs each year, which is a write-off for both the IRS and Section 8. We get doctors and lawyers in all the time who want to get their mothers on the program (He leaves, shaking his head).

Sara then informs the researcher, "there are little flaws like that in the program, but if you fixed it, you'd just create new flaws. If children couldn't rent to their parents, it would be unfair to someone."

The following sections will address the locally recognized ways by which workers guard against making "bad decisions." Throughout the analysis, two aspects of workers' determinations of eligibility will be probed: the fact that they are both decisions and practices. Such *decisions* often include moral assumptions about clients, as in the following account from Joe, the manager of the office, who says that he asks two questions when interviewing applicants to determine eligibility:

> Here, sure it's hard saying 'no,' but there's some people you like saying 'no' to . . . You won't see this in the regs anywhere, [but I ask] "First, are you willing to share? It's not what we do,

> matching people up, but if they really need a place, they'll say 'yes.' Second, will they take a single? If they say, 'Oh, I have too much furniture,' or, 'I need a place for my dog,' that slows down their application another two days. It makes me that much less willing to help them out. If they answer 'yes' to those two questions, hey, whatever I can do. They can move in today. But the more it seems like they're looking to trade up, the less I figure they need it, and the slower it's gonna be for them.

This way of determining eligibility reveals many of the officers' assumptions about their work. If an applicant seems morally worthy for the program, revealed here by their desire to make sacrifices, the worker would take special pains to assist them. On the other hand, if the applicant was not willing to make such sacrifices, they were less likely to fit the manager's notions of who is destitute enough to "need" the program, and he would be less willing to assist them, as exemplified in his use of "trade up." Such an account shows how eligibility officers may come to devise personalized criteria for decision making.

At the same time, these decisions by workers are also *practices*. Since tacit practices (Polanyi, 1966) are more difficult for workers to articulate than explicit decisions, we will examine instances in which a novice interviewer is instructed by a more experienced worker as especially revealing of such skills. Transcending what regulations could specify, such skills are necessary for being locally recognized as a competent worker. In the excerpt below, Sara, the office supervisor, knew the regulations when she began doing intake interviews, for she had already worked in another capacity in the office for a number of years, but she did not have the "rhythm and style" for adequately determining eligibility.

> My first year of interviewing I was horrible. I was just like, how did Joe put me in this situation to do these things? I can look back now and I realize there are people that I put on the program that I shouldn't have, that there were people that I could've put on the program had I known that there was something else I could've done. It's just that over the course of time you develop a rhythm and a style and you begin to know what to ask when they say things.

Sara's tale here is reminiscent of Sudnow's (1978) elaborate description of how his hands came to play jazz piano. With each page, Sudnow describes the evolving development of "jazz-knowing hands," as an intertwining of hands, music, body, and knowledge. As he states, "when you make music, you are obliged to keep on doing work with your hands. You can't stop for long and think through a next place to go" (Sudnow, 1978, p. xii). Eventually, he comes to find, with reflexive amazement, "the fingers are making music all by themselves" (Sudnow, 1978, p. xiii). As I watched Sara flow from paperwork, to questioning the applicant, to the calculator, I was reminded of Sudnow's discription.

Below, we will examine how such discretionary decisions and tacit practices comprise local competence, and are inevitably conflated in the ways workers judge various features of applicants to deviate from their routine expectations.

These features include the appearance of documents, the appearance and demeanor of applicants, assumptions about familial obligations, and racial/ethnic characterizations. Finally, we will explore a case in which a novice worker discovers grounds for her suspicions through the instructions of a more experienced colleague.

SUSPECTING DOCUMENTS

As in most street-level bureaucracies, paperwork in the Section 8 office is an enormous part of the workers' jobs (see Garfinkel, 1984, p. 195; Miller, 1991, pp. 4, 5; Zimmerman, 1969). Below is one instance of many unsolicited comments of a worker complaining about the paperwork. In this case, the manager highlights the drain of doing the paperwork by means of a metaphorical contrast with what he sees as the more rewarding aspects of the job.

> You know what gets me? It's all this paperwork. About 75% of what we do is recertifications. This is what I hate [he shows me a file he's just proofed which he then files away]. You know, when we first put people on the program, it's like building bridges, you get a lot of gratitude from that. But recerts are like sweeping the streets. It's not that exciting, it bugs the hell out of everyone, but we've got to do it.

Yet, knowing the paperwork well is integral to doing many aspects of the job, including interviews. While the necessity of doing and knowing the paperwork is provided by the regulations, workers understand the *uses* of paperwork in a way that cannot be stipulated in advance. Below, Sara tells how manipulating stacks of paperwork helped her learn the tacit practices of her job.

> You start getting more in tune with the people that you're interviewing rather than all this stuff . . . (That technique) develops after you've done the papers so much.

Experienced workers speak of times when they are able to recognize when a client's documentation deviates from what they expect in a case. As Sara states, "Papers can lie . . . after a while things don't jive, and you can spot it." Below, Sara tells of two instances of using documents to recognize grounds for suspicion in two separate cases. In the first case, the applicant attempts to use a utility bill for a commercial property to appear to meet the local residency requirement. In the second case, the applicant is claiming a federal preference for paying 50% of her income for a room in a house owned by her brother:

> Normally, when families come in and you request a copy of the utility bills, they don't bring in a copy of the utility bill, they bring in the utility bill. She brought in an actual copy. Instantly I went on the alert, like this isn't normal, this isn't the routine thing that happens with a case. So I began to question – I didn't tell her that this is weird that you brought in a copy of your

> utility bill, but I began to ask her questions about where she was actually living, how many bedrooms, and that sort of thing. Then, while she was here I called the utility company to see if she actually lived there, and they said it was a commercial address.
>
> . . .
>
> She had a lease and no utility bills. [I asked] 'OK, why don't you have utility bills?' [The applicant said] 'Well, my mom's name is on the utility bill.' [I asked] 'OK, why is your mom's name on the utility bill?' [The applicant said] 'Well actually, I'm living in a room in a house. *Automatically* [I asked], 'Who owns the house?' [The applicant said] 'My brother.' You know it's just like, after a while [. . .] from one set of evidence, you know what questions to ask, and it just comes out.

Sara speaks of a number of her learned practices in this account. First, as Sudnow (1965) showed in the context of criminal proceedings, officers have an idea of what to expect in a "normal" case, and when that is not forthcoming, they "go on the alert." Secondly, she becomes suspicious "instantly," or "automatically," as if she simply knows, in her working practices, what to do next. Third, she pursues the grounds for suspicion without informing the client. Finally, she knows how to verify the applicant's claims, and does so while the applicant is present. Such practices show how (in)eligibility is not preexisting, but is actively determined through questioning practices.

Below, Carol notices how a feature of the paperwork a woman used to verify her status of homelessness is witnessably questionable.

> So, she hasn't really been thrown out into the streets, because she hasn't been in a shelter yet, with no place to go. And then her SSI papers were going to a bank in Norwood. Why is it all the way in Norwood [30 miles away]? That means she has to travel like from here all the way to Norwood to do her banking?

From the distant location of the applicant's bank as shown in the paperwork, Carol expresses doubt about the applicant's claim of homelessness.

The importance of paperwork is highlighted when a novice worker does not perceive what an experienced worker sees as obvious grounds for suspicion. In the following case, Carol, a novice, consults Maria, an experienced officer, in the midst of a follow-up interview. The first time Carol saw this applicant, she cried when Carol told her she was unqualified for a federal preference, since her husband made enough money for her rent to be less than 50% of her income. In her second interview, the applicant explains that her husband left her two weeks before. In the excerpt below, Carol has explained this to Maria, and asks how she should proceed.

> Maria: Why was her husband on there? [referring to the application]
>
> Carol: She said he left her two weeks before the interview.
>
> Maria: She's schemin'. Where'd she say the husband was?

Carol: Off somewhere. She said they're getting a divorce.

Maria [incredulously]: Where's she living? [louder] You have a right to ask!

Carol: Should I ask to see the lease?

Maria: Something. Or a statement from the owner.

Carol: His owner?

Maria: Get a letter from the owner that he's *not* there.

Carol: Oh, OK.

Throughout this exchange, the importance of recognizing grounds for suspicion in paperwork, and knowing what sort of paperwork to request to pursue those suspicions are integral to locally recognized competence. Maria's first question is a leading question, striking at the fact that the applicant's account contradicts her paperwork, and thus is liable to be false. Following Carol's response, Maria shows that she hears deceitfulness from the applicant, and, in asking for the husband's whereabouts, provides Carol with another question she should have asked to elicit evidence that the husband had indeed moved away. Then, Maria's incredulity demonstrates that she hears Carol's response as evasive, and she thereby both chastises Carol for not probing such questions herself, and typifies the sort of stance an officer may well exhibit when confronted by such a case. Carol, in her response, tries to affirm her competence to Maria by pursuing verification of where the husband lives by asking to see the lease. However, with her following question to Maria, "his owner?" Carol reveals the tenuous nature of this competence when she shows that she does not know from which owner the applicant should solicit a statement. Such a case shows how: (1) workers' suspicion is triggered by documents; (2) workers may demand significant paperwork from applicants in an ad-hoc fashion; (3) workers pass on such ways of seeing and demanding documentation not through regulatory stipulations, but through collegial interactions; and (4) workers judge each other's competence based on such practices.

Usually, if the documents which a Section 8 applicant brings to an interview are not aberrant in some way, they are not treated with suspicion. Nevertheless, one paper record is typically doubted by workers regardless of its contents: letters applicants bring from shelters to verify that they are homeless. Homelessness is an asset for receiving Section 8 assistance, since it not only sidesteps the thorny issue of residency, but it also qualifies as a federal preference under substandard housing. In order to verify homelessness, workers usually request a letter written by a worker at a homeless agency. Letters from some agencies are seen as more dubious than letters from other agencies, however. According to workers, they trust letters from government welfare programs because those programs are more like

Section 8, while letters from emergency shelters are seen as less credible, since they have a different sort of agenda. According to Carol, "The homeless agencies don't exactly follow guidelines like social security or Aid to Families with Dependent Children if a person's homeless. They're there to help people immediately, people that need help immediately, so they can't go through all that these other agencies have to go through." Or, as workers discuss in staff meeting:

> Sidney: A lot of them see us as obstacles.
>
> Ed: They're advocates.
>
> Sidney: They just wanna circumvent the rules.

Emerson (1991) discusses how such interorganizational knowledge provides resources for workers to infer "what is really going on" when they receive a referral. Section 8 workers view emergency shelters as sending "unfiltered" (Emerson, 1991, pp. 201–202) sets of applicants, comparable to the variety of calls that come into a police station. Welfare officers, on the other hand, are perceived to send "filtered" sets of applicants, such as the calls dispatchers screen before notifying the police (Rubinstein, 1973). While the "official" reason for the referral may be the same in both cases, the "real" reason for the referral, as understood by Section 8 workers, is subject to these background understandings.

These impressions about the sources of homeless letters are based in neither experience nor fact, however, but were purely untested, subjective workers' assumptions. Few, if any had spent time in either welfare offices or emergency shelters. When the fieldworker informs a local legal aid attorney that Section 8 workers seem to provide more credence to documents from governmental social service bureaucracies than frontline homeless service centers, he responds, "That's strange, because SSPD [Services to Persons with Disabilities] has fired all their caseworkers. All they have are eligibility workers now, so they don't actually go out to investigate people's claims for services like AFDC [Aid to Families with Dependent Children] anyway."

Nevertheless, since workers perceive letters from homeless agencies as insufficient evidence of homelessness, they verify the verification by asking such applicants numerous questions about their lifestyles. Just how one verifies homelessness is not, and perhaps could not be stipulated by regulations, so workers are free to vary in their degree of suspicion or leniency towards an applicant's claims, depending on their political attitudes toward the homeless, or practical contingencies such as time. In the following account, a worker speaks of eliciting the applicant to "paint a picture for you," so that by their answers the very fact of their homelessness would be self-evident.

> You want them to paint a picture for you, to show you why they need this program. Like, where is their mail being sent, is their name on a lease, where do they stay? If they're homeless, their mail *should* be going to a shelter, and they *should* be receiving services from that agency.

Such a "picture" of homelessness is not arrived at separately for each applicant, but is programmatically assumed. The gestalt of the applicant's lifestyle gleaned from the interview is matched to such a typified definition. Other workers, however, express doubts about this typification, in the assumption that the very behaviors that had led to homelessness would preclude their ability to document it. For many, the only trusted way of verifying homelessness is to have direct contact with the person on the street. Understandably, such instances are welcomed with relief, although documentation of homelessness is still required for the file.

> Joe: Here's this guy, he's definitely homeless. I pass him on my way to work in the morning. I see him there in the park and I talk with him.
>
> Interviewer: Did he give you a letter to show he was homeless?
>
> Joe: Yeah, but I already knew about that.
>
> . . .
>
> Sara says she had asked this one guy where he lives, and he said up on 20th on the corner by the bank. "He's there every day. Why should I question that? I saw him there."

In sum, the only reliable criteria for workers to verify homelessness diametrically opposes the very ideals of regulatory stipulations for action and bureaucratic impersonality, yet the appearance of operating according to such stipulations is still maintained. Whether workers' biases for or against the homeless are a cause or a product of their practices of suspicion is an excellent question for further research.

SUSPECTING APPLICANTS' APPEARANCE AND DEMEANOR

As opposed to suspecting documents, which have a witnessably obdurate quality, and can be filed to officially justify decisions, judging the appearance and demeanor of applicants can be neither officially sanctioned nor documented. Nonetheless, housing gatekeepers, like other street level bureaucrats, are well-known to use client characteristics as a basis for their suspicions. Deutscher's (1968, p. 46) shows how housing gatekeepers *favor* those tenants with an appearance and demeanor which, "are, of course, those of the dominant middle class: cleanliness, clarity of speech, appropriate clothing, self-assurance, integrity, and the like" (also see Sahlin, 1995). However, in the present study it was precisely such qualities of applicants which raise the suspicions of housing eligibility officers.

When Section 8 workers suspect that an applicant is hiding wealth or income that would make them ineligible for a housing subsidy, they often contrast the behavior of the applicant to their own behavior, using a "contrast structure" (Smith, 1978, pp. 38–47). According to Smith, such structures are comprised of a description of behavior preceded by a statement for how to hear that behavior as anomalous. Consider, for instance, the manager's following statement about a problematic tenant on the Section 8 program.

> We've done everything we can yet she still complains. She says, well she's going to Oregon for a few weeks and hopes we won't have any problem with that. I say, 'You know what that tells me? That sends up a big red flag for me, that you can afford to leave for a few weeks for Oregon. I can't afford to go to Oregon. I gotta pay my rent, I got a family.' It's just amazing.

This case stirs the manager's indignation, highlighted by juxtaposing the client's ability to take a vacation on a government subsidy as opposed to his inability to take a trip on his paycheck (see Miller, 1991).

Other workers did not specifically use a contrast structure, but they speak of judging an applicants' appearances as an indicator of their appropriateness as a Section 8 tenant. In the following, Ed speaks in general terms of some of the indicators that an applicant has hidden assets.

> But if the person's sitting in front of you, the longer you do the job, you have a sense of whether or not a person is living off $500 a month or whether they are living off of much more than that. And none of this is in the regulations but, grooming, skin tone, the clearness of the eyes, the intelligence. A lot of that will tell you the standard of living of the individual in front of you. You can bring me two women in here, both on AFDC, both with two children, and I can tell you the one that's living strictly off of their AFDC grant, and the one that at least has a boyfriend that's taking her out to dinner once a week, or giving her some money to get her hair done or get her nails fixed.

Below, Ed tells of how such practices were articulated in an intake interview. Although the applicant had fulfilled all the legal requirements for qualification, she had not met his working notions of the appearance of a qualified applicant.

> I'm sitting here with a woman sitting in front of me with a freshly cut hairstyle, manicured nails, long nails, where we're talking about the overlays, porcelain nails. And she's saying that she's homeless and she has a letter. Now based on regulations, I should basically say, 'OK you have a letter verifying you're homeless, you're on the program.' Well, this particular case sort of hit an emotion, and I said, 'I don't see how you're living in a shelter and you haven't broken your nails.'

Section 8 workers' suspicions may also arise in response to the way an applicant talks. In the excerpt from an intake interview below, Carol suspects Mitch, a man applying for a subsidy for his mother, whose lack of "need" is reflected in the way he speaks on his cellular phone.

Carol: And you are employed?

Mitch: Yes. Can I call work? [She nods and he dials] Sorry about the delay.

Carol: That's OK. [We wait]

Mitch [On phone]: What took you so long to get to the phone? Get to it quicker next time. I'll be hung up for a little while more. OK? OK [hangs up and sits back down].

Carol asks three more routine questions, and then goes to the copy machine and I follow her. As she's copying the papers she tells me, "I bet he owns his own business. You don't talk to your co-worker that way on the phone." She talks about the nice quality of the suit he's wearing and we laugh about it.

After the interview, Sara jokes with Carol about these applicants, saying, "So you sent them out to doctor some papers?" Then, when Carol tells her how he spoke on the telephone, Sara ardently affirms Carol's suspicions, stating, "He owns it. Oh yeah. He *owns* it. You don't talk to people at work that way unless you do." Such inferences are then grounds for suspecting that the applicant may not fit workers' typical notions of a Section 8 tenant as "destitute," since Mitch may be able to provide his mother with adequate funds.

SUSPECTING FAMILIES

In addition to an applicant's documents, appearance and demeanor, eligibility officers also suspect an applicant's family relations in determining if they are eligible for a housing subsidy. As in the case of demeanor, the use of this criteria by the housing gatekeeper in the current study is in stark contrast to the ways Deutscher found housing gatekeepers discriminated based on family constellation. In Deutscher's (1968, p. 45) study, "the gatekeeper does not approve of families without fathers present," whereas in the current study, if an applicant's job and the stability of their family lend them the appearance of being self-sufficient, they may not appear truly destitute, and this may arouse workers' suspicions. Below, Carol speaks of her hesitations to grant a subsidy to a family that was fully qualified, but seemed not to "need" the program.

There was a family that came in composed of a mother and her two daughters and a son. One of the daughters had a child and was getting AFDC. The other daughter was working and the mother was working. They were living in a unit where the rent was not high, and they all pitched in to make the rent. I kind of looked at that family, and maybe I'm wrong for doing it, but I thought to myself, no you really don't need this program, not like the need that I see other people that come in here and need it. Because, even after you guys pay your rent, you have enough money left over to where, you know, if one of you wanted to save and get their own apartment, or you know. Maybe I look at that wrong, but that's kind of the way I looked at it.

Officers are also suspicious of applicants who appear to be able to bring additional money into their family, but are not doing so. In the following, Carol interviews a veteran, Earl, who has a daughter, and she repeatedly asks the applicant to account for the fact that he is not receiving money from AFDC for his daughter.

> Carol: So you get $990 from the VA. Do you get any money for your daughter?
>
> Earl: Nothing.
>
> Carol: Have you ever applied for anything?
>
> Earl: No [Then, after receiving information on where she goes to school, and verifying his income, rent, and identification, she comes back to this topic just prior to concluding the interview].
>
> Carol: I have one more question. Have you ever applied for income for your daughter? Have you ever?
>
> Earl: No.
>
> Carol: Have people told you you could get support?
>
> Earl: I may be eligible. I could look into it, but I don't have the time. I knew I needed this.
>
> Carol: You may be eligible to get something for your daughter. I'd ask. It's not to make you not eligible. Let me know how it goes.

After this interview, she speaks with Ed about her reservations, and he tells her that the applicant should verify the fact that he is not receiving money from AFDC. This would override the applicant's excuse that he "has no time," since procuring a letter that he is not eligible for aid would probably be as time consuming as finding that he is eligible for aid. As Ed states, "if he doesn't receive aid, he should show why."

Below, Carol has been told by Mike, the man she is interviewing, that he has three sons, aged 15, 19 and 20. She then asks how each one is earning a living, as a means of determining how much income is coming into his house, but she doesn't stop with questions simply about his sons' unemployment.

> Carol: What about the 19 year old?
>
> Mike: He was working for the city too.
>
> Carol: How long has he been unemployed?
>
> Mike: 6, 7 months.
>
> Carol:[Staring without blinking at the applicant]: How has he been living?
>
> Mike: It's very hard. The money. He has nothing.

This sort of intense, direct questioning provides a strong moral undercurrent to the interview, and often prompts moralistic accounts from officers in time outs away

from the applicant. Below, the interviewer talks with the researcher as she goes to retrieve a form needed by the applicant.

> You know I'm tired of people with kids who aren't working. When I was 19, I *wanted* to work. I wanted to drive, and to have nice things and go out. I couldn't just live on $5 to $10 a week! Uh uh. Something's funny here. A 19-year-old and a 21-old don't just live on the money their parents give them . . . Sometimes you feel that they're hiding something.

As above, in this case Carol speaks of her own actions as normative, providing a contrast structure for hearing the subsequent information as anomalous, thereby highlighting the questionable nature of the applicants' claims. While the regulations would not condone the fact that a worker uses personal criteria as a basis for judging applicants, such practices may cast applicants' actions in sharper relief, and reassure the worker that, in the manager's words, she was doing all she could to "find the most eligible people to receive a very limited amount of funds."

SUSPECTING RACIAL/ETHNIC GROUPS

While Section 8 workers develop their suspicions of applicants' documents, appearance, demeanor, and familial relations through the course of the intake interview, this section will show how workers become suspicious of applicants themselves prior to any contact, based on the applicants' presumed racial/ethnic status. In Deutscher's (1968) study, the gatekeeper discriminated against African-Americans by placing them in segregated housing projects. In the current study, workers notice how certain perceived racial/ethnic groups present routine problems in intake interviews. Despite workers' reflexive knowledge of regulations that explicitly prohibit the use of such criteria in determining eligibility, workers reify the patterns they notice in their workgroup discussions, and locally define competent work as warranting suspicion based on such "patterns." Specifically, workers often use generalizations based on perceived ethnic/racial categories in suspecting applicants' claims and determining eligibility. Such uses are of interest in this study not for how they incriminate the workers, but for how they reveal the workers' practical responses to the contingencies of their work (see Lipsky, 1980, pp. 108–116). Such categorical understandings are learned through work experience, and, as Emerson (1992, p. 39) states, "are organizationally-sanctioned devices for assessing 'what is going on,' and not simply or primarily sources of bias," even though workers may speak of them in such terms.

On the one hand, workers are mindful and wary of their own personal biases which could predispose them to favor certain groups of people over others. On the other hand, they notice patterns of trouble among applicants of various racial

or ethnic groups, and remark among themselves and to the fieldworker about the predictability of these patterns which could influence their responses to applicants. In pointing out their own biases, Carol and Sara show how they share many of their working notions about ethnic groups.

> Carol: People have their MO's, which you start to recognize after a while. I hate to be prejudiced, but Ed has said this too, and it's just something you start to see. Hispanics almost never have a lease. They live with other people who help them out. For some reason, they just hardly ever have one. Blacks [said hesitantly, and she laughs], try to pull the game on you. Russians, Middle Easterners are very persistent. They'll come back everyday to *make* themselves qualify. After you do this for a while you just start to see it.
>
> . . .
>
> Sara: I mean I'm not prejudiced. Carol's not prejudiced. But you see, it's the Mexican families or Hispanic families that come in, normally, do not have a lease or rental agreement. It's true. Middle Eastern families always have a scam, always in the best apartment, usually have money in the bank, it's usually like with them, it's always questionable. And you're on the alert. You don't want to but you just do. It's like OK, what are you guys gonna try to do today? Um. Usually black families, normally they have a history of generational assistance, you know. It's usually the same situation you see day in, day out.

In both of these accounts, workers orient to the fact that their words could appear prejudiced. Yet the workers were not describing themselves, they were describing their work. As Lipsky (1980, p. 115) states, "they are particularly inclined to believe that experience provides the basis for knowledge in assessing the client world."

Such locally recognized "knowledge" serves as a starting place for the review of a case, but is subject to revision in light of what emerges from the intake interview. Below, Carol articulates such knowledge (and the awareness that it could be perceived negatively) while she previews the files of apparently African-American, Latino, and Persian applicants before their interviews.

> She tells me the next applicant is on the 2 bedroom waiting list, and she's a 65 year-old African-American. She's on the applications with her 47 year old son. "Get a life. I shouldn't say that. He's probably helping her."
>
> Carol tells me about her next interview with an elderly Latina who is on the application with her 16 year-old daughter. They claim a preference for paying over 50% of their income for rent, and local residency. Now watch, she won't have a lease.
>
> Carol looks at her schedule. "Let's see," she says. She points her finger down the list. Op, that one'll be trouble, she says, pointing at a Persian name. "No, I don't wanna do that," she says, laughing, "but it's hard to help it."

It is notable that while Carol's statements could be seen as discriminating against the applicants, she checks herself, reflexively orienting to that possibility. In the second case, Carol's local knowledge that the family is unlikely to have a lease

may aid the family, for it may prepare her to pursue other means of verifying the family's residence and rent paid.

Workers also reveal such predispositions in the course of intake interviews. In the case below, Carol discusses her attitudes towards her current interviewee with the researcher during a "time out" from the interview in which she copies papers from the applicant's file. Although this Persian applicant has met all the criteria for eligibility, Carol still has reservations about allowing him onto the program.

> It's pretty obvious that he's qualified, but there's always that, you know how it is, that gut feeling of mmm I don't know. It's like, I don't know if I should say this on tape but, everybody has their M. O. Their M. O. is that they've got hidden assets. I don't exactly believe that he has, *no* money, that he doesn't have any money at all, you know?

As these excerpts may appear as a blatant example of racism, Carol states, "I don't know if I should say this on tape." In order to understand how she could make such a statement, it is important to recognize that the interview occurs in a context in which she had recently interviewed two Persian applicants whom she initially believed were qualified, but were later determined to be unqualified.[4] While her suspicion of this applicant will not prevent him from receiving a Section 8 subsidy if he meets all the legal criteria for eligibility, she will review his case closer than that of a non-Persian applicant, and this review will be based on locally recognized warrantable grounds. As Lipsky (1980, p. 116) states,

> Clients and concerned citizens see biased behavior. Street-level bureaucrats see attitudes forged from experience reinforced in their validity. Clients see unfairness; street-level bureaucrats see rational responses to bureaucratic necessities.

AN ILLUMINATING CASE

Knowing how to note appearances which are locally recognized as suspicious, and knowing how to respond in interaction are difficult practices to teach. For example, Rubinstein (1973, p. 219) shows that a policeman's training at best consists of anecdotal advice from instructors such as, "watch out for people walking late at night," or "watch out for people carrying large packages" which had led to arrests in the "dimming past." As Rubinstein (1973, p. 219) states, "Each policeman must teach himself to see what he is looking at, just as he must teach himself to patrol. Older men help him out occasionally with hints and tips, but the skills he acquires are discovered by accident, by example, and by making mistakes. It is not a painless process, either for the policeman or for the people he encounters."

In this section, we will see how Carol comes to recognize and act upon grounds for her suspicions through a dialogue with her more experienced colleagues, Joe

and Ed. In this excerpt Carol *feels* that applicants who appear qualified actually are not qualified, and in her search for grounds of her suspicions, and in the instructions she receives from other workers, the practices of warranting suspicions in documents, families presumed obligations, and typifications of ethnic groups are underscored. In this case, a father's oldest son accompanies his father to ask for assistance for his father, who lives with his wife and his second son in the house of his third son. On paper, the family qualifies for assistance since they are paying more than 50% of their income towards their rent.[5] Yet Carol defers making a decision on the case during the interview until she could talk with other staff members, because the applicants somehow do not "seem" like they should be receiving assistance. As she said to the fieldworker directly following the interview, "That man did not need this program. I felt like saying, 'you don't need this program.' *I knew*, but there was no way for me to say that, you know?"

In this case, Carol has many locally accountable reasons to be skeptical of the applicants' claims. First, this case violates the workers' assumptions about familial obligations, for the federal subsidy would allow the father to pay rent to his son. While such a practice was not contrary to the regulations, this seemed to be one of the main reasons Carol felt suspicious of these applicants. As she stated to me, "the thing is, if he wasn't with his son, he would appear qualified." Secondly, the applicants' name and appearance are visibly "Persian," and workers had certain expectations regarding Persian applicants, as discussed above. During the interview, Carol takes a "time out" from the clients to speak with the manager, Joe, about this case.

> Carol: Can I ask you something?
>
> Joe: Sure [Carol tells Joe that the father receives disability insurance and General Relief, and that they qualified under the rent they had to pay to their son].
>
> Joe: [shaking his head] These people don't belong on the program, do they? Is this where you want your tax money to go, to creeps like this? This guy's basically looking for us to subsidize his mortgage.
>
> [Joe tells Carol to get a copy of the deed for the house, and make sure their parent's name isn't on it].
>
> Joe: Ask for deeds for their other properties, so their parent's name isn't on that either.
>
> Carol: OK.

Like Carol, Joe suspects the applicants although he lacks grounds to dismiss their claims according to the regulations. He offers locally justified "good reasons," using the morally damning term, "creeps." Still, his advice to Carol is on legal grounds, requesting verification that the properties are not in the parents' name – verification that could be easily doctored.

Carol then resumes the interview, concluding it by leaving the applicants with a list of items to bring to their next appointment. She failed to articulate her suspicions to the applicants in the context of the interview, so these men could conceivably keep returning for follow-up appointments until they are granted a subsidy. Below, Carol expresses her reservations about seeing these applicants again, and refers to the skills of other workers as more apt to handle such issues.

> I know I don't wanna interview them. I'm gonna ask Joe if he'll do it, or Sara if she'll do it. 'Cause I'm too inexperienced to handle something like this. They're detectives. They'll ask him a question and get him to talk and then go, 'Ah ha! What did you say?' Like when they first started talking, Mossein [the second son] was working, and then all of a sudden I come back and he's not working. Well what is it? You know? Did you catch that?

Although Carol proposes an incident in the interview which elicited her suspicion, since it could reveal an additional source of income, she was not able to act on it in the course of the interview.

As I continue to interview Carol, Ed enters the office, and I elicit his opinion of the case. In the excerpts that follow, he begins to show Carol, in the course of his instructions, both what she may have noticed with suspicion and how she may have acted on that awareness.

> Ed: OK. So he had himself, his wife, and his 23 year old son.
>
> Carol: Mm hmm.
>
> Interviewer: This brother said the 23 year old brother [Mossein] was in chiropractic school all the time, so she gave him a school verification form.
>
> Ed: Who's paying tuition? [he looks squarely at Carol] You know, part of this job is we get caught up in the regulations, and we forget *common-sense*. Sometimes if you approach people with common-sense, they may not like it, but they get the understanding. And the bottom line is, this program is designed for low income families. When we say low income, we're talking about income available to you. Now it appears as though you have one son that has multiple properties that you could live in. You have another son where you say he's a dependent with no income, but he's going to chiropractic school. So, in order for us to determine your eligibility, we have to be sure that there's no unreported income. And you have assets available to you. So until we can get a clear picture of that, we can't say that you're qualified for this program.

Ed begins his monologue with Carol with an implied criticism, that she is too caught up in legal stipulations to act in locally recognized competent ways, referred to here as, "common-sense." Although he speaks of common-sense as something "we forget," as if it is intrinsic to human nature, he then enacts for Carol what using common-sense consists of in an interview. Ed then lists the clues for inferring that the applicants do not "fit" the typified notion of applicants as "low income families." Finally, Ed provides her a way to "cool the mark out" (Goffman, 1952), by explaining this situation to these interviewees without telling

them "no" outright, which would not be appropriate without definitive evidence of their ineligibility.

Thus far, each of the ways the workers probed to find these applicants unqualified were unsuccessful. If the parents' names were on the deeds to the property they were renting from their children, they could simply omit those in a subsequent interview. The two suspicions concerning the second son, who was living with the father and attending chiropractic school, that he may be bringing in unreported income by working, or that there may be unreported income based on the fact that someone had to be paying for his tuition, were also moot since the parents mentioned they were willing to remove the dependent son from the application, as Carol informed Ed. Later, however, as Ed and Carol review her day's interviews, they collaboratively arrive at a way to prove ineligibility.

> Ed: You're dealing with relatives here. And our program's a government program and it has to be able to withstand scrutiny by an objective party, so it would appear that – well common-sense. Why are you charging your parents rent anyway?
>
> Carol: Huhu. Mm hmm.
>
> Ed: You know. How much are they supposed to be paying in rent?
>
> Carol: $500.
>
> Ed: OK, now here you go.
>
> Carol: $400 and $200, and you're taking $500 of your parents' money?
>
> Ed: Parents' money? No.
>
> Carol: And you're leaving them to live off of $100?
>
> Ed: Make a note of that, because that's where you get them.

As Ed begins this excerpt, he collaboratively searches with Carol for a foundation for their suspicions in the applicant's family status, and in the fact that their program is subject to government oversight. Then, signaling he has found a means of questioning these applicants, he provides for his talk as connected to prior instructions by repeating what he had said earlier ("Use common-sense"). This statement also signals to Carol to hear him using common-sense, through an enacted statement that is not simply a question to the applicants, but a confrontation. This morally challenges the applicant's family relations in terms of workers' typified notions of familial obligations, and may even shame them (the father is receiving $400 from Supplemental Security Insurance, the mother $200 from General Relief, and their son is charging them $500 in rent). Ed's final statement in this excerpt emphasizes officers' satisfaction when, in a job that mostly consists of the routine paperwork of recertifications and modifications, they can prevent

an unworthy applicant from getting onto the program (compare Rubinstein, 1973, pp. 219, 225; Sacks, 1972, p. 293). As their conversation continues, Ed tells Carol she can cancel her subsequent interview with these applicants, and instead send them a letter on file which states, "There appears to be unreported income that is not verifiable. Based on the lack of information, you're not qualified."

As they continue to discuss the case, they enact through a sort of role play what they could say to the applicants. First, Ed utters another hypothetical challenge, continuing to strike at the moral transgression of their claims of eligibility. Then Carol, perhaps in her eagerness to show herself as a quick study, offers a challenge of her own.

> Ed: Why don't you let them stay there free? If you don't charge them so much money in rent, they don't need this program.
>
> Carol: If I had two houses I wouldn't charge my mother [Carol laughs heartily but Ed does not].
>
> Ed: See that's the thing. But would the regulations say it?
>
> Carol: Mm hmm.

Ed does not join with Carol in her laughter, but is careful to point out that her personalized contrast structure is not to be dismissed, but is in fact integral to doing the job. Just such a way of "personalizing" a case may make the doing of suspicion tangible for the novice, for at this worksite competence is found not when one's personal "biases" are omitted, but when they are integrally incorporated into doing the job. As the workers find a personal sense of moral outrage at the applicants' claims, rather than a particular regulatory guideline, they come to see most clearly how those claims might be effectively questioned. As Ed states in a career interview,

> Initially you are interested in doing your job correctly. That means following the regulations and knowing the regulations and applying them to the people sitting in front you. I think the next step that happens is your own self judgment. What beliefs, politics, and feelings that you have, they come to play in you performing your job . . . So, you use all of the skills and the knowledge that you have in life in doing your job.

CONCLUSION

In revisiting the biases of housing gatekeepers, this analysis has shown how they may be founded in working practices of suspicion which are integral to officer's notions of local competence. In contrast to prior studies by Deutscher (1968), and Sahlin (1995), this study finds that such practices are not rooted in middle-class

bias, but arise from workers' earnest efforts to find the most destitute applicants for limited funds. The appearance and demeanor, the families of applicants, and their supposed ethnicity continue to be important in such workers' eligibility decisions, but in a very different sense in the current study. Applicants are not discredited for appearing destitute, but for appearing middle-class, and families are not excluded for having a single parent, but they are suspected if they seem to underreport potential sources of income, or seek subsidies for rentals within the family. Race is seen not in a way that warrants segregation, but in a way that cues gatekeepers into potential problems in applications. Far from being secretive and apologetic for such practices, experienced workers help novices find a personalized means to potentially threaten the face of ineligible applicants, through contrast structures. Such contrast structures are integral tools for novices, for it is through articulating what they could not morally condone for themselves, such as charging a mother rent, that they find the means to question applicants. Two primary questions arise from this analysis. First, why might workers' use of the appearance and demeanor, family constellation, and the presumed ethnicity of applicants in the current study differ so substantially from prior studies? Secondly, are workers justified in judging applicants based on their appearance, demeanor, family obligations, and presumed ethnicity?

