SELF-REPRESENTATION, SEXUALLY TRANSMITTED DEBT AND THE 'BENCHMARK MALE': A CASE STUDY

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Access to justice in Australia is full of hurdles, both explicit and implicit, and these hurdles include the privileging of social norms. This article examines gendered standards in relation to access to legal assistance, fines as a sentencing option, the nature of the sentencing process itself, inequity and human rights law. The case study of Kate's story is used to explore these issues as they intersect with driving offences, self-representation, summary justice and gender. Drawing on Margaret Thornton's concept of the 'benchmark male', analysis of the legal framework within which this study is situated exposes embedded privileging of gender-biased benchmarks. Kate's case is drawn from the work of the *Court Order Helper* project, a clinical partnership between Victoria University and Footscray Community Legal Centre.

I INTRODUCTION

How do court-ordered fines and self-representation fit with the notion of social justice? This discussion interrogates this question, focusing on fines as a sentencing option and the sentencing process itself as it was observed in action in summary courts in the western suburbs of Melbourne. Alongside this, the complicating factors of self-representation and gender as these feed into outcomes for women will be explored. The case study of Kate's story (located at the end of this article) will be used to exemplify some of the issues raised by these questions.

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While most of the subjects of this research were male, the focus here is on women and the gendered disadvantage they experience in the context of self-represented summary justice and fines as sentence dispositions. The purpose is to bring to the surface concealed gender bias in the delivery of summary justice observed while undertaking research as part of the *Court Order Helper* program, discussed below. Kate's case was selected as it signals many of the issues revealed in the following analysis. In particular, it is suggested that the components of the criminal justice system discussed here have a particular set of values built in, values that impact differently on women due to the existence of gender biased blinkers.

Much has been written about the invisibility of the lived experience of women in the pages of the law.[1] This literature deals with the way that politicians and judges create the legal system, associated content and processes, building from their own socially constructed subject positions and inserting their own values as they go about this work.[2] The characterisation of these values is reminiscent of Margaret Thornton's 'benchmark male'. Critiquing anti-discrimination legislation, Thornton posits:

> Anti-discrimination legislation accords a right of action to individuals who allege less favourable treatment by virtue of class membership vis-à-vis a real or hypothetical member of a benchmark class. This benchmark figure is likely to be a white, Anglo-Celtic, heterosexual male who falls within acceptable parameters of physical and intellectual normalcy, who supports, at least nominally, mainstream Christian beliefs, and who fits within the middle-to-right of the political spectrum.[3]

The 'benchmark male' is an implicit character within the words of the law, existing in the spaces between the lines, but creating a foundation upon which these words of great power and influence are built. It seems that this figure may not necessarily be confined to

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1 Australian Law Reform Commission, *Equality before the Law: Women's Equality*, Report No 69 (Pt 2) (1994) ch 2; See also Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2010).

2 Ibid.

3 Margaret Thornton, *The Liberal Promise* (Oxford University Press, 1990) 1.

activity in the anti-discrimination law context, but may also be detected in other areas of the legal system. The intention here is to shed light on the activities of the 'benchmark male' as he lurks in the shadows of everyday summary justice. The implication is not that this shadowy figure is necessarily a real person, although he is certainly employed by real people, albeit mostly unconsciously. Rather, as Thornton suggests, he is a construct built by the imaginations of those in charge. Nonetheless, he is an active player in the justice system and, as shown here, one of the main value blindfolds of this character is the specific form of domestic violence known as 'sexually transmitted debt'.[4] The personal value system of the 'benchmark male' is underpinned by the economic structures of Australian society, a system that is structurally incapable of seeing or valuing the contribution and participation of women in anywhere near the same way as that of men.[5] It will be suggested that the 'benchmark male' takes on other features when active in summary justice, features that are additional to those made explicit in the above quote from Thornton. Therefore, not only is the 'benchmark male' a white, Anglo-Celtic, Christian, politically conservative, heterosexual and 'normal', but he also has full time employment status earning the average weekly income and supports a female partner who is economically inactive, less valuable compared to him and dependent on him.

II THE RESEARCH MODEL

This research arose out of a project called *Court Order Helper*, a partnership between Footscray Community Legal Centre[6] and the College of Law and Justice at Victoria University, Melbourne, Australia. The *Court Order Helper* program is an initiative designed

4 Australian Law Reform Commission, above n 1.

5 See Marilyn Waring, *Counting for Nothing: What Men Value and What Women Are Worth* (University of Toronto Press, 1999) for a thorough discussion of the subordination and invisibility of women in the creation of the global economics rules upon which the Australian economics system is built.

