Non-State Policing, Legal Pluralism and the Mundane Governance of "Crime"

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Abstract

Faced with the problem of rising incarceration rates, there has been an emerging discourse in recent years about the need to decolonise justice for Indigenous Australians. While much has been written on the need to embrace initiatives that reflect the Indigenous collective right to self-determination and self-governance, there has been little grounded examination of the everyday politics surrounding these processes. For example, what does self-determination look like in the criminal justice context? What forms of non-State governance constitute self-governance? What activities are considered 'harmful', 'unsafe' and 'criminal' behaviour within local settings, and who ultimately gets to decide what constitutes a 'crime'? To examine these and related issues, this article presents the findings of an empirical study on Indigenous night patrols: locally-run justice initiatives with formal agendas that focus on improving safety within Aboriginal and Torres Strait Islander communities. This article examines the historic development and contemporary operation of this relatively neglected form of non-State policing. It argues for a greater appreciation of both the diversity and complexity of non-State governance structures in contemporary Australia, as well as how they might contribute to better understandings of self-determination and legal pluralism in the criminal justice context.

I   Introduction

Policing is a political activity. This is especially true with respect to the policing of Aboriginal and Torres Strait Islander communities, where the State police represent gatekeepers of the criminal justice system — one of the most enduring and deeply entrenched legacies of British colonisation. This is true also where the routine activities of the State police occur in the absence of a formal treaty with Indigenous Australians, notwithstanding the legally pluralistic nature of contemporary Australian society.[1] Unlike comparable Commonwealth colonies, Australia was not

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[1]   Indigenous legal systems have been operating in Australia for 40 000 years and continue to operate in many locations across Australia, coexisting alongside the mainstream Australian legal system. While, in some cases, knowledge of local laws and customs has weakened or ruptured due to forced removal from country and family, the operation of local legal systems remains an integral part of

settled by formal cession, but under the doctrine of terra nullius — a doctrine that has been acknowledged by the High Court of Australia, the highest court of the non-Indigenous legal system, as a legal fiction.[2] These contradictions and unresolved tensions in Australia's history have consequences that go to the core of politics surrounding the everyday policing of Indigenous Australian communities.

The history of colonial policing in Australia is now well documented, mapping out regimes that have largely consisted of efforts to contain, suppress and even attempt genocide upon Aboriginal and Torres Strait Islander peoples.[3] In addition to frontier violence and paternalistic violence present in colonial forms of policing, neo-colonial violence continues today through expansions in police powers of arrest, over-surveillance, harassment, heavy-handed policing, under-policing of domestic and family violence, deaths in custody, and so on, as documented in various national reports.[4] Over 25 years after the publication of the *Royal Commission into Aboriginal Deaths in Custody*, rates of incarceration for Indigenous Australians continue to rise[5] and deaths continue to occur in circumstances that are

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everyday life in Aboriginal and Torres Strait Islander communities. See generally Australian Law Reform Commission ('ALRC'), *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986); Law Reform Commission of Western Australia ('WA'), *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture*, Final Report, Project No 94 (2006). Importantly, however, processes of nation (re)building, language revival and Indigenous resurgence are taking place across Aboriginal Australia: see generally D E Smith, 'Researching Australian Indigenous Governance: A Methodological and Conceptual Framework' (Working Paper No 29/2005, Centre for Aboriginal Economic Policy Research, October 2005); Janet Hunt et al (eds), *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (ANU Press, 2008); Michael Dodson and Lisa Strelein, 'Australia's Nation Building: Renegotiating the Relationship between Indigenous Peoples and the State' (2001) 24(3) *University of New South Wales Law Journal* 826; Larissa Behrendt, Miriam Jorgensen and Alison Vivian, *Rebuilding Australia's First Nations* (Federation Press, forthcoming); Alison Vivian et al (2017) 'Indigenous Self-Government in the Australian Federation' 20 *Australian Indigenous Law Review* 215; Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28(3) *Sydney Law Review* 403. Notwithstanding the reality of Aboriginal sovereignty, currently the Australian legal system affords recognition to the operation of Indigenous laws in extremely narrow circumstances; namely, in the context of native title, as a mitigating factor in sentencing and with respect to Torres Strait Islander traditional adoption: see generally *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

2   *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

3   See, eg, Mark Finnane, *Police and Government: Histories of Policing in Australia* (Oxford University Press, 1994); Jonathan Richards, *The Secret War: A True History Of Queensland's Native Police* (University of Queensland Press, 2008); Henry Reynolds, *Frontier: Aborigines, Settlers and Land* (Allen & Unwin, 1987); A Dirk Moses (ed), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books, 2004); Amanda Nettlebeck and Robert Foster, *In the Name of the Law: William Willshire and the Policing of the Australian Frontier* (Wakefield Press, 2007); Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001); Harry Blagg, *Crime, Aboriginality and the Decolonisaiton of Justice* (Hawkins Press, 2008).

4   Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991); Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (Australian Government Publishing Service, 1991); Boni Robertson, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (Department of Aboriginal and Torres Strait Islander Policy and Development (Qld), 1999).

5   Research from the ALRC and NSW Bureau of Crime Statistics and Research suggests that the rate of Indigenous imprisonment is rising: see, eg, ALRC, *Pathways to Justice — Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018); Margaret White and Mick Gooda, *Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory* (2017); Australian Institute of Health and Welfare, *Family,*

otherwise preventable.[6] The publication of a recent suite of inquiries and royal commissions into Indigenous incarceration and detention following the exposure of the mistreatment of Aboriginal young people in Don Dale Youth Correction Centre in the Northern Territory ('NT') highlights the ongoing nature of these human rights concerns in the present.[7]

This provides the backdrop to much academic discourse on the need to decolonise justice for Indigenous Australians. But while much has been written on the need to decolonise the justice system,[8] there has been little empirical examination of the everyday politics and mundane practices surrounding these processes. Critics have warned against the mere substitution of Aboriginal people for non-Aboriginal people — simply 'adding Aboriginal people and stirring'.[9] This would amount to

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Domestic and Sexual Violence in Australia (2018). See generally Don Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (AIATSIS Press, 2014); Chris Cunneen et al, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Ashgate, 2013); Chris Cunneen, 'Punishment: Two Decades of Penal Expansionism and Its Effects on Indigenous Imprisonment' (2011) 15(1) *Australian Indigenous Law Review* 8; Julie Stubbs, 'Indigenous Women in Australian Criminal Justice: Over-represented but Rarely Acknowledged' (2011) 15(1) *Australian Indigenous Law Review* 47; Rob White, 'Indigenous Young People and Hyperincarceration in Australia' (2015) 15(3) *Youth Justice* 256. In addition to rising incarceration rates, Indigenous Australians are over-represented as victims of crime. Although it is acknowledged that domestic and family violence are under-reported to the police, research data suggests that Indigenous women are 30 times more likely to be hospitalised for assault than non-Indigenous women in Australia: see, eg, Chris Cunneen, 'Criminalisation and Policing in Indigenous Communities' in Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations* (Oxford University Press, 2009). Space precludes a thorough discussion of this issue, but see Paul Memmott et al, *Violence in Aboriginal Communities* (Department of Attorney-General (Cth), 2001); Chris Cunneen, 'Policing and Aboriginal Communities: Is the Concept of Over-Policing Useful?' in Chris Cunneen (ed), *Aboriginal Perspectives on Criminal Justice* (Sydney Institute of Criminology, University of Sydney Law School, 1992) 76; Australian Institute of Criminology, 'Indigenous Victims of Violence', Crime Facts Info No 79 (Australian Institute of Criminology, July 2004).

