

# NAMING & SHAMING

## A REPORT ON MEDIA SHAMING FOR MINOR CRIMES IN VICTORIA

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Your Honour, no penalty imposed is going to be greater than the fact that this is going to be reported [in the media]. Defence lawyer

## Executive Summary

This exploratory study examines the power of the news media to publically name ordinary people who receive non-convictions for committing minor crimes. If a magistrate imposes a non-conviction, it means the offender is guilty, but gets a chance to reform, away from the public gaze. They are not required to reveal the crime in any job application, and it does not restrict them from overseas travel. The news media, however, can identify and highlight such crimes in the public domain under the principle of open justice. This paper argues that this power to report non-convictions is an issue of national importance in the changing digital landscape because the news media can impose relatively permanent public records, especially in digital space, that detail one's minor misdemeanor(s). It comes at a time when there is a plethora of information available in digital spaces and news travels fast. When a story breaks in a tiny town there is potential for it to be accessed from all corners of the globe, providing one has the internet and a computer/smart device. The issue is also particularly topical in light of the emerging 'Right to be Forgotten' campaign stemming from Europe. This case has attracted attention internationally because it highlights how information that casts individuals in a negative light remains on search engines like Google for an unlimited time.

This baseline study focused on two regions in Victoria identified for having news outlets that regularly identify ordinary people who receive non-convictions for minor crimes in magistrate's courts. It sought a range of perspectives from people involved in the court reporting process, including newspaper editors, journalists, police prosecutors, defence lawyers, victims of crime, offenders and magistrates. All participants in the study acknowledged that regional newspapers have unfettered power to name people who appear before the courts charged with any crime (unless a suppression order has been issued) and that the impact of the reporting is often considered punitive. Some journalists and editors highlighted that it was their duty to the public to report all non-convictions in the interests of serving their communities. However, the research highlights inequalities in this process. For example, people charged with a minor crime in a town with no court reporter will not be identified in the local paper, but a person who commits the same crime where there is media coverage of the court will. It highlights that the severity of the impact such media coverage has on individuals and their families depends on the geographic location in which the crime is committed (especially rural/regional areas). The impact of being named in the digital media environment raises particular concerns because to be named as an offender in a newspaper's online edition is to receive a 'lasting mark of shame' with global reach. Participants also highlighted that media coverage had potential to impact on the judicial process, with offenders seeking matters be heard away from a particular magistrate's court to escape the attention of newspaper court reporters.

This report makes four major recommendations in order to address these issues in a further, broader examination of the news media's relationship to the courts in the digital age. They include:

- the need for clear and consistent news media policies on the reporting of non-convictions, especially in online environments;
- further investigation to determine whether media coverage of minor crimes serves as a deterrent in the communities they serve;
- clearer guidelines regarding a magistrate's ability to consider the impact of media coverage into the sentencing of offenders charged with minor crimes; and
- an assessment of the quality of resources and information available to journalists who cover courts.

## Background

The news media's role in 'naming and shaming' individuals who appear before Victoria's Magistrates Courts is an aspect of society's relationship with the judicial system that has received little attention from legal or media researchers until now (e.g. see Hess & Waller 2011; 2013). Of particular interest is the naming of individuals who receive non-convictions for committing minor crimes. In Victoria, a non-conviction is often issued to a person who commits a minor offence for the first time, and it does not appear on their criminal record. Winford (2011) explains that if a court is considering whether or not to record a conviction, the law states that all circumstances of the case must be considered, including the nature of the offence, the character and past history of the offender and the impact of recording a conviction on their economic and social wellbeing, including employment prospects (s.8 Sentencing Act<sup>1</sup> 1991, Vic). The news media, however, has relatively unfettered power to name and shame individuals regardless of the crime they have committed, or whether a conviction has been imposed. It is rare for an Australian court to formally acknowledge the punitive role of public shaming via media. Australia's judicial system does not clearly consider public shaming as part of its sentencing process but judges in higher courts have reflected on its usefulness. For example, in 2006, John Fairfax Pty Ltd, publishers of *The Sydney Morning Herald* and *The Age* newspapers, applied in the NSW Court of Criminal Appeal to have a name suppression order lifted on two juveniles and their co-offending siblings involved in a series of aggravated rapes. While the application was denied, Spigelman J, in handing down his decision, commented that there were instances where the

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<sup>1</sup> Individuals are required to disclose convictions when seeking employment and for some travel purposes; however, in Victoria non-convictions are only disclosed if an individual lodges a formal request with police. Winford notes Victoria Police is not authorised to release information about a person's police record to any organisation outside the sphere of law enforcement and the administration of justice without the subject's written consent (see Winford, 2011; Lord & Buchanan, 2011)

addition of public shaming to punishment could fulfill the function of retribution, and also the function of general deterrence, that criminal sentences are designed to serve (see Waller & Hess, 2011).

In some US jurisdictions, courts can impose public shaming as a punishment for minor crimes. For example, in 2000 a judge ordered a North Carolina woman to hold a handwritten sign that declared 'I am a convicted drink driver — and as a result I took a life' and parade around the courthouse building (Deardorff, 2000). The news media in Australia is largely responsible for informing the public about matters before the courts, and journalists rely on news values and production requirements to determine which cases will receive attention and how they will be represented. Australian parliaments recognise the power and influence of the news media and set boundaries restricting the publication of certain matters. For example, laws prevent the identification of under-age offenders who are given a chance to reform their behaviour away from the public gaze.

## Shaming: Definitions and Debate

This research is centred on the notion of 'shaming'. Much scholarship acknowledges an 'unmistakable' link between public exposure and shaming. Charles Darwin argues shame 'relates almost exclusively' to the judgment of others (Darwin, 1899), whereas some suggest shame is associated with a sense of powerlessness, as well as feeling exposed to others' judgments. Gehm and Scherer (1988) contend 'shame is usually dependent on the public exposure of one's frailty or failing, as opposed to the concept of guilt, which 'remains secret within us, no one else knowing of our breach of social norms, or our responsibility for an immoral act' (1988, p. 74). There is wide debate over shaming and its effectiveness in rehabilitation and punishment. For example, scholars such as Kahan (1996) argue that shaming sanctions imposed by the courts signify moral condemnation of a crime and are particularly effective penalties for minor offences. Kahan says if sanctions are imposed alongside conventional sentencing measures, such as community-based orders and fines, they can be just as effective as terms of imprisonment in some instances. Meanwhile critics argue shaming only alienates individuals from society and its norms and could be considered a badge of distinction among criminals by functioning as a right of passage within some delinquent cultures. As Nussbaum (2004) notes, 'using shame to control crime is in that sense like using gasoline to put out a fire' (2004, p. 236).

### An ancient cultural practice

Public shaming has played a powerful role in crime and punishment throughout history. It has a place in Australian Indigenous people's customary laws. For example, a report for the Law Reform Commission of Western Australia (2004) discusses shame and ridicule among traditional sanctions including banishment, death sorcery and physical paybacks. In western societies, shaming has been especially popular for less serious crimes, from the use of the stocks and the pillory, to the brank and scarlet letters. Australia was colonised on the back of the British penal system, some decades before brutal shaming sanctions were all but abolished. There remained a desire to publicly expose wrongdoers and public shaming appears to have shifted

from the responsibility of the state to the media (Waller & Hess, 2011). Early Australian newspapers were known for printing lists of names of those who had appeared before the Court of Petty Sessions from the 1800s. This is a practice that continues today across the Australian media, and in regional areas it continues largely to be the domain of newspapers. Australian journalism academics Conley and Lamble (2006) acknowledge the power that comes with a court reporting role:

Sometimes the embarrassment associated with media coverage far outweighs the seriousness of the indiscretion or the penalty imposed by a court ... but newspapers accept the principle of the higher duty to inform the community of legal process even if it appears that newsworthy individuals are victimised. (2006, p. 252)

Often the reporting of Magistrates Court matters are sporadic, inconsistent and depend largely on the size and available resources of the newspaper covering the community where a court is physically located.

### Defining 'ordinary' people

This study focuses on offenders who are considered 'ordinary' people in the eyes of the news media. That is, they are not normally persons of public interest who hold positions of significant power, or are not particularly well known in their communities other than for the crimes they commit. There is much academic research that focuses on the rise of the 'ordinary' person into celebrity status in the digital age (e.g. see Turner, 2010) but there has been little attention paid to the impact of negative publicity on the 'ordinary' individual who has few skills or experience in dealing with the news media.