First, it is notable that Deutscher observed housing gatekeepers for only two weeks, and Sahlin conducted surveys and interviews, but not did not directly observe eligibility practices. While both studies were conducted some time ago, and regard gatekeepers for public housing, rather than portable vouchers, all housing gatekeepers face similar constraints in finding the best applicants for limited funds. Hence, one would expect to find practices of suspicion in each setting, and one might presume that with a more in-depth, ethnographic methodology, one might find how bias is rooted in such locally-justified practices in any street level bureaucracy where workers must determine eligibility for limited resources.

In addressing the second question, certainly housing gatekeepers have no legal basis for such practices, and it is doubtful legislators could write them into law even if they wanted to. Nonetheless, the practices discussed above are tacit, "going without saying," and are the basis for workers to determine local competence. Section 8 officers are judged by administrators on the basis of their files, and indeed, the office which serves as the basis of this study was commended for their exhaustive paperwork. Yet Section 8 workers judge each other on the basis of their practices of suspicion, and the respect or embarrassment that results from such collegiality is a most powerful motivator. Only through observing such processes, rather than generic outcomes, might we better understand the sources of bias in the provision of social services.

While such discriminatory actions are troubling, more troubling are the broader social processes which leave so many women and people of color in poverty and homeless in the first place (see Edin & Lein, 1997; Oliver & Shapiro, 1995). As Deutscher (1968, p. 50) noted, housing gatekeepers are scapegoats for the disappointed and disgruntled housing applicants, as well as housing administrators and policy makers. The allocation of such social services can never be perfect, but the more the poor are empowered to address discriminatory practices and appeal apparently unjust decisions, the more street level bureaucrats will be held accountable, and the less likely they will engage in unfair practices. On the other hand, for those instances in which bureaucrats' practices of suspicion are able to weed out those who would unfairly take advantage of social services, thereby depriving others who may be more needy but less savvy, we would do well to provide them a long overdue acknowledgement.

NOTES

1. This description applies to the Section 8 Program at the time of the fieldwork; the program has undergone substantial legislative changes since that time.

2. At the time of the fieldwork, the limits on household income (based on 50% of the annually adjusted median family income for the regional area, as determined by the Department of Housing and Urban Development) were as follows: for 1 person, $16,900.00; 2 persons, $19,300.00; 3 persons, $21,750.00; 4 persons, $24,150.00; 5 persons $26,100.00; 6 persons, $28,000.00.

3. The Quadel Coursebook (1988) notes: "Family is not completely defined by HUD. Public Housing Authoritys must define in their Administrative Plan." The coursebook then provides a "commonly used definition" as: "Two or more persons sharing residency whose income and resources are available to meet the family's needs and who are related by blood, marriage, or operation of law (or who give evidence of a stable relationship which has existed over a period of time)." Thus, when this definition is applied, two friends who are not kin may be considered as "family." See Gubrium and Holstein (1993) for how the meaning of "family" is determined within an organizational context.

4. One applicant owned two businesses and had over $10,000 invested in bonds, and another applicant rented a room in one of his son's two large houses in exclusive housing areas. At the same time, Carol was also aware that many needy Persian applicants had deservedly received Section 8 subsidies at this office.

5. Parents who pay over 50% of their income towards rent on property their children own can be eligible for Section 8 provided their name is not on the deed.

ACKNOWLEDGMENTS

Thanks to Bob Emerson, Harold Garfinkel, Mel Pollner, Valentina Pagliai, Tim Berard, and Stacy Burns for their comments on this paper.

REFERENCES

Administrative Plan, Section 8 Existing Housing Certificate and Housing Voucher Programs. Revised 12–92. Ferndale.

Becker, H. S., Hughes, E. C., Geer, B., & Strauss, A. (1984). *Boys in white: Student culture in medical school*. New Brunswick: Transaction Books.

Bittner, E. (1967). The police on skid row: A study of peace-keeping. *American Sociological Review*, *32*, 699–715.

Charmaz, K. (1983). On grounded theory. In: R. M. Emerson (Ed.), *Contemporary Field Research: A Collection of Readings* (pp. 156–186). Prospect Heights, IL: Waveland.

Clapham, D., & Munro, M. (1990). Ambiguities and contradictions in the provision of sheltered housing for older people. *The Journal of Social Policy*, *19*(1), 27–45.

Deutscher, I. (1968). The gatekeeper in public housing. In: I. Deutscher & E. Thompson (Eds), *Among the People: Encounters with the Poor* (pp. 38–52). New York: Basic Books.

Edin, K., & Lein, L. (1997). *Making ends meet*. New York: Sage.

Emerson, R. M. (1991). Case processing and interorganizational knowledge: Detecting the 'real reasons' for referrals. *Social Problems*, *38*, 198–212.

Emerson, R. M. (1992). Disputes in public bureaucracies. In: S. Silbey & A. Sarat (Eds), *Studies in Law, Politics and Society: A Research Annual* (Vol. 12 pp. 2–29). Greenwich, CT: JAI Press.

Emerson, R. M. (1997). Constructing serious violence and its victims: Processing a domestic violence restraining order. In: G. Miller & J. A. Holstein (Eds), *Social Problems in Everyday Life: Studies of Social Problems Work* (pp. 191–218). Greenwich, CT: JAI Press.

Emerson, R. M., Fretz, R. I., & Shaw, L. (1995). *Writing ethnographic fieldnotes: An interactionist and interpretive approach*. Chicago: University of Chicago Press.

Feagin, J. R., Orum, A. M., & Sjoberg, G. (Eds) (1991). *A case for case study*. Chapel Hill: University of North Carolina Press.

Foucault, M. (1979). *Discipline and punish: The birth of the prison*. New York: Vintage Books.

Garfinkel, H. (1984). *Studies in ethnomethodology*. Great Britain: Polity Press.

Garfinkel, H. (1986). *Ethnomethodological studies of work*. New York: Routledge.

Goffman, E. (1952). Cooling the mark out: Some aspects of adaptation to failure. *Psychiatry*, *15*, 451–463.

Gubrium, J. F., & Holstein, J. A. (1993). Family discourse, organizational embeddedness, and local enactment. *Journal of Family Issues*, *14*(1), 66–81.

Handler, J. (1986). *The conditions of discretion: Autonomy, community, bureaucracy*. New York: Sage.

Harper, D. (1992). *Working knowledge: Skill and community in a small shop*. Berkeley: University of California Press.

Harper, D. (2001). *Changing works: Visions of a lost agriculture*. Chicago: University of Chicago Press.

Henderson, J., & Karn, V. (1987). *Race, class and state housing: Inequality and the allocation of public housing in Britain*. Aldershot: Gower.

Hughes, E. C. (1984). *The sociological eye: Selected papers*. Edited by D. Reisman and H. S. Becker. New Brunswick: Transaction Books.

Katz, J. (1988). A theory of qualitative methodology: The social system of analytic fieldwork. In: R. M. Emerson (Ed.), *Contemporary Field Research: A Collection of Readings* (pp. 127–148). Prospect Heights, IL: Waveland Press.

Lazin, F. A., & Aroni, S. (1983). The existing Section 8 program and housing assistance plans: A case study of Los Angles and HUD 1975–1980. Public Affairs Document. Graduate School of Architecture and Urban Planning, UCLA.

Lempert, R., & Monsma, K. (1994). Cultural differences and discrimination: Samoans before a public housing eviction board. *American Sociological Review*, *59*, 890–910.

Lidstone, P. (1994). Rationing housing to the homeless applicant. *Housing Studies*, *9*(4), 459–472.

Lipsky, M. (1980). *Street level bureaucracy: Dilemmas of the individual in public services*. New York: Sage.

Logan, J. R., & Molotch, H. L. (1987). *Urban fortunes: The political economy of place*. Berkeley: University of California Press.

Miller, G. (1991). *Enforcing the work ethic: Rhetoric and everyday life in a work incentive program*. Albany: State University of New York Press.

Oliver, M., & Shapiro, T. (1995). *Black wealth/white wealth*. New York: Routledge.

Polanyi, M. (1966). *The tacit dimension*. New York: Anchor Books.

Pollner, M. (1974). Sociological and common-sense models of the labelling process. In: R. Turner (Ed.), *Ethnomethodology* (pp. 201–215). Middlesex, UK: Penguin Education.

Quadel Consulting Corporation (1988). *Coursebook, Section 8 existing certificates and housing vouchers*. Los Angeles: Quadel.

Ragin, C., & Becker, H. S. (Eds) (1992). *What is a case? Exploring the foundations of social inquiry*. New York: Cambridge University Press.

Rubinstein, J. (1973). *City police*. New York: Farrar, Straus and Giroux.

Sacks, H. (1972). Notes on police assessment of moral character. In: D. Sudnow (Ed.), *Studies in Social Interaction* (pp. 280–293). New York, NY: Free Press.

Sahlin, I. (1995). Strategies for exclusion from social housing. *Housing Studies*, *10*(3), 381–401.

Scheff, T. J. (1966). *Being mentally ill: A sociological theory*. Chicago: Aldine.

Schutz, A. (1962). *Collected papers*. (Vol. 1). Martinus Nijhoff.

Smith, D. (1978). K is mentally ill: The anatomy of a factual account. *Sociology*, *12*, 23–53.

Sudnow, D. (1965). Normal crimes: Sociological features of the penal code in a public defender's office. *Social Problems*, *12*, 255–276.

Sudnow, D. (1978). *Ways of the hand*. Cambridge: Harvard University Press.

U.S. Department of Commerce (1993). *Statistical abstracts of the United States*.

Whalen, M., & Zimmerman, D. (1990). Describing trouble: Practical epistemology in citizen calls to the police. *Language in Society*, *19*, 465–492.

Zimmerman, D. (1969). Record-keeping and the intake process in a public welfare agency. In: S. Wheeler (Ed.), *On Record: Files and Dossiers in American Life* (pp. 319–354). Beverly Hills: Sage.

COERCING CHANGE: HOW INSTITUTIONS INDUCE CORRECTION IN THE CULTURE OF SELF-CHANGE

Kathryn J. Fox

ABSTRACT

As Garland (2001, p. 176) argues, the new "culture of control" is characterized by, among other things, a focus on the offense rather than the offender. This more managerial, risk-based approach is difficult to reconcile entirely with the newer forms of rehabilitation that have appeared in prisons recently.

The concepts of "offender accountability" and "risk" have captivated correctional cognitive rehabilitation in the U.S. and Canada. Based upon observational and interview data from a cognitive treatment program for violent offenders in Vermont prisons, this chapter explores how fundamental aspects of the program fit and diverge from the newer penology of risk management.

INTRODUCTION

Many writers have considered the late modernist corrections (or "new penology") as evolving toward a distinctly more offense-oriented, retributive, managerial approach. The modernist project, characterized by several features – namely a belief in social science's ability to solve problems, including those that cause

Ethnographies of Law and Social Control
Sociology of Crime, Law and Deviance, Volume 6, 105–119

ISSN: 1521-6136/doi:10.1016/S1521-6136(04)06006-3

criminal offending – is waning (Simon & Feeley, 1992). Rather, our current approach to corrections has become technocratic, attending to the hyper-rational project of assessing and minimizing risk.

There has been a tendency to polarize the old penology and the new in an arbitrary way (Blomberg & Cohen, 2003; Garland, 2001; Simon & Feeley, 1992). As Garland (2001) argues, the new "culture of control" is characterized by, among other things, a dominant criminology which proposes to change systems of opportunity for offenders, rather than to change the values of offenders. According to Garland (2001, p. 175), "Instead of emphasizing rehabilitative methods that meet the offender's needs, the system emphasizes effective controls that minimize costs and maximize security." Granted, as Garland (2001, p. 8) acknowledges, rehabilitation programs still exist in prisons, however, they "no longer claim to express the overarching ideology of the system." Other goals, such as "retribution, incapacitation, and the management of risk" have become more salient (*Ibid.*).

How do these prominent goals correspond or interact with the everyday activities of rehabilitation programs? In other words, how do rehabilitation efforts make sense in this ideology of the "culture of control?" This newer, more pragmatic approach to corrections, which Garland (1985) says is emblematic of postmodern penology, is difficult to reconcile entirely with the newer forms of rehabilitation that have cropped up in western prisons since the 1990s.

The concepts of "offender accountability," coupled with varieties of treatment incorporating a cognitive skills model, have captivated correctional departments in the U.S., Canada, and the United Kingdom (Duguid, 2000). Based upon observational and interview data from a "Cognitive Self-Change" treatment program for violent offenders in Vermont prisons, this chapter explores the ways in which the fundamental premises and mechanics of the program fit and diverge from the characterizations of postmodern penology. In explaining how prison treatment insists upon self-correction not only of offenders' behaviors but also of their values, I will analyze the larger culture of risk and (self) control and the remnants of modernism that remain.

THE CULTURE OF (SELF)-CONTROL

Penal scholars deliberate about the precise parameters of current penological practice and discourse. In this debate, the old penology is contrasted to the new one; whereas the old penology was characterized by a focus on individual culpability and correction, the new penology is based on aggregate risk predictions of offending populations (Feeley & Simon, 1992). Moreover, technocratic management of prisons and prisoners has replaced the attempts to change

individuals and reduce their particular risk profile. Not only has this shift been documented in courts of law, penal practices have incorporated the science of prison management. Indeed categories of offenders, such as chronic and repeat offenders, or high-risk offenders, reflect "the fact that actuarial forms of representation promote quantification as a way of visualizing populations" (Feeley & Simon, 1992, p. 453). In other words, individual offenders are regarded by corrections as instances of risk based on statistical averages of similar offenders. Thus, rehabilitation serves the purpose of managing risk.

However, individual culpability is perhaps more salient than ever. Garland (2001, p. 175) describes the revision of "penal welfarism" from a system that views offenders as "clients in need of support" to "risks that must be managed" (see also Garland, 1985). "Penal welfarism," characterized by discretion and individually-determined sanctions, has given way to the new penology of crime control (Garland, 1985). Certainly this shift has affected correctional systems in the U.S., and as Garland (1985) explains, in the United Kingdom as well. The advance of scientific methods and technological innovations in risk assessment has changed the ways that individual risk is determined. Thus, risk assessment programs are used to establish security levels and supervision levels for offenders. This new crime control strategy, which has as one focus the processing of individual accountability, has an added effect: the discipline of individuals. While rehabilitation has always concentrated on fixing individuals to some extent and in some ways, the interesting consequence of a decline in the rehabilitation ideal is the decentralization of rehabilitation. For example, in addition to asking offenders to self-monitor and self-correct (as I will outline below), newer technologies of surveillance allow community control and monitoring.

The net of social control is not only wider, but the mesh is finer – not only in the sense of catching more "fish," but also by asking the fish to jump into the net themselves. In other words, the mesh of the net is of a different quality. Rehabilitation takes place inside inmates' heads now, as they use tools from cognitive programs to self-correct. Rose (1996, p. 78) describes such programs as not trying "to *crush* subjectivity but to produce individuals who attributed a certain kind of moral subjectivity to themselves and who evaluated and reformed themselves according to its norms." In many ways, this is what rehabilitation would suggest, especially in our current climate of self-actualization. Yet as Duguid (2000) points out, rehabilitation implies a return to a former state – what prison programs try to do is habilitate, and in this case, create new habits of mind.

Part of the debate about the qualities of modern corrections has centered on the degree to which these shifts represent an abandonment of the modernist project in corrections, which embraced, among other things, a belief in the power to resolve human offending and re-offending through the application of social

scientific information and insight. Garland (2001), for example, contends that the schism between a modernist and post-modernist penology is too simple and, thus, inaccurate because there are aspects of both in current practice. According to Garland (2001, p. 217):

> [Penal rhetoric]'s multiplicity of meaning is thus a reflection of its historical development, in which one strategy, vocabulary or conception has been laid on another, without expunging all traces of the earlier style.

Whereas the debate over new and old penology has focused on larger systemic orientations toward corrections, little empirical attention has been paid to the everyday interactional practices in prisons, and the extent to which these represent the old or new penology. As Feeley and Simon (1992, p. 455) describe:

> The new penology is neither about punishing nor about rehabilitating individuals. It is about identifying and managing unruly groups . . . Its goal is not to eliminate crime but to make it tolerable through systemic coordination.

What, then, are the goals and implications currently for rehabilitation programs in prison? Clearly, rehabilitation has lost its foothold since the 1970s; the shift to more retributive practices has been amply documented (Allen, 1981; Irwin & Austin, 1994). And certainly, reforms in sentencing and security levels have enacted some of the actuarial language of the new penology (Feeley & Simon, 1992). That is to say that practices such as fixed sentencing reflect the statistical knowledge of risk based on enhanced assessments.

However, some rehabilitation efforts still continue. The nature of these programs has changed since the 1960s and 1970s attempts to reduce recidivism by expanding opportunities for offenders. Instead, therapeutic or psychological orientations have come to dominate treatment while sociological influence has waned in corrections (see Nolan, 1998; Rose, 1990). The consequence of this shift (which has numerous causes) includes a de-emphasis on structural explanations for crime (see Garland, 1990; Scheingold, 1991). The question becomes: how do these (quasi-)psycho-therapeutic programs reflect the new penology's preoccupation with the management of aggregates rather than individual risk reduction? In what ways do the newer forms of correctional treatment reflect the evolution to a newer form of prison discourse?

In this chapter, the everyday rehabilitative practices currently in use in Vermont prisons will be examined to explore the ways in which the therapeutic concepts and exercises represent the merging or blurring of the old and new penology. Specifically, therapeutic language used in rehabilitation echoes the larger discourse of risk that prepares the landscape of punishment. In addition, the current correctional emphasis on self-change of irrational thinking demonstrates a departure from

previous notions of rehabilitation. As Duguid (2000) discovered, rehabilitation works to the extent that offenders are regarded in prison as sentient subjects and full participants in their self-evaluation and correction. The Vermont Cognitive Self-Change program bridges both the older approach to offenders as "objects" for scientific intervention and the newer focus on offender subjectivity. Subjectivity associates with risk in complex ways in cognitive rehabilitation programs.

THE DISCOURSE OF RISK REDUCTION

A central and motivating notion in corrections has been recidivism. Indeed, treatment was all but abandoned in the mid-1970s after Martinson's (1974) meta-analysis determined that treatment programs do not effectively impact re-offending rates. According to Feeley and Simon (1992) the discourse of risk has changed in the new penological motif; effectiveness is now evaluated by the improved management of inevitable failures (see also Nolan, 2001). According to this argument, because management has become paramount, the language of risk is modified to address administrative concerns. The rhetoric of risk is re-packaged for the "efficient enhancement of social control" (Garland, 2001, p. 176; Mayr, 2004). In short, the new penology incorporates a "new realism" (Beckett, 1997), which views certain individuals' deviance as inevitable, and thus, not subject to repair. Since deviance is inevitable in this new scheme, managing populations of deviants is the best we can hope for.

Whereas many correctional departments consider only offender risk calculations when assigning security levels in prison, Vermont Department of Corrections utilizes two axes: risk assessment and needs assessment. Various forms of treatment are designed to address needs in order to reduce risk. For example, some of offenders' poor choices may stem from alcohol problems, thus the Department of Corrections might mandate alcohol treatment for such an offender. In my observations of the Cognitive Self-Change (CSC) program (formerly called the Violent Offender Program or VOP), violent behavior was traceable to "thinking errors" or "cognitive distortions." The program is predicated on a fundamental assumption, which is that criminal thinking is distinct in its distortion and distinctly distorted in particular and patterned ways (see Yochelson & Samenow, 1976). The need, then, for violent offenders is "responsibility training" – learning to hold themselves accountable by accepting and understanding the role that their own thoughts play in their decisions to behave anti-socially.

Mayr (2004) argues that the new orientation to risk management translates into prison discourse in the way that cognitive change programs are administered. Foucault (1979) contends that the relatively new (in a historical sense) practices

of monitoring, measuring, recording case studies and the like transform discourse (see also Rose, 1990). In other words, normative categories come into existence because of the intensive scrutiny of individual difference. The Cognitive Self-Change program was developed in Vermont based, in large part, on the substantive research of two psychologists who developed an inventory of the characteristics of the ideal-typical violent offender. What emerged is a catalogue of types of utterances that indicate risk. For example, in this model, offenders are regarded as both suffering from distorted thinking and of being cons in trying to hide their risk for violence, perhaps by lying about their thoughts or being unaware of the relationship between thoughts and risk.

In group sessions, facilitators attempt to "break down" offenders – to encourage or pressure them into seeing how their thoughts motivate their behaviors. The program goes well beyond the simpler assessments which predict risk based on statistical knowledge about offending history, employment, marital status and the like. Rather, CSC assumes a certain level of risk among offenders based on these statistical predictors and then intervenes in the thoughts that move behavior from risk to offending. In CSC group sessions, and in the documents that offenders produce for the facilitators, offenders' internal states are subjected to "normalizing judgments" about the degree to which their thoughts conform to pro-social expectations (Foucault, 1977). The near-constant monitoring of thoughts and emotions, as well as actions, indeed heightens risk among offenders. Monitoring allows the production of "finer distinctions" between normative and non-normative behaviors and states of mind. An exchange between a facilitator and offender is instructive; when asked to reflect on how his thoughts lead to destructive behavior:

Offender:	There's not much that leads to destructive behavior in my life. So I gotta have destructive behaviors to have these [thinking] patterns?
Facilitator:	yeah
Offender:	well, I don't have any!
Facilitator:	You've never done destructive things? Never gotten in fights? Never done anything wrong?
Offender:	Twenty years ago, when I was a kid! I grew up. You get mature.
Facilitator:	Well, these patterns go through your whole life . . . when I have these thoughts, someone gets hurt.
Offender:	There isn't anything in my life that goes like that
Facilitator:	These are patterns that lead to destructive behaviors!
Offender:	None of it, really you know, that it [sic] creates trouble or risk or some bullshit. I don't know what you want out of this shit.
Facilitator:	We're going round and round and nothing's changing.

The offender's denial of risky thinking only confirmed his pathology in the mind of the facilitator (see Fox, 1999b). Denial of risk reinforces riskiness. Monitoring

thoughts, by asking offenders to reflect and report on them, allows for assessment of subtle distinctions between the thoughts of normal and abnormal people.

The striking aspect of CSC and similar programs is the way in which they focus nearly exclusively on individual pathology (Fox, 1999a, b; Mayr, 2004). The old penology, as it is archetypically conceived, presumed that life opportunities played a role in provoking crime, and therefore, was an appropriate locus for intervention to prevent recidivism. How does this subtle shift from rehabilitation of life chances to the habilitation of individuals reflect the new penology of risk?

COGNITIVE CORRECTION AS A MICRO-PHYSIC OF POWER

Rehabilitation programs, such as cognitive treatment programs, embody the tension between the treatment focus implicit in the "individual pathology" views of criminality and the newer focus on efficiency and actuarial predictions of risk. For example, the language in Cognitive Self-Change – although clearly centered on individual states of mind as the site for intervention – utilizes the notion of risk persistently. Thoughts are "risky," as are behaviors, feelings, incidents, beliefs, and interactions. In other words, virtually all aspects of offenders' lives represent risk in varying degrees. Their old lives are regarded as sites of risk; their values are risky – indeed, offenders exist in a continual state of risk for criminality. To the extent that other, more ordinary lives are not constructed as continual sites of risk, it is because our thoughts are fundamentally normal. And our states of mind are not construed as points of risk precisely because we are not subject to the same level of scrutiny. For instance, an offender thought that throwing away a cigarette lighter was an example of risk reduction because it reduced the risk of his getting caught with a lighter. To him, "risk" meant the risk of getting caught with contraband or other rule-breaking behaviors. The facilitator tried to explain that his *thinking* that it was acceptable to procure a lighter in the first place was risky, not the rule-breaking behavior itself.

Some examples from my field notes might be instructive. In a training session for CSC facilitators, the developer of the program explained the purpose of "check-ins" in group sessions wherein offenders give brief updates on their recent feelings and thoughts. The point, said the trainer, is to "pay attention to our thoughts and feelings objectively and to see the risk in those." In evaluating group participants' check-ins, the trainer encouraged facilitators to ask "did they identify a risk? . . . Did they understand how thoughts, feelings, attitudes and beliefs relate to that risk?" In fact, the training session was so focused on risk that one trainer said: "I want you to know what risk looks like, feels like, sounds like, smells like."

In these examples, risk is the core concept for rehabilitating offenders. Whereas some rehabilitation programs target educational deficits, for example, or more concrete cognitive skills, CSC targets thinking patterns which increase criminal tendencies. Those other models acknowledge that at least some risk comes from a lack of opportunity or other factors external to the individual offender. CSC locates the energy and motivation for crime within the individual offender's head entirely.

Certainly this focus reflects our current cultural passion for self-actualization and empowerment, as evidenced by the still burgeoning self-help trend and our pressure on citizens to know and improve themselves (Rose, 1990). And our retributive inclinations in penal practices currently insist upon a relentless individual accountability. Similarly, as Garland (1991, p. 210) notes, penal practices "helps construct individual subjectivities." Notions of normality pervade the social and institutional relationships in corrections and courts; offenders are evaluated as willful detractors from the norm. Implicit in the institutional relations of court and corrections are assumptions of individual "will, intention, rationality, freedom, and so on" (Garland, 1991, p. 210). Just as the courts assume personal will and responsibility, so do rehabilitation programs like CSC. Although CSC suggests offenders suffer from a form of psychological impairment, such as erroneous thinking habits, an element of willfulness is assumed as well. Facilitators state that offenders "hang on" to beliefs and thought patterns in order to rationalize misbehavior.

Facilitators can help offenders re-orient their responses to things like personal slights – for example, when another inmate cuts in line – by identifying especially risky ways of describing thoughts. Anger of almost any kind is considered risky. In discussing a problematic offender, one facilitator described that the offender looks for "problem-solving techniques versus intervention into anger." In other words, it is not enough simply to intervene into rule-breaking behavior; offenders must not get angry in the first place. Whereas our anger might be permissible, offenders' basic pathology prevents their anger from being legitimate or justified (see Fox, 1999b). The distinction we might make on the outside between valid anger and invalid anger does not hold water in the prison. Ironically, in trainings, facilitators are told – and they repeat this in group sessions – that "nobody gets punished for their thinking." One would assume that this means offenders are not sanctioned for their angry thoughts. However, the program facilitators are inconsistent in this regard. Sometimes anger is penalized because of the fact that is represents risk. At other times, angry thoughts are deemed normal as long as offenders develop and use interventions into behavior that might emanate from anger. For example, in an exchange with a facilitator an offender named Sandy reported a recent angry situation:

Sandy: Not getting my mail on time – is that good?
Facilitator: Is it good? It is risky?
Sandy: I don't know.
Facilitator: So, "not getting mail on time" – is that objective?
Sandy: Mail being late?
Facilitator: Late for you, maybe not for them (The offender reported then on her thoughts in this situation).
Sandy: Why does this always happen? I shoulda got it by now (She stated her belief was that she should get her mail on time).
Facilitator: Another belief?
Sandy: People should do their job.
Facilitator: There you go – risk?
Sandy: I don't know, running my mouth?
Facilitator: Anybody help her? Maybe it's the post office's fault?
Sandy: Isn't that negative thinking?
Facilitator: It's negative but does it take your anger away? . . . Do you know what your patterns are?
Kate (another offender): Entitlement
Facilitator: Why?
Brenda (another offender): Because she's entitled to her mail.
Facilitator: (to Sandy) Do you agree with this?
Sandy: I don't know; it sounds good.
Facilitator: Are you entitled to get your mail?
Sandy: Yeah
Facilitator: Okay, then.

A few issues become apparent from this exchange: anger over late mail is illegitimate in prison. Feeling entitled to anything is illegitimate and evidence of distorted thought. It also seems clear why offenders are confused by the viability of certain thoughts and interventions. Sandy mentions this confusion in asking if she wouldn't be guilty of negative thinking which is considered destructive in the CSC program. Yet she is assured that if it "works," it is acceptable. At other times, interventions that "work" are criticized by facilitators for being "problem-solving" rather than meaningful shifts in thinking.

According to one trainer, when offenders say "you're trying to tell me how to think," facilitators can respond "No, we're not. We're trying to give you options . . . so that you can manage your own risk." Efficiency is maximized, at least potentially, when unmanageable prison populations manage themselves. In fact, offenders are evaluated in the program (and ultimately for release), based in part on their willingness to share their risk, called keeping an "open channel." Ironically, the program is facilitated by the very correctional authorities who hold the power to deem participants low or high risk based upon what they say in the group sessions. Language determines risk – and language is observed and categorized based on aggregate predictors of risk. How inescapable is the paradigm of actuarial risk

prediction? An assumption of "riskiness" pervades the discourse of correctional treatment, reasonably one could argue, given that the re-offense rate for many criminal offenses is so high. However, an assumption of risk based on statistics animates the long tradition of assuming that every inmate is a con artist. In practice, the treatment may be the same. And both may be based on aggregate assessments or ideologically-tinged discursive codes.

THE CULTURE OF SELF-CHANGE: REALISM AND RISK

Duguid (2000) argues that the "cognitive panacea" of late has replaced both the medical or (illness) model of treatment and the opportunities (sociological) model. The cognitive deficits model allows corrections to insist that offenders take responsibility and self-correct, where the medical and opportunities models did not. Both models assume a determinism that cognitive models do not; rather, cognitive deficits models assume agency and will within participants. The task is to teach "new ways of thinking" – in essence, responsible thinking. As one trainer explained: "We're doing responsibility training." In an exchange between an offender and two facilitators, an offender, Richard, provided an explanation for how CSC works when confronted by other offenders crowding one's space:

Richard:	[you] look at a situation and evaluate if it's worth saying [something] or not.
Faciliatator A:	Is it going to help you or not? Your goal is to reduce your risk of reoffense.
Facilitator B:	Change your thinking. Risk of just getting more space is that you're still *thinking* these things. If those things works for you, that's intervention.
Other offender:	What if that thinking's been part of your life for 26 years? How do you change it? My thinking's always been: if someone hits me, hit back every time.
Facilitator B:	We can't tell you how to act. The question is for you to ask is: 'is it worth it at this time?' Give yourself the chance to step back and ask if I want to do this now . . . Sometimes it's a tough choice . . . There are some tough situations in here and on the street.
Facilitator A:	In the past, you might not have thought, you might have just struck. Now you may have enough control of your thoughts to think of options. You may want to choose another way, knowing the consequences.
Facilitator B:	This teaches you to take control of your thinking, by recognizing your thoughts.

Governmentality, according to Foucault (1991), refers to "the conduct of conduct" – in other words, the link between political rationalities and the control and production of subjectivities in their service. In this example, offenders are asked to develop a very particular kind of subjectivity: one which knows its thoughts and thinks about its thinking.

As Sloop (1996, p. 180) argues, along with the arrival of the "just deserts" retributivist orientation to justice in the 1980s came an "ideology of moral autonomy" of offenders. According to Rose (1990) the advent of the psy disciplines allows for a governance of subjectivity that was not possible without the scientific knowledge base upon which to gauge observations through measurement and calculation. Thus, actuarial justice – predictions based upon statistical information about how similar others have behaved – is possible because of the creation of "criminal types" (Duguid, 2000, p. 204). According to Rose (1990, p. 9):

> The translation of the human psyche into the sphere of knowledge and the ambit of technology makes it possible to govern subjectivity according to norms and criteria that ground their authority in an esoteric but objective knowledge.

As Ransom (1997, p. 44) describes, corrections administrators or other disciplinary practitioners produce "administrative handbooks, not philosophical treatises." Nonetheless, these documents echo the political rationalities behind them (Foucault, 1988). The handbooks and documents utilized in the everyday practices of power represent two key concepts. First, they form the basis for an expert knowledge in the "service of power" (Foucault, 1977); as one facilitator said: "We're the experts." Presumably, facilitators are experts on the offenders' subjectivities. In addition, the handbooks serve as the tool to tame subjectivities. The wielding of the handbook (in this case, the CSC training manual for example) is illustrative of Foucault's "technologies of the self" (Foucault, 1991).

This same trainer touting the facilitators' expertise admitted that the program facilitators and trainers cannot predict program failures well. Their expertise, then, is in seeing, smelling and hearing risk. Yet, similar to Feeley and Simon's (1992, p. 450) description of the new penology's aim at "offenders as an aggregate" rather than using "individualizing" methods, risk is viewed, measured and monitored collectively; in other words, it is assumed to be a universal and relentless aspect of all violent criminals. However, individual offenders must individualize their own risk assessment and relapse prevention strategies. Facilitators accept or reject the relapse prevention plans based on an evaluation of offenders' attempts to reduce risk. The evaluation is based on several issues, primarily whether or not the facilitators trust the sincerity of the offenders' efforts; in addition, the evaluation is based on knowledge of what works, not for individuals in particular instances, but based on the accumulated data on many cases. Facilitators would occasionally defer to the science behind the cognitive treatment program by saying "It's from a book," as if this gave it an irresistible legitimacy. The relapse prevention plans that offenders produce and turn in as their "final exam," as it were, are evaluated at several levels up in some mysterious chain of command. The final arbiters are nameless and faceless. If a plan is accepted, the offender is theoretically eligible

for release. Offenders related that the standards used for evaluating the relapse plans were unexplained and thus baffling. Offenders must self-monitor and self-evaluate, but they are judged in this process by an unseen disciplinary force – one that relies on vague scientific evidence and texts to make determinations about the risk that remains within. In one exchange with a facilitator:

Offender: Any chance of getting parole if I don't complete this program?
Facilitator: It's up to the parole board.
Offender: So slim and none, huh?
Facilitator: Yeah, I think you could pretty much say that.

The facilitators have the authority to challenge the thinking of offenders and to insist that they monitor their own risk. In a training session, an instructor repeated the story of an offender who had said "what you're really asking me to do is be my own P.O. (probation officer)!" to which the facilitator responded "Exactly! You want me [to be it]?" Interestingly, political rationalities can be enacted through micro-policies in this way: by encouraging personal choice and responsibility, it allows "government at a distance" (Parton, 1999, p. 105). In other words, as Rose and Miller (1992, p. 174) assert: "Personal autonomy is not the antithesis of political power, but a key term in its exercise." Scrutinizing the micro practices of rehabilitation reveals how governing from a distance works: the link between retributivism in corrections, and the larger context of economic and political expediency is manifest in a program that insists upon self-regulation. The absence of self-knowledge and self-control are the presumed causes of crime. Locating the cause and cure for crime within individuals reflects a kind of political position that suits the culture of control.

CONCLUSION

So many authors of late have written about the new "realism" (Beckett, 1997), or similar concepts which emphasize the correctional sensibility of accepting failures and tempering expectations about the nature of risk and responsibility (see also Feeley & Simon, 1992; Garland, 2001). All of these features of the new realism (Beckett, 1997), the new penology (1992), and the culture of control (Garland, 2001) converge in the various forms in the everyday practices of government corrections. Recent trends in rehabilitation bring to light the way that the absence of cognitive skills and the need to improve them for risk reduction meet in policy and practice. These treatment systems emphasize personal responsibility and self-monitoring, which reflect the notion of discipline in a Foucauldian sense. Foucault's vision of a new enhanced discipline takes shape in cognitive treatment. First of

all, punishment shifts from the body to the mind/soul – a more pernicious form of discipline within which it is difficult to demonstrate reform. And punishment is recast as treatment in service of risk reduction. In other words, coercion appears more benign, but in fact, offenders are not only punished for actual criminal events, but for not reducing their own risk. This may well be in offenders' best interest, although that is not the concern of corrections. Surveillance changes form as well: certainly bodies are observed and behaviors considered within prison walls. However, as attitudes, feelings, beliefs and thoughts are assessed and examined, the normalization process extends into all aspects of the individual's subjectivity. In a training, the facilitator explained how often offenders use "interventions" in their thinking, such as "It's not worth losing my job or going to jail" to defuse some criminal impulse. The facilitator explained what was wrong with this intervention:

> It's a justification scale – what *is* worth going to jail for? Sooner or later, something will be worth taking the risk . . . [the intervention] may divert the behavior but it doesn't lessen the risk.

