ABSTRACT

The story of David Hicks dominated public debate in Australia during the first decade of this century. Labeled a terrorist by the United States and Australian governments, his internment in Guantanamo Bay made visible a range of complex legal, social and ethical issues, which emerged in the wake of the West’s ‘War on Terror.’ While much has been written about Hicks, this paper seeks to examine the Hicks’ discourse in order to see how it illustrates Foucault’s theory of power. Foucault argued that power is produced discursively by the way ideas are talked and written about and he argued that it was possible to alter power relations by making visible the rules which determine what is true and false. In examining how Hicks was transformed from the ‘Australian Taliban’ to ‘unlikely symbol of the sanctity of human rights,’ it is possible to see how power in an institutionalized and systematized social world is no longer about ‘confronting reality with universal truths’ but rather the production of ‘multiple and differentiated realities’ (Archaeology 125). It is these competing realities which produce the strategic knowledge and tactics necessary for social change.

BIOGRAPHY

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DAVID HICKS AND FOUCAULT’S WEB OF POWER

The story of David Hicks dominated public debate in Australia during the first decade of this century. His treatment by the United States and Australian governments made visible a whole constellation of complex issues, which emerged in the wake of the West’s ‘War on Terror.’ Disputations existed over whether Hicks was, in fact, a terrorist and whether he had been tortured while in U. S. custody. Broader concerns also emerged over the significance of Guantanamo Bay, the nature of ‘sovereign exceptionalism,’ and the limits of citizenship. While some of these issues have been explored in detail by a range of political, legal and international relations theorists and scholars, this paper focuses upon the discursive practices that transformed Hicks from terrorist and traitor to ‘symbol of the sanctity of human rights,’ and the way in which competing knowledge/power practices mobilised different subjectivities and cultural identities as part of dissent against the Australian government.

Foucault theorized power as a ‘web,’ a ‘productive network which runs through the whole social body,’ and a strategic struggle between ‘relations of contrary force.’ He was interested in the diverse techniques of power engaged in this constant struggle and he argued that it was the invisibility of these techniques that made them so dangerous. The Hicks’ case, therefore, has significance because it provides a visible illustration of the intensification of power relations, and affirms Foucault’s contention that although western society has functioned for two centuries on the notions of ‘liberty and the rule of law’ it has cloaked the ‘coercive dressage and disciplinary order’ at play in the biopolitical body. The Hicks’ case has also served to expose how ‘governmentality’, which Foucault describes as the ‘ensemble of institutions and procedures’ that produce power through a range of techniques, apparatuses and knowledge, discursively produced the young South Australian as an object to be deployed as a part of the disciplinary and normalizing functions that determine who is a part of society and who is not. Foucault argued that biopower seeks to control and produce compliant populations not through fear of death but through rationalities based upon the protection of life. In the case of Hicks the legitimation of political violence against him, and his exclusion from the rights of Australian citizenship, were part of a regime of truth about national security and the defence of western civilization. This rationality justified the deployment of the government’s disciplinary techniques, which are a series of universalising social practices, and in discursively producing Hicks as a terrorist enabled the exercise power as a ‘set of actions upon other actions.’

These discursive techniques became visible when a dissenting discourse emerged to dispute the Federal government’s regime of truth about Hicks. A network of social actors, which included lawyers, journalists, academics and human rights activists produced power discursively in the way Hicks was spoken and written about in order to produce different forms of action upon the actions of others. The Australian citizen subject was encouraged to sign petitions, attend rallies and fund promotional campaigns in the name of individual human

5 Ibid., 119.
rights and freedom and to protest the government’s treatment of an Australian citizen. Using news and magazine articles, public lectures, television interviews, online blogging and literature, social actors produced a different regime of truth based upon threats to freedom and human rights.

Foucault had been critical of the language of rights as a basis for resistance. Philosopher Giorgio Agamben has argued that Foucault had insufficiently explored law beyond its juridical discursive role as a justification of power. However, Foucault did concede that the concept of individual rights can exist and that they can be ‘affirmed through invention and struggle.’ Importantly, he also argued that rights can be used not just as a legitimation of certain forms of power but also as a demand for freedom and protest against the way citizens are governed. In the Hicks’ case then it can be argued that the language of rights can be seen as a mechanism to assert individual sovereignty as a protest at the extension of executive power. This dominant form of power was not only evident in the treatment of Hicks but was also visible in a series of associated domestic and international actions taken by the Australian government, including the invasion of Iraq, the passage of the 2005 Anti-Terrorism Legislation, which curtailed citizen rights and expanded police powers of surveillance, and the internment of 13 Melbourne Muslim men in Barwon Prison without charge for more than 12 months. In this context then, the battle over Hicks’ human rights can be seen as a broader struggle over shifting rationalities produced by the ‘war on terror.’ He became implicated in the emergence of a more authoritarian form of political liberal democracy, which seeks to minimalise criticism and subordinate individual legal rights to concerns about order and security.

