

PUTTING INDIGENOUS ISSUES INTO THE CURRICULUM: SUCCESSION AND EQUITY

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Introduction

I am a new academic teaching my first few classes in the subject Legal System. We are considering the concept of *terra nullius* and the impact of the British on the Aboriginal people in NSW. Discussion about dispossession of land and the consequent disadvantages to Aboriginal people has followed. One of the students in the class of about 30 says suddenly (against the main trend of discussion), ‘They’re lucky we didn’t just kill them all’. An Aboriginal student leaps over a desk and starts to punch him. Other students pull them apart. I sit there wondering what to do. This is a true story.

Teaching Indigenous issues in the law curriculum is challenging enough for people to want to avoid it. When it is done it has often been done as a ‘special’ area for ‘bleeding hearts’ and ‘lefties’,¹ which the serious ‘real’ law students ignore in their quest for ‘pure’ law and commercial gold. This article is based on the premise that it is important to have Indigenous issues incorporated into all aspects of the curriculum, and that it is not particularly difficult to do so.

Indigenous people in Australia were and are the first people to be here. They were prior sovereigns. This, and not their disadvantaged status, is the reason to give their position emphasis in the Australian law curriculum. Otherwise, unlike in some other societies, their proportion in the population would not necessarily warrant a specific approach by either the legal system or the legal academy. In this paper I argue that putting Indigenous issues into the curriculum should be automatic for every subject. However I focus on some of the areas where I have specifically found considering Indigenous issues to be useful. First I consider some fundamental matters for teaching these issues. Then I consider some issues of content and suggest some techniques which I have found useful over my years of teaching law.

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¹ Sometimes referred to as ‘the chattering classes’, ‘chardonnay socialists’ etc. Note that ‘the chattering classes’ label, which the Oxford English Dictionary says was brought into English by Clive James in *Falling Towards England* in 1985 seems to have older antecedents. According to the conservative jurist Carl Schmitt, a Spanish thinker, Donoso, writing in 1855 thought ‘it was characteristic of bourgeois liberalism not to decide in [a battle] but instead to begin discussion. He straightforwardly defined the bourgeoisie as a “discussing class” *Una clase discutidora*. ...This definition contains the class characteristic of wanting to evade the decision: Carl Schmitt, *Political Theology* (G Schwab trans, 1985) 59 [trans of *Political Theology* (first published 1922)]. Schmitt took the view that failing to decide was a significant danger in any political system and that sovereignty is ‘who decides on the exception’, 5.

The rationale for teaching Indigenous issues in the Australian law curriculum

It is not uncommon for law curricula to be concerned with social justice. In my own law school at the University of New South Wales (UNSW), the saying is ‘a law school should have and communicate to its students a concern for those on whom the law may bear harshly’.² This is a good reason to teach Indigenous issues, but it does not explain why Indigenous issues should get any priority over feminist issues, for example, or discrimination law in general.

The position of Indigenous peoples in Australia as the first peoples with prior sovereignty is, in my view, the reason why Indigenous issues should be taught. As first peoples, they have a cultural imprint on the country which no other people or group can have; and as first peoples with prior sovereignty they were uniquely dispossessed. They were not only deprived of land and culture, but also found themselves in a new legal system which rests on the denial of their sovereignty. The cultural imprint consists of an original relationship with the land which is 40 000 or more years old; it includes knowledge of the land and climate which was used by the early settlers to achieve their own ends. It includes artwork and a customary law/religious framework which covered the whole country before it was interfered with (but not entirely dismantled) by the newcomers. The fact that customary law framework still exists is a fact not sufficiently recognised; one that is being forcibly borne in on our legal system even as it resists — the *Native Title Act 1993* (Cth) recognises the existence of a continuing normative system including customary law,³ even though the High Court has attempted to freeze it in time.⁴ The Australian Law Reform Commission (ALRC) and the Western Australian Law Reform Commission (WALRC) have published reports on Aboriginal customary laws which recognise the continuing existence of customary laws and the need to recognise them.⁵

Further, as first peoples, Aboriginal and Torres Strait Islanders were uniquely dispossessed by the newcomers of their land, their identity and their cultural

² Hal Wootten, Founding Dean, UNSW Law School. This is not the motto of the law school, but one of the quotations set out on a wall of the law building. A banner with this statement on it also hangs in the Law Building Foyer.

³ Here I use the term ‘customary law’ to refer to an entire Indigenous legal system with all its normative elements. I am not referring to specific rules.

⁴ *Members of the Yorta Yorta Aboriginal community v Victoria* (2002) 77 ALJR 356: Gleeson CJ, Gummow and Hayne JJ held in that case that even though customary law had to demonstrate ‘continuous existence and vitality since sovereignty’ at [87] only the law and custom which had existed before sovereignty were to be regarded as authentic. Thus they required the law to be frozen at the time of British settlement. See Sean Brennan, ‘Native Title in the High Court of Australia a decade after *Mabo*’ (2003) *Public Law Review* 209.