This excerpt seems profound: diverting behavior is not sufficient anymore; offenders must devise extraordinary thought processes to reduce down to nothing their risk for crime down to nothing. Presumably we all have some risk, insofar as people can embody risk. Yet the notion that something, someday may feel worth "the risk" to offenders is not only pathologized, but becomes the subject of governmental discourse and practice.

Assessing risk in this way, analyzing the micro-phenomena of subjectivities produces "docile" subjects ideally, and confused subjects in reality. We may create and demand autonomous subjects who willingly oblige in their reformation, yet their autonomy is illusory as they are caught in an exercise of power. Autonomy is certainly a perverse concept in a coercive setting such as prison, however, the rhetoric infuses much of the practice. In addition, I would argue that regulation *requires* knowledge of subjects' subjectivities. According to Parton (1999, p. 112):

> While discipline produces knowledge by constituting individuals as objects of scientific discourse, regulation provides knowledge of subjects in their subjectivity.

Governing at a distance involves the use of a variety of experts who employ technologies of the self in order to conduct human service. This new class of experts draws upon their expertise and "insights" as their "primary technologies of practice" (Parton, 1999, p. 112). Especially in "soft" fields such as child welfare and correctional rehabilitation, "reading" subjectivities is the skill that is required and traded. As offenders are deemed instances of risk, in varying degrees and ways, then individual wills must be constructed accordingly. Participation in treatment in Vermont correctional centers is voluntary, yet certainly one's willingness to

participate represents risk in a particular way; every action or example of resistance inscribes risk, whether low or high.

The modernist project of rehabilitating offenders through the application of social scientific information is still alive in corrections in many places and in many forms. The cognitive "panacea" (Duguid, 2000) merely reproduces the retributivist tendencies of the post-welfarist state. That risk is perceived to pervade thoughts and minds – to exist internally rather than externally – is due to our failure to produce social sciences that would satisfy consumers who demand control and governance of unruly citizens. There is a demand for control and a market for control as well as a market for sciences that will fulfill the notion that risk is everywhere within us. Collectively we promote the construction of new subjectivities. As economic and political realities have shifted, according to Garland (2001), so have our expectations of offenders, of correctional practices, and our demands on individual souls. Moffatt's (1999, p. 235) description of the purposes of social assistance offices applies to corrections as well: "The purpose of government . . . is the creation of autonomous beings." Similarly, monitoring the thoughts and feelings of violent offenders serves a political end as well, if not several ends: it allows an expansion of the web of social control that would otherwise not be tolerated. In our post-industrial culture of control, this tolerance serves many functions, most of which support the infrastructure of social control.

Social welfare policies and correctional rehabilitation personify the specific discretionary power that make up disciplinary practice – this is where the rubber meets the road.

REFERENCES

Allen, F. A. (1981). *The decline of the rehabilitative ideal*. New Haven: Yale University Press.

Beckett, K. (1997). Managing motherhood: The civil regulations of prenatal drug users. In: A. Sarat & S. Silbey (Eds), *Studies in Law, Politics, and Society* (Vol. 16, pp. 299–325). Greenwich, CT: JAI Press.

Blomberg, T. G., & Cohen, S. (Eds) (2003). *Punishment and social control* (2nd ed.). New York: Aldine de Gruyter.

Duguid, S. (2000). *Can prisons work?: The prisoner as object and subject in modern corrections*. Toronto: University of Toronto Press.

Feeley, M. M., & Simon, J. (1992). The new penology: Notes on the emerging strategy of corrections and its implications. *Criminology*, *30*, 449–474.

Foucault, M. (1977). *Discipline and punish: The birth of the prison*. New York: Vintage.

Foucault, M. (1988). Technologies of the self. In: L. H. Martin, H. Gutman & P. H. Hutton (Eds), *Technologies of the Self* (pp. 16–49). Amherst: University of Massachusetts Press.

Foucault, M. (1991). Governmentality. In: G. Burchell, C. Gordon & P. Miller (Eds), *The Foucault Effect*. Chicago: University of Chicago Press.

Fox, K. J. (1999a). Changing violent minds: Discursive correction and resistance in the cognitive treatment of violent offenders in prison. *Social Problems*, *46*, 88–103.

Fox, K. J. (1999b). Reproducing criminal types: Cognitive treatment for violent offenders in prison. *The Sociological Quarterly*, *40*, 435–453.

Garland, D. (1985). *Punishment and welfare*. Aldershot: Gower.

Garland, D. (1990). *Punishment and modern society: A study in social theory*. Chicago: University of Chicago Press.

Garland, D. (1991). Punishment and culture: The symbolic dimension of criminal justice. In: *Studies in Law, Politics, and Society* (Vol. 11). Greenwich, CT: JAI Press.

Garland, D. (2001). *The culture of control*. Chicago: University of Chicago Press.

Irwin, J., & Austin, J. (1994). *It's about time: America's imprisonment binge*. Belmont, CA: Wadsworth.

Mayr, A. (2004). *Prison discourse: Language as a means of control and resistance*. New York: Palgrave Macmillan.

Moffatt, K. (1999). Surveillance and government of the welfare recipient. In: A. S. Chambon, A. Irving & L. Epstein (Eds), *Reading Foucault for Social Work* (pp. 219–245). New York: Columbia University Press.

Nolan, J. L., Jr. (1998). *The therapeutic culture: Justifying government at century's end*. New York: New York University Press.

Parton, N. (1999). *Reconfiguring child welfare practices*. In: A. S. Chambon, A. Irving & L. Epstein (Eds), *Reading Foucault for Social Work* (pp. 101–130). New York: Columbia University Press.

Ransom, J. S. (1997). *Foucault's discipline: The politics of subjectivity*. Durham: Duke University Press.

Rose, N. (1990). *Governing the soul: The shaping of the private self*. London: Routledge.

Rose, N. (1996). *Inventing our selves: Psychology, power and personhood*. Cambridge: Cambridge University Press.

Rose, N., & Miller, P. (1992). Political power beyond the state: Problematic of Government. *British Journal of Sociology*, *43*, 173–205.

Scheingold, S. (1991). *The politics of street crime*. Philadelphia: Temple University Press.

Sloop, J. M. (1996). *The cultural prison: Discourse, prisoners, and punishment*. Tuscaloosa, AL: University of Alabama Press.

Yochelson, S., & Samenow, S. E. (1976). *The criminal personality*. New York: J. Aronson.

This Page Intentionally Left Blank

MOTHERS IN JAIL: GENDER, SOCIAL CONTROL, AND THE CONSTRUCTION OF PARENTHOOD BEHIND BARS

Vickie Jensen and Jill DuDeck-Biondo

ABSTRACT

This chapter discusses the interplay of incarceration and traditional gender expectations in the construction of motherhood. We present data from in-depth interviews which examine the accounting jailed mothers provide of motherhood in general and of their own lives in jail. Constraints from the institution and traditional gender ideals heavily shape both definitions and self-concepts of incarcerated mothers. Institutional controls significantly hamper the ability to practice parenthood. Accounts of motherhood are constrained by traditional notions of nurturing and the necessity of presenting themselves as "good mothers." Addressing these limitations can provide avenues for improving the experience and skill of parenting for incarcerated mothers.

INTRODUCTION

Research began to examine parenthood in correctional facilities when scholars studying women in prison discovered how the loss of children and family provided the greatest amount of stress in women prisoners' lives and how their motherhood role shaped adaptation to the correctional environment. In general,

Ethnographies of Law and Social Control
Sociology of Crime, Law and Deviance, Volume 6, 121–142

ISSN: 1521-6136/doi:10.1016/S1521-6136(04)06007-5

the research on imprisoned women has demonstrated the pain and frustration that women feel as parents who are faced with structural limitations on parenting and controlled access to gender roles which can played out in jails and prisons. This research has provided invaluable insight into incarcerated mothers but has not fully taken on the task of exploring exactly how motherhood is constructed through interaction within the correctional context. Specifically, it is not clear how practices and accounts of motherhood are constructed within the institutional climate. Using the perspective of "doing gender," we can see how women prisoners "do motherhood" within structural and social controls which limit their physical and interactional activities involving children. This chapter will present literature and data which will elucidate how female prisoners manage their status as parents.

INCARCERATED MOTHERS: DEMOGRAPHIC AND BACKGROUND CHARACTERISTICS

Mothers are a large majority of the women in correctional institutions with figures ranging from 59% to nearly 80% in state prison (Berry & Eigenberg, 2003; Clark, 1995; Luke, 2002; Mumola, 2000; Owen, 1998). Incarcerated mothers are predominantly young (under 35) (Gaudin & Sutphen, 1993; Schafer & Dellinger, 1999), economically disadvantaged (Gaudin & Sutphen, 1993; Luke, 2002), undereducated (Mumola, 2000; Schafer & Dellinger, 1999), racial and ethnic minorities (Baunach, 1985; Gaudin & Sutphen, 1993), and single, primarily never married (Gaudin & Sutphen, 1993; Luke, 2002; Mumola, 2000; Schafer & Dellinger, 1999).

Parents in correctional facilities are primarily sentenced for nonviolent offenses, of particular, drug and property offenses. Mandatory custodial sentences as well as length in sentencing have increased the numbers of all offenders in custody for these crimes, including parents (Beckerman, 1994; Berry & Eigenberg, 2003; Luke, 2002; Morash & Schram, 2002; Owen, 1998; Schafer & Dellinger, 1999). Around 25% of imprisoned mothers in state facilities are incarcerated for violent crimes. Mothers are likely to have prior arrests (Mumola, 2000) and have concurrent problems with drugs and alcohol (Luke, 2002; Mumola, 2000). Mothers are most often unemployed prior to coming into correctional custody. Figures of employment for mothers place the percentage at between 33% and 45% (Mumola, 2000; Schafer & Dellinger, 1999). When they do earn wages, mothers were most likely to be paid less than adequate wages (Mumola, 2000).

INCARCERATED MOTHERS AND THEIR CHILDREN PRIOR TO IMPRISONMENT

Mothers are generally involved with their children before going into custody. Mothers are very likely to have lived with their children prior to incarceration. The percentages of mothers who lived with their children prior to incarceration range from 84% in federal prison (Mumola, 2000) to around 65% in state facilities and jails (Mumola, 2000; Schafer & Dellinger, 1999). The majority of imprisoned mothers are the sole economic and financial providers for their children (Luke, 2002) and the only parent in the household (Mumola, 2000). In those cases in which children have not lived with their mothers, less than a quarter of the children have been living with the other parent (Mumola, 2000; Schafer & Dellinger, 1999), with the majority living with other relatives (Block & Potthast, 1998; Schafer & Dellinger, 1999).

IMPRISONED MOTHERS AND THEIR FAMILIES: THE IMPACT OF INSTITUTIONS AND POLICIES ON PARENTING

Once incarcerated, women (as well as their families) experience the severe disruption that incarceration brings to families as well as the shock of the correctional environment with rules, regulations, and practices designed for the control of its prisoners. The nature of parental contact, roles, activities, and family structures are significantly constrained and controlled (Morash & Schram, 2002). In other words, structural controls take a primary role in dictating the parameters within which women can be parents while incarcerated.

Contact with Children

Limitations on contact with children provide one facet of the institution's impact on the ability to engage in behaviors associated with parenting. Women experience a loss of contact or a significant decline in contact with their children while incarcerated. A very small percentage of mothers receive visits from their children while incarcerated (Baunach, 1985; Block & Potthast, 1998; DuDeck, 1999; Gaudin, 1984; Morash & Schram, 2002; Mumola, 2000; Owen, 1998), and in some cases, a mother may have never received a visit from her child (Mumola,

2000). Telephone calls and letters are used by a majority of incarcerated mothers (Gaudin, 1984; Mumola, 2000), though Berry and Eigenberg (2003) find that only about a third of the women they studied had phone contact.

The correctional institution provides strict controls on interaction with the outside world, including what kind of contact prisoners can have and with whom. As a total institution (Goffman, 1961), the primary goal of the correctional facility is complete control over all activities and persons within it. Visitation and outside contact are not held as high priorities, and they are heavily regulated so they do not disrupt institutional functioning and security. These regulations have a negative impact on maternal contact with children. Facilities are often located a long distance from families, making transportation difficult (Block & Potthast, 1998; Fishman, 1982; Gaudin, 1984; Morash & Schram, 2002; Mumola, 2000). Restrictions on visitor lists can exclude children or their caretakers through rules involving background checks, exclusion of those with criminal records, and other denials judged to be necessary by the institution. Time allowed for visits and lack of provision of child-friendly visitation areas are also institutional controls negatively impacting parent-child visits (Block & Potthast, 1998; Norman, 1995). Telephone calls are monitored, limited in time, and prohibitively costly for many incarcerated parents' families. Letters are monitored and carry the stamp of the institution.

Informal controls through gatekeepers such as custodial parents and other family are also a significant factor. Incarcerated parents are dependent upon caregivers for information about their children not available through direct contact with them. Information is dependent upon often tenuous relationships with caregivers who may not wish to interact with the inmate, allow visitation of the children, accept calls from the institution, or otherwise provide discussion about the lives of the children. Given the restrictions on contact and the inability to be present to force the case, incarcerated mothers are helpless in the face of gatekeepers who choose to restrict or deny information (Block & Potthast, 1998).

Laws and Policies Impacting Incarcerated Mothers and Families

Incarcerated mothers have not been a priority of the criminal justice or the child welfare system. While the need for parenting training has been demonstrated, parenting and visitation programs have not become a universal part of correctional programming. Where they do exist, there is great variation in quantity and quality. Additionally, these programs are always within the realm of the total institutional climate (Morash & Schram, 2002). As of 1998, there were 31 institutions across the country which offer parenting programs. While prison programs are becoming somewhat more prevalent, parenting and visitation programs are much more

limited in jails. Programs such as correctional nurseries for babies born to incarcerated mothers are still extremely rare, only existing in a few places (National Institute of Corrections, 1998).

Child welfare policies have the power to not only limit the actions engaged in by incarcerated mothers but can jeopardize the very status of women as mothers. Policy changes have made it easier to terminate parental rights. Criteria, including being present in the home, work against mothers in custody who are not only vulnerable to losing parental rights in the first place but who are significantly less likely to receive regular visits from caseworkers, copies of important documents, and assistance in attending crucial meetings (Beckerman, 1998; Luke, 2002). The correctional institution often provides more difficulties than assistance through restriction of visitation with case workers, impediments to receipt and provision of crucial information, and lack of provision of supervision to attend important hearings (Beckerman, 1994, 1998; Luke, 2002).

Gender and Parenting

Parenting while incarcerated is clearly impacted in structural ways through barriers and obstacles presented by correctional and other institutions to the actual practices of parenting. Imprisoned mothers also face negative social and emotional impacts from their incarceration. Additionally, cultural values of gender and parenting have an impact on incarcerated mothers. Combined, these two factors have the power to control not only the practices that constitute parenting but the meanings connected with motherhood and the role of mother for incarcerated women.

Socio-Emotional Impact of Incarceration on Parents

Prison culture research has provided a framework from which we derive our understandings of the socio-emotional impact the correctional environment provides for incarcerated mothers. Sykes (1958) was among the first to identify what he called the "pains of imprisonment," those losses such as loss of freedom and autonomy which provide psychological pain and stress for individuals in correctional facilities. While this work was carried out in a men's prison, the notion of the pains of imprisonment carried over into study of men's and women's prison culture. Giallombardo's (1966) work in a federal women's prison demonstrated that loss of children and family was a pain of imprisonment women felt in addition to the list produced by Sykes. In fact, the separation from children was found to be

the most painful for women, a finding replicated in all later work on incarcerated women (e.g. Baunach, 1985; Giallombardo, 1966; Luke, 2002; Owen, 1998). Specific elements to this pain include the inability to nurture because of physical separation and concurrent feelings of guilt, emotional and financial strains caused by their incarceration, fear of losing custody or parental rights, fear of changes to the relationships with their children, helplessness exacerbated by crises with their children, and other kinds of anxieties (Berry & Eigenberg, 2003; Block & Potthast, 1998; Clark, 1995; Jensen, 1991; Luke, 2002; Morash & Schram, 2002; Owen, 1998; Stanton, 1980).

Impact of Traditional Gender Roles and Expectations on Parenting

Structural controls on the nature of parenting are not the only controls experienced by incarcerated mothers. Cultural values embodied in traditional roles and expectations clearly shape the ways in which women parent. The cultural values associated with parenthood provide constraints on the meanings of motherhood as well as the shaping of one's identity as mother.

FEMININITY AND MOTHERHOOD

Traditional roles and expectations for women derive from the cultural ideals of emphasized femininity (Connell, 1987, 1995; Messerschmidt, 1993). The idealized and imposed form of womanhood includes strong and enforceable values on women's passivity, nurturing and child rearing, and a sexuality that is centered on men's needs and desires. The cultural ideal of womanhood is heavily enmeshed with motherhood as emphasis on nurturing in particular is defined in terms of children and family (Lindsey, 1994; Morash & Schram, 2002; Rothman, 1989; West & Fenstermaker, 1993). Motherhood is a responsibility, a duty, and a privilege for women, and a woman's greatest achievement is in her fulfillment of the role of mother, referred to as the "motherhood mandate" by Russo (1979). The good mother is expected to put the needs of her family above her own, to nurture and love her children, be there for them whenever they need her, and to make sure the children are happy, healthy, and safe (Berry & Eigenberg, 2003; Klein, 1995; Morash & Schram, 2002; Owen, 1998). Women who violate this traditional ideal are likely subjected to social sanctions ranging from those found in informal interaction to those which come from formal institutions such as the legal or child welfare system. The goal of these sanctions is to push women back into compliance with the ideal (Schur, 1984). Psychologically, women may punish

themselves for failing to meet the standards of a good mother and provide their own personal sanctions for nontraditional behavior.

Incarcerated mothers, with respect to these cultural values, have violated the core essence of motherhood. Women who are imprisoned tend to maintain traditional views of gender, including those of motherhood. They see and value themselves as mothers and wives and have devoted time, effort, and energy into maintaining this positive self-image for themselves (Clark, 1995; LeFlore & Holston, 1989; Owen, 1998). Most, in fact, see themselves as good mothers (Berry & Eigenberg, 2003; Clark, 1995; DuDeck, 1999; Morash & Schram, 2002; Owen, 1998). However, the traditional image of a good mother is incompatible with a mother who is imprisoned. She cannot be there to comfort or nourish her children or attend to their physical needs. To society, the criminal act represents a choice of selfishness over children, a notion which cannot be reconciled within the cultural ideal of "good mother." Incarceration further prevents her from engaging in behaviors that comprise traditional motherhood (Berry & Eigenberg, 2003; Clark, 1995; Johnson, 1997; Morash & Schram, 2002; Owen, 1998). Despite this challenge to their being suitable mothers, most incarcerated mothers have invested in their self-definition of mother and maintain the identity of good mother. The embeddedness of parenthood and the role of nurturer of their children makes the external judgments of a gender-traditional society even more difficult for inmate mothers (Clark, 1995). Berry and Eigenberg (2003) describe this conflict as role strain which results in pain and suffering because the ability to do the things a good mother does is so severely restricted.

Doing Gender/Doing Motherhood

The discussion thus far has focused on parenting roles and expectations for women that cannot be completely fulfilled in the environment provided by incarceration. What has not been discussed are the ways in which mothers manage parenthood and construct its definition within this context. It is clear that gender and motherhood cannot be separated and that one must look at the ways in which gender is played out in order to understand the construction of motherhood. This sort of examination requires the view of "doing gender" which refers to gender as a product of interaction within particular contexts as individuals engage in discourse and other behaviors that are designed to demonstrate their competence as men or women vis-á-vis cultural values and expectations that are presumed to be shared by participants in the interaction. Gender, thus, is not an objective state but something that is an outcome of interaction, a "situated accomplishment" (West & Fenstermaker, 2002, 1993; West & Zimmerman, 1987). There are two crucial components to this

process of producing gender: context and agency. Context refers to the particular external situation in which participants are interacting. The meaning and action of gender are dependent upon the context, a concept known as indexicality (Speer, 1999). In the doing of gender, the context includes both the physical environment as well as those culturally derived gender norms and expectations that frame the situation and constrain the ways in which social action is done (Messerschmidt, 1993, 1995; Thorne, 2001; West & Fenstermaker, 2002; Williams et al., 2002). In this respect, the way in which gender is enacted is constrained by what is understood to be the limitations of the situation and the culturally appropriate characteristics of one's gender.

The second crucial component to the process of production of gender is agency. Agency refers to the individual's actions, verbal and nonverbal, in producing social life. Discourse is particularly important in agency. It is through discursive interaction that one engages in the production and reproduction of social order (Zimmerman & Boden, 1991). When one engages in discourse to do gender, we see self-regulatory behaviors that are produced in response to those presumed definitions of gender (West & Zimmerman, 1987). Individual actions are accountable, that is, they are able to be described in ways that are consequential to one's participation as a social actor (Heritage, 1984). One draws upon those cultural values and expectations as resources in order to present oneself as normal and reasonable (West & Fenstermaker, 1993). Thus, the action of constructing gender requires the accounting of not only one's understandings of the cultural ideals of gender but also how one can be seen as following them. The ways in which those ideals are used are done with the presumption that other participants' know those ideals and will make determinations as to one's gender competence based on how well one fits one's actions within them. Doing motherhood as doing gender, then, will include direct examination of the ways in which women prisoners provide accounts of their actions and beliefs as mothers and the constraints of the context in providing the means in which to create these accounts or constructions.

SETTING AND METHODS

This study was designed to allow us to see the ways in which women construct motherhood or "do parenting." In particular, our interest was focused on the ways in which incarcerated mothers constructed descriptions of their practices as mothers, definitions of motherhood, and the ways they constructed themselves as incarcerated parents. Embedded in this examination is attention to the ways in which institutional and cultural constraints shaped these constructions.

Setting

Qualitative interviews with jailed mothers were employed in order to examine the construction of motherhood. Interviews took place at one of the three jail facilities run by a county sheriff's department in the Southwest. These facilities house prisoners awaiting trial or sentencing as well as those who have been given county sentences of generally a year or less. The facility was a coed facility located in a non urban setting which housed minimum security men and minimum through maximum security women. Most living quarters were dormitory style with beds in large rooms. Secure housing for the women consisted of individual cells reserved for women who required segregation because of psychiatric problems, violence, or for other reasons.

Programming was available for women in a variety of areas. Most notably, this facility offered the TALK (Teaching and Loving Kids) Program, originally developed by Los Angeles County. The TALK Program consists of parenting classes covering a wide variety of skills and information including good parenting practice, child development, and managing the parental relationship while incarcerated. The TALK program also allows for contact visitation between prisoners and their children up to age 12. Only prisoners involved in TALK and other designated programs are allowed contact visits. Contact visitation through the TALK program is limited to once a week, one and a half hours, and occurs after that week's class. The institution restricts these visits to those prisoners who have completed three parenting and chemical dependency classes as well as maintaining continued attendance in classes. Other prisoners in the general population must visit either across a table with no touching allowed or through a glass partition.

Method

Interviewee Selection

Purposive sampling was employed to select individuals for interviewing. As the focus of this research is qualitative and focused on a specific population, this form of non probability sampling is most appropriate. Those interviewed for the study were selected in two ways. Initially, an announcement was made in each dorm or living unit outlining the purpose of the study. The only requirement was that the inmate have children under the age of 18. Those interested parents were encouraged to sign up to be interviewed. This initial sign up was the preliminary list of interviewees we used. However, due to the jail's high turnover, the sign-up initial sheet was soon exhausted which required additional solicitations from

time to time. Occasionally, we depended on jail personnel to select inmates for us because they usually knew which inmates were parents. In addition, jail staff selected women from Secure Housing to be interviewed. Interviewees were given sodas in exchange for their interviews. A total of twenty women were interviewed.

Structure of the Interviews

Qualitative, in-depth interviews were conducted with mothers in jail. The interviews were conducted on site, in private rooms adjacent to the guards' station or office. All interviews were audio-taped. While it was a stipulation that jail personnel be allowed to monitor the interviews both visually and audibly, they never entered the interview rooms. Monitoring took place on a visual basis only, through a glass window. As a consequence, all interviews were kept confidential. Interviews were open-ended and varied from person to person. They ranged from 45 minutes to around two hours.

The interviews were administered in what Berg (1998) refers to as the "semi standardized" model. A semi standardized interview involves the use of predetermined guiding questions (or topics) but also allows the subject to digress into other related areas. The interviews were formatted as guided conversations to allow for the most free and natural connection of thoughts, feelings, and interests. The scheduled, probing questions were generally asked in an open-ended fashion, which allowed the subject the freedom to go into detail as she saw fit. Interviewees were informed that should a question make them uncomfortable, they could decline to answer. The list of probing questions included questions asking about stresses in jail, adaptation to being separated from their children, how the woman defined motherhood and whether they saw themselves that way in jail, as well as questions about contact and other interaction with their children and other topics that were raised by the interviewee.

DATA ANALYSIS

The analysis of the interview data was done using an inductive, grounded approach in which the entirety of the interview was examined for themes relating to our concepts of construction of parenthood. Rather than taking a more traditional conversation analysis approach, the discourse analysis was done more ethnographically with a highlight on the ways in which the accounts were given. The focus, however, is ethnomethodological as we highlight the process of producing gender and parenthood through accountable, discursive action (Garfinkel, 1967).

Incarcerated Mothers and Motherhood

Interviews with the mothers in jail reconfirmed several findings in the literature regarding the pains of separation from their children as well as the importance of the motherhood role to them. Constructions of that motherhood can be clearly seen as the interactional outcome of traditional cultural ideals and institutional context.

Mothers and Physical Separation from Their Children

One of the biggest pains that the majority of mothers faced while in jail was the physical separation from their children. Women specifically cited the inability to see their children on a daily basis, having physical and verbal contact with them, and attending to their needs to be particularly painful and anxiety producing. With the separation, for some, came the fear of losing touch with their children's lives and gradually not knowing them. Ann, aged 39, explains:

> You know, I don't know what's packed in his lunch right now . . . And they say the things on TV and they have all this new stuff coming out. It's been so long since I bought that kid stuff. I miss that.

An additional pain of separation came in the missing of the growth, development, and important events in their children's lives. A mother of two, a seven-year-old-boy and a two-year-old girl, says:

> I mean, I've been coming in and out of jail for the past few years. And it's hard, especially for my daughter. Because ever since she was born, right after that I started getting in trouble and coming in and out of jail. And I haven't really been, you know, around her. I come to jail and I go home and she's off the bottle and the next time I go in she's off the diaper and she's growing up so fast and I haven't been there for her.

Many mothers felt that they didn't really know their own children anymore. They realized that other people, caregivers in particular, knew their children including their habits and preferences better than they did. The separation resulted in their sense of estrangement and "losing out" while their children changed without them. This caused the inmate mother a great deal of anxiety and guilt.

Separation from the children also resulted in anxiety because of the mothers' inability to tend to day-to-day concerns and care for their children. This was further exacerbated in those instances in which there was conflict with caregivers as to the ways in which their children were cared for. This is not to say that these women felt their children were not physically safe (in fact, no women expressed worry over their children's current physical safety), but that they did not agree with parenting techniques being used with their children.

One of the sources of conflict between mothers and caregivers over parenting was the result of what mothers called over-protectiveness. Pat provides an example:

> Both my 12 year-old sister and my son have a very strange life for being kids. And I feel really bad for them . . . My mom's idea of childhood is you know, getting up, going to school, coming home and sitting in the house. And just watching T.V. . . . I want my children to have activity. I want them to have friends . . . I don't even want to begin to take that from him. And she is. I know she is because he said and wrote me he had not one friend.

Annie adds this account of over-protectiveness:

> And then, the Girl Scouts, they had, when I was out there they had a camping trip. My sister wouldn't let them go. But, she don't let them spend the night at friends, cousins, nowhere. You know, I don't know why she's like that . . . She goes, 'It could be anybody. Anything could happen to them.' I think it's good but, I feel like, God, they're always locked in the house . . . I feel like they don't have friends.

Another source of conflict was over styles of punishment and discipline. One mother expressed her concerns this way:

> My mom's a parent from way back so, when she gets mad at them, she yells. She's a yeller . . . 'Cause when I get mad . . . I try to talk to them. And reason with them . . . But my mom's not like that. My mom's different. Very different. When we were growing up she was like, we'd get in trouble. We'd get beat. You know, with the belt.

Over-dependence on the caregiver was another aspect of the frustration over lack of control over children's lives. Connie relates this conversation with her mother-in-law:

> Then she'll tell me, 'I'm not trying to take your kids away from you. Just get your act together.' And just then she'll tell me how they're so close. And how my little girl sleeps with her. Every night. She can't go anywhere without her. That she's hooked, attached to her. Things you don't really want to hear.

Mothers' Contact with their Children

Contact with children for these mothers was significantly constrained. A minority (six of 20) received visits while others were able to manage some form of contact through telephone and/or letters. The majority of the women did make attempts to maintain some sort of contact, and only three had no contact at all. In the interaction with children that was possible, both institutional and informal social controls exerted a significant impact on the frequency, nature, and quality of mother-child interaction.

Visits were restricted in the same ways discussed in the literature. The two most prominent constraints on mother-child visiting produced by the institution were

remote location and non-contact visitation policies for the general jail population. Location was a particular problem. Although the institution was within the county, many families either lived outside the county or could not get transportation to the small town in which the women's jail was located.

Women who participated in the parenting and visitation program were allowed contact visits. Of the six women who did get visits from their children, four received contact visits because they were involved in the jail's parenting program. However, other mothers in the general population were not. Non-contact visitation provided a particularly painful restraint on mother-child interaction that strongly influenced whether women had visits and the quality of those visits. Prisoners who have non-contact visits cannot engage in any physical contact with their visitors. They are either placed across a table from each other and cannot touch or are separated by glass.

Some women made decisions not to visit with their children at all due to the no-contact rule for visits. The women stated that it was too difficult and stressful for the children and themselves to not be able to touch, and they were at a loss to be able to explain that rule to children who were upset that they could not touch their mothers. Pat, a mother of a seven-year-old and a two-year-old explained:

> Children show their affection with, you know, physical. And my daughter, she likes to hug me, she likes to hold me. I can't sit and [say] 'No, Emily, sit there and stare at me.' That's torturing a child. I'd just as soon not have [the visits] at all.

Penny relates the story of her one noncontact visit with her children. She highlights the role of correctional staff in enforcing this restriction and influencing the visit itself:

> Once, my two older ones, when I was here, my mom brought them. And my kids came up to hug me and one of the deputies yelled at them. And they got scared. And they were crying and I told my mom, 'Don't ever bring them again.' And that was it. After that, they never came back.

The physical environment of the jail was a structural factor in some women's decisions to not visit with their children. Many women related that they could not subject their children to jail itself or to the pain of limited, restrictive visits which resulted in upsetting good-byes.

Another source of constraint on the mother-child contact of jailed mothers was found through informal means used by the caregivers of those children, serving as gatekeepers of information in and out of the household. Shaky relationships with some of the caregivers meant that access to communication with the children was not always given. This included both letters and phone calls. Connie, for example, describes her frustration:

> They won't let me talk to them on the phone. They won't . . . 'cause they said once they get off the phone they cry. And they [the caregivers] don't want to deal with it, you know. And so, they don't let me talk to them at all and I don't think they'll give them mail, but I'm going to try. Keep trying, trying, trying.

Laura's mother feared calls and visits would upset her daughters so she prevented Laura from contacting them. She states:

> When your family won't bring your kid up to visit you, it's really hard when you're his mother. 'Cause we miss our kids a lot. And I think there should be some way to where we can have a court order for them to come to visit.

Gatekeepers, in their prevention or restriction of mother-child interaction, actually had an impact on the quality and character of the parental relationship in some cases. Ingrid provides this story about her relationship with her daughter:

> She's mad at me 'cause I haven't talked to her in awhile. And I tried to call over there, collect and everything, they [the foster parents] won't even let me talk to them. She [the foster mother] wouldn't even accept the collect call. Her husband would accept it once, and now she won't accept it so I can't even talk to her.

In addition, caregivers directly shaped the flow of information to the child in ways that could directly impact the mother-child relationship. Lisa, mother of three, provides this insight:

> You know [you] always lose a little bit of control because you've got all these other voices in the background telling them things and it's very, very difficult . . . They get to hear everybody else's voice in the world and not yours.

Some caregivers, for information-control purposes or because of money, simply placed blocks on the phone completely preventing any phone calls from the jail reaching them.

Activities and Practices Associated with Motherhood

The vast majority of the women reported that they were engaged in whatever they could do as mothers within the constraints of the jail. These women were unable to engage in daily care of their children, including providing physical and emotional comfort, being involved in their activities, and being able to make decisions for their children, but they were active in whatever else was permitted under jail rules and by the children's caregivers. The practices associated with motherhood were done purely within the mothers' allowed contact with the children.

Writing letters and sending mail to the children was one way women actively engaged in motherhood practices. The contents of letters and mail included not

only standard kinds of letters but also pictures and stationery that had been created by the mothers for the children. The purpose of the letters and other mail was to communicate with the children and otherwise remind them that they have a mother who cares. Candy describes her efforts to use the mail to be a mother in her seven-year-old son's life:

> My mom don't have a phone. I write to my son. And I try and write to him a lot. I write to him every week. And send him cards. And I draw. Anything, you know. And I do write him once a week. And I send him pictures.

Letters and other mail also helped the mothers establish a presence at important events. One woman found a creative way to help her daughter celebrate her birthday:

> For her birthday, you know, I wasn't going to be there and it was really starting to hurt, you know . . . I started to just cutting things out of the magazine that I would buy for her if I was home. So I did all that and then I mailed her a whole scenario of the day that she was born. From the beginning of the labor pains and, so when she got that, it really touched her.

Contact through telephone conversations and visits also provided a context in which women could be involved in actions that were connected to motherhood. A frequent topic of mothers' conversations with their children was emotional reassurance. Other topics included questions about their children's lives and activities as well as requests to behave for their caregivers. These were all intended to keep bonds between the mothers and children strong. Monica, a mother of four children, provides an example:

> And everyday we talked about what was happening in school and what was happening at home and what they were doing. What challenges they have. I tell my two little ones, my little boy to listen to his grandparents and to his older brother and sister. And that everything's going to be okay. And that I'm okay. Just, you know, things so they don't worry.

Another element of conversational contact with the mothers' children was to help guide them away from criminal and destructive behavior that could result in their ultimately going to jail. Actively encouraging children to recognize the harsh realities of jail life was one way. Discussion of alcohol and drug abuse was often included in these conversations about jail. However, this did need to be tempered so that the message of discomfort and unpleasantness of jail did not create undue stress by alarming the children with too much information about the difficulties the mothers were going through. Penny relates the aspects of incarceration she shares with her adult children:

> I've always talked to my older ones about that [drug use]. How awful it is. How ugly it is in here . . . Just talk to them about everything I've been through. They know everything. And I think that's what helps them. They're afraid. They have the fear of drugs and, and the jails and institutions and stuff.

Monica, serving a sentence for insurance fraud stated:

> I hope that . . . they will learn something by what happened to me and they will learn that telling the truth is important. That they'll learn that being honest is important.

Despite the severe limitations that jail provided in access to their children and the kinds of mother-related behaviors they could do, the woman did as much as they could to continue to engage in mothering through supportive and instructive communication with their children.

BEING A MOTHER IN JAIL

It was found that some women were concerned that their children were no longer looking at them as "mother." They identified several reasons for this including previous drug problems, separation from the children and limited contact while incarcerated, and the dependence their children had on others for support. This erosion of their identity as "mother" led to fears about being replaced or taken less seriously. Ann, a 39-year-old mother of two, noticed that her 17-year-old daughter, Sophie, was treating her neither as a mother nor as a friend:

> I think she thought of me as pathetic. And then I think she thought of me as just, kind of silly . . . Maybe not responsible, like someone she couldn't depend on.

Women also shared their difficulties identifying with the mother role. Joyce comments:

> I don't feel like a mother right now because I haven't seen him in so long. I haven't been the one taking care of him. My mom is. My mom's been more of a mom to him for a year, than I have.

While some women were extremely distressed over their mothers or other women becoming "mommy" to their children, other women suffered less distress in their attempt to create distance that would benefit their children. One mother explains:

> When I go around them it's like, 'Um, do I call you mom?' They don't have a reason to be, but they're afraid, 'What if I offend you? If I call you mom, what if I hold you?' That's a hard thing. So I just tell them to go ahead and call grandma 'mom'. That's fine. So they call me by my name. I'm just like a sister right now.