In order to examine how the competing regimes of truth constructed Hicks as an object, this paper combines two aspects of Foucault’s work to examine his arrest and incarceration, as well as the protests against his treatment. Foucault described discourse as collection of statements or utterances that belong to a ‘group of verbal performances,’ which shape the structures and knowledge systems that form society. It was Foucault’s interest in truth and knowledge that led him to identify the rules or discursive practices that produce distinctions between what is considered true and false. He argued that by describing the object of the discourse, and analysing who speaks about it and from where, together with identifying the concepts and themes, which delinate, specify and synthesize the object, the rules that produce discursive formations, or formalized bodies of knowledge, can be exposed. He later came to examine the power effects of knowledge and this paper, therefore, looks at the discursive practices that produced Hicks as a part of the discursive formation of terrorism and national security and that of human rights.

In examining these practices the paper proposes four arguments. The first is that the treatment of Hicks illustrates the struggle in different rationalities produced in liberal democracies by the emergence of terrorism, and Hicks’ treatment can be seen as a part of the performance of disciplinary power designed to produce a more compliant citizenry. Second, the network of lawyers, journalists and activists who discursively reproduced Hicks as a signifier of human rights demonstrated how the governed can successfully challenge the state and galvanise citizens to action through appeals to rights, understood not just as juridical power but also as a right to freedom and a ‘legitimate self-defence’ against being governed in a particular way. Third, in examining the Hicks’ campaign it is possible to see how cultural and social identities based not on geographic or ethnic affiliations but around communities of interest committed to notions of rights and freedom can be deployed as a part of mobilizing citizens to reflect upon their own subjectivity/identities, and by engaging in a process of ethical self-fashioning take the action upon the actions of others. Finally, in describing the Hicks’ discourse and identifying the tactics and strategies used to define and delimit him it is clear that challenges to power are no longer about ‘confronting reality with universal truths’ but rather the production of ‘detailed analyses of the social formation of specific social fields.’ Thus the discursive practices that challenged the Australian government’s construction of Hicks did not speak of his guilt but rather detailed the emergence and permanent institutionalization of the apparatus of disciplinary power that enabled the state extended control over the individual subject. In exposing these ‘multiple and differentiated realities’ the strategic knowledge and tactics it produced enable the social action that can alter power relations.

13 Ibid., xxxviii.
14 Steven S. Seidman, Contested Knowledge: Social Theory Today (Malden, MA: Blackwell Publishing, 2009), 183.
15 Foucault, Archaeology, 125.
BACKGROUND

David Hicks was a 26-year-old South Australian who left Adelaide in November 1999 looking for adventure and ended up training in an Al Qaeda funded camp in Afghanistan. While fighting for the Afghan government, the Taliban, he was arrested by the U. S. supported Northern Alliance in December 2001, sold to the United States military for $US 1,000 and detained in Guantanamo Bay for five years. He was interrogated, eventually charged, and prosecuted in a U. S. Military Commission. Hicks pled guilty to charges of providing material support for terrorism and after being convicted he was returned to Australia to serve out the remainder of his sentence. He was released in December 2007.

Within two months of Hicks’ arrest he was labelled a terrorist, traitor and ‘as dangerous as a person can be in modern times.’ This representation of Hicks as a significant threat to Australia was relentlessly reproduced in both the media and by the government. It was an image that was used to justify his classification as an unlawful combatant, which denied him the protection of both the Geneva Convention and the rule of law and enabled him to be charged with war crimes. Most importantly it was this characterization that made him eligible for the U. S. military commissions’ process. These commissions had been set up after 9/11 to operate at the discretion of the U. S. President and were primarily a mechanism to interrogate and prosecute terrorists. They were, therefore, designed to operate outside existing military, civil and international law. The U. S. Supreme Court subsequently challenged the legality of these commissions in 2004 and 2006, declaring them unconstitutional and a violation of international law. The U. S. government, however, refused to abandon the commission process.

