DISCIPLINES: THE LENSES OF LEARNING

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Chapter 2: Broader Social Context as a Lens for Learning: Teaching Criminal Law

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Law students predominantly learn law in a distinctive method that develops a disciplinary lens often described as "thinking like a lawyer". This involves "seeing both sides of an argument, sifting through facts and precedents in search of the more plausible account, … using precise language, and … understanding the applications and conflicts of legal rules" (Sullivan, 2007: 186). This disciplinary lens is the fundamental way of seeing necessary to practice as a legal professional. However, this lens has been increasingly criticised as producing lawyers who are too narrowly focussed; or because it fails to appreciate the need for ethics and justice; or fails to understand the complexity of life and the perspectives of others (Sullivan 2007; Gannt 2007). There is increasing recognition that law students must learn not only via the professional lenses of legal reasoning and critical thinking, but that they should also be exposed to a range of other lenses through which situations can be analysed, to be drawn on in their decision making processes as practitioners. Just as importantly, students need to become aware of the personal lenses they view issues through and recognise their need to discard these lenses in order to see issues from other's perspectives.

The traditional focus on only one disciplinary lens is related to the history of legal education.

The Development of Law Teaching

Although law and lawyers have always been an integral part of western society, the study of law as an academic discipline is much more recent. In Australia law remained predominantly a "trade school" form of education until the late 1960s, where the focus was on mastering the rules and procedures of legal practice and litigation rather than seeing them in a broader social context.

Largely this was a result of the prevailing legal theory of positivism, which in its most restrictive form argues that all law derives from pronouncements of a

sovereign or Parliament rather than from nature or broader moral principles. Consequently law is not beholden to anything outside of its own internal logic and is an autonomous discipline (Dyzenhaus: 2010). This theoretical lens led to the studying of law as an exposition of what the law was not an examination of what the law should be, or what effect the law had more broadly on society (Chesterman and Weisbrot: 1987; Keyes and Johnson: 2004).

Beginning in the United States in the early 20th century, alternative theoretical approaches to understanding law have provided a rich source of critique of the practice and assumptions of law. These theories range from empirically based critiques of the operation of law such as realism, new realism and economics and law to political perspectives such as Marxism, critical race theory and feminism (for reviews see Bottomley and Bronitt: 2012; Gordon: 2007; Steel: 2013). These alternative theoretical lenses for understanding law have not been successfully translated into curriculum wide approaches to legal education in Australia, though they have been used to define a range of elective courses. This is not to say that social commentary is avoided or ignored in legal teaching. A significant legacy of reforms to Australian legal education in the 1970s and 1980s is that Australian legal education typically attempts to incorporate a range of broader perspectives as part of the discussion of case-law and legislation (see eg Johnson and Vignaendra: 2003).

This is now reflected in the Australian Learning and Teaching Council's *Bachelor of Laws Learning and Teaching Academic Standards Statement* (Kift et al: 2010). The Standards set out six Threshold Learning Outcomes (TLOs) for the Bachelor of Laws degree. The first TLO, Knowledge, goes beyond requiring understanding of doctrinal areas and states that graduates should be able to demonstrate knowledge of the 'broader contexts in which legal issues arise'. The third TLO, Thinking Skills, mandates that graduates be able to engage in critical analysis. Many law schools have incorporated these TLOs into their desired graduate attributes. UNSW Law, for example, aims to have graduates understand and appreciate: legal knowledge in its broader contexts; Indigenous legal issues; and principles of justice and the rule of law (UNSW).

The reference to broader contexts in TLO1 requires students to be able to see legal issues through lenses other than a disciplinary lens of legal reasoning and analysis. The challenge is how to provided ways into experiencing learning through these alternative lenses.

Discussion of Social Issues in Law Classes

The methods used to incorporate broader perspectives vary and at times can be criticised for being tendentious and lacking in intellectual rigour. In a detailed study of legal education in the United States Elizabeth Mertz found that forensic examination of legal texts through the legal reasoning lens was often accompanied with free-ranging speculation about broader issues (Mertz: 2007, 76). She notes:

> A correct legal reading [of case-law] requires strict adherence to layers of legal authority discernable in the text: the question is not what any reader thinks is fair, but what the courts say or what the law permits …

> When classroom discussion moves to consideration of social causes and impacts, a much more free-form discussion occurs in law schools. Implicit in this movement is the sense that one can discern social and moral implications through unravelling a cultural logic that is obvious or transparent … Most of this discussion is anecdotal or speculative, and indeed lapses into the use of hypothetical storytelling at times.

