

# INVOKING CULTURAL AWARENESS THROUGH TEACHING INDIGENOUS ISSUES IN CRIMINAL LAW AND PROCEDURE

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## I INTRODUCTION: DEVELOPING GRADUATE ATTRIBUTE OF CULTURAL AWARENESS IN TEACHING CRIMINAL LAW AND PROCEDURE

A critical, contextual approach to the criminal law has always been the most appropriate way to teach students about crime. This now coheres with the pedagogical milieu of Threshold Learning Outcomes (TLOs) and graduate attributes, which requires law schools to go beyond legal doctrine and to delve into legal contexts and skills. Six Law TLOs are stipulated in the Australian Learning and Teaching Council's *Bachelor of Laws Learning and Teaching Academic Standards Statement*.<sup>1</sup> These include the Knowledge TLO, which states that graduates should be able to demonstrate knowledge of 'principles of values and justice' and 'broader contexts in which legal issues arise'; and the Thinking Skills TLO, which mandates that graduates be able to engage in critical analysis. These TLOs require students to learn about the differential impact of the law, including on culturally marginalised groups. In addition to TLOs, graduate attributes have been developed in a number of law faculties that set out more specific aspirational qualities, including cultural awareness, understanding cultural diversity, and understanding and appreciation

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<sup>1</sup> Sally Kift, Mark Israel and Rachel Field, *Learning and Teaching Academic Standards Project: Bachelor of Laws — Learning and Teaching Academic Standards Statement* (Australian Learning and Teaching Council, 2010).

of Indigenous legal issues.<sup>2</sup> The University of Technology Sydney's Faculty of Law graduate attributes, for example, include the ability to:

- identify different perspectives, recognising difference as having inherent value;
- recognise when bias, stereotyping and negative attitudes are manifesting in self and others;
- understand how different legal systems handle diversity; and
- comfortably and empathically interact with people from diverse backgrounds.<sup>3</sup>

Similarly, the UNSW Law program objectives aim to have graduates understand and appreciate:

- 1 Legal knowledge in its broader contexts
- 2 Indigenous legal issues
- 3 Principles of justice and the rule of law.<sup>4</sup>

Therefore, an appreciation of how the law affects and accommodates diverse groups — in addition to being the only principled way to teach criminal law — is squarely required by TLOs and other desired graduate attributes.<sup>5</sup>

This article explores methods for incorporating Indigenous issues in the subject Criminal Law and Procedure (hereafter 'Criminal Law') to allow students to gain a greater understanding of cultural diversity, how it operates in the legal system, and the differential impact of the law on different groups. It draws on the authors' experience in teaching Criminal Law at a number of universities in Sydney since 2006,<sup>6</sup> and our use of current textbooks and other resources, in-class activities and assessment to enhance students' understanding of Indigenous issues without compromising the core requirements of the Priestley 11.

Criminal Law is an obvious site for considering Indigenous issues given the stark interface between the criminal justice system and Indigenous Australians, but it is by no means the only one. Indeed, for students to gain a true understanding of the significance

<sup>2</sup> See for example, University of Adelaide, *Faculty of the Professions: Graduate Attributes 2007*, Faculty of Law, <[http://www.adelaide.edu.au/professions/downloads/gradattributes/law\\_11b.pdf](http://www.adelaide.edu.au/professions/downloads/gradattributes/law_11b.pdf)>; University of Technology, Sydney, *The 10 Graduate Attributes*, Faculty of Law <<http://www.law.uts.edu.au/graduate-attributes/attributes.html>>; University of New South Wales, *Program Objectives and Graduate Attributes* <<http://www.handbook.unsw.edu.au/undergraduate/programs/2013/4701.html#programobjectives>>.

<sup>3</sup> University of Technology, Sydney, *Cultural Awareness and Global Outlook*, Faculty of Law <<http://www.law.uts.edu.au/graduate-attributes/attribute9.html>>.

<sup>4</sup> University of New South Wales, *Program Objectives and Graduate Attributes*, Faculty of Law <<http://www.handbook.unsw.edu.au/undergraduate/programs/2013/4701.html#programobjective>>.

<sup>5</sup> Kift et al, above n 1, 13.

<sup>6</sup> This includes the University Technology, Sydney, the University of Sydney and the University of New South Wales.

of the criminalisation of Indigenous people, they need grounding in issues relating to the place of Indigenous laws in the Australian legal system, courts' historical refusal to recognise Indigenous title, and international human rights obligations.<sup>7</sup> The teaching of Indigenous issues in Criminal Law, therefore, is best built on and supplemented by the teaching of Indigenous issues in other subjects such as Foundations of Law and Real Property.<sup>8</sup>

While this article focuses on Criminal Law, many of the approaches it discusses could be adapted to other subjects. For example, principles of incorporation of Indigenous voices and perspectives in legal analysis, critical analysis of the application of formal laws to various groups and a commitment to ethical and equitable treatment of people from diverse backgrounds, can be usefully applied in any number of teaching contexts.

The teaching strategies discussed in this article have been used in our law faculties with positive outcomes in the development of students' cultural awareness. For some of our students, there is initially a degree of resistance to learning about Indigenous issues in the criminal justice system. These students are pushed out of their comfort zones when their uncomplicated concept of doctrine is muddled by the lived realities of the criminal justice system. Professor Larissa Behrendt notes that students can feel 'uncomfortable and therefore alienated' in discussions on Indigenous issues, resulting in their 'tun[ing] out'.<sup>9</sup> The challenge for us as teachers has been to engage students who resist this knowledge by relating it back to basic principles, such as substantive equality or abuse of process, while also imbuing a sense of cultural awareness of the 'difference' of Indigenous perspective and laws. We have found that a few weeks into the subject, students who initially may not have engaged with the cultural dimensions of the criminal justice system begin to initiate their own class discussion of these issues, in some cases even requesting resources to further their burgeoning understanding outside the classroom. Achieving this shift to openness in learning has been more feasible when students are prescribed a textbook that integrates issues of cultural diversity throughout the Criminal Procedure and Law subject. Such books are more likely to provide for a deep understanding of cultural issues because they explore systemic

<sup>7</sup> Adelaide Law School, University of Adelaide, *Threshold Learning Outcomes for the Bachelor of Laws* (April 2012), 10 <<http://www.law.adelaide.edu.au/documents/threshold-learning-outcomes-report-2012.pdf>>.

<sup>8</sup> On incorporation of Indigenous issues into other law subjects see special editions on Indigenous curricula in Law in: *Ngiya: talk the law*, vol. 4 (2012); *Legal Education Review*, vol. 19, no.2 (2009). See also Thalia Anthony, 'Embedding Specific Graduate Attributes: Cultural Awareness and Indigenous Perspectives' in Sally Kift, Michelle Sanson, Jill Cowley and Penelope Watson (eds), *Excellence and Innovation in Legal Education* (Lexis Nexis, 2011), 137–69.

<sup>9</sup> Larissa Behrendt, 'Womens' Work: The Inclusion of the Voice of Aboriginal Women' (1995) 6(2) *Legal Education Review* 169, 171.

bias against Indigenous people across the criminal justice system. They are also important aids for teachers of criminal procedure and law who do not have a strong background in Indigenous issues. In contrast, when we have grouped Indigenous issues into just one class or have raised them in an *ad hoc* manner, students are more likely to tune out.