Constructing Accounts of Motherhood

While the women clearly described limitations in the activities and practices of being mothers and their difficulties in managing the mother role, almost all of

them presented their accounts of being a mother in a positive way. Regardless of what they were doing with regard to their children, their actions were presented as being commensurate with a "good mother." There were three key ways in which the mothers constructed their accounts of themselves as good mothers. First, all the women interviewed mentioned how much they loved their children. When asked how they perceived their roles as mothers in jail, many responded that loving their kids was the most important thing they could do for them, and many identified this love as constituting "good motherhood." Breaking the law, being incarcerated, and otherwise making life mistakes did not automatically make them bad mothers. Loving their kids and committing the crimes were two completely separate issues. Candy provides this explanation:

> [N]o matter what you do . . . even though we are messing up out there, we never stop loving our kids. We just have a problem . . . ourselves. And regardless, whatever we do, we . . . still love them . . . And a lot of people don't really understand that.

A second theme in the women's accounts of being a "good mother" focused on their attempts to alter their past behavior (e.g. ending their drug use). For these women, working programs and seeking self-improvement was a priority and a requirement for being a good parent. Realizing they had made mistakes in the past, they felt that by focusing attention on improving themselves, they were fulfilling the role of good mother. Erika, mother of a three and a half-year- old, remarked:

> I'm not . . . setting a very good example for my little girl. So I have to think. I'm thinking about her, and I'm thinking about myself also. Improving my ways.

For these women, being a good mother meant recognizing their faults and putting forward efforts to change, usually by becoming sober. They felt that before they could be any good to their children, they must focus their attention upon their weaknesses, in the hope that upon release they will be functioning parents. Additionally, a small number of women identified themselves as good mothers based upon both the love they felt for their children as well as their efforts to change themselves.

Thirdly, some women provided accounts of "good motherhood" through focusing on how they had been good mothers in the past. Their incarceration was merely an interruption in what was described as a pattern of deep involvement in their children's lives, and once they were released, they would pick up this pattern of being good moms. This is not to say, however, that they completely overlooked the behavior that got them in jail. In fact, these women identified their drug use and unlawful behavior as improper and indicative of poor mothering. Annie, a mother of three girls (ages five, seven and eight), serving time for possession of heroin stated:

> But as for [being a] mother, it's like, I know how to do good. I mean, I know how to go to work and get up and get everybody ready and I've done all that. But I don't know what happened . . . 'cause of what was going on. I couldn't deal with it.

These women felt a great sense of disappointment in themselves knowing that at one time they handled motherhood very well, and they were especially remorseful about their past behavior. Said Kathy, mother of four:

> I think I was a really good mother, teacher, you know. The memories I have, you know, I dare to even think about when I had my children. 'Cause . . . it hurts me.

Indeed, they felt they had little excuse for their destructive decisions because they had previously been good mothers. But because they were clean and sober in jail and were paying their debt to society, they felt prepared to accept the role of good mother once again.

IMPLICATIONS AND CONCLUSIONS

This study of mothers in jail has produced a complex picture of how women construct their experiences as mothers while they are in custody. These constructions are done within severe structural and cultural restraints which prevent almost all traditional means of fulfilling parental roles. Despite these restraints, mothers were able to provide accounts of what motherhood was and how it pertained to their lives in jail.

Social Control and Doing Motherhood

Mothers experienced both institutional and gendered cultural controls on their ability to do parenthood in the jail. The structural controls imposed by the jail presented a significant barrier to enacting behaviors that are associated with being mothers. Being incarcerated provided a tremendous practical barrier to simply being able to be involved in the day-to-day lives of the women's children. Being in jail, by definition, means not being in the home to interact and care for children. Thus, the practices of parenting could not occur in the ways that the incarcerated mothers claimed they needed to be. These daily practices of parenting were taken over by caregivers over whom mothers had no control.

The only way in which women were permitted to engage in parenting behaviors was contact with their children through visits, telephone calls, and mail. Access to these contexts was highly controlled by restrictive visitation and telephone policies. Strict visitation policies which limited who could visit, when they could visit, how

long they could visit, and the conditions for the visit subsequently eliminated visits altogether for several mothers when rules were not met. Additionally, conditions such as those involved in non-contact visiting made the quality of the interaction with children poor. Telephone restrictions and cost curtailed the frequency and time spent in verbal interaction with children.

Gendered cultural definitions of motherhood are inextricably tied to cultural ideals of femininity. Definitions for mothers included nurturing and caring for children as the most integral part of what motherhood is. These ideals were reflected in the practices the women discussed as those that they did as mothers either outside or inside the institution: emotional support, day-to-day care, attending to physical needs, and the like. As such, traditional ideals exerted a significant impact on how women defined motherhood. The influence of these cultural ideals significantly shapes what is considered motherhood for most of the jailed women, potentially limiting broader definitions that would open up new ways of becoming better parents to their children.

Creating an Accounting of Parenthood

The controls of both social structure and gendered ideal culture exerted a critical influence on the ways that women accounted for their practices and definitions of motherhood. The influence of gender is particularly felt as women relied heavily on idealized forms of femininity and motherhood to construct what were strongly gendered accounts of their parenting.

Constructing the "Good Mother"

The construction of the image of "good mother" is a vital insight into how strongly cultural ideals of femininity impact, shape, and limit the ways in which incarcerated women can be mothers. Virtually all of the women reported engaging in physical, embodied activities that demonstrated their roles as mother. Providing emotional support and guidance to their children was considered sufficient evidence of behaving as a mother while in jail. While a few stated that it was difficult, most of the women did not hesitate when asked what they do as mothers in jail. These activities were largely restricted to conversational interaction with children during telephone calls or visits, though letters were also cited as ways in which the mothers engaged in mothering acts. The attribution of the achievement of "good mother" was a dimension of the accounting that fully demonstrates the control and direction provided by gendered cultural ideals of womanhood and parenting.

All women eagerly accepted the identification of mother and spoke at length of the acts of mothering they did, despite being in jail. Notwithstanding the societal labels of "bad" or "unfit" mother that society and individuals in their lives had placed on them, the jailed mothers tailored their accounts of their motherhood to present evidence of being a "good mother." The resources drawn upon to create this construction include traditional values of womanhood and motherhood that are used to categorize them as not being good mothers. Women cited caring about their children, taking care of their own problems, and past histories as good mothers as evidence of their good motherhood. The significance of invoking traditional gender ideals in the account comes when we examine the purpose of the interaction: for them to discuss motherhood. Given stigmas experienced because of challenges to their value as mothers, these women shaped their accounts to appear as good mothers in an effort to demonstrate normalcy and reasonableness in the face of what would otherwise appear to be unreasonable. The social interactional action of providing the good mother account was an effort to present a positive, acceptable face to a stranger interested in their mothering. By including attitudes and actions which are in compliance with gendered traditional expectations, the hope was to cast the most favorable light on themselves.

We have much to gain in examining the ways in which incarcerated women experience motherhood. Stresses and pains of imprisonment are only part of the story. The very nature of the structural and cultural controls felt by mothers shape and define not only the ways in which they can engage in the practices that comprise motherhood, but also the ways in which they will understand motherhood and themselves as mothers. Institutional controls on parenthood clearly inhibit effective parenting, and calls for more intimate visitation with children as well as more noncustodial sentences for mothers' crimes are clearly indicated. But more importantly, we need to look at the ways in which traditional gender ideals create and eliminate ways of defining motherhood and the implications of that. By encouraging mothers in a supportive way to look beyond the necessity of appearing competent as "good mothers," we can encourage them to honestly appraise their strengths and weaknesses as parents and as adults in general (see also Clark, 1995). This kind of application can encourage us to do more research into the "how" of incarcerated mothering as a resource for producing change in the lives of imprisoned mothers.

REFERENCES

Baunach, P. J. (1985). *Mothers in prison*. New Brunswick: Transaction Books.

Beckerman, A. (1994). Mothers in prison: Meeting prerequisite conditions for permanency planning. *Social Work*, *39*, 9–14.

Beckerman, A. (1998). Charting a course: Meeting the challenge of permanency planning for children with incarcerated mothers. *Child Welfare*, *77*, 513–530.

Berg, B. L. (1998). *Qualitative research methods for the social sciences*. Boston: Allyn & Bacon.

Berry, P., & Eigenberg, H. (2003). Role strain and incarcerated mothers: Understanding the process of mothering. *Women and Criminal Justice*, *15*, 101–119.

Block, K. J., & Potthast, M. J. (1998). Girl scouts beyond bars: Facilitating parent-child contact in correctional settings. *Child Welfare*, *77*, 561–579.

Clark, J. (1995). The impact of the prison environment on mothers. *The Prison Journal*, *75*, 306–330.

Connell, R. W. (1987). *Gender and power*. Stanford, CA: Stanford University Press.

Connell, R. W. (1995). *Masculinities*. Berkeley, CA: University of California Press.

DuDeck, J. (1999). The effects of jail on mothers and children. Unpublished Master's thesis, California State University, Northridge.

Fishman, S. H. (1982). The impact of incarceration on children of offenders. *Journal of Children in Contemporary Society*, *15*, 89–99.

Garfinkel, H. (1967). *Studies in ethnomethodology*. Englewood Cliffs, NJ: Prentice-Hall.

Gaudin, J. M. (1984). Social work roles and tasks with incarcerated mothers. *Social Casework*, *65*, 279–286.

Gaudin, J. M., & Sutphen, R. (1993). Foster care vs. extended family care for children of incarcerated mothers. *Journal of Offender Rehabilitation*, *19*, 129–147.

Giallombardo, R. (1966). *Society of women: A study of a women's prison*. New York: Wiley.

Goffman, E. (1961). *Asylums*. New York: Anchor Books.

Heritage, J. (1984). *Garfinkel and ethnomethodology*. Cambridge: Polity Press.

Jensen, V. (1991). Inmates, residents, and convicts: Social types in a women's prison. Unpublished master's thesis, University of Oklahoma, Norman.

Johnson, A. G. (1997). *The gender knot: Unraveling our patriarchal legacy*. Philadelphia, PA: Temple University Press.

Klein, D. (1995). Crime through gender's prism: Feminist criminology in the United States. In: N. Rafter & F. Heidensohn (Eds), *International Feminist Perspectives in Criminology: Engendering a Discipline* (pp. 216–240). Philadelphia, PA: Open University Press.

LeFlore, L., & Holston, M. A. (1989). Perceived importance of parenting behaviors as reported by inmate mothers: An exploratory study. *Journal of Offending Counseling, Services, and Rehabilitation*, *14*, 5–21.

Lindsey, L. L. (1994). *Gender roles: A sociological perspective*. Englewood Cliffs, NJ: Prentice-Hall.

Luke, K. P. (2002). Mitigating the ill effects of maternal incarceration on women in prison and their children. *Child Welfare*, *81*, 929–949.

Messerschmidt, J. W. (1993). *Masculinities and crime: Critique and reconceptualization of theory*. Lanham, MD: Rowman & Littlefield.

Messerschmidt, J. W. (1995). From patriarchy to gender: Feminist theory, criminology, and the challenge of diversity. In: N. H. Rafter & F.Heidensohn (Eds), *International Feminist Perspectives in Criminology: Engendering a Discipline* (pp. 167–188). Philadelphia, PA: Open University Press.

Morash, M., & Schram, P. J. (2002). *The prison experience: Special issues of women in prison*. Prospect Heights, IL: Waveland Press.

Mumola, C. J. (2000). Incarcerated parents and their children (USDOJ Publication No. NCJ 182335). Washington, DC: U.S. Department of Justice.

National Institute of Corrections (1998, September). *Current issues in the operation of women's prisons*. Longmont, CO: U.S. Department of Justice, National Institute of Corrections Information Center.

Norman, J. A. (1995). Children of prisoners in foster care. In: K. Gabel & D. Johnston (Eds), *Children of Incarcerated Parents*. New York: Lexington Books.

Owen, B. (1998). *In the mix: Struggle and survival in a women's prison*. Albany, NY: State University of New York Press.

Rothman, B. K. (1989). *Recreating motherhood*. New York: W. W. Norton & Company.

Russo, N. F. (1979). Overview: Sex roles, fertility, and the motherhood mandate. *Psychology of Women Quarterly*, *4*, 7–15.

Schafer, N. E., & Dellinger, A. B. (1999). Jailed parents: An assessment. *Women and Criminal Justice*, *10*, 73–91.

Schur, E. M. (1984). *Labeling women deviant: Gender, stigma, and social control*. New York: McGraw-Hill.

Speer, S. A. (1999). Feminism and conversation analysis: An oxymoron? *Feminism and Psychology*, *9*, 471–478.

Stanton, A. (1980). *When mothers go to jail*. Lexington: Lexington Books.

Sykes, G. (1958). *A society of captives*. Princeton, NJ: Princeton University Press.

Thorne, B. (2001). Gender and interaction: Widening the conceptual scope. In: B. Baron & H. Kotthoff (Eds), *Gender in Interaction* (pp. 3–20). Philadelphia, PA: John Benjamins Publishing Company.

West, C., & Fenstermaker, S. (1993). Power, inequality, and the accomplishment of gender: An ethnomethodological view. In: P. England (Ed.), *Theory on gender; Feminism on theory* (pp.151–174). Hawthorne, NY: Aldine de Gruyter.

West, C., & Fenstermaker, S. (2002). Accountability in action: The accomplishment of gender, race, and class in a meeting of the University of California board of regents. *Discourse and Society*, *13*, 537–563.

West, C., & Zimmerman, D. H. (1987). Doing gender. *Gender and Society*, *1*, 125–151.

Williams, L. S., Alvarez, S., & Andrade Hauck, K. S. (2002). My name is not Maria: Young latinas seeking home in the heartland. *Social Problems*, *49*, 563–584.

Zimmerman, D. H., & Boden, D. (1991). Structure-in-action: An introduction. In: D. Boden & D. H. Zimmerman (Eds), *Talk and Social Structure: Studies in Ethnomethodology and Conversation Analysis* (pp. 3–21). Berkeley, CA: University of California Press.

PART III:
SOCIAL CONTROL BY LEGAL PROFESSIONALS AND FUNCTIONARIES

This Page Intentionally Left Blank

PROSECUTING MIKE TYSON: BOXING WITH THE MEDIA

Jeffrey A. Modisett* and Judge David J. Dreyer

ABSTRACT

In 1991, former heavyweight champion Mike Tyson was charged with raping an 18-year-old beauty contestant in Indianapolis, Indiana. The county prosecutors approached their strategy in the legal case separate and apart from their handling of the intense media scrutiny. The chapter details how this bifurcated approach helped to win the trial, though it may have lost the public relations battle. The study finds that, while the media is not necessarily the prosecutor's enemy, its presence and involvement in high-profile cases is so great that it does in fact have an impact on the investigative and prosecutorial aspects of the case. In such cases, even in the midst of public attention, misunderstanding, occasional hostility, and often erroneous commentary, the prosecutor must accept, understand, and manage the media intrusion.

---

*Jeffrey A. Modisett was the elected Prosecuting Attorney for Marion County (1991–1994) and was later elected Attorney General of Indiana (1997–2000). Judge David J. Dreyer was Modisett's Chief Counsel (1991–1994) and was elected to be a Marion County Indiana Superior Court judge in 1997. The more common title is "District Attorney," but in the State of Indiana, both the state constitution and myriad state statutes use the term "Prosecuting Attorney." For accuracy, we use the technically correct title in this article rather than the more commonly-used title.

Ethnographies of Law and Social Control
Sociology of Crime, Law and Deviance, Volume 6, 145–163

ISSN: 1521-6136/doi:10.1016/S1521-6136(04)06008-7

INTRODUCTION

> When Santayana said that another world to live in is what we mean by religion, he could hardly have foreseen how his remark might apply to the sports mania of our time . . . Set beside the media-promoted athletes of our time and the iconography of their success, the average man knows himself merely average . . . Boxing is not to be seized as a metaphor for life, but its swift and sometimes irremediable reversals of fortune starkly parallel those of life, and the blow we never saw coming – invariably, in the ring, the knockout blow – is the one that decides our fate. Joyce Carol Oates, *Life Magazine*, "Mike Tyson", March 1987.

On July 19, 1991, former heavyweight boxing champion Mike Tyson lured a naive 18-year-old girl to his Indianapolis hotel room and raped her. Six months later, a racially-mixed Marion County jury found him guilty. In between, and as occurs in all date rape cases, the prosecutors and defense attorneys battled to investigate the facts, collect evidence, and build their cases. However, as the prosecutors were to quickly learn, this fight was destined to be waged on two fronts. While the prosecutors fought to hold the rape prosecution together – a notoriously difficult and delicate effort even in non-celebrity cases – they would also be required to fight a separate battle with the media, sparring with cameramen and reporters on a daily basis. At stake was not only control of public opinion in one of the highest-profile celebrity trials of the late 20th century, but also access to untainted evidence, an impartial jury pool, a fair trial, the truth, and justice itself.

We served as two of the four main prosecutors for *State of Indiana v. Michael Tyson* in 1991–1992. As veteran criminal prosecutors, we were well-acquainted with the highly technical legal and procedural terrain ahead of us; it was what we had been trained for and had experience in. But we had no experience as the focus of frenzied media attention, we were inexperienced. Even past political campaigns had ill-prepared us for the onslaught to come. We would have to learn a whole new set of skills that our law school professors simply did not teach – and we had to learn them quickly and "on our feet."

Immediately after the guilty verdict was handed down by the jury, the entire experience still had not quite hit us. Our outlook was simple: the *Tyson* case was largely unremarkable as a basic criminal rape case, but had been blown up by the media because of Tyson's celebrity. However, with the benefit of hindsight, we now believe that proving the criminal rape case under such intense media scrutiny (and interference) was in many ways very remarkable. Our achievement was more significant because we learned to overcome the media, and because *they* completely missed this aspect of the story. By focusing on a defendant who was arguably among the most recognizable persons in the world, the media missed what was a significant part of the "real story": that local prosecutors had secured a

"*Rocky*"-type victory over a high-priced criminal defense team of national renown, contrary to the predictions of almost all the pundits. Throughout the investigation and prosecution, we focused solely on winning the legal case; but ultimately we also learned that essential to winning the *legal* case, we also had to address the *media's* intrusion. We found out early that by not stroking the media's ego, the media usually made us pay. Indeed, the specious claim by some of Tyson's defenders that he was a man convicted by the fluke of a bad defense team appearing before a "home town" jury and judges could be the unfortunate result of our inability to handle the media better – especially at the initial stages. It is said that history is written by the winners, but the winners surely would prefer that the writing not be the work of a disgruntled media.

In a less celebrity-obsessed society, the legacy of the *Tyson* case would help improve understanding of, and better prevent, acquaintance rape. Acquaintance rape is nothing less than a social epidemic in contemporary life, with no end in sight or effective counter-strategy. The alarming phenomenon of rape by a "non-stranger" (that is, an acquaintance, intimate partner, or friend) was well-known to law enforcement and prosecutors at the time Mike Tyson visited Indianapolis in July 1991. As prosecutors, we were aware that Bureau of Justice Statistics and the FBI Uniform Crime Reports show that victims of rape most often knew their attackers, like Tyson's victim did.[1] The *Tyson* case was an acquaintance rape case which should have brought further needed attention to the plight of such victims. Unfortunately, because the case involved a high-profile celebrity defendant, it became a spectacle.

Of course, on the one hand our focus was to use the law and prove the case against the defendant to the jury. *State of Indiana v. Tyson* ("*Tyson*") presented issues which are common and recurrent in rape cases. The elements of rape generally include: (i) penetration; (ii) force; and (iii) lack of consent.[2] Slight "penetration" is sufficient. "Force" can be of any type, not necessarily physical and the victim does not have to resist. "Lack of consent" can be manifest in many ways as well. For example, the victim does not have to actually say "no." The prosecution is required to prove *each* of these elements beyond a reasonable doubt to the satisfaction of a lay jury. Rape convictions are the most difficult to obtain among all violent crimes because factual issues often complicate the element of consent.

Many *Tyson* facts were undisputed, such as the penetration itself (the first element above). But significant differences emerged in the accounts given by Mr. Tyson, Desiree Washington,[3] and others. The jury would have to decide whether Tyson used force and whether the victim consented to sex by drawing upon circumstantial evidence of the day Ms. Washington met Mr. Tyson: what she said, what he said, what she did, what he did, what she wore, and what she wanted or did not want when she agreed to go to his hotel room late at night.

On the other hand, this article focuses on how we as the prosecutors in the case were forced to manage and respond to the media and Mr. Tyson's celebrity. From the moment we were informed that allegations of criminal misconduct had been made against Mike Tyson, we knew that media interest would be very high and we wanted to make every effort to ensure that each decision we made was "down the line" and could not be interpreted as partisan or unfair. We knew there would be intense media scrutiny and we wanted to make sure no one could say we did not do a competent and fair job, no matter what the outcome turned out to be. We believed that, because of the enormous media attention about to descend upon us, time was our enemy and we had to be certain that nobody tipped off the press any sooner than necessary. We were especially interested in interviewing fact witnesses and "locking down" their testimony before the media descended upon us and them. We also tried to complete as much of our investigation as possible and to prevent anyone from pre-conditioning or persuading witnesses, before both the media and Tyson started their own investigations and public relations campaigns.

We were so consumed with the proper handling of the legal case, however, we initially were unprepared for the media's treatment of the case. We were oblivious to how our early failure to be mindful of the media's needs for constant projection of the "story" and instant analysis would color the media coverage of the legal case. It simply did not occur to us that upsetting the media could result in widespread coverage questioning the prosecution's and the victim's motives in bringing the case, the competence of the prosecution, or the credibility of the victim. Consequently, we often found ourselves with two adversaries: (1) the defendant, Mike Tyson; and (2) the media.

DATA SOURCES AND METHOD

In writing this article, we began to collect data and information in a variety of ways. First and foremost, we slowly and informally recorded our recollections about our experiences in the case. We also reviewed newspaper accounts we had collected during the case, and over 13,000 archived news items from Internet search engines collected recently. As a result, our recollections were often refreshed. Next, we re-read transcripts of testimony from the grand jury and the trial itself, including Mike Tyson's and the victim's, as well as the opening trial argument of Mr. Tyson's lawyers. These materials are public records that we copied and saved since 1991. Finally, we went to the court files (also public records), and to our own personal files of notes, research, copies of significant legal papers, and miscellaneous items from *Tyson*. As legal professionals and knowing participants, we used these records and recollections of our observations and experiences in an attempt to reconstruct

the key events and identify analytic themes which are closely descriptive of our professional practices.

CASE OVERVIEW AND FACTS

From July 17 to July 19, 1991, Mike Tyson visited Indianapolis (unannounced) to see a girlfriend perform a rap concert. He was accompanied by a bodyguard and hired a local limousine and driver. He met several city officials and other notables attending the annual Indiana Black Expo, including Rev. Jesse Jackson. Ironically, co-author Prosecuting Attorney Jeff Modisett himself stood on the platform with Tyson (and others) during the ceremonial opening of the Expo.

The victim was visiting Indianapolis from Rhode Island to participate in the Miss Black America beauty pageant as part of the festivities. Tyson visited the contestants' rehearsal and met the victim along with the rest of the young women there. He was somehow able to obtain the name of the victim's hotel and phone number. Some beauty contestants later claimed she made comments about Tyson's money after this meeting.

Tyson spent one night with his rap artist girlfriend, but the next night she was unavailable, so his limousine eventually took him over to the victim's hotel late at night. Shortly after midnight, Tyson called the victim from the limousine and asked her to come out with him for a date on the town. After some reluctance and discussion with her roommate, the victim agreed – and brought along her camera since her father was a boxing fan. When she got into the limousine, Tyson told the driver to go to his hotel. When they arrived, he asked the victim to walk with him to his room because he needed to get something. She agreed. After a few minutes in the room, he grabbed her and raped her; it was around 1:00 a.m. She came downstairs and got back into the limousine by herself. The driver later testified she looked dazed, was disoriented, and kept repeating, "I don't believe this." The limo took her back to her hotel. Her roommate later found her in a fetal position in the running shower. Tyson packed up and left town at 5:00 a.m. (unannounced).

The victim continued another two days in the beauty pageant without telling anyone about the rape. But when her parents arrived at the pageant, she immediately told them, called 911, and went to the emergency room of a nearby hospital. The doctors were unable to perform a comprehensive "rape kit" for evidence, but did find cervical abrasions commonly caused by forced intercourse in rape cases.

The primary witnesses who immediately emerged were the victim, the roommate, and the other contestants from all over the country, the limo driver, the hotel staff, and the emergency room doctor. The physical evidence included the victim's

clothing (altered by the rape) and bedding from the hotel. We also later obtained an independent medical expert.

We chose to present the evidence to a grand jury and let them decide whether to file the charges or not. Surprisingly, Tyson himself agreed to testify; he claimed the sex was consensual. In addition, about eight other beauty contestants from around the country testified before the grand jury. After the indictment in early September 1991, the trial took place less than five months later in later January 1992. The jury deliberated about nine hours and found Mike Tyson guilty of rape and criminally deviant conduct. He eventually spent three years in an Indiana prison.

MANAGING THE PROSECUTION IN THE *TYSON* CASE

> The trial will constitute an event so extraordinary as to be virtually without precedent . . . no athlete of Tyson's celebrity and stature has ever faced criminal charges of such gravity . . . William Nack, *Sports Illustrated*, January 20, 1992.

There is an old adage that "a prosecutor never loses." A defense lawyer has the obligation to defend his client and raise reasonable doubt to undermine the state's case, but does not have the burden of establishing the innocence of the accused. By contrast, a prosecutor is obligated to do justice in the case and to use his or her discretion to determine what is right and what is fair. Prosecutors represent the public and are required to pursue truth and justice, maintain fairness and due process in the system, and even protect the rights of the accused. So a prosecutor "never loses" in the sense that justice is done, whether the case is "won" or not.

The prosecutor's job in all criminal prosecutions is to investigate the alleged crimes, seek charges and indictments when appropriate, anticipate opposing defenses and evidence, prepare the case for trial, and try the case to the jury. This inevitably involves ongoing efforts to overcome emergent obstacles, manage difficult and surprise situations, and advance the State's partisan aims, while at the same time limiting the effectiveness of the defendant's tactics, moves, and maneuvers. The prosecution of *Tyson* had many notable turning points which served to convince us and/or jurors of Mike Tyson's guilt. For example, co-author Chief Counsel David Dreyer decided to pointedly ask Tyson in front of the grand jury why he was pursuing the victim for allegedly consensual sex when he had sex with his girlfriend the night before. Tyson's reaction was hostile. He reached over the witness table and said to Dreyer that he did not need his approval to have sex. It was a very telling moment for the grand jury, especially since grand jurors were trying to decide if this man waited for the woman's approval before having sex.

Other significant developments occurred as the result of the grand jury testimony. During his testimony, Tyson recounted the sexual encounter with the victim as a long, romantic, and consensual interlude. Tyson's bodyguard told the grand jury the same story, claiming he was listening through the bedroom door in Tyson's hotel suite. After hearing this testimony, we went back to the hotel and discovered hotel records and receipts showing the bodyguard had lied – that he was in fact having room service in his own room at the precise time the rape was occurring. If the bodyguard had lied on Tyson's behalf (or perhaps at his request), it was highly likely that Tyson had also lied. While we were trying not to come to a conclusion prior to the presentation of all the grand jury evidence, as the lies from Tyson and his camp came forth, we had no reason to doubt the victim's account and became committed to securing a conviction.

Later, our three-and-a-half-hour grand jury questioning of Tyson became important evidence in the trial as well. Tyson changed his testimony at trial and explained that he did not tell the grand jury an allegedly key piece of testimony, that is, that he clearly informed the victim of his sexual intentions before the sexual act, because the prosecutor questioning him had "cut him off." We played the grand jury tape at the trial and it clearly showed that grand jury prosecutor Dreyer had not cut Tyson off and had instead invited him several times to offer information in an open-ended manner. When the tape finished playing for the jury, you could have heard a pin drop.

TYSON'S CELEBRITY STATUS AND THE MEDIA INTEREST INFLUENCES STAFFING IN THE PROSECUTION'S CASE

The high-profile nature of the *Tyson* case and the intense media interest in it affected the decision-making of the prosecutors right from the start. Most of the witnesses were contestants at the Miss Black America Pageant – the event that had brought Tyson, the victim, and many other witnesses (some of them very high-profile celebrities themselves) to Indianapolis. Normally, we could call witnesses to a crime on the telephone and ask them to come in to the prosecutor's office for an interview. However, in this case, we had to interview 20 witnesses who were spread out all over the country after leaving the pageant. This is not an unusual situation in a federal case, but it is highly unusual in a local case being conducted by a county prosecutor. Moreover, because the case involved Mike Tyson, we were concerned that the media would want to get to any potential witnesses first to get the "scoop." Consequently, creative measures were called for and undertaken.

Prosecuting Attorney Modisett decided to speak directly with the Special Agent in Charge for the local FBI and got his agreement to use FBI agents in the respective states to locate and interview witnesses. This was unorthodox, but the Justice Department was willing to help because they had an ongoing interest in Don King, Tyson's promoter. Prosecutor Modisett's prior experience and contacts in the federal system, together with the FBI's ongoing interest in Don King, led to the adoption of this creative solution to the difficult logistical problems facing the county prosecutors.

Internal staffing in the case was also affected by its high-profile nature. We concluded early on that recently-elected Prosecutor Modisett should not personally be in charge of the trial. This was a difficult decision since a conviction would undoubtedly catapult the career of the lead trial prosecutor, but not of the prosecution's behind-the-scenes supervisor. Still, local political circumstances and the practical realities of managing a big-city prosecutor's office precluded any such serious consideration of this option. Also, we came to understand that it would in fact be a no-win situation: people would accuse the Prosecuting Attorney of grandstanding if we won and the criticism would be even more fierce if we lost. We agreed that Chief Counsel Dreyer would handle all pre-trial and some post-trial matters. Other prosecutors in the office would participate in the trial. Once a jury had determined guilt beyond a reasonable doubt, Prosecutor Modisett would handle the sentencing hearing and other post-trial issues.

Many other decisions regarding staffing were affected by the celebrity nature of the case and the media attention it was drawing. Initially, we thought we would use county's sex crimes specialist to handle the trial. However, the sex crimes prosecutor advised she was not interested in doing the trial. Amazingly, when we approached other veteran prosecutors inside the office, they too were reluctant to do the case. Since this was a "career case" for a lawyer, their reticence was a clear indication that the early media coverage had already convinced many people, including our own veteran prosecutors, that the case could not be won.

Instead, we recruited a private attorney already under contract to our office to be the lead trial prosecutor, together with another of our staff attorneys who had experience and expertise in jury trials. The private attorney was a well-known former prosecutor who had an excellent reputation as a trial attorney. Moreover, he was someone from the opposite political party. The previous elected prosecutor had signed a contract with him to conduct civil forfeiture proceedings for the office, and the contract had not expired. Thus, the appointment worked for all the right reasons: He was a very good trial attorney who had done numerous death penalty trials; his selection kept the case from overwhelming our office; his appointment de-politicized the case; and it kept all the credit and blame on an independent party and sent a signal that we intended to play it right down the middle from the outset.

But because we did not prepare or package the announcement of his involvement, instead of the media writing about a veteran prosecutor from our office returning for the big fight, they described him as a "hired gun" coming in to try to salvage our case.

In addition, we sought assistance from large private law firms in Indianapolis. They were willing to help and they lent us young attorneys free of charge for weeks and months to aid us with the trial preparation. For many of them, it was a big thrill to be associated with such an historic event. Finally, we enlisted periodic advice from a well-known retired criminal judge on all aspects of the case. This was never made public. Since he was also employed during the trial as a media commentator, he could advise us on the media as well. His advice was great, but his support was even more valuable. All of this was extraordinary.

Thus, while the news-worthiness of the *Tyson* case attracted the media unabashedly and in droves, it had just the opposite effect on many members of the prosecutorial side, including medical and other expert witnesses who would normally have participated in the trial. The media's impact even had a negative effect on the ability of the prosecution to present expert medical testimony at the trial. We had retained another medical expert from North Carolina to testify on "rape trauma syndrome." Although this was a new medical field at the time, (like DNA), it was clearly admissible evidence for whatever weight the jury would give it. Courts have held that "rape trauma syndrome" evidence is admissible in cases where the defense is consent (see e.g. *People v. Beldsoe*, 36 Cal. 3d 236). But the media portrayed the theory as novel and speculative. In fact, it had been accepted in Indiana four years earlier in *Simmons vs. State* (1987) Ind., 504 N. E. 2d 575. When the defense asked the judge before trial to exclude the expert, she complied. The pros and cons of "rape trauma syndrome" had in effect been weighed and publicly discounted before the evidence was ever heard. Apparently, we started to realize, possibly even the Court could be affected by the media.

Moreover, we could not find through our usual channels a doctor who would testify on the prosecution's behalf as a medical expert, a phenomenon that we had never experienced in any other rape case. Although the victim's vaginal lacerations were clearly the result of force, and other classic rape injuries were apparent, the doctors we approached refused to testify. We had the top expert in town advising us, but he would not agree to come to court or to convince one of his cohorts to testify. He admitted to us that his refusal was based on the fact that he did not want his name forever linked to this case. We had to resort to other devices: after our initial efforts were exhausted, we sent our new lead trial attorney to see the doctor. Chief Counsel Dreyer had been the "bad cop" arguing with the expert to get him to testify. Now, the "good cop" pleaded with him. Ultimately, the doctor promised to help us find us someone who would testify, and he did.

MANAGING THE MEDIA: THE OTHER BATTLE

> High-celebrity cases are like huge mountains – they create their own weather systems. Michael Goodbee, former Eagle Co., Colorado Prosecutor.

No one could have foreseen the extent of the media interest and scrutiny in this case. Indianapolis had never seen such a celebrity case before (probably the closest predecessor was the murder trial of D. C. Stephenson, the notorious head of the Indiana Ku Klux Klan in the 1920s). Moreover, few cities anywhere had seen such a celebrity case. In 1991, the electronic media itself was still developing. There were essentially no cell phones and few computers, but there were plenty of electronic pagers and cameras. This was before O. J. Simpson, before Kobe Bryant and Michael Jackson, before Scott Peterson and Martha Stewart, before reality TV, and before celebrity trials had permeated 24/7cable television and the national culture.

One hundred and nine news organizations eventually covered the *Tyson* case in Indianapolis for six months following the charges and beyond. Unfortunately for us, the members of the media seemed rarely able or willing to become interested in any frame of reference larger than a camera lens. As stated above, we tried to get as much investigation done on the case as we could before the news that Mike Tyson was involved could spread. We spent considerable time during the first five days subsequent to the rape quietly gathering evidence and remaining mum about suspect Tyson's identity. However, the rape allegations eventually leaked out (probably from a local police officer anxious to curry favor with a local reporter – another example of the media's impact).

The local story focused only on the partial information the media had managed to gather, which was just a small part of our expedient investigation. Before we knew it, claims were being made that we had let "the trail grow cold." We immediately found ourselves on the horns of a dilemma: by failing to bring the media into our investigation from the beginning, the media decided to characterize our investigation as sloppy and slow, despite the fact that we were working day and night, across a dozen states, with the close cooperation of the FBI and other professional law enforcement agencies. Yet if we had brought the media in earlier, the initial stories would likely have been more favorable, but the efficacy of our investigation in these crucial first days would almost certainly have been sacrificed.

Even though we could not initially gauge the eventual effect of the media on our case, we were very leery of its intrusion. We made the conscious decision to advise the police to keep Tyson's name out of the preliminary police report (a public document) until we could get our work done. This was somewhat unusual,

but perfectly legal. We knew from our own research that there were no statutes prohibiting this action. We also specifically asked the police department if their internal policies permitted us to omit Tyson's name at this stage and we were assured that they did. But the media could not abide anything that prevented it from getting all the information, and the omission of Tyson's name (when discovered) eventually resulted in a hailstorm of media criticism, including editorials and cynical coverage of our work. Regardless of this, our action did serve its purpose, and our case *at trial* was really made in those first few days when no media were aware of our investigation. While some claimed we "let the trail grow cold" in those critical first few days, we in fact interviewed numerous witnesses without interference from the media, and had our case preparation largely completed.

