

IS THERE SOCIAL JUSTICE IN SENTENCING INDIGENOUS OFFENDERS?

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The principles expressed by [the New South Wales Supreme] Court in *Fernando* ... seek to point particularly to aspects of the discrimination against, and disempowerment of, indigenous Australians and the consequences of that treatment in family circumstances. ... Nevertheless, the process of sentencing, and the criminal law, is not a tool for the attainment of social justice.¹

I FERNANDO'S STORY: AN EXPERIMENT IN SOCIAL JUSTICE

On the night of 13 February 1991, Walgett was the scene of a shocking act of violence. Stanley Fernando stabbed his friend and one-time de facto partner, causing serious wounds to her neck and leg. Fernando's background is not unusual among Australian Indigenous people: he had low levels of education, and had been removed from his family by the Welfare Department and sent to an isolated property, thereafter living in poverty. Walgett's spatial divide between 'black and white' is marked by Indigenous impoverishment and non-Indigenous wealth, housing and employment.² Fernando's criminal record was stained with alcohol and shot through with disadvantage. When his matter went before the New South Wales Supreme Court, the appalling nature of this crime and the impact on the victim were not in dispute. Rather, Woods J of the Supreme Court had to contend with the significance of the defendant's Indigenous circumstances. Should his economic disadvantage and ensuing alcoholism mitigate the criminal sentence? Do these factors weigh particularly heavily on Indigenous offenders? What bearing would a lighter sentence have on social justice for Aboriginal people? Is sentencing a means of compensation or restoration?

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1 *B P v R* (2010) 201 A Crim R 379, 402 [109] (Rothman J).

2 Cilka Zagar (ed), *Growing up Walgett: Young Members of the Walgett Aboriginal Community Speak Out* (Aboriginal Studies Press, 1990) xi; Kate Ross and John Taylor, 'The Relative Social and Economic Status of Indigenous People in Bourke, Brewarrina and Walgett' (Working Paper No. 8/2000, Centre for Aboriginal Economic Policy Research, 2000) vii–viii.

The New South Wales Supreme Court's answers to these questions framed a seminal body of jurisprudence on the relevance of Aboriginality, alcoholism and disadvantage to sentencing known as the *Fernando* principles.³ They provide for lighter sentences so as to reflect the Indigenous offender's reduced moral culpability and promote non-custodial penalties to respond to the disproportionate impact of imprisonment on Indigenous offenders. In recognising Indigenous circumstances, the principles were hailed as a glimmer of social justice in the sentencing process.⁴ These principles would nonetheless come to constitute a tenuous and problematic recognition of Indigenous identity, and an insufficient premise for addressing the disadvantage of Indigenous people in the criminal justice system. In this article I draw on Nancy Fraser's theory that social justice requires transformative change in social relations and the deconstruction of identities, rather than affirmation of stereotyped identities, to assure marginalised groups have a stake in the justice process.

II LOCATING SENTENCING IN SOCIAL JUSTICE THEORY

Although criminal sentencing is not typical fodder for considering notions of social justice, its capacity to recognise alterity has powerful epistemological implications for Indigenous identity, and instrumental implications for the means of punishing Indigenous people. At its best, the sentencer's use of discretion can instrumentally structure sentences to soften the devastating effect of imprisonment on Indigenous peoples. Blagg notes that the prison is part of 'white on black institutional violence' that coexists with white institutions such as missions, orphanages and boarding facilities.⁵ Epistemologically, it can provide a contextual understanding of the hardship faced by Indigenous offenders due to colonising processes. However, recognition gestures are at the behest of courts, which have an interest in maintaining their privileged status over Indigenous peoples and laws. This article argues that if sentencing is to provide a vehicle for social justice, it must engage Indigenous communities in the recognition and punishment process. The ad hoc dispensation of lighter prison sentences alone is insufficient. Rather, social justice is achieved through empowerment of Indigenous communities on the one hand to define the terms of recognition, and on the other to order penalties or initiate reconciliation processes commensurate with the interests of the community.

In this article I use the 'status model of recognition', devised by the American legal philosopher Nancy Fraser, as a heuristic device for understanding how recognition of Indigenous identities in criminal sentencing is a limited form of social justice. This model identifies the ways in which 'low-status groups',

3 *R v Fernando* (1992) 76 A Crim R 58 ('*Fernando*').

4 Sheryn Omeri, 'Considering Aboriginality' (2006) 44(7) *Law Society Journal* 74, 74.

5 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, 2008) 129, 139–40.

including those defined by race and culture, are subject to the injustices of ‘maldistribution’ and ‘misrecognition’ or ‘non-recognition’, and how these injustices may be overcome through deconstructing the identities of the recogniser and recognised and by making the low-status group a ‘peer’ in social life.⁶ My methodology consists of an analysis of New South Wales and Northern Territory higher court sentencing remarks in relation to disadvantaged Indigenous offenders who have argued that their disadvantaged position has reduced their moral culpability. For Indigenous people, economic disadvantage is intimately connected to their historical colonial oppression and denial of their land and laws. Fraser describes the ‘bivalent’ dimensions of marginalisation, ‘rooted simultaneously in the economic structure and the status order of capitalist society’.⁷ Applying Fraser’s paradigm, it becomes clear that the Indigenous experience of ‘economic and cultural injustices’ can only be redressed where recognition of Indigeneity coincides with the transformation of economic structures.⁸ In other words, justice is achieved where recognition is reconciled with redistribution. For this to occur, *transformative* remedies must be levelled at structural inequalities. Fraser is critical of the social justice approaches in capitalist society by which *affirmative* techniques provide the disadvantaged with provisional measures that are embedded in structures that foster marginalisation. Such concessions are subject to constant scrutiny, and require ongoing surface gestures to maintain their relevance in an unjust society.⁹ These affirmative acts have the effect of marking ‘the beneficiaries as “different” and lesser, hence to underline group divisions’ rather than overcome them.¹⁰ Social justice requires much more than recognition on the courts’ terms to redress both Indigenous over-representation in prisons and institutionalised patterns that inferiorise Indigenous people. In Fraser’s conception, it requires transformative measures that correct injustices by ‘restructuring the underlying generative framework’.¹¹

Fraser’s calls for redistribution and recognition converge on the social justice aspiration of ‘parity of participation’ and draw on the same analytical perspective: identifying how institutionalised arrangements unjustly prevent subordinated groups ‘from participating on a par with others in social life’.¹² Accordingly, this article conflates the *transformative* process required for redistribution (which Fraser advocates in terms of collapsing class relations) with that required for recognition (in terms of collapsing the postcolonial relations that buttress the objectified position of Indigenous people in sentencing). The analysis

6 Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange* (Verso Books, 2004) 29.

7 Nancy Fraser, ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation’ (Lecture delivered at the Tanner Lectures on Human Values, Stanford University, 30 April–2 May 1996) 18.

8 *Ibid* 66.

9 *Ibid* 45–6.

10 *Ibid* 46.

11 Nancy Fraser, ‘From Redistribution to Recognition? Dilemmas of Justice in a “Post-Socialist” Age’ (1995) 212 *New Left Review* 68, 82.

12 Fraser and Honneth, above n 6, 30.

of *affirmative* social justice approaches is also used to critique the recognition process that valorises and essentialises Indigeneity.¹³ The susceptibility of affirmative acts to relapse is apparent in Indigenous sentencing remarks, in which the affirmative act of leniency through recognition of Indigenous disadvantage has been replaced with harsh penalty for Indigenous people since the late 1990s. Affirmative acts secure the dominant order and compound institutionalised patterns of communication, which in the case of sentencing discourses can result in *misrecognition* (where the identity of the other is 'routinely maligned' or disparagingly stereotyped) or *non-recognition* (where the identity of the 'other' is 'rendered invisible' by falsifying the universality of dominant groups).¹⁴ These forms of status subordination constitute actors as 'inferior, excluded, wholly other, or simply invisible, hence as less than full partners in social interaction'.¹⁵ The injustices of misrecognition and non-recognition can only be redressed through an assault on dominant sociocultural norms to reorder 'social patterns of representation, interpretation and communication'.¹⁶

Modelling the recognition of Indigenous identity in criminal sentencing to Fraser's social justice theory shows us how sentencing is a racialising process that expresses the dominance of the Anglo-Australian legal order. Fraser claims that recognition of social status is a matter of justice because it reflects 'institutionalized patterns of cultural value' and 'their effects on the *relative standing* of social actors'.¹⁷ This coheres with the colonisers' inferiorising discourses in relation to Indigenous peoples to assert their own superiority.¹⁸ But recognition can be an avenue for the attainment of social justice where cultural values 'express equal respect for all participants and ensure equal opportunity for achieving social esteem'.¹⁹ This requires deinstitutionalising patterns of cultural value that 'impede parity of participation' and replacing them with patterns that foster participation of low-status groups as peers.²⁰

Fraser developed her position on social justice with reference to the 'postsocialist condition' when identity politics and claims for recognition by separatist movements were 'driv[ing] many of the world's social conflicts'.²¹ She laments the divisiveness of these movements as well as how they have overshadowed 'claims for egalitarian redistribution'.²² However, she is also wary of the need for critical theory, and particularly the Frankfurt School thinkers with whom she is associated, to respond to the challenge of identity politics to go

13 Nancy Fraser, 'Rethinking Recognition' (2000) 3 *New Left Review* 107, 114.

14 Fraser, above n 7, 7.

15 Fraser and Honneth, above n 6, 29.

16 Fraser, above n 7, 7.

17 Fraser, above n 13, 113 (emphasis added).

18 Michael Dodson, 'The Wentworth Lecture – The End in the Beginning: Re(de)finding Aboriginality' [1994] (1) *Australian Aboriginal Studies* 2.

19 Fraser, above n 7, 54.

20 *Ibid* 30.

21 Fraser, above n 13, 107.

22 *Ibid*.

beyond orthodox Marxism by theorising recognition.²³ Fraser seeks to unite the movements for status recognition and class equality by challenging the structures that give meaning to status and class inequality. The implications for misrecognition, according to her *deconstructivist* theory,²⁴ are that social groups will be dedifferentiated ‘although without necessarily seeking homogeneity’.²⁵ Dedifferentiation relates to the access that low-status groups have to the social life. Fraser’s scheme has currency for a settler postcolonial society. The need for class and status to be addressed has resonance for Australian Indigenous offenders, particularly those discussed in the substance of this article, because they confront a double burden of disadvantage. However, Fraser’s status model, particularly its deconstructivist tendencies, need to be understood as a means of affording low-status groups the same access to participation as other status groups, rather than as a melting pot. For Indigenous people, this would mean attributing their systems of justice with the same authority as non-Indigenous systems. It does not mean that they are dedifferentiated such that they are absorbed into the mainstream. Fraser consciously makes this point.²⁶ Accordingly, Fraser’s theory can enliven postcolonial theory that seeks to decentre power from the coloniser and identifies Indigenous sources of authority. Postcolonial theorists argue that the colonised’s identity can be expressed through community-controlled programs in the ‘liminal spaces’ where Indigenous law and introduced law overlap,²⁷ as discussed towards the end of this article.

I begin my analysis by canvassing the objectives and processes of criminal sentencing in Australia, including the scope for discretion to recognise Indigenous ‘difference’. I then analyse the New South Wales and Northern Territory supreme courts’ reasons for more lenient sentences for Indigenous offenders in the early 1990s, when the *affirmative* approach reached its high watermark with the decision in *Fernando*. However, the terms of the affirmation are constantly under scrutiny, as Fraser informs us,²⁸ and the following section illustrates that by the late 1990s the courts were retreating from *Fernando* by handing down more punitive sentences on the basis that offenders were insufficiently Indigenous.²⁹ A corpus of New South Wales Court of Criminal

23 Fraser, above n 7, 198–9.

24 Fraser describes her use of the term ‘deconstruction’ as ‘unorthodox’ and denoting a ‘specific type of institutional remedy for misrecognition’ distinct from Jacques Derrida’s theory of deconstruction: Nancy Fraser, ‘Institutionalizing Democratic Justice: Redistribution, Recognition, and Participation’ in Seyla Benhabib and Nancy Fraser (eds), *Pragmatism, Critique, Judgment: Essays for Richard J Bernstein* (Massachusetts Institute of Technology, 2004) 125, 146.

25 Fraser, above n 7, 47.

26 Ibid.

27 Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press, 2008); Chris Cunneen, ‘Postcolonial Perspectives for Criminology’ in Mary Bosworth and Carolyn Hoyle (eds) *What Is Criminology?* (Oxford University Press, 2011) 249.