As a social scientist as well as a lawyer Mertz is concerned about the lack of rigour applied to these broader discussions, though she does recognise that such discussions are an improvement on a straight "black letter" law analysis without reference to the broader issues. She points out that such discussions were they to occur in a social science course would instead

> focus attention on the evidence required to support generalizations … require[ing]parsing of social science data and studies, in which there are stringent requirements for demonstrating generalisations regarding social impacts. (ibid)

Echoing these concerns, Atiyah and Summers have argued:

> Textbook writers' analysis of policy issues are often rather facile, amounting sometimes to little more than jejune statements about what seems 'fair' … The tone of textbooks is often dogmatic, with decisions presented as if they were strict deductions from basic principles. (Atiyah and Summers: 1987 at 394)

Other writers have emphasised that law student wellbeing is connected to the ability of students to maintain their own moral and ethical worldviews while studying law – not being forced to subsume their own identity within what they imagine is required of a lawyer (Sheldon and Krieger: 2004). One significant way to support student wellbeing, therefore, is to permit students to freely express their own opinions on legal outcomes. In this context, asking a class whether they think a legal outcome is "fair", although failing Mertz requirements of scientific rigour, may well be an important aspect of the development of law student's own value systems. It recognises the need for students to reflect on their own interpretative lenses and the impact that these have on how an issue is defined, recognising Geertz's insight that we can never imagine other's perspectives through discarding our own "interfering glosses" but that "we can apprehend it well enough, at least as well as we apprehend anything else not properly ours; … not by looking behind the interfering glosses that connect us to it but through them" (Geertz 1983: 44).

An ideal solution is thus to create a learning environment where students are provided with both the tools to engage in informed, research based social analysis of legal issues, and to also be permitted to voice and defend their own personal responses. An approach used at UNSW Law is to combine set readings from broader social science research and theoretical positions with extensive class discussion. In this chapter we discuss a number of ways this is realised in teaching criminal law classes.

Approaches to Teaching Criminal Law

Criminal law, like other doctrinal areas of law was traditionally taught as a discussion of legal principles derived from the reasoning of higher courts. As such the emphasis was on discovering timeless underlying principles by which the system of criminal law could be internally analysed for logical correctness. This positivist legal reasoning assumed that criminal law was one unified object of study, and that there was a shared understanding as to what was contained within it.

Teaching law in small classes, with a strong emphasis on student discussion rather than lecturing can assist in opening up and questioning assumed doctrinal positions on the criminal law (Steel et al: 2013). Such an approach can help to reduce the sense that the lecturer's statements and perspectives are completely authoritative, and can allow room for alternative perspectives to be aired and debated. This requires the lecturer to also accept that their role is to facilitate discussion rather than to provide conclusive answers. This approach is a central philosophy of the teaching of criminal law at UNSW.

But ensuring that student discussion is based on a strong evidence-based approach can be a considerable challenge for teachers. Legal academics – and in particular part-time casual academics – cannot be expected to have mastered a range of social sciences prior to teaching. While some may well have other degrees in a social science, many will not. As a result they will need to look to published work by social scientists to provide perspectives on the law. While some full time academics may be dedicated enough to engage in such research, for many, competing demands will inevitably mean that consistent incorporation of broader perspectives will require readily accessible collections of materials. Such materials also need to be of a short enough length to be able to be incorporated in readings alongside case-law materials rather than completely displacing them. This essentially speaks of a need for teachers to have access to pre-prepared sets of reading materials.

Influenced by the criticism of legal positivist assumptions by the law and society and critical legal studies movements, criminal law teachers at UNSW in the 1980s developed courses based around materials that went significantly beyond standard legal texts and incorporated academic writing from the social sciences and political sciences. These materials were first published in book form in 1990 as *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales*.[1] The book weaves historical, socio-logical, criminological, philosophical, feminist, empirical and procedural material around extracts of case-law with the aim of providing a range of perspectives on the choices made by courts and parliaments in defining what is criminal.