6   Recent examples of preventable deaths in custody in circumstances involving police brutality include: the death of Ms Dhu, a 22-year old Yamatji woman who died after her pleas for medical attention were not taken seriously by frontline personnel (see Amanda Porter, 'The Price of Law and Order Politics: Re-examining the *Fines, Penalties and Infringement Notices Enforcement Amendment Act 2012* (WA)' (2015) 8(16) *Indigenous Law Bulletin* 28); the death of Rebecca Lyn Maher, a Wiradjuri woman who died in police custody after being detained for being intoxicated in a public place (Calla Wahlquist, 'Indigenous Woman Died in Police Custody after Notification Service Not Used', *The Guardian* (online, Australian ed), 16 August 2016); the death of Mr Langdon under the Northern Territory's ('NT') 'paperless arrest' laws (see *Inquest into the Death of Perry Jabanangka Langdon* [2015] NTMC 016 (14 August 2015)); the death of a Palm Islander man from injuries sustained while in police custody (see Christine Clements, *Inquest into the Death of Mulrunji* (Unreported, Queensland Coroner's Court, Christine Clements, 27 September 2006)); and the death of an Aboriginal boy who impaled himself on a fence during a police pursuit in Redfern (see Chris Cunneen, 'Aboriginal Deaths in Custody: A Continuing Systematic Abuse' (2006) 33(4) *Current Issues in Criminology* 37).

7   ABC, 'Australia's Shame', *Four Corners*, 25 July 2016 (Caro Meldrum-Hanna); ALRC, above n 5.

8   See generally Chris Cunneen and Juan Tauri, *Indigenous Criminology* (Policy Press, 2017); Blagg, above n 3; Cunneen, above n 3; Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Issues* (Oxford University Press, 2009); Elena Marchetti and Janet Ransley, 'Applying the Critical Lens to Judicial Officers and Legal Practitioners involved in Sentencing Indigenous Offenders: Will Anyone or Anything Do?' (2014) 37(1) *University of New South Wales Law Journal* 1; Juan Tauri, 'Family Group Conferencing: A Case-Study of the Indigenisation of New Zealand's Justice System' (1998) 10(2) *Current Issues in Criminal Justice* 168.

9   Tauri, above n 8; Marchetti and Ransley, above n 8; Chris Cunneen, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30(3) *Australian and New Zealand Journal of Criminology*

simply the 'indigenisation' of the mainstream legal system.[10] Yet very little attention has been given to what autonomous justice initiatives or self-determination might involve in practical terms in the criminal justice context. For example, what does self-determination look like in the criminal justice context? What activities are considered 'harmful' and 'criminal' within local settings? Who 'polices' these activities and who ultimately decides what constitutes a 'crime'? What forms of non-state governance constitute 'self-governance'?

This article examines these and related questions with reference to the everyday practices and operations of non-State policing in New South Wales ('NSW'), Australia. Non-State policing is a term I use to refer collectively to encompass a broad range of community safety and alternative policing initiatives including: night patrols, streetbeats, granny patrols, men's patrols, foot patrols, community patrols and other community justice initiatives aimed at reducing harm and maximising safety.[11] In this article, non-State policing serves as a lens through which to observe political struggle and contestation between grassroots movements in Aboriginal communities and their relations with various arms of formal or non-Indigenous governance in Australia, notably the State police.

As will become clear in this article, not only are these questions muddied in practice, but in many instances they are posed here in a way that does not necessarily reflect the concerns of night patrol workers in the study reported here. For example, many study participants were convinced that night patrols could only work if they are 'owned' by the local community, focusing on local relationships and knowledge, while the question of some universal principle of self-determination was normally left unstated. Some patrols, though wholly Indigenous-controlled and managed, drew sharp criticism for neglecting other marginalised groups within the local community. Despite the fact that the police and patrols adopt vastly different approaches to the 'policing' of crime and safety, this was rarely the source of major conflict for either service.

At the outset I would like to clarify that night patrols do not represent or simply equate to self-determination in practice — far from it. Throughout this article, my objective is to emphasise the complexity of these processes and to show that, on the ground, processes of decolonisation appear as much more subtle, ambiguous, changeable and inconsistent than is implied by the broader analytic binary of 'self-

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292; Jo Kamira, 'Indigenous Participation in Policing' in Mike Enders and Benoît Dupont (eds) *Policing the Lucky Country* (Hawkins Press, 2001) 70; Leanne Weber, 'Contemporary Comment: Bridges or Bandaids? Another Death in Custody Reveals Fatal Flaws in the Aboriginal Liaison Officer Concept' (2007) 19(2) *Current Issues in Criminal Justice* 235, 237; Paul Havemann, 'The Indigenization of Social Control in Canada' in Bradford W Morse and Gordon R Woodmann (eds), *Indigenous Law and the State* (Foris Publications, 1988) 71; H W Finkler, 'The Political Framework of Aboriginal Criminal Justice in Northern Canada' (1990) 5 *Law and Anthropology* 113.

[10]   The term 'indigenisation' has been defined variously as 'the involvement of indigenous peoples and organisations in the delivery of existing socio-legal services and programs' (Finkler, above n 9, 113) and elsewhere as 'the recruitment of indigenous people to enforce the laws of the colonial power': Havemann, above n 8, 72. Tauri uses a broader definition of indigenisation that includes 'cultural sensitisation' of the justice system as well as service delivery institutions: Tauri, above n 8, 169.

[11]   A variety of terms are used to described night patrols and non-state forms of policing, reflecting the localised nature of community justice initiatives.

determination versus indigenisation', 'autonomous versus co-opted', 'bridges versus band-aids'— as sometimes appears within the literature.

II   Background: Indigenous Self-Determination as a Right and a Concept

Australia is a legally pluralistic nation, with multiple legal systems and overlapping jurisdictions. Aboriginal Australia is made up of over 250 nations, each with its unique culture, language, history, laws and customs. Aboriginal legal systems continue to operate in many locations across Australia, coexisting simultaneously with the mainstream Australian legal system (including local, state, territorial, federal and international jurisdictions). Indigenous law or lore is a fact of life for Indigenous communities and nations around Australia and is a significant influence in the lives of many Aboriginal and Torres Strait Islander peoples.[12]

Notwithstanding this fact, the Australian and Aboriginal legal systems operate with little or no legal recognition of one another. There has been limited formal recognition of Indigenous sovereignty by Australian governments. An example of limited recognition is native title legislation, whereby the Australian Government recognises, in certain instances where a claim is successfully proved, certain proprietary rights (namely, rights to 'native title') that include the right to fish, hunt and practice customary laws.[13] Conversely, there have been few instances of recognition of the sovereignty of the Australian governments by Aboriginal nations and legal systems. Recent examples of contestation between the Australian and Aboriginal nations include: legal disputes and conflict between non-Indigenous authorities and the Sovereign Yidindji Government;[14] the Aboriginal Tent Embassy since 1972; the Yirrkala Bark Petitions; the use of Aboriginal passports by Aboriginal activists; and the 'Invasion Day' celebrations. Indigenous peoples' collective right to self-determination and self-government has its genesis in the unextinguished Indigenous sovereignty to Aboriginal nations or 'country'.

The right to self-determination is a collective right of Indigenous peoples, communities and nations to freely determine their political status and their economic, social and cultural destiny. The right to self-govern underpins the normative framework of Indigenous peoples' rights in international law and politics and is enshrined in key sources of international law; specifically, in art 1 of the *International Covenant on Civil and Political Rights* ('ICCPR')[15] and in art 1 of the *Covenant on Economic, Social and Cultural Rights* ('ICESCR'),[16] both of which were adopted by the General Assembly in 1966. More recently, the collective right

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[12]   Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Discussion Paper Project 94 (2005). The discussion paper quotes this vivid description: 'Aboriginal law is the table, the solid structure underneath. Whitefella law is like the tablecloth that covers the table, so you can't see it, but the table is still there.': at 51.

[13]   *Native Title Act 1993* (Cth).

[14]   Saffron Howden, 'Murrumu Walubara Yidinji Renounces Citizenship to Reclaim Australia', *The Sydney Morning Herald* (online), 2 November 2015 <http://www.smh.com.au/nsw/murrumu-walubara-yidindji-renounces-citizenship-to-reclaim-australia-20151102-gkok6g.html>.