While our investigators were scurrying all over town and country to secure testimony and evidence, reporters began buzzing everywhere around our office as leaks created more rumors. We spent a number of days trying to delay the inevitable public confirmation of the criminal rape investigation of Mike Tyson – a public celebrity and household name. So many cases since *Tyson* have made national news that it is now hardly as notable. But in July 1991, this was a huge story and the biggest story of many reporters' careers. We struggled to balance that consideration with our first obligation as prosecutors – to do justice. As a result, many reporters viewed us as disingenuous or even obstructionist. We learned the crucial lesson that when information is kept from the media, the media will not only criticize that withholding, but will often use it to put a negative spin on the substance of the story as well. (The media's thinking appeared to be that if we were acting in secret, we must be trying to cover-up incompetence; privacy issues and good prosecutorial work were not valid considerations.)

There were many other milestones in the emerging prosecution battle with the media. At the beginning of the investigation, we did not even have a media person on staff in our office. We quickly decided we needed a constant public spokesperson, so we drafted our office budget director, an accountant who looked and acted (and was) very trustworthy and could speak articulately and unemotionally. Interestingly, he continued in that role after the *Tyson* trial, first in our office and subsequently with a major Indianapolis company where he became a public relations executive.

Another key event occurred during the first day of the grand jury proceedings when we learned the benefit of merely giving any statement to the media. We normally arrived at the grand jury offices at 7:00 a.m. Each morning, we got off the elevator and were met by a phalanx of bodies covering the floor in front of the office. They were cameramen sent to get the day's shot for the evening news or

the late edition papers. They had gotten to the grand jury so early each morning they were napping by the time we arrived. As they all jumped up, we made our way quickly into the grand jury offices. They were not allowed into the offices, but their numbers swelled all day, and we never came out. They knocked, looked in the windows and grew frustrated, but we were prohibited by law from discussing the grand jury proceedings. Finally, a local well-known TV reporter got Chief Counsel Dreyer on the phone and vented his frustration. He explained the practical realities of the situation we were all facing: growing national attention, news directors sending out assignments for any shot or comment, and the cameramen and reporters standing for twelve hours outside the offices. At that moment, we understood. The next day, and every day the grand jury met thereafter (about two weeks), we had Dreyer come outside the door to the grand jury offices before deadline to talk to every reporter on camera. In truth, he said nothing aside from vague generalities about the criminal justice system. He said nothing about the *Tyson* case or the grand jury proceedings. He talked a lot about how the grand jury operates, how prosecutors are bound to be fair, how the criminal justice system works, etc. Sometimes they used the footage, sometimes not. After that, we knew how to better play the game. We had fed the beast and our rounds with the media became more evenly matched.

The high profile nature of the case and the obvious media interest in it were the primary reasons why we decided to take the case to the grand jury for indictment, even though it could have been charged outright (as is done in most criminal cases in Indiana). Prosecutor Modisett came from the federal system which uses grand juries frequently and as we discussed our strategy the advantages of this approach became obvious. The grand jury afforded the sanctity of physical space, away from the glare of the media, and the process gave us additional time to prepare our case. We could obtain a lay jury's opinion on the merits of the case (a "dry run" of sorts) and, most importantly, the procedure required confidentiality during the decision to indict or not. A smaller case could have been presented to the sitting grand jury, but a case of this length and complexity required the convening of a special grand jury.

The process for creating a special grand jury is quite routine and begins with a motion to a criminal court to appoint the grand jury. At this point in time, we thought we had still managed to keep Tyson's identity under wraps. However, when we approached our first judge with the motion, he indicated he would not do it unless we told him who was the target. This was an unprecedented (and inappropriate) response, and our first indication that the "cat was out of the bag." Facing pressure, we told the judge that Tyson was the target, and he entered the appropriate orders to get the grand jury process started, but the leak about Tyson seemed to immediately intensify.

At the time of the *Tyson* trial, there were very few precedents addressing how to deal with a high profile celebrity rape case. The notable exception was the William Kennedy Smith rape case, which had taken place just months before our trial. We studied this case and wanted to be aware of all its aspects, legal and non-legal. We learned that at trial Smith's defense team intentionally and carefully presented all of its evidence in such a way as to constantly communicate a certain image of the victim to the jury and public, that is, of a woman who had probably consented, but was confused and embarrassed, and could not be believed. We were also interested in how Smith's defense had handled the media. We feared that Tyson's defense would attempt similar tactics, and we discussed how to counter them.

We decided that, at the first hint of public "spinning," we would aggressively attack back by seeking to seal all court papers and to hold hearings in private. Even if that did not work, we would be making our public response in a proper, logical and legal way. As it turned out, we did not see anything unusual or inappropriate from the defense until a month before trial, right before Christmas, in a long and irrelevant footnote in a pleading that attacked the character of the victim. We immediately sought to seal all pleadings and accused Tyson's lawyers of violating the state rape shield laws. Our attack made news coast-to-coast and Tyson's defense quickly agreed to seal everything. While the prosecution in *Bryant* attempted to protect the victim's character, too, they did not fully anticipate that the defense could drop bombs during routine cross-examination during pretrial proceedings ("sex with three different men in three days") and lost the public relations battle before the trial was able to get underway.

In addition, early on Tyson's lawyers deposed our crime lab expert. During the deposition, they repeatedly referred to the case as the "Washington case." We repeatedly objected and referred to it as the "*Tyson* case." We believed that this was further evidence of defense attempts to proceed in ways akin to the Smith defense. A related tactic was recently utilized by the *Bryant* defense team, with the defense objecting to the prosecution's use of the term "victim" to refer to the woman making the sexual assault allegations against Bryant, and asking the court to instead refer to her as the "complaining witness."

Our trial itself presented numerous logistical problems because of public interest and the media frenzy. The trial judge did a remarkable thing – she appointed a diverse committee to develop and enforce a media management plan, perhaps the first of its kind. It included a lottery for seats, ensured seats for local news organizations, allowed certain seats for the public, and most significantly, obtained state Supreme Court approval for a closed circuit cable telecast to a basement room in the courthouse for all of the media which could not get in. That committee model

was new, unprecedented, and innovative. It is still cited today in literature about courts and media.

Getting the victim in and out of the courtroom was no easy feat. When the young victim was scheduled to appear for the trial, we faced the daunting gauntlet of reporters and cameras, though we were still intent upon preserving her (then) anonymity. We approved a police plan to use a decoy– a paralegal dressed in sunglasses and scarf– and simultaneously sneak the real victim through a basement corridor. The plan would have worked, except one local TV cameraman was tipped off. Nevertheless, the lone camera was foiled from getting his exclusive footage when the victim's escort, another paralegal, spontaneously put his hand over the cameraman's lens, blocking the videotaping of the real victim. Many media members, especially local news gatherers, became furious and complained bitterly about the use of the decoy. But most alarmingly, the reporter who was tipped off, but stymied from getting his exclusive camera shot, entered the courtroom seeking a fistfight with the paralegal. We had to physically restrain both of them before the judge walked in to start the trial.

While the media impact was often negative, on occasion the impact was either neutral or even helpful to the prosecution. For example, following Tyson's initial arraignment, he held a press conference to deny the charges. Afterwards, seated at the same table where the press conference took place, Tyson continued to talk to a member of his entourage unaware the camera and microphone were still on. No one was around, but the camera was rolling. Later, the TV station noticed the out-take, called us, and allowed us to all come and view the tape in their studios. They even tried to help us enhance the tape and hear it better. The tape showed Tyson ranting about how the rape charge was hurting him and culminated in his statement that he should have "killed the bitch." We tried to get the unused footage admitted into evidence. Tyson claimed he was referring to a local reporter at the news conference, and the court would not allow it as evidence. But, it showed a unique circumstance when media work itself became part of the investigation and, to their benefit, the media had no qualms about helping.

We also noticed that Jose Torres, a notable boxing figure, had written a detailed book about boxing and its psychological elements. His comments were sometimes included in feature stories about *Tyson*. He related many examples of the aggressiveness of boxing leading to deviant behavior, and had a plethora of stories about Tyson and his assaults on women. We flew to meet Torres and found him very cooperative and eager to testify. We tried to get Jose Torres as a witness, but the Court would not allow him since such evidence of prior bad acts is usually not admissible. We continued to be interested in Tyson as a person and consulted with Torres to predict what Tyson might be like at trial.

THE PROSECUTION'S INTEREST IN PURSUING THE "CASE" VERSUS THE MEDIA'S INTEREST IN PURSUING THE "STORY"

> [The trial] could make the Bonfire of the Vanities seem like a cozy campfire. John Shaughnessy, *The Indianapolis Star*, January 27, 1992.

There was a constant strain between the prosecution's interest in pursuing the "case" and the media's interest in pursuing the "story." There were over 2,500 press stories posted around the world by the time the *Tyson* trial was over and many more were written during the appeal. From our perspective as prosecutors, it appeared that the media was constantly trying to invent or build the stories. Commentators and reporters often "tried" the case in the press or attempted to second-guess the trial attorneys. While this became commonplace during the *O. J. Simpson* trial, it was a relatively new phenomenon in 1992.

Jury selection is considered by both the prosecution and defense sides to be a critical procedure which often means the difference between winning and losing a case. A celebrity with the financial means to do so may find himself or herself in a position to try to precondition a jury pool before jury selection actually begins, for example, through a public relations campaign. This kind of inappropriate conduct could facilitate the selection of a jury from the jury pool with a more favorable impression of the defendant and more likely to believe his version of the facts. About three weeks before trial, the court conducted a lengthy hearing on many issues, including whether our jury system was defective because it did not allow a sufficient number of African-Americans on the jury. This defense claim lacked legal merit, and was certain to fail, but the defense had hired several experts to testify to support it. Their purpose was to create the image of a hostile local community that could not be fair to Tyson, especially for potential jurors who were coming to the courthouse within days. Tyson's lawyers wanted African-Americans to turn out in droves for jury duty, and wanted others to feel pressure to *prove* that they could be fair.

Just days before jury selection in the *Tyson* case, members of the media asked us what we thought about the fact that Tyson was giving away hundreds of free turkeys to the inner city community in Indianapolis. Of course, we showed interest in this news and responded that we would have to look into it, but we added matter-of-factly that a defendant is not allowed to try to influence a potential jury pool. Later, the prosecutor's office learned that Tyson had annually given away turkeys in various cities, including Indianapolis, a fact of which they had not been aware. Although we had specifically spoken in theoretical terms and made it clear that

we would have to investigate the situation ourselves, the press nevertheless had a field day when we ultimately acknowledged that the giveaway appeared to be an annual event that was not related to the upcoming jury selection. The media's role in presenting us initially with incomplete and inaccurate information was never examined, but our subsequent clarification was quickly labeled an "apology" and the story made headlines.

A good story may result from uncovering what appears to be an inconsistency or weakness in one side's case. During the *Tyson* trial, the defense called one of the prosecution's original witnesses in *their* case. She was a minister who had been "on call" in the emergency room the night the victim came in. She stayed with the victim for counseling and talked to her about the rape. We decided not to call her as a witness for the prosecution because her information was unremarkable to us. However, when the defense questioned her on the witness stand, they elicited the victim's apparent feelings of guilt because of her "participation." That was the minister's word, not the victim's, and it was never clear what "participation" the witness thought the victim was referring to; whether it was her decision to go out with Tyson, or her "participation" in the sex act, meaning consent, as the defense insinuated. Later that day, a lawyer doing commentary for local TV said the minister was a highly important witness for the defense and the public impression of consent was strengthened against the victim. We did not think the testimony was that significant and the impact on the jury was obviously not as dramatic as the TV commentator had reported. But the public was informed that it had great weight, regardless of the reality inside the courtroom.

Today, it is commonplace to see former jurors on high profile cases become minor celebrities themselves, by appearing on the talk show circuit, writing books about their experience, or even posing for *Playboy*. We have all heard stories of jurors who have been kicked off of juries because they were discovered to be keeping notes or a journal for a future book. Trial attorneys are thus faced with a serious problem posed by would-be jurors who actively seek selection on such a jury and unfortunately will do or say almost anything during voir dire (jury selection) which they think will enhance their chance of being selected for the jury, even if their statements are slanted or untrue. After the guilty verdict in the *Tyson* case, we were careful to secure affidavits from all of the jurors to confirm each juror's verdict before the juror or the media could change their minds. Indeed, one juror later appeared on a national talk show to disavow Tyson's guilt. Our affidavit showed him to be craving fame, not justice. There is little doubt that juror questionnaires of today in such famous cases delve into many media issues and that trial attorneys are on the look out for "imposter jurors" trying to acquire their own "15 minutes of fame" after the trial is over as "celebrity jurors."

In addition, part of managing the Tyson prosecution involved dealing with several other celebrities who were potential witnesses in the case. For example, shortly before the grand jury convened, our lead investigator asked Prosecutor Modisett to come to his office to listen to a tape. The tape involved Don King, who had called the investigator to "chat" about the case. In Indiana, it is legal to tape a phone conversation if one party consents. On the tape, King was obviously trying to get friendly with the investigator and often referred to how women always act around Tyson. He spoke to our investigator as if they were two drinking buddies at a bar, clearly trying to curry favor with him. We were surprised that King would call a criminal investigator directly knowing he was investigating Tyson at the time.

In addition, Chief Counsel Dreyer had to interview Rev. Jesse Jackson, who had been in Indianapolis during the Black Expo and spent time with Tyson. Rev. Jackson reportedly told a local official that Tyson was behaving very badly around women and he was concerned about what might happen. During the interview, Dreyer made the conscious decision not to ask Rev. Jackson direct questions regarding Tyson's behavior because he determined Rev. Jackson was not comfortable being interviewed about Tyson, the information had little potential value, and out of concern for offending him. Any other potential witness would likely have been questioned much more thoroughly and aggressively. But the media scrutiny, and Rev. Jackson's own celebrity made it unfair to bring him into a case in which he had no direct involvement.

CONCLUSION

There are many lessons that fellow prosecutors and lawyers, as well as scholars, can take from our experience in *Tyson*, including certain useful legal maneuvers and anticipation of defense tactics. But, what is most important is our appreciation for the power of the media and enhanced understanding of it as a social force. Overall, we were embarking upon uncharted territory in the *Tyson* case, and we did not know what we were going to encounter. True, we would ultimately win our courtroom bout with Mike Tyson by proving our case beyond a reasonable doubt. We had confronted the bobbing and weaving of rape defendants many times before and could to a great extent predict what he would do, and how to fight his defenses and advances. However, our match with the media was much more uncertain. We did not know what they wanted, or where or when they would strike next. Their sheer numbers were overwhelming and we were bruised almost before the battle began.

Prosecutors should always handle high-profile cases with an eye toward their downstream consequences. Critical legal decisions should be made without regard

to media scrutiny or commentary. The goal of any prosecution or investigation is fairness, and this can only be earned by the unaffected steps taken to get the work done and letting the evidence dictate the results, not any media interpretation or speculation. Yet if a story is on TV or in the newspaper, the public often views it as more credible. Thus, it behooves any public actor, legal or not, to project a constructive image and develop a pro-active strategy in dealing with the media. Failure to do so ignores the reality that the media will impact the trial itself. We did not understand this basic premise when we first started *Tyson*. Consequently, we paid a price. Our tone was silence and our appearance was rather non-existent. This lack of contact aroused media suspicion and cynicism which we later realized was the natural result of ignoring the media in such a high-profile case.

We eventually came to better understand the media. At first, we viewed it as a faceless horde with hardly any personal characteristics that needed to be fed constantly. But later, we learned that we had to work with the media, while at the same time protecting confidentiality and privacy interests in the case and pursuing the overall efficacy of the prosecution. Former friends among the local media, and strange reporters from far-off lands alike, were part of the media, all with the shared aim of covering probably the biggest story of their careers and possibly obtaining at least one exclusive story to boot. One local newspaper reporter even asked Dreyer if he would help him churn out a quick book just to make a fast profit. He politely declined. A tabloid talk show in New York called numerous times to get *anybody* from the prosecution to appear on the show and talk about the case. We refused and never told anyone about the offer.

Most of the individual reporters were friendly and fair enough, and since Mike Tyson was a bona fide public figure known worldwide, their need to report was certainly reasonable. Yet, even reasonable coverage became an intrusion on our daily activities with the sheer size of the news force which made it difficult to even walk to our office. There was no single person or entity to blame, just the "media."

The media is not the enemy, but its constant inclination is to *project*, regardless of the merit of the story or the image. In fact, the subjects of media interest are always able to supply, control, and manipulate stories and images to a large degree. Therefore, it is important in high profile cases to be pro-active, patient, cooperative, informative, and most importantly, to engage the media before they engage you. It is not useful to avoid the media and say nothing.

As of this writing, the media are obsessed with the most recent incarnations of the *Tyson* case: Kobe Bryant, Michael Jackson, and Scott Peterson being perhaps the most easily recognized. In all three cases (especially in the *Bryant* case, ultimately dismissed), the prosecution and the Court appear to be re-learning the lessons that are the subject of this article. Indeed, the stories that emerged from the *Bryant* case all but predicted the collapse of the prosecution before trial or certainly before

a verdict could be reached – not due to evidentiary problems, but due to fiascos involving the media such as the inadvertent release of the victim's name, her medical history, and even her alleged sexual history. While one lesson from *Tyson* is that these stories may be inaccurate, it is certainly likely that a well-thought out media plan that addressed security concerns while simultaneously providing the media grist for the daily mill might have avoided some of these missteps – missteps that often directly impact the decision of guilt or innocence.

In retrospect, perhaps we were initially unduly influenced by Prosecutor Modisett's federal experience: Department of Justice prosecutors are indoctrinated to state only what is in the criminal indictment, or to say "no comment," and nothing more. If we had understood the different dynamics of a local prosecution involving a hugely famous personality, the media would have understood more about what we were doing, and why. Accordingly, our boxing match with the media would have resolved into a split decision, or even a friendly spar. Maybe no one could have understood this in 1991 because the media was still developing into its modern behemoth where one celebrity trial can dominate the media for weeks on end on dozens of television channels. Still, we often wish they would have given us a rematch so we could show them that we were only doing our job – and so were they.

NOTES

1. According to the most complete Bureau of Justice Statistics, there was an annual average of 366,460 attempted or completed sexual assaults reported in the U.S., including rape, between 1992 and 2000 – and this is only 34% of the actual number. In 1991, the year of the Tyson rape, the FBI Uniform Crime Reports show reported rapes in America numbered 106,590 – the second-highest year on record – and even 95,136 in 2002, the last year of complete reports. But most alarmingly, victims almost always knew their attackers. In 1997, for example, almost 76.9% of reported rapes were alleged against "non-strangers."
2. Indiana Code 35-42-4-1.
3. The victim in the *Tyson* case was Desiree Washington. Her name was not disclosed during the investigation and trial of Mike Tyson. Ms. Washington decided to go public with her name immediately after the conviction was secured, once the danger of intimidation from the defendant's supporters had passed.

This Page Intentionally Left Blank

ALIENS OF EXTRAORDINARY ABILITY, ALIENS OF EXTRAORDINARY VULNERABILITY: SKILLED PROFESSIONALS AND CONTINGENT STATUS IN AMERICAN IMMIGRATION LAW

John S. W. Park

ABSTRACT

This paper presents a case study of a "non-immigrant" employed by a private firm in the San Francisco Bay Area. As in all such cases, the employee's legal residency remained contingent upon his employment with the petitioning firm. In other words, when the firm terminated him, he fell "out of status," and was forced either to find another petitioning firm, or to leave the country. The case is instructive because its shows how American public law gives powerful private entities – not just the state – the broad authority to determine the basic terms of belonging for thousands of such persons.

THE FIRM

In the spring of 2000, I had been working at an immigration law firm in San Francisco for about seven months, and I had become hooked. It was hard to describe

Ethnographies of Law and Social Control
Sociology of Crime, Law and Deviance, Volume 6, 165–183

ISSN: 1521-6136/doi:10.1016/S1521-6136(04)06009-9

the feeling: the firm was an intense place, full of harried paralegals, last-minute briefs to the federal courts, and attorneys who worked way too hard, often late into the night. The attorneys at my firm cared deeply about their clients: their collective commitment to the law, to a fair result, to a high degree of professionalism in their work – these were especially refreshing for me after years and years of painstaking archival work on my dissertation. And there were also dramatic differences in the work itself: no one cared and nothing seemed to happen when I published an academic paper; but a bad brief meant that someone could get deported, and a good petition or appeal could mean a new life in the United States, and in some cases, it was literally like saving a person's life. The law's impact was more immediate and more proximate, it was like fighting on the ground, often against the government, using only words, and so it was something that deeply attracted me.

The two senior partners were almost like folk heroes in the community of immigration lawyers in San Francisco.[1] David Chestnut came to California in the 1960s, and he was very much a child of that era. He once joked that he had originally come to the City to root for the Giants and to "find himself," although not necessarily in that order. In the neighborhood where he settled, he found a community of Mexicans and Central and South Americans around the Mission District, almost all of them undocumented immigrants, poor, or fleeing persecution of one kind or another. Dave became involved in the sanctuary movement, so much so that he took a law degree at Golden Gate University so that he could represent many of the families he had come to know as friends. His career from there was legendary: he successfully built a practice out of a small office in the Mission District, argued several important cases before the Ninth Circuit Court of Appeals, and twice appeared before the United States Supreme Court in leading asylum cases that are still "good law." He didn't do all this for money; like an idealist, he went into the law to help his friends. Twenty years later, he was doing pretty much the same kind of thing, with the same level of enthusiasm and purpose, and even during the baseball season.

But perhaps because his line of work wasn't always profitable, his partner since the mid-1980s, Anna Marcus, joined Dave in creating a firm that did business immigration as well as criminal deportation, asylum, and immigration for family reunification. Anna was no less an intense person: she was a self-described ardent feminist from Swarthmore College who didn't "take shit from anyone, especially if they were from the INS." Many of her early cases after law school were in asylum and refugee law, but being a pragmatist as well as an idealist, she developed specialties in business immigration, and she cultivated contacts with some of the largest transnational companies in the Bay Area. She also developed expertise in the immigration of the highly skilled and highly educated in general – she was retained by Stanford as a consultant to help the University with their

foreign students and scholars, and she was handling cases on the leading edge of "globalization" and "transnationalism" long before these became fashionable academic concepts. Together, Dave and Anna had developed over a decade a "Robin Hood" immigration law firm: they billed their wealthier clients so that they wouldn't always have to bill their poorest clients. It wasn't always perfect or easy, but their arrangement kept the firm idealistic *and* afloat.

I was originally hired by one of the four junior attorneys in the firm, the one who specialized in the immigration consequences of criminal convictions. Since the passage of the Immigration Act of 1990, immigrants convicted of a wider range of offenses could be deported from the United States; a set of new rules in 1996 cut off almost all forms of relief from deportation for persons with criminal convictions, and these rules otherwise "streamlined" the process of what was now called "removal" (Cook, 2003; Coonan, 1998; Morawetz, 2000; Schuck & Williams, 1999). I was hired to help people who were about to be "removed." Of course, if these clients had already served a criminal sentence for any type of "aggravated felony," it was too late – they would invariably be deported, and the lawyer's job was mostly a matter of petitioning for reasonable delays to settle personal affairs before the inevitable. When I started at the firm in the fall of 1999, the situation for most clients with criminal convictions was grim; the leading challenges consisted of arguing that those who'd plead guilty to criminal charges *before* 1996 should be spared the harshest provisions of the removal rules in 1996.

But even before this issue was settled by the Supreme Court in *INS v St. Cyr* (2001), the vast majority of criminal deportees had fewer and fewer avenues for relief. Before the rules in 1996, a person facing deportation could ask for relief on a number of grounds: unusual hardship for the deportee, for the members of her family, or to an American citizen likely to be caused by the alien's deportation (Marley, 1998; Newcomb, 1998).[2] After 1996, no one with a significant criminal conviction could rely on such relief. This, in part, explained why, in 2000, the United States "removed" more persons than ever before, the vast majority on the basis of criminal convictions (Park & Park, 2004). In general, immigration rules since 1990 tended to discourage the entry of the poor, and for anyone who committed a crime, the law mandated removal, almost without mercy. "Streamlining" removal meant that state penitentiaries were now working more closely with the federal immigration service, so as to facilitate the removal of immigrants who would be released from state prisons.

By the time I started at the firm, more and more clients facing deportation were calling not so much to challenge final removal orders, but rather to confirm a fate that had been meted out to them by the Immigration Service. Ever since Chinese Exclusion in the late 19th century, American immigration law was typically whatever Congress had wanted – Congress had spoken clearly against

any immigrant with a criminal conviction, so for most criminal clients, there was increasingly less to say. I remember that during the first two months with the firm, I had relatively little to do. The new statutes defined "deviant" immigrants in a way that virtually sealed them out of the United States. These people were being banished.

IMMIGRANTS AND NON-IMMIGRANTS

At the same time that deportation and removal were becoming more harsh and straightforward, we were in the midst of yet another kind of revolution in immigration law, and for a very different set of clients. Especially in the Bay Area, firms specializing in so-called information technology industries were proliferating at a breathtaking pace. Established firms like Oracle, Apple, and Hewlett-Packard were growing bigger and more profitable, and up-starts were taking advantage of a tremendous influx of venture capital to start a mind-boggling range of businesses, making everything from hard drives to complex graphics software. In San Francisco itself, the area south of Market Street was changing: once the City's industrial heart, it had grown cold with the decline of manufacturing jobs, only to beat ever stronger now with a new infusion of venture capital and high-tech talent. In the Silicon Valley, the epicenter of the high tech economy, a growing chorus of executives began claiming that there was an acute shortage of qualified workers to satisfy the tremendous demand for skilled labor (Park & Park, 2004).

The law firm itself changed considerably in response to these developments. The firm was once a set of small offices in the heart of the Mission District, but it had since moved in 1997 to a much bigger set of offices near the financial heart of the City, a few blocks from the Transamerica Pyramid and Union Square. A much greater portion of its clients were now high-tech businesses seeking foreign workers – these were very successful and growing businesses with rather deep pockets, eager to hire the best talent wherever it was. To a large extent, American immigration law was unprepared for the enormous demand for foreign workers. In the Immigration Act of 1990, Congress increased permanent visas for employment categories from 54,000 to 140,000 immigrants per year, but even this was apparently not enough.

The tremendous growth in employment-based immigration continued throughout the past decade. According to leading scholars of the immigration law, companies in the United States increasingly relied on other types of visas to petition for the entry of foreign workers (Aleinikoff et al., 1995, p. 241). In the Act of 1990, "non-immigrant" visas for skilled workers in "specialty occupations" – those for persons staying temporarily to work in the United States – had been set

at 65,000 persons per year; after high-tech firms began using these visas for their workers, and by the time I had joined the firm in 1999, Congress had increased these caps to 115,000 per year. By the time I'd left the firm in the following year, there were 195,000 H-1B visas available per year to petitioning companies until fiscal year 2003. By then, over a half million persons were coming to the United States every year under various employment categories that had been greatly enhanced in the immigration law since 1990.

Moreover, the basic requirements for immigrant and non-immigrant admissions were increasingly similar. For example, the eligibility criteria for the first subset of the third-preference employment-based immigrant visas (EB-3) were virtually the same as for a non-immigrant worker in a "specialty occupation" (H-1B): a migrant typically needed a college degree in a "professional" occupation, "for which qualified workers are not available in the United States." The process for obtaining either visa was roughly the same: an employer petitioned the immigration service on behalf on an immigrant "beneficiary"; the employer typically had to obtain certification from the Department of Labor saying that they had searched for qualified workers in the United States, but that none were indeed available; and both employer and employee had to provide other extensive documentation attesting to qualifications and financial eligibility. There was, though, a crucial difference – an immigrant who obtained an EB-3 could stay permanently, irrespective of the subsequent relationship (or lack thereof) between herself and her American employer; on the other hand, a "non-immigrant" with an H-1B could only stay for up to six years, and if she was no longer employed with her petitioning employer, she had to either find another employer willing to sponsor her for another H-1B, or she had to leave the country. Her status as a "non-immigrant beneficiary" was thus contingent on her continuing employment with the firm that had petitioned the immigration service to acquire her services.

This novel legal arrangement might obviously produce conditions for abuse. Was it not likely, the critics of these non-immigrant visas charged, that a migrant employee might tolerate a lower salary, harsher working conditions, and other forms of labor abuse, knowing that her status in the United States was so dependent upon her employers? This type of concern, along with others, persuaded members of Congress to adopt increasingly stringent checks on the issuing of non-immigrant visas: by 2000, firms had to pay non-immigrant workers the "prevailing wage" in their field and for their region where the firm was based; non-immigrant workers had to be offered the same benefits as other persons in the same position; and non-immigrants could not be assigned to different, lower-paying jobs once they had been hired (U.S. General Accounting Office, 2003).[3] Concerns about possible abuse thus drove this non-immigrant visa to look more and more like its immigrant equivalent. Yet these controls did not change that one basic fact: without

a sponsoring company, in the event of lay-offs or firings, a non-immigrant would have to leave the United States, or else fall "out of status."

One other solution might have been to increase the number of permanent employment-based visas, but Congress' unwillingness to do this hinged primarily on the broader politics of immigration policy. Since Chinese Exclusion, federal rules governing immigration were driven by an underlying logic of protecting American workers against cheaper foreign competition. Samuel Gompers referred to this concern as a "meat versus rice" issue: too many cheap Asian laborers would entail a degradation of American labor, and whites would be dragged down to a standard of living that they would find unacceptable (Gompers & Gutstadt, 1902; Higham, 2002; Salyer, 1995). For that reason, since the late 19th century, American immigration law developed in a protectionist mode, admitting only those thought to be beneficial to the economy, and limiting the numbers of persons who might compete directly and adversely with American workers. The requirements for labor certification, for extensive documentation for any employment-based migrant, and now for the employers hiring non-immigrant workers – these were all part of a long-established pattern to defend Americans from foreign laborers who were perceived collectively as an economic threat.

The increasing reliance on non-immigrant visas was yet another part of this trend, although it was the most novel, if only because it was now the most "flexible" part of immigration policy: these workers were "temporary," and once their three to six year tenure was over, they would no longer be allowed to stay and compete with American workers. Although non-immigrant workers were allowed to have "dual intent" – that is, they could work temporarily while looking for a permanent job and a permanent employment-based visa in the United States – the law served American interests, American companies, and American workers. From one perspective, these temporary visa holders were "sifted" in the market, the best likely to compete and win permanent residency, the rest dismissed once the probationary period ended. For Congress, relying on non-immigrants to fill pressing labor shortages also had one distinct advantage: in the event of an economic downturn, visas for non-immigrants could simply be reduced, and those already on a non-immigrant visa would eventually leave, either because they lost their jobs, or because their visas would eventually expire. Legislators couldn't be blamed for allowing American companies to flood the United States with foreign workers, only to watch them stay permanently even when times became tough. These foreigners were expendable in a way that a permanent immigrant population just wasn't.

In terms of qualifications and skills, these non-immigrants looked and acted the same as immigrants, and for my firm in San Francisco, their petitions were just as expensive and time-consuming to process. Yet they were not the same. The

latter were in the United States permanently, and they were looking forward to an exciting new life in America; the former were a more anxious group, and they often worried aloud about how things might turn out in three or six years. In a strange way, looking at them, the non-immigrants who occasionally came through my law firm in San Francisco reminded me of those unfortunate Replicants in *Blade Runner*.

THE ALIEN OF EXTRAORDINARY ABILITY

The business side of the firm was so profitable, and so overwhelmed with work, that within three months, I was assigned to work with Anna and a number of other attorneys who dealt almost exclusively with employment-based immigration. I worked on two or three asylum cases over the next nine months, but the vast majority of my time was spent on national interest waivers, labor certifications, and "aliens of extraordinary ability." I became especially proficient dealing with persons in the last category: I helped put together a number of petitions for the first-preference employment-based visa, the EB-1, and its non-immigrant analog, the O-1. Having not taken the bar, I was formally a consultant on all of these cases, and my part consisted of putting together a complex set of exhibits and documents, and then drafting the corresponding letters detailing the qualifications of the petitioning company and the migrant beneficiary. The circumstances of the clients often made the work fascinating: among others, there was the arrogant Russian computer scientist who was redefining graphics applications, "alone," he insisted; the virtuoso concert pianist from Canada, the one who chewed on her pencils to work through her nerves; and the soft-spoken geneticist from China, whose basic research in avian genetics could impact everything from the engineering of human vaccines to the mass production of poultry.

This last client was the most interesting, not just because we became good friends, but also because his case illustrated starkly what could happen to a non-immigrant alien of extraordinary ability when things went badly. Dr. Chun Guo-feng had a fascinating life: he was born in Harbin, in northern China in 1964, but his parents were ethnically Korean, having immigrated into China during the Korean War. Although his family had experienced some hostility from their Chinese neighbors, Dr. Chun was in his words fortunate enough to live in an era where Mao Tse-tung and other Chinese leaders encouraged the country to reject "Han chauvinism." This meant that Dr. Chun's parents could eventually resume their former occupations as teachers, and this also meant that Dr. Chun and his two younger brothers were able to receive a fairly good education through much of their childhood. Their parents also instilled a sense of Korean national identity,

and everyone in the family had two names – one Chinese and one Korean (Chun Guo-feng was also Chun Tae-gyun). Everyone was bi-lingual.

His own teachers saw in the eldest boy a great deal of promise. By the time he was 15, Chun Guo-feng spoke fluent Chinese and Korean as well as passable Japanese and English. Just at the time when China was emerging from the Cultural Revolution, and Deng Xiaoping was re-investing in the universities, Chun Guo-feng enrolled at Peking University in 1980, where he completed his studies in biology. He was given permission to attend the University of Tokyo, and he was awarded one of the most prestigious fellowships in Asia from the Research Center for Advanced Science and Technology. He finished his doctoral work in genetics in six years. At his graduation, he was just four months shy of his 27th birthday. By then, though, he was a recognized expert in avian genetics. Several of his professors at the University of Tokyo thought he was one of the best students they had ever had.

Upon his return to China, Chun Guo-feng was offered a lectureship in the Department of Genetics and Genetic Engineering at Fudan University in Shanghai, perhaps the second most prestigious university in China after Peking University. Although he accepted the offer with great pride, he did not adjust well upon his return to China. The facilities and support for scientific research at Fudan were simply not the same as those afforded to him at the University of Tokyo. The teaching load was extremely heavy, research money was scarce, and the laboratories were about 10 years too old. Having shared his frustrations with his former professors and some of his colleagues at Fudan, he was encouraged to apply for a post-doctoral fellowship at the University of North Carolina at Chapel Hill, one of the leading centers for avian genetics research in the world. In his third year at Fudan, Dr. Chun married Chan Yen-le, and it was because of her encouragement that he finally applied for that fellowship. Chan Yen-le gave up her own career as a schoolteacher in Shanghai to join Dr. Chun in the United States.

The couple was admitted in 1994, when Dr. Chun was 30-years-old. He entered under a J-1 visa, a non-immigrant category for exchange visitors engaged "in a field of specialized knowledge or skill."[4] His wife was a J-2, "[the] alien's spouse or minor," in the formal language of the immigration law. Their initial adjustments in Chapel Hill were jarring at first, but thrilling at the same time. Dr. Chun was both surprised and honored to know that several of his professors at Chapel Hill considered *him* the expert in primordial avian germ cells; excited about his arrival, they had even alerted their colleagues at North Carolina State University in Raleigh, which had expansive, specialized facilities for the study of poultry. Over the next two years, Dr. Chun shuttled back and forth from Chapel Hill to Raleigh, his wife accompanying him on the 45 minute trip from one lab to another. The first fellowship was extended into another, and by 1998, Dr. Chun held several patents, most relating to laboratory techniques for isolating and cultivating

early chick primordial germ cells, and he had co-authored five scientific papers on the cultivation and development of avian germ cells. By that time, he no longer needed an editor to correct his English, and he had had other happy occasions to practice: he and his wife had their first daughter in 1996, and their second daughter in 1999, the year that he had received a lucrative job offer from Ova Genetics in Belmont, California.

