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# STEMMING THE TIDE OF ABORIGINAL INCARCERATION

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## Abstract

Western Australia's prison population has the highest rate of Aboriginal over-representation in Australia. Research on the criminogenic effect of imprisonment suggests that the use of imprisonment as a deterrent to future offending is not empirically supported and that imprisonment may in fact contribute to further offending. Consequently, this article explores theoretical debates surrounding penalty as a way to inform alternative crime control strategies to imprisonment. It will be argued that any strategy to reduce Aboriginal imprisonment rates could benefit from a perspective that views Aboriginal imprisonment as a manifestation of Aboriginal resistance to settler colonial dominance.

## I INTRODUCTION

Prison terms are often justified on the basis that imposing harsh sentences on offenders will deter them from reoffending. However, research tends to suggest that imprisonment as a deterrent to subsequent criminal behaviour may in fact be counterproductive and contribute to further offending, which in turn leads to further imprisonment.<sup>1</sup> In particular, research has found that harsher prison conditions over the course of a sentence may in fact lead to more violent reoffending and that increasing the length of prison terms has no effect in terms of reducing crime.<sup>2</sup>

Research of this ilk has particular relevance for Aboriginal offenders given their high rates of violent offending and high recidivism rates,<sup>3</sup> as well as their chronic over-representation in Australian prisons, particularly in Western Australia. Western Australia has consistently shown a higher imprisonment rate than the national average (265 out of 100,000 adult population on 30 June 2014 against 186 nationally),<sup>4</sup> and it has the highest rate of Aboriginal over-representation in prisons.<sup>5</sup> With adult Aboriginal offenders 18 times more likely to be imprisoned than the dominant population in Australia and the Aboriginal juvenile offenders' detention rate 53 times higher than for their non-Aboriginal counterparts (which is double the

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<sup>1</sup> See Anthony Doob, Cheryl Webster and Rosemary Gartner, 'Issues Related to Harsh Sentencing and General Mandatory Minimum Sentences: General Deterrence and Incapacitation' (Research Summaries Compiled from *Criminological Highlights*, Centre for Criminology and Sociological Studies, University of Toronto, 14 February 2014); Donald Green and Daniel Winik, 'Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders' (2010) 48(2) *Criminology* 357; Karen Gelb, Geoff Fisher and Nina Hudson, 'Reoffending Following Sentencing in the Magistrates' Court of Victoria' (Paper, Sentencing Advisory Council, Victoria, June 2013).

<sup>2</sup> Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' (2011) (Paper, Sentencing Advisory Council, Victoria, 18 April 2011); Wai-Yin Wan, Steve Moffatt, Craig Jones and Don Weatherburn, 'The Effect of Arrest and Imprisonment on Crime' (Crime and Justice Bulletin No 158, NSW Bureau of Crime Statistics and Research, Feb 2012).

<sup>3</sup> Don Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014).

<sup>4</sup> Australian Bureau of Statistics, *Prisoners in Australia* (Cat No 4517.0, 2014).

<sup>5</sup> *Ibid.*

Australian average over-representation rate of 26),<sup>6</sup> reducing Aboriginal incarceration rates in Western Australia is of urgent concern.

But how do you stem the tide of Aboriginal incarceration? The answer will only come in understanding the factors that lead to the imprisonment of Aboriginal men, women and children in Australia, but this is very much contested terrain. The factors that lead to high rates of Aboriginal imprisonment, and how best to address this problem, is an issue that divides criminologists within Australia. In broad terms, there are those who implicate the criminal justice system for its discriminatory processes or ‘systemic bias’<sup>7</sup> and those who instead emphasise the higher rates of Aboriginal offending, particularly violent offending and higher levels of recidivism.<sup>8</sup>

So whilst this article is mainly concerned with understanding why the imprisonment rates for Aboriginal men, women and children are so high, it also seeks to explore that enquiry as part of a larger commentary on emerging debates within the field of criminology. This article is sympathetic to the approach taken by authors such as Cunneen and Rowe,<sup>9</sup> Broadhurst,<sup>10</sup> Blagg,<sup>11</sup> and Anthony,<sup>12</sup> who have theorised that Australia’s relationship with Aboriginal persons is one founded on a colonialist project of governance, discipline and control, with high imprisonment rates a possible manifestation of Aboriginal resistance to settler colonial dominance.

As settler colonial penal policy has sought to legitimise its application of penal practice through constructing the profile of the ‘Aboriginal offender’, this article also examines the recent growth in positivist criminology research surrounding Aboriginal offending which has opened new areas of knowing the Aboriginal offender through criminogenic risk factors. Knowing the Aboriginal offender, however, is only one aspect of the inquiry, the other one that must be undertaken is an enquiry into the functions of punishment, more particularly imprisonment. Whilst there are a number of legal principles justifying a term of imprisonment, the focus of this article will be on the principle of deterrence, in light of the weight given to both specific and general deterrence by judicial officers when handing down sentences of imprisonment. If imprisonment, as suggested by the research, does not reduce further offending, then the larger question that needs to be answered is why it is so readily used as a crime control strategy. To answer this question will involve an examination of whether the interplay between politics, public opinion and the media has an influence on increased imprisonment rates.

To stem the tide of Aboriginal incarceration, it is argued, requires an understanding of the broad social patterns of unlawful behaviour that results from social exclusion, given it is a major

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<sup>6</sup> Amnesty International Australia, *A Brighter Tomorrow – Keeping Indigenous Kids in the Community and Out of Detention in Australia* (2015) <[http://www.amnesty.org.au/resources/activist/A\\_brighter\\_future\\_national\\_summary.pdf](http://www.amnesty.org.au/resources/activist/A_brighter_future_national_summary.pdf)>.

<sup>7</sup> Chris Cunneen, ‘Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues’ (2006) 17(3) *Current Issues in Criminal Justice* 329; Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press, 2008).

<sup>8</sup> Weatherburn, above n 3.

<sup>9</sup> Chris Cunneen and Simone Rowe, ‘Changing Narratives: Colonised Peoples, Criminology and Social Work’ (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 49.

<sup>10</sup> Roderic Broadhurst, ‘Crime and Indigenous People’ in A Graycar and P Grabosky (eds), *The Cambridge Handbook of Australian Criminology* (Cambridge University Press, 2009) 256.

<sup>11</sup> Blagg, above n 7.

