Cunneen, C. and Porter, A. (2017) 'Indigenous Peoples and Criminal Justice in Australia', in Deckert, A. and Sarre, R. (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice*, Palgrave Macmillan, Basingstoke, ISBN 9783319557465, pp 667-682

CHAPTER 45
INDIGENOUS PEOPLES AND CRIMINAL JUSTICE IN AUSTRALIA

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The impact of Anglo-Australian criminal justice systems on Indigenous communities demands attention to a broad range of political, socio-economic, cultural, and historical contexts, as well as more mundane matters related to the day-to-day operation of criminal justice agencies. The political context requires us to understand the parameters in which Indigenous communities function. This includes the nature of Indigenous political demands for self-determination, and the impact of state and federal policy frameworks that governments impose on Indigenous communities. The socio-economic context requires us to consider the position of Indigenous peoples in Australian society, in particular the consequences of disadvantage that many communities face, and the impact that this position has on the relationship with crime and criminal justice. The cultural context requires attention to the nature of social relationships and cultural concerns within Indigenous communities, including Indigenous law and culture, and local mechanisms for dealing with disputes. The historical context raises fundamental questions of sovereignty, legitimacy, power and resistance.

In this chapter, we can only hope to touch on some of the more salient points. The following discussion is divided into four parts. The first part contextualises crime and criminal justice in Australian colonial history. The second part looks at the discrete issues of over-representation, policing, deaths in custody, and access to justice in the context of neo-colonialism. The third part addresses contemporary Indigenous experiences of criminal justice reform and resistance. Finally, the conclusion reflects on the possibilities of an Indigenous criminology.

Colonial History

The place of Australia's Indigenous peoples within English law was determined during the early part of the nineteenth century; at least to the satisfaction of the British. Although the object of some debate, various judgements confirmed that Aboriginal people were subject to colonial criminal courts. The dominant view was that Aboriginal people had not attained either the numbers or the status of 'civilised nations' that could be recognised as sovereign states governed by their own laws. Upon settlement and possession of the land, there was only one sovereign, the King of England, and only one law, English law. Aboriginal people in the colony became the subjects of the King. The Privy Council was to confirm the doctrine of settlement and terra nullius in *Cooper v Stuart* in 1889. According to the dominant view, Aboriginal people were without sovereignty and their land had been peacefully annexed to the British dominions.

However, the positioning of Aboriginal people as British subjects, and later as Australian citizens, was always—and remains—deeply ambiguous and contested. In many parts of Australia, the police and courts were not simply enforcing the criminal law. They were extending the reach of British jurisdiction over resisting Indigenous peoples. For Aboriginal people, the first contact they may have had with the criminal justice system was with the police acting as a paramilitary force of dispossession, dispensing summary justice,

and—on some occasions—involved in the indiscriminate massacre of clan and tribal groups. There was never any doubt at the time that the Indigenous peoples and the colonisers were indeed at war; during the late eighteenth and early nineteenth century in parts of south-eastern Australia; in TAS during the 1820s and early 1830s; and in QLD and WA during the mid to later half of the nineteenth century (Cunneen 2001). The war of extermination, as it was sometimes referred to, meant that the rule of law as a constraint on arbitrary power and as a guarantee of equality before the law was suspended in relation to the murder of Aboriginal people. Indigenous peoples were simultaneously placed inside the legal space of English law, but outside its protection.

The place of Indigenous peoples in Australia was to change again from the end of the nineteenth century and during the course of the twentieth century with a shift in government policy towards 'protection'. Protection legislation saw many Indigenous individuals and communities—particularly those seen as unable to demonstrate the level of 'civilisation' required to exercise citizenship rights—spatially segregated on reserves and missions. Reserves and missions administered their own penal regimes outside of—and essentially parallel to—existing formal criminal justice systems. Other processes of racialised justice abounded through curfews and segregation (Cunneen 2001), while child removal policies created further generations of institutionalised Indigenous peoples (NISATSIC 1997). These policies and practices reflected various racial assumptions. Some built on 'science' like eugenics. Others reflecting popular prejudices about the social, cultural and biological inferiority of Indigenous people.

