Grossest darkness and irrational superstition

On Australia's policing and punishment of Indigenous Australians.
By Dr Thalia Anthony (BA '99, PhD '05, LLB '06)

On 5 February 1836 "Jack Congo" Murrell, an Aboriginal man, was tried in the New South Wales Supreme Court for the wilful murder of Jabbingee, another Aboriginal man. At trial Murrell protested that he was not guilty, but nevertheless, if he were to be tried the applicable law was his customary law. He claimed that his own people occupied New South Wales before the King of England occupied it, therefore, his people were rightly regulated by customary law, rather than the laws of Great Britain.

What ensued was the landmark decision of *R v Murrell, Sydney Gazette, 6 February 1836*, in which Justice Burton declared that before colonisation, Australian land was "unappropriated by anyone" and thus was lawfully taken into "actual possession by the King of England". The King's laws applied to everyone, including Aboriginal people. Furthermore, Aboriginal people had no recognisable laws, but only "practices" that "are consistent with a state of the grossest darkness and irrational superstition". And not, therefore, entitled to be recognised as "sovereign states governed by laws of their own".

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From *R v Murrell*, two key assumptions emerged in the Australian criminal justice system. First, the Anglo-legal system would trump Aboriginal laws. Second, Aboriginal people were to be viewed as equal before the Anglo-Australian law. These assumptions have shaped the Anglo-Australian legal system's engagement with Indigenous people ever since. The impact has been dire. Deprived of the capacity to regulate their own social systems, Indigenous communities have struggled to retain control. At the same time, the assumption of equality has been proven false. From the early colonial period, Indigenous people have been disproportionately criminalised.

Despite the modern era of legal recognition in the guise of native title, Aboriginal peoples' criminal laws continue to go unrecognised. In the past there have been latitudes for Aboriginal culture in criminal sentencing. In other words, customary factors relevant to criminal behaviour could reduce a sentence. However, even these leniencies are being wound back with the reinvigoration of Justice Burton's ideas of so-called equality before the law.

The previous and current Federal Governments opine that Indigenous people receive unfair advantage in criminal sentencing. In 2006, then Indigenous Affairs Minister, Mal Brough, stated that Aboriginal offenders "hide behind" a veil of customary law. In the same year, former Prime Minister John Howard echoed Justice Burton in *R v Murrell*, that Aboriginal law should be suspended in favour of "Anglo-Australian law" that provides protection to "every citizen of this country".

This led to drastic measures to curb judicial discretion. In 2007, the Federal Government passed legislation to remove cultural considerations. Sections 90 and 91 of the Northern Territory Emergency Response Act 2007 (Commonwealth) provides that for bail and sentencing, courts "must not take into consideration any form of customary law or cultural practice". This legislation signals the end of Aboriginal law in sentencing factors for the Northern Territory and (due to similar provisions) Commonwealth offences. It is likely to lead to even higher rates of imprisonment for Indigenous people.

Throughout Australia, Indigenous people are over-represented in the criminal justice system. They are subject to higher levels of policing, higher charges, arrests and incarceration rates and longer periods of imprisonment. According to the Australian Bureau of Statistics, in 2006, 24 per cent of Australians in custody were Indigenous, while 20 per cent of deaths in custody were Indigenous Australians. Indigenous adults were 13 times more likely than non-Indigenous adults to be imprisoned, according to the 2009 Productivity Commission Report. The imbalance is greater still for Indigenous women. In 2006-2007, Indigenous women comprised 31 per cent of women in prison custody (ABS) and were 21 times more likely to be imprisoned compared with non-Indigenous counterparts.

The chief apparatuses of criminal justice – policing and punishment – were central to colonisation. The police were crucial to Indigenous removal from their land and cultural dispossession. Police were also responsible for the administration of the protection regime, which was governed by the Aboriginal Acts. These Acts provided for a network of "protectors" to police every aspect of an Indigenous person's life. It was an offence to leave a designated area (such as a mission or government settlement), marry, work, receive cash welfare or wages and practice traditional laws, customs and ceremonies without permission from the Protector. According to Eugene Kamenka and Alice Tay in 1993, it was the policeman-protector "who brought in the Aboriginal suspect and the witnesses on the neck chain, who rounded up Aborigines for removal to institutions, who expelled them from towns and who helped the missionaries restrict access of the parents to Aboriginal children."

Policing was also vital to the enforcement of assimilation, including the removal of Aboriginal children. Assimilation was introduced in the mid-20th century when policymakers realised that Indigenous people were not dying out. The objective was to integrate Indigenous people into the dominant non-Indigenous society, albeit at serf level. Aboriginal people were forced into work without pay and into towns.

In 2001, criminologist Russell Hogg argued that the end of control through the Aboriginal Acts marked the

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beginning of control by the criminal justice system. In the 1970s, Indigenous people increasingly moved out of settlements and into towns, putting them in the purview of urban policing. This led to a steady increase in imprisonment numbers. Hogg writes that "administrative segregation" gave way to "penal incarceration" as a mode of Indigenous regulation.