### The Right to be Forgotten

The European High Court ruled in June 2014 that Google must, upon request, remove pages that are 'inadequate, irrelevant or no longer relevant' from its search results. This is being discussed as a major shift in the way the flow of information is regulated online (see Bernal, 2014).

The European case was instigated by Mario Costeja González, a Spanish lawyer concerned that one of the first results when he Googled his name was about the repossession of his home in 1998. Many of the requests that flooded into Google shortly after the ruling were from people with criminal records or other past misdeeds they wanted hidden (Stokes, 2014).

Victorian philosophy lecturer Patrick Stokes argues:

What's being sought here is analogous to the expunging of a criminal record. Sometimes, however, we expunge a record or disregard a prior wrong on the basis that it shouldn't affect how we treat the person now. They still did it, it was still wrong, but we won't hold it against them any more. That's not a form of forgetting, but of forgiving. And it's not clear, at least, that we can actually claim a right to be forgiven — forgiveness always remains within the gift of the forgiver, and can't be demanded or compelled. (Stokes, 2014)

Within the first few days of Google putting a search removal request form online it was receiving an average of seven requests a minute (Curtis, 2014). The Right to be

Forgotten campaign resonates strongly with the work undertaken here, especially when a non-conviction imposed by the courts, at its heart, is about giving offenders the right to be rehabilitated away from the public gaze without any visible mark of shame.

## The Study

This project expands on a previous investigation into the effects of media shaming for minor crimes in Victoria (Hess & Waller, 2013). We have undertaken several research projects that map the evolution of media shaming of ordinary people and documented the practice among Victorian newspapers (Hess & Waller, 2011; 2013; 2014). As part of this project we seek to examine the effect of media shaming on those connected with the judicial process. Interviews were conducted in two regional cities where the practice of 'naming and shaming' is most prevalent (Hess & Waller, 2013) to seek a range of perspectives from journalists, magistrates, lawyers, offenders and victims of crime. The study sought to determine the impact shaming has on offenders and on the operations and objectives of the Magistrates Courts in Victoria, as well as understanding the editorial policies of newspapers in regards to court reporting in the digital era. The research adopted a media-related practice approach (Couldry, 2004) to determine what people say and do about the news media at the intersection of the media, the legal field and society more broadly. A media-related practice approach decentres research from the study of media texts or production structures, to instead focus on people's practices oriented around media (Couldry, 2004, p. 35). Couldry suggests his 'media as practice' approach is 'disarmingly simple' and centres on two primary questions:

What do people do in relation to the media and what do people say in relation to the media ... across a whole range of situations and contexts. (Couldry, 2004b, p. 39)

## Methods

The research employed a case study framework. In doing so it enabled the researchers to focus on intensive examination of particular locations (Bryman, 2008, p. 53). A multi-perspectival approach to data collection and sources is a feature of case study research (Snow & Trom, 2002, p. 154), and is helpful here as we have sought to examine the media-related practices of a range of individuals, including those who are involved in reporting court matters, those who represent the judicial system and ordinary people who have some dealings with the courts. The research identified a range of agents who shared some relationship with the media's involvement with the courts including: journalists, newspaper editors, police prosecutors, magistrates, victims of crime, offenders who had received non-convictions in court and whom had been named in the local newspaper, and defence lawyers. A total of 10 interviews were conducted with participants representing the range of agents involved in the relationship between media and the courts. A series of semi-structured questions were posed to participants including:

- What do you think the media's role is in reporting non-convictions?
- Do you think the media should be able to name and shame people in the print version of a newspaper and its online version? If so why, if not why not?
- Are you aware of a news media policy on the reporting of non-convictions? Discuss.
- Do you think there is a difference in newspapers reporting non-convictions in print and/or online. If yes discuss, if no discuss.
- Do you think there are any disadvantages to the practice of reporting non-convictions for minor crimes? If yes discuss, if no discuss.
- Do you think there are any advantages to the practice of reporting non-convictions for minor crimes? if yes discuss, if no discuss.
- Do you think the media should be free to report on any case that appears before the magistrates court, so long as a suppression order has not been issued?
- Do you think naming people who receive non-convictions is a deterrent?
- Do you think the magistrate takes into consideration that an offender will be named in the newspaper as part of their sentencing?
- Do you think there should be more rigid protocols placed on the media in relation to naming offenders who receive non- convictions?

It is important to note that magistrates declined to be involved in the project and so the data was drawn from all other identified participants. The Chief Magistrate of Victoria did not grant his consent for associates to be involved in the study. The police prosecutor unit in one of the locations also declined to participate and so a recently retired police prosecutor was interviewed instead. Ethics approval was granted by Deakin University's ethics committee to undertake the research, on the basis that participants could not be identified in the study. For this reason we have omitted the names of the cities/towns where the research was undertaken.

## Findings

Data was analysed and coded into six identified themes including: crime and punishment; ramifications of shaming; reporting non-convictions online versus print; policies and positions; news productions and news norms; and quality of information/resources available for media coverage of the courts.

### Crime and Punishment

All participants agreed that the news media played an important role in the operation of the lower courts. Those who worked in the media said it was part of their Fourth Estate role to ensure that justice was seen to be served and to keep the judicial system accountable.

The court system is an important system of crime and punishment in society ... I would argue that the reporting of the courts without fear or favour gives the community a full understanding of crime and punishment ... and I think that is an essential service. I would argue that it is fair because it is important for society to see and have knowledge as to why a certain punishment is handed down for a certain crime. Editor 2

All participants acknowledged that the newspaper played an important role in serving as a moral form of social control as part of its relationship with the judicial system and that it worked 'hand in glove' with police and courts in outlining expected behaviour. A police prosecutor said the news media's presence in courts to 'name and shame' offenders was a powerful aid to keeping people 'on the straight and narrow' and compared this cultural practice to traditional law practices among Indigenous peoples:

They've got ways of punishing people so that there are physical signs to show what sort of offender they are to other people in the community. So I think that as a society, we need to be able to know who's who in the zoo. Police prosecutor 2

Reporting of minor crimes in the local newspaper was perceived as being a general deterrent in the form of 'shaming', but some participants observed that reporting of stories was a not a deterrent for all offenders.

Where people are receiving non-convictions ... getting your name in the [newspaper] criminal list, being shamed, it is definitely a general deterrent ... it is the first thing people ask when they come in most of the time. Instead of 'am I going to jail; it's 'will I get my name in the newspaper'? Defence lawyer 2

Us covering everyone in this town who appears in court within reason, deters them from offending again, or deters others. Court reporter 1

It keeps people on the straight and narrow ... the same as the old punishment of putting people in the stocks. I think it all stems back from that we can be publicly shamed and you won't want to do it again. Police prosecutor 1

Reporting of the courts is a general deterrence I think. As long as the reporting of the proceedings is effective, fair and reasonable and without prejudice, the court system involving the media is an important system of crime and punishment in society. Newspaper editor 2

In many instances, participants said the role of the news media to 'shame' people for their crimes was more powerful than the non-conviction imposed by the court.

The repercussions of being named in the paper is sometimes a greater punishment than what is dealt out in the court ... being named in the paper, especially in a small community, has come to be more of a deterrent. It's a possible outcome of our role. I have people coming up to me begging to keep their name out of the paper. Court reporter 2

One solicitor said he was regularly asked by clients to have cases heard away from courts covered by the local newspaper to avoid publicity.

People see [media coverage] as by far the biggest penalty. Forget the fine or the community-based order. The worst thing that can happen is the publicity ... I've been asked many, many times over the years [to move cases] on that basis. Defence lawyer 2

Some participants highlighted that, when some offenders were publicly identified for a Magistrate's Court matter, they wore the media coverage like a badge of honour and were using social media to showcase their notoriety that was generated within the news media.

The majority of cases, it doesn't deter them at all from what I've seen. Most of them they are the same offenders, they really are. It doesn't deter them one bit. Court reporter 1

The above participant gave the example of a 19-year-old woman who was charged with two separate stabbing offences and stabbing an individual.

