THE PUNITIVE TURN IN POST-COLONIAL SENTENCING AND THE JUDICIAL WILL TO CIVILISE

BY DR THALIA ANTHONY*

Australian criminal justice in the twenty-first century has been characterised by a law and order agenda that has privileged the interests of the victim and "populist" values of the wider community.[1] These factors have overshadowed considerations of leniency such as offender culpability and rehabilitation, and ultimately have given rise to longer prison sentences.[2] For Indigenous offenders in the Northern Territory where customary law is a feature of remote community life and can linked to an offence, the Northern Territory Supreme Court has justified increased sentences to the risk Indigenous cultures and customary laws present to victims and the safety of the community.[3] This article focuses on the punitive turn for Indigenous offenders delivered by the Northern Territory Supreme Court over the past decade and since accommodated by Federal legislative amendments that outlaw cultural and customary law factors in sentencing.[4]

The major texts in criminology, such as David Garland's *The Culture of Control*,[5] identify the punitive turn as emerging across Western societies as a means of controlling social breakdown. The post-war welfarist tendency to support offender rehabilitation has turned to an "urge to punish, to allocate blame, condemn and exclude".[6] The key themes in law and order society are lengthy prison sentences, deterrence, pandering to populist demands and vindication of the victim.[7] However, the general analyses of the punitive turn do not grasp the unique repercussions for minority groups, including for Indigenous peoples in Western societies.[8] This article suggests that while the "punitive turn" and "law and order" frameworks are a means for analysing the harsher sentences for Indigenous offenders in recent years, they need to be matched with an understanding of how courts and legislatures have positioned Indigenous culture as distinctly threatening to law and order.

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* Senior Lecturer, The Faculty of Law, The University of Technology Sydney.

1 Russell Hogg "Resisting a 'Law and Order' Society" in Thalia Anthony and Chris Cunneen (eds) *The Critical Criminology Companion* (Hawkins Press, Sydney, 2008) at 281.

2 Ibid, at 280.

3 See, for example: *R v GJ* (2005) 196 FLR 233 at [36]; *The Queen v Redford* [2007] (Unreported, 26 March, SCC 20624214).

4 Northern Territory National Emergency Response Act 2007 (Cth) s 91; Crimes Act 1914 (Cth) s 16A(2A).

5 David Garland *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, Oxford, 2001). See also: Jonathan Simon *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, New York, 2007) Stanley Cohen, *Visions of Social Control: Crime, Punishment, and Classification* (Polity Press, Cambridge, 1985).

6 Garland, above n 5, at 12.

7 Cohen, above n 5, at 35-36. Also see Garland, above n 5, at 11, 27, 142; Hogg, above n 1, at 280, 282.

8 There have been some attempts to explain the impact of punitive crime control on African Americans, see Benjamin D Fleury-Steiner, Kerry Dunn and Ruth Fleury-Steiner "Governing through Crime as Commonsense Racism: Race, Space, and Death Penalty `Reform' in Delaware Governing" (2009) 11(1) *Punishment Society* 5 at 6.

In Australia, the Northern Territory Supreme Court and the Federal Government have characterised Indigenous offenders in cultural contexts as posing a particular danger to victims in order to warrant tougher penalties.[9] The bases for customary law and cultural submissions to the Northern Territory Supreme Court since the 1950s can be divided into *affirmative forces*, such as cultural expectations imposed on Indigenous offenders by their Indigenous communities, and *negative forces*, such as Indigenous offenders' lack of understanding of the cultural expectations of the non-Indigenous community.[10] Although not commonly heard by the Northern Territory Supreme Court, offenders who rely on cultural submissions are generally from remote Indigenous communities who have had limited contact with European lifestyles, cultures, language and laws.[11] The sentencing remarks analysed in this article refer to crimes in remote communities that are informed, although not justified, by Indigenous cultural practice or law. Because there is no cultural defence anywhere in Australia,[12] cultural reasons primarily arise at the point of sentencing mitigation,[13] which positions sentencing courts as key gate keepers for cultural recognition in the criminal justice system.

Identifying Indigenous culture in post-colonial society is problematic. One of the case studies discussed below relates to statutory rape on a promised bride within (or nearing) a customary marriage under Indigenous law.[14] Promised marriage is a practice that is becoming less common in the Northern Territory and the cases before the Supreme Court are very few.[15] Other cultural practices heard by the Supreme Court, such as "jealousing" (the process of making someone jealous as a test of commitment), emerge from cultural strain rather than pre-colonial culture.[16] A number of academics are at pains to emphasise that family violence is inimical to Indigenous culture.[17] Some of the cases also raise the problematic situation of the offender possessing strong community ties and allegiances to Indigenous laws while the Indigenous victim resists such laws and practices as a result of having greater exposure to European ways, including from living in cities.[18] This article does not seek to analyse the veracity of the cultural claims. This has been hotly contested by academics and policy makers, resulting in greater safeguards for admission of cultural evidence in 2005 to ensure that the offender's reference to the cultural context of the crime (such as promised

9 Senator Chris Ellison "Second Reading Speech: Crimes Amendment (Bail And Sentencing) Bill" *Parliamentary Debates: Senate* (Commonwealth of Australia, Canberra, 8 November 2006) at 16.

10 On both affirmative and negative forces, see *R v Aboriginal Charlie Mulparinga* (1953) NTJ 219.

11 Dean Mildren "Aboriginal Sentencing" (Paper presented to the Colloquium of the Judicial Conference of Australia Inc, Darwin, May 2003) at 3. See for example, *R v GJ*, above n 3, at [9], [29], [34].

12 Law Reform Commission of Western Australia *Aboriginal Customary Laws* (2005) Final Report Project No 94 at 7, 22.

13 There is a limited recognition of cultural factors in relation to bail and the partial defence of provocation in the Northern Territory. On bail, see *Anthony* (2004) 142 A Crim R 440. On provocation, see *Mungatopi v R* (1991) 57 A Crim R 341; *Lofty v The Queen* [1999] NTSC 73.

14 The cases include: *Hales v Jamilmira* (2003) 142 NTR 1; *R v GJ*, above n 3; *The Queen v Redford* above n 3.

15 Rex Wild and Pat Anderson *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"*: *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (Northern Territory Government, 2007) at 71; Northern Territory Law Reform Committee *Report of the Committee of Inquiry into Aboriginal Customary Law* (2003) at 23.

16 Harry Blagg *Crime Aboriginality and the Decolonisation of Justice* (Hawkins Press, Sydney, 2008) at 145.

17 Larissa Behrendt "Politics Clouds Issues of Culture and 'Customary Law'" (2006) 26(6) *Proctor* 14 at 14; McGlade on Damien Carrick "Customary Law and Sentencing" *The Law Report*, Radio National, 22 October 2001.

18 For example: *R v GJ*, above n 3, at [10].

marriage) is not fabricated and is an accepted practice in the community.[19] Rather, this article assumes the long history of cultural submissions to the Supreme Court and assesses how the shifting judicial attitudes to these submissions are linked to law and order discourses.

In order to highlight the contemporary punitive turn, this article opens with a discussion of the preceding historical approach to sentencing Indigeneity through sympathy and lenience between the 1960s and early 1990s. Part II analyses the courts' contemporary re-evaluation of Indigenous culture and emphasis on deterrence, harm and ideal victims. It addresses centrally the practices of customary marriages and "jealousing" in the context of family violence. Part III considers how the recent sentencing reforms passed by the Australian Parliament entrench tough sentences by prohibiting considerations of Indigenous cultures and customary laws to mitigate a sentence. The final part evaluates how Indigenous cases since the late 1990s enhance an appreciation of the punitive turn in the criminology literature. It concludes that representations of Indigenous culture and customary laws further the punitive agenda, and equally, the punitive turn has hardened representations of Indigenous culture.