When Indigenous people moved into towns, their engagement with the criminal justice system was often triggered by public order offences. Vagrancy and public drinking laws had a particularly punitive impact on Indigenous people who were classed as outsiders or the "undeserving poor," according to Elizabeth Eggleston in 1976. Today the over-representation of Indigenous people in custody continues to be for public order offences, especially offensive language and behaviour. Seventeen per cent of Indigenous offenders compared with eight per cent of non-Indigenous offenders had a public order offence as their principal offence, according to the NSW Bureau of Crime Research and Statistics in 2006.

The consequences are often fatal. Australian Institute of Criminology figures from 2005 reveal that just under one quarter of Indigenous people who died in police custody in 2002 were there for public order offences. This figure excludes those people who were in custody for public drunkenness – which is described by policymakers as "therapeutic custody" – rather than penal custody. Indigenous people are currently 42 times more likely to be in custody for public drunkenness than other Australians.

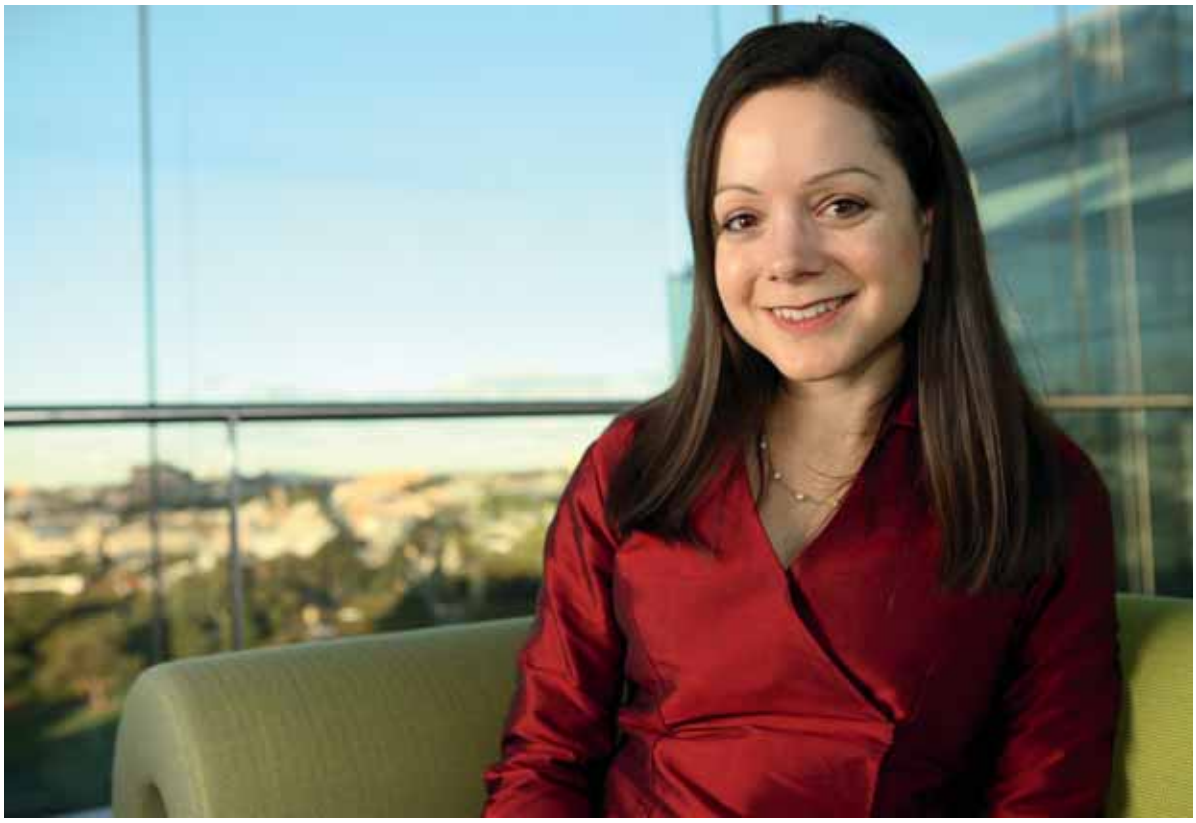
The Royal Commission into Aboriginal Deaths in Custody identified the connection between over-policing public order offences and deaths in custody in 1991. Recommendation 86 of the Report was that the "use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest or charge". However, this has not been addressed by policymakers and law enforcers. Consequently, the number of Aboriginal deaths in custody continues to rise. The high profile death in custody of Mulrunji on Palm Island in 2004 illustrates that police continue to inappropriately arrest for offensive language. On the night in question, Mulrunji insulted a police officer and was arrested on a public nuisance charge. Forty minutes later he was dead in the police station with a black eye, four broken ribs and a ruptured liver. The case is now the subject of a third inquiry after findings were set aside and a judgment on the Coroner's verdict was held to be flawed. In finding Senior Sergeant Hurley responsible for the death, Deputy Coroner Christine Clements initially noted, "The arrest of Mulrunji was not an appropriate exercise of police discretion."