6 Community Legal Centres are not-for-profit community based legal services. The services they provide include advice, advocacy and case-based law reform research and submissions. These services are free of charge.

to provide free assistance to self-represented litigants in the Magistrates Courts at Sunshine and Werribee in the western fringes of suburban Melbourne. Post-appearance help is provided to community members who find themselves in front of a Magistrate without access to a lawyer. Recognising that court orders are complex in both structure and language, containing meaning that is often unspoken in court, assistance is designed to focus on clarification before the litigant leaves the court precinct.

The *Court Order Helper* team works from within the Mention Court.[7] Located inside the courtroom at the back of the public gallery, the team watches for self-represented litigants. While each self-represented matter is running, extensive notes are created, recording details stated in court about the subject of the appearance, legal and other issues discussed between the Magistrate and the self-represented offender, and court-ordered outcomes. As each matter is being finalised, *Court Order Helpers* leave the courtroom and greet the litigant outside as they exit. The litigant's outcome is discussed with them, explaining the meaning of their court order, language used by the Magistrate, responsibilities, rights and consequences.

A team of one academic/current legal practitioner supervising a group of Victoria University law students services the program. The service commenced operation in August 2013 and is ongoing. Up to to six people per sitting day were assisted during the study period and time spent with each of these litigants varied from between five to 30 minutes. The information that forms the basis of the research and which underpins this article was collected between August and October 2013 from information provided in open court and from some litigants who were assisted outside the courtroom by the program helpers.

[7] This is the court that deals with the preliminary stages of the criminal justice process. Matters listed in the Magistrates Court jurisdiction are initiated here. Most pleas of guilty to summary crime are heard in the Mention Court. See Magistrates Court of Victoria, *Criminal Proceedings: Types of Hearings* <https://www.magistratescourt.vic.gov.au/jurisdictions/criminal-and-traffic/criminal-proceedings/types-hearings>.

Findings are drawn from a total of 111 records of self-representation collected at both Sunshine and Werribee Magistrates Courts. One third of these matters took less than two minutes to be finalised in court and another 40 per cent involved between three and five minutes of court time. Thus, approximately 70 per cent of matters ran for five minutes or less. Self-represented litigants were 85 per cent male and 60 per cent were between the ages of 18 and 30. Income scale was stated in only about 25 per cent of cases and, of these, the majority had an income of less than $500 per week. Income source was unknown for almost half of the matters; around 40 per cent was from earned wages and nearly 20 per cent were social security recipients. In terms of types of matters recorded, almost two-thirds were driving offences. The rest comprised of property offences, offences against the person, dishonesty offences, breach or fail to comply with court orders, defaults on fines and interim intervention order applications. Court-ordered outcomes involved fines and court costs in more that half the cases observed. The range of dispositions for the remainder of the matters included adjournments, adjourned undertakings, motor vehicle licence interference and interim intervention orders.

III LEGAL ASSISTANCE

Kate was self-represented because she could not afford to pay for a private lawyer and she did not qualify for state-funded Legal Aid assistance. When her case was discussed with her, Kate explained that she had consulted the court-based duty lawyer service before she appeared in court. She was given some directions about what to say to the Magistrate and what to expect as an outcome, but no in-court advocacy was available.

Victoria Legal Aid provides grants of financial assistance to community members like Kate who cannot afford to pay for their own lawyer. Applications for this help are assessed using a two-part test. The first part is the means test. Using a formula that takes into

account the income and assets of the litigant and any 'financially associated person' plus the estimated cost of hiring a private lawyer for the case at hand, a decision is made as to whether the applicant has the resources to fund their own case.[8] The income cut-off point for assistance with a traffic offence is $256 per week,[9] the same as Kate's income and just under 20 per cent of the median household income in greater Melbourne of $1300.[10] The cost to hire a private criminal lawyer for a matter like the one in the case study ranges from $660 to $2200.[11] So, Kate would have to find between two-and-a-half to nearly 10 times her weekly income to pay for legal representation.

The second part of the Legal Aid grants assessment formula is the merits test. This is an evaluation of the legal merits of the case at hand. As a general rule, guilty pleas to traffic offence charges will not attract assistance unless the sentencing outcome would result in imprisonment or the accused has an intellectual or psychiatric disability.[12] The offence committed by Kate was 'driving while disqualified'.[13] As a first offence of this type, there is a maximum fine of $4330.80[14] or four months imprisonment. The application of this part of the grants assessment formula is the main reason Kate does not qualify for Legal Aid assistance. She did not have a disability and the sentence range for her offence, taking into account her lack of prior history for driving offences, would not include imprisonment. Thus, Kate is defined as neither financially nor physically disadvantaged enough to access Legal Aid assistance.