28 Nancy Fraser, *Justice Interruptus: Critical Reflections on the ‘Postsocialist’ Condition* (Routledge, 1997) 25.

29 Richard Edney, ‘The Retreat from *Fernando* and the Erasure of Indigenous Identity in Sentencing’ (2006) 6(17) *Indigenous Law Bulletin* 8.

Appeal sentencing remarks is analysed to demonstrate how the courts have imposed a notion of 'authentic' Indigenous identity to disable the recognition of urban offenders. The New South Wales jurisdiction has been selected because judicial narratives depict the stories of urban and rural offenders as 'non-functional', such that many of their offenders now elude recognition ('non-recognition'). This judicial perception contrasts with the Northern Territory Supreme Court's reimagining of the communities of remote offenders as 'dysfunctional', representing 'misrecognition'. These offenders require a message of deterrence through lengthy prison sentences. The reconstitution of the requirements for Indigeneity occurred in the late 1990s when leading Court of Appeal judgments in both jurisdictions evinced a narrowing of leniency considerations for Indigenous defendants.³⁰ Given these limitations of recognition in sentencing, I conclude by arguing that the empowerment of Indigenous peoples and their laws through restructuring the justice system would allow Indigenous people to participate as peers rather than objects of domination. This would complete Fraser's social justice model of 'reciprocal recognition and status equality' by transforming social patterns so that Indigenous justice processes operate on a par with non-Indigenous processes.³¹ With this transformation, it is possible to deconstruct identities of the recogniser and the recognised and universalise 'difference'.³²

III AFFIRMATIVE ACTS OF RECOGNISING INDIGENOUS DIFFERENCE IN SENTENCING: PROCESSES AND RATIONALES

In the criminal justice system, sentencing provides a distinct opportunity for the recognition of Indigenous difference. Resisting trends toward mandatory sentencing, discretion has been preserved at common law in Australia, on the premise that judges must be allowed to take into account the relevant circumstances of offence and offender if the ideal of individualised justice is to be realised.³³ This requires that courts have discretion to 'take account of *all* relevant factors'.³⁴ There are normative sentencing principles, such as deterrence,

30 The key cases are *R v Wurraramara* (1999) 105 A Crim R 512 ('*Wurraramara*') in the Northern Territory and *R v Ceissman* (2001) 119 A Crim R 535 ('*Ceissman*') in NSW. The reasoning in these sentencing remarks has been subsequently applied to cases discussed in this article. The cases reflect a broader judicial reluctance to consider Indigeneity for the purposes of mitigation (including in contexts of 'traditional' punishment and political protest): see Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, forthcoming). However, in exceptional cases where the offender has been 'particularly disadvantaged as a result of his upbringing', the Supreme Court has applied the *Fernando* principles to provide mitigation, such as in *R v F A P* [2007] NSWSC 905 [39] (Howie J).

31 Fraser and Honneth, above n 6, 29 (emphasis in original).

32 Fraser, above n 7, 54.

33 Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 16; Chief Justice A M Gleeson, 'Individualised Justice – The Holy Grail' (1995) 69 *Australian Law Journal* 421.

34 *Wong v The Queen* (2001) 207 CLR 584, 611.

retribution, rehabilitation and community protection, which frame sentencing. These are enshrined in legislation across Australia, including in the jurisdictions for which this article is centrally concerned: New South Wales³⁵ and the Northern Territory.³⁶ Nonetheless, courts may take into account a wide range of aggravating and mitigating factors relevant to the offender and the offence. These include the maximum penalty for the offence; the nature of and harm caused by it; the identity and age of the victim; the offender's criminal record, character, age, intellectual capacity, prospects of rehabilitation, and remorse; and other relevant objective or subjective factors.³⁷ Although legislation does not specify Indigenous circumstances as one of these factors, higher courts in New South Wales and the Northern Territory have used their discretion to account for them.³⁸ The High Court has established that Indigenous group membership is one of the many 'material facts' that courts are 'bound to take into account' when imposing sentences.³⁹ In the Northern Territory a sentencing court may receive information about an aspect of Indigenous customary law or Indigenous community views provided certain procedural requirements are met.⁴⁰

Accounting for Indigenous difference in sentencing is relevant not only because of Indigenous peoples' historical dispossession, culture and socioeconomic disadvantage, but also because of their distinct experience with the criminal justice system. They are generally over-policed and over-imprisoned relative to non-Indigenous people due to the colonising role of Indigenous criminalisation.⁴¹ Disadvantage also arises because Indigenous peoples have been historically subsumed in the fantasy of racial neutrality in the court room, where whiteness is normalised.⁴² Gray, Burgess and Hinton argue that racism emerges where courts adhere to 'values, systems, procedures and outcomes that exclude others of a different culture and background'.⁴³ The impact of imprisonment is worse for Indigenous people because, as articulated by Wood J in *Fernando*, it is 'served in an environment which is foreign to [them]' and 'dominated by inmates and prison officers of European background with little understanding of [their] culture and society or [their] own personalit[ies]'.⁴⁴

There are strong reasons for recognising socioeconomic disadvantage in criminal sentencing. It levels punishment at 'the disequilibrium *before the*

35 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

36 *Sentencing Procedure Act 1995* (NT) s 5(1).

37 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Procedure Act 1995* (NT) s 6A.

38 See, eg, *R v Minor* (1992) 105 FLR 180; *Fernando* (1992) 76 A Crim R 58.

39 *Neal v The Queen* (1982) 149 CLR 305, 326 (Brennan J).

40 *Sentencing Procedure Act 1995* (NT) s 104A.

41 See Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001).

42 See Ghassan Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Pluto Press, 1998).

43 Tom Gray, Sally Burgess and Martin Hinton, 'Indigenous Australians in Sentencing' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008) 119.

44 (1992) 76 A Crim R 58, 63.

crime'.⁴⁵ Ashworth criticises sentencing calculations that assume offender autonomy, given that 'strong social disadvantages may be at the root of much offending'.⁴⁶ A coterie of criminologists suggest that sentencing should be more lenient for disadvantaged offenders to redistribute their burdens.⁴⁷ Sadurski describes this redistributive approach to sentencing as restoring 'the balance of benefits and burdens' by affording lesser penalties to offenders who are 'poorer or more oppressed than the rest of the community'.⁴⁸ It rectifies the situation that, as Goldman puts it, '[p]unishments are often imposed upon those already unfairly low on the scale of benefits and burdens'.⁴⁹ An offshoot of this position is that punishment should reflect the lesser socioeconomic opportunities of these offenders, because those circumstances reduce their choice over their actions rendering them less culpable than those who are not so afflicted.⁵⁰ When courts fail to consider such inequalities, the poor are given sentences disproportionate to their culpability.⁵¹ Hudson asserts that, due to 'widening social inequalities' that limit offenders' choices, 'justice demands that society acknowledge responsibility [for the economic hardship] by assisting the offender' in sentencing.⁵² Reduced sentences, according to Hudson, should be founded in 'principled criteria', rather than on a case-by-case basis, to reflect the structural basis of inequality.⁵³ A related position is that punishment for disadvantaged offenders should be adapted to further their opportunities. Rehabilitative and reintegrative programs in lieu of imprisonment could reform and improve the position of the offender.⁵⁴

These arguments for the use of sentencing discretion do not threaten the structures that retain the Anglo-Australian legal order over Indigenous peoples and laws. They coalesce with Fraser's notion of affirmative remedies, because leniency does not disturb 'the underlying framework' of postcolonial criminalisation.⁵⁵ This reversion to postcolonial assumptions is apparent when examining the case law since *Fernando*, which emphasises that Indigeneity is a subjective consideration like any other.⁵⁶ Indigenous recognition in sentencing

45 Wojciech Sadurski, 'Distributive Justice and the Theory of Punishment' (1985) 5 *Oxford Journal of Legal Studies* 47, 58 (emphasis in original).

46 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th ed, 2005) 90.

47 Barbara Hudson 'Punishment, Poverty and Responsibility: The Case for a Hardship Defence' (1999) 8 *Social and Legal Studies* 583, 583; Michael Tonry, *Malign Neglect: Race, Crime and Punishment in America* (Oxford University Press, 1995); Andrew Ashworth, 'Sentencing' in Mike Maguire, Rodney Morgan and Robert Reiner (eds), *Oxford Handbook of Criminology* (Oxford University Press, 3rd ed, 2002) 1076.

48 Sadurski, above n 45, 58.

49 Alan H Goldman, 'Toward a New Theory of Punishment' (1982) 1 *Law and Philosophy* 57, 61, quoted in Sadurski, above n 45, 58.

50 Tonry, above n 47, 125.

51 Ashworth, above n 47, 1079; Hudson, above n 47, 584.

52 Hudson, above n 47, 589–90.

53 Ibid 583.

54 Candace McCoy, 'Review Essay: Sentencing (and) the Underclass' (1997) 31 *Law & Society Review* 589, 611–12.

55 Fraser, above n 7, 45.

56 *Fernando* (1992) 76 A Crim R 58, 62.

remarks rears its head on the terms and at the times that the courts so choose. While there is a body of law that affords leniency on the basis of Indigeneity, especially in the 1980s and early 1990s, the common law does not provide an assured inlet for the engagement of Indigenous perspectives in sentencing. Consequently, courts can recognise, misrecognise or not recognise Indigenous identities and circumstances.

Because affirmative social justice techniques operate within existing legal structures, they leave intact subjugated identities and underlying 'group differentiations'.⁵⁷ Legal narratives in sentencing reproduce a normative universe (*nomos*) that subordinates Indigenous people.⁵⁸ The technique of granting more lenient sentences to Indigenous offenders entails a reproduction of 'stock stories', which are 'a set of standard, typical or familiar stories held in reserve to explain racial dynamics in ways that support the status quo'.⁵⁹ They include the stories of Indigenous socioeconomic disadvantage and alcoholism, which incite sympathy and reduce culpability. These legal representations of Indigenous offenders and their communities have much broader currency than in law alone. Cover explains that laws are intrinsic to their narratives, such that law becomes 'not merely a system of rules to be observed, but a world in which we live'.⁶⁰ The hermeneutic device of 'legal storytelling' reveals law as a bridge between real and imagined Indigeneity. The cultural narratives that cross this bridge, and thus underwrite, inform or help substantiate legal reasoning, are tied to dominant epistemologies that operate throughout postcolonial institutions.⁶¹

The terms of affirmative recognition are constantly under scrutiny while the recogniser makes or denies surface gestures again and again.⁶² The result is to mark the most disadvantaged group as inherently 'deficient and insatiable, as always needing more and more'.⁶³ This group can appear to be receiving special treatment because of such affirmations. One of the effects of this appearance, according to Fraser, is that it stigmatises the group.⁶⁴ By the late 1990s, higher courts would use their discretion *not* to recognise a class of Indigenous offenders in New South Wales. These cases, which are discussed below, signal the weakness of an affirmative approach that leaves intact the deep structures that generate differentiation and regulate power relations. The dark side of affirmative recognition is that it lends itself to misrecognition and non-recognition. These processes and outcomes, according to Fraser, entrench 'institutionalized patterns of cultural value', including subordination of Indigenous peoples, cultures and laws.⁶⁵ Thus the apparent justice of recognition can rapidly turn into an injustice.

57 Fraser, above n 28, 24.

58 Robert M Cover, 'Foreword: *Nomos* and Narrative' (1983) 97 *Harvard Law Review* 4, 4.

59 Lee Anne Bell, *Storytelling for Social Justice: Connecting Narrative and the Arts in Antiracist Teaching* (Routledge, 2010) 29.

60 Cover, above n 58, 5.

61 Ibid 9. Thank you to one of the anonymous reviewers for encouraging this idea.

62 Fraser, above n 7, 45–6.

63 Fraser, above n 28, 29.

64 Ibid 25.

65 Fraser and Honneth, above n 6, 29.

In the following sections, I trace these patterns in sentencing remarks on Indigenous offenders who belong to disadvantaged communities with limited access to employment, decent housing, basic infrastructure and health services, and which radiate a sense of hopelessness. While the courts may not take responsibility for remedying Indigenous disadvantage, as noted in this article's epigram, their capacity to recognise has bearing on Indigenous social status.

