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Mirror, Mirror on the Wall, who is the Fairest of them All?

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MIRROR, MIRROR ON THE WALL, WHO IS THE FAIREST OF THEM ALL?

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I INTRODUCTION

In this article, the authors, both of whom are Indigenous legal scholars, reflect on changes to Indigenous people's engagement with legal education since 2005. The year 2005 was chosen as the beginning point for our analysis because this was the year that Dr Watson published her article, 'Indigenous People in Legal Education: Staring into a Mirror Without Reflection'.[1] This brief article was a vociferous critique of the treatment of Indigenous academics and students in Australian law schools. At the time, Indigenous people and their perspectives of the law were mostly absent from Australian legal texts. For the few Indigenous scholars to gain employment in law schools, the experience was often clouded by isolation, unreasonable faculty expectations and a lack of job security.

During the ensuing years Dr Watson's article was read widely. Academics have debated her claim that Australian law schools are racial hierarchies inimical to the knowledge, histories and worldviews of Indigenous people. The experiences of some Indigenous students found resonance in Watson's critique. At the same time, both authors have had the privilege of witnessing the entry of more Indigenous people into law schools, and the gradual filtering of Indigenous people's perspectives into curricula. Cultural change within law schools, however, remains elusive. Therefore, it is timely to reflect upon what really has changed since 2005, and attempt to answer the question — can Indigenous people now find themselves reflected in legal education?

This article will be divided into three parts. Part one will discuss the motivations behind 'Indigenous People in Legal Education: Staring into a Mirror Without Reflection'. In part two, Dr Watson will share her observations of developments that have taken place over the past fourteen years. In part three, Associate Professor Wood will reflect on changes to legal education and scholarship that fall under the rubric of Indigenous cultural competency. While the level of support for Indigenous law students is now greater than ever before, more needs to

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1 Nicole Watson, 'Indigenous People in Legal Education: Staring into a Mirror Without Reflection' (2005) 6(8) *Indigenous Law Bulletin* 4.

be done to improve awareness within law schools of Indigenous peoples' cultures, historical experience of colonisation and its enduring legacies.

II THE INVISIBILITY OF INDIGENOUS PEOPLE IN LEGAL EDUCATION

When Dr Watson commenced her studies at the TC Beirne School of Law, University of Queensland in 1991, she belonged to a small number of Indigenous people to have gained access to legal education. According to a survey conducted the previous year, only 50 Indigenous people across the country were enrolled in undergraduate law degrees, and a mere 21 had previously completed an undergraduate law degree.[2]

Unsurprisingly, many within this generation of Indigenous law students aspired to make a difference at the grass roots. In a survey of Indigenous law students conducted by Dolman in 1997, 76.7 per cent of respondents claimed that they were motivated by a desire to make a contribution to their community.[3] Seminal events during the early 1990s served to fuel such optimism. In the year that Watson began her legal studies, the Royal Commission into Aboriginal Deaths in Custody released its final report.[4] The following year the High Court delivered its decision in *Mabo v Queensland (No 2)*.[5] One element of the Commonwealth's response to this watershed, the social justice package, appeared to offer a pathway to a treaty and compensation for dispossession.[6]

To Watson's surprise, however, the TC Beirne School of Law was largely oblivious to such developments. Most striking was the invisibility of Indigenous people's historical experience of law. When Indigenous issues were raised in the classroom, they were often the subject of derision. This airing of racist views was not uncommon in law schools at the time. In Dolman's survey referred to above, 38 per cent of respondents reported experiencing racism in the course of their studies.[7] Most complaints were triggered by offensive comments made during conversations about Indigenous issues, such as native title.[8]

Watson described one such experience in her article, which arose during a discussion about *Tickner v Bropho*,[9] in an administrative law class. In that case, the respondent had sought judicial review of decisions made by the Minister for Aboriginal and Torres Strait Islander

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2 Daniel Lavery, 'The Participation of Indigenous Australians in Legal Education' (1993) 4 *Legal Education Review* 177, 179.

3 Kevin Dolman, 'Indigenous Lawyers: Success or Sacrifice?' (1997) 4(4) *Indigenous Law Bulletin* 4.

4 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

5 (1992) 175 CLR 1.

6 Aboriginal and Torres Strait Islander Commission, 'Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures' (Report, Aboriginal and Torres Strait Islander Commission, 1995).

7 Dolman, above n 3, 5.

8 Ibid.

9 (1993) 114 ALR 409.

Affairs to refuse applications for declarations under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), to protect an area known as Goonininup. Goonininup was of profound significance to the respondent and his community because it belonged to the Dreaming track of Waugyl, the Rainbow Serpent.[10] While recounting the facts, Watson's lecturer suggested that the land was sacred only because it had once been the home of the Swan brewery.[11] The large lecture theatre, which housed hundreds of students, was filled with spontaneous laughter.

After graduating in 1997, Watson drifted through a series of jobs, both in practice and the public service. Eventually, she took on the role of editor of the *Indigenous Law Bulletin*, which was housed in the Indigenous Law Centre, Faculty of Law, University of New South Wales. Her exposure to scholars who had a commitment to using the law as a tool of social justice was inspiring. When offered the opportunity to work in the Faculty of Law, Queensland University of Technology (QUT), she embraced it with both hands. But Watson quickly learnt that law schools were complex structures, which were resistant to change.