⁵ Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986); Western Australian Law Reform Commission: *Aboriginal Customary Law*, Discussion paper No 94 (2006).

and political structures and found themselves in a legal and political landscape over which they had no choice. In this they are different from every group which came later. Later groups had at least some notional choice (convicts aside) about their entry into this country and therefore about the polity being created about them. The Indigenous people of this country had no choice at all. As Henry Reynolds' noted:

In 1937, RT Latham, a prominent legal scholar, remarked that when the first settlers reached Australia:

Their invisible and inescapable cargo of English law fell from their shoulders and attached itself to the soil on which they stood. Their personal law became the territorial law of the Colony.

It is a graphic image. What was not mentioned was that in transit from shoulder to soil the inescapable cargo struck the Aborigines such a severe blow that they have still not recovered from it.⁶

The fact that they never recovered or perhaps are only now recovering is significant, but the fact that they were here first is the reason why consciousness of their position should be considered. Thus, even if all the economic and social disadvantage fell away, we should still be teaching Indigenous issues because the very 'first-ness' of Indigenous people creates a cultural primacy and a prior sovereignty which means that teaching this area should be more like teaching conflict of laws or comparative law than teaching discrimination law.

However, in the current situation, the economic and social disadvantage often seems the primary matter to be discussed. This is a trap which needs to be skirted around carefully. The profound economic and social disadvantage must be discussed, but Indigenous peoples are not to be seen only as victims; the respect due is not due merely as human rights are due; but because of the status as the first peoples and sovereigns on this land and the first peoples to interact with the particular landscape we all now call home.⁷ These peoples created a landscape and legal and cultural systems which were a response to the land and each other; and it is this legal and cultural system which the common law and the newcomers did such harm to. It was *prior* to theirs and for that reason

⁶ Henry Reynolds, *The Law of the land* (Penguin, 1987) 1.

⁷⁷ This is not to say that where the 'Indigenous peoples' have come upon another group who were there before them as it is said the Māoris did in New Zealand, that they have not the same sort of priority. The argument that sovereignty existed before the British came to both New Zealand and Australia and that this creates a unique form of dispossession is the core argument. However, it may also be partly arguable that priority in time is itself actually a matter which should be recognised. This would also mean that British culture which came to Australia before some other cultures such as Mediterranean culture should also be given a certain level of respect. This is not to say that some cultures are better than others; but that reasons for respect may vary — for example, coming to an established culture (and therefore choosing it) should be regarded as a reason to recognise and respect it.

should get particular attention. It also is a continuing cultural construct of enormous richness which is worthy of admiration and study. Treating the incorporation of Indigenous issues into the curriculum as just teaching about disadvantage is not appropriate.

Fundamental principles for teaching Indigenous issues

The fundamental principles for teaching Indigenous issues in the legal curriculum arise out of recognition of three things: the prior presence of Indigenous people, the impact of the colonisers on them, and the continuing existence of viable and living culture and law. In teaching these issues we thus need to include rules of respect and rules of recognition of both difference and of disadvantage. Some of these, of course, overlap.

The context within which the teaching is done

Before discussing the principles by which such teaching should be done, it is worth discussing the importance of having a supportive environment within which to teach Indigenous issues. I have been fortunate that I was educated at UNSW Law School which has a long history of commitment to Indigenous issues and Indigenous students. Hal Wootten was the first President of the first Aboriginal Legal Service in Australia.⁸ The first intake included two Indigenous students and UNSW saw the first Aboriginal graduate in 1976. Since 1995, UNSW has run the Indigenous Pre-law Program and has a dedicated tutor for Indigenous students. Approximately 70 Indigenous students have now graduated from UNSW Law School. The dispossession of Aboriginal people was one of the central matters considered in the first year foundation course when I took it in 1985. Professor Garth Nettheim was a central figure on staff and his work on incorporation of Indigenous perspectives and issues was highly influential. Not all staff agreed, but a culture of faith in other academics' ability to sensibly decide what to teach has meant that there is little interference from those who disagree. There has been wholehearted support of these initiatives by Deans and Heads of School throughout the 20 years I have been an academic here. Extra resources have not always been available, but ingenuity and some imagination have been the way forward in most cases. We have connections with people in the local Aboriginal community and Nura Gili, the Indigenous Support Centre of the university. Generally the culture of the Law School is very supportive. In 2010 a forum was held in the faculty to discuss ways of incorporating Indigenous issues into the curriculum, to which a number of people from other Australian and New Zealand universities were invited. There was a large attendance of staff from UNSW, demonstrating their recognition of the importance of the issues.

⁸ Marion Dixon, *Thirty Up: the story of the UNSW Law School 1971-2001* (UNSW Law School, 2001) 31.

This means that for twenty years we have not had to fight to incorporate these issues. Rather we have been able to spend time trying out initiatives and changing what doesn't work. The material that follows is the product of reflection and testing over that time.

Rules of respect

The rules of respect for classroom engagement in relation to teaching Indigenous issues are just an extension of the ordinary rules of respect for class engagement in universities. These include recognition of us all (students, teachers) as a community of scholars engaged in learning and teaching with and from each other. A few examples follow:

- In class discussions, disrespectful statements will not be tolerated;
- People must be prepared to back up their own arguments with evidence; and
- Disagreement is allowable (and even welcome) but must be respectful.