The job offer was for a "senior research scientist," and it was for more money than either Dr. Chun or his wife had ever imagined. It was about 10 times the salary he had received as a professor at Fudan. The money would afford them a very good life in the United States, and it would also be enough to support both of their families in China. But this kind of offer was about more than finances – it was a potentially life-altering decision, one that could have long-term impacts on their extended families, and perhaps more importantly, on their children. By taking the job, by choosing to remain in the United States for an indefinite period of time, everyone would become "more American." The children were speaking English already, and like other American children, they were not taking to the other languages with any proficiency. For Dr. Chun himself, a man who was of Korean ethnicity and Chinese citizenship, and who never felt completely Korean or completely Chinese, the United States was an unusual yet comforting place to be. They knew that they could not stay on a J visa forever – they had been granted two extensions from the Immigration Service to remain in North Carolina, but the second notification was somewhat terse, and it suggested that a third extension would probably not be forthcoming. The couple quietly decided that they would take the offer from Ova Genetics, fall into a different classification in the immigration law, and start again with their two children in California.

ENGINEERING CHICKENS AND EGGS

Ova Genetics was one of four private firms in the United States competing feverishly to create a method that could consistently and efficiently produce transgenic chickens. I didn't know what a transgenic chicken was, so when I asked Dr. Chun, he drew one chicken, then five arrows from that single chicken onto five identical chickens. The five chickens were cloned from the first, like Dolly the sheep in 1996. Dr. Chun had been working on the genetic manipulation and engineering of birds, a cloning of chickens from a single, ideal specimen to produce identical birds and eggs with the exact same features. From a layman's perspective, it was both creepy and fascinating.

Dr. Chun himself acknowledged the creepiness, but he also explained that transgenic chickens and eggs were useful for at least two major reasons. First,

strains of transgenic chickens could revolutionize the poultry industry because scientists could create through genetic manipulation sets of birds that were disease resistant, ones that also grew faster and leaner with less feed. They could be meatier, too. Secondly, because chicken eggs were readily available and inexpensive, they were natural "bio-reactors," a protein-rich environment upon which scientists had already successfully cultivated human and animal vaccines, medicines, and other biological agents. Flu vaccines were commonly cultured in chicken eggs. However, because of genetic variations within the eggs themselves, standard methods to produce a specific vaccine or pharmaceutical produced inconsistent results. To create a dozen doses of flu vaccine, for example, one often had to break many, many more eggs. A genetically identical set of eggs could in theory solve this problem, and could also provide a much more constant set of bioreactors to cultivate complex human and animal proteins, and to test new drugs, vaccines, and other biological materials. The benefit to pharmaceutical companies and to medicine in general could be revolutionary, and the first company to produce a reliable, consistent set of transgenic chickens and eggs could possibly make an untold fortune.

Ova Genetics was founded in 1997 by an avian geneticist from Stanford University, Professor Robert Smith, with money invested from a number of different venture capital firms in Silicon Valley. A few of the principal investors were also from Japan and South Korea. They had all invested in Ova Genetics based on the strength of a number of patents that Professor Smith himself had acquired in his work in avian genetics. Dr. Chun was a key hire: coming to the company with his own impressive patents, Dr. Chun had hoped to collaborate with Professor Smith on several new lines of avian germ cells that could possibly thrust Ova Genetics ahead of its competitors. Given the intense competition, however, and given the sheer amount of capital required to establish a private, world-class laboratory in Belmont (a rather expensive enclave between San Francisco and Stanford), the pressure on both principal scientists was intense.

In 1999, Ova Genetics was only a company of ten people. As was customary for many companies in the Silicon Valley, the two chief business officers were given shares of the company rather than high salaries. Whether these shares would be worth anything in the next five or ten years depended largely on the work of Professor Smith, Dr. Chun, and their three laboratory assistants. In 1997 and 1998, things had not gone very well. Professor Smith had had an encouraging start when his laboratory was finally established, but several of his genetically engineered strains were unstable, and for reasons that he himself did not completely understand. On a number of research trips to North Carolina, where he had met Dr. Chun, Professor Smith was impressed with a number of novel techniques employed by this scientist from China and Japan. He was not altogether convinced that these methods, if developed further, would yield truly transgenic chickens and eggs, but

they certainly looked more promising than any of the other methods he had seen. Dr. Chun was himself impressed with Professor Smith, the highly-recognized avian geneticist whose work he often cited and whose experiments he had attempted to replicate in his own laboratories in North Carolina and Tokyo. When things eventually went badly between the two men, however, Dr. Chun himself admitted that in those early meetings, he should have been more circumspect about Professor Smith, who seemed on more than one occasion impatient and somewhat distracted. He was a man under tremendous pressure, a man who had convinced several investors to put up several million dollars for the promise of a payoff that was proving more elusive than he had anticipated.

J, H, L, EB-1, AND O

Professor Smith and the CEO of Ova Genetics, Mr. Thomas Curry, retained our firm in San Francisco to advise them about the hiring of Dr. Chun. This was in February of 1999. The lawyers at the firm quickly recognized that for Dr. Chun, there was really only one option, the O visa, for aliens of "extraordinary ability . . . which has been demonstrated by sustained national or international acclaim." This was because of a number of complicated reasons, one dating back to 1948. In that year, Congress had passed the Educational Exchange Act, which among other things, enacted a rule saying that exchange visitors under J visas must return to their country of origin or another foreign residence for at least two years following the completion of the activities authorized under the J visa. The rule applied to anyone seeking an immigrant visa, or the two most common non-immigrant employment visas, the H (temporary workers) or the L (intracompany transfers).[5] Congress' intention in 1948 was to make sure that the J was truly an exchange visa – persons coming under that visa could not use it as a "back door" into permanent residency in the United States, and given that the J was designed to provide opportunities for advanced training to foreign persons who would in turn take that training back abroad, the rule remained in force for over 50 years (Fragomen et al., 1994).

If Dr. Chun was a first-time immigrant – if Ova Genetics wished to hire him while he was a professor in China – he would have been most suitable for an EB-1, the first preference employment-based immigrant visa. The legal requirements to satisfy the EB-1 were almost identical to the criteria used to determine eligibility for an O.[6] Petitioning employers requesting either an EB-1 or an O did not need to acquire labor certification from the Department of Labor. From an attorney's point of view, an O was in some ways just as good if not better than an EB-1. All employment-based visas were subject to certain kinds of restrictions and caps: there were only 140,000 per year; and no one country could have more than 7%

(9,800) of these visas per year, meaning that certain employment-based migrants from highly-impacted countries (like India, China, and the Philippines) had to wait in a queue for an employment-based visa to become available.[7] It wasn't uncommon for a person in India, China, or the Philippines to wait for up to six or more years for an EB-3, the third preference employment-based immigrant visa; it was no wonder that the non-immigrant analog of the EB-3, the H-1B, had become so popular, and that the clear majority of H-1B beneficiaries were Asian, and were Indian, Chinese, and Filipino.

The O was like a super-charged version of the H-1B – there were no limits placed on the number of O visas granted per year, nor were there any specific time limits imposed on persons with an O. There were literally an unlimited number of O visas, and the visa holders could stay for as long they wanted, or as long as the companies sponsoring them were willing (Ayers & Syfert, 2001).[8] An O was also a kind of back door for persons who had been on a J – all J visa holders were supposed to leave the country for two years, but nothing prevented a J from switching to an O, and anyone on an O could "at the same time lawfully seek to become a permanent resident."[9] All permanent residents were, of course, entitled to become American citizens after five years of lawful residence. The O was, then, an excellent ticket to permanent residency; Dr. Chun and his prospective employers at Ova Genetics were excited about the possibility of hiring Dr. Chun within a few months. A two year delay would have been out of the question.

FALLING OUT OF FAVOR, FALLING OUT OF STATUS

For some clients, getting an O is a hard thing. For the vast majority of persons – those who have not won a Nobel Prize or some other "major, internationally-recognized award" – getting an O meant satisfying at least three of the eight criteria spelled out in 8 C.F.R. § 214.2(o)(3)(iii), including "receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor," "membership in associations in the field which require outstanding achievements of their members," and "scientific, scholarly, or business-related contributions of major significance in the field" (Wolfson & Tomson, 2001).[10] Dr. Chun was not a hard case: he easily satisfied all eight of these criteria. In support of his petition, leading professors from Auburn University, the University of Minnesota, Seoul National University in Korea, and the University of Tsukuba in Japan, all wrote glowing letters attesting to Dr. Chun's expertise in avian genetic engineering. Dr. Chun gathered all of his publications, his patents, copies of his diplomas and awards, and forwarded them to the law firm. I assembled all of these materials, collected all of his peer-review letters, and prepared everything for final review for

the senior associate assigned to oversee his case. We joked that this case required no lawyerly stretching to fit the criteria. From beginning to end, the file took about five weeks to assemble, although most of it was spent waiting for those peer-review letters. When it was finished, the collection of materials resembled a tenure package for a university professor. It was about two inches thick.

During that time, I also learned that my wife was expecting our first child, and after sharing that news with Dr. Chun, he sent us two outfits, one blue, the other pink. We met frequently at the firm, and because his case was relatively easy, he asked me about everything in California and the Bay Area, from how to get tickets to the Giants and 49ers, to where his family should live without paying too much. (Rent and real estate prices shocked him; I think he rather may have thought he was being underpaid by Ova Genetics, given the high cost of living in the Bay Area.) But we had lunch and coffee together, and he always insisted on paying for me like any traditional older Korean brother. We laughed together about how a Korean who had grown up in China was becoming good friends with a Korean who had grown up in the United States. My own facility with language was not nearly as good as his, so we mostly spoke English, and in English, he shared his aspirations for his family, especially his children, always his children.

Five weeks after the petition had been sent, the O was approved by the California Service Center of the Immigration and Naturalization Service in Laguna Niguel. It was one of the fastest approvals anyone in the firm had ever received. I called Dr. Chun myself to tell him the good news. He offered to take me and my wife out to dinner, but I had to decline because my wife had an ultrasound late that afternoon across the Bay. Later that week, I sent a card to his family, along with some toys for his kids. It turned out that on the same day, he had also sent a thank you card to me and to the senior lawyers at the firm. There is nothing quite like this: helping a client you actually like, seeing for them and their family the promise of a new life in the United States – these were extremely heart-warming and special things, things that made you feel happy for them and good about yourself. He was thanking me, but I was just as thankful for having met him.

I was horrified when five months later Dr. Chun called me to say that he was being terminated by Ova Genetics. By then, he was renting in an expensive neighborhood in Belmont so that his children could go to a good school, they had been enrolled for about two months, and his wife had been looking for a house to buy. In fact, he hadn't yet told his wife – he didn't quite know how – and he wanted to confer with us about the immigration consequences of his termination before he broke the news to his family. He sounded crushed. I was crushed.

Over the next day and a half, two senior attorneys called Professor Smith and Mr. Curry repeatedly to talk about what might happen to Dr. Chun if they terminated his employment. Officially, Ova Genetics was our client – *they* were the ones who had

petitioned the Immigration Service for an O visa on behalf of their non-immigrant beneficiary, Dr. Chun. "How is he not our client?" I remember protesting, to which Anna replied: "He is the non-immigrant beneficiary of our client, Ova Genetics, but he himself is not our client. He was fired."

In this way, the senior associates at my firm reminded me that although I might sympathize with Dr. Chun as they did, their professional obligations were primarily with Ova Genetics, and they were bound not to give any advice or counsel harmful to the interests of this client. The law itself was fairly straightforward as to what the firm was required to do: "The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(O) of the Act and paragraph (o) of this section. An amended petition should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the Director who approved the petition."[11] In other words, if they proceeded with the termination of Dr. Chun, we were required to tell the Immigration Service of this fact, and Dr. Chun and his entire family would fall "out of status." The O would be "revoked," because the beneficiary "is no longer employed by the petitioner in the capacity specified in the petition."[12] Was there any way to retain Dr. Chun until he could find another employer willing to petition for another O visa on his behalf? Was there any way to retain Dr. Chun in any reasonable capacity at Ova Genetics? The terseness of the replies from Ova Genetics indicated that Dr. Chun was being terminated immediately; our client seemed extremely disappointed that Dr. Chun had not produced sufficient results in the laboratory.

My own conversations with Dr. Chun revealed a broken-hearted man. His experiences at Ova Genetics were bad from the beginning: he learned quickly that he had joined a company under considerable stress. He felt that the firm was rushing too quickly in an attempt to produce transgenic birds, without observing basic (but much more time-consuming) techniques for poultry husbandry and breeding. Apparently, the labs were in disarray, the scientists and laboratory assistants all impatient for results. Dr. Chun conceded that part of the problem may have been cultural – when Professor Smith had told him that they were expecting results from his techniques "in the near future," Dr. Chun thought that this meant a couple of years, maybe more. Professor Smith obviously had had a much faster timetable in mind, one that Dr. Chun now thought was impractical, if not impossible. Dr. Chun said that he had been working constantly since his arrival in California – he had relied completely on his wife to set up their apartment, arrange for their children to attend school, and take care of everything related to their private life, or what little of it that was left for him. Still, the work seemed to have been met with nothing more than disappointment, and the feelings of disappointment were

becoming mutual between the petitioner and the beneficiary. All of this was shared with me in phone conversations that I now had to make from my home, as Dr. Chun was no longer a client of the firm, and no longer attached to me professionally or to the firm in any way.

The subsequent options for Dr. Chun were not very good. At most, he had about 30 days to find another employer willing to petition for another O, but this did not seem likely or possible. Even in spite of his impressive credentials and experience, the professional network for avian geneticists was somewhat small, and finding a sympathetic employer under these circumstances – in light of a sudden, rather public termination – would be a challenge. Dr. Chun was caught off guard by the speed with which he was terminated, and his initial inquiries to colleagues and friends in his field had not produced much hope for another position. A week after his first call to me, he was even more despondent and pessimistic. That was also the week that the NASDAQ seemed to implode, the beginning of the end of the high-tech boom.

After the company had given him 30 days' notice, after falling "out of status," Dr. Chun and his family would find themselves in an altogether different category of "status-less" persons under the immigration law. In the law, such persons share the same position as persons who "enter without inspection," or persons who are "removable" from the United States for any number of reasons. They are literally persons who should not be here. In 1996, under various provisions of the Anti-Terrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act, Congress imposed a three-year bar against persons who have been "out of status" for more than 180 days but less than a year. Persons "out of status" for more than a year would be barred for 10 years.[13] Passed at the height of anti-immigrant feeling, these rules were part of the larger set of rules governing criminal deportation and expedited removal.

All of a sudden, Dr. Chun and his family would be facing these notorious "three-and-ten year bars." Moreover, if he was out of status upon his termination with Ova Genetics, the length of time he was in this position might adversely affect any subsequent petition for an O; even in those days, the Immigration Service did not look mercifully on anyone who was out of status for any reason. And so, in the next two weeks, Dr. Chun called from time to time, but mostly to confirm a different fate – he and his family would be leaving the United States and returning to Harbin. From there, after visiting his family and introducing his children to the grandparents they had not yet met, he would see about finding another position in China. In one of the last calls, I told him of a rule that said, in part: "In the case of an alien who enters the United States under §101(a)(15)(O) of the Act and whose employment terminates for reasons other than voluntary resignation, the employer whose offer of employment formed the basis of such non-immigrant

status and the petitioner are jointly and severally liable for the reasonable cost of return transportation of the alien abroad."[14] But Dr. Chun refused to call Ova Genetics for any reason. The experience was just too painful.

Before he and his family left for China, in May of 2000, I finally finished my dissertation, and a week later, my first daughter was born. Tae-gyun and Yen-le sent two outfits, both pink. Their daughters, Jennifer and Lisa, made a card for our new baby. About six weeks later, I left the firm.

A BIG BROOM

The immigration law has always fascinated me, perhaps more for personal reasons than for purely intellectual or professional ones. My late mother came to the United States when she was 36 years old, and when my brother and I were 11 and five. When my mother went back to Korea in 1984, nine years after her departure, she came home with a pensive demeanor: she said that once she was in her homeland, she came to the realization that she had become an American. She didn't seem either happy or sad about this, it just somehow felt true. Five years later, she went back to Korea again, and upon her return, she asked me to initiate for her the process by which she would become an American citizen.

I thought about my mother a great deal once I myself became a father, and for many, many months, I thought about Dr. Chun, his wife Yen-le, and his daughters, Jennifer and Lisa. I still think about them, and Dr. Chun and I even now correspond by e-mail. I think his case affected me the most because he reminded me of me, and he reminded me also of my own mother. After all, when he was forced to leave the United States, Dr. Chun was also about 36 years old, and he had been in the United States for almost nine years. Back in Harbin, did he feel the same way about the United States as my mother had in Korea?

There are, of course, obvious lessons about immigration law to be drawn from Dr. Chun's case. First of all is that the law gives a tremendous amount of authority to private corporations, and the law valorizes their interests above the interests of the "non-immigrants" that they use or discard. The federal government now classifies a much broader pool of non-citizens as "deviant" and "removable," but at the same time, the corporations that hire non-immigrants are positioned collectively to throw thousands of people "out of status," and thus also "removable." Streamlined deportation proceedings have now been in place to get rid of people convicted of relatively minor crimes, but the "three-and-ten-year bars" also functioned in roughly the same way to remove "unnecessary" workers from the American economy. One imagines the immigration law like a big broom, sweeping away the unwanted, and threatening those who stay "out of status" with longer and

longer sentences of banishment. This was, in the end, precisely the reason why Dr. Chun and his family did not want to gamble in an uncertain labor market.

The scholarly literature addressing the immigration law as it pertains to non-immigrants has focused a great deal on the protection of American workers, and on the interests of American companies. But with a few exceptions, scholars have largely ignored the consequences of *not* working on the migrants themselves – the experience of being laid-off, fired, or otherwise falling out of favor with the petitioning company whose on-going employment of the non-immigrant determines his status. In so many ways, the non-immigrants who come to work in the United States act and behave in much the same manner as their immigrant peers, but there is that tremendous difference in what happens to both groups when the work disappears. The difference is vital in the law – in powerful legal definitions of immigration status – and yet it appears so arbitrary and rooted in naked politics and fear rather than a sense of justice and fairness. The excessive focus on American interests – the nation's own workers and companies – perhaps blinds us to the tremendous costs that American immigration law both permits and ignores in the lives of non-immigrants who come here, build attachments, start families, and plan for the future. Dr. Chun Guo-feng was at once an alien of extraordinary ability and an alien of extraordinary vulnerability, the first being what the law said he was, and the second being what the law allowed him to become.

There were other lessons, more personal ones. Exactly who had been my client? Whose interests had I been serving, and whose interests *should I* have been serving? The law said one thing, my heart said another. The legal categories that we create and into which we fit never really capture who we really are.

NOTES

1. To protect privacy and confidentiality, several details of this account have been changed. The names of all persons mentioned in this chapter have also been changed.
2. For examples of case law on these issues, see: Bastidas vs. Immigration and Naturalization Service, 609 F.2d 101 (3rd Cir. 1979); Immigration and Naturalization Service vs. Jung Ha Wang, 450 U.S. 139 (1981); Hee Yung Ahn vs. Immigration and Naturalization Service, 651 F.2d 1285 (9th Cir. 1981); and Antoine-Dorcelli vs. Immigration and Naturalization Service, 703 F.2d 19 (1st Cir. 1983).
3. The provisions appear in Pub. L. 105-277.
4. INA § 101(a)(15)(J).
5. INA § 212(e).
6. INA § 101(a)(15)(O): (a) Receipt of a major, internationally-recognized award, such as the Nobel Prize; (b). The alien must demonstrate at least three of the following forms of documentation: (i) Receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor; (ii) Membership in associations in the field which

require outstanding achievements of their members; (iii) Published material in professional or major trade publications or major media about the alien concerning the alien's work in the field; (iv) Participation on a panel, or individually, as a judge of the work of others in the field; (v) Scientific, scholarly, or business-related contributions of major significance in the field; (vi) Authorship of scholarly articles in the field in professional journals or other major media; (vii) Current or previous employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation; or (viii) High salary or other remuneration commanded by the alien for services; or (c) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence. 8 CFR 214.2(o)(3). Compare this to the language of INA §203(b)(1)(A).

7. INA §§202(a) and 203(b).

8. A recent amendment to the rule in 2001 added a 3-year time limit, but petitioning employers may still request extensions of the visa indefinitely in increments of one year. 8 CFR 214.2(o)(6)(iii).

9. 8 CFR §214.2(o)(13): "The alien may legitimately come to the United States for a temporary period as an O-1 nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States."

10. Consider the following commentary about these criteria, from Wolfson et al. (2001, p. 51): "Meeting only three criteria is a recipe for denial, despite the language of the law, unless the evidence submitted is extremely strong and the practitioner is able to show that most of the evidentiary criteria do not apply to the alien's profession . . . The practitioner should submit a reasonable amount of documentation confirming the alien's career achievements. Letters from diverse sources and preferably diverse nationalities should be obtained to meet the criterion of 'significant recognition from organizations, critics, government agencies, or recognized experts' and to confirm any achievements or contributions made by the alien that are not easily verifiable through other means. It is important to ensure that the experts providing letters on the alien's behalf understand the high benchmark of proof in these visa applications and utilize appropriate language that assists the alien's application. More modest cultures in Europe, Africa, and Asia consider 'competent' to be an extremely high form of praise, and yet it is completely destructive to any O-1 claim of extraordinary ability or achievement. The INS could use submitted evidence with terms like 'competent' against the alien, arguing that even the alien's own supporters 'only' call him or her competent, not extraordinary."

11. 8 CFR §214.2(o)(8)(A).

12. 8 CFR §214.2(o)(8)(B). "(ii) Automatic revocation. The approval of an unexpired petition is automatically revoked if the petitioner, or the named employer in a petition filed by an agent, goes out of business, files a written withdrawal of the petition, or notifies the Service that the beneficiary is no longer employed by the petitioner. (iii) Revocation on notice – (A) Grounds for revocation. The Director shall send to the petitioner a notice of intent to revoke the petition in relevant part if is determined that: (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition; (2) The statement of facts contained in the petition was not true and correct; (3) The petitioner violated the terms or conditions of the approved petition; (4) The petitioner violated the requirements of section 101(a)(15)(O) of the Act or paragraph (o) of this section; or (5) The approval of the petition violated paragraph (o) of this section or involved gross error."

13. 8 USC §1182(a)(9)(B).
14. 8 CFR §214.2(o)(16). This is the "return transportation requirement."

REFERENCES

Aleinikoff, T., Martin, D., & Motomura, H. (1995). *Immigration process and policy*. St. Paul: West Publishing Company.

Ayers, K., & Syfert, S. (2001). U.S. visa options and strategies for the information technology industry. *North Carolina Journal of International Law and Commercial Regulations*, *27*, 301–334.

Cook, M. (2003). Banished for minor crimes: The aggravated felony provision of the immigration and nationality act as a human rights violation. *Boston Third World Law Journal*, *23*, 293–329.

Coonan, T. (1998). Dolphins caught in congressional fishnets – immigration law's new aggravated felons. *Georgetown Immigration Law Journal*, *12*, 589–619.

Fragomen, A., Del Ray, A., & Bernsen, S. (1994). *Immigration law and business*. New York: Clark Boardman Callaghan.

Gompers, S., & Gutstadt, H. (1902). Meat v rice: American manhood against Asiatic coolieism. In: S. Joshi (Ed.), *Documents of American Prejudice* (pp.436–438). New York: Basic Books.

Higham, J. (2002). *Strangers in the land: Patterns of American nativism, 1860–1925*. New Brunswick: Rutgers University Press.

Marley, B. (1998). Exiling the new felons: The consequences of the retroactive application of aggravated felony convictions to lawful permanent residents. *San Diego Law Review*, *35*, 855–895.

Morawetz, N. (2000). Understanding the impact of the 1996 deportation laws and the limited scope of proposed reforms. *Harvard Law Review*, *113*, 1936–1962.

Newcomb, B. (1998). Immigration law and the criminal alien: A comparison of policies for arbitrary deportations of legal permanent residents convicted of aggravated felonies. *Oklahoma Law Review*, *51*, 697–725.

Park, J., & Park, E. (2004). *Probationary Americans: Contemporary immigration law and the shape of Asian American communities*. New York: Routledge.

Salyer, L. (1995). *Laws harsh as tigers: Chinese immigrants and the shaping of modern immigration law*. Chapel Hill: University of North Carolina Press.

Schuck, P., & Williams, J. (1999). Removing criminal aliens: The pitfalls and promises of federalism. *Harvard Journal of Law and Public Policy*, *22*, 367–463.

United States General Accounting Office (2003). *H-1B foreign workers: Better tracking needed to help determine H-1b program's effects on U.S. workforce*. Washington, DC: General Accounting Office.

Wolfson, B., & Tomson, M. (2001). Minding your O's and P's. *Los Angeles Lawyer*, *24*, 47–53.

This Page Intentionally Left Blank

PUNISHING TO PROTECT? BALANCING PUNISHMENT AND FUTURE WELFARE IN THE JUVENILE COURT

Aaron Kupchik

ABSTRACT

Contemporary juvenile courts in the U.S. simultaneously pursue two potentially contradictory goals: helping children who lack blameworthiness, and punishing young criminal offenders. In this chapter I explore how juvenile court decision-makers balance these competing concerns. I find that courtroom interaction produces a negotiated order that allows the consideration of both goals, through three strategies: (1) prosecutors convince judges to punish juveniles in order to protect them; (2) defense attorneys invoke treatment as a bargaining chip to elicit compromise from prosecutors and persuade judges to help juveniles; and (3) judges simultaneously consider both future welfare and punishment. These three methods of balancing competing concerns are shaped by the shared understandings and professional obligations of court actors.

Contemporary juvenile courts in the U.S. pursue two potentially contradictory goals: to mend the deficiencies of children who lack blameworthiness, and to punish young criminal offenders (Emerson, 1969; Feld, 1999; Singer, 1996). Choosing between these two goals often requires court decision-makers to decide between rehabilitative programs that are intended to treat wayward youth, and punishment

Ethnographies of Law and Social Control
Sociology of Crime, Law and Deviance, Volume 6, 185–202

ISSN: 1521-6136/doi:10.1016/S1521-6136(04)06010-5

(such as incarceration) designed to deter offending and protect the public (Morris & McIsaac, 1978; Parker et al., 1981). Given recent scholarship on the "punitive turn" (Hallsworth, 2000) or the "culture of control" (Garland, 2001) that has led contemporary justice systems to increasingly value punishment, one might expect that contemporary juvenile courts forsake defendants' future welfare for a more punitive mission. Yet the assumption that juvenile court decision-makers value punishment over treatment presumes that the rhetoric of treatment on which the initial juvenile court was based has little bearing on contemporary juvenile courts, which may or may not be true.

In this chapter I analyze ethnographic data to explore how juvenile court decision-makers balance these potentially competing concerns: punishment and future welfare. To explore the resolution of this tension I examine: (1) the professional obligations and roles of defense attorneys, prosecutors and judges; and (2) the negotiated order that arises from the interaction between these decision-makers. I demonstrate how this negotiated order is shaped by the particular institutional features of juvenile courts, and how it allows decision-makers to pursue both punishment and future welfare for juvenile offenders.

BACKGROUND OF THE TENSION BETWEEN WELFARE AND PUNISHMENT IN JUVENILE COURT

The Initial Juvenile Court

According to its founders, the first juvenile court was created to uplift wayward youth through treatment and counseling (Tuthill, 1900). This court originated in Chicago in 1899, and was framed as an almost exclusively welfare-oriented institution. The Progressive-era founders of the court claimed to be creating a system that recognized the malleability of youth and the reduced culpability among juvenile offenders. They argued that children were only delinquent due to external, fixable problems such as poverty, and that a parental style of intervention could help solve these problems and rehabilitate individual youth. The offender and his or her needs were claimed to be more important than the circumstances of the offense or the need for punishment. Thus the court used a *parens patriae* orientation to intervene in the lives of youth in order to improve the youth's future welfare (Rothman, 1980; Ryerson, 1978).

Yet scholars have described the history and mission of the juvenile court as a more punitive institution than its founders claimed. Anthony Platt (1977), for example, describes the juvenile court as a system of class-based social control designed to control lower-class and immigrant youth and prepare them for factory

labor. Others as well have described the juvenile court as a system of social control masked by claims of good intentions. Some argue that the juvenile court was designed to dole out punishment to specific groups, such as girls (Chesney-Lind & Shelden, 2004) or racial and ethnic minorities (Feld, 1999). Other scholars argue that contrary to its rhetoric, the juvenile court prescribed severe punishment by incarcerating many more youth than its treatment-oriented mission would lead one to believe (Schlossman, 1977).

As these arguments make clear, since 1899 juvenile court decision-makers have confronted a tension between punishing offenders and protecting the future welfare of juveniles (Tanenhaus, 2004). Barry Feld (1999) argues that a clear winner will always emerge from this confrontation: punishment (see also Matza, 1964; Parker et al., 1981; Ryerson, 1978). According to Feld, the social control of youth has and will continue to seem more salient to decision-makers than treatment, especially when the youths' offenses are the subject of consideration and their basis of eligibility for court intervention.

With its 1967 *In re Gault* decision, the Supreme Court expressed a similar skepticism about the juvenile court's ability to protect juveniles' future welfare. After 15-year-old Gerald Gault was sent to a juvenile reform school for making a harassing phone call – without his parents being informed he was taken into custody, a written record of proceedings, or testimony by his accuser – the Supreme Court mandated that juveniles in juvenile court receive rights previously not granted to them. These rights include the right to an attorney, the right of notification, and the right to confront one's accuser (Bernard, 1992). According to the Supreme Court:

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment (387 U.S. 1, 1967 – cited in del Carmen et al., 1998, p. 176).

This landmark decision clearly voiced the Court's realization that juvenile courts are not entirely treatment oriented, and that without limits on discretion or procedural informality court decisions can result in unfairly harsh punishments.

Effects on the Juvenile Court of the "Culture of Control"

Over the past few decades, a changing landscape of punishment by justice systems, generally, may have reshaped the balance between future welfare and punishment in juvenile courts. The past 30 years have brought about more than a quadrupling of the adult prison population, largely through increased mandatory sentences for violent and drug offenses. David Garland (2001) describes this increased level

of punishment as part of a "culture of control" whereby a new penal regime has displaced previous sensibilities about punishment and ways of punishing offenders.

As part of the culture of control, many juvenile court jurisdictions have re-written their purpose clauses to emphasize punishment more and treatment less. According to Feld (1999), over the past few decades many states have re-written the purpose clauses of their juvenile courts to make punishment an explicitly stated goal of the juvenile court. Contrary to the initial juvenile courts, whose sole stated goal was rehabilitation and treatment, contemporary courts are more likely to state a dual goal: punishment and rehabilitation. Furthermore, many states have stiffened their sentencing laws in juvenile courts and limited judicial discretion by mandating custodial sentences for certain types of offenders (Feld, 1998, 1999).

Thus, since 1899 juvenile court decision-makers have been caught in a dilemma between punishing juveniles and looking after their future welfare (Tanenhaus, 2004). In theory, the juvenile court recognizes that juveniles are not yet mature citizens and deserve to be helped rather than punished; yet court actors must react to juveniles' offenses in a way that ensures the safety of the community and communicates the State's disapproval (Zimring, 2000). Given recent changes in justice systems whereby punishment is more forthcoming than before, one would predict that contemporary juvenile courts pursue punishment to a greater extent than they look after juveniles' future welfare. To test this prediction, I analyze data from courtroom observations in juvenile courts and interviews of juvenile court judges, defense attorneys and prosecutors.

METHODS

Qualitative research – and ethnographic research in particular – is uniquely suited for understanding how organizational actors navigate tensions through interaction processes (Cicourel, 1968). A rich body of prior sociological research uses ethnographic methods to understand how court actors both compete and cooperate to reach outcomes (e.g. Bortner, 1982; Carlen, 1976; Eisenstein et al., 1988; Emerson, 1969; Feeley, 1979; Holstein, 1993; Sudnow, 1965). These studies contribute to our knowledge of courts by illustrating how locally derived understandings allow court actors to collectively interpret offenders and offenses, and how they cooperate to solve problems facing court communities. For example, Robert Emerson (1969, 1981) demonstrates how juvenile courts can impose punishment and still maintain legitimacy by evaluating the moral character of adolescents and defining prison-worthy cases as "last resorts." Ethnographic study is therefore a critical tool for better understanding how defendants' identities are constructed (e.g. Garfinkel, 1956), and how order is negotiated among competing court stakeholders

(Emerson, 1969). Only by taking into consideration court community members' organizational exigencies and constraints can one make sense of why court actors pursue different goals.

In this chapter I follow the tradition of court ethnography to better understand the subtle ways in which punishment and welfare concerns are balanced in juvenile court. I analyze data from interviews with decision-makers and courtroom observations in juvenile courts in two densely populated counties of Northeastern New Jersey. To collect these data I studied each juvenile court in these two counties – two courts in one county and four in the other.[1]

I performed 17 interviews with juvenile court judges, prosecutors and defense attorneys in these courts. These interviews ranged from 50 minutes to two hours in length, and were tape-recorded and sent to a professional transcriber. They included questions on how court actors evaluate adolescent defendants, how they weigh factors such as the juvenile's future welfare and punishment, and how they interact with other court actors.

I also observed 469 juvenile hearings in the six courts over the course of eight months. During these hearings I noted all interaction among participants in cases, including defendants, defendants' families, defense attorneys, prosecutors, judges, and external sponsoring agents (e.g. social workers or probation officers). Though not taken from official transcripts, my hand-written notes are as accurate as possible a representation of all consequential dialogue. The routine nature of most court interaction enabled me to use brief notations for many of the exchanges and focus my note-taking efforts on dialogue consequential to case processing and disposition (see Burns & Peyrot, 2003) and any unusual interaction (see West, 1996). I transcribed these fieldnotes daily in order to translate my notes into nearly complete records of all court activity. Though verbatim transcripts of hearings (which are unavailable to researchers) might be preferable to the data used, the fieldnotes I recorded are consistent with data used by others for similar research (Atkinson & Drew, 1979; Holstein, 1993; West, 1996).

I analyzed these fieldnotes using NU-DIST software in an attempt to understand how order and meaning are produced through in-court discourse. The NU-DIST program allows one to search for patterns in qualitative data, code these patterns into themes, and interpret these themes as one might do by hand-coding qualitative data (see Emerson et al., 1995; Lofland & Lofland, 1984).

New Jersey is an excellent research site because it has maintained a fairly traditional juvenile court. Despite nationwide trends toward changing juvenile court laws to mandate less discretion among judges and increased use of transfer to criminal court (Feld, 1999), New Jersey has made relatively few changes to its juvenile justice statutes. Sentencing in New Jersey is primarily determined through judges' discretion, and a very small proportion of cases are transferred from the

juvenile to criminal court (Kupchik et al., 2003). One exception to this lack of reform is the change of its juvenile justice purpose clause. Mirroring many other states (Feld, 1998, 1999), in 1982 the New Jersey legislature altered the juvenile justice purpose clause from solely a goal of helping juveniles, to a dual goal of helping juveniles and punishing offenders (Kupchik et al., 2003). As a result New Jersey offers a view of a contemporary juvenile court dealing with the tension between punishment and future welfare.

FINDINGS

As I explain in detail below, I find that a concern for juvenile defendants' future welfare is still alive and well in the juvenile court. Court actors negotiate a compromise between the two competing concerns; this compromise prioritizes juveniles' future welfare more than one might expect, given recent punitive policy shifts and the "culture of control." This compromise is the product of an active process whereby court actors use shared understandings of typical offenses, offenders and punishments (Sudnow, 1965) to construct meaning and guide the court's actions (Emerson, 1969). Thus, all court decision-makers actively participate in the process of reaching this compromise.

In order to understand how this negotiated order comes about, one needs first to understand the professional interests and obligations of each primary stakeholder in the juvenile court process. As prior research has shown, prosecutors, defense attorneys and judges are socialized into local knowledge about how to handle cases. Over time, colleagues' professional roles and obligations combine with their shared experiences to develop understandings of how to interpret offenses and offenders, and what a given case is "worth" in terms of appropriate punishments (e.g. Eisenstein et al., 1988; Emerson, 1969; Heumann, 1978; Sudnow, 1965). Thus, below I begin discussing my results by highlighting how judges, defense attorneys and prosecutors distinctly approach the tension between punishment and future welfare in ways that are structured by their professional roles. I then discuss how these decision-makers interact to produce three distinct types of compromises between punishment and future welfare concerns.