<sup>12</sup> Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013).

determinant of incarceration and a fundamental tenet of an incarceration philosophy.<sup>13</sup> It follows that any initiatives to reduce incarceration may benefit from relying on a social inclusion approach.<sup>14</sup>

## II THEORIES BEHIND THE GROWTH OF IMPRISONMENT RATES

A number of theories have been offered to explain the recent growth in imprisonment rates experienced not only in Australia but also in other western democracies. Garland, for instance, claims that western democracies such as Britain and America, have witnessed a ‘punitive turn’ which has resulted in them entering a period of ‘mass imprisonment’.<sup>15</sup> This is consistent, as Simon argues, with the broader political agenda of the neo-liberal state moving away from rehabilitative aims towards a culture of ‘governing through crime’.<sup>16</sup> Wacquant also sees neo-liberalism as an explicit political project, which led to a ‘punitive state’.<sup>17</sup> For Wacquant, the overpopulation of prisons and attendant lack of resources towards rehabilitation and meaningful work within prisons is reflective of the welfare state being transplanted by the neo-liberal political project.<sup>18</sup> Prisons are simply an exercise in ‘warehousing’. An example of prisons, as Mathiesen highlights ‘bifurcating society between the productive and unproductive’.<sup>19</sup> Further, it is argued that neo-liberal societies tend to have higher imprisonment rates because they follow social and economic policies that lead to exclusionary cultural attitudes towards deviant and marginalized fellow citizens.<sup>20</sup>

Baldry and Cunneen note that, whilst the rapid increase in imprisonment rates have been explored through a number of theories, such as the ‘culture of control’, ‘penal excess’, the ‘new punitiveness’ and ‘governing through crime’, they criticise these theorists for their Eurocentric bias and failure to include the role of colonialism in their analysis.<sup>21</sup> Both Baldry and Cunneen,<sup>22</sup> and Blagg<sup>23</sup> argue that Garland’s ‘punitive turn’ thesis, which rests on an assumption there was a rupture between post-war liberal welfare policies and the more recent prioritisation of retribution and incapacitation, may not be relevant to settler countries such as Australia. This is because, they argue, there has been an unbroken chain from 1788 until now, of discriminatory institutional methods of control of Aboriginal Australians, with an emphasis on various forms of detention and punishment.<sup>24</sup>

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<sup>13</sup> Jill Guthrie, Michael Levy and Cressida Fforde ‘Investment in Prisons: An Investment in Social Exclusion? Linking the Theories of Justice Reinvestment and Social Inclusion to Examine Australia’s Propensity to Incarcerate’ (2013) 1(2) *Griffith Journal of Law & Human Dignity* 254.

<sup>14</sup> See Roy Baumeister and C Nathan DeWall ‘The Inner Dimension of Social Exclusion: Intelligent Thought and Self-Regulation Among Rejected Persons’ (2005) 88 *Journal of Personality and Social Psychology* 589.

<sup>15</sup> David Garland, *The Culture of Control: Crime and Social Order In Contemporary Society* (Oxford University Press, 2001) 142; David Garland, ‘The Meaning of Mass Imprisonment’ 3 *Punishment and Society* 5-7.

<sup>16</sup> Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, 2007) 49.

<sup>17</sup> Loic Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press, 2009) 5.

<sup>18</sup> Loic Wacquant, ‘Deadly Symbiosis: When Prison and Ghetto Meet and Mesh’ (2001) 3(1) *Punishment & Society* 95, 97.

<sup>19</sup> Thomas Mathiesen, *Prison On Trial* (Waterside Press, 2006) 138.

<sup>20</sup> Michael Cavadino and James Dignan, *Penal Systems: A Comparative Approach* (Sage, 2006) 23.

<sup>21</sup> Eileen Baldry and Chris Cunneen ‘Contemporary Penality in the Shadow of Colonial Patriarchy’ (Paper presented at the 5th Annual Australian and New Zealand Critical Criminology Conference, Rydges Hotel, Cairns, 6-7 July 2011).

<sup>22</sup> *Ibid.*

<sup>23</sup> Blagg, above n 7.

<sup>24</sup> Baldry and Cunneen, above n 21; Blagg, above n 7.

For Blagg, understanding Aboriginal incarceration therefore requires an analysis that must be mindful of the historical role of the criminal justice system as being the enforcement arm of colonial authority.<sup>25</sup> A key strategy of the colonisation process is the classification of Aboriginal people as ‘criminal’, as well as their increasing criminalisation and punishment.<sup>26</sup> Blagg warns that, unless the effects of colonization are considered, the depths of Aboriginal people's sense of alienation from, and frustration with, the existing criminal justice system will never be understood.<sup>27</sup> A real understanding of colonisation must therefore also include an analysis of how the policy of assimilation has contributed to the criminalisation of Aboriginal people.<sup>28</sup>

Assimilation included the repeal of many laws that under the ‘protection era’<sup>29</sup> had oppressed Aboriginal people and limited their rights, now giving them access to association with non-Aboriginal people in towns and cities.<sup>30</sup> As a consequence, Aboriginal people increasingly moved out of settlements and into towns, placing them under the radar of urban policing. It has been noted that this led to a steady increase in imprisonment numbers, given vagrancy and public drinking laws had a particularly punitive impact on Aboriginal people.<sup>31</sup>

Colonialism therefore, with its history of dispossession of Aboriginal communities, provides a possible explanation for the over-representation of Aboriginal persons in the criminal justice system. Aboriginal imprisonment could be viewed as part of the political process that has direct historical continuity with the processes of colonisation and dispossession and the establishment of colonial Australia as a penal colony.<sup>32</sup>

However, Tubex argues that it is very difficult to assess the exact relationship between colonist practices and over-representation of Aboriginal people in the criminal justice system.<sup>33</sup> Difficulties arise, she argues, due to other prevalent factors that emerged at the conclusion of the protectionist era, such as shrinking economic opportunities, rising unemployment, along with the unintended effects of emancipation and equal wages legislation, and the removal of alcohol bans which all may have played a part in the steady rise of Aboriginal imprisonment.<sup>34</sup>

Nonetheless, the rise of settler colonialist theory to highlight the resilience of colonial forms of knowledge and structural arrangements deserves further attention. This is particularly the case

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<sup>25</sup> Blagg, above n 7.

<sup>26</sup> Ibid.

<sup>27</sup> Harry Blagg, ‘A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Government in Western Australia’ (Background Paper No 8, Law Reform Commission of Western Australia, 2005).

<sup>28</sup> Blagg, above n 7.

<sup>29</sup> The protection era was enacted in the *Aborigines Act 1905* (WA), which aim was to protect, control and segregate Aboriginal people.

<sup>30</sup> Tim Rowse, ‘Historical Reasoning about Indigenous Imprisonment: A Community of Fate?’ (2015) 13(1) *Australian Review of Public Affairs* 1, 4.

<sup>31</sup> Thalia Anthony, ‘Grossest Darkness and Irrational Superstition’, *Sydney Alumni Magazine, The University of Sydney*, Spring 2009, 15.

<sup>32</sup> Richard Edney, ‘Just Deserts in Post-Colonial Society: Problems in the Punishment of Indigenous Offenders’ (2005) 9 *Southern Cross University Law Review* 73, 73-4.

<sup>33</sup> Hilde Tubex, ‘The Revival of Comparative Criminology in a Globalised World: Local Variances and Aboriginal Over-Representation’ (2013) 2(3) *International Journal for Crime, Justice and Social Democracy* 55.