[15]   Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[16]   Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

to self-determination forms the normative backbone of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP'), adopted by the General Assembly in 2007.[17]

At least in principle, the concept of self-determination seems simple enough. Yet beyond these broad statements of international law, the term 'self-determination' remains imprecise or 'invidiously vague'.[18] Overly romanticised by idealists and readily dismissed by conservatives, discussions about self-determination tend to take place at a level of abstraction which is often unproductive for local communities. Because of the high level of generality and state-centered focus, discussions about self-determination tend to pay too much attention to the relationships between Aboriginal communities and the State and tend to neglect the relationships between Aboriginal peoples, communities and nations.[19]

The endorsement of the principle of self-determination by successive Australian federal governments has a chequered past. Although both the ICCPR and ICESCR were signed and ratified by the Australian Government, the articles specifically relating to self-determination have not been implemented in Australian domestic law. Australian domestic politics in the 1970s was predicated on a 'self-determination policy', aimed at replacing paternalistic surveillance and control with a more respectful and egalitarian relationship between Indigenous and non-Indigenous Australians. In 1972, the Whitlam Government adopted a formal self-determination policy, reflected in the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Aboriginal Councils and Associations Act 1976* (Cth). The formal policy continued under the Hawke Government, with attempts at fostering self-determination reflected in the enactment of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) and attempts to negotiate a treaty ('the Barunga Statement') in 1988. The Turnbull Government distanced itself from the term 'self-determination', stating preference for (former Liberal Prime Minister) Tony Abbott's hand-selected 'Individual Advisory Council'. Current federal policies include the Indigenous Advancement Strategy;[20] the 'Close the Gap' national targets;[21] and support for a referendum to recognise Indigenous Australians within the *Australian Constitution*.[22]

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[17] GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc/A/RES/61/295, annex. Several articles are relevant here, in particular, arts 3–5. The Australian Government initially refused to sign the *UNDRIP* in 2007 (alongside New Zealand, Canada and the United States), but reversed its position in 2009.

[18] Megan Davis, 'Aboriginal Women: The Right to Self-Determination' (2012) 16(1) *Australian Indigenous Law Reporter* 78, 79.

[19] There are many examples of Indigenous governance structures at regional and federal levels, most notably the Murdi Paaki Regional Assembly (created in 1997) and the National Congress of Australia's First Peoples (created in 2010). However, the focus of this article concerns justice initiatives at the local community level.

[20] Department of the Prime Minister and Cabinet (Cth), *Indigenous Advancement Strategy* <http://www.dpmc.gov.au/indigenous-affairs/indigenous-advancement-strategy>.

[21] Department of the Prime Minister and Cabinet (Cth), *Closing the Gap: Prime Minister's Report 2018* (2018) <https://closingthegap.pmc.gov.au/>.

[22] Department of the Prime Minister and Cabinet, *Referendum Council's Fifth meeting* (2016) <https://www.dpmc.gov.au/resource-centre/indigenous-affairs/referendum-council-communique-9-august-2016>.

Australian federal policy can hence be characterised, in general terms, as being focused more on the rolling out of government strategies and programs in an attempt to deliver self-determination to Indigenous Australian communities than in nurturing and supporting local visions of governance. In the words of Davis:

> The adoption of a policy of self-determination for Indigenous peoples by the Commonwealth [G]overnment meant that the developing norm of self-determination became state-centric — focused on the state — and less attention was paid to how the right to self-determination should be managed internally within Indigenous groups themselves, especially in regards to Aboriginal women, gender equality and violence.[23]

For many years, Indigenous scholars and activists have repeated the vital importance of this right as an explicit goal and as integral to the future prospects for all Aboriginal and Torres Strait Island peoples, communities and nations.[24] Rarely, however, is 'self-determination' examined with reference to everyday practices of policing.[25] This is perhaps due, at least in part, to the influence of previous policing scholarship, which both reflected a preoccupation with the State police and defined 'policing' narrowly as involving social regulation combined with the use or threat of coercive force.[26] It is now readily acknowledged, however, that 'policing' extends beyond the activities of the State police.[27]

III   Non-State Policing

There is a significant body of international literature on the rise of non-State policing and security.[28] However, very little information exists on Indigenous forms of self-

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[23]   Davis, above n 18, 80.

[24]   Kevin Gilbert, *Because a White Man'll Never Do It* (Angus & Roberston, 1973); Aileen Moreton-Robinson, *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007); Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016); Irene Watson, *Aboriginal Peoples, Colonialism and International Law* (Routledge, 2015); Nicole Watson, 'The Northern Territory Emergency Response: The More Things Change, the More They Stay the Same' (2011) 48(4) *Alberta Law Review* 905; Michael Dodson, 'The End in the Beginning: Re(de)fining Aboriginality' (Wentworth Lecture, Australian Institute of Aboriginal and Torres Strait Islander Studies, 30 June 1994) <https://aiatsis.gov.au/publications/presentations/end-beginning-redefinding-aboriginality>; Gary Foley, Andrew Schaap and Edwina Howell (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2013); Michael Mansell, 'Towards Aboriginal Sovereignty: Aboriginal Provisional Government' (1994) 13(1) *Social Alternatives* 16; Daryle Rigney and Steve Hemming, '"Is Closing the Gap" Enough? Ngarrindjeri Ontologies, Reconciliation and Caring for Country' (2014) 46(5) *Educational Philosophy and Theory* 536; Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003).

[25]   There are two important exceptions: Blagg, above n 3, ch 9; Cunneen, above n 3, ch 8.

[26]   See especially Carl B Klockars, *The Idea of the Police* (SAGE Publications, 1985).

[27]   See, eg, Les Johnston, *The Rebirth of Private Policing* (Routledge, 1992); Lucia Zedner, *Security* (Routledge, 2009); Robert Reiner, *The Politics of the Police* (Oxford University Press, 4th ed, 2010); Jean-Paul Brodeur, *The Policing Web* (Oxford University Press, 2010); Adam Crawford, *The Local Governance of Crime: Appeals to Community and Partnerships* (Oxford University Press, 1997); Alison Wakefield, *Selling Security: The Private Policing of Public Space* (Willan, 2003); Ian Loader and Neil Walker, *Civilizing Security* (Cambridge University Press, 2007).

[28]   Community policing initiatives have been given considerable attention within many national jurisdictions such as Canada (see Pamela Leach, 'Citizen Policing as Civic Activism: An International Inquiry' (2003) 31(3) *International Journal of the Sociology of Law* 267; Mike King,

policing. The work of Aboriginal night patrols first came to the attention of legal researchers during consultations for the Australian Law Reform Commission's report on *The Recognition of Aboriginal Customary Laws*, which was initiated in 1977. The Final Report contains one of the first, albeit very brief, written references to Aboriginal self-policing initiatives and related activities of schemes operating in several remote communities in South Australia and the NT in the 1970s.[29] The first academic paper on the subject of night patrols was written by Langton, who saw their potential for providing an effective alternative to State intervention in the early 1990s.[30] Langton's research suggested that the everyday activities of patrols extend beyond western concepts of 'policing' to provide a much more encompassing cultural service for Indigenous Australian communities.[31]

The earliest patrols to be documented in archival and secondary (written) accounts include: the 'Security Men' patrol at Roper River (NT); the 'ten man committee' in Roebourne, Western Australia ('WA'); the 'Community Council' at Yirrkala (NT); the 'Julalikari Council Patrol' in Tennant Creek (NT); the 'Redfern Patrol' (NSW); and the 'Yuendumu Women's Night Patrol' (NT).[32] These patrols were informal responses to the specific needs of the local communities in which they operated. Many of these patrols were staffed by Elders, community leaders and other respected community members who set up a patrol in response to a perceived need within the local area. It is a common misconception that the earliest night patrols existed solely within remote communities of WA and the NT — examples of early self-policing initiatives exist equally in urban and rural locations. In addition to the self-policing initiative that existed in Redfern in the early 1980s, while completing fieldwork I heard of similar initiatives in NSW including the Bourke Women's Night Patrol (circa 1991–97), the Brewarrina Granny Patrol (circa 1990–2011) and the Walgett Night Patrol (circa 1995–present).

