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Abstract
Criminal justice decision-makers are routinely called upon to formulate and apply normative standards — including adjudication on criminal responsibility, assessments as to the availability of defences, and sentencing determinations. In polyethnic societies such as Australia, the terms in which the relevant standard should be conceived is sometimes challenged by defendants on the basis of their ethnic or religious identity. Such claims are commonly regarded as giving rise to a 'clash' — between the objective of valuing and respecting multiculturalism and pluralism, while adhering to 'fundamental' liberal principles regarding equality before the law (universality, uniformity and neutrality). This article examines a range of 'diversity friendly' theoretical perspectives with the aim of revealing whether it is possible to overcome the 'equality' hurdle and the associated demands for single and generally applicable normative standards. Drawing from the political philosophy of liberal multiculturalism, legal pluralism, critical race theory and whiteness studies, the theoretical limits of cultural diversity accommodation will be explored.

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‘EQUALITY BEFORE THE LAW’ IN POLYETHNIC SOCIETIES: THE CONTRUCTION OF NORMATIVE CRIMINAL LAW STANDARDS*

Luke McNamara**

Abstract

Criminal justice decision-makers are routinely called upon to formulate and apply normative standards — including adjudication on criminal responsibility, assessments as to the availability of defences, and sentencing determinations. In polyethnic societies such as Australia, the terms in which the relevant standard should be conceived is sometimes challenged by defendants on the basis of their ethnic or religious identity. Such claims are commonly regarded as giving rise to a ‘clash’ — between the objective of valuing and respecting multiculturalism and pluralism, while adhering to ‘fundamental’ liberal principles regarding equality before the law (universality, uniformity and neutrality).

This article examines a range of ‘diversity friendly’ theoretical perspectives with the aim of revealing whether it is possible to overcome the ‘equality’ hurdle and the associated demands for single and generally applicable normative standards. Drawing from the political philosophy of liberal multiculturalism, legal pluralism, critical race theory and whiteness studies, the theoretical limits of cultural diversity accommodation will be explored.

1. Framing the Multicultural Challenge to Legal Normativity

The emergence of multiculturalism as official Australian government policy in the 1970s was unquestionably an event of great significance, particularly in light of the role that racism and cultural imperialism has played in Australia’s history. However, three decades later, the imprint of multiculturalism on Australian laws and legal institutions is decidedly faint. As Davidson has observed:

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> It is not flippant to say that a multicultural Australia incorporated souvlaki and dragon dances, but not the legal, political and ethical voices of its myriad NESB newcomers. ... [I]n the realm of legal and political arrangements ... the monocultural Anglo-Celtic past did not disappear when multiculturalism became state policy in Australia.[1]

The 'gap'[2] between a polyethnic population and a monocultural legal system has not gone unnoticed. For example, in the last twenty years the Australian Law Reform Commission (ALRC) has undertaken two relevant major references, on *The Recognition of Aboriginal Customary Law* (1986)[3] and *Multiculturalism and the Law* (1992).[4] In addition, a number of scholars have written on various aspects of the law/cultural diversity relationship.[5]

The questions raised by this relationship are large and complex. What does multiculturalism demand of the law and the legal system? Is the legal system sensitive to cultural diversity? Should it be? Should the law *reflect* cultural diversity? Does it? Should the law expressly protect distinctive and differentiated cultural rights? However, the answers which judges, legislators and law reformers have provided to date have tended to reflect a rather narrow and superficial interpretation of the challenges posed by cultural diversity.

Diminution of the legal significance of multiculturalism is manifested in various ways. At one end of the spectrum, law, and the 'mainstream' values and standards that it embodies, are seen as outside the reach of multiculturalism. In this conservative

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[1] A Davidson, "Multiculturalism and Citizenship: Silencing the Migrant Voice" (1997) 18(2) *Journal of Intercultural Studies* 77 at 77 & 82 (emphasis added). See also S Castles "Multicultural Citizenship: A Response to the Dilemma of Globalisation and National Identity" (1997) 18(1) *Journal of Intercultural Studies* 5.

[2] A O'Donnell, "Thinking 'Culture' in Legal Education" (1996) 7(2) *Legal Education Review* 135.

[3] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law. Report No. 31* (Canberra: AGPS, 1986).

[4] Australian Law Reform Commission, *Multiculturalism and the Law. Report No 57* (Canberra: AGPS, 1992).

[5] Eg, G Bird (ed), *Law in a Multicultural Australia* (Melbourne: National Centre for Cross-Cultural Studies in Law, 1991); S Garkawe, "The Impact of the Doctrine of Cultural Relativism on the Australian Legal System" (1995) 2 *E Law-Murdoch University Electronic Journal of Law* 29; S Bronitt & K Amirthalingam, "Cultural Blindness: Criminal Law in Multicultural Australia" (1996) 21(2) *Alternative Law Journal* 58; I Leader-Elliott, "Sex, Race and Provocation: In Defence of Stingel (1996) 20 *Criminal Law Journal* 72; S Yeo, "Sex, Ethnicity, Power of Self-Control and Provocation Revisited" (1996) 18 *Sydney Law Review* 304; J Burley, "The Law and Multiculturalism: Problems With Criminal Law Reform in the Vietnamese Community" (1996) 17 (1&2) *Journal of Intercultural Studies* 69; D Stepniak, "Minority Values and the Reasonable Person of Torts" in M Chanock and L Marks (eds), *50th Anniversary Conference of the Australasian Law Teachers' Association—Cross Currents: Internationalism, National Identity and Law* (Melbourne: La Trobe University, 1996) p405; and F. Bates, "Minority, Multiculturalism and Parenthood in Australian Family Law" (1992) 21 *Anglo-American Law Review* 202.

account of the law/diversity 'clash', the fundamental standards and norms of the law are considered 'off-limits'. Adjustment of these 'core values' with a view to accommodating difference is not seriously contemplated or may even be vigorously opposed as a threat to traditional 'Australian' values and an associated 'way of life'.

More commonly, the starting point for considerations of multicultural law reform is an acceptance that, in liberal democracies, the legal system does need to 'come to terms' with the cultural diversity of the citizens which it is supposed to serve. However, the parameters for any form of adjustment are firmly (and narrowly) established by the 'fundamental' principles of *equality before the law* and *universality*.[6] As Sarat and Kearns have observed, (with reference to the United States, but arguably with equal application to Australia):

> Generally, color blindness, gender blindness, blindness to differences of sexual preference—these have been the beacons of our law. Law has been unable or unwilling to foster actively a society in which cultural pluralism and identity politics could flourish.[7]

To the extent that it is considered desirable that the law should 'reflect' cultural diversity, active law reform strategies are generally deemed to be unnecessary because it is assumed that the organic nature of law, and its location *within* culture, mean that 'mainstream' legal standards and norms will incrementally, but inevitability, be transformed in response to the influences of cultural difference. For example, Laster and Taylor have observed that:

> shifts in our cultural values are mirrored in the law ... [and] Australian law today reflects a growing acceptance that our society is multicultural and that part of the function of law and legal institutions is to make multicultural social policy 'work'.[8]

This position resembles a view expressed by former judge, Sir James Gobbo, a decade earlier when he suggested that in pursuit of "justice in a multicultural society" we

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[6] ALRC, *supra* note 4 at 10-14.

