

Indigeneity, Sovereignty and the Law:
Challenging the Processes of Criminalisation

Chris Cunneen*

*James Cook University; University of New South Wales

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Throughout Australia, the United States, Canada, New Zealand Indigenous communities continue to exercise authority, or have at least attempted to develop localised methods of dealing with problems of social disorder. Indigenous practice has provided us with the opportunity and the necessity to re-think the possibilities of a postcolonial relationship between criminal justice institutions and Indigenous communities. The article argues that the recognition of Indigenous claims to governance offer the possibility of new ways of thinking about criminal justice responses to entrenched social problems like crime.

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Chris Cunneen, Professor of Criminology, The Cairns Institute, James Cook University, Australia.

ABSTRACT

The processes of criminalisation lay the foundation for creating significant disadvantage among Indigenous people across the former settler societies of Australia, New Zealand and North America. Yet the massive incarceration of Indigenous people has not resulted in ensuring the safety of individuals within Indigenous communities. Imposed criminal justice systems have not ensured the maintenance of social order in Indigenous communities. This article explores the relationship between Indigenous sovereignty and Indigenous over-representation in the criminal justice system.

Throughout Australia, the United States, Canada, New Zealand Indigenous communities continue to exercise authority, or have at least attempted to develop localised methods of dealing with problems of social disorder. Indigenous practice has provided us with the opportunity and the necessity to re-think the possibilities of a postcolonial relationship between criminal justice institutions and Indigenous communities. The article argues that the recognition of Indigenous claims to governance offer the possibility of new ways of thinking about criminal justice responses to entrenched social problems like crime.

Introduction

This article explores the relationship between sovereignty and Indigenous over-representation in the criminal justice system with a particular focus on Australia. The recognition of Indigenous law in Australia has been partial and ad hoc – with the only significant recognition occurring through common law native title to land. By way of contrast, Australian courts have been the least accommodating in acknowledging the existence and importance of Indigenous law in matters involving the criminal law. While Indigeneity may be at times taken into account by the courts when sentencing for criminal matters, the approach has been to consistently view the assertion of British sovereignty as extinguishing any claims to an Indigenous criminal jurisdiction. This situation contrasts with developments in Canada, the United States and New Zealand.

At the same time the processes of criminalisation lay the foundation for creating significant disadvantage among Indigenous people in Australia today. Imprisonment rates for Indigenous people in states like Western Australia are over 4,400 per 100,000 of the adult population and are among the highest recorded anywhere in the world.¹ The application of colonial systems of criminal law is a failure that perpetuates oppression: criminal law neither protects Indigenous victims of crime nor rehabilitates Indigenous offenders. Instead it provides for a carceral regime that significantly disrupts Indigenous communities and limits the life choices of individuals.

Indigenous claims to sovereignty and self-determination have stressed the need for developing a postcolonial hybridity in the criminal law. This developing hybridity involves a serious undertaking to see Indigenous people as equal partners with solutions for the social order problems that besiege many Indigenous communities. The implications of this developing hybridity in the criminal law is a more fluid approach to the question of sovereignty - in reality multiple places where a divisible sovereignty is exercised, rather than a singular indivisible view of sovereign power.

Criminalisation and Victimisation

Indigenous people are over-represented in criminal justice systems across the settler societies of North America, Australian and New Zealand. Data shows that Māori are over-represented at every stage of the New Zealand criminal justice system. In 2007 they were four to five times more likely to be apprehended, prosecuted and convicted for a criminal offence than non-Māori, were 11 times more likely to be remanded in custody and were more than seven times more likely to be sentenced to imprisonment. The result was that Māori made up approximately 14 per cent of the general population and over 50 per cent of the prison population.² In Canada Aboriginal people comprise 3 per cent of the general population, but Aboriginal offenders make up 17 per cent of inmates in the federal penitentiary system. The situation is even worse in some provincial institutions, particularly in Manitoba, Saskatchewan and Alberta, where Aboriginal people make up more than 60 per cent of the inmate population in some penitentiaries. In Saskatchewan, for example, Aboriginal people are incarcerated at a rate 35 times higher than the mainstream population.³ In the United States, on any given day an estimated one in 25 American Indians 18 years old and older is under the jurisdiction of the nation's criminal justice system. This is 2.4 times the rate for whites and 9.3 times the per capita rate for Asians but about half the rate for blacks. The number of American Indians per capita confined in state and federal prisons is about 38 per cent above the national average. The rate of confinement in local jails is estimated to be

nearly four times the national average.⁴ In Australia in December 2009 Indigenous imprisonment rates were 2,338 per 100,000 of the adult Indigenous population compared to a general imprisonment rate of 171 per 100,000. Twenty-six per cent of the total prisoner population were Indigenous people.⁵

Criminal victimisation rates for Indigenous peoples are also much higher than the rates found in the general population. For example in Canada some 35 percent of Aboriginal people report being a victim of crime compared to 26 per cent of non-Aboriginal people. Aboriginal people are nearly three times more likely to be victims of violent crime than non-Aboriginal people and Aboriginal people were five times more likely than the general population to have been the victim of sexual offending.⁶

Criminal victimisation is particularly high for Indigenous women. To take Australia as an example, Indigenous women are:

- more than 10 times more likely to be a victim of homicide than other women in Australia
- 45 times more likely than non-Indigenous women to be a victim of domestic violence
- 10.7 times more likely to be victims of violent crime than non-Indigenous women
- more than twice as likely to be the victim of sexual assault than non-Indigenous women
- 7 times more likely to suffer grievous bodily harm in an assault than non-Indigenous women
- 30 times more likely to be hospitalised for assault than non-Indigenous women in Australia.⁷

The massive incarceration of Indigenous people has not resulted in ensuring the safety of individuals within Indigenous communities. Many Indigenous and non-Indigenous commentators argue that the roots of the current crisis can be found in colonial dispossession⁸ and neo-colonial forms of control – particularly through administrative, economic and legal controls which have created new forms of dependency.⁹ The over-representation of Indigenous people in the criminal justice systems of the former settler societies is a common feature despite differing approaches to the recognition of Indigenous law.

The Colonial

Colonialism has been a process of subjecting particular territorial groups of people, usually with pre-existing links to land and resources and independent cultural and political processes, to the control of another group. It is a process that necessarily involved the exercise of power and a range of political strategies to ensure subjugation. It is a process that implies exploitation, violence and cultural domination. It is a process that also implies resistance on the part of those being dispossessed and expropriated.

Although there were significant historical variations between Australia, New Zealand, Canada and the US particularly in the recognition of Indigenous rights (a point I return to below), colonialism set in motion a process of invasion, settlement and nation-building which fundamentally altered the lives of those original peoples and nations living in the occupied lands. These processes disrupted existing economies, political and religious institutions and cultures. The processes disrupted the modes of governance through which the Indigenous

peoples lived. Modes of governance were changed, modified, eliminated or untouched to greater or lesser extents depending on a range of contextual factors. This colonial framework of a violent and imperial imposition of law and governance on essentially fluid, changing and multiple modes of Indigenous governance has profound implications for understanding both who Indigenous peoples are and their relationship with nation-states today.

There were significant commonalities in the territorial expansion of the British over Indigenous peoples, and today there are similarities derived from a common law tradition across the contemporary legal systems of Canada, the United States, New Zealand and Australia. However there were and are differences in the way Indigenous rights have been recognised, particularly those rights deriving from recognition of sovereignty and the rights of Indigenous people to maintain systems of law, order and governance – that is a right to self-determination and/or self government. While the over-arching sovereignty of the Canadian state remains in place, there has been recognition of Aboriginal rights through the Canadian constitution. Contemporary examples of the recognition of this right can be found in the Nisga'a Final Agreement and perhaps to a lesser extent in the establishment of the Nunavut territory. In the United States federally-recognised Indian tribes continue to possess inherent authority derived from their original sovereignty – a sovereignty long recognised by federal governments and the US Supreme Court. Thus both governments and courts in Canada and the United States recognise Indigenous people's right to self-government. In New Zealand the Treaty of Waitangi influences government legislation and administration in relation to Maori. While differing English and Maori versions of the Treaty provide different accounts of whether sovereignty was surrendered by the Maori, the Treaty has a 'quasi-constitutional' role and provides a structure and process for Maori influence.¹⁰ In contrast to Canada, the United States and New Zealand, Australian governments and courts have consistently denied Indigenous sovereignty. In *Coe v Commonwealth* the High court found that Aboriginal people 'have no legislative, executive or judicial organs by which sovereignty might be organised'.¹¹ Subsequent decisions have confirmed that British acquisition of sovereignty could not be challenged in a domestic court¹², that 'English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it'¹³ and further 'what the assertion of sovereignty by the British Crown necessarily entailed was that there could be thereafter no parallel law-making system in the territory over which it asserted sovereignty'.¹⁴

A consequence of the different ways in which the British settler societies came to understand and recognise Indigenous sovereignty, and the authority that resided with these powers, has been significant variation in the extent to which Indigenous peoples have been able to influence the state's criminal law and penal sanctions. The possibility of developing legal pluralism in the early years of the Australian colonies was effectively jettisoned in 1836 with *R v Murrell (NSWSC, April 1836)* which later courts held as binding; the possibility of recognising a form of residual sovereignty along the lines drawn by the United States Supreme court decisions relating to 'domestic dependent nations', has been consistently denied by Australian courts. As a result, any 'right' to self-determination is seen as a matter of administrative and political discretion by non-Indigenous Governments.¹⁵ As a result the Australian situation contrasts with the development of native American jurisdictions such as the Navajo, or the developments in self government in the Canadian Nunavut regions or the New Zealand approach to biculturalism and legal pluralism. This contrast is not meant to suggest that Indigenous criminal justice issues are not problematic in Canada, the United States or New Zealand – indeed the evidence presented earlier in this article demonstrate otherwise. Nor is it meant to suggest that various jurisprudential contradictions and anomalies do not exist across the settler states. US Indian federal law, despite the limited recognition of

sovereignty, treats Indian peoples as minors before the law – the coexistence of sovereignty and dependency is clearly anomalous. All the sovereign powers of Indian tribes may be removed by Congress. In Australia the High Court recognises Aboriginal law for the purposes of native title, but denies recognition of Aboriginal law-making capacity in other areas of social life – a contradiction at the heart of Australian jurisprudence.