Unusually for legal textbooks, *Criminal Laws* begins with an essay length chapter that explicitly sets out the intentions of the authors in writing the book. Introducing a detailed discussion of the aims of the book, the authors explain that traditional approaches to criminal law only examined appellate case law and legal methods of reasoning:

[1] The four original authors Brown, Farrier, Neal and Weisbrot all had the first name David, and the book has become colloquially known as the "4 Davids". The book is now in its fifth edition and one of us is now an author.

> The result is that a great deal of evidence has been refused admission on the grounds of irrelevance. What we have tried to do in this collection of materials and commentary is to broaden the terms of reference and thus to expand existing conceptions of what is legally relevant. … We would contend that what we choose to call criminal law in fact comprises a number of different practices with a variety of rationales rather than a single principled response to diverse social behaviour. We have criminal laws rather than criminal law. …
>
> What we have tried to do at an elementary level is to take the abstracted criminal law away from the appeal courts and relocate it in the social reality of the day-to-day operation of the whole of the criminal process – to take crime away from the judges and put it back into the suites, the streets and the homes where it actually occurs; to replace the anonymous, degendered, declassed abstractions of Crown and Defendant and give people back their identities; and to question constantly the taken-for-granted beliefs that lawyers have about the way men and women think and behave and relate to each other (Brown et al: 2011, 3-4)

The very fact that choices have been made over what to include and exclude, the fact that it is a printed textbook, and the consequent need to provide summaries of arguments and justifications as to why extracts are included inescapably creates its own lens through which criminal law is viewed. The introductory essay is thus an explicit attempt to both avoid the impression that the book presents an account of what the law "is" and also explain to teachers and students the reasons why particular materials have been used. As such the book makes as clear as possible the particular lenses through which the authors see criminal laws. The intention is to make that clear up front, but then to leave readers to interpret the cases and materials in any way they choose. Within the book the extracted articles and reports provide a further range of disciplinary lenses for students.

In the remainder of this chapter we draw on the use of broader perspectives in *Criminal Laws* and our own experiences in teaching criminal law to illustrate how a range of arguments from the social and political sciences and based on theoretical perspectives can provide exposure to a range of alternative lenses to the positivist legal lens or a student's personal experiential lens, and broaden understandings of the operation and impact of the criminal law. Many of the writers referred to are extracted in *Criminal Laws* (Brown et al: 2011). The perspectives are international, Australian, and at times NSW based. For students, all three levels are important. Crime is local, but to understand it can need national and international perspectives.

Theorising of Crime

Although the temptation in teaching a crowded course is to dive straight into the case law or legislation, it is important for students to appreciate what marks out one area of law from another – and whether those boundaries are valid. Beginning a course with a discussion around what makes an act wrongful, and then what

makes it criminal rather than a civil liability can engage students with underlying issues of criminality and provide avenues to critique law reform and political posturing.

But to discuss the boundaries of crime in the abstract is likely to encourage students to merely air their own assumptions and prejudices. Many will have uninformed populist or "common sense" (Hogg and Brown: 1998) beliefs that can be challenged through the lenses of criminology, legal theory, politics and accounts of victims. Accounts such as Garland (2001) and Pratt's (2007) which provide overarching narratives for increased punitiveness worldwide can be useful in this regard. Structuring the conversation with readings from a range of theoretical perspectives can give the students a solid basis to critique their own and others assumptions. The debate over whether criminal law has a basis in preventing harm or immorality can be discussed through the debate between Hart (1962) and Devlin (1965), and later critiques of the breadth of the harm principle (eg Harcourt: 1999). Considering the inclusion of offensiveness as a basis for criminalization is also useful – particularly as an introduction to public order offences (cf Simester and Hirsch: 2002) . Viewing current events such as fears of "Middle Eastern" gangs through the prism of theories of moral panics (eg Poynting et al: 2004) can also engage students. Discussion of more normative theories of criminalization (eg Duff: 2007; Husak: 2008) is useful to highlight the gap between principled theories and the reality of the political drivers behind the creation of offences. Critique of normative theories can also underscore the artificiality of seeing criminal law as one coherent body of law.

Criminal process can also be introduced via theoretical perspectives. The classic account of Packer (1968) where he draws a distinction between the due process and crime control model of criminal procedure remains a useful prism with which to consider the drive for efficiency in lower courts, and O'Malley's work on technocratic justice (eg 1984) usefully situates the issues of moving from morally laded trials to determine guilt towards the more amoral use of fines and expiation notices to regulate behaviour.

