

**Addiction veridiction:  
Gendering agency in legal mobilisations of addiction discourse**

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**Synopsis**

This paper utilises the theoretical work of Bruno Latour to explore whether and in what ways the law and legal processes work to stabilise addiction as a health problem or 'disease'. In undertaking this analysis we also explore the associated gender implications of these practices and the means through which legal processes that stabilise addiction simultaneously stabilise gender. We explore these issues through an analysis of interview data from Australia and Canada, where lawyers talk about the ways they understand addiction and how it features in their work. We argue that legal practices are centrally implicated in the making of both gender and health and that elements of these processes, which are not often publicly visible or subjected to scrutiny, require more analysis.

## **Abstract**

This paper explores the question of whether and in what ways the law and legal processes work to stabilise addiction as a health problem or ‘disease’. In undertaking this analysis we also explore the associated gender implications of these practices and the means through which legal processes that stabilise addiction simultaneously stabilise gender. Using the work of science and technologies scholar Bruno Latour, in particular his anthropological analysis of scientific and legal ‘modes of existence’, we explore legal processes of what he calls ‘veridiction’ – or the specific processes by which law distinguishes truth from falsity – associated with addiction. We focus on processes that are largely hidden from public view and as such receive little scrutiny, but through which the meaning of addiction as a disease is secured. Our aim is to consider the role of legal negotiations in establishing agreed facts, and to explore lawyers’ understanding of these processes. We argue that although in public discourse judges are ascribed the status of the law’s key decision-making figures, lawyers’ accounts do not necessarily support this view. Instead, their accounts of the judicial process foreground their own and other lawyers’ role in decisions about addiction, despite an absence of training or education in the area. We also note that lawyers’ accounts suggest little independent oversight – even from judges – of the work lawyers do in stabilising addiction ‘facts’. Based on these observations we consider the ways such processes of stabilisation impact on women in the legal system whose lives are in some way affected by discourses of addiction as a disease. We argue that legal practices of veridiction are centrally implicated in the making of both gender and health and that elements of these processes, which are not often publicly visible or subjected to scrutiny, require more analysis.

## Introduction

Addiction is a relatively recently developed concept<sup>1</sup> that first emerged in relation to the consumption of alcohol and has since expanded into a range of different areas of human life. As scholars have noted, in recent decades an increasing number of activities (such as sex, Internet use, gambling, eating, exercise and shopping) have come to be recast through the language of addiction, reframed as compulsive forms of conduct. Famously, Eve Sedgwick described this as a process of escalating ‘addiction-attribution’<sup>2</sup>, and in their 2014 book, Fraser, Moore and Keane recast this notion, arguing that the ‘addicting’<sup>3</sup> of contemporary society is underway. While the language of addiction is increasingly deployed in a range of settings, its meaning is not well defined.<sup>4</sup> Little consensus exists among scientists and clinicians,<sup>5</sup> as well as policymakers and alcohol and other drug (AOD) health service providers,<sup>6</sup> on key concepts underpinning it. Disagreements include whether addiction is a disease, whether ‘addicts’ are responsible for and can control their own behaviour, and whether they should be held to account for compulsive conduct and associated behaviours. Probably the most widespread approach at present is one that itself has several manifestations: the ‘disease model’ first advanced in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries.<sup>7</sup> Scientific versions of the disease model generally ‘share the common view that control over drug use is somehow impaired’, although they differ as to the precise mechanisms involved.<sup>8</sup> In recent years, for example, the (neuroscientific) brain disease model has gained influence. This is largely a result of the work of the US National Institute on Drug Abuse, which first articulated this view under the leadership of Alan Leshner, and has since invested heavily in it under the direction of Nora

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<sup>1</sup> Room (2003); Levine (1978).

<sup>2</sup> Sedgwick (1993).

<sup>3</sup> Fraser, Moore and Keane (2014).

<sup>4</sup> Fraser (2015).

<sup>5</sup> Carter, Mathews, Bell, Lucke and Hall (2014).

<sup>6</sup> Karasaki, Fraser, Moore and Dietze (2013).

<sup>7</sup> Carter, Mathews, Bell, Lucke and Hall (2014).

<sup>8</sup> Carter, Mathews, Bell, Lucke and Hall (2014 at 206).

Volkow.<sup>9</sup> In that they are thought to relieve those who use drugs from responsibility and blame for their condition,<sup>10</sup> disease models of addiction are often thought to be more generous and progressive than traditional conceptualisations of drug use (where drug use was understood as a form of deviance, wickedness or moral failing). This approach has also attracted vigorous criticism, however. Some have pointed to the failure of the neuroscience of addiction to live up to its potential,<sup>11</sup> others have argued that the possibility of moral judgment, stigmatisation and marginalisation of those who use drugs or those who are labelled as ‘addicts’ persists.<sup>12</sup> This might occur where, for example, the addicted individual is conceptualised as perpetually sick, unable to make sensible decisions and in need of treatment. Where disease models are underpinned by the assumption that addicts lack volition or the capacity for self-control, the use of coercive practices and paternalistic policies – including involuntary treatment, detention and sterilisation – can follow.<sup>13</sup> As we have argued in our previous work,<sup>14</sup> these processes and conceptualisations can have far-reaching implications for people who use drugs and those labelled addicts, constituting them as flawed subjects, or as non-citizens.

