TRUE CRIMINAL LAW ETHICS

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What duties do legal academic authors owe to the people involved in the cases they write about? This article explores recent suggestions on how to answer this question and draws on the author's experience in writing legal academic work – a true crime book on a semi-famous murder trial and a rape law article that narrated the facts of little-known cases in detail – to explore two particular dilemmas. First, when we write about living people, should we contact them as journalists do, in order to check details and provide them with a right of reply? Second, when we write about crime victims, should we write about matters that, if they were to read what we wrote, would likely distress them? New ethics guidelines suggest answers to these questions that many criminal law academics will find uncomfortable.

In October 2017, *TEXT* published a special issue, *Writing Death and Dying*, the output of a conference the previous year by the Australasian Death Studies Network.[1] Alongside articles on nurses writing about patients, children writing about parents, advertisers writing about funerals, eyewitnesses writing about accidents and novelists writing about beaches is a paper by legal academic Rachel Spencer about her in-progress book, *The Emily Perry Stories*.[2] The name Emily Perry is well known to Australian evidence law academics from a 1982 High Court ruling overturning her conviction for poisoning her third husband, because her jury shouldn't have been told of three other deaths in her life.[3]

In her *TEXT* article, 'Dignifying the poisoned chalice: the ethical challenge of using archival material in a narrative about death and arsenic', Spencer writes of her visit to the Public Records Office of Victoria to look at a coronial file involving Perry's second husband, a police officer, who – like her brother and her third husband – was poisoned by arsenic:

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[1] Donna Brien (ed), 'Writing Death and Dying' (2017) 45 *TEXT*, <http://www.textjournal.com.au/speciss/issue45/content.htm>.

[2] Rachel Spencer, 'Dignifying the poisoned chalice: the ethical challenge of using archival material in a narrative about death and arsenic' (2017) 45 *TEXT*, <http://www.textjournal.com.au/speciss/issue45/Spencer.pdf>.

[3] *Perry v R* (1982) 150 CLR 580.

> When the file of the inquest into the death of Albert Haag arrived at the counter, I carried its plastic-sleeved contents to one of the long brightly-lit tables in the public viewing section… Amongst this bundle of officialdom was another official, yet intensely personal document. It was a black and white photograph, professionally developed. It was a photograph that seemed so intensely private that I felt I should not be looking at it – a picture of someone's brother, son, husband, friend, mate, daddy. It was a closeup photograph of Albert, dead. I found this photograph intensely confronting. I quickly turned it over, unable to look at it, because suddenly this narrative was not merely a sensational story about arsenic and murder. It was about a real person, a man who had lived an unsensational life, but who had, in death, become a headline.[4]

Spencer's paper piques my interest for many reasons. I've visited those same archives in North Melbourne many times in recent years (mainly for a teaching purpose – to source material for evidence exams) and have seen similar photos (and worse – plastic bags containing nooses, bloody t-shirts and the like) in similar files, all part of an extraordinary open archive of Victorian coronial matters from the 1960s through to 1986. Indeed, around six months previously, I saw the very photo Spencer described (and took a photo of it, though I left it out of the evidence exam I set on the case.) And, like Spencer, I'm researching a book on the Perry case.

The question Spencer goes on to pose – how to write 'ethically' about such matters – is one I've angsted over a lot, because I now write this sort of thing a lot. In the last decade, I've written academic articles on a couple of celebrated Australian cases (the Falconio backpacker investigation, the Chamberlain and Farah Jama miscarriages of justice) and some very fact-heavy analyses of High Court judgments on topics like similar fact evidence, forensic evidence and constitutional criminal law. More recently, I've shifted to writing books on semi-famous cases for semi-academic audiences.

This paper is my own navel-gazing on the question Spencer raised about her in-progress book:

> In writing and reading about death and dying, it is easy to become side-tracked by the 'whodunnit' aspect of crime writing and the minutiae of the legal principles involved in a criminal trial. In writing about a series of deaths that perhaps were murders, a whole raft of ethical issues becomes important.[5]

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[4] Spencer, above n 2, 5-6.
[5] Spencer, above n 2, 5.

By 'a whole raft of ethical issues', Spencer is not seeking to engage with the philosophical literature on ethics, but rather what people in adjacent fields to the true crime genre – lawyers, journalists, doctors and academics – would classify as dilemmas about 'what is right, fair, just or good, about what we ought to do'.[6]

Here, I examine a version of this question in relation to two of my past works, where I worried about similar issues and never satisfactorily resolved them. As will be clear from the second example below, I think Spencer's question has wider import for many criminal law academics.

I THE ETHICS OF CANNIBALISM: WHAT DO ACADEMICS OWE TO THE LIVING?