'Policing and Public Order Issues in Canada (1997) 8(1) *Policing and Society* 47; Tonio Sadik, 'Native Policing in Canada' in K Hazelhurst (ed) *Perceptions of Justice: Issues in Indigenous Community and Empowerment* (1995); Don Clairmont, 'Community Policing in Aboriginal Communities in Canada' in Mahesh K Nalla and Graeme R Newman (eds) *Community Policing in Indigenous Communities* (CRC Press, 2013)); South Africa (see Mike Brogden and Clifford Shearing, *Policing for a New South Africa* (Routledge, 1993); Anne-Marie Singh, *Policing and Crime Control in Post-Apartheid South Africa* (Ashgate, 2008); Clifford Shearing and Jan Froestad, 'Nodal Governance and the Zwelethemba Model' in Hannah Quirk, Toby Seddon and Graham Smith, *Regulation and Criminal Justice* (Cambridge University Press, 2010) 103; Bill Dixon and Lisa-Marie Johns, *Gangs, Pagad and the State: Vigilantism and Revenge Violence in the Western Cape* (Centre for the Study of Violence and Reconciliation, 2001)); and Kenya (Mathieu Deflem, 'Law Enforcement in British Colonial Africa: A Comparative Analysis of Imperial Policing in Nyasaland, the Gold Coast, and Kenya' (1994) 17(1) *Police Studies* 45; Mutuma Ruteere and Marie-Emmanuelle Pommerolle, 'Democratizing Security or Decentralizing Repression? The Ambiguities of Community Policing in Kenya' (2003) 102(409) *African Affairs* 587).

29 ALRC, above n 1, [858]–[866].

30 Marcia Langton, 'The Wentworth Lecture — Aborigines and Policing: Aboriginal Solutions from Northern Territory Communities' (1992) *Australian Aboriginal Studies* 2; Marcia Langton et al, 'Too Much Sorry Business', Submission of the Northern Territory Aboriginal Issues Unit to Commissioner Elliott Johnston, *Royal Commission into Aboriginal Deaths in Custody*, July 1990.

31 Langton, 'The Wentworth Lecture', above n 30.

32 This is the conclusion I have drawn after reviewing secondary texts. It is likely that earlier forms of localised community policing existed well before this, however further research is needed to document the rich and varied history of these initiatives.

According to Langton, the most important skills that patrol workers had were fluency in local Aboriginal languages, cultural knowledge and verbal persuasion.[33] Sources suggest that the earliest patrols developed in an ad hoc way that was responsive to the local environments in which they formed, and as such there was a large degree of diversity among initiatives.[34] In some instances, local patrols developed in response to a perceived deficiency of the existing State police service — for example, the Yuendumu Women's Night Patrol (NT), which was set up by female Elders in response to the inadequacy of services available to address substance-related issues. In other instances, patrols were set up in response to perceived harassment and over-surveillance by the existing State policing service. While in other instances, as Higgins notes, night patrols developed 'quite simply, because there was nothing else'.[35]

Given this diversity, this article uses 'non-State policing' collectively to encompass a wide variety of localised safety initiatives including night patrols, streetbeats and other locally-run initiatives with formal agendas that focus on keeping young people safe and preventing contact between Aboriginal and Torres Strait Islander people and the State police. The core features of non-State policing include: independence from State police; a consensual basis of operations; and a connection to the local Indigenous community. Non-State policing initiatives currently exist in a diverse range of urban, rural and remote settings across Australian jurisdictions. A national review of night patrols conducted by Blagg in 2003 found that there were in excess of 130 night patrols operating at the time, with two-thirds of these located in remote parts of WA and the NT.[36]

As begins to emerge already in this analysis, there is an enormous degree of diversity among the functions, objectives, composition and style of each unique service. Despite this variation, broad unity can be seen at the level of key functions, which in NSW included maximising safety, mentoring, and preventing harmful behaviour. One of the core activities of patrols is their attempt to act as a safety net for young people who 'fall through the cracks of the system' — in particular, homeless youth, young mothers and youth who are in and out of juvenile detention centres. Another key activity is attempting to minimise conflict and confrontation between the State police and Aboriginal communities. Aboriginal Patrols hence attempt to counter the negative impacts of the criminal justice system for Indigenous young people and to manage relations between the State police and the community.

At least in theory, night patrols are connected in some way to the local Aboriginal community within which they operate. In practice, night patrols operate with varying levels of community input or involvement from the Aboriginal community (for example, they might be organised by an Aboriginal corporation, by a men's group or women's groups, or they may function with the oversight of the

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[33]   Langton, above n 30.
[34]   Ibid; ALRC, above n 1; Anne Mosey, Taking Control of the Grog' (1999) 19(3) *Artlink* 47.
[35]   David Higgins, *Best Practice for Community Night Patrols and Warden Schemes: A Report to the Office of Aboriginal Development* (Office of Aboriginal Development (NT), 1997).
[36]   Harry Blagg, *An Overview of Night Patrol Services in Australia* (Department of Justice and Attorney-General (Cth), 2003); Harry Blagg and Giulietta Valuri, 'Self-policing and Community Safety: The Work of Aboriginal Community Patrols in Australia' (2004) 15(3) *Current Issues in Criminal Justice* 205.

local Aboriginal Working Party). Similarly, patrols operate independently of — and, not infrequently, in some degree of conflict with — the State police. This does not mean that the relations between patrols and the State police are essentially acrimonious, although this is sometimes the case. Indeed, most patrols relied on the State police to intervene in instances of violent crime (domestic violence, assault) and many patrols had positive relationships with the State police. In some cases, senior police officers were present on the management committees of local patrol initiatives. That said, a key part of the agenda of local night patrols is to minimise contact between community members and the State police. As this implies, night patrols do not fall neatly into either the governmental or autonomous reform efforts, and occupy what scholars have termed 'third' or 'hybrid' spaces.[37] These theorisations aside, very little information exists on the development and contemporary operation of night patrols and other forms of non-State policing in Australia.

IV   Methodology

To begin to redress this oversight, a qualitative study was conducted on the everyday operations and politics of night patrols, streetbeats and non-State policing in NSW, Australia. The study examined the nature of their everyday operations (at service and managerial levels) and the nature of relations between the patrol and various entities (clients, the Indigenous community, the non-Indigenous community, the local State police, funding bodies and so on). To this end, the overarching objective of the study was to uncover the agency of 'bottom-up' justice initiatives including the many unsung heroes involved in their everyday operation such as Elders and community members.

The purpose of the study was to gain insights into the everyday operation and politics of Aboriginal Patrols. I did not attempt to provide an evaluation of the patrols or consider whether or not, according to some fixed performance criteria, they 'work'. I was more interested in the mundane details in order to demonstrate the variety and complexity of alternative governance structures in their local context. In doing so, a related aim of this research was to document the oral testimonies of those involved in the everyday operation of patrols and to paint a more in-depth picture of patrols. In this way, I was interested in adopting a sociological approach to the everyday operation of non-State policing initiatives and their 'mundane governance'[38] of crime and safety.

Three primary case studies were carried out in Redfern/Waterloo (inner-city areas of Sydney, NSW), Bourke (a small town in far-western NSW) and Dubbo (a provincial city in mid-western NSW). In terms of research methods, the study consisted of: field observations (sitting in on patrol operations during operation hours and observing the patrol activities and interactions), interviews (83 were audio-recorded and some were not recorded); and informal discussions (including individual and group discussions). During field observations, I would usually sit

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[37]   Blagg, above n 3; Cunneen, above n 3.

[38]   I adopt the term 'mundane governance' in line with its usage by sociologists as everyday modes of regulation and social control. See especially Steve Woolgar and Daniel Neyland, *Mundane Governance: Ontology and Accountability* (Oxford University Press, 2013).

behind the driver, though after half a year on the Redfern Streetbeat I ended up working as a volunteer (in an unofficial capacity) and thus sat in the passenger seat from this time onwards. My purpose during the 'sit ins' was primarily to observe, though I took detailed notes as discretely as possible. The other purpose was to converse with patrol workers and young people using the service. The study was supplemented by archival searches of documents, reports, photos and related materials. The study has been informed by original fieldwork conducted on several other sites in NSW: Grafton (October 2010, December 2011); Ballina (October 2011); Brewarrina (November 2011); Daceyville (August–September 2011); Kempsey (May 2011); and Newcastle (January 2012).