I am not suggesting in this essay any one of the settler societies referred to above have seen adequate recognition of Indigenous sovereignty and self-determination. However, my argument is that an understanding of Indigenous demands for sovereignty and greater power over law-making and administrative functions must be contextualised by the differing historical developments across the British settler societies. Thus, while acknowledging similarities in the demand for recognition of sovereignty, self determination and self government among Indigenous leaders across Canada, the United States, New Zealand and Australia, these political demands will be played out within specific legal and constitutional frameworks. Further, specifically in regard to criminal jurisdiction, existing constitutional and treaty arrangements will influence the nature and level of Indigenous control over justice institutions. Finally, and perhaps most importantly, the rates of Indigenous incarceration in Australia suggest there is a negative relationship between the recognition of Indigenous law-making functions and high levels of incarceration by nation states.

Sovereignty and Self Determination

Western liberal democratic states see themselves as based on popular sovereignty. The source of their political legitimacy is popular consent and support – a notion of consent often at odds with Indigenous views of the colonial process and its outcomes. These states also see their criminal justice systems guided by principles of the rule of law and as essentially neutral, fair and universal in their application. Yet it is clear that for many Indigenous peoples state criminal justice systems are seen as ineffective in their operation and oppressive in their outcomes. The process of re-asserting Indigenous collective rights may require significant institutional change on the part of state criminal justice agencies, especially when a central component of the Indigenous critique of policing and the criminal justice system has been that Indigenous rights have been ignored, in particular rights to self-determination, self-government and authority over the maintenance of social order. The political claim to self-determination has significant implications for state-based criminal justice systems – particularly when narrow definitions of universalism are seen to preclude the potential for the development of differential approaches to justice. However, rather than seeing Indigenous claims as a *problem*, a postcolonial vision might see the potential fragmentation of centralised criminal justice systems as an opportunity for progressive change and development.

We know that sovereignty can have multiple meanings. It is a word whose meaning has constantly changed and has been described as an ‘elusive’ concept dependent on context.¹⁶ Indigenous aspirations for sovereignty fundamentally challenge a unitary vision of the criminal law. Sovereignty in the context of Indigenous political claims can refer to the historical claim that Indigenous people have never relinquished sovereignty – particularly pertinent in Australia where there were no written treaties recognised by the Crown. Or it can be used to refer by Indigenous people to the residual and unextinguished rights to self-government and autonomy which were recognised to varying degrees through treaties in New Zealand and North America. More generally, the political claim of a right to self-determination implies the right and ability to exercise some level of sovereign power – even if within the boundaries of existing nation states. Sovereignty can refer to a kind of residual

distinctiveness and identity: 'we were sovereign peoples'; or to a more specific capacity to make social, political and economic decisions. For some Indigenous leaders it is the starting point, the bedrock on which other Indigenous rights can be developed and acknowledged.¹⁷ Sovereignty is about power and authority and it is seen as a point at which negotiation can begin. As Michael Dodson notes in the Australian context there 'has never been genuine negotiation with Indigenous peoples, there has never been agreement between Indigenous and non-Indigenous Australians as to the terms of our citizenship in this nation'.¹⁸

Indigenous sovereignty is not necessarily about creating separate enclaves or secession. As Steven Curry notes, Indigenous sovereignty is 'something to do with the whole country that once belonged to Indigenous people and which now contains them. And it has something to do with the terms of engagement that will govern their membership of the state that now governs that country.'¹⁹ Among the necessary features of Indigenous sovereignty identified by Curry, of particular importance for a discussion of the criminal law is the expectation that Indigenous sovereignty will require a retrospective re-imagining of the terms of engagement between settlers and Indigenous peoples, and will require changes to how non-Indigenous institutions conduct themselves and to the laws of the larger society.²⁰ Respect for Indigenous self-determination and self-government does not necessarily require the creation of territorial units with primary Indigenous control over administration, 'rather it encourages the principled collaboration in, and sharing of, administrative functions in areas affecting Indigenous interests'.²¹

Sovereignty in international law is usually seen as inextricably tied to territory: 'Sovereignty demands a territory over which the governmental authority of the sovereign extends. Control over territory is the most essential element of sovereignty... Territory thus represents both the encompassing limits of a state's jurisdiction over its resident population and the barriers to outside jurisdiction'.²² However, sovereignty is also a dynamic concept with transformed meanings in different political and historical contexts. It is neither static nor absolute. Despite the apparent claims of the nation state to a concept of sovereignty which privileges a particular political relationship and concept of power, the concept of sovereignty is in a state of flux. In the US the notion of Indian sovereignty has at different times alternatively emphasised the importance of either a territorial-based concepts of sovereignty or one based on consent: *Duro* held that Indian tribes lacked the sovereign power to prosecute non-member Indians in tribal courts.²³ The US Supreme Court in *Lara* held that Congress possessed plenary authority to legislate in matters involving Indian affairs, and upheld Congress legislation effectively overturning *Duro* and granting Indian tribes authority to prosecute non-member Indians.²⁴ Overall though, changing concepts of sovereignty have largely occurred in the context of a derogation of Indian rights, particularly in respect to exercising authority over non-Indians on tribal lands.²⁵

US Supreme Court decisions have discussed the question of consent in terms of the authority exercised by the tribal criminal jurisdiction over both non-member Indians and non-Indians. It is not the purpose of this essay to specifically consider those decisions. Rather, it is to raise the more general question of whether the linking of sovereign power with consent opens up other avenues for rethinking Indigenous political claims. How, might we think about the requirement of consent for the exercise of sovereign powers in relation to criminal jurisdiction, given that an Indigenous critique of colonial claims to sovereignty is the absence of consent by Indigenous peoples? Considerations of sovereignty built on the foundation of consensual agreement rather a territorial base, also opens up new possibilities for Indigenous peoples who are unlikely to achieve a territorial base. From an Indigenous perspective, sovereignty can be conceptualised in terms of jurisdictional multiplicity and divisibility rather

than monopoly and unity. A consent-based sovereignty may open up new ways to imagine multiplicity and the decentring of state power.