Although disillusioned, she was able to draw strength from critical race theory. Critical race theory originated in America in the 1970s, when lawyers such as Derrick Bell and Alan Freeman observed that civil rights victories in the earlier part of the twentieth century had delivered only the mirage of change. [12] Racism was still pervasive, but it had become obscured as a result of laws and practices that treated America's long history of racial segregation as irrelevant. Critical race theorists cast a light on both systemic racism and the privilege that emerges as a result of such forces. For Watson, the most exciting aspect of critical race theory was engagement with the work of activist scholars from marginalised communities. Reading Mari Matsuda's call for outsider experiences of patriarchy and racism to inform law and legal theory[13] was empowering. Likewise, Richard Delgado's use of story-telling to illuminate the invisible prejudices of law school hiring practices,[14] had a particular resonance.

In 'Indigenous People in Legal Education: Staring into a Mirror Without Reflection', Watson argued that in common with America, racism was ubiquitous in Australian society.[15] In institutions such as law schools, it was manifest in exclusionary practices. Texts written by

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10 Ibid 411.

11 Watson, above n 1, 4.

12 Richard Delgado, 'Liberal McCarthyism and the Origins of Critical Race Theory' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: The Cutting Edge* (Temple University Press, 3rd ed, 2013) 38, 40.

13 Mari J Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' in Richard Delgado and Jean Stefancic (eds) *Critical Race Theory: The Cutting Edge* (Temple University Press, 3rd ed, 2013) 31.

14 Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: The Cutting Edge* (Temple University Press, 3rd ed, 2013) 71.

15 Watson, above n 1, 5.

Indigenous people were mostly absent from curricula. Indigenous scholars were seldom employed in law schools. For the tiny number who broke through the glass ceiling, the experience was often jaded by a series of fixed term contracts and heavy teaching loads. Furthermore, as junior members of staff their ability to effect institutional change was constrained.[16]

The paper was subsequently published in a special issue of the *Indigenous Law Bulletin* on racism in legal education, which also featured articles by Irene Watson,[17] Phil Falk,[18] Hannah McGlade[19] and others. Reading those articles today, one is struck by the commonalities between the Indigenous authors. Virtually all were employed as associate lecturers. Most struggled to convince their peers of the need for all students to be exposed to Indigenous peoples' worldviews and historical experience. Some had endured subtle forms of racism from senior colleagues. Others were distressed that Indigenous issues were still not being discussed with sensitivity in classrooms.

III 'TWO STEPS FORWARD, ONE STEP BACK', BY DR NICOLE WATSON

Before I began to work on this paper I revisited, 'Indigenous People in Legal Education: Staring into a Mirror Without Refection'. The bitterness of my younger self was confronting. Learning that Indigenous peoples' perspectives were not welcome at my former law school had been a painful experience indeed. But I was also saddened that the only means for me to be heard was to write such a scathing piece. I doubt that I would be so strident in my critique of Australian legal education today. But as a senior lecturer, I now have a degree of power that I lacked all of those years ago.

I have chosen the above title for my contribution to this article because I think that it captures the trajectory of Indigenous people in the law. As will be seen below, the numbers of Indigenous people to graduate from Australian law schools have increased since the 1990s. We have also made progress in the profession and our community of Indigenous legal scholars is blossoming. However, this journey has been largely ignored by scholars. In this part, I will argue that there is an urgent need for a new research agenda, which would encourage debates concerning the roles and obligations of Indigenous practitioners and scholars, examine the Indigenous student experience and finally, advocate for the inclusion of Indigenous legal traditions in curricula.

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16 Ibid 5–6.

17 Irene Watson, 'Some Reflections on Teaching Law: Whose Law, Yours or Mine?' (2005) 6(8) *Indigenous Law Bulletin* 23.

18 Phil Falk, 'Law School and the Indigenous Student Experience' (2005) 6(8) *Indigenous Law Bulletin* 8.

19 Hannah McGlade, 'The Day of the Minstrel Show' (2005) 6(8) *Indigenous Law Bulletin* 16.

A *Indigenous Practitioners*

A comprehensive history of the Indigenous legal fraternity is yet to be written. Arguably, however, the most consistent theme of any such book would be tenacity, given the incredible strides taken by Indigenous people since the latter part of the 20th century. It was not until the 1950s that Indigenous children were enabled to receive anything more than a rudimentary education that would equip them for lives of servitude.[20] For my grandmother and other Aboriginal children of her era, grade four represented their final year of schooling, before they were compelled to seek employment as domestic servants. It was not until the adoption of the policy of self-determination in 1972 that the crisis in Indigenous education finally received federal attention.[21]

In the same year, the Murri man, Mullanjeiwaka, formerly known as Lloyd McDermott, was admitted to the New South Wales Bar. His reflections give some indication of the barriers that our early lawyers had to overcome:

> People thought I was a Greek or Italian. When I told them, they said 'but you are not a real Aborigine.' They didn't think you could have an Aboriginal with a degree and a pin-striped suit.[22]

Mullanjeiwaka and his contemporaries gained their qualifications at a time when our people were vulnerable to widespread and unchecked police brutality.[23] This was also the height of the Indigenous civil rights movement, and it is unsurprising that some played pivotal roles in the fledgling Indigenous legal services.