These 'rules of engagement' can be seen to be culturally specific rules of western education based on western liberal theory. These rules are based on the politics of reason. On this view the rational is the product of logical thought derived from observation. The object of learning was to use one's mind to reach universal laws by processes of 'pure' logic such as syllogism and dispassionate observation. This rationality was the opposite of, and unsullied by, emotion, imagination and the irrational. In order to learn in this way, a dispassionate view of argument must be taken. This has the advantage of requiring some emotional distance from arguments and requiring evidence for such arguments; it also requires that counter-arguments are considered. This is its advantage. However, it is important to recognise that this view of rationality (which continues to dominate western thought) is to some extent unreal.⁹ It is not possible for an observer to observe phenomena without some choices being made, including cultural choices. For that reason it is vital to include some further rules of engagement to help to deal with cultural assumptions.

The rules of respect for teaching Indigenous issues, which might be regarded as going beyond those already stated, arise from recognition of status as members of first nations and recognition of status as humans with human rights. This is not to suggest that Indigenous people should be afforded greater respect than non-Indigenous people in a human rights framework. Rather, it is to emphasise that recognition of status as a member of a first nation requires recognition that

⁹ See for example, Louise Antony and Charlotte Witts (eds), *A Mind of One's Own: feminist essays on reason and objectivity* (Westview Press, 1993) and Sandra Harding and Merrill Hintikka (eds) *Discovering Reality: feminist perspectives on epistemology, metaphysics, methodology and philosophy of science* (Reidel Publishing, 1983).

there was and is a complex culture. It is important to emphasise that it is continuing rather than past (even if our courts are not sufficiently aware of that).¹⁰

Such rules include, for example: ‘using and expecting students to use culturally appropriate parameters for authoritative information’. For example, when discussing Indigenous cultural matters one should use the most authoritative sources and voices in Indigenous terms. This means not accepting a non-Indigenous source of information about Indigenous matters when Indigenous ones are available, and when they are not available, evaluating the level of authority of information in a culturally appropriate way. For example, in certain situations an Elder’s statement may be more significant than a non-Elder’s statement, even if the non-Elder’s statement is easier to read or locate. Finding out what the rules for authoritativeness are is part of this process. This is simply a parallel to the normal process of evaluating the authoritativeness of any source as we do in law anyway, such as accepting the authority of a case from a higher court over the authority of a case from a lower court. That is culturally appropriate for common law. Discussing the *Hindmarsh Island* cluster of cases illustrates the issues created by not respecting these rules.¹¹ In that case there was a clash between the rules of authoritative discourse for the common law and the rules of authoritative discourse for Aboriginal law caused by the failure of one legal system to recognise the rules of authentication of another legal system and indeed dissent within the community as to whether any weight should be given to Aboriginal law.

Rules of recognition of difference and disadvantage

Because cultural assumptions are the major difficulty in this area, the rules of recognition of difference and disadvantage need to include rules for checking cultural assumptions. Cultural assumptions are very difficult to counter. They are so automatic that it is very difficult to ensure that they are not in operation. Cultural assumptions need to be challenged in the curriculum content, but they also require an intellectual stance of alertness and a willingness to recognise that one may be making unwarranted cultural assumptions. This can be facilitated in class by constantly asking questions about why people think the

¹⁰ A case which shows this not operating is *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 77 AJLR 356; [2002] HCA 58 where the High Court took a very rigid view of what it meant to have a continuing connection with the land for a native title case.

¹¹ *Chapman & Ors v Minister for Aboriginal and Torres Strait Islander Affairs and Ors* (1993) 133 ALR 74; *Tickner v Chapman* (1995) 57 FCR 451; (1995) *Minister for Aboriginal Affairs v Chapman* [1995] FFCA 987; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] HCA 18; (1996) 189 CLR 1; *Kartinyeri v Commonwealth* [1998] HCA 22; 195 CLR 337. For the anthropologists’ account of this see Diane Bell, *Ngarrindjeri Wurruwarrin: a world that is, was, and will be* (Spinifex Press, 1998). She was one of the expert witnesses. See also Maureen Tehan ‘A Tale of Two Cultures’ (1996) 21 *Alternative Law Journal* 1, 10-14.

way they do. This can be done by the teacher, but it also can be done by having a ‘questioning class’ — where the students have to develop the possible questions concerning cultural assumptions at each point of information. For example, cultural assumptions in the courtroom include that looking directly at a person in authority demonstrates honesty and trustworthiness. This is a very western European cultural stance. In Anglo-Australian culture, looking someone in the eye is a sign of respect and honesty and trustworthiness. This is extremely significant in the context of the courtroom where a judge or jury is likely to use non-verbal communication patterns to determine the credibility of witnesses or an accused and regard a direct gaze as a sign of credibility. However in many Aboriginal cultures it is extremely rude to look at a respected person in the eye. One looks down and away. This has often caused courts to think that the Aboriginal witness is not credible or the accused is not trustworthy.¹² Such cultural assumptions are extremely significant. They are made even more significant by the reluctance of appellate courts to interfere with the findings of trial judges on matters of credibility.¹³

Consider the likelihood that the law class will include both Indigenous and non-Indigenous students and act appropriately for both

The Indigeneity of an individual may not always be physically obvious and a class may include Indigenous and non-Indigenous students. This means that one should always operate in a way which would be appropriate for both groups of students. Both should always be respected and considered. Indigenous students should not be required to be the source of information on Indigenous matters — they may not have the relevant authority or knowledge (this is another manifestation of the authoritative evidence rule above) and it is inappropriate to treat a student as a manifestation of a culture (tokenism) or require them to ‘represent’ it. Where they do wish to offer information and insights it should be heard as a voluntary contribution along with other students’ contributions.