While sovereign power remains central to the nation state, trends towards globalisation have also seen the state deal with competing modes of governance. Although ‘the liberal-democratic nation-state retains a central role in redistributing elements of sovereign power and national jurisdiction’²⁶, there has also been a ‘redistribution’ of sovereign powers. In the criminal justice area, we can see sovereign power moving out of the state to international bodies for courts and policing (United Nations and regional-based courts, regulatory bodies, investigatory bodies and so forth). Sovereign power can also be seen as moving downwards to more regional and local spheres of government and governance such as multi-agency crime control partnerships.²⁷

The redistribution of sovereignty may also provide avenues and gaps for the development of shared jurisdictions or shared sovereignty. The challenge that Indigenous claims to sovereignty and self-determination pose are both theoretical and practical. The theoretical challenge is to understand that basic categories and definitions of crime are fundamentally circumscribed by historical and political contexts. The very legitimacy of the institutions used to control crime is not universally accepted. The praxis issue this raises is how do we develop legal institutions which are capable of dealing with multiple jurisdictions and differential citizenship claims.²⁸ In other words, how do criminal justice system institutions develop in a manner that can deal fairly with competing citizenship demands and maintain legitimacy for different social groups? Developing answers to the challenge of differential citizenship is a necessary alternative to the ‘one nation’ view of citizenship which sees equality narrowly defined as ‘sameness’ and fails to recognise the unique status of Indigenous peoples within modern states.

In liberal democracies the rule of law is understood as a universal principle and a fundamental good. Equality before the law and equal protection of the law are seen as the defining features of a legal system built on the rule of law. A postcolonial perspective does not necessarily argue against these principles and the rights they bestow but rather demonstrates the way in which marginalised and colonised peoples are constrained in their capacity to enjoy these protections and rights. Part of the constraint arises from the social and economic position of Indigenous people, as well as racialisation and the lack of tolerance of cultural diversity. There is a palpable tension between a universal principle like equality before the law and the recognition of collective rights and cultural difference. This tension is constantly played out in law, policy and practice.

Nation, Crime and Risk

It is not possible to understand the dynamic of Indigenous demands for self-determination and the resistance with which this is normally met without considering the links between nation, state and criminalisation. There is an extensive literature on the relationship between nation and the ‘imagined community’ and the way the state defines itself as synonymous with the nation.²⁹ Nationalism constructs the ‘people’, but does so through a process of excluding and forgetting. The limits of belonging to the nation can also become the boundaries of the moral community.³⁰ To be outside the moral community is to be susceptible to the violence of the state. Discourses on nationalism and the state also bear directly on definitions of crime and criminality. Sumner has argued that the moral censure of crime attempts to unify and publicise a vision of the nation and its morality.³¹ Crime is seen as a threat to national unity.

Criminalisation is a key part of the building of the nation through processes of exclusion – of keeping out the moral unworthy who lack commitment to the social contract. Thus ‘notions of crime control, the crime wave, the crime zone, crime as a social problem, and the breakdown in law and order [are presented] as signs of a moral malaise threatening the constitutional integrity of the state’.³² In this sense Indigenous resistance to the state can be redefined as criminal, and Indigenous demands for recognition of sovereignty can be portrayed as irrelevant to problems of community disorder and crime.

The criminal justice system plays a significant role in constituting social groups as threats and in reproducing a society built on racialised boundaries. Indeed it has been argued that the process of criminalisation itself now constitutes a significant racialising discourse – that is we understand race through discourses about crime and we understand crime through images of race.³³ Further, the impact of globalisation has led to deep seated insecurity within liberal democracies. As a result the role of the state in representing itself as the guardian of sovereignty and internal and external security has become enhanced.³⁴ These processes are inter-related: crime as a moral censure reinforces the moral boundaries of the nation, crime as a racialising discourse draws exclusionary boundaries based on race, and the state, at a time of diminishing power in the face of globalisation, is eager to exert its power to maintain internal order. The racialisation and criminalisation of Indigenous peoples (and, indeed, minority groups) excludes and isolates people from the assumed national consensus. The exclusionary processes undermine citizenship rights, and criminalisation legitimates excessive policing. Racialised groups are transformed into a ‘law and order’ threat to national unity.

