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# Penal Culture and Hyperincarceration

## The Revival of the Prison

Chris Cunneen, Eileen Baldry, David Brown,
Mark Brown, Melanie Schwartz and Alex Steel

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## The Revival of the Prison

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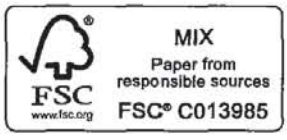


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# Table of Cases

*South Australia v Totani* (2010) 242 CLR 1.
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**DCS**: Corrective Services personnel from NSW, Qld, WA, Victoria and Northern Territory, including Commissioners, psychologists, prison managers, Indigenous staff and educational staff.

**NGO**: Non-government organisations providing services to prisoners and ex-prisoners, including community legal services, chaplains, post-release services and prisoner advocacy bodies.

**PB**: Member of the Parole Board.

**Prac**: Legal practitioners, including senior defence lawyers, prosecutors and judges.

# Chapter 1
# Penal Culture: The Meaning of Imprisonment

Penological theory and research within criminology has been reinvigorated in recent years by the seemingly inexorable rise of prison populations in most Western nations. The terrain of this work has been marked out by important new ideas, such as the 'new penology' (Feeley and Simon 1992), 'culture of control' (Garland 2001a, 2001b) and 'new punitiveness' (Pratt et al. 2005), and more recently by claims about the connection between neoliberalism, penality and hyperincarceration (Wacquant 2009, 2010) and an emergent 'carceral state' (Social Research 2007). Underpinning this work has been a veritable drum roll of statistics, first signalled in the US by the arrival at a prison population of 1 million, but then in June 2002 it was recorded that 2 million (mainly young, mostly male, increasingly black and Latino) people were behind bars, and so the counting continued. In the UK, continuing the trend established under Thatcher, New Labour expanded the prison population rapidly during the latter part of the 1990s and 2000s with inmates held in increasingly overcrowded conditions (Sim 2009). Canada had apparently avoided the US/UK trend but since the early 2000s imprisonment rates have also been on the rise there (Prison Justice 2005, Statistics Canada 2012).

In Australia and New Zealand prison populations have been subject to many of the same upward pressures noted in North America and Western Europe, including for example a growing feminisation of the prison population (Sim 2009, Baldry and Cunneen 2012). Like the United States, these changes have involved significant over-representation of particular communities: most notably Indigenous people[1] in Australia and Maori in New Zealand. Moreover, jurisdictional variations have also mirrored US patterns, with some places, such as the Northern Territory (NT) and Western Australia (WA), imprisoning at rates amongst the highest in the world, while others, such as Victoria, like the US counterpart Maine, seem almost models of Scandinavian-style restraint. Imprisonment in Australia thus exhibits many of the hallmarks of what has made the US such a crucible for recent work in penology. We discuss Australian and international imprisonment trends in Chapter 3.

This book is focused on identifying changes in penal culture over the last 40 years, which have led to a re-valorisation of imprisonment as a frontline criminal justice strategy. As discussed in more detail below, we use the concept of *penal culture* to refer to the broad complex of law, policy and practice which frames

1 We use the terms 'Indigenous' and 'Aboriginal' interchangeably in this book.

the use of imprisonment, and to the broad system of meanings, beliefs, ideas and symbols through which people understand and make sense of the prison. The focus of our analysis of penal culture is Australia and its states and territories, although we place this analysis within a broader international context.

At times, our discussion draws on American literature on penality and penal culture. It is true that American imprisonment rates dwarf those of Australia and elsewhere. Tonry and others argue that the US penal phenomenon is 'distinctly American', arising 'partly from American moralism and partly from structural characteristics of American government that provide little insulation from emotions generated by moral panics and longterm cycles of tolerance and intolerance' (Tonry 1999: 419; see also Pratt 2011).

While American exceptionalism in this arena makes direct comparisons of limited value, the US experience remains highly valuable in any discussion of penal culture. Wacquant has suggested that US penal severity is a pattern that has to some extent been replicated across the Western world, and is thus a relevant point of focus as the core from which the abiding (Western) penal paradigm is diffused. It is not necessary to fully accept this view (Pratt 2011) to find value in the discussion of the US penal experience. The USA is a useful case study of the relationships between penal cultures and resulting trends in incarceration rates, and provides insight into the outcomes that can be expected when punitive trends are pushed further than in other comparable Western liberal democracies.

We take as a starting point that imprisonment rates are not simply a function of increased levels of crime. Wilkinson and Pickett (2009: 147) note that only 12 per cent of the growth in the state prison population in the USA during the 1980s and 1990s could be associated with increases in criminal offending – the rest was the result of increased use of imprisonment and longer periods of imprisonment. Similarly a comparison between the UK and the Netherlands showed that two-thirds of the difference in the higher UK imprisonment rates was a result of the greater use of custodial penalties rather than differences in crime rates. As we discuss in more detail in Chapter 3, in Australia increases in imprisonment rates have continued, while crime rates have levelled or fallen in many categories of crime.

