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REFLECTING ON THE 'GENERAL PART' WHEN THERE IS SYSTEMIC INJUSTICE

Do We Inadvertently Facilitate Overcriminalisation of First Peoples in Australia?

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Introduction: Can Criminal Law Doctrine Contribute to Systemic Bias against First Peoples?

The rules for Australian legal practitioner admission require all law courses to teach elemental proof—the theory and method of the 'general part' of the criminal law.[1] For this reason, criminal law courses and textbooks continue to emphasise the doctrinal account of the criminal law. Even in critically engaged contexts, such as a criminal law course where lecturers critique elemental analysis,[2] it is apparent to the students that mastering elemental

1 The topics of criminal law and procedure are set out in *Legal Profession Uniform Admission Rules 2015* (NSW), s3:

> Either the following topics: . . .
>
> (b) Elements of crime . . . [et cetera] or topics of such breadth and depth as to satisfy the following guidelines:
>
> The topics should provide knowledge of the general doctrines of the criminal law and, in particular, examination of both offences against the person and against property. Selective treatment should also be given to various defences and to elements of criminal procedure.

As a legal practitioner, I would lug to court daily the loose-leaf service in which was set out the 'form of indictment' and commentary that deconstructed each offence into elements. This elemental deconstruction still appears in the annotated legislation available online; see, e.g., Rod Howie and Peter Johnson, *Annotated Criminal Legislation New South Wales 2019–2020 edition* (LexisNexis Butterworths, 2020).

2 See, e.g., David Brown et al., *Criminal Laws Materials and Commentaries on Criminal Law and Process in New South Wales* (Federation Press, 1st ed, 1990). Refer to the textbook, now in its 7th edition and the criminal law courses based on this. (Disclosure: I taught courses with its authors and others since while relying on this text). See, e.g., Brown et al.'s discussion of HM Hart's critique of the circularity of Glanville Williams' definition of crime: HM

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analysis and proof is what matters. This is because we (teachers) continue to emphasise—in the final examination, in tutorials—problem questions that require application of the general part; mastery earns students a higher grade and—we are told—will earn them the job.

In this chapter, I explore how elemental proof—the theory and the method of the general part of the criminal law—contributes to systemic bias against First Peoples. Orthodox doctrines and definitions of crime and our training in the general part influence how we (lawyers) analyse complex social issues and perform our roles within a complex social system: the criminal justice system. Could this training impede a court's capacity to make sense of serious socially destructive and disruptive conduct? In what way might this create the potential for direct and indirect discrimination against First Peoples? The answers to these questions raise concerns about whether elemental proof gives effect to the rule of law, especially with respect to First Peoples.

This chapter has two parts. The first part critiques the continuing influence of the general part of the criminal law and how this may facilitate the perpetuation of systemic bias against First Peoples. The second part reflects on building our capacity as a profession to engage critically with criminal justice with a view to ameliorating systemic racism. These two parts are hinged with reflections on my experiences and perspectives of legal education and criminal law practice.[3]

Part 1: The Doctrinal Approach to Teaching Criminal Law: The Continuing Influence of the 'General Part'

In the mid-twentieth century, Glanville Williams purported to curate the common law of criminal law principles into what he called the 'general part' (or 'general principles') and the 'special part' of the criminal law.[4] In the 1950s and 1960s, law schools were yet to monopolise legal education; lawyers had only recently started to craft themselves as a profession.[5] The common law

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Hart, 'The Aims of the Criminal Law' (1858) 23 *Law & Contemporary Problems* 404 cited at Brown et al. (*Criminal Laws Materials and Commentaries on Criminal Law and Process in New South Wales* (Federation Press, 6th ed, 2015) 59–60.

3 As will become obvious from my remarks and positioning throughout this chapter, my perspective is informed by my descendancy from the First Peoples of the sandstone Country (what is known as Sydney and stretches north of Dyarrabbin; my father is Darkeñung), my experiences as a criminal law practitioner, criminal law policy officer and desert peoples' law and justice projects officer (especially the Warlpiri), and my teaching and research in criminal law, criminology and critical Indigenous studies.

4 Glanville Llewelyn Williams, *Criminal Law: The General Part* (Stevens & Sons, 1961).

5 Michael Coper, 'Recent Developments in Australian Legal Education' (Research Paper No 10–85, ANU College of Law, 2010) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1715262>; David Barker, *A History of Australian Legal Education* (PhD Thesis, Macquarie University, 2022) <https://figshare.mq.edu.au/articles/thesis/A_history_of_Australian_legal_education/19432868>.

(the courts) defined crime and standards of proof. Since then, legislatures have increasingly intervened in this space, and judiciaries have deferred to parliamentary sovereignty.[6]

Elements and Proof

Williams' curation continues to influence criminal law education and practice. Typically, the starting point in a criminal law course is an examination of the 'General Part' or 'General Principles' of the criminal law. These set out a legal definition of crime and a method for proving the guilt of a defendant.

Prosecutors are required to prove beyond reasonable doubt the 'elements' of an offence.[7] These elements, unique to each offence, can be imagined as a list of ingredients for a recipe that will fail if one is missing. The term 'element' associates the method with the scientific credibility of chemistry and the certainty of an element in the periodic table. The reality is that elemental proof is premised on a discredited yet resilient Cartesian concept about the self—the dualism of human mind and body.[8] The elements of an offence are broadly categorised into the *mens rea* (also referred to as 'internal' or 'mental' elements) and the *actus reus* ('external' or 'physical' elements). The method of elemental proof assumes that a crime is defined by the coincidence of an individual's action and thought.

Already, the requirement that a crime be composed of an *actus reus* and a *mens rea* narrows our thinking about what a 'crime' is: inherently, a crime is 'contained' within a human being and is knowable through an individual. The method allows us to imagine that only an individual can be responsible for a crime. Indeed, under the general part,[9] it is challenging to hold responsible more than one human unless all are directly involved in the event. This method of proof does not allow us to imagine, for example, that social structures, experiences and events could have contributed to the cause of the crime. The requirement that the elements must 'coincide' or be 'contemporaneous' can also result in such material being excluded from consideration.

6 For a discussion of this specifically with respect to the legislative reform of criminal law, see, e.g., John Pratt, *Penal Populism* (Routledge, 2007); Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998).

7 *Woolmington v DPP* [1935] AC 462.

8 See, e.g., RA Duff, *Intention, Agency and Criminal Responsibility* (Wiley-Blackwell, 1990) 116 cited in Brown et al., *Criminal Laws* (Federation Press, 6th ed, 2015) 156; Ian Leader-Elliott, 'Benthamite Reflections on Codification of the General Principles of Criminal Liability: Towards the Panopticon' (2006) 9(2) *Buffalo Criminal Law Review* 391, 428–29; Dov Fox and Alex Stein, 'Dualism and Doctrine' in Dennis Patterson and Michael S Pardo (eds), *Philosophical Foundations of Law and Neuroscience, Philosophical Foundations of Law* (Oxford, 2016). Until now, the Cartesian conception of the dualism of the mind and body has strongly influenced western culture and ways of knowing.