Whether students initially resist or embrace learning about Indigenous issues, we have found that as the subject progresses, they not only gauge the relevance of these issues but also make independent contributions about the way they perceive criminal laws and procedures impacting on Indigenous accused and their communities. Students who are encouraged to leave their comfort zones can be the ones who acquire the most from a subject that confronts the complex issue of Indigenous criminality and criminalisation. Indigenous issues also resonate strongly with Indigenous students and students from cultural minorities who may have entered the classroom with a sense of legal discrimination but come away from the subject with the capacity to theorise and substantiate their experiences. We have noticed that these students contribute to class discussion on Indigenous issues more freely than they do when the material is concentrated on doctrine. Moreover, engagement with these issues is more viable when class sizes are smaller. When numbers exceed approximately 30, it becomes more difficult for students to summon confidence to contribute to class discussion. Where the subject is taught in larger seminars or lectures, many of the strategies discussed in this article can be applied by asking students to break into smaller groups.

Student surveys indicate that students value learning about the implications of the criminal justice system for marginalised groups and its differential impact on Indigenous people in particular. For example, at the University of New South Wales ('UNSW'), Course and Teaching Evaluation and Improvement survey<sup>10</sup> results suggest that students appreciate the ongoing integration of discussion of the impact of the criminal justice system on Indigenous issues. It is interesting to note the responses to the UNSW Law School *Survey of Student Engagement* (2012) question of whether their studies had contributed to 'Understanding people of other racial and ethnic backgrounds'. Students who had just finished studying Criminal Law (second-year LLB students, no: 52) had reported the highest proportion of positive responses than in any other year of LLB study (first to fifth year, no: 277):<sup>11</sup> 88 per cent said that their

<sup>10</sup> See *Law School Survey of Student Engagement* <<http://lssse.iub.edu>>.

<sup>11</sup> There were a small number of respondents in the 6th year of their LLB (11), 86% of whom indicated that their studies had contributed to their understanding of people of other racial and ethnic backgrounds 'some', 'quite a bit' or 'very much'.

studies had contributed ‘some’, ‘quite a bit’ or ‘very much’ to their understanding of people of other racial and ethnic backgrounds; 54 per cent responded ‘quite a bit’ or ‘very much’.<sup>12</sup> At UNSW, the textbook Brown et al is used for Criminal Law.

Students’ sensitivity to these issues is also demonstrated by a portion of our students expressing a keen interest in applying for volunteer work with Aboriginal legal services, law reform agencies and the national Aurora Indigenous internship program, towards the conclusion of our Criminal Law subjects. Anecdotally, students also demonstrate a greater interest in social justice programs more generally, such as the Brennan Justice and Leadership program at the University of Technology, Sydney, which involves participation in volunteer work and activities relating to social justice,<sup>13</sup> or the social justice internships at UNSW. Students’ interest in such programs suggests that the teaching of Indigenous issues imbues students with a greater appreciation of cultural diversity and social justice. Since discrimination in the criminal justice system also applies to groups other than Indigenous people — examples include the over-policing of Middle Eastern men in Sydney and Somalis in Victoria as well as homeless people generally — teaching Indigenous issues can make students think broadly about the effects of criminal justice policy and practice on a range of marginalised groups.

By acquiring knowledge on Indigenous perspectives and laws, students are also sensitised to difference in diversity rather than assuming ‘unity-in-diversity’ where non-white groups are assigned the status of Other and whiteness is normalised.<sup>14</sup> This is a crucial skill for dealing with clients and appreciating the uneven impact of the law, even within marginalised groups. The contemporary experiences of Indigenous Australians stem from colonial and postcolonial policies that have displaced Indigenous peoples, laws and societies. However, these experiences are varied depending on the community or status within a community, for instance, as determined by gender, age and authority over the transmission of laws. Larissa Behrendt suggests that issues of cultural diversity should be linked ‘to students’ broader understanding of how society operates’, so that they realise that the law is not ‘black and white’ but ‘a reflection of the diversity of the society in which we live’.<sup>15</sup>

In essence, developing cultural awareness in students involves teaching them about Indigenous laws, how the legal system

<sup>12</sup> Eleven per cent of respondents said that their studies had contributed very little to their understanding of people of other racial and ethnic backgrounds.

<sup>13</sup> *Brennan Justice and Leadership Program* <<http://www.law.uts.edu.au/brennan/>>.

<sup>14</sup> Jon Stratton and Ien Ang, ‘Multicultural Imagined Communities: Cultural Difference and National Identity in Australia and the USA’ (1994) 8(2) *Continuum* 124, 155.

<sup>15</sup> Larissa Behrendt, ‘Womens’ Work: The Inclusion of the Voice of Aboriginal Women’ (1995) 6(2) *Legal Education Review* 169, 172.

perpetuates cultural disadvantage and how it can be a source of empowerment. As early as 1991, the Report of the Royal Commission into Aboriginal Deaths in Custody recommended that teaching students ‘to understand that Australia has an Aboriginal history and Aboriginal viewpoints on social, cultural and historical matters’ should be part of the curriculum.<sup>16</sup> Critical approaches to teaching Indigenous issues allows students to acquire a sense of the diverse implications of legal practice and gives them a grounding from which to contribute to better justice outcomes for Indigenous people.

## II FROM ORTHODOX TO CONTEXTUAL LEARNING OF CRIMINAL LAW

Studying or teaching criminal law can be suffocatingly doctrinal — covering the *mens rea* and *actus reus* elements of assault, sexual assault, manslaughter, murder, property offences, and then going over the same again for attempted crimes before examining the elements of the defences. A solely doctrinal approach can leave students with an impression that the criminal law is about the application of principles to a blank canvas involving neutral voices. This ‘shopping list’ approach gives no indication of the dynamics of the criminal process that give rise to the vast over-representation of Indigenous peoples in the criminal justice system, or of the unique issues involving Indigenous people that may arise. Before the landmark publication of Brown et al’s *Criminal Laws: Materials and Commentary on Criminal Law and Process in NSW* in 1990,<sup>17</sup> textbooks were almost exclusively doctrinal. *Criminal Laws* provided a teaching template for framing the law in the context of social practices and situating it within a critical and historical analysis. Since then, Australian criminal law textbooks have been increasingly written in a way that takes the context in which the criminal law operates into account.<sup>18</sup> This includes the role of the criminal law in colonisation, the significance of the exercise of discretion by criminal justice actors, and the existence of institutional discrimination.<sup>19</sup>

In any subject purporting to approach Criminal Law from a critical or contextual standpoint, we argue that Indigenous issues need to be

<sup>16</sup> Elliott Johnston, *National Report: Royal Commission into Aboriginal Deaths in Custody*, vol 1 (1991) Recommendation 295.

<sup>17</sup> David Brown, David Neal, David Farrier and David Weisbrot, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (Federation Press, 1990).

<sup>18</sup> See for example, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law*, 3<sup>rd</sup> ed (Law Book Co, 2010); Mark Findlay, *Criminal Law: Problems in Context*, 2<sup>nd</sup> ed (Oxford University Press, 2006); Stephen Gray and Jenny Blokland, *Criminal Laws: Northern Territory*, 2<sup>nd</sup> edn (Federation Press, 2012).

<sup>19</sup> For example, Findlay, above n 18, 10; Bronitt and McSherry, above n 18, 851; David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in NSW*, 5<sup>th</sup> ed (Federation Press, 2011) 64–73.

included. There are arguments for their inclusion from a practical perspective, in the sense that the degree of overrepresentation of Indigenous people in the criminal justice system mandates that these dynamics be examined. But there is also a principled argument for the inclusion of Indigenous issues in criminal law courses, and not only because of their resonances with TLOs that seek to develop cultural sensitivity. The intersection between the criminal law and Indigenous communities raises difficult and pressing questions about colonialism and neo-colonialism, and exposes some of the central issues pertaining to Indigenous disadvantage in Australia today. Teaching criminal law and procedure without recognising — with a degree of depth and engagement — the historical and ongoing impact of the criminal justice system on Indigenous people entrenches ignorance around these issues, promotes invisibility of the drivers of Indigenous contact with the criminal justice system and ignores the historical and contemporary use of the criminal law as a tool of discrimination against Indigenous people. For these reasons, inclusion of Indigenous issues in the criminal law curriculum is necessary.