The speed with which Hicks was branded a traitor in Australia, together with the Australian Government’s refusal to bring him home, even after it emerged he was not the threat originally anticipated, can perhaps be partially explained by the timing of his arrest. He was apprehended just three months after 9/11 and six weeks after Australia had committed 1,500 troops to Afghanistan. Australia was in the process of assessing her own vulnerability to terrorism following 9/11, and like the United States, had no way of knowing whether there were to be further attacks. For the President of the United States, 9/11 was an act of war so the immediate goal, according to U. S. Secretary of Defense, Donald Rumsfeld, was to ‘dissuade others from thinking that terrorism against the United States would advance their cause.’ Accordingly on 18th of September 2001 the U. S. Congress passed a resolution giving the President full authority to take action against those responsible for 9/11. The overriding problem as this stage, however, was the U. S. had very little specific intelligence about potential targets, and thus the focus of U. S. and Australian activities was on capturing suspects and interrogating them.

The Australian Government’s entrenched support for leaving Hicks in Guantanamo Bay to face the U. S. Commissions process, despite almost universal condemnation, lay in part with Australian Prime Minister John Howard himself. According to journalist and author of Detainee 002 Leigh Sales, John Howard appears to have been radicalized by the experience of being in Washington D. C. during the 9/11 attacks. He not only immediately declared his support for the United States and promised to support any retaliation; he also invoked the ANZUS treaty, which committed Australia to any action the United States might take. This was to include the commitment of Australian troops to Afghanistan in October 2001 and the deployment of troops as a part of the War on Iraq.

In this context of a heightened awareness of threat Howard viewed Hicks suspiciously. This negative attitude was further reinforced by the advice Howard received from both the Australian Federal Police and A. S. I. O. stating that on the basis of letters written by Hicks to his family expressing strong anti-Western sentiments he posed a credible security threat. Hicks subsequently expressed regret for his comments declaring that he was ‘full of bravado and exaggeration.’ At the time, however, Hicks’ comments constituted proof that Hicks was a terrorist and they provided the grounds upon which the Australian Attorney General, Darryl Williams, the Minister for Defence, Robert Hill, and Prime Minister John Howard all declared, within weeks of each other, that they thought he had done something wrong and that they had no sympathy for him. It was these letters that led Hicks to be labelled a terrorist, understood as ‘someone who’s prepared to kill innocent people to further political objectives.’ He was absorbed into a broader discursive terrain that constructed the terrorist as alien

16 Leigh Sales, Detainee 002, 54.
18 David Hicks, Guantanamo Bay: My Journey (North Sydney, N. S. W.: Random House, 2010), 121.
19 This was how Australia’s Secretary of Defence Robert Hill described a terrorist (Sales, 54). Rumsfeld also described a terrorist as ‘fanatics dedicated to advancing their cause by killing innocents and themselves in the process’ (Rumsfeld, 342).
and outcast, a person without rights and beyond the law. Described as the ‘Australian Taliban’ Hicks became for the Australian Government, a signifier of an unseen diffuse threat menacing society and he operated as a totalizing force that brought together citizens upon whom power could be enacted.

THE CAMPAIGN

The discourse protesting the treatment of Hicks was initially produced by civil libertarians, Amnesty International, and Hicks’ family, who all had a difficult time getting anyone interested in Hicks’ plight. During these early days Hicks remained a marginal issue with the Australian electorate for a range of reasons, not least of which was his conversion to the Islamic faith, which after 9/11 had become generally associated in Australia with extremism. Hicks’ strongly worded anti-western and anti-Semitic comments helped to reinforce the government’s view of him as a dangerous extremist. In adopting the Islamic faith Hicks was particularly reviled because he disrupted the dominant rationality of western liberal governments that western civilization is privileged and superior. This was evident in the way that Hicks was targeted in Guantanamo Bay. According to former detainee British Shah Mohammed, Hicks received particular abuse in Guantanamo Bay by U. S. soldiers because he was a ‘white boy.’ Foucault observed that it is not possible for the modern state to operate without some form of racism, and according to global political scientist Halit Mustafa Tagma, this assumption of the superiority of western civilization is a form of cultural racism that was used to justify state violence against detainees.

Hicks also remained a marginal issue with the electorate for practical reasons. He was isolated in Guantanamo Bay while being interrogated throughout 2002. With no additional information, the government’s depiction of Hicks remained unchallenged. Moreover, Australians at this stage remained unclear about the degree of threat posed by terrorism. It was speculations about national security and counter terrorism that shaped debates about the deployment of troops to Afghanistan, the Bali Bombings in October 2002, and the declaration of the war on Iraq in early 2003. Indeed so disinterested were people in Hicks’ plight that in mid-2003 Hicks’ father Terry stood in a cage in New York City in a dramatic effort to draw attention to his son’s ongoing lack of justice.