IV AFFIRMATIVE RECOGNITION OF INDIGENOUS HARDSHIP: THE EARLY CASES

From the 1970s until the late 1990s, supreme courts in New South Wales and the Northern Territory recognised contemporary Indigenous communities as sites of disadvantage. In sentencing, they would receive submissions from defendants evidencing their membership of deprived Indigenous communities, membership that resulted in, among other things, poverty, unemployment, lack of education, alcohol abuse, isolation, racism and loss of connection to family culture, land or Indigenous laws.⁶⁶ The New South Wales jurisprudence enunciated in the *Fernando* principles especially recognises poverty and alcoholism as grounds for mitigation. It mirrors criminological and political thought that social strain among Indigenous offenders leads to criminal offending.⁶⁷ This replicates a stock story about Indigenous disadvantage and lack of self-control. This is a story that bolsters the superiority of the 'dominant society'⁶⁸ by reinforcing stereotypes of Indigenous people as helpless and hopeless.⁶⁹ Its central narrative is that 'Aboriginal people [are] incompetent to look after their own affairs, and [are] degenerates, drunkards and criminals unable to fulfil their status as social subjects'.⁷⁰ This stock story has had as much force as the romantic ideal of the 'traditional Aboriginal'; both are loaded with 'fixed and value-laden characteristics' that attract 'certain privileges or penalties'.⁷¹ The courts skate a fine line between recognition of Indigenous people affected by strain in postcolonial society, and non-recognition of Indigenous people who fail to embrace the opportunities presented to them by postcolonial society and fulfil its

66 Omeri, above n 4, 78.

67 Roderic G Broadhurst, 'Aborigines and Crime in Australia' (1997) 21 *Crime and Justice* 407, 413–14; Don Weatherburn, Lucy Snowball and Boyd Hunter, 'The Economic and Social Factors Underpinning Indigenous Contact with the Justice System: Results From the 2002 NATSISS Survey' (Crime and Justice Bulletin No 204, NSW Bureau of Crime Statistics and Research, October 2006) 2–3.

68 Dodson, above n 18, 8.

69 Gillian Cowlshaw, 'Inquiring into Aboriginal Deaths in Custody: The Limits of a Royal Commission' (1991) 4 *Journal for Social Justice Studies* 101, 107; Chris Cunneen, 'Riot, Resistance and Moral Panic: Demonising the Colonial Other' in Scott Poynting and George Morgan (eds), *Outrageous! Moral Panics in Australia* (ACYS Publishing, 2007) 28.

70 Dodson, above n 18, 8.

71 *Ibid.*

social norms. They pick and choose which path to traverse and in doing so determine the prerequisites for Indigeneity.⁷²

The leniency provided to Indigenous defendants from disadvantaged communities feeds into the white racial fantasy of the tolerant 'self' and the inferior 'other'.⁷³ In the Northern Territory, it replaced a racial fantasy of the 'civilising' judicial self that prevailed in the 1950s. In that juncture, impoverished Indigenous offenders who had contact with the 'white' community and then committed crimes while under the influence of alcohol were given a severe sentence.⁷⁴ For these offenders, specific deterrence was effective and necessary in their path to civilisation and assimilation, as opposed to more 'tribal' offenders who would not be affected by specific deterrence, although their community may feel the impact of general deterrence.⁷⁵ Generally, 'tribal' offenders would benefit from leniency because they were regarded as lacking civilising influences.⁷⁶ In the 1970s, the Indigenous offender who was dislocated from his or her community was no longer considered civilised, but rather the victim of 'social devastation'.⁷⁷ Alcohol became a signpost for 'Aboriginal cultural breakdown, social devastation and disadvantage'.⁷⁸ From the 1970s, the Northern Territory Supreme Court provided leniency to Indigenous offenders so as to compensate for this disadvantage, an approach of the kind that was later formalised by the New South Wales judiciary in the *Fernando* principles. Therefore, the higher courts perceived their role as softening the burden of 'civilisation' through a lighter sentence.

A New South Wales: 'Grave Social Difficulties' of Urban Indigenous Offenders

The *Fernando* principles were not a drop in a legal ocean of blind universalism. They drew on a body of sentencing remarks across Australia that endorsed leniency for Indigenous defendants who experienced disadvantage.⁷⁹ This included the Queensland Court of Criminal Appeal case of *R v Friday*,

72 These legal narratives that essentialise Indigenous identity have as much application to native title cases as to criminal sentencing: see, eg, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. Critical legal theorists argue that the dichotomous ontologies have given rise to a 'cunning of recognition' (requiring both traditionalism and modernism to fulfil the legal requirements for native title): Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Duke University Press, 2002) 267. See also Shaunagh Dorsett, "'Since Time Immemorial": A Story of Common Law Jurisdiction, Native Title, and the Case of Tanistry' (2002) 26 *Melbourne University Law Review* 32, 52; H A Amankwah, 'Post-Mabo: The Prospect of the Recognition of Customary Law in Australia' (1994) 18 *University of Queensland Law Journal* 15, 32.

73 Hage, above n 42, 155.

74 Heather Douglas, *Legal Narratives of Indigenous Existence: Crime, Law and History* (PhD Thesis, University of Melbourne, 2005) 10.

75 *Ibid* 64, 199.

76 *Ibid* 174.

77 *Ibid* 187.

78 Heather Douglas, *Aboriginal Australians and the Criminal Law: History, Policy, Culture* (VDM Verlag, 2009) 170.

79 *Fernando* (1992) 76 A Crim R 58, 62.

where it was held that the defendant was ‘a victim of the circumstances in which her life had placed her’.⁸⁰ A subsequent case by that Court, also cited in *Fernando*,⁸¹ supported this view of hopelessness. In *Yougie v The Queen*, the Court held that ‘it would be wrong to fail to acknowledge the social difficulties faced by Aboriginals’ that have ‘placed heavy stresses on them leading to alcohol abuse and consequential violence’.⁸² The Western Australian Court of Criminal Appeal, in *Rogers v The Queen*, recognised the ‘notorious fact’ that the ‘use of alcohol by Aboriginal persons in relatively recent times has caused grave social problems, including problems of violence’, which should ‘provide circumstances of mitigation’.⁸³ In *R v Juli*, the same Court maintained that the ‘abuse of alcohol reflects the socio-economic circumstances and the environment in which [the Indigenous offender] has grown up and should be taken into account as a mitigating factor’.⁸⁴ Also bearing down on the New South Wales Supreme Court in *Fernando* were the findings of the Royal Commission into Aboriginal Deaths in Custody, which had just been handed down when the case was heard.⁸⁵ The Royal Commission’s *Final Report* fuelled concern about the over-imprisonment of Indigenous people and made a case for a distinct jurisprudence for sentencing Indigenous offenders, including that prison be a sanction of last resort for Indigenous people. This report was referred to in *Fernando* as evidence of the unique conditions for Aboriginal people in the criminal justice system, although the New South Wales Supreme Court did not aver to its significance.⁸⁶

While Justice Wood’s remarks in *Fernando* were not unique, they synthesised the Indigenous considerations to be taken into account and formulated them within a paradigm that balanced competing sentencing considerations, such as the seriousness of the crime and the harm to the victim. Consequently, the eight *Fernando* principles for sentencing Indigenous offenders from disadvantaged communities have been influential across Australia.⁸⁷ As stated above, *Fernando*’s circumstances of disadvantage constitute an Indigenous stock story. Specifically, *Fernando* was from a marginalised section of a rural community in northern New South Wales, beleaguered by alcoholism and socioeconomic disadvantage; he was semi-educated and removed from his family by the Welfare Department, and had drunk excessive amounts of alcohol just before stabbing his once de facto partner in the neck and leg. *Fernando* had a criminal history that was linked to his excessive alcohol consumption. The New South Wales Supreme Court handed down what it considered to be a mitigated sentence of four years imprisonment with a nine-month non-parole period. In his remarks, Wood J meandered between recognising *Fernando*’s disadvantaged

80 (1985) 14 A Crim R 471, 472.

81 (1992) 76 A Crim R 58, 62.

82 (1987) 33 A Crim R 301, 304.

83 (1989) 44 A Crim R 301, 305.

84 (1990) 50 A Crim R 31, 36.

85 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

86 (1992) 76 A Crim R 58, 62.

87 Omeri, above n 4, 76.

Indigenous community and invoking normative sentencing principles, which are paraphrased as follows:

1. Facts relevant to the offenders' membership of a group should be accounted for, but 'the same sentencing principles are to be applied in every case'.
2. Aboriginality does not necessarily 'mitigate punishment' but may 'throw light on the particular offence and the circumstances of the offender'.
3. Alcohol abuse and violence 'go hand in hand within Aboriginal communities', feeding into 'grave social difficulties' of unemployment, low education, stress, and so on.
4. Mitigation should be provided where alcohol abuse reflects the offender's 'socio-economic circumstances and environment'.
5. Courts should provide punishment to protect Indigenous victims and reflect the seriousness of 'violence by drunken persons', particularly domestic violence.
6. A long prison term is particularly alienating and 'unduly harsh' for Indigenous people who come from a 'deprived background' or have 'little experience of European ways'.
7. The relationship between violence and alcohol abuse in Indigenous communities requires 'more subtle remedies' than imprisonment.
8. The public interest in 'rehabilitation of the offender and the avoidance of recidivism on his part' should be given full weight.⁸⁸

In the aftermath of *Fernando*, the New South Wales Court of Criminal Appeal and higher courts in other states adopted and expounded its principles and observations. In *R v Hickey*, the Court referred to the 'tragic truth' of the 'litany of disadvantage' that frequently accompanies Indigeneity and should be taken into account in sentencing where relevant.⁸⁹ In *R v Stone*,⁹⁰ the Court allowed an appeal against the trial judge's finding that the *Fernando* principles had been eroded due to the defendant committing similar serious offences in the past. The Court held that subjective mitigating factors should be accounted for notwithstanding the objective circumstances.⁹¹ The *Fernando* principles have had a significant influence on sentencing in South Australia, which was relatively late in developing its Indigenous sentencing jurisprudence for Indigenous urban offenders.⁹² In 1999 the South Australian Supreme Court held that the *Fernando* principles have broad application to Indigenous offending from remote and urban communities and cannot be offset by 'tariff' (minimum) sentences.⁹³ Also

88 *Fernando* (1992) 76 A Crim R 58, 62–3.

89 (Unreported, NSW Court of Criminal Appeal, Finlay, Abadee and Simpson JJ, 27 September 1994) 4.

90 (1995) 84 A Crim R 218.

91 *Ibid* 224.

92 Christopher Charles, 'Sentencing Aboriginal People in South Australia' (1991) 13 *Adelaide Law Review* 90, 90.

93 *Police (SA) v Abdulla* (1999) 74 SASR 337, 343–4.

commenting that the *Fernando* principles were ‘not restricted to traditional [A]boriginals’, the South Australian Court of Criminal Appeal found in *R v Smith* that heritage, rather than geography, contributes to the offender’s circumstances.⁹⁴ The Court stated that:

no distinction is to be drawn between an Aboriginal person to whom European culture is foreign because of a lack of exposure to that culture (ie: a traditional Aboriginal), and an Aboriginal person to whom European culture is foreign, not because [of] a lack of exposure to that culture, but simply as a result of that person’s identity as an Aboriginal person.⁹⁵

Unlike other recognition instances, which attend to the nature of the Indigenous community, South Australia’s higher courts highlight the Indigenous experience in prisons. They underscore the impact of Indigenous over-representation in the prison system. This has implications for structuring sentences to provide leniency on a consistent basis. It creates an opportunity to move away from affirmative acts that recognise marginalised identity without dislocating the structures that maintain domination. It does this by shifting the focus from the problem of the Indigenous community and circumstances, to the problem of the punishment and imprisonment of Indigenous people. In this respect, it points the finger at the dominant institutions that create the patterns of subversion. The South Australian Supreme Court highlighted the ‘debilitating affect’ that imprisonment has on Aboriginal people, and referred to the *Indigenous and Tribal Peoples Convention*⁹⁶ as endorsing penalties ‘other than confinement in prison’.⁹⁷ In *R v Smith*, the Court of Criminal Appeal noted that while the ‘traditional Aboriginal person’ who is unfamiliar with culture and language may experience ‘particular problems’ in prisons, the urbanised Aboriginal inmate may be just as likely to experience a ‘cultural milieu which is foreign’.⁹⁸

However, broader judicial misgivings about the Indigenous community prevail in recognition dynamics. It is the disadvantage and endemic alcoholism in communities that remains the stock story for urban Indigenous offenders. Leniency requires affirmation of this story. Fraser explains that affirmative acts create a stigmatising recognition dynamic: the ‘insult of misrecognition’.⁹⁹ For the marginalised to benefit from the affirmative remedy – such as sentencing leniency – they are made to cathect this stigma. Rolls argues that there are broad ‘repercussions of shackling cultures to affirmations of uniqueness’, including bolstering colonial binaries and fixed notions of Indigenous identity.¹⁰⁰ The judiciary’s emphasis on the circumstances of the individual offender and his or her Indigenous community, rather than on the colonising role of imprisonment, is

94 (2003) 86 SASR 132, 141 (Lander J).

