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## **Survival, dignity and wellbeing**

### **Indigenous human rights and transformative approaches to justice**

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In considering the intersection between Indigenous people and human rights, there are potentially three broad areas of interest to criminology. These are: compliance with international human rights treaties; the question of redress for historical abuses of human rights; and, finally, the role of normative human rights principles that have emerged in the last decade and apply specifically to Indigenous peoples. The high levels of criminalization and hyper-incarceration of Indigenous people in settler colonial societies (Cunneen et al. 2013, Cunneen and Tauri forthcoming) raise fundamental compliance questions with a range of treaties including the *International Covenant on Civil and Political Rights*, *Convention against Torture*, *International Convention on the Elimination of All Forms of Racial Discrimination*, *Convention on the Elimination of all Forms of Discrimination Against Women*, *Convention on the Rights of the Child* and *Convention on the Rights of Persons with Disabilities*. The United Nations (UN) monitoring committees for these treaties regularly question the compliance of countries like Australia, Canada and the United States (US) in relation to their treatment of Indigenous peoples within criminal justice systems (Cunneen and Tauri forthcoming). The long-term effects of the policies and practices of colonization have also given rise to claims for redress for historical human rights abuses. The specific nature of these claims for redress varies between settler colonial states. However, they have included reparations for the forced removal of Indigenous children from their families and their treatment in residential schools, and various

abuses of Indigenous trust funds and other state-controlled monies, including fraud, corruption and mismanagement (Cunneen 2012).

While both the failure to comply with existing human rights treaties, and the failure to adequately redress historical human rights abuses are important in their own right, this chapter will focus on the third area identified above: the role of normative human rights principles, particularly those established in the UN *Declaration on the Rights of Indigenous Peoples* (hereafter the Declaration). The framework for understanding, developing and promoting Indigenous human rights has advanced significantly since the adoption of the Declaration by the UN General Assembly in 2007. The Declaration is a normative document that establishes the ‘minimum standards for the survival, dignity and well-being of the indigenous peoples of the world’ (Article 43). It was adopted by a majority of 143 states, with four votes against and 11 abstentions. Significantly, the four states that voted against the Declaration were the Anglo settler colonial states of Australia, Canada, Aotearoa/New Zealand and the US. During the period of 2009–10, these states reversed their opposition to the Declaration, and moved to affirm and support the document. However, they also stressed that the Declaration is ‘aspirational’ and ‘non-binding’ (Lightfoot 2012), thereby hedging their support for the principles underpinning Indigenous human rights.

The purpose of this chapter is to look at the normative framework of human rights provided by the Declaration in the context of Indigenous peoples’ assertions of their right to ‘justice’. It is argued that the evolving Indigenous justice movement provides a decolonizing moment in challenging the operation of settler colonial criminal justice systems. It can also be argued that Indigenous justice activism, in particular their

claims for a measure of jurisdictional autonomy, problematizes the normative foundations of human rights frameworks established by nation-states and supra-national bodies like the UN, frameworks that are often utilized to deny Indigenous claims of exceptionalism afforded them as the 'First Peoples'.

<A>The normative human rights framework established in the declaration

There are four key principles that underpin the Declaration: self-determination; participation in decision-making and free, prior and informed consent; non-discrimination and equality; and respect for and protection of culture (ATSISJC 2011, p. 18). Each of these principles provides a basis for assessing criminal justice in settler colonial states as it impacts on Indigenous peoples, and a guide to understanding Indigenous demands for reconceptualizing justice. These principles have both practical and theoretical implications. They require us to rethink the way we approach the institutional frameworks of policing, courts, sentencing, punishment and the reintegration of Indigenous offenders. They require us to move from a position inside of the taken-for-granted institutional frameworks of criminal justice, to one that is continually *questioning* whether these institutions can or do meet the requirements of Indigenous human rights norms. As argued further in this chapter, this normative position also challenges a range of theoretical, research and ethical assumptions within criminology.