A shift in public sentiment was discernible in 2003 when two things occurred. Firstly, Australia declared War on Iraq. Howard saw the war with Iraq as a ‘legitimate act of anticipatory self-defence’ necessary to preserve Western civilization. Australians, however, were not so convinced that there was a link between 9/11 and Iraq and this was evident in the staging of the largest national protests in Australian history when more than 500,000 people took part in anti-Iraq War rallies across the country in March 2003. Howard also ignored the Newspoll figures, which showed that more than 76 percent of Australians opposed a U. S. backed war and he was accused of ‘deploying troops without reference to parliament and against public opinion.’

Second, President Bush selected Hicks in mid-2003 to be one of the first to be tried by the commissions. It was at this point that public disputations over Hicks’ treatment started to emerge in the media. The Victorian Institute of Law challenged the Attorney General’s Department and Department of Public Prosecutions’ advice to the Prime Minister that there was nothing Hicks could be charged with under Australian law because nothing he was alleged to have done had been illegal at the time of his arrest. Both the Law Institute and the Victorian Criminal Bar Association argued that Hicks could, in fact, be tried under the Crimes Foreign Incursions and

21 Civil libertarians had been concerned from outset that the term ‘military combatant’ threatened the rule of law and through the New York Constitutional Centre for Human Rights had launched a habeas corpus writ on behalf of Hick in U. S. civilian courts.
23 Halit Mustafa Tagma, Homo Sacer, 423.
Further media coverage also accompanied Hicks’ scheduled appearance before the commission and the appointment of his legal representation. Sales wrote that Hicks was given access to legal counsel for the purposes of plea bargaining the charges. Hicks, however, plead not guilty and his legal team, in preparing his defence, became concerned that the commission admitted coerced testimony and hearsay, and that the commission judgments could not be reviewed. Hicks’ legal team, including his appointed military defence lawyer, Major Michael Mori, concluded that the commissions were not capable of delivering justice and in a public statement on January 2004 he said: “The military commissions will not provide a full and fair trial. The commission process has been created by those only with a vested interest in conviction.” Mori made similar comments in an interview with Andrew Denton in August 2006 when he said the commissions were not a fair system because it has no checks and balance or independence. “They don’t want to give him (Hicks) a fair shake, unfortunately because I think his case has become political and the politics of it don’t want to – the first military commissions can’t be acquitted.”

Mori had been given permission to speak to the public as a part of lending credibility to the commission process. These comments, however, were unexpected. The Pentagon had clearly not anticipated that the young lawyer would be so outspoken and active on his client’s behalf, and in March 2007 the U. S.’s chief prosecutor sought to have Mori removed from the case and charged with using contemptuous language towards the president. Mori as a Judge Advocate General’s Corp (J. A. G.) lawyer dedicated to the protection of the rule of law in the battlefield, admitted in a New York Times article that the commission process offended his understanding of justice.

The commissions were also criticized by Australia’s legal observer to the process, Lex Lasry, who in August 2004 said that it was ‘virtually impossible’ for Hicks to receive justice at the hands of the commission. The Australian Prime Minister remained unmoved and his continued insistence that Hicks be charged with war crimes, and his refusal to bring Hicks home – despite an offer by the U. S. government – increasingly came to be seen as a ‘favour for an ally’. Mori and Hicks’ Australian barrister, David McLeod, accepted that Hicks was caught up in a political process and that there was no chance that he would be brought home like Mamdouh Habib the other Australian who had been released from Guantanamo Bay after the U. S. government announced there was insufficient evidence to prosecute. Hicks’ legal team realized that the only way Hicks was going to receive justice was if he was sent home and it was at this point that a campaign emerged designed to court public opinion and put political pressure on the government to change its mind.

The campaign was not just one group or individual co-ordinating the process but a collection of individual social actors enabled by technology and connected by a shared social identity based upon a commitment to legal rights. Operating like a social movement, these actors from online activist group GETUP, Amnesty International, Fair Go for David lobby group, and members of the Australian legal profession, adopted an informal discursive approach to engage in a war of ideas about Hicks. Working with these groups, Mori and Australian Barrister David McLeod took Hicks to the people. GETUP ran a series of public ads in February 2004 saying that it was ‘virtually impossible’ for Hicks to receive justice at the hands of the commission. The Australian government, however, declined to reconsider its position and Hicks was not seek the death penalty for Hicks, and that if Hicks was convicted, then he would serve out his sentence in Australia.