Due primarily to ease of access, I spent proportionately more time in urban centres relative to the rural and remote patrols. Specifically, as a Sydney-based researcher, I was able to observe the Redfern Streetbeat operations regularly each Saturday and Sunday night from 9pm–3am (and sometimes later). The fieldwork in Redfern formally started on 11 February 2011 and continued to 28 June 2013 (with a three-month period away from October–December 2012 during which time I was completing a residency). At that time, the Redfern Streetbeat was operating from Thursday to Saturday nights, from the hours of 9pm–3am in summer and 10pm–3am in winter. Fieldwork in Dubbo and Bourke was carried out between 1 August 2011 and 12 December 2011 (totalling five visits of 1–2 weeks duration in each town). At that time, the Dubbo Safe Aboriginal Youth Patrol operated Wednesday–Saturday (7–10pm), and during my visits I went on patrol every patrol night. The Bourke Safe Aboriginal Youth Program operated from Thursday to Saturday (6–11pm), and I was similarly able to observe all patrol operations and related youth activities during my visits.

Interviews were conducted with patrol personnel (including drivers, workers, volunteers, management, administrative staff) who worked for the patrol in each of the case study sites. Interviews were also conducted with staff from funding bodies, local police (at all levels including Sergeant, Detective Inspector, Head of Police Command, Aboriginal Liaison Officers), with local government councillors, with representatives of local businesses, with teachers at the local school (Aboriginal Education Officers) and with members of the general community (both Indigenous and non-Indigenous).

The study raises important ethical considerations that deserve more thorough treatment than is possible here.[39] Ethics approval for this research project was granted by the Human Research Ethics Committee of the University of Sydney ('HREC') and the NSW Aboriginal Health and Medical Research Council Ethics Committee ('AHMREC').[40] Throughout the course of this research project, however, my ethical obligations as a researcher extended above and beyond the conventional paradigm of 'human research ethics' to include a range of ongoing personal or moral responsibilities as a researcher. I was conscious of my position as a researcher (including the power and privilege this position necessarily entails) and how this

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[39]   For a more detailed account of the ethical considerations arising out of this study, see Amanda Porter, *Decolonising Juvenile Justice: Aboriginal Night Patrols, Streetbeats and Safety* (PhD Thesis, University of Sydney Law School, 2014) ch 3.

[40]   HREC approval: Protocol No 13165; AHMREC approval: December 2010.

affected my interactions with research participants, the importance of reciprocity and partnerships with community organisations (in this case, local patrol initiatives). I had an awareness of the ethics around my own relative privilege especially in relation to the patrol's 'client group', which included Indigenous young people.

The study resulted in multiple findings, the scope of which lie beyond this article. For the purposes of this article, Part V sketches out three key findings that are relevant for discussions of legal pluralism and the meaning of self-determination in the criminal justice context.

V   Findings: Non-State Policing, Self-determination and Legal Pluralism

A   *Diverse Local Histories of Community Safety Initiatives*

The first and seemingly most significant finding of the study related to the rich and diverse local histories of non-State policing initiatives, which were much more complex and typically formed part of a longer local history than I anticipated. I was particularly struck by the vibrant local histories and the breadth of initiatives currently in operation. In Sydney, for example, there are two night patrols: Redfern Streetbeat and the Daceyville Boomerang Bus. There are also several safety initiatives, such as Clean Slate Without Prejudice, an initiative run by Tribal Warrior Aboriginal Corporation in partnership with the Redfern Local Police Area Command aimed at improving relationships between young people and the State police. In Bourke, I had originally come to town with the intention of learning about the Bourke Community Assistance Patrol ('the Bourke CAP'), but quickly learnt that it was part of a significantly longer history including the Bedford Bus, the Active Neighbourhood Watch, the Aboriginal Women's Night Patrol (also known as *Ngapri Nalli* or 'my mother') and the Bourke Safe Aboriginal Youth Patrol.[41] The function and form of the patrol changes over time in response to local needs and priorities. In the case of Bourke, this local vision for community justice continues today and forms part of a larger community vision for justice as seen more recently with the justice reinvestment strategy: the Bourke Maranguka Justice Reinvestment Project.[42] As begins to emerge, the picture of night patrols is one of variability and complexity.

B   *Governance Structure and Community Control*

A second and equally significant finding related to governance structure and the significance of community control as repeated in interviews and discussions. When asked 'what are the essential ingredients of a successfully run night patrol?', the term 'community' (in the sense of the local Aboriginal community), was the single most common response by patrol workers, residents, and management staff. Those who

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[41]   See the Appendix for further information about night patrol initiatives in Bourke.
[42]   Just Reinvest NSW, *Justice Reinvestment in Bourke* <http://www.justreinvest.org.au/justice-reinvestment-in-bourke/>. See also the Appendix to this article.

mentioned the term usually mentioned it at the beginning and placed emphasis (via repetition or stress) on its central importance in the everyday functioning of the patrol:

> Has to be community owned. Has to be community people on it. Has to retain control by the community. I think they're the three strongest points. Honestly, community, community, community. If a non-Aboriginal person walks into town and says: 'I've got this fantastic idea people, this is what we're gonna do'. It's not gonna get off the ground.[43]

> It's around the governance model, it's gotta be a strong governance model. Again, be driven by the community for the community and I'm a big believer in that. … Keep the government bureaucrats out of the road as they only muddy the waters. Community driven, local employment strategy, community stakeholders that take ownership and leadership by the CAP patrollers because they get looked upon and the peers look to them as they've got a job and 'hey that could be me'. … But it's more around the model, the home-grown grassroots model where we're in control but [also] having good governance. Home-grown, community driven... And being culturally appropriate.[44]

In interviews with residents, there was acknowledgement of the 'home-grown' patrol models, an attribute which was, for many, perceived as 'the' underlying factor affecting everyday patrol operations. These points bring out not just the importance of having 'an Aboriginal design' or 'Aboriginal personnel', but of being built on understandings and relationship that are culturally, historically and locally specific to the local Aboriginal community. All of this translated into cultural authority, legitimacy and belonging in a very local sense. When I spoke with patrol staff of the Redfern Streetbeat — the longest running patrol service of all three case studies — and asked what they perceived to be the key to this sustainability over time, chief among the reasons offered was that of 'community engagement'. The importance of this was emphasised by the current manager of the Redfern Streetbeat, who viewed the partnership with a local Aboriginal corporation as an integral part of the service:

> [I] think it's important that the bus, because we work predominantly with Aboriginal young people, to be closely associated with an Aboriginal organisation. … And I just think, you know, that's the way it should be, [it's] that link to the community. Danny [CEO of the Aboriginal Resource Centre in Redfern] sees all these kids' parents, they come in to get sporting grants. *That link is important, it gives credibility and…. No, credibility is not the word. It just. It gives the bus a place in the Aboriginal community*. It's not just out there.[45]

Creating a nexus with the local Aboriginal community would thus appear critical to what is understood to be self-determination — at least in terms of the kinds of everyday relations touched on by local patrol initiatives. However, this should not be thought of as a once-and-for-all process, as if once established the 'self-determining' status of a given patrol exists eternally or universally.

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43   Patrol worker #3, Dubbo.
44   Patrol manager #2, Bourke.
45   Patrol worker #5, Redfern Streetbeat (my emphasis).

As could be anticipated, the governance structure of a local patrol is unlikely to be the same from one community to another, to such an extent that the very term 'night patrol' seemed inadequate in capturing the diversity of these highly disparate justice initiatives. So, for example, the governance structure of the Bourke CAP consisted of over a dozen patrol staff (all Indigenous and from Bourke, with the exception of one non-Indigenous patrol worker), a Patrol Manager (Indigenous) and a Steering Committee (consisting of Indigenous and non-Indigenous residents). Bourke residents who were regularly in attendance at Steering Committee meetings included: Aboriginal community member; Elders; the Chair of the Bourke Aboriginal Community Working Party; state (NSW) police officers; the Chair of the Darling Police Command; members of the local government council (Bourke Shire Council); local business owners, teachers, the town Mayor, TAFE (Technical and Further Education) NSW representatives, teachers and residents.