Spencer, like me, willingly embraces the term 'true crime narrative' for her writing (in addition to the sunnier genre of 'life writing'), despite the pejoratives associated with the true crime label:

> The true crime genre has been said to rely 'simultaneously upon a rhetoric of truth claims and the activation of myth, superstition, gossip and story as its narrative strategies'. As a writer, I admit that I see the myth, superstition and gossip as rich pickings for a potential bestseller. As a lawyer, I see my role as exposing them for what they really are, and allowing a critical analysis of these various narratives to show the reader the different contexts in which these different narratives have been able to flourish. But I also seek to explain the legal context in which these narratives occurred.[7]

As she notes, she and I join such excellent company as Truman Capote, Peter Carey, Helen Garner and the producers of *Underbelly*, but with the difference that we write not as 'outsider' journalists or novelists but rather insiders with legal knowledge:

> My view is not from the public gallery. It is from the bar table where the lawyers sit. I can write as if seeing the story through this lens, not because I was there, but because I am able to explain and imagine how and why the lawyers said what they said and did what they did.

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[6] Ibid.

[7] Spencer, above n 2, 3 citing Rosalind Smith, 'Dark Places: True Crime Writing in Australia (2008) 8 *Journal of the Association for the Study of Australian Literature* 17, 18.

She doesn't mention it, but a key pathbreaker for legal academics entering this particular field is Britain's and later Michigan's AWB Simpson, legal historian and author of 1984's *Cannibalism and the Common Law*,[8] a deeply researched account of *R v Dudley & Stephens*. Simpson's book not only gained a measure of popular success but also lent (some) academic credibility to endeavours such as mine and Spencer's.[9] In writing my recent book on 1994's *R v Young*,[10] where some jurors used a makeshift Ouija board at their one night at a Brighton hotel during a murder trial, I consciously attempted to write a sort-of *Spiritualism and the Criminal Law*.

Being 'academic', while perhaps necessary, isn't sufficient. Spencer sees an external rule as also regulating her work:

> I am a qualified legal practitioner – an officer of the Court. Upon being admitted to practice, I swore a public oath that I would
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> > diligently and honestly perform the duties of a practitioner of this [Supreme] Court [of South Australia] and will faithfully serve and uphold the administration of justice under the Constitution of the Commonwealth of Australia and the laws of this State and the other States and the Territories of Australia.
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> Inherent in this oath is the acknowledgement that I will respect the legal profession and uphold its ethical traditions and not bring the profession into disrepute. In writing this book, if I somehow bring the profession into disrepute, I could be found guilty of professional misconduct and be struck from the roll of legal practitioners. I have had, therefore, to be mindful of the issue of whether questioning the adversarial system and analysing the role of each character in this very high profile case (in which many of the legal characters are still playing important roles in the legal profession) might be considered disrespectful or unprofessional.[11]

I'm an Australian lawyer and dimly recall making a similar affirmation in the Supreme Court of Victoria in mid-2005 – I think I promised to 'well and truly demean myself'! – but, unlike Spencer, I don't see that promise as

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[8] Alfred Simpson, *Cannibalism and the Common Law* (University of Chicago Press, 1984).

[9] For a discussion of 'cannibal discourse', including Simpson's account (ibid) of 'frontier' and 'maritime' cannibalism, see Katherine Biber, 'Cannibals and colonialism' (2005) 27 *Sydney Law Review* 623.

[10] Jeremy Gans, *The Ouija Board Jurors: Mystery, Mischief and Misery in the Jury System* (Waterside, 2017).

[11] Spencer, above n 2, 4, quoting the Courts Administration Authority South Australia (CAASA), *The oath or affirmation of admission:* the Supreme Court practice directions to operate in conjunction with the Supreme Court civil rules (2006), part 1 – practice direction as amended at 1 April 2012.

imposing any limits on my academic writing. Being an 'officer of the court' in no way limits my ability to speak or write, at least to appropriate academic standards, about the legal system and to reach any good faith conclusion, including a conclusion that devastates the whole justice system or some participants in it. (For what it's worth, my most distinctive take on the Ouija board jurors is to not treat them the way most lawyers do: as some sort of punchline about the justice system.) If any of that's a breach of my duty to the court, then I'll welcome being tossed out of the lawyers' club.

Spencer highlights three other legal rules that apply to everyone:

> Firstly, I may not ask the lawyers involved to breach client confidentiality… Secondly, I cannot be in contempt of court… A third issue relates specifically to the jurors who sat through the trial and found Emily Perry to be guilty…. Speaking to jurors about a case is specifically prohibited by law (*Criminal Law Consolidation Act 1935*, s 246).[12]

I agree that these rules can limit academic research, but I think their impact on my own research and writing choices is limited. I see the confidentiality issue as the lawyers' lookout (they're professionals after all) and, as with Spencer and Simpson, I've so far only written and plan to write about court proceedings that are long over. As for jurors, South Australia's prohibition is indeed broad, applying to all past and future trials in any Australian jurisdiction, but it's narrower than Spencer describes. It only bars speaking to jurors with the intention of publishing their identities or things said in the course of their deliberations, so she and I can still speak to a juror from the Perry trial off the record about anything, or publish many aspects of their experiences and memories.[13] (The events in Brighton's *Old Ship* – where Stephen Young's jury were accommodated overnight and where four of them performed a late night séance in one of their rooms – that I cover in my book were famously, albeit somewhat controversially, ruled outside the UK's equivalent prohibition.) My broad point is that our legal expertise makes us particularly well placed to navigate this section of the true crime writing rulebook.