The four principles noted above provide a framework for the discussion in this chapter. Put briefly, every issue concerning Indigenous peoples is implicated in the collective right of self-determination. 'Self-determination is a process. The right to self-

determination is the right to make decisions’ (ATSISJC 1993, p. 41). At a community or tribal level, it includes the right to exercise control over decision-making, community priorities, how communities operate and processes for resolving disputes (ATSISJC 2011, pp. 109–10). The recognition that self-determination is a process rather than a single act has important implications: it requires that there are *ongoing* processes that facilitate self-determination, and these may change over time. The right to make decisions might include Indigenous controlled and operated criminal justice processes (for example, policing), but it might also involve collective decisions to participate in non-Indigenous criminal justice processes where Indigenous people negotiate processes and outcomes. For example, the recommendations from Australia’s Stolen Generations Inquiry relating to juvenile justice require that accredited Indigenous organizations play a role in decision-making when diversionary options are being considered for Indigenous young people (NISATSIC 1997, pp. 590–7).

Self-determination is closely linked to the second principle of participation.

Participation in decision-making requires participation in both internal Indigenous community decision-making, as well as external decision-making processes with government, industry and non-government organizations. Decision-making must be free, prior to any activity occurring, informed of all the options and consequences, and based on Indigenous consent. As the Aboriginal and Torres Strait Islander Social Justice Commissioner explains:

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Free means no force, bullying or pressure. Prior means that we have been consulted before the activity begins. Informed means we are given all of the available information and informed when that

information changes or when there is new information. If our peoples don't understand this information then we have not been informed.

(ATSISJC 2011, p. 122)

The requirements underpinning decision-making are particularly apt when assessing how governments 'consult' (rather than negotiate or engage) with Indigenous peoples, and specifically the process through which various policy initiatives are introduced in Indigenous communities, even those cast as benevolent, such as family group conferencing, child protection interventions or alcohol restrictions.

The principle of non-discrimination and equality is particularly important given the history of racial discrimination against Indigenous people that were entrenched within the colonial project. Systematic regimes of racial discrimination played a fundamental role in creating the current socioeconomic marginalization of Indigenous people.

Contemporary Indigenous poverty, ill-health, over-crowded housing and poor educational outcomes did not simply 'fall from the sky' – they were created historically through policies such as forced relocations of Indigenous nations, removal of children, control of wages and denial of social security (Cunneen and Tauri forthcoming).

Furthermore, the principle of equality requires the recognition of cultural difference.

The Declaration affirms that 'Indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such'. Criminal justice systems have played an important historical role in enforcing racial discrimination through discriminatory legislation and practices, including separate regimes for policing, sentencing and punishment (Cunneen 2001, Cunneen et al. 2013). Today various criminal laws and their enforcement (such as

public order legislation and police powers) are often seen as constituting indirect racial discrimination in their application, in effect a repudiation of the right of Indigenous peoples to be 'Indigenous', through the criminalization of Indigeneity.

For a decolonizing criminology, a fundamental understanding is that Indigenous culture is a source of strength and resilience, and cultural safety and cultural security are foundational to restoring and maintaining social order in Indigenous communities (ATSISJC 2011, pp. 123–34). In the health, child protection and criminal justice sectors, evidence shows that participation in decision-making and governance leads to improved outcomes, as do holistic Indigenous programs aimed at family wellbeing, and culturally informed, Indigenous-designed treatment, rehabilitation and diversionary programmes (Kelaher et al. 2014, pp. 1–9, AIHW 2013, p. 1, SNAICC 2013, pp. 9–11, SCRGSP 2014, pp. 11.39–40).

Furthermore, respect for Indigenous culture (and the right to self-determination), must include respect for the formulation and practice of Indigenous knowledge. In our view, the lack of respect for Indigenous knowledge and Indigenous culture is one of the hallmarks of contemporary criminology. We return to this point below.

Overall, the four principles underpinning the Declaration have 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 Indigenous approaches to justice. However, rather than seeing Indigenous claims as a *problem*, a decolonizing and human rights-based criminology might see the potential

fragmentation of centralized criminal justice systems as an opportunity for progressive change and development.