The following questions then arise: What is the minimum material that needs to be covered to adequately address Indigenous issues? What needs to be taught so that the subject of Criminal Law is not contributing to silences about Indigenous criminal legal issues, or worse, their suppression? Answering these questions is no easy task, given that there is limited time in the Criminal Law syllabus to deal with these issues, compared with the scope that would be available in a specialist subject on Indigenous criminal justice. But to do justice to a consideration of Indigenous issues in Criminal Law, we argue that there needs to be a sustained treatment of the dynamic relationship between the criminal justice system and Indigenous dispossession, disadvantage and overrepresentation. In our classes, we introduce students to the intersection between the lives of Indigenous people and the criminal justice system and explore the way that the criminal law operates to discriminate and assert social control.

What follows is a range of suggestions for introducing students to the relationship between Anglo-Australian criminal law and Indigenous laws, cultures and people. This article suggests ways in which teachers can include Indigenous themes across criminal law topics, in teaching and assessment, without rewriting the whole subject. Generally, the gamut of strategies discussed can only be incorporated in a two-semester Criminal Procedure and Law subject (with four hours of seminar time per week and 13 weeks per semester). Accordingly, at UNSW, where the subject is taught over two semesters, there is scope to develop these strategies. Nonetheless, where Criminal Procedure and Law is a one semester subject, or where Criminal Procedure coexists with Civil Procedure

in a broader procedure subject, there is ample capacity for some incorporation of Indigenous issues. However, it will require teachers to be more mindful of embedding the issues in the interpretation of prescribed cases and statutory provisions rather than teaching them separately in short blocks. It may not be feasible to implement every strategy suggested below. However, at least some of what is set out here does not require an enormous commitment of class time; rather, it requires a reorientation and a consciousness in teaching to allow for the themes suggested below to become part of the way students are exposed to the operation of the criminal law in Australia.

### III INTRODUCING STUDENTS TO INDIGENOUS LAWS AND THE ONGOING IMPACT OF COLONISATION

#### *A Understanding the Ongoing Operation of Indigenous Laws*

Indigenous laws need to be addressed on their own terms rather than merely as a system subservient to the introduced criminal law. While colonisation has had a destructive impact on Indigenous laws, they nonetheless continue to exist in communities across Australia to varying degrees.<sup>20</sup> Some universities, particularly those that use Brown et al's *Criminal Laws* text, may teach the impact of the early introduced criminal law on Indigenous *people*,<sup>21</sup> and this is critical, but it is not the same as teaching the impact of colonial law on Indigenous criminal *law*. This reorientation requires preliminary teaching of Indigenous laws (by an Indigenous person where possible) as holistic systems of regulations and sanctions. We have found that this is most effective when done at the very beginning of the subject. If an Indigenous speaker is not available, students can be shown a short film, *Bush Law*<sup>22</sup> (27 minutes), which demonstrates the ongoing significance of punishment and atonement processes under Indigenous law in central Australia.

The introduction of Indigenous laws paves the way for a critical approach to the system of criminal law that currently operates in Australia. It introduces the idea of modes of criminalisation as historically, culturally and socially contingent — a theme explored in Brown et al's text.<sup>23</sup> Under the heading 'Cross-cultural perspectives'

<sup>20</sup> See George Pascoe Gaymarani, 'An Introduction to the Ngarra Law of Arnhem Land' (2011) 1 *Northern Territory Law Journal* 283; James Gurrwangu Gaykamangu, 'Ngarra Law: Aboriginal Customary Law from Arnhem Land' (2012) 2 *Northern Territory Law Journal* 236.

<sup>21</sup> See Brown et al, above n 19, 64–73.

<sup>22</sup> *Bush Law* (Directed by Danielle Loy, Australian Broadcasting Corporation, 2010).

<sup>23</sup> A whole chapter of *Criminal Laws* is devoted to problematising criminalisation: Brown et al, above n 19, Ch. 2, 42–115.



Brown et al demonstrate the way that appreciation of cultural relativism can act as ‘an antidote to the taken-for-grantedness, the commonsensical cast of current definitions of crime’.<sup>24</sup> The textbook might well add here a consideration of the ways in which Indigenous laws stand conceptually alongside Anglo-Australian law, and examine whether Anglo law is, as Watson suggests, a ‘body of Western knowledge that works against the centring of Aboriginal ways and knowledges’.<sup>25</sup>

In teaching Indigenous laws, it should be stressed that Indigenous legal systems vary among Indigenous communities. Students should be cautioned against simplistic dichotomies between law and Indigenous lore/custom. Students also need to be informed of the resilient and dynamic nature of Indigenous laws, and their complicated, but ineluctable, engagement with Anglo-Australian rights and obligations.

### B *Coexistence of Indigenous and non-Indigenous Criminal Law?*

Once students have acquired a sense of the contemporary operation of Indigenous laws they may be encouraged to discuss how such laws may be accommodated or, inversely, how their dismissal contributes to the overrepresentation of Indigenous people in the criminal justice system. In discussing the possibility of a coexisting Indigenous criminal justice system, students should be mindful of the limitations imposed by the domestic legal regimes. A useful case to signal the limitations of recognition and the exclusivity of Anglo-Australian criminal law is *Walker v New South Wales*.<sup>26</sup> There, Mason CJ of the High Court stated:

The proposition that criminal statutes do not apply to Aboriginal people must be rejected. If accepted, it would offend the basic principle that all people should stand equal before the law. There is no analogy in the criminal law of the finding in *Mabo* that native title could be held notwithstanding radical title being vested in the Crown. English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it.<sup>27</sup>

However, this should not rule out classroom discussion on the ways in which recognition does arise in criminal statutes, common law or policy and the propensity for the further reforms. Legislation such as the *Sacred Sites Act* (NT), which criminalises trespass on certain significant Indigenous sites, is one example that could be

<sup>24</sup> Brown et al, above n 19, 53.

<sup>25</sup> Irene Watson, ‘Some Reflections on Teaching Law: Whose Law, Yours or Mine?’ (2005) 6(8) *Indigenous Law Bulletin* 23, 24.

<sup>26</sup> (1994) 16 ALR 321.

<sup>27</sup> *Ibid.*

considered. Reference to developments in New Zealand or Canadian case law may be a useful pedagogical tool for introducing to students other avenues for recognition.<sup>28</sup> Discussion of avenues of law reform which recognise Indigenous laws and cultures allows students to think both critically and constructively about the operation of the criminal justice system. To facilitate this, students may be referred to law reform commission reports that consider ways in which Indigenous laws may coexist with the mainstream criminal law.<sup>29</sup>

### *C Understanding the Criminal Law as a Tool for Subjugation*

It is important for students to grasp the ways in which the criminal justice system is bound up with the colonial tradition, and, specifically, the role of the criminal law as a tool of dispossession. This is evident both in an examination of the declared laws and policy in the protection and assimilation eras, and in a reading of case law. Some ways that we have used to introduce students to the criminal law as an instrument of colonisation are suggested below.