But Spencer's main concern, like mine, is not legal rules, but rather ethical ones:

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[12] Spencer, above n 2, 4-5.

[13] By contrast, s 68A *Jury Act 1977* (NSW) and s 78 of *Juries Act 2000* (Vic) bars merely asking a juror about her deliberations.

> I have been very conscious of conducting this research in an ethical manner, which requires a level of attention and consideration beyond technically ticking the requisite boxes on the university's ethics application form. It means conducting research that will do no harm.[14]

At least in relation to the external ethics rules that apply in Australian universities, this is an overstatement. The rules of human research ethics do not apply to all research conducted by university academics, only 'human research' (a tricky term that I'll consider further below). And, while they certainly do bind all university academics (amongst others) and go well beyond 'box ticking', they do not require that we 'do no harm'. Rather (amongst other things), we must weigh any risks to humans against any benefits and subject that assessment to scrutiny by a (somewhat) independent body.

Anyway, Spencer goes on to devise her own specific ethics rule, riffing off the usual deficits of popular crime writing (true or otherwise):

> While works of true crime may use the literary techniques of crime fiction to enhance suspense and enliven characters, an underlying ethical brake needs to be applied to true crime writing to prevent acceleration into the territory of giving offence and reviving pain for those whose lives have been affected.[15]

For Spencer, applying this 'brake' comes down to some more conventional writing goals:

> In writing about the deaths of three men, and the near-death experience of another, my own text must balance the trauma experienced by those who died, the presumption of innocence due to my protagonist, and a conscious avoidance of clichéd stereotypes about the use of poison.[16]

In my view, none of these things differ especially from the usual goals of good, or at least good academic, or at least good legal academic, writing – the trick is all in the 'balance' and terms like 'protagonist', 'clichéd' and 'experienced'.

These are all matters on which reasonable minds can differ. A recent non-academic example of a true crime narrative that troubled me is the ABC's *Trace* podcast, which reinvestigated a decades-old murder.[17] *Trace* was extremely

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[14] Spencer, above n 2, 5.
[15] Ibid 10.
[16] Ibid 8.
[17] Rachael Brown, *Trace* (Radio National, 2017),' <http://www.abc.net.au/radio/programs/trace/>.

successful in terms of audience reach, critical reception, media awards and – most importantly – prompting a police and (perhaps) coronial reconsideration of an old, unsolved case. But it is also promoted as an exemplar of ethical research by reporter and presenter Rachael Brown, who, like Spencer, defines her ethics in part as a response to problems in her medium:[18]

> "It's a really fine line and a fine balance we have to strike between being forensic but also being compassionate," Brown told Guardian Australia. "I was acutely aware of the kind of criticisms that were levelled at Serial. There were comments by Hae Min Lee's brother that people were forgetting that it was their life, it wasn't a story. So I had kind of the benefit of hindsight with a lot of the discussion that went on there."

(*Serial*, the first runaway success of the podcast medium, was a lengthy analysis of a murder in Baltimore in 1999, including extensive analysis of whether the conviction of the victim's ex- boyfriend for her murder was a miscarriage of justice.)

In presenting *Trace*, Brown said that she felt a deep responsibility to the victim's sons, who she was close with, to 'get this right' and avoid voyeurism.[19] She adds:

> I'm really proud of Trace. I think it finds a good balance, being both forensic in its investigation, and compassionate towards those caught up in this tragic case… It was important to me that fighters' voices shone through; that I gave Adam James the opportunity to tell his own story of his abuse, despite his difficulties communicating (he has cerebral palsy and tourette's), instead of leaving it to others to speak for him. This took a lot of time, and tears (both his and mine), but the podcast is all the more powerful for it, and all the more empowering for him. This podcast was also a chance for other abuse victims of the Catholic Church to tell their stories, in a different medium of podcasting, which is intimate, affords anonymity when needed, and isn't as intimidating for people as TV which requires a camera in their face.[20]

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[18] Calla Wahlquist, 'Trace: how the hit podcast is making waves in an unsolved murder case', *The Guardian* (online), 13th July 2017 < https://www.theguardian.com/tv-and-radio/2017/jul/13/its-brought-me-undone-rachael-brown-on-maria-jamess-and-the-podcast-trace >.

[19] Radio National, 'What are the ethics in true crime podcasting?', *Tell me straight* (online), 23 June 2017, (Yasmin Parry and Will Ockenden) <http://www.abc.net.au/radio/programs/tell-me-straight/ethics-of-true-crime-journalism/8642260>.

[20] Sophie Tedmanson, 'Meet the woman behind Trace, Australia's newest podcast sensation', *Vogue*, 30th June 2017, <https://www.vogue.com.au/culture/features/meet-the-woman-behind-trace-australias-newest-podcast-sensation/news-story/2651dd2a89389a444a4e8079943d7d12?>.