95 Ibid 141 (Lander J).

96 Opened for signature 27 June 1989, ILO C169 (entered into force 5 September 1991).

97 *Police (SA) v Abdulla* (1999) 74 SASR 337, 344.

98 (2003) 86 SASR 132, 141 (Lander J).

99 Fraser, above n 28, 26.

100 Mitchell Rolls, ‘The Meaninglessness of Aboriginal “Cultures”’ (2001) 2(1) *Balayi: Culture Law and Colonialism* 7, 9.

precisely why Hudson calls for ‘principled’ rather than ad hoc approaches to lighter punishment for the disadvantaged.¹⁰¹ Not only do ad hoc approaches place leniency on a weak ground and make it susceptible to displacement, but they also fail to deconstruct the role of prisons as warehouses for the disadvantaged. For Australian Indigenous offenders, who are amongst the most imprisoned people in the world, this disadvantage is acute.¹⁰² McCoy argues that sentences should be reintegrative, so as to challenge the penal objective of prosecuting ‘underclass citizens’ and excluding them from the ‘moral community’.¹⁰³

B The Northern Territory’s Mitigation for Cultural Breakdown

The Northern Territory was colonised much later than the southeastern regions of Australia; as a result, the ‘cultural breakdown’ affecting remote Indigenous people was still relatively new well into the latter part of the 20th century.¹⁰⁴ The despair attendant to this ‘social devastation’ was embraced by the Northern Territory’s higher courts in the 1970s as a basis for leniency.¹⁰⁵ In the same manner as the New South Wales Supreme Court, mitigatory considerations of disadvantage were channelled to alcohol abuse. Northern Territory courts regarded this as one of the greatest vices delivered to Indigenous people by colonialism, implicating Anglo-Australian society in the social problems of Indigenous communities. In *R v Long*, the Northern Territory Supreme Court remarked that Indigenous problems arise out of ‘things introduced by white Australians’, which create a ‘familiar pattern’ of alcohol consumption and offending and provide for mitigating circumstances.¹⁰⁶ To account for these circumstances, the Northern Territory Supreme Court developed a sentencing jurisprudence independent of the *Fernando* principles, which distinctly accounted for the contemporaneity of cultural breakdown and the alienation derived from the imposition of a foreign culture and society.¹⁰⁷ The Court’s representations of Indigeneity conveyed a narrative of hopelessness in the face of an all-encompassing colonial culture in which ‘absolute sovereignty’ had completely undermined Indigenous cultures.¹⁰⁸

101 Hudson, above n 47, 583.

102 Fiona Skyring, *Justice: A History of the Aboriginal Legal Service of Western Australia* (UWA Publishing, 2011); Harry Blagg, ‘Aboriginal Youth and Restorative Justice: Critical Notes from the Australian Frontier’ in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing, 2001) 227.

103 McCoy, above n 54, 611–12.

104 Douglas, above n 78, 170. The term ‘cultural breakdown’ is problematic, given that many Indigenous communities in the Northern Territory continue to practice their culture. It is used by the courts to describe the unsettling impact that colonisation has had on these pre-colonial Indigenous practices.

105 Ibid.

106 (Unreported, Supreme Court of the Northern Territory, Martin CJ, 13 February 1995) 24, 26.

107 The Supreme Court has noted that the *Fernando* principles ‘have been adopted in appropriate cases’: *R v Booth* (Unreported, Supreme Court of the Northern Territory, Martin AJ, 22 September 2005) 4. Northern Territory cases that have referred to the *Fernando* principles include *Leering v Nayda* (Unreported, Supreme Court of the Northern Territory, Kearney J, 23 January 1997); *Cook v Chute* (Unreported, Supreme Court of the Northern Territory, Kearney J, 16 June 1997).

108 Cunneen, above n 27, 258.

Recognition of the concomitance between cultural despair, alcoholism and poverty was noted by the Northern Territory Supreme Court in *R v Lee*.¹⁰⁹ The Court regarded alcohol dependence as a 'much more' mitigating circumstance 'in the case of Aboriginal people' than non-Aboriginal people because the former were often led to drinking out of 'despair'.¹¹⁰ The Court adopted a similar approach in *R v Herbert*, in which three Indigenous women were convicted of murdering a 'handicapped man' by striking him to the head with an iron bar at least eight times.¹¹¹ The mitigating factors included that the defendants were 'reared in a traditional Aboriginal environment' and had 'abandoned their traditional lifestyles and set out to take up a city lifestyle, finally in Darwin'.¹¹² This was described as 'a way of life that [Indigenous people] are ill-equipped to handle' because they cannot draw on 'traditional' relationships 'that not only protect them from undue physical violence but also that censor their moral conduct'.¹¹³ Instead, they find themselves in a 'limbo', in which they 'belong nowhere', due to the 'trans-cultural dimension of their condition'.¹¹⁴ Consequently, 'they soon fall prey to the destructive influences of alcohol' and 'become fringe-dwellers, or perhaps town campers in the city'. Rounding out this account of cultural despair, the Court remarked that the transition to city life:

is psychologically, and often physically, a brutalizing experience for [Aboriginal women], giving rise to tension and acute emotional distress. Their plight is a desperate one from which they cannot escape. *They have a feeling of helplessness, hopelessness and purposelessness.* Their whole sense of themselves becomes so abused that they lose that natural dignity that Aboriginal women have. As it was put to me, they feel 'they are no longer clean ... they feel dirty and sullied but they are caught'.¹¹⁵

Supreme Court sentencing remarks in the 1980s and 1990s focused on the poverty and economic difficulties facing Indigenous communities and their members. These, along with their bedfellow, alcohol abuse, gave rise to the dispensation of 'special leniency'.¹¹⁶ In *Robertson v Flood*, the Court regarded alcohol abuse as reducing the offender's 'chances in life', and being a symptom of deprivation.¹¹⁷ The offender's community of Ali Curung (350 kilometres north of Alice Springs) was viewed as having 'a particularly serious problem with alcohol'.¹¹⁸ In this context, the Court held that there must be 'regard to the general policy of leniency towards those Aboriginal offenders who are disadvantaged socially, economically and in other ways because of their membership of a deprived section of the community'.¹¹⁹ In addition, the Full

109 (Unreported, Supreme Court of the Northern Territory, Foster CJ, 1974).

110 *Ibid.*

111 (1983) 23 NTR 22.

112 *Ibid.* 29.

113 *Ibid.*

114 *Ibid.*

115 *Ibid.* (emphasis added).

116 *Gadatjiya v Lethbridge* (1992) 106 FLR 265, 273.

117 (1992) 111 FLR 177, 187.

118 *Ibid.* 179.

119 *Ibid.* 187.

Federal Court, hearing an appeal from the Northern Territory Supreme Court in *R v Davey*, emphasised the ineffectiveness of the deterrent effect of imprisonment where the offence was alcohol-related.¹²⁰ The Court noted that sentences should instead be directed at reformation of Indigenous offenders as the ‘greatest protection to society’.¹²¹ In that case, the offender, from Borroloola near the Gulf of Carpentaria, was intoxicated when he struck another man with a large piece of timber, resulting in the man’s death. In upholding a lenient sentence of three years’ imprisonment, which was suspended under certain conditions, the Court stated that:

The devastating effects of liquor, especially upon Aboriginal society, are daily demonstrated in our courts. I am afraid in this area sentencing policies are unlikely to prove an effective deterrent. A man crazed with alcohol seldom takes stock. The concept that imprisonment must be regarded as an effective deterrent is now enshrined in our law despite the fact that modern research throws some doubts upon its validity. It is perhaps accurate to say that it is because of awareness of the difficulties of the Aboriginal and with knowledge that the source of practically all Aboriginal crime is alcohol, that lenient penalties are frequently imposed.¹²²

V REIMAGININGS OF HARDSHIP IN THE LATE 1990s

In the late 1990s there was a retreat from subjective Indigenous circumstances in New South Wales and Northern Territory sentencing considerations. Judicial narratives of Indigeneity have been rewritten to produce new types of knowledge about Indigeneity and the circumstances of Indigenous communities. They signal a diminution of the significance of Indigenous factors in sentencing and a punitive turn for Indigenous offenders. The reconstructed identity of the Indigenous offender in New South Wales relies on fixed and arbitrary concepts of authenticity, requiring geographical remoteness. Fraser claims that recognition encourages the ‘reification of group identities’, placing pressure on groups to display an ‘authentic’ and rigid collective identity and culture.¹²³ The Supreme Court has confined the recognition of Indigenous identity to reflect membership of remote *and* especially disadvantaged and alcohol-prone community. In the Northern Territory, the Indigenous community to which the offender belongs has been reclassified as ‘dysfunctional’ rather than ‘disadvantaged’ to implicate the community (rather than colonising processes) in the crime and deride the community’s functionality. In both jurisdictions, subjective factors relevant to Indigeneity have been overshadowed, first by objective circumstances, the seriousness of the offence and victimisation, and second by normative principles such as deterrence. These narratives produce, as Fraser would term it, a non-recognition and misrecognition problem.¹²⁴ Motha

120 (1980) 50 FLR 57.

121 *Ibid* 65 (Muirhead J).

122 *Ibid* 62.

123 Fraser, above n 13, 110, 113.

124 Fraser, above n 7, 7.

argues that just as Indigeneity is prone to disappearance, it is also prone to a view that the Indigenous community is too 'repugnant' to be recognised.¹²⁵

In a widely-cited lecture on Indigenous identities in Australia, Aboriginal rights campaigner Mick Dodson maintains that particular types of identities are 'created, reproduced and embraced by states and non-indigenous peoples at particular times' in order to serve 'the various and changing interests and aspirations of ... the colonising or "modern" state'.¹²⁶ Boundaries between 'primitive' and 'modern man' affirm the superiority of the colonisers and legitimate state policies and practices that seek to control, manage and assimilate Indigenous cultures.¹²⁷ Dodson points to the binaries that bolster the coloniser's identity:

By our lack, we provided proof of their abundance and the achievements of 'progress'; by our inferiority we proved their superiority; by our moral and intellectual poverty we proved that they were indeed the paragon of humanity, the product of millennia of development.¹²⁸

Since colonisation, Indigenous peoples have been 'objects' of a continual flow of commentary and classification based on gradations of skin colour and analyses of brain size.¹²⁹ For Dodson, Indigenous people are constantly defined in terms of the colonising culture, rather than on 'our own terms'.¹³⁰ To do otherwise, he suggests, would threaten 'the boundaries of identity, knowledge and absolute truth, which give the subject a sense of power and control' and bring Indigenous people 'into check'.¹³¹ Dodson argues that Indigenous identities are more than a relation with the coloniser; they are formed across and within Indigenous communities and are subject to change and variation.

To adopt Dodson's tone, sentencing courts have reimagined Indigenous alterity by enforcing an idea that the remnants of Indigeneity are fading in Australian postcolonial society or that Indigeneity amounts to dysfunctionality. This metaphorically negates the role and capacities of Indigenous societies. Further, channelling Indigeneity into traditionalism is conterminous with abandoning urban Indigenous identities. Fraser notes that non-recognition and misrecognition deny 'some individuals and groups' the 'status of full partners in social interaction' due to 'institutionalized patterns of interpretation and evaluation in whose construction they have not equally participated and that disparage their distinctive characteristics or the distinctive characteristics assigned to them'.¹³² The effect of these categorisations, in the words of Dodson,

125 Stewart Motha, 'The Failure of "Postcolonial" Sovereignty in Australia' (2005) 2 *Australian Feminist Law Journal* 107, 119.

126 Dodson, above n 18, 7.

127 *Ibid* 7–8.

128 *Ibid* 8. Dodson's concern for the recognisers' changing criteria for Aboriginality reverberates in a number of appellate sentencing decisions. The NSW Supreme Court has refused to apply the *Fernando* principles where the offender did not have ties to his culture or was only 'part' Aboriginal.

129 *Ibid* 3.

130 *Ibid* 8.

131 *Ibid* 8–9.