#### *1 Case Law*

The New South Wales (NSW) Supreme Court decision *R v Murrell and Bummaree* (1836)<sup>30</sup> shows that the process of land dispossession (through the rationale of *terra nullius*) went hand in hand with the enforcement of criminal law statutes. In that case, an Aboriginal man, Murrell, was on trial for the wilful murder of another Aboriginal man, Jabbingee, in Windsor, New South Wales. At trial, Murrell pleaded not guilty, and argued that if he were to be tried the applicable law was his customary law. He claimed that New South Wales was occupied by his own people before it was occupied by the King of England. The leading judgment was handed down by Justice Burton, who held that the jurisdiction of the Supreme Court of New South Wales was exclusive, and included jurisdiction over Indigenous people. This was because the state was not inhabited by people who had ‘attained the numbers and civilization to form government and laws of sovereign states’. Furthermore, Indigenous laws merely represented the ‘grossest darkness and irrational

<sup>28</sup> The Canadian case of *Casimel v. Insurance Corporation of British Columbia*, [1994] 2 C.N.L.R. 22; 82 B.C.L.R. (2d) 387 (B.C.C.A.), where Indigenous marriage was recognised, could be discussed.

<sup>29</sup> See Law Reform Commission of Western Australia, *Report on Aboriginal Customary Laws* (2006); Northern Territory Law Reform Committee, *Report of Inquiry into Aboriginal Customary Law* (2003); Law Reform Commission of New South Wales, *Sentencing: Aboriginal Offenders*, Report 96 (2000); Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (1986).

<sup>30</sup> *R v Murrell and Bummaree* (1836) NSWSC <[http://www.law.mq.edu.au/scnsw/cases1835-36/html/r\\_v\\_murrell\\_and\\_bummaree\\_\\_1836.htm](http://www.law.mq.edu.au/scnsw/cases1835-36/html/r_v_murrell_and_bummaree__1836.htm)>. This website is a good teaching site because it provides background material to the judgment.

superstition'.<sup>31</sup> Therefore, Indigenous people were subject to the criminal law of the colony and the Supreme Court did not allow the Indigenous community to try to punish the Aboriginal defendant.<sup>32</sup>

It is useful to also draw students' attention to the contrasting NSW Supreme Court decision of *R v Bonjon* (1841),<sup>33</sup> which reveals that *Murrell* was not an inevitable decision but a choice the courts adopted to legitimise colonisation. In 1841 Justice Willis also tried an Aboriginal man for the alleged murder of another Aboriginal man. After hearing arguments similar to those put in *Murrell*, the judge in *Bonjon* stated that New South Wales was not 'unoccupied' in 1788 because 'a body of aborigines appeared on the shore, armed with spears'. The judge applauded the English settlers who entered treaties with the US Indians. In the end, Justice Willis decided not to declare the law on this matter. While this meant that the reasoning in *Murrell* prevailed, students should nonetheless consider the relative merits of the reasoning of each judgment.

## 2 Legislation and Policy

Students tend to be shocked by the fact that in the period after colonisation, the laws of murder and rape were virtually suspended where the victim was Aboriginal, and by the existence of criminal offences which are only applicable to Indigenous people. Such history shows, as Reynolds notes, that racism was 'as functional for the frontier squatter as the Colt revolver. One cleared the land, the other cleared the conscience'.<sup>34</sup> But students should also be taught that this discriminatory approach endured after the frontier period when statutes were enacted. Extracts from publications that draw on primary sources, such as those by Mark Finnane, Heather Douglas and Anna Haebich, are useful in illustrating these statutes and their impacts.<sup>35</sup> Some such sources also appear in Brown et al.<sup>36</sup> For example, Western Australian statutes provided that Indigenous people alone would be subjected to corporal punishment and executions to ensure their subjugation. The *Capital Punishment Amendment Act 1871* (WA) provided for the public execution of Indigenous offenders. These executions lasted until the late nineteenth century,

<sup>31</sup> Ibid.

<sup>32</sup> See Thalia Anthony, 'Blackstone on Colonialism: Australian Judicial Interpretations' in Wilfred Prest (ed) *Blackstone and His Commentaries* (Hart Publishing, 2009) 141.

<sup>33</sup> *R v Bonjon* (1841) NSWSC <<http://www.law.mq.edu.au/scnsw/cases1840-41/cases1841/R%20v%20Bonjon,%201841.htm>>.

<sup>34</sup> Henry Reynolds, *Frontier: Aborigines, Settlers and Land* (Allen & Unwin, 1987) 104.

<sup>35</sup> For example, Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law: White Sovereignty after Empire* (Palgrave Macmillan, 2012); Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800–2000* (Fremantle Art Centre Press, 2000).

<sup>36</sup> Above n 19, 64–8.

while they ceased for non-Indigenous people in most colonies by the 1860s. Also, while whipping was phased out as a sentencing option for non-Indigenous people in the 1870s, it remained available for Indigenous people in Western Australia under the *Summary Trial and Punishment of Native Offenders Ordinance 1849* (WA) and the *Aboriginal Offenders Amendment Act 1892* (WA). In 1892, the Attorney-General of Western Australia, Septimus Burt, continued to justify the whipping of Indigenous summary offenders in the following terms: ‘You can only deal with [Indigenous offenders] like you deal with naughty children — whip them ... Give them a little stick when they really deserve it, and it does them a power of good’.<sup>37</sup>

The use of the criminal law as a colonial tool of subjugation provides a background for a more general understanding of criminalisation (directly or indirectly) based on race. Students can be introduced to a continuum of law and policies that criminalise Indigenous behaviour, from the protectionist and assimilation policies<sup>38</sup> of the early colonial period up to the present day, with the *Northern Territory National Emergency Act 2007* (Cth) and the *Stronger Futures in the Northern Territory Act 2012* (Cth). One good example of the unequal application of ‘equal’ laws is of the child welfare laws of the nineteenth and twentieth century which produced the Stolen Generations. As noted in the *Bringing Them Home* report, children removed under such laws had to be found to be ‘neglected’, ‘destitute’ or ‘uncontrollable’.<sup>39</sup> These terms were much more readily applied to Indigenous children because ‘the definitions and interpretations of those terms assumed a non-Indigenous model of child-rearing and regarded poverty as synonymous with neglect’.<sup>40</sup> Thus, the *Neglected Children and Juvenile Offenders Act 1905* (NSW) included in its definition of neglect: ‘no fixed abode’, ‘sleeps in the open air’, and ‘having no visible means of support’ — all criteria particularly targeted at Indigenous communities.<sup>41</sup> Essentially, the criminalisation of Indigenous laws, practices, cultures and customs were concealed behind law and welfare. These welfare regimes placed restrictions on movement, language, culture, marriage, employment and wages and were enforced, often violently, by the police with the backing of the criminal justice system.

<sup>37</sup> Quoted in Mark Finnane and John McGuire, ‘The Uses of Punishment and Exile: Aborigines in Colonial Australia’ (2001) 3(2) *Punishment and Society* 279, 284.

<sup>38</sup> See *Aborigines Protection Act 1909* (NSW); *Aboriginal Protection Act 1869* (Vic); *Aborigines Act 1905* (WA); *Aboriginals Ordinance 1918* (Cth); *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld).

<sup>39</sup> Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 27.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid* 266–7.

It is crucial that it is made clear to students that such policies cannot be consigned to the unenlightened practice of a dim and distant past. Students are often visibly stunned to learn that forced removal of children continued to be implemented in many jurisdictions into the 1970s.<sup>42</sup> What must be made clear is the *continued* detrimental application of the criminal justice system to Indigenous peoples, and the continued criminalisation of Indigenous laws and families. There are, sadly, any number of examples on which teachers can draw to illustrate the point: mandatory sentencing, public order offences such as offensive language/behaviour,<sup>43</sup> and the (mis)use of police discretion in cautions/arrest,<sup>44</sup> to name but a few.