These debates about the meaning and regulatory function of addiction concepts have also given rise to a growing body of scholarship on concepts of addiction in policy and service provision,<sup>15</sup> but research on legal settings is far less common. This is important because ideas about the nature and meaning of addiction regularly impact on legal settings, with major implications for the rights of people who use drugs, and those

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<sup>9</sup> Leshner (1997).

<sup>10</sup> Fox (1999).

<sup>11</sup> Hall, Carter and Forlini (2015).

<sup>12</sup> Reinerman (2011); Courtwright (2010); Brook and Stringer (2005).

<sup>13</sup> Lucke and Hall (2014).

<sup>14</sup> Seear and Fraser (2010)

<sup>15</sup> Moore, Fraser, Törrönen and Eriksson (2015).

labelled addicts. As we have argued elsewhere,<sup>16</sup> courts are increasingly being called upon to consider key questions about addiction, such as whether and how addiction is relevant to sentencing in the context of the criminal law. Although a number of studies focus on how specialist drug courts operate, as well as how they approach drug use,<sup>17</sup> addiction is rarely the central object of analysis in such research. Indeed, beyond a few examples, including our own recent work,<sup>18</sup> few critical analyses have been conducted on the models of addiction operating in the law, and the many implications of these approaches for people caught up in legal processes, whether as plaintiffs, defendants or others. To our knowledge, no research has yet investigated lawyers' perceptions of these processes, nor their role in negotiations around the 'nature' and meaning of addiction. As we will go on to explain, lawyers report playing a significant role in these processes – a phenomenon we argue deserves more attention.

In conducting our analysis we focus on an area to date largely ignored in the literature: the gender dimensions of addiction in the law. Using the work of science and technologies scholar Bruno Latour,<sup>19</sup> in particular his anthropological analysis of scientific and legal 'modes of existence', we explore legal processes of 'veridiction' – or the specific processes by which law distinguishes truth from falsity – associated with addiction and gender.<sup>20</sup> To this end, we examine lawyers' understandings of the role of

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<sup>16</sup> Seear and Fraser (2014a).

<sup>17</sup> Fitzgerald (2008); Murphy (2011); Murphy (2012); Tiger (2011); Vrecko (2009).

<sup>18</sup> Seear (2015); Seear and Fraser (2014b).

<sup>19</sup> In this sense, our paper is part of an emerging body of scholarship that draws upon elements of Latour's work and applies it to different legal and regulatory settings or questions. Kyle McGee's recent work represents a notable example, as does the work of Jay Sanderson (2013), among others.

<sup>20</sup> We acknowledge that Latour is not the first theorist to critically examine the way that particular legal processes and practices make truths, and the implications thereof. In *Feminism and the power of law*, for example, Carol Smart (1989 at 4) explored 'law's ability to impose its definition of events on everyday life' and – speaking specifically about gender and truth making – argued that 'law manages to retain the ability to arrogate to itself the right to define the truth of things in spite of the growing challenge of other discourses like feminism'. Latour's work differs from Smart's in important ways, however. Whereas Smart arguably frames events and everyday life as objective realities that to some extent exist prior to legal discourse, practices and processes, Latour would argue that what counts as events and everyday life is constituted through the law.

legal processes in the production of addiction as a disease, the related stabilisation of ‘addicts’ as lacking volition, and the place of gender in these processes. Our analysis is based on data collected for a pilot project studying legal practice and addiction. Although we focus on the accounts of a small number of interviewees here, the themes we present (relating to legal processes of veridiction and gender) were found to be present throughout the pilot data. We focus on select accounts as a way of illuminating in-depth, how different lawyers encounter addiction in their work and understand truth-making practices to unfold. Building on previous work on the limits of disease models of addiction, and on the impressions articulated by our participants, we argue that, when brought to bear on issues of addiction, legal processes of veridiction may operate to marginalise and oppress women – particularly when they experience family violence at the hands of men. These processes, rarely subjected to public scrutiny, require more critical analysis, particularly by feminist scholars, socio-legal scholars and scholars of health law.

### **Approach: Law as a mode of existence**

Our analysis is inspired by Bruno Latour’s recent book, *An Inquiry Into Modes of Existence* (hereafter *AIME*).<sup>21</sup> This book synthesises several decades of scholarship to consider what he terms modernist ‘modes of thought’ across various ‘domains’ including law, science, politics, religion and economics. Drawing on Latour’s key observation that the law is a ‘highly distinctive world’,<sup>22</sup> with its own processes of veridiction – or truth making – we argue that the law has particular ways of establishing truth, allowing non-expert deliberations that frequently rely upon commonsense assumptions, for example about gender. The nature of these processes of veridiction also means that such

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<sup>21</sup> Latour (2013).

<sup>22</sup> Latour (2013 at 54).

deliberations remain largely immune to scrutiny. Latour's book is in many respects the culmination of a life's work. Bringing together ethnographic research on science, law and other domains of knowledge and practice including politics and economics, *AIME* is concerned with exploring 'modern' – developed late capitalist – societies, how their institutions understand and make sense of the world, and the claims they make in the process of producing knowledge about fundamental phenomena such as nature, culture and truth. *AIME* builds upon and extends Latour's earlier works, including his first major foray into the study of law: *The Making of Law*,<sup>23</sup> a detailed ethnography of a French administrative court. This anthropological project leads him to conceptualise these institutions as each positing and working from a particular 'mode' of existence with an 'exclusive manner of demanding truth'.<sup>24</sup> The law, for example, is a 'highly distinctive'<sup>25</sup> structure that mobilises 'its own [system of] explanation'.<sup>26</sup> In this sense:

law has its own separate place; it is recognized as a domain that can be isolated from the rest; it has its own force, as everyone would agree; and above all [...] it has its own mode of veridiction, certainly different from that of science, but universally acknowledged as capable of distinguishing truth from falsity *in its own way*.<sup>27</sup>

According to Latour, the law is the only mode of existence 'to have offered [...] resistance to the demand for explicitness',<sup>28</sup> in that it is dominated by a simultaneously 'obscure' and 'respectable' method of establishing truth and falsity that is distinct from other modes of veridiction.