132 Fraser, above n 7, 24.

is to preclude ‘a genuine relationship’ between Indigenous and non-Indigenous peoples, ‘because a relationship requires two, not just one and its mirror’.¹³³ In the following sections, I outline how higher sentencing courts have reconstituted Indigenous identities to serve the purpose of longer prison sentences. This is followed by a discussion on how sentencing may be restructured to relinquish the one-way process of Indigenous identity formation, drawing on Fraser’s notion of transformative social justice techniques.

A New South Wales: Non-Recognition of the Urban Offender

1 Requirements of Remoteness and Drunkenness

The New South Wales Supreme Court, since the late 1990s, has confined who can be classed as Indigenous for the purposes of applying the *Fernando* principles. It increasingly regards Indigenous identity and community connections as having been washed away by the tide of colonialism and urbanisation. Offenders from remote Indigenous communities are more likely to activate the principles. In this way, offenders from urban communities in New South Wales are perceived as not being ‘Aboriginal enough’ to activate the *Fernando* principles.¹³⁴ Fraser discusses the problematic notion of recognition where the dominant class defines the boundaries of identity.¹³⁵ Attempts to ‘eliminate, restructure and reconstitute’ Indigenous identity have operated in the interests of the coloniser from the late 18th century in Australia.¹³⁶ Since then, there has been a tendency for the recogniser to invoke ‘neo-traditionalism’ by only recognising ‘authentic’ types of Indigenous people. Motha suggests that courts subject Indigeneity to several determinative ‘essences’.¹³⁷ This makes the ‘essential’ idea of ‘tradition and custom’ prone to disappearance.¹³⁸ Based on this essentialism, Borrows argues, Indigeneity becomes a ‘once upon a time’ concept, that is, a retrospective rather than a contemporary experience.¹³⁹

One of the first New South Wales Court of Criminal Appeal cases that relied on an authentic construction of Indigeneity, *Ceissman*, upheld a Crown appeal against an Aboriginal offender’s sentence for being ‘[m]anifest[ly] lenient[t]’.¹⁴⁰ Its reasoning downplayed the significance of Indigenous circumstances because the offender resided in an urban environment. Despite the fact that the offender ‘grew up in extreme poverty’, received little education, had parents who were drug addicts with criminal histories, witnessed serious physical violence between

133 Dodson, above n 18, 9.

134 Martin Flynn, ‘Not “Aboriginal Enough” for Particular Consideration When Sentencing’ (2005) 6(9) *Indigenous Law Bulletin* 15, 18. See also Edney, above n 29.

135 Fraser, above n 7, 9.

136 Blagg, above n 27, 3.

137 Motha, above n 125, 119.

138 Ibid.

139 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002) 60.

140 (2001) 119 A Crim R 535, 541 (Wood CJ at CL).

them, and was orphaned when he was 11 years old,¹⁴¹ his circumstances did not suffice to activate the *Fernando* principles. The majority stressed that the offence did not occur ‘in a particular local or rural setting’ and did not involve ‘an offender from a remote community for whom imprisonment would be unduly harsh’.¹⁴² Chief Judge Wood noted that ‘*Fernando* is not to be regarded as a decision justifying special leniency merely because of the Aboriginality of the offender’.¹⁴³ Nonetheless, he discounted Ceissman’s Indigenous identity, stating: ‘I am unable to see the existence of any factor arising from the fact that the respondent’s grandfather was part aboriginal’.¹⁴⁴ This reference to ‘part’ Aboriginality is contrary to Indigenous notions of identity that are not determined by the degree of descent. It also contrasts the legal definition that does not draw lines between ‘full’ and ‘part’ Indigeneity, but requires Indigenous self-identity and community identity as well as descent.¹⁴⁵ The reasoning is reminiscent of colonial classifications of ‘half-castes’ or ‘hybrids’ that are based on biological taxonomies. Ultimately the Court in *Ceissman* privileged the guideline sentence (for drug importation) that is predicated on the seriousness of the crime over subjective Indigenous circumstances.¹⁴⁶

Following *Ceissman*, the New South Wales Court of Criminal Appeal, in *R v Morgan*, applied its reasoning to a defendant who was brought up in a town in central Victoria and had an ‘intimidating, violent and alcohol dependent’ father.¹⁴⁷ The offender was found not to be ‘particularly disadvantaged’, despite having to regularly flee his home to avoid his abusive father and spending ‘a good part of his early life in boys homes or correctional centres’.¹⁴⁸ Because the ‘offences were not alcohol-related and the appellant did not come from a *remote* community, nor was he unfamiliar with the justice system’, the *Fernando* principles were not activated.¹⁴⁹ Remoteness here appears to be a matter of degree, given that he lived near Shepparton (a town of less than 40 000 residents), and the traditional land of the Yorta Yorta people, which is almost 200 kilometres from Melbourne. These factors, as far as they related to the *Fernando* principles, ‘added little to the ... sentencing exercise beyond those matters which would otherwise have been taken into account, for any offender’, according to the Court.¹⁵⁰

The narrow application of the *Fernando* principles culminated in the Court of Criminal Appeal’s reasoning in *R v Newman*.¹⁵¹ It held that the urban town of

141 Ibid 543.

142 Ibid 540.

143 Ibid.

144 Ibid. For applications of *Ceissman*, see *Andrews v The Queen* [2007] NSWCCA 68; *Carr v The Queen* [2009] NSWSC 995.

145 *Shaw v Wolf* (1999) 163 ALR 205; *Eatock v Bolt* (2011) 197 FCR 261, 304 (Bromberg J).

146 (2001) 119 A Crim R 535, 541.

147 (2003) 57 NSWLR 533, 535.

148 Ibid.

149 Ibid 539 (emphasis added).

150 Ibid.

151 (2004) 145 A Crim R 361.

Griffith in central New South Wales was not sufficiently remote for the *Fernando* principles to apply. The Court distinguished these Indigenous defendants from Indigenous defendants in ‘a remote community’, who would be more likely to enliven the *Fernando* principles.¹⁵² One defendant, Newman, was forcibly removed from his family at a young age to an isolated mission property.¹⁵³ He had an early introduction to alcohol in communities where this conduct was ‘not only the norm but positively encouraged by peer group pressure’, and his criminal record was ‘exclusively, if not entirely’ alcohol-related.¹⁵⁴ Submissions were also made that the ‘defendant had endured childhood taunts and gotten into fights because of his colour’.¹⁵⁵ The Court questioned whether Aboriginality was an issue at all, observing that the offenders’ ‘lamentable’ background of disadvantage and alcohol and drug abuse ‘is not in any way unique nor is it restricted to any particular community group’.¹⁵⁶ It regarded alcohol and drug abuse as arising from a common type of ‘deprivation or abuse early in life’ that does not give rise to special consideration, ‘notwithstanding his [the offender’s] Aboriginality’.¹⁵⁷ The seriousness of the offence – aggravated entering dwelling with intent to commit a serious offence – made it legitimate to ‘give little weight to the applicant’s subjective circumstances’.¹⁵⁸ The majority stated: ‘it is not every case of deprivation and disadvantage suffered by an offender of Aboriginal race or ancestry that requires, or even justifies, the special approach adopted in that case’.¹⁵⁹ However, in the minority, Shaw J regarded the defendants’ disadvantage as being ‘associated with growing up as an indigenous citizen of this country’¹⁶⁰ and therefore the ‘aboriginality of the applicants and the social and economic difficulties flowing from that fact’ were ‘relevant consideration[s]’.¹⁶¹ Commenting on this case, Flynn states that the majority’s failure to apply the *Fernando* principles overlooked important factors relevant to the offender’s Indigenous background, which ‘ought, consistently with the substantial equality principle, [to have been] considered’.¹⁶²

The remarks of the New South Wales Court of Criminal Appeal misapprehend the nature of postcolonial Indigenous identity, and the nature of

152 Ibid 376, 378.

153 Ibid 385.

154 Ibid 386.

155 Flynn, above n 134, 16.

156 *R v Newman* (2004) 145 A Crim R 361, 378–9.

157 Ibid 379.

158 Ibid. This reasoning that privileged the seriousness of the offence above the subjective considerations in the *Fernando* principles was applied in *Gillon v The Queen* [2009] NSWCCA 277, [30] (Hislop J); *R v Blow* [2010] NSWCCA 294, [55] (McClellan CJ at CL); *Russell v The Queen* [2010] NSWCCA 248, [50]–[51] (Price J).

159 *R v Newman* (2004) 145 A Crim R 361, 376.

160 Ibid 384.

161 Ibid 388.

162 Flynn, above n 134, 16. See applications of *R v Newman* (2004) 145 A Crim R 361 in *R v Kelly* [2005] NSWCCA 280, [20] (Johnson J), [57]–[59] (Rothman J); *R v Knight* [2005] NSWCCA 241, [81] (Howie J).

Indigenous communities, in order ‘to confine the reach of *Fernando*’.¹⁶³ Nicholson, who represented the defendant in *Fernando*, expresses that it is nonsensical that the *Fernando* principles, which rest on the breakdown of Indigenous culture, would require proof of the retention of culture in a remote community.¹⁶⁴ He states that requirements of authenticity and remoteness are irrelevant to mitigation on the basis of cultural *breakdown*, disadvantage and the ‘mass post-traumatic stress syndrome’ arising from colonisation.¹⁶⁵ The diversity of Indigenous experiences in postcolonial society includes the predicament of negotiating the demands of Anglo-Australian society, which involves identity permeations between ‘black and white’.¹⁶⁶ These experiences extend to the urban community that exhibits ‘complex rules of kinship which determine, govern and influence an individual’s fundamental roles in their society’.¹⁶⁷ The courts create this dichotomy between urban and remote offenders for the ‘spatial management’ of postcolonial space, metaphorically securing white urban space to the exclusion of Indigenous people.¹⁶⁸ The ‘imaginative geography’, to use Said’s term, is determined by colonial knowledges¹⁶⁹ and a nationalist sense of (white) homogeneity that excludes those on the outside.¹⁷⁰

Alternating with the stock story of the remote Indigene is the stock story of the alcoholic Indigene. As mentioned, the New South Wales Supreme Court in *Fernando* pointed to the nexus between violence and alcohol abuse. Courts have regarded alcohol as an endemic problem in Indigenous communities and thus a material fact in sentencing – despite evidence that alcohol consumption is lower than in the general population.¹⁷¹ Langton asserts that the image of ‘the drunken Aborigine’ projects ‘inauthenticity onto the “half-civilised” native’ and, at the same time, a lack of capacity ‘to accept and adopt the genteel constraints of civilisation’.¹⁷² The rigidity of the drunkenness requirement was made apparent in recent cases that denied mitigation where the offenders were under the influence of other substances. These offenders were more likely to receive an aggravated rather than mitigated sentence.¹⁷³ Similarly, the New South Wales Supreme Court has refrained from applying the *Fernando* principles to offenders

163 Edney, above n 29, 8.

164 John Nicholson, ‘The Sentencing of Aboriginal Offenders’ (1999) 23 *Criminal Law Journal* 85, 86.

165 *Ibid.*

166 Rolls, above n 100, 9, 16; Gillian Cowlishaw *The City’s Outback* (UNSW Press, 2009).

167 *R v Smith* (2003) 86 SASR 132, 140 (Lander J).

168 Hage, above n 42, 32.

169 Edward W Said, *Orientalism* (Pantheon Books, 1978) 55.

170 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1983) 7.

171 Neil Thomson et al, Australian Indigenous HealthInfoNet, *Overview of Australian Indigenous Health Status 2011* (2012) 47 <<http://www.healthinfonet.ecu.edu.au/health-facts/overviews>>. Nonetheless, the veracity of measurements of alcohol consumption are methodologically problematic as they are based on surveys and hence self-perception: at 16.

172 Marcia Langton, ‘Rum, Seduction and Death: “Aboriginality” and Alcohol’ (1993) 63(3) *Oceania* 195, 205.

173 See *R v Ah-See* [2004] NSWCCA 202, [18] (Hislop J).

who were not drunk at the time of the offence.¹⁷⁴ In *R v Trindall* an Indigenous offender who was raised in a remote community and had been abused by her relatives with whom she was placed did not activate the *Fernando* principles because she had not experienced problems ‘referable to the applicant’s membership of the Aboriginal society’.¹⁷⁵ Rather, the Supreme Court described the offender’s problems as ‘more generally associated with the destructive effects of drug addiction’.¹⁷⁶ These offenders fell short of iconic images of drunk Indigenous persons. They were comparable to the broader criminal population rather than the Indigenous cohort; as such, their identity was nullified. The judiciary’s refusal to recognise the urban, non-alcoholic Indigenous offender reveals how the affirmative justice technique of recognition can both treat and wound Indigenous difficulties in the criminal justice system.