It turns out ... a 19-year-old girl and we covered it the first time she did it and she just thrived on it. Her Facebook page was open and we could see everything she was doing and she was linking our stories and writing 'I'm [the town] slasher and I'll come and get you, you dogs' ... this is her first offending and she's almost thriving on the publicity. She was linking our stories on to her Facebook status trying to convey she's dangerous and don't mess with her and things like that. Court reporter 1

Other comments highlighted how the socio-economic background of the offender often influenced whether they would be likely to be 'shamed' as a result of media coverage.

There have been cases where the write-up in the paper, the perpetrator likes it, it is their name up in lights and far from being a deterrent. Defence lawyer 2

The sorts of people that don't give a rats about the community, couldn't give a damn. Defence lawyer 1

I think [media reporting] probably deters people that don't need deterring. For instance, if I had a conviction or even a non-conviction for theft and it appeared in the paper, I would be very embarrassed and I would move out of town. But I'm not the sort of person that is going to get one, hopefully. However, a habitual offender, they may very well look at it and even be half proud of it, in my experience. Police prosecutor 2

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### Ramifications of media shaming

In many instances, media coverage of minor court matters was considered an additional penalty for a crime that appeared to be unwittingly endorsed by the courts. In Victoria, media coverage was often dependent on the geographic territory where the crime was committed and whether or not there was a court reporter present to cover the story. Several participants highlighted that if a minor crime was committed in a metropolitan area, the offender would not be written about in the media. In other words, punishment via media was geographically determined:

It's an unfortunate consequence of geography. If you are unfortunate enough to appear in the magistrate's court [here] your name is going to be recorded by the local paper. Editor 1

Obviously there is a discrepancy and so the question is should all papers be doing it, or should magistrates be encouraging that in towns where the paper doesn't report on it. If [media coverage] really is a bad punishment or really so unfair I would think that either the magistrate might look at this and say whether it works or is effective ... I don't know. Journalist 2

Several participants highlighted that in smaller regional areas, being identified in the newspaper for a minor crime had ramifications for employment prospects, social issues and personal safety of offenders. Offenders and defence lawyers also noted the ramifications that being 'named and shamed' could have on an offender's family.

I know people that have had to leave town and make a new life for themselves after what was a pretty minor deal. It is the nature of the offence that is so excruciating that they felt they had to go. It affects their spouse, their kids and their friends, their work and their business. Defence lawyer

Unfortunately, I have noticed that in some instances in smaller regional communities it also seems to be as much a form of punishment for those who are close to the defendant (for example mothers). This is unfortunate, but seems to be unavoidable. Journalist 3

The media put in the paper that I was getting married, so then we could not put a marriage notice in the paper because ... the wife was worried that people would show up that shouldn't ... vigilantes or people who might cause a scene. I read all the comments on the internet about what I had done ... there were threats. Offender 1

Employment prospects can be damaged and that contributes to the poverty/welfare spiral that is of no benefit to the person or the community. Family, especially children of named people, are likely to have detrimental impacts especially where bullying and teasing of innocent family members could or would occur. Offender 2

Some participants highlighted the ethical issue of newspapers reporting stories involving offenders who committed minor crimes and whom were identified in court as having a mental illness. An offender (who received a non-conviction for speeding in a school zone) said he was more concerned about the newspaper's coverage of offenders with mental health problems than his own situation after sitting in a crowded courtroom waiting for his case to be heard.

There is a clear pattern of disadvantage where there are some people in the courts who cannot help but be named and shamed in the newspapers. Mental health and other issues are not considered and make reporting grossly irresponsible. Poor ethics in my opinion. Offender 2

The above participant, who was a healthcare professional, said he was aware of an example where a VCE student had decided to leave school after her mother was reported in the local paper for committing a minor crime. He said the newspaper printed the full name of the woman and her home address (a practice performed by most court reporters so that there can be no case of mistaken identity).

A defence lawyer raised concerns that media coverage of court stories increased risk of offenders committing suicide.

A man was caught masturbating in a car in the main street ... no prior convictions. He received a non-conviction with a stiff fine and so he should receive a stiff fine ... that got reported and it was devastating. There were deep-seated psych reasons behind something like that and it's an example of where media reporting was by far and away the biggest penalty in the case and that was his main concern. I worry about people committing suicide, just on the basis of their humiliation factor through the local press.

A court reporter reflected on the benefits of news media coverage of a minor crime for the community, and especially for victims of crime. She said it 'delivers a denouement, or sense of closure' for the community and that professional, accurate reporting can play an important role in stamping out falsehoods and rumours being spread. She said that media reports can also be helpful to victims of crime:

Some local residents, who have been on the receiving ends of crimes, have contacted our paper to thank us for covering a matter involving them, and particularly for publicizing something of the traumatic experience they had been through as victims of crime. Court reporter 3

### Reporting non-convictions online versus print

All participants said the ability to 'name and shame' offenders in both print and online spaces presented challenges and required further examination in the digital age. The majority of those interviewed did not believe that court reports for minor matters that received non-convictions should be published online.

... for God's sake I think it's realistic to expect that it not be there, haunting you there [online] 10, 3, 4, 5 years after you did it, particularly if is the sort of thing that gets a non conviction — then it's a minor thing and it shouldn't be something that people can haul you over the coals about 10 years later. Defence lawyer 1

Only the editor of one regional paper and a victim of crime had a strong alternative view. The editor believed the online edition was an extension of the print product that would only grow stronger as people adapted to technological changes.

There is not much difference if a case is reported in print and replicated online, the consequences for the person who has gone through the judicial system is just the same. It is just reaching a broader audience and that is a consequence of social media online news generally. The website is an extension of the print product ... there is nothing I can do about that, I can't make the distinction between print and online, I can't report a non-conviction in print and them decide not to put it online. Editor 3

A journalist at the same newspaper was less sure about the practice, especially when reflecting for the first time on the possible implications:

If you apply for a job you get Googled, whereas that wasn't an issue before ... you used to see a person's name in the paper, and it was only there one time, people either forgot about it or couldn't see it, it was hard to search for. It has a degree of permanency now .... that degree of permanency could be a good reason as to why we shouldn't do non-convictions any more ... particularly online. Journalist 2

And this from a victim of crime:

They [newspaper] should be able to and shame them in any way they want to. Victim 3

An offender whose crime was written up in the local media, and the story subsequently published by other news websites across the country, said while he believed the newspaper had the right to identify offenders in the press, minor court matters should not be published online. He said it was unfair that when people undertook a Google search of his name, the court case appeared in the top of the search engine hits, resonating with the Right to be Forgotten campaign outlined earlier.

Once it is on the internet it never goes away ... it is worse than a police clearance. If an employer wants to know something, they just type in the name and there is the history.

The offender said he now worked interstate, but the minor crime he committed continued to haunt him because his new colleagues had been able to access details of the story online.

Another offender offered this view:

As an employer myself I am also aware that any adverse media comment fair or not can and does impact on employment prospects.

A defence lawyer in the same town said he had not given any thought to coverage of court matters in online space but offered this comment:

I think the same applies whether it is in print or if it is there forever on the website. It if has happened it's happened and if it's reported, it's reported.

### **Policies & positions**

The findings highlighted that there were inconsistencies in the policies of reporting non-convictions across the newspapers studied. Neither newspaper had an established written policy on the reporting of non-convictions. Editors said it was their understanding that some of the larger owners of regional papers across Australia did not have clear, consistent policies on court reporting.

Our policy is to report them [non-convictions]. Everyone who goes through the court system appears in the paper in some form or another. The public interest is there ... we don't report everything equally but we do report everything. Editor 2

This editor said reporting non-convictions was part of the media's role in open justice and to keep the courts accountable while educating the community about the implications of breaking the law. The other editor who was interviewed said his newspaper took a different approach to reporting non-convictions:

We don't actually have a written policy, but our policy in the past certainly has been unwritten. It is that we wouldn't report cases where offenders don't receive a conviction, unless we believe there was extenuating public interest in a matter. For instance, if the mayor appeared in court, there might be a case there to say, 'Well, there's a greater public interest than a member of the general public'. So we would consider in those circumstances reporting those cases, but generally, our rule has been that if the court doesn't deem it serious enough to convict somebody of an offence, then it probably doesn't make the pages of our paper. Newspaper editor 1

Most other participants outside the news media field, with the exception of a victim of crime and a defence lawyer (defence lawyer 2), said there needed to be clearer guidelines around the media's decision to report non-convictions:

There does need to be a code of conduct as far as that is concerned. I think you can't just willy-nilly report everything. I think if it's a non-conviction for a first-timer it shouldn't be there. If it's a non-conviction for a person with other convictions it's probably appropriate to report it. Defence lawyer 1

Having the media judge my actions just to sell a story, it's unfair to people like me. Offender 1

Some participants highlighted inconsistencies or a lack of clarity about whether a magistrate could, or was, taking into consideration shaming as part of the punishment. Most suggested that the magistrate should take into consideration the role of shaming as a factor influencing the severity of the punishment.