9 Cf. the special part, which includes the extensions of criminal responsibility and exceptions to liability. I discuss the effects of appending the special part later.

Material outside the moment of the guilty act is not admissible evidence because it has been classified as irrelevant on the basis that it is outside the moment of an artificially isolated event.[10]

Another justification for exclusion of evidence deemed not relevant to the coincidence of the actus reus and mens rea is that it is 'relevant instead' to sentencing. This is not a reason for it to be irrelevant to proof; this justification is more accurately characterised as an uncritical commitment to components. The method of proof presumes that a crime has component parts, that these can be disassembled and that one can make sense of a crime by pulling such components apart. During proof, legal actors must disassemble the putative crime and then reassemble only some of its sundered parts, ensuring that there is a part that goes into each element 'box'. By this method, we are meant to reliably determine an individual's responsibility for the crime. We purport to make sense of a whole through dissection and disassembly, but, significantly, we do not reassemble *all* of the criminal conduct—the elements determine which parts we are permitted to reassemble.

Praxis reveals another weakness of a dualist deconstruction: some important concepts are simply not amenable to disassembly. 'Dishonesty' and 'possession', for example, are not meaningfully segmented into an act and a state of mind.[11] These concepts necessarily intertwine 'internal' elements (such as knowledge, awareness or intention) with the so-called 'external' element (typically, an act).

The general part of criminal law requires us to narrow the frame of our consideration to a moment and only to the evidence that is relevant to the elements of the offence. The legitimacy of this relies on the elements being a complete and accurate translation of what is 'criminal' into these components. The definition of an offence may be misleading and reductionist. This has the potential to impede our ability to make sense of a specific case and affects popular perception of what is an offence.

Such elemental reductionism also makes it easier for legislators to chip away at the normative coherence of the criminal law and the procedural protections that common lawyers have tried to ensure are constitutionally protected.[12] In the absence of constitutional enshrinement of the rule of law, a principle of antidiscrimination or some other civil right, there is nothing to inhibit legislatures from deracinating principle and removing nuance

10 The dicta on the principle of coincidence are more complex, but this is a basic rule.

11 See, e.g., discussion by English criminal law professor John Child, 'Teaching the Elements of Crimes' in Kris Gledhill and Ben Livings (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Taylor & Francis Group, 2016) 34, 35.

12 Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116(2) *Law Quarterly Review* 225.

through which the common law may have imbibed an offence.[13] Australian citizens have almost no constitutional rights; nonetheless, many enjoy rights. I could say provocatively that we enjoy these rights by relying on the beneficence of the legislature and executive. For First Peoples, this beneficence manifests—at best—as paternalism. Settler colonisers gave themselves the power to determine without limit anything about our lives; they achieved this by constructing First Peoples as a 'race'.[14] For First Peoples, the politicisation of criminal law and its legitimisation of surveillance, intervention, control and violence by the state is felt as 'just' another aspect of the ongoing colonial project of dispossessing and rendering First Peoples outsiders in our home. The mechanistic conception of crime as elements and standards of proof is vulnerable to political whim that advances law and order agendas; First Peoples tend to experience the impact of these more than other populations.

Lawyers and law students are trained not only to focus on the elements but also to turn our attention away from, and discontinue inquiry about, any material deemed irrelevant. Indigenous defendants and their communities may consider such material relevant to the question of guilt, especially material concerning historical context, intergenerational trauma, contemporary discrimination, structural bias and other forms of injustice or material that gives insight into First Peoples' perspectives. A valued cultural practice can help to explain and de-stigmatise what might be viewed as criminal conduct—not merely to mitigate penalty but to acquit. Indigenous people have unique insight into the multiple ways of being caught in the state criminalisation system—the interventions for petty infractions, the persistent surveillance and intrusion that pre-empts reactions against over-selection and over-policing, the disrespectful way that some police treat Indigenous people. Rarely is such material permitted during the determination of the threshold question of guilt. Our scholarship regarding criminal proof does not inquire into how this could be relevant; such inquiry is inhibited by the elemental method of proof.

In my experience, when First Nations cultural material is raised at the guilt determination stage, it is diverted *quickly* to the sentencing hearing, where it cannot affect the threshold question of criminal responsibility—that is, of guilt. Those legally trained react swiftly to a proposal that such material be

13 See, e.g., observations of the Australian legal system as 'a pale and poorly version of itself, so it does not even recognise itself anymore' in a 'dilapidated condition': Anne Poelina et al., 'Reflecting on Australia's Current Legal System', in Anne Poelina et al. (eds), *Declaration of Peace for Indigenous Australians and Nature: A Legal Pluralist Approach to First Laws and Earth Laws* (Springer, 2024) 7; 'First Law and Songlines', *The Other Others* (Tyson Yunkaporta and Megan Kelleher, April 2021) <https://open.spotify.com/episode/3q0WY4VBhhs38iHTtTA3Nd>.

14 *Australian Constitution* s 51(xxvi).

included: 'But that's relevant to sentencing, not to proof.' That material is relevant to sentencing does not necessarily mean that it is irrelevant to proof. In itself, this is an insufficient justification for not taking it into account at the guilt determination stage and indicates that, to lawyers, it is the compartmentalisation (the delineation of relevance) that is important, not the substantive question of whether the material can relevantly help us to determine whether the state can punish a person. We can be too quick to determine helpful material irrelevant.

What impact might this training to divert such material have in practice? It may help to explain the preponderance of defendants who plead guilty. Despite the emphasis that we place on proof, the prosecution is rarely 'put to proof'. Less than 20 per cent of cases are tested in a defended hearing.[15] The overwhelming proportion of cases in the criminal courts proceed after a lawyer has advised the defendant, and the defendant has pleaded guilty. Such advice and instructions are privileged communications, rendering it impossible to research whether defendants have given instructions that potentially implicate settler social structures—the legal system, our shared histories, the effects of contemporary punishment practices—in criminal responsibility.

Are lawyers trained adequately to consider whether such evidence should be relevant to the threshold question of guilt? Or are we training lawyers to do something much simpler: divert such material away from being considered in guilt? If such material is available, then it is likely to be diverted because, historically, we (lawyers) have not been trained to understand how social systems can contribute to the cause of crime—because such material has not been classified *relevant*. More critically, we do not allow this to affect criminal law principles or practice. In essence, we are not developing our epistemology in line with other social science developments. Instead, elemental proof welds our analysis to only that of individual responsibility, diverting our attention from larger social forces at play.

The speedy diversion of this material on the basis of its relevance to sentencing is not only faux reasoning, it is misleading. In sentencing hearings, despite the promises of context being considered, legal practitioners struggle to have courts adequately consider material that a defendant—and their community—may consider relevant to criminality.[16] If a court *is* prepared to

15 For example, in the New South Wales District Court between 2011 and 2013, only 17 per cent of defendants pleaded not guilty: Clare Ringland and Lucy Snowball, 'Predictors of Guilty Pleas in the NSW District Court' (Issue paper No 96, NSW Bureau of Crime Statistics and Research, August 2014). See discussion of the preponderance of guilty pleas in Brown et al. (6th ed, n 2) 337–52.