Use empathic imagination as an intellectual tool

This is a value and skill which is profoundly important whenever one is considering difference as well as disadvantage. I define empathic imagination as the ability to imagine the situation of another person in as rich a way as possible. The term ‘Empathy’ is defined as ‘the power of projecting one’s personality into (and so fully comprehending) the object of contemplation’.¹⁴

¹² Diana Eades (ed) *Language in Evidence: issues confronting Aboriginal and Multicultural Australia* (UNSW Press, 1995); Ken Liberman, ‘Communication Problems in Western Desert Courtrooms’ (1995) 3 *Legal Services Bulletin* 94.

¹³ See, for example, McHugh J in *Rosenberg v Percival* (2001) 178 ALR 577; [2001] HCA 18, [41]; Brennan, Gaudron and McHugh JJ in *Devries v Australian National Railways Commission* (1993) 177 CLR 472, 479.

¹⁴ Oxford English Dictionary online, ‘empathy’

The aim is full comprehension of the position of another. Where empathic imagination does not exist in a society trust withers, and richness dies. To develop the skill of imagining what it would feel like to be in the shoes of another, and to think through the implications of that rationally and intellectually is very significant. This skill is not about mere sympathy (defined as, ‘The quality or state of being affected by the condition of another with a feeling similar or corresponding to that of the other; the fact or capacity of entering into or sharing the feelings of another or others’)¹⁵ which is a more limited quality than empathy which incorporates comprehension. It is about creating data which can be tested by a slightly different process than the one which we traditionally use (or think we use) in academic thought. It is naive to think that reason has no emotional component; it is valuable to harness the imagination in ways which will help to understand the mental processes of another person (without then making the mistake of assuming that we are them).¹⁶ Teaching students to use empathic imagination not as sheer emotionalism but as an intellectual tool actually requires them to ask themselves such questions as, if I were a person in that position, would it be reasonable to require me to do ‘X’? What implications would that have for my ability to consider various courses of action?

For example, consider the argument that the government owes a fiduciary duty to Aboriginal children who were removed from their parents. In *Cubillo v Commonwealth (No 2)* (2001) 112 FCR 455, it was argued that the government owed such a duty to Cubillo and Gunner. However O’Loughlin J rejected the argument that the duty of a guardian to a child should be seen as fiduciary on the basis that such a duty had traditionally been considered only to exist in relation to economic interests. But what were the interests of these children which had been impacted by the states’ behaviour. If we step into the shoes of the children we find that they have suffered the loss of their connection with their families, and their connection with their land. We further find that they have lost their ability to bring actions for native title land for this reason. If we consider this logically and intellectually we come to the conclusion that clearly economic interests of the plaintiffs have been affected. One of the interests of a ward which a guardian should protect is their economic interest. Taking students through this process teaches them the intellectual value of empathic imagination as a reasoning process. It requires real care, though, to think this through in order to avoid a form of appropriation occurring. There is a danger that the stereotypical white, middle class, law student may simply project themselves in a limited way into the position of the people concerned and fail

<<http://www.oed.com/view/Entry/61284?redirectedFrom=empathy#eid>>.

¹⁵ Oxford English Dictionary online, ‘sympathy’

<<http://www.oed.com/search?searchType=dictionary&q=sympathy>>.

¹⁶ There is a large literature on the limits of rationality and/or objectivity in discourse. See Louise Antony and Charlotte Witt, *A Mind of One’s Own: Essays on Reason and Objectivity* (Westview Press, 1993), for an example from feminist theory. Critiques of liberalism, critical legal theorists and philosophy of science have all mounted such critiques.

to comprehend the whole scope of the issue for that person. This is the reason I emphasise the word ‘empathy’ with its element of comprehension, as opposed to ‘sympathy’ which is more about an emotional response. It is also the reason I emphasise that it is an intellectual tool which must be practised.

Content

In this section I set out some content areas where Indigenous issues can be taught in my areas of interest. I have approached this by fairly baldly setting out topics and then giving references which may be useful in the footnotes. The references are by no means exhaustive, but may give an easier way to begin to include this material in the law curriculum.

Succession and Equity

Many topics in succession and equity are worth considering Indigenous issues in, either in that the impact of common law on the Indigenous peoples is disproportionate in some way or that Indigenous views of the issue give us some other way of looking at it. The latter is an example of treating the area as a comparative law topic; it very often adds richness or critique to the consideration of the common law. The following topics are examples of areas in succession and equity where there is material available to assist.