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8 See Victoria Legal Aid, *VLA Handbook for Lawyers* <http://handbook.vla.vic.gov.au/handbook/97.htm> ch 3 guideline 2, ch 12.

9 Ibid.

10 Australian Bureau of Statistics, *2011 Census QuickStats* <http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/2GMEL>.

11 Information obtained from a cold call inquiry to criminal defence practitioner in Melbourne, May 2014: $660 is equivalent to the Legal Aid rate paid when a grant of assistance is approved.

12 Victoria Legal Aid, above n 8, ch 3 guideline 2.

13 *Road Safety Act 1986* (Vic) s 30.

14 Ibid.

This is our first glimpse of the 'benchmark male'. A finite pool of legal aid funds is set aside by state and federal governments to help people who cannot afford a lawyer. These resources have been slowly diminishing and the most recent federal budget extracts even more.[15] Victoria Legal Aid allocates these funds using a set of rules outlined in an internally produced handbook.[16] In the criminal law context, the more serious a crime is and the greater the likelihood of incarceration, the more likely a grant of aid will be approved. Crime statistics consistently show that it is men who commit the vast majority of criminal offences and that they are particularly more likely to commit more serious crimes.[17] In addition, men are 12 times more likely to be imprisoned than women.[18]

Kate is being measured here by and against the 'benchmark male'. His measure of worthiness for access to legal aid funds is someone he is more likely to understand with reference to himself. Thus, the position of a man whose criminal acts place him at risk of losing his liberty is more worthy of the allocation of stretched resources. A loss of physical liberty is the biggest threat for 'benchmark male', taking away his capacity to participate in mainstream society where he is recognised and rewarded for this participation.[19] While this can also be said about women, those whose economic liberty has been diminished or erased by the financial domestic violence perpetrated by their partner, have long been acknowledged as occupying a particular position of disadvantage and invisibility within the legal system.[20] This adds an extra dimension to the idea of a loss of liberty, as economic dependence is a largely female reality[21] and

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15 Michael Inman, 'Budget cuts to legal aid to affect most disadvantaged', *The Canberra Times* (online), 16 May 2014 <http://www.canberratimes.com.au/act-news/budget-cuts-to-legal-aid-to-affect-most-disadvantaged-20140516-zrfa9.html>.

16 Victoria Legal Aid, above n 8. This is pursuant to the *Legal Aid Act 1978* (Vic).

17 Australian Bureau of Statistics, *Offenders, 2011-12* <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4125.0main+features5310Feb%202014>.

18 Australian Bureau of Statistics, *Gender Indicators, Australia, Feb 2014: Imprisonment Rates* <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4125.0main+features5210Feb%202014>.

19 Waring, above n 5.

20 Australian Law Reform Commission, above n 1, ch 10.

21 Ibid.

Kate is a good example of this. Her economic dependence created the foundation for sexually transmitted debt and her eventual loss of financial freedom. The 'benchmark male' is not only blind to this as a lived disadvantage, but is also unable to conceptualise economic disadvantage as equivalent to the loss of liberty effected by a sentence of imprisonment. Yet both situations stop the affected person being free to participate in the community.

It is interesting to note that even though a litigant may qualify for Legal Aid assistance, not all of the legal process associated with their case will be resourced. A common example of this is an application by the assisted person for an adjournment that is not funded by Legal Aid.[22] This often happens when the litigant has taken some time to find a lawyer and has applied for at least one adjournment in the meantime.[23] The effect of this limit to the funding model is that a lawyer representing such a client will not be paid for an adjournment application that requires a court appearance. No payment means the lawyer will usually not appear at court. The 'benchmark male' in the form of the legal practitioner is valuable and must always be paid. Of course, criminal defence lawyers are often female, but the point being made here is that these practitioners assume the characteristics of the 'benchmark male' for the purposes of the structural evaluation of how state-based funding support for preliminary criminal justice process should be allocated and used.

Therefore, if the matter is not ready to proceed on the day of listing and an adjournment is required, the client must appear in court unsupported. My observations show this to be a common daily occurrence in the two Magistrates Courts from which data was collected. While this may seem straightforward enough, it does not always work out that way. Concerned with the efficient progression of cases through the justice system, a Magistrate who notes the applicant's case has previously been adjourned will not always be prepared to simply adjourn it once again. This often happens in the

[22] Victoria Legal Aid above n 8, ch 24 sch 1.

