2016

Populism and Criminal Justice Policy: An Australian Case Study of Non-Punitive Responses to Alcohol-Related Violence

Julia Quilter

University of Wollongong, jquilter@uow.edu.au

Publication Details

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Abstract
The original motivation for this article was the atypical way that the government, police, media and wider community responded to the tragic death of Thomas Kelly in Kings Cross in July 2012. Kelly was killed as the result of a random, unprovoked and drunken ‘one punch’ assault. This event had all the hallmarks of the crimes that have often triggered a punitive knee-jerk response, reflecting the ‘law and order’ paradigm that Russell Hogg and David Brown so powerfully exposed in Rethinking Law and Order (Pluto Press, 1998). However, at least initially, we did not see the familiar calls for harsher retribution, new offences or additional police powers. Rather, as discussed in the article, what unfolded in 2012-2013 was a progressive campaign centred on the need to take meaningful steps to prevent so-called ‘alcohol-fuelled violence’. In the article, I employed the work of Ernesto Laclau, Margaret Canovan and Russell Hogg to suggest that these events illustrated that populism is not an inherently punitive force, but can produce constructive, even progressive, outcomes. The campaign that followed Kelly’s death was driven by the emotions of sadness, sympathy and grief, but also anger, revulsion and outrage. Often at such moments a polarising and demonising discourse dominates, but in this instance, these emotions operated to unify the people against the common ‘enemy’ of ‘alcohol-fuelled violence’.

Keywords
populism, criminal, justice, violence, policy; responses, australian, case, study, non-punitive, alcohol-related

Publication Details

This journal article is available at Research Online: http://ro.uow.edu.au/ihapapers/3231
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Editor’s Note: The recipient of this year’s Allen Austin Bartholomew Award is Julia Quilter for her article ‘Populism and criminal justice policy: An Australian case study of non-punitve responses to alcohol-related violence’, published in the Australian and New Zealand Journal of Criminology.

The original motivation for this article was the atypical way that the government, police, media and wider community responded to the tragic death of Thomas Kelly in Kings Cross in July 2012. Kelly was killed as the result of a random, unprovoked and drunken ‘one punch’ assault. This event had all the hallmarks of the crimes that was killed as the result of a random, unprovoked and drunken ‘one punch’ assault. This event had all the hallmarks of the crimes that...

One of the distinctive and problematic features of the ‘One Punch’ law introduced in NSW was the inscriptions in criminal law of a simple causal relationship between a person’s alcohol and drug consumption and the violence which s/he perpetrates. This approach is at odds with the scientific and social-scientific literature which suggests that alcohol is more appropriately regarded as a ‘conditional’ cause, ‘risk’ factor, or one of multiple factors that might be implicated in the production of violence.

This aspect of my ‘One Punch’ research opened up wider questions about how the effects of alcohol and/or other drugs are treated by the criminal law and criminal justice system in Australia. In 2015-2016, with the support of an AIC Criminology Research Grant, I led an interdisciplinary research team that undertook important foundational work exploring how criminal law statutes and courts attach significance to ‘intoxication’. We analysed more than 500 statutory provisions and over 300 appellate decisions from all Australian jurisdictions. To date, we have found that the criminal law attaches significance to a person’s intoxication for a variety of purposes, with different underlying rationales regarding the nature of alcohol and drug effects. For example, intoxication may enliven police powers, constitute a key component of offence definitions, operate as an aggravating factor, or impact on the determination of sentence.

We have found that the meaning of ‘intoxication’ is often unclear. Intoxication is often assessed on the basis of highly subjective or ‘common sense’ criteria – in contexts as diverse as ‘on the street’ public order policing and sexual assault trial assessments of victim credibility. This has the potential to produce injustice in the form of overly punitive treatment of offenders, but also the potential to fail to adequately protect victims of violence.

My research on the manner in which the criminal law defines and attaches significance to alcohol and drug effects is ongoing. In addition, the paper I will present at the 2016 ANZSOC Conference considers the laws, practices and tests that are currently used to detect and punish ‘drug driving’.

Julia Quilter is an Associate Professor in the School of Law and a member of the Legal Intersections Research Centre at the University of Wollongong. The AIC Criminology Research Grant-funded project referred to in this article was completed in collaboration with Professor Luke McNamara (UNSW), Dr Kate Seear (Monash University) and Professor Robin Room (La Trobe University).