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<sup>23</sup> Latour (2009).

<sup>24</sup> Latour (2013 at 366).

<sup>25</sup> Latour (2013 at 54).

<sup>26</sup> Latour (2013 at 359).

<sup>27</sup> Latour (2013 at 358-9).

<sup>28</sup> Latour (2013 at 359-60).

In *The Making of Law*, Latour argues that one of the key characteristics of legal processes of veridiction involves the setting of parameters for the issues to be resolved. He explains that judges have specific, defined tasks, and these separate them from other knowledge-makers, notably scientists. Judges, he says, have to:

answer each of the arguments invoked [...] and *only* those arguments (imagine how horrified a scientist would be if she were asked to address only those questions asked of her by others rather than the hundreds she has asked of herself), to add as few innovations as possible to the knowledge established by their predecessors [...] and to do all of this in such a way as to close the discussion once and for all.<sup>29</sup>

In this way, legal processes of veridiction are fundamentally distinct from those of science. Law is intended to be an internally coherent total system of logic through which lawyers ‘can indulge a power to invent fictions’ or to introduce ‘constructive solutions’, precisely because – unlike science – ‘they have no object, or no objectivity,<sup>30</sup> to deal with’.<sup>31</sup> These processes play out differently between different courts, tribunals and jurisdictions (there are, for example, differences, between how lawyers operate in the French administrative tribunal that was Latour’s focus in *The Making of Law* and how they operate in the jurisdictions we analyse for this article). Nevertheless, there are important connections too. In many areas of law, legal professionals are not simply empowered to

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<sup>29</sup> Latour (2009 at 205).

<sup>30</sup> According to Latour, ‘we should distinguish ‘objectivity’ as the basis of a mood of indifference and serenity as to the solution, from what might be termed ‘objectivity’: the ordeal by means of which a scientist binds her own fate and that of her speech to the trials undergone by the phenomenon in the course of an experiment. Whereas objectivity, paradoxically, pertains to the *subject* and his *interior state*, objectivity pertains to the *object* and its peculiarly *judicial* role’. (Latour 2013 at 236).

<sup>31</sup> Latour (2009 at 240).



engage in processes designed to result in constructive solutions, but required to do so. In recent years, for example, courts all over the world have begun to implement processes of ‘managerial judging’, whereby ‘judges or judicial officers [...] control the movement of cases through a court [...] managing the time and events involved’.<sup>32</sup> One of the main initiatives of managerial judging is that of ‘case management’, where the aim is to:

encourage the parties to identify and reach agreement on as many issues as possible that are not in dispute and thus reduce the length of a trial or obviate it altogether.<sup>33</sup>

In most instances, this happens via multiple formal meetings (such as mediations) between the parties, where the court has ordered them to try and narrow or resolve the issues in dispute.<sup>34</sup> In other instances, these processes happen less formally, as courts invite or encourage parties to reach agreement on key facts and points of law to narrow down the issues in dispute.

This difference between two of modern societies’ most influential systems of veridiction raises important questions about what happens when they come into contact, as they do more and more frequently where scientific evidence is used in deciding cases. Because of the law’s distinctive approach to veridiction,

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<sup>32</sup> King, Freiberg, Batagol and Hyams (2014 at 218).

<sup>33</sup> King, Freiberg, Batagol and Hyams (2014 at 218).

<sup>34</sup> For more on case management, see Australian Centre for Justice Innovation (2013) The Timeliness Project <http://www.aija.org.au/Timeliness%20Forum/Timeliness%20Report%20ACJL.pdf> (accessed 22<sup>nd</sup> August 2015).

When an expert gives evidence in court, the judge and the law take all precautions to ensure that what the expert says should be neither a judgment nor a warrant for judgment, but that it should serve only as a form of testimony which does not usurp the role of the judge.<sup>35</sup>

In other words, the law entails a process of taking into account but not necessarily deferring to scientific knowledge, nor to claims of scientific objectivity and truth. Legal officials retain the power to determine for themselves the meaning of specific scientific findings or assertions, and to incorporate those interpretations into a distinctly legal framework for distinguishing truth from falsity.

As Latour points out, legal conceptualisations of ‘truth’ and ‘falsity’ often make little sense to people other than legal experts. Importantly, legal conceptualisations of what is (and is not) legally possible often depend upon whether there is a *legal means* for a particular course of legal action. The existence of a legal ‘means’ depends upon a combination of obscure and highly specific factors including the existence of legislation, regulations and other legal procedures, rules of evidence and case law, details of how these have or are likely to be interpreted, and so on. These are factors generally understood only by lawyers. In what follows, we mobilise Latour’s insights to consider lawyers’ impressions of the contact between science and the law in the specific case of addiction. In particular we examine how lawyers perceive these processes, including their perceptions of the effects of the encounter between medico-psychiatric modes of conceptualising addiction and the legal processes of veridiction noted above. Drawing on interview data collected from lawyers whose work involves issues of drug use and addiction, we explore how, in their view, debates about the ‘nature’ of addiction play out

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<sup>35</sup> Latour (2009 at 206).

in court settings, focusing on what has to get resolved, how boundaries are drawn and what arguments are invoked. As we shall explain, lawyers' descriptions of these processes suggest that legal practices may often reinforce and compound existing inequities for women. Because of this, we argue, these processes demand further attention from researchers.