16 I have argued this elsewhere in commentary on *Bugmy v The Queen* (2013) 302 ALR 192: Mary Spiers Williams, 'The Relevance of Colonialism and Structural Racism: "Turning the Gaze" in Bugmy' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 277.

consider such material, then legal practitioners find themselves constrained in the submissions that they can make about such material, *because* the threshold question of guilt has already been determined. We can only plead in mitigation and must tread carefully or risk the ire of the court. Judicial officers predisposed to engage critically with such material are similarly constrained, both in their interactions with barristers during submissions and in their remarks on sentences. This is because their findings and orders may be overturned on appeal.

The Special Part: The Arbitrary Inclusion of Other Material That Is Relevant to Proof

While the distinctive Indigenous culture and law and the unique experiences and perspectives of First Peoples tend to be excluded, settler cultural practices tend to be insulated from criminalisation. Protecting valued settler practices can excuse what would otherwise be a crime (for example, protection of one's property and the protection of private property generally). Settler cultural practices are normalised, centred and even looked to as the measure of constructive participation in society. Settler interests can even define what is a crime and influence the discretion of the settlers who work in the criminal justice system. The police discretion not to charge, a prosecutor's drafting of alleged facts, a defence lawyer's decision not to put before the court some of the client's instructions or a magistrate's decision to order 'no conviction be recorded' for the child of police officers—for all of these, there are always justifications that resonate with settler values. State criminalisation is structural, ideological and embedded in settler culture.

This is one way to make sense of the addition of the 'special part' to the doctrinal principles of the criminal law: the special part can be imagined as an 'addendum' to the 'general part'. The general part does not capture all instances of criminality, such as the wrongfulness of those not directly involved in committing the offence. It does not capture all of the justifications for what would be otherwise criminal. Rather than address the epistemological challenges of the insufficiency or incoherence of the principles of the general part, Williams grouped these exceptions, extensions and justifications by placing them into what he called the 'special part'. He avoided rather than solved the problems that the general part generates—and effectively diverted us from critiquing the criminal law epistemology. The epistemological justification for annexing the special part to the general part can seem like a loose appeal to a 'common sense'.

What implications might this have for contributing to First Peoples' overcriminalisation? Reliance on 'common sense' is a 'red flag' in my experience and is a useful indicator of potential prejudice, such as that inherent in whiteness and patriarchy. Where common sense is deployed, there are

opportunities to ask questions—for example, is the status quo (or other asymmetry, such as systemic racial discrimination) reproduced here? Critical feminist and queer scholars, for example, have challenged the common sense of the construction of self-defence[17] and provocation,[18] specifically, the capacity of these 'defences' to exonerate or even legitimate male violence while excluding those who are 'othered' from accessing benefits of such justifications.[19]

Avoiding the problems that the general part creates by diverting students to the special part affects how law students think—and trains them—in other problematic respects.[20] The special part normalises exceptionalism and trains legal actors to respond to weaknesses in the theory by finding an exception or another rule that allows them to finalise a case. Some of these rules are so inconsistent with principle that we use them like bad playwrights use the 'deus ex machina': we lower them—like a god winched down onto a stage—to fix problems of narrative, structure or logic with a bald declaration.[21] Instead of solving the incoherence, lawyers learn and apply by rote a rule contrived to resolve a specific issue. This is not reasoning; it is more akin to dogma, demanding as it does faith and obedience. The epistemology of the general part is left uncritiqued by legal educators and scholars.

The normalisation of exceptionalism in a settler society has two effects: it advantages those who are privileged in a racialised hierarchy, and it normalises the suspension of reasoning, critique and principle with respect to First Peoples. Although exceptionalism indicates epistemological incoherence with the rule of law and civil rights, it is coherent with a legal ordering that is

17 For example, self-defence in the context of relationship entrapment: Heather Douglas, Stella Tarrant and Julia Tolmie, 'Social Entrapment Evidence: Understanding Its Role in Self-Defence Cases Involving Intimate Partner Violence' (2021) 44(1) *University of New South Wales Law Journal* 326.

18 For example, on the use of provocation in charge bargaining for men who kill women: Asher Flynn and Kate Fitz-Gibbon, 'Bargaining with Defensive Homicide: Examining Victoria's Secretive Plea Bargaining System Post-Law Reform'(2011) 35(3) *Melbourne University Law Review* 905; on the homosexual advance provocation defence: Kent Blore, 'The Homosexual Advance Defence and the Campaign to Abolish It in Queensland: The Activist's Dilemma and the Politician's Paradox' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 36.

19 There is an opportunity to critique the epistemological coherence of the general part and special part; praxis may be one way to resolve this. This, however, is beyond the scope of this chapter.

20 For example, in an instance of justifiable killing of another person, we separate the determination of guilt into two stages: first, prove all elements and determine guilt; second, undo this in the same hearing by relying on, for instance, self-defence. It is possible to cohere the assessment of guilt if one is not welded to elemental proof. However, elaboration of this is beyond the scope of this chapter.

21 Desmond Manderson references this in numerous publications: see, e.g., Desmond Manderson, *Kangaroo Courts and the Rule of Law: The Legacy of Modernism* (Routledge, 2012) 38.

racialised. 'Exceptional' treatment of First Peoples has been a feature of the settler legal system since colonisation commenced.[22] The Australian Constitution retrospectively recognised that former colonies had such power de facto when it made the race power de jure and divided the power to make laws for people who are racialised between the Commonwealth and the states. At the federation level, the power to make special laws about Indigenous peoples carried over to the states, and the Commonwealth then took over this power in 1967.[23] The tolerance of exceptionalism is one of the many ways that racism against First Peoples seeps into Australian law.

Engendering Obedience

The rules in the special part add to the volume of material that criminal law students and practitioners must study, and much of it is not coherent with general principles. The rules are voluminous and particular; this does not allow a student time for critical reflection and analysis. In Australian law schools, our examinations rest heavily, if not exclusively, on solving hypothetical cases—the answer to none of which requires critical engagement with the principles or the process on which students are examined. Obedience is inculcated in law students by overwhelming them with material on which they are examined. In the context of a settler culture that Kumbumerri philosopher Mary Graham calls 'survivalist',[24] law schools are competitive. That there are fewer legal practitioner vacancies than there are graduates exacerbates students' sense of precarity (a marker of these times).