[23] The first adjournment of a summary criminal matter can be made administratively, without making an appearance at court.

absence of written correspondence from a law firm to the court on behalf of their client outlining the reasons for the adjournment request. In this situation, the litigant must then respond to questions from the Magistrate about why a further adjournment of the matter is justified. This questioning is often followed by a sentence indication,[24] a mechanism that is designed to allow an offender to weigh up the worth of an immediate plea of guilty, finalising the matter on the same day and saving court time. Thus, the case status changes from adjournment application to a plea of guilty. The legally aided litigant becomes self-represented and loses the benefit of any legal advice or preparation. On the books they have an advocate but in reality they do not.

IV FINES

The imposition of a fine is one of the oldest forms of sentencing disposition.[25] Just like the result in Kate's case,[26] court-imposed fines are by far the most common sentencing disposition in the summary criminal jurisdiction in Victoria.[27] Fifty per cent of the dispositions recorded by the *Court Order Helper* program included a fine component. Yet, as so clearly illustrated by Kate's case, the integrity of this type of criminal sanction is worthy of interrogation and has recently been under the microscope. The Victorian Sentencing Advisory Council (VSAC) has explored the fairness, effectiveness and relevance of fines to the principles of sentencing.[28] These issues relate directly to Kate's story and to many of the other litigants assisted by the *Court Order Helper* program and are discussed further below.

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24 *Criminal Procedure Act 2009* (Vic) div 3.

25 Judicial College of Victoria, *Victorian Sentencing Manual 15* <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#7252.htm>.

26 *Sentencing Act 1991* (Vic) s 49(1).

27 In fact, this is the most common sentence in all Victorian criminal jurisdictions. See Sentencing Advisory Council, *Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria* (Sentencing Advisory Council, May 2014).

28 Ibid. Sentencing principles are discussed further below.

The western suburban area of greater Melbourne is characterised by populations formally recognised to be near the top of disadvantage in the Australian Bureau of Statistics Socio Economic Index for Areas.[29] Nearly all of the self-represented litigants assisted by the *Court Order Helper* program lived in this region, had an income of less than $800 per week and most earned less than $500 per week. Income source was split relatively evenly between social security and earned wages. Yet, in approximately 70 per cent of recorded cases, details about the offender's income scale was neither sought by the Magistrate nor stated by the offender. This means that, in most cases, judicial officers decided on the amount of the fine imposed without any information as to the actual income of the self-represented litigant. In contrast, information about the source of the offender's income was sought in approximately 75 per cent of cases. Extrapolating from this, it seems that Magistrates may make assumptions about income scale based on income source. That is, it seems that a litigant who has a job may be assumed to have a greater capacity to pay than a litigant on social security benefits. Again, this is an instance of the 'benchmark male' stepping into the courtroom and taking on the role of the implicit measure that is an employed man. While Thornton does not describe him this way, the set of attributes associated with this legal character almost certainly includes full time paid employment and he arbitrates from this position. In contrast, many litigants assisted by the *Court Order Helper* program were employed in part-time or casual work, often earning less than or not much more than they would if they were receiving social security benefits. A plea in mitigation prepared by a lawyer will include these details and the court will be pressed to take this information into account, especially when the sentencing disposition includes a fine component. In contrast, the majority of self-represented litigants observed by the *Court Order Helper* program did not volunteer this information to the court and Magistrates did not seek specifics.

[29] Federation of Community Legal Centres and Footscray Community Legal Centre, *Council Debt Collection: Alternatives to Suing Ratepayers in Hardship* (2012) app 1, 40-42.

At this juncture, it is useful to note clause 15.7.2 of the *Victorian Sentencing Manual*, which instructs that:

> Both the Commonwealth and State schemes require that the sentencer take into account the offender's financial circumstances. For the Commonwealth scheme, those circumstances are relevant to the decision to impose the fine: *Crimes Act 1914* s 16C(1). In the State scheme, those circumstances are relevant to the determination of the amount of fine, and the method of payment: *Sentencing Act 1991* s 50(1).
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> For both schemes the court is not prevented from imposing a fine because the financial circumstances of the offender cannot be ascertained: *Crimes Act 1914* s 16C(2); *Sentencing Act 1991* s 50(2).[30]

Section 52(1) of the *Sentencing Act 1991* (Vic) states that when imposing a fine a court 'must in determining the amount and method of payment of the fine take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that its payment will impose'. This legislative framework is supported by case law which states that 'the amount of the fine must be such as will constitute an *appropriate* punishment having regard to the offender's capacity to pay'.[31]

It is arguable whether the Magistrate who imposed the sentence in Kate's case complied with these legislative and common law obligations. He made little attempt to ascertain her full financial circumstances, therefore he could hardly take these into account when passing sentence. Moreover, Kate tried very hard to inform the court of her financial circumstances but the Magistrate would not listen to her, resulting in a sentence that is difficult to describe as 'appropriate punishment'.[32] In such a situation, a lawyer will actively

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30 Judicial College of Victoria, *Victorian Sentencing Manual* (2006-2014) <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#7272.htm>.