An assessment task which ties in closely with general themes around modes of criminalisation is one where students are asked to keep a scrapbook with newspaper clippings, including online newspaper sources, of criminal representations of Indigenous people. Their assessment then involves the presentation of this media portfolio along with a commentary that includes critical reflection on the main themes, reflections on criminalisation and discussion of any prevailing stereotypes. This assessment has been weighted at 20 per cent. The learning outcomes include that students exercise self-management by locating sources and identifying articles on which they will reflect in their commentary. It allows students not only to appreciate how the media conveys cultural issues as they pertain to the criminal justice system but also to reflect on how their understanding of criminal law and procedure has helped to process these issues. Unlike assessment based on factual answers and passive thinking, which produces fragmented outcomes and limits students' ability to acquire meaning from legal principles,<sup>45</sup> this assessment personally engages students and challenges their everyday perceptions of crime and their cultural preconceptions. The 'criminal news' assessment takes the student outside of textbook approaches to learning and requires them to consider how the world operates. While some students struggle with this assessment at the outset, they soon develop an affinity with the issues in the sources, and the presentation of their work reflects a lot of attention and thought to Indigenous issues. Their personal engagement with the issues is much deeper than it would be with a formal exam or assignment based on a hypothetical problem question.

For a more research-based task (which is generally assessed at 30 per cent or more of the total marks for the course), students

<sup>42</sup> Ibid 165.

<sup>43</sup> See Russell Hogg, 'Penalty and Modes of Regulating Indigenous People in Australia' (2001) 3(3) *Punishment and Society* 355.

<sup>44</sup> Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001).

<sup>45</sup> JB Biggs, 'What the student does: teaching for enhanced learning' (1999) 18(18) *Higher Education Research & Development* 57.

have been asked to write an essay assessing the role of community justice avenues in the relevant state or territory, potentially through a comparative framework using New Zealand and Canada. Alternatively, students have been asked to reflect on whether the historical criminalisation of Indigenous people has any ramifications for today's criminalisation processes. The focus of this assessment includes the criminalisation of property offences, public order offences and move-on laws. Parallels may be made with the frontier period of offences under the Aboriginal Acts.<sup>46</sup> Such an assessment ties into course learning outcomes that encourage application of the principles of criminal law in their broader context and which require students to demonstrate knowledge of the key processes and ethical issues involved in criminalisation by engaging in policy analysis.<sup>47</sup>

### D *Overrepresentation of Indigenous People in Prisons*

The overrepresentation of Indigenous people in prisons is an ongoing feature of the criminal justice system. For subjects using Brown et al as a text, the connections between colonialism, penal welfarism, criminalisation and overrepresentation are well made through a series of extracts exploring these dynamics in turn. One of the extracts is the primary report on one of the 99 deaths in custody investigated by the Royal Commission into Aboriginal Deaths in Custody — the death of Malcolm Charles Smith. It is a good example of the power of primary documents in teaching. The extract outlines the suicide of a mentally ill young man in a prison toilet cubicle when he drove a paintbrush through his left eye (following the biblical instruction that 'if the eye offend thee, pluck it out'). It then says:

<sup>46</sup> The Aboriginal Acts at the turn of the twentieth century were: *Aboriginal Protection Act 1869* (Vic); *Aborigines Protection Act 1886* (WA); *Aboriginal Protection Act and Restriction of the Sale of Opium Act 1897* (Qld); *Aborigines Protection Act 1909* (NSW); *Aborigines Act 1911* (SA); *Aboriginals Ordinance 1911* (Cth); *Aboriginals Ordinance 1918* (Cth).

<sup>47</sup> At the University of Sydney, when Criminal Procedure and Criminal Law was a single 8 credit point subject taught over one semester, it was viable to have all of the following assessment: the media 'scrapbook' assignment (discussed above, worth 20%), research assignment (30%), class participation (10%) and exam (40%). For a 6 credit point subject, the research assignment may be dropped and replaced with a greater loading of 70% on the exam. Furthermore, the exam may include questions that engage Indigenous issues. For example, a question relating to the application of the *Bail Act* where an Indigenous offender has multiple locations of residence and no constant employment; or a question on provocation or negligent manslaughter where the Indigenous offender commits the crime in pursuance of their cultural responsibilities; or an essay question requiring students to critique the effect of objective tests for Indigenous offenders (as they arise in homicide offences or the defences).

So much for how Malcolm died. Why did he die? Why was he in prison, seeking to pluck out his eye? The answer being (depending on how long a perspective one takes), some where between 26 January 1788 and 5 May 1965. On the former day there commenced the European settlement that, in Rowley's phrase, was to mean 'the progress of the Aboriginal from tribesmen to inmate' ... the other date from which Malcolm's story may be commenced ... [was when he] was taken away from his family by police, cut off from his family, whom he did not see until he was 19, and sent to Kempsey, over 1500 kilometres away on the coast, beyond the boundaries of their accessible world.<sup>48</sup>

This is a powerful integration of the themes of colonisation, forced removal, penal welfarism, criminalisation and deaths in custody. It also touches on other important criminal justice realities such as the prevalence of mental illness in prisons. It allows students to understand these links through the life story of one young man, and to approach for themselves the understanding of lives destroyed 'not by the misconduct of police and prison officers, but in large measure by the regular operation of the system of self-righteous and racist destruction of Aboriginal families that went on under the name of protection or welfare'.<sup>49</sup> Again, students should be informed that such policies are not limited to the twentieth century, but that Indigenous children continue to be disproportionately removed from their families, in jurisdictions including the Northern Territory, at higher rates than during the official assimilation era.<sup>50</sup> By the end of Week 1 of Criminal Law, students would have been introduced to notions of historical and institutional discrimination in the criminal justice system in preparation for an application of these notions in studying the rules of criminal law and procedure in the coming weeks. The remainder of this article explores Indigenous issues in the substantive aspects of Criminal Law, including some attempts by the criminal justice system to redress bias against Indigenous people. Delving into Indigenous issues provides cogent examples and illustrations of legal principles.

#### IV INDIGENOUS ISSUES IN LEARNING CRIMINAL PROCEDURE

The area of criminal justice process presents the richest ground for discussion of Indigenous issues in teaching criminal law, because so many concerns arise in the interaction between the system and its actors and Indigenous people. At all stages of the criminal justice

<sup>48</sup> Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Malcolm Charles Smith*, extracted in Brown et al, above n 19, 69.

<sup>49</sup> Ibid 70.

<sup>50</sup> Heather Douglas and Tamara Walsh, 'Continuing the Stolen Generations: Child Protection Interventions and Indigenous People' (2013) 21(1) *The International Journal of Children's Rights* 59.

system, from street policing through to bail and sentencing, discrete dynamics exist for Indigenous people which speak volumes of the system as a whole, and which therefore constitutes important pedagogic material. A selection of these are discussed below.

### *A Overrepresentation, Policing and Interrogation*

The over-representation of Indigenous people (and particularly young people and women)<sup>51</sup> in the criminal justice system constitutes a powerful and important indicator of the magnitude of the problem of adverse Indigenous contact with the criminal justice system.<sup>52</sup> However, we stress to students that there is no simple relationship between crime rates and rates of imprisonment. Rather, the use of the prison is a function of government choices around the use of punishment,<sup>53</sup> and of the interplay of choices of other criminal justice actors including the judiciary, police, parole boards and the media. There is also a nexus between early colonial practices and modern policing and punishment, which can be explored through Baldry et al's notion of the penal/colonial complex.<sup>54</sup> This way of thinking about 'penal culture' encourages a much more nuanced exploration about why the rates of Indigenous imprisonment are so high.<sup>55</sup> The rise in Indigenous imprisonment rates appear to be explicable not in terms of higher crime rates, but rather because of more frequent use of the prison for longer periods of time.<sup>56</sup> In our Criminal Law classes, we challenge students to consider why this might be the case.