New developments around ‘risk’ have further limited the appeals to sovereignty by Indigenous peoples, particularly where such claims might affect criminal justice systems. Theorists such as Ulrich Beck have argued that the politics of insecurity in late modern societies like Australia, Canada, the United States and New Zealand has led to a preoccupation with and aversion to risk, uncertainty and dangerousness.³⁵ One reaction to the ‘ontological insecurity’ generated by risk aversion is a decline in tolerance and a greater insistence on the policing of moral boundaries.³⁶ There are at least two ways the rise of ‘risk’ paradigms negatively impact on the assertion of Indigenous authority specifically within the criminal justice area. Firstly, the developments of risk in criminal justice policy has seen a shift in focus towards the utilisation of various risk assessment processes: the development of ‘techniques for identifying, classifying and managing groups assorted by dangerousness’.³⁷ Criminal justice classification, program interventions, supervision and indeed detention itself is increasingly defined through the management of risk. The assessment of risk involves the identification of aggregate populations based on statistically generated characteristics. One result of this is that an understanding of crime and victimisation in Indigenous communities is removed from specific historical and political contexts. Within the risk paradigm any rights of Indigenous peoples (such as self-determination or self-government) are seen as secondary to the membership of a risk-defined group. In other words the group’s primary definition is centred on the risk characteristics they are said to possess, and risk is measured through factors such as the incidence of child abuse, domestic homicide, drug and alcohol problems, school absenteeism, juvenile offending and so on.

Secondly, the post 9/11 concerns with security and the war on terror have led to what some commentators have referred to as a ‘paranoid’ nationalism which emphasises order and conformity over difference.³⁸ Within this context Indigenous claims to sovereignty can be easily portrayed as a threat to the national fabric. As Indigenous legal academic Megan Davis notes in discussing sovereignty claims, “it is difficult to comprehend how the patriotic,

warlike, race-divided Australia of today can even begin to think in earnest about what principles underpin a liberal democracy or to seriously consider reform of our public institutions.”³⁹ Indigenous claims to sovereignty and self-government are presented as at best irrelevant to solving the problems of social disorder which are increasingly defined as a threat of criminality from risk-prone populations, or at worst the claims are seen as a threat to national unity and security.

Indigenous Sovereignty and Criminal Justice Policy

The rise of risk paradigms, ‘governing’ through crime, both domestically⁴⁰ and internationally⁴¹, and the focus on statistical populations rather than people who are the bearers of rights, are all working against the development of Indigenous approaches to criminal justice. However, in this essay, rather than discuss the broad parameters of how Indigenous sovereignty might transform criminal justice systems, what I prefer to do is provide two examples which explore the possibilities and limitations of a re-visioning of criminal jurisdictions in the light of Indigenous sovereignty. They show the need for both challenging the orthodoxy of mainstream criminal justice interventions and replacing them with processes more closely connected to the experiences of Indigenous communities.

Much of the innovative developments in Indigenous justice arise from a *disbelief*: a disbelief in the functionality and the legitimacy of state-centred institutional responses. For the most part, criminalisation and incarceration are seen as destructive avenues which cause further family and social disintegration and do not change the behaviour of the perpetrator. The disbelief in the criminal justice system as reformatory or rehabilitative is hardly surprising given that most colonised Indigenous peoples have had firsthand experience of the police, courts and prisons of the colonising state over many generations.

The importance of healing

I met ‘white’ people whose experiences of life from the first consciousness were of continual affirmation of their being; their self-esteem had never been attacked or questioned in any way; they had no concept of rejection by their families and the community around them. They were totally confident of their places in society; and they disported themselves with the physical and social demeanour of people who knew nothing of the never-ending quest to know who one is; nothing of the struggle to assert one’s existence in the world.⁴²

Colonial policies have at various times sought to exterminate, assimilate, ‘civilize’, and Christianise Indigenous peoples. This colonization has occurred through warfare, the establishment of reservations, the denial of basic citizenship rights, the forced removal of children and forced education in residential schools, the banning of cultural and spiritual practices, and the imposition of an alien criminal justice system. At the heart of these colonial interventions was the goal of eradicating Indigenous culture and identity. It is little wonder today that the assertion of the collective right of Indigenous peoples to maintain and develop their distinct identities, laws and cultures is seen as fundamental to the very existence of Indigenous people and culture.⁴³

One specific consequence of this importance of maintaining and protecting cultural identity in the face of colonial strategies to circumscribe, define and control the identity of Indigenous peoples, is the approach taken towards offenders. Generally speaking, there is a different understanding among Indigenous people about how you change unacceptable criminal

behaviour, compared to what we might call mainstream approaches to penalty. There is a much greater focus on healing. One of the consequences of this is the tension that is created between Indigenous approaches and state-controlled and favoured intervention programs.

In the current period, particularly in North America, Australia and New Zealand, we see an emphasis on approaches that identify criminogenic needs and various behavioural programs put in place as a result of the identification of these needs.⁴⁴ These approaches are clearly in the ascendancy, as opposed to approaches that are more community driven or rely on community involvement and might target greater social inclusion. This emphasis has important ramifications for Indigenous peoples because, although they are most likely to be the subjects of these programs as offenders, they are also less likely as community members to be part of the professionalised staff that administer these types of interventions.

I am not suggesting that therapeutic approaches should not be used. But the danger is that government favours those approaches which it can directly deliver and closely control and monitor – and these tend to be programs reliant on non-Indigenous expert interventions. They also tend to be programs which are off-the-shelf and perhaps only slightly modified for Indigenous people. They are generally not programs which are organic to Indigenous people and their communities, or their needs and experiences.