I. Historical Approaches to Lenient Sentencing for Cultural Crimes

Representations of Indigenous cultures and customary laws in post-colonial criminal courts have cohered with dominant ideologies on Indigeneity. This section traces the period when leniency was granted to offenders in remote communities due to sympathetic judicial notions of culture. Broadly, in the 1950s and 1960s when assimilation marked the Federal Indigenous policy, the Northern Territory Supreme Court was compassionate to Indigenous offenders who were perceived as backward and deprived of the virtues of Western society.[20] Their backwardness meant that they were not sufficiently developed to comprehend legal norms. "Traditional Aborigines" were regarded as being of lesser moral culpability because of their unfamiliarity with modern, "civilised" ways.[21] They were akin to the "noble savage" – wild but with capacity for goodness once civilised. Through this lens, courts sought to compensate Indigenous cultural backwardness by sentencing lightly.[22] From the 1970s, when there was an official policy of self-determination,[23] courts were more inclined to value the role of the Indigenous community and its culture in deterring criminality.[24] They were no longer satisfied that civilisation would cure Indigenous cultural ills, and judges began to view it as a cause of Indigenous disadvantage.[25] The Supreme Court exhibited respect for Indigenous culture as a vehicle for restoring Indigenous community harmony.[26] Culture would explain, although not excuse, an offence and thereby reduce the offender's culpability and punishment.

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19 *Sentencing Act* (NT) s 104A.

20 Heather Douglas *Legal Narratives of Indigenous Existence: Crime, Law, and History* (PhD thesis, Faculty of Law, University of Melbourne, 2005) at ii.

21 Ibid, at 165.

22 Ibid.

23 Dean Mildren "The Role of the Legal Profession and the Courts in the Evolution of Democracy and Aboriginal Self-Determination in the Northern Territory in the Twentieth Century" (1996) 7 Journal of Northern Territory History at 52.

24 See *R v Davey* (1980) 2 A Crim R 254 at 261-262.

25 Douglas, above n 20, at 183.

26 *R v Minor* (1992) 105 FLR 180 at 181.

When the Northern Territory Supreme Court first recognised the offenders' Indigenous culture in 1950s' sentencing cases, it regarded it as a disadvantage resulting "from lack of civilisation and a concomitant lack of knowledge of white norms".[27] Leniency was granted in order to compensate Indigenous offenders for their "backwardness". Douglas points out that the court treated Indigenous people's lack of civilisation as a signifier of disadvantage that needed remedying through lighter sentencing.[28] The Court was concerned to "ameliorate potentially harsh penalties in situations where an Aboriginal person was disadvantaged by lack of civilisation."[29] Lighter sentences for crimes arising from "tribal law" (such as "traditional" spearing) were handed down.[30] Anthropologists' submissions, with their Western view of assimilation, were treated as experts in sentencing for their authority on culture.[31]

The relative leniency that the Northern Territory Supreme Court was willing to hand down for Indigenous offenders, compared with non-Indigenous offenders, is demonstrated in *R v Anderson*.[32] The case concerned an Indigenous man who attempted to rape a non-Indigenous woman. The court commented that an Indigenous offender would never receive a more severe sentence than a non-Indigenous offender committing a similar offence. The sole Judge, Kriewaldt J stated, "In general it has been my practice … to impose on natives sentences substantially more lenient than the sentence imposed on white offenders for similar offences".[33] An Indigenous person's "colour may work to his advantage but never against him".[34] An extension of this approach is that Kriewaldt J would exhibit greater leniency where the Indigenous offender came from a more "traditional" lifestyle, whereas a relatively "civilised" Indigenous offender would be dealt with more harshly.[35]

By the late 1970s, the Northern Territory Supreme Court adopted a view that the creep of "civilisation" into Indigenous communities and the loss of culture had created despair among Indigenous people, especially where alcohol was involved. Where crimes arose primarily from a cultural context, courts treated the context as reducing the offender's culpability. Therefore, cultural explanations were grounds for even greater leniency in sentencing than previously. The Supreme Court valorised the role of "traditional" culture in reducing crime and took a keen interest in Indigenous "customary law" evidence.[36] Indicative of the Northern Territory Supreme Court's increased acceptance of Indigenous culture was its willingness to allow submissions on culture from Indigenous people, as opposed to having them filtered by anthropologists or other non-Indigenous experts.[37] The evidence was used to not only address the reason for the crime, but also to ascertain the type and length of the sentence that would serve the interests of the community, as

27 Douglas, above n 20, at 165.

28 Ibid, at 174.

29 Ibid.

30 *R v Aboriginal Charlie Mulparinga* (1953) NTJ 205.

31 Douglas, above n 20, at 190.

32 *R v Anderson* (1954) NTJ 240.

33 Ibid, at 249.

34 Ibid, at 249.

35 Douglas, above n 20, at 176, 182.

36 See *R v Job Warusam* [1993] NTSC (Unreported 24 March); *R v Minor*, above n 26, at 192-193.

37 Heather Douglas *Aboriginal Australians and the Criminal Law: History, Policy, Culture* (VDM Verlag, Saarbrucken, 2009) at 181.

demonstrated in *R v Davey*.[38] The Court's treatment of such evidence in the 1980s and early 1990s straddled the putative government policy of self-determination that gave Aboriginal people some control over their affairs, communities and land.[39]

The readiness of the Northern Territory Supreme Court to embrace cultural submissions from the Indigenous community is apparent in the case of *R v Davey*.[40] In that case a 34 year old Indigenous person from Borroloola, Northern Territory, pleaded guilty to the manslaughter of another Indigenous person. The victim had interfered in an argument between Davey and his wife, and made remarks that Davey's wife was previously promised to the victim as part of cultural marriage arrangements, prompting a violent response. This is part of a process of "jealousing", which Blagg describes as "a deliberate strategy designed to arouse jealousy in relationships to test out commitment" and generally "leads to or involves violence".[41] A community elder gave evidence at trial that the remarks made by the victim were improper under Indigenous law. At first instance the Northern Territory Supreme Court recognised that the offender was "forced to take some sort of an action according to your tribal customs and traditions" and the victim "should not have intervened".[42] The trial Judge attached significant weight to the views of the offender's community: "It is very important to me that your community think that you should come back into the community".[43]

On appeal, the Full Federal Court in *R v Davey* noted that the trial Judge took into account "relevant considerations" for "dealing with offences which take place within Aboriginal communities, and involving only those people".[44] The Court felt that it was appropriate for it to "inform itself of the attitude of the aboriginal communities involved, not only on questions of payback and community attitudes to the crime, but at times to better inform itself as to the significance of words, gestures or situations which may give rise to sudden violence".[45] It stated that for cultural crimes it was fitting that the sentence be served in the community for rehabilitation of the offender and reformation of the community to take place.[46]

A series of subsequent cases upheld the importance of Indigenous culture and community considerations in sentencing mitigation in the 1980s and early 1990s. In *R v Burt Lane, Ronald Hunt and Reggie Smith*,[47] the Northern Territory Supreme Court made it clear that the interests of the Aboriginal community would be given equal weight to the wider community demands for a deterrent sentence:[48]

> Some sections of the community may think that it is my duty to impose an exemplary sentence which will serve as a strong deterrent ... My function, as I see it ... is not only to punish the prisoners but to encour-

38 *R v Davey,* above n 24.

39 Mildren, above n 23, at 51.

40 *R v Davey,* above n 24.

41 Harry Blagg *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia* (Law Reform Commission of Western Australia, Perth, 2005) Background Paper 8, Aboriginal Customary Laws Project 94 at 325.

42 *R v William Davey* [1980] NTSC (Unreported, 30 June) at 29-30.

43 Ibid, at 29.

44 *R v Davey*, above n 24, at 257.