Simultaneously, students are lured by privilege—the promise that high grades may win employment in a law firm. The privileges of a legal practitioner include financial stability and social status, which are also typical indicators of those who gain entry to a law school. Practitioners, their families and their communities are overwhelmingly settlers who also enjoy other advantages. If one has never experienced the negative effects of social systems and instead has benefitted from them (or rather, perceives this to be the case), then one may believe that one's survival and thriving is premised

22 Shelley Bielefeld, 'Compulsory Income Management and Indigenous Australians: Delivering Social Justice or Furthering Colonial Domination?' (2012) 35(2) *University of New South Wales Law Journal* 522, 539; Harry Blagg and Thalia Anthony, 'Disciplinary Power or Colonial Power?' in *Decolonising Criminology: Imagining Justice in a Postcolonial World* (Palgrave Macmillan, 2019); Aileen Moreton-Robinson, 'Imagining the Good Indigenous Citizen: Race War and the Pathology of Patriarchal White Sovereignty' (2009) 15(2) *Cultural Studies Review* 61. See also Desmond Manderson, 'Not Yet: Aboriginal People and the Deferral of the Rule of Law' (2008) 29/30 *Arena Journal* 219.

23 *Australian Constitution* s 51(xxvi).

24 Mary Graham, 'Indigenous International Relations: Old Peoples and New Pragmatism' (Lecture, Coral Bell School Inaugural Annual Lecture on Indigenous Diplomacy, Australian National University, 7 March 2023) <www.youtube.com/watch?v=p4yz9J31vtw>.

on the continuation of the status quo—even where the status quo involves the ongoing marginalisation of First Peoples and the reproduction of racial hierarchy. This is not only subordination to and reproduction of a legal hierarchy.[25] Such self-and group-interest facilitate the tolerance of and complacency towards others' suffering.

Making Better Sense of Crime

If a crime has been alleged, then a serious disruption to social order has occurred that requires the restoration of balance and wellbeing. If social systems are implicated, then these should be within the frame of legal analysis. If they are not within the frame, then they are not subject to critique, and the opportunity for the reform of any systemic issues is obviated. Conviction and punishment of an individual can give the false sense that the social harm has been resolved. Where social systems contribute to the cause of crime, such causes remain under-analysed and unaddressed, and the crime is more likely to be repeated.

Being There When They Teach the General Part (Some Reflections)

In a criminal law class, First Nations teachers and students sit in a room of overwhelmingly non-Indigenous people and study a system that affects our communities in ways that it does not affect settler middle and upper classes. Māori criminal lawyer Khylee Quince shared the following observation about being in a criminal law classroom:

> Like every Māori law student, I have had the experience of sitting in a criminal law classroom feeling the myriad of emotions that comes from knowing that we have a particular place in the justice system. . . . There is a sense of shame, embarrassment, anger, frustration, and indignation at opening a casebook to see row after row of case citations featuring our names. Whereas outsiders may have no connection or give no more than a passing thought, if any, to these names, these are our relatives—brothers, fathers, cousins, uncles, aunties. These are people convicted of significant harms, of damage to families, communities—mostly our own.[26]

Our experiences resonate with those of Aotearoa, but in our ngurra, now called Australia, a statement that the criminal justice system works primarily

25 Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32(4) *Journal of Legal Education* 591.

26 Khylee Quince, 'Teaching Indigenous and Minority Students and Perspectives in Criminal Law' in Kris Gledhill and Ben Livings (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Taylor & Francis Group, 2016) 161, 163.

on Indigenous peoples is obviated. In most places in Australia, our names were colonised; we carry the names of cattle station owners and settler fathers. But this is not the only reason that it is not as obvious here that we also 'have a particular place in the justice system'—that we are the subjects of this system. In the judgments and legislation that we teach, there is no indication of the discomforting reality that the state's criminalisation system is racialised: the leading authorities rarely, if ever, involve Indigenous people and do not set out matters that we (Indigenous communities) consider justice issues. In Australia, this is one reason that it is easier for non-Indigenous lawyers to avoid thinking about whom the legal system affects most.

Meanwhile, Indigenous teachers, students and practitioners know that the criminalisation assembly line from police intervention to punishment is populated by Indigenous bodies as defendants and victims: rarely are we criminal justice system actors, and those who do work in it are assumed to be 'non-Indigenous'. The few of us who gain admittance to law school[27] and the even fewer of us who graduate[28] tend to be disinclined to practise in this system. For some of us, it is triggering to encounter our community members[29] and to see our concerns treated in this way. For some of us, despite this, criminal law remains a 'vocation' (as it is described in western cultures). Rather, it is the role that some of us are to play in the network of relationships in Country; it is our responsibility to fulfil this.

Many of us (and this is not a uniquely Indigenous perspective) find this system indifferent, ruthless and inherently traumatising. We struggle to reconcile our participation in it with our ideas about self. I wonder if law students who enter practice now are as slow to recognise the cognitive dissonance? Do they realise the dissonance between the claims of legal neutrality and the reality of the gross overrepresentation of one particular population—the population that happens to have a priori rights to be centred in this place? Do these early career lawyers still mistake the role of defence lawyers as outside the system, contesting it? Do they still believe that this system, for example, stops violence against women?

27 See, e.g., Torres Strait Islander legal academic Asmi Wood, 'Law Studies and Indigenous Students' Wellbeing: Closing the (Many) Gap(s)' (2011) 21 *Legal Education Review* 251. Harry Hobbs and George Williams disclose only that they are legal academics, that is, they 'whiten' their position; they completed a comprehensive statistical overview: Harry Hobbs and George Williams, 'The Participation of Indigenous Australians in Legal Education, 2001–18' (2019) 42(4) *UNSW Law Journal* 1294.

28 For example, only 63 per cent of the Aboriginal and Islander students enrolled in Australian universities in 2009 were still enrolled in 2010: Larissa Behrendt et al., *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People* (Final Report, July 2012) 8 <https://opus.lib.uts.edu.au/bitstream/10453/31122/1/2013003561OK.pdf>.

29 See, e.g., Mark Douglass, 'A Road Less Travelled: Footprints from Trauma' (2022) 34(6) *Judicial Officers' Bulletin* 62.

In the last decade, our students have been better educated about our shared histories and, more recently, have greater insight into how discrimination can be systematised. But to what end? These students, these legal practitioners, still do not have the means to resolve this dissonance. Being left only with awareness can engender distress. We are given tools (methods and concepts) inadequate to redress the system effects. These tools that we teach work only *within* the system, not *on* the system. If we continue to practise, then we become unwilling participants, doing our best to minimise the harsher impacts, kept busy using the system's ad hoc tools (such as defences, appeals or technicalities) or otherwise turning to the reform of law and process. Using these tools can be seen not as contesting the system but rather reinforcing its legitimacy.

In courtrooms and popular culture, the settler criminal legal system is represented as universal and monopolising. The authority of this myth is established in its doctrines and 'due process', which are represented as if they are coherent and complete. Where this representation cannot be sustained, the system is represented as self-correcting: checks and balances, distribution of roles and power, defences, exceptions and extensions of liability, appeals, and legislative reform.[30] However, the successful appeals and the legislative reforms have had no apparent effect on the trajectory of the overcriminalisation of First Peoples, which not only continues but worsens. These mechanisms have had little impact on the systemic bias against First Peoples in the criminal justice system or the other societal systems with which it is connected. The criminal justice system is resilient: its tools keep us busy and can seduce us; our engagement in the process innervates the system and reproduces myths about itself and about its justice. The reality is that legal practitioners are constrained in the interventions that we are allowed to make.

