Contemporary Penality in the Shadow of Colonial Patriarchy

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Introduction

Understanding and explaining the rapid increase in the rate of imprisonment in Australia over the past two to three decades is occupying a number of criminologists and legal scholars, not least the Australian Prisons Project group (Baldry et al 2011). One aspect of this investigation is exploring why it is that particular groups of Australians (Indigenous Australians, women and especially Indigenous women) have developed a much higher risk than previously of being caught in the imprisonment cycle over this period. This paper opens a new perspective on this phenomenon by exploring it through the lens of patriarchy and colonialism.

Internationally various explanations have been posited for the increase in penal severity, and have included important new ideas, such as the 'new penology' (Feeley and Simon, 1992), the 'culture of control' (Garland, 2001a) and 'new punitiveness' (Pratt et al, 2005), and an emergent 'carceral state' (Gottschalk, 2008; Social Research, 2007). In reflecting on the US growth in imprisonment, Simon has argued that criminalisation and imprisonment have been used increasingly as a tool of social policy, which has resulted in a process of 'governing through crime' (Simon 2007). There is evidence that increased punishment has been targeted at those defined as high risk, dangerous and marginalised (Baldry et al 2006; Calma 2005; Harrington 1999; Markowitz 2010; NSW Legislative Council 2001). Furthermore, governance through crime has also focused on reducing the risk of crime and thus extended various modes of surveillance into a range of institutions previously outside the criminal justice system, including schools, hospitals, workplaces, shopping malls, transport systems and other public and private spaces. These changes have brought about a transformation in the civil and political order, which is increasingly structured around 'the problem of crime'. One outcome of this has been the reorientation of fiscal and administrative structures to deal with crime and a resultant level of incarceration well beyond historical norms (Simon 2007:6).

The advent of governing through crime, and the rise in penal severity, has been attributed to certain political configurations in some liberal democracies (Simon 2007, Lacey 2008). These include lower levels of public trust in politicians and a new populism, which distrusts 'experts'. Further, there is said to be a public lack of credibility specifically in the expertise of criminal justice professionals and less virtue and public good associated with judicial autonomy: judicial independence is seen as a problem to be contained rather than a basic democratic safeguard. Weaker ideological differentiation between major political parties has resulted in a greater focus on the 'median' voter and the exploitation of fear of crime as a strong consensus concern. There are certainly examples of this phenomenon in Australian states and territories where Liberal and Labor politicians have competed in the use of punitive crime control measures as a potential vote winner.

It has also been argued that in Australia, as elsewhere, a large number of policy and legislative changes over the past 20 years have had negative and disproportionate effects on Indigenous persons, and women who are poor, disadvantaged and racialised, thereby increasing their rates of imprisonment (Australian Prison Project 2009; Pratt et al 2005; NSW Legislative Council 2002; NSW Legislative Council 2001).

These various explanations illuminate the phenomenon of, and go some way to explaining, the growth in the prison population and a changed penality. However, we argue that an analysis drawing on colonial patriarchy provides a new

perspective, particularly in explaining the specificity of the growth in Indigenous and women's imprisonment in Australia – in other words an analysis of colonial patriarchy assists in explaining why it is that certain social groups are identified as high risk, dangerous and marginalised. We argue that penal culture1 is at least partially defined by patriarchal colonial relations. To begin with though, it is necessary to frame this discussion briefly with a consideration of the expansion of the penal estate in Australia over recent years.

The Penal Estate

The Australian Bureau of Statistics (ABS) estimated that in the decade between 1993 and 2003 the Australian rate of imprisonment increased by 22 per cent (ABS 2004). Between 2000 and 2010 the number of prisoners increased by 37 per cent from 21,714 to 29,700 and the rate of imprisonment had increased by a further 15 per cent to 172.4 per 100,000 of the adult population (ABS 2010a:33). This growth demonstrates that the prison population is increasing at a significantly faster rate than the general Australian population. Yet the problem is almost certainly worse than the increasing imprisonment rates would indicate. Census or daily average counts mask the number of people who flow through the prison system each year. As the majority of prisoners (sentenced and unsentenced) are incarcerated for less than 12 months, far more than the 29,700 counted on a census night move through the system. Extrapolations from various data sources suggest around 50,000 persons flow through Australian prisons annually (ABS 2010b; Baldry 2010). The national census picture also masks significant differences between states and territories: the Northern Territory's imprisonment rate is 662.6 whereas Victoria's is 105.5 (ABS 2010a:33).