Further, there are often contradictory movements within some states, even high imprisoning ones: WA, for example, has maintained a 'three strikes' law relating to property offences while simultaneously abolishing short prison sentences of six months or less. A number of factors appear to have contributed to the increased use of imprisonment, including changes in sentencing law and practice, restrictions on judicial discretion, changes to bail eligibility, changes in administrative procedures and practices, changes in parole and post-release surveillance and a public perception of the need for 'tougher' penalties. This is all occurring in an environment of constantly changing criminal law. In Australia between 1 January 2003 and 31 July 2006 there were over 230 major changes to law and order legislation in Australian states and territories (Roth 2006). A comparable story can be found in the UK where in 10 years the Blair government passed 53 crime Acts creating 3,000 new offences (Dean 2008: 16). As Jenkins (2012) points

out, this was compared with '500 in the equivalent period under the Tories. He [Blair] packed the courts, bust legal aid and put more people in prison than ever in British history.' Our analysis of bail and sentencing legislation shows constant and dramatic changes to criminal law in recent years, often as a result of an individual high profile case.

Quantitative studies have not adequately explained the complexity of change in the prison population. Partly, this limitation is technical in nature, since crime rates and imprisonment rates may influence each other reciprocally. Yet even sophisticated statistical modelling addressing why imprisonment rates vary so widely from place to place have failed to show any simple mechanical relationship between crime and punishment (Nagin 1998). In Australia, there is an often noted differential in imprisonment rates between the demographically similar states of New South Wales (NSW) and Victoria, with the former showing twice the imprisonment rate of the later state. Gallagher (1995), for instance, concluded that a combination of higher flows into prison and longer terms of imprisonment accounted for the higher NSW rate, yet a paucity of sufficiently detailed and comparable quantitative data on crime rates, crime seriousness and the like meant that the reasons for this greater breadth and intensity in use of the prison remained unexplained (although see Freiberg and Ross 1999). This has led a number of criminologists to suggest that some aspects of the wider penal culture of the two jurisdictions must play a role. In fact, this sort of explanation is consonant with the conclusions of two major studies of custodial remand in Victoria, South Australia (SA) and WA (Bamford, King and Sarre 1999; Sarre, King and Bamford 2006). In both studies a complex of social, cultural and decision-making factors, in interaction with frameworks of legislation that were either permissive or restrictive of bail, accounted for the marked cross-jurisdictional differences. In the post-release context, Baldry et al. (2006) suggest that social exclusion and support factors need to be taken into account when explaining differing re-imprisonment rates.

At a more theoretical level, recent international literature and research pose a number of explanations for the growth in imprisonment rates over recent decades (D. Brown 2005). It has been suggested that many Western democracies are entering a period of 'mass imprisonment' (Garland 2001a). This change represents a reversal of earlier trends where prison rates had been relatively stable or increasing only slowly during most of the twentieth century. According to many commentators the rise of mass imprisonment is consistent with the broader political agenda of the neoliberal state (O'Malley 1999; Wacquant 2009), a move away from rehabilitative aims (Garland 2001b) and an increased reliance on risk assessment (Mark Brown and Pratt 2000). We have chosen the period from the 1970s to fully capture this transformation in penality. Indeed one of our tasks is to identify when and how in the period from the 1970s, ideas, practices and sensibilities developed which have allowed for the re-valorisation of the prison. We also note that as a general rule we have adopted Wacquant's (2010) notion of 'hyperincarceration' rather than 'mass imprisonment'. We note that Garland has argued that mass imprisonment needs to be defined in the context of the

*social concentration* of imprisonment's effects (Garland 2001a: 1–2), and both Garland and Wacquant refer in the US to the concentration of imprisonment among young black men. For us, however, the term 'mass imprisonment' can imply an undifferentiated increase in imprisonment and the term is often used in this generalised manner. In contrast, the concept of hyperincarceration captures more clearly the idea that increased imprisonment has been targeted at particular racialised groups (in the Australian context, Indigenous people) and others marginalised into a liminal existence between prison and community, including people with mental health disorders and drug and alcohol addictions.

## Approaching Penal Culture

An understanding of penal culture allows us to explore what Garland (1991) refers to as the public 'sensibilities' that underpin the penal values of a particular society. Young and Brown have noted that 'while punishments may be *justified* by policymakers, judges and penal administrators by reference to their instrumental goals (which tend to be similar across jurisdictions), their form and severity are in reality likely to be *chosen* on the basis of almost instinctive feelings about what the right punishment is' (1993: 40–41). A key goal of our work is to develop and theoretically expand the notion of penal culture: a number of writers draw upon the term, yet few do so reflexively, tending instead to regard it as a self-explanatory notion (see Garland 1991; Franko Aas 2004; Tonry 2004; Pratt 1998).

We begin by acknowledging that there are two complex and contested concepts in play when we speak of 'penal culture'. Our understanding of these two concepts and their meaning when linked together goes to the core of the argument presented in this book: an understanding of penal culture is necessary to explain the developments in imprisonment in Australia over the last 40 years. The concept of penal culture is the explanatory principle around which this book is organised. Therefore it is worthwhile spending some time unpacking how we understand these two interlinking terms.