I think it is generally held by magistrates that media coverage of court proceedings should not affect their sentencing, but privately I would be very surprised if it didn't colour their sentencing on a day-to-day basis, especially with things like non-convictions. Editor 2

In my opinion they [magistrates] take into consideration anything they bloody well feel like. I've seen a magistrate take into account that's nearly Christmas. Retired police prosecutor

Additional research undertaken for the project indicates that the guidelines around factoring in media coverage during the sentencing process are unclear. The *Sentencing Act 1991 (Vic)* section (5)(2)(g) does not make a clear distinction about the impact of media coverage in the sentencing guidelines other than to say that in sentencing an offender the court must have regard to "... any other relevant circumstances". The Judicial College's Victorian Sentencing manual also does not address the issue of media coverage when sentencing an offender (Judicial College, 2005). A defence lawyer said it was his understanding, however, that the court did take media publicity into account during the sentencing process. He said he often mentioned likely media coverage during a plea.

Often I have said 'Your Honour, no penalty imposed is going to be greater than the fact that this is going to be reported' ... it's the ultimate. It is a factor that the court takes into account.

And these comments from a journalist and another defence counsel.

I think there are pretty stringent guidelines already ... That's what suppression orders are for. I think that if a magistrate doesn't see benefit of something being reported in the media then he has the methods to stop that from happening. Journalist 2

The press isn't greater than the court. Defence lawyer 1

### The impacts of news production and news norms

The data provides evidence of how news production values and news norms heavily influence which court matters will receive media coverage, the level of publicity given to a particular case and the media-related practices of those involved in the court system. Several participants made a link between news value and the newspaper's commercial interests and success. For example, a court reporter reflected on how a certain amount of space in the newspaper has to be filled each day and said court stories play an important role in helping to fill this space. He said a relatively minor matter could make it into the pages of the newspaper on a 'quiet news day', where it would not receive coverage if more serious or dramatic cases were before the court:

If we are having a slow day we are just sitting there and getting all that, that's almost unlucky for them that we are having a slow news day at the court I guess, but that's part of it. Court reporter 1

An editor said court reporting was important as a community service, but that it was also important for the newspaper's business because it was so newsworthy. He observed that 'big cases tend to see significant readership jumps online, and that would tell you something about our local community'. He said 'My view [on whether to report a non-conviction] is that you have to make a decision on newsworthiness'.

When asked what advantages there might be in reporting non-convictions, the same editor said:

To the judicial process? Probably I wouldn't see too many, necessarily. I think there'd be advantages to our newspaper, in some circumstances, of doing that. And when you're a commercial operation, there's always that in the background going ... 'Where's our newspaper sales going? Where's our online hits going?' I think there's overriding principles around your choices there.

A reporter said his newspaper had a dedicated court reporter because the local courts were busy and provided a lot of news stories of interest to its readers. He said where reporters on other rounds, such as local government or police, had to 'chase' stories, newsgathering was relatively easy in court. He said reporters on other rounds viewed the court round as 'a story factory':

The boys in the office — often when I come back — they refer to it as the story factory, they will say 'how was the factory today, mate?' There will be a bit going on, but I'll come back and say, 'I've got these'. They'll go 'bloody hell' and they reckon it's like a conveyor belt thing — they've all gone through and I just think 'Oh that one looks good". Court reporter 1

Mediatization is a concept that describes how the media has come to shape other areas of social life, from politics to everyday activities such as friendships (Coudry & Hepp, 2013). It also provides an approach to studying these effects. This study provides insights into how media coverage of court processes might be contributing to the mediatization of the Victorian legal system. This deserves further research, but we include the insights of one of the lawyers who was interviewed, commenting on how media coverage, and even anticipation of the effects of media coverage, shapes his practice in relation to court matters:

As a lawyer, you can almost without fail pick the cases that are going to get reported, you know beforehand. There is no doubt that sometimes you tailor your plea to the client's situation and it's not uncommon to say, 'I could say a lot more for you but the more I say, the more likely it is to attract a headline or a few paragraphs, as opposed to keeping it simple and touch wood, you will just end up in the court penalties column', that happens quite a bit, it's a factor to be taken into account. Defence lawyer 2

## Other Possible Research Directions

The interviewees raised a number of issues related to news media reporting of minor court matters more generally that suggest the need for further consideration and research, including:

- The educational needs of journalists to ensure good quality court reporting, especially in smaller regional communities.
- Some interviewees stressed that there is a need for court officials to gain a greater understanding of, and more formally acknowledge, the role of journalists in the judicial process. This goes to questions of resourcing court reporters to do their jobs well, including the provision of information about charges and court processes. At present it appears that in some Victorian Magistrates Courts information is provided by court staff as 'favours'. Some interviewees gave examples of court staff refusing to provide information on request, or making it difficult for journalists to get the information. Research is needed on the relationship between court staff and news media representatives with a view to developing better relationships that can result in more accurate court reports to keep the public informed about the administration of justice.

## Summary

This report makes four major recommendations:

- There is a need for clear and consistent news media policies on the reporting of non-convictions, especially in online environments.
- Further investigation is required to determine whether media coverage of minor crimes serves as a deterrent in the communities they serve.
- Clearer guidelines are required regarding a magistrate's ability to consider the impact of media coverage in the sentencing of offenders charged with minor crimes.

- An assessment of the quality of resources and information available to journalists who cover courts would also be helpful.

We have highlighted that in a digital age, the media's power to name and shame people who have received non-convictions has become a far more potent practice. Offenders are named not only in print, but in cyberspace, where anyone across the globe with access to a computer can read about an individual's misdemeanors if a newspaper deems the case newsworthy.

The practice of 'naming and shaming' is of particular interest to us as former newspaper journalists and as academics. It is rarely questioned, but regularly performed as part of the news media's role in upholding the doctrine of open justice. This research can be used to raise awareness among journalists, and journalism students, on the impact 'naming and shaming' has on the legal system and individuals. Importantly, it will provide an evidence base for industry and public discussion of editorial policies on court reporting in the digital age. In particular, our research could inspire policymakers and the news media to work together on a more consistent approach to reporting non-convictions across the state of Victoria and to consider the intensification of this court reporting practice in the context of the evolving digital landscape.

## About the Authors

Kristy Hess and Lisa Waller are senior lecturers in journalism at Deakin University. Their research on the media and society has been published in Australia and internationally. They are both former journalists and court reporters in the Australian media.

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## **Appendix 1**

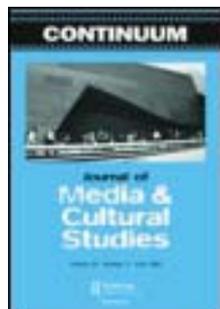
**Media as pillory: the power to 'name and shame' in digital times**

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### The digital pillory: media shaming of 'ordinary' people for minor crimes

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## The digital pillory: media shaming of ‘ordinary’ people for minor crimes

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This paper discusses the intensified role of the media in shaming ‘ordinary’ people when they commit minor offences. We argue that shaming is a powerful cultural practice assumed by the news media in western societies after it was all but phased out as a formal punishment imposed by the judiciary during the early nineteenth century. While shaming is no longer a physically brutal practice, we reconceptualize the idea of a ‘lasting mark of shame’ at the hands of the media in the digital age. We argue that this form of shaming should be considered through a lens of media power to highlight its symbolic and disciplinary dimensions. We also discuss the role new and traditional media forms play in shaming alongside formal punishments imposed by the judiciary. While ‘ordinary’ people armed with digital tools increase the degree of disciplinary surveillance in wider social space, traditional news media continue to play a particularly powerful role in shaming because of their symbolic power to contextualize information generated in social and new media circles and their privileged position to other fields of power.