After witnessing the unjust treatment of two Aboriginal women who had been assaulted by police officers, the Murri woman, Pat O'Shane, was drawn to study law.[24] She graduated from the University of New South Wales and then worked for Aboriginal Legal Services in Redfern and Alice Springs, before becoming our first magistrate in 1986.[25] The late Judge Bob Bellear was also motivated to study law after witnessing

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20 Angela Melville, 'Educational Disadvantages and Indigenous Law Students: Barriers and Potential Solutions' (2017) 4 *Asian Journal of Legal Education* 95, 100.

21 Gary Partington, '"In Those Days It Was Rough": Aboriginal and Torres Strait Islander History and Education' in Gary Partington (ed), *Perspectives on Aboriginal and Torres Strait Islander Education* (Social Science Press, 1998) ch 2, cited in Kevin Gillan, Suzanne Mellor and Jacynta Krakouer, *The Case for Urgency: Advocating for Indigenous Voice in Education* (Australian Council for Educational Research, 2017) 41.

22 Michael Pelly, 'Black Lawyers Can Raise the Bar', *The Australian* (online), 28 March 2008 <https://www.theaustralian.com.au/business/legal-affairs/black-lawyers-can-raise-the-bar/news-story/8527377bfc1e32c042ee0e090cd47ded>.

23 Gary Foley, *Black Power in Redfern 1968–1972* (5 October 2001) The Koori History Website <http://www.kooriweb.org/foley/essays/essay_1.html>.

24 Larissa Behrendt and Stephen Walsh, 'From Cairns to the Courtroom' (1991) 2 *Polemic* 161.

25 Paul Gregoire, 'A Career of Firsts: An Interview with Former NSW Magistrate Pat O'Shane' on *Sydney Criminal Lawyers* (22 January 2017) <https://www.sydneycriminallawyers.com.au/blog/a-career-of-firsts-an-interview-with-former-nsw-magistrate-pat-oshane/>.

racially discriminatory policing practices.[26] He would go on to perform the role of Counsel assisting the Royal Commission into Aboriginal Deaths in Custody, and become a much admired Public Defender.[27]

It has been estimated that more than 500 Indigenous people have since followed in the footsteps of giants such as Judge Bellear.[28] Although some Indigenous lawyers still practice in criminal law, others are breaking new ground.[29] As distinct from earlier eras, Indigenous lawyers are creating a presence in large corporate law firms.[30] The Yamatji lawyer, Ben Wyatt, made history when he was elevated to the role of Treasurer of Western Australia in 2017.[31] Damien Miller, of the Ghangulu of central Queensland, also blazed a trail when he became Australia's ambassador to Denmark.[32] The Wiri barrister, Tony McAvoy became our first Senior Counsel in 2015.[33] Three years later, the Ghangulu and Bidjara man, Nathan Jarro, was appointed to the District Court of Queensland.[34] He joined the growing Indigenous judiciary, which includes Matthew Myers AM, Judge of the Federal Circuit Court, and Magistrates Jacqui Payne, Zac Zarra, Louise Taylor and others.

While it is important to celebrate such success stories, we should also acknowledge that there has been a dearth of research into the experiences of Indigenous people in the legal profession. Only 16 of Australia's 6000 barristers identify as Indigenous;[35] an anomaly that has escaped academic consideration. Furthermore, there has been no analysis of the unique experiences of Indigenous women lawyers. However, the reality that there are only five Indigenous women currently at the Bar[36] suggests that there is an urgent need for such work.

Research from the United States of America and Canada suggests that lawyers from marginalised communities face unique challenges. Fletcher argues that narratives about Native American lawyers often fall

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26 Hal Wootten, 'Robert William Bellear (1944–2005)' (2005) 28 *University of New South Wales Law Journal* iii.

27 Ibid.

28 Katie Walsh, 'Indigenous Lawyers On Rise at Top Tiers', *Australian Financial Review* (online), 8 July 2015 <https://www.afr.com/business/legal/toptier-firms-recruiting-indigenous-lawyers-to-boost-diversity-20150708-gi7ft3>.

29 Rebecca Gallegos, 'Paving the Way: Indigenous Leaders Creating Change in the Legal World' (2014) 8(11) *Indigenous Law Bulletin* 8.

30 Walsh, above n 28.

31 David Weber, 'Ben Wyatt Making History as First Aboriginal Treasurer in Australian State or Federal Government', *ABC News* (online), 16 March 2017 <https://www.abc.net.au/news/2017-03-16/ben-wyatt-wa-aboriginal-treasurer-making-history/8361710>.