We use the notion of 'penal' in the context of a wider concept of penality, which refers to the broad field of institutions, practices, discourses and social relations which surround the ideas and practices of punishment. The concept of penality implies an understanding of punishment that is social, historical and political. It is a view that sees punishment as far more than a calculative task by sentencers or a technical apparatus administered by experts. Similarly penality implies a study of punishment that extends beyond the effects on a discrete offender. It is concerned with the social meaning and cultural significance of punishment, of its broader social, political and economic effects. The phenomenon of punishment exists across different institutions and the penal realm is not seen as 'a singular, coherent unit' (Garland and Young 1983: 15). There is a variety of often contradictory and competing discourses on punishment including judicial decisions, parliamentary reports, commissions of inquiry, media and popular

culture depictions, government policy, academic research and prisoner activist voices. The concept of penality allows us to approach this broader, complex and multidimensional realm of punishment, and understand the connections to legal, social, political and economic policy, while seeing the influence that these social and political institutions simultaneously have on punishment.

The concept of culture is more difficult to define than penality. It is more widely used in both everyday language and in academic discourse. It is used as an analytical concept or tool (referring to meaning through symbols, language and other signifiers), and as a description (referring for example to prison culture or youth culture). Raymond Williams refers to culture as one of the most complicated words in the English language, due partly to its complex historical development and its diverse application and conceptualisation within a wide range of disciplines (see Delaney 2004: 11; also Larmour 2008: 227).

Williams (1983) distinguished three broad meanings of culture:

- the idea of civilisation and its intellectual, spiritual and aesthetic development;
- culture as a way of life peculiar to a social group: its material and practical characteristics, and its signifying and symbolic aspects;
- and a narrower definition encompassing the arts and intellectual pursuits (see Eagleton 2000: 9–16; Larmour 2008: 227).

It is the second meaning, the concept of culture as a way of life – the collected ideas and habits learned, shared and transmitted between generations – that has underpinned the discipline of anthropology and seeped into other disciplines, especially sociology, through the mid to late twentieth century, notwithstanding ongoing conceptual development, confusion and debate (Bauman 1999).

Certainly the concept of culture and its use have been debated both within criminology and more broadly. We are aware of some of the inherent pitfalls: the concept can be misused as a fall-back position to account for the unaccountable ('an uncaused cause'); as an 'explanation of last resort', or as a 'veto on comparison' (Wedeen 2002: 714; Larmour 2008: 228). Culture can be conceptualised so broadly as to render it meaningless, or so narrowly as to limit its theoretical validity. There is a danger that the concept is 'torn between an empty universalism and a blind particularism' (Eagleton 2000: 44).

One attempt to overcome these problems has been to draw a distinction between the use of the plural form of 'cultures', which describe 'concrete and bounded worlds of beliefs and practices', and the singular concept of 'culture' denoting a 'semiotics of social life' (Sewell 2004: 202). The conceptualisation of culture as semiotic practices entails seeing culture as the processes of meaning-making. It is an analytical tool for understanding the relationship between people's practices and their 'systems of signification', that is their language and other symbolic systems (Wedeen 2002: 713, 723).

Wedeen argues that culture as semiotic practices operates on two levels: firstly referring to 'what language and symbols *do* – how they are inscribed in concrete actions and how they operate to produce observable ... effects'; and secondly offering a lens, focusing attention on how and why phenomena are invested with meaning (Wedeen 2002: 714). This cultural analytic framework is clearly tied to Geertz's notion of culture:

> The concept of culture I espouse is essentially a semiotic one. Believing with Max Weber, that man [*sic*] is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning. (Geertz 1973: 5)

We see *explanation*, rather than simply description, as our primary criminological task. Therefore, it is necessary to look at the processes and mechanisms which translate culture into action: 'In order to move from the analysis of culture to an explanation of action we have to show how culture relates to conduct, how specific symbols, values or ideas come to be a motivational force or operational basis for action' (Garland 2006: 438).

As Geertz and more recently Garland have noted, this preoccupation with explanatory mechanisms is distinctly Weberian. Weber (2009) in *The Protestant Work Ethic and The Spirit of Capitalism* is not just trying to describe a shift in the material and spiritual re-organisation of Western Europe, but rather to explain those changes. For instance, he describes how certain values – like frugality and hard work – gave rise to the emergence of modern capitalist relations. These values had religious underwriting but they exerted causal force on the material structures of society. Weber provides a cultural account, but it is also explanatory. This is the challenge posed by Garland (2006) and adopted in the current project – a cultural account of the Australian penal system, which is situated within the broader social, economic and political structures of society and ultimately carries explanatory force.