### Introduction

This paper explores the intensification of the media’s pillorying effect on ‘ordinary’ people who commit minor offences in digital times. It maps the evolution of shaming as a cultural practice and argues that the dynamic interplay between new and old media makes the media’s disciplinary power increasingly potent. The entry point for this discussion is the experience of 44-year-old clerical worker, mother of two and Australian football fan, Kerry Ann Strasser.<sup>1</sup> Having consumed a number of alcoholic drinks at the final State of Origin Rugby League football match in Brisbane on 6 July 2011, the resident of the local suburb of Petrie subtly pulled down her pants and urinated on her seat in the Suncorp Stadium at the end of the game. The act, later deemed ‘revolting’ and ‘sickening’ by some (King 2011; *YouTube* 2011, 2012), was captured on a phone camera by a spectator seated behind her, who uploaded his prized footage on to *YouTube*. The video went viral within hours, but was removed a day later as part of the site’s policy of not promoting inappropriate content.

Enter the traditional news media. Just as the footage disappeared from *YouTube*, radio, television and newspapers provided fresh oxygen to the story by reporting the misdemeanour to audiences across Australia, and the globe. A commercial radio station in Melbourne, 3AW, decided to reload the content back on to *YouTube* and also to its own website after being alerted to the footage by one of its Twitter followers. The 3AW report included a short piece to air from one of its journalists who told the audience: ‘... I’m all for sitting on the edge of your seat at the footy, but surely this is taking the piss!’

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With almost 30,000 views on *YouTube* alone, Strasser's humiliation did not stop there. The Brisbane Magistrates Court was told on 28 July 2011 that Suncorp Stadium management provided police with the footage of her urinating in her seat. Strasser then contacted police to admit that she was the person on the video clip that had 'gone viral', the court heard. Police decided against using their discretionary power to give Strasser an on-the-spot fine, and instead gave her a notice to appear in court on one count of urinating in a public place.

While her face is not recognizable on the *YouTube* clip, she was publicly 'named and shamed' in mainstream media coverage that continued to follow developments of the case (Lill 2011). Strasser did not attend the court hearing, but a number of journalists were present. Defence lawyer Penny White, who entered a plea of guilty on her behalf, told Magistrate Wally Ehrich of the public humiliation and 'suffering' her client was enduring. The court heard Strasser suffered from depression and was on medication for her condition. Ms White said Strasser's family had also been affected, 'with anyone who knows her being aware she was the woman in the clip' (Lill 2011). Mr Ehrich showed some sympathy, acknowledging the mother of two had suffered 'worldwide embarrassment' (Lill 2011). He fined her \$100 without conviction. But Strasser's walk of shame continues. On entering her name into a worldwide *Google* search in 2013, the top 10 results continue to reveal details of her antisocial actions at the football. There are also several links to internet pages that describe her as a 'feral bogan'.<sup>2</sup> The footage remains on the 3AW website as well as on a video-sharing site called *liveleak.com*, although to access the content on *YouTube* now users must be aged 18 or over.

Kohm (2009) argues that shame and humiliation in criminal justice have become increasingly commodified, enacted and experienced through hybrid forms of media that blur boundaries of reality and entertainment. He suggests that the media have a strong connection to public shaming, particularly in regards to 'ordinary' people and that humiliation has emerged in recent years as a viable and symbolically rich vehicle for social control. Our research focuses on the shaming of 'ordinary' individuals who appear before courts charged with minor offences (see Waller and Hess 2011; Hess and Waller 2013). By minor offences, we mean misdemeanours that are brought before local courts of law, such as public drunkenness, drink-driving, unlawful assaults or in Strasser's case, urinating in a public place – an offence under Australian law.

The media shaming of celebrities is a subject of academic interest (Marshall 1997; Turner 2004; Starn 2011) but 'ordinary' people have been largely overlooked as both subjects and perpetrators of media shame. The case of Strasser is instructive because it aids us in unpicking the circuits involved in the dynamic interplay between new and traditional media forms that results in a potent form of disciplinary power. Through this case, it can be observed that 'ordinary' people armed with digital tools and publishing platforms exercise a new form of surveillance in digital culture, which the traditional news media capitalize upon. It illustrates that the traditional media continue to play an especially powerful role in shaming because they contextualize information in the public domain and hold a more privileged position to other fields of power, such as the judiciary, than the 'ordinary' citizen.

We will highlight shortly how historically, shaming was a physical, often brutal, practice involving the active participation of the public and the body of the offender. These rituals often left a permanent mark of shame in the form of physical scars. We suggest that shaming in digital times needs to be understood in terms of the continuum of this practice where the media now hold the power to impose a 'digital mark of shame' that is symbolic and lasting.

### The evolution of shaming 'ordinary' people

Much scholarship acknowledges a strong link between public exposure and shaming (Smith et al. 2002). Darwin (1899) argued that shame 'relates almost exclusively to the judgement of others', whereas some suggest that shame is associated with a sense of powerlessness as well as feeling exposed to other's judgements (Tangney and Fischer 1995). Gehm and Scherer (1988) contend shame is usually dependent on the public exposure of one's frailty or failing, as opposed to the concept of guilt which 'remains secret with us, no one else knowing of our breach of social norms, of our responsibility for an immoral act'. Public shaming has played a powerful role in crime and punishment throughout history and across cultures. Throughout the European Middle Ages and early American colonial periods, primitive and grotesque punishments such as mutilation, the whipping post and cart's tail were also treated as public spectacles which not only reinforced the strong psychological element of the punishment (Litowitz 1997), but also highlighted the terror that would be imposed on anyone who broke the law. From the fourteenth to eighteenth century, the stripping of a suspected witch to search for the concealed Devil's mark was a ritual of public humiliation (Burns 2003, 133) often followed by the fiery spectacle of being burnt alive at the stake.

In western societies, shaming penalties were especially popular for punishing people who were found guilty of minor crimes. The stocks were often placed at the entrance to a town, where criminals could be pelted with rubbish and stones. Women who bore illegitimate children had a *scarlett letter* pinned to their clothes declaring their sins, and drunks were ordered to wear signs around their necks bearing the letter 'D'. Some women guilty of 'talking too much' were strapped into a metal mask called a brank. The use of the pillory – a wooden frame in which offenders were locked at the wrists and neck, and exposed to public abuse – was dreaded by prisoners who 'begged for any chastisement rather than the pillory' (Beattie 1986, 469) It was a common custom to put offenders in the pillory at a public market (Andrews 1890, 175) and it was not uncommon for an angry crowd to kill the prisoner by throwing objects at them.<sup>3</sup> Foucault (1991) explains that disciplinary power had its genesis in the early 1800s when the judiciary distanced itself from the 'ugly' act of imposing punishment: 'Those who carry out the penalty tend to become an autonomous sector; justice is relieved of responsibility for it by the bureaucratic concealment of the punishment itself' (Foucault 1991, 10). Foucault refers specifically to the prison system, but we argue that the concept of disciplinary power offers a useful way of understanding how the cultural practice of shaming shifted from the hands of sovereign power into the lap of the news media. As brutal court-imposed shaming sanctions were gradually phased out in the eighteenth century, there remained a desire to publicly expose wrongdoers and public shaming shifted from the responsibility of the state to the news media (Waller and Hess 2011).

### From sovereign power to media power

Croll (1999) contends that in western society it was local newspapers that largely fulfilled the role of shaming minor offenders such as public drunks, by publishing their names and misdemeanours. A column dealing with proceedings in the local police courts became a staple ingredient of all local papers in Britain by the late 1800s (Croll 1999, 3–6):

All urbanites were placed under its watchful eye whether they were holders of local office or the lowliest of public drunks. All were subjected to the possibilities of having their misdemeanours brought to the attention of the reading public. (1999, 4)

The role of the news media in deciding who should be publicly ‘named and shamed’ for minor offences is tied to the news media’s role in upholding the doctrine of open justice (Waller and Hess 2011). This is intimately related to journalism’s Fourth Estate function – the idea of the press as part of society yet with its own authority to scrutinize and check power (Croteau and Hoynes 2006; Simons 2007; Curran 2010; Hampton 2010). The doctrine of open justice protects journalists’ important ‘watchdog’ role in the administration of justice and gives reporters a qualified privilege within courtrooms so they can carry out this function. Under the doctrine of open justice, being subjected to media publicity of an alleged crime is presented as a sometimes unfortunate, but unavoidable price of the system (Conley and Lambie 2006; Rodrick (2008).