If we reflect on Indigenous developed programs⁴⁵, it is evident they begin at a different place to conventional individualised and psychology-based intervention programs. Indigenous programs start with the collective Indigenous experience. Inevitably that involves an understanding of the collective harms and outcomes of colonisation, the loss of lands, the disruptions to culture, the changing of traditional roles of men and women, and the collective loss and sorrow of the forced removals of children.

In Indigenous programs individual harms and wrongs are placed within a collective context. On the one hand, offenders are dealt with as individuals responsible for their own actions; their pain and the forces that propel them to harmful behaviour towards themselves and others are confronted. However, they are *understood* within a collective context of the experience of Indigenous peoples in a non-Indigenous society. The explanatory context, the explanation for behaviour, is within collective experiences of Indigenous people.

In this sense Indigenous programs are unique because they seek individual change within a collective context. Mainstream programs cannot and do not do that – they do not understand individual change as part of a collective experience; they are incapable of drawing upon the collective and empowering strength of culture; change is only seen at an individual level. This is why Indigenous programs and Indigenous people prioritise the concept of healing: healing is quintessentially and simultaneously an individual and collective experience. It is far more expansive than a notion of rehabilitation. It is about healing yourself, healing your relationship with others, understanding yourself within a cultural framework, and healing your community. In summary, Indigenous programs start with the collective experiences and harms of Indigenous people. They then place the individual in a collective context, and seek to understand and change the individual within that context. Finally their focus is on healing individuals and communities.

Grief and loss are core issues that Indigenous programs prioritise and address rather than only focussing on criminogenic needs and cognitive behavioural deficits. Cognitive behavioural programs fail to understand the nexus between oppression and liberation, between collective grief and loss and individual and community healing. Indigenous healing programs start from

this point of the outcomes and effects of longer term oppression, and move from there towards healing of individuals.

Violence against Indigenous Women

Domestic and family violence is a significant problem in many Indigenous communities that desperately needs intervention and change.⁴⁶ The need for intervention is widely accepted, but the critical question is what is the most appropriate and effective types of criminal justice response to violence. From my experience of the situation in Australia⁴⁷, Indigenous perspectives (there are clearly more than one) on violence against women are largely based on different understandings and explanations for the violence, and demands for differing law and policy interventions than what I would characterise as the mainstream approaches to domestic violence. Indigenous approaches do not necessarily or primarily rely on a criminalisation approach. Self empowerment, community development and capacity building are all acknowledged as aspects to dealing with domestic and family violence. Further, approaches that acknowledge the links between colonial experiences of violence, and contemporary approaches that emphasise individual and collective healing are paramount.

Indigenous views of domestic and family violence differ from non-Indigenous views in following areas:

- There is a rejection of criminalisation as the main strategy to deal with family violence;
- There is greater stress on the impact of colonialism, trauma, family dysfunction and alcoholism as primary causes of violence;
- Male violence is seen as less an expression of patriarchal power than as a compensation for lack of status, esteem and value;
- There is greater emphasis on the impact of family violence on the family as a whole;
- There is greater emphasis on a range of potential perpetrators including husbands, sons, grandsons, and other male kin.
- There is a greater emphasis on healing and re-integrating the offender.⁴⁸

There is a perception that western criminal justice interventions suffer from several failures. They fail at the symbolic level because there is little or no 'ownership' of the institutions (that is, they lack legitimacy); they fail by escalating the violence against women and children (imprisoned men return more violent, and there is potential violence from the perpetrator's family); and they fail by continuing to separate Indigenous families (which was a colonial strategy through the late nineteenth and twentieth centuries to disrupt Indigenous social and economic life).

Indigenous women's 'focus has largely been on rehabilitation of the offender and restoration of the relationship between the offender and the victim, and between the offender and the broader community'.⁴⁹ Importantly the promise of an element of self-determination has been important for Indigenous people's approach to dealing with legal responses to social problems like domestic and family violence.⁵⁰ Responses need to be part of a holistic response, based on self-determination and with a strong organic connection to community initiatives. Indigenous demands then are for a system of law that respects Indigenous culture and self-determination.

In practice, the examples provided above demand the development of a system which combines elements of both Indigenous and non-Indigenous law and practice, and includes a significant role for Indigenous people in justice decision-making at a community level and

through the courts, as well as an emphasis on Indigenous modes of healing. Greater control over decision-making means that Indigenous holistic approaches might be triggered as an alternative to state-based criminal justice intervention, or at any part of a state-based criminal justice process from police intervention to corrections. The result of Indigenous demands is likely to be a postcolonial hybridisation of law. For example, the demands of Indigenous women are more likely to be met by a transformation in the justice system that allows the development of a hybrid system where traditional legal bureaucratic forms of justice are significantly modified and combined with Indigenous justice. They might for example, involve the use of community night patrols, Indigenous run healing programs, the use of Indigenous courts administering locally developed law, or the use of state-based criminal courts. The key question is not so much the nature of the intervention, but the location of the decision-making.