45 Ibid, at 257.

46 Ibid, at 261.

47 *R v Burt Lane, Ronald Hunt and Reggie Smith* [1980] NTSC (Unreported 29 May, SCC Nos 16-17, 18-19, 20-21).

48 Ibid, at 98-99.

> age acceptance of the criminal law by them and by the Aboriginal community as a step towards a more orderly and unified society. It would be inimical to this end if I imposed a harsher sentence because the prisoners are blacks ... The punishment which I impose must be seen to be a well-deserved punishment according to white man's community standards and also according to Aboriginal standards.

The Supreme Court in *Joshua v Thomson*[49] pointed out that "the continued unity and coherence of the group of which the particular accused is a member is essential, and must be recognised in the administration of criminal justice by a process of sentencing which takes due account of it and the impact of a member's criminal behaviour on it".[50] In *R v Miyatatawuy*,[51] the Supreme Court maintained that "facts and circumstances arising from this offender's aboriginality remain relevant ... [to] practices affecting her [the offender]. The courts are entitled to pay regard to those matters as relevant circumstances in the sentencing process".[52] In the abovementioned cases, culture was held to be relevant to moral culpability, and the need for deterrence did not overshadow the significance of cultural considerations. Federal and Supreme Courts during the 1980s onwards went further than the Supreme Court in the 1950s in recognising the importance of culture to the offender as an extenuating factor. They identified the role of customary laws in maintaining order, and sought to dispense punishment that would include and serve the offender's Indigenous community.

II. Sentencing Contemporary Indigenous Crimes: Imputing Culture Into Victimisation and Deterrence

In the late 1990s there was a shift in sentencing principles that downplayed matters of the defendant's culpability and emphasised principles of deterrence, the interests of the victim, the seriousness of the offence and the interests of the wider community.[53] This marked a new sentencing regime for Indigenous offenders. These principles that manifested in the Northern Territory Supreme Court's sentencing remarks were part of a broader challenge to the established thinking on the purpose of punishment and principles of proportionality.[54] Indicative of this law and order drift was the introduction of minimum and mandatory prison sentences that negated mitigating factors

49 *Joshua v Thomson* [1994] NTSC (Unreported, 27 May).

50 Ibid, at [39].

51 *R v Miyatatawuy* (1996) 87 A Crim R 574.

52 Ibid, at 579.

53 Courts posit the "seriousness of the offence" to refer exclusively to its harm, rather than the culpability of the offender. Criminologists have widely recognised that culpability is a "central dimension of seriousness" (Andrew von Hirsch "Scaling Punishments: a Reply to Julia Davis", in Cyrus Tata and Neil Hutton (eds) *Sentencing and Society: International Perspectives* (Ashgate, Aldershot, 2004) 360 at 361; Also see Andrew Ashworth "Sentencing" in Mike Maguire, Rod Morgan and Robert Reiner (eds) *Oxford Handbook of Criminology* (3rd ed,Oxford University Press, Oxford, 2002) 1076–1112; Richard Edney and Mirko Bagaric *Australian Sentencing: Principles and Practice* (Cambridge University Press, Melbourne, 2007) at 99. Indigenous cultural explanations can reduce the seriousness of the offence according to the High Court of Australia: *Neal v The Queen* (1982) 149 CLR 305 at 325.

54 For example, preventative detention that emerged in Western societies: Mark Brown "Risk, Punishment and Liberty" in Thalia Anthony and Chris Cunneen (eds) *The Critical Criminology Companion* (Hawkins Press, Sydney, 2008) 253 at 256-257.

relevant to the defendant in the late 1990s.[55] Mandatory sentences sought to punish the harm alone by sending "a clear and strong message to offenders that these offences will not be treated lightly" and to:[56]

- force sentencing courts to adopt a tougher policy on sentencing property offenders;
- deal with present community concerns that penalties imposed are too light; and
- encourage law enforcement agencies that their efforts in apprehending villains will not be wasted.

While rehabilitation of the offender continued to be listed as a consideration, enactments and amendments of the sentencing legislation in the late 1990s around Australia also included punishment, deterrence, the protection of the community, of the offender, accountability for the offender, denunciation, and recognition of the harm done to the victim and the community.[57] In the Northern Territory the emphasis of sentencing reform was on "law-and-order".[58] In the parliamentary debate on the Northern Territory's Sentencing Bill, the Government refused to list Aboriginal customary law as a consideration.[59] Of greater concern than the interests of the Indigenous community or the defendant's moral culpability, which gave rise to leniency, was the wider community's interest in the imposition of harsh punishment. This reasoning also surfaced in the Northern Territory Supreme Court's sentencing remarks from the late 1990s.[60]

Concerns for the victim (and the potential victim) have also pervaded the Supreme Court's rationale for handing down tougher sentences since the late 1990s. Garland points out that victimisation took a front seat in the punitive shift across the West.[61] He states that "the interests and feelings of victims – actual victims, victims' families, potential victims, the projected figure of 'the victim' – are now routinely invoked in support of measures of punitive segregation".[62] The actual victim justifies tougher punishment on the grounds of vindication and the potential victim sanctions harsher penalties to send a deterrence message. The victim is classed as the "ideal victim"

55 John Pratt "Penal Populism and the Contemporary Role of Punishment" in Thalia Anthony and Chris Cunneen (eds) *The Critical Criminology Companion* (Hawkins Press, Sydney, 2008) 265 at 269. On guidelines for minimum sentences, see E McWilliams "Sentencing Guidelines: Who Should be the Arbiter, the Judiciary or Parliament?" (1998) 36(11) LSJ 48. On mandatory sentencing in the Northern Territory for property offences, see George Zdenkowski "Mandatory Imprisonment of Property Offenders in the Northern Territory" (1999) 22(1) UNSWLJ 302.

56 Mr Burke Attorney General "Sentencing Amendment Bill (Serial 186) Work Health Amendment Bill (Serial 189) Juvenile Justice Amendment Bill (Serial 188) Prisons (Correctional Services) Amendment Bill (Serial 187) Presentation and Second Reading, Debate Adjourned" *Northern Territory Parliamentary Record*, Seventh Assembly First Session No 27 17 October 1996 at 9689.

57 See Crimes (Sentencing) Act 2005 (ACT), s 7; Crimes (Sentencing Procedure) Act 1999 (NSW), s 3A; Sentencing Act 1995 (NT), s 5(1); Penalties and Sentences Act 1992 (Qld), s 9(1); Criminal Law (Sentencing Act) 1988 (SA), s 10; Sentencing Act 1997 (Tas), s 3; Sentencing Act 1991 (Vic), s 5.

58 Mr Finch "Sentencing Bill (Serial 85) – Presentation and Second Reading, Debate Adjourned" *Northern Territory Parliamentary Record*, Seventh Assembly First Session No 10 18 May 1995 at 3387.

59 Mr Bell "Sentencing Bill (Serial 85) – Second Reading in Continuation, in Committee, Third Teading" *Northern Territory Parliamentary Record*, Seventh Assembly First Session No 14 22 August 1995 at 4756.

60 *Hales v Jamilmira*, above n 14, at [27]; *R v GJ*, above n 3, at [27].