The history of equity as a shield against common law wrongs

When teaching equity we often begin by teaching the mediaeval position and then the early modern law where we think in terms of principles and then leap to the equity law of today which in Australia is now a fairly rigid system of rules. Emphasising the principled approach and applying it to Indigenous people in situations where there is very little use of equity is an excellent way to develop students’ knowledge of equity. For example the idea of fiduciary duty of the state as it was explored in *Mabo (No 2)*¹⁷ allows this. Arguments about fiduciary duties owed to the stolen children (members of the Stolen Generations) have also been made.¹⁸ Similarly, fiduciary duties have been considered in relation to cultural knowledge and these cases allow a further exploration of equitable principles.¹⁹ Breach of confidence is another area of equity which allows exploration of Indigenous issues.²⁰

¹⁷ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 especially the judgment of Deane and Gaudron JJ who also discussed the imposition of constructive trusts.

¹⁸ *Cubillo v Commonwealth (No 2)* (1999) 89 FCR 528; *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136; [2007] SASC 285. The argument was successful in the latter case.

¹⁹ *Bulun Bulun v T & R Textiles Pty Ltd* [1998] FCA 1082; (1998) 157 ALR 531.

²⁰ See *Foster v Mountford & Rigby* (1976) 14 ALR 71, where an anthropologist in breach of confidence published secret customary law matters.

Is cultural knowledge property sufficient to be the subject of a trust?

Questions about what constitutes property in relation to both land (where the view of the common law originally was that Aboriginal people's relationship with land was too custodial to be recognisable as property at common law)²¹ and personality (including matters such as ritual objects and knowledge) are significant issues for Indigenous peoples where conflict arises with Australian common law. Whether Australian common law can recognise customary law knowledge at all²² and whether such knowledge can be regarded as property²³ sufficient to be subject to a trust are issues which have real impact on Indigenous people's lives. Indeed the concept of property as a cultural construction is a significant topic which can be explored in a range of different contexts.²⁴

Construction of wills (and family members in intestacy)

Who is regarded as family by the common law and whether that fits with the cultural construction of kinship has been a longstanding research interest of the author.²⁵ The issues include the fact that the pattern of family on which the common law and the intestacy rules is based does not fit with that of Indigenous people (or many other groups). The adoption regimes of the common law are also problematic for Indigenous people, although they have been modified to attempt to improve the fit in all jurisdictions except the Australian Capital Territory, Queensland and Tasmania.²⁶ For example, take the common assumption that 'family' means the same thing to everyone. This is a cultural assumption that many people do not even realise they have; it is

²¹ From *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 to *Mabo v Queensland (No 2)* (1992) 175 CLR 1. For discussions about what it means to say something is property see *Yanner v Eaton* (1999) 201 CLR 351.

²² See Western Australian Law Reform Commission, *Aboriginal Customary Laws*, Report No 94 (2006).

²³ *Bulun Bulun v T & R Textiles Pty Ltd* [1998] FCA 1082; (1998) 157 ALR 193. See Terri Janke, *Our Culture, our future* (AIATSIS, 1998).

²⁴ Prue Vines, 'The Sacred and the Profane: Property Concepts in Post-mortem Examinations' (2007) 29(2) *Sydney Law Review* 235-261.

²⁵ Prue Vines, 'When Cultures Clash: Aborigines and Inheritance in Australia' in Gareth Miller (ed) *Frontiers of Family Law* (Ashgate Press, 2003), 98-119; Prue Vines, 'Drafting Wills for Indigenous People: Pitfalls and Considerations' (2007) 6 *Indigenous Law Bulletin* 25, 6-9; Prue Vines, 'Consequences of Intestacy for Indigenous People in Australia: the Passing of Property and Burial Rights' (2004) 8 *Australian Indigenous Law Reporter* 4, 1-10; Prue Vines, 'Wills as Shields and Spears: the failure of intestacy law and the need for wills for customary law purposes in Australia' (2001) 5 *Indigenous Law Bulletin* 13, 16-19; Prue Vines, 'Cultural conflict or enriching dialogue? Cross-cultural issues in will-drafting' (2002) 81 *Reform*, 34-37.

²⁶ See, for example, *Adoption Act 2000* (NSW) s 3 and ss 33ff (provisions for placement of Aboriginal children) and ss 37ff (provisions for placement of Torres Strait Islander children). Similar, though less extensive provisions exist in: *Adoption of Children Act 1994* (NT) s 11; *Adoption Act 1988* (SA) s 11; *Adoption Act 1984* (Vic) s 50; *Adoption Act 1994* (WA) Schedule 2A.

significant because the term ‘family’ is embedded in the common law and may be applied to people who have different ideas about who belongs to their family.

In my course on Succession (Undergraduate, fifth year), I teach a class on Indigenous people and inheritance. In this class, students are given readings from several articles on the subject, including my own and are asked to discuss them. They are shown kinship diagrams and asked to discuss how their own family would fit into the diagrams. The diagrams are anthropological kinship diagrams showing blood groups and they fit the mainstream western view of who is in the family. We then look at the Intestacy legislation and determine how the kinship diagram fits with the legislation’s assumptions about who is in the family. I then show them a diagram of how an Aboriginal kinship group might operate and ask how the intestacy legislation will operate on this family. (It is the same blood-grouping as the first diagram, but many Aboriginal groups will regard more people as their children than the mainstream western view and similarly will have wider groupings for other kinship classification). The students are then asked to write a reflective note on how they responded to the class’s content and teaching methodology. This exercise forces students to see the assumptions the law uses and how the assumptions may be wrong in relation to other cultural groups. Students are forced to think of the assumptions which underlie the law and how those assumptions might cause harm to certain cultural groups. Students develop a more sophisticated basis from which to critique the law of inheritance as they progress through the course; and the exercise creates an atmosphere of class participation which incorporates a high level of intellectual challenge and the development of sophisticated articulation of argument.