Conclusion: Sovereignty, Citizenship and Criminal Justice

It is clear that the Indigenous domain⁵¹ has continued to not only survive but develop and extend itself in the settler colonies of the United States, Canada, Australia and New Zealand. Indigenous space continues to be defended and where possible extended. In contrast, non-Indigenous governance through the criminal justice system and the broad spectrum of government policy and programs tends to circumscribe and delimit the struggle for Indigenous autonomy.

In many cases where Indigenous community justice initiatives have flourished there have been successes in reducing levels of arrests and detention, as well as improvements in the maintenance of social harmony.⁵² The success of these programs has been acknowledged as deriving from active Aboriginal community involvement in identifying problems and developing solutions. Indigenous resistance to colonial power has been productive of new spaces for the exercise of Indigenous governance over policing and criminal justice issues. Throughout Australia, the United States, Canada, New Zealand Indigenous communities have continued to exercise authority, or have at least attempted to develop localised methods of dealing with problems of social disorder. Indigenous practice has provided us with the opportunity and the necessity to re-think the possibilities of a postcolonial relationship between criminal justice institutions and Indigenous communities with their demands for the exercise of authority derived from claims of sovereignty.

Recognition of Indigenous demands for sovereignty requires new ways of thinking about citizenship. Liberal ideals of citizenship were traditionally tied to notions of individual human rights. New notions of citizenship stress self-determination by collectivities, pluralism and diversity – what has been referred to as ‘differential citizenship’.⁵³ Differential citizenship represents a new notion of citizenship based on collective rights (self-determination), as well as the traditional individual rights associated with liberal notions of citizenship. Collective rights for Indigenous peoples are embodied in the principle of self-determination, yet individual rights are also still an important aspiration for Indigenous people - particularly those rights relating to freedom from arbitrary state intervention and freedom from racial discrimination. Citizenship, like sovereignty, is a changing and evolving socio-political concept. Arising from these challenges is the need to consider how frameworks for the operation of multiple jurisdictions might be designed, how hybrid systems of justice might be forged and how decision-making can be relocated back to Indigenous people.

¹ Australian Bureau of Statistics, *Corrective Services Australia December Quarter 2009* (Canberra: Australian Bureau of Statistics, 2010), 6.

² Bronwyn Morrison, *Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research* (Wellington: Ministry of Justice, 2009) 18.

³ Chris Cunneen, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Crime Prevention Division and Aboriginal Justice Advisory Council, 2001), 108

⁴ Lawrence Greenfeld and Steven Smith (1999). *American Indians and Crime*. Washington D.C.: Bureau of Justice Statistics

⁵ Australian Bureau of Statistics, *Corrective Services*, 6.

⁶ Department of Justice Canada, *A Review of Research on Criminal Victimization and First Nations, Métis and Inuit Peoples 1990 to 2001*, http://www.justice.gc.ca/eng/pi/rs/rep-rap/2006/rr06_vic1/p5.html (accessed 1 May 2010).

⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities* (Sydney: Australian Human Rights Commission, Sydney, 2006). See Department of Justice Canada, *A Review of Research on Criminal Victimization and First Nations, Métis and Inuit Peoples 1990 to 2001* for similar figures in Canada.

⁸ See for example Richard Trudgeon, *Why Warriors Lie Down and Die* (Darwin: Aboriginal Resource and Development Services, 2000).

⁹ Jon Altman and Melinda Hinkson, eds., *Coercive Reconciliation* (Melbourne: Arena Publications, 2007).

¹⁰ Sean Brennan, Brenda Gunn and George Williams "Sovereignty and Its Relevance to treaty-Making Between Indigenous Peoples and Australian Governments," *Sydney Law Review* 26 (2004): 307-352.

¹¹ *Coe v Commonwealth* (1979) 24 ALR 118 at 129

¹² For a summary see Brennan et al. "Sovereignty and Its Relevance", 304-328.

¹³ *Walker v New South Wales* (1994) 182 CLR 45 at 50

¹⁴ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at 552.

¹⁵ For discussion of legal recognition of residual powers of self-government among Indigenous peoples in north America see James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) 16-18 and in contrast to Australia see Henry Reynolds, *Aboriginal Sovereignty*, (St. Leonards: Allen and Unwin, 1996), 124-135.

¹⁶ Brennan et al. "Sovereignty and Its Relevance", 310.

¹⁷ Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future*. (Leichhardt: Federation Press, 2003), 99.

¹⁸ Michael Dodson, "Citizenship in Australia: An Indigenous Perspective," *Alternative Law Journal* 22 (1997):58

¹⁹ Steven Curry, *Indigenous Sovereignty and the Democratic Project* (Aldershot: Ashgate, 2004), 147.