The story changed very dramatically following the sentencing of Kelly’s killer, Kieran Loveridge, for manslaughter in November 2013. The sentence was widely perceived to be inadequate (‘four years for a life’). The judiciary was criticised for being ‘out-of-touch’ (a familiar law and order trope), and the political and media rhetoric quickly took a more punitive turn. In January 2014, the Premier recalled MPs early from the summer recess, and in a single sitting day, Parliament passed what are now known colloquially as the ‘Lock Out’ laws (including time restrictions on entry to licensed premises and service of alcohol under the Liquor Act 2007 (NSW)) and the ‘One Punch’ law (ie assault causing death as defined by s25A of the Crimes Act 1900 (NSW)).

Ironically, then, the events that had been the catalyst for the article – the appearance of a welcome moment of progressive populism in criminal justice policy and law reform – proved to be ephemeral. Knee-jerk, law and order policy-making was again ascendant. In subsequent work published in the Criminal Law Journal, the International Journal for Crime, Justice and Social Democracy and elsewhere, I critiqued the excesses and flaws of the new homicide offence in NSW, as well as the similar laws that were introduced in 2014 in Queensland and Victoria.

The Government’s response to this campaign was nuanced and multi-faceted, with an emphasis on management of the risks associated with alcohol consumption in high volume entertainment precincts. Although there was a flurry of law-making, very few of the several Acts passed by the NSW Parliament in this period had a punitive ‘law and order’ character.

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Sex work is almost invariably regarded as a highly gendered activity that needs to be eliminated or at least severely restricted by the criminal law. Broadly, legal policy makers take one of two approaches to sex work; that it should be abolished or that it should be severely restricted. Abolitionist approaches, such as those taken in some American states, criminalise both the act of sex working and everything associated with sex work such as location, premises, clients, advertising and soliciting. Restrictive approaches are taken in countries like the UK and most of Australia where the act of sex work itself is not criminalised, but most if not all activities associated with sex work are criminalised.

And yet criminology has shown only passing interest in sex work. It wasn’t always the case. The pioneers of criminology, including Lombroso, were very interested in sex work and their early voyeuristic preoccupation with the sex worker provided a blueprint for subsequent readings of female pathology and, later, female victimisation.

Only recently have criminologists turned their attention to policy and critically examined the idea that sex work is inherently problematic. Yet, even here, the outputs have been modest, with most research of this type pre-occupied with examining sex work and sex workers as ‘vectors of disease’, whilst making little or no reference to underlying structural factors such as the criminalisation of sex work. When considering male sex work, for example, which is the focus of our own research (see www.aboutmaleescorting.com), it is notable that same-sex sexual acts, which are inherent in male sex work, are criminalised in roughly half of UN member states.

True, female deviance – and we do think of women when we think of sex workers – has largely been framed in terms of health. The old adage that women are framed mad and men as bad, holds true when we consider responses to sex work. It is often forgotten that very specific penal regimes existed historically for prostitute women, including lock hospitals and Magdaleneasylums. The failure of criminology to appreciate public health measures as systems of social control and the additional tendency to view sex work as a welfare problem only adds to the ambivalence of criminology towards sex work.

The notion that sex work is a health or welfare problem owes much to the elaborate mythologies that researchers have erected around sex work. Think of sex work and images of street workers and their early voyeuristic preoccupation with the sex worker provided a blueprint for subsequent readings of female pathology and, later, female victimisation.

The situation can be compared to climate science: the research speaks loudly, but denial, drawing on a mix of morality and misconceived ideology, persists and the ‘science’ has not translated into much needed reforms. In 2015 Amnesty International declared its support for decriminalisation, citing state obligations to respect, protect and fulfill the human rights of sex workers. Significantly, sex workers have advocated for decriminalisation since the emergence of sex worker rights movements during the early 1970s, and more recently, researchers are coming on board with policy recommendations favouring reversing the agenda of stigmatisation and criminalisation for both sex workers and clients.

One of the difficulties with decriminalisation is that it is not easy to define. Criminalisation, which sells itself on an impossible dream of eradication, has a relatively easy pitch. While many countries criminalise the selling and purchase of sexual services, prostitution has never been illegal in Australasian jurisdictions, only activities associated with sex work, such as soliciting, pimping and keeping premises used for sex work. Another fact is that the law has been ineffective in eliminating sex work. At best it might be considered to have symbolic impute, as a deterrent, but there is no hard evidence to indicate that the incidence of sex work increases in the absence of criminalisation. Legalisation, also seems straightforward, and often gets confused with decriminalisation. So, what does decriminalisation mean for sex work?

In the simplest sense, it is the recognition of sex work as a legitimate occupation, as opposed to an identity. In this system there are no special laws aimed solely at the regulation of sex workers or related activities. Instead, sex workers are subject to the same laws that regulate other businesses, such as tax laws, occupational health and safety regulations, zoning regulations and employment laws. In this system sex workers are entitled to the full protection of the law and human rights. They can organise into collectives, such as unions, if desired. All this is premised on the definition of sex work as activity that involves consensual sexual exchanges between adults for some form of remuneration. Sex work and sex workers are still of course subject to the criminal law in the same manner as all citizens of the state and are therefore protected from exploitation and violence by the same laws that protect non-sex workers from exploitation and violence.