The situation for Indigenous people in prison has progressively deteriorated. In the 20 years to 2008 Indigenous imprisonment rates rose from 1,234 to 2,492 per 100,000 of population, while non-Indigenous rates were both significantly lower and increased at almost half the rate (ABS, 2008; Carcach and Grant, 1999; Carcach et al, 1999). These increases occurred at a time when governments were responding to the Royal Commission into Aboriginal Deaths in Custody recommendations designed, inter alia, to reduce Indigenous incarceration (Cunneen 2007a). It is clear that punishment in Australia is highly racialised. The two jurisdictions in Australia, which have the highest imprisonment rates (the Northern Territory and Western Australia), are also the jurisdictions with the largest proportion of Indigenous people living within their boundaries. Indeed in Western Australia, Indigenous imprisonment rates are well beyond any meaningful comparison to other rates in Australia: whilst the non-Indigenous imprisonment rate in Western Australia in 2010 was 170 per 100,000 (ABS 2010a), the rate of Indigenous imprisonment (male and female) was 4309.6, and the Indigenous male rate was 7803.5 (ABS 2010b:23). By the first quarter of 2010 the number of Indigenous people imprisoned in Australia had reached 7613 and comprised 26 per cent of the total prison population. The Indigenous rate of imprisonment was 14 times higher than the non-Indigenous rate (ABS 2010b:6).

There has also been a changed environment in our cultural understanding of the appropriateness of gaol for women, reflected in the extraordinary growth in women's imprisonment. In 1983 women formed 3.9% of the Australian prisoner population, in 1993 the proportion was 4.8%, in 2003 it was 6.8% and in 2010 it was 8% (ABS 2010a; Biles, 1984; Walker, 1982-1990). Although the actual number of women prisoners remains small compared to men, their proportion of the total prison population has been increasing. Over the last decade (2000-2010) the number of women prisoners increased by 60% compared with 35% for men (ABS 2010a:16). However, this increase is not uniform across groups of women in Australia, with much of the increase accounted for by the increasing rate of imprisonment of Indigenous Australian women.

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[1] See Baldry et al (2011) for a discussion of penal culture in the Australian context.

The proportion of Indigenous women prisoners increased from 21% of all women prisoners in 1996 to 30% in 2006 and steadied at around that percentage (29.3 per cent in 2010) (ABS 2006, 2010a). The rate of Indigenous women's imprisonment in 2010 was 374 per 100,000 of adult Indigenous females compared with 18 per 100,000 for non-Indigenous females (ABS 2010a:56). Thus the Indigenous women's rate of imprisonment was 21 times higher than the non-Indigenous women's rate. Changing sensibilities about both race and gender have clearly impacted on the propensity to incarcerate Indigenous women. The Australian Aboriginal and Torres Strait Islander Social Justice Commissioner severely criticized the over-representation of Aboriginal people and Aboriginal women in particular, in prison (Calma 2005). Well over a decade ago Cunneen and Kerley (1995:88) had pointed out that the increase in Aboriginal imprisonment had impacted disproportionately on Aboriginal women. The complexity of the intersection between 'race' and gender is shown by the fact that Indigenous women's rate of imprisonment is now more than 50 per cent higher than of the non-Indigenous male rate (ABS 2010a:56).

A closely allied factor in the growth in the rates of imprisonment has been the increase in the rates of imprisonment of people with mental health disorders. This has been a concerning trend across the western world (Harrington 1999). In Australia though, it has been most marked amongst women and Indigenous Australian prisoners (Butler et al 2006). Women with mental health disorders are more highly over-represented amongst the prison population than men and when compared with national norms, with Indigenous women the most highly over-represented (Butler & Allnutt 2003; Indig et al 2010; Tye & Mullen 2006). Indigenous Australians and women with dual diagnosis and co-morbidity (complex needs) in NSW prisons have higher numbers of offences and convictions but shorter sentences and incarceration periods than persons without these diagnoses and cycle in and out of prison quickly (Baldry, Dowse, Snoyman, Clarence & Webster 2008). There may not be a direct correlation between the closure of large psychiatric institutions and this rise in the rate of persons with mental health disorders in prison, but the link is well established (Harrington 1999).