28 The Australian Government while insistent on U. S. justice, did make some effort on Hicks behalf. Officials worked to win concessions and successfully lobbied for the attendance of the media, an independent legal expert, family members and Australian officials at the trials. They also obtained a guarantee that the U. S. would not seek the death penalty for Hicks, and that if Hicks was convicted, then he would serve out his sentence in Australia.
29 Sales, Detainee, 120.
30 Michael Mori, Enough Rope Andrew Denton Episode 116 (August 2006).
33 Natalie O’Brien, “US did Howard a Favour” Sydney Morning Herald, 21 August 2011. Guantanamo Bay’s former military prosecutor Colonel Morris Davis described Howard’s approach as political interference.
2007 designed to ‘remind the Australian people of Hicks’ humanity,’ and Mori, who had become the public face of the legal team, made regular trips to Australia to address public rallies, law society meetings and meet with politicians. Gradually support increased; GETUP’s online petition numbers went from 700 signatures to 43,000 and more than $150,000 was raised in three days to pay for strategically placed public billboards protesting Hicks’ treatment.

**DISSENT**

Foucault outlined three conditions under which he believed dissent against the universalised techniques of disciplinary power could occur. He argued that there needs to be a recognition of an ‘international citizenship with the right and duty to react against abuses of power’ and a refusal to let governments get away with human misery. In the Hicks’ case this international citizenship consisted of social movements like Amnesty International whose members are concerned with human and legal rights. Also included in Foucault’s principles was a rejection of the governments’ construction of a division between the inefficient governed and the efficient government. It was possible to resist, he argued, by understanding that power relations are relational and complex and that power is not just a single entity nor is it contingent upon consent or violence. For Foucault power operates in the realm of possibilities in which the ‘behavior of active subjects is able to inscribe itself.’

Power is a ‘set of actions on possible actions; it incites, it induces, it seduces, it makes easier or more difficult; it releases or contrives, makes more probable or less.’ In other words the exercise of power is the management of possibilities. It is not so much a confrontation between adversaries than an issue of government, which is understood as the way the conduct of individuals is managed, and it is always ‘a way of acting upon one or more acting subjects by virtue of their acting or being capable of action.’

In discursively producing Hicks as a victim, a competing regime of truth emerged, one that would enable the emergence of a different form of citizen subjectivity. The discourse did this not by challenging the guilt or otherwise of Hicks. Instead, it focused upon two elements. First the discourse sought to expose the disciplinary techniques, the hidden agendas and self interest that produced Hicks as an object of power, and in the process showed how the Australian government’s actions diverged significantly from Australia’s avowed commitment to human rights and the rule of law. Legal and political theorists have written extensively on this issue but it was Chas Savage who perhaps best captured the general public sentiment when he wrote Hicks may have been ‘reckless, superficial and fickle’ but this in no way justified his ‘indefinite detention, cruel punishment or slow justice administered by way of kangaroo court.’ Further, when academic Alfred McCoy revealed that the U. S. were having difficulty in assembling a prosecutable case against Hicks, and that there were significant tensions between the White House, the Pentagon and the State Department over the Australian’s treatment, it became evident that this was not just about an issue of justice.

Second, the campaign sought to humanise Hicks in an effort to build sympathy for him. He had been effectively vilified by the media and the government, and pictures of Hicks as a fair-haired, blue-eyed young boy were published together with stories of his childhood in suburban Adelaide, his children, his work as a kangaroo skinner and the unflagging support of his family. Details of his mistreatment in Guantanamo Bay were also made public and articles described how he was routinely forced to run in leg shackles, was handcuffed for periods of up to 15 hours and spent more than 244 nights in isolation. During this time Hicks lost 30 pounds and developed suicidal thoughts, and according to Josh Dratel, one of Hicks’ American lawyers, Hicks had become ‘so withdrawn that he was obsessed with the minutiae of his surroundings, almost unable to comprehend the reality of his trial and the larger issues at stake.’

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35 Michel Foucault, *Power*, xxxviii.

36 Ibid., xxvii.


38 Ibid., 341.

39 Ibid., 341.


42 Ibid.
The issue of Guantanamo Bay and whether Hicks was tortured was critical to the discourse protesting his treatment because it served as the point which showed the intensification of power relations. Foucault argued that the social body constitutes itself through the exclusion of others and that ‘government is only possible when the strength of the state is known.’

Hicks and Guantanamo Bay, therefore, served as the spectacle designed to show who was a part of society and who was not. The power effect of this public display was to induce the self-regulation of the subject and produce the more compliant citizen. The use of torture, however, had another effect; perversely it highlighted the ongoing tension between the Pentagon, Secretary of State and the Judge Advocate General’s Corp (J. A. G.), thus destablising any universal claims the government might make to legitimate action. The issue of torture remained contentious and despite the 2004 photos of Abu Graib, the U. S. continued to deny that torture occurred in Guantanamo Bay. Secretary of State Donald Rumsfeld defended the operations of Guantanamo Bay insisting that the allegations of torture were from people who were ‘uninformed, misinformed or poorly informed.’