#### <A>Indigenous self-determination and criminal justice: a short history

A major political impact of criminalization is that it disavows the political status of Indigenous people as 'first peoples', as well as denying the validity of Indigenous methods of governance, social control and knowledge. In place of an inherent, empowered political status, Indigenous people are both racialized and criminalized: in effect, they are 'dehumanized'. 'Race' becomes conflated with criminality and the political right of Indigenous people to control their own lives as legal subjects disappears. It is not surprising then that Indigenous political claims to self-determination often focus on criminal justice (see Jackson 1988), and are thus directly linked to a process of decolonization of criminal justice institutions and a decolonization of the discursive construction of Indigenous people as 'criminal'.

The problem with seeing Indigenous people only through the lens of disadvantage and dysfunction is that it leads to a deficit-based approach to public policy where Indigenous people are invariably cast as a 'problem to be solved', rather than as a people who have been actively oppressed and are demanding meaningful recognition of their human rights. Indigenous peoples are political actors engaged in a variety of activities within and against existing colonizing criminal justice systems. Through resistance, reform and creativity new 'justice' spaces have been opened. We only have to look at what Indigenous peoples are doing: Aboriginal and Torres Strait Islander night patrols, community justice groups and law and justice committees in



Australia (Blagg 2008) and similar justice processes developed by Canadian First Nations, such as the Stó:lo First Nation's *Qwi:qwelstóm* process (Palys and Victor 2007), and justice institutions, including courts and police institutions instituted and run by the Navajo, the San Carlos Apache and other American Indian nations (see Newton 1998).

More generally, the rise of the modern Indigenous political movement focused on criminal justice issues, particularly the struggle against police brutality and imprisonment. In 1968, what was to become a leading national organization, the American Indian Movement was formed in Minneapolis. Its early work involved setting-up street patrols in Indigenous housing projects to address the problem of police violence, and the establishment of the Legal Rights Center to provide legal representation to American Indians and African-Americans (Dunbar-Ortiz 2014, pp. 184–5). In inner-city Sydney concern over police brutality and discriminatory arrests of Aboriginal people led to the establishment of the first Aboriginal Legal Service (ALS) in 1970. The ALS was from the beginning much broader than simply a service provider. It was a key advocacy organization for Indigenous self-determination and human rights, and represented, according to one of the founding Aboriginal activists, 'the birth of the modern day Aboriginal political movement' (Foley 1988, p. 109).

During the 1980s and 1990s, as a result of the Indigenous political pressure described above, both the Australian and Canadian governments established judicial inquiries that either focused directly on, or substantially considered, the criminal justice system treatment of Indigenous peoples. These inquiries included the Australian Royal Commission into Aboriginal Deaths in Custody (RCADIC), the Canadian Royal

Commission on Aboriginal Peoples (RCAP), the Nova Scotia Royal Commission on the Donald Marshall, Jr., Prosecution and the Aboriginal Justice Inquiry of Manitoba (Johnston 1991, RCAP 1996, Hickman et al. 1989, Hamilton and Sinclair 1991). With the exception of the Marshall Royal Commission, all the inquiries emphasized the central role of Indigenous self-determination (Clark and Cove 1999, Cunneen 2001). For example, the relevant recommendation from the RCADIC reads:

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That Governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people.

(Johnston 1991, p. 111)

This recommendation encompassed the philosophical and political basis of action to implement the 337 recommendations of the RCADIC. The RCAP and the Manitoba Inquiry made similar recommendations in relation to self-determination (RCAP 1996, pp. 54–76, Hamilton and Sinclair 1991, p. 266).