32 Gallegos, above n 29.

33 Andrea Booth, 'Tony McAvoy: Appointed First Indigenous Silk', *NITV* (online), 25 September 2015 <https://www.sbs.com.au/nitv/article/2015/09/24/tony-mcavoy-appointed-first-indigenous-silk>.

34 Melissa Coade, 'Indigenous Barrister Appointed to Qld Bench', *Lawyers Weekly* (online), 26 March 2018 <https://www.lawyersweekly.com.au/wig-chamber/22965-indigenous-barrister-appointed-to-qld-bench>.

35 Australian Bar Association, *Indigenous Members* <https://austbar.asn.au//for-members/indigenous-members>.

36 Ibid.

within the tradition of 'Indian abductee stories'.[37] The protagonist in such stories is usually taken away to a new land, and when she returns, she brings with her a special gift. While the gift is valued by her community, the protagonist is forever transformed by it, and as a result, can no longer live among her own people. By way of analogy, Native American lawyers acquire valuable skills at law school. After graduation, however, they are not always embraced by their communities, and some are compelled to seek an exile of sorts.

Unique pressures can arise from not only from the families of such lawyers, but also their peers. Russell argues that African American attorneys often endure a 'double bind'.[38] On the one hand, they are expected to operate under the pretence that the legal profession is race-less. On the other hand, such attorneys are also under pressure to assume special responsibilities because of their race, such as membership of diversity committees and pro bono work in African American communities. They are also constantly reminded of their race by gratuitous comments made within and outside of their workplaces.[39]

Research is required in order to determine whether the narratives of Indigenous Australian lawyers are analogous to 'Indian abductee stories', and whether our practitioners similarly endure the loneliness of Russell's 'double bind'. One of the few articles[40] on the experiences of Indigenous Australian practitioners alluded to racism in the workplace, which was often manifest in probing by colleagues about their Indigenous heritage. More work is required, however, in order to explore the full breadth of the experiences of Indigenous Australians in the legal profession.

B *Indigenous Legal Scholars*

Mirroring developments within the profession, our community of legal scholars has grown over the past 14 years. The authors are aware of at least 10 other Indigenous academics who are employed in Australian law schools. As distinct from 2005, a time when most were associate lecturers, we even have a small number of professors.[41] Given that there has been no recent research into the experiences of Indigenous legal scholars, it is difficult to gauge whether law schools have become safer spaces over the past 14 years.

However, a national survey of Indigenous academics revealed that such scholars often perform tasks outside of conventional academic

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37 Matthew LM Fletcher, 'Dibakonigowin: Indian Lawyer as Abductee' (2006) 31 *Oklahoma City University Law Review* 209, 211.

38 Margaret M Russell, 'Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice' (1997) 95 *Michigan Law Review* 766, 768.

39 Ibid 768–9.

40 Harriet Morley, 'Breaking the Barriers: Victorian Indigenous Lawyers' (2007) 81(8) *Law Institute Journal* 18 <https://www.liv.asn.au/mobile/home/law-institute-journal/Article?NodelD=40546&NodeParentID=40534>.

41 Professor Larissa Behrendt (UTS), Professor Megan Davis (UNSW), Professor Irene Watson (UoSA), Professor Mark McMillan (RMIT) and Professor Mick Dodson (ANU).

workloads, such as support to Indigenous students, community outreach, and assistance to colleagues who aspire to include Indigenous content in their courses.[42] In order to make such contributions, Indigenous academics often sacrifice their own research, harming their prospects for promotion.[43] Indigenous scholars also confronted unique burdens, such as hostility from non-Indigenous students, particularly in the context of discussions about Australian history.[44] Whether Indigenous legal scholars also deal with such issues is yet to be examined.

C *The Indigenous Student Experience*

Since the advent of colonisation, negative stereotypes have been the lenses through which settler Australians have understood us. At various times we have been the noble savage, members of a dying race, and more recently, welfare-dependent.[45] Because such representations are entrenched in Australian culture, they remain a potent, virulent force, which impacts upon the lives of Indigenous people in myriad ways. In a recent survey of 755 Aboriginal people in Victoria, almost every one of them had experienced racism in the previous 12 months,[46] in settings that included retail stores, public spaces, financial institutions, schools and universities.[47]

If racism is omnipresent, then it follows that law schools are also affected by this pernicious force. Which begs the question — how does racism impact upon our students? To date the most comprehensive analysis of the experiences of Indigenous law students was undertaken by Professor Heather Douglas between 1998 and 2005.[48] Douglas' research was based on interviews that she conducted with Indigenous law students in Brisbane, while employed as the Indigenous support person at the School of Law, Griffith University. Although the students came from a diversity of backgrounds, all experienced alienation:

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42 Christine Asmar and Susan Page, 'Sources of Satisfaction and Stress Among Indigenous Academic Teachers: Findings From a National Australian Study' (2009) 29 *Asia Pacific Journal of Education* 387.

43 Ibid 394.

44 Ibid 393.

45 Sophie D Hickey, '"They Say I'm Not a Typical Blackfella": Experiences of Racism and Ontological Insecurity in Urban Australia' (2016) 52 *Journal of Sociology* 725, 726.