61 Garland, above n 5, at 11.

62 Ibid.

who is defined by her moral character rather than her injury.[63] An attack on the victim is, in the Durkheimian sense,[64] an attack on the morality of society. The priority given to the interests of the victim is evident in the Second Reading Speech for the Northern Territory Sentencing Bill 1995, in which it was emphasised that "for a number of years, there has been concern about the role of the victim of a crime in the criminal justice process" and on this basis the legislation will "ensure that the victims are not the forgotten people in the sentencing process".[65] In parliamentary debate the Opposition noted its support for "indefinite sentences for violent offenders" because "victims of crime have to be satisfied that offenders pay their penalty and that society exacts retribution from offenders".[66] After the sentencing legislation was enacted, Northern Territory's Attorney General noted that imprisonment for offenders sends "the clear message from society and from this government that their behaviour will not be tolerated" and meets the government's "solemn duty to care for those who have become victims of society's outlaws".[67] He stressed, "When a crime is committed, consideration and priority should be given to the victims. The rights and welfare of the victimisers, the guilty, are a secondary consideration".[68]

In sentencing Northern Territory Indigenous offenders from remote communities over the past decade, the Supreme Court has mobilised the interests of the Indigenous victim around the risk of the Indigenous male and Indigenous culture. Although Indigenous culture does not condone violence within family relationships,[69] the Supreme Court has handed down severe sentences to deter the community from practising culture, such as customary marriage. In increasing the sentence in *GJ*, the promised marriage case discussed below, the Supreme Court stated that a tougher sentence was required to deter those "who might feel inclined to follow their traditional laws".[70] Shaw points out that the courts have created a "damaging fiction" about the "barbaric" nature of Indigenous culture to impute Indigenous communities.[71] By contrast, the Indigenous victim of violence is cast as an "ideal victim" who is devoid of culture and defined exclusively by her gender and age.[72] She is the embodiment of "white" social norms. Blagg has noted that Indigenous women have traditionally found it hard to achieve victim status because of racist stereotypes, but they are now afforded victim status, "provided they are positioned within victim discourse as *helpless, hopeless victims of traditional Aboriginal male violence, sanctioned – even encouraged*

63 Kimberle Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour" (1991) 43 (6) Stan Law Rev 1255 at 1278. Also see Nils Christie "The Ideal Victim" in Ezzat A Fattah (ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (Macmillan, Basingstoke, 1986) 17 at 17; Sandra Walklate *Victimology: The Victim and the Criminal Justice Project* (Unwin Hyman, London, 1989).

64 Emile Durkheim *The Division of Labor in Society* (The Free Press, New York, 1964) at 70–110.

65 Finch, above n 58, at 3387.

66 Bell, above n 59, at 4759.

67 Mr Burke Attorney General "Ministerial Statement: Criminal Justice System and Victims of Crime" *Northern Territory Parliamentary Record* Seventh Assembly First Session No 24, 20 August 1996 at 8080.

68 Ibid.

69 Behrendt, above n 17, at 14.

70 *R v GJ*, above n 3, at [38].

71 Wendy Shaw "(Post) Colonial Encounters: Gendered Racialisations in Australian Courtrooms" (2003) 10(4) Gender, Place & Culture 315 at 329.

72 See *R v GJ*, above n 3, at [36].

– *by Aboriginal law*".[73] In recent statutory rape and jealousing cases the Supreme Court reinforces the Indigenous victim's helplessness by referring to the victimising nature of customary laws.[74]

A. Tougher sentencing for statutory rape in customary marriages

Although statutory rape offences for customary marriage are rare,[75] with only one case heard by the Northern Territory Supreme Court in the twentieth century,[76] recent cases nonetheless demonstrate the Full Supreme Court's downplaying of the significance of cultural circumstances in mitigation. The defendants in these cases sought to argue that sex with their promised (or actual) wives in Indigenous law, who were under the age of consent, was culturally acceptable and allowed under "traditional" law.[77] Indeed, until 2004 sex with a minor was decriminalised under legislation where the couple was married under Indigenous customary law (*Criminal Code* 2009 (NT) s 129[78]). Nonetheless, since *Hales v Jamilmira* the Supreme Court has sent a strong deterrence message about such cultural practices, based on the seriousness of the offence and the interests of the victim and wider community.[79] Similar judicial approaches are taken in cases involving "jealousing",[80] which are briefly discussed towards the end of this article.

The practice of customary marriage has taken place in Northern Territory Indigenous communities for thousands of years and continues to operate in a number of remote communities, although the practice is generally in decline.[81] Customary marriage is based on a highly complex system that involves a myriad of "strictly regulated sets of social and ritual relationships conducted over many years which bound all parties in a mesh of overlapping ties and responsibilities".[82] Where it continues to be practised, customary marriage is regarded as essential to the transmission and continuation of Indigenous law, culture, ceremonies, traditional economies, land custodianship and genetic integrity in small communities.[83] While arrangements vary among communities,

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73 Harry Blagg "Colonial Critique and Critical Criminology: Issues in Aboriginal Law and Aboriginal Violence" in Thalia Anthony and Chris Cunneen (eds) *The Critical Criminology Companion* (Hawkins Press, Sydney, 2008) 129 at 138 (emphasis in original).

74 *R v GJ*, above n 3, at [25], [36]; *The Queen v Bara* [2006] NTCCA 17 at [18].

75 This point is made by Mildren J in *Hales v Jamilmira*, above n 14, at [54].

76 The earlier case of *R v Mungurala* (Unreported, SC (NT) 18 April 1975 SCC 313 of 1974) was not analogous to contemporary promised marriage cases because it involved an offender who was not aware that the victim was promised to him, although in fact she was. Therefore, the sexual act was not sanctioned by Indigenous law: *Hales v Jamilmira*, above n 14, at [54].

77 *Hales v Jamilmira*, above n 14, at [61]; *R v GJ*, above n 3, at [21]; *The Queen v Redford*, above n 3, at 4.

78 Section 129(1) of the *Criminal Code* 2009 (NT), when read with the definition of "unlawfully" in s 126 and the definition of husband and wife in s 1, decriminalised under-age sex in marriage. This was referred to in *Hales v Jamilmira*, above n 14, at [50].

79 *R v GJ*, above n 3, at [38]; *The Queen v Redford*, above n 3, at 6.

80 *The Queen v Bara*, above n 74, at [18]; *The Queen v Linda Nabarula Wilson* [2006] NTSC (Unreported, 19 May, SCC 20521793) at 4.

81 Wild and Anderson, above n 15, at 71; Northern Territory Law Reform Committee, above n 15, at 23. Customary marriage also exists in Western Australia (see Blagg, above n 16, at 173; Law Reform Commission of Western Australia, above n 12, at 343).

82 Anna Haebich *Broken Circles: Fragmenting Indigenous Families 1800-2000* (Freemantle Art Centre Press, Freemantle, 2000) at 594. Also see Northern Territory Law Reform Committee, above n 15, at 24.

83 Joan Kimm *A Fatal Conjunction: Two Laws Two Cultures* (Federation Press, Sydney, 2004) at 62, 66; Wild and Anderson, above n 15, at 66, 68, citing Geoffrey Bagshaw *Traditional Marriage Practices Among the Burrara People of North-Central Arnhem Land* (North Australian Aboriginal Legal Aid, Darwin, 2002).

customary marriage generally involves promised brides offered as a reward for male initiates. Very young women from appropriate skin groups are promised to men who have undergone initiation, achieved a "certain level of maturity and status" (around 30 years old)[84] and who have provided food or payment to the promised wife's family.[85] Women enter the marriage once they are post-menarche. Neither the man or woman have a choice in the arrangement, which is based on a collective "marriage contract" between groups and families.[86] Customary marriage is not marked by a symbolic ceremony, making it difficult for courts to determine when it occurs.[87]

Within traditional marriages, Northern Territory Indigenous communities condone sexual relations where the young women is under 16 years but has reached puberty.[88] However, they *condemn* sexual assault. As a result, sexual violence in customary marriages is rare.[89] The *Little Children are Sacred Report* stated that it did not "come across any evidence … to show that children were being regularly abused within, and as a result of, traditional marriage practices".[90] The sentencing remarks discussed below are concerned with the charge of statutory rape in a customary law context, rather than sexual assault. The Supreme Court made it clear that it was sentencing offenders who had *consensual* sex with a minor.[91] Dwyer has argued that the "issue of promised marriages should be clearly distinguished from sexual abuse, which is part of the breakdown of functioning communities and the cycle of poverty".[92] In the case of *R v GJ* violence preceded the sexual act – the victim was threatened and struck with a boomerang.[93] However, the assault charge was sentenced separately and was not subject to an appeal.[94] Therefore, the cultural question for the Court of Appeal was solely whether traditions of customary marriage were relevant in sentencing those who had consensual sex with a wife or promised wife under the age of 16 years; because of the nature of the charge, it was not open to the Court to deal with sexual assault.

