BOYS LIKE THEM:

the role of the courts in moral panics around “Muslim” gang rape

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This thesis is dedicated to my mother, Muzzi Dagistanli.

For her “nice cups of tea”, hugs, unwavering sense of humour, general moral support and for having enormous faith in me.
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I certify that this thesis does not incorporate without acknowledgment any material that has been submitted for any other degree at any other institution. The work undertaken is original and a result of my own research. A version of Chapter One of this work has been published in a collection edited by Scott Poynting and George Morgan 2007, *Outrageous!: Moral Panics in Australia*, Hobart, Tasmania, ACYS.

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Introduction

‘Fear is the mother of morality’ – Friedrich Nietzsche, *Beyond Good and Evil*, 1885 (201)

‘We might be more connected to each other by our worries, our matters of concern, the issue we care for, than by any other set of values, opinions, attitudes or principles’. Bruno Latour – 2006.

Empirically, the focus of this thesis is an investigation of how the courts become implicated in the construction of certain high profile gang rape cases in New South Wales since 2000, as having a strong ‘cultural’ component. The case studies chosen for this project involve what became widely referred to in the associated moral panic as “ethnic gang rape”: the “Bankstown rapes” (in South-western Sydney) of 2000 involving a group of second-generation immigrant youths of Lebanese Muslim background, and the “K brothers” rapes in 2002 (also in Sydney) – perpetrated by four brothers who identified as Pakistani immigrant Muslims and their friend.

At the beginning of this project my empirical scope was much wider. I was interested in social reactions of the “mainstream Australian” culture towards “ethnic” crime. I had not yet chosen to hone in on a specific crime but had decided that the general focus would be on violent or particularly heinous crimes that attracted media attention and invoked moral outrage. In line with this, I began to attend the trial of notorious Lebanese ‘gang-land’ figure, Michael Kanaan, on a daily basis. Michael Kanaan had allegedly shot at two policemen, and was on trial for their attempted murder (Collins et al. 2000: 8; Kennedy 2003). He had been previously convicted for three murders and was said to be a member of a ‘Kings Cross drug gang’.

Despite my later decision to abandon this trial and exclusively pay attention to the “Lebanese” and later K brothers’ gang rapes, there were many interesting issues raised in the trial which, as I was to realise later, provided an invaluable starting point for the research to follow. One of them was that Michael Kanaan had chosen to represent
himself on the basis that the courts were ‘not to be trusted’ and that the police and court
system had conspired to convict him: ‘I trust no-one else to do it and I’ve lost all faith in
the legal system […] Your Honour, I don’t any trust in these people at all. To my belief
it’s all collusion with each other’ (Transcript, *R v Kanaan*, NSWCCA, 5 June 2003). The
same reasoning had underpinned the two eldest K brothers’ decision to represent
themselves: ‘My barrister said “All Muslims are rapists!” so me and my brother had to
represent ourselves […] We should be presumed innocent […] We are being treated like
animals but we are human beings. The police have set us up!’ (Field notes 29/10/03). The
K brothers who represented themselves – MSK and MAK – proclaimed that they were
being persecuted by a racist government and criminal justice system on the basis of their
Islamic religion. Kanaan was not a Muslim but an Australian-born, Maronite Christian of
Lebanese background and he thought that the criminal justice system was racist against
youths of Lebanese background (Field notes 29/07/03). The differences in the cultural
and religious backgrounds of these perpetrators did not count for much in the wider
environment of social fear around minority deviance: the differences between Lebanese,
Muslim, Middle Eastern or Arab were conflated so as to form a general problematic
group.

Such widespread homogenisation of Middle Eastern ethnicity, culture and religion was
demonstrated in a casual conversation that I had with an elderly Australian man, “of
Anglo-Saxon appearance”, sitting outside the courtroom during the Kanaan trial. He
struck up a conversation with me and it turned out that he was a witness for the trial – he
lived in the area where the shooting had occurred and had been woken by the sound of
gun shots. He commented that Michael Kanaan must be a ‘really evil bugger’ because he
had heard that Kanaan was serving ‘three life sentences’. He then began to express his
opinion on ‘Lebanese gangs’. He said, ‘them and their entire bloody families should be
sent back to their own country if they commit a crime […] some people may not agree
with me, and maybe some of them are not as bad, but I don’t care. I hate them! They’re
all trouble-makers’ (Field notes 29/07/03). Whilst we were conversing, two young
Muslim women wearing hijabs entered the courtroom. They too were witnesses to the
crime, as they lived nearby. The elderly man said ‘they must be his (Kanaan’s) bloody
girlfriends or something!’ (Field notes 29/07/03). He had assumed that Kanaan was Muslim.

“Muslim” gang rapes in Sydney: the case studies
From 2001 to 2002, there was substantial media coverage of the set of group sexual assaults perpetrated, a year earlier, by Lebanese-Australian young men in Bankstown – in Sydney’s south west. Police informants had telephoned a reporter with a story about the upcoming trials of gang attacks on young women of ‘Caucasian’ backgrounds by youths of Lebanese background. These attacks were publicised a year later because of intense media coverage of the Sydney Olympics in 2000.

The crimes were newsworthy for the brutal and horrific nature of the attacks. Accordingly, prominent press coverage provided sordid detail about the attacks, the ordeal of the victims, and the callous and degrading actions of the offenders. On some occasions, the perpetrators – via text messages and phone calls – invited their friends to take turns in sexually assaulting the victims. The perpetrators were publicly named after a media campaign against them demanded this. All of these men came from Muslim backgrounds, a fact that was emphasised by the intense, ideologically driven media coverage that followed.

The basis for this highly publicised information was that the perpetrators had apparently asked the young women before attacking them, whether they had ‘Arabic blood’ or ‘Arabic boyfriends’ (Poynting 2002; Warner 2004). This fact was exploited by conservative sections of the media and conservative politicians: the social and political climate was one of anxiety about “boat loads” of illegal immigration from the Middle East in mid-2001, and a racialised connection was made about the deviancy of Middle-Eastern (and / or Muslim – the categories were popularly conflated) people from abroad who were seen to be trespassing on Australian territory, and the Middle-Eastern (and Muslim) perpetrators of the gang rapes attacks on “Australian” women (Poynting et al. 2004). Such connections were sealed through comments such as the one made by then Premier of New South Wales, Bob Carr, who remarked that ‘ethnic crime gangs […] were
causing mayhem on the streets [...] because of decisions about immigration made decades ago’ (Morris 2001: 8). Regarding the “ethnic” overtones of the group sexual assaults, a mainstream Sydney newspaper, *The Sun-Herald* on 29 July 2001, carried the headlines: ‘70 Girls Attacked by Rape Gangs’ (Kidman 2001: 1), ‘Police Warning on New Race Crime’ and ‘Caucasian women the targets’. As demonstrated by further detail of the cases throughout this dissertation, these headlines misrepresented the facts around the attacks: the women were not all Caucasian nor were there 70 attacks. Such (mis)representations ensured that the offenders were portrayed as ethnic invaders who were terrorising “Australian” women and attacking the “Australian” way of life. The rapes were constructed as a powerful metaphorical (and literal) violation of “Australian values”. As violators of these values, the perpetrators became folk devils of Middle-Eastern extraction.

Another gang rape case had recently gone through the courts at the same time as the public debate that was rife around immigration and so this became part of the overlapping Middle Eastern crime and immigration debates. This case – *AEM, KEM and others* – also involved Lebanese youth and a series of sexual assaults from April through to October 2000. For the attack that went to trial, Judge Megan Latham of the District Court of New South Wales sentenced 19-year-old AEM to six years imprisonment with a four year minimum, his 16-year-old brother, KEM to five years, seven months with a three and a half year minimum, and another accomplice to eighteen months for detaining with intent to hold for advantage. Another youth, MM, was later given six years with a minimum of four years (Warner 2004: 347). These sentences attracted widespread public outrage – fuelled by the popular media, and conservative political parties – for their perceived leniency. This moved the State government to change legislation in the first week of September 2001 and create the specific offence of ‘aggravated sexual assault in company’ with a maximum penalty of life imprisonment (Johns et al. 2001). It was under this legislation and within this socio-political environment that Bilal Skaf was sentenced to a landmark 55 years in gaol for being the “ringleader” of a gang of men who
committed aggravated sexual assault in company. Skaf’s sentence and its later reduction\(^1\) will be discussed in detail within the following dissertation, particularly in Chapter Three.

Two years later, in 2002, another gang rape occurred. On this occasion the attackers knew their teenage victims, having established limited previous contact with them. The boys were Pakistani immigrant Muslims and there were five of them – four of them brothers.\(^2\) The two eldest chose to represent themselves, which resulted in a new law being rushed through parliament preventing the accused in sexual assault trials from directly cross-examining complainants. The Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003 (s 294A) presented many practical difficulties, which during the trial, the presiding judge, Justice Sully, did not hesitate to point out. He proposed ‘that serious and urgent attention be given to the repeal of s 294A before it really does become an entrenched vehicle for the wrongful depriving of accused persons of what are, in truth, not merely basic legal rights, but basic human rights as well’ ([*Regina v MSK and MAK* [2004] NSWSC 319]). Perhaps Sully speculated that an appellate court might find that the amendment threatened the accused’s right to a fair trial by effectively undermining the presumption of innocence. Sully also recognised that his criticism of the new law ‘is to show, in many quarters, the proverbial red-rag to a bull’ (*Regina v MSK and MAK* [2004] NSWSC 319). He was right. Sully’s concerns were criticised by conservative social commentator, Paul Sheehan of the *Sydney Morning Herald*, as yet another recent instance of judges ‘exhibiting a fetish for the rights of the defence over those of the prosecution’ (Sheehan 2004a: 17).

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\(^1\) Skaf’s sentence has since been reduced upon appeal to the New South Wales Court of Criminal Appeal (NSWCCA). One of Skaf convictions were quashed by the NSWCCA as a result of jury misconduct in the trial, reducing Skaf’s sentence to 46 years. The NSWCCA also, on 26 July 2005, quashed the 46-year sentence handed down to Skaf, reducing the sentence to 28 years. The appeal was upheld partly on the grounds that the original sentence was manifestly excessive and that the proceedings miscarried as a result of the trial judge’s failure to maintain ‘an appropriate level of judicial impartiality’ (*R v Bilal Skaf* [2005] NSWCCA 297 at 33). The judges of the NSWCCA, on both occasions, were severely reprimanded by the media, conservative commentators and politicians.

\(^2\) The fifth member of the group was the only non-Muslim. He (RS) was an international student. RS later committed suicide in custody to avoid telling his parents in Nepal that he had been charged and convicted of sexual assault in company. As is typical in such cases, his cultural identity was subsumed by the ‘Pakistani Muslim’ identity of the co-accused.
Sheehan’s comment was also prompted by the considerable delays to the trial process that was caused by the antics, in court, of the self-represented brothers, MSK and MAK. I was able to watch one of the many trials and appeals that took place for the K brothers’ offences. These were for the offences committed against the victims LS and HG and a media suppression order was placed on these because of the trials that were to follow. The trials that were more highly publicised were for the offences committed against Tegan Wagner and Cassie Hamim, who waived their right to anonymity after the brothers were sentenced in the last set of trials.

The events surrounding these second set of trials were significant for a couple of key reasons aside from the simple fact that the press was not restricted by a media suppression order. First, the antics of the accused caused disruption of the court process, and prejudicial information being yelled to the jury (Wallace 2005b). Second, the decision of Tegan Wagner (and later Cassie Hamim) to forego her anonymity and contribute to the public debate around victims’ rights was a significant breakthrough for victims and complainants of sexual assault. This particular case draws attention to a newly realised and rigorous protection of complainants’ victims’ rights in sexual assault cases. I argue that this resulted from the complex network of overlapping and sometimes contradictory ideological interests and agendas that converged and became manifest as a “victims’ rights” debate that was begun by the Bankstown gang rapes, but reached its climax shortly after the completion of the K brothers’ sentencing. At the same time as the K brothers’ trials, appeals were taking place for the “Bankstown” convictions and the long sentences they attracted. Some of these appeals resulted in retrials, quashed convictions and reduced sentences. The public outrage directed at the courts for their application of legal technicalities to these cases sparked heated debate about the extent to which the rights of alleged offenders should be protected against those of victims. This further fuelled the “victims’ rights” debate that had begun to blaze after the K brothers’ trials.

This heightened public awareness of victims’ rights in sexual assault trials, is a welcome development. Yet it is unusual in that victims are often blamed for a sexual attack –
particularly if they knew the perpetrators, were intoxicated or behaved and dressed in a way which has popularly been seen as inviting sexual assault. These considerations will be specifically addressed in Chapter Six. According to one academic, Paul Tabar, “moral panic” about the Arab “Other” underpinned the exceptional public sympathy surrounding the victims in these cases. He was quoted as saying: ‘It is a shame we have to be racist to recognise the rights of raped women. It seems to me the fact that the rapists are an “ethnic other” explains both the exceptional space given to the rape victims and the magnified outrage manifested by the dominant culture’ (The Age 2002: 3).

**Why these cases?**

Given the intense media coverage around these cases and their trials, it was difficult not to be interested. Further, I soon understood that the empirical scope of my analysis would have to be pared down from the incredibly broad topic of “moral panics” around “ethnic” crime. So I decided that I would focus solely on these gang rape cases. I chose the crime of “gang rape” because I found that it was often more likely to cause moral outrage (and panic) than murder and other violent crimes. The reasons for this are varied and will be subsequently explored; however, one of the reasons could be that the moral outrage emanates mainly from the sexual nature of the crime. A Senior Crown Prosecutor whom I interviewed during the course of my research indicated:

> in sexual assault, people have to almost suspend disbelief, in a way that they’re not used to thinking if they’re *decent, moral people*. And that’s probably because there’s so much shame attaching to sexual assault because it’s such a terrible thing to do to someone, it’s so inexplicable. Most people can understand how you could get angry enough to kill someone, but they can’t understand how you could be so cruel and depraved to have sexual intercourse with someone against their will, especially if they’re a child, or especially if they’re a pack and it’s one woman and so forth. People just can’t understand that. So you’ve got to prove to them in the first place that such horrible things can take place (Interview 22/02/07. Emphasis added).

The idea that gang rape was more morally outrageous than murder became evident in the many social conversations that I had with friends, strangers in bars, taxi drivers,
hairdressers, and so on. This, as I realised much later, formed a valuable part of my research experience as it not only demonstrated that most people had a strong opinion about these cases and the “ethnic” element that was constructed around them, but also that many of the people I spoke to had linked the gang rapes to a homogenised notion of “Muslim” or “Lebanese” or “Arab” culture which was associated with the events that surrounded “illegal immigration” from the Middle East and the September 11 terror attacks. When people found out what I was researching, they invariably wanted to know about what I thought of the crimes, their “ethnic” or cultural dimension, and the original severe sentence of 55 years that was given to Bilal Skaf. Perhaps more tellingly, many people misunderstood my project; they thought I was writing a worthy expose of the sexual depravity and misogyny of Muslim men, and their particular propensity to think that Western women were “sluts” and therefore “fair game”. If conversations progressed further than this and they found out that my intention was far removed from what they thought, I was sometimes accused of being “politically correct” and “siding with” or “defending” the rapists just because they were members of ethnic minority groups.

Furthermore, these lively conversations highlighted that this topic was “alive”: the cases were prominent because the crimes were brutal; they were highly politicised and publicised due to the cultural dimension that was constructed around them. The media coverage, in particular, was sensational. The hub of the discourses that coalesced around these crimes was the courts because of the seemingly never-ending trials and appeals that took place against the sentences and some of the convictions. In short, everyone was interested. This proved to be an exciting aspect of my research. There was always something new occurring with these cases and their trials. The cases, appeals and even events that occurred beyond the scope of these cases (for example, occurrences that involved “Lebanese” or “Muslim” communities) were, almost always, ideologically linked back to the gang rapes.

The exciting and the constantly shifting nature of this topic also, however, caused considerable difficulties: it was simply too tricky to “pin down”. Eventually I was forced to ignore events that took place – relevant or not – after a certain point in my writing.
Prior to that, I had to draw a line between the empirical events that were crucial to the project and those which were less relevant. This was more complicated than I initially thought. This illustrated the complexities that are inherent in tracing social reactions to particular crimes: it is never just about the crime itself, but also the moral, political and ideological beliefs that give rise to certain social reactions and which determine the magnitude of those reactions. In these crimes, it was not just the crimes that were shocking – they were also committed by members of a popularly demonised group. Other events that involved members of the same or “similar” ethnic, religious and cultural groups bore relevance to these crimes because they were ideologically linked in the popular imagination.

**Moral panics and the courts: the conceptual framework**

The interplay between “public opinion”, political rhetoric and legal responses to these cases displays all, or many of the features of the amplification and escalation in social reaction that defines what Stan Cohen (1972), Hall et al. (1978) and others refer to as a “moral panic” (Thompson 1998: 16-19). The juxtaposition of the two images of the sexually deviant (the rapist), and the threatening invader (the Arab/Muslim) in the popular press, resulted in them being inextricably linked in the minds of the public. Further, there was a conflation between the “Muslim” and the “Arab” – without any acknowledgement of the multiple variations within Islam, between so-called “Arab” (or Middle-Eastern) cultures and no regard to the fact that not all Arabs or people of Middle-Eastern descent are Muslim. This echoed the prevalent connection of Islam with terrorism. The cultures from which the perpetrators came were homogenised and constructed as “Other” to an imagined Anglo-Australian norm. This was neither new nor peculiarly Australian: Edward Said (1978) through his criticism of “Orientalist” discourses had long problematised Western representations of the ‘Arab other’ as monolithic and perverse. Similarly, Poynting et al. mention that ‘blaming the Other – the Aborigine, the immigrant, the refugee – is a pervasive operation in contemporary Western societies’ (2004: 224).

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3 The interchangeability of the terms ‘Arab’, Middle-Eastern, Lebanese and Muslim in public discourses will, to some extent be reproduced in this thesis in order to convey the ways in which these diverse cultural, ethnic and religious groups were popularly homogenised.
Prevalent discursive formations around criminality and cultural difference, assimilation and punishment, coalesced to provide a fertile ground upon which the volatile ‘splutter of rage’ which characterised the “Muslim” gang rape panic, could erupt and flourish. The gang rapists were “Un-Australian” Muslims and they were attacking “Australian” victims. This ‘splutter of rage’ did not erupt in isolation from existing nervousness around the cultural difference of the Muslim and/or Arab “Other”. The gang rapes themselves were triggers which were seized by proponents of populist political discourses which promoted and legitimated this increasing unease. The cases themselves were bound together via the category of the crimes committed, and the popular association of the cultural background – in terms of religion – of the perpetrators in each case. In a wider context, both sets of gang rapes were swept into and became part of the racialised moral panics around the Arab or Middle-Eastern or Muslim “Other”, which provided a threat to (ontological) and literal security (Poynting et al. 2004; Warner 2004; ADB 2003). This has been prevalently referred to as “Islamophobia” (Runnymede Trust 1997; Hassan 2005; Sajid 2006).4

The indispensability of the concept of “moral panic” to criminological, sociological and other cultural studies discourses cannot be underestimated. In particular, the notion of moral panic cannot be divorced from social reactions to crime – particularly of a heinous nature. Despite this, the concept of “moral panic” – as developed by Stan Cohen in 1972 – is subject to limitations and needs some augmentation. This became more apparent as I delved deeper into this project, in places where the original model was not sufficient to capture the complex processes that had unfolded and were still unfolding in the project’s duration.

A crucial aim in this thesis is to augment the classic model so that it captures the complex social processes at play during moral panics. The intersection of various discourses demonstrates that diverse individual and institutional actors play a role in a cycle of moral panic and fundamentally define the moral boundaries which are transgressed in

4 Abduljalil Sajid (2006: 1) defines the term as “anti-Muslim prejudice.”
order to cause the outrage. I argue that the diverse network of actors in a moral panic, each with their own agenda and set of interests, coalesce to create a seemingly stable conception of moral community, but one whose boundaries are continually negotiated. The shifting boundaries of community reflect a structure of power that becomes naturalised through its iteration in varying discursive constructions. It is true that the dominant values expressed through interrelated notions of morality, culture, community and justice are ideologically driven and that structurally powerful groups suppress minorities through such ideological constructions. Yet an analysis of moral panic demands greater attention to the complexities of the process. There is a multiplicity of perspectives and interests of individual and institutional actors that comprise the social networks that operate behind a moral panic and these dominant values are always contested and contradictory.

Such a conceptual framework acknowledges the structures of power that are inherent to moral panic and its consequences for certain groups in society, while maintaining an idea of the multifaceted context and shifting manner in which power is negotiated between multiple groups. This has been difficult to capture in terms of the existing theory around moral panic. My reference to the traditional moral panic literature as per Cohen (1972) and Hall et al. (1978), who, respectively, traced moral panics in the UK around youth subcultures – the mods and rockers – and the phenomenon of “mugging”, has necessarily been supplemented by some poststructuralist feminist theory. Poststructuralist feminist theory has been particularly useful in deconstructing the binaries that operate within certain contexts and have the effect of naturalising the dominance of certain groups over others. I have used the feminist literature, particularly in my critique of the courts – not only to apply to the gendered bias that operates around legal constructions of the subject, but also to argue that the Western legal subject is constructed as universally Anglo-Saxon-Celtic.

Overall in this dissertation, I interweave a number of intellectual threads. Other than the traditional moral panic literature and the poststructuralist feminist theory already outlined, I also refer to the concept of “Islamophobia” as a more recent manifestation of
Edward Said’s criticism of “orientalism”. Along this theoretical continuum, I refer to critical race theory in addition to feminist critiques of legal discourses and the courts, to illustrate the construction of neutrality around the White, Anglo-Saxon-Celtic subject of law, while highlighting the “ethnicity” of criminal offenders who are brought before the courts. I also make some limited use of media and cultural studies in delineating the relationship of the popular media and popular culture with the courts and the influence this has on popular conceptions of morality and the law. More specifically, I trace mass media representations and the part that these play in creating the reality of crime, morality and social control. The extent to which these realities, generated by popular representations, contribute to and differ from the realities constructed by the courts and legal discourses more generally, is of particular significance to this project.

The overlap between the often incongruent elements of a moral panic is conceptualised through the notion of “moral community”. Based in legal and political philosophy, the concept of moral community illustrates the seemingly stable, foundational morality in which a moral panic occurs: I use the concept to demonstrate the appearance of a unified and stable cause, identified through a common enemy or threat that is continually produced, reproduced and shaped by the disparate agendas and interests that are voiced in the process of moral panic. The complexity of this process necessitates the use of diverse theoretical strands. A single intellectual approach could not be adopted to demonstrate the multifarious and often contradictory elements within moral panics in general, and the specific adaptation of the moral panic model – with its focus on the courts – that is demarcated in the current project. A thorough exploration of the intersections of cultural, ethnic, criminal and legal dynamics in this moral panic has demanded an intellectual approach that weaves together concepts as diverse as the elements in the phenomenon they are employed to address.

Thus, aside from supplementing the moral panic model with the concept of “moral community”, a fundamental aim of this thesis is to fill what I argue is a significant gap in the classic moral panic literature: more specific focus on the role of the courts as institutional actors in a moral panic. This is not to suggest that I will be examining the
role of the courts in isolation. Nor do I want to argue that the courts are the key site in which moral panics are played out or caused. I focus on the courts because they, as mentioned, are the hub of multifarious discourses that have defined the moral panic around the gang rapes: the courts were the centre of attention most of the time. This is not the same as suggesting that the genesis of these moral panics is found within the space of the courtroom during the criminal trial. The trials and appeals for these cases are but moments in a multiplicity of events during the cycle of these moral panics. Moreover, the courts themselves – as a separate system – are only one of the institutional actors involved in an episode of moral panic. A comprehensive analysis of the courts’ role within a moral panic must include all the parties in the situation and their relationships. The webs of signification that are established via the collective entanglement of all parties can only be examined thus.

Accordingly, this dissertation will not offer an exhaustive analysis of the courts as much as an analysis of the courts’ role in moral panics in relation to other key institutional and individual actors. The courts must, at times, necessarily cooperate with multiple actors in a moral panic for the sake of a concept of “shared justice” – even in the face of contestation, to restore and maintain confidence in the criminal justice system. Further, any attempt to consider the role of the courts in isolation from their relationship with other actors in a moral panic would not only be artificial, but fail to capture the role of the courts in their entirety; their role cannot be separated from a broader social network in which specific reactions to crime occur. Another reason for this is that an outline of the trajectory of influence between powerful institutional actors is impossible because a moral panic and the discourses that are produced and reproduced within it are never linear. For example, mass media representations of the “leniency” of sentences in the face of a victim’s suffering can (and has) resulted in popularly fuelled legislative changes around maximum penalties for certain crimes, to which judges must adhere. However, appeal courts also have the power to reduce sentences that are deemed disproportionate by members of the judiciary and legal system. This then causes public outrage against the judiciary which is then fuelled by the media and populist law and order campaigns – in what seems to be a perpetual feedback loop. To suggest that the courts play a role in
moral panics in isolation from other key actors would be akin to reproducing a key contention that I criticise: that the judiciary live in a social vacuum and are not “real people” engaging with or affected by the “real world”.

Aside from all of this, locating the courts’ part in the complex web which constitutes a moral panic is crucial because such social reactions take place around violent crimes resulting in public scrutiny of the courts’ ability to protect society from the perpetrators of such crimes. Furthermore, the courts, as I will argue throughout this dissertation, have a significant symbolic duty as “moral arbiters”. There is a popular as well as official expectation that the courts will both reflect and enforce standards of morality. However there is, at the same time, considerable divergence in the moral expectations imposed by popular cultural and media discourses on the courts and notions of morality as delineated by legal and academic discourses. This is reflected in the paradox which characterises the role of the courts during moral panics: they have a crucial role in defining and upholding the margins of moral propriety and community, and yet are usually criticised as being “out of touch” with these community and moral standards. Given the complex symbolic significance of the courts’ role to notions of morality, it is difficult to see why traditional contributions to the concept have not given the role of the courts more attention.

To the extent that there has been some focus on the courts in the traditional literature, it has mostly been limited to their power to administer punishment and the ways in which the courts interact with and at times respond to public demands for harsher punishment. Some analysis has also been placed on the moralising of the judiciary in response to certain events and the way in which judicial admonitions towards perpetrators become co-opted by the mainstream media. Also, Cohen in particular, has addressed the use of bail and remand as a form of punitiveness that was exercised by the judiciary against the relevant “folk devils” in his study. None of this literature – presumably because of a different focus – has acknowledged that the courts are a relatively autonomous micro-network of social actors in their own right and that there are a diverse range of opinions that animate the processes of the court. While it is impossible to disentangle the courts’ role from that of other institutional actors, it is not sufficient to say that the courts simply
reflect or respond to social anxiety through harsher sentences and ‘ritual admonitions’ (Hall et al. 1978) from judges towards the perpetrators in response to offences that attract public and political controversy.

**Methodology and sources**

The data collected and drawn upon for this dissertation was accessed through a variety of sources – both “official” and “popular”, primary and secondary. These included, besides the relevant literature, notes acquired from fieldwork observation in court; qualitative interviews with legal and other professionals; sentencing judgments; the unpublished written submissions of a defence barrister for MSK for a sentencing appeal; some access – via the generosity of some legal professionals – to court transcripts around the Kanaan trial and the K brothers’ trials (although in the latter, I relied mainly on my primary material in fieldwork observations); general crime and sentencing statistics over the last 10-20 years, and specific statistics on convictions secured for sexual assault; research conducted by other bodies in the form of surveys mainly in Australia and in some instances, the UK, tracing various trends relating to juries in sexual assault trials, general social attitudes and beliefs surrounding sexual assault, and public faith in the judiciary; official Hansard New South Wales parliamentary speeches.

The other crucial body of empirical material was acquired from a sample of the Australian mainstream media – mainly in print form and mainly from New South Wales over the last six to seven years. My sources included (but were not restricted to) *The Sydney Morning Herald*, *The Australian*, *The Daily Telegraph*, *The Sun-Herald* and *The Sunday Telegraph*. The mainstream press provided a seemingly inexhaustible supply of material which demonstrated the varied group of actors and institutions that are involved in moral panics around crime – particularly in a morally fraught and outrageous crime such as group sexual assault. There was a rich diversity of opinions and commentary that circulated around these cases. This provided confirmation of the complex manner in which divergent agendas and interests converge to give rise to a dominant morality whose boundaries are constantly being shifted and negotiated by multifarious and relatively autonomous institutional and individual actors. I examined the mainstream
press through the method of discourse analysis whereby I identified repetitive themes and language and considered how the representations and definitions around the cases, the “communities” allegedly involved in the crimes and the courts were linked to the wider dynamics of “moral community”, criminal, and social justice. The textual analysis was not descriptive but rather sought to illustrate the ideological construction of the “Other” (and the immorality attached to it) which was produced and reproduced in mediated accounts of the crimes explored in this thesis (and beyond). Primarily, I used the method of discourse analysis to unpack the widely generated “common sense” assumptions made about “neutral” moral standards that were invoked in legal, political and media discourses alike. My overall aim – as indicated in my outline of the conceptual framework – has been to produce a multi-layered study interweaving primary, participant observation of various actors in the courtroom and qualitative interviews, with textual analysis of the mainstream media and official discourses around the cases. In so doing, I attempt to reveal the ongoing, dialectical processes through which different actors have (re)constructed meanings of “community” and “Other”.

In writing this dissertation, I endeavour mainly to analyse the role of the courts in the heightened social reactions that have surrounded the “Muslim” gang rapes. For this reason, much of my primary material has been sourced from the courts via original, unobtrusive fieldwork observation of the K brothers’ trials for the offences committed against LS and HG; some observation of the appeals that had taken place for the perpetrators of the Bankstown gang rapes (although this proved increasingly difficult because of the overlap between the K brothers’ trials and the Bankstown appeals); and in-depth interviews with legal and other professionals that were involved in the trials either as a prosecutor, defence counsel, counsellor, journalist or police officer. A couple of interviews were also conducted with professionals who were public commentators around the cases and the broader social issues that surrounded them.

Observation of the K brothers’ trials and Bankstown appeals formed the major part of my primary research. The observations were crucial for the valuable insight they provided into the cultural arena of the courts as a “micro-network” in their own right, in the midst
of a broader network of actors in a moral panic. The network of court actors, for the purposes of this project, include: judges, prosecutors, defence counsel, defence and prosecuting lawyers, juries, the accused (and offenders in appeal trials), the complainants (victims as later established), “expert” (academic) and other witnesses (usually comprised of the complainants and families, both of the accused and complainants, in the trials I attended). In this dissertation, reference is made to all of these actors as playing crucial roles in the moral drama that unfolded – particularly on the “stage” of the courtroom in a criminal trial. There is however, a more pronounced emphasis on judges and the accused in these cases and their trials. There are various reasons for this. Throughout the course of my research about the courts’ role in these moral panics, judges and the accused appeared to attract the most external and popular attention. This could be partly explained by their positions within the constructed boundaries of “moral community”: judges and the accused are at opposite ends of the “community” spectrum – at least in a moral sense and certainly in terms of socio-economic and institutional power. While judges could possibly be characterised as the “gatekeepers” of community boundaries, perpetrators (or the accused) have (allegedly) transgressed these boundaries. The research undertaken for this project consistently demonstrated that judges are often the focus of public attention in highly publicised and politicised crimes, as the moral community looks to them for protection from and retribution against the transgressors of moral boundaries. Thus the judiciary are often thrust onto centre-stage by the media and populist political campaigns that promise to be “tough on crime” and “send a message” to judges that are perceived to be too lenient in their sentencing. Numerous examples of this will be referred to throughout this dissertation, to varying degrees, in most chapters.

Having said this, there was, in these particular moral panics, also an unusual focus on victims and complainants in sexual assault cases. While this will be addressed in detail in Chapter Six, it is worth mentioning here that victims’ suffering at the hands of their perpetrators and then later, in the impersonal space of the courtroom also received significant public attention. This provided leverage for other, often politically conservative, actors in the moral panic to demonstrate the supposed inability of the courts to protect the moral community against evil perpetrators of gang rape and the deviant
“Other” in general. As a result, the victims of these horrific sexual assaults became constructed as unwitting representatives of the moral community: the victims were the “us” within the constructed dichotomy of “us”/“them”. This simultaneously served to highlight the perpetrators (or accused) as “Other” for their evil actions (and in these cases, for their cultural difference), and judges as outsiders predominantly because of their perceived failure to perform their duty as moral “gatekeepers”. Other actors in the courtroom accordingly fell on either side of the “good/evil” dichotomy in the dramatisation of the events around which the moral panic erupted: defence counsel were often painted as disrupting the moral order, while prosecutors were lauded for their heroism.

The trials observed in court did not only provide insight into the power dynamics between various actors in the courts and, in a broader sense, this “moral panic”; the courtroom became a stage where the drama of the moral panic around “Muslim gang rape” was performed in a highly ritualised way, through the lens of ethnocentric “rationality”. This became particularly apparent in my observation of the K brothers’ trials in which the two eldest of the brothers legally represented themselves. MSK and MAK’s self-representation caused a rupture in the rational and neutralised anglocentrism of the courtroom. This “rupture” had broader discursive implications which fed into the whirlpool of signification that characterised the general social anxiety about Muslims and their alien values.

The other component of my primary research included qualitative interviews with legal and other professionals who were directly involved in the cases or had some impact on the broader public debate around issues pertinent to this project. Importantly, these interviews served to highlight the often competing and contradictory interests of actors within the powerful micro-network of the courts (or agencies linked to the courts) and their place in public debate within a more expansive network of actors in a moral panic. My interviews were restricted to key public figures in the cases and public debate – namely the more “powerful” actors in the moral panic. Despite the fact that this is not necessarily a representative sample of either legal professionals, actors in the courtroom
or more general participants in the relevant public debates, the reason for my focus is twofold. The first is that the relative positions of power held by these actors ensured the immediacy of their impact on the multiple and diverse discourses that constituted the specific moral drama of the “Muslim gang rapes”. The second is that these public figures have a clear and practical impact on the way the role of the courts is negotiated: specifically within these cases, but also in other cases which generate moral outrage and social unease, and more generally, in the capacity of the courts as “overseers” or “gatekeepers” of the moral community and its boundaries. My reasons for choosing this particular sample are also a result of more banal and practical considerations. I was faced with considerable difficulty in obtaining an ethics clearance to interview any of the victims or perpetrators in these cases. Had I obtained an ethics clearance to interview these actors, institutional barriers would have prevented interviews with the perpetrators in gaol. Victims may also be understandably reticent to talk about their ordeal. Nevertheless, my focus was not as much on the experiences of the victims and perpetrators in these cases as the more powerful actors who had a direct impact on their fate.

In total there were eight interviews. The interviews were not the main focus of my primary research – they were supplementary to the courtroom observations and media analyses. The interviewees, as mentioned, were carefully selected because of their influential positioning in the legal, political and moral debates that took place around the cases and most were selected because they were key informants within the cases themselves. These actors, through their generosity, provided insights that were not only beyond the reach of popular publicity, but also could not be elucidated in such a personal way within an official arena such as the courtroom. Most interesting was the often significant disjuncture between the “insider’s” perspective and the popular conceptions of their views (as high profile figures), the cases and broader thematic issues around the courts, justice, sexual assault, “ethnic” crime and popular media representations. For these reasons, the interviews provided me with a more balanced perspective around the events and a more thorough appreciation of the divergent interests and agendas of different actors in a moral panic.
The interviewees were comprised of three defence counsel (two of which were specifically acting on the case), the senior Crown prosecutor in both gang rape trials, a police officer who was on the team which investigated the Bankstown gang rapes, a journalist, a retired judge (current members of the judiciary were unable to speak to me), and a manager of the New South Wales Rape Crisis Centre (see Appendix 1). All participants were high profile. This presented a dilemma in that their anonymity could not be entirely protected because of widespread recognition of their status and involvement in these trials. For the sake of efficiency, the interviews were scripted and structured around my general research questions and specific questions about the cases (where the interviewees were specifically involved in either or both cases). Despite the scripted nature of the interview questions, most of my meetings with the participants ended in lively, free-flowing conversations. Interviews with high-profile professionals posed some practical difficulties for reasons other than potentially compromising their anonymity. Some of these participants were understandably reluctant to talk about the cases because of their professional commitment to confidentiality. There were also difficulties encountered in contacting and securing interviews with extremely busy legal professionals: some needed to cancel the interview due to work demands, while others could not respond to a request for an interview in the first place. Most, thankfully, were willing to oblige and were generous with their insights into the specific cases and more broadly about the social atmosphere in which these cases were tried.

This primary material was collected throughout the duration of my dissertation. New developments constantly arose, both in the cases themselves, and in laws enacted around sexual assault and other issues that arose around these court trials. New actors who joined the drama of the K brothers and Bankstown gang rape cases became crucial interviewees – even though some of these actors emerged quite late during the progress of my candidature.
The structure of this dissertation

This dissertation will be separated into three overarching categories. The first section will explore the concept of moral panics, augment the original concept and pay attention to the integral role of the media in moral panics and the emphasis that has been accorded to the media in the traditional moral panic literature. The two chapters included in this section will review the traditional moral panic literature, locate its limitations and explore the relationship between the mainstream media – which have traditionally been posited as major institutional actors in a moral panic – and the courts.

In Chapter One, a crucial aim is to provide an augmentation of the traditional concept of moral panic via a focus on the existence of a ‘moral community’ which, I suggest, unites in reaction to particular incidents through collective fear of a demonised “Other”. The more fundamental aim however is to locate and explore the role of the courts within a moral panic and, in keeping with the aforementioned reconfiguration of the concept, within the scope of public morality and notions of “moral community”. Chapter Two will continue the themes begun in Chapter One through an exploration of the dialectical relationship between the popular media and the courts. The interest here is to examine the ways in which notions of public morality and popular justice are created and sustained as “realities” through media representations and the ways in which these realities around justice and morality are simultaneously challenged and adapted by legal discourses and practices within the courts. In short, I will identify and deconstruct the binary between legal and popular notions of justice to show that these notions of justice are not mutually exclusive but interdependent.

The second section will specifically focus on the courts and their role in these particular moral panics around “Muslim” gang rapes. The topics explored within this section are sentencing and the anglocentric orientation of legal constructions of the hypothetical legal subject. Chapter Three will aim to trace the extent to which sentencing decisions are influenced by moral panics and broader social anxieties as the traditional literature states. In so doing, I will explore the public debates around the perceived leniency of sentences, particularly during times of moral panic and the relationship between retribution and
causing mayhem on the streets [...] because of decisions about immigration made decades ago’ (Morris 2001: 8). Regarding the “ethnic” overtones of the group sexual assaults, a mainstream Sydney newspaper, The Sun-Herald on 29 July 2001, carried the headlines: ‘70 Girls Attacked by Rape Gangs’ (Kidman 2001: 1), ‘Police Warning on New Race Crime’ and ‘Caucasian women the targets’. As demonstrated by further detail of the cases throughout this dissertation, these headlines misrepresented the facts around the attacks: the women were not all Caucasian nor were there 70 attacks. Such (mis)representations ensured that the offenders were portrayed as ethnic invaders who were terrorising “Australian” women and attacking the “Australian” way of life. The rapes were constructed as a powerful metaphorical (and literal) violation of “Australian values”. As violators of these values, the perpetrators became folk devils of Middle-Eastern extraction.

Another gang rape case had recently gone through the courts at the same time as the public debate that was rife around immigration and so this became part of the overlapping Middle Eastern crime and immigration debates. This case – AEM, KEM and others – also involved Lebanese youth and a series of sexual assaults from April through to October 2000. For the attack that went to trial, Judge Megan Latham of the District Court of New South Wales sentenced 19-year-old AEM to six years imprisonment with a four year minimum, his 16-year-old brother, KEM to five years, seven months with a three and a half year minimum, and another accomplice to eighteen months for detaining with intent to hold for advantage. Another youth, MM, was later given six years with a minimum of four years (Warner 2004: 347). These sentences attracted widespread public outrage – fuelled by the popular media, and conservative political parties – for their perceived leniency. This moved the State government to change legislation in the first week of September 2001 and create the specific offence of ‘aggravated sexual assault in company’ with a maximum penalty of life imprisonment (Johns et al. 2001). It was under this legislation and within this socio-political environment that Bilal Skaf was sentenced to a landmark 55 years in gaol for being the “ringleader” of a gang of men who
revenge in punishment. I argue that the broader social and political environment of fear around the “Other” increases demand for more severe punishment and that the courts – despite statistical evidence to the contrary – are always perceived as too lenient. I refer to a “new punitiveness” (Pratt et al. 2005) or “penal populism” (Roberts et al. 2003) that describes the politicised demand for harsher punishment. That sentencing considerations reflect notions of morality, justice and community, will be explored through the lens of ethnicity and cultural difference. To illustrate I will make use of defence barrister Stephen Odgers’ (in)famous “cultural time bomb” argument which was posited in a sentencing appeal for MSK.

Chapter Four will be a conceptual continuation of the notion of cultural difference before the courts, through a critique of what I argue are the fundamentally anglocentric standards against which notions of legal subjectivity and responsibility are constructed. I analyse the ways in which the universalisation of the law’s anglocentric standards deals with ethnic and cultural difference before the law and whether it does so in a way that advantages or disadvantages those who exhibit such differences. In so doing, I employ feminist critiques of the “reasonable” or “ordinary” man, which argue that such legal constructions are imbued with an inherently masculinist bias. I suggest that reasonable or ordinary person in legal discourses is not only male, but Anglo-Saxon-Celtic and middle class. There is nothing substantially new about the idea that justice is “white” or that the “reasonable person” of law is a white, socio-economically affluent man. Critical race theorists have had much to say about the “whiteness” of the legal subject (Valverde 1993; Crenshaw et al. 1995; Harris 1997; Delgado and Stefancic 2000; Sharma and Sharma 2003). My intention in Chapter Four is to harness these concepts of justice as gendered and ethnicised, to locate the norms underpinning such legal constructions within a broader scope of morality, moral community and hence, moral panics, when they emerge.

The third and final section explores considerations of gender and ethnicity in relation to the perpetrators and victims in these specific cases, and also in relation to the broader communities with which the perpetrators and victims are identified. My analysis of gender and ethnicity in these cases is not solely restricted to the perpetrators and victims
in these crimes and their “communities” but also to the legal and judicial professionals who are powerful actors in both the broader social network in moral panics and the smaller network that is defined as the inner sanctum of the courts.

Chapter Five will explore the masculinities of the perpetrators in the Bankstown and K brothers’ cases within the context of popular constructions of the Arab or “Muslim” man as particularly misogynistic and lascivious. The relational nature of such constructions will be demonstrated through the application of some aspects of RW Connell’s seminal concept of “hegemonic masculinity” and via an exploration of the different masculinities that emerged during the infamous “Cronulla race riots”. In this chapter some parallels will be drawn between the exclusory nature of representations around “Muslim” and judicial masculinities: both are popularly excluded from a domain of “reality” and “ordinariness”. These groups of men – in ways that are valorised in their respective milieux – “perform” their masculinities on the margins of a popularly delineated idea of “community”. This chapter explores the relationship between the performances of marginal masculinities in their own cultural contexts, the interpretation of these performances in a broader cultural context and the way in which the negotiation between contextual and broader structural forces shape the masculinities in question.

Finally, Chapter Six deals with the focus on the victims of these sexual assaults as a positive outcome of racialised moral panics around “Muslim” gang rape. A fundamental focus will be the sudden and ostensible urge – as mentioned previously – to protect the rights of complainants in sexual assault trials and a shift of moral blame to the courts (from the perpetrators) for their perceived failure to do this. The convergence of various different and conflicting agendas has been particularly noteworthy in the “victims’ right debate” that culminated after the trials for the K brothers’ convictions. For example, the “feminist” discourses that were previously maligned by conservative social commentators were appropriated in order to further conservative ideological interests that include anti-multicultural and punitive agendas. Victims were also popularly upheld as defining the abstract moral category of “good” against the “evil” that defined the perpetrators. Another noteworthy development has been the changing status of the victim
in these debates. No longer were victims silenced: they were now active participants in the public debates and reforms that took place in response to these gang rape cases. As mentioned previously, Tegan Wagner, through waiving her right to anonymity, broke new ground and encouraged other young victims of sexual assault to come forward.
Moral Panics and the media: negotiating the boundaries of moral community and justice
1. “Muslim” gang rape in an “Australian” moral community: the role of the courts in moral panics around “ethnic” gang rape

The concept of moral panic, as developed by Stan Cohen in 1972 and further augmented by Stuart Hall et al. in 1978, is primarily definable through a ‘deviance amplification sequence (initial deviance, societal reaction, increase in deviance, increase in reaction, etc.)’ (Cohen 1972: 118) as well as what Hall et al. refer to as a ‘signification spiral’ (1978: 223-7). These processes identify a perceived threat to a set of established social boundaries. The perceived threat, by definition, must be moral in nature. Moral panics might most accurately be described as complex situations which are characterised by the involvement of a network of social and institutional actors in relative positions of power, who contribute to common and dominant cultural understandings of moral norms, and particular events or social groups who are defined as aberrant or a threat to such norms. A moral panic is also characterised by typically heightened reactions, on the part of these various actors, to the perceived threat. If it is assumed from the outset that a separate or continued “moral panic” did exist around the group sexual assaults examined in this thesis, the social and institutional responses to each case could be differentiated through varying degrees of publicity surrounding the cases and their trials, and the extent to which public policy was changed or reforms made to cater specifically for the circumstances surrounding the cases. Of more significance is that the cases were bound together along broader ethnic, racial and “cultural” lines: the perpetrators in each group were young men of Muslim background. The values attributed to a homogenised notion of “Muslim culture” in the popular imagination, became synonymous with the morally repugnant actions of the perpetrators in both gang rape cases.

I argue that intertwined representations of the offenders as morally, culturally and ethnically “Other” (or as “folk devils”) functioned to define the boundaries of an imagined ‘moral community [of] right-minded citizens’ (Hudson 2006a) and that the notion of “moral community” is central to moral panics. The boundaries of “moral community” in the context of the “Muslim” or “ethnic” rapes were partially delineated
through nationality and “culture” – a concept of “Australian-ness”. Perceptions of threat, through culturally dominant constructions of criminality and an ethnically marked “Other”, to a set of imagined moral boundaries underpins the emergence of social insecurity: a moral panic is a reasonably brief outburst within such an anxious socio-political environment. Specifically, threat to the boundaries of “community”, in whichever sense that notion can be defined, is the core of moral panic. Hence an examination of the concept of moral panic through the notion of ‘moral (and geopolitical) community’ (Hudson 2006a) is what drives the present analysis. I am more interested in the conditions in which moral panics can arise and flourish and the possible reasons behind the occurrence and recurrence of such episodes, rather than providing yet another confirmation of the anti-Muslim sentiment around these crimes and other events on a national and international scale.

Simply arguing that a moral panic occurred around these gang rape cases specifically, as well as Muslim minority cultures more generally, is, in itself, insufficient and unremarkable. It is not unusual for moral panic to occur around brutal, morally repugnant crimes such as gang rape. Social anxieties around ethnic and cultural minorities are also fairly commonplace. Aside from showing why social reactions to the Bankstown and K brothers’ cases could be viewed as separate or an extended and continuing moral panic(s), a substantial aim of this chapter is to unpack the basic values and morals that underpin such moral panics, and what such notions of “public morality” reveal about the (racially configured) structural circumstances in which these crimes occurred.

An equally crucial aim of this chapter is to locate and explore the specific role of the courts as one of the many different institutional actors within these racialised moral panics. In line with my proposed extension of the theory of moral panic, it is crucial to unpack how the courts are implicated in defining the scope of moral community and interrelated notions of public morality, as well as being subject to these boundaries. That the courts are given the symbolic duty of moral arbitration is something which becomes apparent during times when public morality is perceived as tenuous and public expectations around the courts’ role to restore order – particularly through severe
punishment – becomes substantially increased. As will be shown in various different ways throughout this dissertation, there is a tension between the moral arbitration that is expected of the courts, and their perceived failure to perform their moral duty to the community. In a more abstract sense, I will argue that the morality, values and sense of community that is produced and reproduced by the law is based on ideas of ethnic, cultural and racial uniformity which are universalised and legitimated by legal discourses.

Moral Panic: a ‘splutter of rage’ or chronic anxiety?

Any analysis of moral panic must begin with the frequently quoted definition of the concept as developed by Stan Cohen:

A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. Sometimes the subject of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic passes over and is forgotten, except in folklore and collective memory; at other times it has more serious repercussions and might produce such changes as those in legal and social policy or even in the way society conceives itself (Cohen 1972:9).

The classic concept of moral panic has been open to criticism (Cohen 2002; McRobbie and Thornton 1995). Out of some of the perceived shortfalls, the main contention in this chapter is that too little focus has been afforded to the specifically moral underpinnings of the concept. Also, there is insufficient exploration of the complexities inherent in the web of signification that is produced and reproduced around notions of public morality by a network of different actors in a moral panic. A crucial question here is to locate the underpinnings of public notions of morality so as to explain why any perceived or real deviation from these moral norms attracts a “burst” of moral panic. At least part of the answer lies in an exploration of the notion of moral community and the ‘ontological
security’ (Giddens 1991) offered by such a construction, rather than simply pointing to a media-fuelled fear of deviance, or constructions of a folk devil, or both.

In the introduction to the third edition of *Folk Devils and Moral Panics*, Cohen refines the characterisation of moral panic as: public *concern* as opposed to unbridled fear; moral outrage or *hostility* towards the folk devils; *consensus* or widespread agreement about the ‘problem’ which is legitimated by the majority of elite and influential groups; *disproportionality* or exaggeration of the threat; and *volatility* – sudden eruption and dissipation of the ‘problem’ (2002: xxii. Original emphases). The last two terms have been subject to criticism on a couple of bases (Thompson 1998). To suggest that a social reaction is disproportionate to a real (or perceived) threat relies on the assumption that such reactions are irrational: connotations of irrationality in the very term “moral panic” draw attention to the value-laden nature of the concept (Cohen 2002: xxviii; Thompson 1998). Moreover, to state that a particular social reaction is a moral panic and therefore disproportionate to the actual threat, places those who analyse the phenomenon in a privileged position from which they are able to judge such reactions as disproportionate (Cohen 2002: xxviii). Some theorists prefer to argue that the series of social reactions described as “moral panic” are a consequence of rapid social change and increasing pluralisation in postmodern societies, and that this creates the growing potential for ‘value conflicts and lifestyle clashes between different social groups’ (Thompson 1998: 11) which are then ‘aired in a public arena’ (Lumby 1999).

That moral panics are volatile is also an assumption that has been questioned, because it takes for granted that such episodes are always characterised by a short life span. Some theorists argue that the rapid succession between every episode of moral panic blurs the boundaries between each (Thompson 1998), while others suggest that a discussion of moral panics should not focus on a ‘single, brief, discrete episode lasting a few months or a year or two […] but] a series of events – a process’ (Goode and Ben-Yehuda 1994: 229). Such arguments indicate that a panic which appears volatile at the time sometimes take several decades to build up to such an explosive point. It certainly appears more plausible to describe a moral panic as one moment (or a successive set of interrelated moments)
within the context of broader social anxieties that are constantly bubbling beneath a façade and expectation of social stability. This is not to say that broader social anxieties are long-enduring moral panics. As Cohen argues in his introduction to the third edition of *Folk Devils and Moral Panics*,

The notion of a ‘permanent moral panic’ is less an exaggeration than an oxymoron. A panic, by definition is self-limiting, temporary and spasmodic, a *splutter of rage* which burns itself out […] Successful moral panics owe their appeal to their ability to find points of resonance with wider anxieties (2002: xxx. Emphasis added).

As is evident in what follows, the moral panics explored in this project can be described as ‘splutters of rage’ within a backdrop of wider and continuing social anxieties. Perhaps, as Goode and Ben-Yehuda argue, a burst of moral panic that does not appear to last for long serves the purpose of reaffirming moral boundaries, while a succession of panics around the same issues are more ‘likely to bring about institutional change’ (1994: 228). Evidence of both these factors – in varying degrees between the two cases – can be found in the social outrage around the cases that came to be conflated by conservative Sydney journalists as “Muslim” gang rapes. The most remarkable feature of the social reactions surrounding the first case(s) – the “Lebanese” gang rapes in Bankstown – was the amount of publicity that the offences and their trials attracted, and the specifically racialised nature of this publicity (Poynting et al. 2004). In this sense, as mentioned from the outset, reactions to these cases could be characterised as moral panics on two separate yet popularly interrelated fronts: because of the morally repugnant and brutal nature of the crimes themselves, as well as through the “race” of the perpetrators who were a group of young, second-generation Lebanese, Muslim men.

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5 It is important to note that the term “race” is applied to religious difference against a dominant ethnic and religious “norm”. This has been referred to as a manifestation of “racism” by a number of theorists who work on the area of identity politics. There is some discussion of this in Poynting and Mason (2006: 360) and in Poynting et al. (2004), where it is argued that the ‘Arab Other’ has become the ‘Muslim Other’.
“Lebanese” gang rapes in Bankstown

For a social event to be classed as moral panic, the object of panic, or the ‘folk devil’, must be morally offensive. While the moral repugnance of group sexual assault is obvious, the additional “racial” element of the crimes resonated with wider anxieties which, according to Cohen, form the foundations for an episode of moral panic. The year that the “Lebanese gang rapes” were most highly publicised – between 2001 and 2002\(^6\) – was the same year of the attacks on the World Trade Centre on September 11. However, the terror attacks of September 11 were not the starting point for the anxiety felt by members of the dominant ethnicity towards people of Middle-Eastern extraction. Prior to the World Trade Centre attacks, many Australians were anxious about the prospect of “illegal immigration” mainly from the Middle East which culminated in a set of events which came to be known as the “Tampa crisis” and the “children overboard affair”. In the latter, it was alleged that a fishing boat full of Middle Eastern asylum seekers threw their children overboard to prevent the Australian navy from turning the fishing boat back, when in fact the footage shown was that a boat was sinking and ‘asylum seekers, including children, had to be rescued from the water’ (cf. Poynting et al. 2004: 26-27).

The ‘children overboard’ allegation was fabricated for federal electoral advantage, and, as Poynting et al. assert, ‘the imputation that the asylum seekers were bad parents only served to strengthen the popular opinion that refugees would not be good and decent Australians’ (2004: 27). ‘Prime Minister John Howard repeated, “I don’t want, in Australia, people who would throw their own children into the sea”’ (Four Corners 15/4/02, cited in Poynting et al. 2004: 27). Indeed the mere possibility that these events could be used for electoral advantage, points to previously existing and progressively developing fears about metaphorical or literal invasion by the “Muslim Other”. The “Lebanese gang rapes” were one moment, a somewhat prolonged ‘splutter of rage’, within this context.

\(^6\) Notwithstanding the fact that the actual offences occurred a year earlier; the media ignored the police press release because the Olympics were more newsworthy at the time. The press coverage continues presently and is usually framed through criticism that is leveled at the courts around victims’ rights in sexual assault cases. These considerations will be explored in Chapter Six.
In this environment, the rapes were significantly portrayed as race hate crimes (Poynting et al. 2004; Warner 2004). Comments uttered by the perpetrators to their victims such as ‘Aussie pigs’; ‘You deserve it because you’re Australian’; ‘I’m going to fuck you Leb style’ (Poynting et al. 2004) became the focus of media attention. Such comments were upheld as evidence that Anglo-Australian women were the designated prey of the attackers and ‘were taken as a justification for the racialised coverage’ (ADB 2003: 61). An article in the Daily Telegraph read: ‘In a chilling racial development, some of the victims said they were being asked if they were true Australians before being attacked by the youths, believed to be of Middle-Eastern extraction’ (Miranda 2000: 14). On the front page of the Sun-Herald on 29 July 2001 was the headline: ‘70 girls attacked by rape gangs’. The sub-heading was: ‘Caucasian women the targets’.

That this was an ideological description became apparent because the victims were reported as “Australian” regardless of ethnic or racial background – in marked contrast to the perpetrators who were described as “Lebanese”, regardless of the fact that the perpetrators were all born in Australia. In fact, of the seven victims of the rapes, there were two girls of Italian background, one of Greek and one of Aboriginal parentage (Fickling 2002; ADB 2003: 82). These were among the victims who secured convictions. A little publicised fact divulged in an interview I conducted with a rape crisis counsellor, was that young women from the same cultural background as the perpetrators were also among the victims of this group of men (Interview 13/2/06). There was no substantial evidence to indicate that the crimes were motivated by racial hatred – even if racial taunts were used to belittle some victims. As Poynting et al. argue:

> given the horrific humiliation and damage of the rapes, it is interesting that the relatively minor aspect of these comments should be so seized upon and emphasised – by certain media and populist politicians as a major aggravating factor of the crimes (2004: 125).

In terms of the intense publicisation and politicisation of the crimes, it is easy to characterise public responses to the Bankstown rapes as moral panic in the classic sense.

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7 This was part of the limited coverage during the Olympics.
8 The racial and ethnic backgrounds of the victims will be further explored in Chapter Six.
of the term: there was a clearly discernable ‘signification spiral’ produced by the interaction of the media, public opinion and the authorities, to link the identified threat to larger, more sinister issues (Thompson 1998: 7). Kate Warner points out that by mid-2001 ‘we were in the midst of anxiety about Arabic or Middle-Eastern or Muslim asylum seekers and the Middle-Eastern connection made the racial aspects of the rapes newsworthy’ (2004: 345). With the added horror of the September 11 attacks in 2001, the rapes became linked in the public imagination with broader and largely unrelated issues (ADB 2003). The common thread was the public construction of the “Arab” or “Muslim Other” as folk devil: a representation which had been homogenised and ‘naturalised through iteration and association’ (Poynting et al. 2004: 50).

Evidence of “moral panic” as per the original model could also be found in the exaggeration of the extent and significance attributed to crimes (Cohen 1972). The ‘70 attacks’ to which the media referred was a figure that encompassed every reported incident of sexual and indecent assault in the Bankstown area in 2001. One individual – Lesley Ketteringham – was responsible for most of these attacks. Ketteringham was charged, convicted and imprisoned for committing a high number of ‘wilful and obscene exposure offences’ (Weatherburn 2001). Ketteringham was not of Lebanese or Middle-Eastern extraction, nor could his crimes be accurately described as brutal. The cycle of the moral panic around the Bankstown gang rapes, was reinforced on 15 August, 2002, when Judge Michael Finnane sentenced the ringleader, Bilal Skaf, to a landmark 55 years in gaol with 40 years non-parole. Finnane’s sentence and his commentary on the crime were widely applauded. The sentence was the longest in Australian history for rape (Gleeson 2004).

It is true that these rapes did occur, that the crime was horrifying, and the perpetrators were of Lebanese and Muslim background: a moral panic always begins with some truths. However, as described, there were many elements of the story that were either substantially exaggerated or fabricated for ideological purpose and effect. Popular and conservative commentary which emphasised the “ethnic” or “cultural” dimension of the attacks reinforced the status of the offenders as threatening, not only to young women,
but to Australian society more generally. In this context, the entire Lebanese community became guilty by cultural association. Conservative journalist Miranda Devine conceptualised the gang rapes as a ‘war’ being fought on Australian soil:

[A] home-grown form of systemic ethnic cleansing by a group of men said to be of ‘Middle-Eastern’ extraction […] they wage war on those they feel do not belong. And make no mistake. It is a war, and one in which our laws are impotent (Devine 2001a:15).

Political, legislative and judicial reactions (details of which will be explored in later chapters) followed. This is not to say that these reactions followed in a linear sense or without some resistance from some quarters. Moral panics are characterised by the complexities inherent in the involvement of many different actors and their diverse personal or institutionally aligned motivations. However, an editorial in *The Age* newspaper put it concisely: ‘On their own, rape, ethnicity and religion are issues that raise strong passions. These crimes seemed to intertwine all three’ (*The Age* 2002). It was not the crimes themselves that intertwined all three elements of rape, ethnicity and religion, but rather, public portrayals of the crimes in the popular press and political rhetoric.

‘All Muslims are rapists’: The K brothers’ gang rapes
There must be a shift in emphasis when applying classic formulations of moral panic to public reactions generated by the second set of rapes involving the K brothers. It is difficult to say whether this was a separate moral panic or part of an after-shock or reigniting of the previous moral panic around the Bankstown cases. Perhaps the most apt characterisation of social reactions to these offences and their trials is to say that they constituted a separate moment of moral panic within the generalised social anxiety around Muslims – particularly the mythical figure of the Muslim gang rapist.

More immediately apparent in these cases were the rapid changes in social policy due to the problems that arose in the court trials. This was partly prompted by the decision of the two eldest brothers to represent themselves in court. This meant that the brothers would
be able to cross-examine and intimidate the complainants personally in court. That this raised public outrage was unusual. The reality – as ascertained in my interviews with a rape crisis counsellor and a Senior Crown Prosecutor – is that intimidation of complainants during a sexual assault trial is a common occurrence and would not normally attract much publicity or widespread concern (Interviews 13/02/06; 22/02/07). Yet the fact that the intimidation would have been by – and not merely on behalf of – the accused is of consequence to the outrage around the K brothers’ trials.

In terms of detail the crimes were brutal and, in this respect, not so different to the earlier Bankstown or “Lebanese” gang rapes. The rapes occurred in a unit in Ashfield in inner-western Sydney on 27th July 2002 and involved considerable violence and the threatening with offensive weapons.9 In the trials for these rapes, the court heard that the four brothers and one of their friends befriended a number of young women in a variety of different situations. After becoming acquainted, the group would frequently invite the girls over for a “party” which ended in group sexual assault. The victims were as young as 13 years of age and the eldest brother in particular threatened to kill them if they did not sexually submit. As is common in sexual assault, the humiliation of the victims was horrific, as was the psychological taunting that accompanied the physical violence. One of the young victims was told that her friend in the other room had been killed. After being raped, the girls were dumped, late at night, in a suburban street.

The K brothers were said to target mainly Anglo-Australian girls notwithstanding the fact that the ethnic backgrounds of the victims in the K brothers’ cases were also mixed. For the Bankstown boys, the racially derogatory words uttered by some of them during the offences may plausibly be seen as a type of self-exclusion from the imagined moral and cultural boundaries of the dominant “community” which had marginalised them. Thus, the comments of the Bankstown boys can be framed as a type of “protest” to their social marginalisation (Poynting et al. 2004: 102). The concept of “protest masculinity” will be further delineated in Chapter Five. Along the theoretical continuum of “protest

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9 There were other rapes that were tried in the first half of 2005, but I will here focus on the first case that was tried – involving the victims, LS and HG. This trial was observed from beginning to end as part of my fieldwork research.
masculinity” – where minority males protest against mainstream and institutional discrimination or racism – the K brothers’ rebellion may be found in the choice of the two eldest brothers to sack their barristers and represent themselves. Their proclaimed reason for this was that barristers were racist and not to be trusted. MSK, the eldest of the brothers, said: ‘My barrister told me, ‘all Muslims are rapists’, so how can I put questions through any senior counsel? We are helpless’ (Glendinning 2003a: 5). Echoes of the previous Bankstown cases are discernable in this comment and in many other remarks throughout the trial. It is interesting to note that the racialisation of the previous gang rapes was exploited by the self-represented K brothers in order to push for their own interpretation of the right to a fair trial.