It is important to recognise the cycle of self-reproducing higher imprisonment rates: although the various measurements used are recognised as flawed, it appears that between 35% to 41% of sentenced prisoners will be re-incarcerated in two years and around 66% to 70% re-incarcerated at some time in their lives (ABS 2010c, Payne 2007). The same phenomenon looked at from a different perspective shows that almost half (49%) of non-Indigenous prisoners, and almost three-quarters (74%) of Aboriginal and Torres Strait Islander current prisoners had a prior adult sentence of imprisonment (ABSa 2010:49). Furthermore, the situation is likely to be considerably worse than these static census figures suggest, particularly for Indigenous prisoners who tend to move in and out of the prison system relatively frequently. Indigenous prisoners are more likely to be re-imprisoned on multiple occasions, and many more Indigenous people will be imprisoned for short sentences over a twelve month period than the annual census figure would indicate (Lind and Eyland 2002). Women also form a higher proportion among those on remand and serving short-term sentences, than they do in the overall prison population.

We know then that there is a likelihood of multiple imprisonment experiences over a lifetime particularly for Indigenous people, that simultaneously there is a greater proportion of Indigenous people and women generally among those serving short sentences and that their rates of imprisonment have grown far faster than non-Indigenous people. They also have greater difficulty upon release from prison, in securing safe and secure housing, and appropriate assistance with mental health and drug and alcohol problems, and often continue to be subject to high levels of surveillance and control in a merged community-criminal justice space (Baldry 2010).

Although a number of vulnerable groups, as already noted, have experienced a rapid rise in their rates of imprisonment, we now focus on Indigenous Australians and Indigenous women in particular, to draw out our argument.

Penal Modernity and Postcolonial Penality

The rapid increase in imprisonment rates, the excessive imprisonment of Indigenous Australians and the surveillance and control impositions just described have been explored through the development of new ideas around a 'culture of control', 'penal excess' and the 'new punitiveness'. These refer to aspects of severity and spectacle in punishment, which seem contrary to the values underpinning penal modernity. Three strikes sentencing and associated longer prison terms, special offender laws (for example aimed at sex offenders), pre-trial detention (remand) and post-sentence confinement, surveillance, compliance and breaching seem to lie outside of, or at least run counter to penal modernity, with its liberal values of parsimony and proportionality, and desired outcomes of rehabilitation.

However, do changes to penal modernity adequately explain the gendered and racialised outcomes of the current increases in penal severity? Why is it that Indigenous people and women have seen their imprisonment rates increase more rapidly than other groups? Discourses of modernity have been criticized by post colonial theorists for their Eurocentric bias and lack of consideration of the role of colonialism (Loomba 1998). More specifically, the application of postcolonial theory to criminology and penology may require us to re-evaluate the way we conceptualise particular problems. For example, the 'mass incarceration' argument (Garland 2001b) rests on an assumption there was a rupture or break between post war liberal welfare policies and the more recent prioritisation of retribution and incapacitation. Yet Blagg (2008) indicates that this periodisation does not necessarily transfer to colonial settings where Indigenous peoples were never fully included as citizens in the postwar welfare state. Following Said, Blagg (2008) argues for a 'contrapuntal' dynamic that stresses continuities in control over marginalised peoples, and an acknowledgment that radically divergent and bifurcated practices based on race, gender and colonial status have operated and continue to operate within criminal justice systems. The question for us is how do we understand racially bifurcated modalities of punishment through the lens of gendered colonial relations?

Drawing on an analysis of the British in colonial India, Brown (2002:403) has convincingly argued that the idea and practices of penal excess were central to the constitution of the colonial state. He demonstrates that what are seen as contemporary shifts in penal modernity towards penal excess are in fact well established aspects of penal modernity which were fundamental to the development of a modern colonial state.[2] Brown (2005) has argued that apparently new trends in penality and the relationship between the individual and the state hark back to a colonial model of state-subject relationship. The 'logics and rationalities of colonial power are not separate from and antagonistic to those of modern state formations but are indeed available to them' (Brown 2005:44). We take this as a starting point for considering how contemporary penal culture, and in particular its severity and excess directed against particular subjects, can be understood within the specific dynamics of colonialism. Indeed we argue further that a colonial mode of penality has underpinned racialised/gendered crime control in late modern states with their internal colonised Others.