46 Angeline Ferdinand, Yin Paradies and Margaret Kelaher, 'Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey' (Report, Lowitja Institute, 2013) 1.

47 Ibid 6.

48 Heather Douglas, '"This Is Not Just About Me": Indigenous Students' Insights About Law School Study' (1998) 20 *Adelaide Law Review* 315; Heather Douglas and Cate Banks, '"From a Different Place Altogether" Indigenous Students and Cultural Exclusion at Law School' (2000) 15 *Australian Journal of Law and Society* 42; Heather Douglas, 'The Participation of Indigenous Australians in Legal Education 1991–2000' (2001) 24 *University of New South Wales Law Journal* 485; Heather Douglas, 'Indigenous Legal Education: Towards Indigenisation' (2005) 6(8) *Indigenous Law Bulletin* 12.

> Doing law was the worst experience of my life. I was from a lower working class family, I was the only person who went to a state school, I was indigenous, I worked and I rode a bike because I did not own a car, not a good combination at law school. I was absolutely ostracised.[49]

On rare occasions when Indigenous issues were discussed in class, the content often acted as a magnet for the expression of racist attitudes.[50] Unsurprisingly, the attrition rate for Indigenous students was 'disturbingly high'.[51] In her final article, Douglas concluded that the problem was not the students:

> Basically my research and my teaching experiences relating to Indigenous students lead me to the view that the whiteness of the law school, by its very nature, excluded Indigenous students. The staff; the curriculum; the methods for teaching and assessing, were all white.[52]

I was one of the students who participated in Professor Douglas' research. I can still identify the quotes in her articles that were mine, and in spite of the passage of time, the pain that lingers behind those words is surprisingly raw. Do Indigenous law students of today experience the alienation that my peers and I described? Undoubtedly, there have been some improvements since Professor Douglas published her important work. There is now a diversity of support programs for Indigenous students, such as pre-law courses,[53] scholarships, mentoring[54] and schemes that are designed to lessen the expense of prescribed texts. All such measures are both important and commendable, but they are still about helping Indigenous law students to 'fit in', rather than bringing about institutional change.

In the absence of a follow-up study to Douglas' work, it is impossible to know whether alienation remains the norm for Indigenous law students, and I have only my personal observations to draw upon. In my current employment at Sydney Law School, I have had the privilege of meeting a small number of Indigenous students. Due to privacy considerations, faculty staff are not advised of who our Indigenous students are, and therefore, the majority remain unknown to me. This has prompted occasional conversations with concerned colleagues about why it is that some Indigenous students seemingly

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49 Douglas, 'This Is Not Just About Me', above n 48, 323.

50 Douglas, 'Indigenous Legal Education: Towards Indigenisation', above n 48, 13.

51 Douglas, 'The Participation of Indigenous Australians in Legal Education 1991–2000', above n 48, 489.

52 Douglas, 'Indigenous Legal Education: Towards Indigenisation', above n 48, 14.

53 Mel Thomas, Jill Milroy and Richard Bartlett, 'Teaching and Learning the Law: The University of Western Australia's Indigenous Law Program' (2010) 7(19) *Indigenous Law Bulletin* 13; Sean Brennan et al, 'Indigenous Legal Education at UNSW: A Work in Progress' (2005) 6(8) *Indigenous Law Bulletin* 26.

54 Melissa Coade, 'Top-Tier Offers Targeted Mentoring for Indigenous Law Students', *Lawyers Weekly* (online), 21 August 2017 <https://www.lawyersweekly.com.au/careers/21710-top-tier-offers-targeted-mentoring-for-indigenous-law-students>; Katie Walsh, 'One Barrister's Battle to Increase Indigenous Lawyer Numbers: Chris Ronalds AO', *Australian Financial Review* (online), 1 February 2018 <http://www.afr.com/business/legal/one-barristers-battle-to-increase-indigenous-lawyer-numbers-chris-ronalds-ao-20180126-h0otlu>.

choose to keep their identity private. I always struggle to answer this question because it overlooks the harsh realities of being an Indigenous person in a society in which racism is ubiquitous.

By the time that Indigenous students arrive at university, most have learnt to anticipate racism, based on either their own experiences, or witnessing loved ones being treated differently because of their Indigenous heritage. Out of necessity, each student learns to live with the constant threat of racism and creates protective strategies. Suppression of identify is such a strategy;[55] albeit one that will likely harm the self-esteem of those who adopt it. Rather than pondering why it is that some 'choose' to conceal their identity, perhaps a better question to ask is how can we change the culture of the Law School, so that our Indigenous students will be empowered?

D *The Inclusion of Indigenous Legal Traditions in Curricula*

When I wrote my article in 2005, Indigenous people existed only on the periphery of the curriculum, if at all. In the ensuing years some legal scholars wrote about their own practices of incorporating Indigenous people's knowledge and perspectives in teaching.[56] Impetus for change was also provided by the emergence of Indigenous cultural competence as a 'fundamental aspect' [57] of Australian higher education. Commitments to embed Indigenous cultural competence in the curriculum and include it as a graduate attribute are now enshrined in the policy documents of most universities.[58] At first glance, educating all students to become culturally competent appears to be a noble aim, because it is one possible means of securing 'curricular justice'[59] for Indigenous students. However, Indigenous cultural competence rests upon some flawed foundations.