Rather than viewing media shaming merely as an unavoidable outcome of its role in open justice, we consider it through a lens of media power, with both symbolic and disciplinary dimensions. The ascendancy of media is itself considered a central dimension of power as societies depend increasingly on the fast circulation of information and images. Couldry and Curran argue that:

... far from media simply being there to guard us against the overwhelming influence of other forms of power (especially government) media power is itself part of what power watchers need to watch. (2003, 3)

### **Symbolic and disciplinary power**

The Fourth Estate theory that has dominated scholarly discussion of the relationship between the courts and the news media is based upon a sovereign model of political power that is being increasingly superseded by the disciplinary model of power. Foucault’s (1991) theory of disciplinary power provides a way of understanding how extra-state influences (such as the news media) serve a ‘normalizing’ function that persuades individuals to conform to accepted modes of social conduct. Foucault (1991) identified a new kind of ‘disciplinary power’ in the administrative systems and social services that were created in eighteenth century Europe, such as prisons, schools and mental hospitals. Their systems of surveillance and assessment no longer required force or violence, as people felt compelled to discipline themselves and to behave in expected ways.

It is in respect of this particular model of power that the practice of media shaming marks certain behaviours as deviant and unacceptable. This process not only bears upon the individuals concerned but also significantly reinforces public understanding about (and compliance with) persuasive social standards and implicit norms. This is the political problem viewed in social terms. Disciplinary power creates a ‘discursive practice’, or a body of knowledge and behaviour that defines what is normal, acceptable and deviant (Hayward 1998). The disciplinary power of the media shares synergies with theories of symbolic power, where the news media are considered a recognized authority to ‘symbolize’ or to construct reality (Hall 1973; Tuchman 1978; Anderson 1983; van Dijk 1988; Bourdieu 1991; Noelle-Neumann 1993; Couldry and Curran 2003). Bourdieu (1991) emphasizes that there can be ‘no symbolic power without the symbolism of power’ (Bourdieu 1991, 75). This symbolism rests in the western media’s claims to objectivity or representing the ‘truth’, in its role as the Fourth Estate or a watchdog of society. Bourdieu says that symbolic power is:

A power of constituting the given through utterances, of making people see and believe, of confirming or transforming the vision of the world and thus the world itself, an almost magical power which enables one to obtain the equivalent of what it obtained through force. (1991, 170)

Noelle-Neumann (1993) points out that the media's disciplinary power can have a 'pillorying effect'. She argues that when a group or individual steps outside society's boundaries through actions, such as breaking the law, media exposure can be punitive. She uses the term 'pillorying effect' to describe the power of the media to draw attention to an individual who is surrendered to them as a scapegoat to be 'exhibited' (Noelle-Neumann 1993, 154):

He cannot defend himself – he cannot deflect the slings and arrows. The means of rebuttal are grotesque in their comparative weakness – in their awkwardness compared to the polished objectivity of the media. (1993, 155)

### **The fusion of new and old media in shaming 'ordinary' people**

Foucault argues that certain authorities are able to exercise control according to a double mode of binary division and branding (mad/sane, dangerous/harmless, normal/abnormal), and that of coercive assignment, of differential distribution, 'who he is, where he must be, how he is characterised, how he is to be recognised, how a constant surveillance is to be exercised over him in an individual way' (Foucault 1991, 199). This dual approach to disciplinary power (of surveillance and branding/contextualizing) is useful to differentiate the role of social media to that of traditional media in discussions of media's power to shame in a digital environment.

### ***The rise of 'isurveillance'***

The case of Strasser highlights that through the media technologies available to them, 'ordinary' people are now playing an increasing role in the surveillance of individuals in digital space. Foucault's idea of the 'panopticon', inspired by Bentham's model of the prison system has been linked to the power of different media forms (Brunon-Ernst 2012). To Foucault, the courts largely decide what is criminal or unlawful behaviour, but the technique of discipline through coercion is surveillance. Cohen (1985) argues that forms of surveillance such as community penalties, neighbourhood watch, private security and surveillance cameras create a dispersal of social control that exist not only within the criminal justice system but also alongside it. 'Ordinary' people armed with mobile phones that have audio and visual capabilities offer a new form of surveillance in the digital age. A fellow spectator captured Strasser's behaviour on a mobile telephone device. Between Samsung and Apple, for example, more than 105 million phones have been sold worldwide since 2007 (Tsukayama 2012) – most with video and audio capabilities. This creates what we dub 'isurveillance', transforming the ordinary citizen into an embodied surveillance system with the power to alert the world to acts of immoral/illegal behaviour. Norris (2003; Norris and Wilson 2006) suggests, however, that the power of surveillance is limited and its disciplinary power is only complete when one-way surveillance is combined with additional information about the individual being monitored.

### ***Branding/contextualizing***

Robert Gehl's investigation of *YouTube* as an archive is useful in understanding the dynamic interplay between new and old media as a form of symbolic and disciplinary power. It was *YouTube*, for example, that provided the initial platform where Strasser's actions were displayed before the online world. Gehl (2009) argues that the *YouTube* archive has two curatorial functions – the storage and classification of material and its

exhibition and display. He says that *YouTube* users are the *curators of storage and classification*, such as the football spectator who uploaded the footage of Strasser. This is where content is titled, described and tagged, while *curators of display* create meaning and facts from the archive by contextualizing, interpreting and displaying material – and we have argued elsewhere that this is a role performed by the traditional news media (Hess and Waller 2009). Gehl (2009) argues that the curators of display benefit from the unpaid labour of the curators of storage who have invested significant capital costs in equipment (such as smartphones, video recorders, computers) and internet access to produce, gather, edit, upload and tag videos. A commercial radio station's exploitation of 'free labour' in its use of the video footage of Strasser provided by an 'ordinary' citizen was noted by one *YouTube* user 'Div8digital' who commented:

Nice content theft 3AW [radio station] – stealing someone else's removed video to get views to your radio station. You suck ...

Ordinary people may play an increasing role in surveillance and in expanding media's disciplinary power across wider social space, but the example of Strasser highlights how the traditional commercial media continue to take the lead in contextualizing surveillance content. Journalists decide what *YouTube* footage warrants their attention by relying heavily on important cultural codes such as news values and narrative structures to guide their judgements (Tuchman 1978; Bell 1991; Evensen 2008). Noelle-Neumann (1993) says that there is a shared set of assumptions that all news people have on criteria for acceptance of stories by audiences. Evensen (2008, quoted in Hess and Waller 2012, 119) lists these as conflict, consequence, prominence, timeliness, proximity and human interest, along with the unusual.

Citizen-generated stories, such as the case of Strasser, appeal to the traditional media's news values such as controversy, or the bizarre or unusual and will be represented in this way. The use of cultural codes also helps to explain journalists' part in exhibiting 'everyday' people who appear before the law courts or social media platforms – as in the case of Strasser – to the wider public as part of their role in defining and policing social values and condemning those who transgress these powerful norms (Hess and Waller 2012). A qualitative analysis of public opinion and news coverage of Strasser's actions over a 12-month period<sup>4</sup> places almost all media content under the themes of 'condemnation' and 'humiliation'.

Strasser's actions were denounced across new media platforms, notably *YouTube*, remembering that the original footage was repackaged by a commercial radio station and given the title 'Woman Takes p ... at the Decider'. Comments were generally those of disgust such as:

Deathwalkr1: what a dirty f ... b ... what sort of role model is that for kids ... use the toilet u f ... mole ... no -one wants to smell ur c ... pong or see ur fanta pants.

And following are comments from a social media site '*The Roar*' (<http://theroarforum.com/index.php?topic=4003.30;wap2>), where users not only condemned Strasser's behaviour but also queried the leniency of the sentence after reading details of the story in the newspaper:

I just hope they replace the seat, or maybe we can rip it up and throw it at some gold coast scum bag, as the bogan was probably from there anyway.