In the following cases of *Hales v Jamilmira*,[95] *R v GJ*[96] and *The Queen v Redford*,[97] the offenders were convicted of statutory rape on their promised or actual brides. In *Hales v Jamilmira* and *R v GJ*, although the promised brides had reached puberty, the offender had not entered into customary marriage with their promised brides in the sense of cohabiting.[98] The defendants had offered income to the victim's family as consideration for the promise[99] and the promise had been

84 However, at least in the past, there was "no concept of 'age' as the Western cultures know it today" (Wild and Anderson, above n 15, at 69). The *Little Children Are Sacred Report* noted that "many Aboriginal people were still confused as to the age of consent and as to the general state of the wider Australian law as far as traditional marriage practices were concerned" (Wild and Anderson, above n 15, at 71).

85 Kimm, above n 54, at 62; Wild and Anderson, above n 15, at 68.

86 Wild and Anderson, above n 15, at 68.

87 Dean Mildren "Customary Law: Is it Relevant?" (2008) 1(2) NTLJ 69 at 70.

88 Wild and Anderson, above n 15, at 69.

89 Ibid.

90 Ibid, at 68.

91 *R v GJ*, above n 3, at [22]; *Hales v Jamilmira*, above n 14, at [7], [83], [85]; *The Queen v Redford*, above n 3, at 6.

92 Peggy Dwyer "Last Drinks: Correspondence" (2008) 31 Quarterly Essay 87 at 90.

93 *R v GJ*, above n 3, at [2]-[3].

94 Ibid, at [4].

95 *Hales v Jamilmira,* above n 14.

96 *R v GJ*, above n 3.

97 *The Queen v Redford*, above n 3.

98 *R v GJ*, above n 3, at [10].

99 *Hales v Jamilmira*, above n 14, at [12].

made with the victim's family in accordance with "traditional Aboriginal law".[100] The offenders were traditional men who were custodians of traditional knowledge.[101] The offences "occurred in communities where the practice of traditional marriage was still relatively strong and the impacts of colonisation [were] reduced due to relative geographical and social isolation".[102] The offenders were nonetheless aware that the sexual intercourse was not required under customary law,[103] and in some cases believed it amounted to an offence under Anglo-Australian law but chose to follow their customary law nonetheless.[104] In *The Queen v Redford* the offender and victim were married at the time that they were pursuing sexual relations.[105] The offender believed the sexual conduct was an offence even though in the initial period of their relationship it was lawful.[106] While the offenders accepted the wrongfulness of the act, they did not consider the offence to be *as serious* as it would have been if the young women were not promised to them. Defence submissions therefore stressed that the cultural arrangement reduced the moral culpability of the offender. They pointed to the fact that until 2004, Northern Territory legislation decriminalised sexual relations with minors within customary marriage. This, however, did not preclude the courts from handing down sentences that sought to deter both sex with minors and customary marriage altogether.

1. Hales v Jamilmira (2003): statutory rape on a promised bride

The first case of its type of statutory rape on a promised bride before the Northern Territory Court of Criminal Appeal[107] involved a 49 year old Indigenous male from Maningrida who had sexual relations with his 15 year old promised wife. The defendant, Jamilmira, submitted that his sentence should be mitigated on the grounds that the relationship had almost reached the status of customary marriage when sex would have been allowed in customary law and Northern Territory criminal law.[108] Aboriginal witnesses gave evidence that customary marriage was still practised in Maningrida and the victim's family had arranged for the victim to be sent to her promised husband on his outstation.[109] The Northern Territory Court of Criminal Appeal increased the sentence from 24 hours to 12 months, which could be suspended after one month.[110] The courts pointed to the "irreconcilable conflict between Aboriginal customary laws relating to promised marriage and the legal system applying generally in the Northern Territory"[111] and the fact that "the law of the Northern Territory must prevail".[112]

100 Ibid, at [16]; *R v GJ*, above n 3, at [10].

101 *Hales v Jamilmira*, above n 14, at [14]; *R v GJ*, above n 3, at [9].

102 Wild and Anderson, above n 52, at 69.

103 *Hales v Jamilmira*, above n 14, at [87]; *R v GJ*, above n 3, at [23], [30].

104 *Hales v Jamilmira*, above n 14, at [87]; *The Queen v Redford*, above n 3, at 4.

105 *The Queen v Redford*, above n 3, at 4.

106 The customary marriage and sexual relations began in 2003. The legislation that criminalised sexual relations in customary marriage commenced in 2004 as a result of the amendment of s 127(1)(a) of the Northern Territory Criminal Code.

107 This is noted by Mildren J *Hales v Jamilmira*, above n 14, at [54].

108 Ibid, at [20], [50].

109 Ibid, at [51].

110 Ibid, at [37].

111 Cited in McIntyre, above n 52, at 344.

112 *Hales v Jamilmira*, above n 14, at [86].

Riley J noted that this was especially the case because it reflects the interests of the "wider community".[113] Martin CJ stated:[114]

> Personal and general deterrence must feature as significant factors in sentencing for an offence such as this. I am of the opinion that notwithstanding the cultural circumstances surrounding this particular event, the protection given by the law to girls under the age of 16 from sexual intercourse is a value of the wider community which prevails over that of this section of the Aboriginal community. To hold otherwise would trivialise the law and send the wrong message not only to Aboriginal men, but others in Aboriginal society who may remain supportive of the system which leads to the commission of the offence.

The majority on the Court of Criminal Appeal downplayed the significance of customary marriage laws in sentencing the defendant. It held that while promised marriage was part of the law of the Burarra society, and sex with a promised female under 16 was not considered aberrant in that community, it could not be regarded as a significant factor.[115] The Court deferred to the standards of the wider community to set them apart from Indigenous peoples' values.[116] Martin CJ was "of the opinion that notwithstanding the cultural circumstances surrounding this particular event, the protection given by the law to girls under the age of 16 from sexual intercourse is a value of the wider community which prevails over that of this section of the Aboriginal community."[117] The Court recognised that for decades the average age of first time mothers at Maningrida was 15 years, however, "the perspective of the wider Territory community" of these breaches "is a good reason to reinforce the operations of the law".[118]

Martin CJ and Riley J refer to the victim in terms of the need to "protect young girls" or "women and children' generally".[119] The victim is positioned as a weak and passive "ideal"[120] victim to whom the Anglo-Australian community has an affinity. This contrasts with the offender whose practice of customary law is serious because it offends "white" values.[121] However, Douglas notes that despite the reference to victim's concerns, there is little evidence taken from the victim herself in *Hales v Jamilmira*: "the victim is rendered mute" as far as "the white legal system is concerned".[122] In cases where the Indigenous victim has actively expressed views that reflect cultural interests, the courts have dismissed such views. For example in *R v Miyatatawuy*,[123] the Supreme Court refused to canvass the views of the male victim that he would rather the offender be punished by traditional punishment than receive a custodial sentence because this would be beneficial for his relationship with the offender. The Chief Justice remarked, "I am not satisfied that the wishes of a victim of an offence in relation to the sentencing of an offender can usually be relevant. The criminal law is related to public wrongs, not issues which can be settled

113 Ibid, at [88].

114 *Hales v Jamilmira*, above n 14, at [27].

115 Ibid.

116 Ibid, at [34].

117 Ibid, at [26].

118 *Hales v Jamilmira*, above n 14, at [26].