[7] A Sarat and T Kearns, "Responding to the Demands of Difference: An Introduction" in A Sarat and T Kearns (eds), *Cultural Pluralism, Identity Politics and the Law* (1999) 1 at 11.

[8] K Laster & V Taylor, "Law For Our Multicultural Society? No Worries" in H Selby (ed), *Tomorrow's Law* (Sydney: Federation Press, 1995) at 210 (emphasis added).

should "place our faith in the common law. It is a deep, rich well — and it will tap the riches of other cultures, for all deep wells interconnect."[9]

An important consequence of this approach to multicultural law reform, and of the conventional liberal democratic philosophy on which it is based, is that multiculturalism in the context of the legal system has largely been seen as a *procedural* matter. Indeed, law reform energies have primarily been directed at facilitating *access* to the legal system and including the promotion of sensitive and effective cross-cultural communication.[10] In addition, a range of legislative measures based on international human rights standards and the principle of *non-discrimination* have been enacted.[11] While of undoubted importance, such changes do not bring into question the legitimacy of fundamental legal principles and standards for a culturally diverse society. Procedural reforms of this sort often proceed on the assumption that so long as *access* is provided in a manner which is sensitive to cultural diversity, the legal system—and the rules, norms and values which are enforced within it—is more than capable of dispensing justice to all parties regardless of identity.

The starting point for this article is the contention that the full implications of cultural diversity for law and legal institutions in 'post-colonial' polyethnic countries such as Australia[12] have not been adequately articulated or taken seriously within

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[9] J Gobbo, *Law in a Multicultural Society* (Canberra: Australian Institute of Multicultural Affairs, 1983) at 6. See also J Gobbo, "The Supreme Court" in Bird, supra note 5 at 29.

[10] See, ALRC, *supra* note 4; also K Laster & V Taylor, *Interpreters and the Legal System* (Sydney: Federation Press, 1994); Mr Justice Brooke, "The Administration of Justice in a Multi-Cultural Society" (1994) 1 *Judicial Review* 283; D. Eades (ed), *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* (Sydney: UNSW Press, 1995); J. Chan (ed), *Proceedings of the Symposium on Cross Cultural Issues in the Law* (Sydney: Ethnic Affairs Commission of NSW, 1993); M. D'Argaville, Cross-Cultural Communication Issues and Solutions in the Delivery of Legal Services (Clayton: Monash University, 1991); Commonwealth of Australia, *Access to Justice Advisory Committee, Access to Justice: An Action Plan* (Canberra: AGPS, 1994); and J. Stubbs et al, *Cross Cultural Awareness for the Judiciary* (Sydney: University of Sydney, 1996).

[11] Eg, the *Racial Discrimination Act 1975* (Cth) and the *Anti-Discrimination Act 1977* (NSW), Part 2. On the impact of the *Racial Discrimination Act* see, Human Rights and Equal Opportunity Commissioner, Race Discrimination Commissioner, *The Racial Discrimination Act: A Review* (Canberra: Australian Government Publishing Service, 1996).

[12] Debate over the implications of cultural diversity for Australian law has tended to follow two sometimes parallel, but rarely intersecting tracks: claims based on ethnicity and claims based on Aboriginality. The ALRC's completion of separate references on *The Recognition of Aboriginal Customary Law* and *Multiculturalism and the Law* follows this pattern which mirrors the government policy 'divide' between Aboriginal affairs and immigration-related matters (see S. Castles & E. Vasta, "Introduction: Multicultural or Multi-Racist Australia? in E. Vasta & S. Castles (eds), *The Teeth Are Smiling: The Persistence of Racism in Multicultural Australia* (Sydney: Allen and Unwin, 1996) at 1. While sensitive to the significance of the distinction (particularly from the point of view of many Aboriginal people who object to the reduction of their distinctive claims to arguments for mere minority status) the project will explore the conceptual common ground between the multicultural

conventional legal discourse due to uncritical acceptance of such conventional legal wisdoms as:

- the inviolability of fundamental principles such as "equality before the law" and "universality";
- the incompatibility of pluralism with the rule of law; and
- the amenability of 'mainstream' legal values to adjust 'organically' in response to the cultural diversification of society.

This article approaches the task of finding the limits of multicultural law reform by exposing these propositions to critical scrutiny, and by looking to a wider range of philosophical and jurisprudential arguments for guidance. Are these 'conventional wisdoms' valid and verifiable conclusions as to the nature of a democratic legal system; or do they represent powerful myths which play an important role in maintaining the existing cultural exclusivity and hegemony of the legal system?[13] In answering these questions this article examines the applicability of Homi Bhabha's depiction of the process of cultural difference 'tension resolution' as one whereby "a transparent norm is constituted by the dominant culture which says that 'these other cultures are fine, but we must be able to locate them within out own grid".[14]

The potential for principles such as "equality before the law", "universality" and "colour-blindness" to paradoxically perpetuate *injustice* in a culturally diverse society will be examined. Support for this line of analysis, with specific reference to normative criminal law standards, can be found in the observation of McHugh J, of the High Court of Australia, that "Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of this minorities."[15]

Such a judicial expression of doubt about the justice-yielding potential of the Australian legal system's 'fundamental principles' is rare. In the same case the

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(ethnicity) law reform agenda and the Aboriginal rights agenda and will consider the practical implications of areas of overlap as well as points of departure.

[13] It should be acknowledged that the project is necessarily reformist in orientation. That is, it assumes that it is possible and desirable to respond more justly to cultural diversity in the construction and application of normative criminal law standards.

[14] H. Bhabha, "The Third Space" in J. Rutherford (ed), *Identity, Community, Culture, Difference* (London: Lawrence & Wishart, 1990) 207 at 208.