I agree with Brown that diverse victims' stories and voices are necessary parts of true criminal law ethics. But, for me, this goal is far from a comprehensive account of the ethical issues in such cases and its pursuit can itself be unethical if taken to a fault. Spencer puts the point this way in her article. Quoting Janene Carey, who wrote a book with her mother on palliative care, she says:

> Given that my work 'draws upon narratives of lived experience' writing about Emily Perry means I must decide whether I will provide a voice for everyone involved in each of the stories that made up her life, or 'grapple with the issue: whose voice is allowed to speak in the final text?'[21]

Brown's podcast – especially its middle two episodes – consisted of a largely unsceptical account of the theories of the victim's two children about the death of their mother, centring on two dead priests. While Brown's research identified strong evidence of the priests' paedophilia, the podcast provided only weak (or, in the case of one priest, no) evidence of their involvement in the murder. Despite this, the priests were the focus of half of the podcast, while many other suspects in the case were given relatively little attention. In my view, while this approach served Brown's victim-centred ethics, it fails to strike a balance with the other ethical duties listed by Spencer (innocence, avoidance of cliché) and the reputational interests of deceased people and (something Spencer leaves out) Brown's audience. Indeed, *Trace's* audience was not told of her particular approach to ethics until late in the podcast. When she was later asked about how she maintained her independence given her devotion to the crime's victims, she gave a non-answer: that solving the crime was the police's job, not hers.[22]

Even putting aside these difficult questions of balance and degree, I struck a practical problem in meeting Spencer's particular goal:

> My challenge is to write a book which maintains the fascinating reality of a remarkable story, while presenting the narrative with compassion and preserving the dignity and humanity of all the characters.[23]

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[21] Spencer, above n 2 7, quoting Janene Carey, 'Whose story is it, anyway? Ethics and interpretive authority in biographical creative nonfiction' (2008) 12 *TEXT* < http://www.textjournal.com.au/octo8/carey.htm>.

[22] Parry and Ockenden, above n 19.

[23] Spencer, above n 2, 9.

Here, AWB Simpson had an advantage: all the characters in his story of cannibalism and its aftermath are (and were, when he wrote his book) long dead. Spencer (and, in my next book, I) have much the same advantage: virtually all the characters in the Emily Perry story are dead (though some side characters, notably ex-pathologist Colin Mannock, and relatives, such as Perry's four children, are still alive.) Were the main characters alive, then we would have to worry about the law of defamation (which Emily and Ken Perry were very willing to use in their lifetimes.) And, we would, I think, face a much sharper ethical dilemma.

My Ouija board book likewise concerned a fairly old case – dating mainly to 1993 and 1994 – a period at the dawn of the internet that poses some fascinating archival research difficulties. But those years are still sufficiently recent that many of the (relatively young) key characters – the convicted murderer, the thirty-six jurors empanelled at various times to try him, most of the key police investigators, lawyers and judges, academic and media commentators and relatives of the two murder victims – are still alive. This adds a significant additional dimension to the ethical concerns identified by Spencer. In addition to doing right by the dead, I also faced the distinct possibility that any of these people will read my book and be distressed, offended or harmed by it. To take just one example, how will Stephen Young himself feel about my book's twin conclusions: the Court of Appeal was wrong to allow his first appeal (which rested on the claims about the jurors' use of a Ouija board) and was right to dismiss his second appeal (which rested on claims that his retrial was both procedurally flawed and based on insufficient evidence?) Similar issues arise from my pointed, passing criticisms of judges, lawyers and even some statements by relatives of the victims. Is my self-assessment that my research in these areas was careful, thorough and (except for Young) highly sympathetic to all involved enough?

The fact that so many people I discuss in my book are alive presented me with a further option: to communicate directly with them during my research. But that choice was not one I welcomed and indeed was a dilemma that I struggled with. In my book's 'afterword', I explain why I decided not to exercise that option:[24]

> There are many living people who were involved in the Ouija board case, either personally, or as investigators, or in the legal proceedings. These likely include

[24] Gans, above n 10.

> most of the jurors (only one of whom has been publicly identified), Stephen Young, the families of Harry and Nicola, the various lawyers and investigators, and many other witnesses. I have not tried to interview any of these people. I am an academic, not a journalist, and lack the expertise to locate people who do not have public profiles, propose, arrange and conduct interviews (especially with people traumatised by crime) or to meet journalistic ethical standards (such as giving people opportunities to respond to claims by others.) I also suspect that most of these people would not want to speak to me about the case, either for professional reasons or personal ones, especially as my agenda as an academic differs from the understandable interests of those closely involved. Indeed, because Young is continuing to pursue avenues for establishing his innocence, I doubt that the parties in the legal proceedings would be willing to speak with me or make non-public documents available.

In short, I (in my judgment, anyway) lack the skills necessary to interview most living people or to deal with the consequences of what they say or refuse to say. Hence, the book I wrote was exclusively based on public documents (notably public court records and newspapers.) In partial compensation, I also made a stylistic decision to frame each chapter around a public statement of key characters – two jurors, a chief justice, an academic commentator, one of the victim's relatives and court accounts of statements by the accused and (via Ouija board, alas) one of the victims.