## **Method**

Our analysis is based on data collected in 2013-14 for a pilot project analysing concepts of addiction in Australian and Canadian law. The pilot had two main components. The first was a mapping exercise in which we identified legal realms in which addiction features. The second was an in-depth interview component, where we explored the concepts of addiction used by lawyers working in Australia and Canada. A total of fourteen interviews were conducted (n=7 in Australia; n=7 in Canada; with 10 women and 4 men). These lawyers worked across a range of different legal realms including family law, criminal law, family violence, administrative law and human rights law, with the majority employed by non-profit organisations.

We chose to compare these jurisdictions for several reasons. The two share important similarities. Both Australia and Canada are Commonwealth jurisdictions, and both were early adopters of harm reduction, a key public health response to illicit drug use in the West.<sup>36</sup> Both are regularly ranked highly in overall standard of living,<sup>37</sup> but sustain major pockets of marginalisation and disadvantage in relation to AOD use.<sup>38</sup> As well, Sydney and Vancouver both host supervised injecting facilities.<sup>39</sup> There are also key differences. For example, unlike Australia, Canada has a Commonwealth Charter of

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<sup>36</sup> Ritter and Cameron (2006).

<sup>37</sup> Tiffen and Gittins (2004).

<sup>38</sup> Ritter, Lancaster, Grech and Reuter (2011).

<sup>39</sup> de Vel-Palumbo, Matthew-Simmons, Shanahan and Ritter (2013).

Rights and Freedoms.<sup>40</sup> Although the supervised injecting facilities in both countries emerged out of long political campaigns, public scrutiny of the facilities has been handled differently. In Canada, lawyers played a vital role in resisting Federal government attempts to close down the facility through a constitutional challenge, based in part on provisions in the Charter. The facility was kept open only through the landmark legal case of *Canada (Attorney General) v PHS Community Services Society* (known as the ‘Insite’ case) which in part turned on the idea that addiction was a ‘disease’.<sup>41</sup> In Australia, proponents of supervised injecting facilities have not had to rely on such legal challenges. These similarities and differences offer important opportunities for learning and exchange between the two countries. Little research has been conducted to date exploring these similarities and differences and the opportunities they offer to the AOD field in general or to legal practitioners in particular (excepting Fraser, forthcoming<sup>42</sup>), yet the two nations have much to learn from each other.

Interviews were confidential, digitally recorded and transcribed verbatim. All interviews were conducted by one of the authors (KS). To ensure anonymity we have assigned pseudonyms to all participants. The interviews explored a range of issues including: definitions of addiction; concepts or models of addiction drawn on in legal work; relevance of statutes and case law from within and outside the participants’ own fields of expertise; experiences of and needs regarding education in AOD and addiction; views on the strengths and weaknesses of existing approaches; and public policy implications of various legal approaches to addiction. Data were analysed using the Miles and Huberman

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<sup>40</sup> Although there are some state and territory based Charters in Australia, such as Victoria’s *Charter of Human Rights and Responsibilities Act 2006*, these generally do not offer the same level of protections as the Canadian Charter.

<sup>41</sup> *Canada (Attorney General) v PHS Community Services Society* [2011] 3 SCR 134.

<sup>42</sup> Fraser (Forthcoming).

approach<sup>43</sup>, which involves thematic analysis and coding in three stages: data reduction, data display and data analysis. Our analysis suggests that an important dynamic unfolds in the associations between legal processes of veridiction, addiction, health and gender, at least in terms of how lawyers perceive their own role and describe these processes. Insofar as this paper explores lawyers' perceptions of these processes, and does not draw upon formal and direct observation of them, we argue that these dynamics deserve further scholarly attention. The project was approved by the Curtin University Human Ethics Research Committee (Approval number: HR146/2013).

### **Stabilising the legal 'fact' of addiction as a disease**

The starting point for our analysis is the examination of how legal processes secure or stabilise particular notions of addiction. A key exemplar of how this happens is the landmark decision of the Canadian Supreme Court in *Canada (Attorney General) v PHS Community Services Society* (known as the 'Insite' case), which instantiated the idea that addiction is a 'disease'.<sup>44</sup> *Insite* was concerned with the legality of Vancouver's supervised drug consumption facility ('Insite'), a clinic designed to allow on-site consumption of illicit drugs such as heroin and crystal methamphetamine so as to support illicit drug consumers in avoiding blood-borne virus transmission, overdose and other dangers associated with illicit drug use.<sup>45</sup> Established as a pilot facility in 2003, Insite operated at first through a special government exemption from the *Controlled Drugs and Substances Act*. By 2007, however, the Federal Minister for Health had decided not to grant further exemptions beyond the middle of 2008. In effect, the operation of Insite would be illegal after that time. Clients and advocates of the facility issued proceedings, with the case eventually making its way to the Supreme Court of Canada. The Supreme Court

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<sup>43</sup> Miles and Huberman (1994).