31 *R v Sgroi* (1989) 40 A Crim R 197, 200 (Malcolm CJ) (emphasis added). Judicial officers are directed to this case law via the *Victorian Sentencing Manual*, ibid 15.7 <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#7270.htm>.

32 Ibid.

claim the court's time and attention on behalf of their client, ensuring this crucial information is aired. If the outcome is an inappropriate application of the law resulting in an inappropriate sentence, the lawyer will know to lodge an appeal. This sets up a particular disadvantage for self-represented litigants, as little of this knowledge or advocacy skill is available to them. Here, the 'benchmark male' stands in for the absent lawyer, advocating in a powerful yet silent way.

The notion of the 'benchmark male' also moderates the setting of the amount of the fine imposed. This is done in two ways. The first is via the penalty unit maximum contained in the relevant legislation. When a criminal offence is created, Parliament sets a maximum penalty to be applied by courts. The offence in Kate's case attracts a maximum penalty of 30 penalty units and/or four months imprisonment. [33] The decision about the appropriate legislative approach to maximum penalty units is clearly taken by someone in a position of financial advantage, measuring this maximum against their own reality and deciding which amount would most hurt their own hip pocket in order to modify future behavior related to this type of criminal offence. The second part of this moderation process is evident when judicial officers apply their discretion, tempered by the principles of sentencing, as to the penalty they will impose. As discussed above, the majority of cases observed were concluded in less than five minutes and the majority of self-represented cases revealed scant information about the financial circumstances of the offender. Very little time was spent on understanding the full financial position of those appearing before the court. Thus, the 'benchmark male' becomes quite active here, interposing his subjective understanding of relevant financial information so as to inform both legislative sanctions and the court-ordered outcome. Of course, not all offenders who bear the brunt of this are female. The point is that the measure that is the 'benchmark male' subordinates

[33] *Sentencing Act 1991* (Vic) s 30. At the time of this hearing, the value of one penalty unit was $144.36; *Monetary Units Act 2004* (Vic), s 5(3); Office of the Chief Parliamentary Counsel, *Government Gazette*, Reference G 16, April 18 2013.

all who are other than him, most effectively financially dependent women.

V THE SENTENCING EXERCISE

Guidelines for this judicial process have developed over time from common law origins.[34] The focus of this area of law is on supporting the judicial officer in what has been called a process of 'instinctive synthesis'[35] of all of the matters that need to be contemplated, balanced and applied to the sentence decision. Victorian legislation lists sentencing principles, which include: just punishment; deterrence; offender rehabilitation; denunciation of the offending conduct; community protection; or a combination of any of these.[36] While there is debate about whether this process is properly framed as such,[37] it is the intuitive nature of this process and the involvement of the 'benchmark male' in that intuition that is highlighted here. Each of the legislatively specified sentencing principles listed above is interrogated.

Does a fine effect just punishment? It is difficult to find the justice in fining Kate $400, or nearly twice her weekly income. For a Victorian earning the average weekly wage of $1470,[38] this would be equivalent to imposing a fine of approximately $2400 or more than half the maximum fine that could be imposed. Viewed another way, a $400 fine represents approximately 15 per cent of the average earner's weekly income, compared to 160 per cent of Kate's income. This is 10 times the financial impact. If the impact were to be adjusted to make it proportional to Kate's income, the fine would be $38. Moderated by the 'benchmark male', whose employment status

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34 See Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) for a thorough review of sentencing.

35 Ibid 28.

36 *Sentencing Act 1991* (Vic) s 5(1).

37 Mackenzie and Stobbs, above n 34, 28-30.

38 Australian Bureau of Statistics, *Average Weekly Earnings, Australia, Nov 2013: State and Territory Earnings* <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/6302.0main+features7Nov%202013>.

is upper middle class, $400 does not seem unjust. Interestingly, case law states that:

> … courts should avoid giving the impression that a rich person can purchase absolution from a crime for cash or that a poor person can do so by instalments. It is also the case that a fine may be effectively a greater punishment upon a poor person than upon a rich person.[39]