Legalisation, in contrast to decriminalisation, involves state regulation of the sex industry. In places, such as the US state of
Nevada and parts of the Netherlands, this can mean increased police surveillance, forced health evaluations, higher taxes and financial penalties for sex workers. The law can also force sex workers to work in unsafe, often isolated, locations, making them more vulnerable to violence. Closer to home, in Queensland, where (indoor) prostitution was legalised in 1993, conditions for street workers deteriorated, with increased policing and incidents of violence against street workers, which often go unreported as sex workers by reporting such crimes are themselves admitting to criminal activity. In licensed brothels, workers have often been young, casual and non-unionised, with little negotiating power against brothel operators. Workers are not subject to normal work entitlements, but subject to penalties for indiscretions, such as lateness to work. They are also subject to compulsory health examinations and controls not typical of other industries.

So, what is holding back sex industry reform? Recent punitive trends in some countries may be put down to the increased visibility and accessibility of sex work provided by advances in telecommunication technology. Historic concerns around sex work were grounded in the moral view that the commercialisation of sex is degrading and damaging also persist. While the dichotomy between erotic and commercial life has remained, recent concerns include the idea of sex work as inherent victimisation and the notion that reform equates with increased oppression of children and women. There are claims that decriminalisation increases the overall volume of sex work activity and leads to more trafficking and child prostitution. There is no evidence that this has been the case in NSW or NZ. More broadly, while trafficking may have increased in some regions along with general increases in migration, such as Eastern Europe, there is no data to support increases in Australasia.

Of course, the real problem here lies in the conflation of trafficking with sex work and competing definitions of what trafficking might be. An historic tendency of research to focus on street work, which is more likely to involve survival sex and violent exploitation, has also muddied the waters. Further, some research has cherry-picked data for worst cases of exploitation and generalises these to all sex work and sex worker experiences. This perpetuates the idea that sex workers are inherent victims and sex work as not freely chosen. It is better to frame concepts of trafficking and forced prostitution as exploitation. Exploitation is experienced by other occupational groups, and is not exclusive to sex work. Indeed, decriminalisation has the aim of reducing exploitation and other industry harms by ensuring the human rights of sex workers are recognised.

Decriminalisation is best conceptualised in terms of a ‘harm reduction’ approach. Research indicates that decriminalisation delivers better public health outcomes, improved working conditions, safety and well-being, while not increasing the volume of the sex industry. Amnesty International (2016) states “The primary and secondary evidence gathered by Amnesty International demonstrates that criminalization and penalization of sex work have a foreseebly negative impact on a range of human rights.” In contrast, where sex work is criminalised, sex workers and clients have been shown to be at increased risk of harm and violence. What’s more, stigma and corrupt law enforcement means that abuses to sex workers and clients are often not prevented or acted upon in places where sex work is criminalised.

Policy denial is built on myths around sex work, some of which are perpetuated in research. Notably, there needs to be recognition that sex workers are not a homogenous population, something our own research on male sex work has emphasised. The experiences of sex workers and clients are diverse and any generalisation or simplistic policy calling for abolition requires caution. In terms of method, it is impossible to gain a random sample of sex workers, as the size of the population is unknown. Clients are an even harder population group to locate and sample, largely because of the stigma associated with sex work, yet they are randomly represented in all age and ethnicity groups of the population. Where prostitution is criminalised and stigmatised the problem of gaining representative samples is the more difficult. Further, defining who is a sex worker is fraught with complexity.

With more certainty we can say that most sex worker organisations advocate decriminalisation. From this, it does not seem a huge step to ensure the meaningful participation of sex workers in research affecting them and their participation in the development of legislation and policy that responds to recent changes to the structure and organisation of sex work, as well as recognises human rights. It also points to the important role academia has to play in promoting the removal of repressive laws around sex work, much like the laws that criminalised same-sex relations.

John Scott, Queensland University of Technology
Cameron Cox, CEO, Sex Workers Outreach Project Inc.
Vitor Minichiello, Queensland University of Technology

John and Victor will be launching a website on male escorting (www.aboutmaleescorting.com) at the 29th Annual ANSOC Conference in Hobart. In addition, a panel that includes sex workers and sex work organisations will be held to discuss legislative reform in the Australian sex industry.

Here is a link to a Q&A on Amnesty International’s Policy to Protect the Human Right of Sex Workers: https://www.amnesty.org/en/qa-policy-to-protect-the-human-rights-of-sex-workers/

References