Numerous legislative controls and eligibility restrictions existed on movement, residence, education, healthcare, employment, voting, workers compensation, welfare, and social security entitlements. For example, many Aboriginal people were disqualified from receiving entitlements, including old age, invalid and widow's pensions, child endowment, and maternity allowances. Discriminatory restrictions on social security benefits were not completely lifted until 1966 (Chesterman and Galligan 1997).[1] Various governments put in place controls over the employment, working conditions, and wages of Indigenous workers. These controls allowed for the non- or under-payment of wages to some Aboriginal workers—which amounted to forced labour and bordered on a type of slavery—and the diversion of wages into Aboriginal trust funds and savings accounts, which were then rorted through various negligent and corrupt practices (Senate Standing Committee on Legal and Constitutional Affairs 2006).

Given the depth of contemporary Indigenous detriment across all social, educational, health, and economic indicators (SCRGSP 2014), and the active role played by the state in controlling Aboriginal people's lives, the outcome of this colonial process was one of *immiseration* (Senate Standing Committee on Legal and Constitutional Affairs 2006). Contemporary problems of overcrowded housing, low incomes, chronic health issues, lower life expectancies, poor educational outcomes, child protection concerns—precisely the factors known to be associated with higher levels of violence and offending—can be related in various degrees to state control of Indigenous lives (Cunneen and Tauri 2016). In other words, contrary to some criminological interpretations (see, for example, Weatherburn 2014), the outcomes of colonialism have a direct bearing on the contemporary situation of Indigenous peoples in the criminal justice system.

Neo-colonialism

Neo-colonialism refers to the ongoing processes and outcomes of colonial control which exist within a framework of formal equality (Cunneen 2001). Criminalisation is a key process that disrupts Indigenous communities and maintains extensive state control.

Over-representation

The imprisonment of Indigenous peoples has been increasing since the 1980s and is, in rcent decades, growing more rapidly than non-Indigenous imprisonment rates. On June 30, 2015, there were 9,264 Indigenous peoples in Australian prisons, or 27 percent of the total prison population. Indigenous peoples were imprisoned at a rate 13 times greater than their non-Indigenous counterparts (ABS 2015). In the decade between 2005 and 2015, Indigenous imprisonment rates had risen by 30 percent, while at the same time the non-Indigenous imprisonment rate rose by 12 percent (ABS 2015). Thus, while the use of imprisonment has increased for all people, the increase is more pronounced for Indigenous people. Criminal victimisation rates for Indigenous peoples are also much higher than the rates found in the general population, particularly for Indigenous women who—compared to non-Indigenous women—are 10 times more likely to be a victim of homicide, 45 times more likely to be a victim of domestic violence, and twice as likely to be the victim of sexual assault (ATSISJC 2006).

The causes of over-representation are complex and there is a need for a multifaceted conceptualisation of Aboriginal over-representation which goes beyond single causal explanations such as poverty, racism, et cetera. An adequate explanation involves analysing interconnecting issues. Such issues include historical and structural conditions of colonisation, social and economic marginalisation and institutional marginalisation. At the same time, the analyse needs to consider the impact of specific—and sometimes quite localised—practices of the criminal justice system and its related agencies (Cunneen 2001). The structural conditions of poverty create fertile ground for the crimes of the powerless. But, as we noted above, these conditions did not magically appear; they were created under the particular conditions of colonialism. The recent increases in Indigenous imprisonment have also occurred within particular political contexts of more punitive approaches to law and order, including restricted access to bail, longer sentences, and increasing risk aversion in relation to probation and parole (Cunneen et al. 2013).

Deaths in Custody

The Royal Commission into Aboriginal Deaths in Custody (RCADIC) was established in 1987 after a political campaign waged by Indigenous organisations and the families of Indigenous peoples who had died in custody. At the time it was unclear how many deaths had occurred in custody or indeed how many Indigenous people were held in police custody or prison. In the end, the Royal Commission investigated 99 deaths of Indigenous peoples, most of whom had died in police custody (Johnston 1991). The RCADIC found that the high number of Indigenous deaths in custody was directly relative to the over-representation of Indigenous people in custody. The RCADIC found that the failure by custodial authorities to exercise a proper duty of care was a major issue. There was little understanding of the duty of care owed by custodial authorities. There were many system defects in relation to exercising care, and many failures to exercise proper care. In many cases, both the custody and the failure to offer proper care were directly related to the person's Aboriginality. In many cases, assumptions were made that a seriously ill person was drunk (eg the deaths of Mark Quayle and Charles Kulla Kulla). In these cases, assumpptions were made that stereotyped Aboriginal people as drunken. The failure to exercise a proper duty of care contributed to, or caused, the death in custody by failing to properly assess the health of the person in custody (Cunneen 2001).