Deterrence, both specific and general is about affecting the future behaviour of the offender and of the community at large. This sentencing purpose seeks to get into the mind of someone before they commit an offence and stop them by making them mindful of the possible punishment. Such logic cannot go to the motivation for Kate's offence. The cause of her offending was economic dependence, which preceded her taking on sexually transmitted debt. It is difficult, therefore, to see how imposing a fine would affect her future responses in the emotionally charged context of financial domestic violence. The same goes for other women in Kate's position, making the aim of general deterrence in this context difficult to activate using a fine as a disposition. In addition, the principle of rehabilitation is a notion that seems completely at odds with Kate's position, as there is nothing about the events that led to her offending that needs rehabilitation in the criminological sense. Her motivation to be financially independent by participating in the paid workforce was what pushed Kate to break the law and this evidences pre-existing self-motivated decisions to extract herself from possible future financial domestic violence, in effect already rehabilitating herself. The 'benchmark male', who is in the position of full-time paid employment, is not able to see this situation from the position of a victim of economic domestic violence in relation to deterrence and rehabilitation. This viewpoint is built into the imposition of a fine as both deterrent and rehabilitation for offenders like Kate and decision-making is blinkered by his inability to see her lived experience.

[39] *R v Sgroi* (1989) 40 A Crim R 197, 200 (Malcolm CJ).

Finally, the purposes of denunciation and protection of the community seem totally at odds with an offender such as Kate. Her decision to drive while her licence was suspended is, in isolation, an action to be denunciated. But, she was actually disqualified as a result of her ex-partner's manipulation of her economic dependence on him, not because she was in the habit of driving while her licence was suspended. This is further underscored by her lack of history for driving offences. In fact, Kate was trying to extract herself from her financial quagmire by getting herself to her workplace, to earn the income that could prevent this situation happening again. These are the actions of someone the community needs to applaud rather than seek protection from.

In order to achieve the purposes discussed above, one element of the sentencing method involves contemplation and application of a hierarchy of penalties. The *Sentencing Act 1991* (Vic)[40] sets out the types of orders available to the court, starting with imprisonment as the most severe sentence that can be imposed, moving in stages to the most lenient options. Community Correction Orders containing unpaid community work[41] are situated one level higher than the imposition of a fine[42] on this scale of seriousness. Criminal legislation generally specifies only the maximum penalty applicable to a crime. The judicial officer is required to come to a decision about how to penalise each offender before them by synthesising sentencing law with all the information before the court about the circumstances of the offending and the personal circumstances of the offender. This complex and highly nuanced process has been described as the 'art' of sentencing[43] and while common law and legislative guidelines exist, there is a great deal of discretion available to judicial officers.[44]

Section 5(3) of the *Sentencing Act 1991* (Vic) states that a 'court must not impose a sentence that is more severe than that which is

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40 *Sentencing Act 1991* (Vic) pt 3.
41 Ibid pt 3A.
42 Ibid pt 3B.
43 Mackenzie and Stobbs, above n 34, 28.
44 Ibid 250.

necessary to achieve the purpose or purposes for which the sentence is imposed', that is, the parsimony principle.[45] The exercise of applying the parsimony principle to arrive at the sentence decision involves the judicial officer taking into account the offender's criminal past as outlined in their criminal record.[46] This history is 'relevant to the weight given to different sentencing purposes and to the assessment of the offender's moral culpability'.[47] The result of this process is a sentence that is designed to fit appropriately within the range of options available to the judicial officer in each case, a just sentence in all of the circumstances. An outcome that is too lenient or too harsh may be appealed and, if successful, further common law guidance is added to the mix.[48]

In Kate's case, as a first offender, the maximum penalty for driving while disqualified was '30 penalty units or imprisonment for four months'.[49] The Magistrate took two minutes to apply the above process and impose a fine, even though Kate tried desperately to inform the court of her personal circumstances.[50] Community work was the sentence outcome that she thought was most appropriate to her circumstances and she was willing to complete this work. What she did not know was that the Magistrate did not view her offence as serious enough to impose the only order available to him to hand down such a sentence: a Community Correction Order with community work as a condition.[51] Such an order would have been his only option to comply with Kate's needs, but in the hierarchy of sentencing options this disposition is a more severe sentence than a fine. Taking into account her lack of criminal history, parsimony would not be achieved.