The focus of public indignation in this case was more to do with the eldest K brothers’ assertions that they were “victims” of a racist government and criminal justice system, than their religious, ethnic or cultural backgrounds. That this would result in the complainants – perceived even before the accused were tried, as the real victims – being personally cross-examined by these self-represented accused, fuelled any existing public ire. A detail that highlights the emotive nature of the reporting is that the complainants were referred to as “victims” and a very clear line between victims and perpetrators was established before the cases were tried. The outrage was succinctly summarised by a front page Daily Telegraph headline: ‘Rape Outcry: Accused attackers to question teenage victims’ (Knowles 2003: 1).

Proposals were made for legislative changes to protect the rights and address the needs of complainants in sexual assault trials. The changes were implemented ten days before commencement of the trial, resulting in the passing of the Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003 which prevented those accused of sexual assault who represent themselves from directly cross-examining complainants; they could only now do so through a court-appointed intermediary. That this was not a valuable or valid legislative imperative is not in question. Yet, the oversimplification of the concept of a fair trial and the speed with which the legislation was passed, glossed over the complexities faced by the courts in ensuring that a balance is reached between
the rights of the accused and complainants. This was a criticism of the legislation by Justice Brian Sully of the Supreme Court of New South Wales, who presided over the first of the K brothers’ cases (*R v MSK, R v MAK, R v MRK, R v MMK*, [2004] NSWSC 319 at 137-139).

In response to the passing of the *Criminal Procedure Amendment (Sexual Offences Evidence) Act 2003*, Justice Brian Sully separated the trial of those who were legally represented from that of the brothers who were not. The separation of the trials resulted in the placing of a strict media suppression order on the first trial to prevent media coverage from prejudicing the latter trial of the self-represented brothers. There were also to be subsequent convictions for offences for which the brothers were yet to be tried. This is one substantial reason for considerably less publicity around the K brothers’ cases and court trials, than the Bankstown ones. The courts needed to ensure that negative publicity did not prejudice the juries on future trials and were subsequently criticised by conservative sections of the popular media (who also pushed an associated “anti-Muslim” agenda)\(^{10}\) as being more interested in the rights of the accused than those of victims. This concern about prejudicial publicity is indeed legitimate: one of the perpetrators of the previous Bankstown rapes – Tayyab Sheikh – successfully appealed to the New South Wales Court of Criminal Appeal on this basis (*Regina v Tayyab Sheikh* [2004] NSWCCA 38). The subject of the Tayyab Sheikh appeal will be explored in more detail in the following chapter.

When media suppression orders were lifted, the mainstream media commentary focused on familiar themes (in line with the more extensive publicity surrounding the Skaf trial) of the callousness of the perpetrators, the racism of the perpetrators against their victims, the ordeal and continued suffering of the victims and the bad behaviour of MSK and MAK in the courtroom. Peculiar to these trials was that the self-represented brothers caused numerous delays and were able to cause trials to be aborted due to strategically timed outbursts in court, resulting in the dismissal of juries. One press article observed, ‘MSK and MAK subjected their victims, the police, prosecutors, judges and even their

\(^{10}\) These overlapping and connected agendas will be further elucidated in chapter 6.
own defence barristers to calculated ploys to avoid justice’ (Wallace 2005a). Whether or not the K brothers’ antics in court were in fact ‘calculated ploys to avoid justice’ can only be the subject of speculation. The point is more that despite the courtroom theatrics of the self-represented K brothers (which will be detailed in Chapter Four), the reporting around these trials was not as sensational as that surrounding the Bankstown rapes and there was no perceptible mainstream media exaggeration of either the crimes themselves, or the antics of the brothers in court. It is difficult to ascertain exactly why these cases and their attendant trials were reported less sensationally to the previous rapes. Granted that the media suppression order around the first trial played a part; it is also interesting to speculate on whether the response of the Muslim community along with various academic, government and media counter-discourses such as the Human Rights and Equal Opportunity Commission (HREOC 2003) and the Anti-Discrimination Board of New South Wales (ADB 2003), ensured that there was not a repeat of the sensational and racialised reporting surrounding the Bankstown sexual assaults.

Themes similar to those found in the “Lebanese” gang rapes were sometimes supplemented by a linkage to those earlier offences in Bankstown – indicating that public outrage around the K brothers’ cases were part of a broader framework of moral panic about “ethnic”, or, more specifically, “Muslim” gang rape. There is also room for the view that the racialised reporting around the K brothers’ trials was exacerbated by the brothers’ own vociferous identification as Pakistani Muslims in court (which to some extent paralleled the behaviour of “Lebanese” perpetrators’ families in court), as well as a “cultural defence” argument later brought up by MSK’s counsel on appeal. This infamously became known as defence counsel Stephen Odgers’ “cultural time bomb” argument.

**A legal defence**

To summarise, Odgers argued that the set of circumstances in which MSK found himself were heavily influenced by the culture in which he grew up in North-West Frontier Pakistan. The substance of Odgers’ argument will be unpacked more substantially in Chapters Three and Four. For now, it is sufficient to say that simplified media
representations of Odgers’ defence submissions, removed from their original context, perpetuated a dual perception that the cultural background of the offenders was responsible for their crimes, and that the Australian courts unjustly protect rapists from divergent “ethnic” and “cultural” backgrounds. This was reflected in the simplicity of the headline: ‘Gang rapist’s attacks unavoidable, says lawyer’ (Wallace 2005d: 6). Justice Grove of the New South Wales Court of Criminal Appeal, rejected Odgers’ argument and stated that it was offensive to anyone who ‘fell within the scope of its insult’ (Wallace 2005e). Such coverage of a contentious yet reasonably complex argument served to reinforce Paul Sheehan’s back-cover blurb statement that the K brothers’ ‘crimes took place against the backdrop of a violent cultural clash between young Muslim men and young Western women’ (Sheehan 2006). From legal viewpoints, those on both sides of the legal profession admitted in my interviews with them, that Odgers was harshly and very publicly reprimanded for a potentially valid legal argument (Interviews 21/2/06; 24/2/06; 22/2/07), while my interview with a former Judge and Acting Justice of the Supreme Court of New South Wales, revealed equal distaste for Odgers’ argument as Justice Grove’s original response: ‘[Odgers’ argument] could even be referred to as bullshit!’ (Interview 24/4/07).

On a theoretical level, responses to Odgers’ cultural defence illustrate the assumptions of cultural uniformity that underpin the law and the traditional reluctance of the courts to consider diversity (Cotterrell 2004: 4). It also demonstrates that the law is a site of continuous struggle and negotiation between the dominant values on which it has been built, and the untenability of sustaining assumptions of cultural uniformity in ‘contemporary conditions of considerable cultural diversity’ (2004: 4).

Overall, the concept of moral panic can be utilised to make sense of the social and institutional reactions to the K brothers’ cases. Public reactions to these cases do not precisely fit the ‘signification spiral’ model however the K brothers’ cases did display some of the key elements apparent in a classic conception of moral panic. Cohen’s point on the dramatisation of deviance through the ‘ritual’ and ‘ceremony’ in the courtroom is of particular relevance to the K brothers’ cases which stand out due to the markedly
dramatic nature of their trials. I will outline, in greater detail, the trials of the K brothers and the more general theatrical element of court trials, in Chapter Four. Here it is sufficient to say, following Cohen, that the ‘ceremony’ of the court trial ‘not only publicly labels the deviant but functions to stir up moral indignation to a still higher pitch’ (1972: 86). More generally, despite a broader difference in magnitude between public reactions to the Bankstown and K brothers’ cases, the panic around the latter case echoed many of the same fundamental themes that were raised in the Skaf case: those of racial motivation – the idea that these foreign men were exclusively attacking “our”, “(Anglo-)Australian” women and the assumption of an ethnically homogenous and consensual moral “community” that underpins such ideologically driven ideas.

Legal self-representation enabled the two eldest K brothers to push the limits of the criminal justice system and cause considerable delays through impassioned outbursts in court, screaming prejudicial information at the jury and causing trials to be aborted, sacking their barristers, appealing for new ones and sacking them again, not turning up to court, pleading insanity, and so on. By behaving inappropriately in court and demonstrating what was seen as an ability to exploit legal loopholes, the self-represented K brothers were seen as cunning, dangerous and capable of successfully perverting the course of justice. The K brothers’ lack of respect for the legal system served simultaneously to bolster the view of the accused as obeying alien moral codes and to show that the criminal justice system was incapable of coping with the strain and imposition created through its accommodation of the “Other”. As a result, much of the blame was popularly located in the workings of a “soft” or permissive court system – criticism of which was part of a similar and overlapping conservative agenda that criticises the elusive concept of “political correctness”, also commonly attributed to “left-wing” social or political movements and academic discourses. Perhaps the moral reprehensibility of the perpetrators was already taken for granted and did not need to be highlighted as much as the incapacity of the courts. It is also conceivable that the courts, to some extent, became morally implicated in these crimes because of the legal importance placed on the provision of a fair trial for the accused, who, by rules of popular justice, were already guilty before being tried. That this was the prevalent belief is clear,
as previously mentioned, in prevalent pre-verdict references to the accused as “perpetrators” and the complainants as “victims”.

**The moral community**

What becomes apparent in the emphasis on issues of “race” is that there are interrelated presuppositions about the existence of a culturally delineated ‘moral and geo-political community’ (Hudson 2006a); a “we” against which an ethnic or culturally incongruous “Other” is defined. In effect, two assumptions operate here: one about the general existence of a “moral community” of right-thinking citizens (Hudson 2006a), and another about the cultural specificity and uniformity of a geo-politically defined national community. These constructed categories become aligned during a moral panic: the particular “moral order” upon which the concept of citizenship is predicated, is overlaid by a racial and ‘cultural imaginary’ of whiteness (Noble 2007). The link between a racialised cultural imaginary and a sense of nationhood is linked particularly well in Ghassan Hage’s concept of “white nation” – whereby the Australian nation is structured by a dominant White culture which controls indigenous Australians and migrants (Hage 1998). This conceptualisation can also be compared to Charles Taylor’s notion of ‘social imaginary’, which defines the abstractly shared understandings and horizons of common expectations that give people a sense of shared group life or community. An interrelated notion is that of the ‘moral order’. This is a more explicit, concrete set of codes about how we should act and provide explanations for the way society is arranged the way it is (Taylor 2004).

Such emphasis on the moral dimension of moral panics allows greater consideration of its affective and emotional underpinnings. The idea that the term “moral panic” invokes a disproportionate and therefore “irrational” response to crimes and terrifying folk devils overlooks the fact that moral judgment is inseparable from emotion. Institutional involvement in a moral panic – particularly through agencies of social control and the mainstream media – endorses and legitimises these affective reactions. Indeed, as Kahan and Nussbaum argue, ‘Emotions are ubiquitous in criminal law, as they are in life’ (1996: 270). This is particularly clear in Barbara Perry’s notion of ‘permission to hate’ which is
defined as the sanctioning, through state action or inaction, of hate crime against minority groups which are perceived to be “dangerous” (Perry 2001). The idea that the state ‘permits’ the ‘hatred’ of certain groups in society, gives consideration to the affective or “irrational” element of state control. Perhaps a permission to ‘hate’ animates the anti-Muslim sentiment which resulted in vilification and harassment of members of Muslim communities, against which the state mechanisms of social control were generally inactive (HREOC 2003).

Related to this is the furore that emerges around the inability of the criminal justice system to contain members of “dangerous” minority communities when they perpetrate crimes against the “mainstream” community. A significant theme is the popularly perceived inability of the courts – as the traditional arbiters, guardians and protectors of public morality and “the community” – to deal with these “alien” perpetrators and maintain the ‘moral order’. This contributes to moral panic in the classic sense of the term, not only because the perpetrators are seen as belonging to groups which are threatening to entrenched social norms and values of mainstream morality (in this context, “Australian-ness”), but also because the courts – which are supposed to be protecting the collective “us” – are depicted as inefffectual by popular standards and expectations. To some extent this explains both the heated criticism levelled at the courts when sentences are popularly seen as too lenient, and the occasional spike in sentence severity in response to offences that generate heightened social anxiety and insecurity in the face of an apparent enemy. Perhaps this could be seen as one part of the explanation behind Judge Finnane’s severe 55-year sentence for Bankstown gang rape “ringleader”, Bilal Skaf.

Both the Skaf and K brothers’ cases thus contain at least three of the essential elements of a moral panic as outlined by Stan Cohen in the introduction to the third edition of Folk Devils and Moral Panics:

First, a suitable enemy: a soft target, easily denounced, with little power and preferably without access to the battlefields of cultural politics […] Second, a suitable victim:
someone with whom you can identify, someone who could have been and one day could be anybody […] Third, a consensus that the beliefs or action being denounced were not insulated entities […] but integral parts of the society or else could (and would) be unless ‘something was done’ (Cohen 1972: xi. Original emphasis).

In each case the perpetrators were indeed ‘suitable enemies’, who attacked ‘suitable victims’ and it was believed that these attacks would become ‘integral parts of society’ if they were not promptly contained. The media, political and legal discourses in each case delineated similar themes: the presence of a demonised, foreign “Other” – a “folk devil” who threatened not only “Australian” women, but by doing so, “Australian” values.

Hall et al. argue that ‘ethnic criminal networks’ or ‘youth gangs’ are newsworthy because they lie outside the perceived norms of society and even crime; “ethnic” crime breaks ‘normative contours’ and that ‘such criminals and their crimes get a treatment – in courts and the media – which consciously marks them out as different from the rest of society’ (1978: 31). In accordance with Hall et al.’s analysis, both the Bankstown and K brothers’ cases are particularly newsworthy because they involve “ethnic” youth – which have been represented by the mainstream media and conservative political groups as ‘criminal networks’. In the Bankstown case, the perpetrators were portrayed as a racist, Lebanese-Muslim gang (Poynting et al. 2004: 190). The K brothers were seen to operate like a gang due to all brothers’ involvement with crime (Sheehan 2006) and later portrayals which described them as hunting girls in packs (Wallace 2005b).

A significant function of differentiating and excluding certain groups from the ‘normative contours’ defining a moral community, is to more firmly establish more firmly social and individual identity. An immoral or amoral “Other” must exist in order to establish more clearly the identity of the moral citizen and community. William Connolly encapsulates this in his focus on the interdependence between notions of identity and difference:

An identity is established in relation to a series of differences that have become socially recognised. These differences are essential to its being. If they did not coexist as differences, it would not exist in its distinctness and solidity […] Identity requires
difference in order to be, and it converts difference into otherness in order to secure its own self-certainty (Connolly 1991:64).

One of the obvious ways in which a sense of solidarity is sought, is through calls for more punitive and repressive solutions to contain a threat. On a concrete level, power to implement such measures lies in the hands of judges, who make the ultimate decisions regarding punishment. The reality is more complex than this, yet such perceptions fuel heightened expectations of the judicial system to ensure “community” safety and security and also uphold norms that are encoded by a notion of “community standards” – in whichever way these can be defined. The courts are, at different times in a moral panic and more generally, both unresponsive and reactive to public demands of this nature. The ways in which this is bound to deeper, more abstract and universal issues of solidarity, public morality, justice and belonging, will be explored in the sections to follow.

Arbiters of “public morality”?: The role of the courts during times of moral panic

Much of what will be introduced in this section lies at the heart of this entire dissertation. I argue that there is a conspicuous gap in the classic and contemporary literature about the specificity of the courts’ role in the complex social and institutional web of meaning that is produced and reproduced during a cycle of moral panic. The courts are particularly important actors in moral panics because there is an expectation that their role will be to restore and maintain the ‘moral order’ when it is perceived as being awry. Before proceeding any further, what is meant by my reference to “the courts” must be specified as an analysis encompassing the discourses, practices and people involved in the court system, including the judiciary, defence counsel and prosecutors, and the practices of the court system at trial and appellate levels. The courts are but one example of the network of relatively autonomous institutions and social actors (each with divergent, contradictory and sometimes overlapping agendas) that are implicated in the process of moral panic. It is also important to emphasise that the courts are inextricably bound to a broader structural and discursive social network of which they are a part. This explains why the courts are both unresponsive yet also reactive to public demand for generally more punitive measures towards certain perpetrators during moral panics.
Classic and contemporary moral panic theories have put forward some general arguments about the law’s disproportionate targeting and punishment of people or groups that are popularly designated, during times of moral panic, as the current folk devils. Specific mention of the role of the courts or judiciary is only made in relation to obvious instances of judicial responses to popular demand: more severe punishment or ‘exemplary sentencing’ (Hall et al. 1978). There is some reference – as mentioned earlier – to the ‘ritual admonitions’ of judges, which are reproduced by the media, towards the perpetrators of crimes that attract moral outrage (Hall et al. 1978). In a wider sense, this literature generally positions the courts as a state apparatus of social control; as part of the institutional forces which shape and reproduce the social structure of power relations. Such top-down analyses can be subject to limitations. Further, the classic literature tends to collapse the court system into an overarching idea of a social control culture (Cohen 1972), which overlooks the role of the courts as a relatively autonomous network within a broader control culture. A more comprehensive approach needs to be taken in addressing how the courts respond, resist and engage in dialogue with other actors and discourses during times of moral panic, to ensure that public morality and safety is maintained. An examination of the court system’s engagement with other forces during moral panics highlights the specificity of the courts’ discursive contribution to, and belonging within a moral community: both as overseers or gatekeepers of those abstract boundaries, as well as subject to some concrete notion of those same boundaries.

This is not to suggest that these classic contributions are insignificant or inaccurate. For a start, many sentencing judgments for serious crimes are rife with moralising commentary: examples of which will be referred to throughout this dissertation. There are many instances in which it would be difficult to conclude that judges are doing anything other than responding to public demand and contributing to the cycle of moral panic through severe and exemplary sentences. It is also crucial to note that these arguments, positing the courts as reactive to public demand and media campaigns, are made in altogether different social and historical contexts. In the 1970s – the context in which Cohen and Hall et al. were writing about moral panic – the social and political climate which
determined the nature of public debate around crime and the criminal justice system in Britain throughout the 1960s and early 1970s was markedly different to the current, post 9/11 social climate, both globally and in contemporary Australia. The most relevant disparity can be found in different trends in criminal justice and punishment. In that era, rehabilitation was upheld as a more desirable principle of punishment than the recent trend towards retribution (Zdenowski 2000a; Brown et al. 2001; Pratt et al. 2005). Legislation passed which aimed at rehabilitation rather than punishment for young offenders, was viewed as “soft” and “permissive” and judges and magistrates often countered the philosophy of such legislation by imposing punishment in a “tougher” way. ‘Ritual admonitions’ from judges towards the perpetrators, accompanied by tough sentences, were loaded with apprehension about moral permissiveness. This helped to maintain public respect and confidence in the courts and the legal system during times of moral panic (Hall et al. 1978: 32-34). As Cohen argues, bail and remand were also utilised as punitive measures by the courts against youths who had become folk devils in the public imagination: ‘It was clear that the magistrates were using their power to remand as a ‘form of extra-legal punishment’, in order to provide the youths with a short taste of imprisonment’ (1972: 82). A few lines later, Cohen states that ‘bail was refused as a matter of principle’ (1972: 83).

A relatively recent and conspicuous shift in emphasis around the legislative aims of punishment is defined by the social climate commonly referred to as the “age of terror” and is marked by consistent demand for more punitive measures against offenders that transgress (through criminal behaviour and otherwise) constructed moral norms (Pratt et al. 2005). There is an upward trend in the minimum sentences delineated by legislation, in place of the “soft” or ”permissive” philosophy that was more likely to emerge in sentencing legislation passed in the 1960s and 1970s. As will be shown in Chapter Three, such legislative imperatives are paralleled by substantial increases in sentences handed down by the courts. Regardless of this fact, populist media and political rhetoric will continue to assert that judges are too lenient in their punishment of violent offenders, and that this calls for the (further) reduction of judicial discretion. Pratt et al. (2005) and Roberts et al. (2003) attribute the shift in sentencing imperatives from rehabilitative aims
to retribution. Related to this, calls for the delimitation of judicial discretion are attributed to increasing anxieties and aversion to risk amongst the general populace, and the exploitation of such fears by political opportunists.

While it is hardly surprising that periods of social anxiety should produce calls for tightened security and therefore more punitive measures, the symbolic “moral” element of the courts’ role is under-explored. A productive way of addressing the complexities around the role of the courts during episodes of moral panic may be found in examining general expectations for the courts to create and reflect notions of public morality simultaneously. This is an expectation that is posited across a variety of discourses, not least the media. Media proclamations on the courts’ (lack of) morality will be analysed in Chapter Two. Religious, political and legal discourses are other examples which play an integral role in shaping public notions of morality. In the legal domain, Lord Devlin, a former British Law Lord, argues that shared morality holds society together and enforcement of that morality is essential to prevent society from disintegrating (Devlin 1965). In a discussion of Lord Devlin’s article, C.L. Ten states, ‘if an act is regarded as immoral by the ordinary man, and it arouses him to feelings of intolerance, indignation and disgust, then he is justified in invoking the law to suppress the act and thus enforce the generally and deeply shared morality of his society’ (1972: 329). The significance of the legal construction of an “ordinary man” is something that will be subsequently explored in Chapter Four. On a more concrete level, the ways in which the courts produce and reproduce notions of public morality could be framed by the concurrent, yet at times conflicting democratic imperatives of impartiality from ‘transient public moods’, and the maintenance of public confidence in the courts (Parker 1998). Public morality is also more concretely reflected in punishment.

Punishment is a key concern in analysing how the courts become involved in moral panic. Yet judicial responses to public debate around punishment do not by themselves explain why the courts are stringently upheld as arbiters of morality, as well as providers of ‘ontological security’ (Giddens 1991) during episodes of moral panic. ‘Ontological security’ describes the communal well-being that is experienced in the unity and
familiarity found in everyday surroundings within a social setting; it is most simply described as a ‘sense of trust we have […] in the things and people around us to make it possible to act in the world […] we need constantly to secure our identities and relations to make our lives viable’ (Poynting et al. 2004: 245). Punishment, particularly in its retributive function, is a practical way in which ontological security is sought, to the extent that it defines an “Other” through criminalisation, and by doing so, helps identify a moral community of law-abiding, right-thinking citizens.

In unpacking the relationship between security, public notions of morality and criminal justice practices, risk theories appear to be more pertinent in conceptualising the ways in which the courts become inevitably pulled into and implicated within a cycle of moral panic, as some of these theories capture the necessary tensions between imperatives of ‘crime control objectives [security] and due process rights [justice]’ (Hudson 2003: 41). Risk theories that focus on a criminal justice context are also useful in emphasising the ways in which the contemporary (Western) trend towards ‘punitiveness’ is focused on control of risk, sometimes at the expense of justice; in a ‘turn that seems to have taken place from justice to vengeance’ (Hudson 2003: 45; cf. Pratt et al. 2005; Connolly 1995). The interrelated effects of perceived risks to security and the influence of a ‘new punitiveness’ (Pratt et al. 2005) will be examined in greater depth in Chapter Three, as will the shift towards retribution as a preferred ideal of punishment and the philosophical association of retribution with revenge. In the meantime it is useful to analyse the relationship between an apparent move towards revenge in punishment, and the impact of revenge on considerations of justice, morality and community. Here the link between morality, justice and the administration of law needs to be traced in order to establish the positioning of the courts within a “moral community”.

One such link may be found in speculating on the role of revenge within the interrelated loci of criminal justice and punishment, general social anxiety (as per ‘risk society’ theories), and the shorter ‘splutters of rage’ that characterise moral panics. William Connolly argues that ‘it is not difficult to hear a call to revenge animating the desire to punish’ (1995:42). He continues:
Revenge against those who rob upright citizens of goods, time, health, dignity, or life itself. And revenge against racially marked urban constituencies whose conditions of existence disturb the practices of fairness, neutrality, impartiality, and responsibility said to govern everyone. These two calls become combined in the same practices of representation. The call to revenge forms the least discussed and most pervasive force in the desire to punish. It infiltrates legal justice, closing up uncertainties within it. It can even be brought against those who interrogate the desire to punish (1995:42).

Connolly’s commentary on revenge succinctly condenses most of the considerations that need to be addressed in locating the ways in which the courts react to or resist the social expectation to maintain moral solidarity – however that concept may be defined in a given historical moment. Of particular relevance are the statements that revenge ‘closes up uncertainties’ within legal justice and the idea that vengeance should be sought against those who ‘interrogate the desire to punish’. The first point echoes the idea that legal and sentencing principles are not explored in the popular press and political rhetoric because they are too complex: the impenetrability of legal discourses around sentencing and punishment fail to appease a public that yearns for straightforwardness, certainty and efficient, practical measures (Pratt et al. 2005).

The second point is not too far removed from the first. The answer does not always lie in imposing the maximum penalty available. Judicial decisions to refrain from imposing a maximum penalty have had a tendency to attract public ire, which is clearly dependent on the extent of publicity and emotion surrounding the case and trial. An illustration of this can be found in the aforementioned example of public reactions to the reduction of Skaf’s sentence, while the original long sentence was widely applauded. Such reactions – fuelled by media and political discourses – bypass the “rational” complexities of legal reasoning, in a desire for revenge. As will be shown in later chapters, judges, according to popular perceptions, rarely punish severely enough and the courts fall short of their duty to protect the community which they ought to serve. This results in popular media representations which render judges as morally blameworthy as the perpetrators that they
are supposed to punish. Numerous references to public debates representing judges as morally reprehensible will be made throughout this dissertation.

Another significant point raised by Connolly goes to the heart of the notion of “literal” and ontological security:

Once revenge infiltrates the call to punish, this eminently deniable drive can expand indefinitely. You might seek revenge against entire groups who pose a threat to your security. Or against constituencies whose way of being threatens the security of your identity (1995:42).

Linking revenge in punishment with revenge against groups who threaten security and security of identity, bridges a conceptual gap between what I have called “literal security” – the concrete, tangible consideration which provides protection of the borders of geopolitical community; and “ontological security” – an abstract notion which defines the unity or solidarity sought within the figurative borders of a moral community. The courts protect and control the boundaries of geo-political (or spatial) and moral community, yet, at the same time, are subject to and controlled by the boundaries of geo-political and moral community. These interrelated and inseparable dimensions of “community” have a symbiotic relationship with the principles and practices of criminal justice. Likewise, principles and practices of criminal justice are based on notions of “community” morality while current notions of morality are, at least partially, informed by the law.

The “culture” of morality
That community morality is culturally, ethnically or racially configured is evident in Stephen Odgers’ cultural defence in the MSK’s sentencing appeal. The central argument of the appeal has been mentioned briefly in a previous section of this chapter and will be unpacked in more detail in following chapters. Taken literally, Odgers’ defence submissions demonstrate that the law itself is embedded in a dominant cultural community, from which other cultural communities are always already excluded, raising questions of how they should be accommodated. The law, in Western liberal societies,
follows a formula of secular universalism, which, far from being “neutral”, is imbued, particularly according to feminist critiques, with the characteristics that are privileged by a Western, Anglo-centric legal system: male, white, heterosexual and middle-class (Naffine 1990). Though the main focus of such critiques is to show that law is gendered, they also give rise to the ‘parallel claim that law is “cultured”, in the sense of being shaped by powerful cultural assumptions’ (Cotterrell 2004: 4). The cultural uniformity of legal norms – which reflect and create broader social and cultural norms – is apparent in constructions of the hypothetical legal subject: the “ordinary” or “reasonable” person (or until recently, “man”). The “ordinary person” or “reasonable person” is one which evinces the morality of “community standards”. The indispensability of “community standards” to the notion of the hypothetical legal subject is illustrated in a legal dictionary definition of reasonable person: ‘A person who possesses the faculty of reason and engages in conduct in accordance with community standards’ (Nygh and Butt 1998: 367). These “community standards” are not static but constantly in a process of flux and negotiation: they are shaped by and shape the dominant standards of the community to which they apply. These considerations will be explored in depth in Chapter Four.

Theoretically, the hypothetical legal subject is one which is upheld as the arbiter of morality and reason; factors that are inseparable in a Kantian sense. The Kantian connection of reason and morality is in this sense crucial to an examination of how the courts fit into a regime of public morality – both generally and in specific historical moments of panic. Following the tradition of enlightenment, legal discourses uphold reason as a yardstick for morality. Richard Rorty points out, ‘[f]or Kant, it is not because someone is a fellow Milanese or fellow American that we should feel an obligation toward him or her, but because he or she is a rational being’ (1989: 191). This can be differentiated from public notions of morality to the extent that anything causing moral outrage within (moral and geo-political) communities generates an emotional response and, as Connolly contends, a widespread desire for revenge. “Reason”, in the enlightenment sense, is diametrically opposed to the emotion or passion that drives revenge and which often characterises the outrage experienced in moral panic. Public notions of morality also depend on discriminating between those who are perceived as
belonging to the same “community” (on a national or more localised scale) in deciding whether a moral obligation is owed to a person or not.

What must be considered here is the relationship between morality, community and the elusive concept of “justice”. Connolly’s reference to revenge is once again useful, if only for the fact that punishment – in a retributive or “just deserts” sense – is often linked to justice in popular discourses. As Barbara Hudson points out: ‘[w]here justice is, community is also’, and retributive models of punishment:

> also depend on the sharing of values by members of societies, so that offenders will know they have transgressed and be able to accept the censure as reasonable; punishment proportionate to the seriousness of the offence presupposes shared values such that there will be widespread agreement on rankings of offence seriousness (2006a: 235).

The question shifts to whether offenders who – even before committing their offences – are not perceived to share the values of the dominant moral community are subject to a different sort of justice. It is clear that the presupposition of a normative moral code, does not sufficiently address the realities of a pluralistic and fragmented notion of social morality. If we are to assume, in line with popular reasoning, that justice is grounded in retributive punishment, then there certainly appears to be differential treatment of those that are not perceived to belong. This is not necessarily a judicial imperative but rather something that occurs when episodes of moral panic drive the rapid legislative change that is specifically aimed at increasing the length of minimum sentences. Examples of this can be found in mandatory sentencing, “three-strikes” laws that had been passed in the Northern Territory and Western Australia in 1996 and 1997 respectively, which disproportionately targeted poverty-stricken indigenous populations (HREOC 2001). Connolly also refers to ‘revenge’ against certain minority groups in an American context: ‘The call to revenge can be felt in the zeal with which gays or young underclass male African-Americans are punished when the legal opportunity arises’ (1995: 42). Accordingly, some argue that retribution is a state-sanctioned and controlled form of revenge.
Connolly’s argument resonates with Hudson’s in that ‘people who do not behave or look as we do are beyond our sense of moral community’ (Hudson 2006a: 236), and so proportionality, in a retributive sense, is not owed to those who are perceived as outsiders. A more appropriate reaction may be vengeance. Justice is differential towards those who do not share dominant values, which in this instance is demarcated through the concept of nationality: ‘Australian-ness’. This moral dimension not only marginalises particular groups but allows us to hate and fear them. Often, as Perry (2001: 179-223) argues, the state, through its various institutions, sanctions this hatred and fear. Attempts of the judiciary to resist this through the expression of neutrality towards cultural or ethnic difference – and the application of equal justice for all – are frequently met with widespread censure, particularly during an episode of moral panic. Yet when the courts do respond to culturally marginalised offenders in a disproportionate way – as was arguably the case with the 55-year Skaf sentence – ideals of community justice are legitimated through the institutional expression of revenge.

If it is to be accepted that morality and law are mutually dependent, an emphasis on the role of the courts during times of social anxiety and moral panic necessitates an extension of the classic model of moral panic, so that the specifically “moral” dimensions underpinning such episodes are foregrounded. The questions that arise from this revolve around an identification of those who define standards of morality (and to what end) within specific social and historical contexts, and the processes which determine who or what stands outside of those boundaries of morality. In the next section, I suggest that morality – however it may be defined in different social and historical contexts – is crucial to the perception and functioning of a collective referred to as “community”, while a concept of “community” simultaneously determines the morality to which individuals adhere. During moral panics, the security found within the abstract moral and concrete geographical boundaries of “community” is disrupted by that which is perceived as an external threat. The insecurity that results drives the moral panic. In short, security is more fervently sought during episodes of moral panic which entails a more possessive protection of community boundaries and the public morality that determines and is
determined by those community boundaries. Much of what has been discussed in the preceding argument has pointed to the centrality of the concept of “community” to the role expected of the courts, during times of moral panic and in a more general sense.

It is to these considerations that I now turn through an exploration of the philosophical concept of ‘moral community’ (Hudson 2006a) and the ‘ontological security’ (Giddens 1991) that is gained through belonging to a community.

**Security in a moral community: augmenting the classic “moral panic” model**

As has been argued above, the classic model of “moral panic” does not place as much emphasis on its “moral” underpinnings, as the term itself implies. While it is clear that the emergence of moral panics are reliant on the occurrence or existence of something that is morally offensive, the underlying moral norms that identify an event, group or individual as morally offensive or reprehensible are to some extent, taken for granted. Moreover, the social, cultural and existential importance of moral norms in a moral panic are largely overlooked, resulting in an analysis that appears to be focused on identifying a minority social group that is marginalised and morally blamed by a dominant social group which is responsible for the panicking.

Notwithstanding, what I refer to here as the “moral binds” of community is in some ways similar to Cohen’s (1972) and Hall et al.’s (1978) references to the consensual model of society – a model which refers to the moral and social ‘consensus’ on values assumed in popular discourses that fuel moral panics. There is a difference between these accounts in that Cohen is critically analysing a Durkheimian or Parsonian notion of shared values which he sees as popularly taken for granted (in what Gramsci would call ‘common sense’) in moral panics. Hall et al’s argument is distinct, in that they are saying that there is a consensus: a ‘manufactured’ one.

Cohen, for example, states that:
Most people are seen to share common values, to agree on what is damaging, threatening and deviant, and to be able to recognize these values and their violations when they occur. At times of moral panic, societies are more open than usual to appeals to this consensus [...] The deviant is seen as having stepped across a boundary which at other times is none too clear (1972: 57-8).

Hall et al. in their account of the ‘mugging panic’ argue (in a Gramscian spirit) that dominance is secured through social consensus: ‘the vast majority of people are united within a common system of values, goals and beliefs – the so-called “central value system”; and it is this consensus on values, rather than formal representation, which provides the cohesion which such complex modern states require’ (Hall et al. 1978: 215, original emphasis).

What is lacking in the classic literature is an exploration of the reasons that communities seek to establish moral boundaries and the significance of these boundaries – whether tangible or abstract – to the collective well-being and security of community members. Identification of a moral “Other” is another way of determining a moral “Self”. In addition, a society’s search for moral orientation provides a sense of collective security and thereby well-being. More crucially, an attempt to analyse the ontological underpinnings of moral panics provides a more fruitful path towards understanding the fundamental social patterns – common to most Western liberal societies – that necessitate or give rise to such episodes in the first place.

One productive way of capturing the broader conceptual underpinnings of moral panic is through Giddens’ concept of ‘ontological security’ (1991). Ontological security partially demarcates the existential boundaries of belonging to a “community”. Community membership can be as specific and localised as a small “ethnic” group, or as broad and geographically defined as a nation – with the attendant feelings of nationhood and belonging that emanate from a concept of “nationality”. Moreover, many localised communities exist within a larger scope of community membership; for example a community on a national scale, can be said to accommodate a multiplicity of other, ethnically, culturally or linguistically defined communities. In the examples given by
contemporary and classic accounts of moral panic, the concept of community is often demarcated through an idea of a broadly defined shared culture and ethnicity which is posited in “common sense” terms as a dominant “norm” against which certain other groups are marginalised or subordinated. A community can also be one that is imagined or figurative – existing and maintained at a level of abstraction, yet grasped through categories that are “concrete” and readily identifiable. It is within all of these interrelated and overlapping levels of community that a moral panic around a particular event or group identified as “Other” can occur.

In an atmosphere of moral panic, the sense of collective well-being that is gleaned from community membership becomes compromised because something unfamiliar poses a threat. This could be part of an explanation behind attempts to assimilate the “Other” into the “Sameness” of the dominant culture through appropriation and a reduction of the “Other’s” subjectivity.11 This is not to argue that all forms of cultural appropriation are negative or that appropriation is something that necessarily occurs violently in the dominant appropriation of minorities. There are many examples in which certain cultural peculiarities of minority groups are appropriated in a “positive” way (Hage 1998; Sharma and Sharma 2003). Political discourses of penal populism and assimilation provide pertinent examples of dominant attempts at appropriation; both have involved varying degrees of literal and metaphorical violence. Discourses of penal populism hinge on containment of the “Other” because we are unable to accommodate the “Other” in broader society. The perpetrators – particularly of violent and morally repugnant crimes – have transgressed acceptable social norms and must be segregated and punished accordingly. Successful denial of the humanity of the perpetrators validates a more punitive response (Hudson 2006a).

Perhaps a denial of the subjectivity of the “Other” can, in some way, explain public demands for severity in sentencing the perpetrators in the “Muslim” gang rape cases. In a different context, a denial of humanity – as exemplified through the use of dehumanising

11 I here use the concept of ‘appropriation’ in the sense that philosopher of ethics Immanuel Levinas claimed that only objects, not subjects, can be appropriated or possessed – that attempts to reduce the ‘Other’ to the ‘Same’ will always fail (1969: 79).
language – could explain the punitiveness with which asylum seekers have been treated in Australia. Such measures are also popularly justified through discourses of “national security”. Discourses of assimilation and calls for cultural integration are not dissimilar in that the threat, in the form of the foreign “Other”, is unable, by virtue of being different, to be accommodated within dominant perceptions of social and cultural uniformity. Only when the subjectivity of the “Other” is appropriated and moulded to a level of acceptability, can the ‘Other’ be accommodated within the dominant culture. Until then, the threat must be contained. As Hudson argues:

> Law-and-order policies generally, refugee and immigration policies, sentencing and other domestic criminal justice decision-making take place in a context of ever (or so it seems) diminishing sympathy and understanding for those who transgress our community’s moral codes, or who appeal to us for justice from beyond the boundaries of our moral and geo-political community (2006a: 233).

A (perceived) threat to these boundaries can be conceptualised as a threat to solidarity and the abstract sense of well-being that is engendered by this. Richard Rorty points out that ‘solidarity is at its strongest when those with whom solidarity is expressed are thought of as “one of us”, where “us” means something smaller and more local than the human race’ (1989: 191).

It is impossible to disentangle discourses of assimilation and ‘penal populism’ (Roberts et al. 2003) from one another, and many others, in the context of the public reactions in response to the “Muslim” gang rape cases. Perhaps it would be sufficient to say that discourses of assimilation and penal populism have worked so well in this social and political context because they undermine the subjectivity of the “Other” during moral panics. Such refutation of subjectivity situates the “Other” outside the boundaries of moral community and justifies unethical treatment of criminal offenders and asylum seekers. In contemporary Australia, there has been an accrual of panics that revolved around the cultural difference of the “Other” and the threat that this posed to the security of moral, national and political boundaries delineated by an abstract sense of belonging or “Australian-ness”. The overlapping boundaries of ‘geo-political and moral community’.
(Hudson 2006a: 232) are what Ghassan Hage has referred to as the boundaries of true “Australian” belonging within an imagined ‘white nation’ (1998). In Hage’s formulation, Australia’s multicultural reality is surrendered to the fantasy of White, Anglo-Saxon nationalism and supremacy.

The most recent threat to this is the “Muslim Other” (Poynting et al. 2004). The Sydney gang rapes on a local level had become conflated – via various public discourses – with unrelated national and international issues. Consequently the public consciousness identified these unrelated matters as a large-scale, amorphous and intangible ‘Muslim problem’ (ADB 2003) although, as Poynting et al. (2004) point out, this has been variously construed as a Lebanese, Arab or Middle Eastern problem prior to the current emphasis on Islam. Conservative public commentators blamed multiculturalism for these “evils” because it allegedly allows the perverse values of the “Other” to flourish, and is seen to promote divisiveness within an otherwise united, secure and peaceful nation.\(^\text{12}\)

This characterised the sentiment behind popular reference to the gang rapes as “Un-Australian”, in which there is an implicit sense of rightful ownership of the title “Australian”. A conservative Sydney radio talkback personality, John Laws, captured the sense of ownership inherent in the animosity felt towards the “Other” and the multicultural policies that are seen as accommodating them:

> This is a country that we have worked hard and our forebears have worked hard to create. We’ve created it with strength of character. We’ve created it with goodwill, and we’ve created it with hard work, and we don’t want people who have different points of view to the point of view we have in Australia in relation to how we live our lives, coming here and simply destroying it (in ADB 2003:63).

In relation to the concept of national belonging, philosopher, David Miller argues that ‘national boundaries may be ethically significant’ in that ‘[t]he duties we owe to our compatriots may be more extensive than the duties we owe to strangers, simply because

\(^{12}\) For a comprehensive account of the conservative political rhetoric and media commentary around the ‘dangers’ of multiculturalism (particularly in the context of the ‘Arab Other’), see Poynting et al. 2004, and Hage 1998, 2003.
they are compatriots’ (Miller 1988: 647). Thus the relevance of nationality or national boundaries to the concept of moral community resides in what may define those boundaries:

It is fairly clear that no objective criterion, such as language, race or religion, will be adequate to mark all national distinctions, even though these criteria may enter into particular national identities. Thus nationality is essentially a subjective phenomenon, constituted by the shared beliefs of a set of people: a belief that each belongs together with the rest; that this association is neither transitory nor merely instrumental but stems from a long history of living together which (it is hoped and expected) will continue into the future; that the community is marked off from other communities by its members’ distinctive characteristics; and that each member recognizes a loyalty to the community, expressed in a willingness to sacrifice personal gain to advance its interests. We should add, as a final element, that the nation should enjoy some degree of political autonomy (Miller 1988: 648).

Key elements in Miller’s definition are the shared beliefs, the belonging, the loyalty owed to the community and personal sacrifice. All of these aspects of national distinction have strong moral and ethical implications. And while it is clear that there are no “objective” criteria of race or culture that determine the moral and ethical boundaries of nationality, these are imagined for the purpose of establishing national identity through popular constructions of an “Other”. Kate Gleeson points out: ‘In tandem with the identification and labeling of ‘their’ exclusory communities a discourse of Australian nationalism simultaneously provides the backdrop for demarcation of otherness and deviance’ (2004: 3). These explanations are useful in that they clearly capture the ideological bent of the values expressed in “Australian” nationalism. However this is but one aspect of an idea of a nationally, culturally and ethnically defined moral community. It is also crucial to recognise that the boundaries of moral community are consistently contested and contradictory, because of the broad diversity of perspectives in the social network that underpins moral panics.
Identification of a “Muslim threat” – through the conflation of terrorist groups, refugees and gang rapists – in homogenous and simplified ways represents it as a surmountable problem which can be overcome by tightened security around such groups. Paradoxically, the amorphous and intangible nature of the “Muslim problem” renders it identifiable and therefore tangible, due to the conflation of various unrelated issues into a homogenous and therefore, manageable concept. The contradiction lies in obfuscation of the real issues through the clarity gained from simplification of the complexities. Durkheim was apt in stating that ‘There is nothing so obscure and so indefinite as these collective representations that are spread throughout all societies – myths, religious or moral legends, and so on’ (1957: 50). “Certainty”, however flawed the understanding of it, is more accessible and appealing than the complex, messy and uncertain reality. Such simplifications often characterise popular media representations (especially through stereotyping) around the topic or object of moral concern, whereby the “problem” is broken down into consumable and digestible components (Poynting et al. 2004). Simplicity is also comforting, as is the location of moral blame outside the community in a readily identifiable deviant “Other”.

A sense of security has been a significant feature of these discourses. Extensive reference to security is not arbitrary. In a sense, moral panic is not only about ethnicity, crime or a general sense of the “Other”, but also about the failures of key social institutions and policies like the courts and multiculturalism. In any modern society, a sense of security is taken for granted and forms a fundamental facet of that society’s well-being. Hudson argues that in Western liberal democracies, security is the necessary corollary of liberty – that without security, liberty ‘amounts only to momentary glimpses’ which are insufficient for planning a meaningful ‘life course […] and] chosen actions’ (Hudson 2003: 40). A notion of security as a social good exists on a number of different levels ranging from the concrete to the abstract. To separate the concrete manifestations of security from its conceptual underpinnings would be artificial; the abstract and the concrete are interdependent and inseparable. Similarly, “borders” are geo-political, social and moral at the same time. For example in a post-September 11 environment, there has been heightened emphasis on “border security” as a part of tightened security measures.
generally, against potential attacks by “Middle-Eastern / Islamic” terrorists. The significance of these security measures imbues an abstract sense of ontological security: the security that is found in belonging to a community that excludes the threat of the “Other” – whether that community is delineated by moral, geographic, ethnic or cultural boundaries. Community boundaries also can be alternately delineated in abstract or more tangible ways. A disruption of community boundaries through potential invasion by the (Middle-Eastern) “Other”, entails a disturbance of security which must be curtailed through “real” measures. The incursion is both abstract (a moral threat expressed through the threatening “difference” of the “Other”), and literal (a tangible fear of the violence of which the “Other” may be capable). The fear of invasion or disruption of literal or abstract boundaries often forms the foundations for episodes of moral panic.

In a globalised world, blurred boundaries, a lack of certainty and fear of the “Other” characterises fragmented, culturally plural societies. This results in a collective desire for solidarity. Feelings of solidarity, according to the risk society literature, have diminished in (post)modern societies (Hudson 2003). As Sharma and Sharma argue,

Postmodern globalization is producing an uneven and anxious transformation of the West, where diasporic cultures are slowly and partially being integrated into the multiculture of metropolitan urban life. The troubled discourse of liberal multiculturalism is ambivalently split and caused between the celebration of cultural diversity and a heightened manifestation of cultural racism and Islamophobia. Refugees and new migrants are the new subjects of a contemporary Orientalist discourse of (paranoid) racist violence, not just within the apparatuses of border security and internal policing, but more widely in the Western cultural imagination (2003: 308).

Individuals are increasingly seeking solidarity through delineation of a common enemy, which, Bauman says, ‘is an excellent cause to bring together people who seek an outlet for long-accumulated anxiety’ (1999: 10). A common enemy reaffirms the existence of a ‘collective conscience’ (Durkheim 1957: 50). And the ‘long-accumulated’ anxieties to which Bauman refers are abstract and indistinct but are made to appear more tangible in the form of a literally and metaphorically threatening “folk devil”. Bauman argues,
We must have something to worry about, and not just any kind of something, but a pinpointable, tangible something – something which we might at least imagine to be within our reach and power, something which ‘we can do something about’ (1999: 44).

Collective containment of an enemy also provides a common project and existential meaning: it becomes yet another type of adhesive which binds together an otherwise fragmented society. The collective task of doing something about the “Other” explains the increasing desire for ‘crime strategies to be constructed defensively and repressively’ (Hudson 2003: 44-45).

A community that unites in its fear of the “Other” becomes well-defined, secure and comforted by its identity: taking refuge in being able to define the “Other” as what it is not. As Kearney points out, in the context of George Bush’s “war on terror”: ‘War had been declared and everyone, as Bush made plain, had to “take sides”. For the “civilized” or the “barbarians”; for the innocent or the damned; for the courageous or the “cowards”’ (Kearney 2003: 24). As with any stereotype, the simplified, black-and-white nature of such political narratives, are infinitely more appealing to an apprehensive or fearful public than the complexities that really characterise the “war on terror”.

Furthermore, defining an “Other” enables definition of a “Self” – even though this is not all there is to establishing identity. In this sense, ‘[t]he requisite Other is then not what is merely excluded, but has to be acknowledged at the same time’ (Sharma and Sharma 2003: 304). Yet, being aware of the presence of an “Other” is also disconcerting because it reminds us that we are, in some sense, collectively responsible for creating deviants. This goes beyond the idea that the boundaries of a moral and geo-political community are simply threatened by difference. Richard Kearney (2003) argues that our metaphorical dehumanisation of the deviant “Other” as “monsters” or “animals” simultaneously captures our anxieties about the “Other” and ‘remind[s] us that we don’t know who we are.’ Kearney says, ‘Without them we know not what we are. With them we are not what we know’ (2003: 28). The most accessible solution lies in calls for social exclusion and
marginalisation of the ‘Other’; hence the ‘Other’ becomes popularly located outside of the boundaries of moral, and in a related sense, geo-political or national community.

To this end, institutional responses to the desire for unity and safety usually come at the expense of demonising marginal social and cultural groups. As Poynting et al. (and many others: cf. Cohen 1972; Hall et al. 1978; Hage 2003; Sharma and Sharma 2003; Warner 2004; Gleeson 2004; Hudson 2006a) have argued,

the promise of community safety and solidarity is made at the expense of the social exclusion of marginalised groups, as particular ethnic minorities are identified as potential wrongdoers and sources of disorder […] rather than creating a sustainable sense of national belonging, this eats away at it, producing a paranoid nationalism. At stake […] are the wider issues of citizenship, community and cultural diversity (2004: 254).

To banish symbolically and literally the perpetrators of the gang rapes (and, more significantly, the communities to which they are “really” said to belong) from a social and moral community ‘erodes…responsibility for understanding and challenging the individual and social forces that have produced such an […] event. To demonise […] removes the [act] from the realm of social action’ (Jackson 1995: 4). Prevalent representations of the gang rapes popularly located the problem in the perverse cultural values of the “Other”, rather than society at large. In the Skaf case for instance, it was rare for public discourses to refer to the perpetrators as “Lebanese-Australians”: the fact that they were born and raised in Australia was subsumed by references to their ‘Lebanese’ background. Gleeson reinforces this point in the context of the gang rapes:

By demonising the ‘other’ as intrinsically, culturally disposed to gang rape, mainstream society is able to remain unexamined and is absolved of responsibility for the crimes […] Political leaders have not assumed responsibility for gang rape: its collective nature enables a dismissal of responsibility by the mainstream society for its perceived problem of ‘them’ (2004: 3).
This highlights that within these different manifestations of fear of the “Other”, there is a discernable flipside. Ontological security is not only threatened by fear of the “Other” but is also reinforced by it. Put simply, the mere definition and subsequent demonisation of the “Other” is ontologically affirming: perceptions of the precariousness of “their” values, affirms, by contrast, the certainty, stability and morality of “ours” (Young 1999; Bauman 1999). While the demonised “Other” is represented and perceived as a terrifying threat, the process of “Othering” the deviant, simultaneously defines a virtuous and morally upright community. Hall et al. argue that “folk devil” is the alter ego of “Virtue”: the folk devil becomes the inverse of all the values that make up the moral community (1978: 162). For Immanuel Kant, a liberal moral community is one in which all ‘share a sense of justice, a community of all who recognise each others’ rationality’ (Hudson 2006a: 234). In a moral panic about the “Muslim Other” then, the Muslim or Arab or Middle-Easterner is perverse and irrational, deviant and immoral (Said 1978). The “Other’s” understanding is perceived as incommensurable to our own, and therefore constructed as beyond reason or unreasonable.\footnote{13 This is something that will be explored in some depth, within a legal context, in Chapter Four.}

Hence, in definitions of the folk devil or “Other” during moral panics, there are tensions between fear and comfort, insecurity and security. Following Bauman, we can perhaps refer to this as ‘insecure security’, ‘uncertain certainty’ or ‘unsafe safety’ (1999). Moreover, as Bauman argues, ‘anxiety is unspecific, and the resulting fear may be easily blamed on wrong causes […and] there is a powerful temptation to construe and name putative, yet credible culprits against whom one can wage a sensible defensive (or, better still, offensive) action’ (1999: 18).

**Conclusion**

A classic concept of moral panic – particularly as it is developed by Stan Cohen – is useful in the conceptualisation of social reactions to certain events and groups in society, but is subject to limitations. My aim has been to augment the classic model so that it captures better the moral constituents of the complex social processes at play during moral panics, and in particular the role of the courts in these. The intersection of various
discourses demonstrates the diversity of social and institutional actors which play a role in a cycle of moral panic, and fundamentally define the moral boundaries which are transgressed in order to cause the outrage. I have argued that these moral boundaries are integral to a conception of “community” in all its different yet aligned manifestations – moral, social and geo-political – and the definition of an excluded “Other” is fundamental to ascertaining who belongs within those boundaries. This is not to suggest that these abstract moral boundaries (which are also defined in more concrete ways) are static. Rather, I argue that the diverse network of actors in a moral panic, each with their own agenda and set of interests, coalesce to create a conception of moral community whose boundaries are constantly contested and negotiated. The shifting boundaries of community do, however, reflect a structure of power that becomes naturalised through its iteration in varying discursive constructions.

In the publicity surrounding the Bankstown gang rapes, the perpetrators were frequently referred to as “Un-Australian”. Beyond this, dehumanising language was used in media and legal discourses and political rhetoric; not only to “Other” the perpetrators, but to render their subjectivities as beyond the realm of moral comprehension and empathy (ADB 2003; Hudson 2006a). Following Bauman (1999), Poynting et al. argue that

First, we fashion a sense of unity founded on ‘killing an enemy’: the Arab Other functions as this enemy in contemporary Australia, and its murder is both symbolic and increasingly literal. Second, by turning our existential fears into something smaller to worry about, some ‘practical task’ to perform, we find an object for human action – harsher laws and sentences, tightening border security and the detention of asylum seekers (2004: 246).

The function of representations of a perverse Muslim “Other” partly resides in a desire to provide ‘moral orientation’ to the public (Melossi 2000: 298). As Melossi points out, in a climate of moral panic, ‘the deviant is seen as the producer of evil…and the representations of the criminal are under the constellation of the monstruum, the monstrosity, far removed from any common experience and hence from the possibility of empathy’ (Melossi 2000: 300). The monstrosity of the deviant in these cases is
compounded by racist ideologies that posit the “Otherness” of the Muslim. As Poynting et al. argue, the “Arab other” is “assembled” through linking criminality, terrorism, lack of civilisation and lack of humanity […and equated with] Middle Easternness and Islam’ (Poynting et al. 2004: 50). This is one form of denying subjectivity. Characterising certain offenders as “monsters” also situates them outside of our moral universe: no common humanity is shared with those that are dehumanised as monsters (Hudson 2006a: 238). Therefore we cannot have compassion for them. This goes some way towards explaining the overwhelming public demand for a more punitive criminal justice system during times of moral panic. It also explains the desire to protect the victims who are perceived as belonging to “our” moral community, from an external threat.

The role of the courts does not end with their power to punish deviant strangers. As I have argued in this chapter – and will continue to do so throughout this dissertation – the courts are endowed with a symbolic duty as “moral arbiters”. A variety of conflicting official and popular discourses converge on the idea that the courts must maintain and enforce the moral order so that society does not “disintegrate” (Devlin 1965). However the ways in which popular discourses present their versions of morality and their expectations of what the courts should do, are vastly different from notions of morality as demarcated by legal and academic discourses. The divergence between popular and legal conceptions of morality (and interrelated notions of justice) is reflected in the paradox which characterises the role of the courts during moral panics: they have a crucial role in defining and upholding the margins of moral propriety and community, and yet are usually criticised as being “out of touch” with these community and moral standards. The divergence between popular notions of morality and justice and legal conceptions of the same will be explored in what follows.
2. **Popular Justice: “trial by media” v trial by the courts**

This chapter will trace the dialectical relationship between the popular or mainstream media and the courts, alongside notions of public morality and popular justice. I argue that in the cases examined in this thesis, conceptions of public morality and justice are imbued with a strong ethnocentric element. The previous chapter provided a brief illustration of this through linking discourses of national belonging and punishment to a dominant conception of “moral community”.

Popular media coverage of the “Muslim” or “ethnic” gang rape cases exhibits the interplay between various ideological dimensions that become apparent in both abstract and material ways. The abstract or “symbolic” power of media representations are reproduced at every level of social life (Couldry 2000), and this has far-reaching implications for overlapping “material” relations of power around gender, race, ethnicity and class. What is meant by the “symbolic” power of media representations is that they can ‘construct reality’ (2000:4) and naturalise certain ideological claims as “common sense” knowledge. An example of this is found in the extent to which the popular media, through labelling, has contributed to the “common sense” racialisation of various crimes such as gang rape, resulting in the simultaneous criminalisation of certain ethnic communities. The “symbolic” power of media representations is inseparable from the concrete and real effects of ideological exclusion. For example, racialised representations around the gang rapes have had very real consequences for members of these ethnic and cultural communities (cf. HREOC 2003; ADB 2003).

More specifically, my concern here is to analyse the direct and indirect material effects that the media may have on the administration of justice, public policies around punishment and due process rights. I also examine the extent to which justice – in a “legal” sense – can be compromised through the intense publicity surrounding certain court trials. Accordingly, significant attention will be given to the concept of prejudicial publicity – an area in which the strained nature of the relationship between the media and
the courts is most obvious. Here, the dialectical linkage and disjuncture between popular media and specifically legal formulations of justice are highlighted in the competing truth claims made by each, and the degree of influence these respective discourses have on juries in criminal trials.

The inherent tensions of the relationship between the popular media and the courts can also be located, on a more abstract level, in the concept of “justice”. I use the term “popular justice” as one that is largely defined and perpetuated by the mass media. For the purpose of analysis, I will initially construct an artificial separation between a concept of “justice” as defined by popular culture and the media, and a legally defined concept of “justice” prior to examining the areas of convergence between these conflicting definitions of the term.

Before proceeding further, it is also important to explain my use of the term “mainstream or popular media”. I use the term in a general sense whilst acknowledging the plethora of different media outlets, their differing political and social affiliations, and the varying social impacts that each has on the domain of criminal justice and more broadly. I do not intend, in this chapter, to focus on any particular medium like television, the press, film and so on, but rather, following Couldry, to trace the social effects of mainstream outlets that include but are not restricted to the press, radio and television broadcasting and popular entertainment (2000: 6). Although I will mainly focus on “factual” forms of media reporting, my analysis will not be restricted to these, and will include an examination of the blurred boundaries between mediated “reality” and the imagined. Again, this becomes particularly obvious within representations of crime and law. Popular cultural and media understandings of the law have become synonymous with socio-legal categories of crime and criminal justice. Media enthrallment with crime and criminal procedure can be partly explained through the fact that “[c]rime, like no other subject, is capable of providing a narrative of passion, transgression and suspense” (Gies 2005:167). Crime and criminal justice provide high drama because the stakes are higher – particularly when the crimes are violent. Furthermore, representations around crime and criminal procedure invoke more challenging questions about morality and justice, and the
ways in which such questions are negotiated around culturally and ethnically defined norms.

This chapter will be separated into three broad sections. First, I will unpack the notion of prejudicial publicity to illustrate one obvious manifestation of the relationship between the actual administration of justice and media portrayals of crime and justice. Empirically, I will focus on one particular example in the Bankstown trials – the appeal of Tayyab Sheikh’s conviction in 2004 – because prejudicial publicity was the specific subject of appeal in that case. Second, I will set out the ways in which the media represent certain crimes, offenders, victims and the courts, and how such representations are ‘received’ by audiences. Here I explore the appeal of ‘news’ discourses as ‘infotainment’, and the significance of mass media and popular culture representations (to the extent that the two are separable) on audience interpretations of the interrelated dimensions of morality, criminal justice and popular justice. Third, I will explore the differences and parallels between popular media conceptions of justice and those articulated by the law. The aim of this final section will be to examine the contested boundaries of the law, the challenges that the mass media present to the law’s legitimacy and autonomy and the implications that this has for public confidence in the courts and their ability to administer a ‘just’ outcome for all.

**Prejudicial Publicity**

On 4 March 2004 the majority in the New South Wales Court of Criminal Appeal (NSWCCA) ordered a new trial for Tayyab Sheikh, one of the perpetrators of the Bankstown gang rapes. Upon his counsel’s request, Tayyab Sheikh was tried separately from the other four accused – Mahmoud Chami, Mohammed Skaf, Mohamed Ghanem and Bilal Skaf – for one of a series of gang rapes. The basis of the appeal was that a miscarriage of justice arose because of sensational media coverage of the guilty verdicts in the earlier trial. The NSWCCA found, by majority verdict, that no amount of judicial direction to the jury could have resulted in a fair trial for Tayyab Sheikh because
The feelings of anger, revulsion and general hostility to young Lebanese men that emanated from the media coverage of the earlier trial would have lingered heavily in the atmosphere of the appellant’s trial. Its fairness and the appearance of its fairness were undermined to an unacceptable degree due to the unnecessary decision to direct back-to-back trials. It is always regrettable that a new trial should be ordered, especially in a sexual assault case. But a conviction following an unfair trial is a conviction obtained at too high a price. The law must ever strive to uphold this standard, in the interests of all (*Regina v Tayyab Sheikh* [2004] NSWCCA 38 per Mason P and Wood CJ at 40-41).

For the same reasons, namely, the possibility of prejudicial publicity, media suppression orders were placed on the first of the series of trials for the K brothers. The trial judge in the first K brothers’ trial, Justice Sully, wanted to ensure that guilty verdicts for the represented brothers, did not adversely affect the outcome of the trials for the unrepresented accused. The *Sydney Morning Herald* applied for a court order to ‘name and shame’ the perpetrators, ‘for the public interest’ as they did in the Bankstown trials (Spencer 2002; Chulov and Milligan 2002). Why the naming of the perpetrators would serve the public interest, was never clearly delineated. The courts did not succumb to media pressure, and upheld suppression orders on the names of the accused in order to protect the identity of the offenders who were juveniles at the time.

Prejudicial publicity describes the effect that negative media publicity around a criminal trial can have on the perceptions of jurors and the verdicts that they reach. If it is assumed that publicity surrounding a trial can induce a verdict, it is the most direct impact that the media can have on the administration of justice. The consequences of prejudicial publicity can be substantial and serious. The courts often seek to prevent jurors from being prejudiced by the publicity surrounding a case through a number of different measures, including rules of *sub judice* (media suppression orders around trials that are yet to be decided) and judicial directions to juries. The latter, as shown in the Tayyab Sheikh example, are problematic because at times, no amount of judicial direction to juries can result in the delivery of an impartially reasoned verdict. Indeed, it is difficult to see how any verdict can be entirely impartial – the biases of any jury will inevitably have a bearing on the decisions they will reach. The same can be said of judges. However, the
The notion of prejudicial publicity is premised on assumptions that judges are neutral, independent and impartial while the “community representatives” that constitute juries are more susceptible to reacting emotionally to sensational media representations around certain crimes. As Lieve Gies points out, ‘a common presumption is that it is not qualified lawyers or legal academics but laypeople who are most at risk of being duped and badly misled by the media’ (2005: 169). Judges are placed in this privileged category, often ‘claiming the neutral vantage point of a detached observer unaffected by the media’ (2005: 169).

For purposes of the present analysis, we might assume that judges are professionally inculcated in the principles of impartiality, and are therefore generally better equipped with the skills to suspend individual prejudices than people who are not professionally trained to do so. Yet, arguments to this effect are, at best, speculative. A more useful way of proceeding might be to draw attention to the fact that jurors are adjudicators of fact while judges decide on the legalities of a case. The significance of this distinction is to highlight that it is easier to be ‘impartial’ about the application of standardised legal rules than the conflicting factual accounts between the accused and complainant(s) that characterise criminal trials. This bears particular relevance to violent and heinous crimes that come before the courts: the more violent and morally repugnant a crime, the more difficult it is for jurors to be impervious and emotionally “neutral” to its factual details.