And:

Whilst I have no issue with them not recording a conviction, the fine appears quite lenient, but if it's consistent with the fine for public urination, then I guess 'justice served' and 'case closed'.

And

Maybe a little lenient as I've been done for the same offence (note not at a stadium or live sporting event surrounded by thousands of people) and it cost me \$200.

Newspapers meanwhile could not resist the use of humiliating puns in their headlines with 'Woman in the Poo ... Over a Pee', 'Wee Trouble' and 'Viral Shame a Real Pisser'.

Scholars have argued that media power is used to patrol the boundaries of society (Hall 1973; Glasgow University Media Group 1976; Gamson et al. 1992) where individual cases are used to publicly condemn what are deemed to be 'bad' behaviours or even the social categories engaged in such behaviours, i.e. those who behave 'badly' in terms of gender, race or class. For example, the question arises whether the intense interest in Strasser's misdemeanour in both social media and mainstream media was largely due to her gender, with comments from *YouTube* viewers such as:

Brizchic: what a dirty old woman!! She should be ashamed!! I have never seen anything so revolting.

And this:

Bigstevio: This woman is a complete and utter disgraceful pig lacking in common sense, dignity and worth.

One newspaper columnist, however, queried the motives of the citizen who uploaded the footage in the first place. As King (2011) writes:

the video is enough to make you feel sick ... But as revolting an image as it is, I can't get past the motivation of the person who filmed it. Someone, a couple of rows back has turned on their video camera, focused on the woman and let it roll ... What was their motivation? Why would any person with an ounce of decency do something like that? ... What's more appalling – the indecent act of urinating in front of others at a football match, or deliberately turning on a video camera, capturing the act, and then allowing thousands of others to have a chortle? It has to be a close contest. But one person faces charges, the other remains anonymous – and is afforded privacy that none of the rest of us seem to have any more.

### **Traditional media's privileged position to other fields of power**

The role of traditional media to lead the contextualization of footage is best understood through its relationship with other fields of power, notably the state (represented by its agents, the police) and the judiciary, which rely on the symbolic capital of news media in the exercise of disciplinary power. Bourdieu and Wacquant (1992) used the term 'meta-capital' to describe the concentration of different types of capital in the state, giving it power to decide what counts as capital in specific fields. Couldry argues that the media's power can be theorized in the same way:

Just as the state's influence on cultural capital and prestige ... is not confined to specific fields but radiates outward into social space generally, so the media's meta-capital may affect social space through the general circulation of media representations. (2003, 688)

The doctrine of open justice protects journalists' important 'watchdog' role in the administration of justice and the state affords the news media a qualified privilege within courtrooms so they can carry out this function. It is no exaggeration to say that the world of courts is 'bureaucratically organised' for journalists (Fishman 1980) through the doctrine of open justice. Arms of the state, including parliaments and courts, even provide physical spaces for journalists. It is usual practice in Australia for courts and parliaments to furnish them with office spaces and specially designated seating in courtrooms and parliamentary chambers. This creates a close relationship between the power of the state and the news

media. This privilege, which is only extended to journalists, can be understood to contribute to the news media's meta-capital across both traditional and digital platforms. This affords journalists the symbolic power to affect social space through the general circulation of representations of the courts and those who appear in and before them.

Official agencies, such as the police and courts, make the names and details of those who are alleged to have committed crimes available in wider social space via recognized news media channels, rather than citizen-generated sites such as *YouTube* and *Facebook*. In Strasser's case, it was not 'ordinary' people who linked her identity to the citizen-generated video clip of her misdemeanour. It was the traditional news media, carrying out its role in the system of open justice, that named Strasser, exposing her age, occupation, family role and the suburb in which she lived. It was through its privileged position in the court that it was able to parade her as the offender across both traditional and digital media platforms, ensuring that her shameful actions were attributed to her in the digital archive, alongside the citizen-generated footage that does not offer viewers her identity.

### **Media's power to impose a lasting mark of shame**

The case of Strasser provides a rich example of how the fusion of new and old media intensifies the pillorying effect on 'ordinary' people who are caught committing minor crimes in the digital era. Various media have now become interactively connected and as a result information flows more easily across technical, social and geographical boundaries (Bennett 2003). Traditional news media have set up new media platforms where news and information can be produced and disseminated at a rapid pace across the globe. The old saying 'today's newspaper is tomorrow's fish "n" chip wrapper' no longer applies to traditional media as content is archived across digital spaces from news websites to *Google* and internet blogs, which means for 'ordinary' people like Strasser, their shame is only ever a mouse click away.

Historically, the practice of shaming for minor crimes was confined to a particular geographic area or social circle and administrated within a specific time frame. However, in the digital landscape, the media's power to shame is unconstrained because it transcends geographic and temporal boundaries. The time frame in which a minor offender, such as Strasser, is subjected to media shame has no limit when content is archived and stored by powerful nodes in information flows and spaces, and can be retrieved with ease. Nor is the practice of shaming through public exposure restricted to the locality and community where the offence occurred as it can be accessed from anywhere in the world as long as there is an internet connection and computer available.

Strasser's crime was committed in Queensland, Australia, but the newspaper court reports were picked up by online news sites across the globe, from China to the USA. The internet site 'What's on in Tianjin', for example, makes reference to the story under the headline 'Oz Mum Kerry Ann Strasser Fined for Peeing on Seat at State of Origin Final' (<http://www.whatsontianjin.com/tag-%20Kerry%20Ann%20Strasser.html>).

Historically, shaming was a particularly physical, if not brutal, practice involving the body, at times leaving a permanent mark of shame via scars from all forms of torture. We suggest in the digital age, media have the power to impose a digital mark of shame that is difficult to remove.

### **Conclusion**

The media's power to spoil a person's reputation is well documented and a legal remedy is available in the form of the tort of defamation (Pearson and Polden 2011;

Breit 2011). However, this is no protection for individuals such as Strasser, who pleaded guilty and was brought before the criminal courts where reporters enjoyed a qualified privilege to cover the proceedings. The case of Strasser has been used to provide some *prima facie* evidence in support of the arguments made here about a new dynamic of media shaming in convergence culture and how this is a symbolically rich vehicle for social control. Through this case, it can be observed that 'ordinary' people armed with digital tools and publishing platforms exercise a new form of surveillance and that in this context, marks of media shame are not easily erased and can have lasting consequences. It also shows that traditional media continue to play an especially powerful role in shaming because it contextualizes or brands information in the public domain and holds a more privileged position to other fields of power, such as the judiciary, than the 'ordinary' citizen.

The history of shaming as a cultural practice shows it has been considered a form of punishment across time and across societies. In western countries, it is a power that has largely rested in the hands of the traditional media in modern times, but in a convergence culture the media's power to shame has been extended to citizen media producers and social media platforms as well. In this media world, information is produced and disseminated at a rapid pace across the globe, and content is archived across digital spaces from news websites to *YouTube*, *Google* and internet blogs.

While 'ordinary' people armed with digital tools increase the degree of disciplinary surveillance in wider social space, traditional news media continue to play a particularly powerful role in shaming because of their symbolic power to contextualize information generated in social and new media circles and their privileged position to other fields of power.

### Acknowledgements

We would like to thank the two anonymous reviewers who provided helpful advice on this paper.

### Notes

1. We do not want to contribute to this woman's shaming, but direct evidence is required to properly consider the phenomenon, the circuits through which her misdemeanour was taken up in digital media and how that intersected with traditional media. We argue that through shifting the gaze of the reader here on to the actions of the media itself, we speak back to the power that shamed her. Both digital and traditional media producers' motivations in promoting the footage are the focus of this study, rather than the woman's actions.
2. 'Feral bogan' is an Australian slang phrase that describes a person who is from a poor socio-economic background and is uncouth and not clean.
3. Intellectuals began to challenge the public spectacle of torture and humiliation in the eighteenth century. Penal reformers decided to remove criminals from their environment to teach them good habits so that they could return to society. There were also humanitarian concerns and the democratic view that brutal punishment was distinctive of hierarchical relationships. During the Enlightenment period, the system of punishment was influenced dramatically by the ideas of Italian criminologist Cesare Beccaria and Jeremy Bentham, an English advocate of utilitarian philosophy. Beccaria argued that torture and infamy (public shaming) were not as effective as swift and certain punishments: Bentham believed that punishment should not be administered if it was groundless, if it did not act to prevent mischief, was unprofitable or needless (see Waller and Hess 2011).
4. An analysis of 25 newspaper articles from international academic database Newsbank, along with results from search engine *Google* between 5 July 2011 and 30 June 2012, was undertaken.