Again, the 'benchmark male' makes an appearance in the way the sentencing hierarchy is legislatively structured. His values are

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45 Ibid 65-70.
46 Judicial College of Victoria, above n 30, 10.3.7.
47 Ibid.
48 Mackenzie and Stobbs, above n 34, ch 9.
49 *Sentencing Act 1991* (Vic) s 30.
50 Kate's Story as outlined at the end of this article.
51 *Sentencing Act 1991* (Vic), s 48C.

particularly evident in the placement of fines as a less serious disposition than a community work order. Crucially, this figure measures all others against himself as the ultimate benchmark. To situate a fine as a less serious punishment than community work in the sentencing hierarchy reflects a value system that prioritises freedom over money. This can only come from the position of someone who has full-time paid work and earns at least the average weekly income. Australian employment statistics consistently show that men earn more than women and are more likely to be in full-time paid work than women.[52] Measuring against his own circumstances, the 'benchmark male' is unable to see the inherent inequality he builds into the sentencing hierarchy. Not only is a financially dependent and disadvantaged person such as Kate invisible to the 'benchmark male', but her circumstances are also devalued by this invisibility. The sentencing hierarchy cannot contemplate the fullness of her personal circumstances and, in fact, this value-laden hierarchy pushes her even further into disadvantage.

VI INEQUITY

As mentioned above, the VSAC recently published research acknowledging the inherent inequity of court ordered fines.[53] As a result of this research, the VSAC recommended the introduction of new sentencing options and approaches to the management of infringements. These are designed to address current financial penalty inequities in the criminal justice and infringements systems and include:

'Work and development permits':[54]

- This option would apply to court-ordered fines and follows the approach that already exists in other parts of Australia. If introduced in Victoria, a court could impose a penalty on eligible offenders that involves community and/or personal contribution in

[52] Workplace Gender Equality Agency, *Gender Pay Gap Statistics* (2014) 2.
[53] Sentencing Advisory Council, above n 27.
[54] Ibid recommendations 12, 13.

> lieu of a financial penalty. Eligibility for this disposition would be disability, addiction, homelessness or severe financial hardship.

'Reduced penalties in cases of financial hardship':[55]

> - This option would be introduced into the infringements system, allowing the relevant statutory authority to reduce the infringement of a person suffering financial hardship by 50 per cent before the matter goes to court.

The Work and Development Permit Order would sit at the same level as fines in the sentencing hierarchy. So, had the above options existed and Kate had been allowed to speak, she would have been able to access court ordered personal support programs tailored to her needs. She could be ordered to undertake financial counselling or financial domestic violence education and counselling, or she could do appropriate community work. This changes the court intervention in her life from being just another form of financial oppression to something that at least has the potential to be more socially just.

In addition, the 'adjusted penalty for financial hardship' formula would allow the $1700 worth of sexually transmitted debt that Kate was trying to bring to the court's attention to be reduced to $850 before her appearance at court. While this is certainly an improvement, it hardly goes to the heart of the inequity highlighted by Kate's story. It seems that 'benchmark male' reappears here, demonstrated by an inability to fully comprehend the circumstances of a victim of financial domestic violence, how this connects to infringement acquisition and how best to introduce effective structural change. A really progressive approach would introduce a special financial hardship category that applies to victims of financial domestic violence. This could be a court-based application, supported by evidence from relevant expert support workers, such as financial counsellors and psychologists. A court, satisfied that the applicant fits this definition, could be empowered to completely waive the total infringement debt.

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[55] Ibid recommendation 39.

VII HUMAN RIGHTS

Victorian Toll & Anor v Taha and Anor; State of Victoria v Brookes & Anor[56] ("*Taha*"), a recent decision of the Victorian Supreme Court of Appeal discussed the impact of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("*Charter*") on the operation of all other Victorian legislation. In this case the court states:

> … it is clear from the terms of s32(1) of the Charter of Human Rights and Responsibilities Act 2006 … that relevant Charter rights must be taken into account as part of the interpretive process mandated by s32(1) in determining the proper construction of any enactment …[57]

The right to a fair hearing[58] is a specific focus of this decision. This case is concerned with imprisonment upon failure to pay fines and human rights considerations related to such a sentence. The Court of Appeal considered whether the rights contained in the *Charter* should be in the mind of a judicial officer when performing the sentencing task. *Taha* makes overt the link between the concept of 'special circumstances',[59] which could be considered as part of a sentence imposed under the *Infringements Act 2006* (Vic), and the *Charter* right to a fair hearing. The court found that the *Charter* imposes an obligation on the judicial officer to ensure the court is fully appraised of any 'special circumstances' so as to protect an accused's right to a fair hearing. The *Sentencing Act 1991* (Vic) sets out an obligation for the court to inform itself of the financial circumstances of an accused before handing down a sentence with a fine component.[60] *Taha* sets up scope to argue the need for a conscious nexus between an offender's financial circumstances as 'special circumstances' and the right to a fair hearing. Yet, this connection is not evident in *Court Order Helper* research. As Kate's story illustrates, the links between *Charter* rights and the operation of the *Sentencing Act 1991* (Vic) do not always appear to be in the minds of Magistrates dealing with self-represented litigants.