More recent deaths of Indigenous people in custody continue to illustrate the problems of racism, ill-treatment, and the failure to exercise a duty of care. For example, the role of the police in the deaths of Cedric Trigger in 2010, and Kwememtyaye Briscoe in 2012—both of which occurred in Alice Springs Watch-house—was heavily criticised by the

coroner particularly in relation to the multiple failings that allowed the deaths to occur (Cunneen, forthcoming).

Policing

To a significant degree, police determine who enters the criminal justice system, and how inidividuals enter it, particularly for summary offences. The use of discretion is a central part of police work, amd police must continually decide whether to intervene, and how to intervene. The available evidence shows that police discretionary decisions work against the interests of Indigenous people. For example, in the case of juveniles, various studies—conducted over the last two decades—have found that Indigenous young people do not receive the benefit of a diversionary police caution to the same extent as non-Indigenous young people (Cunneen, White, and Richards 2015). Further, Indigenous young people are more likely to be proceeded against by way of arrest and bail, and to be held in police custody, and are less likely to be summoned before the court than non-Indigenous youth. The process of sunmons is a less punitive way of intervening and does not involve the consideration of bail and its consequences such as bail refusal or punitive bail conditions (Cunneen, White, and Richards 2015).

The differential policing of Indigenous peoples in public places has been raised as an issue since at least the late 1960s (Cunneen 2001). The problem was reiterated in the investigations by the RCADIC where the majority of deaths involved the use of custody for minor offences. More recently, the Law Reform Commission of WA found that police use of move-on powers[2] in Perth were being issued to Aboriginal people in inappropriate circumstances. The Commission found that "in some cases Aboriginal people are being targeted by the police for congregating in large groups in public areas even though no one is doing anything wrong" (LRCWA 2006, 206).

Problems with racist abuse by police officers towards Indigenous people also continue. The SA Police Ombudsman recently commented on the inadequate disciplinary sanctions imposed on officers where racial abuse against Indigenous peoples was found proven. The use of force is also an ongoing issue (Grant, 2015). Independent inquiries in QLD and NSW found that Indigenous people were more likely to be subjected to both the use of tasers and OC spray than other members of the public (Cunneen, forthcoming).

Access to Justice

The existing barriers that prevent Indigenous peoples from accessing justice are well-documented (Productivity Commission 2014). Socio-economic disadvantage and related issues are particularly relevant to accessing legal assistance. For example—compared with non-Indigenous peoples—Indigenous peoples experience lower levels of English literacy and numeracy, high levels of hearing loss, higher levels of disability, higher levels of psychological distress, higher rates of self-harm, the effects of childhood removal, higher levels of drug and alcohol addiction, and geographic isolation. All these factors are likely to inhibit Indigenous access to justice. In addition, funding for Aboriginal Legal Services and Family Violence Prevention Legal Services have not kept pace with service delivery, and have led to cuts in frontline services, law reform, and advocacy work (Productivity Commission 2014). Failure to access justice to resolve legal problems leads to a range of adverse legal and social outcomes.

In terms of neo-colonialism, the over-representation, the criminalisation and policing of Indigenous peoples, and the lack of access to justice procedures reproduces social, economic, and political marginalization. These various forms of marginalization were themselves initially created through the processes of colonisation.

Contemporary Indigenous Experiences

There has been extensive documentation of the suffering of Indigenous people under the imposed criminal justice system. The most comprehensive works to date have been the RCADIC (Johnston 1991) and the National Inquiry into Racist Violence (HREOC 1991). Both examined the reasons for Indigenous over-representation within the mainstream criminal justice system. The findings and recommendations of these national reports provided the blueprint for the past 25 years of Australian criminal justice reform. The nature of this reform has been two-pronged, and has included efforts targeted at both addressing the underlying causes of crime and altering the practices and institutions of the criminal justice system (Cunneen 2006). However, despite these and other reform efforts, incarceration rates for Indigenous Australians remain at unacceptably high levels.