This is incorporated into assessment by a requirement of a reflective note which provides immediate feedback on students’ response to the content and process. It also gives students a reflection ‘space’ in which they can step back and think about what and how they are learning. The feedback from classes is extremely enthusiastic. Some reflective notes on this class from non-Indigenous students²⁷ demonstrate that the exercise makes them aware of their cultural assumptions:

I had never thought of that aspect of Aboriginal culture.

It was enlightening to learn that many Aboriginal cultures and practices were stuck between the traditional and the modern world.

It’s important to appreciate that Common Law may conflict with the legal system of other cultures.

This exercise was very valuable in breaking down the cultural arrogance I have intrinsically developed.

²⁷ I have had Indigenous students in my succession class, but not since I began the practice of reflective notes on this topic.

Death and the body

There are many issues around death and the body which are significant for Indigenous people. These include the issue of the treatment of Aboriginal remains and the repatriation of those remains which were taken to museums in Australia and around the world.²⁸

When dealing with bodies, issues concerning the concept of property in body parts and property in a dead body, cultural views of death and its impact on post-mortem examinations and the use of human tissue after death have been significant legal issues for Aboriginal people in Australia and there is a significant amount of available material for considering these issues in the curriculum.²⁹ Because these issues are often deeply felt they are good ones to both raise discussion and also emphasise the rules of culturally appropriate authority and checking cultural assumptions. I have found that students (both Indigenous and non-Indigenous) often reflect on these classes as having great impact on their world view and it is not unusual to find students reporting that their view about some matter concerning the body or inheritance has changed after such a class.³⁰

Legal system fundamentals which are relevant to equity and succession

There are a number of issues relevant to Indigenous peoples which might be regarded as fundamentals of the legal system, some of which are mentioned here. Examples include, themes such as the rule of law as restraint of power, types of legal systems, and the impact of the legal system on Aboriginal people in Australia generally. I note a few of these matters here with some material which may be useful for using in the curriculum.

²⁸ See Paul Turnbull, 'Ramsay's Regime: the Australian Museum and the Procurement of Aboriginal Bodies c1874-1900' (1991) 15 *Aboriginal History* 108; Andrew Chalk, 'Protecting Burial Sites' (1995) 20 *Alternative Law Journal* 1, 34; 72 *Aboriginal Law Bulletin* 34; Prue Vines, 'Resting in Peace?: a Comparison of the Legal Control of Bodily Remains in Cemeteries and Aboriginal Burial Grounds in Australia' (1998) 20 *Sydney Law Review* 1, 78-107.

²⁹ Prue Vines, 'Objections to Post-mortem Examination: Multiculturalism, Psychology and Legal Decision-making' (2000) 7 (4) *Journal of Law and Medicine* 422-433. Prue Vines, (above n 17); 'Prue Vines, 'Dealing with Death and the Body from a Multicultural Perspective: the Post-mortem Examination' in Rosalind Atherton (ed) *The International Academy of Estate and Trust Law, Selected Papers 1997-1999*, 535-546; Prue Vines, 'Bodily Remains in the Cemetery and the Burial Ground: a Comparative Anthropology of Law and Death or How Long can I Stay?' in Desmond Manderson (ed) *Courting Death* (1999) 111-127.

³⁰ I had thought that Indigenous people would be the group finding this topic most difficult, but in fact the Indigenous students I have had have not been bothered by it. By contrast, students of Chinese ethnic background find it extremely confronting and often mention that they cannot say the word 'death' at home or discuss these issues with their family.

- Whose land are we on?³¹
- Comparative legal systems. Our common law and equity system is very different from Islamic law or Australian Aboriginal laws or Civilian laws. It is worth emphasising that Aboriginal legal systems are as various as legal systems across Europe are — these are nations with different legal systems. Other Indigenous legal systems are also worthy of comparison.³²
- The legal and social meaning of the stolen generations.³³
- The dispossession of the Indigenous people from their land and its effects, and the fight to reclaim it.³⁴
- The impact of racism and its insidious incremental effect.³⁵
- The court system and language/interpreter rights including non-verbal communication and credibility of witness issues.³⁶

Principled techniques to consider when teaching Indigenous issues

Drawing on the above principles, the following are some more specific techniques that I have found useful in teaching Indigenous issues.

Techniques for mythbusting, checking cultural assumptions

To develop students' ability to challenge myths and cultural assumptions it is necessary to develop in the student a questioning rather than a complacent stance. It is therefore vital to increase students' abilities to ask questions. This may sound bizarre at first, but asking questions is a skill which many people have trouble with. For example, it is important to distinguish between closed

³¹ Use the map of Australian Aboriginal language groups by David Horton, *Aboriginal Australia*, published by Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies; and Peter Turbet, *The Aborigines of the Sydney District* (Kangaroo Press, 2001); Nigel Parbury, *Survival* (Ministry of Aboriginal Affairs, 1986); Behrendt, Cunneen and Libesman *Indigenous Legal Relations in Australia* (Oxford University Press, 2009) (hereafter 'Behrendt et al') chapter 2.