Even as this system purports to combat or ameliorate crime, Indigenous communities see the harm caused by the criminal justice system and recognise its criminogenic dynamics. Settler research has been late to confirm such impacts and recognise the connections between criminalisation and other settler systems that work against First Peoples. In the late 1980s to early 1990s, prominent inquiries conducted extensive research into the underlying causes of Aboriginal people dying in state custody[31] and the state removal of children from families.[32] The recommendations of the first major inquiries and

30 This begins before law school, in the social field, and continues after we are admitted to practice.

31 *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991) <https://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/>.

32 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home* (Report, 1997) <https://humanrights.gov.au/our-work/projects/bringing-them-home-report-1997>.

subsequent inquiries[33] remain largely unimplemented.[34] Rates of deaths in state custody and child separations have worsened, so we must assume that the underlying causes have continued to be unaddressed and that the suffering of those who survive criminalisation or are not removed from their families is also increasing. These reports and subsequent research consistently identify that the systematisation of discrimination has been a driver of the state's overcriminalisation of First Peoples. Systems analysis has now become a critical tool for making sense of the experiences of First Peoples in Australia and other colonised places.

Part 2: Beyond Inclusion, Towards Structural Reform

Since the number of our bodies in law schools began increasing decades ago, there has been no substantive epistemological or methodological reform concerning the subject matter of the degree or the way that it is taught or practised. This is despite the innovation and tenacious advocacy of Indigenous legal scholars and others committed to decolonisation in law schools[35] and sociolegal critical justice perspectives.[36] What renders legal education relevant to us, to our values and our laws? Is it insider access to the settler

33 See, notably, *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Report, 2017). <https://childdetentionnt.royalcommission.gov.au/Pages/Report.aspx>.

34 See, e.g., Kirrily K Jordan et al., 'Joint Response to the Deloitte Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody' (CAEPR Topical Issue No 4/2018, 2018) <https://openresearch-repository.anu.edu.au/bitstream/1885/154725/1/Topical_issue_4_2018_Jordan_et_al_final__KJ2.pdf>; Thalia Anthony et al., '30 Years On: Royal Commission into Aboriginal Deaths in Custody Recommendations Remain Unimplemented' (CAEPR Working Paper No 140/2021, 2021) <https://openresearch-repository.anu.edu.au/bitstream/1885/229826/2/WP_140_Anthony_et_al_2021.pdf>.

35 See generally the scholarship-advocacy of Gomeroi-Kamilaroi legal practitioner and academic Marcelle Burns, e.g., Marcelle Burns, Anita Lee Hong and Asmi Wood, *Indigenous Cultural Competency for Legal Academics Program* (Final Report, 2019) <https://openresearch-repository.anu.edu.au/bitstream/1885/311023/1/Indigenous%20Cultural%20Competency.pdf>. Scholarship/advocacy regarding legal curriculum decolonisation from allied scholars includes Heather Douglas, 'Indigenous Legal Education: Towards Indigenisation' (2005) 6(8) *Indigenous Law Bulletin* 12; Susan Bird (Larrakia Anmetjerre legal practitioner), John Trevor Rawnsley and Ciprian Radavoi, 'True Justice through Deep Listening on Country: Decolonising Legal Education in Australia' (2023) 19(4) *AlterNative: An International Journal of Indigenous Peoples* 892.

36 For example, at the University of New South Wales or Charles Sturt University law schools. See Melanie Schwartz, 'Retaining Our Best: Imposter Syndrome, Cultural Safety, Complex Lives and Indigenous Student Experiences of Law School' (2018) 28 *Legal Education Review* 1; Alison Gerard, Annette Gainsford and Kim Bailey, 'Embedding Indigenous Cultural Competence in a Bachelors of Laws at the Centre for Law and Justice, Charles Sturt University: A Case Study' (Conference Paper, Australasian Law Academics Association Annual Conference, 2019).

legal system? Are we being conditioned to leave behind our law and culture and to harden our hearts against the effects of the system on the people that it processes and their communities?

Risking failure can paralyse settler academics; some share that they are fearful of making mistakes, such as inadvertently reproducing racialised harms. Unfortunately, doing nothing is doing something: it maintains the status quo. Quince importunes teachers to be models for students. This asks us to change our attitude toward 'failure' and to reflect on what being an 'expert' means. We need to allow ourselves to be humbler and take students with us when initiating a process of change while assessing and ameliorating the risks involved but nonetheless, taking action. Change can occur if we put theories into practice and are ready to learn from this: this is praxis. We should not expect everything to work; this has never been tried before. It is an experiment with a lot at stake.

A known issue in settler institutions is placing the burden for reform on the few Indigenous academics who have managed to get in the door. When we are pressured to do this, we are taken away from our research agendas and, therefore, from career advancement, social impact, cultural responsibility and research passions. Many of us already feel pressures from our communities (imagined and otherwise) to make changes that we fear are not possible, at least in the timeframes that we hope. It can be difficult work reconciling one's cultural perspectives and life experiences with those of conservative, privileged, western-centric universities. To make these demands of us is to place on Indigenous people the burden that is settlers' responsibility for the colonial inheritance.

When we discuss inclusion, it is assumed that this means that the institution needs to assimilate Indigenous knowledges. At this point, Indigenous staff are called upon to be what Quince refers to as 'cultural sherpas'.[37] Our old people have consistently endeavoured to engage settlers in law and culture. I agree with this—it is lawful to share knowledge and to teach this through relationality—but with a key reservation: we should only share what can be heard and respected. Sharing our knowledges with settler educational institutions has been fraught and, unhappily, often marred by epistemic violence. For this reason, I argue that before one can share substantive matters, training in reflexivity skills and developing insight into one's own standpoint are necessary.

How to Begin? Always with Reflective Practice

To develop insight into another's perspective and understand their knowledge, one must first develop insights into one's own ways of knowing. The call to action is a humble one: develop insight into one's own standpoint

37 Quince (n 26) 164.

and recognise how this is affected by cultural context, history and social structures. For criminal lawyers, this means reflecting on one's role in and effect on the criminal justice system. In considering the overcriminalisation of First Peoples, the purpose of engaging in reflective practice is to realise how one 'knows' and reproduces knowledges as this reflective practice makes it possible to develop insight into Indigenous peoples' diverse perspectives and experiences of overcriminalisation. Such a practice can ameliorate (but not eliminate) the risk of misappropriation or misrepresentation of Indigenous knowledges and other forms of epistemic and ontological violence. Although we want others to have insight into our perspectives, insight is not possible without first disrupting the centredness of the western gaze. One needs to start with a critique of the discipline, its history and our role in it.