Following Chatterjee (1993) and Brown (2005), we are interested in how the 'rule of colonial difference' has enabled the

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[2] Finnane (1997: 35) also notes that the latter day large scale incarceration of Aboriginal people in Western Australia was 'conditioned' by the historical experience of 19th century Aboriginal imprisonment in that State.

state to represent the Other as inferior and radically different, and through the criminal justice system maintain a level of surveillance, intervention and control outside of, and in contradistinction to the 'universal' rights of liberal subjects. Chatterjee argued that the 'rule of colonial difference' operated to limit participation in governmental and civic life. According to Chatterjee (1993:20), the 'most obvious mark of colonial difference' was race and this mark was used to limit the application of universal and non-arbitrary rights. We consider in more detail below the rule of colonial difference in the context of penality, and in particular how race and gender combined to differentiate modalities of punishment. But first we need to incorporate another element, that of patriarchy, into the framing of colonial penal relations. This reconceptualising, we argue below, provides a deeper dimension to our analysis of the turn, in contemporary penality, to excessive imprisoning of vulnerable populations.

Patriarchal Colonialism

Here we follow Lerner's (1986) argument. We take it that early elemental patriarchy, the ownership and subjugation of women and children in familial contexts by dominant men in the family and then the state, was socially constructed as a means to achieve and maintain power[3], but that patriarchy is not, by any means, simply male dominance over females. This social arrangement in the ancient near eastern world, argued Lerner (1986:36-53), was supremely successful, adaptive and persistent, transforming into an increasingly sophisticated ideological paradigm and blueprint for the development of institutions and ideologies such as patriarchal religion, the hierarchical state, classism, racism and, most relevant to the matter at hand, colonialism. The implication of Lerner's thesis, as well as work by others such as Mies (1998), Jaimes*Guerrero (2003) and Bannerji (2001), is that colonialism was not just tightly affiliated with patriarchy, but that it was and is an economic and political manifestation of patriarchy. Following the patriarchal paradigm, colonialism assumes ownership of and subjugates those being colonised; imposes a class structure in which the colonisers occupy the top rungs of the class ladder and the colonised the lower and bottom rungs; assumes ownership of all the colonised resources; deems the colonised culture, language and beliefs as inferior to the coloniser's; and imposes the coloniser's governance, laws and religion on the colonised. British colonialism also included the form of patriarchal subjugation of women particular to British society of the time. This patriarchal colonialism (Jaimes*Guerrero 2003) was transported, along with the convicts, to Australia by the invading British in 1788. Indigenous Australians were progressively subjected to this new social, economic and political structure from the moment Captain Arthur Phillip planted the colony at Sydney Cove.

Patriarchal colonialism as an ongoing historical and political process required the removal and remaking of Indigenous peoples. Institutional systems, both formal, such as the prison, the British law, the military, the church, the orphanage and the mission and informal such as the nuclear male headed family and the British class system, were part of the colonising package through which non-Indigenous and Indigenous alike were socially and culturally constructed (Green & Baldry 2002). Aboriginal peoples were variously murdered because they stood in the way of colonial acquisition, herded onto missions as irrelevant to the colonising project and so expendable, or relegated to the lowest servant class as useful workers. Indigenous women, experiencing the double jeopardy of being female and colonised (Payne 1992:68), suffered not only in these but also in other ways with their sexuality commodified via rape and sexual servitude (Chesterman & Galligan 1997).[4] Legal institutions both civil and particularly criminal were fundamental to defining and enforcing patriarchal colonial relations. Law defined who was and was not Aboriginal and delimited a range of economic (eg who could work and for what

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[3] This is of course a gross oversimplification, but due to space, Lerner's theory cannot be rehearsed here.
[4] This brief appraisal of the colonial project in Australia follows Jaimes*Guerrero's (2003) analysis of the British colonization of North American Native peoples as fundamentally patriarchal in nature.

wages), social (eg who needed to be institutionalized, who could live in which area, who could marry) and citizenship rights (eg who could vote, who was entitled to social security). The law enforced these patriarchal colonial relations through civil and criminal penalties. British colonial law constituted the white mythology that governed a gendered and colonial order; that placed Indigenous men and women in a particular relationship to the colonial state and colonial civil society.