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- ²⁰ Curry, *Indigenous Sovereignty*, 148-149.
- ²¹ Melissa Castan and David Yarrow, "A Charter of (Some) Rights... for Some?," *Alternative Law Journal* 31 (2006):135
- ²² Judith Royster, "The Legacy of Allotment" *Arizona State Law Review*, 27.1 (1995): 1-2
- ²³ *Duro v Reina*, 495 US 676, Supreme Court, 1990.
- ²⁴ *United States v. Lara*, 541 US 193, Supreme Court, 2004
- ²⁵ See Royster, "The Legacy of Allotment"; L. Scott Gould, "The Consent Paradigm: Tribal Sovereignty at the Millennium", *Columbia Law Review*, 96.4 (1996): 809-903; Stephen Pevar, *The Rights of Indians and Tribes*, (Carbondale: Southern Illinois University Press, 2004).
- ²⁶ Kevin Stenson, "Crime Control, Governmentality and Sovereignty" in *Governable Places: Readings on Governmentality and Crime Control*, ed. Russell Smandych, (Aldershot: Ashgate, 1999), 67
- ²⁷ Stenson, "Crime Control", 68.
- ²⁸ Chris Cunneen, "Consensus and Sovereignty: Rethinking Policing in the Light of Indigenous Self-determination," in *Unfinished Constitutional Business? Rethinking Indigenous Self-determination*, ed. Barbara Hocking, (Canberra: Aboriginal Studies Press, 2005), 47-60.
- ²⁹ Benedict Anderson, *Imagined Communities*, (London : Verso, 1990)
- ³⁰ Jan Pettman, *Worlding Women*, (St Leonards: Allen and Unwin, 1996), 47
- ³¹ Colin Sumner, (ed) *Censure, Politics and Criminal Justice*, (Milton Keynes: Open University Press, 1990).
- ³² Sumner, *Censure, Politics and Criminal Justice*, 49
- ³³ Malcolm Keith "From Punishment to Discipline", in *Racism, The City and The State*, eds. Michael Cross and Malcolm Keith, (London: Routledge, 1993), 193.
- ³⁴ Zygmunt Bauman, "Social Issues of Law and Order", *British Journal of Criminology*, 40 (2000): 205-221
- ³⁵ Ulrich Beck, *Risk Society. Towards a New Modernity*, (London: Sage, 1992).
- ³⁶ Fenna Van Marle and Shadd Maruna, "Ontological Insecurity and 'Terror Management'" *Punishment and Society* 12.1 (2010): 10.
- ³⁷ Malcolm Feeley and Jonathan Simon, "Actuarial Justice: the Emerging New Criminal Law," in *The Futures of Criminology*, ed. David Nelken, (London: Sage, 1994), 173.
- ³⁸ Ghassan Hage, *Against Paranoid Nationalism. Searching for Hope in a Shrinking Society*, (Annandale: Pluto Press, 2003).
- ³⁹ Megan Davis, "The 'S' Word and Indigenous Australia: A New Variation of an Old Theme," *Australian Journal of Legal Philosophy* 31 (2006):134.
- ⁴⁰ Jonathan Simon, *Governing Through Crime. How the War on Crime Transformed American Democracy and Created a Culture of Fear*, (Oxford: Oxford University Press, 2007).

⁴¹ Mark Findlay, *Governing Through Globalised Crime*, (Uffculme, Willan Publishing, 2008).

⁴² Pat O'Shane, "The Psychological Impact of White Settlement on Aboriginal People" *Aboriginal and Islander Health Worker Journal*, 19. 3 (1995): 29.

⁴³ See for example the rights established in the United Nations *Declaration on the Rights of Indigenous Peoples*.

⁴⁴ Criminogenic needs include personal deficits such as pro-offending attitudes, poor problem-solving abilities, high hostility and anger and anti-social personality traits. According to this approach treatment should involve highly structured cognitive behavioural programs implemented by qualified trained staff. See Tony Ward and Shadd Maruna, *Rehabilitation*, (Abingdon: Routledge, 2007) 48-49, 72-74.

⁴⁵ In the Australian context these are programs like *Rekindling the Spirit*, *Red Dust Healing*, *Ending Offending*, *Ending Family Violence*, *Journey to Respect* and *Family Well-Being*. The names of many of these programmes are indicative of their focus on specific Indigenous identity.

⁴⁶ Data cited at the beginning of this essay show the extent of violence against Indigenous women.

⁴⁷ For example, Chris Cunneen, *Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities*, (Brisbane: Queensland Department of Communities, 2008).

⁴⁸ Harry Blagg, *Crisis Intervention in Aboriginal Family Violence*, (Perth: University of Western Australia, 2000). Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, (Annandale: Hawkins Press, 2008).

⁴⁹ Heather Nancarrow, "In Search of Justice for Domestic and Family Violence: Indigenous and Non-Indigenous Australian Women's Perspectives", *Theoretical Criminology* 10. 1 (2006): 94.

⁵⁰ Nancarrow "In Search of Justice", 98.

⁵¹ The concept of the 'Aboriginal domain' refers to the social, political and cultural space of Aboriginal people - a space that maintains the dominant social and cultural life and the language of indigenous people. The 'Aboriginal domain' provides a point of resistance to colonising processes and insulates minority cultural, social and political space from being overtaken. This is where Indigenous knowledge, culture and governance reside. See Chris Cunneen, "Restorative Justice and the Politics of Decolonisation." in *Restorative Justice: Theoretical Foundations*, eds. Elmar Weitekamp and Hans-Jurgen Kerner (Uffculme: Willan Publishing, 2002).

⁵² Blagg, *Crime, Aboriginality and Decolonisation*.

⁵³ Paul Havemann, "Indigenous Peoples, the State and the Challenge Differentiated Citizenship," in *Indigenous Peoples in Australia, Canada and New Zealand*, ed. Paul Havemann (Auckland: Oxford University Press, 1999), 472. See also Duncan Ivison, *Postcolonial Liberalism* (Cambridge: Cambridge University Press, 2002).