These introductory discussions resonate throughout the rest of the course, providing contrasting lenses of analysis that students can use as frameworks for critique of individual offences.

Triviality and the Legal Process

One fundamentally distorting factor of only using the lens of reasoning in appeal judgments in the study of criminal law is that, in general, only the most serious of offences are appealed to the highest courts. These offences - such as homicide and associated defences – are argued at great length and produce extensive analysis from the courts. Much of the development of what are seen to be the underlying principles of 'just' criminal law come from these cases. But the vast majority of criminal law is prosecuted and ruled on in lower courts, with less visibility, less legal argument and less concern for underlying principle. It is therefore important for students to be exposed to all layers of the criminal justice system and to recognise that proceedings in the higher courts are the exception, not the norm. Most lower court decisions are not reported and thus not easily available for use as class readings.

This broader appreciation by students can be achieved through the lens of sociological studies of the operation of lower courts. A classic account is that of Doreen McBarnett's study of Scottish courts (McBarnett: 1981) who coined the phrase the "two tiers of justice" – one geared towards the structures of legality and public consumption of the law, and the other one, not. Significant work on Australian courts has also been undertaken by Kathy Mack and Sharyn Roach Anleu (2007; 2010). Such work can provide powerful insights for students, particularly if combined with visits to courts.

Similarly, the methods used by police in the investigation of crime and preparation for court is largely ignored in judicial analysis of criminal law. Yet the high degree of discretion afforded to police has significant impacts on who is charged, and with what offences. Use of extracts from academic studies and reports from independent bodies such as the Ombudsman can provide succinct windows into the practices of police and the environment in which criminal lawyers work. It is important for students to recognise that a court appearance represents only part of a client's encounter with the justice system, and that many discretionary factors influence such an outcome. Examples of the type of material that can be incorporated are research into interrogation practices (eg Dixon: 2006; McConville : 1991); the use of fines (eg O'Malley: 2009) police powers (NSW Ombudsman: 1998 and 2008) and charge bargaining (NSW Sentencing Council: 2009)

The Use of Crime Statistics

The realities of crime prevalence, criminal process and criminal investigation can be underscored by the use of crime and justice statistics. Whereas, as has been noted above, law has traditionally been taught by having students examine the reasoning of appeal court judgments, the use of statistics drawn from a range of sources – including victim surveys, recorded crime, police charges, court outcomes, sentencing outcomes and imprisonment rates - provide a much broader perspective on the criminal justice process than just the moment at which guilt or sentence is determined. Statistics are now easily accessible via State and Federal agencies – such as the Bureau of Crime Statistics and Research and Judicial Commission in NSW and the Australian Bureau of Statistics and Institute of Criminology (for an overview of the data available see Weatherburn: 2011)

The use of crime statistics allows students to develop a more contextualised approach to the operation of the criminal justice system. Court appearance statistics (eg BOCSAR: 2012a) can be used in the classroom to throw light on policing and prosecution practices, while guilty plea rates for certain offences can illustrate the pressures to plead or the dominance of the guilty plea. On the other hand, acquittal rates can be used to demonstrate attrition rate for particular offences (particularly sexual assault – see eg Fitzgerald: 2006) and sentencing data can be used to investigate the use of imprisonment by the courts. National and State trends can be examined not only in general, but also by age, indigenity and gender (see eg ABS: 2012; Cunneen et al: 2013).

Analysis of the experience of victims of crime utilises a lens different to that offered by the popular media. In homicide for example, the vast majority of deaths occur at the hands of intimates rather than random strangers, and the

reasons for homicides are strongly linked to cultural norms (Wallace: 1986; National Homicide Monitoring Program). Recorded criminal incidents statistics showing the geographic spread of particular offences, can also prompt discussion on the complexity of the links between crime and social disadvantage, and the approach to policing in certain geographic areas (eg BOCSAR: 2012b; CRC UWA: 1999)

Statistics can also indicate which offences are rarely charged and which offences consume large amounts of time and resources in the courts. This gives students a sense of the relative practical importance of offences to practitioners which may be different to the emphasis given by text writers. If emphasis in teaching matched frequency of consideration in the courts, there would be very little mention of homicide and most of the course would deal with traffic offences and assault (BOCSAR: 2012a). The underlying statistics can also act as a counterbalance to the level of reporting of crime in the media – and lead to discussion of the disjunction between rising fear of crime and the dropping recorded levels of crime (Garland: 2001; Weatherburn: 2011)