Modalities of confinement and punishment

These patriarchal colonial understandings and constructions of Aboriginality and gender have permeated, from the beginning, the development of institutional forms of control of Indigenous Australians, including that of penality. Penality, in a variety of institutional forms, has been a central part of the operation of the colonial state in its governance of Indigenous peoples. As Rowley (1972:123) famously remarked in the early 1970s, 'it is still true… one can be incarcerated either for crime or for being Aboriginal'. Separate modes of confinement and punishment were introduced and justified on the basis of the coloniser's 'superior' race and 'rightful dominance' of the colonised race. While differing and often competing definitions of 'race' have operated across the broad historical terrain of European domination of Australia (McGregor 1997), racial discourses on Aboriginality have remained central to penality (see also Purdey 1996; Hogg 2001). These racial discourses have been and remain gendered: Indigenous women were separated from other women because of perceived biological and culturally–defined racial differences: sexually promiscuous; incompetent mothers; and so forth.

Racial understandings, founded in colonial categorisations of difference and inferiority, played a constitutive role in defining the appropriateness of certain types of punishment. For example, public execution of Aboriginal offenders continued for decades after their cessation for non-Aboriginal offenders. Aboriginal onlookers were gathered to watch the events, and these were meant as salutary spectacles of punishment. Similarly the extended use of physical punishments and restraints (lashings, floggings, chaining) for Aboriginal offenders continued until well into the twentieth century, as did police punitive expeditions (Cunneen 2001). Modernity and the development of modes of punishment that disavowed corporal and capital punishment were seen as less suitable for Indigenous people because of their perceived racial characteristics (Finnane 1997: 115). Aboriginal people appeared to be well over-represented in death sentences (Finnane 1997: 37, 129-130). Senior members of the judiciary (such as Judge Wells from the Northern Territory Supreme Court) viewed flogging and execution as the most appropriate forms of punishment for Aboriginal people certainly until well into the 1930s (see Markus 1990; Cunneen 1993).

The formal and informal segregation of all institutions (schools, hospitals, employment, places of entertainment) along racialised lines was common place and applied also to places of detention, such as Rottnest Island (Finnane 1997:36). Historically these different modes of punishment were justified by (and reproduced) racialised understandings of Aboriginal difference, with the courts freely pronouncing on the degree to which individual Aboriginal offenders had reached a particular stage of civilization. After an extensive review of criminal cases involving Aboriginal people, McCorquodale argued,

> [T]he courts seem to have accepted that there is a continuum which distinguished Aboriginals in various stages of sophistication... there is a pronounced judicial perception that Aboriginals are different from whites in a way that disadvantages Aboriginals... The courts have therefore adopted, as a proper test of sentencing, the extent to which an Aboriginal's mode of life and general behaviour approaches that of a white person (1987:43-44).

The development of 'protection' legislation from the end of the 19th century saw many Indigenous individuals and

communities, particularly those who were seen as unable to demonstrate the level of 'civilisation' required to exercise citizenship rights, segregated on reserves and missions. Under the protection legislation, reserves and missions administered their own penal regimes outside of, and essentially parallel to, existing formal criminal justice systems (Cunneen and Libesman 1995). Other semi-formal processes of racialised justice abounded through curfews and segregation (Cunneen and Robb 1987), while child removal policies created further generations of institutionalized Indigenous people (NISATSIC 1997). These policies and practices reflected various racial assumptions about Indigenous people, some built on 'science' like eugenics, others reflecting popular prejudices about the incapability of Indigenous people to live like civilized white folk.

Aboriginal women were subjected to criminal law and penal sanctions in both similar and different ways to Aboriginal men were in the early colonies.Both were for example governed by various nineteenth century protection legislation. Aboriginal women were also subjected to colonial patriarchal control by being locked up in disproportionate numbers in women's 'factories' and in mental asylums and punished further by having their children removed (Baldry 2010; Green & Baldry 2002). The removal of Indigenous children in the early part of the twentieth century relied on views that Indigenous parenting was negligent and, in particular, that Indigenous female sexuality was a threat that needed to be controlled by targeting pubescent girls (Goodall 1990:7). Still today Aboriginal women identify the removal of children through child protection legislation as a form of punishment (NISATSIC 1997).