<sup>34</sup> Ibid 61.

for Western Australia which could be referred to as a settler state<sup>35</sup> imbued with a frontier mentality that sees itself as vulnerable and threatened by ‘outsiders’.<sup>36</sup> It could also be useful in analysing how the increase in incarceration of Aboriginal offenders may have a wider impact on Aboriginal communities by sustaining colonisation and intergenerational trauma.

### III SETTLER COLONIALISM AND ABORIGINAL INCARCERATION

Settler colonialism, as a practice, is a distinct subset of the scholarly field of colonial studies.<sup>37</sup> Generally, postcolonial theories focus on two forms of colonialism. External colonialism is theorized as often requiring the creation of war fronts and frontiers against enemies to be conquered, and the enlistment of foreign land, resources, and people into military operations.<sup>38</sup> In external colonialism, all things native become recast as ‘natural resources’, bodies and earth for war, bodies and earth for chattel.<sup>39</sup> The other form of colonialism that is given much attention by postcolonial theories is internal colonialism or settler colonialism, the bio-political and geopolitical management of people, land, flora and fauna within the ‘domestic’ borders of the imperial nation.<sup>40</sup>

Lorenzo Veracini, in comparing the difference between internal and external colonial relations, argues that different historic, political and structural relationships occur when colonizers do not leave as compared to colonisers who go out to the colonies and then return home.<sup>41</sup> When colonisers stay, he argues, their goal becomes the transformation of the new colony into ‘home’.<sup>42</sup>

Within settler colonialism, therefore, the most important concern is land. This is both because the settlers make Aboriginal lands their new home and source of capital, and because the disruption of Aboriginal relationships to land represents a profound epistemic, ontological, cosmological violence<sup>43</sup> that is based on the violent systematic disavowal of Aboriginal presence.<sup>44</sup>

Without this disavowal settlers would be ‘forever reminded of their status as foreigners and, more accurately, invaders and exploiters’.<sup>45</sup> As a result of this disavowal, Aboriginal populations are viewed not as labour useful for resource extraction, but rather the emerging settler colonial state seeks to erase the ‘Aboriginal Other’, through assimilation and elimination.<sup>46</sup> The ‘Aboriginal Other’ ultimately does not exist.

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<sup>35</sup> Patrick Wolfe, ‘Nation and Miscegenation: Discursive Continuity in the Post-Mabo Era’ (1994) *Social Analysis* 93, 93.

<sup>36</sup> Broadhurst, above n 10, 271.

<sup>37</sup> Patrick Wolfe, ‘Settler Colonialism and the Elimination of the Native’ (2006) 8(4) *Journal of Genocide Research* 387; Lorenzo Veracini, ‘Settler Colonialism and Decolonisation’ (2007) 6(2) *Borderlands e-journal*.

<sup>38</sup> Eve Tuck and Wayne Yang, ‘Decolonization is not a Metaphor’ (2012) 1(1) *Decolonization, Indigeneity, Education & Society* 1, 4.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Lorenzo Veracini *Settler Colonialism: a Theoretical Overview* (Palgrave Macmillan, 2010) 4.

<sup>42</sup> *Ibid.*

<sup>43</sup> Tuck and Yang, above n 38) 5.

<sup>44</sup> Lorenzo Veracini, ‘Settler Collective, Founding Violence and Disavowal: The Settler Colonial Situation’ (2008) 29(4) *Journal of Intercultural Studies* 363, 366.

<sup>45</sup> Adam Barker ‘Already occupied: Indigenous peoples, settler colonialism, and the Occupy movements in North America’ (2012) 11(3) *Social Movement Studies* 327, 330.

<sup>46</sup> Wolfe, above n 37, 388.

So unlike colonisers in external colonies, settlers in Australia aimed to replace Aboriginal peoples on their land, instead of exploiting natural resources or extract surplus value from Aboriginal labour.<sup>47</sup> The nature of the settler colonial project has required, therefore, the active and forceful domination of an invaded territory's original inhabitants through the repression of their culture, identity and history; and given its persistence challenges the legitimacy of the colonial mission to replace Aboriginal peoples on their land.<sup>48</sup>

Part of the settler colonial project to erase or dominate the 'Aboriginal Other', has involved the use of particularised modes of control, such as prisons, schooling and policing, to ensure the ascendancy of a nation and its white elite.<sup>49</sup> These modes of control work to authorize the settler colonial project and 'conscribe her periphery'<sup>50</sup> and are not 'temporarily contained in the arrival of the settler but are reasserted each day of occupation.'<sup>51</sup>

Settler colonialism is therefore an ongoing encounter rather than a single historic event.<sup>52</sup> Reflective of this ongoing encounter is the fact, as Veracini argues, that settler colonialism normalises ongoing asymmetric power relations by erasing the history of settler colonialism and 'obscuring the conditions of its own production'.<sup>53</sup> The desire to erase and/or assimilate Aboriginal people now coexists with the symbolic necessity of a continued Aboriginal presence, this Aboriginal antithesis, as it underpins settler identity must now be infused by a discourse of 'virtuous' settler and 'dysfunctional' Aboriginal person.<sup>54</sup>

The settler colonialist approach led by Patrick Wolfe and Lorenzo Veracini, while appealing due to its apparent theoretical neatness, has been criticised for reducing sensitivity to Indigenous heterogeneity.<sup>55</sup> More particularly Rowse<sup>56</sup> takes issue with what he views as the search for a single colonialist project or structure that perceives so many Aboriginal encounters as manifestations of elimination rather than as less predictable co-existing diverse colonial formations. Accordingly, for Rowse,<sup>57</sup> a more fruitful endeavour for understanding the current high incarceration rates of Aboriginal offenders would be to investigate the tensions structured within the settler colonial project itself.

The settler colonialist perspective is nonetheless important as it can provide a context in how we evaluate the growth in empirical research which has been produced on the Aboriginal offender. For example, research on the link between Aboriginal disadvantage and offending behaviour highlights that the risk factors for offending are the same for the non-Aboriginal community.<sup>58</sup> They are, being young and male, being of low socio-economic status, failing to

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<sup>47</sup> Ibid.

<sup>48</sup> Nadim Rouhana, 'Reconciling History and Equal Citizenship in Israel: Democracy and the Politics of Historical Denial' in W Kymlicka and B Bashir (eds) *The Politics of Reconciliation Multicultural Societies* (Oxford University Press, 2008) 73.

<sup>49</sup> Tuck and Yang, above n 38, 5.

<sup>50</sup> Ibid 5.

<sup>51</sup> Ibid 5.

<sup>52</sup> Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (Cassell, 1999) 2.

<sup>53</sup> Veracini, above n 41, 25.

<sup>54</sup> Wolfe, above n 37.

<sup>55</sup> Tim Rowse, 'Indigenous Heterogeneity' (2014) 45(3) *Australian Historical Studies* 297.