2 *More Than Ordinary Disadvantage*

In order to satisfy the standard set by New South Wales higher courts, the remote Indigenous offender must also experience the worst kinds of disadvantage to activate recognition of his or her subjective circumstances in mitigation. Povinelli describes this as a ‘cunning of recognition’ – not only do courts require traditionalism, but they also require fulfillment of modern norms.¹⁷⁷ In relation to the Indigenous offender, these norms include *severe* social strain. An ordinary type of disadvantage is insufficient because it is subsumed into the ‘normal’ experience of Indigenous people.¹⁷⁸ Allowing an ordinary degree of disadvantage would challenge the courts’ sentencing of almost all Indigenous offenders. In *Gillon v The Queen*, the New South Wales Court of Criminal Appeal dismissed the ‘subjective matters’ related to Indigeneity, which included an upbringing on an Aboriginal mission reserve, early exposure to violence, alcohol abuse from the time he was 16 or 17 and extending up until the time of the offence.¹⁷⁹ The Court found that these were not ‘special circumstances’ that warranted mitigation: ‘it is not every case of deprivation and disadvantage suffered by an offender of Aboriginal race or ancestry that calls for the special approach adopted in *Fernando*’.¹⁸⁰

The New South Wales Supreme Court posited the requirement for a greater degree of disadvantage in *R v Pitt*.¹⁸¹ In that case, the appellant, who had pleaded guilty to malicious damage by fire, claimed that the trial judge had not given sufficient weight to his deprived background and intoxication as required by

174 See *R v Morgan* (2003) 57 NSWLR 533.

175 [2005] NSWCCA 446, [27] (Hall J).

176 *Ibid.*

177 See Elizabeth A Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Duke University Press, 2002).

178 On this approach see *Anderson v The Queen* [2008] NSWCCA 211, [24]–[25] (McClellan CJ at CL); *Croaker v The Queen* [2008] NSWCCA 232, [6]–[7] (Bell JA); *R v Knight* [2004] NSWSC 498 [14] (Barr J).

179 [2009] NSWCCA 277, [9] (Hislop J).

180 *Ibid* [30] (Hislop J).

181 [2001] NSWCCA 156.

Fernando. The defendant was raised on a mission in the remote community of Moree, and was subject to abuse by a drunken and violent father. He had limited education and employment history, and was susceptible to self-harm. However, the Supreme Court held that these circumstances were not sufficient to activate the *Fernando* principles, stating that ‘there was nothing of an exceptional kind, in the aboriginality or upbringing of the applicant, that called for any particular mitigation of sentence’.¹⁸² According to the Court, the defendant’s ‘childhood experiences [had] been shared by many persons across a wide range of ethnic, social and racial backgrounds’.¹⁸³ This approach also arose in *R v Walter*, a case involving two Indigenous defendants.¹⁸⁴ The New South Wales Court of Criminal Appeal held that the *Fernando* principles should not apply to mitigate the sentence of one defendant, who was adopted into a ‘white’ family in northern New South Wales at the age of three months and physically and emotionally abused by his step-mother, who called him ‘little black bastard’. The other defendant did not come within the *Fernando* principles because his situation was simply ‘in common with other members of the community, [he] had resorted to alcohol as a comfort from his troubles’.¹⁸⁵ There was also no regard given for the fact that the offence of robbery and assault was provoked by an act of racism.¹⁸⁶ Edney has commented in relation to the Court’s reasoning that ‘Aboriginality is rendered invisible as this disadvantage is assumed to be the same as all other ethnic groups’.¹⁸⁷ This is a ‘classic type of liberalism’ that divorces Indigenous people from ‘the operation of historical forces’ such as dispossession and institutional control, and assumes that they commence life on an equal footing to other groups.¹⁸⁸

B Recognition of Difference in the Northern Territory: Maligned Dysfunction

The Northern Territory Supreme Court’s representation of Indigenous alterity has shown a different countenance to that of the New South Wales Supreme Court. In the Northern Territory, there has not been a challenge to the Indigeneity of the offender, but a condemning of the offender’s Indigenous community. The Supreme Court’s interpretation of the Indigenous community as a risk factor that contributes to the crime problem has formed the basis of a reduced reliance on mitigation since the late 1990s. To facilitate this reimagining of the Indigenous community, there has been a change in language, from the ‘disadvantaged’ to the ‘dysfunctional’ Indigenous community. Disadvantage can impute responsibility for the offender’s wrongs to the postcolonial system, whereas dysfunction invariably implies responsibility on the part of the Indigenous community itself.

182 Ibid [18] (Wood CJ at CL).

183 Ibid.

184 [2004] NSWCCA 304, [37], [57].

185 Ibid [58].

186 Flynn, above n 134, 17.

187 Edney, above n 29, 9.

188 Ibid 10.

The Court hones in on this dysfunction to emphasise the seriousness of the offence, particularly for victims in these hopeless conditions. Denying Indigenous communities functionality coheres with Fraser's view that misrecognition creates social patterns that impede the participation of low status groups.¹⁸⁹

The Northern Territory Supreme Court construes the Indigenous victim as an 'ideal victim', one who is characterised by a vulnerability to harm.¹⁹⁰ According to the Court, the victim does not have a stake in the Indigenous community and is not of concern to it. She is embodied as one of 'us' in the 'wider community', and the violent offender, along with the Indigenous community at large, is one of 'them'.¹⁹¹ In law and order regimes, the victim is invoked 'in support of measures of punitive segregation'.¹⁹² Judicial reasoning that positions the victim as particularly vulnerable in Indigenous communities undermines active community efforts to protect victims, including those made by women and Elders. The turn of phrase – from disadvantaged to dysfunctional – implies that the Indigenous community lacks the functionality or will to be involved in the processes of justice. The attribution of dysfunction justifies punishment being confined to the prisons of the Anglo-Australian system, and undermines the capacity of Indigenous communities to prevent or respond to crime, or to be involved in the structuring of punishment.

Sentences are aggravated so as to send a special message of deterrence to the Indigenous community, and to uphold the interests of the 'wider community' through the imposition of lengthy prison sentences. Deterrence is required because the Northern Territory Supreme Court regards Indigenous communities as condoning the violence that offenders inflict on victims. In a speech to the Law Council of Australia, Southwood J, well known for his dissenting judgments on the bench, cautioned against dysfunction being used to justify harsher punishments for Indigenous offenders:

In view of the recent media coverage of the violence and dysfunction in some Aboriginal communities, it must also be noted that each Aboriginal offender is not to be punished as if he or she were responsible for all of the violence and dysfunction in Aboriginal communities. Often Aboriginal offenders are also victims.¹⁹³

In *Amagula v White*, the Supreme Court described the prevalence of assaults as a key marker for dysfunction on Groote Eylandt in the Gulf of Carpentaria.¹⁹⁴

189 Fraser and Honneth, above n 6, 29–30.

190 Nils Christie, 'The Ideal Victim' in Ezzat A Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (Macmillan, 1986).

191 Russell Hogg, 'Resisting a "Law and Order" Society' in Thalia Anthony and Chris Cunneen (eds), *Critical Criminology Companion* (Hawkins Press, 2008) 282.

192 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 11.

193 Justice Stephen Southwood, 'Equality of the Law and the Sentencing of Aboriginal Offenders under the Sentencing Act (NT)' (Paper presented at the Law Council of Australia, Rule of Law: The Challenges of a Changing World, Brisbane, 1 September 2007) 3.

194 (Unreported, Supreme Court of the Northern Territory, Kearney J, 7 January 1998).

Although counsel for the defendant submitted that assaults on Aboriginal women had reduced in recent years, Kearney J said that he preferred to rely upon '[his] own general experience over the years'.¹⁹⁵ That case involved an aggravated assault in which the offender punched his wife in public, resulting in bruising and scrapes to the skin. The Court held that 'the prevalence of an offence is a matter to be taken into account in determining the appropriate sentence'.¹⁹⁶ This included the 'fairly widespread belief that it is acceptable for men to bash their wives in some circumstances'.¹⁹⁷ The Court's punishment sought to 'erase' the belief that violence is acceptable in Indigenous communities, and to 'send the correct message' to the community.¹⁹⁸ This conveyed that the Court stood above the community, which had failed to care for its own members, and that punishment was needed in order to provide 'general deterrence' to the community.¹⁹⁹ The Court's endeavour to deter crime through imprisonment permeates cases since the late 1990s, including in *Wynbyne v Marshall*, in which Martin CJ remarked that imprisonment 'is undoubtedly an instrument for the maintenance of law and order' and operates 'so as to deter' the Indigenous community.²⁰⁰ The Court also pointed to 'general deterrence' as being of 'particular importance' in the context of violence in Aboriginal communities in *R v Riley*.²⁰¹ This channelling of Indigeneity into the risk of violence is embodied in the discussion of the 'significance of Aboriginality' in *Amagula v White*, in which the Court referred to it in terms of what a court can do to deter crime rather than in terms of moral culpability.²⁰²

Justice Kearney in *Amagula v White* also spoke for the Indigenous community when he stated that 'the Groote Eylandt community acting through the court does not approve of what you [the defendant] did'.²⁰³ This infers that although the Indigenous community violates Anglo-Australian norms, it also genuflects to the authority of the Court and the punitive system through which it operates. In this respect, the Court is projecting both the face of humanity and morality (speaking for and on behalf of the Indigenous community), and the face of denunciation (speaking above and over the community). Rutherford illustrates how the treatment of Indigenous people in Australia is schizophrenic – acting as

195 Ibid 9.

196 Ibid.

197 Ibid 10.

198 Ibid.

199 Ibid 3–4.

200 (1997) 117 NTR 11, 15.

201 (2006) 161 A Crim R 414, 419. Consequently, the Court ruled out the 'deprived and dysfunctional circumstances' of the offender as representing mitigating circumstances: at 425. This position that 'general deterrence is a matter of particular importance' in punishing the Indigenous offender was upheld in *Mununggurr v The Queen* [2006] NTCCA 16, [22]; *R v Walker* (Unreported, Supreme Court of the Northern Territory, Olsson AJ, 26 September 2007) 7.

202 (Unreported, Supreme Court of the Northern Territory, Kearney J, 7 January 1998) 10. This approach is echoed in *R v Riley* (2006) 161 A Crim R 414, 419; *R v Rindjarra* [2008] NTCCA 9, [98] (Southwood J).

203 (Unreported, Supreme Court of the Northern Territory, Kearney J, 7 January 1998) 4.

both protector and punisher.²⁰⁴ Invoking Lacan's psychoanalysis, Rutherford explains that the nation seeks to transgress the pleasure principle through morality and aggression to the Other.²⁰⁵ In *Amagula v White*, reference to the victim also operates on this dual level – protection through imprisoning the offender *and* condemnation of the victim's request for the offender (her husband) not to be imprisoned.²⁰⁶ The Supreme Court rejected the victim's submission that a custodial sentence would bring hardship for her and her family, stating that hardship to a third party is only considered where it is 'highly exceptional'.²⁰⁷ In this way, the Court fulfils a paternal role: caring for, but not listening to, the victim.

Both in New South Wales and the Northern Territory, courts have emphasised the seriousness of the crime, eclipsing subjective Indigenous factors and allaying mitigation.²⁰⁸ The high watermark for the Northern Territory Court of Criminal Appeal's disregard for the recognition of difference was embodied in *Wurramara*. In this seminal decision, the Court stressed the *seriousness of the offence* above all other sentencing considerations. Although 'seriousness' has been held by the High Court to encompass a range of factors, including the subjective circumstances of the offender,²⁰⁹ the Northern Territory judiciary now tends to measure seriousness chiefly in terms of the harm of the offence to the victim.²¹⁰ The defendant in *Wurramara* was also from Groote Eylandt, and had stabbed his wife and his neighbour. In pointing to the seriousness of the offence, the Court held that condign punishment for offenders from dysfunctional Indigenous communities was needed to protect vulnerable victims in those communities.²¹¹ The Court noted that the 'dysfunctional' status of the Groote Eylandt community, with its prevalence of alcohol abuse and violence, was 'by no means' justification for 'a lower sentence'.²¹² Rather, the dysfunctional

204 Jennifer Rutherford, *The Gauche Intruder: Freud, Lacan and the White Australian Fantasy* (Melbourne University Press, 2000) 57.