Nowhere provides a better example of patriarchal-colonial state control of females, Aboriginal women in particular, via institutional means and the conflation of classism, racism and sexism than the Parramatta Female Factory and Girls Home in NSW (Parragirls undated). It began in the first decades of the colony as a welfare institute for convict women and their children; quickly became the Parramatta Female Factory where convict women were incarcerated and required to work (similar institutions were built around the country) but were also subjected to almost constant rape; morphed into a Lunatic asylum in 1848 and incarcerated women over its 130 years, a large number of them Indigenous (see Haskins 2001 regarding declaring Aboriginal women insane in order to institutionalise and control them). Next door to the Female Factory an orphanage was built in 1841 in which girls, many of them stolen Aboriginal children, were raised in punishing circumstances by the Catholic Church. In 1887 the orphanage became an Industrial School for Girls (a euphemism for a girls' detention centre) later known as the Parramatta Girls Home, only to be taken over in 1980 by the Department of Corrective services as a women's prison. This one geographical location and institution with its many manifestations, exemplifies the various institutional forms used to control Indigenous, poor, disadvantaged women and those with mental and cognitive disability and shows the elision of welfare and psychiatric institutions, and prisons.

That, from the beginning, most white colonists perceived and reported on Aboriginal societies' gender relations through their own sexist, classist cultural framework, has been established (for example see Berndt 1981; Gale 1974). Paternalistic as well as brutal colonial attitudes to Indigenous Australian women resulted in them being cast as the lowest on the class ladder with expectations of submissive servitude when in white society. These views linger in contemporary Australia. Dodson for example, noted that one justice in Western Australia stated that he sentenced Aboriginal women to terms of imprisonment to protect their welfare. 'Sometimes I sentence them to imprisonment to help them... They get cleaned up and fed then' (Dodson 1991: 136). The significantly greater extent to which Aboriginal women are brought before the courts and sentenced to imprisonment for minor offences compared with non-Aboriginal women maintains a view of Aboriginal women as a criminal class.

The Civil Rights Turn

The 1960s saw the repeal of significant sections of discriminatory state and territory legislation as part of the general move towards assimilation and integration, policies that were argued to be continuing the colonisation of Aboriginal Australians (Green & Baldry 2002). Laws, which enabled Aboriginal men in Western Australia and South Australia to be whipped for breaches of the criminal law or for false statements, were repealed. In the Northern Territory the criminal code was amended in 1968 so that Indigenous people convicted of murder could receive a 'just and proper' penalty instead of the death sentence.

This civil rights era also saw the referendum in 1967 that overwhelmingly approved changes to the Australian Constitution confirming the power of the Commonwealth to make laws for Australian Aboriginal people and their inclusion in national census. The 1967 referendum reflected a national mood for full citizenship rights for Indigenous people. The ten years following the referendum saw the abolition of Aboriginal Welfare Boards and the closure or handing over to Indigenous communities of the many dozens of missions and institutions across the country, for example the Cootamundra Girls Home, that had confined and detained them for decades (National Australian Museum Canberra undated).

During the 1960s – 1980s the process of the deinstitutionalisation of long term psychiatric patients gained pace along with the closure of psychiatric institutions and later of institutions for those with intellectual disability in Australia. Psychiatric hospital beds decreased from 281 per 100,000 in the 1960s to 40 per 100,000 in the 1990s (Petersen, Kokanovic & Hansen 2002:122) but without the concomitant support, particularly for the most vulnerable of these persons – Indigenous peoples, the poor and homeless – being established in the community.

By the 1990s the patriarchal colonial institutions that had confined and controlled Indigenous Australians had been dismantled but at the same time, mechanisms of colonial surveillance derived from more than a century and a half of colonisation (Cunneen 2001) did not disappear, rather they changed their focus and methods. Based on her research in Western Australia, Purdy (1996:414) argues that as the disciplinary regimes of the reserves, settlements, missions and pastoral stations were replaced by assimilation in the 1950s there began a significant increase in the imprisonment rates of Aboriginal people. In addition the movement of Indigenous people into urban areas brought an intensified focus to non-Indigenous racial concerns. From the limited national evidence on imprisonment levels from the early 1970s, it would appear that Indigenous people were increasingly appearing in the mainstream prison system (Hogg 2001), while for Indigenous children and young people, juvenile justice and child welfare played increasingly important interventionist roles structured by both race and gender (Carrington 1993, Cunneen 1994).

As we have identified elsewhere a penal expansionism was underway, beginning from the 1980s and picking up speed from the 1990s onwards, which was to see profoundly negative impacts on Indigenous imprisonment rates (Baldry et al 2011). Sentencing was and is one of these latter day means by which greater levels of control are imposed on Indigenous Australians, funnelling them into the prison in significantly greater proportions than non-Indigenous Australians.