<sup>56</sup> Ibid 301.

<sup>57</sup> Ibid.

<sup>58</sup> Don Weatherburn, 'What Causes Crime?' (2001) 54 *Contemporary Issues in Crime and Justice*, Bureau of Crime Statistics and Research, Sydney, 58.

complete year 12, being unemployed, abusing drugs and alcohol and experiencing poor parenting, often in the form of child abuse and neglect.<sup>59</sup> However, these risk factors are more prevalent in Aboriginal communities, which, it is suggested, may be directly linked to the higher rate of offending.<sup>60</sup> Risk factors for offending particular to Aboriginal communities have been found to be substance abuse in rural and remote communities that primarily involves the abuse of alcohol, cannabis, inhalants and, increasingly, amphetamines.<sup>61</sup> Viewing this type of research through the lens of a settler colonialist perspective, we have to question the positivist endeavour to know the Aboriginal offender through actuarial based ‘risk assessments’ which result in constituting the Aboriginal offender as well as the Aboriginal community as pathological or dysfunctional and in need of curing.<sup>62</sup>

It also helps us to understand how western knowledge systems, such as those surrounding law and science, have perpetuated a belief in the superiority of western knowledge systems, a process which has constructed the racialised inferiority of Aboriginal people and their knowledge.<sup>63</sup> This, it has been argued, has resulted in colonial harms as well as complex structural injustice.<sup>64</sup>

This perspective could also inform our understanding of why the prison population in Western Australia is so high. Using this lens, the increase in bail refusals, increases in public order offences, such as move on orders and prohibited behaviour orders, as well as increases in mandatory and presumptive sentencing, can be seen as the enactment of settler colonialist dominance.

#### IV UNDERSTANDING ABORIGINAL OVER-REPRESENTATION

Cunneen and Rowe argue that positivist approaches in criminology understand the over-representation of Aboriginal offenders in the criminal justice system “as the result of essentially individualised factors that can be determined from aggregate populations’.<sup>65</sup> In this vein, Weatherburn argues that to reduce the over-incarceration of Aboriginal offenders, there needs to be a focus on improving Aboriginal child development, reducing Aboriginal substance abuse, increasing Aboriginal school attendance and performance, increasing Aboriginal workforce participation, reforming the law in relation to bail and reducing Aboriginal recidivism through providing alternatives to imprisonment.<sup>66</sup> To reduce recidivism, Weatherburn suggests reviewing through-care processes to identify the programs and services that are critical to reintegration.<sup>67</sup> He also suggests the promotion of programs that reduce

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<sup>59</sup> Ibid.

<sup>60</sup> Troy Allard, ‘Understanding and Preventing Indigenous Offending’ (Indigenous Justice Clearinghouse Research Brief, No 9, 2010) 4.

<sup>61</sup> Paul Memmott et al, ‘Good Practice in Indigenous Family Violence Prevention – Designing and Evaluating Successful Programs’ (Australian Domestic & Family Violence Clearinghouse Issues Paper, UNSW, 2006); Judy Taylor et al, ‘Supporting Community Solutions to Family Violence’, (2004) 57(1) *Australian Social Work* 71; Matthew Willis M and John-Patrick Moore, ‘Reintegration of Indigenous Prisoners’ (Research and Public Policy Series, No 90, Australian Institute of Criminology, Canberra, 2008).

<sup>62</sup> Cunneen and Rowe, above n 9, 58.

<sup>63</sup> Ibid.

<sup>64</sup> Jennifer Balint, Julie Evans and Nesam McMillan, ‘Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach’ (2014) *The International Journal of Transitional Justice* 1.

<sup>65</sup> Cunneen and Rowe, above n 9, 52.

<sup>66</sup> Weatherburn, above n 3, 155.

<sup>67</sup> Ibid 157.



violent offending given the high proportion of Aboriginal offenders convicted for violent crimes.<sup>68</sup>

The way Weatherburn approaches the issue relies predominantly on quantitative, statistically driven research, an approach which has been criticised for failing to hear the voices of Aboriginal people who serve simply as the providers of empirical data for analysis.<sup>69</sup> This approach has also been criticised for constituting the Aboriginal offender as a subject that is problematic, pathological and that requires curing through actuarial-based assessments.<sup>70</sup> Central to this pathology is ‘race’ which becomes reproduced, not as a social, economic, cultural and political set of relations, but as an individualised factor ‘that may or may not show signs of statistical significance’.<sup>71</sup> This, it is argued, results in a criminology that has justified a pattern of penal reform in Australia that has tended to be ad hoc and partial, rather than a systemic attempt to redress complex structural injustices that leads to the over-imprisonment of Aboriginal men, women and children.<sup>72</sup>

According to Cunneen, what has also been hampering reform is the fact that the increasing over-representation of Aboriginal men, women and children has taken place in a broader context of ‘law and order’ politics.<sup>73</sup> This political environment has led, Cunneen argues, to changes in sentencing law and practice, restrictions on judicial discretion, changes to bail eligibility, mandatory sentencing, changes in administrative procedures and practices, as well as changes in parole and post-release surveillance of offenders.<sup>74</sup> Cunneen argues that these legislative changes reveal a shift toward a more punitive approach to crime that is closely tied to the ascendancy of neo-liberalism.<sup>75</sup> Such changes are a result of the politicisation of crime and justice issues and populist responses to what is assumed to be the ‘public opinion’, rather than the result of a pathology located in the individual or their community.<sup>76</sup>

The claim that the increase in imprisonment is more a matter of the response to crime than of changes in crime itself is confirmed in a study of the New South Wales Bureau of Crime Statistics and Research which studied the 48 per cent increase in Aboriginal imprisonment rates in New South Wales between 2001 and 2008.<sup>77</sup> The research established that 25 per cent of the increase was caused by more Aboriginal people being refused bail, therefore remanded in custody and for longer periods of time, and 75 per cent of the increase was caused by more Aboriginal people receiving a prison sentence and being imprisoned for longer periods of time.<sup>78</sup> In other words, the overall increase was not a direct result of more Aboriginal people being convicted of committing crimes.

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<sup>68</sup> Ibid.

<sup>69</sup> Juan Marcellus Tauri, ‘Indigenous Critique of Authoritarian Criminology’ in Kerry Carrington et al (eds) *Crime, Justice and Social Democracy: International Perspectives* (Palgrave MacMillan, 2012), 217, 220.

<sup>70</sup> Homi Bhabha, *The Location of Culture* (Routledge, 1994) 80; Anthony, above, n 12, 34.

<sup>71</sup> Cunneen and Rowe, above n 9, 52.

<sup>72</sup> Balint, Evans and McMillan, above n 64, 210.

<sup>73</sup> Chris Cunneen, ‘Punishment: Two Decades of Penal Expansionism and its Effects on Indigenous Imprisonment’ (2011) 15(1) *Australian Indigenous Law Review* 8, 8.