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## **Appendix 2**

**Drive thru incident reveals the potent cocktail of new media mix**

# Drive thru incident reveals the potent cocktail of new media mix

By Kristy Hess and Lisa Waller

March 21, 2014, 4:30 a.m.



While The Standard did not publish an embarrassing image of a woman urinating in public, the image has been viewed thousands of times on Facebook.

The woman who became a social media sensation after urinating outside the Warrnambool McDonald's restaurant drive thru sparks some serious issues regarding "crime and punishment" in the digital age.

The woman has so far been spared any "formal" public humiliation via the news media. The Standard has opted not to publish the image which shows her "mid-act" and crouching beside a taxi. The image has, however, been viewed thousands of times on Facebook.

This case bears similarities to the story of Brisbane NRL fan Kerry Ann Strasser. After a few drinks at a State of Origin game in 2011, Strasser pulled down her pants and urinated on her seat. A spectator captured the act on his phone camera and uploaded the footage to YouTube.

The video went viral within hours, scoring 30,000 hits, but was removed a day later as part of the site's policy on inappropriate content.

But just as the footage disappeared from YouTube, traditional media intensified her shame by reporting the incident across Australia and the globe.

Strasser admitted to being the person in the clip, but instead of issuing an on-the-spot fine, police summonsed her to court on one count of urinating in a public place. Strasser did not attend, but a number of journalists did.

Her lawyer, who entered a plea of guilty on her behalf, told magistrate Wally Ehrich of her client's humiliation and suffering.

She said Strasser's family had also been affected. The magistrate acknowledged her "worldwide embarrassment" and fined her \$100 without conviction.

But Strasser's walk of shame continues. Type her name into Google today and the top results continue to reveal details of her anti-social behaviour.

Our research, with the support of the Victoria Law Foundation, examines the intensified role of the media in shaming ordinary people when they commit minor crimes. Unlike some North American jurisdictions, Australian courts do not consider public shaming when sentencing. It is the news media that decides if a person who appears before the court will also be brought to wider public attention and the degree to which they will be shamed.

The research is also particularly concerned with the role of the media in reporting non-convictions. When someone like Strasser receives a non-conviction it means they are given a "second chance" at keeping their criminal record clean.

Consider the example of the woman who did a wee at McDonald's. If police decide that this matter should go before the courts, The Standard will be in its rights to "name and shame" her for the crime.

News  Business

So far, the news media has taken the admirable Resist stance of not identifying or publishing the photographs of this woman, knowing all too well the damage this may cause to her reputation in this small community, particularly if she is a "local".

As former court reporters, we have lost count of the number of people who appeared before a magistrate's court charged with urinating in a public place mostly men caught "draining the snake" in public spaces like a CBD alley next to the Whalers Hotel. Almost all of these people were fined and issued non-convictions a slap on the wrist and the chance to redeem themselves away from

the public gaze. Yet, journalists have the discretion to decide who they want to name and shame on the basis of whether they consider a story to be "newsworthy". This places them in an enormous position of power.

In Western societies, shaming has always been a popular and arguably effective means of social control. Up until the 19th century, shaming penalties were popular punishments for minor crimes. It was a common custom to put offenders in the stocks at a public market and it was not unusual for an angry crowd to pelt them to death.

When these brutal punishments were eventually phased out, the practice of shaming became the domain of the news media. However, the practice of shaming is changing again. The "mob" is making a resurgence, but where they once hurled stones, they now use new media tools to inflict indelible marks of humiliation.

Cases such as this in Warrnambool provide a rich example of how the fusion of new and old media intensifies the pillorying effect on people who commit minor crimes. Content is archived across digital spaces from news websites to Google and internet blogs, which means for people like Strasser and more recently the Warrnambool McDonald's example, their shame may be only ever a mouse click away.

*Kristy Hess and Lisa Waller are senior lecturers at Deakin University. They are undertaking research into the relationship between media, the courts and public shaming with the assistance of a grant from the Victoria Law Foundation.*

## **Appendix 3**

### **The digital pillory: media shaming of 'ordinary' people for minor crimes**

# THE CONVERSATION

9 August 2013, 6.31am AEST

## Media as pillory: the power to ‘name and shame’ in digital times

### AUTHORS



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In today's digitised world people are able to be 'named and shamed' in an instant through social media, which is then picked up on by the mainstream press. AAP/Richard Wainwright

Australia's "human headline" Derryn Hinch built his fame in radio and television by - often controversially - "naming and shaming" those he subjected to the media blowtorch.

But today, Hinch, as do many others, prefer to use social media tools to publicly humiliate people for behaviour they find unacceptable. There are recent examples of people filming racist behaviour on public transport. There's even footage of people urinating in public places. Citizens upload their shame files into digital space and traditional media lap up the content.

Take the case of Brisbane NRL fan Kerry Ann Strasser. After a few drinks at a State of Origin game in 2011, Strasser pulled down her pants and urinated on her seat. A spectator captured the act on his phone camera and uploaded the footage to YouTube.

The video went viral within hours, scoring 30,000 hits, but was removed a day later as part of the site's policy on inappropriate content. But just as the footage disappeared from YouTube, traditional media intensified her shame by reporting the incident across Australia and the globe. And while her face is not recognisable on the YouTube clip, Strasser was named in

mainstream media coverage.

Melbourne radio station 3AW took the lead, reloading the content back onto YouTube and to its own website. Its report included a short piece to air from journalist Seb Costello, who said:

*I'm all for sitting on the edge of your seat at the footy, but surely this is taking the piss!*

The Brisbane Magistrates Court heard Suncorp Stadium was alerted to the YouTube footage and provided police with CCTV evidence used to identify her seat. Strasser admitted to being the person in the clip, but instead of issuing an on-the-spot fine, police summonsed her to court on one count of urinating in a public place.

Strasser did not attend, but a number of journalists did. Her lawyer, who entered a plea of guilty on her behalf, told magistrate Wally Ehrich of her client's humiliation and suffering. She said Strasser's family had also been affected "with anyone who knows her being aware she was the woman in the clip". The magistrate acknowledged her "worldwide embarrassment" and fined her A\$100 without conviction.

But Strasser's walk of shame continues. Type her name into Google today, and the top results continue to reveal details of her antisocial behaviour. There are also links to web pages that describe her as a "feral bogan".

Our research examines the intensified role of the media in shaming ordinary people when they commit minor crimes. Unlike some North American jurisdictions, Australian courts do not consider public shaming when sentencing. It is the news media that decides if a person who appears before the court will also be brought to wider public attention and the degree to which they will be shamed.

Our research is also particularly concerned with the role of the media in reporting non-convictions. When someone like Strasser receives a non-conviction it means they are given a "second chance" at keeping their criminal record clean. For example, they are not required to reveal their misdemeanour when applying for a job.

However, they can still have an indefinite "media record" imposed on them. We have uncovered numerous examples of people who received non-convictions for minor offences, like stealing a tea towel from Kmart or jaywalking. But they still had their names plastered across Google by traditional and social media outlets. We question whether the unfettered power to impose this punishment fits the nature of the crime.

In western societies, shaming has always been a popular and arguably effective means of social control. Up until the 19th century, shaming penalties were popular punishments for minor crimes. It was a common custom to put offenders in the stocks at a public market and it was not unusual for an angry crowd to pelt them to death.

When these brutal punishments were eventually phased out, the practice of shaming became the domain of the news media – and it's been that way in Australia ever since. However, the practice of shaming is changing again. The "mob" is making a resurgence, but where they once hurled stones, they now use new media tools to inflict indelible marks of humiliation.

Traditional news outlets step in and use their power to further "name and shame". Cases such as Strasser and others that we have encountered provide rich examples of how the fusion of new and old media intensifies the pillorying effect on ordinary people who commit minor

crimes.

The old saying that “today’s newspaper is tomorrow’s fish ‘n’ chip wrapper” no longer applies. Content is archived across digital spaces from news websites to Google and internet blogs, which means for people like Strasser that their shame is only ever a mouse click away.