Let us think about what this could look like in a criminal law classroom.

Acknowledging Country

In the last decade, it has become conventional for university course conveners to open a course with an 'acknowledgement of Country'. Often, it is a formula of words prepared by an institution that is read verbatim. A land acknowledgement is an opportunity to demonstrate one's respect for First Peoples in a way that is particular to the course and to share one's standpoint as the teacher. Acknowledging Country does not mean acknowledging only First Peoples. Acknowledging Country means locating oneself within a place or perhaps demonstrating that one understands what Country is (it is not just 'land'). In an opening, there is an opportunity to acknowledge Country and signal its influence, then allow it to influence the pedagogy and content of the course. In acknowledging Country, one could ask, for example, 'What does it mean to teach and learn settler criminal law in Country?' One response could be the following:

> The First Peoples of this continent—like all societies—have had legal systems. These laws were part of the social structures that sustained the most successful and longest continuous cultures in human history. These nurtured the most ancient and fragile continent on the planet that flourished until the British commenced colonisation. These legal systems facilitated the interrelations of the diverse peoples across and beyond the continent and addressed social disruptions that inevitably arise in human societies. These legal systems—each distinctive but all sharing basic precepts—responded differently to what settler society calls criminal offending. First Laws emerged from philosophies about ways of being that understood human beings in relationship with other beings in Country, and that was highly responsive to praxis. These laws functioned and function differently to the transplanted and transformed legal system that the colonisers very recently imposed upon this place.

These basic observations of the fact of legal plural orders and their distinctiveness can help students situate and begin to make sense of settler criminal law in this place. They can prompt realisations about its brief history on this continent, its origin in and ongoing connection to English history and law and prompt reflection about the implications of this. For example,

> The criminal law has been applied unevenly and unjustly with respect to First Peoples. The rule of law has been promised but has rarely been used to curb the extraordinary violence that settlers wrought on First Peoples, and this failure to serve First Peoples facilitated colonisation and the usurpation of First Laws. Settler law has been the 'cutting edge of colonialism . . . central to the 'civilizing mission' of imperialism . . . [that] justified and legitimated conquest and control'.[38] If settler law is the 'cutting edge', then police wielded that blade: the police, originally a paramilitary force, played a critical role in 'settling' the frontier, in killing or removing people from their lands, especially separating children and women from families and clans. This history is neither ancient nor over. For these reasons and more, most First Peoples distrust the state's agents and the state's laws.

When opportunities are not taken to acknowledge First Peoples—to demonstrate insight into our diverse perspectives or the effects of settler criminal law and the criminal justice system on First Peoples—an acknowledgement is diminished to mere lip service. Acknowledging Country and its First Peoples should continue beyond the opening of the course or the opening minutes of a class.

Acknowledging First Peoples

What does it mean to acknowledge First Peoples in a criminal law course? Throughout Australian public life, there are nascent gestures of substantive inclusivity of First Peoples. When we discuss overcriminalisation, we necessarily are discussing negative matters; the challenge is to resist accounts that stereotype and racialize and to desist from deficit discourse about Indigenous people. I have observed gestures of inclusivity that involved presenting a quantitative account of First Peoples' overrepresentation. These statistics were taught in the first two-hour lecture and necessarily, given the time allowed, were taught with limited historical context and explanation about the continuities of colonialism. These statistics were accompanied by an image that drew the eye to a brown body rather than the carceral context.[39]

38 Sally Engle Merry, 'Law and Colonialism' (1991) 25(4) *Law & Society Review* 890.

39 Specifically, an unattributed image of deidentified and bodiless brown hands grasping prison bars (deidentified source) cf. Ricky Maynard's images—even where he includes First

The statistics of grossly disproportionate criminalisation and victimisation in every stage of the criminal justice system can elicit shock in some students—but to what end? With little or no explanation about structural discrimination and its impact on individuals, this shock is fetishisation, a buzz from an emotional reaction to something in which one has little at stake.

In 1991, when the findings of the Royal Commission into Aboriginal Deaths in Custody were published,[40] the scale of overrepresentation and its underlying causes shocked the public conscience. Decades later, *awareness* of the numbers of Indigenous people seems to have spurred no effective action; instead, the numbers are worse than ever.[41] Naïve students have been raised to trust the systems and their agents and to believe that those who are punished have brought it upon themselves. What conclusions do we expect that they will draw about First Peoples (as a cohort) when confronted with such overrepresentation without any skills or other information to make sense of them? Numbers without context repeat a story—perhaps the only one that many non-Indigenous Australians have heard—of deficit and disadvantage. Numbers about criminalisation are the most stigmatising of all. This effect is heightened where the statistics are expressed in the passive voice. 'Indigenous people are overcriminalised/overincarcerated/hyperincarcerated' is a normalised state of affairs—'the way that things are'. Those who are criminalised are identified; those who do the criminalising are not ('overincarcerated *by whom*?'). Have settlers become inured to the implications of the statistics? Meanwhile, First Nations people in the room may be triggered, feel stigmatised by a deficit account or wonder at the parochialism of such content.

Sharing statistical information about overrepresentation is not necessarily ontologically and epistemically violent. It can be effective if those who teach reflect upon its impact and then revise their concepts and practices—as one should in any experiment. To make sense of these statistics, we need to provide students with reliable and relevant information and train them how to make sense of it and how to continue to revise and critique such

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Peoples, his images ask more questions about the incarcerating state and better questions about the people incarcerated. See 'Prison Series 20 No More Than What You See' (1993) <www.bettgallery.com.au/artists/90-ricky-maynard/works/17205-ricky-maynard-prison-series-20-no-more-than-what-1993–2023/>; 'Prison Series 29—No More Than What You See' (1993) <www.bettgallery.com.au/artists/90-ricky-maynard/works/17218-ricky-maynard-prison-series-29-no-more-than-what-1993–2023/>. I use this image when I discuss incarceration: 'THERE ARE THINGS IN THIS PICTURE YOU CANNOT SEE. "I enter here only with a pair of jocks. The walls are made of rubber and the blankets are made of canvas" ' (1993) <https://searchthecollection.nga.gov.au/object/16523>.

40 *Royal Commission into Aboriginal Deaths in Custody* (n 31).

41 See, e.g., Law Council of Australia, 'Incarceration Rates of Aboriginal and Torres Strait Islander Peoples' (Discussion Paper 84, 6 October 2017) <https://lawcouncil.au/publicassets/eae6ee0a-23ae-e711-93fb-005056be13b5/3349%20-%20Incarceration%20Rates%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples%20(Discussion%20Paper%2084).pdf>.

methodologies. We also need to train them to recognise how this can affect their understanding and application of legal principles. Such training would at least involve developing insight into the effects that standpoint has on the production of knowledge.