<sup>74</sup> Ibid 9.

<sup>75</sup> Ibid 15.

<sup>76</sup> Ibid 11.

<sup>77</sup> Jacqueline Fitzgerald, ‘Why are Indigenous Imprisonment Rates Rising?’ *Crime and Justice Statistics*, Issue Paper No 41, NSW Bureau of Crime Statistics and Research, August 2009, 5.

<sup>78</sup> Ibid.

Similarly, in Western Australia, research has established that the high rates of Aboriginal over-representation in prisons is a result of traditionally strong reliance on imprisonment as a sentencing option, a number of government led ‘law and order’ initiatives such as mandatory sentencing and truth in sentencing legislation, the way the judiciary reacted to legal interventions, as well as changes to the release practices of the Prisoner Review Board.<sup>79</sup>

Increased incarcerations by the courts in Western Australia may also reflect further amendments made to the *Criminal Code 1913* (WA) and the introduction of ‘three strikes’ legislation for repeat home burglary offenders in the *Sentencing Act 1995* (WA). For example, in Western Australia mandatory and presumptive terms of imprisonment have expanded from their use in repeat home burglaries<sup>80</sup> to now also being used for third strike breaches of violence restraining orders.<sup>81</sup> Mandatory sentencing also applies to an offender if convicted of a charge of grievous bodily harm, where the victim is a police officer,<sup>82</sup> to adults convicted of selling/supplying drugs to children and adults, or convicted of manufacturing or preparing a prohibited drug, or cultivating a prohibited plant in circumstances that endanger a child.<sup>83</sup> It also applies to offenders convicted of driving recklessly during a police pursuit which includes driving 45 kilometers over the speed limit, or driving dangerously during a police pursuit that causes bodily harm, serious harm or death.<sup>84</sup> This increase in mandatory sentencing has occurred in the face of research undertaken in Australia and the United States which has found no evidence that increases in penalty severity lead to reductions in crime.<sup>85</sup>

In her historical analysis of sentencing remarks of higher court judges, Anthony<sup>86</sup> has also noted the shift towards more punitive sentencing which reveals, she argues, a shift in the past decade away from the judicial idea that Aboriginal offenders could be rehabilitated through integration in their communities, towards a view that prison sentences are the only effective disciplinary instrument.

## V THE CRIMINOGENIC EFFECT OF IMPRISONMENT ON COMMUNITIES

Anthony argues that the frequent reliance by judicial officers on the sentencing principles of retribution and incapacitation, rather than rehabilitation, has also played a part in increasing imprisonment rates.<sup>87</sup> This, she argues, is due to the increased consideration by the judiciary on the seriousness of offending and on the protection of the community, which is underpinned by a belief that sending people to prison will increase the safety of the community.<sup>88</sup>

However, in the United States researchers have found support for the criminogenic effect of imprisonment on communities. They have found that incarcerating large numbers of

<sup>79</sup> Hilde Tubex et al, ‘Penal Diversity Within Australia’ (2015) 17(3) *Punishment & Society: The International Journal of Penology* 345, 363.

<sup>80</sup> *Criminal Code Act 1913* (WA) s 401.

<sup>81</sup> See *Restraining Orders Amendment Act 2011* (WA).

<sup>82</sup> *Criminal Code Act 1913* (WA) s 297(5).

<sup>83</sup> *Misuse of Drugs Amendment Act 2011* (WA).

<sup>84</sup> *Road Traffic (Miscellaneous Amendments) Act 2012* (WA).

<sup>85</sup> Anthony Doob and Cheryl Webster, ‘Sentence Severity and Crime: Accepting the Null Hypothesis’ in Michael Tonry (ed), *Crime and Justice Volume 30* (University of Chicago Press, 2003) 143; Neil Morgan, ‘Mandatory Sentences in Australia’ (2000) 24 *Criminal Law Journal* 164.

<sup>86</sup> Anthony, above n 12, 82.

<sup>87</sup> *Ibid* 71.

<sup>88</sup> *Ibid* 16.

individuals living in poverty-pocket, high-minority concentration neighbourhoods does little to alleviate the crime problem in these areas but may instead have increased crime rates, making these communities less safe.<sup>89</sup>

Rose and Clear's research found there may in fact be a 'tipping point' in certain communities so that crime increases once incarceration reaches a certain level.<sup>90</sup> Their work argues that high rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment towards the legal system.<sup>91</sup> As a result, as communities become less capable of managing social order through family or social groups, crime rates go up.<sup>92</sup>

Brown argues that it is likely that such effects apply in the Australian context, particularly amongst remote Aboriginal communities, where the tipping point may already have been reached, and excessive imprisonment rates are actually causing crime.<sup>93</sup> Another factor contributing to the criminalisation of these communities, it is argued, is the issue of over-policing.<sup>94</sup>

## VI OVER-POLICING AND PUBLIC ORDER OFFENCES

For Cunneen, the proliferation of public order offences highlights how police are still a critical factor in the criminalization of Aboriginal people, just as they were during the colonial period, further cementing hostile relations between police and the Aboriginal community.<sup>95</sup>

Concerns have been raised about the negative effects of over-policing of public order offending on Aboriginal communities for some time.<sup>96</sup> However, despite these concerns, such legislation continues to expand. In 2004, for example, legislation was introduced in Western Australia to enable police to issue individuals with a move on notice ordering them to leave a specified area for a period of up to 24 hours, if the officer reasonably suspects that the person is committing a breach of the peace or intends to commit an offence. If a person returns to the prohibited area he or she can be arrested.<sup>97</sup> The penalty for breaching a move on notice is a fine of up to \$12,000, or imprisonment for up to 12 months.<sup>98</sup> One in every three move on notices in Western Australia is issued to an Aboriginal person.<sup>99</sup> In 2011 alone, approximately 10,000

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<sup>89</sup> Todd Clear and Natasha Frost, *The Punishment Imperative: The Rise and Failure of Mass Incarceration in America* (New York University Press, 2013) 8.

<sup>90</sup> Dina Rose and Todd Clear, 'Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory' (1998) 36 *Criminology* 441, 457.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> David Brown, 'The Limited Benefit of Prison in Controlling Crime' (2010) 22(1) *Current Issues in Criminal Justice* 137, 142.

<sup>94</sup> Chris Cunneen, *The Impact of Crime Prevention on Aboriginal Communities* (NSW Crime Prevention Division and Aboriginal Justice Advisory Council, Sydney, 2001).

<sup>95</sup> Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001) 192.

<sup>96</sup> Elliott Johnson, *Royal Commission into Aboriginal Deaths in Custody, National Report, Volume 4* (Australian Government Publishing Service, 1991).

<sup>97</sup> *Criminal Investigation Act 2006* (WA) s 27.

<sup>98</sup> *Criminal Investigation Act 2006* (WA) s 153.