Using criminal statistics also encourages a critical approach in students through a consideration of what statistics do and do not measure, and through an awareness that statistics are themselves 'produced' rather than being a reflection of 'real' levels of crime. Classroom exercises extracting findings from data also expose students to the fact that statistical findings may depend on the nature of the query and the source of the data For example, the Australian Institute of Criminology has demonstrated the tenuous links between actual rates of offending, rates of arrest, conviction and imprisonment by observing that for every 1000 crimes committed (self-report studies or victimisation surveys), 400 are reported to police and 320 recorded as crimes (police statistics), 64 cleared up (police statistics), resulting in 43 convictions (court statistics) and one person being imprisoned (prison statistics) (AIC: 1987). The difference in drawing on conviction statistics for a certain offence, compared with court appearance or recorded crime figures, can produce quite different impressions of the prevalence of crime.

Politics and Compromise

Part of the 'shopping list' approach to teaching law involves an uncritical study and application of statutes as delivered by Parliament. However, the creation of criminal law is often an extremely political process, particularly when the appearance of being 'tough on crime' has been such a fruitful platform in election years. It is important for students to be able to see through the glosses of positivism to the underlying political pressures. As examination of the underlying crime statistics show, new laws are often not based on objective need.

In order to allow a more nuanced understanding (and critical approach) to why laws take the form they do, the political aspects of law making should be made explicit. In contrast to other areas of the law, the criminal law is often used as a political response to public concerns. Laws are often rapidly passed in the immediate aftermath of offences attracting exceptional media and public interest without widespread consultation, in part through the hope that 'more law will produce more order' (Loughnan: 2010). Examples of such legislative behaviour

are best drawn from the student's own jurisdiction, and, where possible, should be part of recent public discussion. Below we discuss two recent NSW examples.

Repeated restriction of the presumptions in favour of bail since the introduction of a legislative scheme in NSW in 1978 can be read as a catalogue of instances in which parliament wanted to be seen as 'doing something' in response to a crime or public event looming large in the media. Examples include the last minute amendment made to the Act in 1978 to make armed robbery the sole exception to the presumption in favour of bail – a response to a high profile chase and shooting of an armed robbery suspect that occurred just prior to the passing of the Act (Weatherburn: et al: 1987); the creation of the presumption against bail for certain drug offences by the Greiner Government in 1988 without evidence of any link between drug offences and reoffending (ibid); and for riot and affray offences following the Cronulla riots in December 2005. Many of the amendments 'have been a result of political imperatives or moral outrage over a particularly abhorrent high profile case, rather than responses to detailed empirical research or evidence' (Brignell :2002).

Following several widely reported incidents of 'bikie-gang' related violence, legislative expansions of police powers in relation to 'criminal organisations' were drafted, introduced and passed in one week in 2009 (Loughnan: 2010). There is also an ever-increasing 'particularism' of offences, for example, the creation of an offence of throwing objects at vehicles where an assault charge would cover the same ground (ibid). Here, politicians can be seen to be responding to community concerns around the issue of the moment by being seen to be taking measures to reduce dangers or punish wrongdoing. Students can be asked to consider what the best legislative approach should be in light of the evidence from statistics and social sciences and then compare that with the rationales given by Parliamentarians in second reading speech debates.

Historical Perspectives

There is a strong element of history in any study of law, such history emerging from the precedent judgments that constrain and inform the reasoning process in current-day court cases and decisions. However the "history" that emerges from the case-law is often perversely a-historical, assuming the positivist notion of central tenets of law being timeless and immutable. Courses which teach the current criminal law "as is" can reproduce this fallacy.

The law on theft is a good vehicle for this perspective. Analyses such as by Jerome Hall (1935) and George Fletcher (Fletcher: 1976, 1978) provide a rich historical perspective on the fundamental change of the offence of larceny from a common sense based public order offence, which assumed guilt based on actions, to a complex offence that operated to protect private property, and used actions to presume mental elements. This historical perspective opens up for students the strong political underpinnings of property offences and can lead to historically based discussion of current issues such as copyright and digital music.