The Bourke CAP meetings were different to governmental or inter-agency meetings, which patrol management staff are contractually required to attend (for example, under funding requirements). The meetings were the initiative of, and operated according to, conditions set by the patrol management staff, with attendees participating of their personal capacity and typically in the capacity of 'concerned local residents'. The fact the government representatives present at these meetings were Bourke residents was important and allowed patrol management to counter the power structure in which government–community relations habitually occur. The Steering Committee meetings, in particular, allowed patrol and management staff to present findings and manage problems that arose with the objectives of transparency, accountability and whole-of-community involvement. The purpose of Steering Committee meetings was to create a platform for the transfer of information about everyday patrol operations, as well as providing a culturally appropriate way for non-Indigenous community members to offer suggestions, to air grievances and provide feedback on the running of the service. Night patrols similarly reflected a varied spectrum of Indigenous control and ownership. Whereas the Bourke Women's Night Patrol was run on a voluntary basis by Elders and senior Indigenous women (with the provision of in-kind support from the local council), the Redfern Streetbeat was managed by a team of Indigenous and non-Indigenous staff members, including paid staff and volunteers.

Another common issue related to the balancing of competing expectations on issues relating to the service and management of the local night patrols. As could be imagined, the everyday management of patrol services involved mundane, routine disputes regarding local patrol activities and operations. These disputes might concern: the management of relations with non-Indigenous entities (for example, the State police and funding bodies); issues concerning logistics (for example, the appropriate place for the van to be parked, the appropriate venue for meetings); managing competing community expectations, desired hours of operation, training, uniforms, changes in personnel, and handover practices; staff and personality conflicts; managing competing expectations; funding disputes; processes related to the banning of badly behaved individuals from the service (also known as 'ousting'); and the inclusiveness of the service. In managing competing community expectations, research participants highlighted the importance of transparency, communication, integrity and good governance. Indigenous research participants

were at pains to emphasise that the issue of how the conflict was dealt with was often more important than the conflict itself:

> But this is a constant process you had to deal with. So there would be family feuds in the community and sometimes we would receive complaints. Things like 'Uncle wouldn't pick me up because of this family'. But *it was how we dealt with this that mattered. Our priority was youth, not certain families — but if that is there, or even if that perception is there, it has to be dealt with.* Sometimes this would be by talking with the young fella one on one. But it would be led by example also and [by] making sure we did see all kids.[46]

Compounding the issue of competing expectations was the tendency for any solution that fell short of solving *all* the problems of a local community to be accused of 'not getting to the nitty gritty' or dismissed as a 'band-aid solution'. The expression 'band-aid solution' was used commonly in conversations and was particularly current in rural settings. While such views were not universally held, the mere presence of such perceptions is reflective of deeper issues of cynicism and community self-esteem. Some residents felt that term created an air of cynicism that was itself inhibitive of social change. The band-aid label was perceived by a number of participants to be part of the problem itself.

Patrol workers and management staff were cognisant of the ambitious nature of their work and the expectations placed on their role:

> If I could remember my work plan for the first month, it was ah — get the [Bourke] CAP started up again, solve law and order ah, cure cancer — you know what I mean? [laughter] You know, I drove myself into the ground! I worked so hard because I was so chuffed to get the job I thought, I've got to … [Our role involved] Trying to build people up to these expectations and to talk those other people's expectations down, do you know what I mean? Because people have really unrealistic expectations about what can be achieved and then they crack the shits when they can't be done and that's the thing. *People don't want it just to work a bit, they want it to be the cure for cancer.*[47]

Given the high level of expectations placed on the performance of a local patrol — specifically, in 'fixing' poverty, 'solving' homelessness or 'reconciling' police–community relations — it is perhaps unsurprising that patrol workers described experiencing a sense of 'burn out' or the need to 'step down' from positions of management and leadership. The issue of burn out was often compounded by difficulties in securing predictable and ongoing funding.

C   *Everyday Governance of 'Crime' and Safety*

A third finding, which is important in relation to the meaning of self-determination in the justice context, relates to the everyday governance of 'crime' and safety. At least in theory, patrols and the State police share common goals and there are multiple advantages for both parties to work together. For the State police, advantages include: assistance in managing difficult situations and individuals; and

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[46]   Patrol worker #5, Bourke CAP (my emphasis).
[47]   Patrol manager #2, Bourke CAP (my emphasis).

the potential to open up channels of communication for broader issues facing Aboriginal communities generally. For the local patrol, advantages include: the ability to have police 'on-call' as back-up support for serious crimes; access to secure premises to store the patrol vehicle and equipment; and the potential to open communication channels with the State police. For both parties, there is the potential of decreasing high arrest and incarceration rates of Indigenous peoples and improving relations between the police and Aboriginal communities.

Generally speaking, improved relations between communities and the police have the potential to decrease the trust gap that currently exists between Indigenous peoples, communities and the State police. Both State police officers and patrol workers seemed to recognise advantages of working in unison and acknowledged, to varying degrees, the complementary nature of their work. Patrol workers said: 'we're taking a load off their [the police] work too',[48] 'we're just doing them a favour',[49] and 'if they wanted to work with us, they would get a lot more'.[50] These sentiments were echoed in interviews with police officers, who regularly acknowledged the cultural appropriateness of the service, some of whom stated: 'it's a two-way street',[51] '[they are] stopping things before police intervention is necessary',[52] '[patrols are] an alternative to the police going around'[53] and 'they make our job easier'.[54] In some interviews, the very fact of attempting to foster good relations and build bridges between the two entities was seen as a positive step and an achievement in and of itself:

> I've gotta say that one of the things in particular about the CAP [Community Assistance Patrol] that I thought was successful was the fact that the police volunteered to work with the CAP members and also support the patrols. So we had a good relationship generally … I made a request that the CAP drivers come into the police station and talk to the police as an overt way of ensuring that we maintained a system because the police look after the radios for them, and that was an opportunity for the police, if they were in the position to do so, to talk with them see how they've gone again, exchanging the any significant issues that may be arising around town and also um, you know, it's a two-way street in terms of the people from the CAP maybe raising issues of concern in the community that type of thing.[55]

> Look, like anything it fluctuated depending on those involved, but I was certainly keen to foster a positive relationship there, and that's part of the key to the success of these type of programs. You're gonna have varying levels of attitudes and past conflict between individuals, but generally it was very good, I thought, and the police recognised the importance of maintaining that, of fostering good relationships.[56]

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48   Patrol manager #2, Bourke.
49   Patrol worker #5, Redfern.
50   Patrol worker #1, Grafton.
51   Police officer #3, Bourke.
52   Police officer #2, Bourke.
53   Police officer #1, Dubbo.
54   Police officer #2, Lismore.
55   Police officer #3, Bourke.
56   Police officer #2, Lismore.

These discourses provide an important counter-narrative to the otherwise fairly bleak analyses within the literature on policing and Indigenous peoples. In completing my fieldwork, I was able to witness some first-hand attempts by both sides to work together. In Redfern, patrollers notified police immediately after a serious incident involving a dispute between two young people and were able to manage the scenario while awaiting police arrival at the scene. Later, they provided witness testimony to the police and attended specifically to the needs of both of the two young boys involved, including facilitating access to a counsellor.

Despite such examples of convergence, inevitably complications arise in practice. As one research participant succinctly described: 'it's a love/hate relationship'.[57] Recalling the historical and contemporary dimensions of the relationships between communities and the police, as described at the outset of this article, this hardly seems surprising. The broader dimensions of these neo-colonial power dynamics were a great source of ongoing conflict and confrontation between communities and the police across all case study sites.