<sup>99</sup> Gerry Georgatos, '10,000 Move on Notices', *The Stringer* (online), 15 January 2014 <<http://thestringer.com.au/10000-move-on-notice-6362#.VjTGrLcrLVY>>.

move on orders were issued to people of Aboriginal descent even though Western Australia has an Aboriginal population of only 80,000.<sup>100</sup>

Prohibited behaviour orders<sup>101</sup> were introduced in December 2010 in Western Australia to address anti-social behaviour. They are civil in nature and constrain any behaviour that a court considers likely to increase the chances of a person committing an offence. Fears were held that Aboriginal youth's behaviour would readily be viewed as anti-social and fall under the radar of this type of order, given Aboriginal youth tend to congregate in public spaces.<sup>102</sup> To date, however, very few orders have been made by the courts binding either adults or children.<sup>103</sup>

Nonetheless, there is a fear that the growth in regulating public order offending can lead to over-policing of Aboriginal communities, which is supported by research that indicates that no other group within the Australian society is subject to the same degree of scrutiny and supervision as Aboriginal people.<sup>104</sup>

The risk in policing this type of offending (disorderly behaviour, street drinking etc) is, as Walsh<sup>105</sup> notes, that they often act as 'gateway' offences, leading to further charges, such as 'obstruct and assault public officer' charges and/or 'threats to injure' charges, increasing the risk of imprisonment upon conviction.

Ultimately, the problem of how to respond to the proliferation of public order offences is philosophical and involves asking what behaviour should or should not be criminalised. Many decisions to criminalise certain behaviour are the result of shifting, incoherent notions of the appropriate reach of criminal law.<sup>106</sup> This is a particularly important point, given offences, such as breaching a move on order or breaching a prohibited behaviour order, do not involve the perpetration of harm but are instead related to the concept of offensiveness which some writers have argued should have no basis for criminality in Australian law.<sup>107</sup>

## VII DISCUSSION

For some authors, to address the issue of over-policing as well as the over-incarceration of Aboriginal men, women and children, requires shifting from individualistic and state-focused modes of redress towards an openness to deep and wide-ranging reforms, which would transform social, political, legal and economic arrangements that have all contributed to the

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<sup>100</sup> Ibid.

<sup>101</sup> *Prohibited Behaviour Orders Act 2010* (WA).

<sup>102</sup> Thomas Crofts and Tanya Mitchell, 'Prohibited Behaviour Orders and Aboriginal Over-Representation in the Criminal Justice System' (2011) 23(2) *Current Issues in Criminal Justice* 277, 280.

<sup>103</sup> Amanda Banks, 'Name and Shame Laws Fail to Bite', *The West Australian*, 3 March 2012.

<sup>104</sup> Chris Cunneen, 'Policing and Aboriginal Communities: Is the Concept of Over-Policing Useful?' in Chris Cunneen (ed) *Aboriginal Perspectives on Criminal Justice* (University of Sydney Institute of Criminology, 1992) 76; Lorraine Mazerolle, Elena Marchetti and Andrew Lindsay, 'Policing the Plight of Indigenous Australians: Past Conflicts and Present Challenges' (2003) 7 *Police & Society* 75; Rick Sarre, 'Police and the Public: Some Observations on Policing and Indigenous Australians' (2005) 17(2) *Current Issues in Criminal Justice* 305.

<sup>105</sup> Tamara Walsh *No Offence: The Enforcement of Offensive Language and Offensive Behaviour Offences in Queensland* (University of Queensland, 2006) 14.

<sup>106</sup> Paddy Hillyard et al, *Beyond Criminology: Taking Harm Seriously* (Pluto Press, 2004) 231.

<sup>107</sup> Julia Quilter and Luke McNamara, 'Time to Define the "Cornerstone of Public Order Legislation": The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)' (2013) 36(2) *University of New South Wales Law Journal* 534.

long-term harm done to the Aboriginal community.<sup>108</sup> Following this reasoning, Aboriginal people have suffered systemic collective oppression by the enactment of colonial settler sovereignty.

For others, like Weatherburn, reductions in Aboriginal imprisonment rates are more likely to be brought about by policies that optimise the social integration of those who are at high risk of imprisonment rather than by changes to sentencing and penal policy.<sup>109</sup> This reflects the view that criminal justice policies should be informed by the need for social inclusion and that alternatives to sentences of imprisonment should be pursued to address social exclusion.

Weatherburn acknowledges the long-term harm done to Aboriginal people by colonisation, noting in particular the harm done to Aboriginal men and women's capacity to parent.<sup>110</sup> According to him 'You cannot colonise a country, dispossess the original inhabitants of their land, destroy their traditional way of life, herd them into camps, remove large numbers of their children, put large numbers of their parents into prisons and expect to find the parenting process unaffected.'<sup>111</sup>

Crucial then to reducing Aboriginal incarceration rates, according to Weatherburn, are programs which improve Aboriginal child development, reduce Aboriginal substance abuse, increase Aboriginal school attendance and performance, increase Aboriginal workforce participation and reduce Aboriginal recidivism.<sup>112</sup> To reduce recidivism, he suggests reviewing through-care processes to identify the programs and services that are critical to reintegration, which again accords with the notion of social inclusion. He also suggests the promotion of programs that reduce violent offending given the high proportion of Aboriginal offenders convicted of violent crimes, as such programs would also increase social inclusion.

Whilst Weatherburn's approach targets the pathology in the behaviour of the Aboriginal offender as in need of 'curing', it can also be viewed as providing strategies for social inclusion and a policy reform agenda that is likely to be more palatable to the general public. This is an important consideration in light of the symbiotic relationship between public opinion, media and public policy.

In pursuing the idea of promoting social inclusion as a way to reduce Aboriginal over-representation, a range of other reforms to the legal and legislative framework of sentencing could be enacted. For instance, repealing mandatory and presumptive sentencing laws may have some effect on reducing Aboriginal imprisonment rates. Particularly in light of research that indicates that, as Aboriginal offenders are more likely to have a prior criminal record, commit a violent offence or breach a previous court order, they are more likely to receive a prison sentence than the average non-Aboriginal offender.<sup>113</sup>

In a similar vein, sentencing legislation could be reviewed to incorporate an acknowledgement of Aboriginal social and economic disadvantage in the criminal justice system to ensure the emphasis placed on the seriousness of offending is more balanced. The High Court had a

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<sup>108</sup> Balint, Evans and McMillan, above n 64, 213.

<sup>109</sup> Weatherburn, above n 3, 149.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid* 117.

<sup>112</sup> *Ibid* 155.