But, as the afterword notes, my decision to not interview carries a significant cost: 'I am conscious that not pursuing these [live] sources may deny me insights or corrections of errors.' Unfortunately, these costs were not hypothetical. Shortly after publication, I was made aware of some factual errors in the text that I could readily have corrected had I interviewed one person I discuss, a solicitor (who I had some brief contact with while seeking a journal article he wrote.) While I could (and did) explain how the errors were sourced from public documents (and also arranged for their correction in electronic and subsequent paper editions of the book) and they were by no means crucial to or emphasised in the book, it is clear that they nevertheless meant a great deal to him (especially my wrong statement that his marriage had failed, whereas he and his wife had only temporarily separated.) He has since made it clear that he is less concerned about the factual errors than my decision to include that part of his story in my narrative, given that the details were sensitive, personal matters that he understandably wished to leave in the past. While again I believe my approach was defensible – those personal matters became a central appeal ground in Young's second appeal, and my presentation

of those issues was more sympathetic to him and provided more context than the Court of Appeal judgment – I have only my above explanation as an answer to his pointed query: why didn't I give him a prior chance to present his viewpoint prior to publication?

So, one ethical dilemma posed by true crime narratives that incorporate still living characters is about whether an academic entrée into this particular field carries with it an obligation to comply with at least some of the norms of journalistic ethics, such as ones about always checking public records and analysis with living sources where possible, and always offering fair opportunities to respond to criticism or make the case for privacy. In my case, my view that I lack the capacity to comply with these norms (e.g. interviewing a convicted murderer who maintains his innocence, or even contacting grieving relatives at all, and 'fairly' incorporating their responses into my book) means that the dilemma really comes down to a narrow choice: as an ethical but (journalistically) untrained academic, should I be writing true crime narratives at all? As will be seen next, that's a question that extends beyond traditional true crime works like *The Ouija Board Jurors*.

II THE ETHICS OF #YOUTOO: WHAT DO ACADEMICS OWE TO VICTIMS OF CRIME?

All of this might seem like an object lesson on (one of) the many perils of venturing outside of the academic publishing field. Spencer's analysis turns largely on the need to fight against the various unhappy aspects of the true crime genre, the stuff of magazines, books and (lately) podcasts. But I'm not convinced that the nature of the publishing field is determinative of legal academics' ethical obligations to the 'characters' whose stories we choose to write about. While criminal law academic articles come in a very many different forms, here I'm concerned with articles that provide a detailed treatment of one or more legal decisions, including the underlying facts and surrounding circumstances. Are differences in scale, style, audience and path to publication enough to wholly distinguish these articles from the kinds of works Simpson, Spencer and I write?

To flesh out this point, I'll focus on an especially sharp instance of this problem: a legal academic deep dive into a court decision or decisions about sexual violence. There are very many examples of this in the extensive legal literature on rape law, ranging from early pieces puzzling over curious cases of

the past to detailed critiques of the facts and reasoning of key precedents, or more recent pieces picking over the blind spots and nuances of contemporary discussion of an account of sexual assault. What do we academics owe to Vera Howley, raped twice at the age of 16 in 1922 by her church choirmaster Owen Williams under the pretence that he was 'mak[ing] an air passage'? Or to Daphne Ethel Morgan, who in 1973, aged 34 or 35, was dragged from a room in a Staffordshire air force base she shared with her 11-year-old and raped by four officers, including her then husband William, while screaming for her 12 year-old to call the police? What about 23-year-old New York photographer 'Grace', whose account of coerced sex with comedian Aziz Ansari late last year was picked over online for days (presumably rich fodder down-the-track for legal academic analysis of #metoo, amongst other things)?

These are all examples criminal law academics know well. At the same time, though, we don't really know that much at all about the (non-celebrity) characters. Rather, all we know about them is set out in public documents: a 1923 England Court of Criminal Appeal judgment,[25] 1976 judgments of England's Court of Appeal and House of Lords,[26] and a recent article by journalist Katie Way published on the *Babe* website.[27] But, as my summaries above pointedly reveal, we know all of the rape complainants' years of birth and two of their full names. That is likely enough to find more information about all of them, including the 77-year-old former Mrs Morgan, who is probably still alive – even Grace's identity was speedily outed and doxxed online.

Much like the photo Spencer saw of Albert Haag, these details more than suffice to humanise these complainants. Should their obvious humanity temper what we write about these cases, or even require us to think twice about writing about them at all? If we do write, what are our obligations beyond the important but rather banal expectation that we will write respectfully about victims (or alleged victims) of trauma? Are our obligations lessened or even removed if we do the usual academic thing: limit our discussion to the available public documents, especially documents that were official products of official proceedings (or, in the case of the Babe article, were seemingly published with the consent of the victim?) I'm sure the answer to these questions is (as usual)

[25] *R v Williams* [1923] 1 KB 340.
[26] *DPP v Morgan* [1976] AC 182.
[27] Katie Way, 'I went on a date with Aziz Ansari. It turned into the worst night of my life', *Babe* (online), 14 January 2018, < https://babe.net/2018/01/13/aziz-ansari-28355>.

that it depends – on the case, the documents, the timing, the complainant, the article, the publishing venue and the writing.