Despite the evidence against charging and prosecuting public order offences, policing of such offences continues to expand. Most recently in May 2009 the NSW parliament gave police the powers to move on people who are "slurring" their words. If suspected inebriated persons do not comply with the move-on direction, they can be arrested and charged with a criminal offence. The laws amend the Law Enforcement (Powers and Responsibilities) Act to lower the threshold from "seriously" drunk to "noticeably" drunk. The amended law was a lively topic on talk-back radio, with callers suggesting that police will be drawn to people singing in the streets, eating late night kebabs or unaware of a wardrobe malfunction.

But the real impact will be on Indigenous people. According to an Ombudsman review of the move-on powers in 1999, there was a very high incidence of police directions in parts of NSW with substantial Indigenous populations. The use of such powers has been described by Dennis Eggington, CEO of the Western Australian Aboriginal Legal Services, who conducted a study on the powers, as "ethnic cleansing". In 2009, Eggington said these powers have the effect of removing Aboriginal people from public places. Move-on powers – like most public order offences – set in train a sequence of criminal processes that punish Indigenous people disproportionately to their alleged crime. The "slurring" laws will have the likely effect of increasing the policing and punishing of Indigenous peoples in the absence of a crime.

The paternal style of the old Aboriginal Acts re-emerged with the Northern Territory Emergency Response Act 2007 (Commonwealth) and its control measures in Indigenous communities. The Federal police and military mobilised to bring Indigenous communities under the control of the Commonwealth Government in mid-2006. The regulation of Indigenous people under this Northern Territory Intervention has entailed the universal quarantining of Indigenous welfare income, reclaiming Indigenous land, prohibitions on alcohol and pornography and mandatory health checks and contraception.

Contrary to media reports and government rhetoric – that the Intervention sought to support victims and reduce Indigenous crime – the increased policing of Indigenous communities in the NT has not targeted



child abuse and domestic violence. Indeed, the 2009 Productivity Commission Report noted the increase in child abuse incidents. Despite the hundreds of millions of dollars already committed to the Intervention, there remain inadequate services for victims of violent crimes, such as medical services, sexual assault and trauma counselling and crisis shelters. Rather, policing has been focused on enforcing the new Intervention laws and detecting and prosecuting traffic offences – especially driving uninsured, unlicensed and unregistered. This type of policing signals to the communities the paternalism of the police without any associated protections.

The emergency and disaster management approach to NT Indigenous crime was used to justify top-down policies without community consultation. It undermined, rather than drew on the strengths of, community-based programs targeted at combating crime; and community-owned initiatives such as night patrols. These patrols, which are commonly run by senior Indigenous women, intervene in disputes with a view to mediating a resolution, protecting victims and ensuring community safety. They do not have the capacity to charge or prosecute, but may work in conjunction with the police.

In 2008 criminologist Harry Blagg identified more than 130 night patrols across remote, regional and urban areas of Australia. These include patrols run by Indigenous communities and those operated by government agencies in consultation with communities. In NSW, community policing programs operate in Forster, Kempsey, Narrandera and Dareton, where they have minimised "harm associated with consumption of alcohol and other drugs", such as malicious damage, street offences and vehicle theft, according to a 2001 study by Lui and Blanchard. A modified form of community policing operates in inner-city Redfern under the auspices of the Street Beat program, set up under the Children (Protection and Parental Responsibility) Act 1997 (NSW) to ensure the safety of Indigenous youth. It is run by outreach workers and volunteers to provide safe transportation for young people at risk, offer support systems to divert Indigenous youth from the criminal justice system and help families in crisis.

Community policing has been described by Chris Cunneen in Conflict, Politics and Crime (2001) as a space for self-determination to operate in Indigenous communities. According to Harry Blagg, community policing plays an important role in social control and has been effective in reducing crime levels.

Without a legitimate space for Indigenous forms of crime control and social regulation, the criminal justice system will continue to manage Indigenous people's lives rather than address crime problems. This has been an overlooked and tragic consequence of the NT Intervention. It is also evidenced by ongoing deaths in custody. The horrific circumstances of Mulrunji's death have still not been addressed systemically, or nationally. Last year, Mr Ward, a traditional man who was deeply respected in his Ngaanyatjarra community in Western Australia, died after enduring a four hour journey in the bare metal cell pod of a non-air conditioned prison van, in temperatures above 56C. He was being taken from Laverton to Kalgoorlie to be charged with a drink driving offence. He should not have been arrested in the first place.

A rethinking of a legal domain with Indigenous forms of policing and social regulation could set the basis for a final departure from Justice Burton's rulings in *R v Murrell* almost two hundred years ago and the ongoing shame of deaths in custody. **SAM**

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Photo by Ted Sealey