It is clear that considerations such as these contribute to the assumption that negative media coverage has a substantial impact on the verdicts of juries: people that sit on juries are presumably less accustomed to the details of a vast range of crimes than judges or other legal professionals. Between 1997 and 2000, a study was conducted in New South Wales, by Michael Chesterman, Janet Chan and Shelly Hampton, researching the effects of prejudicial publicity on juries in criminal trials. To ascertain the extent of such effects, a key distinction was made between the incidence of ‘jury recall of [relevant] publicity’ and the extent of the influence of such publicity ‘on the perceptions of the jury, and […], as a possible but not necessary consequence, having a determinative effect on the jury’s
verdict’ (Chesterman et al. 2001: xiii). The research found that “jury recall” of publicity was generally overestimated by legal counsel and judges and that recollection of the publicity was dependent on a number of variables. The three most significant instances in which it was more likely for juries to remember publicity related to the trial, included situations when:

(a) it [the publicity] related to accused people who are independently well-known in the community; (b) it related to offences committed in the area where they live; or (c) they did not encounter it until after the trial began. Other familiar explanations for pre-trial publicity being recalled – for example, that it appeared unusually close to the start of the trial or was especially prominent – were also discernable (Chesterman et al. 2001: xiv).

The last of these points proves the most significant – at least in relation to the Bankstown rapes and the Tayyab Sheikh trial in particular. The publicity surrounding those trials was exceptionally prominent, with specific references to the cases themselves, as well as more generic ideological links relating the (homogenised) cultural backgrounds of the accused with their alleged actions. For example, Peter Manning found, in his study, that 30% of items in New South Wales newspapers including The Sydney Morning Herald, The Daily Telegraph, The Sun-Herald and The Sunday Telegraph, over two years from 11 September 2000 to 11 September 2002, dealing with the selected categories of Arabs, Muslims and refugees/asylum-seekers, pertained to “Lebanese rapists”. Indeed, the publicity around the Bankstown cases was so intense, that anyone residing in Australia at the time would have had difficulty avoiding it. As Justices Mason and Wood had asserted in the Tayyab Sheikh appeal, this was one of those ‘cases where the jury’s capacity to ignore the material is put into serious doubt’ (R v Tayyab Sheikh [2004] NSWCCA 38 at 23).

Tayyab Sheikh’s trial was initially separated, by the NSWCCA, from the trial of the other co-accused, because he was not implicated in all of the offences: of the 19 counts against the co-accused, only two applied to Sheikh. The separation of the trials aimed to prevent

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14 What must be noted here is that Chesterman et al.’s (2001) methodology only takes account of the “conscious recall” of jury members to recount details of the related publicity.
the likelihood of prejudice that would inevitably emanate from his association with the other four accused, and the fact that the complainant was the same. Ipp JA of the NSWCCA expressed concerns that a joint trial would result in an unfair trial for Sheikh because

The details of these offences are likely to arouse extremely hostile feelings against these persons. The common ethnicity of the offenders could well give rise to generalised feelings of disgust and anger. It is possible that the jury may be influenced by such feelings, brought about by the conduct of all the offenders, when considering their verdict in respect of the counts alleged against Sheikh [...]n the highly charged atmosphere of such a trial where there will be a mass of evidence of these appalling crimes, it may be difficult for a jury, with the best will in the world, to remain entirely objective (R v Tayyab Sheikh [2004] NSWCCA 38 per Ipp JA cited at 8).

Despite the separation, Sheikh’s individual trial became subject to the same concerns that prompted the separation of trials in the first place. An application for a media suppression order for the verdicts from the first trial was rejected by the trial judge, Michael Finnane. The result, according to Justices Mason and Wood of the NSWCCA, was a miscarriage of justice due to prejudicial publicity:

The nature and tone of the media coverage of the outcome of the earlier trial were such that the very concerns that led this Court to sever the joint indictment came home. For what it is worth, this was always an extremely predictable outcome in the event of guilty verdicts in the earlier trial (R v Tayyab Sheikh [2004] NSWCCA 38 at 31).

The Court referred to the ‘nature and tone’ of the publicity as (in a ‘generic’ sense) inciting racist sentiments towards members of the Lebanese community, and, more specifically, making assumptions about the guilt of the accused through association with the co-accused. Ipp JA’s reference to the ‘common ethnicity’ of the offenders giving rise to sentiments of ‘disgust and anger’ describes the racist tone of the media coverage around the gang rapes. This has been the subject of much academic analysis and was outlined in some detail in the Anti-Discrimination Board Report of 2003, and the ISMA
Report commissioned by the Human Rights and Equal Opportunity Commission also detailed the concrete consequences and violence directed at Muslim communities due to the ideological linkage, mentioned in Chapter One, of the terror attacks in 2001, “illegal” Middle-Eastern immigration to Australian shores, and the gang rapes – particularly the Bankstown (and earlier cases involving AEM et al.) (HREOC 2003). The intensity of the media coverage was such that judicial direction to ignore the publicity surrounding the first trial was futile. In fact, Finnane’s directions only served to exacerbate the problem by causing ‘the jury to think about the linkage with the earlier trial’ (R v Tayyab Sheikh [2004] NSWCCA 38 at 35).

Some have argued that Tayyab Sheikh’s guilty verdict had nothing to do with the publicity surrounding the first trial; that Sheikh was found guilty because of an insurmountable Crown case. The Crown Prosecutor indicated, in my interview with her, that Sheikh’s appeal was futile, given his subsequent guilty plea:

It was such a strong case. His face was on the railway video, so there was no question of his identity and the jury believed Ms C, who was such a credible witness, about what had happened to her in those toilets. And of course as we now know, Tayyab Sheikh admits that he raped her and he’s written in his own hand, a letter of apology to her, which was tendered during his sentence after he pleaded guilty. So, what a waste of time and resources (Interview 22/02/07).

Finnane J’s main reason for rejecting an application for a media suppression order around the verdict of the first trial, was the possibility that it ‘would bring the law into grave disrepute […and] that is one of the interests of justice which I have to take into account’ (R v Tayyab Sheikh [2004] NSWCCA 38 per Finnane J cited at 68). Finnane is also quoted in the judgment for Sheikh’s appeal, as saying: ‘I am reluctant to ban the media altogether from attending and members of the public from seeing a criminal trial in progress. I think that is an extreme step, and only invites a sort of suspicion as to what is really going on’ (R v Tayyab Sheikh [2004] NSWCCA 38 at 70).
For his Honour, the interrelated dimensions of a free press and the maintenance of public confidence in the courts were paramount – even if the press is erroneous. This is reflected in his following directions to the jury:

Now from time to time in the trial there may be other comments that people make. People sit in Court and they can listen. The press are free in this country. They’re free to be right and they’re free to be wrong, and sometimes they are wrong. But if they have a comment or they have a view, they are entitled to express their view. But you should ignore it, just treat it as a matter of interest in passing, something that’s gone on in the trial, and concentrate on the actual evidence before you. That’s the only matter before you that counts (R v Tayyab Sheikh [2004] NSWCCA 38 per Finnane J cited at 129).

Judge Finnane, at different times, also gave numerous directions to the jury that emphasised the importance of ignoring headlines, presuming the accused innocent until proven guilty beyond reasonable doubt, and deciding the case ‘without emotion and without partiality’ – notwithstanding possible prejudices that members of the jury may have towards the ‘Lebanese community’ of which the accused is a member (R v Tayyab Sheikh [2004] NSWCCA 38 per Finnane J cited at 131).

Finnane’s arguments in relation to a free press reveal critical components of the relationship between the media and the courts in Western liberal democracies such as Australia. On the one hand, the popular press – even if they represent the legal issues in erroneous and prejudicial ways – plays a significant role in maintaining or destroying public confidence in the judiciary and the administration of criminal justice. If the judiciary is to accept Finnane’s arguments, the courts need the press because it has the power to influence substantially the public’s confidence in the courts. Finnane states that banning the press from observing and reporting on criminal trials would breed ‘suspicion’ and that this would be of greater detriment to the administration of criminal justice than the possibility of an unfair trial due to prejudicial publicity. Some judges argue the opposite. Justices Mason and Wood remarked, as mentioned previously, that the potential for an unfair trial was not a fair trade-off for appeasement of the public. Additionally, Finnane’s directions that the jury should ignore the publicity around the trial and at all
times decide ‘without emotion’, implies that the media sometimes have the potential to thwart the process of justice through representations of the crimes and accused persons, that tend to appeal to natural public emotion and community outrage around violent crimes. Mainstream media publications may also seek to raise information about accused persons that is deliberately avoided in the courtroom due to its prejudicial potential. An example of this may be reference to past convictions of the accused that are not relevant to the charges that are being tried. Yet rules of sub judice are usually enacted to ensure that this does not happen.

In his dissenting judgment, Justice Sully disagreed with Justices Mason’s and Wood’s arguments that the publicity surrounding the first trial for the co-accused deprived Tayyab Sheikh of the chance for acquittal, and agreed with Finnane’s arguments about the importance of the public administration of justice. Sully rejected the appellant’s submissions based on two grounds. First, he stated that the appellant’s argument for prejudicial publicity was based not on ‘rational inference from facts admitted or proved, but [by] giving effect to unsubstantiated speculation’ (R v Tayyab Sheikh [2004] NSWCCA 38 at 124). Second, he claimed that ‘the argument does not give due weight to his Honour’s instructions to the jury’ (125). Furthermore, Sully argued that even if Finnane did grant a suppression order on publication of the first trial’s verdicts, there would be no practical sanction to prevent the first jury, after being discharged, from publicly divulging the content of the verdicts. According to this reasoning, a suppression order would be ineffective because such information ‘was effectively in the public domain from the moment at which the discharged jurors left the Courtroom’ (101). This is a reasonable point. However, there is a vast difference between the public dissemination of information via individual jurors who have been discharged from a criminal trial, and the dissemination of information through the mainstream media.

Aside from this, Sully’s dissenting arguments raise some interesting issues about the relationship between the media, the courts and ‘the public’. The first reason Sully gives for rejecting the appellant’s submissions was that claims for prejudicial publicity in Tayyab Sheikh’s trial were based on ‘unsubstantiated speculation’. If this argument is
accepted, it can be extended to all claims of prejudicial publicity which must, by definition, be speculative because there is no way of ascertaining the extent to which juries are really influenced by publicity surrounding criminal trials. The concept of prejudicial publicity is based on legal and judicial assumptions that juries are influenced enough by the media to reach a guilty verdict when they otherwise would not have done so. Perhaps the most substantial basis for the concept of prejudicial publicity is when it pertains to publicity that concentrates on the specifics of a case. Even so, no ‘rational inference’ can be made about the degree to which jury members will question, or in other instances, uncritically accept, what the media is telling them.

To reiterate a point in the aforementioned New South Wales study by Chesterman et al., the extent to which juries recall and are influenced by adverse publicity surrounding the case is generally overestimated by legal counsel, and to a lesser extent, by judges (Chesterman et al. 2001: xvi). According to this research, the factors said to exert some influence on the decisions of juries were variable and ‘inevitably based on subjective evaluations’ (2001: xv). The factors listed in the study are too numerous to list all of them here. However it is worth noting a few due to their particular relevance to the issues here examined. These are:

The opinions of ‘professional assessors’ – that is, the trial judge, counsel and, if the issue was considered in appellate proceedings, members of the NSW Court of Criminal Appeal – on two matters. These were (i) the overall standard of performance of the jury, including particularly whether the verdict was ‘safe’, in the sense of being justifiable on the evidence, and (ii) whether the evidence in the case was such that a verdict could easily be reached [...] The weight and the extent, if any, to which the publicity was biased for or against the accused [...] The existence of any factual material in this publicity that as not replicated in the evidence (2001: xvi).

If nothing else, these factors and other general findings in this study illustrate that juries are more likely to believe legal professionals and unequivocal factual evidence presented to them by judges and legal counsel, than the media coverage surrounding the case. There are, however, exceptions. During the course of the Skaf trial, several jurors –
unconvinced by the facts presented to them in court, conducted their own investigations by visiting the park in which the sexual assaults took place. This resulted in public outrage in relation to jurors in trials, and towards the courts for quashing the conviction due to jury misconduct (Johns 2005: 28-40; *Sydney Morning Herald* 2005).

Aside from this example, the degree to which jurors were influenced by the media in the cross section of 34 trials (in which the jury was aware of publicity) was dependent on the perceived fallibility of the evidence. Where the evidence was perceived as ‘unequivocal’, jurors ‘often believed that newspaper coverage of their trial was inaccurate and / or inadequate’, and in 55% of these trials, ‘the inaccuracy or inadequacy [of media coverage] was discussed in the jury room’ (2001: xvi). According to this research, the truth claims made in the context of the courtroom are privileged by jurors, over truth claims made by the popular media. A similar study of juror perceptions in the UK indicated that ‘most jurors expressed a healthy scepticism toward the media’ (Matthews et al. 2004).

These research findings lend some credibility to the argument that Sheikh’s original guilty verdict was due to the strength of the Crown case. The findings also reinforce Sully’s grounds for rejecting Tayyab Sheikh’s appeal. However, despite the research, claims that potential prejudicial publicity are based on ‘unsubstantiated speculation’ is itself speculative as is Sully’s assertion that judge’s directions to juries should not be underestimated. More importantly, the first of Sully’s assertions undermines the power of representations and the influential effect that these can have in shaping everyday social and political realities (Couldry 2000) and the extent to which representation can have a subconscious influence on jurors and other media audiences. Similarly, his contention that insufficient weight was given to judicial directions that such publicity should be ignored, runs the risk of perhaps overestimating the influence of the judiciary in shaping the entrenched and inescapable beliefs and prejudices of juries, and the role that these beliefs and prejudices invariably play in the decision-making of jurors. The question raised is what role representations, such as the ones presented by the popular media and
culture, play in shaping our beliefs and prejudices, and to what extent? Conversely, how do our views shape what is represented by the media and popular culture?

“Good” v “Evil”: moral categories in media representations

Another point to be noted is that the publicity surrounding the Bankstown rapes was extraordinary, both in quantity and content. The way in which the Bankstown gang rape narrative unfolded shows that to some extent the popular media contributes to the social distribution of power. This can be inferred through the fact that the mainstream media are responsible for the ways in which a public narrative is presented, which can then substantially influence the ways in which audiences understand certain issues – particularly if the media are the sole or main source of information for some people. Specifically, media representation of perpetrators and victims (and other criminal justice issues) in dichotomised moral terms echoes and reinforces the appeal of popular cultural formats in which there is a perpetual battle between “good” and “evil”. These abstract categories of good and evil may be conceptualised through representations that construct a binary between “ordinary” people who could be victims, and dangerous criminals: as explored in the previous chapter, through those who belong to a moral community and those who do not.

In more concrete terms, abstract universal categories of good and evil are imbued, in certain socio-cultural and political contexts such as the one explored in this thesis, with certain ethnic, religious, “racial” and gendered characteristics that resonate with popular ideas of good and evil at the time. This is particularly illustrated through media reference to the victims of the Bankstown group sexual assaults as “Australian” irrespective of ethnic, “racial” or religious background, and the perpetrators as “Lebanese” – irrespective of the fact that they were Australian-born.

It is also important to bear in mind that an analysis that places too much emphasis on the domination of the media runs the risk of being too one-dimensional. Power does not rest solely with the popular media. There are other discourses that challenge the ways in which criminal justice and other issues are constructed. Some consideration must also be
given to the agency that media audiences have in their critical interpretation of media representations. To use a court-centred example, juries are, as suggested by the research, media audiences that approach most popular representations perhaps more critically than those who are not exposed to the details of a particular case. During the course of a trial, jurors are exposed to the conflicting influence of legal and judicial discourses. Within a courtroom context, the “impartial” and judicious tone of official discourses are perhaps more likely to be taken seriously and are therefore more influential than the often patent sensationalism of popular media discourses.

Furthermore, a courtroom is the only context in which multiple dimensions and complexities of a story will be presented in the interests of justice. While there is no reason, in theory, why this could not or should not be so in the media, jury duty develops an unusual forum where “audiences” are given both sides in the narrative which is then supported by evidence and “rational” argument, and they are then sent away to discuss and decide on the issues and evidence presented from both sides. The popular media however, have a distinct advantage in being substantially more accessible to infinitely broader and less informed audiences who are not aware of the complexities of a criminal case. Only the most sensational facts and the sometimes irrelevant aspects of particular cases are selected which are then packaged in ways that appeal to the public psyche. In this way, the popular media can breathe life into the complicated banalities and often inaccessible language of legal discourse. Indeed the inaccessibility of “legalese” is a fact that is sometimes exploited by the popular press to further an, often conservative, agenda that attacks the alleged secrecy, unaccountability and “inhumanity” of the legal system at the level of the courts. These concerns will be unpacked in subsequent Chapters, particularly Chapter Six.

**Representation v ‘reality’?: dialogues between popular media audiences and the courts**

However small their role, audiences also take part in shaping media narratives, at least through the different ways in which they receive and interpret mass media and ‘news’ discourses. On a more general level than the jury example, Couldry points out:
Media power is not a binary relation of domination between ‘large’ and ‘small’ ‘actors’, with ‘large actors’ (the media) having the automatic ability to dominate ‘small actors’ (audience members) simply because of their ‘size’. Media power is reproduced through the details of what social actors (including audience members) do and say (2000: 4).

The reception of media discourses by audiences is dependent both on the broader socio-political context in which the media representations mean something and are understood, as well as the social positioning of audience members within that context. The dialectical influence between the media and its audiences cannot be disentangled from the media’s relationship with socio-political and legal spheres. Audiences, as groups who belong to and form part of this public domain are involved in, and are, to some extent influential in these spheres. Mark Findlay argues that ‘The relationship between criminal justice agencies and the media is symbiotic, and the impact of media representation on the communities in which criminal justice agencies work may often affect the manner in which an official account is presented’ (2006: 55-56).

Even so, it would be absurd to suggest that audience participation and influence in the public sphere is egalitarian. Some voices are obviously more powerful than others, and certain groups are more likely to be misrepresented without recourse to a counter-discourse that has any hope of attaining the dominance and “common sense” prevalence of the views propagated by mainstream media outlets. Socio-economically and ethnically marginalised groups, for example, are unlikely to have the means to challenge prevalent media-fuelled ideologies. Mass media discourses affect a tone of impartiality and thereby represent dominant views as “common sense”. The media, as Couldry points out, have the power of “naming” social reality (2000: 22). For instance, dominant media discourses surrounding the Bankstown and K brothers’ cases were predominantly politically conservative, and they rationalised the exclusionary and at times racist views that they espoused through the common sense construction of “ethnic” or “Lebanese” or “Muslim” gang rape. To explain further, the constructed phenomenon of “ethnic gang rape” was underpinned by an exclusionary discourse which tended to ignore the multicultural reality
of contemporary Australia, constructing Australian nationality as White and Anglo whereby other ethnicities and cultures (especially Middle-Eastern) did not belong (Hage 1998; Poynting et al. 2004; Gleeson 2004). Such a construction also ignored a history of gang rape that, in contemporary times, would not be referred to as “ethnic” (cf. Gleeson 2004).

In this sense, there is a parallel between the construction of an ethnocentric “impartiality” in both media and legal discourses: in both domains there appears to be an appeal to “reason” to legitimise the dominant agenda, with the only difference residing in the type of “reason” that is employed. In mass media discourses, the reasoning appeals to the consensus generated by plain “common sense”, while legal discourses pride themselves on judgment that is arrived at via intellectual rigour, unhindered by emotion. Another significant difference is that dominant views espoused by the mass media are disseminated through extremely accessible and widespread means: the tabloid press, current affairs television shows, talkback radio, and “the news” on mainstream television channels. The power of mass media discourses lies in their ubiquitous nature and their ability to naturalise representations through common sense discourses and thereby “create” social reality (Couldry 2000). Legal discourses are neither widespread nor accessible and our understanding of the law is often obtained through the media and popular culture. As Gies points out, law, as understood through popular culture and the media, ‘bring[s] into play flashpoints of exclusion and inequality such as class, gender, ethnicity, race and sexuality’ (2005: 166) through a process of legitimation and naturalisation. This has had an impact on the legal sphere, because there is an increasing expectation for criminal justice and, in particular, courtroom dynamics, ‘to be media-friendly and entertaining, as well as being able to achieve the expectations that are set out for it in the media commentary’ (Findlay 2006: 56). The impact that this has had on the administration of justice through judicial decision-making will be explored in later chapters.

Here, there is also a need to distinguish (albeit in a cursory way) between “popular / mainstream” and “alternative” forms of media, and delineate, as far as possible, the scope
of the media sphere. In the simplest terms, the popular or mainstream refers to dominant views that are found, for example, in sensationalised news discourses that have widely been referred to as “infotainment”. This alludes to a blurring of boundaries between factual and fictional forms of media. In terms of scope, it is not possible to attribute clearly defined boundaries to the media. Some theorists have included ‘lifestyle and feature journalism’, fiction, and popular culture in the mainstream ‘media-sphere’ (Hartley and McKee 2000; Carter and Weaver 2003). While it is plausible to argue that mass media narratives exhibit many of the features of popular culture formats, it is important to note that such discourses are not interchangeable; if only for the fact that the mass media (although heavily biased) are not based on fiction. “Alternative” media formats are, by definition, less widespread and accessible, and often offer a counter-discourse to the dominant one promulgated by mainstream media outlets. While some alternative media discourses claim to provide a more “balanced” approach to news stories, others are counter-attacks or counter-ideologies which display resistance to the prevalent ideologies championed by the mainstream or popular media.

The classic moral panic literature also offers an account of mass media discourses which “impartially” legitimate a dominant agenda. The most comprehensive account of the media’s role in society – specifically during an episode of moral panic – can be found in Hall et al.’s (1978) account of the mugging panic in Britain in the early 1970s. Hall et al. assert that the construction of news stories involves the invocation of an assumed audience to which media representations are comprehensible and events are made to mean something (1978: 54). A background assumption is the ‘consensual nature of society’ in which there are no major cultural or economic differences between groups and that political representation and the law applies equally to everyone. Such consensus views are a particular feature of ‘modern, democratic, organised capitalist societies; and the media are among the institutions whose practices are most widely and consistently predicated upon the assumption of a “national consensus”’ (Hall et al. 1978: 55). While there is some acknowledgment of differences of opinion and the diverse nature of interpretation, the media’s assumption of consensus forms the broader, standardised framework of agreement and meaning which is represented as “common sense”.

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Moreover because the media report mostly on events that are beyond the experiences of the majority of society, they have the power to choose which events are significant enough to report in the first place. Of the events that are reported, the media have control over the ways in which these events are understood (Hall et al. 1978: 57). As Findlay points out: ‘[c]riminal justice systems’ records of crime, while presenting greater credibility as official accounts, are often general enough to fuel a variety of crime representations’ (2006: 56).

Accordingly, the media have a symbiotic relationship with institutions of social control, whereby the interests of those institutions are represented “impartially” via the news media. Hall et al. argue that this relationship forms a ‘primary definition’ of certain issues from which alternative interpretations cannot really derivate. (1978: 57-59). An ‘inferential structure’ is formed by the mainstream media, which is controlled by the ‘primary definers’ – accredited sources such as representatives of government institutions, the courts, and ‘experts’ – which lend authority to and legitimise media representations. What results is that ‘structured preference is given in the media to the opinions of the powerful […] and these “spokesmen” become what we call the primary definers of topics’ (Hall et al. 1978: 58. Original emphasis). Alternative definitions do not have the power to offer diverse interpretations, because the meanings have already been established and entrenched within the collective consciousness by the mainstream media – which stands in a position of ‘structured subordination to the primary definers’ (Hall et al. 1978: 59). More specifically, Hall et al. speak of an ideological interdependence between the courts and the media, in which they argue, the courts are established as the primary definers of newsworthy events:

In the majority of cases, the court report is the first reference there is in the press to the event. The cases become prominent because of what judges say and do, rather than because of what the offender has done or said. […] And it is this ritual enactment, as much as the actual sentence passed – in short, not just the crime but the judicial response to the crime – which leads the media to treat court cases as ‘news-worthy’ (1978: 31).
Prevalent understandings of crime, criminal justice and the workings of the court system, are thus shaped by ‘primary’ definitions aired in dominant media discourses which subsequently cannot be budged by the alternative discourses which are, in Hall et al.’s account, referred to as ‘secondary definers’. The ‘agenda’ has already been set and this makes it possible for the media to contribute to the social distribution of power:

The closure of the topic around its initial definition is far easier to achieve against groups which are fragmented, relatively inarticulate, or refuse to order their ‘aims’ in terms of reasonable demands and a practical programme of reforms, or which adopt extreme oppositional means of struggle to secure their ends, win a hearing or defend their interests. Any of these characteristics make it easier for the privileged definers to label them freely, and to refuse to take their counter-definitions into account (1978: 65).

It is clear that Hall et al. favour an argument that articulates the power relations that occur around media representations. The ‘primary definers’ are posited mainly as the government and institutions of social control (Hall et al. 1978: 59). While there much that is convincing about this argument, there are also some limitations. The most obvious issue in the current context is the fact that certain institutions, notwithstanding their relative position of power, are generally not free to provide an alternative voice or a counter-representational view because they are professionally bound by codes of silence. The most obvious of these is the judiciary. The mass media can provide an unchallenged (often negative) cultural understanding of the courts and judiciary because members of the judiciary and legal professionals generally cannot, owing to professional restrictions, provide a counter-understanding – or at least not one which is going to be as widespread and accessible as media-oriented descriptors. To the extent that judges do occasionally offer their views to the media, their contributions appear to fall into the category of what Hall et al. refer to as ‘secondary’. The ‘agenda’ of popular justice has already been set and the judiciary cannot live up to it. One of the results of this is that:

In many jurisdictions throughout Australia, leading judges have recently identified community attitude as now being an appropriate concern when determining sentences
and punishment. This is a significant shift away from previous judicial opinion that the sentencer should be above public pressure or political influence (Findlay 2006: 56).

The extent to which the judiciary is influenced by media, public and a political pressure is a key concern in this thesis and will be explored in greater depth in subsequent chapters – particularly Chapter Three.

On a broader level, to state that the media shapes prevalent understandings of certain events, groups or institutions, which then serve the interests of the hegemonic classes (which control the media in the first place), can overlook the fact that audiences also bring their own knowledge, cultural understanding and politics – acquired through other means and shaped by their own realities – into the meanings distributed, on a larger scale, by the media. The different socio-economic and cultural groups that comprise audiences will have widely differing interpretations and levels of scepticism in regard to media representations. Groups that are disproportionately targeted by police, for example, may have first hand experiences of the law which invariably challenge popular media representations of the law (Gies 2005: 172). By the same token, ethnic and cultural groups such as the Arab or Muslim communities in Australia, that are victimised by negative, sometimes racist stereotyping of their cultures in the mass media (cf. ADB 2003; Poynting et al. 2004; Collins et al. 2000), are similarly distrustful of ill-informed media representations of their culture. This is mainly because of first hand experiences of their own culture and the consequences that negative media representations of their communities have had on their day-to-day lives. In a Human Rights and Equal Opportunity Commission (HREOC) survey of Arab and Muslim Australians, some 47% of respondents believed their communities had been vilified in the media (Poynting and Noble 2004). One informant in HREOC’s national Isma consultation commented, ‘If I wasn’t Muslim myself I wouldn’t like them either the way the media portrays them’ (HREOC 2004: 64, cited in Poynting and Perry 2007). This is one very obvious way in which social realities can shape interpretive responses to media and popular cultural representations.
This is certainly not to suggest that audiences are sovereign when it comes to interpretation of media content. The reality, as indicated, is far more complex. There is a reflexive relationship between audiences and the media in that audiences (which include powerful government institutions), are both shaped by and shape the meanings that are produced and reproduced by mainstream and alternative media outlets. At the most basic level, the media, in all their manifestations, whether “alternative” or “mainstream”, need an audience for their very existence. Governments need the media and their audiences to remain in power, just as the courts need the media in order to attract public confidence and maintain the rule of law. In Western democracies, the media are, in theory, free and thus powerful enough in their own right either to exalt or defame governments and their institutions – just as much as they can exalt or defame certain minority groups. However, there are concrete political and cultural limits to the media’s freedom. The popular media as agents in a network of social actors that are implicated in moral panics, serve their own interests by adhering to the current dominant agenda in a particular social context. For example, popularity demonised groups during a moral panic will attract more public and political attention, and therefore it would be in the mainstream media’s interests to afford more coverage to these groups. Popular media power emanates from their ability to legitimise, produce and reproduce dominant agendas through their relative control over social representations. The media also decide who has a voice or access to self-representation; a distinction is made between an “ordinary” world in which actors are silent and a media sphere where media people themselves, politicians or other high-profile social agents are ‘systematically overaccessed’ (Hall 1973 as cited in Couldry 2000: 49).

Despite audience agency to interpret events according to their own experiences and consume mass media discourses critically, the fundamental effects of representation cannot be underestimated in their capacity to contribute to social and cultural meanings and understandings. The significance of representations is that they help shape our perceptions of ourselves and ‘Others’, and our relations with ‘Others’ (Carter and Weaver 2003: 16). Hall et al. claim that in order to ‘make an event intelligible’ the media assume that we “exist as members of one society because” – it is assumed – we share a common
stock of cultural knowledge with our fellow men: we have access to the same “maps of meanings” (1978: 55. Original emphasis). In this sense the media, like the criminal justice system, uphold a normative public morality, albeit in a substantially different way: indeed the relationship between legal and mass media domains is characterised by a struggle for legitimacy in regard to their truth claims (Gies 2005: 175). This ongoing battle appears to intensify particularly during times of social anxiety and moral panic.

As mentioned in the previous chapter, public discourses around national belonging, ethnicity, and criminal justice coalesce, largely through the popular media, to (re)produce a moral campaign around the object of social concern, while the law produces and stabilises these dominant, constructed norms. When violence is perpetrated by members of minority groups who are not perceived to “belong”, dominant news discourses have a tendency

to assume that certain types of violence, namely those types perpetrated by the military and police (representing “us”) are “legitimate”, while other types are deemed to be “illegitimate” (violence associated with “them”, namely those who challenge “our” norms, values and beliefs) (Carter and Weaver 2003: 23).

Furthermore, as Hall et al. observe, the actions of socially marginalised and disenfranchised groups, are often labelled by the mainstream media as threatening the ‘moral order’ (1978: 189). This goes some way in explaining why the crimes of minorities – mostly those who belong to an already demonised culture – appear to be more newsworthy, particularly within a dominant, conservative framework, than the crimes of those who are not members of minority groups. Marginalised youths who break the law seem to be more easily scapegoated than more powerful groups in society. They are, as Cohen has argued, ‘a soft target’ without the means to fight back (1972: xi). The popular media, ever observant of social trends and fears, play a substantial role in constructing the threatening figure of the “folk devil” through reference to disenfranchised groups, through moral narratives that appeal to the public imagination, thus legitimising and naturalising social anxieties around certain marginalised groups. As
Couldry points out, this ‘legitimacy […] is the overall result of countless processes of reproduction in talk, belief, and action, both by media producers and by media consumers’ (2000: 39).

In this sense the popular media play several roles in fuelling moral panics. Classic moral panic theories of Cohen and Hall et al argue that this is particularly the case with the popular media and tabloid press. The appeal of Hall et al’s Marxist orientation, for example, lies in their ability to explain and clarify the apparently differential treatment of ethnic minority, or other marginalised groups when members of such groups behave in violent or criminal ways. The unequal treatment can include selective sensationalisation of crimes that are just as frequently committed by members of the dominant or “normal” cultural group. In such reporting, the ethnicity of offenders is invoked and implicated in their criminal actions, and the criminal sanctions that invariably follow such sensational publicity and subsequent uproar are potentially more severe than usual. Acts of brutality committed by members of groups who are always already constructed as threatening the “moral order” are more newsworthy than violence perpetrated by those who are seen as having briefly deviated from the norm.

The dual ideological manoeuvre of criminalising people from certain ethnic, racial or cultural backgrounds, and at the same time “racialising” certain criminal behaviours, functions to construct a threat to the moral, existential and literal security of the dominant culture. For example, rape or gang rape is constructed by some conservative media commentators as more commonplace in Arab and/or Muslim cultures because of an inherent misogyny in the practices of such cultures. Another example can be found in the criminalisation and subsequently punitive treatment of asylum seekers of predominantly non-Western heritage (Pickering 2005). Such representations lend popular support to the “tough measures” promised in law and order campaigns. Then the courts, which are partially constructed as the arbiters of public morality, are looked to for protection from groups who are believed to threaten the “moral order”.

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“Popular” v “Legal” Justice: trial by the courts and media

In Chapter One, I provided a brief outline of the most obvious way to look at the relationship between the courts and the media during moral panics: the courts respond to populist, media-fuelled political and moral campaigns, and these judicial responses work to legitimise or lend authority to such media campaigns – furthering the ideological agenda for the dominant groups in society. The symbiotic relationship between the courts and the media is a line adopted by classic moral panic theorists such as Hall et al. and Cohen, whereby ‘news’ becomes a ‘modern morality play [which] takes place before us in which the “devil” is both symbolically and physically cast out from the society by its guardians – the police and the judiciary’ (Hall et al. 1978: 66). I have already begun to argue that these theories are useful in describing one part of the relationship, but the reality is that the courts and the media have a much more complex interaction than indicated by this literature. The dialectical nature of the relationship is more productively framed by constant conflict – exacerbated during episodes of moral panic – for the legitimacy of their claims to truth and reality (Gies 2005).

Within the context of moral panic, the courts often resist public, sometimes emotional demands for tougher and more punitive measures against perpetrators of violent crime – which are voiced through the media. Because of their autonomy, the courts aim to remain neutral to ‘transient public moods’ (Parker 1998:6). To the extent that they do respond, the courts frequently fail to live up to community expectations and the severity of sentences (with the notable exception of the initial 55-year sentence given to Bilal Skaf) does not increase swiftly enough for an emotional public’s satisfaction. As Findlay points out, ‘[u]ntil recently […] the judiciary has largely been spared the critical public debate about community safety and crime control. Not so now’ (2006: 57). The actual trend in increasing sentences is of little or no consequence in the collective consciousness because the judiciary can never seem to live up to expectations that are driven by public emotion (Findlay 2006: 57). Widespread suspicion of the judiciary (of the type cautioned against by Justice Finnane) is helped along, and some would argue, caused, by mass media fanning of community outrage.
To this end, Loic Wacquant argues:

The more the question of crime is posed in dichotomous moral terms geared to electoral games in the public sphere, the less relevant the empirical knowledge produced by experts and the technical constraints faced by correctional administrators become to the conduct of penal policy. Conversely, as the authority of penal professionals is eroded and disregarded, moral entrepreneurs in journalism and politics can shape the mission of the police, the courts, and prisons to suit their own agendas and interests (Wacquant, in 2005: 19).

It is evident that the mass media provide an effective outlet for populist politicians and that one aspect of “popular justice” is the application of more punitive measures for violent (and sometimes non-violent) crime. Of more interest here, however, is an examination of how the popular media provide parallel and at the same time, divergent representations of morality and justice to those provided by the courts. Of interest also is the way conceptions of “popular justice”, as propagated by the mainstream media, conflict with and contest the authority of legal constructions of justice. The example of “popular punitiveness” is one manifestation of the conflict between legal and media authority on public morality. Who, as Gies asks, ‘has ultimate authority: legal institutions or the media?’ ‘[D]o people entirely depend on the media for their legal experiences’ (2005: 166), and their understanding of justice?

It is hardly surprising that there is a chasm between legal and media conceptions of justice, just as there is, at times, consensus and shared meaning between such understandings. Such is the nature of dialogue. Nobles and Schiff point out that differences [between discourses] are not simply the outcome of different interests, classes or ideologies. Because systems use different coding and different procedures for validating reality, they systematically produce different meanings and understandings of social events. Thus science, law, and the media will produce different communications about the same events (2000: 6).
This is not to suggest that the differences in coding and procedure between different institutions are entirely arbitrary and not driven by the interests of those institutions. Rather, Nobles and Schiff draw attention to the highly contextual and situated way in which meanings, interests and ideologies are disseminated through different agencies in accordance with their relative power. There is undeniably a clash between the construction of social reality in popular or tabloid notions of justice, and the type of justice that is sought by the common law. A notable difference is that popular discourses openly take sides. Sides are also taken in an adversarial legal system, but the courtroom provides a forum – at least in theory – in which both “sides” are heard and balanced in accordance with the evidence. Mass media discourses often only present one side of the story and these narratives typically champion the rights of victims of violent crime – provided that the victim exhibits culturally “appropriate” traits as a “victim”. These considerations will be explored further in Chapter Six.

The media plot, often shared by popular culture discourses (to the extent that these can be separated from media discourses), is that an innocent victim falls prey to an evil, sometimes deranged, and predatory criminal, and the law does not give adequate and due attention to the innocent victim’s needs. Mass media crime narratives often reproduce this typical popular cultural formula in which legal and factual complexities are inevitably obscured in the interests of a more digestible, entertaining and sensational story. Such obfuscation results in media accounts, particularly in their tabloid form, that resemble what Hall et al. (1978) have referred to as a ‘morality play’ – bearing remarkable resemblance to the fictional genre of “law and order” films and television shows. In these narratives, good opposes evil, and justice is done when the villains are identified, apprehended and severely punished. Judges assume a symbolic role before the media: ‘their status as representatives and ventriloquists for the good and the upright against the forces of evil and darkness’ (Hall et al. 1978: 68). This is reflected in media attention to judge’s pronouncements. The appeal of these popular criminal justice narratives is reinforced by and related to the desire for “ontological” and “literal” security that is sought particularly during an episode of moral panic. The characteristics of the folk devil in a particular moral panic – in this instance the Arab or Muslim gang rapist,
terrorist or “illegal immigrant”, usually male (but not necessarily) – are applied to fictional and non-fictional genres of popular criminal justice narratives. Cohen also has an interesting way of conceptualising this point through his reference to the dramatisation of deviance in the courts, which is then coopted in a broader, popular context: ‘This element is illustrated with particular vividness in the court, the perfect stage for acting out society’s ceremonies of social degradation’ (1972: 85).

There are also some instances where the media can change sides and represent the “perpetrator” as wrongly accused and therefore as a victim of one of the failures of the criminal justice system. This is a media construction of a miscarriage of justice, as opposed to the legal construction that arose from the prejudicial publicity in, for instance, the Tayyab Sheikh appeal. Nobles and Schiff argue:

in situations in which the media become convinced of the factual innocence of particular appellants, they approach the appellate process in the expectation that it can produce versions of the truth that accord closely with their own… [This] shows how there is a dominant media understanding of the role of truth within the legal system, which is different from that of the legal system itself (2000: 93).

Conversely, in relation to media reporting of a legal perception of miscarriage of justice, there is a shift in narrative style that results from prior conviction of the accused: ‘With conviction the news media are able to present a single, objective conclusion: the accused did what he was accused of’ (Nobles and Schiff 2000: 90). Accordingly, the popular media did not react well to the quashed conviction and the order for retrial for Tayyab Sheikh. One media headline stated: ‘Tears as rape retrial ordered’ (Pelly 2004: 2). This headline, without reading the rest of the article, encourages condolences for the victim in the face of legal and procedural insensitivity to her rights. This is sufficient to illustrate that often, the common ground in media constructions of a miscarriage of justice, media criticisms of legal constructions of miscarriages of justice, and victim-oriented news stories, is that the courts are represented as falling short of the justice that is expected of them. Miscarriages of justice are but one area in which the disparate narratives of justice between legal and media discourses become apparent.
The personal characteristics of the accused and complainants play a substantial role in who is selected as “defendable” protagonists in the popular media and those who are not. The protagonists in popular media crime dramas – whether fictional or non-fictional – need to exhibit certain attributes with which the majority can identify. Identity is a requirement for empathy. This type of empathy was apparent in public reactions prompted by the media coverage of the victims of the Bali bombings and September 11 terror attacks. However, similar mainstream sympathy had not been elicited by the popular media for the victims of, for instance, the Rwandan genocide, because the victims in that incident were from a separate national, cultural and moral universe (Rorty 1989; Kearney 2003; Hudson 2006a). Furthermore, it is less likely that the public is going to feel empathy or even sympathy towards an offender who is already demonised by virtue of their culture. Likewise for victims: they need to be constructed as “innocent” (in the sense of being attacked by a stranger, for example) and exhibit personal characteristics that are culturally “acceptable” in order to attract public empathy or sympathy, and to be included within the narrative boundaries of popular justice (Mason 2007).

In this context, measures taken by the courts to ensure “fair trials” (in the legal justice sense) are perceived as violations of “popular justice”. In “popular justice” terms, violent criminals do not deserve the right to a fair trial or humane treatment in punishment. The courts, in their pursuit of “legal justice” attract public criticisms to the effect that they are not “in touch” with, or subject to the concerns of “real people” because they attempt to elude the emotion that characterises public reaction to morally repugnant crimes. Like the offenders themselves, judges can frequently be dehumanised, albeit in a different way. While criminals are labelled as “animals” or “monsters”, judges, and some legal professionals become the faceless, emotionless representatives of powerful, oppressive institutions. Once again, the formula tends to echo the popular culture configuration in which the courts are sometimes represented as the villains – usually either as institutional bullies against the innocently accused, or as wilfully non-committal towards victims of heinous crimes who seek “justice”. Indeed, judges are represented as so far removed from
social “reality” that they are often rendered devoid of human feeling or, at best, eccentric. As will be illustrated in the next chapter, they are sometimes not seen as “real people” (Letters, *Daily Telegraph* 2003). Other examples of this will be given in the chapters to follow. This is not to suggest that all forms of media and popular culture represent crime, the courts, and judges in such simplified terms.

There are certainly media outlets which attempt to approach issues of justice in less stereotypical ways. Indeed there are some media genres which attempt to inform their audiences in a factual manner (Gies 2005: 168). Even so, the focus of the present analysis is not to ascertain the extent to which the mass media represent the legal sphere in distorted ways. My interest here is more to explore the “real” effects of the contested representations of legality on cultural understandings of (criminal) justice, the consequences that these dominant understandings have on the administration of justice – for the courts, offenders and victims – and the capacity of ‘all social actors to contribute to a meaningful construction if what law is, or should be, about’ (Gies 2005: 169).

Where judges have sought to protect accused persons from prejudicial publicity, they are concerned to fulfil the democratic necessity for the right to a “fair trial”. In legal terms, a “fair trial” is one which procedurally balances the rights of both parties and operates on the assumption that the accused is innocent until proven guilty. Again, this hinges on presumptions of impartiality: an unbiased trial must be based on “objective” facts. Prima facie, this is the inverse of what is espoused by discourses of “popular justice”, highlighting the most significant difference between tabloid or popular notions of justice and that which is conceived by the common law. The former is not interested in the notion of a “fair trial” – in the sense of striking a procedural balance between the rights of complainants and accused – because the alleged offenders are predominantly represented as evil and therefore undeserving of legal rights.

Similarly, the mass media is disinclined to subscribe to the presumption of innocence. There are many instances of the accused being referred to as “perpetrators” before they were actually tried, and tabloid newspapers generally do not refer to the complainants as
such, or as “alleged victims”, but simply as “victims”. An example was given in the previous chapter in relation to the *Daily Telegraph* coverage of the K brothers’ trials, where the accused chose to represent themselves: ‘Rape Outcry: Accused attackers to question teenage victims’ (Knowles 2003: 1) A former judge of the District Court, in my interview with him, stated that the dichotomy constructed in the media, of “accused” / “victim” instead of “accused” / “complainant” is problematic because the word “victim” is laden with ‘emotional overtones’, an assumption is made about the guilt of the accused. This interviewee also indicated that the boundaries between victim and accused are tenuous if the jury dismisses the case, whereby one could argue that “[the accused] is the victim because he has been the one who has been wrongly accused’ (Interview 24/4/07). Perhaps comfort is found in assumptions of guilt: in the “real world” (through the lens of popular justice) a trial is played out in the interests of allaying public fear of a violent criminal at large, because there is a sense that there is something “being done” about the criminal who remains a threat to public safety. The sooner someone is blamed, the sooner they can be excluded from society.

This is one part of the reason that defence counsel, alongside judges, attract public backlash: defence counsel and judges are unwilling simply to attribute blame without exploiting all possible avenues of “rational” inquiry into the circumstantial, personal and cultural considerations that are attached to an accused person’s actions. It is not unusual for broader implications about the courts to be drawn from individual submissions given by defence counsel. The moral reprehensibility of the crime and the marginal status of the perpetrator (that is, one who does not stand a chance of being represented as a protagonist), determine the severity of the media backlash. A particularly fruitful example can once again be found in the infamous “cultural time bomb” argument that was put forward as an appeal submission by Stephen Odgers. Odgers’ argument will be explored in detail in Chapters Three and Four. More broadly, what is demonstrated by general backlash against what is perceived as the “soft” reasoning of the courts, is that there is a divergence between popular and legal understandings of criminal culpability. The fundamental convergences are less clear, but they exist, as I will argue in Chapters Three and Four, in common ethnicity and the shared values of anglocentric culture.
Alan Norrie argues, ‘[u]ntil we interrogate a certain way of understanding law, we will not understand popular or community justice’ (1999: 249). Gies (2005) also refers to an attractive argument about the way dominant public discourses coalesce through the rule of law. The notion of the “rule of law” is pivotal to the core values of a rational legal system including, ‘equality before the law and the absence of arbitrariness in government’, as well as being ‘culturally constitutive of the way in which communities and nations define their identity’ (Gies 2005: 169). Such a theory is plausible to the extent that the courts’ adherence to “neutrality” is itself informed by the norms of a dominant culture and ethnocentrism. This will be discussed in more detail in Chapter Four which will explore the anglocentrism of the Australian criminal justice system and the implications that this has for cultural difference before the law. Of more relevance here is the fact that social norms embodied by the rule of law set ‘the gold standard against which the conduct of legal subjects (irrespective of whether they are fictitious or real characters) is often measured and scrutinized in the popular culture’ (Gies 2005: 169).

Still more needs to be explored about the different discourses that coalesce within the legal sphere and the extent to which these impact on legal autonomy. As shown by the notion of prejudicial publicity, the courts consistently seek to protect the “rational” legal sphere from being infiltrated and tainted by external influences: both popular cultural and political. Norrie points out that from the perspective of Western law, ‘[p]opular justice is either inchoate or given form by returning it into the arms of what it supposedly is not: the legal, the formal rational, the bureaucratic, the statal’ (1999: 252). The law seeks authority for its constructions of legal truth and justice through its rational “neutrality”, and will, as much as possible seek to impose legal constraints represented by way of ‘contempt of court’ on alternative understandings of the law as presented by the mass media (Nobles and Schiff 2000: 95).

On a less official level, there are some members of the judiciary and legal profession who express open contempt towards the media. Justice Sully of the Supreme Court of New
South Wales is one member of the judiciary who has made disparaging comments about the mass media at different times. One example was found in my fieldwork observations of the K brothers’ court trial. During sentencing proceedings a member of the public gallery interrupted by yelling abuse at one of the accused. After security escorted the young man from the courtroom, Justice Sully remarked:

American TV is not a yardstick for public administration of criminal justice in NSW […] This is not an arena for public entertainment […] For those who are distraught, or mentally disturbed… sensationalised media reporting is oxygen (Field notes 20/2/04).

Sully urged the media not to report the ‘unfortunate incident of this morning’ for it would ‘not do anything for the public administration of criminal justice’ (Field notes 20/2/04). Here Sully posited a clear dividing line between the concerns of the media and those of the courts. The implication was that the frivolity of the media and entertainment is clearly discernable from the administration of justice and the gravity of matters before the courts. More simply, it could also have been that the content of what the person interjected, if reported, might prejudice the trial through the way it could be taken up in the media.

More revealing remarks were made by Justice Sully in a speech given during a function commemorating his very recent resignation during the time of writing. He said:

The media, as we know, react with savage vindictiveness to any attempt to apply to them those standards of transparency and accountability that they are insistent on applying to other people … The media are not a constitutional arm of government … To suggest that [they are] is legal fiction, a political subversion and a moral absurdity. The media are major money-making cartels. They are not knights in shining armour. Their agenda is power. Their strategy is fear and their tactics are a combination of ridicule, sometimes of the most savage personal kind (Ackland 2007).

Sully also expressed that the media deal in ‘finely calibrated half-truths’, demand more convictions and longer sentences, and undermine the presumption of innocence (Ackland 2007).
While most of what Justice Sully has said resonates with some of arguments in this thesis, the truth or otherwise of Sully’s attack on the Sydney media is not of interest in this context. More revealing are his suggestions that the courts should and can exist independently of the media – and that the courts do not need the media in order to maintain public confidence in the judiciary. As legal journalist Richard Ackland points out, the concept of ‘public confidence’ is ‘one of those ritualistic incantations the meaning of which is mysterious’ (2007). Yet it cannot be denied that the media have the power to influence public confidence in the judiciary, if only because judges do not have the professional freedom to respond to media based attacks. The media, as Ackland points out in his article, thus see judges as ‘soft targets’.

Another point raised by Justice Sully is that the mass media specialise in lies and ‘finely calibrated half-truths’ which suggests that, in his opinion, mass media representations of truth and reality lack legitimacy. Justice Sully’s opinion is not necessarily representative of all other members of the judiciary; however, it is not a far-fetched assumption to make. In my interview with him, a former Judge of the District Court expressed the opinion that:

The attitude of the press and writers and radio commentators who get carried away with their own importance and if they think it’s going to help build up their own importance or their ego – they don’t care who they hurt or who they criticise. A lot of judges think that the media is out against judges. I don’t. They’re out against anybody who they think, by criticising, it will improve their position, and if judges are in the way, well then, bad luck. That’s my personal view (Interview 24/04/07).

The existence of official sanctions such as contempt of court through publication and comments made by other judges in relation to media portrayals of the courts, the judiciary and the administration of justice, also show that Sully is not alone in his opinions of the media.
In a 2003 seminar about judicial corruption, independence and public opinion, Judge Norrish of the New South Wales Supreme Court made comments to the effect that judges are subject to vigorous criticisms in the public sphere, by the media and politicians who construct an image of the conditions under which judges must work which is very different from the reality of those conditions. Norrish stated that ‘judges stand against any wind’ for those who may suffer and who are weak or subject to prejudice by the majority culture, and that this impartiality is what determines and at the same time undermines, public confidence in the judiciary (2003). At the same seminar, Magistrate Orchiston argued that there was a substantial lack of balanced public debate about the judiciary which leads to a lack of public confidence – that the judiciary must bear the ‘slings and arrows’ of ill-informed media attacks without adequate recourse to a public defence. Her conclusion was that the community needs to be educated more about the role of the judiciary through a more balanced approach – that is currently lacking – by the media (2003). More recently, Chief Justice Spigelman prompted populist political backlash and public anger against the judiciary because of the following comments:

Long experience has established that such tasks are best done by independent, impartial and experienced persons, who are not subject to the transient rages and enthusiasms that attend the so frequently ill-informed, or partly informed public debate on such matters (Davies 2006: 1).

Spigelman’s comments were prompted by public criticism levelled at the judiciary about the perceived leniency of the courts towards the murderer of police officer Glen McEnallay (Davies 2006: 1).

Conclusion: A consensus on “justice”?
The nature of the relationship between the media and the courts is succinctly summarised by Nobles and Schiff.

When journalists seek to translate their understanding of legal processes into news, and lawyers attempt to turn journalists’ stories into evidence or arguments for reform, we
have a situation which is both consensus, and a multiplicity of understandings and misunderstandings (2000: 5).

Such an analysis aptly captures the reality that there must be some shared meaning between the notion of justice as defined by the courts and the media. Yet the relationship between the media and the courts is marked by constant contestation over meanings of justice. Cultural understandings of justice are produced and reproduced through this struggle, and there are no clear boundaries between the understandings of justice promoted through both domains. As Phillips and Strobl argue, in a similar vein to Couldry: ‘the media do not merely reflect social reality, but in a media-saturated world, increasingly constitute the social reality itself […] justice and representations of justice, therefore, can be seen as resonating in a “vast hall of mirrors” thereby producing a dialectic of reflections on, and constructions of, justice’ (2006: 306).

As can be seen by some of the aforementioned examples, this is not an argument that would appeal to the black letter positivism of the law, which claims authority in regard to truth and justice. The law claims a privileged status because the courts are the principal forum in which moral norms can be defined and justice practically administered, through a semblance of neutrality, reason and fairness. Yet, the law is far from monopolising the domain of moral norms and justice – the media and their audiences also play significant and varying roles in constructing a shared understanding of justice. A significant overlap is found in an imagined moral community’s understanding of the “ordinary person”; a construction that will be explored in Chapter Three, which is strongly imbued with a set of ethnic and cultural characteristics. The media naturalises this understanding through its ‘framing of the social […] without actual co-presence’ (Couldry 2000: 43).

To the extent that popular notions of justice can be superficially separated from a legal sense of justice, the difference can be attributed to a number of factors. The most significant of these, in this context, is a constructed dichotomy between emotion and reason: popular notions of justice aim to appeal more viscerally to the moral outrage felt by audiences when perpetrators of brutal crimes are not given what are perceived as their
“just deserts”, while legal conceptions refer to the paramount importance of “cool reason” in the administration of justice. The law’s entitlement to a “true” definition of justice is attained through claims to impartiality and objective truth. Yet this does not mean that legal notions of justice are privileged as truths in a broader public context.

This reveals another important point: in the popular imagination, justice is equated with swift and severe punishment for wrongdoing, while legal notions of justice focus on procedural fairness during criminal trials and “proportionate” punishment. This chasm illustrates the tensions that underpin and provide the driving force for public dissatisfaction around sentences that are perceived to be too lenient, and the political and legislative measures that are subsequently taken to address this dissatisfaction. The extent to which the elusive notion of “public opinion” – as shaped by the dialogue between media, legal and political domains – affects sentencing outcomes, is arguable. Some assert that public opinion, as shaped by media notions of justice, has influenced a gradual upward trend in the severity of sentences. Yet this is not the impression one would get from reading a tabloid publication about the ‘leniency’ of the judiciary. These are relationships that will be explored in significant detail in the following two chapters.
The Courts:

their role in moral panics
3. “If the Judiciary were real people…”\(^{15}\): the impact of moral panic on sentencing outcomes

On 15 August 2002, Judge Michael Finnane sentenced Bilal Skaf to a landmark 55 years in gaol with 40 years non-parole. It was the longest sentence for sexual assault in Australian history (Gleeson 2004). In his sentencing remarks Finnane said: ‘The courts must attempt to protect society from the possibility that those who have been caught will engage in this type of activity again’ (Finnane J, *R v X*, District Court of NSW, Criminal Jurisdiction 2002).\(^{16}\) Prior to the trials for the Bankstown rapes, the “leniency” of the sentence for another case in 2001 (*AEM and Others*) involving young Lebanese-background perpetrators had attracted community outrage and political response which prompted a new statutory maximum of life imprisonment for sexual assault (*Crimes Act 1900* s 61JA(2)). Two years later in the K brothers’ case, the four brothers, MSK, MAK, MRK and MMK, received less severe but still substantial sentences between 10 and 22 years. It was proven that MRK, who received the lightest, 10-year sentence, did not even participate in the act of sexual assault. Echoing Finnane, Sully emphasised ‘the protection of society’ (132) as central to the purpose of punishment, and moralised about the ‘sheer waste of young lives and prospects’.

Sentencing and punishment are the key ways in which the seminal moral panic literature, including Cohen (1972) and Hall et al. (1978), identifies the role of the courts during an episode of moral panic. Both works, to a similar degree, posit an ‘ideological interdependence between the media and the judiciary’ (Hall et al. 1978: 33), and outline the relationship of this interdependence to a ‘generalized belief system rather than judgments on the individual offender on the one hand or generalised principles of sentencing on the other’ (Cohen 1972: 85). According to this literature, the courts are implicated in moral panics by effectively legitimating the public outrage around a

\(^{15}\) Anne Mooney from Silverwater. Quote taken from *Daily Telegraph* letters page, November 3, 2003, p.24. The full quote is referred to later in this chapter.

\(^{16}\) Skaf was referred to as ‘X’ before his name was publicised.
heinous crime by labelling it as morally reprehensible and offensive. As I have argued in Chapter One, this is a significant part of the reason that the courts can be seen as “moral arbiters”. The media then extensively publicise the crime mainly via the forum of court proceedings, which leads to widespread moral outrage, political responses which gain full force in “law and order” election campaigns, and then judicial response to public demand for punitive measures through severe and ‘exemplary’ (Hall et al. 1978) sentences. While conventional moral panic theories describe the basic role of the courts in times of social anxiety, I argue that they do not adequately address the complexities that impact on judicial sentencing decisions – both from within the legal sphere and beyond.

The aim of this chapter is to situate and attempt to ascertain the extent to which sentencing decisions are as influenced by moral panics and social anxieties: a key claim of the traditional literature. I will mainly focus on the Bankstown (and to a lesser extent, the K brothers’) gang rape sentences. Additional reference will be made to a previous case – *AEM and Others* (which like the Bankstown case involved Lebanese Australian youths) - to trace the events that led to the new legislative maximum for sexual assault. The judicial decision-making around these cases will be situated within the social and political climate that saw substantial legislative increases in maximum sentences for sexual assault and more generally. Pratt et al. (2005) refer to the upward trends in sentences as the ‘new punitiveness’, while Roberts et al. (2003) refer to it as ‘penal populism’ – a term which reflects the populist political imperatives behind legislative increases in maximum sentences. While the issue of ‘penal populism’ will be unpacked in considerable detail, my specific interest is to locate the existence, if any, of what I will refer to as “judicial populism” in sentencing decisions, or the extent to which the judiciary resists – within this punitive legislative scope – meting out increasingly severe sentences.

The specifically racialised trend towards punitiveness will be historically linked, in the first instance, to the pervasive sentiment of fear generated by the September 11 terror attacks. Furthermore, because the discussion will be limited to an empirical scope in which the relevant folk devils are “‘Muslim gang rapists”, the relationship between
ethnicity or “cultural difference” and sentencing must be explored in greater detail. The most obvious example of this in recent times, occurred in the sentencing appeal of one of the K brothers in which counsel for MSK – Stephen Odgers – submitted that the culpability of the offender should be reduced on the basis that the cultural circumstances in which he was raised (in North-West Frontier Pakistan), affected his judgment (Odgers 2005). This raises a number of issues around the dialectical relationship between popular morality and the morality that is espoused by the courts. This relationship has been explored in Chapter Two. And in Chapter One, I argued that the correlation between race, ethnicity and punishment can be located in the racialised configuration of moral community and through unpacking the difference between retribution (as a principle of punishment) and revenge. Here I reinforce and expand on my previous arguments that revenge, as opposed to “retribution”, is sought with particular ‘zeal’ against those who are excluded from the boundaries of moral community (Connolly 1995). That the boundaries of moral community are racially and ethnically configured is apparent in the racial, ethnic and cultural characteristics that are attributed to Islamic “terrorists”. The moral cohesion that is sought through the suppression of diversity and severe punishment are of central concern in this chapter, alongside the extent to which the prevalent ideological context affects and informs sentencing decisions.

**Popular punitiveness: ‘we are all safer if they are off the streets’**

Recent studies have shown that in most Western societies, there has been a general increase in sentences and an inclination towards more punitive measures. What has been referred to by some criminologists as a type of “new” or “popular” punitiveness is characterised by longer and harsher prison sentences, a trend towards mass incarceration, and laws which breach principles of proportionality (such as “three-strikes” laws) and basic human rights (Pratt et al. 2005: xii). The contemporary tendency towards more severe punishment is contrasted by Pratt et al. to Michel Foucault’s ‘productive, restrained, and rational’ (2005: xii-xiii) account of punitiveness. The origins of the recent recourse to increasingly punitive measures are complex, widely varying and difficult to determine. Factors attributed to these trends range from an emphasis on growing public concerns about moral cohesion and its decline (Frieberg 2000: 66) to populist politics
seen commonly in the “right-wing” law and order lobby persuading the public of the effectiveness of tougher punishment in deterring offenders (Hudson 1987: 176). It would be more realistic to argue that the “new punitiveness” cannot be located in one particular cause or factor, but a number of overlapping, interrelated and sometimes contradictory agendas.

The most overtly political facet of the new punitiveness however, is what Roberts et al. (2003), have referred to as ‘penal populism’. The term ‘penal populism’ is defined as ‘the pursuit of set of penal policies to win votes rather than to reduce crime rates or to promote justice’ (Roberts et al. 2003: 5). An important defining feature is also that ‘the central tool of penal populism is imprisonment’ (2003: 5). The phenomenon typically arises in the law and order auctions of state election campaigns, where ‘Governments and politicians… are constantly attentive to their political standing on the crime question [and] many appear to welcome the opportunity to show their virility by adopting harsh law and order measures’ (Hogg and Brown 1998: 1).

Roberts et al. (2003) argue that the concept of ‘penal populism’ is not even necessarily representative of public opinion. This argument is generally based on the idea that the term, ‘penal populism’ reflects political opportunism rather than political responsiveness (Roberts et al. 2003: 4); the former operates on the exploitation of an uninformed public, or on general assumptions about the public as uninformed. Roberts et al. argue that no effort is made to educate the public on the reality of crime trends and so “public opinion” becomes based on misinformation and misrepresentation, mainly by the mainstream media. “Opinion polls” therefore represent a reactionary stance about issues on which the public is not even properly informed (2003: 7-9). Further, assessments on opinion polls are based on over-simplified, inadequate and often manipulated methods of collecting “public opinion” (2003: 25). Questionnaires posing simplistic questions about the severity or leniency of sentences for indictable offences, ‘fail to do justice to the complexity of sentencing; no one would consider addressing a question of such simplicity to criminal justice professionals’ (2003: 25).
The simplistic terms in which sentences and sentencing considerations are posed by populist politicians and by the media, propagate judicial leniency and unawareness as ‘common-sense’. Hogg and Brown claim that law and order politics has a ‘common-sense’ dimension in which crime is depicted as ever-increasing and something that must be dealt with quickly and urgently (1998: 7). The political opportunism around crime has been aptly labelled by Hogg and Brown as the “uncivil politics of law and order” – which both creates and exacerbates existing mistrust in the courts and the criminal justice system as a whole, prompting calls for limitation of judicial discretion. Law and order political debate is typically closed and narrow rather than open and inclusive; inclined to disqualify rather than welcome diverse viewpoints; suspicious of knowledge and expertise where it fails to validate pre-existing prejudices; predisposed to populist pandering to private insecurities and resentments instead of the promotion of informed, public-spirited debate; and [the] timeframe is always the short rather than the long term (Hogg and Brown 1998: 2).

In Chapter One, I briefly referred to social conditions of risk which generate collective insecurity and thus provide a fertile ground for the growth of populist punitive discourses. Following Giddens (1990), Anthony Bottoms in his analysis of the philosophy and politics of sentencing, suggests that “populist punitiveness” is partly traceable to conditions of modernity in which we have seen a disembedding of social relations from many of their traditional milieux such as the extended family, the local community, and the church; hence, there has been a relative erosion in the significance, for most people’s daily lives, of these intermediate level social groups (Bottoms 1995: 44-45).