He said that the irresponsible allegations were ‘exploited by terrorists to improve their fundraising and recruitment.’ Others within the administration, however, felt that Guantanamo Bay and the formalization of interrogation techniques in legislation compromised the United States moral ground. Former Supreme Commander of the U. S. Military Forces, Colin Powell argued that the Detainee Treatment Act 2005 removed ‘the moral basis of our fight against terrorism.’

John Howard did not share these concerns, and he said that ‘he took with a grain of salt’ allegations that Hicks had been tortured while in U. S. custody.

The allegations of torture persisted, despite repeated investigations, and Halit Mustafa Tagma argues that this reveals that citizen collaboration is necessary in the production of sovereign power. Tagma argues that local micro fascist forms of power were evident in the comments of the Guantanamo Bay commander Rear Admiral Harry Harris who argued that suicides in the camp were acts of ‘asymmetric warfare’ and in the comments of Deputy Secretary of State for Public Diplomacy, Colleen Graffy who in talking about inmates observed that ‘taking their own lives was not necessary but certainly is a good PR move.’

Local fascism was also evident in the reported behaviour of the commission judges. In Alfred McCoy’s description of the first commission hearing he relates how Judge Peter. E. Brownback III, called Mori ‘sunshine’ a term that showed both ‘condescension’ and ‘hostility’ when disputing Mori’s claims that Hicks should be tried under the Fourth Geneva Convention.

As a discourse exposing the self-interest and questionable agendas underpinning the truth regimes about Hicks emerged, mainstream advocates were also beginning to speak out. The legal profession through the Law Institute of Australia had repeatedly expressed concern that a duly elected government would disregard basic human rights and the rule of law for political expediency. The International Jurists Association also insisted that the detention of Hicks was not only illegal but that the U. S.’s violation of his human rights posed just as great a threat to the rule of law as terrorism. The Head of Australia’s Military Bar, Captain Paul Willee Q. C. had stated that the military commissions ‘breached every single precept of natural law and justice in a criminal context,’ and Former High Court Justice, Mary Gaudron said that Hicks’ trial was an abuse of law. By January 2007 the Director of Military Prosecutions in Australia, Brigadier Lyn McDade declared that Hicks’ treatment was ‘wrong regardless of what he is alleged to have done.’ Catholic Archbishop George Pell and

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43 Michel Foucault, *Power*, 408.
44 Sales, *Detainee 002*, 69.
45 Donald Rumsfeld, *Known*, 569.
Anglican Archbishop Peter Jensen both publicly shared their concerns about Hicks’s lack of justice, and former Liberal Prime Minister Malcolm Fraser declared Hicks had been abandoned by his government.

Fraser’s accusation constructed Howard’s unwavering support for the U. S. military commissions process as a betrayal of Australian sovereignty; a sensitive issue in a nation still deeply conflicted over Republicanism. Patriotism emerged as an object in the discourse and Howard’s refusal to bring Hicks home was characterized as putting political relationships over human rights. Hicks’ American lawyer Josh Dratel described Howard’s willingness to tolerate the illegal detention of one of its citizens an ‘inexplicable surrender of Australia’s sovereignty.’ Further, Howard’s continued insistence that Hicks had to be left in U. S. custody and had to appear before the commissions because nothing he had done at the time of his arrest violated any Australian laws, was compared with the actions of other leaders who had brought their citizens home. Moreover, the Australian government’s position contrasted poorly with that of the European Parliament, the British House of Lords and the United Nations Human Rights Commission, who had all condemned Guantanamo Bay and the commission process. Guy Rundle suggested that the growing sense that Hicks had been abandoned by the government was amplified by the paradox of Howard portraying Hicks as a villain, at the same time that the Prime Minister launched a domestic program affirming Australian values. This program was designed to foster national stability and coherency at a time of increased immigration and fears about terrorism. However, it also served, according to Rundle, to highlight for the public Howard’s abandonment of an Australian citizen. As Hicks ceased to be a caricature of a terrorist it became apparent that he was hardly the ‘most dangerous man in the world.’ This was especially obvious when it was revealed that sitting alongside Hicks in prison was Khalid Sheikh Mohammed, the self-confessed mastermind of 9/11, and Mansor Hambali, the alleged terrorist behind the Bali bombings.