Sentencing and Aboriginality

In contemporary Australia, understandings of both sentencing and punishment have been enlarged through concepts of race, gender and culture. Some of these understandings might be seen as positive affirmations of Indigenous cultures,

others may be seen largely in a negative light where being Indigenous brings with it certain disadvantages. An example where the consideration of the Aboriginality of an offender in sentencing is largely based on a set of negative characteristics is the Fernando principles (R v Fernando [1992] 76 A Crim R 58 at 62-63). In the Fernando case Justice Wood found that the Aboriginality of an offender does not necessarily mitigate punishment but may explain the particular offence or the circumstances of the offender. Wood J. noted that 'the problems of alcohol abuse and violence... to a very significant degree go hand in hand within Aboriginal communities' (R v Fernando at 62). The endemic problems in Indigenous communities including poor self-image, absence of education and work opportunities and 'other demoralizing factors' need to be recognized by the court when sentencing. The principles, and their interpretation in later case law, establish a hierarchy of Aboriginality, at least to the extent that they are seen as more appropriate in their application to Indigenous people from rural or remote areas - a familiar trope in judicial pronouncements on Aboriginality (see Behrendt, Cunneen and Libesman (2009) for more recent cases, and Cunneen (1993) for earlier cases referring to this well rehearsed distinction).

The Fernando principles also established that for an Indigenous person,

who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality (R v Fernando at 63).

On this point the court was reiterating, perhaps in more humane terms, what had been a common understanding and practice since the early days of the colony - that specific forms or modalities of punishment were applicable to Indigenous offenders. We materialize this cultural understanding of penality today in a variety of ways, one of which is through de-facto Indigenous prisons, such as the Broome prison in Western Australia or through self-conscious attempts on the part of correctional services such as the Indigenous prisons and facilities at Balund-a and Yetta Dhinikal in New South Wales.

In the realm of penality not all understandings of Aboriginality are negative. The growth in Koorie, Nunga and Murri courts, and circle sentencing courts over the last decade (Marchetti and Daly 2007) are the outcome of Indigenous activism and official accommodation. They provide an opportunity for Indigenous people to be involved in the sentencing process, albeit at least at a formal level on the terms set by the government and the judiciary. Importantly, punishment is understood as an outcome of decision-making by judicial officers and non-judicial Indigenous members of the court. In this context, Indigenous culture is seen as a positive contributor to the reform of Indigenous offenders.

No matter the accommodations made, the results of these initiatives over the past fifteen years have not halted the increase in the rate of Indigenous imprisonment, as detailed early in this article. Part of the reason for this is that they are essentially peripheral to the workings of the mainstream criminal justice system – with comparatively very few Indigenous people actually appearing before Aboriginal sentencing courts. And the theories posited to explain the broader increases in the prison population, also outlined earlier, do not explain the much greater growth in imprisonment rates of Indigenous and women prisoners compared with non-Indigenous and male rates. To shed light on this we come back to the pervasive ongoing effects of patriarchal colonialism.

Contemporary Penal Politics and the 'NewBarbarism'

A useful way of considering the ongoing effects of patriarchal colonialism is to look at various ways of considering the problem of violence in Aboriginal communities. Within the dominant penality, there is little understanding that the violence in Aboriginal communities can be 'sourced in the invasion and colonisation of Australia... [that] violence is inherent in the colonial project' (Watson 2007:97). Indigenous perspectives (there are clearly more than one) on violence against women are largely based on different understandings and explanations for the violence, and demand differing law and policy interventions. In contrast, the history of rape and frontier violence is absent from contemporary penal approaches to violence in Aboriginal communities. Indeed, Indigenous law is presented as part of the problem of violence. Indigenous women are presented as victims, and Indigenous men as inherently violent, thus confirming 'the superiority of white men' (Watson 2007:102).   By way of comparison, Indigenous perspectives emphasise self determination and empowerment, community development and capacity building as aspects to dealing with domestic and family violence. Further, approaches that acknowledge the links between colonial experiences of violence, and contemporary approaches that emphasise individual and collective healing are paramount.