119 Ibid, at [49] per Martin CJ, [80], [88], [89] per Riley J.

120 Crenshaw, above n 63, at 1278.

121 *Hales v Jamilmira*, above n 14, at [89] per Riley J.

122 Heather Douglas "'She knew what was expected of her': the White Legal System's Encounter with Traditional Marriage" (2005) 13 Feminist Legal Studies 181 at 182.

123 *R v Miyatatawuy* (1996) 87 A Crim R 574 at 580.

privately".[124] Therefore, sentencing courts are more inclined to rely on the ideal victim whose weakness justifies higher sentences and represents the wrongfulness of Indigenous practices.

In *Hales v Jamilmira* it was only the dissenting Judge, Mildren J who regarded the "social pressures brought to bear on an Aboriginal defendant as a result of Aboriginal customs" as "relevant to *moral blame* and therefore to sentencing".[125] Mildren J emphasised that *Hales v Jamilmira* "was not a case ... of the respondent using his position as an older person to satisfy his lust".[126] Notwithstanding these remarks, the Northern Territory Parliament criminalised under-age sex in customary marriage.[127] This enactment and the reasoning of the majority in *Hales v Jamilmira* paved the way for higher sentences for this type of offence in subsequent cases.[128]

2. R v GJ (2005): post-criminalisation of under-age sex in promised marriage

There was a hardening of judicial views towards statutory rape in customary marriage in *R v GJ*, especially by Mildren J who led the majority and departed from his position in *Hales v Jamilmira*. Three months before the offence the Northern Territory Criminal Code was amended to remove the immunity from offenders who committed statutory rape within customary marriage and to increase the maximum penalty for statutory rape.[129] In *R v GJ*, a 54 year old male was charged with "unlawful assault" and "statutory rape" of a 14 year old female who was his promised wife under Ngarinaman law. The defendant lived according to his traditional law, with little contact with the non-Indigenous society and had with no prior convictions. English was his fourth language and he had not met a non-Indigenous person until the age of 30. The defendant provided, and continued to provide, goods to the family of the promised wife as consideration for the customary marriage.[130]

The circumstances of the offence in *R v GJ* were that the victim's grandmother had sent the victim to be with the defendant on his outstation, as she believed it was the victim's obligation under customary law. From the outset GJ asserted that "he had acted within his traditional rights",[131] believing it was acceptable to have sex with a 14 year old who was promised to him. The Northern Territory Court of Criminal Appeal imposed a sentence of 3 years and 11 months, which could be suspended after serving 18 months. The Court held that culture did not reduce culpability because while the offender believed he was "entitled" to act in the way he had "according to traditional law", he was not "obliged" to do so.[132] Furthermore, the respondent's belief that he was justified in committing the offence, and thus his lack of remorse, worked against mitigating the sentence.[133] In this way, the Indigenous context was not only rendered insignificant in reducing moral culpability, but also gave rise to an aggravating factor in sentencing because it precluded feelings of contrition.

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124 Ibid, at 580.

125 *R v Miyatatawuy*, above n 123, at [52] (emphasis added).

126 Ibid, at [49].

127 On 17 March 2004 the Northern Territory Criminal Code was amended by the Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003 to make the criminalisation of sexual intercourse with a child under the age of 16 extend to sex within customary marriage.

128 See *R v GJ*, above n 3, at [32]; *The Queen v Redford*, above n 3, at 3.

129 The offence took place on 20 June 2004, three months after the legislation was changed: *R v GJ*, above n 3, at [17], [32].

130 *R v GJ*, above n 3, at [9].

131 Ibid, at [12].

132 Ibid, at [30].

133 Ibid, at [35].

The Court or Criminal Appeal focused on the objective seriousness of the offence, especially given the youthfulness of the victim.[134] In the hearing, Riley J responded to submissions from the accused about the right to preserve custom and tradition by asking, "but what about the victim? Has anyone asked her if she wants to preserve customs and traditions?"[135] The Court maintained that the sentence should "reflect and recognise" its seriousness "in the eyes of the wider community".[136] The age difference between the offender and victim was particularly threatening for the victim.[137] Mildren J stated that victims require protection from older male offenders' "taking advantage of the immaturity of the young in order to *satisfy their lust*"[138] This is a marked departure from Mildren J's view in *Hales v Jamilmira*, where he held that the cultural belief removed the imputation of an offence based on lust.[139]

The Court perceived itself as obliged to deter community members and to protect the community through a special punitive sentence against customary marriage. The initial lighter sentence "failed to act as a deterrent to others who might feel inclined to follow their traditional laws".[140] The Court depicted the threat of violence in Indigenous communities as a greater threat than in the non-Indigenous community because of *inter alia* customary law. This required "appropriate penalties" to deter like-minded men.[141] It remarked that courts have been concerned to send "the correct message to all concerned" that "Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so".[142] Commenting on the Northern Territory *Criminal Code* s 127(1)(a), which in 2004 made it unlawful to have sex with a minor in customary marriages, Mildren J stated:[143]

> In the context of a case such as this, where a promised marriage is involved, whilst the law has stopped short of making such marriages illegal, such marriages cannot be consummated until the promised wife has turned 16. Plainly the purpose of s 127(1)(a) in that context is *to give Aboriginal girls some freedom of choice as to whether or not they want to enter into such a marriage and to thereby empower them to pursue equally with young Aboriginal men employment opportunities or further education rather than be pushed into pregnancy and traditional domesticity prematurely*.

Although Southwood J in *R v GJ* generally agreed with Mildren J's conclusions, he sounded a few notes of caution, which highlighted Mildren J's symbolic shift away from viewing Indigenous legal entitlements as relevant to moral culpability. Whereas Mildren J stressed the need to teach Indigenous people in GJ's community to "better understand these important principles" of the criminal law,[144] Southwood J cautioned against the offender shouldering the burden of community education through a particularly harsh sentence:[145]

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134 Ibid, at [30]-[31], [35].

135 Ken Brown "Customary Law: Sex with Under-Age 'Promised Wives'" (2007) 32 (1) Alt LJ 11 at 14.

136 *R v GJ*, above n 3, at [27].

137 Ibid, at [35].

138 Ibid, at [36] (emphasis added).

139 *Hales v Jamilmira*, above n 14, at [49].

140 *R v GJ*, above n 3, at [38].

141 Ibid, at [38].

142 Ibid, at [37].

143 *R v GJ*, above n 3, at [36], emphasis added.

144 Ibid, at [37], [67].

145 Ibid, at [73].

> Where sentencing and the manner of sentencing has the purpose of educating both the offender and the community care must be taken to ensure that an offender is not seen to be doubly punished and is not made to shoulder an unfair burden of community education.

Also, whilst Mildren J emphasised the importance of allowing "freedom of choice" in entering a customary marriage,[146] Southwood J pointed to its utility for Indigenous communities: "It must not be forgotten that Aboriginal customary law often has an important and beneficial influence in Aboriginal communities".[147] Southwood J also blew a reinvigorating breeze across the embers of moral culpability, by pointing out that the *Sentencing Act* 1995 (NT) s 5(2)(c) directed the Court to have regard to the extent to which an offender is to blame for an offence when sentencing an offender:[148]

> The courts of the Northern Territory when sentencing an Aboriginal offender properly take into account whether he or she has received tribal punishment and whether what he or she has done has been in accordance with Aboriginal customary law and in ignorance of the other laws of the Northern Territory. Clearly, a person who commits a crime because he is acting in accordance with Aboriginal customary law may be less morally culpable than someone who has acted in an utterly contumelious way without any justification whatsoever and this may in appropriate circumstances be a ground for leniency when sentencing Aboriginal offenders: *Hales v Jamalmira*.