³² H. Patrick Glenn, *Legal Traditions of the World* (Oxford University Press, 2nd ed, 2004) is one of the best accounts of different legal systems that I know of because of its approach to traditions rather than systems. See also Prue Vines, *Law and Justice in Australia* (Oxford University Press, 2nd ed, 2009) (hereafter 'Vines 2009') chapter 2 'The Place of Australia in Global Law' for a more accessible account for students.

³³ *UNSW Law Journal Forum*: 'Stolen Children: from removal to reconciliation' (1997) 4 (3); Behrendt et al, above n 31, chapters 1, 8 & 9; Vines, above n 32, chapter 6.

³⁴ Behrendt et al, above n 31; Vines, above n 32, chapters 6 & 10.

³⁵ Behrendt et al, above n 31, chapter 11; Vines chapters 8 & 12. Critical race studies literature see Peter Fitzpatrick, 'Racism and the Innocence of Law' (1987) 14 *Journal of Law and Society* 119; Richard Delgado and Jean Stefancic, *Critical Race Theory: an Introduction* (New York University Press, 2001).

³⁶ Vines, above n 32, ch 12; Diana Eades (ed), *Language in Evidence* (UNSW Press, 1995); Diane Eades, *Aboriginal English and the Law* (Queensland Law Society, 1992); Ken Liberman, 'Communications Problems in Western Desert Courtrooms' (1995) 3 *Legal Service Bulletin* 94.

(requiring a specific answer) and open questions (questions which have no right or wrong answer). Questions can be asked at multiple levels of specificity and they can be asked about everything from truth values to assumptions.³⁷ To develop students' ability to ask questions you might run a class (or set a time) in which the students are only allowed to ask questions which would take them closer to understanding the matter. Answering might be done later as a separate exercise, or not at all — it doesn't hurt to be left in the questioning mode: it creates thought. Students can also be taught some questions to ask and make them habitual: 'Is this true/accurate?' 'From whose point of view is this so?' 'Is there another way to see this?' are all important questions to ask about any human activity, including law.

Techniques for developing empathic imagination

Developing empathic imagination can be done by using stories. It can also be done by using exercises where the law student is advocating for a person different from themselves. This is most commonly done by the use of moots in law school, but to develop empathy trial work and arguments based on facts are really useful — this might include argument on what the facts were, but also arguments about what damages should be awarded, drafting victim impact statements and similar documents are actually ways of developing this skill. Working out what the damages should be is an excellent exercise for developing an understanding of the impact of a particular matter on somebody's life.

Exercises where the student has to swap between advocating for one party and then the other are sometimes castigated as increasing ethical looseness, but this can be avoided if careful thinking through of the situation is encouraged. After several years of doing using such techniques in class I have found that they are enhanced by an explanation that they are being used to develop empathic imagination as an intellectual tool.

Techniques for understanding the process of systematic disadvantage

One of the paradoxes of our legal system, an apparently fair system which attempts to treat like cases alike, is that it can actually create systematically disadvantageous outcomes. The classic example is the disproportionate presence of Indigenous people in Australian prisons. How is it that there could be such disproportion if magistrates are not deliberately treating Indigenous people worse than non-Indigenous people? Tracing stories of individuals through the statistical pattern helps to establish how small disadvantages become magnified in a system. For example if we consider two 10 year old boys, one living in a rich suburb of Sydney, the other in Redfern, a much

³⁷ See Neil Postman and Charles Weingartner, *Teaching as a Subversive Activity* (Delacorte Press, 1971), for a definitive analysis of question asking for educational purposes.

poorer suburb. Where does each boy play? One plays in the backyard, the other on the street and is therefore seen by police and more likely to be regarded as ‘known’ and more likely to be found swearing at police simply because he is more likely to be seen by the police. If we then consider both being caught shoplifting, one is more likely to be dealt with harshly by police than the other — it is not necessarily purely because of racism (although that may of course be part of it) but it is also because the criminal justice system regards a person ‘known’ as one step further towards prison than one who is not known, etc. This also allows an examination of the problematic nature of the idea of ‘equality of treatment’ as opposed to ‘equality of outcome’ and ‘equality of opportunity’.

Techniques for ensuring the use of culturally appropriate authoritative information

Stating the criteria we use in the common law and in academic legal discourse and then working out what the Indigenous equivalent is means that this principle is being clearly articulated. For example, in teaching the legal system we spend a significant amount of time talking about the doctrine of precedent, and when one case should follow another and how to distinguish cases. We know a case is the law because it has been decided by a judge in the court. We know legislation is the law when it has been passed by parliament and assented to by the Governor/Governor General or Queen). Noting that this is a question of authority and that in Indigenous communities there is also a question of authority works well. Bringing material into the classroom which meets these criteria is important.³⁸ Recognising that some stories have special authority and using them as they are supposed to be used. When bringing in visitors to the classroom it is important to ensure they are authoritative, whether this is in terms of Indigenous authority or academic authority. It is important to be very careful about using any Indigenous students in the class as authority — they may be reluctant to identify in front of a class, they may have no cultural authority themselves on a particular topic and it may interfere with their privacy. By now it should be clear that no one person can speak on behalf of *all* Indigenous people and that there is no such thing as ‘the Indigenous perspective’. If you wish to ask an Indigenous student questions which might highlight their Indigeneity you should negotiate this in advance and respect their wishes.