<sup>113</sup> Fitzgerald, above n 77, 6.

chance to examine this issue in the case of *Bugmy v The Queen*.<sup>114</sup> William Bugmy was an Aboriginal man who grew up surrounded by drugs and violence in the remote New South Wales town of Wilcannia. Bugmy was illiterate, suffered from mental illness and had spent the majority of his adult life in prison. In 2011, Bugmy pleaded guilty to assaulting two prison officers and intentionally causing grievous bodily harm to another while imprisoned on remand. Bugmy was initially sentenced to six years and three months, with a non-parole period of four years and three months. That sentence was increased on appeal by the New South Wales' Court of Criminal Appeal on the grounds that too much weight was given to Mr Bugmy's personal circumstances in light of the objective seriousness of his offences.<sup>115</sup>

Whilst the High Court found that the Court of Criminal Appeal failed to consider whether the initial sentence imposed was manifestly inadequate, which was the 'determinative issue',<sup>116</sup> it took the opportunity to explain the relevance of Aboriginality and social deprivation to sentencing. The High Court found that, while Aboriginal Australians may face particular social deprivation (especially relating to alcohol abuse and the impact of prison), in general the principle of 'individualised justice' prevents any automatic discount in sentencing on account of an offender's Aboriginal background.<sup>117</sup> In other words, the High Court found that social disadvantage is not exclusive to Aboriginal people and should therefore not attract special treatment at sentencing. On the issue of social deprivation however, the submission that evidence of social deprivation does not diminish over time was upheld.<sup>118</sup>

The High Court's rejection of the possibility that Aboriginal over-representation in the criminal justice system might be considered when sentencing has been criticized by authors who were disappointed that the decision did not acknowledge the effect of Aboriginal disadvantage on individual culpability.<sup>119</sup> Accordingly, these authors argue that if courts were to acknowledge the disadvantages experienced by Aboriginal offenders within the criminal justice system as a mitigating factor in sentencing, such an approach could assist in promoting the use of more fair and just sentencing outcomes.<sup>120</sup>

More fair and just sentencing outcomes may also arise by promoting non-custodial sentences as viable alternatives to imprisonment, and by making technical breaches of community based and parole orders more flexible; given that the mandatory supervision and attendance requirements attached to community based orders might often be too difficult for an Aboriginal person, leading to terms of imprisonment being imposed once their non-compliance comes to light.<sup>121</sup>

Repealing public order offences may also impact on the growth of Aboriginal imprisonment rates, given how often the prosecution of public order offences acts as a gateway to other offending, as may offering diversion for driving whilst disqualified offences, given the large number of Aboriginal people in prison due to driving offences. More generally, parole

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<sup>114</sup> (2013) 249 CLR 571; [2013] HCA 37.

<sup>115</sup> *R v Bugmy* [2012] NSWCCA 223 (18 Oct 2012).

<sup>116</sup> *Bugmy v The Queen* (2013) 249 CLR 571, 583[5] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>117</sup> *Ibid* 592 [36].

<sup>118</sup> *Ibid* 594-95 [43].

<sup>119</sup> Sarah Krasnostein, 'Bugmy v The Queen: Too Much Individualization, Not Enough Justice' (2014) 39(1) *Alternative Law Journal* 12; Thalia Anthony 'Indigenising Sentencing? Bugmy v The Queen' (2013) 25(2) *Sydney Law Review* 451.

<sup>120</sup> *Ibid*.

<sup>121</sup> Jelena Popovic, 'Meaningless vs Meaningful Sentences: Sentencing the Unsentenceable' (Paper presented at the Sentencing Principles, Perspectives and Possibilities Conference, Canberra, 10-12 February 2006).

eligibility could be increased and credit programs could benefit prisoners who make steps towards their rehabilitation by allowing them to serve shorter sentences or shorter parole periods.

Bail hostels, SMS court date notifications as well as programs that offer transport to and from court may also go some way in reducing the structural inequalities in relation to bail and reduce Aboriginal remand rates.<sup>122</sup> Intensive case management of violent offenders may assist; therefore resources allocated to through-care services to support people on parole and those on community based orders should be increased.<sup>123</sup>

There is a strong case for also investing in residential rehabilitation and having Aboriginal knowledge inform therapeutic programs so that there is an emphasis on Aboriginal healing and spirituality, in recognition that western concepts of rehabilitation are different to an Aboriginal understanding of how to curb criminal offending.<sup>124</sup> Programs that address drug and alcohol abuse cost significantly less than imprisonment and should therefore be promoted.<sup>125</sup> In prisons, particular focus could be given to raising educational and vocational skill levels which are likely to promote social inclusion.<sup>126</sup> Prisons could also promote increased visits by family members, given this has been shown to reduce recidivism rates and could be a factor that leads to human flourishing.<sup>127</sup> In communities, particular focus could be given to addressing health care, ensuring appropriate housing and increasing employment opportunities for released Aboriginal prisoners which would all promote social inclusion.<sup>128</sup>

Reducing the incarceration rates of Aboriginal offenders does, however, require more than amendments to the statutory sentencing framework; it must also confront the hegemony of neo-liberalist ideology which has influenced policing as well as criminal justice policy in Australia. To do this necessitates an effort to educate the public about the fiscal, penological and humanitarian harms of imprisonment, as well as its limitations in reducing recidivism.<sup>129</sup> This is very important given there is general agreement that the public is misinformed about key features of crime and punishment.<sup>130</sup> Many members of the public believe for instance that crime rates have risen and that sentences are too lenient while they also substantially underestimate the proportion of convicted offenders who get sent to prison.<sup>131</sup> While there is still debate whether the media have created these misperceptions, or responded to them, the outcome, as Lacey argues, is that ‘politicians’ fears of the electoral costs of moderate criminal

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<sup>122</sup> Jennifer Sanderson, Paul Mazerolle and Travis Anderson-Bond, ‘Exploring Bail and Remand Experiences for Indigenous Queenslanders’ (Final Report, Griffith University, January 2011) 51.

<sup>123</sup> Michael Salter, ‘Managing Recidivism Amongst High Risk Violent Men’ (Australian Domestic and Family Violence Clearinghouse, Issues Paper 23, January 2012); Weatherburn, above n 3, 157.

<sup>124</sup> Cunneen and Rowe, above n 9, 59.

<sup>125</sup> National Indigenous Drug and Alcohol Committee ‘An Economic Analysis for Aboriginal and Torres Strait Islander Offenders: Prison vs Residential Treatment’ (Research Paper 24, Australian National Council on Drugs, Deloitte Access Economics, August 2012) 63.

<sup>126</sup> Anna Macklin and Robyn Gilbert, ‘Working with Indigenous Offenders to End Violence’ (Indigenous Justice Clearinghouse Research Brief No 11, 2011) 5.

<sup>127</sup> Alison Lieblich, ‘Can Human Beings Flourish in Prison?’ (Public lecture given to the Prison Phoenix Trust, London, 29 May 2012) 6.

<sup>128</sup> Macklin and Gilbert, above n 126, 5.

<sup>129</sup> Julian Roberts, ‘Reducing the Use of Custody as a Sanction: A Review of Recent International Experiences’ (2005) 5(2) *Judicial Studies Institute Journal* 21, 37.