This has resulted in social insecurity and nostalgic yearning for a past that seemed more certain with the contemporary predicament, consisting of ‘abstract systems on which people are expected to rely’, failing to adequately reassure insecure publics (Bottoms 1995: 47). Hudson has argued, ‘it is not surprising that a diminishing sense of the social
should lead to demands for strengthening of the state’ (2003: 56). Popular punitiveness is one way of reassuring an anxious electorate that the State is taking a “tough” stance with criminals and groups and individuals who are perceived not to belong: ‘if society cannot be relied upon, what we are left with is the state to defend us each against the other, and to defend us together with those we do recognise as fellow members against those we define as outsiders’ (Hudson 2003: 56-57). In line with the argument put forward by Roberts et al., Bottoms suggests that in these conditions, ‘a politician seeking popularity can reasonably easily tap into the electorate’s insecurities by promising tough action on “villains” – even if […] the public are actually less punitive than this when confronted with real situations of criminality (Bottoms 1995: 47).

While calls for more punitive measures have mostly been traced to populist political imperatives (Roberts et al. 2003; Pratt et al. 2005; Hogg and Brown 1998), statistics show that judicial decision making has followed the trend. The New South Wales Bureau of Crime Statistics and Research (BOCSAR), show that between 1996 and 2003, the average length of imprisonment in the higher courts for all indictable offences rose from 27.1 months in 1996 to 29.8 months in 2003. This is an approximate 10% increase in general sentence severity for all indictable offences. For ‘sexual assault and related offences’ specifically, prison sentences rose from 32.9 months in 1996 to 38.2 months in 2003 – peaking at 41.7 months in 2002: an increase of approximately 12%. More recent BOCSAR statistics of 2006 indicate that the average rate of imprisonment for all indictable offences is 29.4 months – slightly lower than the 2003 rate, and 40.3 months for sexual assault (BOCSAR 2006). These statistics show substantial increases in sentence severity, which indicates that public perceptions that the courts are “getting softer” are based more on sensationalised media criticism of the judiciary, than fact. The Bureau’s director, Don Weatherburn commented in a Sydney Morning Herald article, that ‘the figures reflected a hardening of attitudes among judges and magistrates…[where] people who previously would have been given non-custodial orders are being given a custodial sentence’ (Pearlman 2005: 14). In the same article, senior defence counsel Andrew Haesler argued that ‘pressure from politicians and the media have led to higher sentences and “revolving door jails”’ (Pearlman 2005: 14). As this statement from
Haesler indicates, judges cannot entirely escape the public pressure imposed upon them from beyond the courtroom: as I will argue later, to attempt to do so would be detrimental to the public’s confidence in the courts.

The judicial system in theory, however, must remain independent, apolitical, and generally unresponsive to emotional public demand. When judges adhere to principles of impartiality and proportionality in sentencing offenders, they are often constructed as falling short of popular expectations of harsher penalties. As a consequence, “public confidence” in the courts wanes during times of social anxiety because the judiciary fails to live up to popular ideals of justice and morality. Arie Frieberg argues that mistrust of the judiciary stems from general ‘judicial resistance’ (through discretion, strict application of proportionality, due process and constitutional and international law principles) to ‘sometimes considerable social and political pressure’ (2000: 58).

Even though judges are constrained by legislative boundaries and subject to public and political pressure, they often resist applying the maximum available penalty to avoid excessive and draconian punishment that precludes prospects of rehabilitation. This reflects judicial independence. For example, in his sentencing judgment for the K brothers, Justice Sully prefaced his decision with a warning against ‘a self-righteous rush towards the maximum sentence’, commenting on the draconian nature of imprisonment for the term of the offender’s natural life by quoting an observation in another judgment that ‘such a sentence cannot lightly be imposed in any civilized society’ (R v MSK, MAK, MRK, MAK [2004] NSWSC 319, at 120. Original emphasis). Sully also remarked that ‘it is wrong in principle for the sentencing Judge to say that he will not impose the literal life sentence, and then to impose a determinate sentence, or a group of determinate sentences, which have in every real and practical sense the same result […] notwithstanding that I am firmly of the view […] that the [present] offences are worst-case examples’ (2004: 122-123). Attitudes such as Sully’s have resulted in popular political moves to restrict judicial discretion through more punitive policies. The tensions between the judiciary and the legislature in this sense will be explored in a later section.
As I have argued in Chapter Two, the role of the mass media cannot be underestimated in its capacity to influence notions of public morality, as well as public perceptions of how effective the courts are doing to administer “justice” and protect “the community”. At the most basic level, the popular media sensationalize reports of heinous crimes, fuel public outrage and appeal to the collective empathy of the moral community, which in turn generates demands for more severe sentences. The legal complexities of a case and the sentencing principles, to which judges must adhere, are obscured in favour of emotive and sensational stories. What results is an incomplete picture whereby judges, and more generally, the courts, are one-dimensionally represented as being out of touch with and ignorant of “community” concerns (Findlay et al. 2005: 57). This was particularly highlighted in a survey conducted by Quantum Market Research in early 2003: “focus groups had indicated that the community's poor opinion of judges was influenced by media reports of criminals being given apparently light sentences for heinous crimes” (Dasey 2003: 16. Emphasis added). The main researcher David Chalke commented that “[t]here’s a real concern that while the cops can catch criminals, the magistrates are being too lenient” (Dasey 2003: 16).

Dominant community perceptions – fuelled and legitimated by populist politicians from both sides of the political spectrum (Pratt et al. 2005; Roberts et al. 2003; Roberts 2002; Beckett 1997) – that sentences are too short and that the judiciary is “too soft”, leads to a general waning of confidence in the courts and a questioning of their ability to protect society from dangerous criminals. In some sense, judges are excluded from the domain of “community” because they are seen as standing beyond it in their decision-making capacity. Because of this general perception, judges are often constructed by popular media and political discourses as unaccountable, “out of touch” with community concerns and in some instances, inhuman. Anne Mooney from Silverwater wrote to the Daily Telegraph letters column, stating: “If the judiciary were real people travelling on trains, walking home from railway stations, being robbed, bashed, shot at, then perhaps these thugs would receive tougher sentences” (“Letters” 3/11/03). This quote reveals that judges are perceived as a group of old, upper-class men – a privileged minority – who are “out of touch” with the everyday, lived realities that touch “ordinary people” and that
their “lenient” sentences are a reflection of this.

Such portrayals of judges are accompanied and fuelled by an anxious and consistent public clamour for escalation of sentence severity and policies to reflect this (Zdenowski 2000b: 67). Federal, and to a greater extent, State level law and order auctions appeal to insecure publics through assurances of tougher and more immediate penalties. This is exemplified in Bob Carr’s State election campaign of 2003 in which pamphlets were distributed across New South Wales promising, amongst other things, ‘Record Police Numbers’, the ‘toughest anti-gang laws in the country, new powers to search for guns, knives and close drug houses’, and ‘Standard Minimum Jail Sentences to put criminals behind bars for longer and make judges accountable’ (2003).

Additionally, there has been a relatively recent focus on the interests of victims of crime and particularly in the current context, on victims of sexual assault. Frieberg has argued that there is a recent trend that privileges the rights of the victim over those of the offender where ‘the victim impact statement comes to carry more weight than the presentence report’, and the ‘delicate sentencing balance between the interests of the offender, the state, and the victim is shifting away from the former to the latter’ (1997: 163). This is not surprising. Emile Durkheim states, ‘it is undeniable that our sympathy must be less for the offender than for his victim’ (1978: 121). However, our tendency to feel more empathy for the victim is not something that is simply attributable to human nature; it is a tendency that is intensely politicised and dependent on a variety of factors that have been outlined in previous chapters and will be more extensively explored in Chapter Six.

My argument in previous chapters is that tabloid media and political campaigns have once again played a significant role in this shift towards the privileging of complainants’ rights over those of the accused in the courtroom. This can be conceptualised through the separation of offenders and victims into abstract moral categories of “good” and “evil”, which underpins a heightened desire to see “good” triumph over “evil” – actualised through concrete, politically motivated policies to ensure that “evil-doers” are punished.
severely. Calls for harsher punishment and the corresponding increase in sentence severity, ensure that the “evil” are literally and metaphorically banished from the moral community of “good” citizens who are potential victims. As I have argued in Chapter Two, it is not unusual for popular cultural formats and the tabloid press to allude to universal and abstract moral categories of good and evil. These moral categories have also been found useful in the context of populist political campaigns. This is reflected in the headline: ‘Carr splits society into good and evil’ (Horan 2002: 4). In a bid to gain electoral advantage before the State election, then Premier Bob Carr told the *Sunday Telegraph* that: ‘There are some people who cannot be rehabilitated and need to be locked up to keep the rest of us safe. There are some people who are bad, just bad. Capital “B” bad. The sad truth is we are all safer if they are off the streets’ (*Sunday Telegraph* 2002: 95).

Pratt et al. point out in their account of the new punitiveness, that public anxiety about ‘dangerous criminals’ and the perceived judicial inability to effectively deal with them is compounded by the ‘mediaization’ of everyday life (2005: xvi). Typically sensational mass media emphases on macabre and morally repugnant crimes, reinforce perceptions that such crimes are on the rise, which inflames public desire to stop evil offenders quickly by way of “no-nonsense”, “results-oriented” measures. The community favours swift and less complex ‘solutions from sources beyond traditional expertise and bureaucratic imperatives’ (Pratt et al. 2005: xvi), and populist politicians respond readily to such public demands. Popular punitiveness is thereby underpinned by:

> [e]xpectations that are minimal – we demand that these institutions keep [criminals] away from us, for as long as possible and as inexpensively as possible. Time in prison has become the metric through which effective response to crime is measured, and we demand more time for more offenders. We are impatient with the numerous community-based alternatives to prison that were pursued in previous decades, because anything that is an alternative to or in lieu of the ‘real’ penalty of incarceration represents a ‘slap on the wrist’ and an evasion of legitimate punishment. (Flanagan et al., 1998: x).
“Community” and Punishment

A recurrent theme in the public discourses calling for more severe sentences is the concern to protect the “community” from heinous crime and the criminals that commit them. The importance of an idea of “community” to moral panic – in its interrelated concrete and abstract manifestations – has been highlighted in Chapter One. A concept of community (both “moral” and more concretely delineated) is also central to punishment. Anthony Bottoms in his account of modern sentencing practices argues that “community”, though an infuriatingly imprecise term, remains highly suggestive to most listeners, and with positive connotations of belonging, support and identity. As such, it may be used in modern societies from a variety of political perspectives, including the left (in which the reference and appeal may be to the idealized working-class community, trade union, or friendly society, etc.) and the new right. It may also be used, more or less consciously, as an attempt to evoke an image of a bygone and allegedly more tranquil/peaceful society (1995: 36).

Here my focus is on the extent to which sentencing and punishment is seen as a concrete consolidation of an abstract or imagined (moral) “community”. Concrete boundaries of an abstract moral community, are delineated by national, geographic, political, ethnic and racial markers. A moral community is also partially defined by the “Other”: by what it is not. Responsibility for violent, heinous acts is collectively denied through blaming the “Other” and the values inherited through the (imagined) marginal community from which the “Other” supposedly emerged. This is reflected in Bob Carr’s comments justifying more punitive measures for “bad” people – it removes “them” from “our” midst. In this way, punishment is a tool that reinforces the boundaries of moral community, with ever increasing zeal towards those who are already perceived not to belong (Connolly 1995: 42).

Aside from being symptomatic of an anxious populace about crime trends which are fuelled by the popular media and populist political campaigns, “popular punitiveness” is also expressive of communal concern to contain groups or individuals who are popularly stigmatised as a threat to society and its values. This is particularly to the point in a post-
September 11 socio-political climate which has marked the beginning of an era popularly labelled as the “age of terror” (Talbott and Chandra 2001). In the “age of terror” Middle-Eastern and Muslim groups have specifically been represented and perceived as threat or folk devils because the perpetrators of the September 11 attack were part of a radical Islamist group. Long before the popularly coined “age of terror”, Edward Said had provided an influential exegesis about the tendency of the West, to link Islam with violence (1978). The relatively recent terror attacks reinforced, in the Western imagination, the perception that Muslims and Arabs were from a different moral universe from Westerners. Kearney observes: ‘The initial response of President Bush [to the September 11 attacks] was to divide the world into good and evil. In the days immediately following the terror, he declared a “crusade” against the evil scourge of terrorism’ (2003: 24).

The significance of constructing abstract divisions such as these – whether on a large or small scale – has already been mentioned in Chapter One: it provides moral orientation and a basis for concrete punitive measures that appear as pragmatic solutions for larger social problems. Reference to the broader, international context of terrorism goes some way in explaining local public reactions to violent crimes such as gang rape committed by “Muslim” perpetrators; it locates the evil outside of nationally, culturally and ethnically defined boundaries of moral community. It is common for popular discourses to associate morally repugnant crimes with events that are larger and more sinister. In the September 11 terror attacks themselves, ‘images of apocalypse were commonplace […] idioms of virus, poison, disease and contamination were variously deployed to express the sense of an omnipresent menace’ (Kearney 2003: 24). On a local scale one conservative columnist Miranda Devine, compared the “Lebanese” gang rapes to a ‘form of ethnic cleansing’ and ‘war on Australian soil’ (Devine 2001a: 15; cf. page 9 of Chapter One).

This is not to understate the horrific nature of the terror attacks or the rapes, but rather to illustrate that such events tend to be represented in public discourses, in abstract universalised terms. In these instances, there was an oscillation between the universal and...
the particular: the dichotomy of good versus evil corresponded in this instance with orientalist thesis that ‘divides the world schismatically into West and East’ (2003: 25). Or, as Kearney puts it, in Bush’s war on terror, ‘one finds a personification of the West versus Islam dichotomy’ (2003: 25).

Solutions for the public anxiety caused by the very real fear caused by threats to community safety, and the more abstract or ontological fear of cultural and ethnic diversity, are often sought through literally exclusionary methods such as longer periods of incarceration. Within a post-September 11 social context, the calls for harsher punishment mainly reflect arguments that ascribe the new punitiveness to fears that moral cohesion is in decline (Cohen, 1972; Hall et al., 1978; Frieberg, 2000; Poynting et al., 2004). Arie Frieberg argues that

public punitiveness is linked more to judgments about social conditions and underlying values than to concern about the level of crime and work of the courts…In other words, the instrumental effects of sentencing policy…are less important than judgments about social conditions: concern over the decline of institutions such as the family, the lack of moral and social consensus, the decline of social ties and a discomfort with growing social and ethnic diversity… [This] leads to more punitive attitudes because people who are sceptical of the courts, of politics and of society in general are also sceptical of the ability of social, welfare and penal agencies to rehabilitate offenders (2000: 66).

Alleviation for the anxieties over conditions described by Frieberg, is sought in security from those who are perceived as existing outside of the dominant culture’s conception of moral community.

The racialised nature of moral panics around “ethnic” or, more specifically, young “Muslim” gang rapists was illustrated to dramatic effect in social reactions to the sentences for a series of gang rapes committed by three Lebanese youths, AEM (Snr), AEM (Jnr) and KEM, from April 2000 through to October 2000 (Crichton and Stevenson 2002b: 30). These cases will be outlined later in this chapter.
Retribution or revenge?: The ascendancy of retribution or “just deserts” in punishment

Retribution is defined as the principle which posits that ‘the imposition of punishment under the criminal law is justified because a person who inflicts harm should receive harm’ (Nygh and Butt 1998). Central to the idea of retribution is the concept of “just deserts”; that the punishment will be proportionate to the seriousness of the offence. This in turn, is based on an idea of community consensus as regards rankings of offence seriousness, which is in turn dependent on shared values (Hudson 2006b: 235). Nicola Lacey argues that

criminal law is understood as being concerned with wrong-doing in a quasi-moral sense [...] crime is conduct judged to be sufficiently seriously in violation of core social or individual interests, or shared values, that it is appropriate for the state to punish its commission. This is a view that sits naturally with a retributive approach to punishment and with a strong emphasis on the symbolic, expressive dimensions of criminal justice (2002:268).

Shared values and community consensus are also presupposed in the words “just deserts”. As Bottoms points out, ‘the concepts of “justice” and “desert” as applied to sentencing are essentially asymmetric concepts, in the sense that it is reasonably easy to establish what is unjust or undeserved, but not what, precisely, is just or deserved’ (1995: 20). However, it seems that in the principle of retribution there is general agreement to the (vague) extent that the punishment administered should reflect the degree of harm imposed by the crime and that the perpetrators hence “deserve” the punishment they receive. In this sense retribution also reflects a collective desire to communicate to the offender the moral wrongness of their actions (Katz 1987). Durkheim refers to punishment as an instrument of social cohesion:

[Punishment’s] real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour [...] The consciousness must therefore be conspicuously reinforced the moment it meets with opposition [...] It is a sign indicating that the sentiments of the collectivity have not changed, that the communion of minds sharing the
same beliefs remains absolute, and that, in this way, the injury that the crime has inflicted on society has been made good (1978: 69).

As noted in the preceding section and in Chapter One, social cohesion is sought during times of moral uncertainty in the face of growing ethnic or social diversity or a decline in “community” ties. Punishment is as a form of risk management (Hudson 2003). It is obvious that the incarceration of violent offenders or those who are morally aberrant to a perceived norm, is going to reduce the real or perceived risks that such individuals or groups present, therefore instilling feelings of security in a community of “right-minded”, law-abiding citizens. Popular discourses around punishment tap into this by making distinctions between abstract moral categories of good and evil, which are then used to justify concrete policies of harsh punishment. If certain people are continuously represented as “evil” then the only “common sense” option is to give them the harsh punishment that they “deserve”. The concept of retribution in this context becomes paramount to justice: “evil” perpetrators receive their “just deserts”. With the exception of deterrence and other principles which are not in direct tension with retributive ideals, other principles of punishment, such as rehabilitation (Connolly 1995; Hudson 1987; Hudson 2003; Pratt et al. 2005; Roberts et al. 2003) are often overlooked in popular constructions of criminal justice (or what criminal justice “ought to be”).

The “new punitiveness” has seen the ascendancy of retribution as the central aim and justification of punishment. Retribution gained precedence, from the 1970s onwards, as a result of widespread disillusionment with the rehabilitative ideal (Brown et al. 2001: 1382; Bottoms 1995: 19). The appeal of the “just deserts” model of traditional retributivism was widespread because it emphasised the central importance of commensurability of punishment with the crime (Brown et al. 2001: 1383). The concept initially appealed to legal professionals, political figures and academics across the political spectrum for varying reasons (Hudson, 1987: 38-39). Furthermore, retribution as a principle of punishment, has appealed to the greater public because it is definable as a ‘ritual which symbolically returns society to its original order’ (Phillips and Strobl 2006: 309; Von Hirsch 1976). Eventually however, “just deserts” ‘came to be most strongly
identified and associated with the conservative “law and order” lobby which saw it as guaranteeing “swift and sure punishment”, ending leniency and the softly, softly approach of giving criminals over into the care of social workers rather than into the control of the prison system’ (Hudson 1987: 39). In the 1980s in particular, conservatives used the principle of “just deserts” to attack the so-called ‘leniency of the judiciary in sentencing’ (Brown et al. 2001: 1376). In this sense “just deserts” came to be closely linked with popular punitiveness or penal populism.

The fact that certain offenders and groups are more likely to attract popular media and political attention over many others who go unnoticed, is significant in the sense that it is seen as “just” to punish more severely some offenders – perhaps because they are seen to “deserve” it more than others. Why some offenders are more morally reprehensible than others and therefore deserving of harsher punishment is dependent on a variety of factors, some of which have been explored in Chapter One. Part of the answer lies in the ambivalence, inherent in the punishment of heinous crimes, between the responsible agent who is deserving of legal punishment, and the dangerous “monster” which must be destroyed or contained permanently (Connolly 1995: 45). “Monster” (as I have argued in Chapter One) is a label which is attached to many perpetrators of heinous criminal acts – it is a creature whose actions we do not understand. The “monster” is often racialised and located outside of the interrelated and concentric boundaries of moral, ethnic, racial and national community. It is not part of “our” moral universe, so we do not owe any moral obligation to the “monster” (Hudson 2006a). This extends to the domain of legal punishment but a contradiction emerges because a “monster” is not a responsible agent deserving of legal punishment, however a “monster” may be destroyed or contained through disproportionately harsh punishment. Alan Norrie notes:

It is a common theme in liberal criminal law theory and the political philosophy of punishment that individual responsibility is that the proper basis for legitimate punishment because of a homology between legal practice and moral thought […] The specific locus of this homology is the retributive theory of punishment that ties law and morality together (1998:102).
In line with this, Connolly argues, ‘if “we” made the line between responsibility and monstrosity too clear and clean we might never be allowed to punish criminals inhabiting minority subject positions with the severity we demand’ (1995: 45).

It appears that retribution (or “just deserts” – concepts which are interchangeable according to most criminologists), in its application to those classified as “monsters” descends into its more visceral manifestation, revenge. Perhaps the difference between retribution and revenge can be found in the principle of proportionality: revenge is not really “an eye for an eye” – it can be grossly disproportionate to the original act that prompted it. It originates from emotion rather than a Western liberal conception of “reason” that underpins legal discourses. However, Durkheim states that ‘in the first place, punishment constitutes an emotional reaction’ (1978: 59). He continues:

And indeed punishment has remained an act of vengeance, at least in part. It is claimed that we do not make the guilty person suffer for the sake of suffering. It is nonetheless true that we deem it fair that he should suffer […] Certainly the term ‘public vindication’ which recurs incessantly in the language of the law-courts, is no vain expression […] What we are avenging, and what the criminal is expiating, is the outrage to morality (Durkheim 1978: 61-62).

The ‘public vindication’ to which Durkheim refers is particularly relevant to the current socio-political context of popular punitiveness in a post 9/11 world. Arie Frieberg has said that a significant part of the popular appeal of retributivism comes from ‘a natural and understandable urge to have some retribution or revenge where you see horrific crimes’ (Insight 2004). I have already begun a discussion of the role of revenge in Chapter One, in arguing that it bridges a conceptual gap between popular notions of justice, (moral) community and the courts. Here I will continue the discussion with more specific emphasis on the relationship between retribution as a “legitimate” principle of punishment that is considered by the courts, and revenge.

There are numerous examples in media, popular culture and political discourses that allude to revenge as a vehicle of justice. The moral community is both influenced by and
influences popular discourses that champion revenge. Aside from the domain of popular culture formats such as “law and order” television shows and comic book narratives that focus on revenge and vigilante action (Phillips and Strobl 2006), examples can also be found in the tabloid media and “Letters” pages of the mainstream press, particularly when certain cases have attracted public outrage and moral panic. Vivid examples are found in responses to the murder of Sydney teenager, Kurt Smith, by four youths on New Year’s Eve 2002. That particular case stirred public emotion that was exacerbated by sentences that were perceived as outrageously lenient. Guilty pleas from the offenders had the consequence of reducing the charges from murder to manslaughter, resulting in sentences that ranged from two years to five for the ‘worst offender’ (Wallace 2005c: 9). The day after the sentences were publicised, the “Letters” page of the Daily Telegraph was inundated by emotional and angry responses. R. Lowe from Lithgow asked: ‘When are judges going to understand that the majority of the public are not as civilised as they think? In crimes like this we want revenge not rehabilitation’. Michael Rees from Camden asked: ‘Every time a judge hands down a sentence to criminals, a message is sent to the community. The sentencing of the four offenders convicted of the manslaughter of Kurt Smith…has to be a joke. What message has been sent to the hoodlums who infest our streets? “Do what you like and nothing will happen to you”’ (Daily Telegraph ‘Letters’ 14/4/05).

The concepts and imagery invoked in these examples are revealing. The first letter simultaneously posits a desire for revenge as “uncivilised” as opposed to the “civilised” desire to rehabilitate offenders, and locates judges in a separate realm from the “public”. This echoes Justice Sully’s argument, quoted in the previous section, in his sentencing judgment for the K brothers, that life imprisonment ‘cannot lightly be imposed in any civilised society’. The second letter refers to the “hoodlums”, such as those who killed Kurt Smith, as an “infestation” on “our” streets. In this latter image, a sense of ownership is expressed of spatial boundaries which should be protected against an “infestation” of “hoodlums”. The term “infest” also conjures images of pests which must be exterminated and controlled: it is a dehumanisation that is akin to the term “monster” – which must also be destroyed or contained. In both letters, “the community” is referred to in some
way and a division is erected between “we” who belong to “the community” on the one hand, and judges, criminals or deviants on the other. Here there is a moral dichotomy between the community and criminals, and judges are placed in an isolated category that appears to stand beyond this dichotomy. The moral and symbolic standing of judges will be explored in more depth in Chapter Five.

Connolly argues:

> The desire to punish crystallizes at that point where the shocking, vicious character of a case blocks inquiry into its conditions, repressing examination of uncertainties and ambiguities pervading the very concepts through which it is judged. Where astonishment terminates inquiry, the element of revenge is consolidated (1995: 47).

Particularly apt is Connolly’s contention that shocking crimes quash the spirit of inquiry, because crimes that offend the moral consciousness are more likely to generate an emotional reaction than considered judgment about the circumstances of the case. The latter duty is reserved for the courts, which partially explains why the courts are considered too lenient on offenders – often labelled as “monsters” – who are popularly seen as “undeserving” of fair treatment. This is as applicable to due process rights during the trial, as it is to sentencing and punishment.

**‘Ridiculously lenient sentences’ for AEM, KEM and Others**

In relation to sentencing, examples can be found in comparing public reactions to Judge Megan Latham’s sentence for the gang rapes committed by AEM and his cohort, and the public reactions to Judge Finnane’s sentence to Bilal Skaf. The fact that these cases involve the morally shocking crime of group sexual assault is significant because, as Bottoms points out, ‘the kinds of offences that are most likely to be the subject of “populist punitiveness” stances are violent and sexual offences, on the one hand, and drugs on the other’ (1995: 40). Another significant factor is that both cases involved Australian-Lebanese youths. The ethnic and cultural dimension of these cases and how it may have increased the moral offensiveness of the crimes, and the effect this had on the
sentences, is something that will be subsequently explored.

In the present context, the significance of \( R \, v \, AEM \, (jnr) \, \& \, AEM \, (snr) \, \& \, KEM \) resides in the fact that it created empirical circumstances in which Bilal Skaf was to be later sentenced. Two of the perpetrators in this case were brothers, and the third was related to them through marriage. There were a series of approximately 12 reported attacks committed by this same “gang” yet not all were present for each attack and the last of them was the only one to attract media attention (Warner 2004: 346). The heated public debate that arose around this case was due to the perceived (or real) leniency of the sentences received by the perpetrators, who pleaded guilty and had their sentences reduced as a result. The case was tried before Sydney District Court Judge Megan Latham, who sentenced the offenders on 23 August 2001.

[Latham J] sentenced AEM, aged 19 years, to 6 years imprisonment (4 years minimum), his 16-year-old brother KEM to 5 years 7 months (3 years 6 months minimum) and a third youth to 18 months for detaining with intent to hold to advantage. Another youth, MM, a cousin of the brothers, was sentenced later to an effective sentence of 6 years with a minimum of 4 years (Warner 2004: 347).

During the trial, conservative sections of the media reported that the crimes were racially motivated and state politicians, eager for electoral advantage, readily agreed (Johns et al.: 2001). Judge Megan Latham did not succumb to the media campaign, nor did she agree that there was evidence before her that the attacks were racially motivated (Warner 2004: 347). Her sentences ‘left the tabloids and the talkback opinion-vendors, and the politicians who are so much at their mercy…as well as the Police Commissioner, disappointed and outraged’ (Poynting et al. 2004: 130). Premier Bob Carr responded to the public furore in response to Latham’s original sentence by promptly organising a meeting with Chief Justice Spigelman to discuss the ‘ridiculously lenient sentences’ (Crichton et al. 2001: 4). The meeting resulted in an appeal of the sentences by the DPP, the introduction of legislation in Parliament creating a new offence of aggravated sexual assault in company with a maximum penalty of “life imprisonment” (Johns et al. 2001; Warner 2004), and the subsequent increase of the sentences for AEM and others by the
New South Wales Court of Criminal Appeal. A legislative amendment to the *Crimes Act (Aggravated sexual assault) Bill* in 2001 created a specific description for the crime of ‘gang rape’. The new legislative strand of sexual assault was assigned a term of punishment which ranged from 25 years to life imprisonment. Prior to 1981, the indictable crime of ‘Aggravated sexual assault in company’ carried a single maximum term of life imprisonment which was then replaced by ‘a sliding scale of maximum penalties which ranged from 20 years to 2 years’ (Johns, Griffith and Simpson, 2001: 2). The change was to some extent prompted by the fact that judges were reluctant to impose the single life sentence because of pragmatic factors; part of the reasoning was that it prevented ‘victims from proceeding with the complaint; and its magnitude deterred alleged offenders from pleading guilty’ (2001: 6).

The sentences handed down by Justice Latham were in fact the norm for aggravated sexual assault with some of the worst cases receiving a maximum of 7 or 8 years (Poynting et al. 2004: 132; Johns et al. 2001: 18). Nonetheless, the sentence caused much public controversy and led to legislative amendments that laid the groundwork for the subsequent 55 year sentence given to Skaf as “ringleader” of the Bankstown rapes (tried in 2002) as well as heavy sentences for subsequent sexual assault convictions: particularly those which have been highly publicised, involving “ethnic” offenders. The fact that the offenders were of Middle Eastern background was of substantial political consequence because the sentences coincided with parallel moral panics about terrorism and immigration from the Middle-East (Johns et al. 2001; Poynting 2004; Gleeson 2004; Warner 2004). In this case, the outrage around the sentences emanated from a collective desire for revenge against those who were seen as invading the spaces of the racially and ethnically defined moral community: they infested “our” streets and raped “our” women (Crichton and Stevenson 2002a). One headline stated that the offenders were responsible for ‘[a] season of terror: rape in the suburbs’ (*Sydney Morning Herald* 2002: 31. Emphasis added). Balancing the demands of moral standards in the “community”, with principles of legal justice and proportionality presents substantial difficulties for judges. In his sentencing judgment for the K brothers, Sully J has referred to a decision by the New South Wales Court of Criminal Appeal in *Camilleri* (unreported, NSWCCA, 8
February 1990): ‘A sentence imposed must be commensurate with the seriousness of the crime in the sense that it should, having regard to all the proved circumstances, accord with the general moral sense of the community’ (cited in Regina v MSK, Regina v MAK, Regina v MRK, Regina v MMK [2004] NSWSC 319). An irreconcilable tension resides in the gap between what is considered commensurate by the courts on the one hand and the “community” on the other.

‘Finally a judge is getting it right’: Bilal Skaf’s 55-year sentence

The Bankstown gang rapes involving Bilal Skaf and his cohort (also including a brother and cousins) were tried within the same political atmosphere that saw the creation of specific legislation for ‘aggravated group sexual assault in company’ and its maximum penalty of life imprisonment. In the original sentencing judgment for Bilal Skaf – who was given the lengthiest sentence as “ringleader” – Judge Michael Finnane indicated that each offence of sexual intercourse without consent was ‘of the worst kind’ and that the ‘courts cannot tolerate such offences’ (Finnane, R v X, DCNSW, 15 August 2002: 10). He continued:

The principle of totality means that particular individual sentences in a total sentence could receive a lesser sentence than if they were imposed on a sole offender for one offence. If that were not so and I just cumulated every sentence, the offender would get a sentence that was utterly unrealistic and it would be beyond his own lifetime. Courts cannot impose such sentences… *I have to make it plain that the sentences which I am about to impose in total mean that he will spend most of his life in gaol…I make it plain where I specify non-parole periods I am giving the offender close to the statutory period available, as he shows no contrition or remorse. If anything, he demonstrates just straight out contempt for the whole proceedings. I see no reason to give him the benefit of any significant reduction in his parole period* (2002: 10-11. Emphasis added).

The offences for which Skaf was convicted and sentenced, included: ‘detain for

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17 The numbers in the references that appear beside the year of judgment, reflect page numbers rather than paragraph numbers in the original sentencing judgment. This is due to the fact that the original District Court sentencing judgment was not available online. The judgment I am referring to is a reproduction of the original from an online *Four Corners* transcript (16/9/02).
advantage’ (s 90A of the *Crimes Act*) – which carries a maximum penalty of 20 years imprisonment and 14 years imprisonment if the victim escapes without substantial injury; aggravated sexual intercourse without consent in company (s 61J) – which carries a maximum penalty of 20 years imprisonment; assault (s 61) – which carries a maximum penalty of 2 years imprisonment; aggravated indecent assault in company (s 61M) – with a maximum penalty of 7 years imprisonment; aggravated act of indecency (in company) for which s 61O provides a maximum penalty of 3 years imprisonment and finally, perverting the course of justice for which s 319 provides a maximum penalty of 14 years imprisonment (*R v Bilal Skaf* [2005] NSWCCA 297 at 7).

Judge Finnane had split his sentence for Skaf into three parts: for offences that occurred on 10 August 2000 at Northcote Park in Greenacre – for which Skaf was convicted of 14 counts of forced sexual intercourse with two separate victims; a second set of offences that occurred on 12 August 2000 at Gosling Park, Greenacre with another victim; and a third set of offences that occurred on 30 August 2000 with yet another different victim. All together, Bilal Skaf was convicted of 21 counts of sexual intercourse without consent with four different young women. For 7 of those counts, Skaf was convicted as the principal offender, where he was given the maximum penalty of 20 years for each count (Warner 2004: 349). The final outcome was an aggregate head sentence – taking into account the effect of accumulation and concurrency – of 55 years with a non-parole period of 40 years (*Regina v X*, District Court of NSW, Criminal Jurisdiction, 15 August 2002). Judge Finnane made various remarks throughout his sentencing judgment which indicate that his desire to punish Skaf severely for his offences was paramount, as his prospects of rehabilitation were low. For one of the counts of forced sexual intercourse Finnane said, ‘It merits more, but to impose any more as a total would be to take a total sentence beyond the bounds of reality’ (*R v X*, 2002 at 12), while elsewhere he said that he was constrained by the law to make the sentences concurrent rather than cumulative ‘because to do so would be to increase the sentence beyond the bounds the law would tolerate’ (*R v X*, 2002 at 11).

The public reaction to Skaf’s sentence was opposite to the reactions of outrage around the
sentences handed down for AEM and others. The 55-year sentence in particular was celebrated as a rare instance of justice served by the courts. Dramatic media headlines reflected this: ‘Sword of justice fells worst rapist’ (Crichton 2002: 1), ‘True Justice’ (Sunday Telegraph headline in ADB 2003: 62). Elsewhere, then Premier Bob Carr said that ‘it was the sort of sentence the community expects’ (Age 2002: 3). That the ‘ringleader’, Bilal Skaf and his gang of rapists would be locked away for a very long time provided “the community” with a sense of security – a fact that was illustrated by members of the public sending letters of praise, particularly about Finnane’s 55 year sentence, to the “letters” pages of the mainstream press. Many letters articulated a collective sigh of relief. This is very clearly articulated by Laine Preston of Randwick who said: ‘It is a profound relief that finally a judge is getting it right. The sentencing of that barbaric sociopath […] is sending a much needed message to society’ (Letters, Daily Telegraph 2002: 18). S.A. Miller’s letter from Kirribilli, Sydney stated:

[Judge Michael Finnane] clearly possesses an ability to understand the feeling in the community of extreme outrage and revulsion in relation to the Muslim Lebanese gang rapes. The Australian people are indebted to him, for our country is, today, a far cleaner, nicer, safer place to be (Letters, Daily Telegraph, 17/8/02: 18. Emphasis added).

Again, these letters indicate that the “we” of a popularly constructed cultural and moral “community” was taken for granted as the opposite of a cultural, ethnic and moral “Other”. Skaf’s sentence was applauded as a rare instance in which legal and popular notions of justice coincided: Finnane was upheld as a judge who ‘finally got it right’ and was “in touch” with the concerns of a community of “real people”.

‘I think it was probably a bit too much’: reduction of Skaf’s 55-year sentence

However this renewal of faith in the judiciary was short-lived, only lasting until the New South Wales Court of Criminal Appeal (NSWCCA) reduced Skaf’s sentence. The reduction of the sentence took place over two separate intervals: the first resulted from one of Skaf’s convictions being quashed because of juror misconduct in the trial. This

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18 More examples are provided in Chapter 6.
brought the head sentence down to 46 years – commencing on 12 February 2001 and expiring on 11 February 2047. The total non-parole period was reduced to 30 years, with the non-parole period expiring on 11 February 2031 (R v Bilal Skaf [2005] NSWCCA 297). In addition to this initial reduction, the sentence became the subject of appeal on ten grounds. On 26 July 2005, six of the ten grounds were upheld by the NSWCCA. The grounds of appeal were based in errors of fact or judgment or both by the sentencing judge. Grounds one, nine and ten however, are most relevant to this analysis. Ground one states that ‘His Honour erred in imposing the maximum available statutory sentence in circumstances that did not constitute the worst class of case’ (2005: 34-56). The basis of ground nine was that ‘[t]he sentencing proceedings miscarried as a result of the failure of the learned sentencing judge to maintain an appropriate level of judicial impartiality’ (2005: 110-114). Ground ten was that the ‘sentences were individually and collectively manifestly excessive’ (2005: 114).

Grounds one and ten are linked because Finnane’s categorisation of the offences into ‘the worst class of case’ resulted in ‘manifestly excessive’ sentences. In considering ground one, various other sexual assault cases were outlined by the CCA judges – with varying features of aggravation. The cases outlined19, of sexual intercourse without consent, included aggravating features of: break and enter (R v Boatswain and R v Roberts); use of an offensive weapon – knives in all cases and in one case, a gun, bottle and baton (R v Presta); forced oral, vaginal and anal intercourse; actual bodily harm during and after the sexual assaults; drugging; and subjection to humiliating acts and torture which included leaving victims bound and naked and urinating on them (Boatswain, Roberts). Though the CCA judges expressed that it ‘would be both undesirable and inappropriate to seek to define the requirements of the category of the worst class of case’ (2005: 54), they accepted the submission from Skaf’s counsel ‘that for an offence to be regarded as belonging to the worst class of case, the Court would require that there be some additional element or elements such as torture, or the infliction of bodily harm, or the performance of degrading acts such as urinating on the victim’ (2005: 53). The latter

statement was removed from its context by the media and was the subject of much public controversy and outrage. More to the point however, is that the comparisons highlighted the fact that Skaf’s offences could not be categorised as the worst class of case (2005: 55). The judges of the NSWCCA therefore concluded that Skaf’s convictions should not have attracted the statutory maximum – neither individually nor collectively (2005: 55; 122) and that overall effect of the accumulation of sentences was excessive (2005: 122).

Ground nine is based on the view that Justice Finnane did not exercise the appropriate level of judicial impartiality in relation to the Skaf trial. The submission concentrated on two particular statements made by Finnane. The first referred to Skaf as ‘the leader of the pack, a liar, a bully, a coward, callous and mean. He is in truth a menace to any civilised society’ (cited in 2005: 111). In the other statement Finnane said that the ‘prisoner and these men treated [the complainant] much like wild animals treat prey they have killed’ (2005: 111). Defence counsel argued that these statements were excessively emotional, indicating failure of the sentencing judge to perform his task judicially however the NSWCCA judges disagreed and stated that the sentencing process miscarried for other reasons (2005: 113).

Then again, it is quite common for judges to inject moralising commentary into their sentencing judgments – both of a general nature and those which specifically castigate the offenders and their actions, and provide warnings to others (Hall et al. 1978). A good example can be found in Justice Sully’s recommendation, when he sentenced the K brothers, that the disturbing tape recording of the triple-0 call made by one of the victims after her and her friend had been raped, be used as an educational tool in schools to warn ‘young people, boys and girls alike, of the need to take care not to become in the one case a perpetrator, and in the other case a victim, of any form of sexual offence’ (R v MSK et al. 2004: 141). Sully J finished with the ominous warning that ‘if you do go to gaol for such a crime, then you will be as much at risk from others as your victim was at risk from you. Anyone that tells you that gaol is a tax-payer funded holiday has obviously never had a proper look inside a gaol’ (2004: 145). In this extraordinarily frank comment Sully obviously stated that the prisoners are likely to be raped in gaol, and implied that this is
accepted, in reality, to be part of the punishment.

Public debate around the Bankstown gang rape sentences, mainly, but not exclusively in relation to Skaf, was reignited when the sentences were reduced by the New South Wales Court of Criminal Appeal. Many public commentators and politicians were incredulous that the crimes were not seen by some members of the judiciary as being within the worst category of offence. Yet, a common refrain in legal and academic circles was that ‘even murder does not attract such a severe sentence’ (Interview 22/2/07).20 The Crown Prosecutor in those trials, herself stated in my interview with her, that the crimes were not in the worst category of offence, and that the sentence far exceeded her expectations:

You’ve got to remember that it was for 22 counts for four different women, but I still think it was probably a bit too much […] I really thought that about 30 years maximum, 22 or 24 years minimum term would have covered it and wouldn’t have been so sensational […] I think it was excessive […] 55 years is fairly crushing for such a young man (Interview 22/2/07).

In the furore that followed the reduction of the sentences, the New South Wales government and the Director of Public Prosecutions (DPP) applied to the High Court for an appeal against the reduction (which was widely believed to be an insult to the victims). Despite these efforts, the appeal was rejected by the High Court. This raises an interesting point in that the DPP appealed to the High Court to reinstate a severity that even its own leading prosecutor, indeed the prosecutor on the case in question, conceded to be manifestly excessive. This sort of action in tandem with the government in the context of the furore is worth underlining to demonstrate how the legal system can react to heightened episodes of public outrage.

The significance of the final reduction of Bilal Skaf’s sentence is that it illustrates the general independence of the judiciary, and a fundamental disjuncture between legal and

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20 The issue is not only one of proportionality. It also has to do with the perpetrators having “nothing to lose” by murdering their victims and thus doing away with the principal witness(es). For example, there was evidence of some discussion amongst the K brothers to kill their victims because of what happened to the boys in Bankstown (Field notes 30/09/03).
judicial, (mainstream) media, and political discourses. While the legal sphere generally seeks proportionality in punishment, popular public discourses display a thirst for revenge. In my interview with a retired District Court judge, I asked him what he though drove public demands for harsher punishments. He replied:

The innate bloodlust that’s in us all. I call it bloodlust. Desire for vengeance. The same motivation has led to thousands of people being on the square where the guillotine was chopping off heads. Or the thousands that used to go to Newgate to watch hangings. It’s the same thing. Now, I remember getting told off by a politician for saying that, he said “Oh no, that’s wrong. We are all good Christians. We do not seek revenge. We seek to prevent crime” (Interview, 24/04/07).

The disparity between, and the judicial reasoning behind the original and the reduced Skaf sentence shows how at different times, different members of the judiciary may respond to or resist public and political pressure for more severe punishment. This is also evident in the difference between Judge Latham’s sentence for AEM and others, and Judge Finnane’s original sentence for Bilal Skaf.

The Judiciary v the Legislature: political restrictions on judicial discretion

There have been moves – suggested from a number of different quarters but mainly the populist law and order lobby – to make judicial decision-making more consistent and sentences more severe, through the legislative reduction of judicial discretion. Judicial discretion is already subject to legislative boundaries. As Justice Sully pointed out to the accused in the self-represented segment of the K brothers’ trial: ‘in deciding how you are to be sentenced, I have to sentence you according to the law, not anything else… Many people think that judges presiding over criminal trials can do anything they like…[but] judges are bound by the law just like everyone else’ (Field notes 1/03/04). Yet, as Sully points out, this is often overlooked. In response to the furore that erupted over Latham J’s sentence for AEM and others, Premier Bob Carr had said: ‘We want to send a clear message from NSW families [to the judiciary] that judges must take a tougher attitude […] It is clear we need tougher legislation and a guideline judgment that the courts can follow for these terrible crimes’ (Sun-Herald 2001: 26). President of the NSW Police
Association, Ian Ball was more forthcoming: ‘Some members of the judiciary have
decided, for whatever reason, they’ll exercise their own social conscience without having
to live with the consequences. You don’t see many of them living out where people
experience crime daily’ (Devine 2001c: 17). The implication here is that judges, when
left to their own devices fail to live up to the standards of justice that are expected by the
community.

Thus, populist penal policies seek to tighten the legislative boundaries of judicial
discretion through policies such as guideline judgments, standard minimum sentencing
legislation, ‘mandatoriest’ and proposals of ‘grid sentences’, which set strict guidelines to
encourage both consistency in sentencing, greater adherence to “community standards”
and expectations, and the increased accountability of the judiciary to parliament
(Zdenowski, 2000a; Frieberg, 2001; Roberts et al., 2003). While acknowledging the
merits of consistency in sentencing (Zdenowski, 2000b; Cowdery, 2004; Spigelman CJ in
R v Jurisic, 1998) judges and legal academics have expressed disapproval of the
standardisation of sentencing judgements – arguing that each case is fundamentally
different and must be judged accordingly (Cowdery, 2004; Spigelman CJ in R v
broader level, judges have argued that such restrictions impinge on the democratic and
constitutional imperative of judicial independence, thereby undermining the rule of law.

The initial legislation to guide judicial sentencing judgments was the Crimes (Sentencing
Procedure) Act 1999. This legislation set “standard non-parole periods” ‘for an offence in
the middle of the range of objective seriousness’ (Section 54A(2)). The Act included a
table of offences and the recommended standard periods of imprisonment for each
offence. The standard non-parole period for aggravated sexual assault in 1999 was 10
years and for aggravated sexual assault in company – 15 years (s54D (2)). This
legislation, though providing guidance to judges, did not considerably restrict judicial
discretion. Jacobs J has commented: ‘the [judicial] fixing of the non-parole period is the
fixing of the time which not only reflects community attitudes on the minimum
retribution called for but represents also the best assessment of the earliest time that can
be made by an experienced person, namely a Judge of how the particular individual may be likely to react to parole’ (Jacobs J in *Portolesi* [1973] 1 NSWLR 202 at 209). The 1999 legislation, though it functioned to fix non-parole periods, seemed to be more in line with the view that judges are in the best position to ascertain the appropriate non-parole period – therefore allowing broad non-parole guidelines in which wide discretion could be exercised.

In the recent punitive climate, judges are trusted far less. The 1999 Act was amended in 2002 in order to establish a renewed and more restrictive scheme of standard minimum sentencing for a large number of serious offences, and also to institute the “New South Wales Sentencing Council” to collaborate with the Attorney General on sentencing issues (*Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002). The amendment functioned to further restrict judicial discretion. The new legislation also inserted section 3A into the 1999 Act, which created two additional purposes for punishment: denunciation and ‘to recognise the harm done to the victim of the crime and the community’ (Cowdery, 2004: 14). The aim of section 3A was to reflect the “objective” seriousness of the offence in line with community expectations and standards, and adjust the punishment accordingly. Underlying these more obvious goals, the legislation could be interpreted as a desire to shift power away from the judiciary to the legislature and executive – both exploiting and enhancing popular disenchantment with the judiciary (Ashworth 1987: 37). As Ashworth points out, ‘there has been a tendency for the legislature and the executive to seek other means of exerting control over the effects of sentencing decisions. Parole is the foremost example, and it may fairly be said that the broader the ambit of a parole system, the more power over sentencing is shifted away from the judiciary to the executive’ (1987: 37).

One way in which judges resist legislative direction on sentencing is through the approach of “instinctive” or “intuitive synthesis”. ‘Instinctive synthesis’, as defined by Chief Justice Spigelman, is the ‘wide range of incommensurable, and sometimes conflicting, objectives – deterrence, retribution, rehabilitation, and public condemnation […]which] must be brought together by a sentencing judge’ (Spigelman CJ in *R v
Spigelman continues to say that ‘in the case of sentencing ‘the only golden rule is that there is no golden rule [...] The instinctive synthesis approach is the correct general approach to sentencing’ (2001: 1438). This approach to sentencing stands in contrast to the more restrictive “two-tier” approach, which posits that the ‘sentence should be proportionate to the gravity of the offence unless the applicant’s history warranted departure from the principle’ (Brown et al. 2001: 1438). The latter judicial approach is criticised on the basis that there is no such thing as “the proportionate sentence” (2001: 1438. Original emphasis).

Resistance to limitations on judicial discretion stems from arguments that it undermines judicial independence and procedural fairness, and that sentences are already effectively reviewed by appellate courts (Zdenowski, 2000b: 59). Frieberg has pointed out, ‘Australian courts remain firmly of the view that the retention of wide judicial discretion is necessary and that individual justice is possibly more important than some more abstract notion of systemic fairness’ (2001: 35). The imposition of limits on judicial discretion has not in Australia, reached the heights that it has in other Western countries. This is mainly due to a culture of resistance within the courts and legal profession, in the face of such reforms: ‘even relatively moderate attempts to structure judicial discretion have met with a lukewarm response’ (Frieberg 2001: 36). Nonetheless, the legislative developments here outlined illustrate the tendency for the Australian government to follow Western liberal democratic trends towards punitiveness and create populist strategies to limit judicial discretion and make the judiciary more accountable to Parliament. This is particularly the case within a climate of post-September 11 anxiety. Such statutory measures both exploit and exacerbate widespread suspicion of the courts during times of fear (Roberts et al. 2003; Bottoms 1995; Pratt et al. 2005; Frieberg 2001; Zdenowski 2000b; Hogg and Brown 1998).  

The relevance of legislative limits to judicial discretion is not only traceable to populist

21 There has, very recently, been a noticeable public appreciation of the courts’ integrity in the face of government manipulation in areas of ‘anti-terrorism’ and asylum seekers. The case of Mohammad Haneef was a notable example in Australia and the positive involvement of the media was here a factor.
punitiveness, which aims to take control of the sentencing process. The obvious message put forward by populist moves to limit judicial discretion, is that judges cannot be trusted to keep the “community” safe without the aid of other arms of government. Beneath this is yet another reference to the importance of a popular concept of “community” and the implication that judges – along with perpetrators and other minority groups – are excluded from its realm. As examples given from newspaper letters columns and comments made by political figures have indicated thus far, judges are not “real” or “ordinary” people. This begs the question of who is regarded as an “ordinary person” or who can be afforded legal status as a responsible subject – deserving of proportionate punishment instead of straight-out revenge. While the ethnic, racial and gendered characteristics of the “ordinary person” will be explored in the following chapter, here I am interested in whether perpetrators that belong to racially or ethnically marginalised groups are more likely to incite revenge in the form of disproportionate punishment. It is to these considerations that I will now turn.

Race, Ethnicity and Sentencing: A “cultural time-bomb”? 

Thus far, the only avenue through which sentences have been linked to the race or ethnicity of the perpetrators is through reference to the broader ideological climate in which perpetrators from minority ethnic, racial or cultural groups are sentenced. The sentences for the “Lebanese” gang rapists have been situated in a post-September 11 context in which there was also pervasive fear of “illegal immigration” from the Middle-East. The rapists were believed to be in the same racial, religious or ethnic group as the perpetrators of the terrorist attacks and the boatloads of immigrants that were “invading” Australian waters (Poynting et al. 2004; Warner 2004). The “Lebanese” gang rape cases also added to the political backdrop in which four Pakistani immigrant Muslim brothers – the K brothers – were sentenced for gang rape two years later.

As a consequence of the broader ideological environment, the entire “Lebanese” and / or “Muslim” community was held responsible and therefore criminalised for the crimes of a handful of youths in the AEM, Bankstown and K brothers’ cases. Individual legal responsibility seemed to become irrelevant in the popular sphere, and as indicated by my
reference to Connolly’s argument below, the related political rhetoric around punishment slipped into a ‘murky’ conceptual space that wavered between punishing a legal subject and destroying a racialised monster (Connolly 1995: 45). On an interrelated conceptual level, the racialised monster could not be a legal subject because it is denied the right to be an “ordinary person” who, as I will argue in the following chapter, is imbued with a set of ethnic and racial characteristics. The implications that the concept of legal responsibility and “ordinariness” has for punishment of the ethnic or racialised “Other” are multidimensional and complex.

Up until this point I have focused mainly on the sentence of Bilal Skaf due to its remarkable severity and the fact that it was embedded within a social atmosphere of moral panic about “Lebanese, Muslim” gang rapists. The ethnicity or cultural background of the perpetrators was not an obvious or specific feature of sentencing considerations, nor was it raised as an issue in the Court of Criminal Appeal. To the extent that the ethnicity of the perpetrators was mentioned, it was raised in relation to convictions and the potentially prejudicial effect that the prevailing anti-Lebanese sentiment would have had on the jury (Regina v Tayyab Sheikh [2004] NSWCCA 38). This was outlined in some detail in Chapter Two. In the K brothers’ case however, “culture” was a central issue throughout the trial and later, in the sentencing submissions put forward by MSK’s counsel upon appeal. The sentences themselves for the first set of offences that occurred in July 2002 on victims HG and LS were substantial but not the maximum: MSK and MAK received 22 years each, MAK received 16 years, while MRK was given 10 years for being in the same house while the offences occurred (Regina v MSK, Regina v MAK, Regina v MRK, Regina v MMK [2004] NSWSC 319).

What is of more interest here than the length or severity of the K brothers’ sentences, is the substance of MSK’s sentencing appeal submissions. MSK’s counsel, Stephen Odgers, argued that the offender’s culpability must be lessened and his sentence reduced on the basis that he would interpret the circumstances in which he found himself substantially differently to someone who was raised in Australia or another, culturally similar, Western country. In these submissions, MSK was famously referred to as a “cultural time bomb”
by his legal counsel. Sociologist, Professor Michael Humphrey was called on as an expert witness who had researched the specific tribal culture in North West Frontier Pakistan where the K brothers (particularly MSK, being the eldest) were raised for most of their lives (Odgers 2005). Aspects of the culture that Humphrey described were as follows:

[It is] a tribal culture with strong patriarchal values and an honour code enforced by personal violence; the honour code [...] makes men responsible for their women economically but also allows them control over their everyday lives and moral behaviour [...] Men have control over women in all areas of their lives; men’s authority over women is reinforced by the legal system [and] rape is a crime that is prosecuted rarely (Odgers 2005: 6).

Elsewhere, Odgers quoted Humphrey’s arguments that the factual circumstances in which the offender found himself would, in North West Frontier Pakistan, ‘almost certainly be found in a brothel’ and that the ‘proposition that a girl in this situation could take control by asserting her rights – i.e. saying no – would be very difficult in a patriarchal tribal culture where women are treated as dependants and legal minors’ (2005: 7). The substance of the submissions then, were that ‘the offender, by reason of this cultural background, did not appreciate, or did not fully appreciate the wrongness and criminality of his actions’, and that this, to an extent, diminished the culpability of the accused (Odgers 2005: 6). Humphrey asserted that in the scenario in which the accused found themselves, the girls would be seen ‘as morally loose and available for men’s sexual gratification and [...] saying “no” would not be regarded as sufficient to require a man from not having sex with them’ (2005: 7).

As I have briefly mentioned in Chapter One, these submissions were met with a chorus of disapproval from the media, politicians and the public, and also the judge – Justice Grove – who heard the submissions. Grove J rejected the appeal and said that Odgers’ submissions were ‘inappropriate and inapt [and that] it would understandably be regarded as offensive by those who fell within the scope of its insult’ (cited in Odgers 2005: 15). Other legal professionals, when I asked them about their professional opinion on Odgers’ argument, did not comment on the substance of the argument as much as the harsh
response he received from Justice Grove and the media. One interviewee – a legal
defence barrister – indicated that Odgers ‘had it coming’ by attaching as sensational a
term as “cultural time bomb” to his argument and that such a label was ‘a reckless media
stunt’ (Interview 24/2/06). Another criticised it by saying: ‘I think …Odgers’ view
there…I don’t think he’s ever been to Pakistan. I don’t think it’s based in reality, and I
think he’s just misinformed about those comments’ (Interview 7/2/06). The problematic
nature of Odgers’ argument will be unpacked further in Chapter Four. For now the focus
is on issues that such an argument raises in relation to sentencing and the notion of
community that is implicated in the need for punishment (or revenge).

Odgers, in his submissions, raises common law instances in which “cultural background”
has been posited as relevant to sentencing. He quotes Brennan J:

The same sentencing principles are to be applied, of course, in every case, irrespective of
the identity of a particular offender or his membership of an ethnic or other group. But in
imposing sentences courts are bound to take into account, in accordance with those
principles, all material facts including those facts which exist only by reason of the
offender’s membership of an ethnic or other group. So much is essential to the even
administration of justice (Neal v The Queen (1982) 149 CLR 305 at 326 in Odgers 2005:
15).

Brennan J’s reference to ‘the even administration of justice’ is significant on both
concrete and conceptual levels in the overlapping discourses around punishment.

David Faulkner claims that the ‘debate on race and ethnicity [in sentencing] has been for
many years focused on the need to prevent discrimination… [and] promote racial
equality’ (2002: 61). There is extensive debate on the way in which equality can be
promoted; whether it is best advanced through the formal equality that is espoused by
anglocentric legal systems and Western liberal theory more generally, or through an
acknowledgement of cultural, ethnic and racial difference, so that the “Other” is not
rendered invisible within a dominant cultural norm. Odgers’ argument follows the latter
formulation. Formal equality – which broadly applies to everyone irrespective of
cultured, gendered or socio-economic difference – overlooks the difference of the “Other” by imposing on them a standardised norm. The shortfalls of the “universal” equality espoused by legal discourses will be explored in the following chapter. The inherent contradiction in arguments such as Odgers’ is that an acknowledgement of difference can have the counterproductive effect of reinforcing and legitimating racist stereotypes around certain cultural groups. The pragmatic merit and good intentions that underpin notions of formal and substantive equality do not save them from the ethical ambivalence that plagues concepts of equality and difference in a criminal justice context.

This is evident in comments by some members of marginalised groups indicating that a type of institutional racism has affected sentencing outcomes for offenders from certain cultural backgrounds. One youth from Bankstown said, ‘if he was an Anglo Saxon he wouldn’t have got that many years’ (Ramsey 2002, in Gleeson 2004: 13). Similarly, the eldest of the K brothers, MSK and MAK, proclaimed that the entire criminal justice system was complicit in a racist, “anti-Muslim” conspiracy, which forced them to represent themselves (Glendinning 2003a: 5; Field notes 29/10/03). To speculate on the validity of such allegations seems absurd, at least from a legal viewpoint. However some weight must be given to the broader socio-political context of moral panic against “Muslims” and subsequently “Muslim gang rapists”, in which the trials were conducted and the sentences handed down.

Faulkner argues, in relation to sentencing and punishment generally, that the ‘debate took a new dimension after the terrorist attacks in the United States on 11 September 2001 [and] religion especially Islam, became a new focus of attention’ (2002: 61-62). There is no need to here reiterate the argument outlined in the earlier section of this chapter about moral panics and the ‘new punitiveness’ in an ‘age of terror’. It is, however, worth reiterating a couple of major points. The first point is that sentences have become more severe partly due to a fear of, as Frieburg has pointed out, ‘the decline of social ties and a discomfort with growing social and ethnic diversity’ (2000: 66, quoted earlier; Emphasis added). This is not to suggest that popular fear about the ethnic “Other” directly
influences judicial sentencing decisions, but rather that it can do so indirectly, through
trends towards punitiveness and longer sentences in times of social anxiety (Pratt et al.,
2005). Like anything else, there is no way that an examination of the possibility of
institutional discrimination (within a sentencing context) against certain minority groups,
can be detached from an analysis of the broader social and political setting within which
the judiciary operates.

Some consideration must also be given to the consideration of maintaining public
confidence in the judiciary, when it is clear that this confidence wanes during times of
social anxiety and moral panic. Once again, this is not to suggest that judges will make
decisions that are discriminatory in the literal sense that they will punish “ethnic”
perpetrators more severely. It is more that the cultural uniformity that is not only assumed
but universalised by legal discourses may have the effect of disadvantaging groups that
fall beyond the scope of its standards. This is mainly because these standards are
produced and reproduced by other popular discourses which then have the effect of
generating public opinion that demands more severe punishment, or indeed, revenge, for
racialised monsters that commit heinous crimes.

Conclusion: “judicial populism” during moral panics?
As evident through the various examples given in this chapter, the judiciary, in a climate
of social anxiety, is subject to intense media and political pressure to increase the severity
of their sentences. Judges, despite statistical evidence to the contrary, are often perceived
as failing to live up to the “community expectations” for harsher punishment. When there
is considerable public emotion about heinous crimes and the groups who are blamed for
such criminal activity, the principles of proportionality to which most judges adhere, are
perceived as unduly “soft” and lenient on violent criminals. Further, the complex legal
principles that inform the sentencing process lack the transparency that is required for
public satisfaction and perceptions that justice is being served. This is because popular
notions of justice during times of moral panic or general social anxiety are driven by
widespread public desire for vengeance (Connolly 1995; Hudson 2003; Frieberg 2004).
Public desire for vengeance is opposed to the “rational” legal imperatives of sentencing and punishment. As Justice Sully said, in his sentencing judgment for the K brothers:

I have approached the matter of totality having in mind the various, and not easily reconciled, purposes of punishment: the protection of society; personal and public deterrence; denunciation of the crimes; retribution for the injury caused, but remembering always that *retribution ceases to be just when it degenerates into primitive vengeance*; and the reform of the offender (*R v MSK et al.* [2004] NSWSC 319 at 132. Emphasis added).

Particularly noteworthy is Sully’s description of vengeance as ‘primitive’, while he says elsewhere in his sentencing judgment that the maximum penalty of life imprisonment cannot generally be imposed ‘in any civilised society’ (at 120). In a different context, Chief Justice of Australia, Murray Gleeson, argued, at a judicial conference:

Sentencing has been […] an issue in recent years […] Discussion of topics of this kind inevitably includes comment, some well-informed, some ill-informed, on the courts. Such comment has an effect on public opinion. We cannot afford to ignore it; and we look for appropriate ways to respond to unjustified criticism (Gleeson 2002).

The question is whether judges, at times, compromise judicial independence for the maintenance of public confidence in the courts. Does the judiciary sometimes make decisions or put forward claims that could be interpreted as “populist” – in the same way that politicians are “populist” in their law and order policies? Given the declining levels of trust in the judiciary during times of moral panic, it is apt to speculate on how judges balance considerations of judicial independence from ‘transient public moods’ (Parker 1998: 6), impartiality and the conflicting imperative of maintaining public confidence in the courts.

Public reactions to Bilal Skaf’s original 55-year sentence certainly indicated its popularity. However this does not indicate that it was a “populist” decision on the part of Judge Finnane, in the sense that the term can be applied to politicians looking for
electoral advantage. It would thus be short-sighted to simply interpret the Skaf sentence as an instance of what I have referred to the possibility of “judicial populism”. Finnane’s decision may have reflected a degree of personal revulsion towards the offences and the offenders, some pity for the victims and their families, and perhaps in a small way, an intention to vindicate public response to the case. This much was reflected in Finnane’s reference to the perpetrators as ‘wild animals’ and a ‘menace to any civilised society (2005: 111).

Furthermore, the term “populist”, even if some judges are more likely than others to pander to public opinion, cannot be applied across the board. The subsequent reduction to Skaf’s sentence, for example, was extremely unpopular. The Daily Telegraph stated that the law had ‘become an unfunny joke’ that the new sentences made ‘a mockery of the government’s get-tough laws’ (Wockner 2005: 23). Other criticisms directed at the New South Wales Court of Criminal Appeal are too numerous to mention here, however the common themes were that the courts had yet again failed the community and the victims of crime. These themes will be explored further in following chapters – particularly Chapter Six.