Role-defined Orientations to Punishment and Welfare

Prosecutors

Juvenile court prosecutors approach cases with a somewhat balanced perspective – rather than pursuing one primary goal, they seek a dual goal of protecting the

community from offenders (by punishing the offenders) and obtaining rehabilitative services for juveniles. According to prosecutors:

> . . . [S]o I'm told, in the juvenile system everything is fashioned to rehabilitate juveniles . . . I'm always with the hope that perhaps the juvenile can take advantage of whatever programs are available to them, if they are indeed interested in rehabilitating themselves and making themselves better people. I think the purpose is twofold, to get them the help that they might need . . . . And obviously punitive in nature. I don't think anyone will deny this, sentences often reflect the nature of the crime.

> I think the juvenile justice system is supposed to be for rehabilitation. That is what we are supposed to be doing. So I think the juveniles do get plenty of opportunities to take advantage of [treatment] programs and anything that the court has available to it . . . We try to balance that against the [protection of the] community because of the other [potential] victims out there.

All of the prosecutors with whom I spoke shared the understanding that juvenile court should be more treatment-oriented and less punitive than criminal court, due to the fact that juveniles are less mature and therefore less culpable for most crimes than adults. Prosecutors therefore recognize the need to protect juveniles' future welfare, but balance this with their mandate to punish violent or chronically offending youth in order to protect the public.

Prosecutors operationalize the concept of protecting juveniles' future welfare in two ways. One is through rehabilitative services such as drug counseling, mental health treatment, or vocational education. The other is through reduced sentences. The juvenile court prosecutors give juvenile offenders several opportunities to desist their offending behaviors before attempting to incarcerate a juvenile. For all but very violent juveniles, prosecutors will recommend relatively lenient sentences for the first few times a juvenile is arrested and convicted in the hope that the juvenile will "learn a lesson" without any need for severe punishment. With each new arrest, the juvenile receives incrementally more severe sentences (see Lemert, 1970; Parker et al., 1981). Referring to this gradual progression of increasingly severe punishments for juveniles who repeatedly offend, one prosecutor stated:

> That is the general progression . . . It's like we will give them chances really. That is what juvenile [court] is all about, trying to give them chances so they rehabilitate more so than punish them.

Prison is therefore seen as a "last resort" (Emerson, 1981) by prosecutors, a punishment to be reserved for only the most violent or recalcitrant offenders. Prosecutors interpret these offenders' prior offenses as evidence that the youth are not amenable to rehabilitation, and therefore suitable for severe punishment (see Emerson, 1969). In contrast, other defendants are considered amenable to rehabilitation and are offered the closest proxy for treatment that prosecutors are able to offer: lenient sentences. According to one prosecutor:

> Generally by the time you are ready to send a kid to [the State reform school], you've been through just about every plea, or the majority of pleas . . . they've been through every aspect of the system that you can offer unless, of course, they have done something absolutely horrific from the outset – like killing somebody or coming close to killing somebody. But usually when we are looking for [incarceration], the kid has gone through intake review, probation, drug treatment programs whether out-patient or inpatient, on to residential . . . and a lot of the times they have gone through several residential [placements]. They have exhausted every other remedy they can have, and at that point in time there is literally nothing else to do.

Thus, prosecutors state a desire to merge the goals of pursuing defendants' future welfare and punishing offenders, yet they do so from a punishment-centered orientation. That is, prosecutors operationalize the concept of helping youth as the process of convicting the juvenile and giving him/her a lenient or treatment-oriented sentence. This reflects their conception of appropriate reactions to delinquency by convicting the youth and "sending a message" about the inappropriateness of the youth's behavior, protecting the community by punishing the youth in some capacity, and still offering the juvenile a chance to evade serious punishment and/or receive therapeutic intervention.

Defense Attorneys

Juvenile court defense attorneys are in an awkward position because they have the most interaction with defendants and their families, thus they are in the best position to consider the needs and future welfare of the defendants, yet their professional obligations require them to act as legal counselors rather than social workers (Parker et al., 1981; Prescott, 1981). Many of the defense attorneys acknowledge this tension and interpret their primary goal as protecting the defendants' legal rights, with a secondary goal of helping defendants. For example:

> We went to a seminar and some of the attorneys from other regions were talking about how they have juvenile cases and how they don't get the best [plea bargain] for their clients because they feel that he needed help and . . . the kid could be found not guilty at trial and they would have a hard time saying the kid should just walk off rather than 'the kid needs the services of the court and I think we should do something to get him help.' Our job should be first off to do what your client wishes, and getting him to be acquitted is of course what he would want first.

And, another defense attorney stated:

> Respondent: To me one of the rewarding things about this work is having an impact on a young person's life. You can try to give another chance or the kind of advice they are missing. To me, that is what makes this a little different from an ordinary practice of law. Here you actually get a chance to do a valuable service.
>
> Interviewer: What about . . . a case that you think you can win and get it dismissed, but you know the kid needs some sort of help . . . how do you deal with that?
>
> Respondent: I think that depends, too . . . I mean that really depends. The first [thing] you have to understand and remember [is there] is a delinquency charge – another word for

> saying criminal charge – against a youth. My number one goal and objective is to address that. That is my job . . . I may be able to get another program involved or something, so if [so] I can I say 'neat' and I try to do that. But if it is a choice between resolving favorably a criminal charge or not, that is the first step. That has much more of a lasting impact.

According to these and all other defense attorneys with whom I spoke, their primary job is to seek the best possible *legal* outcomes for their clients. The best legal outcomes are acquittal or dismissal of charges against a juvenile, if possible, and the lowest possible sentence for which they can negotiate if an acquittal is not likely. Many state that if they are in a position to help the defendant, the attorneys will pursue this as a secondary, and valuable, goal. As the above transcript shows, some defense attorneys enjoy working with juveniles because they can help these youth; the tension between counselor/mentor and legal advocate is evident here. Yet the defense attorneys' shared understanding of their professional roles dictate that protecting the future welfare of a juvenile through treatment or rehabilitative services is less important than protecting the legal rights of a client.

Judges

Though the approaches of individual judges vary (Bortner, 1982; Hogarth, 1971), they all pursue a merger of punishing juveniles and protecting their future welfare, as dictated by the New Jersey juvenile court purpose clause. All judges with whom I spoke and who I observed perceive juveniles to be less culpable for offenses than adults and more in need of rehabilitation. Thus they take seriously their statutorily defined mission of enhancing juveniles' future welfare. Yet they also heavily weigh the need to protect the community by punishing wrongdoers. More so than either defense attorneys or prosecutors, judges seem to pursue a true merger of punishment and future welfare considerations in the juvenile court.

The judges clearly articulate their goal of helping adolescents whenever possible. According to one judge who is a former public defender:

> I find myself doing the same things that judges that I appeared before did 20–25 years ago. You basically try to save the kid. As a public defender I tried to save the kid. But you also had to defend constitutionally, legal rights were protected. Here I'm more concerned about doing the right thing for the kid's best interest and trying to rehabilitate him and try to save the kid.

And, judges (like prosecutors) state that they only use incarceration as a last resort for juveniles who have demonstrated (with prior arrests) that they are not amenable to rehabilitation:

> To tell you the truth, the kids that get sent to [the State reform school], run the whole system and have been given the benefit of anything we have available to us . . . Kids have exhausted all the programs, probation hasn't been successful, the outpatient programs haven't been successful, the residential programs for the juvenile justice have not been successful. They've probably

> completed it, and just didn't do well afterward. At that point, the kid usually [has committed] a serious offense and that's when they go. We have really run out of resources. We try to keep them out of there.

Moreover, judges complain about a lack of suitable rehabilitative programs for youth:

> Over the years since 1969, when I started, there have been many programs that have either just expired or for lack of funding have been terminated . . .

Thus juvenile court judges are very sensitive to the rehabilitative mission of the juvenile court.

Yet the juvenile court judges I studied also weigh the severity of offenses very heavily, and do not hesitate to impose punishment when they feel the circumstances of particular cases warrant punishment:

> Interviewer: What things are important for you when deciding on [a juvenile's] sentence?
> Judge: The nature of the charge. The particular facts surrounding the robbery. How was it perpetrated? Was there a weapon involved? Was [sic.] there any injuries to the victim? The impact on the victim. Then of course, you shift gears and you decide . . . what sentence will act both as a deterrent personally and whether or not the juvenile is a candidate for rehabilitation and if so how can that best be accomplished.

Overall, the judges walk a fine line between punishment and future welfare, and attempt to pursue both simultaneously:

> If you are able to work out a plea which . . . would serve the interest of society and society is protected and you can do something to try to deter the juvenile and/or rehabilitate him, then that should be done. You can't generalize this. It has to be done on a case-by-case basis.

Reaching a Compromise Between Punishment and Welfare

Prosecutors, defense attorneys and judges each have a different orientation – based on their professional roles and obligations – to the court's balancing of punishment and welfare concerns. Yet these three stakeholder groups work together in "court communities" with a mix of cooperation and adversarial competition to reach outcomes for cases (Eisenstein et al., 1988; Emerson, 1969). This interaction of the three groups produces a compromise between punishment and future welfare through three primary mechanisms. One, prosecutors persuade judges to punish juveniles in order to protect and help them. Two, defense attorneys use treatment programs as a bargaining chip to elicit compromise from prosecutors and convince judges to prescribe lenient, treatment-oriented sentences. Three, depending on the

circumstances of individual cases, judges simultaneously consider both punishment and welfare in a balanced decision-making process. By using these three forms of compromise, the stakeholder groups negotiate common understandings of appropriate solutions to cases. These understandings resonate with the groups' common and unique goals, and they are facilitated by the shared local knowledge that helps direct the actions of court communities (Eisenstein et al., 1988).

Punishing to Protect

The act of punishing youth in order to protect them was one of the building blocks of the first juvenile court. The Progressive era founders of this court created a category of status offenses, offenses such as truancy and curfew violations that are illegal only for youth. The goal behind this expansion of the court's mission was to protect and reform youth by forbidding them from behaviors that might hurt them. Thus, punishing a juvenile for violating curfew or not attending school was believed to help the juvenile to commit to a moral lifestyle and to prevent the youth from hurting herself (Tuthill, 1900).

This practice of punishing youth in order to protect them is still used by juvenile court actors in an effort to merge treatment and punishment. The following hearing offers an example of this practice. In this hearing, a youth is remanded to a detention facility prior to his placement in a treatment program:

Judge:	'[Defense Attorney], it's my understanding that he's been accepted into the [residential counseling] program, correct?'
Defense Attorney:	'Yes.' [The defendant's mother starts crying].
Probation officer:	'Your honor, it will probably take about 30 days for a bed to open for him.'
Judge (to defendant):	'I want you to know. [Probation officer] has gone to great lengths to get you this program. I can't [release] you [out of detention] now because you might mess this up, get into trouble and be found unacceptable, given your record' [The judge then gives the defendant an 18-month suspended sentence, to be served by placement in the residential program. The defendant is remanded to the youth house until a bed becomes available].

Here the defense attorney, prosecutor and judge agree to send this youth to a residential treatment program rather than the State reform school (juvenile prison). The defendant was interviewed by program staff and found acceptable for admission. He was then placed on the waiting list for the next available bed, estimated at a 30-day wait. Yet the judge sends the youth back to the detention facility. After the hearing he clarifies that he does not want to incarcerate this defendant, but feels compelled to do so in order to prevent the youth from getting into further

trouble and risking exclusion from this program. In order to protect the juvenile from harming his chances at getting treatment instead of long-term incarceration, the judge subjects the youth to an additional month in the juvenile jail. The juvenile is eventually given a treatment-oriented sentence, but only after being punished[2] in order to secure the possibility of getting this treatment. This practice is common when a defendant with several prior arrests is spared incarceration for a residential program for which he must wait to enter.

Other, more mundane, examples of punishing youth in order to treat her are when judges admonish or detain youth because of non-criminal, youthful misbehavior. Judges usually admonish defendants who are arrested late at night about being out late; often the time at which an offense is committed receives more attention during a hearing than the offense itself. For example:

Prosecutor: 'The police saw a car driving down a sidewalk, it was stolen. [The defendant is] a minor with no license, and [the defendant and passengers in the car] had cocaine. The state requests house arrest. He has a prior arrest.
Defense Attorney: 'House arrest is fine.'
Judge (looking at the police report): 'What's he doing out at 5:00 a.m.?'

Despite the fact that the juvenile was driving a stolen car without a license and was caught with cocaine, the judge's initial question is why the defendant is out at 5:00 a.m. In the following hearing the judge remands a 14-year-old girl to the juvenile shelter for disobeying her parents. In this hearing the judge never mentions that she was arrested for aggravated assault with a weapon:

Judge: 'Obviously she isn't complying with you or with my orders . . . I think it's obvious why – she's running away to her boyfriend. I guess it's infatuation. You can't continue to do that. But looking at you, I don't think you're going to listen to me, either, because you're of the mind that you're going to do what you want. And I can't allow that, so I have to send you to the shelter. If you run from there, I'll have to send you to the youth house. I'm sending you to the shelter and you'll do what they say.'

These examples demonstrate the merging of punishment and future welfare concerns – the youths receive punishment, but for treatment-oriented or protective reasons. These solutions are initiated by the prosecutor and appease each court actor: the defense attorney is satisfied because the juvenile eventually receives a non-severe, treatment-oriented sentence; the prosecutor is satisfied because the juvenile is sent a punitive message that will hopefully deter future behavior; and the judge is satisfied because she finds a way to pursue both punishment and welfare simultaneously.

Treatment as a Bargaining Chip

A second merger of punishment and future welfare is initiated by the defense attorney, when she offers a treatment-oriented solution to a case that troubles the prosecutor. Consider the following hearing:

> Prosecutor: 'This defendant is charged with distribution of [drugs] within 1,000 feet of a school, and one charge of distributing marijuana to an undercover officer. There were two undercover buys within 10 minutes of each other' [The prosecutor then gives a detailed description of the undercover operation, and requests that the defendant be remanded to the youth house].
>
> Prosecutor: 'The defendant has previously been given a [outpatient drug treatment] referral and a six month adjourned disposition [after which the case was dropped].'
>
> Defense Attorney: 'The state gets more creative all the time. Before it was a hurt leg, and now this. It's ridiculous that the police would do two undercover buys within 10 minutes of each other, in the same place. I ask that he be released to his mother, and to see [drug treatment professional].'
>
> [The judge follows this suggestion by sending the youth home to his mother, having him report to the drug counselor working with the court, and telling him to not go to the corner where he was selling drugs].

Here the defense attorney points out that the prosecutor has very weak evidence against the defendant – it is unlikely that the police would conduct two undercover drug purchases from the same defendant within 10 minutes of each other. This casts doubt on the police officer's testimony, which is the primary evidence against the defendant. The defense offers a solution in the form of a drug treatment program. The prosecutor can then claim to have secured a conviction on a case that might have otherwise ended in acquittal, the defense attorney allows the defendant to avoid punishment, and the judge clears a potentially difficult case. Thus, the defense attorney uses a treatment-oriented action as a bargaining chip to secure a lenient sentence (see Lemert, 1970). This allows each party to "save face" and claim a legitimate outcome, while merging the court's dual mission of achieving punishment and protecting juveniles' future welfare.

Mutual Consideration of Punishment and Future Welfare

The third method by which punishment and future welfare merge through courtroom interaction is when judges present them as simultaneous considerations. In each of the two above methods, the court actors use either punishment or welfare to achieve demands for the other. When punishing to protect, the court uses punishment to help achieve treatment goals. When using treatment as a bargaining

chip, the court uses treatment to help appease the demand for some court action (rather than allowing an acquittal or dismissal). In this third method, however, judges simultaneously project both goals.

In the following hearing a judge expresses his desire to help the youth through psychological treatment, while voicing his concern for protecting the public from further crimes and his commitment to punishing the youth severely if he does re-offend. The judge begins the hearing by stating:

> Judge: 'Last time we were here we remanded him and requested a psychological exam. The director of the youth house said they can't do that because the state has no contract for a psych exam. He's saying they can't do it because of politics. *I think it's necessary for public safety*. Counselor, what do you think?' (emphasis added)
>
> Defense Attorney: 'The parents want to take him home if there is drug testing and a curfew.'

The judge's request for psychological treatment (distinct from drug counseling) is interesting, since the youth has been charged with a drug offense rather than violence stemming from a mental disorder. In fact, no mental disorder is ever mentioned during this case. The judge's comments are also interesting because he couches his treatment request as necessary to protect the public. This demonstrates a balance between protecting a youth's future welfare and protecting the community from victimization. The hearing continues:

> Judge: '[Defendant's parents], have you visited him in the youth house?'
>
> Father: 'No'
>
> Judge: 'Have you spoken to him?'
>
> Father: 'Yes. He seems to be more remorseful and he realizes that he's as low as he's going to get. He wants to turn his life around and that's our hope and prayer. He can't hang out with his friends because they're using and selling drugs.'
>
> Judge: 'What about you [defendant]?'
>
> Defendant: 'I don't really know.'
>
> Judge: 'Do you want to go home?'
>
> Defendant: 'Yes'
>
> Judge: 'What drugs were you using?'
>
> Defendant: 'Just marijuana.'
>
> Judge: 'But you were caught with heroin on you.'
>
> Defendant: 'I was just holding it.'
>
> Judge: 'I'm getting a bad vibe. He's hanging his head, has nothing to say. I'm not trying to hurt you, let me make that clear. Is this behavior going to end?'
>
> Defendant: 'Yes'
>
> [The judge then releases the Defendant to his parents and mandates random drug testing].
>
> Judge: '. . . Your parents are good people and they love you very much. They're trying to help you get on the straight and narrow. If you violate this court order they'll call me and I'll have an officer come get you. That's not a threat, but it's what I'll do.'

The remainder of this hearing is a good example of how the judge offers the youth treatment and a second chance, but with a threat of punishment for non-compliance. The judge directly states that he isn't trying to hurt the juvenile, but he will be forced to take more punitive action if the juvenile re-offends. This hearing demonstrates how the two missions are invoked simultaneously using seamless language during court hearings.

We see further evidence of this mixed consideration in the following statement about a defendant by a representative from the New Jersey Division for Youth and Family Services:

> Your honor because of his low functioning – he has an IQ of 46 – he's been deemed unacceptable for our services. He is of a very low functioning level. We're trying to get him into a [developmentally disabled] service. It's not a question of money, because we're willing to pay for it. Regarding his grandmother, she lives in a senior citizen center and really can't take him in for more than a few days. He has frequently gone AWOL from previous placements. Because of this we're concerned that he is a danger to the community. And, because of his very low functioning we think there is a danger of him being victimized by others.'

This passage underscores the idea that the goal of the court is to simultaneously pursue both treatment and protection of the community.[3] Rather than selecting certain cases that are eligible for one or the other of these competing goals as mutually exclusive options, the court attempts to consider them both simultaneously.

CONCLUSION

Based on interviews with court decision-makers and observations of court hearings, I find that juvenile court actors pursue both punishment and treatment concerns through a negotiated order during juvenile court hearings. The negotiated merger of these concerns is facilitated by local knowledge – including shared understandings of offenders, offenses, and each actor's professional obligations – that is held by each court community member (Eisenstein et al., 1988). When the court punishes to protect, it follows the prosecutor's orientation – here the court attempts to help adolescents by adhering to a punitive framework that acknowledges the offender's responsibility and culpability. When the court admits treatment as a bargaining chip, it follows the defense attorney's orientation of securing the most favorable legal disposition first, and then acquiring therapeutic services. When the court mutually considers both objectives, it follows the judge's orientation of following the court's purpose clause and attempting to simultaneously achieve both goals. By using these three strategies for compromise, court actors actively create a

shared understanding of appropriate responses to delinquency – these responses are carefully balanced to both punish and protect the future welfare of youth, while appeasing all court community members.

These results are contrary to what one would predict based on recent sociological work on the increasing punitiveness within both criminal justice (Garland, 2001) and juvenile justice (Feld, 1999). I find that all three stakeholder groups in the juvenile court – the defense attorneys, the prosecutors, and the judges – attempt to enhance the future welfare of adolescents to some extent. They each do this in different ways, based on their professional roles and obligations. But rather than the juvenile court dispensing with concerns of future welfare and primarily seeking to punish, as one might predict, I find that rehabilitation is still alive and well in the juvenile court. Protecting the future welfare of adolescents is therefore still a goal of the juvenile court, despite the increasing punitiveness of juvenile courts and the increasing numbers of youth who are transferred to criminal court to be prosecuted as adults (Feld, 1999).

More broadly, these findings suggest that youth who offend may be perceived as less culpable for their crimes than adults. Political slogans such as "old enough to do the crime, old enough to do the time" have proliferated in recent years and possibly eroded much of the support for protecting the future welfare of juvenile delinquents. Yet this chapter suggests that the progressive mission of rehabilitating delinquents has not disappeared. Future studies should employ longitudinal research to consider how the court's rehabilitative mission has changed over time, as well as comparative research that contrasts juvenile and criminal courts.

These findings may be relevant to other institutions that deal with youth, as well. Many schools, for example, have recently augmented their focus on security by following zero-tolerance policies that mandate punishment for minor misbehaviors (Skiba et al., 1997). This shift mirrors recent changes in juvenile court, in that schools must now balance between protecting the future welfare of students and suspending or expelling students for petty offenses in order to maintain safety. Future research should use ethnographic research to investigate how schools discipline students. Such research can examine how these competing objectives are balanced within schools, and how the diverse stakeholders in schools (teachers, principals, security guards, students and parents) produce a negotiated order between these competing objectives. The findings of this chapter suggest that despite increasingly punitive policies, schools might still protect the future welfare of misbehaving students in ways that are structured by the roles and obligations of the stakeholders involved in school discipline.

NOTES

1. Juvenile courts in each county are centralized in a single county courthouse building. Four judges preside over adjacent courtrooms in one county, and two judges in adjacent courtrooms in the other county.
2. To be clear, the judge's goal is to confine the youth to keep him out of trouble, rather than to punish the youth. Yet this method of protection involves an additional month of incarceration.
3. This passage also illustrates how court actors interpret prior misbehavior as indicative of a potential future threat to the community (see Emerson, 1969).

ACKNOWLEDGMENTS

This research was funded in part by the National Science Foundation (SES-0004334) and by the National Institute of Justice (2001-IJ-CX-0005). All opinions are those of the author and do not represent either funding agency. The author would like to thank Stacy Burns for her helpful comments on earlier drafts of the manuscript.

REFERENCES

Atkinson, J. M., & Drew, P. (1979). *Order in court: The organisation of verbal interaction in judicial settings*. Atlantic Highlands, NJ: Humanities Press.

Bernard, T. (1992). *The cycle of juvenile justice*. New York: Oxford University Press.

Bortner, M. A. (1982). *Inside a juvenile court: The tarnished ideal of individualized justice*. New York: New York University Press.

Burns, S. L., & Peyrot, M. (2003). Tough love: Nurturing and coercing responsibility and recovery in California drug courts. *Social Problems*, *50*, 416–438.

Carlen, P. (1976). *Magistrate's justice*. London: Martin Robertson.

Chesney-Lind, M., & Shelden, R. G. (2004). *Girls, delinquency and juvenile justice* (3rd ed.). Belmont, CA: Thomson Wadsworth.

Cicourel, A. (1968). *The social organization of juvenile justice*. New York: Wiley.

del Carmen, R. V., Parker, M., & Reddington, F. P. (1998). *Briefs of leading cases in juvenile justice*. Cincinnati, OH: Anderson.

Eisenstein, J., Flemming, R., & Nardulli, P. (1988). *The contours of justice: Communities and their courts*. Boston: Little & Brown.

Emerson, R. M. (1969). *Judging delinquents: Context and process in juvenile court*. Chicago: Aldine.

Emerson, R. M. (1981). On last resorts. *American Journal of Sociology*, *87*, 1–22.

Emerson, R. M., Fretz, R. I., & Shaw, L. L. (1995). *Writing ethnographic fieldnotes*. Chicago: University Chicago Press.

Feeley, M. (1979). *The process is the punishment: Handling cases in a lower criminal court*. New York: Russell Sage Foundation.

Feld, B. (1998). Juvenile and criminal justice systems' responses to youth violence. *Crime and Justice: An Annual Review*, *24*, 189–261.

Feld, B. (1999). *Bad kids: Race and the transformation of the juvenile court*. New York: Oxford University Press.

Garfinkel, H. (1956). Conditions of successful degradation ceremonies. *American Journal of Sociology*, *61*, 420–424.

Garland, D. (2001). *The culture of control: Crime and social order in contemporary society*. New York: Oxford University Press.

Hallsworth, S. (2000). Rethinking the punitive turn: Economies of excess and the criminology of the other. *Punishment & Society*, *2*, 145–160.

Heumann, M. (1978). *Plea bargaining: The experiences of prosecutors, judges and defense attorneys*. Chicago: University of Chicago Press.

Hogarth, J. (1971). *Sentencing as a human process*. Toronto: University of Toronto Press.

Holstein, J. (1993). *Court-ordered insanity*. NY: Aldine de Gruyter.

Kupchik, A., Fagan, J., & Liberman, A. (2003). Punishment, proportionality, and jurisdictional transfer of adolescent offenders: A test of the leniency gap hypothesis. *Stanford Law & Policy Review*, *14*, 57–84.

Lemert, E. (1970). *Social action and legal change: Revolution within the juvenile court*. Chicago: Aldine.

Lofland, J., & Lofland, L. H. (1984). *Analyzing social settings: A guide to qualitative observation and analysis*. CA: Wadsworth.

Matza, D. (1964). *Delinquency and drift*. New York: Wiley.

Morris, A., & McIsaac, M. (1978). *Juvenile justice? The practice of social welfare*. London: Henneman.

Parker, H., Casbarn, M., & Turnbull, D. (1981). *Receiving juvenile justice: Adolescents and state care and control*. Oxford: Basil Blackwell.

Platt, A. (1977). *The child savers: The invention of delinquency* (2nd ed.). Chicago: University of Chicago Press.

Prescott, P. S. (1981). *The child savers: Juvenile justice observed*. New York: Alfred A. Knopf.

Rothman, D. (1980). *Conscience and convenience: The asylum and its alternative in progressive America*. Boston: Little & Brown.

Ryerson, E. (1978). *The best laid plans: America's juvenile court experiment*. New York: Hill and Wang.

Schlossman, S. (1977). *Love and the American delinquent: The theory and practice of "progressive" juvenile justice*. Chicago: University of Chicago Press.

Singer, S. I. (1996). *Recriminalizing delinquency: Violent juvenile crime and juvenile justice reform*. New York: Cambridge University Press.

Skiba, R. J., Peterson, R. L., & Williams, T. (1997). Office referrals and suspension: Disciplinary intervention in middle schools. *Education and Treatment of Children*, *20*, 295–315.

Sudnow, D. (1965). Normal crime: Sociological features of the penal code in a public defender office. *Social Problems*, *12*, 255–270.

Tanenhaus, D. S. (2004). *Juvenile justice in the making*. New York: Oxford University Press.

Tuthill, R. S. (1900). The juvenile court law in Cook County, Illinois, 1899. In: *Proceedings of the Illinois Conference of Charities* (pp. 10–14). Springfield, IL.

West, C. (1996). Ethnography and orthography: A (modest) methodological proposal. *Journal of Contemporary Ethnography*, *25*, 327–352.

Zimring, F. E. (2000). The punitive necessity of waiver. In: J. Fagan & F. E. Zimring (Eds), *The Changing Borders of Juvenile Justice* (pp. 207–225). Chicago: University of Chicago Press.

UNDERSTANDING PROBLEMS IN AN INTERPRETER-MEDIATED POLICE INTERROGATION

Martha Komter

ABSTRACT

This chapter focuses on ways in which the participants in an interpreter-mediated police interrogation manage problems of understanding. Understanding problems are related to the particular types of turn-taking of interpreter-mediated interaction. Cultural, institutional and interactional perspectives are explored to shed light on the complexities of the understanding problems. Understanding problems are seen not just as "trouble" in interaction, but also as interactional resources that are exploited for the management of institutional tasks and interests.

INTRODUCTION

The materials presented in this chapter are transcripts of a police interrogation with an interpreter.[1] What is immediately obvious in this interrogation is that there are many understanding problems. These problems are manifested in three ways: First, problems of understanding are exhibited in the interaction and dealt with by way of repair sequences (cf. Schegloff, 1992); secondly, the interrogator and the interpreter explicitly comment on the suspect's state of understanding; thirdly, the participants make inferences that are based on a demonstrable lack

Ethnographies of Law and Social Control
Sociology of Crime, Law and Deviance, Volume 6, 203–224

ISSN: 1521-6136/doi:10.1016/S1521-6136(04)06011-7

of contextual or cultural knowledge, which results in apparently unrecognized misunderstandings.

These different manifestations of understanding problems call for different analytic approaches. Most importantly, understanding problems will be treated as inseparable from the context of the interaction in which they occur. This involves adopting the perspective of ethnomethodologists and conversation analysts, who address how the actors themselves make sense of what they are doing. "Context" is not considered as external resource that has an independent "existence," but as integral part of the participants' orientations, brought into being by the sequential organization of the interaction (Drew & Heritage, 1992). Understanding or appreciation of the prior turn is displayed by the recipient's next turn (Heritage, 1984a, p. 255; Sacks et al., 1978, p. 44). If the recipient recognizes some kind of understanding problem repair may be put into action through repair initiators such as "what do you say," after which the next speaker can remedy the problem (Schegloff, 1992; Schegloff et al., 1977). In this way understanding problems and their solutions are situated, negotiated, and achieved in the course of the interaction.

However, misunderstandings are not always recognized by the participants themselves. In our materials some of the inferences made by the police interrogator and the interpreter are clearly based on a lack of sufficient knowledge. As none of the participants appears to realize this, no repair activities are initiated to remedy the problem. All the same, it is obvious to the analyst that these "misunderstandings" affect the ensuing interaction. It could be argued that in those instances of misunderstandings, ethnographic contextual knowledge can provide for a fuller understanding of the events (cf. Moerman, 1988). However, it has been pointed out that a diagnosis of "misunderstandings" that are not oriented to by the participants themselves, opens up all sorts of prejudiced interpretation (Linell, 1995). The problem for the analyst is then to explore to what extent and in what circumstances ethnographic knowledge can contribute to a better understanding of the materials.

The aim of this chapter is to show how, in an interpreter-mediated police interrogation, "misunderstanding" is not just a result of "problems" in interaction, but can also be exploited as interactional resource for reorganizing the turn-taking in the interrogation, and for accomplishing institutional tasks. The materials to be analyzed here comprise excerpts of talk that occur in the first 10 minutes of a police interrogation. The suspect had been apprehended by the police because he was drinking a can of beer in the street, and could not identify himself. He was then taken to the police station, where it was found that he carried a passport that did not belong to him. It was suspected that he had stolen the passport in order to sell it. Moreover, as he did not speak Dutch nor carry any papers of identification,

he was suspected of being an illegal immigrant. In the interrogation, the suspect is charged with the theft of the passport and the intention of selling it. He admits to having wanted to sell the passport, but he denies having stolen it. According to him, a Moroccan man, whom he met in the street, gave him the passport and asked him to sell it and share the profits with him. The suspect speaks French with a heavy accent and, in spite of his claims that he is French, both the interrogating policeman and the interpreter think he is Moroccan.

First I shall present a sequential analysis of a substantial part of the first 10 minutes of the interrogation, to clarify the characteristic features of interpreter-mediated interaction, and their effects on the interrogation. Then I will take a broader view in order to explore to what extent ethnographic or cultural knowledge can contribute to our understanding of the events, and to illuminate the institutional and interactional commitments of the participants.

TURN-TAKING AND PARTICIPATION FORMAT

As in many other kinds of institutional interaction, a characteristic feature of police interrogations is the question-answer format, where the police officer typically asks the questions and the suspect or witness typically provides the answers. In interpreter-mediated police interrogations the turn-taking organization is somewhat more complex, as it has to accommodate the activities of the interpreter. Consequently, the question-answer format is transformed into a question-translation-answer-translation format.

The standard opening of a police interrogation is the police officer's informing the suspect of his right to silence. In our interrogation this is managed as follows:[2]

1)
1. P: U:::h you can tell him that he
2. [uh is not obliged to answer [questions
3. I: [Bon [vous n'êtes
4. pas obligé de répondre à ses questions.
5. (3)

What is noticeable is, that P does not address the suspect, but talks *about* him to the interpreter as a third party, using the personal pronouns "him" and "he." This sets the tone for the rest of the interrogation, in that there is no direct interaction between the police officer and the suspect (cf. Müller, 1989, p. 729). The descriptive manner in which P asks I to relay what he is about to say ("you can tell him that . . ."), is not taken up by I (for example: "the police officer asks me to tell

you . . .”). Instead, she enters into direct conversation with the suspect, using a form of address (Lines 3, 4: “Right . . . you are not obliged to answer his questions”), on the assumption that he knows that what she says is not her own invention, but a translation of P’s prior utterance. In terms of the “participation framework” of the interaction it could be said that P is the “author” of his text, and that I is the “animator” who is understood to act only as “voice” (Goffman, 1981). This is a well documented characteristic of interpreted interaction (see Wadensjö, 1998, pp. 86–90). In Line 3 it can be seen that the interpreter does some form of simultaneous interpreting, in that she does not wait until P has produced a complete utterance or turn-constructional unit (TCU), but she overlaps with “bon” (“right”), indicating that something is coming up; she continues after she has heard some more “translatable material” but not a complete TCU. It has been suggested that simultaneous interpreting conveys the idea that the interpreter is merely a “medium of transmission,” not a “true third party” (cf. Wadensjö, 1998, pp. 77, 254).

Her translation of the suspect’s “right to silence” is followed by three seconds of silence. After this the interrogator continues:

2)

6. P: And then he can (1) [(write down) his name ((gives paper to S))
7. I: [Vous pouvez marquer, votre nom, (3)
8. S: Je sais pas écrire =
9. I: = I cannot write.
10. P: He cannot write (2).

The interpreter’s professionalism and experience are demonstrated by her quick entry into the talk, and by her translation of the policeman’s talk that was uttered in overlap with hers. In spite of the overlap, the turn-taking in Lines 6–9 exhibits the characteristic pattern of interpreted interaction: question-translation-answer-translation. As has been noted before, the interrogator does not use terms of address when speaking about the suspect, but the interpreter does when she asks him to write down his name (Line 7: “you can write down your name”). Her translation of the suspect’s response in Line 8 preserves the suspect’s direct speech: “I cannot write.” This direct speech translation appears to be a common way of translating (Wadensjö, 1998, pp. 241, 242). That there is no ambiguity as to who is the referent of “I” in the interpreter’s translation (Line 9) is exhibited in Line 10. P acknowledges the suspect’s claim that he cannot write, by repeating the interpreter’s utterance in Line 8, while changing the personal pronoun. The fact that the policeman’s acknowledgement “He cannot write” is not translated, illuminates limits to the “translatability” of the interaction: the substance of utterances is translated, rather than interactional phenomena such as acknowledgements or other “back-channel” activities (cf. Müller, 2001,

p. 263). P's utterance in Line 10 reinforces the participation framework that is being set up in these first few turns at speech in the interrogation: P talks *about* S to I; I talks to S *on behalf* of P, and to P *as* S. After a two seconds' silence P continues:

3)
11. P: Yes we still want to know his name.
12. I: Quand même, monsieur voudrait savoir votre nom.
13. S: Hm?
14. I: Il voudrait quand même avoir votre nom.
15. S: Ah je sais pas écrire moi.
16. I: I cannot write.
17. P: Cannot write (2).

It could be observed that in Line 12 ("still, mister would like to know your name") I translates P's personal pronoun "we" (Line 11) as: "monsieur" (mister). Something similar is shown in Line 14, where the interpreter, in response to the suspect's repair initiator (hm?), rephrases the utterance, changing "monsieur" into "il" ("he"). This reconfirms her independent status and avoids an appearance of alignment with P.