[15] *Masciantonio v R* (1995) 183 CLR 58 at 74.

remaining six judges of the High Court of Australia reaffirmed the court's previous position[16] rejecting the suggestion that the objective standard which is at the heart of the criminal law defence of provocation should be shaped according to relevant identity characteristics of the accused, including ethnicity.[17] According to the court, the "governing principles" of equality and individual responsibility demand that all persons be held to a single standard.[18] Similarly, in *Walker v NSW* [19] Mason CJ rejected the Indigenous defendant's assertion of the continuing operation of Indigenous criminal laws and the non-applicability of NSW criminal law on the basis that "It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle".[20]

Despite various necessary and valuable forms of legal accommodation and recognition over the course of the last 20 years, the monocultural core of Australian law has remained largely unchallenged and unaltered.[21] This article attempts to account for the apparent cultural "immunity" (and implicit cultural bias) of legal values and standards, focusing on the political and philosophical foundations of reform initiatives. To date law reform strategies have been developed on the basis of liberal principles of cross-cultural *access to justice* and *non-discrimination*. The article responds to the partial and problematic nature of conventional liberal responses to the demands of cultural diversity and evaluates the potential of alternative jurisprudential accounts of the law/culture/difference relationship to facilitate a broadening of the debate over multicultural law reform to deal not only with issues of access, cross-cultural communication and cultural sensitivity *within* the dominant legal paradigm, but also with the processes by which 'common' legal values and norms are constructed and legitimated in culturally diverse societies. Following Bird

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16 *Stingel v R* (1990) 171 CLR 312.

17 (1995) 183 CLR 58 at 66.

18 (1990) 171 CLR 312 at 326.

19 (1994) 69 ALJR 111 (High Court of Australia).

20 *Ibid* at 113.

21 This pattern is perhaps most significantly reflected in the approach adopted by the Australian Law Reform Commission in its report on *Multiculturalism and* the Law, *supra* note 4. On the imperviousness of Australian legal and political institutions to the implications of multiculturalism, see A. Jamrozik et al, *Social Change and Cultural Transformation in Australia* (Melbourne: Cambridge University Press, 1995); G. Bird, *The Process of Law in Australia: Intercultural Perspectives* (Sydney: Butterworths, 2nd ed., 1993); Bird, *supra* note 5; Davidson, *supra* note 1; Castles, *supra* note 1; and O'Donnell, *supra* note 2.

and McDonell,[22] this project challenges the conventional wisdom that judges (and other decision-makers) "make decisions based on the 'facts' and their unbiased and unproblematised versions of the values of the community",[23] and joins Bird and McDonell in asking: "Who stands outside the vision of community the law constructs, and what are the origins of the community values that the court seeks to reflect?"[24]

Part 2 of this article will briefly examine the manner in which the relationship between polyethnicity, cultural diversity and normative criminal law standards was approached by the Australian Lawn Reform Commission in its 1992 report on *Multiculturalism and the Law*,[25] to illustrate the conventional parameters which have been set for multicultural law reform. Part 3 considers Will Kymlicka's work on the capacity of liberalism to accommodate multiculturalism in the form of differentiated citizen rights, with an emphasis on the possible extrapolation of Kymlicka's philosophical principles to the context of criminal law reform and operation.[26] The insights offered by research and scholarship undertaken under the banner of legal pluralism, will be considered in part 4. In part 5, the implications of recent insights from critical race theory and "whiteness" studies will be considered, focusing on the Angela Harris' call for a "jurisprudence of reconstruction" in the context of normative criminal law standards.[27] Part 6 will draw together the article's conclusions on whether these diverse theoretical "friends of difference"[28] can contribute to the emergence of a counter-narrative of equality before the of law, which does not automatically mute the claims of cultural minorities.

2. "One Set of Values": The Australian Law Reform Commission's Approach

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22 Greta Bird and Mark McDonell, "Muslims in the Dock: A Transgressive Narrative of Law and Life" (1997) 3(2) *Australian Journal of Human Rights* <http://www.austlii.edu.au/au/other/ahric/ajhr/V3N2/ajhr3205.html>

23 *Ibid*.

24 *Ibid*.

25 ALRC, *supra* note 4.

26 W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

27 A. Harris, "The Jurisprudence of Reconstruction" (1994) 82 *California Law Review* 741.

28 A Sarat and R Berkowitz, "Disorderly Differences: Recognition, Accommodation, and American Law" (1994) 6 *Yale Journal of Law & the Humanities* 285 at 289.

In introducing the final report of its reference on "Multiculturalism and the Law", the Australian Law Reform Commission observed that "While cultural diversity is now an accepted part of Australian society, the consequences of this for the legal system have not yet been fully considered."[29] Through its work on the reference, the Australian Law Reform Commission made an important contribution to the necessary considerations. However, an examination of the Commission's analysis, reasoning and recommendations, reveals that it adopted a very familiar approach to resolution of the problems associated with criminal justice administration in a polyethnic society: removal of procedural barriers, enhanced cross-cultural awareness and faith in the capacity of the legal standards to 'evolve' in line with the standards and values of the society. Inevitably, this approach led the Australian Law Reform Commission to conclude that normative standards in the criminal law should not be adjusted in accordance with the ethnicity of the accused.[30]

The Commission's take on the formulation and application of objective fault elements is illustrative. Despite acknowledging that "there is concern in the community about standards of behaviour and assessments of reasonableness being devised and imposed from the perspective of the dominant culture",[31] the Commission concluded that the such concerns could not justify abandonment of the single standard approach:

> Where reasonableness, negligence or recklessness is an element, however, the determination is ultimately a value judgement ... Such a judgement can only be made against one set of values. The Commission agrees that a proliferation of different standards against which to judge the reasonableness or otherwise of a person's behaviour in the criminal law context is undesirable. To apply different standards to different group would lessen the protection afforded to all by the criminal.[32]

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[29] ALRC, *supra* note 4 at 9.

[30] The Commission did recommend that "the offender's cultural background should be specified as a factor to be taken into account when the court is passing sentence": *ibid* at 173.

[31] *Ibid* at 187. Counter-intuitively, perhaps, Sinha has identified the concept of reasonableness as a (potential) friend of cultural pluralism: "The most important quality of this doctrine of reasonableness is that it can neither be reduced to a finite set of rules, nor can it be specified in terms of customs or practices. Therefore, its open-endedness lends itself to the pluralistic use": Surya Prakash Sinha, "Legal Polycentricity" in Hanne Petsersen and Henrik Zahle, *Legal Polycentricity: Consequences of Pluralism in Law* (1995) 31 at 51.

[32] ALRC, *supra* note 4 at 187.