Standpoint, Positioning and the Reification of Objectivity

To teach the law now, one needs to have reflected on standpoint. One can no longer assume that the 'othered' is outside the classroom. 'Talking about us without us'—and not *to us*—remains an issue, albeit one encountered less often and less blatantly. An aspect of this that troubles me is the faux corollary of inclusion: instead of positioning Indigenous students as 'other', we are positioned as the same.[42] This is assimilative. It primarily serves to make those who engage in whiteness comfortable—what Eve Tuck and K Wayne Yang might call 'white moves to innocence'.[43] Rarely does this appear to be done knowingly/consciously. Rather, it occurs through positioning.

Legal education and training prepare all students to be inured to the effects of the justice system on others. When law students learn about the criminal law, we are positioned as a gazer, experiencing the 'privilege' of not being gazed upon. The western value of impartiality is reinforced.[44] From a First Law jurisprudential perspective, such 'impartiality' is unlawful and unjust, as any determinations would be made based on incomplete knowledge of the context of the event, the community and those who are closest to the

42 Another aspect of deficit discourse that has become more apparent recently is a speaker expressing a racialised and deficit statement and then asking the Indigenous person (or, less often, people) in the room to address it, thereby positioning them either as an apologist for the statement, placing the responsibility on them to save the statement maker (fawn), make explicit the racism (fight) or remain speechless (freeze).

43 Tuck and Yang engage with Mawhinney's productive phrase 'moves to innocence': Janet Mawhinney, '"Giving Up the Ghost": Disrupting the (Re)production of White Privilege in Anti-racist Pedagogy and Organizational Change' (Master of Arts Thesis, University of Toronto, 1998) <www.collectionscanada.gc.ca/obj/s4/f2/dsk2/tape15/PQDD_0008/MQ33991.pdf> cited in Eve Tuck and K Wayne Yang, 'Decolonization Is Not a Metaphor' (2012) 1(1) *Decolonization: Indigeneity, Education & Society* 1. See also the work that informed Mawhinney: Law Council of Australia, 'Incarceration Rates of Aboriginal and Torres Strait Islander Peoples' (Discussion Paper 84, 6 October 2017), 6 at footnote 3.

44 Larissa Behrendt observes that

> The Western tradition assumes neutrality or objectivity by a scholar and a researcher. . . . It is suspicious of subjectivity. Indigenous approaches to knowledge are completely the opposite. They understand that where you are placed—your positioning or your standpoint—will fundamentally influence the way you see the world.
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> Larissa Behrendt, 'Indigenous Storytelling: Decolonizing Institutions and Assertive Self-Determination: Implications for Legal Practice' in Jo-Ann Archibald Q'um Q'um Xiiem, Jenny Bol Jun Lee-Morgan and Jason De Santolo (eds), *Decolonizing Research: Indigenous Storywork as Methodology* (Bloomsbury Publishing, 2019) 175, 176.

disruptive event. The superordination of 'neutrality'—rather than, for example, wisdom, insight and lived experience—is not only epistemically violent with respect to First Law concepts of justice but also ontologically violent, as it affects relationality, which is core to one's sense of self.

The representation of the law as neutral, objective and impartial (and, 'therefore', just), centres settler cultural practices. It also minimises its effects on those who are privileged by the system, and does this while managing to render invisible this privileging.[45] What are the implications of this centring/othering when we consider the education and practice of criminal law?

Realising the disproportionate impact that the criminal justice system has on First Peoples, this neutral, separate gaze uniquely affects Indigenous law students and lawyers. Being encouraged to gaze upon those to whom one is connected can feel like betrayal—distancing oneself from our kin and kith, straining the strings[46] that connect us and corroding our relationality. We are positioned as a lawyer only, our identity and connection to culture and other laws is obviated, whitewashed: more than 'white passed' (which happens more often than 'white pass*ing*'), we are 'lawyer passed'.[47] One may wonder about the cost of our participation as practitioners in and educators of the criminal justice system—must we suspend critique of its problematic aspects, and are we collaborating? For those of us who are also First Peoples, we might ask ourselves whether the price of participation is our ways of being and knowing.

Senior law men and women who I have worked with see what is not there: our laws and cultures are absent from the state's criminalisation processes, principles and purposes.[48] If our laws are considered in criminal processes, then they are misconceived and misrepresented. In the criminalisation of a defendant, the court may use the opportunity to denounce our laws, legal

45 This, by the way, is a feature of the reproduction of 'whiteness'.

46 See, e.g., discussion of Yolŋu 'strings' of relatedness in Bree Blakeman and Dhambiŋ Burarrwaŋa, '*Yolkala Gumurrlili*? with Whom Towards the Chest? A Relational Portrait of Yolŋu Social Organisation' (2023) 44(5) *Journal of Intercultural Studies* 678.

47 Several Indigenous academics have written powerfully about the ontological violence of legal education, for example, poignantly, Nicole Watson, 'Indigenous People in Legal Education: Staring into a Mirror without Reflection' (2004) 6(8) *Indigenous Law Bulletin* 4. Others recount legal education experiences akin to gaslighting—for example, Larissa Behrendt's account of being told the settler state story of terra nullius: Larissa Behrendt, 'Home: The Importance of Place to the Dispossessed' (2009) 108(1) *The South Atlantic Quarterly* 71, 74. See also Torres Strait Islander scholar Heron Loban, 'Decolonised Law Degrees: A Misnomer' (2022) 74(4) *Alternative Law Journal* 296; Marcelle Burns and Jennifer Nielsen, 'Dealing with the "Wicked" Problem of Race and the Law: A Critical Journey for Students (and Academics)' (2019) 28(2) *Legal Education Review* 1.

48 See, e.g., Mary Spiers Williams, 'Challenging Settler-State Legal Fantasies: Basic Precepts of First Laws' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 61, 61–62.

systems and even cultural practices.[49] When we observe settler law being represented as '*The* Law' (almost never qualified accurately as 'settler law' or 'state law'), we witness the ongoing discursive usurpation of our laws and legal systems. In learning doctrine premised on a settler legal monopoly, are we tacitly supporting this epistemic violence towards First Law,[50] our ways of being and other cultural values?[51]

Each of us identifies with our experiences, education, histories, ancestors and institutions. Reflexivity can disrupt the stories that we have been told and that we have told ourselves about these influences. Such disruption can manifest in emotional discomfort, in my experience, especially for settler students. For example, it can trigger intellectual resistance, a misplaced feeling of guilt or other emotional responses.[52] Such reactions differ markedly in nature and magnitude from the trauma and ontological violence that an Indigenous person may experience when we learn, are required to teach or are required to practise such principles, methods and related concepts.

Understanding Social Systems and Structural Injustice

A contemporary reflection of our commitment to uphold the rule of law requires education about what structural injustice is and how it can emerge. Iris Marion Young observes that structural injustice is produced when 'many people . . . interact in complex ways to produce the outcomes that many agree are unjust',[53] although such outcomes are unlikely to have been intended or foreseen by any of these actors.[54] The criminal justice system—like any human system—is susceptible to discrimination and injustice. The criminal justice system creates opportunities for discrimination through its assembly

49 See, e.g., *Police v Tommy Watson* (Alice Springs Court of Summary Jurisdiction, 1 December 2010, Magistrate Bamber), discussed in Mary Spiers Williams, 'The Impossibility of Community Justice Whilst There is Intervention' in Garry Coventry and Mandy Shircore (eds), *Proceedings of the 5th Annual Australian and New Zealand Critical Criminology Conference, 7–8 July 2011, Cairns, QLD, Australia* (James Cook University, 2012) <https://ssrn.com/abstract=2095839>.