Nonetheless, Southwood J's dissenting remarks are the exception that proves the rule: the Northern Territory Supreme Court no longer treats Indigenous customary law and an offender's lack of awareness of the Anglo-Australian legal system as significant mitigating factors. Indeed, the Court is more inclined to regard these factors as aggravating a sentence because of the need to send a deterrence message. The current judicial position perceives culture as requiring a punitive sentence to restrain Indigenous people from practising their Indigenous laws and to have a civilising effect.

3. The Queen v Redford (2007): statutory rape within customary marriage

The third Northern Territory Supreme Court case indicative of the emergent judicial position on customary marriage is *The Queen v Redford*. It illustrates the problematic intersection between expectations of the Indigenous community, the expectations of the individual offender and the expectations established by the legislature. The offences straddle the legislative transition from the decriminalisation to the criminalisation of under-age sex in customary marriage. The offender, however, was under the apprehension that he was breaching Anglo-Australian law by having sex with a minor, even when it was legal.[149] The sexual acts took place in 2003 and 2004, the criminalisation occurred on 17 March 2004. The facts were that the 13 year old female from Malnjangarak entered a "tribally arranged marriage" with the 25 year old defendant from Buluhkaduru in 2003, based on an arrangement made four years earlier between the parents of the female and the parents of the defendant.[150] They began a sexual relationship at that time and it continued throughout 2004. The prosecution took place in 2004 and the defendant was convicted of statutory rape for the sexual acts between 2003 and 2004.

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146 *R v GJ*, above n 3, at [36].

147 Ibid, at [71].

148 Ibid.

149 Mildren J stated, "It seems to me that I cannot hold it against you that you thought you were breaking the law when you were not breaking the law. On the other hand, I can not [sic] take into account that you may have thought that you were not breaking the law" (*The Queen v Redford*, above n 3, at 4).

150 Ibid, at 2.

The Supreme Court accepted that promised marriage "is still a strong tradition in the Maningrida area and has been … for thousands of years."[151] Nonetheless it stated that promised marriages will not exist forever – "things are changing even in [the offender's] community and now it is not always the case that promised marriages still go ahead."[152] The Court sought to hasten this change. Mildren J, the sole judge, ordered a custodial sentence "to deter others from similar offences offending in this way, to underline the message that offences of this nature will not be tolerated and to express the Court's disapproval of your conduct."[153] Commenting generally rather than with reference to the situation of the victim, Mildren J noted that the law sought to prevent young persons from "being pushed into traditional domesticity prematurely".[154] This comment on the harm of customary marriage reflects a sense of cultural risk that goes beyond the sexual offence and requires a broader deterrence message.

B. Sentencing "jealousing" and decontextualisation

"Jealousing" is another cultural practice that demonstrates the Northern Territory Supreme Court's retreat from cultural considerations in sentencing. Blagg points out that jealousing exists in Indigenous communities as an expression of insecurities arising from uncertainty in relationships "where old rules no longer apply, particularly those governing marriage and sexual relations, traditionally controlled through skin relationships and promised marriages".[155] Jealousing was a feature in the aforementioned case of *R v Davey*,[156] in which the Northern Territory Supreme Court and the Full Court of the Federal Court deemed it, and the victim's desire for a non-custodial sentence, as a relevant mitigating factor. In present jealousing cases, the courts have overshadowed Indigenous victims' submissions that have sought shorter sentences with considerations of the seriousness of the offence that require longer prison terms.

In *The Queen v Bara*,[157] the offender and victim lived together on Groote Eylandt, Northern Territory. The offender attacked the victim with a knife causing serious wounding after she had made him jealous. The victim, who subsequently reconciled with the offender, made a statement to the Court that she did not want the offender to go to prison.[158] The elders of the community told the Court they would discuss the offence as part of "men's business" and this would involve a period of isolation in a male-only environment.[159] The Northern Territory Court of Criminal Appeal noted that the victim's wishes for a non-custodial sentence were not a significant consideration.[160] In this instance the Court sent a "message" to "men in Aboriginal communities that the wishes of a victim, be they freely given or given under some form of duress, will not prevail in the face of serious criminal conduct".[161] Here, the values of the putative victim were more important than the interests of the actual victim.

151 Ibid, at 4.

152 *The Queen v Redford*, above n 3, at 4.

153 Ibid, at 6.

154 Ibid, at 5.

155 Blagg, above n 16, at 146.

156 *R v Davey*, above n 24.

157 *The Queen v Bara*, above n 74.

158 Ibid, at [8].

159 Ibid, at [11].

160 Ibid, at [12].

161 Ibid, at [19].

The main sentencing factors, for the Court in *The Queen v Bara*, were that the "objective circumstances" of the seriousness of the crime and "general deterrence".[162] The Court noted that because "offences of the type committed by the respondent continue to be prevalent in Aboriginal communities" and because jealousy was "a common motivation for such attacks" there needs to be harsh punishment to send a message to the community.[163] A significant sentence was also required because "victims lack the support mechanisms that are available in many other sections of our community. These vulnerable victims are entitled to the protection of the law".[164] Therefore, the Indigenous community context was treated as aggravating the offence because of the defencelessness of Indigenous victims.

In *The Queen v Linda Nabarula Wilson*,[165] a Warlpiri woman in Alice Springs killed her husband in circumstances that constituted manslaughter. Prior to the offence the victim and the offender had a brief verbal argument about another male. The offender stated that she stabbed him because "he was jealousing" her.[166] Disregarding the cultural provocation in mitigation, the Judge focused on restoring the aggrieved victim's family through a harsh sentence.[167] Cultural factors were overridden by other sentencing considerations. Namely, the Supreme Court noted that "any sentence in this case must stress the need for denunciation, retribution and deterrence both general and personal in this case".[168]

III. Sentencing Reforms Removing Culture

The punitive turn for offenders in Northern Territory remote communities and cultural considerations culminated with Federal Government legislation that excluded customary law and cultural practice in sentencing under the *Northern Territory National Emergency Response Act* 2007 (Cth) s 91.[169] The provision was part of a broader legislative and administrative package, labelled "The Intervention", that required the suspension of the *Racial Discrimination Act 1975* (Cth) and placed restrictions on Indigenous welfare, land rights and community governance.[170] In relation to sentencing, s 91 states:

> In determining the sentence to be passed, or the order to be made, in respect of any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:
>
> (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates…

162 Ibid, at [16]-[17].

163 *The Queen v Bara*, above n 74, at [17].

164 Ibid, at [18].

165 *The Queen v Linda Nabarula Wilson*, above n 80.

166 Ibid, at 3.

167 Ibid, at 4.

168 Ibid.

169 The Northern Territory National Emergency Response Act 2007 (Cth) s 91 both stated that in "determining the sentence": "A court must not take into account any form of customary law or cultural practice as a reason for: (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or (b) aggravating the seriousness of the criminal behaviour to which the offence relates".

170 Northern Territory National Emergency Response Act 2007 (Cth); Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth); Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth).

This provision replicates the *Crimes Act* 1914 (Cth) s 16A(2A) for sentencing Commonwealth offences,[171] which was introduced in 2006 to overcome sentencing situations where "a practice can be shown to be part of the background and cultural environment of a defendant" and "in conflict with the rights of the victim".[172] It precludes "any customary law or cultural practice from being taken into account … in such a way that the criminal behaviour concerned is seen as less culpable."[173] Indigenous Affairs Minister Brough stated in Parliament that the sentencing reforms in the Northern Territory seek to privilege the "seriousness" of the offence above cultural factors.[174] The legislation is aimed at increasing sentences for Indigenous offenders. It is exclusively targeted at those offenders whose culpability is reduced due to cultural or customary law factors. Minister Brough claimed that Indigenous offenders have been "hiding behind customary law" to receive reduced sentences.[175]

In line with the punitive turn, the legislation responds to the Government's belief that "we've got to have stronger penalties" for Indigenous offenders.[176] The Minister criticised lenient sentences given to Indigenous offenders because these sentences failed to "send strong messages to communities".[177] In commending to parliament the sentencing reforms and illustrating the Government's opposition to cultural considerations (albeit with incorrect reference to the role of customary law in sentencing[178]), Senator MacDonald stated:[179]

> Criminal behaviour cannot in any way be excused, justified, authorised, required or rendered less serious because of customary law or cultural practice. The Australian Government rejects the idea that an offender's cultural background should automatically be considered, when a court is sentencing that offender, so as to mitigate the sentence imposed.