High Court Judge, Justice Michael Kirby has said, ‘in the law too we have our ideologies […] they adapt to changing times and to the surrounding society and its culture’ (Kirby 2004), and as Chief Justice of the High Court of Australia, Murray Gleeson, says the law ‘cannot afford to ignore it’. Therefore judges must, to a certain degree, respond to “community expectations” or make decisions or proposals that can be construed as politically shrewd. An example of such a proposal was Chief Justice Spigelman’s idea that jurors play a role in the sentencing process in order to ‘enhanc[e] public confidence in that process and to improve the process itself’ (Spigelman 2005: 25). The proposal sparked considerable debate. Victims’ rights groups and Premier Bob Carr endorsed it as a ‘good idea’ (Casella 2005: 7), while most in the legal profession and criminal law experts expressed serious doubts (Pelly 2005a). Director of Public Prosecutions, Nicholas Cowdery was ‘concerned it would create more uncertainty and anxiety than it resolves’ (Pelly 2005a). Pauline Wright of the New South Wales Law Society feared ‘mob
sentencing and [the possibility] that jurors might be distracted from their primary role’ (Pelly 2005a). New South Wales Attorney General Bob Debus was more optimistic, referring to Spigelman’s plan as an ‘answer to community outrage over lenient sentences’ (Casella 2005: 7) and thus enhancement of public confidence in the administration of criminal justice.

Another example is Spigelman’s proposal for guideline judgments in Jurisic. Since the 1970s, the Supreme Court used guideline judgments informally ‘for the political purpose of heading off legislation that could have introduced mandatory sentencing in some form’ (Cowdery 2004: 13). The tradition was borrowed from England (Spigelman CJ, Jurisic, 1998: 216). The statutory basis for guideline judgments came after R v Jurisic (1998)22 – which introduced a judicial guideline for sentencing dangerous driving causing death or grievous bodily harm.

Notwithstanding examples such as these, it is still not possible to ascertain the extent to which individual judges allow their decisions to be influenced by media, political and public pressure. More recently, Chief Justice James Spigelman told a parole conference that public debate over sentences was ‘ill-informed’ and that sentences were best decided by those who are not ‘afflicted by transient rages and enthusiasms’ (Benson 2006: 7). Spigelman’s comment was provoked by public outrage towards the perceived leniency of sentences given to the murder of Senior Constable Glen McEnallay (2006: 7).

Public comments such as Spigelman’s are unusual. Due to the nature of their profession and the code of silence that is required of them, judges cannot respond to ‘unjustified criticism’ through public comment in a media or political arena. Yet, this needs to be seen in the political context that it is traditionally the responsibility of the Attorney General as chief law officer to do so on behalf of judges who cannot. In recent times, the

22 “Jurisic was charged with three counts of dangerous driving causing grievous bodily harm under s 52A of the Crimes Act 1900 (NSW) after crossing a median strip and hitting a car coming the other way, causing severe injuries to occupants of the other car. Jurisic was travelling at excessive speed, was under the influence of cocaine and had prior convictions for serious driving offences. He was convicted and sentenced to 18 months home detention. The NSWCCA upheld the Crown appeal and imposed a sentence of two years imprisonment with a minimum term of one year.” (Brown et al., 2001: 1440).
Attorney General’s position as chief law officer has been compromised by his role as politician, in the context of law and order politics. To the extent that the judiciary does make public comment, there appears to be a division erected between the community who demands rough justice in the “real world” and what is perceived as the rarefied world of the courts and the judiciary. Former opposition leader of New South Wales, Peter Debnam, in response to Chief Justice Spigelman’s remarks said:

I think many of them have a pretty soft life… it’s all limousines…they think the real world is what happens in their courtroom and they need to get out and talk to real people (Benson 2006: 7).

In this, there is a contradiction in that the judiciary are excluded from popular notions of “community” and yet are expected to be its moral guardians (Hall et al. 1978). In this sense, there are parallels between judges, criminal offenders and those groups which have been constructed as “Other” even though these groups are at opposite ends of the power spectrum: they are denied their status as “ordinary” people. While perpetrators are dehumanised as animals or monsters, judges are dehumanised because of their perceived inability to involve emotion in their decision-making and their privileging of rational judgment. In this sense, judges are ‘the last of the secular gods’ (Ackland 2003: 4). They stand “above” the community of “ordinary” people, while perpetrators are constructed as significantly beneath the realm of the “ordinary”.

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4. The Unreasonable “Other”: “ethnic” difference before the
Australian Courts

Reason and reasonableness are frequently invoked in legal practices and institutions. These notions are most typically and obviously used in the figure of the “reasonable person” of law, in order to picture what responses would be considered appropriate to various circumstances. A hypothetical figure of the “ordinary person” is also invoked, in different instances, as a variant on the theme of reasonableness. In this chapter I explore an ethnocentric valorisation of “Reason” in the Australian legal system. My argument is informed both by various feminist critiques of the law and the tradition of Western liberalism on which the law is built (Naffine 1990; Smart 1989; Threadgold 1991; Gatens 1991; Lloyd 1984); and by a rough framework of Edward Said's analysis (1978) that Middle Eastern masculinity has been constructed in the Western imaginary as misogynistic, barbaric and sexually perverse. Said argues that ‘the Arab’ has been presented as “Other” to the civility and reason embodied by a white, Western and Anglo norm. Critical race theorists have also had much to say regarding the “Otherness” of groups that are defined against the subjectivity of the dominant, white, middle-class male of law and, more generally, Western liberal democracy (Valverde 1993; Crenshaw et al. 1995; Harris 1997; Delgado and Stefancic 2000; Sharma and Sharma 2003).

Through this theoretical lens, I argue that the “reasonable person” of law not only has a masculine but also a white, middle-class and Anglo particularity and that this functions to disadvantage and further marginalise groups popularly constructed as aberrant in this respect. The “ordinary” person of law is also premised on an anglocentric subjectivity – even in instances where the “ethnicity” of the accused is taken into account. The primary focus will be on the way in which tests of “reasonableness” and “ordinariness” in criminal trials affect accused persons of divergent, non-Western backgrounds, when they become subjected to these tests. Because the cases I am exploring in this thesis concern group sexual assault, I am also interested in the potential applicability of
“reasonableness” to the various issues that may arise, including consent, in sexual assault trials. In examining these issues, I will unpack the implications, in terms of criminal justice outcomes, that anglocentric models of reasonableness (and ordinariness) have for an Arab and/or Muslim masculinity that is popularly represented as lascivious, peculiarly misogynistic and generally adverse to reason (Said 1978). This will involve broader reference to the relationship between conservative, anti-multiculturalist (and often racist) ideologies and legal discourses, and an examination of the ways that a gendered and racialised construction of reason is “performed” in the courtroom (Threadgold 1991).

While there is nothing substantially new about the idea that justice is “white” or that the “reasonable person” of law is a white, socio-economically affluent man (Hudson 2006b), my intention here is not to provide a renewed interpretation of the notion that justice and reasonableness are gendered, “coloured” or “ethnicised”, but rather to locate the norms underpinning such legal constructions within a broader scope of morality, moral community and, hence, moral panics, when they emerge. This will partly involve tracing the distinction between “reasonable person” and “ordinary person” tests in legal discourses with the aim of unpacking the simultaneous link and disjuncture between the “reasonable” world of the courtroom – which has been characterised as a ‘moral vacuum created by rules of evidence’ (Sheehan 2004b), and that of the “real world” in which a (moral) community of “ordinary”, law-abiding people reside.

These are arenas, as I have argued in all previous chapters, which have been popularly separated but are mutually dependent. The notion of community and the “standards” that it invokes, are central to law and its focus on reason: legal discourses and practices invariably produce and reproduce the norms and morals of the dominant culture in ascertaining what constitutes criminal and therefore punishable behaviour. Yet at the

23 Traditionally, for example, the objective standard of reasonableness is applied in relation to the defense of provocation for murder. There are other areas of law in which the test of reasonableness is also used, such as in distinguishing between recklessness and negligence in tort law but my focus here is reasonableness or ordinariness in its application in criminal law. I refer to the “potential” application of the reasonableness test to sexual assault cases because it is not traditionally used in this context. However proposals have been made by the New South Wales sexual offences taskforce (AGD 2006) to apply “objective tests” of reasonableness to sexual assault cases in which consent is raised as an issue.
same time the courts, to a degree, remain independent as a separate network of actors. They are a (sub)culture with their own, internal values and norms which may be dictated by legal principles, precedent and rules of evidence that are not always compatible, as I have argued in Chapter Two, with popular ideas of morality and justice.

The ways in which dominant norms are embedded in legal constructions of the hypothetical subject will be unpacked in a number of different ways. After a discussion of the literature in this area, I will explore the role of juries in trials where “cultural difference” is raised. This will be followed by an exploration of the significance of spatial ordering in the courtroom and the way in which this was disrupted through the self-representation of the K brothers – as “Other”. I then move onto an analysis of the ways in which arguments around ethnic and cultural difference (“cultural defences”) have been engaged by the courts and the effectiveness of these measures in providing equal justice for ethnic minority groups.

**The “Reasonable” or “Ordinary” Man of Law: some critiques**

The “reasonable person” of law represents an un-gendered, “neutral” and “objective” standard of human conduct. In describing the predominance of reason in Western society, Genevieve Lloyd argues that ‘reason has figured in western culture not only in the assessment of beliefs, but also in the assessment of character […] The conviction that minds, in so far as they are rational, are fundamentally alike underlies many of our moral and political ideals’ (1984: xviii). The abstract individual of legal discourse is a construction that signifies a moral rationalism where ‘reason or rationality are at the centre of the good or moral man’ (Naffine 1987: 108), while at the same time attempting to capture a level of ordinariness or a “common sense” ideal of reason by referring to a person who engages in conduct in accordance with current “community standards”. Both variations of reasonableness suggest that the abstract legal individual is built upon assumptions that the norms or values underpinning legal discourses may be homogeneously extended to any person who finds themselves in the predicament of the accused. Some judges have sought to promote an interpretation of the legal subject in a way that privileges ‘ordinariness’, identifying the reasonable person as the ‘man on the
Clapham omnibus’ (Lord Bowen) or ‘the man who in the evening pushes the lawn mower in his shirt sleeves’ (Naffine 1987:3). In both contexts, the hypothetically reasonable and ordinary subject is male. In an Australian context this ordinariness has also been reflected in Anglo-Saxon-Celtic heritage. For example, in Bilal Skaf et al.’s trial, Judge Finnane directed the jury to put their biases about the ethnic origins of the accused aside, and treat them as they would if they had surnames like ‘Smith or Jones or O’Brien or some other very common ordinary name’ (*Regina v Tayyab Sheikh* [2004] NSWCCA 38 per Finnane J, 2002).

In these examples, notions of reasonableness and ordinariness are somewhat conflated. There is a common ground between these concepts to the extent that the test of “ordinariness” invokes a normative idea of what is considered “reasonable”, to which the accused is expected to adhere in order to provide justification or excuse for their criminal (or criminalised) conduct. In the criminal law, the test of “ordinariness” is applied in murder cases in which provocation, self defence or automatism may be raised as a defence (Yeo 1992; 1996; Boyle 2000; Torry 2001). For example, the “ordinary person” test in its application to the defence of provocation, asks whether the loss of self-control of the accused in the given factual scenario would be expected of the “typical” or “ordinary” person in the same set of circumstances (Yeo 1987; 1996). It is an “objective” test of individual legal and moral culpability according to wider community standards (Yeo 1996). The test of “reasonable person” (or as is often the case, “reasonable man”) on the other hand, is raised in a criminal law context when the act or omission of the accused causes the death of another because the standard of care falls short of that which is expected from a “reasonable person” and becomes categorised, by a jury, as an act of criminal negligence (*R v Wilson* (1992) 174 CLR 313; *Nydam v R* [1977] VR 430). Again, the “reasonable person” is defined as one who engages in conduct that accords to ‘community standards’ (Nygh and Butt 1998: 367).

In both “ordinary” and “reasonable” person tests, the elusive notion of “community standards” is the touchstone of legal and moral blameworthiness. As Mark Kelman argues, in criminal law defences such as provocation or self-defence ‘the implicit norm is
that blame is reserved for the (statistically) deviant; we are blamed only for those actions and errors in judgment that others would have avoided’ (1991: 801). Such tests ask jurors to project themselves into the factual scenario in which the accused found him or herself (Kelman 1991: 803). This raises questions of who is considered “ordinary” or “reasonable” or what counts as “typical” conduct in a given factual scenario. Who constitutes “the community” that judges which actions are to be avoided and which are excusable or justifiable, and in what context? To what extent are juries representative of the “community standards” that are paramount to objective tests of criminality, and what are the ideological underpinnings of the “community standard” to which the courts, “ordinary” and “reasonable” people must adhere?

The answers to these questions are not straightforward. They lie as much in exploring the groups that are excluded from the dominant community and therefore silenced, as the central concept of “community” itself. As I have argued in Chapter One, the “Other” is needed for self-identity and “community standards” are created partly through reference to that which is unacceptable or excluded. The standards which determine what is unacceptable or excluded are racialised, ethnocentric (and gendered) but are normalised via constructions of neutrality. As Perry notes:

The normalization of whiteness constructs racialized boundaries that assume whiteness as the standard against which all others are judged. It divides white from non-white, “unraced” from “raced.” As with gender, there is an ideological presumption of innate, biological differences between races, which is then extrapolated to cultural and ethical differences (2001: 57).

Answers also lie in an exploration of the overlapping social structures of power based on class, gender, race and ethnicity, which enable the voices of the dominant socio-economic and cultural groups, whilst silencing the oppressed. This results in injustices resulting from uneven distribution of resources and a general lack of recognition of the differences of socially, culturally and politically subordinated groups (Fraser 1995: 72).
The legal domain, though egalitarian in intent through its attachment to formal equality, produces and reproduces social structures of inequality through privileging anglocentric norms by constructions of ordinariness or reasonableness. This is not offset by instances in which the law takes ethnic difference into account and generally ignores the broader social disparagement or negative stereotyping of certain ethnic and religious minority groups. Ngaire Naffine argues that ‘a close examination of the aims, priorities and methods of law also tells us a good deal about those individuals who are, in effect, omitted from the legal model of humanity’ (1990: xi). Terry Threadgold puts it another way: ‘the knowledge class […] has a fairly limited repertoire of available narratives […] and that raises […] questions of speech and silence, of legal categories which expect a “unified” community and serve to construct and entrench processes of “othering”’ (1996: 4).

Following feminist critiques of the law (MacKinnon 1985; 1987; 1991; Smart 1985; 1986; 1989; Naffine 1987; 1990), I argue that there is nothing ordinary or typical about the “reasonable person” of law and that this Western liberal construction in fact adheres to the characteristics attributed to the abstract concept of reason: cool-headedness and emotional distance. The ‘white, educated, affluent male […] who evinces the style of masculinity of the middle classes’ (Naffine 1990: 100-101), is often represented as an embodiment of such attributes and is privileged as both the ‘object’ and ‘subject’ of law (Hudson 2006b: 30). Hudson argues that the ‘dominant subjectivity […] is object in that it is he whose behaviour law has in mind when it constructs its proscriptions and remedies; and it is this subject who constructs the law’ (2006b: 30). In the sense that the hypothetical legal person is a ‘subject’ of law (in the sense that Hudson uses the term), he is imbued with characteristics that are exhibited in many (though, of course, not all) judicial and legal professionals who occupy positions in the upper echelons of the legal domain. More broadly, ‘the legal person […] possesses a set of values and a public role which is remarkably similar to, indeed mirrors and reflects, the moral and social priorities of these most powerful of persons and hence is perceived as unproblematic’ (Naffine 1990: 100).
Naffine argues that it is not only women who are excluded by law: a certain type of male is valorised before the law, while others are subordinated by it as defendants or the accused (1990: 124). Hence, those rejected from the domain of reasonableness are also men who do not exhibit the white, middle-class characteristics of the hypothetical legal subject: ‘if law embodies a male norm, it is a norm which fits a privileged minority of mankind, not the mass of men’ (Naffine 1990: 21). The disparities between attributes and behaviours commonly characterising privileged, white, middle-class masculinities, and those masculinities which are less privileged, will be explored at length in the following chapter. However it is important to note here, in line with feminist critics of legal “masculinism”, that the reasonable man of law is modelled on characteristics considered desirable by legal discourses and ‘those members of the legal community who invoke him daily’ (Naffine 1990: 120).

The personal traits and social demographics associated with the “reasonable man” of law are incongruous with the characteristics that are simultaneously associated with the “ordinary man”. If the “reasonable man” is one which is symbolically represented by the characteristics of the male, affluent and white archetype of the judiciary and bar, very few “ordinary” or “real” men fit this ideal. This resonates with popular constructions and perceptions of judges, as outlined in the previous chapter, as being out of touch with the concerns of “real” people because they live outside the realm of everyday reality. In the last chapter I quoted a letter to the editor from Anne Mooney from Silverwater, who suggested that judges were not “real people” because they are not exposed to the realities of everyday life – they do not even catch public transport and are not the victims of bashing, shooting or mugging. In my interview with a District Court judge, I asked him how he felt about judges being perceived as not “real”. He responded:

Well, number one, judges do go on trains and buses. At times they are shot at. Often they’ve been victims of crime. They are real people. Some of them weren’t real people before they were appointed and I don’t think should have been appointed. But the vast majority of them are real people, and one must then say to that lady from Silverwater, ‘well perhaps it’s you who are out of touch with reality’ (Interview 24/04/07).
The “ordinary” person is the ‘man on the Clapham omnibus’ who is subject to the dangers of everyday life, to emotional reactions when provoked and can occasionally lose self-control. Indeed the potential emotional reaction of an ‘ordinary man’ as opposed to a ‘reasonable’ one marks a disparity between these legal constructions. As Chief Justice Barwick argues in *Moffa v R* [1977] HCA 14,24 ‘If the use of the word “reasonable”, in the statement of what is called the objective test in relation to provocation, would exclude from consideration such emotional reactions, I have even greater reason for preferring the description “ordinary man” in the formulation of that test’ (*Moffa v R* [1977] HCA 14 per Barwick CJ at 4). However, indicating that the “ordinary” man is more likely to react emotionally than one that is “reasonable”, leaves the question of the other characteristics (besides maleness) that may be possessed by the “ordinary man” unanswered. Attempts to ascertain the attributes of the hypothetical “ordinary” man are found mainly in discussions of “cultural defence” in legal, sociological and criminological discourses on ethnic, cultural or religious difference before anglocentric or eurocentric courts and criminal justice systems.

‘Cultural Defence’ arguments

There is a considerable body of literature – across various disciplines – in support of what is referred to as a “cultural defence” argument. Such arguments state that the ethnic or cultural background of the “ordinary” person of the accused’s ethnic background should be considered in order to ascertain whether they would have lost self-control in the circumstances in which the accused found themselves (Sams 1986; Sheybani 1987; Kelman 1991; Australian Law Reform Commission 1992; Bohman 1995; Maguigan 1995; Yeo 1996; Harris 1997; Golding 2002; Harding and Örücü 2002; Cotterrell 2004; Renteln 2004; Odgers 2005). It is not feasible for me to address all of this literature in the current context so I will restrict my discussion to the Australian literature on the issue,

24 In *Moffa* [1977], the accused violently killed his wife after a rejection of his “connubial” advances. She ended their relationship, stating that she had intercourse on a regular basis, and with great enjoyment with neighbouring men. The deceased suggested sexual inadequacy on the part of her husband, threw a telephone at him, and showed nude photographs of herself with other men. The defence of provocation was used. The main questions before the jury were whether the deceased provoked her husband enough to reduce the charge from murder to manslaughter, and whether an “ordinary man” in the accused’s position would have lost self-control to the extent that they would kill. Another main issue that was raised was whether “mere words” are a sufficient basis for provocation.
and briefly consider some Australian cases in which the “culture” or ethnic background of the accused has been considered in relation to the objective “ordinary” person test. I will consider these in order to illustrate the ways in which cultural difference is negotiated in the courts and how this might ‘shape the meaning of social relationships and social institutions, and […] define personal identity’ (Cotterrell 2004: 2) and also establish the law – specifically the courts, where cultural defences are raised – as a site for cultural struggle or competition (2004: 4). In other words, my interest is not only to demonstrate the structural biases of the law, but also to demonstrate the ways in which the law performs a ‘constitutive’ function in its ‘capacity to create meaning by which people understand the social environment in which they live, and their place in it’ (Cotterrell 2004: 3).

Yeo, amongst others argues that ‘the law rightly insists on a common level of self-control for everyone in the community irrespective of their sex or ethnic derivation […] however […] ethnicity instructs the jury on the type of reaction which may be expected of an ordinary person belonging to the particular ethnic community’ (1996: 305). To clarify further, the crux of Yeo’s hypothesis is to focus on what he calls the actual ‘response pattern’ of the ordinary person whilst deprived of self-control rather than their capacity for self-control, and that these ‘response patterns’ differ according to gender and ethnicity (1996: 305). In the case of Masciantonio v R,$^{25}$ Justice Michael McHugh touches on the issue of ‘response patterns’ even if he does not subscribe fully to Yeo’s most recent argument, by referring to a ‘curious dichotomy’ and ‘inconsistency’ in how the objective test of ordinariness is applied in provocation cases, where the ‘the personal characteristics and attributes of the accused [are taken] into account on the issue of provocation but not

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$^{25}$ In Masciantonio [1991], the accused, Giovanni Masciantonio, believed that his son-in-law had acted violently towards his daughter, had caused financial difficulties for his daughter’s family due to excessive gambling and had recently left his daughter taking property belonging to her. The accused confronted the son-in-law by saying “Can’t you do anything better than what you are doing?” to which the son-in-law responded by telling him to “Piss off”, attempting to kick him and pushing and shoving him which caused the accused to injure his arm. The accused then got a knife from his car and stabbed the son-in-law. The son-in-law staggered to the other side of the car and the accused stabbed him again. One of the attacks was fatal and it was not determined which one. The question for the jury was to determine whether the acts which resulted in the death of the son-in-law were committed during a period of the accused’s loss of self-control, and whether an “ordinary person” would have lost self control in these circumstances (Masciantonio v R [1991] HCA 22).
on the issue of self-control’ (Masciantonio v R [1991] HCA 22 per McHugh J at 6). Put simply, a dichotomy is constructed between how the accused person would view the provocative conduct on the one hand and how they would respond to it emotionally on the other. The test of “ordinariness” is applied to the emotional response component and is criticised by McHugh J on the basis that to dissect a person’s personality in this way, ‘runs counter to reality’ (Masciantonio v R [1991] HCA 22 per McHugh J at 6). On the specific question of ethnicity in regards to the ordinary person test, the judges of the High Court in a leave to appeal hearing of Mankotia v The Queen26 (S61 – 2001, HCA Transcript), also raise the issue of how ethnicity as a specific attribute can or should be separable from other personal characteristics: ‘if you allow ethnicity to be one of the characteristics of the ordinary person, why cannot a person say, “I was born with this filthy temper”’ (Mankotia v The Queen S61 – 2001 HCA Transcript per Gleeson CJ).

Though McHugh J does not refer to precisely the same thing, his contention could be used to criticise Yeo’s argument that ‘response patterns’ to provocation can be attached to certain groups in society: personalities, regardless of ethnic derivation, cannot be neatly compartmentalised into categories of initial views on a particular event, emotional response and eventual physical reaction to the event – even if this type of separation is necessary on a theoretical level. Furthermore, while there is credit to Yeo’s argument that gender and ethnicity (and indeed, any other personal attribute) partially shapes ‘response patterns’ to certain situations or events, it does not escape the homogenising tendencies of his earlier arguments that ethnicity should be considered by the courts as a characteristic which can effect the power of self-control (Yeo 1987). That these assumptions regarding ethnicity and self-control are problematic is something Yeo had considered in his more recent argument (Yeo 1996). This was in response to criticisms that his earlier arguments

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26 In this case, the applicant (Mankotia) was in a short relationship with the deceased. The deceased decided to end the relationship and when the applicant went to discuss this with her, an argument ensued in which the applicant killed the deceased by stabbing her repeatedly. The applicant claimed that the deceased had used words that provoked him such as referring to the situation as a “bad Indian movie”, saying that she did not want to have his “chocolate babies”, made fun of his religion when he referred to “bad karma” and called him stupid. Mankotia, who is of Indian descent, claimed that the words uttered by the deceased were particularly provocative due to his ethnic background. The specific isolation of ethnic background was not permitted when the jury was left to decide whether the accused’s actions were those of an “ordinary person”, and the application for special leave to the High Court was refused (Mankotia v The Queen S61 – 2001 HCA Transcript).
perpetuated racist stereotypes through stating that persons of particular ethnic backgrounds have a lesser capacity for self-control than other “ordinary” people who are, by default, of Anglo-Saxon-Celtic background (Yeo 1987).

“Ordinary” (Anglo) Juries?: judging who is “ordinary”

The further significance of considering ethnicity comes into play when the question of whether the conduct of the accused was “ordinary” is left to the jury. McHugh argues in *Masciantonio*:

In a multicultural society such as Australia, the notion of an ordinary person is pure fiction. Worse still, its invocation in cases heard by juries of predominantly Anglo-Saxon-Celtic heritage, almost certainly results in the accused being judged by the standard of self-control attributed to a middle class Australian of Anglo-Saxon-Celtic heritage, that being the stereotype of the ordinary person with which the jurors are most familiar (*Masciantonio v R* [1991] HCA 22 per McHugh J at 8).

McHugh J raises some important issues regarding juries as part of the anglocentric structure of the court system. While there is no substantial evidence to suggest that jurors are always going to be of ‘predominantly Anglo-Saxon-Celtic heritage’, there is a chance that individual jurors will at least be culturally “equipped” to the extent that they understand the processes of the trial and the directions that are given to them by judges. Any suspicion by defence counsel or prosecutors that certain jurors may not have the capacity to grasp their arguments or may harbour personal prejudices regarding the issues raised in the case, are usually “challenged” and replaced by another jury member. This does not necessarily suggest that individual jurors may be challenged because they *appear* racially or ethnically diverse, however it is a distinct possibility that this is the case – particularly given that legal counsel cannot base their suspicions on anything other than appearance or “ethnic” accent. Gender and age are also relevant to the empanelling of jurors. This became apparent during my fieldwork observations of the self-represented segment of the initial K brothers trials. When the jury was being empanelled, the Crown prosecutor challenged a young women and a man with a thick European accent. MSK and MAK made no challenges which led a senior detective in charge of the case (who
was sitting beside me in the public gallery) to comment on the inexperience of the accused relating to such matters: he indicated that if they were clever, they would have challenged a very young woman on the jury panel because of the possibility that she would be more likely to sympathise with the complainants. During the process of the jury being “sworn in”, Justice Sully, apologetically, asked a man of Asian appearance whether he could sufficiently speak and understand English in order to be able to follow the trial proceedings.

Challenging individual jury members who are “of ethnic appearance” may be more prevalent in trials where the culture or ethnicity of the accused will be raised as an issue and there is a perceived possibility (however slim) that a jury member may have a heightened desire to acquit or convict the accused on the basis of personal prejudice. Of course, assertions of this nature can only be speculative. A valid objection to such an argument would be the claim that jurors of Anglo-Saxon-Celtic heritage could be challenged by legal professionals on the same basis. In line with what I have argued thus far, this appears less likely for the reason that “neutrality” (and thereby “ordinariness”) is predominantly attached to those from white Anglo-Saxon-Celtic backgrounds. As I have argued in the previous three chapters, Anglo ethnicity is popularly representative – despite the intentions of “multiculturalism” – of the “Australian” community: it is the dominant cultural norm.

Also relevant are speculations on the extent to which jurors genuinely believe that middle-class Anglo-Saxon-Celtic heritage is “ordinary” as much as they may believe that certain ethnicities are not “ordinary”. Any analysis that attempts to assess whether certain “ethnic” response patterns may be seen by juries as more or less “ordinary” than others must explore the extent to which juries could be subject to prejudicial publicity in the form of popular representations of certain minority groups. Such an exploration took place in Chapter Two, where I argued that court trials are a site of struggle between popular media narratives that make truth claims about certain crimes and groups in society and the official accounts that are of particular relevance to the cases played out in the courtroom. The reception of media and legal discourses by jurors is dependent both
on a broader socio-political climate in which representations of certain groups or individuals mean something and are understood, as well as the social positioning of individual jury members within that context. Again however, it is important to reiterate that media audiences who are also jurors received information of cases and the criminal justice system that is not available through media outlets and they are instructed specifically to make decisions based on facts that are abstracted from emotion (or the emotionally invested way in which crime is represented in the popular media). Thus, media discourses are tempered by the legal discourses to which jurors become exposed during the trial.

Nonetheless, media-fuelled ideologies that perpetuate negative, racist stereotypes can be pervasive and their power to make truth claims about certain groups in society cannot be underestimated. This became particularly apparent in the extensive and mainly politically conservative media discourses around the Bankstown and K brothers’ gang rape cases, which made “common sense” truth claims about the ethnic and cultural orientation of the gang rapes. While the full complexities of the extent of media influence on juries has been explored in Chapter Two, it cannot be denied that widespread ideological claims that tap into fear of ethnic difference, have far-reaching implications for demonised minority groups before the law. This resonates particularly with the “ordinary” person test – as well as other tests of “reasonableness” – in the sense that juries will only acquit those persons towards whom they can feel compassion. As I have argued in Chapter One, we cannot feel compassion for those who are “Other” and therefore seen to exist beyond the boundaries of “moral community”. Citing Jeremy Horder’s work on provocation and responsibility (1992) Yeo argues that ‘the jury’s judgment of the defendant’s response is heavily influenced by cultural, moral and gender-specific norms. Hence, only “normal” response patterns as morally defined by the jury are deserving of mitigation’ (Yeo 1996: 307).

“Reasonable” v “Ordinary”: Hierarchies of Reason

As I have mentioned in Chapters Two and Three, there is an interesting parallel between the exclusion of the judiciary or upper echelons of the legal profession from the domain
of “real people” or “ordinariness”, and the exclusion, at the other end of the socio-economic, ethnic and cultural spectrum, of popularly demonised groups from a broader community of “ordinary” people. In this sense, there appears to be a hierarchy that is spelled out – when viewed through a socio-legal lens – in legal constructions of the hypothetical subject. To clarify, these layers of reasonableness are encapsulated through the difference between “reasonable” and “ordinary” men and the constant oscillation between the symbolic and concrete attributes of the hypothetical legal subject in the different contexts in which he is placed. While the reasonable man is emotionally detached, cool-headed and removed from the passions that afflict “real people”, the ordinary man is a construction that allows for flights of passion in the face of provocation and therefore, ‘human infirmity’ (Moffa v R [1977] HCA 14 per Barwick CJ at 3). In the Moffa judgment Barwick also points out that there needs to a ‘cooling off period’ for the accused to act “reasonably” rather than how one would act “ordinarily” in a situation of provocation (Moffa v R [1977] HCA 14 per Barwick CJ at 9).

The loss of self-control experienced by “ordinary” men renders them as “real” humans residing in a “real” community. This makes their actions morally excusable. Women and other subordinated groups fall to the bottom of this conceptual hierarchy because they have not been considered as “reasonable” or “ordinary” by traditional legal and “community” standards. While this is slowly changing for (white) women and some ethnic groups, other marginalised groups – particularly ones which have been popularly demonised – do not stand the same chance of being morally excused. This is mainly because, despite attempts to recognise the situated moral “reasonableness” or “ordinariness” of the “Other”, these attributes are always going to be mediated by what “we” consider to be morally “reasonable” or “ordinary” (Kelman 1991).²⁷ It is also partly because hypothetical legal constructions have wider currency than their use within the rarefied domain of the courtroom via the involvement of “the community” (juries), the popular media, political and legislative discourses in court trials. There is a dialectical relationship, despite contestation and struggle, between the meanings generated by legal discourses and those that operate within a wider social context.

²⁷ This will be further explored in the later discussion on equality and difference.
It is also important to note that one such area in which there is a negotiation between “reason” as defined by legal discourses, and “ordinariness” as defined by “the community”, is through the application of the standard, beyond *reasonable* doubt, to the judgment process. Juries are also consistently given directions to decide the case before them, as Judge Finnane had said, ‘without emotion’, paying attention only to the ‘facts’ before them (see page p. 69). In these ways, reason structures the performances of all members of the courtroom, even if that concept of “legal reason” is necessarily tempered by wider “community” standards.

**(Ir)Rational performances in the courtroom: a spatially structured hierarchy and the behaviour of the K brothers**

Focusing here on the context of an individual court trial, it is apparent that hierarchical social and legal structures of “reason” are reflected within the physical space of the courtroom. The judge stands at the top of a figurative hierarchy as the ubiquitous voice and representation of reason. This physical positioning reflects the judge’s highest ranking. Bewigged and robed, seated in a type of throne with the rest of the court facing them, along with the ceremonial standing and bowing upon their entry into court, endows judges with a god-like presence linked with enlightenment-inspired notions of pure or “ideal” rationality. The judge’s bodily positioning in the courtroom could be seen as a kind of homage or reverence to an ideal rationality as embodied by the “reasonable man”. Further, the valorisation of the judge’s being through his (and, less frequently, her) physical positioning and attire is recognised across cultures. A poignant illustration of the cross-cultural recognition of the judge as quasi-deity was observed in one of the trials for the K brothers’. At the end of cross-examination, the wife of one of the accused, who had only been in Australia for a short time, said that she was pleading with God and praying daily for the return of her husband and that she would now also plead with and pray to the judge to promptly return her husband to her (Field notes 1/03/04).

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28 This denotes Kant’s ideal realm of pure reason. This ‘ideal rationality’ was also attributed to God and kings in medieval times.
Next in the hierarchy are legal professionals well versed in legal rhetoric who, as Pat Carlen says, ‘monopolise the stage […] with] acting often worthy of the best traditions of the theatre’ (Carlen 1976: 38). This resonates with Cohen’s reference, mentioned in previous chapters, to the dramatisation of crime in the courtroom. The function of these legal professionals, it appears, is effectively to mediate between the “hyper-rational” domain of judges and the common-sense reasoning adopted by the “ordinary” people of the jury. Juries, because they are “ordinary” people, inject “community standards” into the trial process. The involvement of community representatives in criminal trials is said to improve “public confidence” in the courts. At the bottom of this figurative hierarchy is the accused, who is isolated (notwithstanding ethnic difference), and whose physical positioning reflects exclusion from the hierarchical regime of reasoning that takes place in the courtroom. This is because the accused is not there to reason with the judge and jury, but to be judged through their process of reasoning.

This semblance of order was notoriously disrupted in the self-represented segment of the K brothers’ trials. Because MSK and MAK decided to represent themselves, they were inevitably included in the “reasoning” process of the trial and behaved in ways that contravened the (reasonable) conventions and formalities of the court. Justice Sully who presided over the initial K brothers’ trial advised the jury to respect the brothers’ ‘decision [to represent themselves] as it is their right’, and to ‘exercise patience because the trial will probably run less smoothly and take more time because of this’ (Field notes 23/10/03). The brothers did indeed cause great delays. Drawing on my own observations during the first of a series of trials, as well as media coverage of the first and subsequent trials, the reason for delays resulted, not only from a lack of experience with legal proceedings, but also from disruptions caused by frequent dramatic outbursts by MSK and MAK. Such outbursts had the effect of causing one of their trials to be aborted because MSK yelled to the jury the following words: ‘Yes, I would like to say something.
We three…brothers are convicted rapists…sexual assault in company and you know that’ Wallace 2005b).  

The delays were the result of largely irrelevant objections placed on each piece of evidence tendered by the Crown, circular and at times, nonsensical cross-examination techniques and numerous emotional outbursts consisting of “political” statements citing the racism of the Australian criminal justice system and government. Such occurrences necessitated frequent intervention from Justice Sully and the need for constantly renewed directions to the jury: ‘You must be careful not to be put off your balance by outbursts of that sort. I refuse to be put off balance by such impertinent outbursts and so should you’ (Field notes 31/10/03). On one occasion Sully J sent the jury out of court to make the following remark to the MSK (who was the more outspoken of the two):

I will not make a martyr of you by charging you with contempt of court […] Firstly, making political statements […] might get you headlines in the media but will not make your case heard more effectively by the jury […] Secondly, if you or [MAK] come to your senses on this all-important matter of cross-examination then the court will assist you with an appointee (Field notes 31/10/03).

The accused did not ‘come to their senses’ and continued to represent themselves. Another observer of that trial, in a subsequent conversation outside of the courtroom, opined that perhaps lawyers in Pakistan were advising MSK and MAK and encouraging them to act out a ‘Muslim martyr’ routine: ‘That may work well in Pakistan but it will not be tolerated here… They are not doing themselves any favours through such emotional outbursts’ (Field notes 31/10/03).

29 The presiding judge in that trial, Justice Hidden ordered a retrial for the other co-accused brothers, MAK and MMK, but not for MSK (Wallace 2005b).
Throughout the duration of the trial, MSK and MAK snickered and giggled amongst themselves, particularly when one of the complainants had to recount details of her ordeal and the sexually explicit and derisive comments that were made to her after the event. They stared at the complainants in ‘a deliberate way’ as they walked past them, to and from the witness box, and MSK blew kisses to one of the complainants as she sat in the witness box (Field notes 31/10/03).

As Justice Sully had predicted, the brothers’ behaviour in the courtroom did earn them media attention. One headline stated: ‘Five gang rapists face life in jail, but smirking brothers still deny all’ (Glendinning 2003b: 1). In that article, court reporter, Lee Glendinning, wrote:

> For months, the men had tested the patience of the Crown prosecutor, Margaret Cunneen, Justice Sully and detectives with deluded courtroom antics… The pair jeered and winked at detectives Tony Adams and Michael O’Rourke, and slyly held up notes to reporters. While the defence cross-examined, they signalled “good” and “that is the right answer” (Glendinning 2003b: 8).

Upon receiving their guilty verdicts, ‘A smirk broke out across the face of the 25-year-old only identified as MSK. His brother, 23-year-old MAK, began to laugh aloud. “But there is one thing your honour,” he grinned. “I am innocent”’ (Glendinning 2003b: 8). A *Sun-Herald* article titled ‘Courage in the face of evil’ told a similar story: ‘Throughout the final trial…the two elder brothers winked at the police who had arrested them, flashed offensive notes at journalists and spent time in court buckled over in laughter’ (Sutton 2004: 52-53). Much was also made of the accused portraying themselves as the victims of a racist, anti-Muslim conspiracy existing between the criminal justice system and the government (Sheehan 2006). Yet another media article quoted a sexual assault counsellor’s comment regarding the courtroom behaviour of the brothers, stating that they were suffering from ‘delusions of grandeur and power […] their lack of remorse, their lack of taking responsibility for [their crimes] and their lack of regard for crime and the law and justice – they think they’re above the law, they’re invincible’ (Glendinning
and Wallace 2004: 27).

MSK and MAK’s disregard of courtroom conventions was paralleled in the Bankstown trials. In the trial involving Bilal Skaf and his cohorts Cindy Wockner quoted one of Judge Finnanne's comments during the trial ‘I am not going to have the place [court] turned into a three-ring circus’, apparently in response to ‘a complaint about one of the brothers laughing and smiling while the victim was testifying’ (Wockner 2002). Wockner added, ‘it was one of the many times that the judge was forced to admonish the rapists […] over their in-court behaviour’; and ‘Throughout the four gang rape trials... the youths sometimes acted as though the whole court process was some sort of sick joke’ (Wockner 2002).

The families of the accused – from both sets of rapes – were also implicated in the courtroom misbehaviour. Popular associations of such unreasonable and disrespectful behaviour with Islamic and Middle-Eastern cultures was fed by the comments of the perpetrators’ families in the courtroom, their comments to the media in defence of their sons, and exposure of dysfunctional methods of upbringing in psychological ‘offender assessment’ reports. I have already referred to the various comments of Dr K, father of the K brothers and a middle-class, educated professional, in regards to his sons’ crimes. Similarly, the family of Bilal and Mohammad Skaf in the Bankstown gang rapes, were quoted as saying that their sons ‘were innocent [and] victims of a police set-up and of racism within our legal system’ (Wockner 2002). Additionally, during the Skafs’ trial, ‘one family member professed loudly in Arabic that it was not a crime to f… a white slut’30 (Wockner 2002).

Psychological assessments tendered during the trial of the K brothers also revealed that from a young age, the brothers had been beaten and ‘threatened with guns’ by their father when they failed to learn passages from the Koran. The youngest brother on trial was

30 This brings up a point where Islamic cultures are perceived as having distorted / irrational views of “western women” and consensual sexual relationships. The strong taboo attached to sex before marriage in Islamic faith (at least among strict followers the faith), is seen as contributing to popularly conceived lasciviousness that Islamic men supposedly have towards ‘White’ / ‘Western’ / non-Islamic women.
reported as being dominated and hit by his older brothers.\textsuperscript{31} The same psychological report also revealed that the brothers had a ‘history of exposure to family conflict, violence, and a lack of parental supervision after emigrating from Pakistan to Australia’ (\(R \ v \ MSK, R \ v \ MAK, R \ v \ MRK, R \ v \ MMK\) [2004] NSWSC 319 at 74). The brothers were also noted as having ‘distorted beliefs and attitudes’ and ‘a reported history of engaging in sexually inappropriate behaviour towards peer-age females’ (\(R \ v \ MSK, R \ v \ MAK, R \ v \ MRK, R \ v \ MMK\) [2004] NSWSC 319 at 74).

The outline of these events in court is not applicable to strictly legal tests of reasonableness or ordinariness. This is because such hypothetical tests are not applicable in sexual assault cases. The perspective through which I have viewed these events has been more sociological (or socio-legal), in order to demonstrate that the courts are formal spaces in the legal domain which, through the physical ordering of bodies in the courtroom and the considered and logical use of legal argument, reflect a valorisation of a Western concept of rationality. The K brothers, to a lesser extent the Skaf brothers and their families, were portrayed as tainting the reasonable space of the courtroom through irrational behaviour and disrespect towards conventions of the Australian courts and therefore, Australian society more generally. Further, the inappropriate behaviour was attributed to the cultural backgrounds of the offenders as those who, as mentioned in Chapter One, obeyed alien moral codes: it was neither “reasonable” nor “ordinary” in the way that such concepts are defined in Western societies with anglocentric court systems.

In the K brothers’ case, a large share of the hostility that was generated by the behaviour of the brothers during the trials was also directed towards the courts. This was because the courts afforded legal rights to the brothers that were more broadly seen as undeserved. I have discussed this issue in Chapter One and will further discuss it in Chapter Six. Here, the issue is that the backlash against the courts for attempting to protect the rights of the accused equally – whether from diverse “ethnic” backgrounds or

\textsuperscript{31} In fact this was the defence case for the youngest (represented) accused MRK. He did not participate in the rapes but was, according to the defence case, too scared to stand up to his older brothers. He was still found guilty, but Sully gave him the most lenient sentence.
not – has implications for further instances in which the courts attempt to promote equality. This is particularly pertinent in instances where the courts attempt to promote equality through the recognition of “ethnic” or “cultural” difference. This was seen with some force when Stephen Odgers raised the “cultural time bomb” argument in a sentencing appeal.

Muslim rapists: the abnormal and unreasonable other

A brief segue into the media coverage around the gang rapes is necessary to illustrate that some groups are constructed as far from “ordinary” and incapable of the “reasonable” behaviour dictated by “community standards”. Whilst legal tests of “ordinariness” or “reasonableness” are not specifically applicable to sexual assault trials, coverage such as that which surrounded the gang rapes, produces, reproduces and perpetuates negative stereotypes that construct homogenised “ethnic” communities as deviant and “Other” to the (dominant) norm. Within this framework, any violent crimes committed by individuals from similar backgrounds then provide “evidence” for ideology that men from such cultures are neither “reasonable” nor “ordinary” and should therefore be excluded from the moral community.

As is usual in popular perceptions of sexual assault, the gang rapes were seen as the result of a group of young men who were unable to control their sexual urges. Such popular myths around sexual assault worked in conjunction with historical Western perceptions of “Muslim” or “Arab” masculinity, via the tradition of “Orientalism”, as sexually perverse and morally bankrupt (Said 1978). Hence the themes expressed in the media coverage of both cases were not entirely unfamiliar. On a broader, international level, homogenous and sexualised portrayals of “Arab” or “Muslim” men have been apparent in media reports of “terrorists” who were reported as willing to die as martyrs both for the sake of ‘revenge’ against the Western world, and also so that they may be rewarded with ‘unlimited sex with 72 virgins in the afterlife’ (Kelley 2001; Manji 2003). Locally, the

32 While this is not currently the case, recommendations have been made by the Attorney Generals’ Department of New South Wales Sexual Offences taskforce (AGD 2006) to use an objective test of “reasonableness” to determine whether the accused took the necessary steps make sure the complainant was consenting. I will refer to this later in this Chapter and also in Chapter Six.
young Muslim perpetrators in both gang rape incidents were represented as displaying their own brand of sexual and moral perversity via calculated ploys to pack rape a number of young women in a number of different incidents (Warner 2004; Wallace 2005a). The perception that there was an “ethnic” or cultural component to the crimes was further reinforced and perpetuated by popular media and political emphasis on comments uttered by the offenders and their families. These comments have been discussed in Chapter One.

Such remarks made it easy for conservative “shock jocks” and populist politicians to racialise the crime of gang rape and implicate a homogenised Arab or Islamic culture in the misogynistic and callous nature of the offenders’ actions. It is not feasible to here quote the immense volume of negative ethnic or cultural stereotyping, particularly after the Bankstown gang rapes, directed interchangeably at “Lebanese”, “Arab” or “Muslim” communities. However, one particular remark made by David Oldfield – New South Wales Upper House MP of the extreme right-wing One Nation Party – is worth mentioning for its significance to the present analysis. Gaining political leverage out of the gang rape incidents, Oldfield called for the ban of “Muslim” immigration to Australia and stated:

Those 14 men did not come to the conclusion that Western women are “sluts” and “whores” by themselves, they were indoctrinated with these beliefs by Islamic leaders…The socially primitive nature of Islamic society is evident…in the way they treat their women and, surely now, in the way they treat ours…such backward practices are not acceptable to Australian society (cited in Poynting et al. 2004: 124).

While Oldfield’s views were not representative of all political and public opinion at the time, his comment is a reasonably accurate snapshot of the general anti-Muslim sentiment immediately following what became popularly known as the “Lebanese” gang rapes (which were, as mentioned in Chapter One, conflated with broader national and international issues in which “Arabs” and “Muslims” were demonised). Conservative political and media commentary around this time also captured the popular Western portrayal of the Arab Muslim as generally misogynistic, and specifically lascivious.
towards ‘White’ women – demonstrated by the “‘othering’ of the perpetrators and the “‘whitening’ of the victims’ (Poynting et al. 2004: 124).

The message effectively delivered by the media saturation around these crimes was that Arab or Muslim youths are more likely to rape “white” women because they see them as “sluts”. The overarching presumption in media coverage of this nature is that Muslim men think that white girls will always consent or that to force them to have sex is not real rape. The fact that many men – regardless of ethnic background – hold this belief about women was obscured by the ideological storm that followed the “Bankstown” rapes in particular. This will be explored at some length in Chapter Six. Here, I argue that linking the rapes to an imagined “essence” of Islamic or Middle-Eastern culture operated as a presumption of guilt by cultural association and echoed a common “Orientalist” theme that has been criticised by Said, pointing out that the Western imagination describes the Arab or Muslim man as an ‘impossible creature whose libidinal energy drives him to the paroxysms of over-stimulation’ (1978: 312).

In this way, the crime of “gang rape” became ethnicised while the minority ethnic communities to which the perpetrators belonged became criminalised and were symbolically (and also literally) removed from the realm of “ordinary” citizens. The exclusion of Muslim Australians from the realm of “ordinariness” – moral and otherwise – became exacerbated by the crimes of a few individuals who identified as Muslim (Lebanese) Australians, or in the latter case, Pakistani immigrant Muslims.

‘It’s not a crime to fuck a White slut’: Western women and lascivious Muslim men

Stephen Odgers’ “cultural time bomb” argument has been outlined in some detail in the previous chapter. To reiterate, the argument was raised by Odgers in an appeal to reduce the sentence of MSK on the basis that the culpability of the accused is lessened because he effectively did not know any better due to the cultural circumstances in which he was raised. There was no doubt raised about whether the offender knew what he was doing: MSK was aware that the victim was not consenting to sexual intercourse but he refused to stop. This was echoed by MSK in his final cross examination by the Crown:
[TW] said no but I go ahead with it because I believe that at the time I commit these offences, I believe that she was promiscuous […] She don't know us, I don't know her, like she was not related to us and she was not wearing any purdah … like she was not … covered her face, she was not wearing any headscarf and she started drinking with us and she was singing… I believe at the time when I commit these offences that she had no right to say no (Wallace 2005f: 5. Emphasis added).

Attributing MSK’s actions to his cultural upbringing can be problematic on a number of levels. Most obviously, it attributes a range of less than desirable characteristics to people from the same ethnic and cultural group as the accused. The New South Wales Law Reform Commission (1997) has suggested that arguments that invoke ethnicity in this way are problematic:

it is unclear how it could be established with any certainty that members of one group have a lower threshold for exercising self-control than others. There is a danger that any such assertion would involve speculation and ill-informed stereotyping (NSWLRC 1997 at 2.67).

Though the New South Wales Law Reform Commission Report refers to the legal example of provocation, it serves to illustrate the problem of essentialism that plagues cultural defence arguments. Any attempt to incorporate an essentialised “ethnic” subject into an anglocentric legal framework fails to move beyond the limitations that are inherent in universalising certain subjectivities through attributing an ethnically determined set of characteristics to them.

While an objective test of ordinariness or reasonableness is not presently raised in sexual assault cases, there have been some suggestions that reasonableness should be applied as a standard of care in ascertaining whether the complainant was consenting. Thus far, in New South Wales, the presence of mens rea in sexual assault is ascertained through the subjective test which relies, in part, on the precedent of DPP v Morgan [1976] AC 182
(House of Lords). This test is utilised in various jurisdictions in Australia and other common law countries. The ‘Morgan requirement’ for culpability in sexual assault, states that ‘an accused is not guilty of rape if he honestly but mistakenly believes that the other person was consenting, even if a reasonable person would not have made the same mistake’ (Law Reform Commission of Victoria 1991: 9).

The Morgan principle is controversial. Bodies such as the ‘Real Rape Law Coalition’ and the ‘Feminist Lawyers’ group have argued that an objective rather than a subjective standard should be used in determining the accused’s guilt; even though feminist theory has traditionally sought to redefine objective tests away from its traditional biases. Those who object to the Morgan principle argue that the prosecution should only have to prove that the ‘reasonable person’ would have been aware of whether the other person was consenting or not. This would ‘refocus the mind of the jury on the standards that the community expects […]and that] the law should ensure that a reasonable standard of care is taken to ascertain whether a person is consenting before embarking on what could be potentially damaging behaviour’ (AGD 2006: 45). There is merit to such arguments because they protect the rights of victims of sexual assault.

The main counter-argument to the application of an objective standard of reasonableness and also one of the main reasons for rejecting policy proposals advocating the sole use of objective standards, is that ‘the criminal law is designed to punish the vicious, not the stupid or credulous’ (Law Reform Commission of Victoria 1991: 10). As delineated by the NSW Attorney General’s Department Sexual Offences Taskforce,

33 In this case, Morgan, after drinking together with three other men from the air force invited them to his house and suggested they should have sexual intercourse with his wife. He told them that she was ‘kinky’ and that she would pretend to resist at first. The men claimed to be doubtful but became convinced by the encouragement of her husband and he gave them condoms. All three men were convicted of rape, while Morgan was convicted of aiding and abetting (Brown et al., 2001: 424). The question that was considered in the appeal is ‘whether in rape a defendant can be properly convicted notwithstanding that he in fact believed the woman consented, if such belief was not based on reasonable grounds?’ (2001: 424-425).

34 This report outlines arguments for retention of the ‘Morgan requirement’ in sexual assault / rape cases. Even though my analysis is restricted to the NSW jurisdiction, the Morgan requirement remains the same in NSW as it does in Victoria. The only difference in Victoria is that the definition of consent was changed in Victorian legislation to mean “free agreement” to be sexually penetrated.
It is argued that if an objective test was introduced, a person may be punished who did not believe that what they were doing was wrong, but because their belief did not accord to a standard of reasonableness determined by the community (AGD 2006: 46).

This takes into account the aforementioned criticisms of any objective test that invokes a reasonable (or ordinary) person: it raises questions of whose standard of reasonableness should be applied. It is also reminiscent of Stephen Odgers’ premise in relation to MSK: that his culpability should be reduced on the basis that by the standards of his specific culture, he did not believe that what he was doing was wrong. A fair assumption could be made that by the logic of Odgers’ argument, MSK’s behaviour would be considered reasonable by the culture of North West Frontier Pakistan in which he was raised and by a young man who was raised there and brought this culture with him on immigration, not yet having been acculturated in opposed criteria of reasonableness.

In relation to an objective standard, the broader ideology both produced and reproduced within legal discourses labels the Arab/Muslim “Other” as fundamentally irrational and therefore incapable of making an ‘honest and reasonable’ mistake. In this context, such presumptions project incapacity on the part of the Arab or Muslim accused to make a rational assessment of sexual dynamics between men and women in Western societies. Though the prospect of ‘reasonable mistake’ remains, at least in theory, open to these accused, the reality is that the broader ideology dictates that these men maintain distorted attitudes and beliefs towards women, that they need, as the Crown prosecutor had said in the first of the K brothers’ trials, ‘to adjust to our society in the first place’ (Field notes 27/02/04).

Yet the dilemma between subjective and objective standards of guilt may be over-stated. A jury would be more likely to grant that the mistaken belief as to consent was honest, if it was reasonable. Simon Bronitt makes this point when he argues that ‘[t]his distraction may be unjustified since there is research suggesting that the dangers of an acquittal from applying Morgan logic are over-estimated’ (Bronitt 1996:4). Bronitt further argues,
One possible explanation for [a] low acquittal rate is the neutralising effect of the jury direction dealing with mistaken belief in consent. The first part of the jury direction instructs the jury of the central importance of mens rea and that, as a matter of law, a belief in consent, however unreasonable, must lead to acquittal. The second part… neutralises the effect of *Morgan* because the jury is instructed that, as a matter of evidence, the less reasonable the mistake is, the less likely it is that the accused actually held that belief (1996:4).

Bronitt’s observation shows that it is not possible to dispense entirely with standards of reasonableness, even if juries are specifically directed to do so.

**“Multiculturalism” and rape**

Defences such as Odgers’ “cultural time bomb” submission are exploited by conservative media commentators such as Paul Sheehan, Janet Albrechtsen and Miranda Devine (amongst others) who have habitually made use of over-simplified, ideologically driven versions of similar arguments in their dual agendas against multiculturalism and the leniency of the courts (Albrechtsen 2002: 11; Sheehan 2006; Devine 2005a: 15). The critique of the courts in conservative popular discourses is double-barrelled: on the one hand arguments posited by legal professionals and judges are often taken out of context and upheld as a legitimation of conservative ideologies that argue gang rape is a result of “cultural conditioning within primitive Islamic societies”. In this sense arguments similar to Odgers’ “cultural time bomb” have the potential to fuel conservative ideologies that assert Muslim men are more likely to be rapists. On the other hand, the courts are castigated for supposedly giving “special treatment” to offenders from ethnically diverse backgrounds (Sheehan 2006).

At times conservative ideologies about “foreign cultures” are also reinforced by judges. Unlike “ordinary” men who rape women, Arab or Muslim sex offenders seem to be recognised as potentially more inclined to commit sexual assault. Justice Sully alludes to this in his sentencing judgment for the K brothers:
In our society, to force a woman, any woman, to have sexual intercourse, is always and everywhere, at once a base act and a major crime. It is not, ever or anywhere, a defence that the woman was flighty, flirtatious or simply foolish. That latter comment is especially to the point with boys and men from foreign ethnic cultures. The status of women in foreign countries is, in the end, a matter for the law and culture of those countries. The status of women in Australia is a matter for the law and culture of Australia (R v MSK, R v MAK, R v MRK, R v MMK, [2004] NSWSC 319, 48-49. Emphasis added).

Elsewhere Sully J says: ‘Neither the law nor the culture of Australia recognises multiculturalism, however that phenomenon may be defined, as providing in any way or to anybody a convenient justification either for rape or any other form of sexual abuse’ (Sully J, 2004: 49). Finnane J also remarked to the jury, in the Bankstown trials: ‘No-one gets a different judgment because of a particular group they are in’ (Finnane J, 26 June 2000; cited in Regina v Tayyab Sheikh [2004] NSWCCA). Both comments were uttered in different contexts for different ends, Finnane’s remark was for the purpose of informing jurors that they should not make decisions based on personal prejudices, while Sully’s comments indicate a refusal to give anyone “special treatment” based on cultural difference.

There is practical and ethical merit to these judicial assertions, because the underlying intention is to promote equality. As Roger Cotterrell points out, ‘in contemporary conditions of considerable (and perhaps partly only mapped) cultural diversity such a position [that posits law as “cultured”] may no longer be tenable’ (2004: 4). Yet the pragmatic and conceptual difficulties of cultural defence arguments, does not preclude the position that some recognition of cultural difference is needed for genuine equality to be reached.

“Cultural time bombs”: equality and the recognition of difference before the courts
There are varying opinions within the judiciary, legal profession and academia about cultural defence arguments and the validity of “objective” tests of ordinariness and reasonableness. Most commentators problematise “objective” tests on the basis that the
characteristics of an “ordinary” or “reasonable” person cannot be legally or otherwise ascribed – even in the interests of theoretical legal analysis. Justice Lush in *R v Dincer* [1983] V.R.\(^{35}\), says:

> ordinary men come in all shapes and sizes with enormous variety of backgrounds of race, religion, colour […] It is obvious enough that men of one colour may find intolerable an insult that means very little to a man of another colour. So it is with situations. A man with one national origin and cultural background will find intolerable a situation which people of different relevant structure would not find intolerable (*R v Dincer* [1983] V.R. 460 at 50).

Justice Lush’s argument does not suggest that people of different backgrounds should be excused for behaviour that would be regarded as criminal by the dominant culture. Rather he points out that in another time or place, the actions of the accused may not be seen as morally reprehensible or criminal and this would have an inevitable impact on the culpability of the accused. This shows that “ordinariness” (or in other contexts, “reasonableness”) is a contested concept: what may be ordinary or reasonable to one person may not be to another who is culturally different. As Lanier and Henry succinctly point out, ‘what counts as a crime in one place or in one time, culture or location may not be considered criminal at another time, in another culture or even across the street’ (2004: 7).

From sociological and philosophical perspectives, ethical ambivalence surrounds the recognition of cultural difference. This becomes apparent when a particular person or minority group becomes identified as a “problem”. The ethical ambivalence arises in what Frantz Fanon (1968) refers to as a ‘dialectic of recognition’ which suggests that the moment an ethnic or racial ‘other’ tries to seek recognition they already face defeat, because they seek recognition within a standard from which they are always already

\(^{35}\) In this case, the accused, a man of Turkish Muslim background, killed his daughter because she had, at the age of 16, left the family home with a boy-friend of non-Muslim origin. This was perceived by Dincer to bring dishonour to the family. Counsel for the accused argued that Dincer should be excused or partially excused on the basis that as a Turkish Muslim man, Dincer felt responsible for the honour of his family and that his daughter’s virginity was crucial to that honour. The presiding judge, Justice Lush, accepted that Dincer’s ethnicity could be used as a partial excuse (*R v Dincer* [1983] V.R. 460).
excluded. The relevance of Fanon’s analysis in this context, though its focus is on the ‘black man’, becomes apparent through his reference to ‘a social web of racism’ in which the Negro identity is defined by white culture, and ‘the real world, [the white world] challenges [his] claims’ (1968:110). Fanon argues that ‘not only must the black man be black; he must be black in relation to the white man […] The black man has no ontological resistance in the eyes of the white man’ (1968:110). He says:

I was responsible at the same time for my body, for my race, for my ancestors. I subjected myself to an objective examination, I discovered my blackness, my ethnic characteristics; and I was battered down by tom-toms, cannibalism, intellectual deficiency, fetishism, racial deficiency, slave-ships (1968:112).

The ‘tom-toms, cannibalism, intellectual deficiency’ which are attributed to black culture, stand in clear opposition to the rational, civilised culture of the ‘white man’.

A similar opposition is posited in relation to what has been homogenised in the Western world as Arab and Muslim culture. Said argues that within traditional Western thought, the Arab is sexualised: ‘they are only capable of sexual incitement and not of Olympian (Western, modern) reason’ (Said 1978: 313-314). In addition, Said argues that ‘Islam is [seen as] an irrational herd or mass phenomenon, ruling Muslims by passions, instincts and unreflecting hatreds’ (1978: 317). Poynting et al. outline a similar and more recent phenomenon experienced by young Lebanese Australians similar to what Fanon describes in relation to the black identity:

The young Lebanese Australians are operating – we will not say ‘caught’ – within a double contradiction… [T]o the extent that they become fluent in the dominant cultural idiom, they are never judged to do so enough to attain the equality that they seek. They always do so imperfectly from the point of view of the cultural arbiters; they always have a cultural ‘accent’, as it were, which serves as a marker and a pretext for discrimination (2004: 97).
Like the Negro identity described by Fanon, Arab identity in traditional Western thought has been constructed in a negative way that posits the Arab as a problematic and essentially irrational “Other”. Both Said’s and Fanon’s arguments are applicable in the current context both internationally and locally; a new ‘social web of racism’ has constructed and essentialised Arabs or Muslims as a culturally homogenous “problem group” which is, as I have argued in Chapter One, excluded from the boundaries of moral community.

The courts, through their various practices and discourses, produce and reproduce this social web of racism through discourses that are unable to depart from the anglocentrism on which they were founded. This is not to suggest that the courts are “racist” in their decision making, as much as pointing out – as expressed in an Australian Law Reform Commission (ALRC) Report on ‘multiculturalism and the law’ (1991) – that the historical and cultural basis of the Australian legal system was Anglo-Celtic and ‘largely excluded the original inhabitants and ignored their cultures, at least until very recently’ (1991: 9). Further, the report states that ‘as a result of post-war immigration of large numbers of people from continental Europe and later from the Middle East, Asia and South America, the ethnic composition of Australian society has dramatically and irrevocably changed […] and] the consequences of this for the legal system have not yet been fully considered’ (ALRC 1991: 9).

Some solutions, as mentioned, have been found in applying ethnicity to objective tests to determine guilt. However, to attribute a set of ethnically determined characteristics to the hypothetical legal subject does not entirely resolve the problem. At best, these tests still operate on an assumed homogeneity of ethnic or cultural communities which are defined as “Other” to a dominant community which is normally considered “ordinary”. At worst, they are misused to perpetuate racist stereotypes that essentialise certain ethnicities as particularly volatile, unreasonable or violent – with little or no propensity for self control (Leader-Elliott 1996). That aside, the efforts of some judges, legal professionals and academics to consider ethnicity as a characteristic must be applauded on the basis that it attempts to extend cultural recognition to ethnic minority groups which are subordinated
by a uniform, anglocentric standard. The recognition of cultural and ethnic difference promotes genuine equality through acceptance of those differences rather than overlooking or ignoring them in ways which are espoused by the formal equality of law and Western liberal individualism. Speaking from a poststructuralist feminist perspective, Moria Gatens argues that difference needs to be acknowledged ‘to put an end to enlightenment-inspired notions of a universal ethic which always amounts to the subjection of women, the colonized, the “barbarian”, the “primitive” and so on, to the one Law, whose author misrecognises himself as the “universal man”’ (1991: 45). Discursive constructs such as the reasonable or ordinary man ‘depend for [their existence and] functioning on the disavowal of positive difference’ (Gatens 1991: 45). Some judges recognise and acknowledge this view.