So, let me pose a much more detailed example from my own writing. I spent the middle of the last decade studying how police gather DNA from suspects on the ostensible basis of consent, research supported by an ARC grant. One of my lines of inquiry was, naturally, published voir dire rulings on the legality and admissibility of such sampling, made in the context of criminal prosecutions. As it happens, the three detailed early rulings were all from the same small jurisdiction (the Northern Territory, in part because of underdeveloped statutes) and all ruled that DNA sampling was consensual, legal and admissible.[28] I wanted to know more about the police investigations in these cases, so used my ARC funding to purchase all relevant transcripts relating to the three cases from the Northern Territory's courts. I received hundreds of pages of transcripts, including hearings and evidence on the voir dire, evidence on the committal and evidence from the two cases that went to trial (including one that went to two trials.)

As a result, I not only learnt a fair amount about the investigations beyond what is revealed in the voir dire judgments, but also a lot about the underlying alleged offences, notably the fact that, after each DNA sample was ruled admissible, the defendant admitted to sex with the complainant, but claimed consent, in each case ultimately successfully. These parallels (of sorts) provided the central hook for my resulting article, which compared the evidence and arguments on consent to DNA sampling in each case with the evidence and arguments on consent to sex, drawing conclusions about the reform of DNA sampling law, while making observations about sexual consent along the way (and noting how the two issues can interact.[29]) For what it's worth, I endeavoured to write sympathetically and contextually about each case, and also clearly noted the many differences between non-consensual DNA sampling and rape.

As criminal law academic articles on decided cases go, my article relied on a much more detailed set of official documents than is typical. That meant that I knew much more about the three rape prosecutions than is usual, including detail about the people involved (complainant, defendant, witnesses, investigators), the alleged actions of all before, during and after the alleged rape,

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[28] *The Queen v Reuben James Jones* [1998] NTSC 88; *The Queen v Mellors* [2000] NTSC 41; *R v Braedon* [2000] NTSC 68.

[29] Jeremy Gans, 'Much repented: consent to DNA sampling' (2007) 30(3) *UNSW Law Journal* 579.

the words spoken at various times (when the crime happened, to the police, to the court.) Much (but not all) of this detail was central to my analysis of the twin issues of consent in each case. Moreover, it served a stylistic goal, which was to allow me to present the cases in a narrative format, telling various 'stories' in parallel, including stories of rape, something I deliberately did to break away from the usual emphasis in criminal law articles on post-conviction appellate procedure, to 'disclose how narrow and contested are law's fact-finding processes, and how vulnerable these might be when situated outside the protective ambit of evidentiary rules'.[30]

Katherine Biber discusses the various stylistic goals that might be brought to bear on criminal evidence:[31]

> Cultural users of criminal evidence give us new concepts for thinking about this material. They may use evidence aesthetically, historically, politically, theoretically; they may see value in abstracting a single moment from an evidentiary narrative and – redacting context and explanation – working with that; they may be looking for evidence of something else – a lost history, everyday habits, even psychoanalytic diagnosis. No longer seeking to resolve facts in issue, cultural users of criminal evidence provoke other responses: affect, arousal, curiosity, nostalgia, pleasure. Furthermore, and which is explored in more detail in the next section, post-trial deployments of criminal evidence create a conflict between existing concepts in the administration of criminal justice, between transparency and secrecy, between the ideals of open justice and the protection of confidences.

Here's an example of how one narrative began in my article:

> …[A]t the other end of the Northern Territory, Rebecca woke her husband at 3am to tell him that 'someone has been … trying to make love to me.' Her husband stood at the top of the stairs and yelled 'Get the gun!', confusing Rebecca. The young Darwin family did not own a gun. Instead, she checked on her sleeping children, phoned the police and began to pray. On that Sunday morning in mid-June 1990, Rebecca was already contemplating an issue that she would later identify as '[w]hether I had consented to the person, or given permission to the person'.

The article gradually revealed that there was more to this case than a rape by a burglar. At first, the narrative resembled the coverage of a classic legal

[30] Katherine Biber, 'In Crime's Archive: The Cultural Afterlife of Criminal Evidence' (2013) 53 *British Journal of Criminology* 1033, 1045.
[31] Ibid., 1038.

precedent, in that the complainant said (to her husband and the police) that she mistakenly thought the intruder was her husband. Then, it came to resemble a contemporary discussion of coercive sex, because Rebecca's detailed account described what was clearly an unpleasant and possibly a non-consensual sexual encounter, no matter who the other person was. Finally, it ultimately took what could be considered a 'bizarre' turn, when the complainant gave a new account during the committal hearing, when she revealed to prosecutors that she had knowingly consented to sex with a stranger. I saw much to discuss in these accounts, pointedly noting that all of them revealed the acquitted accused to be a dangerous and unpleasant man (and, as per the article's central point, drawing some parallels to the deceptive and coercive techniques the police later used to acquire a DNA sample from him.)

The ethical question that arose was whether it was right to include these previously unpublished details in my article, given the publication's possible impact on living people. Biber describes the dilemma this way:[32]

> Whilst evidence is adduced in order to disclose the hidden crimes of the accused, it might also make further disclosures that demand sensitivity, to the accused and to others. Separately from (although not necessarily after) the criminal trial, historians, artists, curators, scholars and journalists come to this evidence with fresh new questions, sometimes unconnected with the guilt of the accused. A jurisprudence of sensitivity would be responsive to the effects of these extra-legal projects. It would not aim to prevent this work from being done, it favours negotiation over censorship, but it demands an active engagement with the unforeseen consequences of disclosing criminal secrets in an open justice regime.