To the extent that normative standards might need to change to 'keep up' with an ethnically and culturally diverse population, the Commission endorsed the gradual evolutionary approach:

> ... the standards of reasonableness against which behaviour is judged ... have changed over time, and will continue to change, in response to changing social conditions including the impact on Australian society of different cultures and ethnic groups. A better result will be achieved of the standard is encouraged to evolve to reflect the cultural diversity in the Australian community.[33]

The language in which the Commission chose to defend its status quo position regarding objective criminal law standards (note the intriguing anthropomorphic image of a standard being "encouraged" to change) effectively highlights the deficiency of the 'organic evolution' theory of multicultural law reform. The preferred policies and strategies for facilitating this evolution of criminal law standards are: (i) a more ethnically diverse judiciary, magistracy, legal profession and police force; and (ii) cultural awareness training for these and other criminal justice system decision-makers.[34] While these reforms are not without merit, it is not clear how they alone can inspire confidence that normative standards will 'naturally' move towards reflecting the cultural diversity of the population.[35]

A feature of the handling of multicultural challenges to the legitimacy of existing criminal law standards and norms, which was also reflected in the Australian Law Reform Commission's approach, is to assume that the challenge is necessarily a request for 'special treatment'. In its examination of whether the criminal law should recognise cultural difference, the Commission observed that "Tests of criminal liability are there to determine whether or not a person should be punished for his or her behaviour," and posed as the critical question: "Does it promote the objectives of criminal law to punish a person who has acted in conformity with cultural norms?"[36]

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[33] *Ibid* at 187.

[34] Preference for this approach is well-established: see John McCorquodale, "Judicial Racism in Australia? Aboriginals in Civil and Criminal Cases" in Kayleen M Hazlehurst (ed), *Ivory Scales: Black Australia and the Law* (1987) at 31-32.

[35] For example, even if the ethnic composition of the New South Wales magistracy was to reflect the ethnic diversity of the state's population, it by no means follows that a magistrate, whatever her/his ethnic identity, would have the unique cultural understanding to deal with an application by the accused that s/he be assessed with reference to a differential standard based on his/her ethnicity (say, in the context of a bail application or a sentencing submission). In addition, there is the difficult of developing cultural awareness programs that taken into account intra-group diversity: see Burley, *supra* note 5 at 82.

[36] ALRC, *supra* note 4 at 170-171.

One might observe that the (initial) answer will depend on whether the "cultural norms" in accordance with which the person has acted are the "cultural norms" which are expressed via the relevant criminal law standards. This, in turn, begs the question: how are the implicit cultural norms which underpin the criminal law determined? When does a criminal justice decision-maker know when the claim being advanced by a person whose criminal liability is being assessed involves a departure from normative criminal law standards?

The Australian Law Reform Commission did not stop to consider these questions. Instead it adopted the default characterisation of the challenge — that is, as a claim for the application of a differential standard or "cultural defence"[37] — and offered up the corresponding default answer. Such claims, according to the Commission, must be rejected because to countenance them would "violate the principles of equality before the law and equal protection before the law."[38] The tendency to automatically characterise claims based on ethnicity as a requests for differential treatment — that is, with reference to a 'special' standard constructed around the accused's ethnic or ethno-religious identity — is evidence of the hegemony of the liberal discourse of equality and universality. The fact that in specific cases a defendant may choose to frame her/his claim in this way, further demonstrates the difficulty of confronting the monoliths of neutrality and objectivity. And yet, claims based on cultural difference need not be presented or received as claims for differential treatment. One might characterise such claims as an attack on the legitimacy of dominant monocultural norms and a demand for the endorsement of a representative normativity which is genuinely responsive to the ethnic diversity of the society from which it derives it status — one that is not coloured by whiteness. Of course, this would be no small task, even if it was regarded as desirable. However, opening up the terms of the debate on multicultural law reform is critical to moving beyond the 'open and shut' approach of the Australian Law Reform Commission.

Therefore, this paper will simultaneously investigate two rather different approaches to the resolution of lingering dissatisfaction with the current application of criminal law standards in a polyethnic society. If the Commission is right that the existence and application of only "one set of values" is a necessary component of the criminal justice system, is it desirable/feasible for decision-makers to adopt a

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[37] *Ibid* at 171.

multicultural normativity or 'non-white' universality? Alternatively, do differential or multiple normative standards which reflect ethnic diversity have a place in criminal law decision-making processes, and if so, how might they be constructed and deployed?

3. Liberalism and Differential Citizenship Rights: Implications for Criminal Law

Given that liberalism has, to a considerable extent, 'underwritten' the conventional antagonisms within the criminal law towards the recognition of cultural diversity, it is appropriate to begin this selected theoretical survey with a discussion of a notable attempt to 'liberate' liberalism from the role of multiculturalism's heavy-handed gate-keeper. In a series of works published during the past decade (most notably, *Multicultural Citizenship*[39]) Will Kymlicka has advanced a contemporary political philosophy that has room for the recognition of differential rights based on ethnicity or distinctive cultural identity. Kymlicka consciously sets out to defend liberalism against claims that it is inadequate in accounting for modern community and culture, and in so doing aims to show how liberalism can respond to the plurality of cultures.[40]

Kymlicka argues that minority rights are consistent with, and indeed promote the liberal ideal of individual freedom.[41] The essential interest of people is to develop and live according to their beliefs, and it is the responsibility of the state to provide the opportunity for this to occur.[42] Individual freedom is said to encompass not only the ability to pursue one's "conception of the good life" but also to revise one's views on what constitutes the good life.[43] The necessary preconditions, to be provided/guaranteed by the state, are the provision of resources and liberties to individuals, and the opportunity to experience and assess other views of the good life.[44] The membership of each individual in a community or communities is based on one's citizenship and also on one's cultural membership, both of which are integral to the individual's pursuit of the good life.[45] Integral to Kymlicka's conception of

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38 *Ibid*.
39 W Kymlicka, *Multicultural Citizenship: a Liberal Theory of Minority Rights* (1995).
40 W Kymlicka, *Liberalism, Community and Culture* (1991) at 3.
41 Kymlicka, *supra* note 39 at 75 & Ch 5.
42 Kymlicka, *supra* note 40 at 13.
43 Kymlicka, *supra* note 39 at 80-81.
44 *Ibid* at 81-82.
45 Kymlicka, *supra* note 40 at 135.

individual freedoms is the value of cultural membership, or "access to a cultural structure"[46] — something which an individual might reasonably be expected "to want, whatever their more particular conception of good".[47]

Kymlicka retains the notion of the individual as the central focus/paradigm of liberalism, but notes that in multicultural and multinational societies, individuals do not "stand in the same direct relationship to the state" but rather, do so "through membership in one or other of the cultural communities".[48] Thus, the theoretical basis of the relationship between the individual and the state is not universal incorporation, but consociational.[49] Liberal theory commonly underestimates or discounts the independent value of cultural membership, focusing instead on the formal equality of individuals as citizens. However, Kymlicka maintains that collective minority rights are not inconsistent with liberal equality, that they can be reconciled.[50] Such a reconciliation is considered by Kymlicka to be vital to the survival of liberal theory as politically and practically relevant in culturally diverse societies. Kymlicka also acknowledges, as a matter of pragmatics, that minority rights would become more politically secure if they were framed as an essential and integral element of liberalism.[51]

Kymlicka argues that it is not enough for the state simply to provide common rights of citizenship without further intervention to support and encourage cultural diversity.[52] The attitude of benign neglect – leaving the maintenance of cultural diversity to the vagaries of the cultural marketplace – is rejected as mistaken and incoherent, and as failing to recognise the decisions made by governments at a basic level decisions which privilege the dominant culture.[53] The cultural marketplace favours the interests of the dominant culture and disadvantages the competing claims of minorities. Thus, state intervention is justified within liberal theory to correct

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46 Kymlicka, *supra* note 39 at 84.