The sentencing reform in s 91(a) suspends ordinary judicial discretion in sentencing, which enables courts to take into account any material fact relevant to the offender or offence, including cultural factors.[180] The reforms resonate with Mariana Valverde's notion of "liberal despotism" in which governments brutally enforce liberal notions on groups requiring civilisation.[181] In other

171 The legislation does not affect judicial discretion in sentencing in other states and territories despite Commonwealth Government attempts to have states insert the provision: Mal Brough, Minister for Indigenous Affairs, "Second Reading Speech: Northern Territory National Emergency Response Bill 2007" *Parliamentary Debates: House of Representatives Official Hansard* No 11 (Commonwealth of Australia, Canberra, 7 August 2007) at 16.

172 Ellison, above n 9, at 16.

173 Senator Sandy MacDonald "Second Reading Speech Crimes Amendment (Bail and Sentencing Bill)" *Parliamentary Debates: Senate* (Commonwealth of Australia, Canberra, 14 September 2006) at 12.

174 Brough, above n 171, at 15-16.

175 Kerry O'Brien "Australian Law Should Apply to All: Brough" *7.30 Report* Television Transcript, Australian Broadcasting Corporation, 23 May 2006 <www.abc.net.au/7.30/content/2006/s1645722.htm>.

176 Anne Barker "Brough Demands Tougher Sentences for Child Offenders" *PM* Radio Transcript, Australian Broadcasting Corporation, 31 October 2007 <www.abc.net.au/pm/content/2007/s2077867.htm>.

177 Ibid.

178 Contrary to Senator MacDonald's statement below, evidence of cultural background is not "automatically considered" in sentencing. In the Northern Territory the Sentencing Act (NT) s 104 requires that prior notice of cultural background evidence be given and Crown scrutiny of such evidence before it is admitted. Thereafter the judiciary has discretion to consider such matters as relevant or not. Also, customary cultural evidence cannot be considered as a defence to excuse, justify or authorise criminal behaviour: Law Reform Commission of Western Australia, above n 12, at 7, 22.

179 MacDonald, above n 173, at 12.

180 *Neal v The Queen*, above n 53, at 326.

181 Mariana Valverde "'Despotism' and Ethical Liberal Governance" (1996) 25(3) Economy and Society 357 at 360.

words, the aspiration of liberal regimes for freedom involves taming those who are different before they too can enjoy the freedom of the majority. Legal philosopher Giorgio Agamben describes how separate legal provisions create states of exception to normalise the dominant culture.[182] The exception, for Agamben, is not simply outside the social order but crucial to its existence.[183]

Avowing the dominant legal norm, Senator MacDonald stated in relation to the sentencing amendment; "All Australians should be treated equally under the law. Every Australian may expect to be protected by the law, and equally every Australian is subject to the law's authority."[184] Given that all Australians can otherwise rely on personal and contextual factors relevant to culpability to argue for mitigation, Indigenous Australians are provided with a distinct disadvantage by not being able to plea culture or customary law issues in sentencing. Legal commentators have criticised the provision for suspending judicial discretion in a racially discriminatory manner that nullifies Indigenous-specific sentencing factors.[185] Northern Territory legal services have also identified increased sentences since the implementation of s 91(a) of the *Northern Territory National Emergency Response Act* 2007 (Cth).[186] In this respect, the punitive turn for Northern Territory Indigenous offenders involves a unique suspension of their rights in order to send a message to them and their communities that their culture requires normalisation in line with "all Australians".[187]

IV. Conclusion: Implications of the Punitive Turn for Indigenous Cultural Considerations

The punitive turn in post-colonial society has not only seen courts and governments endorse tougher punishment, but also reclassify Indigenous culture as threatening to victims and offensive to the wider community. An historical analysis of sentencing jurisprudence on the Northern Territory Supreme Court reveals a shift away from providing significant leniency where cultural circumstances reduced culpability. Over the past decade the Court has primarily emphasised the interests of the wider community, deterrence, the seriousness of the offence and the harm to the victim in its sentencing considerations. While these law and order themes operate across Western societies,[188] they have distinct implications for Indigenous offenders who commit crime in cultural circumstances as well as their communities. As demonstrated in the customary marriage cases, messages of deterrence are directed not only to the offender but to the Indigenous community in relation to their marriage practices. They are intended to have a civilising effect on Indigenous communities. In jealousing cases, the victims' interests in community punishment are undermined because they do not satisfy the "ideal" victim's interest in longer prison sentences.[189] The acultural

182 Giorgio Agamben *Homo Sacer: Sovereign Power and Bare Life* Translated by D Heller-Roazen (Stanford University Press, Stanford, 1998) at 15–16.

183 Agamben, above n 182, at 28–29.

184 MacDonald, above n 173, at 12.

185 Deirdre Howard-Wagner "Legislating Away Indigenous Rights" (2008) 12(1) Law Text Culture 45 at 58; Human Rights Law Resource Centre "Practical Implications of the Northern Territory Emergency Response". Submission to the Northern Territory Emergency Response Review Board, 15 August 2008, at 22.

186 Human Rights Law Resource Centre, above n 185, at 22.

187 MacDonald, above n 173, at 12.

188 Garland, above n 5, at 7.

189 Pratt, above n 55, at 271-272. Also see Garland, above n 5, at 11.

ideal victim is set apart from the victimising *Indigenous* offender and the community that supports non-state punishment.[190]

Fleury-Steiner et al inform us that "tough sanctions" have been accompanied by a rhetoric that "creates new forms of knowledge of space, self, and the other".[191] The Northern Territory Supreme Court and Federal policy makers have redefined the space and members of the remote Indigenous community as dangerous to victims. The Court no longer places emphasis on the Indigenous community as a vehicle for restoring the offender and promoting peace with the victim.[192] Conversely, less weight is placed on Indigenous community submissions relating to punishment.[193] The Federal Government deems culture as a burden on mainstream "social norms"[194] and "safety"[195] in order to remove cultural considerations in sentencing and enforce coercive measures on communities. It encourages tougher penalties through the "imagined possibility of victimization"[196] in remote communities due to the practice of Indigenous customary laws.[197]

Analyses of the punitive turn are enhanced with an understanding of its unique impact on minority cultures. The refashioning of Australian Indigenous culture as a threat rather than a benefit for remote communities has provided a catalyst for tougher penalties for Indigenous offenders. The impact of the punitive turn on Australian Indigenous people is revealed in cases on promised marriage and jealousing. Tougher sentences are handed down not merely to discipline the individual, but also as Foucault put it, to exercise "social power" through the body of the individual.[198] The Supreme Court and Federal Government exercise this power to militate against Indigenous cultural practices. Tougher penalties have been justified with reference to cultural crime risks in Indigenous communities and in turn the community's role in sentencing and offender restoration has been nullified in favour of state coercive apparatus.

190 Blagg, above n 8, at 172.

191 Fleury-Steiner, Dunn and Fleury-Steiner, above n 8, at 6.

192 *The Queen v Bara*, above n 74, at [12].

193 Ibid.

194 Brough, above n 171, at 6.

195 Ibid, at 17.

196 Simon, above n 5, at 1043.

197 Brough, above n 171, at 15-16.

198 Michel Foucault *Security, Territory, Population: Lectures at the College de France 1977-78* translated by Graham Burchell (Palgrave Macmillan, Hampshire, 2007) at 11.