

Indelible shame? News reporting of non-convictions in digital space

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Abstract

This paper examines the role of media in publicising the names of people who receive a non-conviction for a minor crime. It positions the news media's ability to "name and shame" people who appear before the courts as a powerful cultural practice, rather than adopt a widely celebrated Fourth Estate view of the press as a watchdog on the judicial process. The research draws on interviews conducted in two regional centres of Victoria, Australia, with those involved in news coverage of very minor crimes where non-convictions were imposed. Their spoken words reveal a range of tensions linked to reporting non-convictions in the digital age. In the eyes of the law, a non-conviction means that an offender has an opportunity to rehabilitate away from the public gaze. However, the news media's ability to name such offenders online has the potential to impose a lasting "mark of shame" in digital space that can prevent them gaining employment or housing, and damage their social standing and relationships. We live in a media-saturated culture in which the vast majority of people rely on news media for information about judicial proceedings and in turn, the news media constructs public understanding of the law through the way it represents crime and court processes. This paper argues that traditional understanding of the nexus between the judicial system and the Fourth Estate fails to acknowledge the news media's considerable power outside the officially recognised operation of the open justice relationship, and that this deserves attention in the digital age.

Introduction

People who commit minor offences in regional Australia not only face court. It is also likely they will be subjected to the "pillorying effect" of news media coverage (Noelle-Neumann, 1993), which can be experienced as worse punishment than the magistrate's penalty, according to participants in a recent study (Hess & Waller, 2014). In the digital age, the "pillory effect" of media exposure for a minor crime has intensified as it can be re-activated by a mouse-click at any time or location in the world. Consider the case of a young man who participated in our study of news reporting of non-convictions in regional Victoria (Hess & Waller, 2014). Brian McBain attended a buck's party, got drunk and vandalised a local war memorial. This first-time offender – and otherwise decent fellow – appeared in a Magistrate's court where he received a non-conviction and a fine. He says he was "named and shamed" in the widely read pages of the local newspaper and the story was shared across news networks online. When Brian left the town to work interstate his new colleagues had already read about his misdemeanor on the internet, after performing a Google search of his name.

Through the spoken word of those involved in, and affected by online reporting of non-convictions, this paper explores the Australian news media's power to globally, and indefinitely, name and shame people

who receive this penalty. It is an emerging issue for Australia's lower courts and the news media that has received little attention despite its resonance with debates surrounding the "Right to be Forgotten" campaign in Europe.

The right to be forgotten ... only in Europe

Spanish lawyer Mario Costeja González' victory in a 2014 legal battle with Google Spain over his "right to be forgotten" signaled a major shift in Europe about the way the flow of information can be regulated online (see eg Bernal, 2014). It also inspired international debate centred on competing notions about the right to privacy and freedom of speech (see for example, Toobin, 2014; Stokes, 2014). Much like our research participant Brian McBain, Costeja González was concerned because if people typed his name into Google, one of the first results to pop up was a small newspaper clipping from 1998 on the repossession of his home to pay off debts. When the European Court of Justice ruled in his favour, many of the requests that flooded into Google were from Europeans with criminal records, or other past misdeeds they wanted hidden from public view. Within the first few days of Google putting a search removal request form online it was receiving an average of seven requests every minute (Curtis, 2014). The 1995 European Data Protection Directive provided the legal backing for Costeja Gonzales' case. The regulation supports individuals "to have their data processed and deleted when they are no longer needed for legitimate purposes" (as cited in Ausloos, 2012). The European Court of Justice ruled that individuals have the right – under certain conditions – to ask search engines to remove links with personal information about them (see Gady, 2014:14). It applies where information is inaccurate, inadequate, irrelevant or excessive. At the same time, the court found that the right to be forgotten is not absolute and would need to be balanced against other fundamental rights, such as freedom of expression and of the media to report matters of public interest (European Commission, 2014, np; see also Gady, 2014). Rosen (2012) points out a significant difference between the European and US approaches:

In Europe, the intellectual roots of the right to be forgotten can be found in French law, which recognizes *le droit à l'oubli* - or the "right of oblivion" - a right that allows a convicted criminal who has served his time and been rehabilitated to object to the publication of the facts of his conviction and incarceration. In America, by contrast, publication of someone's criminal history is protected by the First Amendment. (Rosen, 2012, np)

Australia has not adopted the same stance as Europe in regulating online space, nor does it have a foundation document that provides a bill of rights. Outside of Europe, Google reportedly provides another search removal request form to have links erased, , but the company is under no obligation to carry out the request (Sharma, 2014). However, the Right to be Forgotten case highlights many of the questions and tensions identified through our research on the role of Australian news media in reporting minor crimes where a non-conviction is imposed. We acknowledge the democratic importance of journalists' role in public understanding of the law, but through a cultural studies lens, we also question the news media's power to name minor offenders online because it has the potential to impose a lasting

“mark of shame” in digital space, which can have consequences for the social and economic wellbeing of those affected.