Firstly, the notion that one can ever become 'competent' in another culture is unrealistic. Paul, Hill and Ewan argue that to 'consider yourself to be "culturally competent"' is, 'in reality a revelation of cultural incompetence'.[60] It is inconceivable that the matrix of historical factors and behaviours that comprise a culture can ever be 'reduced to

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55 David Mellor, 'Responses to Racism: A Taxonomy of Coping Styles Used by Aboriginal Australians' (2004) 74 *American Journal of Orthopsychiatry* 56, 63.

56 Amy Maguire and Tamara Young, 'Indigenisation of Curricula: Current Teaching Practices in Law' (2015) 25 *Legal Education Review* 95; Nicole Graham, 'Indigenous Property Matters in Real Property Courses at Australian Universities' (2009) 19 *Legal Education Review* 289; Gary D Meyers, 'Two Examples of Incorporating Indigenous Issues in Law School Curricula: Foundation Year Courses and Electives in Environmental/Natural Resources Law' (2008) 7(9) *Indigenous Law Bulletin* 6.

57 Marcelle Burns, 'Towards Growing Indigenous Culturally Competent Legal Professionals in Australia' (2013) 12(1) *International Education Journal: Comparative Perspectives* 226, 244.

58 Maguire and Young, above n 56, 96.

59 Ibid 97.

60 David Paul, Shauna Hill and Shaun Ewen, 'Revealing the (in)Competency of "Cultural Competency" in Medical Education' (2012) 8 *AlterNative: An International Journal of Indigenous Peoples* 318, 322.

a singular technical skill'.[61] Furthermore, with its emphasis on effective communication across cultures, it is possible that law students and academics may become 'culturally competent', and yet still avoid difficult conversations about matters such as Indigenous demands for national land rights legislation and a treaty.

I would argue that instead of encouraging students to become culturally competent, we should be having a dialogue about the incorporation of Indigenous legal traditions in the curriculum. The arguments in favour of incorporation are compelling. Firstly, it is illogical to confine legal education to a system of laws that has operated on Australian soil for a mere 230 years, while utterly ignoring laws that have been practised here for thousands of years. Secondly, Indigenous laws have intrinsic value because they are the only bodies of law that have enabled human beings to live here sustainably.[62] Finally, Indigenous laws should be incorporated out of recognition that settler law has consistently proven to be inept in keeping Indigenous communities safe from violence. In virtually every country with a history of settler colonialism, the criminal justice system has profoundly failed the Indigenous population,[63] and Australian is no different.[64]

Although the incorporation of Indigenous law would represent a significant change to Australian legal education, we have models in North America to draw upon. Impetus towards the inclusion of Indigenous laws in Canadian law schools was provided by the Truth and Reconciliation Commission. The Commission was established in 2008, with a mandate to examine the history and legacies of church-run residential schools, and to guide the reconciliation process.[65] The Commission considered that the revitalisation of Indigenous laws and legal traditions was central to the creation of respectful relationships between Indigenous people and Canada.[66]

Courses on Indigenous legal traditions are now offered in several law schools, including the University of Ottawa, Osgoode Hall, McGill University and Lakehead University.[67] Some of the most innovative developments have been initiated by the Indigenous Law Research Unit (ILRU) within the Faculty of Law, University of Victoria. The ILRU

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61 Ibid 322–3.

62 Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Allen and Unwin, 2011).

63 Val Napoleon and Hadley Friedland, 'Indigenous Legal Traditions: Roots to Renaissance' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press, 2014) 225.

64 Hannah McGlade, 'New Solutions to Enduring Problems: The Task of Restoring Justice to Victims and Communities' (2010) 7(16) *Indigenous Law Bulletin* 8.

65 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*: *Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Report, Truth and Reconciliation Commission of Canada, 2015) 27 <http://publications.gc.ca/collections/collection_2015/trc/IR4-7-2015-eng.pdf>.

66 Ibid 16.

67 Val Napoleon and Hadley Friedland, 'An Inside Job: Engaging with Indigenous Legal Traditions Through Stories' (2016) 61 *McGill Law Journal* 725, 731.

has pioneered a research methodology that aims to identify and articulate the principles of Indigenous legal orders, through engagement with Indigenous people's stories and oral histories. [68] The ILRU's work in recovering Indigenous laws has been so successful that the University of Victoria has recently introduced the world's first degree in Indigenous Law, the Juris Indigenarum.[69]

In summary, the contemporary narrative of Indigenous people in Australian legal education is largely positive. In less than 50 years we have gone from having not a single graduate to a blossoming fraternity that includes practitioners, academics, and judges. But there is an urgent need for research into the experiences of both Indigenous law students and graduates. In the absence of such work, we will not be able to understand why it is that so few Indigenous women are entering the Bar. Likewise, we will not know if law schools have, in fact, become safe spaces for our young people. Finally, fairness and national maturity demand a place for Indigenous legal traditions in law school curricula. It is no longer conscionable for law schools to continue to ignore laws that operated here for thousands of years; laws that could be a gift to all Australians.