<sup>44</sup> *Canada (Attorney General) v PHS Community Services Society* [2011] 3 SCR 134.

<sup>45</sup> See: <http://supervisedinjection.vch.ca/> (accessed 12 February 2016).

concluded that drug addiction was an ‘illness’, and that although some addicts retain the ‘power of choice’, addiction was ultimately ‘a disease in which the central feature is impaired control over the use of the addictive substance’.<sup>46</sup> Based in part on this assessment, the Supreme Court concluded that the Federal Government’s intended closure of Insite limited the rights of ‘addicts’ under Section 7 of the *Canadian Charter of Rights and Freedoms*, which protects the right to life, liberty and security of the person. The Court found that in limiting access to health care services, the government’s intentions would have created a risk to the health and the lives of people who inject drugs, thereby depriving them of the protections afforded under Section 7. The facility therefore remained open.

In *Insite*, the Court’s conceptualisation of addiction as disease was central to the final outcome. Although scientific evidence about the nature of addiction had been gathered for the case, and was for a time a live issue, these debates were resolved at a critical point of the trial not by scientific experts, nor even the judge, but by the opposing lawyers. As the trial judge, Judge Pitfield, explained: ‘The plaintiffs and Canada agree on one thing: drug addiction is an illness’.<sup>47</sup> One of our Canadian participants, Erica, was an observer to these proceedings. Erica works across a range of different areas of law, although her work often focuses on disadvantaged and marginalised groups. Her perception of how this agreement was reached aligns with Latour’s observations on the way key figures in litigation set parameters about what issues are relevant and need to be resolved, and the ways courts deal only with arguments invoked before it. As Erica explained:

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<sup>46</sup> *Canada (Attorney General) v PHS Community Services Society* [2011] 3 SCR 134.

<sup>47</sup> *PHS Community Services Society v. Attorney General of Canada* 2008 BCSC 661 at para 47. (available at: <http://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc661/2008bcsc661.html>; accessed 22 August 2015).

I was in court just watching one day and there was something going on in the courtroom that was kind of disturbing, which was that the judge in the course of submissions whenever he used the words ‘addiction is an illness’ he put like scare quotes around it.

Interviewer: He actually did that – in gestures?

Erica: Yes, he used the bunny ears and so on. You know: ‘if addiction is an “illness”’ etc, etc. And [the lawyer] rose and said ‘You know my Lord, I think everyone in the room is in agreement that addiction is an illness in the way that we are talking about it and my friend [the opposing lawyer] I hope will rise if I’m not right about this’. And so the lawyer for the Crown who is [...] a very good lawyer in Vancouver and he is a stalwart lawyer, he’s very conservative but he is extremely professional, he was on as an ad hoc lawyer for the Crown, and he rose and he said ‘No my Lord, quite right. We all agree that addiction is an illness’. So [...the case was no longer] about that, and from then on everything changed. You know the tone of the room changed, the judge’s approach to what they were talking about changed. So when I say that that finding was key, it was key [...] from the moment that the judge understood what they were after, which was, you know, people who have an illness, their compulsion is, you know, it’s not their own volition that they have to do this. It’s that they are – for a lack of better word – *infected* with something. You know, his understanding that that was at play was everything to that case.

Viewed from the perspective offered in Latour's analysis, the process Erica describes forecloses debate about the meaning of addiction, resolving it *legally* as a disease.<sup>48</sup> It seems lawyers played a key role in fixing this particular legal truth, in that their agreement alone meant no further argument was needed on the point. Once addiction was defined without contest as a disease, responses to it became subject to particular legal considerations, and from this point onwards the Court's decision-making scope narrowed significantly. In Latour's terms, the legal discussion distinguished 'truth from falsity *in its own way*' and debate was subsequently closed off, 'once and for all'.

Like Erica, other participants discussed legal processes by which addiction was, in their estimation, given particular, decisive, meanings in court decisions. Some of these occur in less formal ways in legal settings, or with slightly different emphases and implications. In the next section we explore this process, primarily through an analysis of the explanations given by one lawyer (Carl) about how debates about addiction play out even before lawyers enter the courtroom. We argue that Carl's account raises important questions about legal understandings of addiction, in particular about the connections made between addiction, illness, agency, responsibility, violence and gender. We conclude by arguing that these processes are in need of further scholarly attention in that they appear to play out in gendered ways, with potentially inequitable effects, impacting most heavily on women.

### **Addiction as a disease: gender implications**

Carl is a lawyer who works in a wide range of Australian legal realms, but regularly represents female victims of family violence who are seeking what in Australia are called intervention orders (also known as apprehended violence orders). Intervention orders

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<sup>48</sup> *PHS Community Services Society v. Attorney General of Canada* 2008 BCSC 661 at paragraphs 48-59.



differ depending on who is involved, but in essence they are civil orders made by a court where it is deemed necessary to protect someone from physical or psychological harm. These orders are usually sought after one person (the respondent) has assaulted or threatened to assault another person (the victim) or where there is a pattern of financial abuse, stalking, or other controlling behaviour. Where an intervention order is made, the court has considerable scope to determine its content. It might prevent the respondent from having any contact with the victim (a comprehensive order), or prohibit only certain kinds of contact, such as verbal contact and contact in financial matters (a limited order). Where an order involves a couple in a relationship, an order of the former kind might have the effect of ejecting the respondent from the family home and prohibiting all forms of contact. A limited order might permit the couple to continue living together, but on certain conditions. Breaching an intervention order is a criminal offence.