The following section outlines key reform efforts and reflects on some of the challenges in realising meaningful change in criminal justice law and policy. Our examination of reform efforts is intentionally broad and considers both formal state-initiated reform efforts and alternative community-initiated reform efforts.

Circle Sentencing and Indigenous Courts

One feature of recent reform efforts has included the development of Indigenous sentencing courts and circle sentencing. Indigenous sentencing courts involve the participation of Indigenous community members in the sentencing of Indigenous offenders and other efforts aimed at improving the cultural appropriateness of sentencing. Some Indigenous sentencing courts operate informally while others are governed through legislative frameworks, such as the *Magistrates' Court (Koori Court) Act 2002* (VIC) which added section 4D to the *Magistrates' Court Act 1989* (VIC) to establish the Koori Court Division, and the *Statutes Amendment (Intervention Programs and Sentencing Procedures) Act 2003* (SA) which led to amendments to the *Criminal Law* (*Sentencing) Act 1988* (SA) and, later, the creation of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

At present, Indigenous sentencing courts exist in various locations within several Australian jurisdictions: SA, NSW, VIC, QLD, and WA. By way of example, the Nowra Circle Court is made up of four Elders from the local community. They oversee the sentencing of Indigenous young people who have elected to take part in the program. Established in February 2002, sessions of the Nowra Circle Court are held in the South Coast Aboriginal Cultural Centre and are presided over by a magistrate, who travels there as part of a circuit.

Generally speaking, Indigenous sentencing courts have been evaluated in positive terms (Marchetti and Daly 2004; Marchetti 2015). Research suggests that offenders find Indigenous courts more challenging and confronting than mainstream courts (Marchetti 2015). Similarly, sentencing courts play a role in improving communication and understanding between judicial officials, offenders and the Indigenous community (Marchetti and Daly 2007). Other benefits include improving a sense of inclusiveness; transparency and accountability in sentencing outcomes for Indigenous offenders; and providing the opportunity for community input over the sentencing process. Shortcomings of Indigenous courts include their limited reach both in terms of jurisdiction and eligibility; the relatively small proportion of Indigenous offenders sentenced before such courts; and, more generally, questions regarding the meaningfulness of Indigenous agency and oversight over court sentencing processes (Cunneen and Tauri 2016).

State Police Reform

Another key feature of reform has centred on changing the policies and practices of the state police. While the precise content and scope of police reform varies considerably across

jurisdictions, in general terms, reform efforts have included the recruitment of Indigenous personnel, and commitments to improve cultural competency of non-Indigenous police.

The first of these features has involved the recruitment of Aboriginal and Torres Strait Islander personnel, either as sworn police officers or as unsworn community liaison officers. Indigenous people are under-represented amongst both sworn police officers and more generally as employees of the state and territory police departments. Evidence suggests a high attrition rate, difficulties in recruiting and retaining Indigenous police officers; female Aboriginal police officers in particular (NSW Ombudsman 2005). In addition to issues in recruitment and retention of Indigenous police, research suggests that police working culture is hard to change at an institutional level (Chan 1997; Wood 1997). Chan (2007) highlighted the entrenched and highly institutionalised nature of racism within the working culture and socialisation processes of the state police. The study concluded that police racism can only be explained as a "deep phenomenon" (222) embedded within police culture. It cannot be explained merely by identifying individual police officers who are racially prejudiced.

A second feature of police reform has focused on educating police officers in cultural competency. Cross-cultural advisory units exist in every police force in Australia, overseeing the education and training of police officers in cross-cultural issues including communication (Chan 1997). The rationale was that educating police officers about Aboriginal culture and cultural competency would effectively redress the ignorance underlying racist attitudes and discriminatory practices. Limitations of cultural competency have been three-fold. Psychological research emphasises the deeply embedded and persistent nature of racial prejudices, race-crime associations, and unconscious bias (Eberhardt et al. 2004). At an interpersonal level, despite the best intentions of training and education programs, eradicating racial stereotypes is an arduous task (Wortley and Homel 1995). At a systemic level, cross-cultural training assumes that ignorance lies at the heart of the problem and is unlikely to touch biases that arise at both the operational and institutional levels of the state police. For example, an emphasis on training ignores policies (eg, zero tolerance policing towards certain behaviours) and specific criminal laws (eg, paperless arrest laws in the NT) that police officers enforce.