As a response to Indigenous activism, government policy during the 1970s in Australia, Canada, Aotearoa/New Zealand and the US moved away from integration and assimilation (and in the US away from the policy of ‘termination’ – that is, the withdrawal of federal recognition of Indian tribes) to an official policy of Indigenous self-determination. However, ‘self-determination’ was to be defined by government

not by Indigenous nations. It gave rise to an emphasis on consultation, negotiation and partnerships, but in reality denoting ‘nothing more than ... a promise that local [Indigenous] concerns and wishes will be considered in the design and implementation of [Indigenous] policies’ (Fleras and Elliott 1992, p. 165). There was thus a substantial gap in the understanding of self-determination between government *policy* and the political demands of Indigenous organizations for recognition of self-determination as an *inherent right*. These differences have played out in the criminal justice sphere where Indigenous peoples have increasingly argued for greater recognition of their law and ability to develop their own systems of justice. Yet government law and policy continues to override Indigenous concerns. The most dramatic example of this in Australia was the Northern Territory Emergency Response (the Intervention) which introduced a range of discriminatory and authoritarian controls over Indigenous people and required the suspension of the Commonwealth *Racial Discrimination Act 1975* to achieve its aims (Cunneen and Rowe 2015). The rights embodied in the UN Declaration have thus far done little to change the way governments do business in the settler colonial states. As Lightfoot (2012, p. 102) argues, these states ‘strategically, collectively and unilaterally wrote down the content of the [human rights] norms’ to assure current policies and practices comply ‘without any intent of further implementation’.

<A>Indigenous self-determination: where are the criminologists?

There is a significant political disjuncture between the rights embedded in the Declaration and the operation of criminal justice systems. Indigenous people still struggle with the damaging effects of one of the leading institutions of colonial control,

and struggle to change the ongoing cycles of marginalization brought about as an outcome of criminalization. Yet with few exceptions (Blagg 2008, Cunneen 2001, Cunneen and Rowe 2014, 2015, Deckert 2014, Tauri 2014), most criminologists proceed with their analysis and prescriptions with the complete absence of any discussion around the importance of the right to self-determination, or indeed of the other core principles found in the Declaration including participation in decision-making, non-discrimination and respect for and protection of culture.

From the rapidly growing field of Indigenous knowledges and methodologies, there are at least five considerations with implications for criminological theory and practice (Cunneen and Rowe 2014, pp. 53–5). First, as the objects of research, Indigenous peoples have been constantly seen as ‘research curiosities’ and ‘problems’. It is not surprising that within the Indigenous lexicon the term ‘research’ is often linked with colonialism (McIntosh 2011). ‘The way in which scientific research has been implicated in the excesses of imperialism remains a powerful remembered history for many of the world’s indigenous peoples’ (Porsanger 2004, p. 107). Second, an important question raised by the connection between western research structures, philosophies and methods and the colonial process is whether these approaches are fundamentally racialized in their investigation of issues related to colonized peoples. Some have considered these approaches ‘racist epistemologies’ (Bishop 1998, Tauri 2012). Third, Indigenous perspectives on research represent alternative ways of thinking about the research process. The decolonization of research methods is seen as necessary to develop Indigenous knowledge (Smith 1999, Kovach 2009). There are important epistemological and ontological differences underpinning Indigenous approaches (Cunneen and Rowe 2014). These alternative

approaches are not necessarily meant to replace a western research paradigm (Porsanger 2004) but rather to challenge it and to reconfigure Indigenous research as one that is increasingly defined by and responsive to Indigenous needs (Smith 1999). Fourth, Indigenous approaches seek to revalorize Indigenous knowledges as valid ways of understanding and describing the world. Thus, the importance of Indigenous research methodologies has to be understood within the broader valuing and assertion of Indigenous knowledges and cultures. The decolonization *of* research is one strategy emanating from Indigenous approaches, the other is research *for* decolonization. The latter reflects the widely held ethical view among Indigenous scholars that research needs to be for the benefit of Indigenous communities. Finally, Indigenous research is part of the decolonization process, particularly in the struggle for Indigenous self-determination (Porsanger 2004). Criminological research involves relations of power at multiple levels between the researcher and the research participant; in determining the priorities of research agendas; in the broader assumptions that give 'truth' value to certain types of research; and in the social, political and cultural values that underpin our processes of reasoning and understanding of the world (Cunneen and Rowe 2014, p. 54). Yet as Hart (2010, p. 4) notes: 'Eurocentric thought has come to mediate the entire world to the point where worldviews that differ from Eurocentric thought are relegated to the periphery, if they are acknowledged at all' (see also Battiste and Henderson 2000).