In our interview Carl offered details on processes we have already described in this article, including those where courts enjoin or order parties to engage in a dialogue in a bid to narrow the issues in dispute or resolve them altogether. We might understand this, in Latour's terms, as an example of lawyers participating in the process of formulating 'constructive solutions' with ontological effects. For Carl, addiction (or what is often referred to as 'dependence' in Australia) often plays an important role in these family violence proceedings, especially for lawyers acting for the respondent. As Carl explains:

What we know about family violence is that it's very gendered in its nature [...and] the research sort of supports the idea that it's actually about a choice to use violence against partners. The push-back [from other lawyers] for that is often around saying: 'Well you know the person has addictions, there are drug

and alcohol issues, they experienced family violence as a child, it's inter-generational sort of stuff. So in that sort of context we often see addiction bandied around.

Here, Carl is explaining that because violence has been defined in law as a choice, lawyers acting for respondents often seek ways of casting doubt on their respondents' ability to make choices, turning to addiction to do so. When one of Carl's clients applies for an intervention order, the presiding magistrate typically begins by setting the application to one side, encouraging the lawyers representing both parties to first try and negotiate an amicable solution. Four main possibilities are available here: the parties reach an agreement for a comprehensive intervention order, they reach agreement for a limited order, they fail to reach an agreement, or the victim withdraws the application. If an agreement is reached, the parties go back before the magistrate, set out the terms of the agreement and ask the magistrate to approve it, thus giving it effect as a court order. If no agreement can be reached, the matter then goes to a contested hearing, either on the same day or on a later day.<sup>49</sup> One of the main incentives for reaching an agreement is that it negates the need to go back before the magistrate and risk an unfavourable decision. In other words, both parties have pragmatic reasons for accepting alleged facts and finding a way to resolve the dispute without the participation of the magistrate. Naturally, lawyers understand the tensions and incentives at play as these strategic informal discussions unfold.

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<sup>49</sup> For more detail on how these processes unfold, see, for example: <https://www.legalaid.vic.gov.au/find-legal-answers/family-violence-intervention-orders/going-to-court/what-can-happen-hearing> (accessed 9th September 2015). For more on rates of resolution and contest, see, for example: Victorian Department of Justice (2009); Wearing (1996).

In Carl's view, lawyers' uses of addiction in these negotiations often reproduce very 'gendered approaches and gendered responses' to family violence. In one part of the interview he explained that lawyers often make claims that addicts lack agency:

Yeah, so we have a scenario where we might be looking after Mum. Dad's been removed from the home by virtue of an intervention order. The lawyer comes up and is trying to argue [...] that 'actually he's got an alcohol addiction, he's an alcoholic and he recognises that and as an alcoholic he has limited control over his aggression because of the nature of his addiction. And as a resolution type thing, he has undertaken to get drug and alcohol counselling to address that and on that basis, we [propose that you] withdraw the intervention order or make it a limited order so that he can come back home'. So immediately the cause of the family violence is not actually about him choosing to beat up his wife, it's actually this insidious alcohol addiction that's controlling his behaviour and causing him to beat up his wife.

Carl goes on to offer his assessment of this strategy and its logic:

Now in a family violence context, you know [this] is an absolute misnomer on so many different levels because, for example, if he goes to the pub and gets pissed there because he's an alcoholic, the chances are he doesn't turn around and punch the crap out of everybody that's in his immediate vicinity. He doesn't walk down the street and beat up anyone that looks at him funny. He actually goes home with a belly full of grog and then lashes out against his partner. [...] only seems to happen when he's in the home, against his wife.

Here Carl's scepticism about the way addiction is 'bandied about' by lawyers, extends not just to the way key concepts of the 'disease' (such as agency) are conceptualised, but to lawyers' selective approaches to them. Despite his scepticism, however, he must engage in a process of 'unpicking ... those excuses' through negotiations with other lawyers. These negotiations task them with evaluating the veracity of the evidence, if any, of addiction, along with what Carl considers 'very complex' scientific debates about its nature and effects. In many instances these assessments are made by duty lawyers, whose primary role is to assist unrepresented litigants in court, and whose training is, like that of most other lawyers and magistrates, purely legal. In a Latourian sense, these lawyers appear to be playing a key role in establishing and settling 'facts', including medico-legal and scientific 'facts' about the nature and effects of addiction.

Where an agreement is reached (or, in Latourian terms, particular 'truths' are established), as Carl explained, lawyers go back before the Court, outlining the nature of any agreement reached (with respect to an order) along with the reasons for it. According to Carl, how this information is received will depend heavily on the individual magistrate:

Different magistrates have actually talked about getting some anger management, getting drug and alcohol counselling in a family violence context. And on the one hand when you've got a 'Do not drink clause' included [as part of the order], you actually are almost signing up to that understanding that it's actually alcohol that's the problem, not the family violence. But then the flipside is that if the parties have reached agreement on that, then the magistrates are usually reluctant to interfere with that, particularly if there's legal advice all round and it's providing that measure of safety [for the victim].

As with our earlier example of the *Insite* case, Carl's example suggests that officials of all kinds take part in processes of legal veridiction pertaining to addiction. Courts appear to hand over power to legal officials trained only to know what is required in order for legal tests to be satisfied, leaving it to them to establish the 'truth' or 'falsity' of a claim. Significantly, judges may have very limited involvement in the process of evaluating medical evidence and/or the veracity of claims made about the nature of addiction and key addiction concepts. While these claims are sometimes tested in court (in contested proceedings), much is not. This means that the lion's share of work done to stabilise addiction – to define it, decide what it causes and how it can be addressed – is undertaken by other players hidden from public scrutiny, and with potentially major implications for those affected.