### *Garland and Penal Culture*

Garland (1991, 2001b, 2006) has provided the most systematic use of the concept of culture in relation to punishment. For Garland, punishment is a cultural artefact, which embodies and expresses society's cultural forms (1991: 193). He uses a wide definition of culture, which covers both 'mentalities' and 'sensibilities'. By using the concept of 'mentalities', he is referring to 'intellectual systems' and 'forms of consciousness'; and by sensibilities, he refers to structures of affect and emotion. Socially constructed sensibilities and mentalities form the cultural patterns that influence how and why we punish and structure the way we 'feel' about offenders and their punishment. Mentalities provide an intellectual framework, which explain and justify why and how we use certain things as punishment (for example

assess, classify, segregate, train). Cultural sensibilities rule in some forms of punishment as 'appropriate' and rule out others as 'unthinkable' (for example, as cruel, barbaric, repugnant).

In his later work Garland points out that culture is both a theoretical concept and an object of analysis (2006: 420). He identifies two distinct senses in which culture is used. These can be understood as:

- *Analysis of culture* as a 'collective entity', which is similar to the same way comparative anthropology might look at different social groupings (for example, *this* culture compared to *that* culture).
- *Cultural analysis*, which includes the analysis of those aspects of social relations which are distinctly 'cultural' such as ideas, symbols, values, meanings, sentiments.

Both approaches have been used in understanding the relationship between culture and punishment, although Garland argues that the analysis of culture (as an entity) is increasingly problematic largely because of the fluidity that frequently exists between group boundaries and the overlapping and changing nature of social groups and identity. He points out that as a consequence of globalisation there are also now much less pronounced contrasts between cultural groupings (2006: 430). Having said that, writers like Melossi (2001) and Pratt (2008a, 2008b) demonstrate that there is value in comparing national penal approaches, which are least partly informed by an analysis of cultural difference.

The difficulties of the second strand – cultural analysis – relate to the problem of defining and separating out the cultural from the rest of the analysis (i.e. the historical, political, economic and social analysis). Garland points to the near impossibility of distinguishing the 'cultural' from the 'penal control' aspects of imprisonment. However, the basic distinction between analysis of culture and cultural analysis does not have to operate as a typology. In fact it is perhaps better understood as a useful methodology. Both approaches to understanding and analysing culture are frequently used together. Garland notes that much research involves "the overlap and intertwining between culture as a collective entity and the 'cultural' as a dimension of meaning" (Garland 2006: 426).

In reiterating the notion that culture cannot stand alone, Garland defines culture as:

> those aspects of social action or social artefacts that are ideational, affective, or aesthetic – categories and classifications, styles of thought and ways of seeing, structures of feeling and psychological dispositions, values and sensibilities, bodily comportment and spatial arrangements – and which can be studied by attending to the signs, symbols and performances through which these otherwise nebulous phenomena are publicly represented. (2006: 436)

Garland argues that our approach to cultural analysis should not be limited to textual or discourse analysis – although documents and rituals are the most obvious, and perhaps the easiest, sites for understanding culture. He suggests extending analyses into areas that are less convenient methodologically such as technologies, spatial arrangements and bodily postures. He makes the point that the cultural domain is not exclusively discursive insofar as it can be exemplified in ritual practices, and modes of behaviour.

*Elias and the Civilising Process*

Norbert Elias's (1984) work on the civilising process is of interest to our project in two distinct ways. The first concerns the substance of his ideas: his cultural histories of the shifting norms and expectations with regard to etiquette and private and public behaviour and the profound impact he argues that these social shifts have on both social institutions and the human psyche. The second is the methodology he adopts. Elias is a clear example of the kind of 'cultural sociologist' that Garland believes has successfully bridged the divide between cultural analysis and social explanation. Elias' work involved an enormously detailed variety of textual analyses (examining etiquette manuals, paintings and fiction) and finding in these certain normative ideas and ideals.

In Elias' detailed examination of changing norms, expectations and behaviour, he characterises the trends he identifies over several centuries as a 'civilising process'. There is no moral prescriptiveness in Elias's work – by the term 'civilising' he seeks to thematise changing patterns of behaviour and cultural values over time. These patterns include 'a tightening and differentiation of the controls imposed by society upon individuals, a refinement of conduct, and an increased level of psychological inhibition as the standards of proper conduct become ever more demanding' (Garland 1991: 217–8; see also Pratt 2002). Elias explores the social and psychological mechanisms underpinning these processes and links changing sensibilities directly to changing institutional structures – and the inverse. There is interdependence between, for instance, the increased control of behaviour by centralised state systems, and the individual internalisation of these expectations (see Garland 1991: 220–222).

One of the key trends in the civilising process is the shift of some behaviours from the public to the private. This is particularly relevant in the examination of punishment and imprisonment. The movement from public spectacle to private punishment has been well documented (in the tradition of Elias) by Foucault (1977), Spierenburg (1984) and others. Elias links this movement to the more general 'civilising' trend of making private those parts of life that over time became considered distasteful, or a sign of an unrefined appetite. In the same way that changing sensibilities influenced the privatisation of certain bodily functions or violence and suffering more generally, these same sensibilities resulted in the violence of punishment and then almost all forms of punishment being removed from the public sphere. The important point here is that the violence and the

punishment itself is not removed, it simply becomes invisible (see Pratt 2002, 2005). And, as we explore further in this book, this change from public to private was an uneven process mediated by understandings of race and gender.