47 *Ibid* at 86. This is based on various theorists who document the important role of cultural membership in a person's self-identity and self-esteem, and the bonds between language, culture and identity: *ibid* at 88-90.

48 Kymlicka, *supra* note 40 at 137.

49 *Ibid* at 137.

50 *Ibid* at 152-3.

51 Ibid at 154.

52 Kymlicka, *supra* note 39 at 107.

53 *Ibid* at 108.

inequalities which arise through no active choice of the group or individuals concerned.[54]

An illustration used by Kymlicka in this context might be extrapolated (albeit, somewhat creatively) to explore some connections between Kymlicka's generalised liberal theory of minority rights and the specific context of normative standards within the criminal law. Kymlicka points to the correlation between Christianity and the nomination of public holidays by government (in countries like Canada, the USA and Australia):

> In the major immigration countries, public holidays currently reflect the needs of Christians. Hence government offices are closed on Sunday, and on the major religious holidays (Easter, Christmas). This need not be seen as a deliberate decision to promote Christianity and discriminate against other faiths (although this was undoubtedly part of the original motivation). Decisions about government holidays were made when there was far less religious diversity, and people just took it for granted that the government work-week should accommodate Christian beliefs about days of rest and religious celebration.
>
> But these decisions can be a significant disadvantage to the members of other religious faiths. And having established a work-week that favours Christians, one can hardly object to exemptions for Muslims or Jews on the ground that they violate the separation of state and ethnicity. These groups are simply asking that their religious needs be taken into consideration in the same way that the needs of Christians have always been taken in account. Public holidays are another significant embarrassment for the 'benign neglect' view, and it is interesting to note how rarely they are discussed in contemporary liberal theory.[55]

It might be argued, by analogy, that normative criminal law standards, particularly where manifested in the form of the 'reasonable person', are similarly 'embarrassing' and inadequate to deliver liberal justice. Just as public holidays were set at a time that was 'pre-diversity' (in religious terms), so too were conceptions of legal normativity set in an era of pre-diversity, in terms of ethnicity, culture and religion.[56] A counter-argument might be that unlike public holidays, which are 'set in stone' until such time as they are changed by governments, normative criminal law standards are capable of 'organic' adaptation and evolution as they are operationalised in a diverse society. However, the persuasiveness of the counter-argument depends on whether the

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[54] *Ibid* at 109.

[55] *Ibid* at 114.

[56] Of course, the silencing of women and Indigenous peoples in the construction of normative criminal law standards cannot be explained in the same way.

evolution of normative criminal law standards in a manner consistent with the diversity of a society at any one time can be established.[57]

Will Kymlicka's theoretical recipe for multicultural justice is not to salvage or recast universality, but to legitimate recognition of differentiated legal rights based on membership of a national minority or ethnic group. However, just as the case for accommodation of diversity is made in the name of liberalism, so too are the legitimate limits of differential rights — or, by extrapolation, differential criminal law standards — set by liberalism. For Kymlicka, any claim for the value of cultural diversity is also made within an overall framework of liberalism: "liberal goals are achieved in and through a liberalized societal culture or nation".[58] In a similar vein, Bhikhu Parekh has suggested that the ideal multicultural society "is committed to both liberalism and multiculturalism, privileges neither, and moderates the logic of one with that of the other".[59] However, Kymlicka, it would appear, ascribes a dominant role to liberalism in this relationship. Put simply, "The demands of some groups exceed what liberalism can accept. Liberal democracies can accommodate and embrace many forms of cultural diversity, but not all."[60] For Kymlicka, the primary limits is that the rules/standards/values of the minority group cannot be 'anti-liberal'. Kymlicka anticipates the argument that this approach suggests that "reconciling minority rights with liberalism is a Pyrrhic victory":

> If the members of a minority lose the ability to enforce religious orthodoxy or traditional gender roles, have they not lost part of the raison d'être for

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[57] The limits of Kymlicka's 'equality argument' are defined to a certain extent by the existence of disadvantage, which is susceptible to redress by the granting of special rights to national minorities, and whether the rights are sought by polyethnic groups or national minorities – a structural difference with important theoretical consequences for Kymlicka. Kymlicka makes an important distinction between what he describes as "the two main sources of cultural pluralism" (Kymlicka, *supra* note 40 at 239), or elsewhere, as "patterns of cultural diversity" (Kymlicka, *supra* note 39 at 10). Multination states are constituted by more than one culture, marked by distinct language, shared history and sense of nation and people. Typically, a state resulting from the invasion and colonisation of territory occupied by Indigenous peoples would be described as a multination state, and the Indigenous nations as 'national minorities' or 'minority cultures' (Kymlicka, *supra* note 40 at 239). By way of differentiation, a polyethnic state is one marked by extensive immigration of people of diverse cultures. Kymlicka notes that such individuals, while allowed to maintain much of their ethnic particularity, do not constitute nations in the same way that Indigenous peoples do (*ibid* at 239). Post-colonial multicultural societies such as Australia (and Canada and the USA_ are culturally diverse in both senses. although there has long be debate about the relative claims of ongoing debate in legal and cultural theory over the comparative claims of Indigenous Australians and those of immigrant backgrounds: *supra* note 12.

[58] Kymlicka, *supra* note 39 at 93.

[59] B Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2000) at 340.

[60] Kymlicka, *supra* note 39 at 152.

> maintaining themselves as a distinct society? Is the insistence on respect for individual rights not a new version of the old ethnocentrism, found in Mill and Marx, which sets the (liberal) majority culture as the standard to which minorities must adhere?[61]

Kymlicka's answer is that because liberalism is "grounded firmly in the value if individual freedom" it is not acceptable to tolerate or legitimate practices, values, standards or rules which restrict the autonomy of members of the group and deny members the choice not to abide by those rules. Clearly then, an approach to the adoption of differentiated normative criminal law standards based on the ethnicity/cultural membership of the accused and/or victim which was underpinned by Kymlicka's multicultural liberalism would eschew absolute cultural relativism in favour of a preliminary evaluation of the proposed standard in terms of its compatibility with the liberal principles of autonomy and tolerance. It might be anticipated that, under such a system of scrutiny, the prospects for success of a claim for the application of a differential standard would depend to a considerable extent on the degree of correlation with the dominant standard.