McHugh J in his dissenting judgment in Masciantonio commented on the consideration of ethnicity in relation to the capacity for self-control, based on the mere possibility that such differences exist (Yeo 1996: 319). It is worth quoting here, McHugh’s argument in Masciantonio, regarding the issue of equality and ethnic difference:

Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities […] If it is objected that this will result in one law of provocation for one class of persons and another law for a different class, I would answer that that must be the natural consequence of true equality before the law in a multicultural society when the criterion of criminal liability is made to depend upon objective standards of personhood. Moreover, to a large extent a regime of different laws already exists because the personal characteristics of the accused including attributes of race and culture are already taken into account in determining the effect of the provocative conduct of the deceased on the ordinary person. In any event, it would be much better to abolish the objective test of self-control in the law of provocation than to perpetuate the injustice of an "ordinary person" test that did not take into account the ethnic or cultural background of the accused (Masciantonio v R [1991] HCA 22 per McHugh J at 9-10).
Stanley Yeo was mentioned in McHugh J’s dissenting judgment as being an influence. In influencing McHugh’s dissenting argument in *Masciantonio*, Yeo argues that ‘to insist that all these different ethnic groups conform to the one standard of behaviour set by the group having the greatest numbers (or holding the political reins of power) would create gross inequality’ (1992:12).

**Conclusion: ‘due recognition is a vital human need’**

While it is true that the Australian legal system does make genuine attempts to take cultural difference into consideration (Law Reform Commission Report 1992) and that individual judges are sympathetic to the idea, the courts do not venture beyond their own cultural standards for what constitutes “reasonable”, “ordinary” or acceptable behaviour.\(^{36}\) To the extent that cultural difference is considered by the courts, the results do not necessarily serve to exonerate, or ‘lessen the culpability’ (Odgers 2006) of individual offenders from diverse cultural backgrounds. Indeed, cultural defences in law often face the danger of homogenising and thereby implicating entire ethnic groups in the criminal behaviours that characterise the actions of the individual offenders. What can result is an irreconcilable tension between the desire to achieve justice through recognition of cultural difference, and an – albeit unintentional – criminalisation of the “Other”. This is partly because it is not possible for the legal system to depart from its own interpretation of “Other” cultural practices, understandings and behaviours. What is reasonable or ordinary – even with the added element of ethnic or cultural difference – will always be mediated by the courts’ anglocentric understanding of that difference.

Moreover, cultural defence arguments also have the effect of creating a “backlash” against groups that the law tries to accommodate. This backlash is also felt by the courts. An example is seen in the outrage expressed, particularly by conservative sections of the media towards Odgers’ “cultural defence” argument. The outrage revolves around the perception that offenders from other cultures are recipients of “special treatment” – that

\(^{36}\) More recently, the cultural specificity of the courts have been acknowledged in terms of remote indigenous communities with alternative systems of punishment. Circle sentencing has been engaged as a measure to address the differences between anglocentric practices of punishment and those of indigenous communities. These considerations, while fascinating, lie beyond the scope of this dissertation.
they should be subject to Australian laws just like everybody else. A common refrain from conservative columnists and populist politicians is that this is “political correctness gone mad”. There is also a good chance that juries will not be particularly receptive to what they may see as “special treatment” of “ethnic” offenders who have committed heinous crimes. This has significant implications for the accused who raises the cultural defence because the jury is directly involved in ascertaining whether the accused’s behaviour is “ordinary” or “reasonable”.

What becomes clear from a critique of the anglocentrism inherent in Australian legal discourses is that certain ethnicities and cultures are substantially disadvantaged when they fall on the wrong side of the law. This is particularly applicable for groups that have been ideologically constructed as “folk devils” in the public imagination. This is by no means to excuse the behaviour of the rapists or to suggest that there is a clear and simple solution to the problem of addressing cultural differences in an anglocentric legal system. Yet these concerns need to be addressed analytically in order to understand the processes of these legal systems and to see that the law, to some extent, inevitably produces and reproduces the reductive, assimilationist reasoning upheld by popular ideologies. Australian public discourses (which include legal discourse) need to provide practical alternatives that address the political and ethical ambivalences that surround a general recognition of difference.

This is no easy task, owing to the problems inherent in introducing cultural defence arguments. It is difficult to construct a consistent argument around the contested levels of “reasonableness” or “ordinariness” that judges and juries can expect from people of diverse ethnic and cultural backgrounds, without falling into an essentialist trap. Many cultural defence arguments such as the one advanced by Odgers, reinforce and perpetuate ethnic and cultural stereotypes, both within a legal and broader social context. The perpetuation of such stereotypes occurs because cultural difference is measured by an anglocentric yardstick that remains unquestioned; where anglocentrism becomes an “absent presence” [which] seeks to stand for, and be a measure of, all humanity. It
operates as a universal point of identification that strives to structure all social identities’ (Sharma and Sharma 2003:306).

Notwithstanding the practical difficulties or ethical ambiguities around cultural defence arguments, it is important that difference of all marginal groups is acknowledged in some form and the quest to find the best way to address it is continued. As Charles Taylor puts it: ‘Nonrecognition or misrecognition […] can be a form of oppression, imprisoning someone in a false, distorted, reduced mode of being […] Due recognition is not just a courtesy but a vital human need’ (Taylor 1992: 25). This is crucial even if such recognition is, as Fanon suggests, initially unequal.
Who belongs to the moral community?:
gender and ethnicity
5. Minority Masculinities: “Real” men v. men of Law and Muslim rapists

In Sydney, December 2005, an angry, alcohol-fuelled mob of 5,000 people gathered at Cronulla beach setting upon those they identified as “Lebanese” or “Muslims” or generally of “Middle-Eastern” appearance (Poynting 2007: 160-161). Of the 5,000 people, most were Anglo-Celtic-Saxon men. This incident was prompted by a long-standing conflict over territory at Cronulla beach, between the surf-lifesavers (“surfies”) and young Lebanese men (“wogs”) who caught the train into Cronulla from the Western suburbs. The violence began with a fight between three surfies and four Lebanese-Australian youths, culminating in the mob violence which came to be known as the “Cronulla race riots”. The point of beginning this chapter with a description of events at Cronulla lies in the fact that a deviant, misogynistic Arab/Muslim masculinity and the ideological linkage of this with the gang rapes, became a key issue during the Cronulla riots. This is highlighted by the comments of an Anglo-Australian Cronulla local who identified himself as ‘Steely’. This is what he had to say about ‘Middle-Eastern’ men from the Western suburbs:

I’ve got a four-year-old girl and a boy who’s 11, and they see these bastards come here and stand around the sea baths ‘cos their women have got to swim in clothes and stuff, or they see them saying filthy things to our girls…That’s not Australian. My granddad fought the Japs to see Australia safe from this sort of shit, and that’s what I’m doing today (Murphy 2005a: 4).

What is most striking in Steely’s comment is an appeal to “Australian values”. The implication is that “Australian values” do not condone misogyny or disrespect towards women.

After reviewing the relevant theory in the study of masculinities, this chapter will explore constructions of Muslim minority masculinities – interchangeably referred to and homogenised as “Muslim” or Arab” or “Lebanese” – and the ‘dominant” masculinities
that are defined in relation to this minority. In contemporary Australia (as elsewhere), the oppositional characterisation of “dominant” and “minority” masculinities have been broadly defined by interrelated categories of “race”, “ethnicity” and national belonging. The stark differentiation between the so-called “Australian” and “Un-Australian” masculinities was brought into sharp relief during the Cronulla race riots. In outlining the events that unfolded at Cronulla, I will explore the points of convergence and divergence between these constructed masculinities and ways in which each respective group “performs” their gender.

In a less conventional sense, I will mobilise the term “minority” to apply to the small and powerful social elite that constitutes the judiciary (and upper echelons of the legal profession). There are interesting parallels between popular constructions of socio-economically privileged judicial masculinities and socio-economically disadvantaged Muslim masculinities – despite their relative positions of social and symbolic power (or powerlessness). One similarity is the misogyny that is commonly attributed to each group. More fundamentally, I argue that both these popularly delineated categories of men are excluded from an imagined realm of (moral) community: they are not “real” or “ordinary” men. As I have argued in Chapters Three and Four, judges are constructed as hovering above the moral community, while Muslim men, as I argued in Chapter One, are excluded from the boundaries of community and civilisation through their dehumanisation as “animals” or “monsters”. In relation to judges, their legal masculinity serves them well within the context of the courtroom, however in media coverage of their behaviour they are emasculated because of a perceived absence of “realness”, and ironically, emotion.

A crucial aim of this chapter is to unpack the ways in which such groups of men, who appear on the margins of a popularly delineated idea of “community”, perform their masculinity in ways that are valorised in their respective milieux. I am interested in the three-way relationship between the performances of marginal masculinities in their own cultural contexts, the interpretation of these performances in a broader cultural context, and the way in which the negotiation between contextual and broader structural forces
shapes the masculinities in question. The dialectical relationship between the specific and broader structural forces that shape masculine subjectivities will be explored partly through a concept of “performativity”: the notion that subjectivities are naturalised through repetition of the behaviours that are performed and are expected (Collier 1998).

“Hegemonic” and “Marginalised” masculinities: A hierarchical model

RW Connell claims that:

“Masculinity”, to the extent that the term can be defined at all, is simultaneously a place in gender relations, the practices through which men and women engage that place in gender, and the effects of these practices in bodily experience, personality and culture (1995: 71).

The basic thrust of Connell’s highly influential work is that there is not one universal category of masculinity to which all men subscribe, but a diversity of masculinities constructed within different socio-economic, cultural, generational and institutional contexts. Central to Connell’s argument is a concept of ‘hegemonic masculinity’ which delineates a hierarchical structure of gender relations in the Western world, and ‘is always constructed in relation to various subordinated masculinities as well as in relation to women’ (Connell 1987: 183). Hegemonic masculinity is posited as the ‘currently accepted strategy’ and is designated a position of cultural dominance within society as a whole (Connell 1995: 77-78). This does not mean an ascendency that eradicates all alternatives, but a balance of forces, a constant state of play where other masculinities are ‘subordinated rather than eliminated’ (1987: 184). The theory of hegemonic masculinity specifically draws on the classic Gramscian notion of class-based ‘hegemony’ whereby:

a group claims and sustains a leading position in social life […H]egemony is likely to be established only if there is some correspondence between a cultural ideal and institutional power, collective if not individual […] It is the successful claim to authority, more than direct violence, that is the mark of hegemony (though violence often underpins or supports authority) (1995: 77).
Antonio Gramsci’s (1971) notion of hegemony also hinges on the always-imminent possibility that hegemonic power will be subject to contestation and resistance. Following Gramsci, Connell emphasises that hegemonic masculinity is ‘not a fixed character type, always and everywhere the same. It is, rather, the masculinity that occupies the hegemonic position in a given pattern of gender relations, a position always contestable’ (1995: 76). Poststructuralist accounts of masculinity problematise Connell’s categories of masculinity on the basis that they do not pay enough attention to the discursive contexts in which the negotiations and contestations around hegemonic masculinities take place (Collier 1998).

In an earlier work, Connell is more specific about the characteristics exhibited by the hegemonic ideal:

Indeed the winning of hegemony often involves the creation of models of masculinity which are quite specifically fantasy figures, such as the film characters played by Humphrey Bogart, John Wayne and Sylvester Stallone. Or real models may be publicized who are so remote from everyday achievement that they have the effect of an unattainable ideal, like the Australian Rules footballer Ron Barassi or the boxer Muhammed Ali (1987: 184-5).

The examples may be slightly dated but they illustrate the point. Such characteristics form a point of reference for other categories of masculinity which include ‘subordinate’, ‘complicit’ and ‘marginalised’ masculinities (1995: 78-81). These additional categories illustrate the hierarchical order and diversity of masculinities and exemplify the various ways in which hegemony can be contested and resisted. Media and popular cultural discourses play a significant role in constructing and prescribing the attributes embodied in the hegemonic ideal, and these are unrealistic and unattainable for most men (1995: 79). Yet Connell argues that to focus solely on a public dimension of hegemonic masculinity would be ‘a mistake’ because a lot of powerful men (mostly holders of state and corporate power) do not exhibit the characteristics attributed to hegemony in popular cultural and media imagery (1987: 185). Rather, “real” men – a category from which many men are excluded – support and are therefore ‘complicit’ in maintaining the public
image of hegemonic masculinity because it sustains their power. Connell claims that: ‘it seems likely that the major reason [for this] is that most men benefit from the subordination of women, and hegemonic masculinity is the cultural expression of this ascendancy’ (1987: 185). Thus, in analysing the power differences and relations between men, Connell is also sensitive to the traditional feminist concentration on inequalities between men and women (Jefferson 1997: 538).

Hegemony also forms the basis of what defines ‘subordinate’ and ‘marginalised’ masculinities – in the sense that the latter masculinities exemplify what hegemonic masculinity does not. Again, Connell is careful to emphasise that these categories are neither fixed nor mutually exclusive. ‘Complicit’ masculinities for instance, gain from, and therefore connect with the hegemonic agenda. The category of complicity also appears to offer a more realistic and pragmatic alternative to the normative and often unattainable standard of hegemony (1995: 79). However, hegemony remains the cultural standard as opposed to ‘subordinate’ masculinities which are symbolically (and culturally) pushed to the ‘bottom of the gender hierarchy among men’ (1995: 78). The sole example Connell offers of subordinate masculinity is male homosexuality, which ‘is the repository of whatever is symbolically expelled from hegemonic masculinity […] Hence, from the point of view of hegemonic masculinity, gayness is easily assimilated to femininity’ (1995: 78).

‘Marginalised masculinities’ appear in a separate category for purposes of addressing the ‘interplay of gender with other structures such as race and class’ (1995: 80). Connell’s reference both to marginality and ‘marginalised masculinities’ is sketchy:

Though the term is not ideal, I cannot improve on ‘marginalization’ to refer to the relations between the masculinities in dominant and subordinated classes or ethnic groups. Marginalization is always relative to the authorization of the hegemonic masculinity of the dominant group (1995: 80).
To illustrate the fluidity of these masculine typologies, Connell refers to the extreme ways in which “black” masculinities – which are normally subordinated – may be constructed in the United States: “black” sporting stars as ‘exemplars of masculine toughness’ and therefore hegemonic on the one hand, and as deviant and criminal, and therefore marginal on the other (1995: 80). In referring to the constructed deviancy of the “black” masculinity, Connell gives the specific example of ‘the fantasy figure of the black rapist […] which] plays an important role in sexual politics among whites, a role much exploited by right-wing politics in the United States’ (1995: 80).

In a contemporary Australian context, Middle-Eastern and / or Muslim men face strikingly similar circumstances of marginalisation and racist projection as that which has been faced by “black” men in the United States. A figure analogous to Connell’s example of the “black rapist” emerged in Australia: the “Muslim rapist” – particularly after the gang rapes perpetrated by young Muslim men in 2000 and 2002. Examples of this mythical figure have been most prevalent in the work of conservative journalists and commentators such as Paul Sheehan (2006), Miranda Devine and Janet Albrechtsen – amongst many others. Two examples illustrate the point. In a book titled *Girls Like You* about the K brothers’ sexual assaults in 2002, Sheehan wrote: ‘A clear pattern of sexual assault and sexual harassment by Muslim men was beginning to register in the legal system and the public consciousness’ (2006: 64).

Elsewhere, in relation to the Bankstown gang rapes perpetrated by Lebanese-Australian youth, Janet Albrechtsen erroneously quoted “French and Danish experts” to further an ideological agenda that posited the Muslim masculinity as sexually depraved (and deprived): ‘French and Danish experts say perpetrators of gang rape flounder between their parents’ Islamic values and society’s more liberal democratic values, falling back on the most basic pack mentality of violence and self-gratification’ (2002: 11). It was subsequently found by *Media Watch* that Janet Albrechtsen deliberately misquoted these “experts” to racialise its arguments (ADB 2003: 58). Sheehan’s and Albrechtsen’s commentary is not only useful in summarising the general sentiment towards Muslims at the time, but is also used to highlight the representations of Muslim men as animalistic,
violent and more susceptible to perpetrating sexual assault because of the popularly perceived conservativism and repressed sexuality of Islam. This will be discussed in a little more detail in a subsequent section of this chapter.

**Masculinities and Crime**

Given that some cultural and ethnic groups are popularly represented as particularly criminogenic, it is crucial to explore the scope of Connell’s influence on criminological accounts of gendered criminal behaviour. The question explored in such accounts is the relationship of these different ‘types’ of masculinity with crime, criminality, or criminalisation. The first claim in this body of work is that criminology has, until recently, been ‘alarmingly gender-blind’ – that men have been posited as the ‘invisible’ norm in traditional criminological theory (Messerschmidt 1993: 61; Collier 1998: viii). Theories exploring the relationship between masculinity and crime point out that crime is mainly a male behaviour. This is not posited as universal or inevitable. Rather it is an observation that there is a definite tendency for males to commit crime more frequently than females; that ‘in modern Western patriarchal culture the dominant or hegemonic masculine form is aggressive and misogynist’ (Newburn and Stanko, 1994: 4).

A fundamental facet of these theories is the association of different categories of masculinity – as per Connell’s classifications – with crime. As Newburn and Stanko point out in the introduction to their work, early studies on masculinity had focused on the importance of “toughness”, “excitement” and “male sexual prowess” as core values of communities associated with high crime rates (1994: 3). Generally in this body of work, crime is seen as one of the ways of ‘doing gender’. Additionally, the types of (criminal) behaviour in which men engage, is seen as being dependent on socio-economic position. However, masculinities at extreme opposites of the social hierarchy (“hegemonic” and “marginalized” masculinities), purportedly display similar characteristics: aggression, violence and misogyny (Newburn and Stanko 1994: 4). If it is accepted that such characteristics are central to constructions of hegemonic and marginalized masculinities, the difference between these categories of masculinity must be made clearer. It appears that a dominant idea of “hegemonic masculinity” remains roughly the same across socio-
economic and ethnic boundaries (cf. Donaldson 1993 for this point in specific relation to class). For this reason, the concept needs to be adjusted via greater sensitivity to the contextual circumstances in which the “hegemonic” and specifically “male” nature of certain attributes are negotiated. Also crucial is the relationship of these contextual circumstances to broader structures of power.

The traditional literature around masculinity and crime alludes to an overarching ideal of hegemonic masculinity, even if this ideal is constantly transformed, negotiated and contested in and through its cultural context. According to Messerschmidt, ‘what young men and women do tends to mirror and recreate particular gender divisions of labour and power and normative heterosexuality. This appears to be regardless of class and race position’ (1993: 88). Crucial to these theories is the claim that ‘masculinities are not given but ’accomplished’ by men (and women) in everyday life’ through constant negotiation, transformation and contestation of the hegemonic ideal, ‘drawing on resources structured via economic and social organisation’ (Collins et al. 2000: 145).

Because men experience their existence from a particular social position, ‘they differentially construct the cultural ideals of hegemonic masculinity’ (Messerschmidt 1993: 88). Men who are marginalised and disenfranchised through socio-economic disadvantage (due mainly to subordinate positions of class and ethnicity) find that crime is a viable alternative through which a form of hegemony can be constructed: ‘indeed, varieties of youth crime serve as a suitable resource for doing masculinity when other resources are unavailable’ (1993: 88). Thus, even men from circumstances of marginalisation, through their practices (both legal and illegal), have some agency in producing, reproducing and perpetuating the norms which constitute cultural ideals, and more broadly, social structures.

Also significant, is the broader social context in which certain ‘masculine’ attributes are valorised over others. In contemporary Western industrialised societies, social structures around class, race and gender are simultaneously constructed through, and underpin social action around the gender division between labour, gendered relations of power, and
sexuality (Messerschmidt 1993: 64). Through the lens of Marxism, labour is divided in a way which validates ‘the husband /father as the sole breadwinner’ and ‘constituted the social construction of a new type of white adult masculinity – full-time work in the paid-labour force [...] and white-adult femininity, the full-time mother/ housewife’ (1993: 66). Through an industrialised division of labour, hegemonic masculinity became associated with and defined by being ‘a good provider’ (1993: 66). The ‘breadwinner’ model of hegemony also extends to the development of masculinities around ‘expertise, technical knowledge, rationality, and calculation (the "bureaucrat" and the "businessman" emerged as social types)’ (1993: 67-68). In a more contemporary context, hegemony is no longer structured around the notion of the male as sole breadwinner and new constructions of masculinity and femininity are being constructed around the gendered division of labour (1993: 70). However, even in light of contemporary changes in gender roles, there still appears to be a residual and nostalgic notion of the male as ‘breadwinner’ and within the context of a “white collar” professional domain (in which “white” takes on a double meaning) men who are culturally equipped with characteristics which are considered ideal in such domains, are privileged over men who do not embody the requisite attributes.

What is also significant about the cultural ideal of the male as ‘breadwinner’ or ‘good provider’ (aside from assumptions that the ideal is ‘white’) is that it constructs and perpetuates a framework of heteronormativity. Heteronormativity also prevails in the “alternative” and sometimes-criminal behaviours of marginalised youth when trying to attain some semblance of hegemony. Messerschmidt, asserts that there is a normative heterosexuality in youth groups, which results in the ‘sexist exploitation of girls’ and that this is ‘common to all stratum formations, from middle-class to working-class youth groups’ (1994: 83). This resonates with the idea of hegemonic masculinity as heterosexual, aggressive and misogynist – even across class and cultural categories (Newburn and Stanko 1994: 4). The ideals of hegemony demonstrate an exaggerated heterosexuality which defines itself through opposition to and fear of what it is not: homosexual.
Further, heteronormative ideals of being a ‘good provider’ are shaped and restricted by race. For example, structural disadvantage in the United States had ensured that ‘African-American men were without the resources to construct a "breadwinner/ good provider" form of masculinity’ (Messerschmidt 1993: 66). The gendered division of labour demonstrates, at the most basic level, the intersection and inseparability of class and race, and highlights the unequal possession of and access to resources amongst different social groups. This reinforces the argument that marginalised men must construct a cultural ideal of hegemony in alternative ways. One of these alternatives, as mentioned, is crime – for both economic and symbolic ends (Collins et al. 2000: 141). This appears to be applicable to any Western, industrialised and multicultural society. Gibbs and Merghi in their study of black working-class masculinities in the United States, describe groups of young black males who draw ideas of what constitutes appropriate masculine behaviour from their peers, adopting ‘a set of exaggerated “pseudomasculine” behaviours to compensate for their lack of education, their marginal employment status, their inability to support families, and their lack of stability’ (1994: 75). These behaviours include sexual aggression, ‘toughness’ and ‘frequent involvement in criminal activity’ as well as more innocuous behaviours such as hanging out on street corners with groups of friends (Gibbs and Merghi 1994: 76). Gibbs and Merghi also argue that the exhibition of ‘pseudomasculine’ traits, serves as a defensive strategy to counter feelings of inadequacy arising from marginality (1994: 80).

**Gangs and “Un-Australian” Masculinities**

Similar traits can be applied to marginalised youth in a contemporary Australian context. Collins et al. (2000) in their study of marginalised Lebanese-Australian youth, point out that 'gang' membership need not be associated with criminal activity and delinquency – even though the term 'gang' is constructed negatively in popular culture and public discourses. Rather, gang membership in most cases, signifies no more than a ‘friendship group’ in which respect is valorised within a broader context of marginalisation:

The performance of the ‘gang’ functions in several ways: it provides a venue for cultural maintenance, community and identity, and at the same time provides the protection of
strength in numbers in the face of physical threats by other youth, and harassment by police and other adults. These young men were responding to the processes of racialisation that framed their position in Australian society. These threw back in the face of the threats from 'mainstream' culture a valorised empowering assertion of the ethnicity through which they had been labelled. Central to their partial negotiation of their experience of racialisation, they affirm a masculine and 'ethnic' identity of toughness, danger and respect (Collins et al. 2000: 150).

There are clear parallels between the black-American youths described by Gibbs’ and Merghi’s American study, and the Lebanese-Australian youth cultures explored by Collins et al.

These analyses also show, as Messerschmidt points out, that youth groups form a critical organisational setting for the embodiment of public masculinities (1994: 86). As Connell argues, ‘It is the group that is the bearer of masculinity. In a different cultural milieu [group members] are at a loss’ (1995: 107). Yet, regardless of whether the milieu is situated at the hegemonic, subordinate or marginalised level of the hierarchy of masculinities, the characteristics attributed to the hegemonic form appear to remain generally similar – even if the means through which they are achieved differ. This leaves Connell’s typologies (as well as the criminological accounts that fall within the scope of Connell’s influence) open to criticism. The critique that is most commonly mounted is that the concept of hegemonic masculinity fails to resolve fully the tendency towards universalism (Walklate 1995: 181, cited in Collier 1998: 21). Most noteworthy is Richard Collier’s (1998) critique of the very notion of hegemonic masculinity.

From a poststructuralist perspective, Richard Collier argues that the concept of hegemonic masculinity, though influential, ‘is of limited use in seeking to engage with such a complex masculine subject’ (1998: 20). While Collier acknowledges that the notion of hegemonic masculinity goes some way in recognising the diversity within men’s lives as well as acknowledging a culturally exalted form of masculinity (1998: 19), he raises a number of questions in relation to the idea of hegemony, taking particular issue with the idea that hegemonic masculinity is sometimes ‘accomplished’ through
crime (1998: 20). Collier argues that the concept of hegemonic masculinity is limited to descriptions of violent and destructive crimes, and does not appear to be of any use in describing ‘essentially harmless human traits’ (1998: 21). According to this critique, hegemonic masculinity is limited to describing a set of ideal characteristics attributed to “manliness” through popular ideologies, ‘whilst simultaneously holding in place a normative masculine ‘gender’ to which is then assigned the range of (usually undesirable / negative) characteristics’ (1998: 21). The characteristics ascribed to hegemonic masculinity, particularly in accounts of men and crime, ‘depict men as being unemotional, independent, non-nurturing, violent and dispassionate (whilst at the same time being, on occasion, inappropriately passionate)’ (1998: 19).

As stated earlier, criminological analyses of masculinity posit violence as one of the central means through which marginalised men assert some sort of claim to hegemony. However, contrary to Collier’s criticism, such accounts of men and crime do not solely refer to violence as the means through which subordinate and marginalised men subscribe to the hegemonic ideal. As highlighted by some of these criminological accounts – groups of marginalised men need not partake in violent, criminal or even ‘negative’ behaviour in their attempts to achieve some semblance of hegemonic masculinity. To reiterate, their activities may be as innocuous as “hanging out” with groups of friends on street corners (Gibbs and Merghi 1994: 76; Collins et al. 2000). The point is rather, that because certain racialised groups are ideologically demonised, their innocuous actions become criminalised and are more likely to be subject to differential policing. This explains why some masculinities are labelled “Un-Australian” (and criminal) when they behave in ways very similar to those who are labelled “Australian” (not criminal).

In Collins et al.’s Australian study, striking examples of the ways in which Lebanese-Australian youths have been aggressively targeted by police has been highlighted in the various interviews conducted by the researchers. In one example a Lebanese-Australian youth recounts his experience:
I came back from the airport to come and see my mates at [a western suburb] and they [police] were on the side, bashing my mate on the grass. I came past; I told him, ‘Can’t you leave my friend alone?’ He goes, ‘Get out of here before I do the same to you!’ When I chucked a U-turn, he pulled out a gun on my mate on the car…He opened the car and he sprayed capsicum spray on me and I just ran – Sam, 15/0/99 (Collins et al. 2000: 188).

Elsewhere, another young interviewee said the following:

The police sometimes act very childish, in the way, when we were younger, when another bloke called you a wog, you would get upset and you would pick a fight with kids and stuff […] But the police still call you a wog, ‘You little Lebanese fuck, go back to your own country, don’t come to our country and start trouble.’ You know what I mean? There is also a lot of racism and abusive language towards your family […] You start offering to fight them, being abusive to them, racist to them and all they really want is to charge you with something else. You start throwing punches at them, ‘Oh! We have got you on assault now, we have got you on hindering the police…’ All they did was say one thing to get you fired up and they do this on purpose […] They are very racist, very abusive, and they just do it to fire you up to make you explode – Ali 11/8/99 (Collins et al. 2000: 186).

As expressed in another interview from the same research, the media are also seen as being complicit in the criminalisation of these marginalised masculinities: ‘What the media portrays, they say ah, there is a gang of young Lebanese on the street and they call them a gang and all that, they actually scare the community. It’s not really a gang, it’s just young people; they are not organised gangs […] There are just young people hanging around – ECLO, 22/6/99 (Collins et al. 2000: 176). These scenarios provide fruitful examples of how masculinities in a specific set of cultural circumstances can be shaped by those particular circumstances, as well as the broader power structures that subject such masculinities to those circumstances.

More convincingly, Collier’s criticism of the notion of hegemonic masculinity raises the question: ‘If hegemonic masculinity is in ‘transition’ […] what qualities ‘maintain’ the
masculine in such a way that it continues to be of the ‘hegemonic’ kind?’ (Collier 1998: 21). This highlights the fact that an idea of hegemonic masculinity can be subject to the same limitations as the notion of an overarching, universalised and prediscursive idea of masculinity. The suggestion that hegemonic masculinity is always “in transition” does not entirely salvage it from an essentialist trap. Further, Connell’s conceptualisation of hegemonic masculinity renders it as stable in its position in the hierarchy – even if the cultural ideal itself is constantly negotiated and contested. Referring back to the aforementioned examples of conflict between marginalised masculinities and law enforcement officers, there is a pattern of aggressive behaviour exhibited by both groups – despite their relative positions of power – that display characteristics that fit within a cultural ideal of hegemonic masculinity.

This raises a fundamental shortfall of Connell’s categories of masculinity. The categories fail to account fully for the diversity between masculinities because no mention is made of the discursive context in which masculinities may be construed as hegemonic or otherwise. Connell begins to make this point by suggesting that ‘it is the group that is the bearer of masculinity’, and that different cultural milieux produce and reproduce different notions of masculinity (Connell 1995: 107). Yet, an overarching notion of hegemonic masculinity appears to remain stable across differing cultural contexts. This is not to say that the concept of hegemonic masculinity is invalid. The concept is very useful in describing, in any given social and historical context, the dominant culture’s conceptualisation of a broad ideal of masculinity. This is at least as significant as the discursive context in which the hegemonic masculinity is performed. The concept also goes some way in explaining why certain groups of men (and women) are excluded from the culturally and structurally defined boundaries of “community” while others are not. However it does not pay enough attention to the dialectical relationship between discursive and practical contexts which produce and reproduce specific hegemonic ideals and the ideals that are shaped by public conceptions of a dominant standard. This dominant standard in the form of “hegemonic masculinity” is what appears to be the focus of Connell’s analysis, at the expense of the contextual dynamics which contribute to the overarching ideal.
“You flew here! We grew here!”: The Cronulla “race” Riots

Particular manifestations of hegemonic masculinity were brought into sharp relief in overtly racialised and ethnicised ways, through the events in the so-called Cronulla “race riots” in 2005, Sydney. The “Cronulla race riots” involved a clash between two groups of men who identified themselves as belonging to the following ethnic groups and localities: men of Middle-Eastern descent from the working-class, outer western suburbs, and Anglo-Australian men largely from the southern coastal suburbs of Sydney. The groups involved in the conflict were (self-)labelled as “Lebs” or “Westies” and “surfies” or “[Sutherland] Shire boys”, and the violent conflict that occurred between these two groups, at least on a superficial level, was one over territory – encompassing spatial, symbolic and gendered dimensions of “ownership”. The surfies claimed that the “Lebs” were coming to their beach, “causing trouble” and “terrorising” the locals – especially “their women”. They stated that if the “Lebs” wished to attend Cronulla beach, they had to abide by the unwritten rules dictated by those who belonged. As Clifton Evers asserted: ‘Ideas about where you walk, swim, surf, how you dress, what kind of games you play and food you eat on the beach have evolved to fit a particularly Anglo-Australian view of the world’ (Evers 2005: 13). This Anglo-Australian world-view is also evident in the comments of “Steely”, who I quoted in the introduction of this chapter.

Hence when a fight erupted over these issues, between a group of young Lebanese-Australian men and some off-duty Cronulla beach lifeguards, the ensuing uproar in the form of the riots was rationalised on the basis of “ownership”. The predominantly Anglo-Australian “surfies” and other Cronulla locals stated that their beach needed to be “reclaimed”. To reclaim their territory, the mainly Anglo-Australian Cronulla boys used violence and their bodies were used to demonstrate their allegiance to Australia. They draped themselves in Australian flags, wrote: ‘We grew here! You flew here!’ on their bare chests (Evers 2006: 20), chanted ‘Aussie, Aussie, Aussie…Oi, Oi, Oi’ and sung ‘Waltzing Matilda’ (Kennedy et al. 2005: 1), as part of an overtly Anglo-Australian demonstration of exclusive nationalism. These behaviours resonate with the ethnically and culturally delineated sense of “community” that has been the focus of my arguments.
in Chapter One and the tensions that arise when certain groups are perceived as a threat to that community.

While much of the mainstream media coverage of the riots focused on underlying racial tensions between Anglo-Australian and Lebanese groups, the focus here is to draw out the gendered dimension of the “Australian-ness” displayed by the local “surfie” boys and the oppositional masculinity exhibited by the “Lebanese” boys. External and symbolic displays of traits that are valorised as a peculiarly “Australian” form of (hegemonic) masculinity emerged in number of ways: through beer drinking, a beach barbecue (‘to get everyone in the mood to be a real Aussie’), and evocation of the “ANZAC spirit” (Murphy 2005a: 5). Two points however are particularly noteworthy for their compatibility with a much broader, cross-cultural ideal of hegemonic masculinity.

First, the Anglo-Australian men performed their gender in a way which reinforced their masculinity via their opposition to women. As Alan Peterson points out, ‘specific historical and social constructions of masculinity cannot be dissociated from constructions of femininity and, like other terms such as male, men, female, and women, it is difficult to speak of masculinity without implying a binary notion of gender’ (2003: 58). The hegemonic qualities displayed in the behaviours of these men were relational to the perceived feminine helplessness of the local women who were being ‘harassed’ and needed protection from a perceived (or real) external threat.

Australian surf star and local underworld celebrity Koby Abberton offered his view on this particular element of the conflict: ‘The reason why it’s not happening at Maroubra is because of the [Maroubra gang] Bra Boys […] Girls go to Cronulla, Bondi, everywhere else in Sydney and get harassed, but they come to Maroubra and nothing happens to them […]Because] if these fellas come out to Maroubra and start something they know it’s going to be on, so they stay away’ (Sheehan 2005: 13). That the local surfies became protective of “their” women in the face of a “foreign” threat also reinforces an idea of hegemonic masculinity in which females in the same cultural group are constructed as being “owned” by its male members (Messerschmidt 1994: 83). This paternalistic
impulse was also witnessed specifically in male reactions to the Bankstown gang rapes in 2000 and their trials in 2001:

In the second half of 2001, the City Star, the local paper of Penrith in the outer west of Sydney was ‘besieged by letters from angry, white males about “ethnic crime”, especially rape.’ The editor, Chris Hutchins, recounts to Andrew West, ‘They would say these rapists were not real men… Send them out here and we’ll show them what a real man does – all that stuff (West 18/11/01 cited in Poynting et al. 2004: 122. Added emphasis).

As seen in Chapters One, Three and Four, this removal from the realm of “real men” is also extended to judicial masculinities – for their perceived failure to protect “Australian” women from Muslim men who rape them.

During the unfolding of events at Cronulla, some women were moved to write letters to the editors of newspapers to criticise “surfie” men for referring to women as their “property”. Christina Ho from Springwood wrote: ‘What’s with all this talk of “our women” and “their women”? Women don’t belong to anyone, just as the beach doesn’t belong to anyone […] Neither the beach nor women need to be defended by violent vigilantes’ (‘Letters’ 13/12/05: 12). Rachel Rogers in the letters page of the *Sydney Morning Herald*, expressed the following:

Apparently you drunken, bigoted knights in flannelette from Cronulla desire to defend your women, your beach and your Australian way of life […] The women do not feel safer. We are scared. We are sickened. We are disgusted […] A few disgusting things said, a wolf whistle, an insult – they are not good enough reasons to justify what happened. I go to Cronulla all the time. I’ve had just as many leers and wolf whistles from Caucasian males as any other race. You know what I and many other women do? We ignore them. Simple. (‘Letters’ 15/12/05: 16).

There is an overt masculine dominance that is expressed through such professed ownership of women. The comments of women who grew up in Cronulla as “surfie chicks”, suggested that there was a culture of misogyny that accompanied the masculine
dominance. Kathy Lette – one of the authors of *Puberty Blues*[^37] – had satirically summed up her experience as a ‘Shire chick’ as follows: ‘The boys I grew up with in Cronulla disproved the theory of evolution...And we girls were just second-class citizens. We lived vicariously through them. We were sort of nothing more than a life-support system to a vagina’ (Murphy 2005b: 25).

The second crucial element to be found in the white ‘Australian-ness’ of surfie masculinities, is that it was defined against negative portrayals and perceptions of the “foreign” men from whom the “local” women needed to be protected: “Lebs”, Muslims, people “of Middle Eastern appearance” or simply “wogs” (Poynting 2006). The ways in which these men were represented as “trouble-makers” was the legacy of moral panics around various other events involving Middle Eastern people, particularly the gang rapes. In a typically xenophobic account of the events in Cronulla, Paul Sheehan condemned both sides as ‘ugly tribes’ but apportioned blame for the riots to yet another provocation by the aggressive, repugnant Lebanese ‘gangsta culture’ in Sydney, which had allegedly been responsible for ‘dozens of shootings and murders, a spate of gang rapes, hundreds of sexual assaults, and thousands of deliberate racist provocations at Darling Harbour, the eastern and southern beaches and some of the big clubs in western Sydney, along with Canterbury Bulldogs rugby league matches’ (2005: 13).

The Cronulla riots presented conservative commentators such as Paul Sheehan with another opportunity to take an ideological stance on “Muslim” minority groups and, by association, multiculturalism. This is not to suggest that Sheehan’s exaggerated swipe against Middle Eastern youths is purely fabricated, but that in a climate of Islamophobia, the sometimes criminal ways in which Muslim men “perform” their gender is more newsworthy – particularly within the scope of a conservative anti-multicultural agenda – than the behaviours of other socio-economically disadvantaged masculinities.

Certainly, Middle Eastern youths as minority masculinities, may become involved in criminal “gang-related” activity as an avenue towards hegemony through economic gain, cultural recognition, respect and power (Collins et al. 2000: 160-164). The accomplishment of gender through such means can be covered by Connell’s concept of “protest masculinity” (1995) which is ‘the assertion of a form of symbolic power or aggression which compensates for the experience of marginalisation, powerlessness and the “hidden injuries” of class’ (Collins et al. 2000: 166). More convincingly, Margaret Thornton’s concept of ‘sub-cultural capital’ (following Bourdieu’s concept of ‘cultural capital’), posits that some youth cultures adapt and capitalise on their deviant labelling in order to differentiate themselves from a dominant norm and gain status before other members of the same subculture (Collins et al. 2000: 167). This is particularly likely to occur amongst minority youths if they cannot exhibit the symbolic and cultural capital that defines dominant, “hegemonic” social and national groups. As Collins et al. point out, ‘it is little wonder that these young men use the very raw materials of racialisation – which already cast them as ‘other’ – but revalorise these’ (2000: 168). Through the establishment of sub-cultural capital amongst minority youths, overlapping structures of gender and ethnicity are performed and “performative” – naturalised through repetition (Collier 1998: 29). The “protest” aspect of gendered performance was also apparent in the courtroom during the trials for the Bankstown and K brothers’ gang rapes. The behaviour of the Skafs in the courtroom and, more notably, the K brothers who represented themselves, could be interpreted as a deliberate affront to authority, or as one interviewee put it – ‘disrespect for the majesty of the court’ (Interview 22/02/07).

The Cronulla riots, re-established what Australian masculinity is supposedly not, through the construction of an oppositional, “Un-Australian” masculinity as embodied by the “Lebs” (or “Muslims” or “wogs”). Even though media and political discourses constructed the violence enacted by both cultural groups in negative terms – New South Wales Police Commissioner also referred to the Anglo-Australian rioters as ‘clearly Un-Australian’ (Kennedy et al. 2005: 1) – this did not detract from the idea that ‘surfies’ embody a culturally exalted type of masculinity in Anglo-Australian culture. The characteristics exhibited by surfies (and other exalted sub-cultural groups of Anglo-
Australian boys, like sporting stars, for example) were still generally valorised and legitimated by the dominant culture. Popular discourses also seem to be more forgiving about the largely negative qualities of masculinity that are exhibited by surfies and more generally the ‘blokes’ who fit into the Anglo-Australian ideal of hegemony, than they are about the negative characteristics displayed by marginalised Middle Eastern men. Surfie waywardness appears to be forgiven on the basis of underlying good intentions and decency rather than some innate sense of moral corruptness or evil. This could be an extension of the ongoing, criminalising imagery that surrounds Middle Eastern cultures in Australia and other Western societies (Poynting et al., 2004).

Such negative constructions around the ‘Arab other’ set these men apart from the norm and deprive them of the right to be ‘ordinary’. Hanifa Deen in her account of Muslims in Australia, states that:

[Because of] recent world events… today in the eyes of the West, the words Muslim and Arab have become synonymous with ‘terrorist’, ‘fanatic’ and ‘extremist’. While ten years ago Muslims were a ‘problem’, seen to have little in common with other Australians, today they have graduated into becoming a problem with enemy status. Seldom are they thought of as people who mow their lawns, are preoccupied with losing weight, worry about their jobs and mortgages, play sport, swap jokes or tell their children bedtime tales (Deen 2003: 8).

This perceived lack of ordinariness – as interpreted by the law – was discussed in Chapter Four. In the context of the riots, Middle-Eastern-Australians, male or female, who visited Cronulla were not seen as “ordinary” Australians spending a day at the beach, but as the foreign other who disrupted the iconic, “relaxed” lifestyle of the beachside community. They were particularly visible because they are racially marked and they dressed differently to the ‘Anglo-Australian’ view of how beach-goers should dress (Evers 2005: 13). Evers also observes that little attention was paid to the banal fact that ‘Cronulla is the easiest beach to get to from the suburbs of south-west Sydney, where many migrants have moved since the 1960s and 1970s. Young men travel from the inland suburbs to Cronulla and hang out’ (Evers 2006: 20).
In a way that is reminiscent of the police targeting of Middle Eastern youths (as demonstrated by Collins et al.’s research), the innocuous act of “hanging out” became criminalised and associated with the more sinister idea that “Lebs” were coming to these beaches for the purpose of “causing trouble” harassing and disrespecting local women. This was foregrounded by most Anglo-Australian residents of Cronulla in a way that capitalised on existing Western preconceptions about the specifically misogynistic and sexually perverse nature of Middle Eastern men (Said 1978; Deen 2003; Jamal 2005: 13). Such preconceptions had become legitimated by the media and public discourses that surrounded the “Lebanese gang rapes” in South-Western Sydney in 2000 and later, the K brothers’ gang rapes in 2002.

**Gang Rape, masculinities and misogyny**

Sexual assault and group sexual assault is another way in which masculinity is performed. Popular ethnocentric representations that have focused on the “ethnic” and cultural elements of the gang rapes committed by perpetrators of “Muslim” or “Lebanese” background; they have based their assumptions on prevalent myths around sexual assault and racist projection on the demonised “Other”. While it cannot be denied that (group) sexual assault cannot be removed from culture, it is not, as Islamophobic commentators have argued, simply the result of perverse, misogynistic values dictated by specific “ethnic” cultures. Nor are “perverse” values and misogyny, as these accounts would have us believe, exclusively applicable to particular, non-Western, “ethnic” cultures. What was missed by the conservative polemics around the Sydney gang rape cases – particularly in relation to the Bankstown gang rapes – is that there is a nuanced link between masculinity, “ethnicity”, socio-economic position and sexual assault, particularly group sexual assault.

The circumstances under which sexual assault occurs, its prevalence, and the popular myths that surround sexual assault will be discussed at length in the following chapter. Here, for the sake of brevity, I will focus on the phenomenon of group sexual assault – or “gang rape” as it is colloquially known – and the way in which group sexual assault
becomes an extreme way of performing gender, through misogyny and violence, for marginalised masculinities. This is quite a different claim from the one that is made by anti-multiculturalist commentators in that while it acknowledges the (sub)cultural element of gang rape, it does not attach it to the moral values of a particular ethnicity or religion.

Messerschmidt made a similar point through citing the “Central Park wilding” case in the United States on the night of 19 April 1989, in which a group of young African American men gang raped a female jogger, used extreme violence and left her for dead (1993: 114). It was subsequently found that the young men accused of and gaol for the crime were innocent, when another man confessed to the rape and near-fatal beating (Poynting et al. 2004: 148). This fact certainly undermines Messerschmidt’s theory that ‘such group rape helps maintain and reinforce an alliance among the boys by humiliating and devaluing women, thereby strengthening the fiction of masculine power’ (1993: 114) and that group rape is a situation in which the group members compete for status with one another (1993: 115). Notwithstanding the erroneous empirical circumstances on which Messerschmidt built his argument, it is plausible to argue that through misogyny, violence, and a desire to gain status through sexual prowess and subordination of women before other members of their sub-cultural group. It is also an extreme and violent manifestation of attitudes that separate women into the dichotomous moral categories of virgin / whore.

In the Bankstown gang rapes, the factual circumstances of the rapes demonstrated a “bond” between the offenders, in which they were collectively engaged in the sexual exploitation and humiliation of a young woman who was from a cultural group outside of their own. This is not to suggest – as the popular media asserted – that their attacks were restricted to women outside their own community. That this was not the case will be demonstrated in Chapter Six. However, it is not unusual for men who rape women to target those who are outside their own community. Andrew Jakubowicz has argued: ‘Is it the case that adolescent thugs, looking for easy targets to play out their stuff on would pick women from outside their own community? The answer is Yes, they clearly would’
The reasons for this are pragmatic and attitudinal. In a pragmatic sense, the offenders would seek to escape the consequences that extra-marital sex (whether forced or not) would cause in a close-knit community which condemns it (Poynting et al. 2004: 126). A more fundamental reason is attitudinal: ‘Some people also believe that the boys were also conditioned to divide women into the saints, who are their mothers and sisters, and the sinners who inhabit the world beyond. That’s not uncommon among criminals across a range of cultures’ (Crichton and Stevenson 2002a). Neither is it an uncommon attitude amongst men who are not criminals.

In the K brothers’ gang rapes, the psychological assessments of each of the perpetrators exhibited a version of the following findings: ‘indications of a disordered sexuality’, a ‘social history in Australia […] of inappropriate sexual behaviour and of unhealthy sexual attitudes’, ‘cultural displacement’, as well as a desire by psychologists to know more ‘about any prevalent cultural assumptions and practices relating to females that they may have absorbed in their formative years – and in particular, cultural assumptions relating to young females who are perceived to be sexually available’ (Regina v MSK, Regina v MAK, Regina v MRK, Regina v MMK [2004] NSWSC 319 at 61, 78). The arguments of Stephen Odgers and Michael Humphrey outlined the ‘prevalent cultural assumptions and practices relating to females’ in the village in which the brothers were raised. The details of these arguments have already been detailed in Chapters Three and Four. Yet there are couple of points raised by these that bear particular relevance to the ways in which the K brothers’ masculinity was performed through sexually deviant and violent behaviour. The first is that the village from which they came in Pakistan, near Peshawar (at the Afghan border), is characterised by ‘strong patriarchal values and an honour code enforced by personal violence’. An element of the ‘honour code’ that was particularly relevant was that it ‘makes men responsible for their women economically but also allows them control over their everyday lives and moral behaviour’ (Humphrey, cited in Odgers 2005: 6).

This is not far removed from Messerschmidt’s thesis that ‘young men exercise authority and control in terms of gender, at least relative to young women of the same race and
class, [and] the youth group is unmistakeably a domain of masculine dominance’ (1993: 89). However in Peshawar circumstances are far more extreme: women are frequently used as commodities to settle disputes between clans – ‘typically it involves exchanging a 15 year-old, ten year-old and five year-old girl, to be married into three succeeding generations of the enemy clan’, and there are practices such as ‘wife inheritance, wherein a widow is forcibly married to her dead husband’s brother or cousin’ (Economist 2006: 76). Such cultural circumstances would have, as Humphrey and Odgers argue, an impact on the way in which the K brothers’ masculinities were shaped and subsequently performed in different cultural circumstances such as those in Australia.

The other crucial point raised by Odgers’ submissions was that, quoting psychological assessments of the brothers

the offenders espoused hostile and demeaning attitudes towards the victims of these offences. And it is commonly observed that men who use demeaning language about women (eg saying this such as ‘you’re just a slut’) often hold black-and-white (‘virgin/whore’) attitudes about women – such as those females who do not confirm to their ideal are regarded as ‘asking for it’ and ‘deserving what they get’ (Baron and Sutton cited in Odgers 2005: 8).

This echoes the tendency, raised in relation to the Bankstown rapes, for men to separate women into moral categories of ‘saints and sinners’, ‘virgins’ or ‘whores’. To reiterate the point made earlier, this is not unusual, nor is it restricted to men who perpetrate sexual assault. This will be explored more in the following chapter. Yet, elements of this argument were ideologically exploited so as to provide “proof” that men from Muslim cultures specifically targeted white, Anglo-Australian women.

That ethnicity was mentioned by the perpetrators during the Bankstown assaults, was not proof, as claimed by the popular media, that ‘the rapists mentioned race first’ (Devine 2001b: 15). As mentioned in Chapter One, the comments made by the perpetrators of the Bankstown gang rapes, such as – ‘You deserve it because you’re Australian’, ‘Aussie pig’, ‘I’m going to fuck you Leb style’ – became the centrepiece of media accounts of the
gang rapes rather than the horrifying nature of the crime and misogyny that invariably underpins rape itself. Moreover, as Poynting et al. argue, while ‘the rapists said things claiming cultural superiority and expressing cultural put-downs at the same time […] they surely say them at other times, too, in common with their entire cohort. Many men say them who are not rapists’ (2004: 127).

The fact that it is common for rapists to further degrade their victims through racially and otherwise derogatory remarks was something that was obscured by the racialised, ideological furore that erupted over “Lebanese gang rapes” (and later the K brothers’ rapes). This served to create a fictitious character of the “Muslim rapist Other” in the public imagination, who targeted ‘Australian’ women because of the sexually repressed nature of his culture. That a ‘cultural defence’ was raised by the defence counsel created a double-barrelled opportunity for right-wing attack on the permissive, “politically correct” notion of multiculturalism – about which ideological inferences are made about allowing “foreign” men to rape “our” women, and the courts who are too “soft” and fail to adequately protect “the community” from these “ethnic” perpetrators.

Further, claims of cultural superiority during sexual assault have a complex relationship with the masculinity that is performed during a group sexual assault. It is a way of simultaneously affirming cultural and masculine identity. Messerschmidt argues:

In all Western industrialized societies, the vast majority of violent, forcible rapists are those “most removed from the confirmations of manliness derived from wealth or position; most removed, indeed, from any type of ‘respectable’ status or identity” (Segal, 1990: 245, in Messerschmidt, 1993: 114).

Elsewhere he argues that group rape is a method of ‘securing approval and praise’ whereby men from minority groups use this form of sexual assault as ‘a resource that enhances one’s masculine worth at the expense of someone else, and extends the individual’s own significance through negating that of another’ (Messerschmidt 1993: 115). While Messerschmidt acknowledges that group rape is not restricted to men from disenfranchised, minority backgrounds, he argues that ‘the combined class and race
social setting of these youth increases the incidence of this type of rape’, whereby broader resentment about social disadvantages are transformed into misogyny and group physical violence becomes a resource for ‘constructing a particular type of masculinity, a collective, publicly aggressive form of masculinity’ (1993: 116). This argument can be criticised on a number of different levels, however its main weakness can be found in the lack of examples that are given, of “ruling class” men who are no less likely to be guilty of sexual violence – group or otherwise – against women (cf. Donaldson and Poynting 2007 for some good examples of this). It could be that Messerschmidt is extrapolating his thesis on the link between group sexual assault and social disadvantage from those who are prosecuted (and who are more likely to be prosecuted due to their less powerful status).

There is no doubt that sexual assault of any kind – particularly violent, group sexual assault – results from of a culture of misogyny. Yet Messerschmidt’s focus on ‘lower-working class, racial-minority boys’ does not pay enough attention to other contexts in which a culture of misogyny can thrive. Academics Catharine Lumby and Michael Flood, along with manager of the New South Wales Rape Crisis Centre, Karen Willis, concur that ‘it is possible to identify certain groups whose characteristics – a culture of secrecy, of “us against the world”, bonding and hypermasculinity – increase the likelihood of their members engaging in gang rape’ (Jackman 2004: 37). Lumby is cited as listing ‘college fraternities, the military and some surfing communities as subcultures wherein gang rape has been documented as an insidious bonding or initiation ritual’ (Jackman 2004: 34).

The fact that gang rape is not restricted to disenfranchised minority youth, was illustrated by another (alleged) gang rape incident which occurred during a team celebration in Coffs Harbour in early 2004, involving players in the Canterbury Bulldogs rugby league football team. The charges were eventually dropped, mainly because of the paucity of evidence about whether what had occurred was “consensual group sex” or gang rape. The credibility of the complainant was paramount to the issue of consent, as well as the status of the accused as “sporting stars” and their ability to attract “groupies”. The players at the centre of allegations gave their own version of events. They admitted to ‘wild parties’
‘group sex’ and enjoying ‘a bun’ (a term to describe one woman and a number of men engaging in group sex), but they denied that they raped her (Weidler 2004: 5). The team members at the centre of the allegations claimed that she had only had consensual sex with one team member and had tried to entice other team members to have sex with her: ‘Don’t think she was an innocent player in all this. After the Wednesday night she gave her number to one of the boys and said, ‘Come around and bring the whole team around’’ (Weidler 2004: 5). These players claimed that the Wednesday night before their game, the young woman had consensual sex with eight members of the team and was later boasting about it. The footballers referred to the young woman as a “scrag” (Weidler 2004: 4) and a “groupie” (Masters and Halloran 2004: 73).

In the media coverage of the “Bulldogs sex scandal” a culture of misogyny was blamed. Miranda Devine spoke of ‘a powerful streak of misogyny [that] runs through the club’ (2004a: 15), while elsewhere stating: ‘knowing it is wrong to gang rape a woman… can’t be separated from the apparent culture of “gang banging” and misogyny which suffuses rugby league and other male team sports’ (Devine 2004c: 15). Jacquelin Magnay in an editorial entitled ‘What dogs do’ refers to group sex as ‘a method of team bonding’, and asked rhetorically: ‘But why does this happen? Does the club culture in rugby league encourage such behaviour? What is going on that highly paid, fit young men seem to think that it is their right, and indeed, their privilege, to abuse women?’ (Magnay 2004a). Rosemary O’Brien from Georges Hall wrote to the *Sydney Morning Herald* on 29 February 2004, to say that she was ‘utterly appalled at the apparently acknowledged behaviour of a host of sporting stars […] ”Roasts”, “gang-bangs”, “bun chicks” – what mind-numbing culture of excess and infidelity have we, as a society, allowed to fester?’ (Letters 29/2/04).

Many commentators drew parallels between the infamous ‘Lebanese’ gang rapes and the Bulldogs scandal (Devine 2004d: 15; Magnay 2004a, 2004b; Albrechtsen 2004: 15). ‘Team-bonding’ and masculine ‘rites of passage’ were cited as the main reasons for the incidence of gang rape among groups of men (Magnay 2004a; Baird 2004: 43; Devine, 2004c: 15). One article referred to American research which had found ‘that the sexual
assault of women is fostered by the ‘collective rituals of male bonding among closely knit male fraternities’, such as sporting teams and street gangs’ (Jopson 2004: 27). On a conceptual level, the similarities lie in the performance of masculinity in group rape. Messerschmidt points out that group rape is not so much a concern for sexual gratification but more for attaining some form of ‘hegemonic masculinity’ which is ‘partially defined through an uncontrollable and insatiable sexual appetite for women, in which men are expected to perform adequately in each and every sexual situation’ (Messerschmidt, 1993: 115).

Despite similarities in the “culture” of men who gang rape women, segments of the media maintained that there was a difference between the “Lebanese” gang rapes and the alleged Bulldogs scenario: ‘Let us not overlook the race factor’ (Albrechtsen 2004: 15). The ‘rites of passage’ or ‘masculine bonding’ referred to in the Bulldogs case, was also described in a racialised way by Albrechtsen as “tournantes” (or “take-your-turn”) in the “Lebanese” and other “Muslim” gang rape cases (Albrechtsen 2002: 11). As previously mentioned, Albrechtsen referred to the French term “tournantes” to refer to the ‘pack-rape of white girls by young Muslim men’ in France and stated that the “[h]orrific attacks across Sydney’s Southwest reveal the same modus operandi as the French tournantes’ (Albrechtsen 2002: 11). This is an extension of the “culture clash” myth, which maintains that the youths from such ethnic minority groups are ‘caught between two cultures’ (Poynting et al., 2004: 142). The same ‘technique’ has been described in France in relation to Black youths. Paris magistrate Sylvie Lotteau is quoted in the ‘Council of Conservative Citizens’ website: ‘Their technique was to pick up a young girl – a white girl – and once she had become the girlfriend of one of the members [of the gang], he would allow his mates to make use of her…(The Africans) image of the girl is entirely negative’ (COFCC website 2001).

While it is accurate to argue that all of these gang rape cases are the result of misogynistic attitudes towards women, the attribution of such behaviour to a particular ethnicity, race, or religion amounts to simplistic racial (or racist) stereotyping. The commentary surrounding the gang rapes by Skaf and the K brothers is that they were seen
as not being able to help themselves because of what is seen as a sexually repressed and repressive, cultural and religious background which cannot cope with the sexual freedoms of Western culture. According to classic Orientalist writer Raphael Patai, the fundamental difference between Arab and Western sexuality is that:

From the much stricter sexual code that is part of the traditional culture of the Arabs, one could conclude that all the taboos contained in it are indeed necessary because of the greater enticement sex offers to them than to members of other cultures mentioned. But then, one could argue that the obviously greater preoccupation with sex which characterizes the Arabs is the result of those very codes which circumscribe and inhibit their sexual activity. In any case, it is safe to conclude that in comparison with the West the realm of sex constitutes more of a problem for Arabs and hence elicits more concern and more preoccupation. The contrast has become especially noticeable since the so-called sexual revolution of the 1960s in the West, which resulted in the disappearance of many socially and culturally imposed sexual taboos (1973: 140).

The perpetrators of the ‘Lebanese’ or Muslim gang rapes are not constructed as a group of “unruly boys”, but are seen as threatening because of the sexual repressiveness of their cultural background. They are, in the popular imagination, “cultural time bombs”. As Said argues, the ‘Oriental is contained and represented by dominating frameworks […] Orientalism, then, is knowledge of the Orient that places things Oriental in class, court, prison, or manual for scrutiny, study, judgment, discipline or governing’ (1978: 40-41).

The misogyny of one race or ethnic group was represented as different from (and in conservative media accounts, worse than) the misogyny of another because of the overlapping ideological themes that characterised the gang rape and related moral panics. When ‘radical Muslim cleric’, Sheikh Mohammad Faiz, commented last year that the way women dress “incite[s] men’s lust” (Devine 2005b: 26) the ensuing public outrage was typically directed at the peculiarly misogynistic “nature” of the Islamic religion rather than the misogyny of the individual who made the comments. Miranda Devine quoted sections of Faiz’s Bankstown Town Hall speech:
A victim of rape every minute somewhere in the world. Why? No one to blame but herself. She displayed her beauty to the entire world . . . Strapless, backless, sleeveless, nothing but satanic skirts, slit skirts, translucent blouses, miniskirts, tight jeans: all this to tease man and appeal to his carnal nature... It’s sad to see today how young girls are being brought up... The way they dress, their hairstyles . . . layers of make-up, which they just shovel on in order to remove afterwards, tanning out in the sun, bronzed, shiny so she can shine the lustful eyes of men; extreme dieting, working out. Why? So she can get the best figure, but not for her husband (quoted in Devine 2005b: 26).

In another editorial on the same day, Devine said that these comments were a direct affront to victims of the gang rapes, committed by Lebanese Muslim perpetrators, in South Western Sydney: ‘Faiz may not care but his words are a slap in the face to the brave young woman, known to the courts as Miss C, who was raped 25 times by 14 men over six hours outside the Bankstown Trotting Club and elsewhere in 2000’ (Devine 2005b: 26).

As I have argued in Chapter Three, penalties given to such perpetrators by the courts are always deemed too lenient. As a consequence, the courts are often placed in a separate moral category to the rest of the community; perhaps because they exhibit little emotion in response to circumstances that prompt an emotional response in “real” men. The masculinities that are performed on the other side of the bench are affected by this, as well as within the specific (and gendered) space of the courtroom. The aim here is to find out what an elite minority of men who constitute the judiciary and upper echelons of the legal profession share with other men who also perform their masculinity through real or alleged misogyny – be it “criminal” or not.

The Privileged Minority: (white) men of law

The ‘masculinism’ of the law has long been the focus of feminist criticism. According to such analyses, the courts are a patriarchal institution and legal discourses are imbued with an inherently ‘masculinist’ bias whereby the maleness of the legal subject and professional is taken for granted through a construction of neutrality (Threadgold 1993: 11). This is linked, according to some feminist theorists, to the identification of ‘the state
as masculine’ and as the domain of patriarchy. Most notably, Carol Pateman identifies
the domain of public patriarchy as the site for a sexual contract which naturalises the
domination of women by men (Pateman 1988).

In this section I will address the masculinities that are produced and reproduced in the
legal domain. To that end, this section will seek to unpack the ways in which legal and
judicial masculinities (as interrelated but distinct from one another) are performed
through the institutional values and rituals that are encoded in legal discourse and
practice. Where such values and rituals have been addressed in Chapter Four through the
lens of ethnicity, the present analysis will focus on the specifically gendered nature of the
legal profession and the performance of gender through courtroom practices and the
discourses that underpin these. My intention is not to suggest that legal masculinities are
homogenous but rather to unpack the ways in which the discourses and values of the
legal domain, along with the ethnic and socio-economic backgrounds that are given
preference for entry into the elite legal and judicial domain, shape these masculinities. As
Collier argues:

A very different political orientation, interpersonal style and work commitment may
inform the lives of the City and criminal legal aid lawyer. There is, moreover, a great
diversity to men’s bodies. Different shapes, ages, ethnicities, class backgrounds and
physical abilities all mark the body in different ways. The body ‘at work’ may also not be
what it seems. Behind the suit may lie transgression in the form of tattooing, body
piercing, of a subject ‘passing’ as one thing but ‘really’ being another […]
Notwithstanding the above, however, it is possible to identify a broadly hegemonic

Are “Legal” Masculinities ‘hegemonic’?