Issues pertinent to Indigenous people can be used as examples in discussion of pre-trial processes, including charge, arrest and bail refusal. In teaching policing, a discussion of the connection between policing particular crimes and the over-representation of Indigenous offenders in the criminal justice system should be explored. Students should read the relevant police powers legislation with a view to considering the role of discretion.

<sup>51</sup> Heather McRae, Garth Nettheim, Thalia Anthony, Laura Beacroft, Sean Brennan, Megan Davis and Terri Janki, *Indigenous Legal Issues* (Thomson, 2009) 501.

<sup>52</sup> Indigenous people are over 14 times more likely than non-Indigenous people to be in prison — an increase from 10 times in 2001. Australian Bureau of Statistics, *Prisoners in Australia*, no. 4517.0 (Commonwealth of Australia, 2011) 50.

<sup>53</sup> Chris Cunneen, 'Punishment: Two Decades of Penal Expansionism and its Effects of Indigenous Imprisonment' (2011) 15(1) *Indigenous Law Bulletin* 10.

<sup>54</sup> Eileen Baldry, Chris Cunneen, David Brown, Mark Brown, Melanie Schwartz and Alex Steel, *The Revival of the Prison. Penal Culture and Hyperincarceration* (Ashgate, 2013).

<sup>55</sup> See Eileen Baldry, David Brown, Mark Brown, Chris Cunneen, Melanie Schwartz and Alex Steel, 'Imprisoning Rationalities' (2011) 44(1) *Australian and New Zealand Journal of Criminology* 24.

<sup>56</sup> Jacqueline Fitzgerald, 'Why are Indigenous Imprisonment Rates Rising?' (Issue Paper No 41, NSW Bureau of Crime Statistics and Research, August 2009).



When teaching about police questioning powers, students could be referred to the historical mistreatment of Indigenous suspects and fabrication of Indigenous evidence. This has resulted in modified questioning, investigation and detention requirements for Indigenous people. The judgment of *R v Anunga*<sup>57</sup> was one of the earliest attempts to address the language and cultural issues in police interviews and curb potential unfairness or injustice for Indigenous people. Forster J in the Supreme Court of the Northern Territory formulated a set of rules (widely known as the ‘Anunga Rules’) to guide the police when conducting interviews with Indigenous people. They include the provision of a lawyer and an interpreter, the presence of the ‘prisoner’s friend’, administering cautions in terms that the Aboriginal prisoner can understand, and avoiding leading questions. These rules have, however, been applied inconsistently<sup>58</sup> and have limited applicability in court room questioning. Legislation and regulations now partly address these concerns in some Australian jurisdictions.<sup>59</sup>

The exercise of police powers also provides a range of possibilities for assessment. For example, a problem question could involve police officers apprehending a young woman in the vicinity of a smashed window, as a suspect in relation to the property damage. Students could be asked to identify the relevant lawful police powers used in requesting identification, searching, questioning, arresting and detaining. Then, they could be asked to consider how the police powers would be modified if the woman was Indigenous.

### *B Victimisation and Under-policing: Enforcement of DVOs*

Teaching criminal procedure involves addressing protection not only for suspects or defendants, but also for victims. Whereas over-policing of Indigenous people is an important theme, it is equally important to note that over-pricing generally applies only to suspected Indigenous offenders: Indigenous victims are less likely to receive the protection of the police. This is particularly the case for victims of domestic violence. The discussion of police practice in relation to victims extends the discussion of police discretion and relationships between communities and law enforcement authorities. The lack

<sup>57</sup> (1976) 11 ALR 412.

<sup>58</sup> See *Gudabi v R* (1984) 52 ALR 133; *Collins v R* (1980) 31 ALR 257; *R v Aubrey* (1995) 79 A Crim R 100; *Police v Jawrarla* (Northern Territory Supreme Court, 16 May 2006, Unreported). For a critique see Adam Alter, *Aborigines and Courtroom Communication: Problems and Solutions*, Working Paper 2004/2 (Australian Human Rights Centre, 2004).

<sup>59</sup> See *Crimes Act 1914* (Cth) s 23H; *Police Powers and Responsibilities Act 2000* (Qld) s 420; *Law Enforcement (Powers and Responsibilities) Regulations 2005*, Regulations 33, 24 and 26.

of police response, for example, is attributed to under-reporting arising from a range of factors relevant to victims in general, such as repercussions of reporting. But there are also Indigenous-specific reasons that have deep socio-historical roots, such as 'fear and distrust of justice system and other government agencies', as well as a lack of services in remote communities, discussed below.<sup>60</sup> Indigenous female victims have expressed concern that the police cannot relate to their perspective, and make them 'feel inferior'.<sup>61</sup> They state that this is due to 'police racism' and a 'lack of respect'.<sup>62</sup> The result is that police officers may make the victim of a breached DVO feel like she is lying and over-reacting because she is a 'black woman'.<sup>63</sup> These dynamics can also be discussed when teaching police discretion, domestic violence or apprehended violence orders.

### C *Legal Services*

Our teaching of criminal procedure is given a practical dimension with regard to the critical role of legal services. In accordance with the key legal principles, we teach students the importance of legal services and how there is a right to legal representation for serious indictable offences.<sup>64</sup> But we also emphasise that Indigenous suspects and defendants, unlike many non-Indigenous people, have access to free legal representation through Aboriginal and Torres Strait Islander Legal Services (ATSILS). Nonetheless, the provision of these services is undermined by inadequate resourcing. This issue gives rise to in-class discussion on the nature of access to justice.<sup>65</sup> ATSILS practitioners deal with clients who face higher levels of literacy and numeracy issues, disability and health complaints, and for whom English may be a third or fourth language. Their clients live more remotely than those of mainstream legal aid services and there is a need for interpreter services to address the different understandings in cross-cultural communication,<sup>66</sup> even though interpreter services

<sup>60</sup> Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities', *Trends & Issues*, no. 405 (Australian Institute of Criminology, 2011) 5, 7.

<sup>61</sup> Loretta Kelly, 'Indigenous Women's Stories Speak for Themselves: The Policing of Apprehended Violence Orders' (1999) 4(25) *Indigenous Law Bulletin* 4, 5. Also see Chris Cunneen, *Alternative and improved responses to domestic and family violence in Queensland Indigenous communities* (Queensland Department of Communities, 2010).

<sup>62</sup> Kelly, above n 61, 6.

<sup>63</sup> *Ibid* 6.

<sup>64</sup> *Dietrich v The Queen* (1992) 177 CLR 292.

<sup>65</sup> See Melanie Schwartz and Chris Cunneen, 'Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services' (2009) 7(1) *Indigenous Law Bulletin* 19.