These questions are not limited to the alleged crime victim. I gave the defendant's name in the article – a name that google reveals is shared by a man in the Northern Territory currently receiving high praise from reviewers for the tours he offers to visitors. And I also gave the name of several police officers, whose motives and actions I discussed (and criticised) at length.

But here I will focus instead on the complainant, whose real name and identifying details I deliberately omitted from the article. I have two worries. One is that, because the complainant is nevertheless named in the voir dire judgment, albeit with little other detail, she is presumably just as (if not more) identifiable than Vera Howley or Daphne Morgan; anyone who made that

[32] Katherine Biber, 'Open secrets, open justice' in Greg Martin, Rebecca Scott Bray and Miiko Kumar (eds), *Secrecy, Law and Society* (Routledge, 2015) 234-250, 246.

connection would then be able to link her to all the detail in my article about what happened in this case. The second is that the complainant herself would obviously recognise herself in my article if she read it, and may well react to my publishing the details of her ordeal as unhappily as the solicitor in the Young case reacted to me publishing the details of his. While I wouldn't rate either outcome as particularly likely – who, if anyone, reads generalist law journals? – both are obviously grave given the context of sexual crimes.

Hence, I faced the same ethical question as I did in my Ouija board book a decade later: to write or not. (It's obvious that contacting the complainant for her views or response would be unconscionable, regardless of my journalistic interviewing skills.) However, the considerations are different: the context of rape, not murder; the alleged crime and the proceedings occurring almost entirely out of the public eye (rather than, as in the Young case even before the Ouija board, with national media attention); the goal of exploring consent to DNA (rather than the case itself).

And there's the further difference that this is an academic article, rather than a semi-academic book. One possible difference is the reviewing process. Interestingly, my article was rejected by one generalist journal, with one reviewer complaining that I hadn't discussed enough rape law literature (sigh) but the other reviewer refusing to release her/his review at all. Was the second reviewer worried about my ethics? On the other hand, my article was accepted without reservation by another generalist journal, with one reviewer praising my 'novel and arresting' comparisons and 'detailed use of case studies' that would 'fall flat if it were not so competently and sensitively handled'. I'm not convinced that the refereeing process suffices to manage this sort of ethical issue.

And that takes me back to the formal process for human research ethics review that applies to all Australian academics. As those who have dealt with that process know all too well, the usual heart of that process is risk assessment and informed consent, both issues that I think fail to resolve my own ethical dilemma: the risk of harm is both difficult to assess and, if it eventuates, quite serious, and there is no ethical way to seek informed consent. But contemporary ethics review, informed by modern privacy law, also requires consideration of whether and when it is OK to access private information about people that they supplied for a non-research purpose without their informed consent. As Biber points out, these concerns are the domain of another part of

the law, privacy law and the handling of sensitive information, and a related set of ethical questions:[33]

> Listing what is 'sensitive' is an intellectual undertaking; recognizing what is 'sensitive' demands feeling something. A jurisprudence of sensitivity recognizes sensibilities, emotions and harm. It acknowledges the special susceptibility of some individuals, especially those whose context or experience makes them vulnerable in some circumstances. It recognizes that certain materials require special care, delicate handling, tact.

There's an interesting question of whether and when criminal law research into records of public court proceedings must be subject to independent ethics review. At the time my article was researched and written, the *National Statement on Ethical Conduct of Human Research 1999* contained a preamble that said that it was 'addressed to research *involving* or *impacting* upon humans', plus the following observations:[34]

> *This includes the use and/or collection of personal*, collective or cultural *data* from participants or *from their records*, which may include their oral testimony or observed cultural activities, the testing of responses to conditions devised by researchers or invasive testing of new therapies.
> *The definition of participants in this Statement includes* not only those humans who are the principal focus of the research endeavour but also *those upon whom the research impacts*, whether concurrently or retrospectively…

This leaves many relevant questions unanswered – What are 'records'? What are 'personal' records? What are 'impacts'? Does this include post-publication 'impacts'?

On 28th March 2007 – two weeks after I submitted my article to the journal that eventually published it – a new national statement was tabled in the federal Parliament. It contained the following, very different definition of 'human research':[35]

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[33] Biber, above n 30, 1043.
[34] National Health and Medical Research Council, *National Statement on Ethical Conduct in Research Involving Humans* (28 March 2007) NHMRC <https://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/e35.pdf>.
[35] National Health and Medical Research Council, Australian Research Council and Australian Vice - Chancellors' Committee, *National Statement on Ethical Conduct in Human Research* (14 May 2015) NHMRC <https://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/e72_national_statement_may_2015_150514_a.pdf>.