Men in the legal realm embody many of the characteristics that are attached to the notion
of ‘hegemonic masculinity’. The legal profession and, more notably, the judiciary have
typically been comprised of heterosexual, upper class and middle aged, white men (Hearn
Levit 1998; Collier 1998) and other research (Abbas 2005) such men continue to
outnumber both women and other ‘types’ of men in the judiciary and the upper echelons of the legal profession and that the few women that do occupy such positions are seen as “tokens” (Easteal 2001: 224).

The gendered dimension of the judicial and legal profession is relationally defined, as Collier argues, on the systemic exclusion of women and the “de-sexing” of the legal professional:

The gendering of cultural, symbolic and economic capital in the legal field has been secured [...] via a two-fold process involving, firstly, a dissociation of men from child care (premised on the public/private dualism); and, secondly, a ‘de-sexing’ of men’s corporeality in such a way that rationality, authority, the capacity to be objective and distant, and so forth, have each been evoked as ‘key’ masculine qualities (1998: 42).

Such qualities are congruent with the concept of hegemonic masculinity due, in part, to the exclusion (Connell 1987: 181) and ‘de-sexing’ of women so that they can fit the image of a “neutral” male norm. Connell also points out that the professionalism in certain ‘occupational cultures [...] has been constructed historically as a form of masculinity: emotionally flat, centred on a specialized skill, insistent on professional esteem and technically based dominance over other workers’ (1987: 181). This description is particularly pertinent to the legal profession, which valorises Western liberal ideals of rationality, objectiveness and consequently ‘emotional flatness’. Women, who are seen as traditionally bound to the ‘private’ domain and thus excluded from the ‘public’ legal sphere, ‘are not as readily identified as having those attributes’ (Easteal 2001: 210). The “rationality” of the hypothetical legal subject and the ways in which this reflects on actual “men of law” – particularly those who dominate the judiciary and upper echelons of the legal profession – has already been explored in Chapter Four.

These arguments do not necessarily suggest that women (or men from less advantaged backgrounds) do not hold professional positions of power in the legal domain and more generally. On a gendered level, this can partly be seen in the outnumbering of male students by female students in Australian law schools (Law Society of New South Wales
2002: 7), and the existence of a number of female magistrates, judges, prosecutors and senior defence counsel in the Australian courts. However contemporary figures of representative women in the legal world do not by themselves prove that the systemic bias against women in the legal profession has shifted substantially. I refer here to my interview with the female senior Crown Prosecutor in both the Bankstown and K brothers’ gang rape trials:

SD: Did you experience particular difficulties in the job because you’re a woman?

Interviewee: It hasn’t been difficult doing the job but some reactions to me, I think, have been different than they would have been if I had been a man. In fact I don’t think that I would have come to any particular prominence if I was a man and I think perhaps, it’s still regarded as somewhat unusual for women to be prominent in the criminal law and maybe women of a certain kind – because I’m a mother, which is also fairly unusual, in a fairly hard-fighting, hard-hitting job.

SD: Do you think that the legal profession is a “boys’ club” or a network of “old school ties”?

Interviewee: I’m afraid it is. I’m afraid it really is (Interview 22/02/07).

The “masculinism” of the law is demonstrated in a number of ways – both in the domain of law firms as well as in the courtroom. Despite the entry of a large number of women into the traditionally male-dominated legal profession, the male (and white middle-class) standard remains the yardstick to which women (and “Other” men) must conform. Catherine MacKinnon argues:

If you see gender as hierarchy – in which some people have power and some people are powerless, relatively speaking – you realise that the options of either being the same as men or being different from men are just two ways of having men as your standard. Men are set up as a standard for women by saying either: “You can be the same as men and then you will be equal”, or “You can be different from men, and then you will be women” (1985: 21).
Similarly, Gatens argues that the formal equality of liberalism ‘can involve only the abstract opportunity to become equal to men. It is the male body, and its historically and culturally determined powers and capacities, that is taken as the norm or the standard of the liberal “individual”’ (1996: 64).

Yet, women in law are still expected to conform to and fulfil gender stereotypes (Thornton 1995: 307) while simultaneously displaying the “male” reasonableness and “impartial authority” that is required of them as legal professionals. The female senior prosecutor in the aforementioned interview remarked: ‘I think I do get cases which have people in them who need to be looked after, to be mothered a bit’ (Interview 22/02/07). The same prosecutor has a reputation as an ‘aggressive’ (Toy 2006: 2) prosecutor of sexual assault with a ‘ruthless’ cross-examination technique and a ‘formidable’ success rate in criminal trials (Barrowclough 2004: 27). This was displayed in the courtroom during one of the K brothers’ trials, where the Crown prosecutor, to intimidate the accused, slammed a tissue box in front of him before she proceeded with her cross-examination (Field notes 1/10/03). Elsewhere she is also described as a ‘good-looking woman’ (Barrowclough 2004: 27) who seduces juries with ‘her saucy voice and smooth courtroom demeanour’ (Clifton 2005: 29). The “tough” and “aggressive” elements of this female professional’s performance are privileged in the “macho” framework of city law firms (Collier 1998: 44), and the male dominated space of barristers’ chambers. Aggressiveness is also valorised in the courtroom – particularly in an adversarial system of justice.

The reference to this female prosecutor’s good looks and ‘saucy voice’ sexualise her in a way that men in law are not. While male corporeality – both in the context of the law firm and the courtroom – is seen as neutral and authoritative, women are explicitly sexualised: a woman appearing in a ‘(relatively) neutral suit […] is still ‘marked’ as a woman’ (Thornton 1996: 223). This constructs women as the sexed ‘other’ while men are defined as the rational and neutral norm as their bodies are ‘de-sexed’. The identity of the
“neutral” and “rational” legal masculinity is thus relational; it relies on the sexualisation of the feminine “Other”. The constructed asexuality of men in law is expressed and symbolised, according to Collier, through the neutrality of the business suit (1998: 45). Additionally, the business suit symbolises rationality and authority, positing the legal masculinity as an authoritative, ‘knowing subject’, while women in the legal profession are still expected to look like women – as ‘sexed’ subjects ‘although the code is that they do not look sexual’ (Thornton 1996: 226-7).

The example referred to above, provide but one example of the way in which particularly prominent female legal professionals are sexualised as females, yet are expected to exhibit some characteristics which are traditionally regarded as masculine so that they can “perform” as (male) legal practitioners. Gender representation in the law has not yet fundamentally changed the structures of gender inequality in the legal profession (and more widely) because of remaining tensions between greater contemporary opportunities for women to participate in professions that were historically restricted to men, and the conservatism of the law that mostly still upholds traditional gendered norms. That the legal domain remains attached to these gendered norms is also apparent in other significant ways.

Via an expectation of ‘professional availability’, male legal professionals embody the culturally exalted, hegemonic ideal of men as “breadwinners”, placing women in the legal profession at a structural disadvantage due mainly to the traditional association of women with the private sphere (Collier 1995: 44; Easteal 2001: 214-215). Women in the legal profession still face the “glass ceiling” due to their reproductive potential, constructing their entry into the legal profession as a privilege rather than an entitlement:

[A] lot of the firms were asking questions of married women, such as ‘Do you have a family? Do you plan to have one, and how on earth would that fit in with working for [name of firm]? We demand eighty hours a week, twenty-four hours a day commitment, seven days a week’. Real macho stuff. And that was our first real shock, I think, in
coming in contact with how difficult it was going to be (Academic and Former Practitioner cited in Thornton 1996: 140).

The long hours demanded in legal practice assumes, as Easteal point out, that ‘someone is at home preparing meals, looking after the kids, shopping, doing housework and minding the children – the ‘good wife’” (2001: 215). Similarly, Connell argues that the highest specialist development of professionalism relies on ‘the complete freedom from childcare and domestic work provided by having wives and maids to do it’ (1987: 181).

Also within the law firm, as Thornton points out, ‘[t]he idea of the male boss with a woman as his assistant, secretary, or handmaiden is still very much the norm within the hetero-sexed culture of organisations’ (1996: 131). This norm of male authority is taken for granted by the women who form the support staff of law firms. This is evident in Thornton’s research around female legal professionals. The interviewed women referred to a culture within the law firm of female support staff treating their female bosses disdainfully because ‘the underlying assumption is that a female lawyer should really do her own secretarial work because of her sex’ (1996: 133).

The systemic exclusion of women from the upper echelons of the profession, and their concentration into generally subordinate, ‘support’ roles, not only contributes to the definition of legal masculinities as ‘hegemonic’, but also indicates the hetero-sexist framework of the legal community. As Collier points out, the definition of ‘family’ is dependent on the “judicial gaze” which privileges a normative heterosexuality ‘through reference to the idea of the ‘ordinary man’ (in effect a judicial determination of what is considered to be popular morality)” (1995: 54). Within this system, women are relegated to the private sphere and are thereby defined by all of the characteristics that men are not: nurturing, emotional, partial and irrational. In linking masculinity with the ‘reasonableness’ of the law, Carol Smart argues that ‘law is not rational because men are rational, but law is constituted as rational as are men, and men as the subjects of a discourse of masculinity come to experience themselves as rational – hence suited to a career in law’ (Smart 1989: 86-7). Women who are professionally successful on the other
hand, are seen as transgressing the traditionally delineated boundaries of gender and destabilising the “sexual regime”, therefore being seen as inappropriately masculine and aggressive:

[Y]ou’ll be happily sitting in a meeting, and you might well be the only female there, and you’ll make a contribution, yet you’re being reminded that you’ve been male in the course of doing that. You know, the image is one of being a hard-faced bitch just because you speak at meetings (Senior Associate and Academic cited in Thornton, 1996:137).

The ways in which women are treated within the courtroom – when women commit crimes – also goes some way towards explaining the characterisation of legal and judicial masculinities. Smith and Natalier (2005) and Easteal (2001) point out that judges treat women differently in their sentencing decisions. Research indicates that women who are perceived as being ‘good mothers’ tend to receive non-custodial or more lenient sentences while those who do not fit the dominant ideals of womanhood, tend to be punished more harshly (Smith and Natalier 2005: 134; Easteal 2001: 31). This is associated with a sense of judicial ‘chivalry’ or what can be referred to as ‘paternalism and protectiveness towards women’ which, according to some, characterises a power relationship akin to that between parent and child (Smith and Natalier 2005: 134). Even though the outcome for some women is favourable, such paternalism could be criticised on the basis that it further disempowers women by rendering them incapable of rational thought and knowing right from wrong. This sense of legal and judicial paternalism is also associated with the perpetuation of the ‘Madonna-whore dichotomy’ which – drawing from the Judeo-Christian tradition – ‘represents women as either perfect or sinful and beyond redemption’ (Smith and Natalier 2005: 134). According to some theorists, the legitimation of this dichotomy in the legal domain serves to treat women who break the law as ‘doubly deviant’ because they have also failed to adhere to the ideals of femininity (Smith and Natalier 2005: 135; Easteal 2001: 30-31).
Judges, who, for example, subscribe to the ‘Madonna-whore’ dichotomy in their conceptualisation of women, are not only co-opting a very traditional and dominant idea of the gender order, but are also performing their own conservative style of masculinity. This is just as apparent in the purportedly neutral space of the courtroom as it is in legal discourses and professional practices. In the courtroom, gender is, as Judith Butler would argue, a repetitive performative action which gives the appearance of ‘nature’ but is in fact naturalised through repetition (Collier, 1998: 29). Men of law are seen to be impartial – even though they are reproducing the dominant gender order from which they benefit. Yet they also display traits of hegemonic masculinity through an aggressive adversarial style that is adopted in a criminal court trial. As Threadgold notes:

*Legal men* […] are discursively constructed subjects, the subjects of (subjected to/by) patriarchy and of its discursive resources, positioned by the technologies of those discursive resources to embody patriarchal masculinity and the patriarchal fictions that circulate around the concepts of the social contract, the law, property rights, marriage, women, morality [and…] ethics” (1991: 43. Original emphasis).

Thus the law is popularly seen as reproducing the dominant ideals of gender through its espousal of “male”, patriarchal values. This is another way in which legal masculinities can be perceived as conforming to an ideal of hegemonic masculinity that has also been attributed to masculinities from less privileged and powerful backgrounds.

As will be partly shown by Tahir Abbas’ research (2005) and the preceding discussion more generally, it is not just gender that privileges the hypothetical subject (and ‘real’) professional of law: there is an intersection of class, race, ethnicity and sexuality that places some subject positions in greater relative circumstances of advantage or disadvantage than others. In accordance with the various characteristics that Connell describes as ‘hegemonic’, men in the legal profession and judiciary hold power legitimated by the state and acquired through economic class and education. They also tend to be from Anglo-Celtic-Saxon backgrounds or at least have sufficient cultural capital to conform to the universalised Anglo-centric values of Western legal systems. Such characterisations situate power in the hands of ‘ruling class’ men, where the state
not only reflects the interests of such men but also ‘embodies and reproduces a particular form of hegemonic masculinity’ (Collier 1998: 166).

**“Soft” white judges?: the other side of legal masculinities**

Judges are not far separable from the other legal masculinities described in the previous section. Judges too, through their treatment of women in the courtroom and the conservative values that are demonstrated in their reproduction of the gender order, establish a type of hegemonic masculinity that cuts across the legal domain. On an obvious level, judges are frequently ex-lawyers – having worked their way through the ranks of the legal profession and bar. They are predominantly from a white and privileged socio-economic background which has helped them to gain entry into the most elite rank of the legal realm: the judiciary.

There is a paucity of recent Australian research on the social demographic of judges and other senior members of the legal profession. However, existing research from the late 1970s and early 1980s (Tomasic 1978; Sexton and Maher 1982) confirms that most members of the Australian judiciary (along with others in the upper echelons of the legal profession) come from backgrounds of social privilege – often having been raised in a professionally well-connected and financially well-placed ‘legal family’ and having attended private schools and prestigious universities (Naffine 1990: 87; Threadgold 1993: 10; Ackland 2003: 4-6). A similar study in England around the same era shows that judges and legal practitioners display a ‘high degree of social and cultural homogeneity’ (Bankowski and Mungham 1976: 83). More recently, Tahir Abbas’ research into ethnic diversity in the senior judiciary in England revealed that an overwhelming majority of senior judges from 1960 to 2004 have been white-British males from a specific social and educational background (Abbas 2005: 16). Based on his findings, Abbas argues:

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38 A research project by Flinders University law school titled ‘The Australian Judiciary: A National Socio-Legal Analysis’ (2007) was currently underway during the time of writing. One of the aims of the project is to examine the social and cultural backgrounds which Australian judicial officers bring to their decision-making and practice. Unfortunately I am unable to incorporate the findings of this project into the current study because it is not yet complete. For more detail see: [http://ehtl.flinders.edu.au/law/judicialresearch](http://ehtl.flinders.edu.au/law/judicialresearch)
Certain groups are able to capitalise on cultural, economic and social networks and associations, but it is because of access to the elite educational institutions that they can get preferential treatment in the legal profession. Groups most likely to be excluded are those with limited incomes and without family connections. Given the lower socio-economic profile of ethnic minorities in general, a higher proportion of excluded groups in the legal profession is therefore from this population. The consequences are that employers disproportionately favour selective-school educated white-English groups graduating from elite universities (2005: 5).

The Department of Constitutional Affairs (DCA) in the UK argued that ‘it is a matter of great concern that the judiciary in England and Wales – while held in high regard for its ability, independence and probity – is not representative of the diverse society it serves’ (DCA 2004 cited in Abbas 2005: 3). The domination of the British and Australian judiciary by men from backgrounds of socio-economic and cultural privilege produces and reproduces a specific “type” of masculinity that is imbued with the ethnic, cultural and symbolic characteristics that are privileged by the legal domain.

The British study is not inconsistent with descriptions of the judges of the Victorian Supreme Court, in a newspaper article to which Terry Threadgold refers (1993: 10). Threadgold remarks on the cultural homogeneity of members of the Victorian Supreme Court bench by quoting the following extract and commenting:

‘educated at Melbourne Grammar (or Xavier or Geelong College or De La Salle College’), ‘married with children’ (the number varies), ‘one of the best (technical) minds on the bench’, ‘intimidating…because of his knowledge of the law’ […] ‘a fanatical Collingwood supporter’, ‘As a barrister he was a hard fighter and a consummate all-rounder’ – the discourses of aggressive sporting masculinity and excellence in the legal adversarial system are hard to disentangle here (1993: 10).

The parallel between competitive sports and the competition inherent to an adversarial legal system is apt. A judge’s role in the competition that unfolds before him (I use the word deliberately) has also been described in “sporting” terms. The analogy between a
sporting umpire and a judge was raised in an interview I conducted with a retired judge of the New South Wales District Court:

I remember being told when I was first appointed as a judge, by another judge who was a real cynic that the criminal trial is like a rugby game. Everybody’s got to abide by the rules and do their best within the rules, and the function of a judge is to be there with his whistle at the ready, to blow the whistle when someone obviously transgresses the rules (Interview 24/04/07).

Though the comment was partly made in jest, it reveals a significant shift from the position of the legal professional as competitor in a court of law, to adjudicator. The latter assumes high levels of experience in and knowledge of adversarial justice and the consequent ability to oversee complex court proceedings. This authority is reflected, as I have argued in Chapter Four, in the physical positioning of the judge in the courtroom and also, as Threadgold points out, in the judicial gaze: ‘these men have something to say, know they have the right to say it, and are addressing you, if not in some cases accusing you, whether you will or no’ (1993: 10). The implications that this has for a shift in masculine performance must be considered in terms of the change in the legal professional’s role from competitor to adjudicator: the aggression exhibited in adversarial competition is replaced by a calm, emotionally detached and reasonable performance of masculinity.

The qualities required in a judicial role are often represented in a negative way in popular portrayals of judges. What is particularly interesting about popular representations is that there is a tension between popular beliefs that posit judicial masculinity as misogynistic (and hence typically hegemonic) on the one hand, and “soft”, sheltered, paternal, “out of touch” with reality, and unaccountable (hence in a very un-hegemonic, almost emasculating way). This is manifest in media portrayals and public opinion of judges as residing outside the realm of reality where “real” men live (see Chapters Three and Four). As Collier points out, public debates around criminal justice operate around the rhetoric of being ‘hard’ or ‘soft’ on crime: ‘It is through the avoidance of the (feminised) other – the charge of being ‘soft’ on crime – that politicians of all quarters in Britain are
presently articulating policies in the sphere of criminal justice’ (Collier 1998: 167). Besides accusations that the judiciary is “soft” on crime, removal of judges from a realm of “reality” also elevates them to a mythical status of deity. As Ackland notes: ‘Against the ravages born by other estates of the [parliamentary sphere], the judges, by comparison, have preserved a sufficient glow to keep the mystique alive’ (2003: 4).

The dehumanisation of judges – albeit in an exalting way – can also be ascribed to the shroud of mystery around the judicial profession. This is in large part because of the independence required of the judiciary from other arms of government, and the professional code of silence that this entails. The refusal of most judges to respond to ‘transient public moods’ prompts public, media and political criticism which states that judges are simply out of touch with the concerns of broader society. As a general rule, judges do not engage with the media or politicians and therefore cannot respond to the criticism that is meted out to them. This feeds into an image of judicial unaccountability which is publicly bolstered by conservative, particularly tabloid, media publications: ‘These judges and magistrates answer to no-one […] these people are answerable to nobody…and really it is virtually impossible to sack them as well […] It’s a bloody joke!’ (Jones 2003).\footnote{Alan Jones - talk-back radio transcript: July 23, 2003.}

The idea that judges are unaccountable and ‘protected’ further perpetuates the notion that they are ‘soft’ – in the sense that it contributes to the myth that they are unexposed to the daily realities of the majority or the “real” community.

**Conclusion: “barbarians”, “secular gods” and “real men”**

More recent poststructuralist feminist critiques have moved away from arguing that the law simply reflects ‘the domination of women by men’, towards a more complex ‘conceptualisation of the social dynamics whereby such discrimination is reproduced and legitimated on a daily basis’ (Collier 1998: 40). Such critiques also maintain that institutions such as law firms and the courts ‘do not merely “reflect” a dominant sexual ideology; they are, crucially, sites for the active production of gender divisions’ (Collier 1998: 41). It is also important to note, as Hearn observes, that descriptions of men in the legal profession are themselves ‘ideological construction[s]… Such men may rarely, if
ever exist [...] such categories of men are ‘simplified abstractions’ (Hearn 1992: 4) that fail to capture the complexities of power relations in different institutional and discursive contexts. Other men ‘oppressed through disability, sexuality, age, economic class, ethnicity, or some other medium of oppression may dominate in their own ways in their own public domains’ (Hearn 1992: 4).

In this sense, hegemonic masculinity is performed across a range of cultural and socio-economic milieux: a certain ideal is valorised in separate discursive and practical contexts, which interacts dialectically with a dominant shared ideal that is defined through structured relations of power. For example, what differentiates the supposed and actual sexism or misogyny of judges from the sexism and misogyny of other men, is the same thing that separates the supposed misogyny and “barbarism” of Arab men from similar attitudes that may be prevalent within the dominant culture: minority status – even if that minority status (as is certainly the case with judges) – is one of privilege. For example, many of the actions of judges who are caught “behaving badly”, attract media attention when the same behaviour by “normal” men would not. Recent examples range from drink driving, speeding, falling asleep at the bench and suffering from depression (Pelly 2005b). This type of behaviour is not exceptional to judges; men from any profession could be susceptible to similar behaviour. Yet they appear to escape the media scrutiny to which judges are subjected. Even though some of this conduct is more socially unacceptable than others in any given context, judges seem to be, more often than not, publicly castigated. Undoubtedly, this is because judges are in position of authority and are therefore expected to conduct themselves professionally. But even outside of the courtroom, judges are criticised for behaviour that is fairly standard for most men. Public criticism could be partly due to the fact that such behaviours are not consistent with popular conceptions of judicial conservatism. It may also be attributable to the ideological construction of judges as existing outside the realm of reality.

This is not to suggest that such “layers” of masculinity exist in a concrete way. The purpose of constructing a hierarchy such as this is to demonstrate the popular positioning of the masculinities – and crucially, women – which have featured in the “Muslim gang
rape” ‘morality play’ (Hall et al. 1978: 66) that is explored in the current study. Connell’s concept of hegemonic masculinity is useful in this way. Here, the notion of hierarchy is used as a conceptual tool to unpack the ways in which popular representations of masculinities have concrete consequences of marginalisation, inclusion or exclusion for certain groups in society. The roles popularly attributed to these actors demonstrate, in part, the complexity of the overlapping and contradictory ideological agendas and relationships at play during a moral panic, rather than theorising the relational dynamic as one that is characterised by straightforward relations of domination and subordination. This is not just to say that masculinities are plural but that they get “worked upon” in the multiplicity of situations that arise during episodes of moral panic. Of significance here is the relationality and situatedness of the masculinities that are produced and reproduced in these varying circumstances, rather than a singular definition of what those masculinities are. From another angle, this shows that moral panics are not only about their specific focus of panic – they also provide opportunities for other social categories and relations to be redefined and played out.
6. ‘Victims sacrificed to a god of due process’\textsuperscript{40}: protecting ‘our’ women from Muslim rapists and the courts

This chapter will explore the interrelated dimensions of a recent public debate around complainants and victims of sexual assault that has followed moral panics surrounding the Bankstown and K brothers’ gang rapes. There appears to be a shift in moral emphasis and blame from the rhetoric that highlighted the callousness of the offenders and subsequent calls for their severe punishment, to the rhetoric that emphasised the callousness of the courts (particularly judges and defence counsel) and the ordeal of the criminal trial process for sexual assault complainants. The debates explored in this chapter have given exceptional attention to the personal suffering of victims of sexual assault which is often perpetuated by a long and drawn-out ordeal they face in court during sexual assault trials. As a consequence, the courts have been accused of subjecting sexual assault complainants to a kind of secondary victimisation.

I argue that since the Bankstown and K brothers’ gang rapes, issues surrounding complainants’ rights in sexual assault trials have attracted intense public interest in an unprecedented way. As a result, numerous legislative reforms that seek to improve the situation of sexual assault complainants in court have been implemented in New South Wales.\textsuperscript{41} In this debate, populist media and political voices shifted their focus from demanding more punitive measures for criminals, to criticism of judicial efforts to provide a fair trial for accused persons at the (perceived or real) expense of victims. Previously overlooked suggestions from feminist academics and community-based rape victims’ lobby groups have become official via recommendations made by the recent New South Wales Attorney General’s Department, Criminal Justice Sexual Offences Taskforce (AGD 2006). These suggestions have also received considerable front-page


\textsuperscript{41} These reforms have included the use of CCTV evidence in court so that direct cross-examination of the complainant does not need to take place; the prevention of direct cross-examination of the complainant by self-represented accused persons and allowing transcript evidence for sexual assault re-trials. A proposal by the AGD Sexual Offences Taskforce that New South Wales provide a statutory definition of “consent” was also currently being considered when I was in the final stages of this dissertation. For this reason, I was unable to give due consideration to these latest reforms.
tabloid publicity. Indeed, at the time of writing this chapter, a tabloid campaign lasting several days and led by *The Daily Telegraph*, took place to secure further reforms – as recommended by the NSW Sexual Assault Task Force (2006) – to protect the rights of complainants in sexual assault trials. The themes that emerged included the alleged misogyny of judges and their failure to prevent the suffering of complainants by intervening in the distressing cross-examination techniques of defence counsel.

Following from preceding analyses in this dissertation, I argue that the significance of the sudden prevalence of victims’ rights issues in public debate (including a corresponding shift in blame to the courts), is traceable to the racialised moral panics around the Bankstown and K brothers’ cases. In this instance, “victims’ rights” rhetoric is appropriated for the purpose of perpetuating a number of interrelated, overlapping and sometimes contradictory agendas. In these debates, conservative criticism of the courts overlap with conservative ‘Islamophobia’ (Runnymede Trust 1997; Hassan 2005; Sajid 2006), attacks on social movements and voices that are popularly homogenised as emanating from the radical “feminist” left or more broadly, the “left-wing intelligentsia” that condones multiculturalism (Poynting et al. 2004). Paradoxically, however, the same conservative commentators that have been most scathing of what they perceive as the “feminist left” have appropriated these prevalently maligned discourses in their contribution to the currently popular (or populist) “victims’ rights” debate.

As I argued in Chapter Three, it is not unusual for the courts to be publicly castigated for their leniency in punishing offenders of violent crime – especially if the perpetrators are from demonised ethnic and cultural groups. The added element in this particular “victims’ rights” debate, is the courts’ failure to protect victims sufficiently from the “Other”. I argue that the debate is an extension of popular myths around sexual assault which hinge on dichotomies of the innocent victim and predatory (racialised) “Other”. The concept of “moral community” is central to these myths because moral panics around the deviant behaviour of the “Other” results in heightened pressure on the courts to act as moral arbiters and protectors of a perceived social order.
Further, the Bankstown and K brothers’ attacks fulfilled the criteria of cases that are unusual and are deemed newsworthy: the attackers were “Muslim” strangers, the victims were young, the attacks themselves were particularly callous and violent, and they were not perpetrated by one assailant but several at the same time. The moral community was made acutely aware that “their” women needed protection from what was popularly perceived as the sexually deviant ‘Other’, and that the courts were not doing a satisfactory job. Popular juxtapositions of innocent victims with an evil and sexually perverse “Muslim Other” indicates that the victims became just as important in defining a moral community, as the folk devils that define what it is not. In these particular cases, the victims have, in a representational sense, delineated the “we-ness” of the Australian moral community, at least as much as the perpetrators have highlighted its margins and beyond.

One noteworthy result of these debates has been the transformed status of victims of sexual assault. Where victims of sexual assault were previously silent (and silenced), some have now become active participants in the public debate around the rights of complainants and victims in sexual assault trials. A clear example emerges in these cases when Tegan Wagner – one of the victims of the K brothers – famously waived her right to anonymity after their sentencing, in order to encourage other young women to come forward as victims of sexual assault. Tegan Wagner has subsequently been upheld, particularly by the mainstream media and most notably by Paul Sheehan, as a heroine for the “victims’ rights” cause. This is a significant and welcome milestone for survivors of sexual assault. It is also of conceptual relevance to the present analysis for number of interrelated reasons. Such an occurrence highlights the agency of victims in a way that locates them as actors in an already extensive network of agents in moral panics. This is an aspect of traditional and contemporary moral panic literature that remains underdeveloped or altogether unexplored. Some of the literature around the sub-discipline of “victimology” will be harnessed to grapple with notions of victim agency and its relationship with the structural conditions that frame the recent discourses that castigate the courts for its ill-treatment of sexual assault complainants.
Victims of sexual assault: an historical and theoretical overview

Historically, victim credibility in sexual assault trials has been undermined through references to a complainant’s sexual history, what they were wearing and whether they were behaving ‘provocatively’ at the time of the attack, whether they had past sexual relations with the accused and so on (Department for Women Report ACT 1996). Examples of this can be found in the difficulty of securing a conviction for ‘date rape’ where a successful conviction often hinges on the issue of consent, and female complainants are subjected to long and harrowing interrogations about their sexual history by defence counsel. There is no doubt that victims of sexual assault suffer for a long time after the attack and that, potentially, a large part of this suffering has emanated from a general lack of social awareness about the actualities of sexual assault and the treatment of complainants by the criminal justice system.

The realities of sexual assault have been obscured by common myths and misconceptions that are perpetuated by patriarchal institutions and value systems, whereby rape victims have traditionally been attributed some of the guilt for ‘inviting’ the attack, exaggerating the nature of a ‘normal’ sexual encounter or outright lying (Department for Women Report ACT 1996; AGD 2006; Chung et al. 2006). As a consequence, rape victims have been reluctant to report and subsequently endure cross-examination in court, amid fears of humiliation, reprisal and having their reputations publicly besmirched. Recent changes to policing practices around complaints for sexual assault have marked an improvement to previous conditions in which a predominantly male police force would fail to take complaints seriously. This is partially due to a greater female presence in the police force as well as increased social awareness around rape (Nixon 1992: 39). Yet sexual assault remains, even in the wake of recent improvements, an offence for which there is a high attrition rate (AGD 2006: 8).

The attitudes underpinning the treatment of sexual assault complainants by the criminal justice system is one that is reflected more broadly. Traditional beliefs about rape or sexual assault have also prevailed in tabloid and popular media coverage of sexual
assault as well as in political rhetoric and other forums for public debate. In popular media discourses, these beliefs are inherent in the choices that are made about which cases and their trials are to be covered and those that fail to even be considered (Soothill and Walby 1991). A well-known though scarcely publicised fact is that sexual assault is most commonly perpetrated by men who are related to or in an existing (sexual) relationship with the victim (Department for Women Report ACT 1996; Chung et al. 2006). This type of sexual assault remains ‘hidden’ because it is not usually reported to police, or, if it is, does not make for titillating reading for media audiences and attract much political attention (Soothill and Walby 1991). Warner argues, in relation to the sentencing of sexual offenders, ‘at the sentencing stage, as at all stages of the criminal justice process, it is clear that stranger rape is the paradigm of serious or real rape’ (2005: 243).

Classic stereotypes around victims and offenders of sexual assault are also central to whether the offence is taken more or less seriously. There is evidence that judges draw on such myths and stereotypes in sentencing, when considering the gravity of the offence. For example, in the Victorian Sentencing Manual, the factors considered in the sentencing of sexual assault are the following:

24.6.2.3: Relationship between the offender and victim – where a husband/wife, de-facto relationship exists, the court may consider the consequences of the rape may be less grave than in the case of a victim raped by a stranger.

24.6.2.11: Conduct of victim prior to the offence – The sentencer is entitled to take into account the conduct of the victim prior to the crime. That conduct may render the offender’s action more or less serious…

24.6.2.12: Victim a prostitute – Where the victim of rape is a prostitute, the victim’s sexual experience may be relevant to sentence… the prostitute’s experience may tend to reduce the weigh commonly given to rape cases to the “reaction of revulsion” of the “chaste woman” to the “forcible act of sexual intercourse”…where the victim is a

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42 In New South Wales, the term ‘rape’ has been abolished and replaced with the term ‘sexual assault’ and the offence as set out by the Crimes Act 1900, is measured in degrees of aggravation. The statutory definition of ‘Sexual Assault’ means the same thing as the common law definition of ‘rape’. In this chapter, the terms will sometimes be used interchangeably.
prostitute, the elements of “shame” and “defilement” may (on the facts) be missing or diminished, and the offence will thus lack a circumstance of aggravation (Judicial College of Victoria 2005 cited in Clark 2007: 20-21).

There are many abstract, political and structural variables as to why some rape victims elicit public sympathy and others do not. Generally however, as is evident in the Victorian Sentencing Manual, media, political and official discourses often implicate women in the sexual offences that are committed against them. One historically prevalent claim is that women have placed themselves in situations in which men could not be blamed for raping them, while another is that women lie to protect their reputations or for revenge as jilted lovers. Judith Allen refers to The Bulletin in 1890 and its commentary about sexual assault, following the “Mt Rennie outrage” of 1886 (cf. Allen 1990: 54-57; Carmody 1992: 240-242; Gleeson 2004) and various other particularly brutal sexual assaults:

The high rate of pre-trial dismissal of cases by magistrates assisted in the discrediting of complainants. Women were simply conniving and vindictive liars. The Bulletin used the acquittal rate to argue that ‘it is well known that nineteen out of twenty charges are imprudent conspiracies, in a land where any woman can conspire against the life of a man’. Feminine vindictiveness was asserted as the explanation for complaints of rape […] That women would knowingly consign to the gallows men to their acquaintance, even men they loved, to save their reputations, to force marriage, to avenge rejection, or to forestall a work reprimand, apparently were plausible propositions (Allen 1990: 57).

In the “Mt Rennie” incident, the victim, sixteen year old orphan Mary Jane Hicks, was raped by at least eight men in a mob of twenty armed youths who assaulted her (Gleeson 2006: 189). While the innocence of the victim was emphasised in most publications, the incident also raised public debate around capital punishment as nine of the young men were condemned to hang (Carmody 1992; Gleeson 2006: 190). The Bulletin implied that Mary-Jane Hicks was a prostitute and that ‘it is only on fallen women that outrages of the Mt Rennie type have been committed’ (Bulletin 19 February 1887: 5).
Other examples illustrate that rape victims have traditionally carried the burden of responsibility for being raped – that the moral onus is on women to not provoke “male desire”. An example of the institutional perpetuation of this myth can be found in the reported ‘findings’ of a “Legislative Council Select Committee into Violent Sex Crimes in New South Wales” in 1968. The Committee was apparently formed in response to extensive lobbying by women who were outraged by the apparent increase in crime (Sunday Telegraph 26/5/68: 30 as cited by Carmody 1992). Press coverage of the Committee’s research included interviews with ‘experts’ in the area, who laid much of the blame for an apparent increase in the incidence of sexual assault on perceptions of declining moral standards, broken marriages and ‘increased emphasis on sex in films and magazines’ (Carmody 1992: 11). The rest of the blame was apportioned to women. A letter written to the Committee by a taxi driver stated: ‘The actual occasion of sex attack appears to arise when the man has been placed in a position of severe temptation and the girl subconsciously misled him into believing that she would be a willing partner to the affair (Select Committee Report 1968-69 as cited by Carmody 1992). The Committee also mused on the increased incidence of rape as probably fuelled by sexually-permissive behaviour exhibited by some young women, the impact of ‘immodest dress’, and the possibility of some ‘unscrupulous females laying false charges’ (Carmody 1992: 12). In relation to the possibility that complaints of sexual assault were elaborate concoctions, the Committee cited many of the same potential reasons for lying as those referred to by The Bulletin in 1890 (Allen 1990).

**Virgin / whore: differing perceptions of victims of sexual assault in contemporary Australia**

A more contemporary example in an Australian context can be found in media and institutional reactions to the brutal and degrading group sexual assault and murder of 14-year-old Stockton girl, Leigh Leigh, at an unsupervised teenage beach party in November 1989. The horrific details of the crime and the ways in which they were officially and publicly obscured are detailed in Kerry Carrington’s (1998) research on the case. As expected around such brutal offences, there was considerable local and national media

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43 This is not radically different to the position adopted by Sheikh Faiz, quoted in the previous chapter.
coverage around the case (Carrington 1994: 4). The focus of the press coverage was
standard in many respects: considerable attention was given to the violent and macabre
details of the offences themselves, the initial mystery of who did it, and subsequently the
sentencing of the youth who confessed to the murder. Substantial media attention was
also given to the suffering and fear that prevailed in the small community of Stockton
after the murder and to the ‘wall of silence’ with which its members responded to the
police investigation (Carrington 1994: 8). Most of the newspaper reports referred to
Leigh Leigh in impersonal terms, describing her simply as the ‘girl’ or the ‘murdered
schoolgirl’ (Carrington 1998). More significantly, press reports of the violent sexual
assault prior to Leigh Leigh’s murder were obscured, attracting ‘little public criticism’:
‘The murder was disconnected from the continuum of collective violence [at the party]
that had preceded it, and understandings of the crime as one involving a violent sexual
assault upon the victim was almost completely expunged from public discourse’
(Carrington 1994: 4).

Unusually, the young man – Matthew Webster – who confessed and was subsequently
charged with the murder of Leigh Leigh was not portrayed in a particularly disparaging
way. One headline referred to him as ‘Stockton’s “gentle giant”’ (Newcastle Herald
23/10/90), while another referred to his actions as a ‘product of peer pressure’ (Newcastle
Herald 25/10/90). Such descriptions spanned across different public discourses. In the
sentencing judgment, Webster was also described as a ‘gentle giant’ and a ‘first offender
of otherwise good character’ (Carrington 1998: 86). Elsewhere Carrington states that ‘the
discourses of guilt were so thoroughly and mercilessly inverted that Matthew Webster
was represented as a “gentle giant”, an unfortunate victim of “uncharacteristic and
impulsive ferocity whilst disinhibited by alcohol and drugs” ’ (Carrington and Johnson

A psychological report tendered during the sentencing hearing revealed Webster’s
perception of the victim as ‘a slut, a property of the clan’ and his subsequent rage at her
refusal to consent to sexual intercourse with him. As is usual with press coverage of court
proceedings, these words were seized out of context and were highly publicised – to the detriment of the victim. As Carrington observes:

Taken completely out of context, these unkind remarks about the victim received extensive and uncritical publicity. The notion that the victim was a ‘slut’ exercised a powerful sway over popular understanding. Ordinary people and school-age children started to believe that Leigh Leigh was a slut and that this was why Matthew Webster had killed her – not to prevent his identification after having just abused and raped her (1998: 84-5).

That a catchy one-liner is removed from its original, official context and co-opted by the media is a frequent occurrence and unremarkable. A court reporter, in an interview, pointed out the obvious practice of journalists:

It’s all about […] emphasising particular elements of the case, like with the […] Bankstown gang rapes, the thing that everyone seized on from that was, you know, “I’m going to fuck you Leb-style” or whatever […] I don’t think that in itself was a sensational thing but as a court reporter you’re going to prick your ears up at that […] And I think that that is a very easy quote or element to hang a story on […] It’s an immediate entry point into a story that’s going to get people’s attention, it’s going to create outrage or, it’s going to provoke a response in people and get them reading that story (Interview 22/5/07).

The Leigh Leigh case similarly highlights the ways in which criminal justice and popular media discourses around certain crimes can construct a particular version of events which can feed into popular imaginings and moral understandings of the offence, the perpetrators and their victims. In her study of the Leigh Leigh case, Carrington places appropriate emphasis on the importance of the police investigation and the shortcomings of the criminal justice system in bringing to justice a number of individuals:

[T]he investigation seemed to lead away from the crime as a whole and the questions of moral and collective responsibility it posed. The official versions distanced the murder from its antecedents, most crucially the serious sexual violence inflicted upon the victim, as well as the conduct of the boys toward a defenceless victim, and the passivity of
unshocked onlookers, and the humour they found in watching the abuse of a fourteen-year-old. [...] This dimension of the case draws attention to the difficulties of criminal justice in dealing with questions of collective and moral responsibility [...] While in legal terms, such accountability may not always be practical or even feasible, it does happen. In the Anita Cobby case all her rapists were charged and convicted with murder even though only one was present at the murder. But in this case no one was prosecuted for Leigh Leigh’s rape, not even her murderer who, on his own account, killed her to prevent his identification after trying to rape her (1998: 96-97).

Carrington’s comparison with the Anita Cobby case is worth emphasising, not only to draw attention to the disparity in criminal justice responses, but also the wider public outrage that the Cobby case attracted which was obviously missing from the Leigh Leigh case. The Cobby case is comparable in that both victims were brutally assaulted – sexually and otherwise – and subsequently murdered. The Anita Cobby case can be differentiated from the Leigh Leigh case mainly in terms of the circumstantial randomness of the former offence, the legal responses to it, the nature of the media coverage around the case, its trial, and significantly, media portrayals of victims and perpetrators.

In speculating on the reasons behind the discrepancies between public and official responses to the Leigh Leigh and Anita Cobby cases, the differences can be traced to the historically entrenched and institutionalised myths around the perceived ‘innocence’ or otherwise of rape victims. The conventional dichotomising of women into moral categories of “good” or “bad”, “chaste virgins” or “wanton sluts” (the “Madonna/whore” dichotomy) drives traditional beliefs about rape and perpetuates deeply entrenched patriarchal values (Smith and Natalier 2005: 134). These values have long been reflected

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44 On Sunday, 2nd February 1986, Anita Cobby was abducted by 5 men (3 of them brothers) as she was walking home from Blacktown station, in Sydney’s West. She was dragged into a car and driven to a paddock nearby where she was brutally raped by the men and subjected to considerable violence. The horrific details of the violence to which Cobby was subjected were never fully and publicly released. Her naked body was found two days later, face down, neck slit and head almost severed. The case is among the worst in Australia’s criminal history and it attracted massive public outrage. The three Murphy brothers – Gary, Les and Mick – and their friends, John Travers and Michael Murdoch, were found guilty of the gang rape and murder of Anita Cobby and sentenced to life in gaol among the worst category of offenders who are never to be released. The perpetrators were all young working class men who had a violent criminal history.
in the criminal justice system and in the general rhetoric of morality and punishment that surrounds sexual violence. A study by Helen Clark in 2002 demonstrated the extent to which ‘rape myths’ determine perceptions of the seriousness of the offence and sentencing (Clark 2007: 21). In this research, four hypothetical scenarios were presented to a sample of 61 adults – male and female. Two versions of the same scenario included a “traditional” conception of rape and a non-traditional version, so that there were eight scenarios altogether (Clark 2007: 21). The scenarios were divided according to four prevalent myths and stereotypes around rape. These are worth quoting here in full:

Scenario 1 included a combination of stereotypes associated with blaming women, excusing men and justifying acquaintance rape (so the “classic” version involved the stranger, described the victim as a small woman who physically resisted and contacted the police immediately following the assault, while the “non-classic” version involved an ex-partner, described the victim as a large woman who did not physically resist to the same extent and delayed contacting the police…). Scenario 2 focused particularly on “acquaintance-justifying” myths (for example, the classic version included a stranger, and the non-classic involved a boyfriend). Scenario 3 focused in “male-excusing myths” (for example, classic version described the offender as a “nice guy” from a good Australian family who was sexually frustrated, and the non-classic version described the offender as weird, hot-tempered and of Middle-Eastern ethnicity). Scenario 4 focused particularly on differences in “women-blaming” myths (for example, the classic version included that the victim had not consumed alcohol, was on her way home from work and wearing a suit and jacket, while the non-classic scenario included that the victim was out clubbing and drinking and wearing a short skirt) (Clark 2007: 21-22. Emphasis added).

Unsurprisingly, ‘nearly all participants (98%) considered myth factors – such as those relating to the victim’s dress, behaviour, chastity and alcohol consumption, as well as prior acquaintance and the offender’s social status – as relevant in determining the seriousness of any particular offence’ (Clark 2007: 22). The length of imprisonment nominated by participants was also much higher in the scenarios that presented situations of “classic rape”, than those that did not. The findings of this study are clearly reflected in all of the cases to which I have referred in this chapter (and throughout the dissertation) thus far. Combinations of the scenarios designated by Clark’s research were obviously
reflected in the public and official reactions to the Leigh Leigh and Anita Cobby cases, as they were in the “Muslim” gang rapes that are examined throughout this thesis. As mentioned, innocence or moral blameworthiness are popularly deduced from a victim’s or complainant’s personal characteristics, behaviour at the time of attack, level of sexual experience and whether they behave in ‘culturally appropriate’ ways as ‘victims’ (Spalek 2006: 21).

It is clear that to a proportionate extent the personal characteristics, socio-economic status and level of deviancy attributed to perpetrators or those accused of sexual assault, also plays a crucial role in perpetuating popular misconceptions around rape, as well as determining the punitiveness (or otherwise) of the criminal justice response. Intense publicity and politicisation of sexual assault cases and their trials, occurs only in those cases that display the characteristics that mark popular imaginings of sexual assault: the use of violence and attacks by “deviant strangers” on victims that are idealised as young “innocents” – denoting, in this context, a virginal or unblemished sexual background, with no previous involvement with the perpetrator. It appears however, that the extent to which various elements of popular myths around rape are emphasised differentially in each individual case. It is interesting to note that in the Bankstown and K brothers’ cases, the victims engaged in behaviours that would traditionally be considered “blameworthy” according to popular myths around sexual assault. For example, one of the victims in the Bankstown rapes had, after meeting the youth on a train, agreed to smoke marijuana with them. However in these cases, the culpability of the accused – by virtue of a stereotype that was created around Middle Eastern and Muslim rapists who attack Western women – diminished the actions of the complainants.

For every portrayal of the “ideal victim” there must be an “ideal perpetrator”, whereby a simplistic dichotomy between “good” or “innocent” and “evil” or “morally culpable” is constructed (Spalek 2006; McShane and Williams 1992) and the requirement is that the victim must be ‘clearly distinct from the offender’ (Spalek 2006: 22). In the context of the Bankstown and K brothers’ gang rape panics, the evil, misogynistic and cowardly folk devils have found their antitheses in their innocent, good, and heroic victims. Anita
Cobby was an “ideal victim” because she was not drunk, she did not know her perpetrators, and the attack was random and perpetrated by a group of disenfranchised, working-class, drug-taking men (Sheppard 1991). Leigh Leigh was not an “ideal victim” because she was drunk, flirtatious with a number of boys whom she already knew, and her attackers were part of the same tight-knit community who wanted to protect their “own” members (Carrington 1998).

This highlights the idea that the antithesis of the “ideal victim” is not only the perpetrator, but victims who are not deemed innocent or who are seen as “deserving” their fate in some way. Spalek argues that the notion of “ideal victim” is also one which is dependent on a number of structural factors such as age, race, class, gender and sexuality (2006: 22). Some victims, because they may be perceived as “sexually loose” or are seen as morally questionable and deviating from the norm in some other way, can never fit the mould of “ideal victim”. Therefore, in such instances, the victim ‘is held to some moral account for being so degraded’ (Miller 1997: 196). As evident in the aforementioned examples and in many others too numerous to mention here, the attribution of moral accountability or blame for victimisation, is a reasonably common phenomenon in sexual assault (Mason, Riger and Foley 2004; Mason 2007), and it is one that has prevailed in recent times.

Helen Benedict’s (1992) analysis in a US context found that women are typically constructed by popular media discourses as responsible for attacks against themselves and that white, middle-class victims were more favourably constructed than working-class women of colour. Aside from race, ethnicity or class, Carter and Weaver comment more generally that in representations of sexual assault victims:

ideological configurations of ‘normalcy’ are intertwined with discourses about the ‘ideal’, ‘traditional’ family (white, middle-class, nuclear family). Victims who are reported in news accounts as being ‘good’, family-oriented people tend not to be blamed for experiencing sexual violence. At the same time, however, blame for sexual violence is far more likely to be apportioned to female victims who are constructed as having somehow transgressed the ‘normal’, ‘decent’ boundaries of ‘acceptable’ behaviour (2003: 38).
Thus, complainants must display the characteristics that fit the popular construction of an ‘ideal’ victim, and this is crucial to whether moral blame is subsequently attached to the victim or perpetrator. This is clear from the differences in media reporting, political discourses and legal responses to different sexual assault cases that have similar factual circumstances of violence.

**Recent Research: attitudes towards sexual assault and its victims**

In October 2006, a poll commissioned by Amnesty International in Britain revealed the following figures:

- one third of Britons believe that a woman is partially or completely to blame for being raped if she behaved in a flirtatious manner; more than a quarter believe that a woman is at least partly responsible if she wears sexy or revealing clothing or is drunk; one fifth think that a woman is partly to blame if she is sexually promiscuous; more than a third believe that she is partly to blame if she has failed to say “no” clearly to the man (Amnesty International 2005).

A similar study was conducted by the Australian Institute of Criminology in 2006, regarding juror attitudes to complainants of sexual assault. It revealed attitudes and stereotypical perceptions about sexual assault that were similar to the British study:

Many jurors had strong, often stereotypical, expectations about how a ‘real’ victim would behave before, during and after a sexual assault, and these expectations affected their perceptions of the complainant and how they interpreted her testimony. Examples which arose regularly and worked against the complainant included: the complainant flirted and danced with the defendant (some degree of encouragement); she did not scream or shout for help (why not?); there was no evidence of injury and no medical evidence to support her claim (surely there would be evidence of injury or DNA); the complainant went back to the party afterwards, she did not leave immediately (she would leave); the complainant composed herself and pretended that nothing had happened (why would she pretend that nothing had happened?); she continued to work with the defendant for two weeks after the incident (a rape victim could not continue to work with the person who had raped
her); the complainant did not report the incident to police for two weeks (why did she delay in reporting the rape?) (Taylor 2007).

Taylor’s research also drew on another Australian study, in Victoria, about community attitudes towards violence against women. Based on a random survey of the Victorian population, the Victorian research revealed:

one in ten respondents believed that women are more likely to be raped by strangers and another one in 10 couldn’t say; about one quarter disagreed that false claims of rape are rare and one in 10 couldn’t say […]; fifteen percent agreed that women often say ‘no’ when they mean ‘yes’ and one in 10 couldn’t say […]; seven percent of males and four percent of females agreed that women who are raped often ask for it; forty-four percent of males and 32 percent of females believed that rape results from men not being able to control their need for sex (responsibility for rape is therefore removed from men because it is not within their control) (Taylor and Mouzos 2006 cited in Taylor 2007).

Such findings reveal entrenched social attitudes towards rape that are often legitimated by the systemic patriarchal bias of institutions, including, but not restricted to the courts. Carmody also points out that these attitudes hinge on common misconceptions that rape is “primarily sexual” and that the “focus in male desire for sexual gratification and allegations that victims were all ‘fallen women’ and therefore always available” (Carmody 1992: 9).

Social beliefs around rape and rape victims have, at least until the recent past, been perpetuated by police and judicial handling of sexual assault complaints. Police Commissioner of Victoria, Christine Nixon, argued that police assessment of the validity of the complaint, had traditionally placed emphasis on:

[…] early reporting of the offence, the presence of physical injuries and a complainant’s unblemished personal background. This unblemished personal background often translated to the absence of any past history of sexual encounters not deemed morally correct. These attitudes reflect a belief that the only women who were really raped were
those from demonstrably ‘good’ backgrounds who, when reporting, were tearful, hysterical and showing signs of physical resistance (Nixon 1992: 40).

Because of the realities of rape, many women do not display these signs of “innocence” that seems to be required for extensive media coverage, public and political outrage, and a more punitive criminal justice response. It is a reality that “sexual violence is a relatively common experience for many Australian women, especially when practices such as sexual coercion… are constructed as part of normal heterosexual relations” (Chung et al. 2006: 1). Furthermore, as mentioned from the outset, rape is only seen as a heinous crime when it is perpetrated by strangers – not men who are seen to be in legitimate positions of control over women (Chung et al. 2006: 3).

**Official paternalism and ‘misogynist’ judges**

The paternalism inherent in general and official attitudes towards women as property is often reflected and legitimated by the law. This is allegedly illustrated in Justice Bollen’s infamous remark:

> There is, of course, nothing wrong with a husband faced with his wife’s initial refusal to engage in sexual intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling. It may be, in the end, that handling and persuasion will persuade the wife to agree. Sometimes it is a fine line between not agreeing, then changing of the mind, and consenting (Johns v R, unreported, SC (SA), Bollen J, 26 August 1992).

Prima facie, Justice Bollen’s comment indicates that intra-marital rape is acceptable. The understandable outcry in response to what was taken to be the entirety of Bollen’s remark was not restricted to feminist academics and organisations which had criticised the judiciary and the general treatment of sexual assault complainants, long before the publicisation of this particular comment. Justice Bollen was also extensively demonised by the media. The popular media (and this marks a common disjuncture between mainstream media and official discourses) did not acknowledge that the comment was
taken out of context. In a recent speech, Justice Geoffrey Eames indicated the extent to which Bollen was popularly demonised:

A very clear instance of demonising a judge occurred in South Australia where Justice Derek Bollen was attacked for his employment of the phrase “routher than usual handling” in his directions to a jury. It is a phrase that has entered into the lexicon of judicial sexism, and I have no doubt that many members of this audience would assume that in using that phrase Justice Bollen was rightly exposed as a sexist buffoon. Few people would know the circumstances in which the phrase was used. The judge was directing the jury in a case of rape between partners in a relationship where the accused alleged, and it was to a degree admitted by the complainant, that he and the complainant had frequently, and consensually, indulged in what might be termed rough sex. The complainant said that in this instance the accused had gone beyond the level of force that had been implicitly agreed between them. In encapsulating the prosecution case the judge said that it was alleged that in this instance the accused used “routher than usual handling” (Eames 2006).

The demonisation of judges via the removal of their comments from their original context is not unusual. There may be, as Justice Eames point out, room for the view that Bollen’s comment was ‘sexist’, notwithstanding context. If it is to be accepted that the comment is inherently sexist, it is probably more appropriately framed as yet another example of the entrenched, patriarchally informed, misconceptions about sexual assault and, more generally, sexual dynamics between men and women in heterosexual relationships. Judges, as part of the wider community are not immune to such views. As demonstrated in previous chapters (particularly Chapter Five) the popular media usually argue the inverse: judges are the misogynists that create and perpetuate damaging myths and misconceptions about complainants and victims of sexual assault, to which other social actors are sometimes not immune.

‘Uncovered meat’ and ‘men’s basest appetites’: women “asking for it”
In Australia, more obviously antiquated and moralising views about sexual assault victims have been expressed by people from backgrounds as diverse as conservative
Sydney Morning Herald columnist Miranda Devine, through to the (now former) Muslim Mufti, Sheikh Taj el Hilaly.\textsuperscript{45} Hilaly infamously, in a religious sermon, compared women in revealing clothing to ‘uncovered meat’ and asserted that they were at least partially responsible for inviting sexual attacks:

If one puts uncovered meat outside on the street […] then the cats come and eat it, is it the fault of the cat or the uncovered meat? The uncovered meat is the problem. If it was covered the cat […] would have circled around it and circled around it, then given up and gone […] If she was in her room, in her house wearing her hijab, being chaste, the disasters wouldn’t have happened (extract quoted in the Daily Telegraph 27/10/06: 6).

In a similar way, Miranda Devine characteristically blamed feminists for the promiscuity and flesh-revealing habits of ‘modern’ women, arguing that men could not be blamed for the ‘confusing signals’ they were receiving.

For decades feminism has told women they have the right to wear whatever they like, no matter how sexually provocative, without taking any responsibility for the effect come-hither clothing has on men. Woe betide the male who has mistakenly equated flashed breasts and vast tracts of exposed flesh with sexual availability… But far from empowering women and allowing them to “take charge” of their sexuality, this loss of innocence has led to their degradation. It has put them at the mercy of men’s basest appetites…But with sex available on a platter, on call, why should men bother with the niceties? And how are they meant to calibrate their own behaviour when the signals sent by women are so confusing? (Devine 2004d: 15).

Devine’s commentary went unnoticed: as a conservative columnist, her polemical stance on contentious social issues is routine. However, the comments made by Sheikh Taj el Hilaly – who is also socially conservative and routinely associated with a polemical standpoint – attracted significant public outrage. The difference between the comments is marginal and the message effectively the same: that the responsibility for prevention of

\textsuperscript{45} There was considerable public furore over this: the Sheikh’s comments were held up by conservative sections of the media as evidence that Muslims are more likely to sexually assault non-Muslim women than other men.
sexual assault lies with women. Some parallels can even be drawn between the degrading metaphors that are used by both commentators: for example, ‘uncovered meat’ and the female offer of sex ‘on a platter’. A Muslim ‘leader’s’ expression of such views became upheld as evidence that the Muslim community instils its youths with misogynistic and perverse values which were evoked in a search for reasons behind the Bankstown, and later, K brothers’ gang rapes. In a Daily Telegraph online poll, 84% of readers thought that the Sheikh should be deported (27/10/06) in order to prevent what was popularly assumed to be his further influence over young Muslim men.

The differences in public reaction to Devine’s and Hilaly’s comments are noteworthy because they allude to the multiple discourses and the interrelated agendas at play in the moral panic around the Bankstown and K brothers’ gang rapes. The most obvious is the conservative “Islamophobic” agenda that is emphasised – as illustrated throughout this thesis – by commentators such as Miranda Devine, Alan Jones, Paul Sheehan and Janet Albrechtsen. Related to this is the ideological agenda that attacks what is conservatively portrayed as the “permissive”, morally questionable and pretentious politics of the “left”. Feminists, academics and left-wing politicians are often placed in this category and are blamed for supporting sexual permissiveness amongst young people – which includes – as Devine would argue – promoting practices and behaviours that lead to sexual assault, and championing policies like multiculturalism which allegedly privileges “cultural difference” at the expense of “Australian” or, more broadly, Western values (Poynting et al. 2004: 225).

The courts’ failure to protect ‘our girls’

The emotive nature of such commentary spills over into scathing criticism of the courts for failing to adequately protect those deserving of protection from those who are not (Mawby and Walklate 1994; Spalek 2006). In this respect, one of the most vocal commentators has been columnist Paul Sheehan, who was moved to write a book – Girls Like You (2006) – on the topic of young “Anglo-Australian” women being doubly violated by Muslim men and then the courts. Conservative journalists and commentators are important actors in moral panics because they (often simplistically) encapsulate the
emotional responses of publics that are fearful of what is identified as residing beyond the boundaries of moral community. The maintenance of such boundaries, as argued in Chapter One, is of abstract though paramount importance during times of social anxiety. There is a positive side to this: the empowerment of victims of crime in the process.

Victim empowerment through the dichotomous relationship which abstractly emerges through representations of the perpetrators as “evil” and the courts as “treacherous” on one side, and the victims as fundamentally “good” on the other, is worth examining through the lens of moral panic for a couple of key reasons. The first is that such representations give previously silenced sexual assault victims and their families a voice in the public arena. The crucial point here is not simply the long-awaited empowerment of sexual assault victims, but the fact that this empowerment is enabled selectively, with the aim of furthering some interrelated ideological agendas. The elevated status of victims of sexual assault is, in itself, a positive development. It also renders them as key actors in a moral panic, along with other social commentators that have been traditionally identified in moral panic literature: the media, conservative social commentators, politicians, police and the courts. I argue that victim agency, vis-a-vis their role as key “actors” in moral panics, is a neglected angle in most of the literature on the topic.

The second crucial point can be linked back to the notion of moral community. Victims, via popular representations, are as important in defining who belongs to a ‘moral community’ as folk devils are, in defining who does not. Representations that draw the boundaries of “moral community” shift between the abstract and the concrete. A level of abstraction is required to demarcate the universal moral categories of “good” and “evil” around which a “moral community” is fundamentally constructed. On a concrete level victims are more tangible as “ordinary” people with whom others can identify. These points will be unpacked in greater detail in the sections to follow.
‘Have fun in prison boys, I won’: victim representation and agency during a moral panic

A significant element of aforementioned public reactions to Sheikh Hilaly’s comment is the way it highlighted victim agency and recognises the victim as actors in the process of this particular moral panic. Hilaly’s comments sparked extensive outrage on behalf of the victims of the Bankstown and K brothers’ gang rapes, which was partly reflected in the front page headline of the *Daily Telegraph*: ‘Rape victims’ message to Sheikh over his vile rants against Australian women: YOU HEARTLESS IGNORANT MAN’ (original capitalisation). This headline was followed by a response to the Mufti from one of the victims of the K brothers, Tegan Wagner: ‘You are a sad person who has no understanding of what really happens when these people inflict harm and degrading acts upon me or any other young girl [...] Your comments and your words hurt me and many other young girls. You want Australians to be more respectful of your beliefs and your cultural ways, but then you make these silly comments’ (Fife-Yeomans, Watson and Farr 27/10/06: 1, 6).

The publication of Tegan Wagner’s response is but one example of the exceptional column inches and airtime given to the actual victims (and victims’ families) of the Bankstown and K brothers’ gang rapes. Public anger in the aftermath of the trials has resulted in the constructive, yet unprecedented result of sexual assault victims being given a voice in public debate, which can be differentiated from the usual popular or tabloid coverage of victims speaking of their individual suffering, and the detrimental effect that their ordeal has had on their personal relationships. Such contributions to public debate are also partly due to the unusual decision of one particular victim’s choice to waive her right to anonymity after the K brothers’ final sentencing. Tegan Wagner, a victim of the K brothers, made front page headlines in the *Sydney Morning Herald* when she emerged from court and publicly revealed her identity:

> When the court adjourned, she stood up, faced him and said: “F--- you! Go to hell, mate” [...] Outside court, she said: “I’d like to say, have fun in prison, boys. I won” [...] Ms

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46 Quote from Tegan Wagner, Sydney Morning Herald 6 April 2006
Wagner told the *Herald* she had “grown stronger” through the ordeal. “It has changed me and it’s changed me for the better.” It was the rapists who should be ashamed, not their victims, and she revealed her identity to urge other victims to speak out. “They should be proud and say I stood up, I fought it and I’m a strong person. They shouldn’t have to hide” (Wallace 2006: 1, 4).

On the same day, similar coverage was given to Tegan Wagner in the *Daily Telegraph*. The headline read: ‘As her gang rapists get extra jail terms, Tegan speaks up for other women and tells attackers… See ya. Have a nice life. Enjoy prison’ (Clifton 2006: 13). A comment on the same page, titled ‘Courage beyond her years’, talked about Tegan’s ‘deep inner resolve and clear defiance, she wanted to be seen, heard and recorded, pleading to fellow victims not to allow these crimes to silence them. In those few short minutes, Tegan may have done more for the sisterhood than dozens of victims before her’ (Davies 2006: 13). Inspired by Ms Wagner, another of the victims of the K brothers’ attacks – Cassie Hamim – also decided to waive her right to anonymity and appear on a *Current Affair* on 6 April 2006 to ‘urge other girls to report rape crimes’ (Sheehan 2006: 381). In the *Current Affair* interview, Tegan stated: ‘We’re telling people so other victims know they have support […] We’ll all need to be strong and stick together and convict these people’ (Sheehan 2006: 381). Cassie Hamim spoke glowingly of Tegan: ‘I’m proud of her. I realise I need to be strong and move on’ (Sheehan 2006: 381). Victims of the Bankstown and other sexual assaults have also spoken publicly. The advice of a victim from the Bankstown rapes was published on the front page of the *Sydney Morning Herald*: ‘Take my lead, stop the terror, says victim’, and in the article that followed, ‘As D sees it: “I’d say, go to the police. Get them off the streets”’ (Stevenson 2002: 1, 4).