<sup>66</sup> See Diana Eades, 'Cross Examination of Aboriginal Children: The Pinkenba Case' (1995) 75 *Aboriginal Law Bulletin* 10, 10–11.

are not always readily available or used by ATSILS.<sup>67</sup> One good resource for illustrating the nature and challenges of the work of ATSILS, particularly in remote communities, is the first episode of the (fictional) SBS series *The Circuit* (approx 50 mins).<sup>68</sup> Bringing to the fore the importance of adequate and appropriate legal services is a good example of a teaching approach that ‘honour[s] the ‘big stories of the discipline’ in the context of the law’s particular relationship with Indigenous communities’.<sup>69</sup>

## D Bail

Bail is a central topic in criminal law and procedure. Remandees who are refused bail represent a significant portion of the prison population: remandees were 26 per cent of all NSW prisoners in 2011.<sup>70</sup> Indigenous people were held on remand at a rate of 583 per 100,000 population, compared with the average rate in New South Wales of 49 per 100,000.<sup>71</sup> In teaching bail, we point to special problems and needs of Indigenous accuseds in the bail process. The requirements for bail may be especially difficult for Indigenous people to prove, given they are less likely to stay at one residential address, which leads to perceptions that they are a flight risk. The Royal Commission into Aboriginal Deaths in Custody Report (1991) noted that Indigenous people face special difficulties in acquiring police bail because of their socio-economic circumstances and cultural standing. The Report stated:

The lack of flexibility of bail procedure and the difficulty Aboriginal people frequently face in meeting police bail criteria by virtue of their socioeconomic status or cultural difference contributes to their needless detention in police custody. This is the case for both adults and juveniles.<sup>72</sup>

<sup>67</sup> McRae et al, above n 51, 543, 550.

<sup>68</sup> *The Circuit* (Directed by Steve Jodrell, SBS, 2009). The first episode traces the experience of an Indigenous city lawyer who moves to Broome to work on circuit for the Aboriginal Legal Service there. The show picks up on a number of relevant issues for Criminal Law subjects like the ‘sausage factory’ realities of local courts, the large workload of duty solicitors, and the interplay between the criminal law and social marginality. But it also contextualises these themes within an Indigenous service delivery context, such that students are exposed to the key role of the field officer in ATSILS, the difference in the delivery of and access to justice in remote areas, and issues involving cross cultural communication with clients. Watching these issues dramatised allows students to connect to them in a way that a formal discussion may not (and often leads to follow-up emails asking where the rest of the series can be accessed).

<sup>69</sup> Carwyn Jones, ‘Indigenous Legal Issues, Indigenous Perspectives and Indigenous Law in the New Zealand LLB Curriculum’ (2009) 19 *Legal Education Review* 258.

<sup>70</sup> NSW Law Reform Commission, *Bail*, Report 133 (2012) 45.

<sup>71</sup> *Ibid* 59.

<sup>72</sup> Johnston, above n 16, [21.4.2].

Although not statistically current, a 2002 report of the NSW Aboriginal Justice Advisory Council called *Aboriginal People & Bail Courts in NSW* provides some excellent case studies that can be incorporated into a more general class discussion about bail. The following example, which can be used as the basis of a group exercise or discussion, provides a compelling insight into the importance of appropriate bail conditions, as well as demonstrating the pitfalls of ‘fly in fly out’ justice:

A 55 year old Aboriginal woman living in a small Western NSW town had an argument with her husband resulting in her throwing a shoe at him. The shoe missed him and went through a window of a house they were renting. A neighbour had called the police when the argument began and the woman was arrested for causing malicious damage. It was her first offence. The magistrate imposed bail conditions on her that she reside[s] 5 kilometres from her husband. Neither the magistrate nor her legal representative realised that the town was less than 5 kilometres wide. The woman, being intimidated by the court process, did not speak up and believed that she was being given a choice of going to prison or camping in the bush. She chose prison and subsequently spent some months on remand waiting for her case to be heard. When her case was finalised it was dismissed without conviction.<sup>73</sup>

There is also a body of case law on whether the administration of Indigenous law punishment should be considered in the decision to grant bail. Students may be asked to consider the short Northern Territory bail remarks and decision of *Anthony*<sup>74</sup> involving a Warlpiri man who sought to be let out on bail to be punished by his people. This can feed into a discussion of the considerations under the relevant bail legislation. Questions for students include: ‘what do the interests of the community mean?’; ‘who is considered a bail risk?’; ‘what crimes are more likely to be exempted from bail?’.

## E Sentencing

We discuss a range of Indigenous issues in our classes on criminal sentencing because they provide pertinent examples of the way courts apply aggravating and mitigating sentencing factors, including Indigenous culture, Indigenous law punishment and socio-economic disadvantage and alcoholism. There are leading sentencing remarks which indicate that these factors have lessened the sentence for Indigenous offenders.<sup>75</sup> However, we are mindful of Professor Larissa Behrendt’s concern that teaching about culture as an

<sup>73</sup> Aboriginal Justice Advisory Council, *Aboriginal People & Bail Courts in NSW* (2002) 13.

<sup>74</sup> (2004) 142 A Crim R.

<sup>75</sup> See *Neal v The Queen* (1982) 149 CLR 305; *R v Fernando* (1992) 76 A Crim R 58 (on socio-economic disadvantage and alcoholism); *R v Minor* (1992) 105 FLR 180 (on culture and traditional punishment).

explanation for a crime assumes that Indigenous culture is violent.<sup>76</sup> O'Donnell also cautions against teaching culture in a way that leads to stereotypes.<sup>77</sup> Accordingly, our teaching emphasises that culture is not a blanket defence but a context for mitigating culpability based on facts, which are verified by the community, that the person acted according to cultural expectations. Students are invited to critically consider whose voices are aired in this sentencing process and whether the voices of women and other sections of the community are adequately represented.

While we convey to students that sentencing legislation and case law provides for judicial discretion to consider a range of factors,<sup>78</sup> we also make them aware of how such legal principles can be vulnerable to change, for instance, as a result of racially targeted legislation. Students should be informed of Federal government legislation that restricts courts from taking into account cultural and customary law factors in sentencing and bail applications in the Federal and Northern Territory jurisdictions. This restriction was originally stipulated under specific legislation arising from the Northern Territory Emergency Response in 2007<sup>79</sup> and is now included in the *Crimes Act 1914* (Cth) ss 16A–AA.

Students may also consider whether judicial discretion in sentencing is sufficient to account for the views of the community and the victim. To this end, some discussion on alternative sentencing mechanisms such as Indigenous circle sentencing in New South Wales and Koori Courts in Victoria, in which the offender's Indigenous community has a say in the sentencing process and outcome, would be valuable. If time permits, it is worth showing students a short DVD (the relevant Parts 1–3 run for 15 minutes), *Circle Sentencing in New South Wales*, which includes footage on the operation of a circle.<sup>80</sup> This provides students with a sense of how Indigenous courts can work, and is a useful contrast to what they may have previously witnessed in a local court observation. Many students find that circle sentencing offers significant advantages over the formal court process, especially by including the community and victim and reducing the defendant's alienation, and that it would be a valuable alternative not only for Indigenous people but for other offenders.

<sup>76</sup> Behrendt, above n 15.

<sup>77</sup> Anthony O'Donnell, 'Thinking "Culture" in Legal Education' (1996) 7(2) *Legal Education Review* 135, 147–8.

<sup>78</sup> For a brief overview of the sentencing law in each state, see: Thalia Anthony, *Sentencing Indigenous Offenders*, Indigenous Justice Clearinghouse Research Brief No. 7 (2010) 1.

<sup>79</sup> *Northern Territory National Emergency Act 2007* (Cth) ss 90–91. Also see *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth).

<sup>80</sup> *Circle Sentencing in New South Wales* (Directed by Karl McPhee, Judicial Commission of New South Wales, 2009). The DVD can be obtained from the Judicial Commission of New South Wales.

For both sentencing and bail, a challenge in providing alternatives to custodial sentences for Indigenous people is a lack of essential preconditions such as access to appropriate housing, especially in rural and remote communities where a substantial proportion (although not the majority) of Indigenous people live. The court in *R v Ku & ors; ex parte AG (Qld)*<sup>81</sup> made it clear that there are limited options for rehabilitation programs. There is also a lack of corrective services officers in communities to monitor bail and parole conditions. Without such options, imprisonment is more likely to be ordered by the courts.