4. Legal Pluralism and "Orderly Difference"[62]

Merry has described the evolution of the concept of legal pluralism as follows:

> The intellectual odyssey of the concept of legal pluralism moves from the discovery of indigenous forms of law among remote African villagers and New Guinea tribesmen to debates concerning the pluralistic qualities of law under advanced capitalism. In the last decade, the concept of legal pluralism has been applied to the study of social and legal ordering in urban industrial societies, primarily the United States, Britain, and France. Indeed, given a sufficiently broad definition of the term legal system, virtually every society is legally plural, whether or not it has a colonial past. Legal pluralism is a central theme in the reconceptualization of the law/society relation.[63]

Within this process of evolution and development, Merry identifies two phases of legal pluralism. The first, "classic legal pluralism", was concerned with "the analysis

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61 *Ibid* at 153.

62 The overview of legal pluralism which begins this section draws on work previously published in L McNamara, "The Locus of Decision-Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines" (2000) 18 *The Windsor Yearbook of Access to Justice* 60 at 67-69.

63 S Merry, "Legal Pluralism" (1988) *Law and Society Review* 869 at 869; see also D Manderson, "Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory" (1996) 20 *Melbourne University Law Review* 1048 at 1059.

of the intersections of indigenous and European law" in colonial and post-colonial contexts. The second, "new legal pluralism", espouses that "plural normative orders are found in virtually all societies".[64]

The features of the concept of legal pluralism have been variously explained in the literature. Manderson has succinctly stated that "In its simplest form, legal pluralism posits that more than one legal order inhabits the same physical territory".[65] According to Merry legal pluralism is "generally defined as a situation in which two or more legal systems coexists in the same social field. ... Recent work defines 'legal system' broadly to include the system of courts and judges supported by the state as well as nonlegal forms of normative ordering. ... Thus, virtually every society is legally plural."[66] In a similar vein Griffiths has observed that "Legal pluralism is an attribute of a social field and not of 'law' or of a 'legal system'. ... It is when in a social field more than one source of 'law', more than one 'legal order', is observable, that the social order of that field can be said to exhibit legal pluralism. ... [L]egal pluralism is a universal feature of social organization."[67]

Sack has emphasised that legal pluralism has a strong ideological dimension: "Legal pluralism is more than the acceptance of a plurality of law; it sees this plurality as a positive force to be utilised—and controlled—rather than eliminated."[68] In these terms, legal pluralism is not a neutral anthropological lens, but a standpoint from which to challenge the ideology of "legal centralism". According to Griffiths, legal pluralism aims to

> break the stranglehold of the idea that what law is, is a single, unified and exclusive hierarchical normative ordering depending from the power of the state, and of the illusion that the legal world actually looks the way such a conception requires it to look.[69]

It may be considered to follow that this version of legal pluralism (sometimes referred to as "social science" legal pluralism) is positively antagonistic towards the idea of state law (or elements thereof, such as normative criminal law standards) being

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[64] Merry, *supra* note 63 at 872.

[65] Manderson, *supra* note 63 at 1059.

[66] Merry, *supra* note 63 at 871.

[67] John Griffiths, "What is Legal Pluralism?" (1986) 24 *Journal of Legal Pluralism* 1at 38.

[68] Peter Sack, "Legal Pluralism: Introductory Comments" in Peter Sack and Elizabeth Minchin (eds), *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (Canberra: Law Department, Research School of Social Sciences, Australian National University, 1988), 1.

adjusted so as to accommodate polyethnicity and cultural diversity — not because of a lack of sympathy or support for difference, but out of a concern that law reform of this sort perpetuates 'legal centrism'. And yet there is a danger in this stance of separating the 'concept' from its political traditions and potential. As Manderson has observed, "The first stage of 'modern pluralism' was motivated by a clear political agenda ... Whether in colonial societies, Brazil or the inner city, 'pluralism' stood for resistance to the established legal order.[70] The social science version of legal pluralism tends to under-emphasise this factor — deliberately, it would seem, but nonetheless problematically.[71] As Alan Hunt has observed, while it is important to "recognize the diversity of legal phenomena and avoid falling into the presumption of a unitary entity "the Law", it is also important "to give due recognition to the importance of both the state as a political agency and to state-law."[72] More specifically, Hunt has emphasised the need to "address the specific articulation between state-law and non-state law".[73]

The identification and application of differential normative criminal law standards might be assisted by the insights offered by legal pluralism: that it is both empirically established and legitimate that there are multiple sets of rules or normative orders in a polytechnic society. Surya Prakash Sinha has expressly affirmed the empirical and aspirational features of legal pluralism (or "legal polycentricity") as follows:

> Legal polycentricity accepts the pluralism of moral values. Therefore, it conceives the problem of legal relationships in terms of relations among various normative orders within a legal system and seeks their recognition within that legal system. ... It is interested in discovering modes of allocation of decision-making authority that would maximise the coexistence of these normative orders."[74]

However, as one moves from the empirical to the political, from observation to advocacy of reform, and to the specific terrain of normative legal standards, an

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69 Griffiths, *supra* note 67 at 4-5.

70 Manderson, *supra* note 63 at 1060.

71 Thanks to Paul Havemann for first prompting this insight.

72 Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993) at 307.

73 *Ibid* at 323.

74 Sinha, *supra* note 31 at 47, 48.

apparent dilemma emerges. In *Legal Pluralism: Toward a Multicultural Conception of Law*, Warwick Tie expresses the tension as follows:

> A problem emerges ... that threatens to limit legal pluralism's capacity to provide a basis for theorising the conditions of a multicultural law. The problem concerns an incommensurability that exists between the goal of recognising socio-legal diversity and the construction of universalisable standards of legal judgement, so necessary for shared social life. ... The amalgamation of socio-legal diversity and universal standards of legal judgement is a conceptually difficult, if not impossible, enterprise.[75]

In part 2 of this paper I identified two possible strategies for addressing the potential injustice associated with the cultural bias of normative criminal law standards: (a) the (re)construction of a multicultural or 'non-white' universality; or (b) the adoption of differential or multiple normative standards which reflect the diversity of a polyethnic society. The intractable "incommensurability" identified by Tie arises specifically because he pursues the former alone. However, the goal is, arguably, incompatible with a legal pluralist orientation, particularly in light of legal pluralism's opposition to legal centrism.