Non-convictions and news reporting

In Australia, “naming and shaming” people for minor crimes is largely the domain of the news media and is particularly prevalent in rural/regional communities where local newspapers have a long established role covering minor matters that come before the courts (Hess & Waller, 2013). If a magistrate imposes a non-conviction, it means the offender is guilty, but gets given a chance to reform, away from the public gaze. Windford (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 1991, Vic). Under law, the offender is not required to reveal the crime in any job application, and it does not restrict them from overseas travel (Hess & Waller, 2013). However, the news media, has relatively unfettered power under the principle of open justice to publish the names of individuals regardless of the crime they have committed, or whether a conviction has been imposed. In the digital age, such information is easily accessible through search engines like Google for an unlimited time and can permanently blight their public profile. As Ausloos (2012) highlights, the internet doesn’t forget.

Research approach

This project expands on previous investigations into the relatively unfettered power of media to publicly identify people who commit minor crimes in Victoria and receive non-convictions (Hess & Waller, 2013, 2014). The study was focused on regional areas because previous research shows people are more likely to receive news media coverage for a minor crime outside metropolitan areas, where court reporting focuses on major crime. There is not space here to delve into this, but it is discussed elsewhere (Hess & Waller, 2013).

Fourteen semi-structured interviews were conducted in 2014 across two regional cities where the journalistic practice of identifying people guilty of minor offences (for example, urinating in a public place, petty theft and jaywalking) was identified as being most prevalent (see Hess & Waller, 2013). A range of perspectives was sought from journalists, magistrates, lawyers, offenders who had been identified in media coverage, as well as victims of crime. 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: 35).

A case study framework was used to enable intensive examination of particular locations (Bryman, 2008: 53). A multi-perspectival approach to data collection and sources is a feature of case study research

(Snow & Trom, 2002: 154), and is helpful here to examine the media-related practices of a range of individuals. It is important to note that 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, so a recently retired police prosecutor was interviewed instead. Ethics approval was granted by Deakin University on the basis that participants could not be identified. A number of themes emerged from the data that raise issues about the relationship between news media and the courts in an increasingly media saturated world (see Hess & Waller, 2014).

Open justice and the right to report

The news media in Australia is largely responsible for informing the public about matters before the courts, underpinned by its role in serving the principles of open justice. 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 & Lamble 2006; Rodrick, 2008). 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 & Hoynes, 2006; Simons, 2007; Curran, 2010; Hampton, 2010).

Few studies have examined the media's relationship to the courts through a critical cultural lens. Zelizer (2004) argues that the cultural studies approach emphasizes "meaning making" as a primary activity of journalism and challenges the normative biases of much existing journalism research and the professional notions of journalists themselves. Zelizer (2004) says this allows scholars to cut through a false unity about journalism, regarding what it is, what it ideally should be and the purposes it has in society – in this instance its relationship to the courts in covering minor crime. A cultural studies approach highlights the everyday actions of people as they apply to the media.

The interviews from this study reinforce our previous finding (Hess & Waller, 2013) that there is an uneven media terrain in Australia that results in different approaches to court reporting, especially between metropolitan and non-metropolitan newspapers. Our research for this study has revealed important differences between the two regional newspapers involved in this project, in terms of editorial policies on reporting non-convictions, as well as the commitment of resources to covering the Magistrate's court. Several participants highlighted that if a minor crime was committed in a metropolitan area, it was unlikely it would be considered newsworthy, and therefore the offender's crime would not be retrievable on Google. In sharp contrast to this, the editor of a regional daily newspaper said:

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.

This comment highlights that the geographic location of a crime and whether a newspaper covers the courts routinely will determine whether someone is publically identified for committing a minor crime.

We have argued elsewhere that in the digital environment the local newspaper now transcends geography and are “geo-social” (Hess, 2013, Hess & Waller, 2014). Most newspapers have online sites that are accessible from anywhere in the world, providing one has access to the internet and a smart device (Franklin, 2006). Furthermore, many newspapers belong to big media conglomerates with links to powerful global information flows and movements. This means stories that appear on a local newspaper’s website can be picked up and shared across news networks with the click of a button (Hess, 2013). One journalist who was interviewed questioned whether magistrates should take media coverage into account as part of the sentencing process because of the inconsistencies in court reporting across jurisdictions:

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

Our research highlighted 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 and one made decisions on an ad hoc basis. 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. At one of the newspapers in the study, the policy was to report every matter:

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

Another 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 one lawyer, said there needed to be clearer guidelines for news reporting of non-convictions, especially in an online world. One lawyer suggested a “code of conduct” was needed:

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

Other participants also queried the news media’s discretion to report non-convictions, with one lawyer drawing attention to the issue of power regarding the justice system and the news media. He argued that if the court deemed it appropriate not to record a conviction, then the news media should not have the power to do so. “The press isn’t greater than the court,” he said.