It should be noted that S's repair initiator in Line 13 is not translated. Apparently, minor interactional trouble is dealt with immediately on the spot, as something that concerns only the current speakers, without involving P in the matter. In Lines 15–17 prior talk is virtually repeated, including the two seconds' silence after P's acknowledgement in Line 17 (cf. Example 2, Lines 8–10). The difference is that in Example 2 the suspect points at his inability to write in response to P's request that he writes down his name, whereas here the suspect's response follows P's expression of his desire to know the suspect's name. The interrogation continues:

4)
18. P: But the name that I have, ((points at paper in front of him))
19. I: Est-ce que le nom que::: qui figure ici, sur (2) la couverture (5)
20. P: (that is) <u>his</u> name yes.
21. I: Ça c'est votre nom,
22. S: Je sais pas moi je ne sais pas eh écrire.

Again P tries to verify the suspect's name, this time by pointing at a piece of paper in front of him. The interpreter's problems in translating P's personal pronoun "I" (Line 18), are exhibited by her hesitation in Line 19, and her subsequent avoidance of mentioning agency. P's utterance "the name that I have" is translated as: "the name tha:::t that stands here, on (2) the cover" (Line 19). Her hesitation

could then be seen, not as a "word search" but as a "sentence construction search" to deal with the syntactic consequences of the avoidance of the use of the personal pronoun "I."

Although this is not an example of simultaneous translation, I does start translating before P has finished a complete TCU. P allows I to translate the first part of his projected utterance, and then, after a silence of 5 seconds he finishes his sentence, which is subsequently translated. P shows that he is accommodating the interaction for the translating activities of the interpreter, by producing his speech bit by bit, leaving space for her to translate, as if he is "dictating" the translation. For the third time the suspect replies that he cannot write (Line 22: "I don't know I cannot uh write").

In sum, the manner in which the participants have managed the interaction thus far, exhibits an adaptation of the turn-taking to accommodate the contributions of the interpreter. The question-answer format is modified into a question-translation-answer-translation format. As a result, there is no contiguity between the utterances of the primary speakers, and they cannot monitor one another's ongoing utterances. The police interrogator's and the interpreter's use of personal pronouns reveals an unusual participation format. The police interrogator speaks *to* the interpreter, *about* the suspect. When translating this, the interpreter presents herself as merely "passing on" the texts that are presented to her. At the same time, she shows a sensitivity to which party she translates for, as she does not translate identically both ways (cf. Müller, 1989, 2001). Thus, to the suspect she indicates that she speaks *on behalf* of P but not *as* him; to the interrogator she shows that she speaks *as* the suspect, but not *for* him.

ASIDES

As we have seen in Example (3) Lines 13, 14, the turn-taking organization of interpreter-mediated interaction is modified to accommodate a simple repair sequence. This suggests that such a general conversational routine temporarily overrules the business of interpretation. My materials show that also in other cases of interactional "trouble" the interpreter may pursue the matter on her own initiative (cf. Berk-Seligson, 1990; Bolden, 2000; Linell, 1995; Müller, 1989, 2001; Wadensjö, 1998). As shown in Example (4) Line 22, the suspect claims for the third time that he cannot write. This time, the interpreter does not translate this:

5)
22. S: Je sais pas moi je ne sais pas eh écrire.
23. I: Sans- je sais pas le eh le prononcer c'est Santigelain
24. où je ne sais pas comment ça se prononce ( ) (3)

25. S: Pierre Michel (0.5) Santier gélé (3)
26. I: ((softly)) Oh wait.
27. Alors le nom de famille c'est quoi?
28. Shall I write [it down?
29. S: [Santier
30. P: I'll do it =
31. I: = Pardon?
32. S: Santier gailon (1)

Instead of translating the suspect's utterance in Line 22, the interpreter looks at the paper on the desk containing the suspect's presumed name, tells the suspect that she does not know how to pronounce it, and produces a candidate pronunciation of what appears to be his family name: "Santigelain" (Lines 23, 24). As mentioned above, the interpreter's intervention occurs after the suspect has claimed for the third time that he cannot write (Line 22). The obvious absence of an appropriate answer to the interrogator's repeated questions after the suspect's name apparently induces her to pursue the matter of her own accord. Thus, she takes responsibility not just for translating what is put before her, but also for procuring adequate answers. This changes the participation format of the interaction: the interpreter now presents herself as "author" of her own text, rather than as "animator" of the policemen's text. Her activities are informed not only by the task of translation, but also by her understanding of the goal of the interrogation (Bolden, 2000).

In Line 25 the suspect gives his full name, beginning with his Christian names. This shows that he does not respond directly to the difficulties I appears to have in pronouncing his surname, but that he does attend to earlier requests to tell his name. Then, after 3 seconds of silence, the interpreter appears to check herself with an utterance in Dutch ("oh wait"). In Line 27 she addresses S again ("what then is the family name?"). However, without waiting for an answer she addresses P (Line 28) and asks whether she should write it down. The start of the suspect's answer overlaps her turn; he stops talking when P answers I's question in Line 30. The interpreter's subsequent repair initiator (Line 31) is spoken in French and addressed to S, who finally tells her his family name (Line 32).

The interactional complexity shown in this fragment is related to the simultaneous operation of activities performed by different speakers addressing different recipients in different languages. I and S are speaking French while engaged in producing the suspect's name; I and P speak Dutch while organizing who is to write it down. In a way, the two languages separate the business between I and S from the tasks I and P are performing. Who is talking to whom is clearly marked by the language spoken. This is why the utterances in Lines 29, 30 and 31 are heard as responses not to the immediately prior utterances, but to those before

that (in Lines 27, 28 and 29). When S responds to I's repair initiator in Line 32, their interaction has re-established itself as the central business:

6)
31. I: Pardon?
32. S: Santier gailon (1)
33. I: San,
34. S: tier gailon
35. I: tier, (0.5)
36. S: gé, lén,
37. I: géleen, (2)
38. Santier géleen,
39. mais ça s'écrit comment (3).
40. S: Je sais pas moi.

In this fragment the interaction is exclusively between I and S. In Line 32 S finally appears to have answered I's question after his family name. As a response, I repeats the first syllable of what she appears to have heard, with a slightly rising intonation. S hears this as an invitation to repeat the rest of his name (Line 34).

It has been observed that one way of achieving repair is by a partial repeat of the trouble source (Schegloff et al., 1977, p. 368). Here it can be noted that repair is sought by repeating the "untroublesome" part of the trouble source as a candidate token of partial understanding, inviting the suspect to furnish the rest. This can be heard as a "try-marker," securing a recognition of the "correctness" of the name thus far (Sacks & Schegloff, 1979, p. 18). Moreover, in providing the rest of his name (Line 34), S implicitly "ratifies" the correctness of I's version of the first syllable of his name. In Lines 35, 36 the same procedure is generated again: I utters the next syllable of what she has heard, and S ratifies this by producing the rest. It appears that S accommodates for I's possible hearing troubles by pronouncing the two syllables separately, with a rising intonation after each syllable. In Line 37 I pronounces the two syllables in one go, and, after a silence of two seconds, she produces the whole name (Line 38).

Up to this point, it is with sounds that they are concerned, not with spelling. I's troubles may be a result of the lack of clarity of S's pronunciation,[3] or with his particular type of accent. That this is a problem is illustrated by I's utterance in Line 39 ("but how is that spelled"); and that this problem cannot be solved in this way is underlined once more by the suspect's response in Line 40 ("I don't know"). The trouble with the suspect's presumed illiteracy is that, even though the interpreter now appears to have heard his name correctly, it will have to be written down in the record of the interrogation. The fragment shows that the interpreter

takes upon her the responsibility not just for eliciting an adequate answer, but also for eliciting a "write-downable" name.

The interaction of the interpreter and the suspect (Lines 31–40) has temporarily excluded the interrogator. The interpreter continues by addressing P:

7)
41. I: He doesn't know how it's spelled
42. I- I'll do it phonetically for
43. [uh
44. P: [yes
45. I: this is what I hear santier cheleen.
46. For I actually hear a cee eitch here.
47. (4)
48. P: And where was he born? (2).
49. ((20 Lines omitted))

In Line 41 the interpreter brings P up to date, not by translating a prior utterance, but by relating what has been said, describing the suspect in the third person.[4] This subsequently results in a spate of interaction conducted exclusively between the interrogator and the interpreter in Dutch. The interpreter then writes down for the interrogator a phonetic rendition of the suspect's name, after which the interrogator asks about the suspect's place of birth (Line 48).

In the 20 lines omitted from the transcript, the suspect has answered that he was born in Paris. The interrogator then wants to know where in Paris he was born. In response to this, the suspect utters something that sounds like an address, which the interpreter does not appear to understand:

8)
68. I: Pouvez vous eh parler un peu plus eh
69. S: ((louder:)) Trois mille longement La Courneuve.
70. I: Langement?
71. S: Longemon.
72. (5)
73. I: ((softly)) Well that's phonetic again.

In Line 68 I prompts the suspect to speak up a little ("can you uh speak a little more uh") and, as a response, S reproduces his answer in a louder voice. I's expression of a candidate understanding in Line 70 is repeated by S in more or less similar, but not the same, sounds. After a 5 seconds' silence the interpreter concludes by addressing P in Dutch, referring to the fact that they will again have to write down a phonetic rendition of what she heard as the address. She continues:

9)
74. I: Langement c'est le nom du village ou c'est quoi Langement.
75. S: Longemon. House. Logement.
76. I: A::h logement (3)
77. Logement et puis?
78. S: Trois mille logement La Courneuve le village.
79. I: Cour,
80. S: neuve.
81. I: Ça c'est le nom du village?
82. S: Oui (2).
((11 lines omitted))

In Line 74 the interpreter suggests that S may have been born in a village ("Langement is the name of the village or what is it Langement"). This is notable, as the suspect has said earlier that he was born in Paris. The "change of state token" (Heritage, 1984b) in Line 76: "A::h logement" ("Ah hostel") indicates that now, at last, she has understood this item. Then again, in Line 77, the interpreter is pursuing a word-by-word understanding of S's utterances ("hostel and then?"), after which S proceeds to give her what sounds like a full address ("three thousand hostel La Courneuve the village"). The suspect goes along with the interpreter's earlier suggestion by adding "village" to his address in Line 78 (compare this with Line 69 where he does not). After the collaborative repetition of "Courneuve" (Lines 79, 80), the interpreter asks whether that is the name of the village, which S confirms (Lines 81, 82). It now appears that the interpreter's understanding problems do not only revolve around hearing correctly what S says, but also around the fact that the suspect appears to have produced the name of a "village" in answer to the question where in Paris he was born. The interpreter deals with this discrepancy by assuming that the one must be the place where S lives, and the other where he was born (in 11 lines not shown here).

In sum, the opening sequence of this interrogation illustrates that what is routine in many police interrogations, the taking down of the suspect's name and address, is problematic here. Problems of understanding are likely to create "asides" in the interaction: interaction exclusively between the interpreter and the suspect to achieve sufficient understanding before going on, and interaction exclusively between the interpreter and the interrogator, to bring the interrogator up to date, to comment on the state of affairs, or to engage in common tasks.

SEQUENTIAL AMBIGUITIES

The possibility of transforming the translation mode into "asides" where the interpreter is engaged in exclusive interaction either with the suspect or with

the interrogator gives rise to moments of interactional ambiguity. These will be explored in the following sections.

After the intermezzo between the suspect and the interpreter about whether the suspect was born in *La Courneuve* or whether he lives there, the interpreter continues by addressing P:

10)
93. I: I as- uh I ask whether he was born there or whether he
94. [lives there, for
95. P: [Yes yes I understand the difference but
96. I: Yes.
97. P: He's playing dumb of course.
98. →(2)
99. I: C'est un peu bête là.
100. S: Pourquoi.
101. I: Why.
102. (2)
103. P: Well (2).

I's meta-comment to bring P up to date leads to some exchanges of exclusive interaction in Dutch between the interrogator and the interpreter (Lines 93–97). I's comments induce the interrogator to utter an assessment of S's conduct ("playing dumb"). After that there is a silence of two seconds.

It has been shown that in ordinary conversation there is a preference for agreement after an assessment, or for a second assessment (Pomerantz, 1984). As P's assessment (Line 97) concerns the suspect who does not understand Dutch, it could also be heard as a complaint about an absent third party. The appropriate response to a complaint about a third party may be a sign of affiliation (cf. Drew, 1998, p. 324; Drew & Holt, 1988). The two seconds of silence (Line 98) highlight the sequential ambiguity at this moment. If the interpreter decides to continue the prior interaction as an "aside" between her and the police interrogator, she could respond to P's assessment with an agreement, a second assessment, or a sign of affiliation. The continuation shows, however, that she eventually treats P's utterance as translatable material, and that she decides to address the suspect rather than respond to the interrogator. The interpreter's decision to translate can be attributed to her professional capacity as a "neutral" interpreter, but also as sign of reluctance to align with P's utterance.

As has been pointed out before, the participation format is that P talks to I *about* S, which I translates as talk *to* S, using the appropriate form of address. P's description of S as "playing dumb" is uttered during a stretch of interaction between P and I, which excludes the suspect who does not understand Dutch. As we have seen, it can be heard as a complaint about the conduct of a non-present person.

On the other hand, if it were to be translated with the appropriate term of address ("you're playing dumb"), it could be heard as an accusation or an insult to the suspect's face (cf. Dersley & Wootton, 2000, p. 378). The interpreter's translation (Line 99: "it's a little stupid") avoids using a term of address, omitting agency. The absence of agency, and the vagueness in her translation could be a result of her efforts to manage recipient design (cf. Müller, 1989, p. 737), or to mitigate a potential face-threat (Wadensjö, 1998, p. 164). Thus, the silence in Line 98 may be due to two circumstances: first, as mentioned before, the interpreter has to decide on whether to provide an appropriate response to the interrogator's assessment, or to treat it as materials to be translated; second, she must then manage the recipient design when translating an utterance that can be heard as an insult when spoken to someone's face.

Her translation is vague in that the demonstrative pronoun does not refer back to a specific item (Line 99: "it's a little stupid"). Moreover, as P and I have been talking in Dutch for a short while (Lines 93–97), the referent of Line 99 must be unclear to the suspect. This may account for S's subsequent request for clarification ("why," Line 100). After the interpreter has translated this there is a two seconds' silence, a non-committal expression by P ("well") followed by another two seconds of silence. P then continues:

11)
104. P: But he does know in what arrondissement he is born
105. [in Paris.
106. I: [Mais vous êtes né dans quel arrondissement.
107. (2)
108. [A Paris
109. S: [La Courneuve.
110. (2)
111. La Courneuve le village.
112. (1.5)
113. I: In a village, La Courneuve.

P proceeds by continuing on the topic of his earlier request about the suspect's place of birth. As P's selection of the term "arrondissement" shows his geographical "expertise," this question could be heard as a check on the suspect's credibility, rather than as an attempt to elicit the required data for the police-record. It trades on the idea that someone who claims to be born in Paris is expected to know in what "arrondissement" he was born.[5] The question displays the interrogator's "investigative stance" (Zimmerman, 1969, pp. 331–333) in that it reveals a skepticism towards the credibility of the suspect's claims.

Again, the suspect says he has been born in La Courneuve, and when the interpreter does not respond he adds: "La Courneuve the village" (Line 111) as he has done before (Line 78). P has already assessed this conduct as "playing dumb"; this time he upgrades his criticism:

12)
114. P: He indicates non-verbally that he doesn't give a shit about (0.5)
115. [the police.
116. I: [Bon.
117. E:::h c'est clair quand on vous observe,
118. que vous vous en foutez de la police.
119. S: Bon c'est normal c'est eheh ((laughs)) c'est normal =
120. I: = That's logical.
121. (3)
122. P: And we don't give a shit about him.

It must be assumed that P draws his conclusions (Lines 114, 115) on the basis of what can be inferred from the anomaly of having been born both in Paris and in a village, as S has given no non-verbal signs of provocation. P's phrasing suggests agency ("he indicates") and provocation ("doesn't give a shit") on the part of S. In the translation ("u:::h it's clear when one observes you," Line 117) the agency has disappeared, while the responsibility of inferring the attitude from his behavior is assumed by others. The rest of P's utterance is translated literally, and with a term of address (Line 118: "that you don't give a shit about the police"). S accepts this interpretation of his relations with the police, and describes this in a laughing voice as "normal." That this might be construed as an act of defiance or provocation, could be inferred from the three seconds' silence after I's translation, and P's subsequent response. The interaction continues:

13)
122. P: And we don't give a shit about him.
123. I: What do you say? =
124. P: = Then we don't give a shit about him.
125. I: Alors on se fout de vous.
126. (1)
127. S: Comment?

It appears that the hostilities in the interaction are escalating. The interrogator has proceeded from his complaint that the suspect is "playing dumb" (Line 97), to the assessment that he "does not give a shit about the police" (Lines 114, 115), and ends up by stating that "we don't give a shit about him" (Line 122). In response to the interpreter's repair initiator "what do you say?" (Line 123) P repeats his

utterance with a slight rephrasing ("and" becomes "then"). Both "and" and "then" can function as "tying techniques" (Sacks, 1995, Part I, p. 716). P's decision to change "and" into "then" establishes a causal connection between his utterance in Line 124 and S's position in Line 119 ("that's normal"), which makes it more easily identifiable as a counter-insult.

After a second's silence S responds with a repair initiator ("what?" Line 127). It may be suggested that, as it echoes the interpreter's repair initiator in Line 123, both repair initiators might be triggered by the same trouble source: the unmitigated hostility of the interrogator's utterances in Lines 122 and 124. However, the underlying motivation for producing a repair initiator is difficult to establish. Repair initiators do not specify the particular type of trouble the speaker has with the prior utterance, and repair can be accomplished without revealing the actual nature of the trouble source (cf. Sacks, 1995, Part II, p. 413). Moreover, it has been observed that repair initiators may be indicative of other interactional contingencies besides lack of understanding: in certain interactional environments they may also serve as delaying devices (Pomerantz, 1984, pp. 70, 71) or as reluctance markers (Bilmes, 1988, p. 173). Another effect of repair sequences is that they do not just delay the production of the originally envisaged action, but they may make it obsolete (cf. Sacks, 1995, Part I, p. 7). This could then be why these repair initiators were originally produced: to delay or avoid translating something that may be embarrassing or painful, or to delay or avoid answering a question that may foreshadow trouble.

We have noticed earlier that a repair initiator from the suspect is not translated, but dealt with by the interpreter on the spot (Example 1, Lines 13, 14). We have also seen that the interpreter takes the responsibility of procuring adequate answers from the suspect. However, at this point, the interpreter does not respond to S's repair initiator but turns to the police interrogator:

14)
127. S: Comment?
128. I: I think he doesn't even understand it I must say.
129. →(2)
130. I: E:::h se foutre de quelqu'un
131. que::: se- vous n'êtes pas intéressé de::
132. S: De quoi.
133. (2)
134. I: Ben de ce que se passe ici.
135. (1.5)
136. S: [( )
137. I: [He doesn't understand the word to give a shit.

138. P: Is he just (0.5) mad,

The interpreter's comments on the suspect's lack of understanding interrupt the translation mode. As we have noted earlier, the interpreter's comments may initiate an "aside" in Dutch between her and the interrogator (Example 10, Lines 93–97). In this episode this does not happen, and the silence (Line 129) may be taken as another sign of sequential ambiguity, as the police officer is now given an opportunity to respond. When P does not reply, the interpreter continues after two seconds with an explanation of the French equivalent of "to give a shit" ("se foutre de quelqu'un") as meaning: "tha:::t one- you are not interested i:::n" (Line 131). Her clarification in Line 131 suggests that she first explores a passive form ("que::: se"), changes her mind in the process, and proceeds by addressing the suspect ("that you are not interested i::n"). The suspect appears to support her efforts by responding to her word search in Line 132 ("in what"). She clarifies the phrase "se foutre de" by changing the referent: it is no longer a matter of "we don't give a shit about you" but "you are not interested in what happens here" (Lines 131 and 134). When she finishes her explanation ("well in what happens here") the suspect responds after a silence of a second and a half, but this response is inaudible and it overlaps I's final conclusion in Line 137, that "he does not understand the word to give a shit." This conclusion is more definite and more detailed than her more tentatively expressed feeling in Line 128. In doing this, she "fixes" the interpretation of "lack of understanding." This time P accepts her offer of a turn-switch and resumes the floor (Line 138). The interpreter's conclusion retrospectively defines the situation as involving a lack of understanding on the suspect's part. The effect of her activities in Example (14) is that they exempt her from having to repeat the translation of: "we don't give a shit about you"; the effect of her activities in Line 137 is that they exempt the suspect from having to respond.

In sum, understanding problems are likely to result in "asides" between the interpreter and either the suspect or the interrogator. The transitions between these "asides" and the "normal" translation mode show the potential for sequential ambiguity: instead of translating the suspect's utterances the interpreter may decide to treat them as "trouble" and deal with them in interaction with the suspect; instead of responding to the suspect's repair initiators she may comment on the suspect's state of understanding; and when she is engaged in interaction with the interrogator she may, instead of responding to his comments, proceed to translate them. At specific moments in the interrogation the interpreter makes use of this pivotal position to shift her activities continually between translating and engaging in "asides" with either the suspect or the interrogator. This gives her the opportunity to draw conclusions instead of translating, and to clarify instead

of repairing a troublesome item, in situations where this might defuse hostilities or avoid embarrassment.

DISCUSSION: CULTURE, INSTITUTION, AND INTERACTION

So far, the understanding problems in the interrogation have been discussed as displays of the participants' orientations. However, the analysis has not dealt with some intriguing phenomena that may require further investigation. First of all, there appears to be a "misunderstanding" that is not recognized by the participants, but that has a significant effect on the interaction. Next, the interrogator and the interpreter arrive at quite different conclusions about the suspect's conduct: according to the interrogator he is "playing dumb" and "does not give a shit about the police," whereas the interpreter concludes on a lack of understanding. And finally, we might wonder why the interpreter concludes on a lack of understanding, when the suspect has shown in his responses that he does understand the phrase "to give a shit." In order to come to grips with the complexity of the events we will explore to what extent ethnographic or cultural knowledge can contribute to our understanding of the interaction, and illuminate the institutional and interactional commitments of the participants (cf. Komter, 1991).

Culture

Some of the interaction might be explained by the circumstance that the participants lack the knowledge required to interpret the utterances adequately. There are some moments in the interaction when the participants' responses display such a lack of knowledge. As has been shown in Example (9) the suspect confirms the interpreter's suggestion that *La Courneuve* is a village. It appears that a misunderstanding is being created here that none of the participants recognize. Neither the interrogator nor the interpreter appear to know that *La Courneuve* is a suburb of Paris, nor does the suspect appear to be aware of the confusion created by his description of it as a village. Moreover, the participants do not seem to realize that the interpreter herself has suggested the idea of "village" in the first place, which is then taken up by the suspect. The interrogator's conclusions that the suspect is "playing dumb" and that he "does not give a shit about the police" can then be seen as responses to the suspect's apparent insistence on having been born both in Paris and in a village, an anomaly that the interpreter has helped to create.

Another unresolved misunderstanding may be a result of the suspect's statement that it is "normal" not to give a shit about the police (Example 13, Line 119). The interrogator displays that he takes it as an expression of deliberate defiance by responding with an utterance that is hearable as a counter-insult ("then we don't give a shit about him"). However, the suspect's utterance may well be an accurate description of the relations between the French police and Moroccans in France. This interpretation is apparently not available to the interpreter either, when she concludes that the suspect "does not understand the word to give a shit."

Although these cultural explanations may clarify some of the reasons for the occurrence of misunderstandings, they risk being speculative when they are not firmly grounded in the actual interaction with which the participants display how they make sense of the events. Because the participants do not recognize the "misunderstandings," they do not initiate repair to remedy the problem. And because they do not initiate repair they do not make these "misunderstandings" available for sequential analysis.

Institution

Instead of focusing on their analytic elusiveness, we might consider how these "misunderstandings" affect the interaction. As mentioned before, they give rise to contradictory assessments by the interrogator and the interpreter: the interrogator assesses the suspect's conduct as "playing dumb" and "not giving a shit," whereas the interpreter concludes on a lack of understanding on the suspect's part. If we would only consider cultural explanations, these different assessments could be said to result from "faulty" interpretations of the suspect's position engendered by a lack of sufficient knowledge. However, the substance of these interpretations suggests that they may be inspired by the different institutional identities of the interrogator and the interpreter. These identities can be viewed, not as external to the interaction, but as accomplished in the ongoing interaction (cf. Drew & Heritage, 1992).

What is important in this interrogation is that the suspect's personal details are not just administrative business, but part of his trouble, as he had no documents of identification on him when he was picked up (apart from the passport that clearly did not belong to him). This would classify him as an illegal immigrant. The police interrogator's activities show a certain amount of professional distrust, based on the assumption that, as the suspect has a stake in the matter he is unlikely to be candid about who he is and where he comes from. Questions that are designed to check on the suspect's credibility display the interrogator's "investigative stance" (cf. Zimmerman, 1969) and support his efforts to undermine the suspect's claim

that he is a genuine Frenchman. His assessment of deliberate non-understanding on the suspect's part is built on the assumption that the suspect's interests will result in defiance and non-cooperation. His adversarial stance is a way of displaying that he is "being skeptical" towards the suspect's claims.

We have seen that the interpreter shows her professional orientation in the way she translates: a more or less simultaneous translation suggests neutrality, and her translation of personal pronouns exhibits an avoidance of alignment with the interrogator's perspective. At the same time she takes on some of the interrogator's institutional responsibilities in pursuing what she thinks are adequate answers. Her assessment of the suspect's lack of understanding displays her professional commitment, in that her task is to manage the language and the translation, and to evaluate issues of understanding (cf. Wadensjö, 1998, p. 210), rather than to find out whether the suspect is who he claims to be.[6]

Interaction

The institutional commitments of the participants in police interrogations may be conducive to an adversarial atmosphere. Apart from these institutional considerations, it could be argued that the momentum toward hostility or the susceptibility for conflict may be encouraged by the absence of direct contact between the interrogator and the suspect. That might to some extent explain the interrogator's bluntness, as his utterances are unmitigated by considerations of "recipient design" or face-work. Moreover, the turn-taking and the participation format of interpreter-mediated interaction changes the type of activity that is being performed according to who is the addressee. What is produced by the interrogator as a complaint to the interpreter can be heard as an insult when she addresses the suspect and translates it in direct speech. On the other hand, we have seen that the hostilities are somewhat defused by the activities of the interpreter, by leaving out or sidetracking the sense of agency. This makes these translations appear like descriptions rather than accusations or criticisms of the suspect.

It is not only through the substance of her translations that the interpreter mitigates the interrogator's expressions of antagonism, but also by navigating between her different discourse identities. As the interactional organization leads to the emergence of "asides" in the interaction, the interpreter can switch between the translation mode and "asides" with one of the other participants, at those moments where otherwise painful or embarrassing actions would have to be performed. In order to examine some of the interactional contingencies of these switches let us consider again the sequence shown in Examples (13) and (14):

15)
122. P: And we don't give a shit about him
123. I: What do you say =
124. P: = Then we don't give a shit about him.
125. I: Alors on se fout de vous.
126. (1)
127. S: Comment?
128. I: → I think he doesn't even understand it I must say.

That the interpreter treats the suspect as "not understanding" (Line 128) is notable, in view of the fact that the suspect has shown that he is probably perfectly aware of the meaning of "to give a shit" from his answer that it is "normal" not to give a shit about the police (Example 12, Line 119). However, her conclusion in Line 128 can be understood when we take into account its interactional environment. Instead of orienting to the suspect's earlier utterance that displays his understanding of the phrase "to give a shit," her conclusion refers to the suspect's immediately prior utterance in Line 127. Even though his repair initiator may have been produced as a delaying device or a reluctance marker, she treats it as a sign of genuine non-understanding. Her assessment of the suspect's lack of understanding then, is produced at the slot in the interaction where otherwise she would have had to repeat the translation of "we don't give a shit about you." In order to avoid accomplishing repair that would involve a repetition of the problematic item, she exploits the potential for sequential ambiguity that is inherent to the turn-taking organization of interpreter-mediated interaction.

The three perspectives for illuminating problems of understanding can be seen as complementary. Let us illustrate this on the basis of the interpreter's conclusion that the suspect "does not understand the word to give a shit." From a cultural point of view we may say that this conclusion is a result of her lack of knowledge of the relations between the French police and Moroccans in France, which makes her unaware of the possible appropriateness of the suspect's remark that it is "normal" not to give a shit about the police. From an institutional point of view we can point at the appropriateness of her conclusion because it is her task to be concerned about understandability, and to detect and solve understanding problems. From an interactional perspective we may point at the sequential position of the utterance. The utterance can then be seen as resulting from the interpreter's efforts to avoid having to perform an embarrassing task.

CONCLUSION

Problems of understanding in an interpreter-mediated police interrogation have been investigated as oriented to and dealt with by the participants in the emerging

interaction. These problems affect the interaction and make it vulnerable to the emergence of "asides": stretches of talk between the interpreter and the suspect excluding the interrogator, and other stretches of talk exclusively between the interrogator and the interpreter. The transitions between spates of interaction between interpreter and suspect, and between interpreter and interrogator, display the potential for sequential ambiguity in these circumstances: utterances that may have been produced to be aligned with may get translated, and utterances that may have been produced to be translated may get commented on.

The "question-translation-answer-translation" format, in combination with the specific type of participation format adopted by the participants, has a profound effect on the organization of the interaction. The kind of actions performed by the interrogator may be essentially altered by the activity of translation, because of the change of addressee and mode of address. Thus, the interrogator's complaints about the suspect are transformed into insults when spoken to his face. There are also other features of interpreter-mediated interaction that are conducive to a hostile atmosphere. The absence of direct interaction between the interrogator and the suspect allows the interrogator to be adversarial without actually having to do the "dirty work" himself. The interpreter may mitigate the antagonism by leaving out or sidetracking agency in her translations, or by commenting on the state of affairs instead of translating problematic items.

It is not only through the turn-taking organization that understanding problems become manifest, but also in explicit assessments of the interrogator and the interpreter. That they come to different conclusions about the suspect's state of understanding can be seen as displays of their different institutional commitments and professional perspectives. The interrogator's conclusion that the suspect is "playing dumb" can be seen as a result of his professional distrust; the interpreter's conclusion of the suspect's lack of understanding can be viewed as engendered by her professional concern for understandability. The irony is, that these assessments apparently stem from "misunderstandings" that are not recognized or dealt with by the participants. However, if we would just analyze these items as originating from "faulty" interpretations that are the result of a lack of sufficient cultural knowledge, we would miss the institutional appropriateness of these assessments as displays of professionalism, and underestimate the dynamics of their sequential embeddings.

NOTES

1. I observed and audio-recorded 20 police interrogations in two police stations in the center of Amsterdam. I also collected copies of the records made of these interrogations. The interrogation discussed here is the only one in these materials with an interpreter.

2. In order to retain the sense of bilingual interaction, the Dutch is translated into English, not the French. The translations of the French utterances are given in the text. The transcription conventions depart from the standard Jeffersonian transcript notation for reasons of readability, and because they are in part translated from Dutch. Those features of the standard transcript notation have been preserved that are compatible with the translation: intonation, stress, silences and overlap. The names have been changed.

P	police interrogator
S	suspect
I	interpreter
full stop	falling intonation
comma	slightly rising intonation
question mark	rising intonation
underlining	emphasis
[brackets	overlap
(3)	silence of three seconds etc.
:::	prolongation of previous sound
=	latched utterances
→	line relevant to the argument
((double brackets))	note of transcriber
(single brackets)	dubious hearings
( )	not understandable

3. I have tried to preserve this in the transcription. S appears to utter different sounds each time he mentions his name.

4. An inspection of my materials shows that this is the usual way for the interpreter of concluding a spate of interaction between her and the suspect.

5. Paris is divided into 20 different neighborhoods called arrondissements.

6. Whether the suspect is "really" playing dumb or "really" does not understand cannot of course be determined with any certainty. This is not to be seen as a lack of professional skills of the interrogator and the interpreter, nor as a flaw in the analysis, but rather as one of the characteristic features of police interrogations.

ACKNOWLEDGMENTS

I am grateful to Paul Drew and Marca Schasfoort for their insightful comments on earlier versions.

REFERENCES

Berk-Seligson, S. (1990). Bilingual court proceedings. The role of the court interpreter. In: J. N. Levi & A. G. Walker (Eds), *Language in the Judicial Process* (pp. 155–201). New York: Plenum Press.

Bilmes, J. (1988). The concept of preference in conversation analysis. *Language in Society*, *17*, 161–181.

Bolden, G. B. (2000). Toward understanding practices of medical interpreting: Interpreters' involvement in history taking. *Discourse Studies*, *2*(4), 387–419.

Dersley, I., & Wootton, A. (2000). Complaint sequences within antagonistic argument. *Research on Language and Social Interaction*, *33*(4), 375–406.

Drew, P. (1998). Complaints about transgressions and misconduct. *Research on Language and Social Interaction*, *31*(3&4), 295–325.

Drew, P., & Heritage, J. (1992). Analyzing talk at work: An introduction. In: P. Drew & J. Heritage (Eds), *Talk at Work. Interaction in Institutional Settings* (pp. 3–65). Cambridge: Cambridge University Press.

Drew, P., & Holt, E. (1988). Complainable matters: The use of idiomatic expressions in making complaints. *Social Problems*, *35*, 398–417.

Goffman, E. (1981). Footing. In: *Forms of Talk* (pp. 124–159). Philadelphia: University of Pennsylvania Press.

Heritage, J. (1984a). *Garfinkel and ethnomethodology*. Oxford: Polity Press.

Heritage, J. (1984b). A change-of-state token and aspects of its sequential placement. In: J. M. Atkinson & J. Heritage (Eds), *Structures of Social Action. Studies in Conversation Analysis* (pp. 299–345). Cambridge: Cambridge University Press.

Komter, M. L. (1991). *Conflict and cooperation in job interviews. A study of talk, tasks, and ideas*. Amsterdam/Philadelphia: John Benjamins.

Linell, P. (1995). Troubles with mutualities: Towards a dialogical theory of misunderstanding and miscommunication. In: I. Marková, C. F. Graumann & K. Foppa (Eds), *Mutualities in Dialogue* (pp. 176–213). Cambridge: Cambridge University Press.

Moerman, M. (1988). *Talking culture. Ethnography and conversation analysis*. Philadelphia: University of Pennsylvania Press.

Müller, F. (1989). Translation in bilingual conversation: Pragmatic aspects of translatory interaction. *Journal of Pragmatics*, *13*, 713–739.

Müller, F. E. (2001). Inter- and intra-cultural aspects of dialogue-interpreting. In: A. Di Luzio, S. Günthner & F. Orletti (Eds), *Culture in Communication. Analyses of Intercultural Situations* (pp. 245–270). Amsterdam/Philadelphia: John Benjamins.

Pomerantz, A. (1984). Agreeing and disagreeing with assessments: Some features of preferred/dispreferred turn shapes. In: J. M. Atkinson & J. Heritage (Eds), *Structures of Social Action: Studies in Conversation Analysis* (pp. 57–101). Cambridge: Cambridge University Press.

Sacks, H. (1995). *Lectures on conversation* (Paperback edition, Parts I and II). Edited by G. Jefferson, with an introduction by E. Schegloff. Oxford: Blackwell.

Sacks, H., & Schegloff, E. (1979). Two preferences in the organization of reference to persons in conversation. In: G. Psathas (Ed.), *Everyday Language. Studies in Ethnomethodology* (pp. 15–21). New York: Irvington.

Sacks, H., Schegloff, E. A., & Jefferson, G. (1978). A simplest systematics for the organization of turn taking for conversation. In: J. Schenkein (Ed.), *Studies in the Organization of Conversational Interaction* (pp. 7–55). New York: Academic Press.

Schegloff, E. A. (1992). Repair after next turn: The last structurally provided defense of intersubjectivity in conversation. *American Journal of Sociology*, *97*(5), 1295–1345.

Schegloff, E. A., Jefferson, G., & Sacks, H. (1977). The preference for self-correction in the organization of repair in conversation. *Language*, *53*(2), 361–382.

Wadensjö, C. (1998). *Interpreting as interaction*. London: Longman.

Zimmerman, D. H. (1969). Record-keeping and the intake process in a public welfare agency. In: S. Wheeler (Ed.), *On record: Files and Dossiers in American Life* (pp. 319–354). New York: Russell Sage.