IV FROM TERRA NULLIUS TO INDIGENOUS-LED TEACHING, BY ASSOCIATE PROFESSOR ASMI WOOD

This part reflects a subjective account of the transformation of issues related to the so-called 'Indigenous space', which is broadly and collectively defined here as the spaces on Australian campuses that concern Indigenous staff, students, research, teaching and community outreach. This part will discuss the transformation of the Indigenous space primarily as experienced at the Australian National University (ANU). As with many important changes, several people have and still are contributing to positive transformation.

The particular focus here, however, is on the impact of Dr Watson's seminal article[70] on my teaching and research practices in the ANU's Indigenous space. The reason for this choice of criterion is that Dr Watson held up a mirror to the profession and the academy. However, and arguably in doing so, she also highlighted in principle the gaps, and hence, critically the areas, work and work practices that Indigenous academics could usefully reflect upon when considering their own work practices. Dr Watson's paper, which recalls her experience from a further decade back, called out for change in the profession, but specifically to lawyers to not only seek to change their own law schools, but also their own research and teaching practices as well.

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68 Hadley Friedland and Val Napoleon, 'Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions' (2015) 1 *Lakehead Law Journal* 17.

69 University of Victoria, 'World's First Indigenous Law Degree to be Offered at UVic' (Media Release, 21 February 2018) <https://www.uvic.ca/news/topics/2018+jid-indigenous-law+media-release>.

70 Watson, above n 1.

A *The Importance of Indigenous Cultural Competency*

While the broader issues raised by Dr Watson in 2005 largely remain similar in principle, the language used to characterise the key issues has taken different forms over time. For the purpose of this paper, I have employed the generic (and not-uncontroversial) term 'Indigenous cultural competency' (ICC), to describe what we are broadly trying to achieve in the Indigenous space, not as an end in itself but as a means to provide for greater acceptance of Indigenous students, staff, people and cultures within the Academy.[71]

Indigenous cultural competency is a term with no agreed-upon definition, but for convenience and consistency, I have used the Universities Australia definition.[72] There have been many positive changes in this context occurring globally in the university sector, including law school classrooms. While not suggesting that the detrimental issues of the past have been addressed comprehensively, this section first identifies some positive changes in the legal teaching space and then goes on to critique and analyse these changes.

Since Watson's encounter with her administrative law class at the University of Queensland, there has been a significant rise in the numbers of Indigenous lawyers and law academics, improved support services for Indigenous students on campus, and better recognition of the need to increase Indigenous content and perspectives in the legal curriculum.[73] These improvements continue to be made, albeit slowly. Notwithstanding the hard work of many Indigenous and non-Indigenous colleagues, much work still needs to be done to raise awareness of the ongoing legacies of past policies, such as child removal, and the lingering effects of colonisation, including more subtle forms of racism. The hope is that once these problems become widely understood and accepted, the resulting pressure on institutions to act will be overwhelming. In the meantime, Indigenous people themselves are working incredibly hard to address the shortcomings of institutions, and for reasons alluded to in this paper, are doing this under difficult circumstances.

In this context, I would like to be the proverbial fly on the wall of Dr Watson's administrative law class, and I would like to hear the discussions between her peers and her lecturer, whom she alluded to in the conclusion of her 2005 paper. I would also like to imagine the

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71 A J Wood, 'Incorporating Indigenous Cultural Competency Through the Broader Law Curriculum' (2013) 23 *Legal Education Review* 57.

72 'Student and staff knowledge and understanding of Indigenous Australian cultures, histories and contemporary realities and awareness of Indigenous protocols, combined with the proficiency to engage and work effectively in Indigenous contexts congruent to the expectations of Indigenous Australian peoples.' See Universities Australia, *National Best Practice Framework for Indigenous Cultural Competency in Australian Universities* (October 2011) <https://www.universitiesaustralia.edu.au/uni-participation-quality/Indigenous-Higher-Education/Indigenous-Cultural-Compet#.XIrRfJMzYb0> 171.

73 Asmi Wood, 'Law Studies and Indigenous Students' Wellbeing: Closing the (Many) Gap(s)' (2011) 21 *Legal Education Review* 251.

discussions that should have taken place but did not namely: a discussion about why the Parliament belatedly acknowledged that Indigenous people should be counted in the census,[74] how Indigenous civilisations and their laws are acknowledged in the courts,[75] if at all, and the long-term impacts of the wrongful application of the doctrine of terra nullius. The absence of such conversations from such a class is ironic, given that administrative law is meant to impress upon students the importance of procedural fairness and natural justice, particularly in circumstances where there is a significant power imbalance between the parties.

Watson's experience in her administrative law class harks back to a former era, when non-Indigenous academics did not even have to disguise their derision, or even hatred, for Indigenous peoples, or as in later times, to even give perfunctory effect 'to rights' in a manner which scholars such as Charlesworth refer (in a related concept) to as 'rights ritualism'.[76] Such ritualism largely pays lip service, but does little to address the object and purpose of these 'rights', or their substantive content. Arguably, opposition to incorporating Indigenous content in the law, ICC and related issues has become subtle, and therefore, difficult to identify. On the other hand, and a more positive note, so is the active, strong and vocal support from our colleagues.