Law students in their twenties might well think the regime of drugs offences are of long standing. A historical perspective can open up for students the way in which different approaches to regulation of a range of drugs have been tried over the years, and links between changes in regulation and criminalization based on

societal changes in attitudes to sobriety, addiction and personal freedom (see eg Seddon: 2010; Mugford: 1992).

Even within the case-law there is increasing recognition of the historical contingency of legal precedent. Extracting the sections of judgments which recognise this can be important in legitimising a critical historical perspective. Thus the study of homicide can be introduced with a discussion of the pre 18th century assumption of guilt for a killing (see eg the discussion in *Wilson* (1992) 174 CLR 313). What we see now as the basis for proving liability, intent to kill, acting recklessly, etc are in fact the mirrors of earlier defence attempts to avoid liability. Similarly, the reversal in the defence of provocation from a justification of "hot blooded" acts of jealousy to a condemnation of it (see eg the discussion in *Smith* [2000] UKHL 49 and *Chhay* (1992) 72 A Crim R 1) can open up debate over whether the law in this area is so bound by its history that it needs fundamental reform.

Historical perspectives are particularly important in examination of the criminal law from feminist perspectives and in terms of its impact on indigenous peoples.

Feminist Perspectives

Law, in its attempts to achieve justice, operates on a range of assumptions – which can often be misplaced or entirely wrong. The feminist critique of law argues strongly that much of the foundation of law is sexist and inimical to the interests of women. These realities are occluded by the positivist lens. These critiques are particularly strong in criminal law. Violence is central to many crimes and can be strongly gendered. Introducing the law of assault with brief sociological accounts of the incidence of male on male violence, sexual violence (eg Hogg and Brown: 1998) and domestic violence (Drabsch: 2007) can allow students to gain a fuller understanding of the appropriateness of the elements of offences and available defences, and the impact of policy decisions on when and how to charge for violent behaviour. The struggle to recognise domestic violence as a crime and the continued difficulties with enforcement provide further evidence of the law's history of overlooking women's needs (eg Douglas: 2008).

The long feminist struggle for reform of rape offences is a necessary part of understanding current law, and the reasons for variations between jurisdictions. The abolition of the doctrine that there could be no rape in marriage, the struggle to limit the types of questions that could be asked of rape victims in cross-examination, the expansion of the definition of what could amount to sexual assault are all examples of legal change that only occurred as part of the fight for equality for women. Students can gain an insight into the theoretical critique of the legal system through extracts from writers such as Smart (1989), MacKinnon (1983) and Naffine (1994). At the centre of much of the critique in this area is the meaning of consent, and a historical and comparative analysis of the different legal definitions given to consent in sex can illustrate the degree to which the criminal law was, and arguably still is, defined from the perspective of a man rather than a women. Extracts of strong critiques from Law Reform Commissions can be used to demonstrate that the need to reform the law is not a radical feminist polemic, but a widespread belief.

Defences to homicide are another key site of feminist activism and law reform. The overtly sexist history of the partial defence of provocation and the controversies over its reform or repeal (see eg Morgan: 1997; Roth and Blayden: 2012) can be contrasted with the courts' struggle to adequately recognise self-protective violence by women victims, and the history of Battered Women Syndrome in the courts. The potential to medicalise as feeble minded the decisions of women to defend themselves (Edwards: 1987; Leader Elliott: 1993) and the continued uncertainty over the appropriateness of relying on Battered Women Syndrome (eg Sheehy et al: 1992) provides further ways for students to approach the "hidden gender of law" (Graycar and Morgan: 2002). The complexity of the arguments for and against reform in this area is outlined in Brown et al: 595-598; 609-615.

Indigenous Issues

Finally, it would be difficult to claim to teach criminal laws in Australia through a social context lens without a conscious focus on the interactions between the criminal justice system and Indigenous communities. The criminal justice system is bound up with colonialism, in that the criminal law was used as a tool of dispossession of Indigenous people and today remains a site through which disadvantage is entrenched and perpetuated. Students can be introduced to a historical continuum of law and policies that has criminalised Indigenous behaviour from the blatant period after colonization when the laws of murder and rape were virtually suspended where the victim was Aboriginal and where there were indigenous-specific criminal offences through to the present day with continued over-policing of Indigenous people in the public domain for offences such as offensive language/behaviour, mandatory sentencing regimes, (mis)use of police discretion in cautions/arrest powers, and in the *Stronger Futures in the Northern Territory Act 2012* (Cth) (see Hogg: 2001; Cunneen: 2001; Cunneen et al: 2013).