At the more extreme level, Indigenous knowledge in understanding Indigenous contexts is actively devalued by mainstream criminology. For example, both Marie (2010) and Weatherburn (2010, 2014) argue that Indigenous knowledge adds little to our understanding of crime and victimization. For example, Weatherburn (2014, p. 65)

claims that the causes of Indigenous violence and crime are ‘entirely amenable to explanation in conventional scientific or western terms’. Here, Indigenous ways of knowing are negated, and science remains the preserve of the western intellectual. Alternatively, Indigenous knowledge is silenced by being ignored. We know, for example, the work of successive Aboriginal and Torres Strait Islander Social Justice Commissioners in Australia (ATSISJC 1993, 2006, 2008, 2009, 2011, 2014), of Indigenous scholars in Canada, the US and Aotearoa/New Zealand (including, to name only a handful, Jackson 1988, McIntosh 2011, Monture-Angus 1999, Nielsen and Silverman 2009, Victor 2007), have been fundamental in developing an in-depth Indigenous understanding of a broad range of issues central to contemporary criminological inquiry, including violence against Indigenous women, Indigenous women’s experiences of imprisonment and post release, the theoretical and practical development of Indigenous healing, and the role of justice reinvestment in Indigenous peoples drive for self-determination in the justice arena. However, this substantial body of work is often totally ignored in mainstream criminological accounts (see, for example, Weatherburn 2014). In Moreton-Robinson’s terms, ‘defining Aboriginality continues to be a predominantly white patriarchal knowledge production activity ... [which] violates our subjectivity by obliterating any trace of our different ontological and epistemological existences’ (Moreton-Robinson 2011, p. 414).

The rights of Indigenous peoples to self-determination are given little weight by those charged with reforming criminal justice in settler colonial jurisdictions (Cultural Survival 2013). Furthermore, Indigenous perspectives on crime control, in particular what causes crime and over-representation, and how best to respond, has little place in the policy formulation processes of the state. One result has been the reinvigorated

hegemony of administrative and authoritarian criminology, which arguably has led to a retraction in some of the (slight) gains made by Indigenous peoples in the 1980s and 1990s in the development of community-centred justice initiatives (Tauri 2014). The issue is amply exemplified through the experiences of the Canadian *Stó:lō* First Nation being required to *train* to deliver restorative justice conferencing, at the expense of being able to develop a wholly *Stó:lō* approach to youth offending (Palys and Victor 2007). The impact of this reinvigoration of administrative criminology can be seen in the Australian context where some states have begun cutting Indigenous-run programmes, including the discontinuation of the Murri (Aboriginal) sentencing courts program in 2012 by the former Queensland state government, often on the basis of a failure to meet narrow measures such as recidivism; arguably a ‘measure of success’ few interventions initiated by the state appear to be able to meet, including the formal courts (Cunneen and Tauri forthcoming).

At a programmatic level, settler colonial states can, and do point to a range of interventions to highlight their concern for, and response to, Indigenous over-representation and Indigenous critiques of the criminal justice system. However, many ‘Indigenous’ initiatives, such as Family Group Conferencing are best understood as state-centred processes that have been indigenized through the purposeful co-option of what state functionaries determine to be ‘acceptable’ customary practices. A recent example was the implementation in Aotearoa/New Zealand of Rangatahi (youth) Courts, which entail holding the sentencing phase of the youth court process on *marae* (meeting house). While there is no denying that *Māori tikanga* (philosophies and practices) play an essential part in this process, the sentencing framework and the judicial authority remains very much with the state (Cunneen and Tauri forthcoming).