Both Garland (1991) and Pratt (2002, 2005) use Elias to explore the impact of punishment occupying a private, sanitised and professional sphere. The removal of punishment from the public sphere has resulted in a dramatic tempering of the empathic response towards those who commit crime. The punishment of offenders and the manner in which they cope with the punishment became hidden from public view (Garland 1991: 234–235). Today there is scant public knowledge of the suffering that occurs inside the closed institutions of prisons. The invisibility of most current forms of punishment limits the capacity for the general public to develop a compassionate response to people currently in prison. This of course contributes to the ongoing marginalisation of prisoners and ex-prisoner populations.

Pratt argues that penal trends over the nineteenth and twentieth centuries, at least until around 1970, can be seen in the context of the characteristics of the civilising process, 'whereby the power to punish was vested almost exclusively in the state and exercised through its bureaucratic and administrative organs of government' (2005: 263). However, since the 1970s there has been the rise of the 'new punitiveness', which is a result of *decivilising* tendencies running in conjunction with longer term civilising trends. These decivilising tendencies can be seen in a loss of state authority, the breakdown of previously existing interdependencies, and the rise of incalculable risks facing individuals. 'There is less self-restraint on the part of individuals but a simultaneous yearning for stronger and clearer response from the state' (Pratt 2005: 265).

### *Penal Culture and the Political Economy of Neoliberalism*

If until recently analysis of punishment had paid relatively little attention to culture (Vaughan 2000), then perhaps a new trend is to over-rely on cultural explanations for penality. We wish to emphasise the point that seeing punishment as a cultural artefact, as a cultural expression, should not be divorced from:

> the fact that punishment is also, and simultaneously, a network of material social practices in which symbolic forms are sanctioned by brute force as well as by chains of reference and cultural agreement. (Garland 1991: 199)

In other words, seeing punishment in terms of cultural expression does not exclude analysis of power, material interest and social control. Indeed we argue the necessity of combining these differing levels and modes of analysis.

In his more recent work Garland's concern is that cultural analysis can too easily replace social, political and economic, or other structural understandings of punishment and imprisonment, and that whilst analysis of culture, and cultural analysis, are essential to understanding the penal realm, they should always

constitute part of a broader social analysis. His call to arms for sociologists of punishment is to pursue analysis 'both at the level of cultural meaning, and at the level of social causation' (2006: 439). He urges sociologists to mesh cultural analysis with social explanations. The task is to explore what current cultural forces engender, perpetuate or reinforce certain social practices and then to look specifically at the mechanisms through which these occur. Garland's argument is that cultural analysis should serve as pre-cursor to, and also inform the 'more ambitious project of social explanation' (2006: 420). He suggests cultural analysis does not start where for instance economic or political analysis ends but should inform our understandings of these aspects of the social arena (2006: 426).

Nicola Lacey argues for the need to combine cultural analysis and political economy. She notes that the rise of penal populism does not characterise all late modern democracies: 'Rather certain features of social, political and economic organisation favour or inhibit the maintenance of penal tolerance and humanity in punishment' (Lacey 2008: xvi). Lacey's analysis is that the political-economic system as well as the cultural climate is necessary for understanding the institutional processes which frame criminal justice policy. She takes the insights from the comparative work of Cavadino and Dignan (2006) that differences in penal practices across countries are likely to be a function of systematic differences in social, political and economic organisation and De Giorgi's (2006) argument for a combined emphasis on cultural and structural factors for understanding punishment in a post Fordist, post Keynesian world (Lacey 2008: 43–54). We see Lacy's argument as an important counterpoint to an overreliance on cultural explanation.

One of the key conceptual frameworks which have emerged among many critical thinkers in penality is neoliberalism.[2] Changing conditions in punishment have been reflective of the growing ascendancy of neoliberalism as a political and economic philosophy. Among Western style democracies it is those who have most strongly adopted neoliberalism, which have the highest imprisonment rates (particularly the USA, Australia, New Zealand, the UK and South Africa), while social democracies with coordinated market economies have the lowest (Sweden, Norway, Finland and Denmark) (Lacey 2008). The development of neoliberal states has coincided with a decline in welfarism. The realignment of values and approaches in punishment primarily within Anglophone justice systems has emphasised deeds over needs. The focus shifted from a welfare-aligned rehabilitative approach to a justice-oriented approach with an emphasis on deterrence and retribution. Individual responsibility and accountability increasingly became the focus of the way justice systems approached offenders. The privatisation of institutions and services, widening social and economic inequality, and new or renewed insecurities around fear of crime, terrorism,

2 See, for example, Pratt et al. (2005), Cavadino and Dignan (2006), Lacey (2008), Wacquant (2009), D. Brown (2011). For a different analysis of the contemporary origins of the ideology of the free market and strong penal state see Harcourt (2011).