By the end of 2006, more than 71 percent of all Australians wanted Hicks brought home. This included both left and right wing voters. However, the U. S. had convened another commission under the new military commission’s legislation and the trial was proceeding. The U. S. government continued to insist that Hicks’ human rights had not been violated; that he had not been tortured and that he would receive a fair trial. Yet, Australian lawyer, public intellectual and human rights activist Julian Burnside, pointed out the commission process was farcical; Hicks had not broken any Australian, U. S. or Afghan laws; he had not actually killed anyone and at the time he was apprehended Hicks was working for the Taliban, which was the legitimate government of Afghanistan, while the Northern Alliance was, in fact, an invading army. The Australian Government for the first time began to publicly defend its actions and in January 2007 the Federal Attorney General, Phillip Ruddock insisted that Hicks had not been neglected, as had been asserted, and that more than $300,000 had been spent on legal fees for him.

By now Hicks just wanted to go home. On the 26th of March 2007 he pled guilty to providing material support to terrorism, which was a lesser crime than his original charge of conspiracy to commit war crimes, attempted murder and aiding the enemy. He was sentenced to seven years, of which six years and three months were suspended, and he was brought home to serve out his sentence.

Conflict continued over the legality of the commission’s rulings. Gerald Henderson from the Sydney Institute said that Hicks’ sympathisers should not forget that he had admitted that he had trained with a terrorist organisation and had belonged to the Taliban. Henderson also insisted that the long delay in justice was actually

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55 Alfred McCoy, “The Outcast.”


57 John Bellinger from the U. S. State Department said on ABC News 6 February 2007, ‘I don’t believe it has been a violation of human rights for Hicks (Hicks) to be held for five years with no charge.’ In the same interview the U. S. Ambassador, Robert McCallum also insisted that Hicks would receive a fair trial and that the delays had been the result of the ‘United States’ adherence to the rule of law.’


60 Hicks made a deal referred to as the Alford plea. He agreed to the charge of providing material support for terrorism which was not a war crime prior to the passage of the Military Commissions Act (2006). Essentially this meant that Hicks did not admit to the act he was charged with but he did admit that the prosecution could probably prove it.
the fault of Hicks’ lawyers who had dragged out the process to ‘put political pressure on George W. Bush and John Howard.’ Hicks’ lawyers had the capacity to plea bargain for their client since 2004, according to Henderson, but they had failed to do so because they were pursuing a principle. As a result they had not done what was best for their client. John Howard made a similar comment in his biography _Lazarus Rising_ when he wrote: ‘The fact that a lot of the delay was due to major constitutional challenges against the military commissions, which were intended to try detainees like Hicks, went through to the keeper for most Australians.’

**SUBJECTIVITY**

Central to the discourse protesting the treatment of Hicks was Foucault’s idea of subjectivity and self-fashioning ethics. Foucault believed that individuals are constructed by webs of power that create identities tied to self knowledge that forces submission to others. He argued that subjects can experience some freedom, however, by consciously recognizing we are shaped by these webs and by making self-fashioning ethical choices consistent with a conscious mode of moral conduct.

In this context then, the story of Hicks can be seen to exemplify the idea that just as discursive practices can work to produce the compliant subject; different knowledge can produce the citizen as critically conscious of how power seeks to shape them. With this awareness, the subject is enabled to take political action to resist the universalizing disciplinary techniques of government, not on the grounds of juridical power, although the discourse did affirm the rule of law as a legitimating condition of global democracy, but as a personal ethical commitment that recognises not only that individuals can take effective action against government, but also that the rights of one are indivisible from the rights of the many. This was the point made by Australian author Richard Flanagan who dedicated his 2006 book _Writing the Unknown Terrorist_ to David Hicks because he thought ‘in his story was a possible future for all Australians.’

Australians were called upon to express their ethical commitment to the ideas of justice and freedom by signing petitions, attending public rallies, and writing to M. P. s. This was a call to take action and for Foucault action was important because it is ‘experience in’ rather than ‘engagement in’ that establishes the ‘right relationship between intellect and character in the context of practical affairs.’ He believed that it was the experience of struggling with problems and dilemmas that enables subjects to be ‘affected’ or changed by the experience. By being affected, and forced to consider the implications of Hicks’s treatment at the hands of a democratically elected government, the citizen subject could move beyond ideological position-taking, and make choices as a part of their individual ethical practice, which Foucault described as a conscious decision by the individual to choose who they will be consistent with ‘the mode of being that will serve’ a ‘moral code.’ Ironically this idea of freedom to choose who the subject will be was implicit in the comments by former prisoner of war and Republican Senator, John McCain. McCain objected to the legislation that would legalise torture as a part of interrogation practices. When being pressured by his colleagues to disregard his concerns because the enemy were just terrorists, McCain responded by saying the issue was ‘not about who they are. It’s about who we are.’