Legal pluralism, like Kymlicka's multicultural liberalism, would appear to more comfortably and logically support the differential normative standards approach, given its central tenet that there exist multiple normative orders in any one 'social field'. However, as with Kymlicka's liberalism, legal pluralism sets limits on the accommodation of cultural difference. Drawing on the work of Robert Cover,[76] Sarat and Berkowitz, have described those limits:

> First, difference must arise out of and express the normative aspirations of an integrated and ordered community — it must exemplify and express a "nomos". In this sense, Cover's legal pluralism embraces the liberal celebration of multiplicity, but in a way that insists that the claims of difference be linked to the requisites of richly constituted, normatively engaged orderliness.
>
> Second, claims of difference should be honored only when they themselves honor the principle of difference they assert. ... Legal pluralism does not require that those of us sympathetic to the claims of cultural difference stand by as all manner of horrors are committed in its name. We can, and should, insist that difference be orderly, even as we invite questions about what order entails. And

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[75] Warwick Tie, *Legal Pluralism: Toward a Multicultural Conception of Law* (1999) at 162, 167.

[76] Robert Cover, "Foreword: Nomos and Narrative" (1983) 97 *Harvard Law Review* 4.

> we can, and should, insist that the claims of "equal but different" honor principles of equality and of difference.[77]

For Sarat and Berkowitz, the value of legal pluralism, reflected in these conditions, is that it "departs from entrenched discourse and lays the groundwork for a much needed reconciliation of difference and order."[78]

Like Kymlicka's expectation that anti-liberal rules or practices would be a barrier to legally recognised differentiated citizenship rights in relation to those rules or practices, the conditions set by Sarat and Berkowitz for an accommodation of cultural difference founded on legal pluralism are substantial. This, of course, does not necessarily make them improper. However, it is important to recognise that many minority cultural communities in countries like Australia, Canada and the USA may fail to satisfy even the first condition, precisely because their experiences as ethnic or Indigenous 'others' may militate against the continuity and cohesiveness necessary for the expression of a *nomos*. In this way, the historical hostility to cultural difference and the associated pressures to "assimilate" may serve to (re)produce the normativity of dominant cultural values and practices and perpetuate the marginalisation of ethnic minorities.

The challenge may be even greater when one considers that, even where a decision-maker is 'open' to claims based on cultural diversity, that person's limited training and expertise is likely to heavily influence how they approach the task. As Marie Deveney has observed, "... the decision maker's understanding of what constitutes 'cultural distinctiveness' is crucial, for it can strongly influence the outcome of the accommodation question."[79] Deveney suggests that

> A common, seemingly predominant, notion of cultural distinctiveness is ...: Cultural distinctiveness which might warrant accommodation exists only where members of the dominant culture find easily perceived manifestations of the minority culture both to be starkly different from their own and to be essentially unchanged from a time which the dominant culture associates with the 'authentic' minority culture.[80]

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[77] Sarat & Berkowitz, *supra* note 28 at 314-315.

[78] *Ibid* at 315.

[79] See Marie Deveney, "Courts and Cultural Distinctiveness" (1992) 25 *University of Michigan Journal of Law Reform* 867.

[80] *Ibid* at 869.

Assertions as to the dynamic nature of culture and cultural values are likely to clash with judicial expectations of predictability[81] and certainty in the setting of normative criminal laws standards.

5. Critical Race Theory and Confronting Whiteness: The (Re)construction of Multicultural Universality?

Mention of the impact and significance of the historical experience of minority cultures provides a convenient segue to an examination of critical race theory (CRT) perspectives relevant to the application of normative criminal law standards. A defining feature of CRT is its awareness of the contemporary relevance of histories of racial oppression. In a significant work which describes and advances the features and aspirations of CRT, Angela Harris quotes from Richard Delgado and Jean Stefancic[82] to "succinctly state a now-familiar critique of the liberal legal language of objectivity and neutrality",[83] which is especially apt to highlight the potential of CRT to inform an examination of the operation of normative criminal law standards in polyethnic societies:

> Long ago, empowered actors and speakers enshrined their meanings, preferences, and views of the world into the common culture and language. Now, deliberation within that language, purporting always to be neutral and fair, inexorably produces results that reflect their interests.[84]

Challenges to the liberal orthodoxies have come from a variety of disciplinary, political and philosophical perspectives, but what has distinguished CRT is that CRT scholars "have questioned concepts of neutrality and objectivity… from a perspective that places racial oppression at the center of analysis and privileges the racial subject".[85] A major theme, then, of CRT scholarship is a concern with the "ways in which assumptions about race affect the players within the legal system… and have a determining effect on substantive legal doctrines".[86] Racism is understood not "as an

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81 *Ibid* at 876.

82 R Delgado and J Stefancic, "Hateful Speech. Loving Communities: Why Our Notion of 'A Just Balance' Changes So Slowly" (1994) 82 *California Law Review* 851.

83 Harris, *supra* note 27 at 742.

84 Cited *ibid*. See also G. Torres, "Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Pluralist Justice" (1991) 75(3) *Minnesota Law Review* 993.

85 Harris, *supra* note 27 at 750.

86 D Litowitz, "Some Critical Thoughts on Critical Race Theory" (1997) 72 *Notre Dame Law Review* 503 at 503-504.

intentional, isolated, individual phenomenon, equivalent to prejudice"[87] but as "a structural flaw in our society."[88] CRT supports both *exposure/critique* of the "deeper structure that reflects white privilege" beneath the surface of race-neutrality,[89] and, at least at its most optimistic, *reform* of the rules, values and practices by which 'whiteness' is manifested as 'universal'.

For Harris, what distinguishes CRT from "traditional civil rights scholarship" (such as might, in the Australian context, be seen as embodied in the Australian law Reform Commission's *Multiculturalism and the Law*, discussed above) is a rejection of the view that solutions can be found in "the old optimistic faith in reason, truth, blind justice, and neutrality":[90]

> History has shown that racism can coexist happily with formal commitments to objectivity, neutrality, and colorblindness. Perhaps what CRT needs is simply a redoubled effort to reach true objectivity and neutrality. But, then again, perhaps those concepts themselves need reexamination.[91]

For Harris, CRT supports a "jurisprudence of reconstruction" which involves a "project of 'writing back' to white dominated legal rules, reasoning, and institutions."[92] Harris argues that CRT scholars need not shy away from the pressures which "impels legal scholars to take the law as their client" and to "propose solutions that can be implemented within the exiting legal system", so long as this occurs while keeping in mind "the larger political and economic context of law professing as race-crits continue their theory building." [93]

The concept of "whiteness" has emerged as a powerful motif of the insights and concerns of CRT and allied critical perspectives. As Cheryl Harris has observed:

> The law masks what is chosen as natural; it obscures the consequences of social selection as inevitable. The result is that the distortions in social relations are immunized from truly effective intervention, because the existing inequities are obscured and rendered nearly invisible. The existing state of affairs is considered neutral.[94]

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87 Harris, *supra* note 27 at 752.
88 *Ibid*.
89 *Ibid* at 754.
90 *Ibid* at 759.
91 *Ibid* at 759.
92 *Ibid* at 765.
93 *Ibid* at 779.
94 C Harris, "Whiteness as Property" (1993) 106 *Harvard Law Review* 1709 at 1777-1778.