An editorial in the *Sydney Morning Herald* the day after Tegan and Cassie’s appearance on *A Current Affair*, placed similar emphasis on the ‘courage of Tegan Wagner’ for coming forward, enduring the courtroom ordeal and her sacrifice of personal anonymity in order to encourage others to “come forward”:

By identifying herself as a victim, overcoming her own fears and confronting her attackers in court, Tegan Wagner has found her own way to rebuild her confidence and
her life. She shows the way to others overwhelmed by feelings of shame or guilt after the rape. The increasing number of rapes reported indicates that courage such as hers may be spreading […] Ms Wagner’s courage is the greater because reporting a rape is no guarantee of justice. Far from it. Only one in five reported assaults go to court, and only one in 10 results in a conviction. At times witnesses cannot bear to live through the ordeal again, and refuse to testify. The case for special rape courts, which might reduce the trauma of trial for victims is strong (Sydney Morning Herald 2006a).

This editorial raises some crucial points in relation to the “victims’ rights” debates and the multiple and interrelated agendas at play within these debates. Of these aforementioned agendas there is, at least in this editorial, subtle criticism of the criminal justice system: ‘because reporting a rape is no guarantee of justice’ owing to the statistically low number of convictions by the courts which hardly makes it worth it ‘to live through the ordeal again’. The alleged inadequacy of the current court system for dealing with sexual assault is also highlighted by coopting the fundamentally feminist argument as outlined by some members of the Criminal Justice Sexual Offences Task Force (2006: 162-165): ‘the case for special rape courts, which might reduce the trauma for victims is strong’.

“Journalists Like Him”: Paul Sheehan and other conservative commentary on the courts

Elsewhere, criticism of the courts is less subtle. Referring to a background of previous gang rapes in which the attackers were youths of Lebanese Muslim background – the case of AEM and KEM – as well as the Bankstown gang-rape trials, Paul Sheehan, in his book, Girls Like You, embarks on a polemic that castigates the courts for their alleged ‘treachery’:

Even the conspicuous gang-rape trials had malfunctioned one after the other since 2001, when it emerged that Muslim men were sexually assaulting or harassing non-Muslim women in significant numbers. It was a problem the legal system, the police, the government, the civil rights bureaucracies and sections of the media tried to deny and diminish for as long as possible. The courts were no exception […] District Court Judge
Megan Latham imposed a sentence of six years on the ringleader, AEM, with a non-parole period of four years [...] Four years for gang-raping two teenage girls. What made those trivial sentences even more odious was the legal dishonesty they came wrapped in. Judge Latham found no racial discrimination despite the victims’ very different views (Sheehan 2006: 382-3).

A page later, Sheehan argues that this was but one example between 2001 and 2006 in which ‘judges and defence lawyers treated victims as reusable components’ (2006: 384), refers some more to the leniency of sentences, attacks judicial imperatives to protect the identities of the offenders and their families notwithstanding the fact that one of the victims – Tegan Wagner – was brave enough to publicly identify herself. Sheehan concludes the book by referring to a ‘grim, slow and treacherous system of justice’ and a quote from Tegan Wagner: “We went through an ordeal. Then we have to go through another ordeal in the courts. The boys were mentally raping us over and over again by the way they were able to screw the system. And mock us. And mock the courts. The system is stuffed. It needs to be fixed”’ (Sheehan 2006: 385).

Sheehan’s portrayal of the “treachery” of the court system is not restricted to his book. In his capacity as an opinion writer in the *Sydney Morning Herald*, Sheehan has been vocal about the perceived short-comings of the court system, and their failure to adequately protect innocent young, “non-Muslim” women, from the “Muslim” men who were raping them. The recurrent theme is that the courts – with their interests of procedural fairness – make victims of sexual assault suffer. This is reflected in emotive titles for his opinion pieces in the *Sydney Morning Herald*: ‘Victims sacrificed to a god of due process’ (2004a); ‘Ass of a law means the rights of rapists override those of their victims’ (2004c); ‘Why sexual violence is almost legal’ (2004b). In the first of these articles, Sheehan states that ‘A cultural gap has opened between the courts and the people they are meant to serve’, and ‘the spate of gang rape trials exposed the fact the courts are treating rape victims like cannon fodder’ (Sheehan 2004a). In the third example, Sheehan argues that ‘Our inflexible, forbidding court system alienates many who deserve justice’ and criticises the courts for their ability ‘to quell public comment about pending cases, to protect future jurors from prejudicial influences’ (2004b). In two of the three articles
mentioned here, Sheehan makes reference to statistics of conviction rates around sexual assault – that only 2 per cent of sexual assaults that are reported lead to a conviction and sentencing (2004b; 2004c).

Sheehan’s arguments illustrate an interesting appropriation of feminist critiques of the courts and criminal justice system for its history of overlooking the rights of rape victims. These examples from Sheehan’s contribution to the debate are not exhaustive, and Sheehan was not alone in his accusations that the courts “fail” to protect victims of sexual assault. Other examples of headlines in the popular press over the last few years, focused on similar themes: “‘Laughable’ justice for gang rape girl: Rape victim outraged’ (Daily Telegraph 2002: 5); ‘Victim twice suffered trial by ordeal’ (Wockner 2002a: 3); ‘Scales of injustice – making the victims pay’ (Williams 2005: 23); ‘Sexual assault survey reveals how legal system fails victims’ (Duff 2006: 7).

Another significant example was a recent campaign ‘to help rape victims and encourage more women to come forward’ (Fife-Yeomans and Davies 2007a: 1) run by a Sydney tabloid publication, The Daily Telegraph. This campaign encapsulated all of the issues that were raised in previous media commentary. On the first day of the ‘campaign’ which lasted for three days, the front page of the Daily Telegraph showed the headline, ‘JUSTICE FOR WOMEN NOW’, followed by a list of points: ‘90% of rapes left unreported; Victims face marathon trials; Horrific courtroom questions; Today, we say enough is enough’ (Fife-Yeomans and Davies 2007a: 1). Inside the same issue, the headline asserted: ‘It is time to end rape nightmare’, and the accompanying story stated that the Daily Telegraph campaign sought four key reforms: ‘No delays’; ‘Lawyers for victims’; ‘No means no’; and a ‘One-stop shop’ for victims to report the assault, receive a forensic examination, counselling and liaise with prosecutors (Fife-Yeomans and Davies 2007a: 6-7). The next day, the New South Wales Attorney General, John Hatzistergos, was quoted on the front page, telling victims: ‘THE SYSTEM FAILED YOU’, vowing to change laws to include a clearer definition of consent (Fife-Yeomans and Davies 2007b: 1, 8). Significantly, ‘Mr Hatzistergos admitted the catalyst for the changes were Sydney’s notorious gang rape trials’ (Fife-Yeomans and Davies 2007b: 8). In the same issue, John
Hatzistergos wrote a short piece titled ‘Easing the trauma for sexual assault victims’, which outlined the reforms of the New South Wales government for sexual assault trials.

Throughout the campaign, judges and defence lawyers were blamed for the “double victimisation” of complainants in court, with the third day focusing on a particular question asked of one of the complainants in the Bankstown gang rape trials, Ms C: ‘He enraged a rape victim, her family and the public. Now, the lawyer at the centre of the storm tells… Why I asked that question’ (Fife-Yeomans 2007: 1). The question had suggested to Ms C that she was ‘moaning in pleasure’ therefore she had consented to sexual intercourse with the accused (Fife-Yeomans 2007: 1). Inside was more of the same theme of secondary victimisation by the courts, with a short piece telling the story of another rape victim titled, ‘Scarred by the trauma of testifying’ (Cazzulino 2007: 4), and further along, a cartoon depicting two pictures of a traumatised victim shedding a tear. In the first picture, a man portrayed as an evil predator and rapist with sharp teeth, bearing remarkable resemblance to one of the perpetrators of the Bankstown rapes – Bilal Skaf – is standing over a tearful victim with the caption ‘I had to do it’. The second picture depicts a judge standing over the same tearful victim with the same caption ‘I had to do it’ (Warren 30/5/07: 19). This example drove home the point that the courts – specifically defence counsel and judges – are placed in a similar moral category to the perpetrators.

It is important to mention here, that there is clear merit to the prominence given in this tabloid campaign and earlier ones, to the traditionally neglected and maligned feminist discourses around the rights of sexual assault complainants in the courts. This is an unusual breakthrough in popular media reporting around sexual assault in that the focus of such media campaigns is usually the deterrence of offenders ‘with ever harsher punishments’ rather than ‘asking the survivors of this violence what they want and need’ and assisting them (Soothill and Walby 1991: 7). While general former “law and order” concerns of harsher penalties are ever present in this campaign and many others around the Bankstown and K brothers’ gang rapes, the latter concerns are also addressed in a more thorough way than is usual for tabloid reporting. To the extent that ‘feminist’ perspectives have been aired in popular media and government discourses, it ‘is just one
perspective, and usually a dated one at that’ (Howe 1998: 3). The measures that are mentioned in this campaign, however, are recommendations that were put forward by the Attorney General’s department of NSW Criminal Justice Sexual Offences Taskforce (AGD 2006), to address genuine and long-standing issues that complainants have had to face in sexual assault trials.

Assumptions of legal guilt in the court of “public opinion”
That the experience for complainants is harrowing is not in question here. This is evident through the aforementioned historical examples that illustrate the institutional perpetuation of patriarchal myths and misconceptions around sexual assault. Of specific interest are the political and popular agendas that drive campaigns such as the one run by the Daily Telegraph, and how they function in moral panics to define notions of community, order and deviance. The most obvious of these is the conservative agenda castigating the court system, judges and legal professionals – particularly defence counsel. The demonising agenda that is (as demonstrated in Chapter Three) commonplace in tabloid and populist law and order campaigns, is evident through the ways in which “victims’ issues” are framed. The three main issues that are emphasised in the most recent Daily Telegraph campaign are legislative clarification of the definition of consent, curbing defence cross-examination techniques so that it becomes less humiliating to complainants, and putting an end to delays so that complainants are not waiting several years for the trial. All are valid and significant concerns.

Of equal significance in such popular campaigns are the silences, obfuscation of complexities and a general lack of balance in the debate. For instance, some of the matters on which the popular media and State politicians remain silent, are that judges are not immune to the law and must operate within legislative boundaries; that the extent to which judges can intervene in the adversarial nature of proceedings – and therefore the unfortunate prevalence of offensive questioning by defence counsel – is limited; and that trial delays and the process of appeals and sometimes retrials (as unfortunate as they are for complainants or victims of sexual assault) are not always in the control of judges and are necessary evils of the democratic imperative of the right to a fair trial. Throughout the
reporting, there is extensive and erroneous reference to complainants as “victims” which amounts to a presumption of guilt for the accused. This can have significant consequences in terms of prejudicial publicity (see Chapter Two). On the issue of trial delay, part of the solution may be the adoption of more rigorous ‘case management’ measures by legal and judicial officers (AGD 2006: 164), but there is a failure to note that ‘some causes for delay are outside the control or influence of the Courts’ (2006: 165).

Further, to the extent that complexities and nuances are addressed by legal professionals, they are subsequently dismissed as yet another example of legal pretension. For example, criminal defence barrister Stephen Odgers had contributed to the debate by opposing the *Daily Telegraph*’s contention that ‘consent is a simple concept’ (Odgers 2007: 19). Odgers’ argument was met with a response that drew a dividing line between legal complexities and ‘moral terms’; the ‘tortured realm of legal logic’ and ‘ordinary, reasonable people’ (*Daily Telegraph* 2007a: 18). Later in this chapter I will refer to the implications of these divisions between victim and perpetrator, victims and the courts, the perpetrators and “the community”, and the courts and “the community”. For now, it is sufficient to say that the general sentiment towards the courts is encapsulated by the popular dichotomy established between simple ‘common sense’ that appeals to ‘ordinary people’, and the legal realm which, as mentioned particularly in Chapter Three, is ‘out of touch’ with the concerns of ‘real people’. Sheehan has referred to legal and judicial professionals as ‘a self-appointed higher caste, with a sense that any robust criticism of the courts, or God forbid, the judiciary, from outside is, by definition, ill-informed and inappropriate’ (Sheehan 2004: 17). Similarly, the duty of judges to ‘ensure procedural fairness to all witnesses (including the accused and defence witnesses) within the context of a fair trial’ (Judge Ellis 2005: 2), is popularly interpreted as a judge’s wilful disregard of complainants’ rights and their greater interest in protecting the rights of the accused.

Such beliefs are not only voiced by conservative columnists but also members of the public who wrote to the *Daily Telegraph* to give their support for this particular “victims’ rights” campaign. One reader, a Dr Bevan Brown from Castle Hill, wrote about his
experiences as a doctor and seeing ‘cigarette burns, screwdriver stabs, broken bones and bruising inflicted as part of the rape. Now we add cross-examination in court’ (Daily Telegraph ‘Letters’ 29/5/07: 9). Roisean Janmaat from Seven Hills wrote: ‘Having seen a friend go through the court system and be torn apart by the process rather than being supported I believe these changes are needed’ (Daily Telegraph ‘Letters’ 29/5/07: 9). Linda from Sydney said: ‘More power to the rape victims and more justice to the system to imprison rapists’; while Judy from Emu Plains stated ‘I applaud the Daily Telegraph for doing this but only wish our spineless government would do it themselves’ (Daily Telegraph ‘Letters’ 29/5/07: 9). Overall, letters to the editor expressed support for the campaign and the measures that were being taken. As Brian Kelly from Beecroft put it, ‘[for] prevention of the crime being repeated in court’ (Daily Telegraph ‘Letters’ 29/5/07: 18). All of this of course was predictable from the tactics of the Daily Telegraph, which thus made a ‘newsworthy’ story – in which the newspaper was the champion – out of a longstanding reform process. What made this tactic possible was the preceding ‘ethnic gang rape’ moral panic.

**Political responses**

The government, in order to refute any accusations that it may be “spineless” or “soft” on crime, has also played a part in the popular debate. Aside from New South Wales Attorney General, John Hatzistergos’ contribution to the most recent campaign, there have been many others. During the Bankstown trials, then Premier of New South Wales, Bob Carr, made his sympathy for the victims clear – in the context of the interrelated populist law and order rhetoric about lengthier sentences for rapists, keeping “ethnic gang crime” in check, and blaming “political correctness” for the reticence by some to identify the crimes for what they purportedly were: “race hate” crimes (Poynting et al. 2004). An editorial in the Sun-Herald indicated that Bob Carr met with one of the victims of the Bankstown rapes – Ms C – and had been angered by questions regarding the gang rape asked by a journalism student writing for the Arabic-language newspaper, El-Telegraph:

> I’m sorry, I’m emotional because I met one of the victims yesterday, and I just find an appalling insensitivity in the questions you’re asking about the plight of these victims
[...] She was held down by these men for hours [...] The cause of the unease in the community, and you must face up to it, is what these violent rapists said when they committed the crime – that projected race into this argument (Bob Carr quoted in Sun-Herald 2002: 2).

Shortly afterwards, Mr Carr announced a New South Wales government plan to “toughen” sentencing laws so that minimum sentences are given for serious crimes including murder, sexual assault and gang rape (Peterson 2002: 5).

In both the Skaf and K brothers’ cases, various new laws were rushed through parliament after public outrage and an unprecedented campaign by the media and politicians to protect ‘Australian’ women’s rights against the young Muslim men who were raping them. In the K brothers’ case, the two eldest brothers’ decision to sack their barrister and self-represent is what proved to be the most significant and newsworthy feature of those trials. There was public uproar fuelled by the mainstream media and conservative social commentators about the brothers’ decision to self-represent on the basis that this would enable them to cross-examine their accusers directly and personally and to intimidate them. New South Wales Attorney-General (at the time), Bob Debus, proposed the Criminal Procedure Amendment (Sexual Offences Evidence) Bill to prevent this from happening. Court trials were difficult enough for rape victims, said Debus. He then stated that:

There are many social, cultural and personal reasons why victims of sexual assault do not report crime to police. One factor may be the victim’s expectation of how he or she will be treated by the criminal justice system…A 1996 report by the New South Wales Bureau of Crime Statistics and Research found that the vast majority of complainants nominated seeing the accused as the worst feature of having to attend court. Being cross-examined by the accused is even more distressing and traumatic for the complainant… Minimising the trauma…is not only a worthwhile pursuit in itself, but will undoubtedly promote the accuracy and coherency of the complainant’s evidence. It is hoped that the legislation will encourage [more] complainants to report sexual offences to the authorities… Without these protections for witnesses, the court would be an instrument of injustice rather than an instrument of justice (Debus 2003: 2957).
The next day the bill was passed and section 294A (2) of the *Criminal Procedure Amendment Act* (2003) provided the following arrangements for the complainant in sexual assault trials where the accused is unrepresented: (2) The complainant cannot be examined in chief, cross-examined or re-examined by the accused person, but may be so examined instead by a person appointed by the court.

There were also some other reforms enacted in response to the Bankstown cases and the appeals. Some of the convictions for Skaf and MS were quashed after it was revealed that, during the trial, two jurors had conducted investigations at the park where the alleged gang rape occurred. A retrial was ordered and the victim refused to give evidence in the retrial. In response to the outcry that Skaf and MS were getting away with their crimes against this particular victim, the NSW government once again introduced legislation allowing transcript evidence from a previous trial to be used at retrial when a sexual assault complainant is unfit to take the stand. This was the *Criminal Procedure Amendment (Evidence) Act 2005*. Again, these changes were introduced directly in response to the Skaf retrials – when the victim, Miss D, refused to give evidence. Shadow Attorney General of New South Wales, Andrew Tink, was outspoken about this, stating in the legislative assembly that the amendment was introduced because there was

> great public concern about the trauma suffered by the victims of rape who have to give evidence for a second time [...] The catalyst for the introduction of this bill was the specific and harrowing case of a woman who had suffered extraordinary trauma and who was, in some ways understandably, refusing to give evidence at a retrial (Hansard, 23 March 2005).

Another related reform was the introduction of CCTV in sexual assault trials, which allowed complainants to present a video recording of their evidence and therefore not have to face the accused in court. This was encapsulated in s294B of the *Criminal Procedure (Sexual Offence Evidence) Act 2004*. In the Hansard reading, Kerry Hickey, on behalf of Bob Debus, stated that the Bill was initially proposed in response to ‘a
number of high profile cases [which] have highlighted the distress experienced by complainants giving evidence in sexual assault proceedings’ (Hickey 2004: 1).

More generally, since these trials, broader public debate has engaged in feminist critiques of the criminal justice system’s treatment of complainants of sexual assault trials, and further reforms for the benefit of victims are being considered via the recent recommendations of the NSW Sexual Offences Task Force. Some of those recommendations are currently under review.

**The moral drama of (group) sexual assault**

The overlapping and interrelated agendas at play within the tabloid campaigns and the political rhetoric under the rubric of “rape victims’ rights” are apparent in the moral blame that is alternated between the perpetrators, “Muslim communities”, “politically correct”, “left-wing” movements such as multiculturalism (and usually also “feminism”), and the courts. That the popular media, conservative commentators, politicians and “the general public” are key actors in the signification spiral of a moral panic is no surprise. These public figures have been exhaustively acknowledged and analysed in classic and contemporary literature on moral panics. Less acknowledged actors in the process of moral panic are the victims themselves; the literature on this area has usually focused its attention on representations of the victims and the part that such representations play in perpetuating the moral panics in question.

The clearest instance of victim agency in the rhetoric around these cases is, as mentioned, Tegan Wagner – for revealing her identity publicly and actively contributing to the debate as much as the other aforementioned actors. Ms Wagner’s decision to waive her right to anonymity has added another dimension to representations of the victims in coverage of these particular gang rapes. Identifying oneself as “victim” has become valorised as brave and heroic. Also now represented as courageous is the commitment of victims to submit themselves to the gruelling trial process as a witness, with its inevitably harrowing testimony and cross-examination. Even before Ms Wagner’s decision to identify herself publicly, the bravery and heroism of sexual assault victims had been a
recurring and palpable theme in all popular media portrayals of the victims of the Bankstown and K brothers’ gang rapes – regardless of whether they went public with their identities.

Such representations produced and reproduced a concept of victim bravery which became mass marketed. Spalek makes a salient point in relation to the ‘mass marketing’ of victimhood, which, she argues, ‘seems to fetishise and therefore objectify human suffering without offering any meaningful solutions to the terrible events that can engulf people’s lives’ (2006: 171). This echoes a criminal defence barrister’s suggestion that the current political climate has given rise to a ‘victim industry’ in which survivors of sexual assault are forced to ‘identify as victims’ and that this hinders their prospects of healing (Interview 24/2/06). Whether or not the effects of victim “commodification” have had positive or negative effects is debatable. On the one hand, it has resulted in policies that will be beneficial for victims and complainants of sexual assault. On the other hand, the label of “victim” can have detrimental long-term effects on survivors of sexual assault, whereby victimhood is adopted as a perpetual identity. Further the way in which these victims have been “marketed” as “victims”, is a form of objectification. Overall, the point is not that the agency of victims’ in this position is negative, but that it is put to commercial, ideological and legal use in problematic ways. The current political climate has created a “victim industry” in which victims are upheld as valiant heroes of a figurative ‘morality play’ that characterises a moral panic (Hall et al. 1978).

Besides what has already been mentioned, the coverage around Ms Wagner unambiguously portrayed her as a resilient hero: ‘The moment Tegan stood up for herself and became a hero’ (Devine 2006: 15). And another: ‘Inspired by Tegan’s courage, another victim finds strength’ (Clifton and Dunger 2006: 5); and, ‘Exhausted, but Tegan won’t quit’ (Sydney Morning Herald 2006b). Tegan Wagner was not the only victim who was portrayed as a heroine for at least reporting the crime. Similarly extensive imagery of bravery, courage and heroism was seen with the victims of the Bankstown rapes: “Magnificent Seven: The bravery of these young women now has convicted 14 gutless thugs of organised gang rapes in Sydney. This is their story of courage” (Wockner 2002b:
1). After the sentencing for the Bankstown offences, letters poured into the *Daily Telegraph*. All congratulated Judge Michael Finnane for his 55 year sentence for Bilal Skaf while some were moved to comment on the bravery of the victims (*Daily Telegraph* ‘Letters’ 17/08/02: 18). Michelle Bloomfield of Ryde was moved to suggest that ‘these girls deserve a bravery award’ (*Daily Telegraph* Letters 17/08/02: 18). Similar coverage has also been given to the families of victims. Ms C’s father recently wrote to the *Australian* to castigate the New South Wales Court of Criminal Appeal and make allegations of racism against the Courts: ‘She was 18 when she was raped by 14 men and is now 25. I’m an indigenous Australian, as is my beautiful daughter. I’m now convinced that she is only a second-class citizen in the eyes of the Court of Criminal Appeal’ (*The Australian* ‘Letters’ 18/05/07).

Once again, my reference to these representations is certainly not to question their truth or the positive effects they have had, but to point out that such portrayals are remarkable in the context of the prevalent historical attitudes – as illustrated earlier – around sexual assault victims. What is particularly unusual is that most of the Bankstown and K brothers’ victims had previously liased with the attackers and the media did not, as is commonly the case with sexual assault complainants, cast aspersions on the character of the victims. A manager of the New South Wales Rape Crisis Centre commented, in an interview, on the atypical nature of the portrayals surrounding the victims in these cases:

…those young women went off to smoke dope with those fellows. Now, any previous sexual assault victim would certainly have been creamed for that. While I’m not agreeing, I’m not saying that that was right – of course when you go off to smoke dope you don’t expect to be in this terrible sexual assault – but what I’m talking about is how the media reported it. They reported those sexual assaults very differently from anything prior to that time. They did cop quite a bit of flak for that as well, it was said they were taking a racist line…But what that did actually mean is that since that time, the reporting of sexual assault has changed quite dramatically in the media and once that happened they couldn’t go back to blaming the women for being sexually assaulted and judging them and calling them whores and making out they somehow deserved it. If they did, then it was going to be clearly shown that they were racist in their reporting of
Bankstown. So they then had to go on calling women heroines for coming forward and supporting them. Now, that’s been great, in general, for women. Unfortunately it has its roots in terrible racism – that was the reason for that to occur. But at the same time, the reporting of sexual assault has changed dramatically in this country ever since then – regardless of who the perpetrator or victims are, or what their cultural background is (Interview 13/2/06).

That the “ideal victim” in these debates no longer had to be clearly distinct from the perpetrator and therefore seen as playing no part in their own victimisation (Spalek 2006: 22), is revealing. The obvious shift in traditional conceptions of the “ideal victim” shows that such constructions around victims or complainants of sexual assault are obviously dependent on the prevailing social and political climate. As Spalek points out, ‘there appears to be a hierarchy of identities in terms of the level of protection afforded to different people’ (2006: 153). Notions of what is “good” or “evil” are transient. While embodying some of the traditional characteristics that have defined the “ideal victim”, these young women have mainly become idealised in this particular context, through their juxtaposition to popular portrayals of “evilness” around their perpetrators. Particularly noteworthy in these representations of the victims is that they have been represented as diametrically opposed to the perpetrators: the victims were referred to as brave heroines while the offenders were popularly known as ‘cowards’ (Letters, Daily Telegraph 2002: 18) or ‘gutless thugs’ (Wockner 2002b: 1). In the Bankstown gang rapes, as the aforementioned interviewee has pointed out, some of the victims ‘smoked dope’ with their attackers prior to the attacks. In the K brothers’ gang rapes, the victims were willing visitors to the K brothers’ home, in the belief that there was going to be a party, or that the hosts were “nice guys”:

The boys were unfailingly polite, respectful and courteous. When the girls visited their home, they behaved like gentlemen. “They just seemed like really decent people who enjoyed themselves on weekends and couldn’t do enough for you”, Miss G said (Sutton 2004: 52).
Popular media representations led to the empowerment of some victims to the extent that they were given a voice in public debate. The marketing of particular representations, have to a degree, determined the range of choices that have become available to victims of sexual assault. This is a fact that has been acknowledged by a number of professionals – on both sides of the debate – who were either directly involved in the Bankstown and/or K brothers’ cases, and/or have been involved in advocating the improvement of criminal justice conditions for sexual assault complainants. The senior Crown prosecutor whom I interviewed for this research said:

I’m so glad that there has been a shift now, taking away the emphasis of shame upon the victims, and now we’ve finally gone full circle in, I suppose, the generation that I’ve been dealing with sexual assault victims. They now don’t feel that they have to be ashamed and we’ve even got to the stage where they say ‘well, I don’t need my name shielded, or my face, and I’m proud that I’ve been brave enough to go through this ordeal and it wasn’t my fault’ (Interview 22/2/07).

In another interview I conducted with the rape crisis counsellor, the interviewee remarked:

I think, over the last 10 to 15, particularly in the last 10 to 15 years, there’s been some quite massive changes in the way police managed complaints of sexual assault. There’s been a hell of a lot of training of detectives: they now all have to go through specialist sexual assault training, that doesn’t just look at the laws but actually looks at the impacts on victims and a whole bunch of other things and that’s certainly a lot better than it ever was in the past (Interview 13/2/06).

Notwithstanding the empowerment afforded by popular representations, Ms Wagner’s efforts as a social actor were also groundbreaking for generating broader awareness about rape victims’ and complainants’ rights before the criminal justice system. In this sense, the press commentary that speaks of Ms Wagner’s bravery is not unwarranted or undeserving. However, without diminishing the courageousness of Ms Wagner’s actions, I suggest that what is of more interest in this particular context is the opportunity given to
Ms Wagner to speak on behalf of herself and other victims of sexual assault, and the ways in which the popular press as well as other public discourses have portrayed her actions and her character. Such representations and their by-product of creating “victims” as key public figures in this moral panic, carries important implications for the notion of “moral community” and the concurrently perceived failure of the courts to protect its members.

Victims and “Moral community”
In much of the commentary around the rights of sexual assault victims, the “community” is mentioned as part of the debate; whether as a community that is “outraged” about the treatment of sexual assault complainants or victims by the courts, or as a faceless collective that is “concerned” about the protection of members that are popularly defined as vulnerable. For example, Bob Carr referred to a sense of ‘unease in the community’ (Daily Telegraph 2002: 2), when asked about the “racial” dimension of the Bankstown gang rapes. In the tabloid campaign referred to in the previous section, members of the “community” – variously referred to as ‘readers’ who backed the campaign or “the public” – were actively invited to join an online petition ‘calling for justice for rape victims’ (Daily Telegraph 2007a: 18). It should also be noted that the concept of “community” is not restricted to popular media or political discourses but is also extensively used by legal discourses who posit that community or public faith must be maintained by the courts.

That “community” is evoked as part of this debate is significant for a number of reasons which revolve around the concept of “moral community”. In Chapter One, the main concerns were to examine how the construction of “folk devils” as inhuman and therefore beyond the boundaries of “moral community” worked towards defining those who are perceived to belong, and the extent to which the concept of “justice” differed in its application towards each constructed category. The argument in Chapter One was that identity is established through definitions of the “Other” and that the “Other” defines everything that members of the “moral community” are not. In the moral panics around the Bankstown and K brothers’ gang rapes, the “Other” was racially and morally
configured – categories which became entangled and virtually indistinguishable in the multiple discourses that converged in the public debates around these crimes. Through the pervasive yet intangible lens of “justice”, as in Hudson’s argument, those who did not belong to the “moral community” were not owed the same civil obligations and compassion (Hudson 2003; 2006a).

Here I suggest that the victims of these gang rapes are drawn into the debate to help define the “we” of the “moral community” while the perpetrators define the “Other”, and thereby the boundaries of and what lies beyond a “moral community”. As mentioned previously, this public debate has waivered between two representational levels: the abstract – so that universal categories of “good” can be delineated in a collective sense; and the concrete – so that victims can be tangible identities with whom anyone can identify and being “good” can be identified as an individual moral attribute. Both are crucial to the concept of “moral community” and to a degree, correspond with Charles Taylor’s concepts of the “social imaginary” and “moral order” of Western modernity – concepts to which I briefly referred in Chapter One. In Taylor’s words, the social imaginary constitutes ‘the ways in which people imagine their social existence, how they fit things together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations’ (2004: 23). Greg Noble argues in a piece on the Cronulla race riots that the ‘social imaginary’ is overlaid by a ‘cultural imaginary’ which allows the moral order to be ethnicised (Noble 2008a; 2008b).47

Accordingly representations of the victims and perpetrators are diametrically opposed in a number of ways and constantly vacillate between the abstract and concrete: in terms of race or ethnicity, categories of “ordinariness” and “normality”, or “deviance” and “abnormality” on a concrete level, and in more universal moral terms of “good” or “evil” on an abstract level. Once again, there is a parallel in legal discourses, which also adopt a concept of ‘ordinariness’ in the notion of ‘ordinary or reasonable man’ when assessing the culpability of the accused in murder cases. There is some overlap in legal and lay uses

47 Forthcoming articles.
of the concept, but also some substantial differences. These have been explored in detail in Chapter Four.

There has been yet another angle to this debate. This is the opposition popularly posited between “the community” and “the courts” – which are supposed to be protecting members of “the community” but are constructed as failing in their duty. Perceptions of failure around the expected role of the courts, places the court system in yet another category that is characterised as opposite to the norms that are embodied by the “moral community”. Recurrent themes that judges are not “in touch” with “community” concerns, or are not “real people” have already been described in previous chapters. In the debate that has been examined in this chapter, the dividing line is most clearly drawn between judges and the defence counsel on the one hand, and complainants (mostly referred to as “victims” – even before a guilty verdict) and other “ordinary” members of the “community”, on the other. A clear example of this is found in the example mentioned earlier: the Daily Telegraph’s response to criminal defence barrister Stephen Odgers’ argument that ‘consent is not a simple concept’ was:

In the tortured realm of legal logic, no doubt such considerations have some sort of validity. But for the rest of us, consent […] is a simple concept […] The circumstances [Odgers] has outlined as straining such simplicity are scarcely complex in moral terms and unlikely to trouble ordinary, reasonable people (2007a: 18).

The concepts evoked in this editorial function on a number of different planes. A division is hoisted not only between, as mentioned earlier, the ‘tortured realm of legal logic’ and ‘the rest of us’, but also between what is considered ‘legal logic’ and ‘moral terms’. The reference to those of ‘us’ who are ‘ordinary, reasonable people’ who think in ‘moral terms’, and legal professionals – particularly judges and criminal defence counsel – can be read as implicitly excluding some members of the legal profession from the “moral community”. The theme recurs in Sheehan’s inexhaustible polemic on the subject. To repeat a line quoted earlier: ‘A cultural gap has opened between the courts and the people
they are meant to serve’ (Sheehan 2004a: 17). Later in the same article, Sheehan alludes to the metaphorical partition between the judiciary and the rest of the “community”:

All the arguments coming from the legal profession about the sanctimony of due process cannot perfume the impression created by the courts that the courage of rape victims is expendable [...] For better or worse, the community, via Parliament may react to the legal profession’s Brahmanism and intervene in the running of the courts, exactly what the judges do not want (2004a: 17).

Elsewhere, Miranda Devine argues:

Judges and other lawyers seem increasingly troubled by the advent in the past decade of victims' rights groups and associated community criticism of the justice system [...] But what they seem not to understand is that community anger about inadequate sentences and a disregard for the rights of victims stems from a genuine sense of injustice. What’s more, the values of the lawyerly class from which judges and magistrates are drawn are more liberal than those of the community in general, and therefore it is no surprise that courts are increasingly out of touch with the feelings of the people they serve (Devine 2004b: 15).

Here, Devine refers to the frequently enmeshed agenda of criticising the judiciary with common conservative refrain of the inherently ‘out of touch’ nature of liberal values. In addition to the numerous divisions posited between a community of ‘ordinary people’ and the ‘self-appointed higher caste’ (Sheehan 2004a: 17) of judges and other legal professionals, there is also a dehumanisation of judges and legal professionals who are seen as being on the “wrong side” of the criminal justice system. The dehumanisation of judges is explicitly apparent in figuratively setting them apart from “real people”. Dehumanisation of criminal defence counsel (and judges) is implied in referring to the Crown prosecutor who has successfully prosecuted these cases, Margaret Cunneen, as ‘the human face of justice’ (Devine 2004b: 15). Other references to the high profile prosecutor portray her as a ‘hero’ or ‘the good fighter’, with legendary ‘empathy’ for victims of sexual assault (Barrowclough 2004: 25). Without citing a large number of
examples of media portrayals, Cunneen is constructed as a rare example of legal professionalism combined with compassion (Barrowclough 2004: 25).

The dehumanisation of most of the legal profession and judiciary (mainly because of allegations that they are “out of touch” with the concerns of “ordinary” people) is a theme that persists in the popular victims’ rights debate, alongside a parallel dehumanisation of the offenders. Details about the various images that are evoked to dehumanise offenders have already been addressed in Chapter One. Yet it is crucial to here reiterate that portrayals of violent offenders – especially those who are already aberrant to the constructed norms due to ethnic and cultural difference – are dehumanised as a way of locating them outside of the “moral community”. On the flipside, the humanisation of the victims brings the lack of humanity displayed by the perpetrators into sharper relief. As Poynting et al. argue:

> The victims of the various crimes […] are represented in all their humanity. Indeed, they become so well known to us they become like family and friends themselves […] The coverage of the rape trials emphasised the humanity of the victims – their suffering, their bravery, and so on – and the inhumanity of their attackers (2004: 43).

As mentioned, themes of bravery, courage and heroism in representations of the victims are juxtaposed with images of the cowardice, ‘gutlessness’ or ‘bullying’ of the perpetrators. Similar themes have emerged around representations of the courts: the demonisation of criminal defence barristers and judges is directly opposed to the compassion and heroism attributed to, for instance, Margaret Cunneen. Such imagery of heroism functions particularly well when a key agenda is ‘Islamophobia’ and metaphors of ‘war’ have featured in the discursive formations around the ‘Muslim threat’ (Poynting et al. 2004).

Similarly, designations of “ordinariness” or “reasonableness” evoke norms which define what lies within the boundaries of “moral community”. As Poynting et al. argue, ‘Ordinariness is, of course, a key figure in any populism. An enormous investment is
made in the idea to embody the goodness and decency of the populace’ (2004: 74). As mentioned, such designations of “ordinariness” span different discursive domains and exist in a wide variety of public debates about law and order. Of interest here are the means through which victims are constructed as representatives of “moral community” – and what kinds of victims are placed in such positions.

The previous discussion of the concept of “ideal victim” has shown that often the concept of “ideal victim” has been constructed in order to uphold abstract conceptions of “good” versus the “evilness” of perpetrators. These categories are simultaneously abstract and concrete; different characteristics are upheld as inherently “good” or “ideal” at different times. The same reasoning can be applied to the category of “evil” which is exemplified by the folk devil during a moral panic. Such abstractions are often posited as universal but, as specifically illustrated in Chapter Four, are heavily invested with a specific set of dominant social values. Victims’ rights debates – in a variety of domains – very obviously make use of universal categories and constructions. Spalek points out that in much of the literature around victims, ‘there seems to be an assumption that the experience of victimisation is generally the same for all people, regardless of significant differences in individuals’ class/gender/ethnic/religious/sexual orientation and other subject positions’ (2006: 91).

The ethnically defined immorality of the perpetrators in both gang rape cases was obviously highlighted by constructing the victims as ‘all Caucasian’ or Anglo-Australian, notwithstanding the fact that they came from a variety of different backgrounds. The category of “Caucasian” or “Anglo-Australian” is the neutral norm against which the Arab or Muslim “Other” is defined. This is an instance of the oscillation between the abstract universal and the ‘concrete’ or tangible qualities, exemplified by the victims and perpetrators of these cases and which contributed to ideas of who did and did not belong to the Australian “moral community”.
Conclusion

Moral panics need their heroes as much as their villains, their angels as much as their devils, their victims as much as their perpetrators. These shape not just panic, but the moral community through which we draw boundaries of inclusion and exclusion. The reasons that attention was drawn to the previously neglected problem of aggressive cross-examination techniques and the subsequent intimidation of sexual assault complainants in court is varied and complex. In the popular victims’ rights debates explored in this chapter, a moral division is drawn between victims and perpetrators on the one hand, and victims and the courts on the other. There are parallels between popular portrayals of the Muslim rapist as morally deviant and residing outside of the “moral community”, and the moral blameworthiness of the courts for failing to protect this community from these predatory outsiders: neither the (homogenised) cultural backgrounds of the perpetrators nor the culture of the courts are deemed “human” or “ordinary”. In the context of the Western ‘war on terror’, Poynting et al. assert that ‘ordinary and innocent are virtually interchangeable’ (2004: 74). Such divisions vacillate between the abstract and concrete. Victims need to be portrayed in universal terms – as “neutral”, “good” and perhaps “heroic”, in order to clearly demarcate the boundaries of “moral community” and clarify the virtues to which “we” can all aspire. On the other hand, as Cohen argues in his outline of the necessary elements of a moral panic, what is needed is ‘a suitable victim: someone with whom you can identify, someone who could have been and one day could be anybody’ (1972: xi). Abstract categories of “good” and “bad” provide a moral framework in which ordinary people and collective groups can be located in the popular imagination.

As quoted above, a sweeping statement made by the former New South Wales Premier, Bob Carr, in a populist sentencing campaign, encapsulated all of these sentiments: ‘There are some people who are bad, just bad. Capital ‘B’ bad. The sad truth is that we are all safer if they are off the streets’. The Sunday Telegraph editorial in which this quote was published described Carr’s statement as

a rare case of clear politico-speak […] accurately summing up how the community feels about violent criminals […] The courts won’t like it […] But the public will like it
because finally judges will be made accountable for their decisions […] Frankly the bleating of civil-libertarians has no place in this debate. They marginalise themselves and diminish their credibility by arguing against something the vast majority of society wants – tougher sentencing. The fact is that there are grubs in society who do not deserve leniency. They are the murderers, gang rapists and drug lords who have left many people frightened to walk the streets in daylight (*Sunday Telegraph* 2002: 95).

That such measures here, and in the victims’ rights debate, may overshadow the rights of the accused is of no concern because they exist beyond the borders of “moral community”.

These abstract and concrete categories are captured in reactionary campaigns that simultaneously articulate “Islamophobic” and anti-libertarian sentiments along with moral castigation of the courts. In the debates explored in this chapter, these agendas were articulated through the appropriation of victims’ rights and feminist discourses around the courts’ treatment of sexual assault complainants. The appropriation of feminist discourses around rape victims’ rights has yielded some interesting and positive results. These are, as outlined, the construction of victims as heroines rather than as women who were somehow ‘asking for it’. As a consequence, sexual assault victims have also been given a voice in public debate, where they have previously been silenced. This highlights the agency of victims in an extensive network of actors that contribute to the “signification spiral” in a moral panic. There is a gap in the traditional moral panic literature about the role of victims in the cycle. Perhaps, in part, the agency of victims had not been interrogated by the moral panic literature because of the historical circumstances, in the 1970s, around victims (either of sexual assault or other crimes) at the time. However, as mentioned, the point that is addressed well by this body of work is that certain types of people are more credible as victims: they must belong to the moral community so that the status of the perpetrators who do not belong is brought into sharp relief.

That these imagined boundaries of moral community are “racially”, ethnically and culturally delineated was summarised by the remark of one my interviewees. Upon
asking the Senior Crown Prosecutor why she thought the rights of sexual assault complainants and victims were improved, she replied:

Community shift in attitude, that is, an awareness that these things do happen and that it’s not the fault of the victim. Probably improvement or acceptance of women as equals – this has been a very big change because there really was such scepticism about the word of women, but now that women have taken their place in professions and so forth, I think it’s easier for men, and women, because it’s not just men who I think had women in a particular box, some women also found it hard to believe other women (Interview 22/2/07).

Elsewhere, referring specifically to the Bankstown gang rapes and the racialised coverage around those cases, she remarked:

So maybe for the first time, [the cases convinced] sceptical men of society [in relation to the credibility of complainants] even if it was because some racist bone was tweaked’ (Interview 22/2/07).

The possibility that “a racist bone was tweaked” is the unfortunate underbelly of an increased awareness of the plight of sexual assault complainants in court.
Conclusion: gatekeepers of the moral frontiers

Moral Panics in a moral community

My argument in this dissertation has been multi-layered. I have made pragmatic use of a mix of theories, popular media and official discourses. On a conceptual level, I have elaborated what I have referred to as a “classic” model of moral panic: the formula delineated initially by Stan Cohen as ‘deviancy amplification’ and developed by Stuart Hall et al. as a ‘signification spiral’ that creates a complex web of meaning in which certain individuals and groups are demonised and institutions condemned as “spineless” and ineffectual. The notion of moral panic has been unpacked so as to foreground two particular elements that, I argued, have been fundamentally under-explored in the “classic” moral panic literature. The first is the role of the courts in a moral panic as specific, relatively autonomous institutional actors in the signification spiral that takes place during such episodes. The second, which is inevitably entangled with the role adopted by and allocated to the courts, is the specifically moral dimension of moral panic.

That these elements of the theory have remained comparatively under-explored is surprising given that there is a symbiotic relationship between prevailing notions of morality and criminal law, and that the courts are simultaneously subject to and the arbiters of these moral frontiers. As such, I saw it necessary to augment the classic theories of moral panic with legal and political philosophy, to conceptualise the idea of a unified “moral community”, and feminist critiques of the courts, to demonstrate the inherent biases within legal (and other official) discourses. In addition, as outlined in the introduction, I have made some use of Edward Said’s critique of “orientalism” and critical race theory to demonstrate the “hidden” ethnicity of the neutrally constructed legal subject, as opposed to the apparent ethnicity of the offenders in these cases. Such constructions of ethnicity continued, albeit in a more sensational way, in mass media and...
popular cultural spheres which, as demonstrated throughout this dissertation, have a significant impact on both popular understandings of ethnicity and its categorical connection to deviant behaviour. My examination of the popular constructions of the offenders, the cultural “group” to which they were said to belong, and the courts, was substantially aided by media and cultural studies analyses of mass media and popular cultural understandings around law and crime. In this sense I was able to trace the complex mesh of signification in the process of moral panic as one in which representations (re)produced by the mass media infinitely bounced off and reflected back the meanings that were (re)produced by the criminal justice system, the government, political spokespersons, the offenders themselves, media audiences and “the general public”.

To illustrate a notion of morality that underpins moral panics, I referred to the concept of “moral community” which encompasses literal and metaphoric boundaries that are imagined by a dominant social group. These boundaries are simultaneously geographic, political, ethnic and cultural. Moral values – and thus the boundaries of “moral community” – are constructed by a network of social actors in a moral panic: groups of “moral entrepreneurs” who have the power to define the identity of members of this ‘imagined’ community. These actors are individual and institutional; they may sometimes act on their own to further a specific moral agenda, or as part of an institutional micro-network which has its own overarching agenda and interests. The network of social actors in a moral panic has further layers of complexity: each individual network has its own set of actors and relations, and its own transient and sometimes internally contradictory agenda which is consistently negotiated by other powerful and competing agendas and enterprises. Thus, the boundaries of moral community are always shifting, contested and negotiated through the input of different moral entrepreneurs and their conflicting imperatives. Further, the multiple discourses and agendas involved in a moral panic, do not only result in the identification and definition of a core “problem” or concern, but negotiate key social discourses or meanings, like gender (and in this case, masculinity) and indeed, all key social categories and relations. Latour’s argument that we are more connected to each other by our worries and our matters of concern than by ‘any other set
of values’ is also of particular relevance here in that these “worries”, during an episode of moral panic, seem to be the adhesive that binds these actors together in a collective idea of community.

In the moral panics explored around the Bankstown and K brothers’ gang rapes a common theme has emerged in the culturally and symbolically defined characteristics of the “Other”. Race or ethnicity has been a large part of the moral configuration of the “Other”, which has then become entangled and interchangeable with constructions of criminality and, as shown in the Bankstown and K brothers’ case studies, sexual deviance. As I have argued from the outset, this is achieved by constructing the morally questionable character of the “Other” as “common sense”. The attachment of some form of logic – in the form of “plain common sense” – to prevalent notions of morality, bypasses the emotional forces, such as fear, that help shape such morals. In this sense, to reiterate Nietzsche’s point from the very beginning of this dissertation, fear is indeed ‘the mother of morality’. The attachment of logic to the emotional side of morality makes some forms of it more widely accepted than others.

Further, attaching a particular race or ethnicity to the criminal(ised) helps to “Other” them. This is comforting to the rest of the community because it locates deviance outside of its own moral domain. In this sense, moral panics are functional; they offer comfort through the demonisation of an “Other” rather than locating responsibility within the community’s own frontiers. By default, the ethnic and cultural characteristics of the “Other” have defined a particular ethnicity and culture of the mainstream, which is, by virtue of its social dominance, normalised as “neutral” and “universal”.

The Courts as actors in moral panics

As part of a larger network of social actors in what might be called the joint “moral enterprise” underpinning moral panics, the courts play a crucial role. The law, the criminal law in particular, is based on morality and social norms. The criminal law and the courts also shape social morality and norms by enforcing them through punishment of
those who transgress its boundaries. In this sense, I have referred, in Chapter One, to the courts as “moral arbiters”.

Yet the role of the courts during moral panics are marked by a paradox which resides in popular social expectations that the courts act as moral arbiters on the one hand, while being excluded from the popularly delineated realm of morality and moral community on the other. The courts’ simultaneous determination of and exclusion from the boundaries of moral community, results from an oppositional dichotomy constructed between justice and law: according to popular perceptions, the courts rarely punish harshly enough and protect the due process rights of the accused far too much for “real justice” to be served.

Of course there is no clear division between popular notions of justice and those defined by the courts. This much has been illustrated in Chapter Two. Yet the fact that a dichotomy has been constructed between the law and popular notions of justice demonstrates that the courts are relatively autonomous. For example, public outrage in response to sentences that are perceived as too lenient, demonstrate that the courts maintain their independence from transient public rages. In this sense, the courts are a separate network in their own right. There are many diverse actors in the court system, ranging from prosecutors, defence counsel, witnesses (including academic witnesses) the judiciary and temporary members of the network during criminal trials – juries. Further, each of these actors is diverse in their political beliefs, value systems and opinions. This much was demonstrated by the various legal professionals that I interviewed on both sides. Some legal professionals are popularly viewed more favourably than others, perhaps because their views converge more readily with non-legal, “community” notions of justice and morality. This is one area in which popular and legal notions of justice may begin to meet. Overall however, despite their theoretical independence, the courts must consistently negotiate with multiple actors in a moral panic in order to uphold some sense of shared justice and confidence in the criminal justice system – even though it is apparent that “justice” is by nature a contested and elusive concept.
That sentences increase in severity during times of social anxiety and moral panic is not a revelation. As this dissertation has demonstrated, it is a fairly standard response of the courts as part of a society that is in the grip of general anxiety. Further, the courts are restricted by populist legislation that is enacted for the purpose of allaying public outrage and fear. There is a large body of criminological literature that has covered this area. Of more significance to this project is the differential way in which some offenders seem to be treated. This prompted my investigation into whether this was the result of implicit “racism” within the criminal justice system. I wanted to find out if the racialised media reporting around the crime had consequences for the punishment that the offenders received. The perpetrators and their families certainly thought that this was the case, as did other members of Lebanese, Middle Eastern and/or other Muslim communities in Australia; as one youth from Bankstown stated, ‘if he was an Anglo Saxon he wouldn’t have got that many years’ (Ramsey 2002 cited in Gleeson 2004: 195).48

It is interesting to speculate on such claims. Of course the matter is a great deal more complex than the simple suggestion that the criminal justice system and government are complicit in a racist conspiracy against Muslims, Lebanese or any other minority group. However, the net effect of the multifarious social processes at play during a moral panic ensures that certain groups become demonised and treated differently from the dominant group in society. During such times, fear of difference – cultural, ethnic or racial – as defined against a “neutral” anglocentric norm, is heightened. This, on its own, suggests that there may be a kernel of truth in claims about institutional racism, even in their application to the reasonably autonomous network of the courts. As noted throughout this dissertation, despite their relative independence, the courts are subject to the boundaries imposed by societal and community standards and thus inevitably implicated in the process of moral panic against certain groups. This is not necessarily negative; it simply points to the fact that as long as dominant cultural structures remain embedded in institutions such as the courts, certain differences are always going to be constructed as incommensurable.

48 This has already been quoted in Chapter Three, p. 132.
Thus cultural and ethnic difference is a significant area in which there is simultaneous convergence and divergence between legal and popular notions of justice and morality – particularly during a racialised moral panic. For example, in legal constructions of “reasonableness” and “ordinariness” are strongly reliant on “community standards”; and what the community considers “ordinary” is largely defined through categories of race, ethnicity and culture. A corollary of this is that minority ethnicities and cultures that are regarded as “alien” to the moral norms that are upheld in a dominant (imagined) community, can be pathologised before the law. This is not to suggest that the courts do not attempt to temper the wider structural disadvantages faced by minority cultures; they do so through an attempt to reach genuine equality through the recognition of ethnic and cultural difference from the Anglo-Saxon-Celtic tradition that underpins the law and its constructions of the hypothetical legal subject. Recognition of such differences during criminal trials is positive in that it not only affords a level of respect for the difference of the “Other”, but shows an implicit acknowledgement of the homogenous standards that are uniformly applied to those who appear before the courts.

Yet, as this dissertation has demonstrated, there are some inherent problems with the courts’ incorporation of cultural and ethnic difference through “cultural defence” arguments. As a consequence views on cultural defences are divided in the legal domain. While some view a consideration of cultural difference as an indispensable element of justice and equality, others dismiss it on the basis that it could open the floodgates to other excuses for criminal behaviour such as, for example, a ‘filthy temper’, which was a somewhat facetious suggestion made by the Chief Justice Gleeson of the High Court (cf. Mankotia v The Queen S61 – 2001 HCA Transcript). Cultural defence arguments for criminal behaviour also present the risk of perpetuating negative ethnic and cultural stereotypes – particularly in the event that such arguments are represented in grossly oversimplified ways by the popular media. One example, considered in Chapters Three and Four, was Stephen Odgers’ “cultural time bomb” argument to secure a more lenient sentence for MSK on the basis of potentially reduced culpability due to his cultural upbringing. This thesis has shown that arguments such as Odgers’ are often criticised as “political correctness gone mad” by commentators who are driven by overlapping
conservative agendas of anti-multiculturalism and castigating the courts for their perceived leniency on offenders, particularly those who are “ethnic”. However, far from being “politically correct”, even the most progressively intentioned actors in the court system, must adhere to the overarching cultural standards against which “difference” is defined. This is because ethnic and cultural difference is always already mediated by the Anglo-Saxon-Celtic culture that defines such differences. At least this remains the case in a court system where anglocentric standards remain firmly entrenched.

Because of these problems, it is difficult to find a practical way through which to incorporate cultural difference into anglocentric legal discourses. Many legal professionals that I interviewed were sceptical of the possibility that “difference” could be incorporated into the criminal law in any substantial way. While they were generally sympathetic to the idea, many suggested that the uniform application of law should remain, allowing only for minor considerations of ethnic difference for less serious offences – judged, as would be expected, on a case by case basis. One particular defence barrister responded to the question of recognising ethnic difference as follows:

Everything depends on the circumstances of the prosecution. One shouldn’t generalise about this… You have to bear in mind…that one of the continuing themes in the criminal law is the need to balance the circumstances of the individual and their background against the need for certain appliance of social norms, so that you can’t, for example, say ‘oh well, I’m justified in killing somebody because he stepped on my toe and from my moral standards, that’s an extremely severe crime’… You can’t do that, the community doesn’t allow that. So there’s sort of a tension there, between those things and that’s a tension that applies throughout the criminal law and ethnicity is just one example where this kind of issue can arise and there’s a dilemma as to precisely how you resolve it in particular circumstances (Interview 21/02/06).

This comment emphasises that the role of the courts – in moral panics and at other times – involves the difficult task of striking a balance between the recognition of ethnic difference before the law and maintaining social norms and the moral standards that are built into these. Such a task seems impossible in that these conflicting imperatives of
justice appear to be incommensurable. Yet, in order to negotiate a practical solution to these issues, it is necessary that difference is acknowledged in the first place.

**Future directions**

In seeking to order the world, we inevitably come up against that which is other, that which eludes our categories and which is able to affect and shape us in turn. In other words, we inevitably engage in a dialogue (Falzon 1998: 4).

Solutions to the practical problem of providing equal justice to all must begin within a context of cultural sensitivity towards the difference of the “Other”, gained through dialogue. The self-enclosed thinking that characterises the construction of cultural difference – whereby dichotomies are erected between “Self”/“Other” – needs to be dismantled in order to come closer to a more just outcome for all. This would involve a reconceptualisation of the “Other” in a way that humanises and acknowledges their subjectivity rather than the current and prevalent way in which the “Other” is dehumanised and objectified in various discursive contexts as the “alien”, “monster”, “barbarian”, “human cargo” (Poynting et al. 2004: 38) and so on. Recognition of the “Other’s” common humanity is the first step towards establishing an ethical framework which maintains a respect for and genuine dialogue with the “Other”. Popular understandings that this will generate fragmentation and divisiveness because of an infinite array of incommensurable world-views can be overturned through an attitude of openness towards difference. This can be achieved via the acknowledgement that the “Other” is just as able to ‘affect and shape us’ – rather than an attempt to forcibly incorporate difference into established categories of “sameness”. This is as true for the legal domain as much as it is for any other public or institutional sphere which hinges on a universal idea of the “neutral” subject.

In order for true dialogue to be established between divergent cultural groups before the law, discourses and practices must be established that stand outside of its ruling categories. These categories are often constructed in a privileged position above history
as presenting an overarching and abstract truth. Christopher Falzon refers to this as a type of ‘transcendental narcissism’ which emanates from an unwillingness to accept the finitude that is central to our humanity (1998: 8). The irony here is that this attitude of transcendental narcissism dehumanises the “Self” as much as the “Other” – albeit in a completely different way. This transcendental dehumanisation is particularly apparent in legal conceptions of the rational subject – whose author perceives himself as beyond the finitude of the historical.

Attempts to recognise the difference of the “Other” from this overarching perspective cannot result in genuine dialogue because it does not shift the structure of domination and subordination between “Self” / “Other”. In legal attempts to recognise ethnic and cultural “difference” for example, the law imposes its own idea of “reasonable” conduct – a Kantian ideal of the rational agent that is imbued with certain cultural peculiarities but is fundamentally worthy of respect insofar as they are rational. In this way, the “Other” mirrors the “Self” and there is, once again, domination over the “Other” rather than genuine dialogue that transgresses the boundaries of “Self” / “Other”. Another way of putting it is that dialogue is retarded by the attempts of one party to “domesticate” the other to the extent that their otherness is overcome and negated (Falzon 1998: 4).

As Falzon asserts:

resistance to domination and closure can also be pursued in an indirect fashion, through the adoption of a different attitude towards the other. This new attitude is that of openness to the other, to listen to it, to take its claims seriously […] Openness promotes life, continuing human activity in the form of the resurgence of the other, the transgression of existing limits, and the revitalising production of new forms of thought and action (1998: 59-60).

It may be protested that these insights about genuine inter-cultural dialogue are idealistic. However, without such ideals there is little hope for reaching a resolution that provides a just outcome for all – particularly in a social and political climate where fear of a racialised “Other” is rife. Furthermore, these theoretical understandings are necessary to
proceed with research that explores the reality of multiculturalism and its impact on legal and criminal justice discourses and practices.

The “reality” of multiculturalism and its impact on the administration of criminal justice, necessitates an approach that takes into account a diverse array of perspectives, both “official” and “non-official”. Non-official discourses include those exemplified by the mass media and popular culture: representations generated through these sources play a crucial role in constructing the reality of multiculturalism in contemporary Australia which inevitably filters through to the administration and distribution of justice among divergent groups. As shown in Chapter Two for example, there is significant confluence between popular notions of justice and those that are officially administered by the courts, particularly when offences are committed by those that are considered marginal to the mainstream. Another reason that popular notions of justice need to be considered when researching the future of multiculturalism and law is to foresee potential backlash against the courts in the face of contestation over accepted ideals of justice. As demonstrated throughout this dissertation, public and popular (or populist political) backlash against the courts occurs regularly in a moral panic and can have very real consequences for the administration of justice and genuine equality.

The importance of representation in popular cultural and mass media contexts also resides in its ability to promote an understanding and reality of multiculturalism in Australia that attempts to look beyond the tokenism that is currently underpinned by notions of “White” ownership and “tolerance” of the “Other” (Hage 1998). This is not to suggest that the power to make broader social and attitudinal changes resides with the mass media. Rather, I suggest that a holistic view must be taken of institutional interaction to effect changes that promote a dialogic approach with the “Other” rather than an exclusionary or “domesticating” incorporation of their difference. For example, John Hartley and Alan McKee suggest, within an Indigenous Australian context, that there has been considerable movement towards dialogue between “Self” and “Other” in the mediated public sphere: ‘Indigenous people ‘speak’ to the media […] The media ‘speak’ to Indigeneity […] Aboriginal and non-Aboriginal Australians ‘speak’ to each
other via media coverage of Aboriginal affairs’ (2000: 6). Even if Hartley and McKee could be criticised for not sufficiently addressing the asymmetry of this three-way dialogue, they raise the important point that Indigenous issues are substantially represented in the media-sphere (which includes mass media, popular culture and academic discourses in their account) and that this shows their ‘structural place’ in media stories: ‘They are ‘scripted’ in advance by their role in a dramatic narrative over which they have little individual control, but which is nevertheless telling their story’ (2000: 7).

The Indigenous example can also be carried into a legal and criminal justice context. I have not, in this dissertation, addressed any of these relatively recent criminal justice and judicial imperatives and do not intend to raise them at the very end. Perhaps it is enough to say, at this point, that Indigenous land rights have been recognised by landmark decisions in the courts such as *Mabo v Queensland* (No 2) (1992) 175 CLR 1, and alternative sentencing measures for Indigenous offenders (such as “circle sentencing”) have been trialed and implemented in Australia at least over the past decade and a half. More significant to the current context is the fact that these are examples of dialogic interaction between non-Indigenous and Indigenous Australians – “Self” and “Other” – that does not involve negation of the “Other’s” identity via “domestication” into the categories of the dominant group. Perhaps a more accurate way of articulating it is to point out that a long history of British colonialism has paved the way towards dialogue in an Indigenous context – though asymmetric – through continually renewed forms of resistance that, Falzon suggests, inevitably stem from a period of domination (1998: 4).

These forms of Indigenous resistance which have led to the beginnings of self-determination have also been realised through greater participation in institutional contexts. It would be interesting to speculate on whether the same sort of recognition – in

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49 Circle sentencing is an alternative sentencing process for adult Aboriginal offenders. It involves less formality than the traditional court trial and directly involves local Indigenous people (particularly elders) in the sentencing of offenders. This measure has been implemented to enable greater participation and empowerment of Aboriginal communities in the operations of the criminal justice system. Based on the Canadian experience, circle sentencing is now in operation in most Australian states since recommendations in the early 2000s, were put forward by bodies such as The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) and the Human Rights and Equal Opportunity Commission (HREOC) (AGD 2007).
a genuinely dialogic sense – could occur as a result of greater ethnic and religious minority participation in the running of the courts and administration of justice. Of course there is no guarantee that minority representatives in the judiciary or the legal profession would lead to the meaningful incorporation of or engagement with “difference” within the administration of justice. These possibilities could perhaps be examined through a multi-layered methodological approach including the integration of cultural ethnography with media and institutional discourse analysis, to ascertain whether alternative criminal justice and legal processes are implemented through greater minority participation. Further to this, qualitative research in the form of focus groups with minority populations who are over-represented (as offenders) in the criminal justice system, could be extremely beneficial in ascertaining their views about the extent to which they think justice is being served in the current system and how they think it could meet their potentially differing needs. It would be interesting to compare these views to those expressed in qualitative interviews with legal professionals with similar cultural and socio-economic roots, and their views on practical ways to engage with difference and establish genuine equality and minority empowerment through recognition of difference and dialogue.

These speculations into the future of research in this area do not take account of potential policy implications for criminal justice or multiculturalism and the law. They only reflect on a future of criminal justice – particularly as it is processed in the courts – that enables a detour and eventual departure from its cultural limits and limitations. As Falzon asserts:

Here, escape from self-enclosure depends on continuing resistance, on the resurgence of the other, that which transgresses existing limits, introduces the new and unexpected, and reopens the dialogue through which social forms are renewed and revitalised (1998: 59).
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## Appendix I: Interviewees

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<tr>
<th>Date</th>
<th>Occupation</th>
<th>Gender</th>
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<tr>
<td>7 February 2006</td>
<td>Criminal Defence Lawyer / Advocate</td>
<td>Male</td>
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<tr>
<td>13 February 2006</td>
<td>Manager – NSW Rape Crisis Centre</td>
<td>Female</td>
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<tr>
<td>21 February 2006</td>
<td>Criminal Defence Counsel (on Appeal) for MSK</td>
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<td>24 February 2006</td>
<td>Criminal Defence Counsel for MRK</td>
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<td>22 February 2007</td>
<td>Crown Prosecutor for ‘Bankstown’ and ‘K brothers’’ trials</td>
<td>Female</td>
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<tr>
<td>24 April 2007</td>
<td>Judge of District Court of NSW (retired)</td>
<td>Male</td>
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<td>30 April 2007</td>
<td>Superintendent at Manly Police Station, Sydney</td>
<td>Female</td>
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<tr>
<td>22 May 2007</td>
<td>Journalist for Australian Associated Press (AAP)</td>
<td>Female</td>
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