In addition to these broader power dynamics, the tensions between patrols and the State police at other times played out due to the different philosophies or approaches to 'policing'. Whereas the State police have legal powers to arrest, detain and move; night patrols operate on a consensual basis and can only persuade young people to cooperate. Whereas police officers are primarily concerned with maintaining order and enforcing the law; night patrols are concerned with ensuring the safety and wellbeing of Indigenous young people. Whereas police officers retain somewhat of a distance from 'the public(s)' they police, night patrol officers are on a first-name basis with many of 'the client group'. Generally speaking, patrol officers were more likely to 'turn a blind eye' to minor social transgressions such as drinking, offensive language, and recreational drug use. While the idea of turning a blind eye to crime might seem surprising to some, it is in many ways no different to the police officers' powers of discretion with respect to the enforcement of the criminal law. Patrol officers were simply using their judgement to make a decision regarding the most pragmatic course of action with regards to the circumstances and the young person's safety and wellbeing.

An interesting example of conflicting views of 'crime' — and one which arose frequently in the field — related to the policing and governance of breaches of 'curfew'. It was very common for Indigenous young people to have restrictions placed on their movement in terms of both place and time. The breach of (court-imposed) curfew is an offence under the *Bail Act 1978* (NSW). However, many patrol workers saw the imposition of curfew as an infringement of civil liberties. Social justice advocates and human rights agencies have equally raised concerns over excessive curfew checks and the excessive restrictions that curfews impose on Indigenous young people.[58] Criminological research equally confirms the fact that a

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57   Patrol worker #3, Dubbo Gordon Centre Night Patrol.
58   Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan* (Youth Justice Coalition, 2017) <https://www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf>; Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2015);

disproportionate number of Indigenous young people have curfews imposed when compared to non-Indigenous young people.[59] From the perspective of police officers, some police officers expressed frustration over the 'softly softly' approach taken by patrol workers. Other police officers didn't appreciate patrol workers 'treading on their toes'. In the words of one officer, speaking in a personal capacity: 'Police get frustrated a bit ... One of the cops here, his attitude is that they're [police officers] not social workers, they're not there to develop communities; their role is to stop crime.'[60]

Differing perspectives to what constitutes 'crime' and how to best 'police' or manage these scenarios hence constituted a common source of contestation and political struggle between police officers and patrol workers.

The everyday policing of curfews raises significant issues about justice, morality and fairness in law enforcement. However, this example equally raises questions for the meaning of 'self-determination' in the criminal justice context. How do patrol officers and police officers decide what is 'harmful' or 'criminal'? And who ultimately gets to decide?

These simple questions provoke complex, confusing and no doubt passionate debate. To further complicate matters, however, there were also instances in which these contrasting approaches and philosophies to 'crime' and safety were able to be implemented in ways that were mutually beneficial to all parties. For example, patrol workers were sometimes called in to assist where police intervention had failed to achieve the desired outcome. As one patrol worker recounts:

> Sometimes you intervene with relationship issues, you know. You'd have the young ones fighting with their girlfriend and boyfriend, and you'd do some of that stuff. Or there was one incident in Marrickville, friends called me up and said 'Rebecca — can you come over and pick such and such up, her and her boyfriend are fighting, she won't listen to anyone, all the police are here'. So I get there and I pull over and I said I won't be long I'm going to get such and such — the kids knew her, they knew what was going on. So I get there and she's standing there and the boy's standing there. He [the boyfriend] said 'She won't go Aunt she won't go'. So I had to turn around and I said, 'Hey such and such — let's go', you know, 'You're all drinking, you've all had too much to drink, let's leave your boyfriend here you can come back in the morning'. And as you know when people are drunk it's just they go 'no, no', but she eventually came. And the police were there and in the end they said you know 'Thanks because she wasn't listening to us'.[61]

In this example, the patrol worker was able to use a combination of verbal persuasion, communication skills, and her relative cultural authority to gain a beneficial outcome for all. At times patrol workers were able to persuade or convince a young person to leave a public space by virtue of their communication skills, or by way of a pre-existing social relationship with the client. In some situations, patrol workers were able to use cultural authority — such as his or her Aboriginality or

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Julie Stubbs, 'Re-examining Bail and Remand for Young People in NSW' (2010) 43(3) *Australian and New Zealand Journal of Criminology* 485.

[59]   Cunneen, White and Richards, above n 58; Stubbs, above n 58.

[60]   Anonymous Police Officer (my emphasis).

[61]   Patrol worker #2 (referred to as 'Rebecca', not her real name), Redfern Streetbeat (my emphasis).

position as a respected community member — to persuade a regular to follow instructions.

There were many other such examples of conflict, contestation and cooperation. The above examples might seem banal and in many ways unremarkable. Yet they raise important questions for contemporary understandings of 'policing' and 'self-determination' in the criminal justice context.

VI   Conclusion: Reimagining 'Policing'

This article has examined the meanings of 'self-determination' and 'legal pluralism' at a local level, as illustrated by the everyday operation of non-State policing initiatives in NSW. It considered the significance of the local histories of these initiatives, the variety of services in some locations, the importance of community-control and local design, and how these initiatives at times served as a site of political struggle and contestation between the patrol and state entities, notably the State police. Irrespective of the complexity of these findings, several discrete conclusions emerge. First, non-State policing varies considerably from town to town, both in terms of historical development and contemporary operation, to such an extent that it is practically impossible and of questionable utility to conceptualise or theorise Aboriginal patrols as if they were a uniform phenomenon. When the view from the ground is of such diverse initiatives, where one may involve a grassroots initiative and the other a government program, the value of abstract, universal discussion is severely compromised.

Second and relatedly, Indigenous governance must also be understood in situ, in the context of locally-specific practices and preferences. This study hence affirms the growing evidence from the national and international literature on the importance of community control and 'cultural match'.[62] Indeed, it is both impractical and dangerous to look for some abstract set of rules or singular understanding about 'self-governance'. Self-governance, in this way, is something that the local Indigenous community or nation works out pragmatically in relation to local concerns and issues rather than being a matter of abstract definitions or authenticity. It appeared in many, disputed and varied guises: in everyday decision-making about funding; relations with the State police; whether to sign a Memorandum of Understanding; a focus (or not) specifically on Indigenous young people. Rolling all these and many other concrete practices into an abstract ball and assigning or denying the overall status of 'self-governance' or 'indigenisation' to a specific patrol is probably arbitrary and analytically problematic. It is also not necessarily something patrol workers value, given they consistently emphasised the importance of 'community control' and 'community ownership' above all else. Of greater importance were the processes and procedures by which the initiative was created, whether these operated with the backing of local Indigenous forms of Indigenous governance and authority and, ultimately, whether the service prevented Indigenous young people from spending a night in police custody or on the streets.

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[62]   Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007).

Third and finally, in the context of the mundane everyday operations of non-State policing, the politics of decolonisation emerge not as something abstractly unified, but as something always locally thought out, contested, compromised, always changing and often inconsistent or contradictory. It is instructive at this point to recall the work of scholars who have outlined the necessity of seeing colonisation and decolonisation as continuing social, political and cultural processes.[63] To understand community safety initiatives and contexts, the importance of local histories, and especially of local voices, within the context of ongoing battles for justice are paramount.

The experience of non-State policing in NSW demonstrates not only the questionable utility of binaries such as 'indigenisation versus autonomy'; but raises broader questions about the ways in which knowledge is produced about Aboriginal communities, both by governments and within academia. The inclusion of local perspectives and examples of localised community justice mechanisms adds meaning, depth and context to current debates about self-determination and legal pluralism in the criminal justice context.

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[63] Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) ('*Stolen Children Report*'); M Dodson and D E Smith, 'Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities' (Discussion Paper No 250, Centre for Aboriginal Economic Policy Research, Australian National University, 2003); Dodson and Strelein, above n 1; Cunneen, above n 3.

Appendix: Night Patrols in Bourke, NSW

1.   *The Bedford Bus* (circa 1991–93): The Bedford Bus was a non-Aboriginal policing initiative started by a non-Aboriginal police officer, Mr Studsel, working in his personal capacity. The idea came out of police frustrations with public order offences and alcohol-fuelled violence at a notorious local pub, 'The Oxford' (since closed down). Mr Studsel saw an old school bus from the local high school on sale and, seeing an opportunity, encouraged the local police command to deploy a drop-off bus as part of their duties on Thursday–Saturday nights, dropping off people at their houses after closing hours while on duty. Although short-lived and bearing no direct connection to the later initiatives of the Aboriginal community, the Bedford Bus was perceived by locals as operating independently of the State police. Members of the Bourke Aboriginal Community Working Party ('BACWP') discussed how the initiative influenced their ideas about alternative policing.