Techniques for getting students to see these issues as important

It is an unfortunate truth that students often see things as important in direct ratio to their proportionate value in assessment. Giving solid weight to assessment on these issues will automatically make students pay attention.

³⁸ A really interesting example of someone looking at the problems created by using the British ideas of meaning and ignoring the Aboriginal way of seeing things is Inga Clendinnen, *Dancing with Strangers* (Text Publications, 2003).

Over the twenty years of my experience I have found that setting expectations high means students rise to them. Being rigorous in your standards of argument and authority while articulating what you are doing and why you are doing it is also valuable because it is modelling the required behaviour at the same time as stating expectations.

Techniques for engaging students in these issues

Stories are profoundly engaging to humans all over the world. What is a case but a story with a judgment attached? There are hundreds of stories which can be used to engage students in legal issues concerning Indigenous people. The story of Barangaroo (Bennelong's wife) who wanted to have her baby at Government House in Sydney as a sort of land claim, but who Governor Phillip thought was asking for medical help is an excellent story for showing cross-legal misunderstanding. The story of Albert Namatjira and his 'citizenship' because of his painting and his imprisonment because of the cultural difficulties he found himself in is extremely illuminating. The story of Eddie Mabo is an amazing story, going well beyond the *Mabo* decision itself.³⁹ Asking students to find out more background facts about the cases they are reading engages their imagination and gives them a stronger sense of the lives being affected by the law. The *Trevorrow*⁴⁰ story is also an excellent example because it gives a great deal of background detail which students can use to construct proper arguments for damages claims. It thus offers excellent training in a vital legal skill while at the same time demonstrating the impact of the removal of children from their families in a way which even the most critical student finds credible.

Techniques for defusing difficult situations

The situation outlined at the beginning of the paper is uncommon but argument between students and aggressive confrontation (even if it doesn't come to blows) is inevitable at times. These are issues about which people rightly feel strongly. Dealing with these situations will be easier if the general rules of classroom engagement are clear and are usually put into place. However, I have found that when students are confrontational or contemptuous to each other (or to you the teacher), repeating the provocative remark back to the person is better than the alternatives. If you repeat their statement back to them a number of things happen. First, a little time is gained. Second, they are then forced to justify the statement, which may lead them to create an intellectual rather than a merely aggressive argument. Some people will find they can't and

³⁹ Barangaroo's story is told in Vines 2009, 115-6; the case where Namatjira was charged with supplying alcohol to Aboriginal wards of the state, *Namatjira v Raabe* [1959] HCA 13; 100 CLR 664, is extracted there at pp 125-128. In relation to that case it is also interesting to ask why the High Court delivered their judgment *ex tempore*. Eddie Mabo's story is also told in that book at 232-233, as it is in many other places.

⁴⁰ See *Trevorrow v South Australia (No 5)* [2007] SASC 285.

will back down. Others will develop a proper argument, in which case we can then discuss it. Maintaining a tone of respect at all times and requiring it to be applied to everybody in the scholarly community we call a class reduces the likelihood of the kind of incident with which this article opened.

Conclusion

The aim of this article has been to make it easier to begin to put Indigenous issues into the curriculum for people who are daunted by the task. It was also hoped to show that this can be done without sacrificing rigour or legal principle, and indeed that rigour is essential if these issues are to be adequately dealt with within the legal curriculum. Concerns about the loss of time to discuss particular principles can often be dealt with by discussing the same principle but applying it to an Indigenous context in some way. In my opinion some of the principles I set out prevent the presentation of Indigenous issues in law as ‘curiosities’ for non-Indigenous people’s entertainment, as essentially irrelevant to the mainstream, or as subject matter to be treated with paternalistic condescension. A classroom and subject matter based on rules of respect for classroom engagement and rules of respect for cultural difference seem to me to offer the best prospect of academic cultural understanding and knowledge that we can hope for.

This article draws on twenty years’ experience of teaching Indigenous issues in law in both foundational subjects and equity. It began by arguing that it was important to teach Indigenous issues in the law curriculum not just because of the significant disadvantage suffered by Indigenous people in Australia and elsewhere but because of their cultural priority in the development of the nation. The issues and techniques discussed therefore have at their centre a comparative approach rather than an emphasis on disadvantage, although disadvantage will inevitably become clearer when these techniques are used and the issues discussed. In the end, for Australians and for other countries with Indigenous populations, it is becoming inevitable that the Indigenous legal systems become recognised as real and as substantial parts of the legal environment within which we as Indigenous and non-Indigenous people live. It is hoped that this article will contribute to that development so that there will be no need for such articles to be written in the future.