'illegal' immigrants and racial, religious and ethnic minorities have all impacted on the way criminal justice systems operate. All of which have fuelled demands for authoritarian law and order strategies, a focus on pre-crime and risk as much as actual crime (Zedner 2009a: 262), and a push for 'what works' responses to crime and disorder (Muncie 2005: 41).

In his discussion of international criminal justice, Findlay has succinctly summarised the values and principles of neoliberalism to include:

- individualisation of rights and responsibilities;
- the valorisation of individual autonomy;
- a belief in free and rational choice which underpins criminal liability and penality;
- a denial of welfare as central state policy;
- the valorisation of a free market model and profit motivation as a core social value; and
- the denial of cultural values which stand outside, or in opposition to, a market model of social relations (2008: 15).

The values of neoliberalism promote individualism and individual responsibility and downplay the need for social and structural responses to crime such as reducing unemployment rates, improving educational outcomes, increasing wages, ensuring proper welfare support, improving housing and urban conditions (D. Brown 2009: 456).

Promoting individual responsibility largely became identified with retributivism, incapacitation and just deserts – all of which has translated into more frequent use of prison and with longer prison terms. However, we also foreshadow here our discussion in Chapter 2 that an understanding of *colonial* penality may require us to re-evaluate the way we conceptualise state responses to punishment. Such an understanding is not contradictory with a view that contemporary hyperincarceration is targeted and operates as a disciplinary instrument of neoliberalism. A colonial penality does, however, draw our attention to the continuities in the punitive selectivity of particular racialised groups arising from their position within colonial and postcolonial frameworks.

## Elements of a Penal Culture

For our purposes, the study of penal culture includes:

- building knowledge of the socially constructed elements of punishment (the values, beliefs, expectations, sensibilities, purposes, legislation, policy procedures and so on) that have been and continue to be woven together to create a penal realm;

- analysing cultural elements in their social, political and economic contexts, over time and space, for their ideological bases, their interactions with each other and what they signify both internally to the realm and externally to society at large; and
- interpreting the diverse and multi-levelled meanings being conveyed and the impacts of these webs of significance.

These points taken together can be understood as the study of penal culture, as it is developed in this project. There are various dimensions of penal culture that are of particular interest to us, including the rise of risk-thinking, the legitimation of pretrial detention, contemporary understandings of rehabilitation, therapeutic jurisprudence, restorative justice, definitions of dangerousness, and the acceptance of incapacitation for particular types of offenders. We also use the concept of penal culture to address specific aspects of punishment impacting upon particular social groups such as racial minorities, Indigenous peoples, women and people with mental illnesses and intellectual disabilities.

We see punishment as a communicative and didactic institution. It communicates meaning about power, authority, legitimacy, normality. Penal signs seek to instruct us about:

> good and evil, normal and pathological, legitimate and illegitimate, order and disorder. Through their judgment, condemnations, and classifications they teach us (and persuade us) how to judge, what to condemn, and how to classify, and they supply a set of languages, idioms, and vocabularies with which to do so. (Garland 1991: 252)

In this sense, penality defines and depicts social, political and legal authority, it defines and constitutes individual subjects and it depicts a range of social relations.

We have seen a transformation in sentencing legislation and practice over recent decades with, for example, changes in bail eligibility, 'truth in sentencing', the abolition of remissions, the abolition of short term sentences and suspended sentences, the imposition of standard minimum terms and/or mandatory minimum terms, the introduction of guideline judgments, and changes in parole eligibility. We are interested in the impact of these changes but also their sources of social authority, particularly in appeals to community safety and community protection.

How we understand appropriate or acceptable punishment is contextualised within broader social and cultural norms. For example, the way we punish offenders is understood within particular cultural boundaries, which define gender, age, race, ethnicity, disability and class. These boundaries are not static. They are constantly being drawn and redrawn, and penality itself plays a part in constituting these relations.

For example the division in penal regimes between juveniles and adults has been progressively drawn over the last century and a half with the development of distinct criminal justice policy and procedure, sentencing rationales and penal

sanctions and institutions. These differences reflect our cultural understanding of the difference between childhood, adolescence and adulthood. These differences are historically fluid and penality plays a role in formulating broader cultural meanings around age and responsibility. Witness for example the current debates over the age of criminal responsibility and in some common law jurisdictions the abandonment of the common law principle of *doli incapax*. Or the increasingly acceptable idea that children who commit adult-type offences (such as robbery, rape or murder) should be punished as adults and kept in 'real' prisons rather than juvenile detention centres. Thus we now have the extension of adult penal regimes into juvenile systems with, for example, the operation of special juvenile facilities by adult correctional authorities (for example, the Kariong Juvenile Correctional Centre administered by New South Wales Corrective Services).