The connections between colonialism, penal welfarism, criminalisation and overrepresentation can be demonstrated through confronting and deeply sad extracts of reports from the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) (such as that on Malcolm Charles Smith, who drove a paintbrush through his eye in a prison toilet). Such extracts, and more recent reports such as on the deaths of Mulrunji Doomadgee on Palm Island (Queensland Courts 2006; Queensland Courts 2010), Mr Ward in Western Australia (Coroner's Court of Western Australia 2009) or Briscoe in the Alice Springs lock up (Coroner's Court of the Northern Territory 2012) can illustrate the power of considering context in making sense of themes within the criminal justice system. It integrates factors at play in colonisation, forced removal, penal welfarism, criminalisation and deaths in custody.

Teaching criminal process presents a multitude of opportunities for discussion of Indigenous issues. At all stages of the criminal justice system, from street policing, through to bail and sentencing, there are discrete and often discriminatory dynamics that Indigenous people must negotiate. Malcolm Feeley's insight that the process is the punishment (Feeley: 1979) is particularly relevant here: realities like over-zealous policing demonstrated, for example, in

the Ombudsman's reports about the disproportionate effect on indigenous peoples of move-on powers (NSW Ombudsman 1999) and Criminal Infringement Notices (NSW Ombudsman 2009); and the use of offensive language charges to control indigenous youth (NSW Anti-Discrimination Board: 1982; White: 2002) are examples. However, it is also important that 'the process as punishment' not be equated with deaths in custody, which is obviously at the extreme end of the spectrum. It is in a sense even more important that students understand the 'mundane' punitive practices – particularly in policing - that govern the experience of Indigenous people and the criminal justice system from day to day.

The role of violence and crime levels in indigenous communities can also be explored. Looking beyond symptomatic and reactionary responses to examine underlying historical and cultural influences can expose students to the greater complexity of indigenous issues than are commonly portrayed by the media and government (see eg Cunneen: 2005; Cheers et al: 2006). Such discussions can, for example, arise as part of doctrinal analysis of the partial defence of provocation – which reduces a murder conviction to manslaughter. One issue is whether cultural factors should be taken into account in deciding whether the provocation would have induced the ordinary person to have lost self-control (see eg *Masciantonio v R* (1995) 183 CLR 58). The approach in the Northern Territory provides an interesting discussion point: there, 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'(*R v Mungatopi* (1991) 57 A Crim R 341; *Jabarula v Poole* (1989) 42 A Crim R 479).

In order for students to appreciate the nature of Indigenous over-representation and the experience of Indigenous people caught up in the criminal justice system, it is important that the discussion of Indigenous issues is not confined to a discrete class. This would undermine the possibilities for exploring systemic bias against Indigenous people across the criminal justice system (see Anthony and Schwartz: 2013). Where possible, Indigenous perspectives should be included in class discussion. Indigenous voices could be included by inviting an ATSI speaker to address the class or the screening of an appropriate film, such as the short (27 min) film *Bush Law* (Loy: 2010). This allows ventilation of relevant issues through the lens of Indigenous experience, which is extremely important in cultivating a true appreciation of broader contexts rather than being constrained by our own 'objectifying gloss'. .

Conclusion

There are many other moments in a criminal law course where the lens of broader social issues can be easily introduced. There is not space to discuss them here, but examples include the role of harm minimization policies in drug law enforcement, the role of private justice in white collar crime, the acceptance of violence in sport, and the impact of prohibition or repressive policies on abortion and prostitution.

However, in the areas we have discussed, we have attempted to show the wide range of literature easily available to allow students to experience broader perspectives on criminal law from a rigorous empirical and theoretical basis. Such extracts need not be long, nor significantly displace case law readings. But they provide a necessary balance to a positivist 'black letter' law lens. The advantages

for students of the use of the lenses of broader social context are not only to contribute to a more sophisticated and critical approach to the law. A broader social understanding also fundamentally better equips students as practitioner to be able to deal with dynamic practice contexts and to be able to understand and respond to the needs of clients from a range of backgrounds and life experiences.

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