> *Human research is conducted* with or *about people*, or their data or tissue. *Human participation in research is therefore to be understood broadly, to include* the involvement of human beings through:
>
> - taking part in surveys, interviews or focus groups;
> - undergoing psychological, physiological or medical testing or treatment;
> - being observed by researchers;
> - researchers having access to their personal documents or other materials;
> - the collection and use of their body organs, tissues or fluids (eg skin, blood, urine, saliva, hair, bones, tumour and other biopsy specimens) or their exhaled breath;
> - *access to their information (in individually identifiable, re-identifiable or nonidentifiable form) as part of an existing published or unpublished source or database.*
>
> *The term 'participants' is therefore used very broadly in this National Statement to include those who may not even know they are the subjects of research*; for example, where the need for their consent for the use of their tissue or data has been waived by a Human Research Ethics Committee (HREC).

This doesn't seem to be ambiguous at all. My 2007 article on DNA was surely 'about' the three rape complainants (amongst other things), and specifically included my 'access to their information (in individually identifiable… form) as part of an existing published or unpublished source or database'. The latter surely includes the registry of the Northern Territory Supreme Court. Interestingly, it seems to also include repositories of law reports too, including Austlii. Indeed, it would also include newspaper archives.

But this new broad definition operates in conjunction with a formal process for institutions (including universities) to classify some human research as 'exempted from review' or 'low risk'. The 'exempted from review' category can only be applied to research that 'involves the use of existing collections of data or records that contain only non-identifiable data about human beings.' This seems to only cover judgments (or other documents) where the identity of anyone who matters is redacted or replaced with a pseudonym (which in law would cover only the most fraught matters, such as national security or child abuse). The category of 'no more than low risk' is limited to 'research in which the only foreseeable risk is one of discomfort', which is distinguished from 'distress', even if the risk is 'unlikely'. My self-assessment is that the publication of my article carries a very small but very real risk of 'distress' to the three complainants in the cases I discuss.

Nevertheless, my own university now advises its staff that the category of research 'considered to be of negligible risk' that 'may not require ethics review' includes the '[u]se of information freely available in the public domain'.[36] I suppose information on Austlii is 'freely available in the public domain' (although there is a barrier to non-expert entry posed by the mass of information and the need to use the search engine or browse the databases). But I'm less convinced that court transcripts are in the same category, not so much because they typically require a hefty payment but more because I suspect that registry court staff may not provide equal access to all members of the public (and, for example, may be happier to provide transcripts to people with a '.edu.au' email address and who seem to know their way around the law). Biber observes more generally:[37]

> Within the regime of open justice, justice must be seen to be done, but the disclosure of the secret demands that somebody is there to see it. Gatekeepers of law generally function with cold efficiency, effectively excluding all those who cannot speak the language of law, access its domain, or decode its secrets.

All up, the answer to my technical question about the scope of human ethics is rather murky when it comes to my (and many other criminal law academics') research. But there's certainly an argument that potentially distressing publications drawing only from public criminal law documents (especially ones held by court registries, rather than ones on online databases) do require some level of ethics review. This would seem to cover my 2007 article and even my Ouija board book (but probably not, I think, Spencer's and Simpson's works). This is a result that leaves me very much in two minds. On the one hand, I'd appreciate outsourcing these difficult ethical quandaries to others. On the other (and in very familiar refrain in the ethics sphere), I'm quite nervous about letting others (especially non-criminal law academics) make the call about whether I can continue to write these sorts of works.

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[36] University of Melbourne, *Do I need ethics approval?* Research Ethics and Integrity – Frequently Asked Questions <https://staff.unimelb.edu.au/research/ethics-integrity/human-ethics/faq>.
[37] Biber, above n 32, 241.

III CONCLUSION

I keep telling my university that I think formal academic research is dead or dying, because it is tied to a style and medium that almost no-one reads. (This isn't music to their ears.) That's why I can't see myself turning away from true crime narrative writing anytime soon – indeed, I've recently gone down the clichéd podcast route with my Ouija board book, albeit without the usual 'deep dive' of modern true crime podcasts.[38] So, my ethical dilemma isn't going to go away either.

While I doubt that I'll end up going down the journalism route of interviewing living persons and the like, I am sure that I can't continue to rest on my academic training. In this regard, one of Rachel Spencer's decisions is very relevant. She isn't just writing a book on Emily Perry as a legal academic, but rather is doing so as the central part of study in a different academic field: her book is to be her dissertation in a PhD in creative writing [39](which, these days, is not limited to fiction but instead covers the burgeoning field of creative non-fiction):

> The book will hopefully remind readers that all cases that come before the courts are about real people with stories to tell. Some of those stories are ongoing. I honour all of those stories and respect the humanity of all those whose lives were touched by the life of Emily Perry.[40]

This goal requires more than simply good research and sound ethics. Surely, if we are to write narratives in our criminal law writing, then we at least have an obligation to improve our writing skills to a level that can plausibly finesse the many ethical dilemmas that arise in our field?

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[38] See Radio National, 'Inside the Jury Room part one: The Ouija board jurors', *Law Report,* 8 May 2018 (Damien Carrick and Jeremy Gans) <http://www.abc.net.au/radionational/programs/lawreport/inside-the-jury-the-ouija-board-jurors/9718684>.

[39] See Meet Our Readers – Rachel Spencer on *The Hearth* (7 July 2017) <https://thehearthsite.wordpress.com/2017/07/07/meet-our-readers-rachel-spencer/>.

[40] Spencer, above n 2, 9-10.