We are also interested in the blurring of the notion of what constitutes the 'penal'. The reconfiguration of the penal in the community can be seen for example in the development of low security 'community-focused' penal facilities. This extension of the penal regime redefines itself not as a prison but as a 'residential facility' where the environment is said to be as *similar as possible* to life in the community, and thus the normalising of correctional facilities within a social space of the community. As a counterpoint, we also see the absorption of the 'community' back into the prison through the housing of sex offenders under extended *community supervision* in an area of prison space specifically de-gazetted *within* an existing correctional facility. Thus the 'community' finds its existence within the walls of the prison. Discussion of such facilities is undertaken in Chapter 7. The blurring of the penal regime also works back into sentencing and considerations of non-penal sanctions. So we have as a key criterion for entry into community-based therapeutic programmes (such as those administered through the drug courts) the requirement that the offender would have *otherwise been sent to prison.*

Penality signifies its meaning through a range of processes, from declaratory statements to policy documentation, from mass media reports to the daily routines of the incarcerated. The cultural meanings, which imbue penality and are conveyed by penality also reproduce ideas about the psychology and ontology of individuals, those defined as criminal, as terrorist, as justifying preventive detention, as well as those defined as 'normal'. These cultural meanings address us as moral agents, as rational and responsible individuals, or perhaps as those without moral agency, as beyond redemption. We might consider in this context two influences in redefining penality: the influence of the war on terror and the rise of preventive detention. Government reaction to and promotion of the war on terror has redefined threats to public safety, and given rise to a raft of anti-terrorist legislation. The threat of terrorism has re-valorised the role of the 'supermax' prison as a necessary penal strategy to confine those considered as extra-ordinary criminals. Similarly, sex offenders have been (re)defined as fitting subjects for preventive detention on the basis of the risk they pose to the community.

Of particular interest to us are the elements of penal culture that intersect with social relations and definitions around race, gender and mental illness. Cultural

understandings of 'race' have permeated the development of penality across numerous colonial and postcolonial settings with formal and informal differences in punishment existing from the period of expansion of European colonialism through to the present. For example in the US we have the spectacle of lynching and other forms of extra judicial punishment particularly during the Jim Crow period (Ifill 2007; Garland 2010). In the Australian context, some historical examples included the continuance of public executions of Aboriginal offenders after their cessation for non-Aboriginal offenders, and similarly the extended use of physical punishments (lashings, floggings) for Aboriginal offenders well into the twentieth century. The segregation of penal institutions along racialised lines has been commonplace. Today we understand both sentencing and punishment through concepts of race and culture. For example, under Canadian legislation consideration of the Aboriginality of an offender is relevant when considering sentences of imprisonment and case law in both Australia and Canada has held that the unique circumstances of Aboriginal people are relevant considerations in sentencing (see s718.2(*e*) *Canadian Criminal Code*; *R v Gladue* (1999) 1 SCR 688; *R v Fernando* (1992) 76 A Crim R 58). In addition specific practices have developed in Indigenous sentencing courts in both countries. In these examples, the institutional frameworks of sentencing and punishment are imbued with cultural meaning, as well as taking on a signifying role themselves. For example, the Indigenous sentencing courts signify cultural difference through emphasis on the role of elders and the community in sentencing. In both *Gladue* and *Fernando*, the role of Aboriginal disadvantage is signified as a cause of crime. In this sense, sentencing and punishment create social meaning around race and difference.

The extraordinary growth in women's imprisonment clearly reflects a changed environment in our cultural understanding of the appropriateness of prison for women. While debates in the 1980s were still focused on drastically reducing the number of incarcerated women and emphasised the importance of alternatives to custody, there are no longer any *particular* barriers to imprisonment based on gender, which are identified in official discourses. Contemporary penal discourse may identify specific criminogenic needs for women, but prison itself is seen as no less an appropriate punishment for women than it is for men.

Similarly the warehousing of large number of people with mental health issues apparently is a defensible byproduct of the need for greater security and reduction in risk. Even if we accept Harcourt's argument of 'the remarkable continuity of confinement and social exclusion' (2006: 1752), which has characterised the use of asylums, mental hospitals and prisons over the twentieth century, there is a significant cultural change which has occurred since the 1970s with the closure of mental institutions and the apparent acceptability of incarcerating large numbers of the mentally ill in prison. Although the problem in official discourse is often defined as one of providing appropriate treatment for the mentally ill in prison, there is far less questioning of the role of prison itself as an institutional response to mental illness.

Finally, we are concerned with the way a risk paradigm has transformed criminal justice and its specific impact on the use of imprisonment. We set out to analyse how a culture of risk underpins the description, analysis and classification of the offender, and how this use of risk analysis varies from mechanistic applications in areas like bail, to more sophisticated uses in psychological testing and in defining offenders' criminogenic needs. We see the emergence of risk as a key element structuring penal decision-making, operating at different levels in the use of presentence reports, in judicial decisions on sentencing offenders, in assigning offenders to security ratings and treatment programmes in corrections, and in parole decisions relating to release. We also see risk informing community perceptions of safety from particular types of offenders (e.g. sex offenders, suspected terrorists), and how these definitions of risk validate the greater use of imprisonment.