Any number of assessment tasks can take into account Indigenous issues in sentencing. An in-class activity that may contribute to class participation marks (generally assessed at around 10 per cent of total grade overall) can be asking students to present sentencing submissions in a case involving an Indigenous offender. An example of a case may be an Indigenous defendant who was convicted of driving an unregistered vehicle and driving without a drivers' licence when travelling outside his community to attend a funeral of a senior Indigenous Elder. Other circumstances can be added, such as where the offender had two passengers who also did not have licences and held lesser driving skills than the offender. Students could role-play the sentencing procedure where the prosecution would propose aggravating circumstances to increase the sentence and counsel for the defendant would submit mitigating circumstances. The student performing the magistrate's role would be required to take into account cultural submissions against the seriousness of the offence. Taken further, the students may consider some of the differences in approach that might be taken in an Indigenous sentencing court where the voices of the community would be heard. This links to course learning outcomes relating to demonstration of oral communication skills by discussing and debating course concepts in a scholarly, and reflective manner, and demonstration of awareness of the principles of criminal law and their relationship to the broader context.

## V INDIGENOUS ISSUES IN CRIMINAL LAW OFFENCES AND DEFENCES

There are a number of points in the teaching of substantive law where issues relevant to Indigenous people can be raised, and where doing so will improve students' understanding of the operation of the offences/defences in question. In relation to the offence of assault, students may consider the role of consent where it involves the victim taking part in Indigenous law punishment. For example,

<sup>81</sup> [2008] QCA 154.

in *R v Judson*<sup>82</sup> a number of defendants were charged with assault occasioning bodily harm arising from an incident where a young Aboriginal girl was subject to traditional punishment. The alleged offence involved the girl being hit with sticks and a crowbar. The defendants were acquitted by a jury after defence counsel had submitted that the victim had consented to the assault (in Western Australia consent is a defence). Defence counsel relied on evidence which showed that the attack was consistent with the relevant traditional law in order to show that the victim had consented or alternatively that the defendants held an honest but mistaken belief that she had consented.<sup>83</sup>

The *Judson* case highlights the fact that Indigenous cultures may be considered within the boundaries of the Criminal Law. It is, however, also important to explore the ways in which Indigenous rights to culture may clash with women's rights to safety, and how employment of the abovementioned defence arguments may negate the views of female victims — an issue worthy of consideration throughout the subject.<sup>84</sup> Other cases in the Northern Territory such as *R v Miyatatawuy*<sup>85</sup> illustrate instances where female offenders can be subjected to non-violent community views, meetings, banishment and non-drinking orders made by the community were taken into account in sentencing.

Because of the degree of overrepresentation of Indigenous people for public order offences such as offensive language and offensive behaviour,<sup>86</sup> the teaching of these offences can draw on a wealth of examples of the intersection between these substantive offences and police powers. There are a variety of scenarios, based on the facts of cases, in which students can decide whether actions are truly offensive or represent harmless activities. These can be used to illustrate the subjective nature of crimes requiring 'offensiveness' and the (mis)use of police discretion.

Indigenous social and cultural factors (such as attitudes to autonomy, responsibility and social location) do not alone form a basis for a criminal defence. However, students should be invited to consider their relevance to criminal intent, to seriousness of the offence and as a defence. In teaching substantive criminal law, we introduce Indigenous issues and issues of cultural diversity primarily

<sup>82</sup> Unreported, District Court of Western Australia, No POR 26/1995; O'Sullivan J and Jury, 26 April 1996, cited in Victoria Williams, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', *Western Australian Law Reform Commission Inquiry into Aboriginal Customary Laws*, Background Paper 1 (2006) 40.

<sup>83</sup> *Ibid.*

<sup>84</sup> Elena Marchetti, 'How the Mainstream Criminal Court System is Still Getting It Wrong' (2011) 7 (26) *Indigenous Law Bulletin* 27.

<sup>85</sup> (1996) 87 A Crim R 574, 578.

<sup>86</sup> Troy Allard, *Understanding and Preventing Indigenous Offending*, Indigenous Justice Clearinghouse Research Brief No. 93 (2010) 3.

in relation to provocation. This partial defence reduces a conviction from murder to (voluntary) manslaughter. Provocation raises the issue of whether cultural circumstances should be taken into account in assessing whether the gravity of the provocative conduct would have induced the ordinary person to have lost self-control. In other words, should the ‘ordinary person test’ in *Stingel v R*<sup>87</sup> be extended? The Brown et al *Criminal Laws* text provides a discussion on the relevance of ethnicity to this test — that is, attempts to extend the partial defence through attributing ethnic characteristics as an aspect of ‘ordinariness’ — and is followed by a separate consideration of Aboriginality.<sup>88</sup> Here, the approach in the Northern Territory is canvassed, whereby the ‘ordinary person’ can be taken as meaning ‘an ordinary Aboriginal male living today in the environment and culture of a fairly remote Aboriginal settlement’.<sup>89</sup> Again, students should be reminded that the cultural response may not always be generalised, returning to the point made above that teaching of culture should avoid fixed, static notions.

## VI CONCLUSION: CULTURAL DIVERSITY IN CRIMINAL LAW

This article has demonstrated that there are numerous moments in the Criminal Law curriculum where consideration of Indigenous specific issues can enhance learning outcomes without departing significantly from the core material. Reorientating teaching in this manner fulfils a number of objectives. It gives students an informed perspective about a range of legal, social, political and moral issues that arise in the development and practice of the criminal law. It sensitises students to the fact that no area of law is self-executing, by demonstrating the impact of the criminal process on the practical operation and meaning of criminal law. Ultimately, all of this serves to move the student to a place of deep learning, with an increased capacity for a critical, contextual approach to the law.

Teaching criminal law with this reorientation is also a vehicle for introducing students to some of the primary shaping forces of the society in which they will go on to practice law. Given the increasing significance of Threshold Learning Outcomes (TLOs) in law faculties, it is not sufficient to relegate explorations of values, justice and broader contexts, or skills in critical analysis to a Foundations of Law subject or a specialised elective. James and Field write in their first-year textbook, which draws heavily

<sup>87</sup> (1990) 171 CLR 312.

<sup>88</sup> Brown et al, above n 19, 585–8. This includes a discussion on the relevant minority judgment of McHugh J in *Masciantonio v R* (1995) 183 CLR 58.

<sup>89</sup> *R v Mungatopi* (1991) 57 A Crim R 341; *Jabarula v Poole* (1989) 42 A Crim R 479.



on TLOs, about recent changes in legal education, including the move towards supplementing teaching of fundamental legal concepts with ‘developing useful legal skills’ and ‘contextualising doctrinal knowledge by examining social, political, cultural and critical perspectives on the law’.<sup>90</sup> For legal education to do justice to these TLOs, they need to be incorporated across core subjects. One important way of doing this, especially in Criminal Law but also in other subjects, is to engage Indigenous issues, experiences and perspectives. Given the vast overrepresentation of Indigenous people in the criminal justice system, Indigenous issues provide a prism for critically analysing the criminal law. This article has traced the ways in which our teaching has drawn on Indigenous issues to highlight central Criminal Law and Procedure principles as well as to produce graduates who are culturally aware, able to engage with clients from diverse backgrounds, and able to critically appreciate Australia's historical and present use of the criminal justice system to suppress Indigenous cultures, societies and laws. It positions the law graduate not only to apply the law but also to think critically about law reform and the need for legal practitioners to be sensitive to the backgrounds and perspectives of culturally diverse groups.

<sup>90</sup> Nickolas James and Rachel Field, *The New Lawyer* (Wiley, 2013) xiv.