205 Ibid. Lacan posits that the 'pleasure principle' is a limit to enjoyment (*jouissance*). It is a 'law that commands the subject to "enjoy as little as possible"' (cf Freud who regards the pleasure principle as the exclusive desire of the id – a personality trait that produces urges and impulses). Accordingly, the subject constantly attempts to transgress the prohibitions set by the pleasure principle: see Slavoj Zizek, 'Ego Ideal and Superego: Lacan as Viewer of *Casablanca*' in *How to Read Lacan* (2007) Lacan.com <<http://www.lacan.com/zizraphael.htm>>.

206 (Unreported, Supreme Court of the Northern Territory, Kearney J, 7 January 1998) 5.

207 Ibid 7.

208 A similar trend has been observed in Canada where despite legislation allowing Aboriginal considerations in sentencing, courts have not relied on these to provide mitigation where the offence is serious: Kent Roach, 'One Step Forward, Two Steps Back: *Gladue* in the Courts of Appeal' (2009) 54 *Criminal Law Quarterly* 470, 473.

209 *Neal v The Queen* (1982) 149 CLR 305, 325.

210 See *Wurramara* (1999) 105 A Crim R 512, 521; Southwood, above n 193, 6; Chief Justice Brian Martin, (Speech delivered to the South Australian Press Club, Adelaide, 15 September 2006) <http://www.supremecourt.nt.gov.au/media/20060915cjmartin_sa_pressclub1.html>. See also NSW cases reflecting this judicial reasoning: *R v Fernando* [2002] NSWCCA 28, [68] (Spigelman CJ); *R v Kelly* [2005] NSWCCA 280, [56] (Rothman J).

211 *Wurramara* (1999) 105 A Crim R 512, 520.

212 Ibid 522.

community illuminated the difficulties faced by the Indigenous victim, warranting harsh punishments for offenders within it. The Court stated that vulnerable victims – ‘Aboriginal women, children and the weak’ – are entitled to look to the courts to send ‘the correct message’ that they will be protected.²¹³ The offender’s membership of a disadvantaged Indigenous community did not sound in mitigation, and *Fernando* was cited only for the proposition that ‘Aboriginal offenders are not to be treated differently’ such that ‘offences of serious violence call for condign punishment’.²¹⁴ In fact, it was taken to signal the need for a strong deterrence message, notwithstanding the Court’s recognition that imprisonment has limited impact on the ‘dysfunction or deprivation’ that lie at the root of violence.²¹⁵

The emphasis on ‘seriousness’ in *Wurramara* has been applied consistently to increase sentences for Northern Territory Indigenous offenders.²¹⁶ In *Spencer v The Queen*, the Court of Criminal Appeal stated that *Wurramara* displaced the *Fernando* principles and its Northern Territory iteration in *Lee*.²¹⁷ Therefore, membership of a ‘deprived or dysfunctional’ community ‘does not mean that lower sentences should prevail’ where there is a serious offence,²¹⁸ and for this reason, the offender – a ‘traditional Warlpiri man who was alcohol-dependent and living in a fringe bush camp’ – did not receive leniency.²¹⁹ The Court of Appeal has also favoured a standard sentencing approach for some serious offenders, based on a scale of seriousness.²²⁰ This does not merely displace the recognition of disadvantaged contexts in sentencing, but can result in harsher sentences relative to non-Indigenous offenders, because the courts are concerned to deter serious crime in Indigenous communities and protect their particularly vulnerable victims.²²¹ Even where offences are at the ‘lower end’ of assaults,

213 Ibid 520.

214 Ibid 512.

215 Ibid 521. Also see: *R v Downes* (Unreported, Supreme Court of the Northern Territory, Bailey J, 10 October 2001) 8, where the NT Supreme Court stated that ‘[i]mprisonment is a very blunt instrument to protect Aboriginal women from drunken and violent men’. In *R v Wanambi* (Unreported, Supreme Court of the Northern Territory, Bailey J, 7 December 2001) 6, Bailey J stated that although prison may not be the ideal environment for the Indigenous offender, ‘no-one has suggested any better environment for him’.

216 See *R v Jinjair* (Unreported, Supreme Court of the Northern Territory, Angel ACJ, 28 November 2003) 4–5.

217 [2005] NTCCA 3, [23] (Riley J).

218 Ibid.

219 Ibid [31].

220 See *Inkamala v The Queen* [2005] NTCCA 6.

221 See *R v Inkamala* [2006] NTCCA 11, [10], [19] (Martin CJ); *R v Rindjarra* [2008] NTCCA 9. However, while ‘there is always a range of appropriate sentences that can be said to comprise the sentencing “standard” for the offence under consideration’ the ‘standard’ is to be distinguished from ‘tariffs’ that completely remove the relevance of ‘circumstances of the offending and the offender’: *R v Rindjarra* [2008] NTCCA 9, [30], [52]. On standards, see also *Mununggurr v The Queen* [2006] NTCCA 16; *Green v The Queen* (2006) 19 NTLR 1.

with no serious injuries, *Wurramara* has been relied on to hand down a harsh penalty to deter and protect others in the community from violence.²²²

Courts have stressed that seriousness attracts longer prison sentences because it is what the 'wider community' demands. In *R v Webb*, it was stated that due to the seriousness of the crime, 'the interests of the wider community demand the prisoner be punished by the loss of his liberty'.²²³ This reasoning, following *Wurramara*, sets the wider ('white') community apart from the callous Indigenous community. It implies that the Indigenous community is not concerned with the delivery of justice, while the wider community understands its importance and the need for serious penal consequences. In *R v Rindjarra*, it was noted that the initial sentence was 'so disproportionate' to the gravity of the crime that it would 'shock the public conscience'.²²⁴ And the Court of Criminal Appeal in *R v Riley* pointed to the fact that the defendant's crimes were 'particularly abhorrent to right thinking members of our community', based on 'widespread concern about crimes of violence'.²²⁵ Violent offending, however, is deeply felt by Indigenous community members, and has far-reaching ramifications for Indigenous values, laws and relationships. Simply because its devastating impact cannot be addressed through singling out the offender *alone*, and requires 'a holistic process of community healing',²²⁶ does not diminish its gravity for Indigenous communities. Warlpiri accounts (from the Tanami Desert) testify to the importance of dealing with crime and subjecting offenders to community punishment.²²⁷ In the *Little Children Are Sacred* report, Indigenous community members across the Northern Territory expressed concern to reduce family violence and sexual offending through community-based programs.²²⁸ In fact, the Supreme Court's reasoning serves the symbolic purpose of reinforcing its legitimate (and legitimising) role of acceding to the wider community rather than the Indigenous community. This corresponds with the Court's resolve to send a message to Indigenous communities that the Anglo-Australian legal order does not tolerate Indigenous offending. The ensuing juxtaposition of the normal Anglo-Australian legal order against the deviant Indigenous community justifies especially lengthy prison sentences for Indigenous offenders.

222 See, eg, *Alderson v The Queen* [2002] NTCCA 10, [14], in which the defendant unsuccessfully argued that 'too much weight' was placed on these considerations.

223 (Unreported, Supreme Court of the Northern Territory, Bailey J, 21 February 2003) 8.

224 [2008] NTCCA 9, [28] (Martin CJ).

225 (2006) 161 A Crim R 414, 425.

226 Harry Blagg, 'Restorative Justice and Aboriginal Family Violence' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 191.

227 See Australian Broadcasting Corporation, 'Message Sticks', *Bush Law*, 28 March 2010 <<http://www.abc.net.au/tv/messagestick/stories/s2855782.htm>>.

228 Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government, *Ampe Akelyernemane Meke Mekarle – 'Little Children Are Sacred'*: Report (2007) 175–92.

VI SOCIAL JUSTICE AND TRANSFORMATIVE TECHNIQUES IN SENTENCING

The winding road of Indigenous recognition in sentencing impels a rethink of how social justice can be better achieved through transformative techniques. While judicial discretion to mitigate sentences may allow some Indigenous people to avoid imprisonment, it operates at the whim of the Anglo-Australian legal order, and has not been shown to decrease the overrepresentation of Indigenous people in prisons. In Fraser's social justice schema, Indigenous recognition is an affirmative act that is prone to counter-discourses because it is premised on institutionalised patterns of dominance. For Indigenous groups, this has resulted in Indigeneity not being recognised (New South Wales), or otherwise being recognised as dysfunctional and inherently violent (Northern Territory). The uncanny ramification has been that Indigenous defendants are now arguing for 'equality before the law' and the uniform application of criminal sanctions, because their Indigeneity is a disadvantage in sentencing.²²⁹ The affirmative act of recognition entrenches the position of the 'Other' in relation to the dominant position of the recogniser, while denying transformative techniques that challenge the power imbalance between the recogniser and the recognised. Transformative approaches are needed to restructure the legal order to engage Indigenous communities as peers in legal norm creation.

In her support for transformative approaches, Fraser is primarily concerned with economic redistribution for the purpose of providing social justice to oppressed classes. She distinguishes this from the flipside of her social justice theory, deconstructivism, which involves breaking down differentiated identities by engaging status groups as 'peers' in institutional processes such that the recognition of identity is a two-way process. In terms of social justice in sentencing, there needs to be a challenge to institutionalised patterns of subordination (instrumentally and epistemologically) so as to place the 'recognised' status group on a par with the 'recogniser', improving the status of marginalised groups and dismantling 'white' claims to dominance. Vesting authority in Indigenous-owned structures and Indigenous justice processes is necessary to redress these asymmetrical institutional relations. This process is described by Fraser, drawing on Hegel's idea of recognition, as an 'identity model' that 'designates an ideal reciprocal relation between subjects, in which each sees the other both as its equal and also as separate from it'.²³⁰ By doing away with differentiated identities, deconstructivism precludes a seesaw approach to recognition that tips from sympathetic to condemning portrayals of Indigeneity. It steps away from 'affirmative remedies' that are process-based (rather than systemic) and operate at the behest of the dominant legal order.

229 *Alderson v The Queen* [2002] NTCCA 10, [14].

230 Fraser, above n 13, 109. For Hegel the development of a sense of self is realised through recognition: 'one becomes an individual subject only by virtue of recognizing, and being recognized by, another subject': at 109.

Deconstructivist techniques do away with Indigeneity being treated as another material fact in sentencing, but allow Indigenous people to identify the entry points for the Anglo-Australian punitive process. This is tantamount to one of the findings of the Australian Law Reform Commission in its report on Aboriginal Customary Laws: that judicial recognition did not project Aboriginal community concerns, and that a 'considerably greater degree of *local control*' over community-identified crime problems would be more effective.²³¹ The utilisation of local capacities is not a unilateral strategy, but a disparate set of strategies that respond to the circumstances of the individual Indigenous community. Where Indigenous laws bind communities, including through the enforcement of Indigenous punishment systems, those punishment processes may be the 'recognised' avenue for mediating and resolving matters to the satisfaction of the victim, the offender, their families and Indigenous community. Punishment of this type most commonly includes exile, shaming, restitution or non-fatal clubbing or spearing in the leg for serious matters such as homicide.²³² Victims or the Indigenous community itself may seek the protection of the courts, but their involvement will be contingent on their acceptance of that jurisdiction, rather than it being mandated or imposed by the state. This gives responsibility to Indigenous people for identifying their entry points into the Anglo-Australian legal system. Warlpiri Elders, for example, have conveyed their acceptance of Anglo-Australian court processes, so long as 'traditional' punishment can be carried out to reconcile their community.²³³

So-called 'traditional' punishment is not fit for every Indigenous community. In Indigenous communities whose laws do not have the same punitive capacity, but strong authority structures exist nonetheless, an Indigenous court or circle-sentence route may be more appropriate for engaging Indigenous knowledges and axiologies.²³⁴ These courts, which exist outside the mainstream judicial system, galvanise Indigenous justice strategies by involving Indigenous Elders in the sentencing process. They are capable of challenging 'white' law and justice by bringing forward the views and sensibilities of the Indigenous domain. Daly and Marchetti's research shows how Indigenous courts provide 'innovative justice' by incorporating Indigenous knowledge and modes of social control into

231 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31, (1986) [688] (emphasis added).

232 See Chris Cunneen, 'Reviving Restorative Justice Traditions?' in Gerry Johnstone and Daniel W Van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing, 2007) 113.

233 This was conveyed in the contribution by Warlpiri Elders to a panel discussion, *Bush Law: An Open Forum*, hosted by the Indigenous Law Centre at the University of New South Wales on 17 March 2010: <<http://www.ilc.unsw.edu.au/bush-law>>.