Indigenous Security

Another feature of reform has included initiatives such as night patrols, streetbeats and alternative forms of self-policing. Indigenous patrols are locally run initiatives with formal agendas that focus on keeping young people safe and on preventing contact between Aboriginal young people and the state police. Patrols operate in a diverse range of urban, rural, and remote settings across some Australian jurisdictions (Blagg 2003). Blagg (2008) estimated that approximately 130 such patrols operate in Australia; with around two-thirds of these being located in rural and remote parts of WA and NT.

The core features of patrol work include independence from state police, a consensual basis of operations, and a connection to the local Indigenous community (Porter 2016a). Indigenous night patrols are distinctive from formal reform efforts that sought to alter the state police, in that a key part of their agenda is to minimise Aboriginal people's contact with the criminal justice system. Importantly, patrols function independently of the state police and, at least in theory, are connected in some way to the local Aboriginal community within which they operate. In practice, they operate with varying levels of community input or involvement from the Aboriginal community. As this implies, patrols do not fall neatly in either the governmental or autonomous reform efforts, and occupy what scholars have termed third or hybrid spaces (Cunneen 2001; Blagg 2008).

Despite variation and diversity among initiatives, broad unity can be seen at the level of key functions, which in NSW includes providing transport, maximising safety, the

mentoring of Indigenous young people, preventing harmful behaviour, and maximising the safety of young people who 'fall through the cracks' of the system (Porter 2016a). Research suggests that the everyday activities of patrols extend beyond Western concepts of policing, crime prevention, and social work; and that they provide a much more encompassing cultural service for Indigenous youth (Porter 2016a). It is perhaps for this reason that—with few exceptions (Langton 1992; Cunneen 2001; Blagg 2003; Blagg 2008)—the contribution of Indigenous patrols has largely escaped the attention of criminologists.

Community Justice Initiatives

There exists a diverse range of community justice initiatives that currently operate in Aboriginal and Torres Strait Islander communities across Australia. Though making an important contribution to a diverse range of issues facing the local community—be it mentoring, healing, police–community relations, or confronting stereotypes—community justice mechanisms have—just like night patrols—largely escaped the attention of criminologists and policy-makers.

Community justice initiatives are locally community-controlled programs and services focusing on a range of justice and sovereignty issues, designed and delivered by local Aboriginal corporations and personnel. While not all of these initiatives operate with an explicit or exclusive focus on community safety and wellbeing, they are holistic programs and services targeting a range of issues specifically identified as priorities for the local communities. Four examples follow. Firstly, the Tribal Warrior Association, a not-for-profit community organisation operates a range of initiatives including mentoring programs, training programs and other cultural activities in Redfern, Sydney (Phillips, 2016). One of its initiatives is Shane Phillips's 'Clean Slate Without Prejudice' ('CSWP'), a boxing program based at the National Centre for Indigenous Excellence, aimed at providing an opportunity for Indigenous young people and local police officers to exercise and socialise in an informal setting. Secondly, the Gamarada Community Healing and Leadership Program convenes workshops at the Redfern Community Centre Sydney, providing training sessions in cultural strength and therapeutic change (Zulumovski 2016). Thirdly, Uncle Alfred's Mens Group is a volunteer service based in Townsville (North QLD) for young men caught up in the juvenile justice system. Lastly, Tirkandi Inaburra Cultural and Development Centre is a retreat program in Coleambally (South-West NSW) allowing young Aboriginal boys to engage in educational, sport, living skills and cultural activities.