2.   *The Active Neighbourhood Watch* (circa 1995): A later example of alternative policing was the Active Neighbourhood Watch scheme from around the mid-1990s. This initiative was run exclusively by non-Aboriginal residents who used their own private vehicles to patrol streets and take kids to a safe place and was motivated by law and order issues, rather than the general safety of community members. The scheme was highly contentious, with interviews revealing a fairly polarised spectrum of opinions regarding this informal patrol. Described by one non-Aboriginal resident as, 'the most holistic in terms of community ownership', it was described by a local Elder as 'a vigilante group'. A number of Aboriginal interviewees disapproved of the removal of Aboriginal young people in these circumstances and many raised concerns about the cultural inappropriateness of the service. While the Active Neighbourhood Watch Patrol was relatively short-lived, it provided the impetus for the formation of the Aboriginal Women's Night Patrol.

3.   *Aboriginal Women's Night Patrol* (circa 1995–97): Also known by locals as *Ngapri Nalli* ('my mother'), the patrol ran in an ad hoc manner in the mid-1990s. According to the patrol workers, the impetus for the patrol was born out of the need to reclaim control of the youth safety issues in light of the earlier Active Neighbourhood Watch scheme. The Women's Patrol was an Aboriginal operated and managed scheme — it was run exclusively by respected Aboriginal women and Elders (two of whom, Aunty June 'Nitty' Smith and Aunty Nora 'Waggy' Smith, continued to work on the Bourke CAP, a later iteration), and was motivated primarily by the interests and concerns of Aboriginal women regarding youth safety in Bourke. The women worked on a voluntary basis, however the Aboriginal and Torres Strait Islander Commission ('ATSIC') provided funding for a 12-seater bus and covered petrol and maintenance costs. The bus, which had '*Ngadrri & Gundoos*' ('we care for kids') written on the side, was highly visible around town, though staff had no uniform. Due to the voluntary nature of the initiative, there were no set hours or days of operation. According to interviews with patrol workers, the bus would run in accordance with perceived need. One resident stated that there was 'a lovely cultural thing about it — it didn't matter who the Granny was'. The patrol did not ever

officially terminate its service, though concerns from the broader community about irregularity of the service provided the impetus for the development of a more holistic and elaborate patrol model.

4. *Bourke Community Assistance Patrol ('CAP')* (2002–07): The Bourke CAP (known locally as 'the CAP') was an Aboriginal initiative developed tin several meetings of the BACWP. Minutes from the first formal meeting of the CAP on Tuesday 16 December 2003 indicate that twelve participants were in attendance and the initial objectives were two-fold: to look out for young people walking the streets late at night and to provide meaningful employment opportunities to local Indigenous people. As recorded in one of the minutes, 'the program aims to give the trainees an opportunity to gain further opportunities, including drivers' licenses for car and bus and security licensing. The CAP monitored the presence of young people on the streets at night, sometimes returning them to their homes, at other times helping 'young people work out alternative things to do'. Patrol operations typically consisted of one driver, one person in the passenger seat, and two others patrolling on foot. All patrol workers were members of the local Aboriginal community with one exception, a non-Indigenous patrol worker 'of colour' (a point which was often emphasised in interviews). Communication occurred between the bus and on-foot patrollers via a two-way radio. Patrol workers wore a uniform of a polo-shirt with the CAP logo (an echidna, an animal of cultural significance for the Ngemba people), which was designed by one of the patrol workers. The workload was seasonally adjusted, with patrol operations finishing earlier in winter months. The activities of CAP workers and volunteers were overseen by the CAP Coordinator, who compiled a roster and completed statistics, bi-annual reports and wrote applications for funding. There was also a Steering Committee, which oversaw more general managerial and governance issues. This consisted of representatives of: the local police, TAFE, the NSW Department of Community Services, ATSIC, the NSW Department of Justice and Attorney-General, and members of the Bourke Shire Council. Meeting minutes from this period indicate there was considerable ambiguity as to the role and responsibilities of the patrol. In March 2004, employment for workers shifted from working on a purely voluntary basis to receiving a wage component as part of the Community Development Employment Program ('CDEP').[64] During this time the patrol functioned from 6pm–midnight Tuesdays and Wednesdays and from 5pm–midnight Thursdays to Saturdays. The governance arrangements of the patrol were formalised when in 2005 when the BACWP signed two 'Shared Responsibility Agreements' with the Federal and NSW governments. These documents were known officially as the Bourke 'Community Assistance Patrol' and 'Making the Town Safer' Shared Responsibility Agreements. In total, the CAP patrol ran intermittently from December 2002 until sometime in 2007. The CAP temporarily ceased in the months of (May 2004, June 2005, October 2005) due to disruptions in funding and management issues.

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[64] CDEP was established in 1977 under the Hawke Federal Government. It aimed to replace income support with locally-based employment or volunteer projects for Indigenous persons living in rural and remote areas. By decision of the Howard Federal Government, the scheme ended in 2007.

5.   *Bourke Safe Aboriginal Youth ('SAY') Patrol* (circa 2008–present): The SAY Patrol, a separate entity to the CAP, commenced in 2008. The patrol currently operates Thursday–Saturday. At around 6pm, one Aboriginal patrol worker drives around town in a 12-seater bus with 'Safe Aboriginal Youth: an initiative of the Department of Justice and Attorney General' displayed on the side of the van. The worker drives around the streets of Bourke, recruiting Aboriginal young people from the streets, local parks, levy banks, from Alice Edwards Village, North Bourke and other outlying areas. Typically three or four busloads of young people aged around 5–15 years are escorted to the Bourke Police Citizens Youth Club ('PCYC') to participate in activities and are provided with a warm meal. From 10 pm onwards, the patrol worker gives the young people a lift home, starting with the youngest and finishing with the teenagers. A new bus was provided by the NSW Department of Justice and Attorney-General, and funding ($48 000 per year) is currently provided by the PCYC, a non-Aboriginal organisation. Two of the SAY patrol workers had previously worked as drivers on the earlier CAP model. The SAY patrol is currently operated by an Aboriginal staff and management (consisting of one manager, youth worker coordinator, youth activity officer, youth case manager), though it relies heavily on the assistance of a number of Aboriginal and non-Aboriginal volunteers who work as activity officers at the centre. Interviews with Aboriginal residents in Bourke revealed mixed responses as to the perceived autonomy of the initiative.

6.   *Maranguka Justice Reinvestment Project* (2013–present): The Maranguka project is a whole-of-community strategy currently being trialled in Bourke, on the western plains in New South Wales. It is a community-led initiative that builds on previous safety initiatives and involves a collective impact framework bringing together a range of government and non-state entities to work on a common agenda. It is a coordinated strategy, building on previous safety initiatives, to support vulnerable families and young people through community-led teams working in partnership with existing service providers, in order to 'together ... build a new accountability framework which wouldn't let our kids slip through'.[65] The overarching goal of the project is to decrease the rate of contact of Aboriginal young people with the criminal justice system, adult incarceration and youth detention in Bourke. While the Maranguka project is currently in the process of being evaluated, preliminary feedback provides strong indication of the benefits of whole-of-community approaches to justice that include relationship building, networking, sharing information, reducing silos in service delivery, improving processes and improving community safety. Emerging data suggests the initiative has seen a significant improvement in community safety, including: a 72% reduction in youth traffic offences, an 18% reduction in major offences reported and a 39% reduction in the number of people proceeded against for drug offences.[66]

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[65]   Alistair Ferguson, Executive Director of Maranguka, quoted in Just Reinvest NSW, above n 42.

[66]   Mick Gooda, 'Don't Let the "Inquiry Mentality" See Life Get Worse after the Royal Commission', *The Guardian* (online), 8 November 2018 <https://www.theguardian.com/commentisfree/2018/nov/08/dont-let-inquiry-mentality-see-life-get-worse-in-the-nt-after-the-royal-commission>.