It is also worth reflecting here, on what has been referred to as the 'new barbarism', which presents a view of Aboriginal culture as a largely worthless male-dominated collection of primitive beliefs (Cunneen 2007b), evidence of the continuing pervasiveness of patriarchal colonial consciousness. The NT Emergency Response (the Intervention) as a governmental legislative and policy response to violence against women and child abuse brought together particular racialised and gendered understandings of Aboriginality: 'traditional' Aboriginal men were particularly to blame for abuse and violence, and Aboriginal women were seen as passive and hapless victims. Presented as a response to family violence in Indigenous communities, the Howard Government's Crimes Amendments (Bail and Sentencing) Act 2006, introduced just prior to the Intervention, restricted the courts from taking customary law into consideration in bail applications and when sentencing. The legislation clearly draws what is seen to be an incontrovertible link between Indigenous culture and gendered violence. As Moreton-Robinson (2009:68) has noted the 'impoverished conditions under which Indigenous people live [are] rationalised as a product of dysfunctional cultural traditions and individual bad behaviour' and it is Indigenous pathology 'not the strategies and tactics of patriarchal white sovereignty' which is to blame for the situation of violence and abuse.

The Intervention is also a clear example of Chatterjee's (1993) notion of the rule of colonial difference. Aboriginal people in the NT are placed outside the framework of civil society because of their racially-constructed difference. Their most important legal protection against racial discrimination, the Commonwealth Racial Discrimination Act 1975, was suspended by parliament to allow the racially discriminatory aspects of the Intervention to occur without challenge to the courts. In a further sign of Aboriginal removal from civil society, the Australian military was used to support the Intervention, which itself was based on criminalization and extensive forms of surveillance and control over a range of matters from medical records to school attendance to social security entitlements. A consistent criticism of the intervention has been its clearly neo-paternalistic approach and suspension of human rights (Altman 2007).

In this context it is not surprising that we have witnessed a new level of prison based state punitiveness. In the years following the Intervention imprisonment rates grew by 12 per cent between 2008 and 2010 (ABS 2010d:12). By way of contrast the NT is well out of step with the rest of the nation in its limited use of non-custodial, community-based corrections. Nationally there are nearly twice as many people on community-based correctional orders compared to the number of persons in prison. In the NT there are almost the same number of people in prison as there are in community-corrections.

Meanwhile as imprisonment rates in the NT have increased, the use of community-correctional orders has actually declined (ABS 2010d). The use of imprisonment in the NT remains a normalised response to Indigenous people and is constantly re-invented as an appropriate response to government identified 'crises'.

Conclusion: Maintaining Control

In all the examples above we are concerned to explicate the way the institutional frameworks of sentencing and punishment are imbued with cultural meanings and understandings of Aboriginality and continue to be informed by but also struggle with the ongoing influence of colonial patriarchy.

We have demonstrated the unbroken chain from 1788 into the twenty-first century, of discriminatory institutional methods of control of Indigenous Australians, with an emphasis on various forms of detention and punishment. We suggest that the rate of detention of Indigenous Australians has always been very high, but that a variety of different institutions not just the prison, have, in the past, been used and used explicitly, differentially and exclusively to exert control and to punish. Aboriginal girls' and boys' homes, mental asylums, missions, were all quasi prisons, using force, the police and legislation to detain Aboriginal people within their boundaries and segregate them from the rest of the community. When these institutions began to close – the missions and 'homes' following both changes in government policy towards assimilation and integration in the postwar period, the challenge of Indigenous claims to civil rights during the 1960s, and the psychiatric asylums over the 1960s to the 1980s with the deinstitutional movement – these methods of control were lost. It is, we argue, no coincidence that the rates of Indigenous Australians, and of Indigenous women in particular, being imprisoned over the past 30 years, have risen exponentially.

This increase in Indigenous imprisonment appears to be not the result of increasing crime, but rather, of more frequent use of imprisonment (Fitzgerald 2009), something the noted increases in cultural expressions and recognitions of Aboriginality have done little to ameliorate. We have argued in this paper that one understanding and explanation of this use of the prison in contemporary Australia is through the continuing pervasive effects of colonial patriarchy. As the NT example attests, civil and criminal law continue to be integral to the constitutive processes of patriarchal colonialism – as indeed they have been, in various guises, from the earliest days of colonisation. However, in recent decades we have seen a reconfigured Australian penality which appears in the foreground of patriarchal colonial relations. To this extent, the church missionary and the reserve superintendant have been replaced by the correctional centre manager as a key figure in governing Indigenous people.

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