Indigenous Resistance and Resilience

The last two decades have also seen significant resistance to injustices before the criminal justice system in the form of protest, strategic litigation, class action, and artistic-creative means. One high-profile examples is the resistance and advocacy work by the Aboriginal community of Palm Island, who have headed a fierce campaign for justice since a high-profile death in custody in 2004. The most recent of these efforts, which have included protests and strategic litigation, includes the recent launching of a class action against the QLD Government on the grounds of racial discrimination for its response to events in Palm Island in 2004. Another example is the national campaign for justice for the death in custody of Ms Dhu, a 22-year old Yamatji woman, who died while in police custody on a warrant for unpaid fines. The campaign includes National Days of Action, public forums, and advocacy work; all organised by Ms Dhu's family in conjunction with Deaths in Custody Watch Committee and the Aboriginal Legal Service of Western Australia.

In addition to these and many other examples of Indigenous resistance, the creative work of Indigenous musicians, artists and filmmakers has also played an important role in advocating for criminal justice reform. Criminologists have begun to document the important

contribution of Indigenous artists in adding voices and perspectives to criminological discourses on criminal justice and reform (Cunneen 2010). However, the contribution of 'outsider criminologists' within criminology has not been fully recognised (Porter 2016b). Examples of notable Indigenous 'outsider criminologists' include Richard Frankland, a playwright whose works include an award-winning documentary on the interpersonal, systemic, and structural racism that underlies the circumstances of the death of Malcolm Smith (Frankland 1992); and Kev Carmody, a songwriter whose music addresses issues of policing, colonialism, and crimes of the powerful. Notable titles include "Though Shalt Not Steal", "Rivers of Tears", "Black Deaths in Custody", and "Eulogy".

Conclusion

There is growing recognition of the Eurocentric focus in criminological studies and the importance in moving towards a post-colonial or counter-colonial criminology (Agozino 2003; Cunneen and Rowe 2014; Cunneen and Tauri 2016; Deckert 2014). Historically, criminology as a discipline has not always raised questions or developed theoretical frameworks, which are necessarily fitting when applied to Indigenous criminal justice issues. The work of radical and critical criminology changed the criminological gaze to include activities such as state crimes, genocide, and the forced removal of children from their families. However, some criminologists have raised concerns about the cultural 'baggage' of even the most 'critical' schools within criminology—including radical criminology and critical criminology—when applied to Indigenous issues (Blagg 2008; Cunneen and Rowe 2014; Carrington, Hogg, and Sozzo 2015; Cunneen and Tauri 2016; Porter 2016b).

As begins to emerge from the above discussion, criminology has long neglected the contribution of Indigenous peoples, communities, and initiatives to the Australian polity. Criminology has been slow to recognise the contribution of Indigenous night patrols, Indigenous justice mechanisms, and other examples of Indigenous governance.

Criminology has been similarly slow to recognise the relevance of Indigenous knowledges to matters of scholarship, policy, and reform on criminal justice matters. These epistemological challenges impact on a range of matters including research ethics, relationships with communities, the use of engaging methodologies and the focus of research and its outcomes. There is also an alarming failure by mainstream criminology to engage with Indigenous scholarship. For example, one of the earliest academic papers to appear on the subject of night patrols was written by Marcia Langton (1992), who saw their potential for providing an effective alternative to state intervention. Criminologists did not take up the topic for at least a decade. Similarly, today few criminologists engage with the work of the Aboriginal and Torres Strait Islander Social Justice Commissioners, despite the fact that comprehensive scholarship has been produced on a range of topics including justice reinvestment, violence against Indigenous women, post-release, and prison issues. Finally, the writings and creative works of Indigenous 'outsider criminologists' have barely made an indent into the criminological consciousness. In light of renewed calls to 'democratise the toolbox of criminology' (Carrington, Hogg, and Sozzo 2015: 1), the inclusion of Indigenous methodologies—involving the incorporation of Indigenous standpoints, perspectives, methodologies, vocabularies and priorities in a way that is more cognisant of the standpoint of the researcher—seems imperitive in this regard. When we seek out and listen to these voices—many of which have been largely silenced in both political debate and academic scholarship—they have some important things to say about criminal justice.

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[1] And were re-introduced in the NT Intervention in 2007 (Cunneen and Tauri 2016).
[2] Police move-on powers exist in most Australian jurisdictions. The powers enable police to issue a direction to individuals or groups 'to move away from a certain public place for a certain period of time, in circumstances where they are about to commit an offence, are creating an obstruction, or are causing anxiety to those around them' (Walsh and Taylor 2007:151).