The largely detrimental, ongoing effects of colonisation cannot reasonably be erased or reversed quickly. Consequently, the tensions identified by Watson 14 years ago are still experienced by many Indigenous law teachers and students. For example, in common with their peers, Indigenous law teachers and students must encounter the Constitution, but they do so from a unique position. That is, they are cognisant that the Constitution still does not explicitly acknowledge their existence as human beings, or their laws, their civilisations or languages. Likewise, it is yet to expressly deny and reverse the assumptions and the underpinning notions of Aboriginality that informed the Founding Fathers' views when drafting the Constitution; values that arguably remain entrenched. These tensions still appear to be largely invisible to the faculty leadership.

Generally, programs at law schools still focus on getting students to university and much less about helping them to remain at university to the completion of their law degrees. Furthermore, this education is largely an integrationist model with Indigenous students required to accept Anglo-Australian versions of truth, law, justice and what is good, while being expected to supress their own ontologies.

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74 John Gardiner-Garden, 'The 1967 Referendum: History and Myths' (Research Brief No 11, Parliamentary Library, Parliament of Australia, 2007) 4; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010).

75 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 ('*The Gove Human Rights Case*').

76 Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press, 2015).

B *Taking Steps Towards Change*

Clearly much more is needed in this area to help overcome entrenched aspects of Indigenous disadvantage. The authors are currently involved in two projects that challenge such disadvantage. The first is the Indigenous Cultural Competency for Legal Academics Program (ICCLAP), which is funded by a grant from the Office of Learning and Teaching (OL&T). The ICCLAP program is discussed in some detail elsewhere in this issue of the journal. This program aims to bring together the collective experience of Indigenous teachers and students, and show how this collective experience can be broadly disseminated. As a token of the recognition of her work, the ICCLAP program team invited Dr Watson to share her thoughts and reflections on the development of law schools in the intervening decade since 2005, at a workshop in 2017.

The second initiative is the ARC Discovery project, 'Bringing Indigenous Voices into Judicial Decision Making'. Together with our colleague, Professor Heather Douglas, the authors will consider how judgments involving Indigenous issues can be re-imagined, so as to be inclusive of the voices and narratives of the Indigenous parties. Together with the ICC material from the ICCLAP program, the revised Indigenous judgments will provide future students and lawyers with a richer and broader literature to help them to understand Indigenous perspectives.

For Indigenous lawyers and law teachers, change that can most reasonably be effected is arguably 'local action' in their own law schools. At the ANU law school, several approaches have been taken to achieve the goal of increasing enrolments of Indigenous students. The school has avoided setting a quota and recruiting to this number as being the key parameter. Rather, action has been taken to ensure that students are equipped to deal with workloads, and have the requisite oral and written communication skills. The ANU has also created bridging or support programs, which have grown more sophisticated with improved availability of data. The ANU has also created a high level of support on campus by providing measures to help combat social isolation, in order to create communities where Indigenous students do not feel 'Othered'.

Some Indigenous law students continue to have experiences similar to those described by Watson in 2005. It is important to recognise that such experiences are detrimental not only to Indigenous students but also to non-Indigenous students, who are still expected to internalise 'legal fictions' such as terra nullius, which was rejected by the majority of the High Court in the *Mabo* decision. Revising law's history is a key contribution that Indigenous law teachers have undertaken over many years, and this is an ongoing exercise. There are, however, pockets of progress and while initially slow, universities have nonetheless been a place where the existence and the ongoing effects of past injury are recognised. With recognition has come the desire to do better in this space. There should also be recognition that these past injuries must be

rectified, so that true reconciliation can begin in earnest and on an equal footing.

V CONCLUSION

In the final analysis, the central issue for the 'Mirror' in the fable, in Dr Watson's paper and for contemporary Indigenous law students, is that the answer to the question, 'Who is the *fairest* of them all?' is still determined by a very particular, culturally specific image of what is good and beautiful. What constitutes 'good' is not about fairness in the sense of justice. Rather, the 'best answer' given by the Mirror is determined by a very particular Anglo-centric standard of beauty, that privileges aquiline features and a lighter skin colour over all else. It is a standard that largely does not contemplate Indigenous peoples' sensibilities. Like the law, it is unable to faithfully reflect Indigenous peoples' civilisations, histories and systems of law that enabled human kind to live here sustainably for thousands of years.

As a community, we have come some way on the issue of race, but nonetheless, we still have a long journey ahead. One crucial step in this journey will be a new research agenda that will cast light on the experiences of Indigenous law students and graduates. It will also create a space for the respectful inclusion of our legal traditions. Only then will the proverbial Mirror (or Australian law schools for that matter) be able to truthfully respond, not according to the Snow White criterion of beauty, but by that of Martin Luther King. That is, the Mirror will finally judge Indigenous law students, academics and practitioners not by the colour of their skin, but by the content of their character.