## <A>Principles of the declaration in practice

Repeatedly, critical and Indigenous writers have called for the implementation and resourcing of many more Indigenous controlled-programmes and mechanisms and the importance of the principle of Indigenous self-determination. This call has been particularly apparent in implementing responses to violence in Indigenous communities (in the Australian context see Blagg 2008, ATSIJ 2011). There are numerous examples where in practice the principles underpinning the Declaration are operationalized by Indigenous people in developing responses to community problems, including, *inter alia*, Indigenous night patrols (Blagg 2008, pp. 107–25, Blagg and Anthony 2014), various types of Indigenous healing programs (Cunneen et al. 2013) and Indigenous adaptations of justice reinvestment (Brown et al. 2015). We highlight here the role of night patrols which have been one of the key developments in Indigenous community responses to crime and disorder in Australia.

Indigenous night patrols began in the Northern Territory in the 1980s and subsequently developed in most states of Australia over the next two decades. They are operated by Indigenous people at the local community level and work in a variety of urban, rural and remote. They focus on assisting people in need and maintaining social order, and receive varied levels of support from state and federal governments. There is often significant tension between the demands of government (instituted through funding agreements) and the aims and procedures determined by Indigenous communities; there can also be significant tension between Indigenous patrols and state police (Blagg and Anthony 2014, Porter 2015).



Priorities for the night patrols are largely set by local Indigenous need. Blagg (2008, pp. 107–25) describes the services of night patrols as including dispute resolution, removal from danger and safe transportation, connecting people to services, prevention of family violence, assistance and interventions around homelessness, alcohol and substance misuse and anti-social behaviour, keeping the peace at various events such as sports carnivals, and diversion from contact with the criminal justice system. Night patrols are involved in truancy programs and school breakfast programs and they transport people to places such as sobering-up shelters, safe houses, women's refuges, men's places, clinics, hostels, family healing and justice groups (Blagg and Anthony 2014, p. 109).

Night patrols operate through developing and maintaining cultural authority. Patrols, unlike state police, do not rely on the use or threat of force. Nor do they rely on the authority of western law. Their legitimacy and authority is held within Aboriginal law and culture. Significantly, Indigenous women have played a substantial role in developing and operating night patrols, and took the initiative in establishing some of the first patrols. Blagg (2008, p. 114) suggests that, perhaps a consequence of the significant involvement of Indigenous women, patrols report 'seeing their work in terms of mediation and persuasion rather than force, and fulfilling a preventative/welfare role, rather than a reactive/controlling one'. Night patrols represent a different vision of policing to that provided by state agencies: external authority is replaced by local cultural authority; bureaucratized state-centred methods of crime control are replaced by an organic approach to community need which focuses on assistance and prevention rather than the use of force. As Porter (2015)

suggests, the way night patrols work requires us to rethink the concept of policing as it is understood within western criminological discourses.

#### <A>Neoliberalism, risk and indigenous human rights

The Indigenous search for solutions to social disorder and dislocation lie in enhanced Indigenous authority through self-determination. However, significant barriers exist to the recognition of Indigenous human rights. Not least among these is the tension between Indigenous claims to exercise authority over criminal justice, and settler colonial state demands for tougher law and order responses. The emergence of neoliberalism has coincided with the realignment of approaches in punishment, which emphasize deterrence and retribution. The values and principles of neoliberalism include the individualization of rights and responsibilities; the valorization of individual autonomy; and the denial of cultural values that oppose a market model of social relations. The ascendancy of these values has reinforced a particularly negative view of cultural difference and runs counter to Indigenous claims for self-determination. Indeed, cultural difference itself is used to explain crime and the need for particular types of punishment, with a focus on changing Indigenous culture and promoting greater assimilation (Anthony 2013).

We argue then that neoliberalism has led to less sympathetic attitudes towards Indigenous rights, including self-determination. The politics of insecurity in neoliberal societies like Australia, Canada, the US and Aotearoa/New Zealand have led to a preoccupation with and aversion to risk, uncertainty and dangerousness. Respect for human rights and progressive reform of institutions (particularly criminal

justice systems) is more difficult in an environment of paranoia and punitiveness.