The exploration of penal culture in this book is the outcome of a larger study centred on the Australian Prison Project which was initially funded by the Australian Research Council. As part of that project we had two PhD students engaged in qualitative research on how prisoners construct meanings and understandings of their own experiences both within prison and upon release (Hall 2013, Johns 2013). The work of Hall has explored the contrast between the official discourses of sentencing comments around rehabilitation and reform with the lived experiences of prisoners as they serve out their sentences and their own understandings of imprisonment and reformation. Johns has contrasted the subjective accounts of prisoners of their post-release experiences with contemporary discourses of throughcare, post-release and re-settlement. While not directly incorporated into this book, the work of Hall and Johns has informed our appreciation of the sometimes incommensurability between prisoners' experiences and understandings of the prison experience, and the expectations and understanding of imprisonment held by criminal justice decision-makers, or the community more broadly.

## Conclusion

Imprisonment rates have grown across many jurisdictions over recent decades – most dramatically in countries such as the USA, the UK, Australia and New Zealand. Some European jurisdictions have also seen increases, although the changes have been far less uniform. Our focus in this book is on penal developments in Australia, and the extent to which they reflect or differ from developments elsewhere. The Australian Bureau of Statistics (ABS) estimated that in the decade between 1993 and 2003, the Australian prison population rose by 50 per cent and the rate of imprisonment increased by 22 per cent (ABS 2004). The national prison population continued to rise: between 2000 and 2010, the number of prisoners increased by 37 per cent from 21,714 to 29,700 (ABS 2010a). These developments are not simply attributable to single explanations like rising crime rates, or changes

in sentencing laws. While the increases have occurred in all jurisdictions, the size of the increase has not been uniform across the country – NSW and Queensland in particular have had the highest increases – and the absolute levels of imprisonment vary widely around the country.

There are substantial financial and social costs associated with prison, and those costs are increasing. According to the Steering Committee for the Review of Government Service Provision (SCRGSP 2006), expenditure on correctional services in 2004/2005 was $2 billion. By 2011/2012 it had reached $3.1 billion (SCRGSP 2012). The annual growth rate in expenditure between 2000/2001 and 2004/2005 was 5.5 per cent and was the fastest growing expenditure within the justice area – approaching twice the rate of growth compared to police services (SCRGSP 2006: C1). The social costs of imprisonment are observable in a number of respects. These include the unequal distribution of imprisonment among the most marginalised groups (including those with low income, high unemployment, low education levels, high levels of alcohol and other drug abuse, intellectual disabilities and mental health problems) and minority groups (particularly Indigenous people). The indirect costs of imprisonment for many offenders present dire consequences, resulting in loss of employment and income, loss of housing as well as a breakdown of families and relationships. Many people lose accommodation when imprisoned and become homeless once released from custody; these new problems lead to an increased likelihood of re-offending. Imprisonment of a parent can result in children having to relocate or having to enter into the care of the state – research confirms that these children are much less likely to complete secondary school and are more likely to become homeless, unemployed and come in contact with the criminal justice system. The social costs of imprisonment can also be seen through the inability of the prison to reform or rehabilitate and in its self-reproductive nature: in NSW more than half of current prisoners have previously been imprisoned (ABS 2011a).

It is worth considering prisons in the context of *opportunity* costs, by which we mean the cost of passing up the next best choice when making a decision. If government capital expenditure and recurrent funding is used for building and maintaining prisons the opportunity cost is the value of the next best purpose the funding could have been used for. For example, as an alternative to prisons, government funding could have gone into school or adult education, supported housing, mental health services, drug and alcohol rehabilitation or employment programmes. The choice between various options would be an easier decision if we knew the end outcome. However, we know the significant limitations of prison as a rehabilitative institution and crime and control option. And we do have sufficient information to make informed choices on the best results gained for public expenditure. Various international research has shown that reductions in long-term unemployment, increased school and adult vocational education, stable accommodation, increased average weekly earnings and various treatment programmes will bring about reductions in re-offending (Aos et al. 2006; Brown 2010; Spelman 2000; Weatherburn et al. 2009). And we do know that building

prisons is a comparatively expensive option. For every prison bed we construct we could provide more than 30 school student places.[3]

For reasons that are not wholly clear, Australian criminology has on the whole elided consideration of the place of growing prison use in penal politics and in social trends more broadly (but cf. Brown and Wilkie 2002; Zdenkowski and Brown 1982). One factor that seems to have impeded thinking about the Australian prison in national terms and surveying its influence at the national level is the fact that, unlike either New Zealand or England and Wales, the Australian prison stands atop eight different state or territory systems of criminal law and criminal justice. While the services of the ABS and the Productivity Commission (through its annual Report on Government Services) have enabled Australian criminologists to look at correctional data in state-based and national terms, it has been far more difficult to reconcile the apparently different social, political and cultural contexts within which the Australian prison is embedded and operates. In understanding the development of specific contexts of penality, we turn now to a consideration of the prison and punishment in Australia.

3 Quantity surveyor figures for the mid 2000s indicated that construction costs in Sydney were between $222,000–$268,000 per bed medium security prison; $180,000 per bed for a typical 250-bed hospital in Sydney; and $8,000 per student place for a typical 2 level school in Sydney.