Margaret Davies has observed that the fact that "critical reflection about the practical consequences and normative association of whiteness" is a relatively recent phenomenon is testament to "[t]he power (and invisibility) of the white norm".[95] Warren Montag has stated that "in its most historically effective forms, whiteness does not speak its own name."[96]

The identification and interrogation of "whiteness" is a simple and effective rebuff to the claimed neutrality of the law generally, and race-neutral decision-making in particular.[97] It seems intuitively relevant to a critical evaluation of the operation of including normative criminal law standards in culturally diverse and increasingly 'non-white' societies like Australia. Critiques of whiteness do not offers parameters for the accommodation of cultural diversity in the construction and application of normative standards, in the same way that limits cane be gleaned from Kymlicka's multicultural liberalism, or legal pluralism. So where do its insights lead?

To the extent that whiteness is understand as a set of cultural values (amongst many sets in a polyethnic 'multi-coloured' society) the goal may be seen as breaking the nexus between whiteness and universality, or by concluding that universality is beyond redemption and should be abandoned in favour of differential normative standards. And yet, the very act of recognising and accommodating difference (for example, in the construction and deployment of differential normative standards based on ethnicity) may serve to reinforce the privileging of whiteness, but reserving for 'white' decision-makers the authority to define the differentiated identity, whether favourably or unfavourably.[98]

In any event, it is simplistic to regard whiteness as merely one among many sets of cultural values. Joel Olson has argued that "whiteness historically has not been an expression of culture so much as a social status reflecting relations of inequality,

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95 M Davies, *Asking the Law Question: The Dissolution of Legal Theory* (2nd ed, 2002) at 281.

96 W Montag, "The Universalization of Whiteness: Racism and Enlightenment" in M Hill (ed), *Whiteness: A Critical Reader* (1997) 281 at 290.

97 See Barbara Flagg, "'Was Blind But Now I See': White Race Consciousness and the Requirement of Discriminatory Intent" (1993) 91 *Michigan Law Review* 953.

98 See Neil Gotanda, "Tales of Two Judges: Joyce Karlin in *People v Soon Ja Du*; Lance Ito in *People v OJ Simpson*" in Wahneema Lubiano (ed), *The House That Race Built* (Vintage Books, 1998) 66 at 71-72.

discrimination, privilege, and terror".[99] Having cast whiteness as "an identity of power, not of culture"[100] it is not surprising that Olson concludes that the solution is to "neither ... ignore nor redefine white personhood but to *abolish* it."[101] For Olson, the goal is not a "colorblind personhood" or a "multicultural personhood", but an "anti-white personhood" or "abolitionist personality".[102] Olson's abolitionist personality is, in effect, a new universality, which is characterised by opposition to white privilege, a "new core set of values" based on "Black culture", and a fundamentally political identity which eschews superiority and commits to "freedom of all".[103] A complete interrogation of the potential of Olson's remedy is not possible here, but its "Utopian"[104] nature may make it difficult to translate into identified legal and political strategies. In addition, consideration would need to be given to whether it has currency in a country such as Australia, given that it is conceived with specific reference to the history and politics of the USA.

6. Conclusions: The Multiculturalisation of Criminal Law Normativity

This paper has not attempted to 'rank' the various theoretical perspectives discussed in term of their degree of 'diversity friendliness'. Rather, the indicia of legitimate multicultural law reform identified in this paper, drawn from (multicultural) liberalism, legal pluralism, critical race theory and critiques of whiteness, provide valuable reference points and criteria for assessing both the processes and outcomes of efforts to accommodate (or not accommodate) claims based on cultural diversity.[105]

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[99] Joel Olson, "The Limits of Colorblind and Multicultural Personhood" (2001) 2 *Stanford Agora: An Online Journal of Legal Perspectives* 1.

[100] *Ibid* at 16.

[101] *Ibid* at 18.

[102] *Ibid*.

[103] *Ibid* at 21.

[104] *Ibid* at 19.

[105] Although my own research currently focuses on criminal justice decision-making, the challenge of interrogating of normativity, arising in many other (non-criminal law) legal decision-making contexts, particularly, as Simpson and Charlesworth have observed, given that legislation is increasingly framed in a way which relies on "open-ended standards, requiring officials to decide, for example, what is in the 'public interest' or what is 'reasonable in the circumstances": G Simpson and H Charlesworth, "Objecting to Objectivity" in Rosemary Hunter, Richard Ingleby and Richard Johnstone, *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (1995) 86 at 103.

More specifically, they offer a discourse for interrogating and critically evaluating the (conscious and unconscious) parameters within which criminal justice decision-makers approach the task of adjudicating in cases where claims are advanced on the basis of the defendant's Aboriginality, ethnicity, or religion.

Of the two primary accommodation strategies identified in this paper — namely, the adoption of multiple differential normative standards; and the (re)construction of a single multicultural normativity — the former is the approach which would appear to flow most logically from an application of Kymlicka's brand of multicultural liberalism or the concept of legal pluralism deployed by Sarat and Berkowitz. And yet, the preconditions set for the distinct cultural community — including adherence to values of autonomy, tolerance, equality, difference, as well as internal order and integration — will, even if adopted in the criminal justice decision-making context, represent a high threshold that will be practically unattainable for most ethnic groups, although it may be satisfied by some Indigenous communities.

The latter alternative — a reconstructed multicultural normativity — intuitively generates even greater scepticism, because, although not necessarily theoretically implausible, it seems politically naive. And yet, critical race theory demonstrates that critique and scepticism is not necessarily incompatible with practical legislative and judicial attempts to uncouple whiteness and racism from 'universal' criminal law standards. To this end, meaningful scrutiny of the potential for the imagined reconstruction to be achieved must involve examination of the day-to-day decision-making events that constitute the negotiation of diversity and authoritative normativity. Revelation of the full implications of multiculturalism for the legitimacy of criminal law values and standards will be facilitated by consideration of the *agency* of criminal justice decision-makers — including police officers, prosecutors, defence lawyers, magistrates, judges and juries.