Time, resource and space restrictions at a newspaper can also affect how a story is reported (see eg: Conley and Lambie, 2006) and whether an individual's name will appear online. For example, small newspapers that employ only a handful of journalists may not have the resources to devote to routine court reporting and shy away from this, favoring news stories that take less time to source instead (Hess & Waller, 2013). Lower courts, such as the Magistrates courts in Victoria, have the highest "human traffic", which could represent the most valuable use of a journalist's time on a large regional daily because they can return to the newsroom with several local story ideas rather than sit through a day of legal argument in a higher court that might not result in a report.

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.

These comments raise an important question about the difference between public interest and news interest in reporting non-convictions and if a journalist or editor's news values should determine whether a person's non-conviction is recorded online indefinitely.

The right to be forgotten in digital space after a day in court

Several participants highlighted that in smaller regional areas, being identified in the newspaper for a minor crime had consequences for employment prospects, social issues, and personal safety of offenders. There is evidence from this study that the ramifications of an individual being tagged to a minor crime on Google can be just as severe as being "shamed" in the print version of a local newspaper, which is likely to be read by many acquaintances. Many 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 it's 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

A court reporter was less sure about the practice of identifying offenders online, 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

A first-time offender whose crime was featured in the local newspaper and was subsequently published by other news websites across the country, said while he believed the newspaper had the right to identify offenders, minor court matters should not be published online. He said it was unfair that when people searched the internet for his name, the court case appeared in the top of the search engine hits, resonating with the Right to be Forgotten campaign outlined earlier. He lamented: Once it's 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 it's there in 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 first-time offender offered this view:

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

One editor said he regularly received requests for removing online court reports from people who were seeking employment. He said that as there was no editorial policy governing such requests it was at his discretion to make changes to the online publication. He said he was usually happy to grant such applications, but added that it was almost impossible to remove every trace as the news item may have been shared, linked to another website or could be retrieved through Google's archived pages. This underlines the need for news organizations and the courts to consider the issue of non-convictions in the digital age.

Conclusion

This study has revealed differences between regional newspapers' editorial policies on reporting non-convictions, as well as their commitment to resourcing coverage of the Magistrate's court. It also found editors and reporters shared a strong appreciation of the high news value of court reports. They acknowledged that the 'news value' of court reports had a commercial value to their news organizations. This was closely interwoven with these participants' understanding of their 'watchdog role' in keeping the public informed of court proceedings. Participants also identified a number of issues that deserve further investigation by researchers, news media organizations and policymakers. These include whether magistrates should take media coverage into account as part of the sentencing process; the need for consistent editorial policies and clear guidelines to help journalists decide on a case-by-case basis whether they should report non-convictions, especially in an online world. One editor said he regularly received requests for removing online court reports from people who were seeking employment. Further research is needed to discover whether news and internet organizations in Australia are receiving many of these kinds of requests. Other concerns include how they deal with these applications and whether there is a need for policy and legal processes to assist those with a private interest in having news of a non-conviction removed from the internet, and those with a public interest in publicizing these matters.

In the wake of the Right to be Forgotten case, in Europe it is Google that decides whether to remove material people apply to have taken down from its pages. If Google refuses, they can apply through the courts, where they have certain rights enshrined in the European Convention on Human Rights. Australia does not have these kinds of laws or processes yet. However, Australia does have the sentencing principle that a non-conviction means a first-time offender has the right to retain an unblemished criminal and public record, so the question remains, should the news media have the power to override this?

We do not discount that there are those offenders who consider media coverage of their crime to be a “badge of honour” (see eg Nussbaum, 2004), but the evidence presented here highlights that people who are genuinely remorseful for their actions have felt the intense pillorying effect of the media. Further research is needed to unpack in more detail the degrees of shame experienced by those who are placed in the media spotlight at the local and global level and the ramifications of this.

The value and importance of the principles of open justice are not under challenge here, nor is the news media’s vital role in safeguarding a key democratic institution. We do, however, look beyond the news media as a conduit in the administration of justice, to examine the uneven terrain where the news media exercises its autonomy in deciding whether a matter that is brought before an open court will in fact be brought to the attention of the wider public and broadcast to a global audience on the internet, which doesn’t forget.

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