<sup>130</sup> Karen Gelb, ‘Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing’ in A Freiberg and K Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Willan Publishing, 2008) 68.

<sup>131</sup> *Ibid.*

justice policy remain acute'.<sup>132</sup> This results in the influence of penal populism on criminal policy development and the associated lack of faith in an independent professional bureaucracy, being major impediments in the development of policies to curb prison populations.<sup>133</sup>

Establishing a sentencing council or commission in Western Australia could prove a very significant development in this regard. It could reduce the political pressures that come from media and political debate about 'law and order' on the judiciary and contribute to the development of informed sentencing policy. It could also serve as a source of expertise to assist with prison projections and sentencing reform in the future.<sup>134</sup> It may also assist in educating the public about the social and economic cost to the Aboriginal community in following a punitive sentencing regime and could promote alternatives to imprisonment.

A justice reinvestment policy approach may as well act to counter the pervasiveness of the 'law and order policy' agenda and promote policies aimed at social inclusion. Criminal justice programs and legislative reforms underpinned by a justice reinvestment approach have caused reductions in recidivism rates in the United States.<sup>135</sup> It is possible that justice reinvestment could provide an overall framework for these reforms by justifying a redirection of funds otherwise used to incarcerate people, to instead fund pre-release diversion programs, residential rehabilitation programs, employment initiatives, training initiatives and, above all, active involvement of Aboriginal Australians in criminal justice policy formation.

There are, however, a number of difficulties that have been raised both with the justice reinvestment concept itself and in its application to the Australian context. Brown, for instance, has argued that the concept itself is ambiguous and lacks a clear theoretical and normative base.<sup>136</sup> Schwartz has highlighted that the justice reinvestment approach requires changes to bail, sentencing and parole, and subsequent reinvestment in post-release and community programs, all of which may be difficult to achieve at a time when political parties continue to run a popular punitive 'tough on crime' and 'law and order' discourse.<sup>137</sup> However, for Brown, the conceptual ambiguity of justice reinvestment approaches may in fact increase its possible appeal across political constituencies and, if adopted, may result in more favourable political conditions which may ultimately lead to reduced recidivism rates within Aboriginal communities.<sup>138</sup>

Hudson is less optimistic, warning that 30 years of community based strategies have so far not delivered the reforms promised. In particular incarceration and recidivism rates have not lessened in these communities, impeded, according to her, by the barriers to self-management

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<sup>132</sup> Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press, 2008) 181.

<sup>133</sup> Ibid.

<sup>134</sup> Mike Hough and Jessica Jacobson, 'Creating a Sentencing Commission for England and Wales; An Opportunity to Address the Prisons Crisis' (Report, Prison Reform Trust, 2008).

<sup>135</sup> Julie Samuels, Nancy La Vigne and Samuel Taxy, 'Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System' (Report, Urban Institute, November 2013).

<sup>136</sup> David Brown, 'Prison Rates, Social Democracy, Neoliberalism and Justice Reinvestment' in K Carrington et al (eds), *Crime, Justice and Social Democracy: International Perspectives* (Palgrave MacMillan, 2012) 70, 79.

<sup>137</sup> Melanie Schwarz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment' (2010) 14(1) *Australian Indigenous Law Review* 2, 13.

<sup>138</sup> Brown, above n 136.



in Aboriginal communities which relate to low levels of literacy, numeracy and work readiness.<sup>139</sup>

The risk of not having any form of self-management is that, rather than improving the lives of Aboriginal men, women and children, such a strategy increases the disciplinary and bureaucratic gaze over their lives. One way to ameliorate this, as argued by Cunneen and Rowe, is to incorporate Aboriginal worldviews and knowledge in the development of these programs so that they are not simply conceived within western frameworks or run by westerners.<sup>140</sup>

All of the suggestions for reforms highlighted above have been made with the view that reducing reliance on incarceration as a crime control strategy is very important if we are to promote the social inclusion of those who remain trapped in a cycle of repeated arrests, convictions and incarcerations. These initiatives, however, will only be effective if they are founded on ‘respect for and recognition of the Aboriginal domain’.<sup>141</sup> Aboriginal people need to be seen as ‘bearers of knowledge’<sup>142</sup> if any criminal justice reform agenda to change the current sentencing culture is to be achieved.

Further, while developing this more pragmatic approach to criminal justice policy, the deep and wide-ranging reforms needed to address structural harm caused by settler colonialism should also be progressed. An important step in this direction would be the acknowledgement of Aboriginal people in the *Australian Constitution*.

## VIII CONCLUSION

To stem the tide of aboriginal over-representation in prisons requires an appreciation of how the enactment of Australia’s settler colonial dominance has produced a specific set of social relations that has caused the social exclusion of many Aboriginal men, women and children.

In developing criminal justice policies to address the issue of Aboriginal social exclusion and associated incarceration rates, policy makers must accept, as Weatherburn notes, the moral sensibility pervading Australian public discussions, being “the almost universal belief that people who continually or seriously breach the law should not be allowed to get away with it’.<sup>143</sup> This moral sensibility has been shaped by the influence of penal populism but is also influenced by the settler colonial mentality that views the very presence of Aboriginal peoples as unsettling.<sup>144</sup>

According to Weatherburn, a reduction in Aboriginal imprisonment rates will not be achieved by a cultural politics that seeks “dramatic changes in sentencing and penal policy”, but is more likely to be brought about by policies that optimize the social integration of those who are at high risk of imprisonment.<sup>145</sup>

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<sup>139</sup> Sara Hudson, ‘Panacea to Prison? Justice Reinvestment in Indigenous Communities’ (CIS Policy Monograph, No 134, The Centre for Independent Studies, 2013) 17.

<sup>140</sup> Cunneen and Rowe, above n 9, 57.

<sup>141</sup> Blagg, above n 7, 207.

<sup>142</sup> Blagg, above n 7, 3.

<sup>143</sup> Weatherburn, above n 3, 88.

<sup>144</sup> Veracini, above n 37.

<sup>145</sup> Weatherburn, above n 3, 88.

Such an approach to criminal justice policy is highly pragmatic and views the behaviour of the law breaker as the primary issue to be targeted by policy makers; this is in contrast to the settler colonial perspective, which views the way in which settler colonial sovereignty is enacted, as the main problematic issue.

Both approaches are important in unpacking the complexity that surrounds Aboriginal incarceration. When dealing with the issue of Aboriginal offending and recidivism, promoting social inclusion is a worthy goal. However, this goal can only be achieved by an acknowledgment of the colonial harms inflicted on Aboriginal people and the acknowledgment that high Aboriginal imprisonment rates are a manifestation of Aboriginal resistance to settler colonial dominance. A deeper understanding of those who resist colonial settler sovereignty through criminal offending, will allow for more creative criminal justice responses aimed at social inclusion but also, it is hoped, an explicit recognition of the harm done to the Aboriginal community by the excessive incarceration of so many of their men, women and children.