Although Carl's view is that lawyers deploy (and ultimately often constitute) 'addiction' in their work in part for strategic reasons, others we interviewed were more sceptical. Alexandra, a Canadian lawyer, believed that lawyers' approaches to addiction were shaped by a combination of factors, including naivety about their clients' lives, a lack of knowledge about drug use and addiction, and moralising about their clients' behaviour. Lawyers often made assumptions and judgments about their clients and the nature of their 'problems'. Speaking about illicit drug use and 'addiction', Alexandra explained:

I think there is a tremendous class divide between people who use drugs – at least in my neighbourhood – and most lawyers, so if they know anything about addiction it's a drinking aunt or a classmate who does lots of coke. And it's not this unknowing and this space between these two groups isn't restricted to ideas

about drug use, but it's caught up in almost Victorian morality about how you conduct your life and what is proper conduct. And I think that's part of the problem and that's part of the harm that lawyers do when they bring ideas from a different place and a different class and pose them in a place where they don't belong. And there's too much lawyers talking to clients and not enough lawyers listening to clients and saying, 'Yeah okay, so you're using this much, what does that mean for you, what impact does that actually have on your life?', instead of thinking, 'Oh how could you possibly use?' I think the same kind of shame that middle class people see around a pregnant women having a glass of wine in a restaurant, it gets amplified by lawyers and imposed on clients.

Alexandra's account raise questions about the making of drug 'problems' and addiction realities as well as the reasons why drug use and 'addiction' concepts are deployed in legal contexts and stabilised in the particular ways they are. In signalling a gender dimension to lawyers' thinking and practices (via the symbolic figure of the pregnant woman), Alexandra also touches upon the potentially gendered nature and effects of lawyers' practices: a subject to which we shall shortly return.

Returning to Carl's account, and the broader literature describing the court processes to which he refers, we see four important questions raised. First, are judges, widely thought to be our central legal decision-making figures, involved in the decisions the public believes they are? Second, do the court officials who *are* making decisions have any expertise in, or knowledge of, addiction? Third, is there sufficient independent oversight – even from judges – of the dialogue that unfolds privately between lawyers so crucial to the stabilisation of addiction 'facts' and to the fortunes of victims and respondents? Given much of this decision-making is not open to scrutiny, what do we

know of its equity? In particular, how does it withstand scrutiny from the point of view of gender? Although these processes are not inherently gendered and indeed may affect anyone who is understood in a legal setting to be experiencing an addiction, they do have particular implications for women in that it is widely accepted that women experience family and sexual violence at disproportionate rates to men.<sup>50</sup> Wherever addiction is used to excuse or mitigate against this violence, women are necessarily disproportionately affected as victims. In this sense, legal conceptualisations of health and illness, and the veridiction processes that allow these conceptualisations to take form as legal ‘facts,’ help shape the way traditionally gendered forms of violence come to be understood, potentially entrenching assumptions about, and material effects of male violence, agency, the male and female body and gender, along the way.

While these gendered effects could be considered inadvertent, other ways addiction concepts are said to play out in such proceedings suggest that gendered assumptions shape rather more directly than this the arguments made. Carl also spoke of ways key issues of addiction (agency, responsibility and volition) were inverted – with perverse results – where the female victim of violence was the claimed ‘addict’. While alcoholism, for example, may serve as a useful defence for male perpetrators of violence,

‘female alcoholic’ will often be used *against her* by an abusive partner. You know: ‘She’s an alcoholic, she’s always drinking, you know she lashes out at me so I lash back’. And in that instance [...] she’s turned into the perpetrator or she’s actually causing the trouble within the relationship. So then [the Court will] question

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<sup>50</sup> Department of Families, Housing, Community Services and Indigenous Affairs. (2011). (Accessed at: <https://www.dss.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022>, 1<sup>st</sup> September 2015).

mark whether or not she's a fit parent or whether she needs an intervention order to protect her because she's the one getting pissed and lashing out.

According to Carl, such portrayals may even occur where the female partner is acknowledged to consume alcohol or other drugs as a response to trauma experienced as a result of her partner's violence:

...Research will point to that as her coping mechanism. So her living in a violent relationship and her coping strategy is to drink or take drugs, or whatever. So now suddenly she's a 'junkie', 'alco' mother who is unsafe for the kids to stay with, whereas Dad, who's actually been committing horrendous violence, is an upstanding sober sort of person. The court will more often than not put the kids with Dad at least on an interim basis, which then feeds into the trauma of Mum, which can escalate her drinking or substance abuse.

As with the previous examples, these very serious, complex issues are often first debated outside the formal court setting. Significant, even definitive, aspects of the case are frequently agreed upon there, including those involving key concepts of addiction. According to the accounts given by the participants in our study, then, it appears that lawyers and the processes in which they are engaged play a vital 'veridicting' role in relation to drug use and addiction, and in the process to related concepts such as agency, responsibility and culpability.