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56 [2013] VSCA 37.
57 Ibid 27 (Nettle J).
58 *Charter of Human Rights and Responsibilities 2006* (Vic) s 24.
59 *Infringements Act 2006* (Vic) s 160.
60 *Sentencing Act 1991* (Vic) s 52(1).

While *Taha* is concerned with a specific piece of legislation, it does stand for the more general idea that *Charter* rights are central to our justice system, having at its heart consideration of the concept of a fair hearing. So, how would 'benchmark male' read *Taha*? Would he interpret the notion of a fair hearing as being just as important in the context of minor criminal matters like the one in our case study as it is in the context of the possibility of loss of liberty? Does the legal right to a fair hearing contain inherent qualifications? The discussion above indicates this is absolutely the case, yet *Taha* provides scope for 'benchmark male' to rework his thinking.

VI CONCLUSION

Twenty years ago the Victorian Law Reform Commission conducted an extensive investigation into gender bias in the law.[61] This review did not cover the criminal law jurisdiction and perhaps this was because the vast majority of criminal offenders the courts deal with are male.[62] In the intervening years, there has been more research into the criminal justice system and women offenders. Female offending, responses to female criminal behaviour together with the patriarchal underpinnings of criminal justice systems have been explored.[63] Yet, Kate's case, *Court Order Helper* research and the above analysis show significant gender bias still exists in the management of summary crime in Victoria's justice system. The subordination and invisibility of the female perspective in this area of criminal law demonstrates the existence of and considerable power wielded by the 'benchmark male'. He looms large in creation and management of the structures and processes of summary criminal justice, as well as moderating access to justice for self-represented women offenders, entrenching existing expressions of gender bias.

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61 Australian Law Reform Commission, above n 1.

62 Ibid.

63 See, eg, Gill McIvor (ed), *Women Who Offend* (Research Highlights in Social Work eBook, 2004); Judith Warner, *Women and Crime* (ABC-CLIO, 2012).

Kate's Story: *'I didn't want a fine. I just can't pay this'.*[64]

Matter: Plea of guilty to one charge of driving while licence authorisation was suspended.
Sentence: $400 fine, to be paid via an instalment plan of $50 per month.
Time in court: Two minutes.

After hearing the police summary of the events upon which the charge was based, the Magistrate asked Kate if she was pleading guilty. She said 'yes' and he announced that he intended to impose a fine as penalty. Kate began to speak to the Magistrate but he cut her off. He told her he did not need to know anything else; that this was a matter that attracted a fine as an appropriate sentence and that was his intention. He asked her if her income came from social security, whether she needed time to pay, or maybe wanted to pay via an instalment plan. Kate said 'yes' and held up a wad of papers she had in her hand. Again, she tried to speak. The Magistrate told her he was not interested in the paperwork, handed down the sentence and ordered that the matter be closed. The whole case took just over two minutes of the court's time.

Kate was 20 years old. She was very frustrated when she left the courtroom, as she had not been allowed to tell her story. She wanted to bring the court's attention to the issues that were important to her. The wad of paperwork in her hand consisted of outstanding traffic infringement notices, involving fines that totalled more than $1700, an amount she already could not pay. She was trying to tell the Magistrate that she did not want another fine to add to this total. These fines were not her own. Her ex-boyfriend had used her car and committed the driving offences that attracted the infringements. As he was employed and used the car to travel to and from work, he needed to be able to continue to drive. His income was the main household income. He pressured her to take the demerit points associated with these offences so he did not lose his licence and his ability to travel to work. She agreed and lost her licence as a result. Soon after these events, she ended the relationship. He was gone but she was left with his 'sexually transmitted debt'.[65]

On the day of her offence, as there was no public transport to her home, Kate took the risk of driving her car, even though she knew she was not authorised to do so at the time. She needed to travel to work, nobody else was at home to drive her, there was no public transport in her area and she could not afford a taxi. Since then, she had become unemployed. At the time of her court appearance Kate was in receipt of unemployment benefits, which gave her an income of approximately $256 per week. She lived on a semi-rural property, renting in this area because she could not afford a suburban rental property and was sharing this accommodation with two family members, both of whom had recently moved in to support her financially. Before this, she shared the house with her current partner, but he had recently been incarcerated. This partner was in full-time employment before he was taken into custody and they both relied on his income to pay for life's necessities.

Neither Kate nor her legal matter qualified for Legal Aid assistance.[66]

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64 Identity altered, Werribee Magistrates Court, November 2013. This case study and the observations throughout this discussion are taken from notes recorded both in open court and during assistance provided outside the courtroom.

65 Australian Law Reform Commission, above n 1, ch 13.

66 Victoria Legal Aid, above n 8.