234 Since the early 1990s separate Indigenous sentencing courts have emerged in NSW (circle sentencing), Queensland (Murri Courts), Victoria (Koori Courts) and South Australia (Nunga Courts). In some jurisdictions, this is supported by legislation, such as the *Magistrates' Court Act 1989* (Vic) s 4D, or broadly under the *Penalties and Sentences Act 1992* (Qld) s 9(2)(p). However, in other jurisdictions there is no stable legislative basis (such as in NSW), or legislation actually prohibits community sentencing courts (such as in the Northern Territory, due to the legislative notice and form requirements for the admission of cultural evidence under the *Sentencing Act* (NT) s 104A).

the sentencing process.²³⁵ In this way, Indigenous courts ‘bend and change the dominant perspective of “white law”’.²³⁶ Critiques of the current system of Indigenous courts in Australia indicate where they stop short of providing transformative justice: final adjudication rests with a non-Indigenous magistrate;²³⁷ Indigenous people do not have total control over the process; it is usually only minor offenders who benefit from its jurisdiction; the sentencing options available to the court must come within the punishments prescribed by legislation; and they tend to operate in mainstream court complexes rather than in Indigenous spaces.²³⁸ To some extent these concerns have been overcome by the Indigenous Justices of the Peace (‘JP’) system in Queensland, where the Indigenous JP is provided with full adjudication rights when presiding over minor sentencing matters involving Indigenous defendants.²³⁹ Nonetheless, Marchetti argues that Indigenous courts, through their empowerment of Indigenous people and incorporation of Indigenous perspectives and values, have the potential to be ‘transformative’ rather than merely ‘restorative’.²⁴⁰ They provide Indigenous-controlled spaces that catalyse change in ‘white’ processes. This includes in family violence contexts, in which the transformative Indigenous court process can be cognisant of the ‘subordinating experiences’ of both offenders and victims.²⁴¹ Furthermore, unlike in mainstream courts, the Indigenous sentencing court process involves Elders, as well as the families of both the victim and the offender. This removes the risk of the recognition of Indigenous circumstances being filtered through a ‘white’ lens.

Transformative justice in family violence cases requires a broader set of Indigenous controlled strategies and programs, including community peacemaking and reconciliation processes through the acknowledgement of responsibility; support groups for the victim and offender of the same sex and

235 Kathleen Daly and Elena Marchetti, ‘Innovative Justice Processes: Restorative Justice, Indigenous Justice, and Therapeutic Justice’ in Marinella Marmo, Willem de Lint and Darren Palmer (eds), *Crime and Justice: A Guide to Criminology* (Lawbook, 4th ed, 2012) 455, 466.

236 Elena Marchetti and Kathleen Daly, ‘Indigenous Sentencing Courts: Towards a Theoretical Jurisprudential Model’ (2007) 29 *Sydney Law Review* 415, 429.

237 While some defendants have claimed that they would like the Elders to have more decision-making power, Elders express a view that they do not want to be responsible for the final decision imposed: Kathleen Daly and Gitana Proietti-Scifoni, *Defendants in the Circle: Nowra Circle Court, the Presence and Impact of Elders, and Re-Offending* (School of Criminology and Criminal Justice, Griffith University, 2009) 94.

238 *Ibid* 420–1.

239 Fiona Allison et al, ‘Sentencing and Punishment in the Indigenous Justices of the Peace Courts’ (2012) 16(1) *Australian Indigenous Law Review* (forthcoming)

240 Elena Marchetti, ‘Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and Elders on Gender Power Imbalances during the Sentencing Hearing’ (2010) 43 *Australian & New Zealand Journal of Criminology* 263, 271.

241 *Ibid*, quoting Donna Coker, ‘Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence’ in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 144.

culture;²⁴² and enforcement of punishment by the victim's family and supporters.²⁴³ These processes empower communities and reinforce respect for their laws and authority structures.²⁴⁴ Cox, Young and Bairnsfather-Scott stress that it is not possible to have justice without healing: 'If people don't heal, they will not be able to change their behaviours and will continue to be victims and perpetrators of violence'.²⁴⁵ Healing for the victim and community is effective where it is self-determined rather than confined to alienating Anglo-Australian institutions. This enables Indigenous people to 'govern their own path of healing, to deal with past injustices, such as colonisation and its effects, in order to move into a future, which will sustain their livelihood and foster a just society'.²⁴⁶ One example of this kind of healing can be seen in the process of peacemaking on Mornington Island (in the Gulf of Carpentaria), where an Indigenous Peacemaker mediates matters, such as public nuisance, assault and serious extended family disputes, in order to reconcile victims and offenders, rather than lay down punishment.²⁴⁷ As Cox, Young and Bairnsfather-Scott demonstrate, healing is much broader than the punishment processes, and can include everything from leadership and mentoring programs and mothers' groups, to artwork and sporting programs for young men.²⁴⁸ In these respects, transformation draws on the normative order (*nomos*) in Indigenous communities and 'its attendant claims to autonomy and respect', but with the transformative quality of changing 'their own place within the world' to enable their equal participation and two-way recognition.²⁴⁹

Transformative remedies are more likely to decarcerate Indigenous people from the prison system than sentencing practices of the Anglo-Australian courts, because they challenge the basis of that criminalisation process. Imprisonment is a form of 'white' control and subjection²⁵⁰ – evident in that fact that in 2010

242 This includes anti-violence programs for Indigenous men, which Harry Blagg has noted as being grounded in a distinctly Indigenous approach, such as focusing on inter-generational issues and mentoring of Indigenous youth by Elders, supporting young Aboriginal fathers, creating men's 'meeting places' and healing camps and/or healing journeys and formulating local violence prevention strategies aimed at youth: Harry Blagg, *Pilot Counselling Programs for Mandated and Non-Mandated Indigenous Men: Research and Program Development. Full Report* (2001), quoted in Chris Cunneen, 'Preventing Violence against Indigenous Women through Programs which Target Men' (2002) 25 *University of New South Wales Law Journal* 242.

243 Marchetti, above n 240, citing Coker, above n 241, 144.

244 See Cath Brown and Roxanne Bainbridge, 'Enhancing Aboriginal Healing and Wellbeing: Evidence from a Decade of Empowerment Research' (Paper presented at Symposium on Indigenous Sentencing, Punishment and Healing, Cairns, 6 July 2011).

245 Dorinda Cox, Mandy Young and Alison Bairnsfather-Scott, 'No Justice Without Healing: Australian Aboriginal People and Family Violence' (2009) 30 *Australian Feminist Law Journal* 151, 151.

246 Ibid.

247 Australian Government, 'Making Peace on Mornington Island' (1 December 2010) Closing the Gap <http://www.indigenous.gov.au/stories/country/80_making_peace_on_mornington_island>.

248 Cox, Young and Bairnsfather-Scott, above n 245, 160; Dorinda Cox, 'Aboriginal Healing Project' (Presentation at the Indigenous Family Violence Prevention Forum, Mackay, Queensland, 11–13 May 2009) <<http://www.noviolence.com.au/public/forum2009/dorindacox.pdf>>.

249 Cover, above n 58, 34.

250 Blagg, above n 5, 139–40.

Indigenous women were imprisoned at 21 times the rate of non-Indigenous women, and Indigenous men at 18 times the equivalent rate²⁵¹ – and the transformation of postcolonial relations would go a long way in undoing this injustice. Criminologists argue that because sentencing replicates social relations, the sentencing paradigm needs to shift away from imprisonment and towards integrating ‘members of the underclass’ into the ‘common community’.²⁵² This involves concentrating on ‘reintegrative strategies rather than exclusionary ones’ that reorder the penal objective of controlling and incapacitating the poor.²⁵³ However, transformative techniques need to shy away from becoming yet another rehabilitative or restorative justice measure imposed by the state, by critically engaging and decentering their relationship with these sites of power.²⁵⁴ For Indigenous people, integration will achieve just outcomes to the extent that it integrates offenders into the Indigenous domain on the terms of the Indigenous community. Postcolonial theory informs us of the capacities of Indigenous communities to embrace their role as ‘peers’ in the justice process, including through Indigenous law processes, Indigenous community justice groups and community courts.²⁵⁵

VII CONCLUDING OBSERVATIONS

Judicial recognition of the postcolonial Indigenous experiences of poverty, alcoholism and cultural breakdown has had a troubled journey in New South Wales and the Northern Territory. While early representations of ‘Indigenous disadvantage’ were attributed to unequal treatment of Indigenous people in Australian society, and higher courts sought to provide these offenders with mitigation to level the punitive playing field, later versions have regarded the offender as too colonised or too dysfunctional to attract mitigation. The recognition pendulum swung from judicial sympathy to judicial disregard or condemnation in the late 1990s. Fraser’s theory elucidates how either end of the pendulum is insufficient if the purpose of recognition is to achieve social justice. This is because the pendulum pivots from institutions within the dominant order. The Anglo-Australian courts do not merely define the terms of recognition, but also reinstate their superiority over Indigenous systems and peoples. For example, the judicial imagining of Indigenous disappearance in the New South Wales courts is a powerful metaphor for the rule of the postcolonial institutions. Motha has argued that the ‘essential’ idea of ‘tradition and custom’ is prone to

251 Steering Committee for the Review of Government Service Provision, Parliament of Australia, *Overcoming Indigenous Disadvantage: Key Indicators 2011 – Fact Sheet: Indigenous Men and Women* (2011) 3 <http://www.pc.gov.au/_data/assets/pdf_file/0014/111614/key-indicators-2011-factsheet-men-women.pdf>.

252 McCoy, above n 54, 611–12.

253 Ibid 612.

254 Chris Cunneen, ‘Understanding Restorative Justice through the Lens of Critical Criminology’ in Thalia Anthony and Chris Cunneen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 301.

255 Blagg, above n 27.

disappearance, because it is based on unattainable neo-colonial ideals.²⁵⁶ It co-exists with the judicial imagining of Indigenous dysfunctionality in remote Northern Territory communities as a counterpoint to the peaceful and moral order of the wider 'white' community. Dysfunctionality in this sense signifies the need to send a message of deterrence – one that whitewashes the effect of disadvantage on moral culpability – and to impose the white penal complex.

Even at the height of sentencing leniency jurisprudence in the early 1990s, with the *Fernando* principles, the higher courts reinforced a view of the hopeless and drunken nature of Indigenous peoples and their communities. Although sentencing leniency benefits some Indigenous people and goes some way in redressing the over-representation of Indigenous people in prison, this affirmative act of social justice, as Fraser would describe it, is constantly tested and often found wanting.²⁵⁷ Social justice requires more than ameliorative sentences, which serve to reinforce a white racial fantasy in which the 'presentation of the self' as tolerant and accommodating is the means of controlling Indigenous peoples.²⁵⁸ This affirmative act is prone to disintegration in the face of dominant norms. Courts are able fall back to the position that Indigenous offenders are to be treated equally to all other offenders, allowing them to deny leniency or refuse to recognise offenders' Indigeneity (non-recognition). The flipside of non-recognition, according to Fraser, is misrecognition, through which the courts refer to Indigenous dysfunction in order to condemn the community and aggravate sentences. Fraser suggests that these forms of non-recognition and misrecognition are means of institutional subordination. Transformative social justice collapses the misrecognition and non-recognition of postcolonial alterity 'by transforming the underlying cultural-valuational structure', so that Indigenous peoples can participate as 'peers' in social life.²⁵⁹ This necessitates not only deconstructing the identity of low-status groups, but everyone's sense of self and identity, so as to promote reciprocity and solidarity in the relations of recognition.²⁶⁰ The judicial monopoly over the legal recognition of Indigeneity would be undercut by Indigenous recognition of Anglo-Australian legal institutions when and where they further community objectives. Fraser's theory of social justice presents opportunities to seize postcolonial liminal spaces²⁶¹ – where Indigenous and non-Indigenous laws imbricate – such that Indigenous communities perform, rather than merely receive, recognition in the justice process.

256 Motha, above n 125, 119.

257 Fraser, above n 28, 29.

258 Hage, above n 42, 155, citing Erving Goffman, *The Presentation of Self in Everyday Life* (Penguin Books, 1959).

259 Fraser, above n 28, 24.

260 Fraser and Honneth, above n 6, 29.

261 Liminal spaces are those where Indigenous law and Anglo-Australian law intersect, creating cultural hybridity: see Blagg, above n 27.