Along with the politics of insecurity and the ascendancy of neoliberalism, there have been developments in managerialism and risk-thinking that have increasingly permeated criminal justice policy. Criminal justice classification, programme interventions, supervision and indeed incarceration itself is increasingly defined through the management of risk. The assessment of risk in criminal justice involves the identification of statistically generated characteristics drawn from aggregate populations of offenders (such as, drug and alcohol problems, rates of offending and reoffending, domestic violence, prior child abuse and neglect). These characteristics are treated as discrete 'facts' devoid of historical, political and social context (Cunneen et al. 2013). A core problem is the relationship between these 'risk factors', being Indigenous and the outcomes of colonialism.

As we noted previously, the contemporary socioeconomic marginalization of Indigenous people did not magically appear, it was created through colonial dispossession and maintained through ongoing laws and policies of exclusion. Paternalistic and authoritarian government approaches (such as we have seen in Australia and elsewhere) to, for example, school attendance, restrictions on alcohol consumption, access to social security benefits, and so on, reproduce Indigenous people as a highly controlled and criminalized group. The focus on risk management within criminal justice has two significant implications for the human rights of Indigenous people. One is that an understanding of crime and victimization in Indigenous communities is removed from their specific historical and political contexts. Mainstream criminology increasingly understands Indigenous over-representation as the result of individualized risk factors without connection to the

social, economic and political relations of colonialism, which lie at the root of contemporary Indigenous marginalization. The second implication is that within the risk paradigm, the human rights of Indigenous peoples (both collective rights such as self-determination, and individual rights as citizens) are seen as secondary to the membership of a risk-defined group. The group's primary definition is centred on the type of risk characteristics they are said to possess. Within criminology these characteristics are invariably negative and represent Indigenous people as collectively dysfunctional. In this context it is difficult to conceive of Indigenous people as bearers of specific Indigenous human rights, or as having their own law and preferred solutions to social problems. Indigenous claims to self-determination are presented as irrelevant to solving the problems of social disorder that are instead defined as a threat of criminality from risk-prone populations. To the extent that Indigenous culture is recognized, it is often seen as criminogenic – as it was, for example, in the Northern Territory Intervention (Cunneen and Rowe 2015). The apparent irrelevance of Indigenous human rights is further entrenched by some criminologists who argue that little or no 'evidence' exists of the efficacy of non-western programmatic responses to crime (see, for example, Weatherburn 2014).

## <A>Conclusion

We have set out in this chapter to consider normative principles and rights within the *Declaration on the Rights of Indigenous Peoples*. It is clear that the exercise of criminal jurisdiction in Indigenous communities is inevitably bound-up with issues of Indigenous human rights including self-determination. These human rights norms have profound implications for the *right* to police, to enforce the law and to maintain order in

Indigenous communities. The Indigenous domain of law and culture continues to be defended and where possible extended. Indigenous initiatives (such as night patrols) are practical expressions of sovereignty and self-determination. They are declarations of intent that Indigenous people can and will protect their own people, and deliver Indigenous justice. The success of these programmes has been acknowledged as deriving from active Indigenous community involvement in identifying problems and developing solutions.

In contrast, non-Indigenous governance through the criminal justice system tends to circumscribe and delimit the struggle for Indigenous rights. It is often antithetical and antagonistic towards the principles of self-determination, participation in decision-making and non-discrimination, and so often proceeds in blind ignorance of recognition and respect for Indigenous culture. Unfortunately, there is little better that can be said of criminology. There is almost a total absence of any consideration of Indigenous human rights principles in criminology and how they potentially impact on the discipline. Yet these principles have profound implications for how criminologists might go about their work: the assumptions they employ, their research, and perhaps most importantly, their ethics. Recognition of Indigenous human rights requires us to explore the possibilities of new forms of justice, and a rethinking of existing justice processes. It also requires us to reflexively reconsider our position as criminologists. Indigenous over-representation in the criminal justice system is hardly a peripheral area of special interest. It is one of the most significant human rights issues in settler colonial societies.

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