The empowered and active citizen produced by the discourse about Hicks dislocated the common characterization of the Australian citizen produced during the first decade of this century. Public intellectuals like David Marr had been consistently critical of Australian citizens for their failure to protest against infringements of their liberties. Marr argued that this was because Australians found ‘Howard’s reduction of all

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62 Howard, _Lazarus_, 634.
65 Ibid., xxxiv.
66 Ibid., xviii.
67 Ibid., xxviii.
matters of principle to practical solution deeply attractive.”

So pervasive was the idea of the politically apathetic Australian citizen that when people took political action on behalf of Hicks, it led to disgruntlement. Aboriginal activist and lawyer Noel Pearson marvelled at the way the ‘progressive lobby’ had turned ‘al Qaeda recruit David Hicks into a relentless, irrecusably and finally triumphant national cause – from Taliban terrorist to latter-day Nelson Mandela of Guantanamo Bay.”

Pearson complained that it was easier to get Australians to take action on behalf of a terrorist than “an Australian Aborigine subjected to ongoing racial discrimination.”

This reference by Pearson to different cultural identities invoked in the discourse alludes to what Madhavi Sunder calls cultural dissent. He describes this as challenges to cultural orthodoxies and a demand by individuals within communities to reinterpret cultural norms differently. Sunder argues that globalisation and the exposure to different ways of life is operationalising culture as not just a thing or a unified body of customs, but also ‘webs of significance or meaning that individuals create and share in order to… control their world.”

These webs or communities of interest transcend existing cultural and political binaries and reconstitute culture, according to Clifford Geertz, as the “production and contestation of meanings within a community.”

Understood in this way the contestation of Hicks and his rights can be seen as not only a rejection of a reified notion of nationalism or citizenship deployed by Howard, but also as an effort to reconstruct meanings and identities through public engagement in a global civil domain about the much broader political significance of the treatment of Hicks during the war on terror.

CONCLUSION

This paper has sought to show that there are many forms of power, and that it is complex, relational and a negotiation of the fields of possibility. One way in which power is produced is through discursive practices which can induce action upon the actions of others. Thus in focusing upon the ‘conditions under which things become evident” and exposing the complex conditions, ideologies and interests that led to the emergence of Hicks’ cause in the decade after 9/11, it is possible to see how the young South Australian signified a dual between two discursively created objects: terrorism and freedom, and that his human rights operated not just as a ‘foundational juridical premise’ or normalizing function but as what Foucault called a ‘general right of the governed” to be free and a ‘legitimate self defense in relation to government.”

The Hicks’ discourse also exemplifies a struggle between law and order; between the lawful rights associated with citizenship and the extension of state sovereign power necessary to manage an external threat for the survival of society. Hicks became the signifier of a dangerous new threat in the social body – the disaffected outcast – and an indicator of the behaviours that were no longer acceptable in the new uncertain political climate. Hicks’ legal rights were suspended and as an unlawful combatant he became stateless, denied even the basic protection afforded to criminals. The insistence that he appear before the commissions was an effort to legitimate the extension of these disciplinary powers and part of a broader authoritarian shift in the liberal rationality of constitutional governments.

In making visible the power relations that shaped the representation of Hicks it became possible for the opponents of the Federal Government’s approach to produce the strategic knowledge that enables the contemplation of other possibilities, relationships and understandings; and to achieve Foucault’s goal in the analysis of power relations and that is “to stimulate a wider process of reflection and action leading to other and more tolerable ways of thinking and acting.”

While the discourse protesting Hicks’ treatment was ultimately unsuccessful in removing him from the jurisdiction of the military commissions, the debates surrounding his treatment did expose the way that power is constantly negotiated and renegotiated. It also challenged the rationality implicit in government that they are the

71 Ibid.
73 Ibid., 514.
74 Michel Foucault, Ethics, Subjectivity and Truth, xix.
75 Michel Foucault, Power, xxxvii.
76 Ibid., xxxvi.
only one’s capable of effective social and political action and showed the way in which culture can be deployed to create alternative subjectivities and identities. Brett Solomon, the former Executive Director of GETUP believes that Hicks was ‘fundamental to the end of Howard.’

Hicks came to represent everyone’s son, according to Solomon, and brought together a range of different interests increasingly disaffected by the actions of the Australian Government. For Solomon, Hicks was an affirmation of the value of people power, and certainly this analysis of the competing ways Hicks was discursively produced affirms that effective action is not confined to the apparatuses of government, and that freedom with its associated ideas of human and legal rights remains a powerful tool in galvanizing citizens to social and political action.

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