Also concerned about these issues was another lawyer in our study, Erin, whose work was in Australian women's rights, primarily in the areas of family law and family violence. According to Erin, these processes (and in our terms, the modes of legal



veridiction they entail) posed major 'ethical' dilemmas for lawyers, especially where alcohol and other drug consumption or addiction was being asserted and directly tied to questions of witness credibility, agency and legal responsibility or moral culpability for gendered violence. As she explained:

It's almost like the thing we talk about with sexual assault, that sort of blaming victim thing, comes in to play. And so, being a women's lawyer, I don't want to encourage that, but then also the client is determined they don't want the intervention order because they were drug or alcohol affected also. That is difficult and I don't know what the answer is to that.

Other lawyers we interviewed raised related concerns, especially where the implication of that is that violent conduct is compulsive. For example, Australian lawyer Melanie feared that existing legal processes could have far reaching implications for forms of sexual violence that traditionally impact on women more than men:

I do find it quite perplexing, just the notion of being enslaved to behaviours [...] because for a compulsive paedophile, they are enslaved to those behaviours, that's a sexual preference that's grown up from, usually, adolescence. And I wonder, it's funny, just the judgment calls that we put on particular behaviours and 'this is controllable' and 'this is deplorable' and 'this is repugnant', whereas 'this is an addiction'. And I wonder whether that's – I'm just thinking out loud really – but I just wonder whether that's been looked at.

Melanie's question is well-founded. In our view, more research is needed to establish how common are the processes of veridiction she describes, and in what settings, and with what effects.

Speaking in a very different context – the rights of sex workers – Canadian lawyer Erica also raised concerns about the use of addiction in legal processes, in particular, the use of claims that addiction is a disease to justify coercive and paternalistic policies, or to deny the rights of women. She argues that since the *Insite* decision, conceptualisations of addiction as a disease have been combined in Canadian legal settings with questions about sex workers' agency to launch renewed criticism of the practice and a push to ban it:

...the idea is that the illness of addiction removes your actual ability to make choice. The same idea is imposed on sex workers not just because of the fact that many are addicted in the group of people that I work with, but just by [virtue of] the idea that nobody could possibly choose doing this work.

Here, prevailing understandings of drug use, addiction and sex work appear to converge to shape gender and agency in ways that pose significant issues for women's rights. We know very little about how these processes of veridiction unfold, nor how they might differ across jurisdictions, different legal settings and different areas of law. As in our previous examples, given the significant stakes here, more research is needed on how these practices play out.

## **Conclusion**

This article has aimed to illuminate the role of legal processes of veridiction in defining and responding to addiction, and to consider the effects of these processes. Drawing on the perceptions of lawyers interviewed for a study of addiction in the law in Australia and Canada, it has explored the ways lawyers understand their own role in legal processes that enact addiction as a disease, and the gendered implications of these enactments. Using Bruno Latour's work on modes of veridiction, we analysed our interview accounts, arguing that lawyers appear to play a very central role in stabilising addiction 'facts' and establishing legal 'truths' about addiction. These legal 'truths' may differ in key ways from scientific truths about addiction given legal requirements for establishing facts differ significantly from scientific requirements for establishing facts. Building on these observations and drawing further on interview accounts we explored the gender implications of these processes, observing that legal practices of veridiction risk securing, reinforcing and perpetuating gendered inequalities for women. Specifically, the particular ways the law establishes truth (its processes of veridiction) allow non-expert deliberations that can reproduce existing inequitable relations between men and women. These deliberations are by their nature largely hidden from scrutiny. According to our participant accounts, lawyers are just as instrumental as judges in defining addiction and shaping gender. Yet their work is less well known and less invigilated. In neglecting this apparently key role for lawyers, important opportunities for reform of legal practices and processes might be being missed. This is an important issue in need of attention.

In closing, we do not discount the diversity of effects these legal processes produce; including the beneficial implications they have for individuals labelled 'addicts'. This is a process we have analysed at length elsewhere.<sup>51</sup> Yet it is essential to acknowledge the potentially adverse implications such processes can have, and the

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<sup>51</sup> See Seear and Fraser (2014b).

disproportionate risks they pose for women. In sum, we identify three key ways legal processes that stabilise addiction as disease can impact disproportionately upon women (and there may be more). Where lawyers agree that addiction is a ‘disease’:

1. respondents can be said to lack agency and/or to have *diminished* responsibility or culpability for violence they commit, including family violence and sexual violence against women;
2. victims can be said to exercise agency and/or *increased* responsibility or culpability for the acts of violence committed *against* them, including family violence;
3. victims lack agency and are unable to make rational decisions in their own best interests, justifying potentially paternalistic policies concerning the rights of women to make decisions about their own bodies.

In all these respects mobilisations of addiction as disease promise to disadvantage women. In identifying these tendencies in the interview data we collected, we have drawn attention to the central role of legal processes of veridiction in them, noting that legal ways of establishing truth often proceed in the absence of expertise on central issues, and do so in ways that render them inaccessible to scrutiny. As we have noted, this article draws primarily upon accounts from lawyers about their roles in addiction veridiction, and their perceptions of events and motivations. We recognise that these processes might be more complex and nuanced than perceived by our participants. However, the broad structures on which these accounts are based; the legal requirements for alternative forms of dispute resolution, the role of lawyers in deliberations, and their lack of visibility, are well established, as are central empirical matters such as the disproportionately gendered incidence of family violence. Together, these accounts and

the broader circumstances in which they are said to have occurred warrant further research. We would like to see more work, particularly in the form of direct observation of legal processes, if access to them can indeed be secured, along with an exploration of lawyers' strategic decision making processes and motivations in the construction and deployment of addiction concepts in their work.

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