50 Robert Cover would call this 'jurispathy': *Narrative, Violence, and the Law: The Essays of Robert Cover* (University of Michigan Press, 1992) 214; Robert M Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601.

51 Irene Watson, 'Some Reflections on Teaching Law: Whose Law, Yours or Mine?' (2005) 6(8) *Indigenous Law Bulletin* 23.

52 Such emotions are unhelpful; guilt, for example, tends to trigger shame, avoidance and paralysis. See also Danielle Every, 'Critical Discursive Methods as a Resource in Education and Anti-Racism' in Rob Ranzijn, Keith McConnochie and Wendy Nolan (eds), *Psychology and Indigenous Australians: Effective Teaching and Practice* (Cambridge Scholars Publishing, 2008) 93, 97. A former student inspired by Ahmed called this 'white tears', indulging in emotions as if it were an antidote to complicity in racism; see Sarah Ahmed, *The Cultural Politics of Emotion* (Routledge, 2004).

53 Iris Marion Young, *Responsibility* for *Justice* (Oxford University Press, 2011) 107.

54 Iris Marion Young, *Responsibility* for *Justice* (Oxford University Press, 2011) 62–63.

line design. The segmentation of roles prevents legal actors from seeing or experiencing the effects of their decisions, thereby creating the conditions that foster in legal practitioners a sense of 'irresponsibility'[55] and a tolerance of what would otherwise be intolerable. The theory (or phenomenon) of structural discrimination can explain how discriminatory actions perpetuate injustice and how these actions concatenate into a system and accrete. Herbert Packer's generative (and resilient) model of the criminal justice system as an assembly line[56] remains helpful in understanding how injustice can become systematised and in developing insight into how racial discrimination against First Peoples is specifically reproduced.

Built into the criminal justice system are limits on each legal actor's discretion, a function of the doctrine prohibiting acting ultra vires, another systemic feature intended to curb excess of power (especially vis-à-vis an individual). Within these limits, a legal practitioner (and other criminal justice actors) can nonetheless make a decision that is discriminatory. This decision-maker may never realise the effect of their decision as the defendant moves through the assembly line—or legal actors may not realise their role and thus cannot feel 'responsibility'[57] for the larger effects to which their small part contributed, and they otherwise tolerate it. The assembly line may mask the origins of the discriminatory action and even be responsible for its effects: for the decision-maker, there are no consequences (except for the insightful one whose conscience may ache). This can result in a fatalistic attitude towards some of the discriminatory effects. This is one of the ways that discrimination can persist unchecked, be repeated and its effects become systematised.

Working with the Tools that We Have

Although our role in the assembly line is limited, there are opportunities within these limits. Imagine if we listened to Indigenous defendants, victims and communities more respectfully and did this in order to reflect more on the relevance of material about which they instruct us or inform us. We need to think more deeply and persistently about what is considered reliable and challenge the possibility of our own unconscious bias.

When assessing a case, legal practitioners routinely assess whether material would be admitted in a defended hearing—but have we applied a rule by rote or orthodoxy? Have we reviewed the material available, reflected on its reliability and reasoned it well? Is it possible to challenge an orthodox boundary that excludes matters that First Peoples nonetheless consider relevant? Are

55 In the sense meant by Veitch: Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge, 2007).

56 Herbert L Packer, 'Two Models of the Criminal Process' (1964) 113(1) *University of Pennsylvania Law Review* 1. Packer was an American criminal law academic and criminologist.

57 Cf. 'irresponsibility' again in the sense meant by Veitch (n 55).

these boundaries legal, principled and reasonable or are they merely part of the customary practice of legal practitioners?

What I am proposing here—to master criminal law principles, practise advocacy and develop skills—is not a radical departure from principle. Rather, this is taking the common law's ideological claims seriously. Practitioners are officers of the court whose role is to support the judicial officer in not falling into error. We are trained to attend closely to the moment of the decision-making of legal actors and bring to the judicial officer's attention any weakness in inferential reasoning, assessments of reliability or sufficiency of evidence. However, with respect to material that is distinctive to First Peoples, we need to acknowledge that this can require tenacity, as structural discrimination affects the culture in a court, which can resist turning its gaze onto such material.

To Address Systemic Injustice, We Need New Tools

An individual can have little impact on a system as resilient and self-sustaining as the criminal justice system. A larger project of system transformation requires either collective action (coordination and tenacity over the long term) or a cataclysm. Both are outside the control of an individual in the short and medium terms.

The overrepresentation of a cohort of people indicates (if not conspiracy) systematic bias. This occurs within a system that is supposed to review for just such bias. That we do not have the theory, methods, competency or willingness to redress this means that structural injustice is ongoing.

We are trained in law school and practice to analyse a case in isolation and to determine that where there has been individualised justice there can be no miscarriage of justice. But such training does not, and perhaps cannot, address concerns about structural injustice. To understand structural injustice, we need different analytical tools to make sense of this accretion of unjust effects. To transform such structures, we need different methodologies and epistemologies. Unfortunately, it is difficult to see how it will be possible to develop new tools that are compatible with existing restraints of theory, methodology and customary practices of criminal law.

Conclusion: Fulfilling Our Responsibility

In this chapter, I have reflected on an aspect of the role that lawyers play in the criminal justice system. I have made some observations about the teaching of doctrinal criminal law theory and methods in relation to elemental proof and asked questions about whether this contributes—and, if so, how—to the systemic discrimination that the criminal justice system produces. Despite a key responsibility of legal practitioners being to uphold the rule of law, legal

actors participate, albeit unwillingly, in the systematic injustice against First Peoples and their overcriminalisation. Although legal practitioners are constrained by system design, there are opportunities to ameliorate bias. I have reflected on the current practices in legal training in this respect and proposed some ways to support students and practitioners to be more reflexive, purposeful and constructive in our participation in the criminalisation process. As a starting point, I have proposed that we attend more closely to a critical moment in the criminalisation process: to the method of proof of guilt and the material that we routinely decide is irrelevant. This requires a determination to gaze critically—and to hold within this gaze legal doctrines, practices and culture.

Lawyers are only one part of a complex system of agents who create effects that would have been difficult, if not impossible, to plan. To disrupt this, we cannot rely on current theories and methods that individualise and isolate the defendant's crime. We do not currently have the tools to address systemic injustice. It may be that we cannot develop them within the current system. In every case, one can only reflect and develop theory, design a method to apply this theory and then learn through praxis. The least we can do is prepare this generation to do what we have not been able to do.