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Imprisoned Indigenous women and the shadow of colonial patriarchy

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Abstract

Imprisonment in Australia has been a growing industry and large numbers of vulnerable people find themselves in a state of serial incarceration. Women and Indigenous peoples in particular have experienced rapidly expanding imprisonment rates over recent decades. Our argument in this article is relatively straightforward: to understand contemporary penal culture and in particular its severity and excess in relation to Indigenous people and women, we need to draw upon an understanding of the dynamics of colonial patriarchy. We develop this understanding through a specific focus on Indigenous women. Although at a micro level, specific legislation and policy changes have had a negative impact on the imprisonment of vulnerable groups, it is within a broader context of the strategies and techniques of colonial patriarchy that we can understand why it is that particular social groups appear to become the targets of penal excess.

Keywords

Indigenous imprisonment, postcolonialism, women's imprisonment, penal excess, patriarchy

Introduction

Understanding and explaining the rapid increase in the rate of imprisonment in Australia over the past two to three decades is occupying the attention of a number of criminologists and legal scholars, not least the Australian Prisons Project group (Baldry et al., 2011; Cunneen, in press). One aspect of this investigation is exploring why it is that particular groups of Australians (Indigenous Australians, people with mental and cognitive impairments, women and especially Indigenous women) have developed a much higher risk than previously of being caught in the imprisonment cycle over this period. Such a task is especially salient given the 20% rise in

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Indigenous women's imprisonment in a single year (Australian Bureau of Statistics (ABS), 2012a, p. 51). This paper opens a new perspective on this phenomenon by exploring it through the lens of patriarchy and colonialism. We do not present new historical 'facts', but rather develop a theoretical perspective for interpreting historical continuities and discontinuities, and contemporary manifestations of the dynamics surrounding Indigenous women's imprisonment.

Internationally various explanations have been posited for the increase in penal severity, and have included important new ideas, such as the 'new penology' (Feeley & Simon, 1992), the 'culture of control' (Garland, 2001a) and 'new punitiveness' (Pratt, Brown, Hallsworth, & Morrison, 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, McDonnell, Maplestone, & Peeters, 2006; Calma, 2004; 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' (despite crime rates generally falling in most of the Anglo-speaking world over the past decade). 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, p. 6).

The advent of governing through crime, and the rise in penal severity, has been attributed to certain political configurations in some liberal democracies (Lacey, 2008; Simon, 2007). 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 labour politicians have competed in the use of punitive crime control measures as a potential vote winner (Hogg & Brown, 1998).

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 Prisons Project, 2009; Cunneen, Baldry, & Brown, 2013; NSW Legislative Council, 2001, 2002; Pratt, Brown, & Brown, 2005). This argument resonates with Wacquant's notion of 'hyperincarceration' which in the US experience is targeted at '(sub)proletarian African American men from the imploding ghetto' (Wacquant, 2010, p. 74). In addition some commentators have

drawn attention to the increasing feminised prison population: for example, Sim (2009, p. 104) notes in the UK the number of women in prison more than doubled between 1997 and 2007.

These various explanations illuminate the phenomenon of, and go some way to explaining, the growth in the prison population and a changed penality. However, as Angela Davis (2003) noted some years ago, women have been largely left out of the discussions on the expansion of the prison system, despite the fact that they are 'the fastest growing sector of the US prison population' (Davis, 2003, p. 65), a problem which is replicated in Australia. We would argue that this absence of a clearly articulated race/gender analysis is evident in much of the critical scholarship on the expansion of incarceration over the last several decades: the critical conceptual frameworks of mass imprisonment, the new penology, the culture of control, governing through crime, and the rise of neo-liberalism seem to falter in providing an explanation that brings together both race and gender. We argue that an analysis drawing on colonial patriarchy provides a new perspective, particularly in explaining the growth in Indigenous 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 culture[1] 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 statistics around the escalating prison population in Australia are relatively well known (Baldry et al., 2011). After briefly rehearsing the general data we move on to consider specific aspects of the story of rising imprisonment rates: the rise of Indigenous imprisonment, the rise of women's imprisonment, and increase in imprisonment of people with disabilities (mental and cognitive impairments). The common element in these separate stories of increasing imprisonment is the prevalence of Indigenous women. The ABS estimated that in the decade between 1993 and 2003, the Australian rate of imprisonment increased by 22% (ABS, 2004). Between 2002 and 2012, the rate of imprisonment increased from 150 to 168 per 100,000 of the adult population (ABS, 2012a, pp. 9–10). 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 state prison systems each year. As the majority of prisoners (sentenced and unsentenced) are incarcerated for less than 12 months, far more than the 29,381 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, 2012a; Baldry, 2010). The national census picture also masks significant differences between states and territories: the Northern Territory's imprisonment rate is 825.5 per 100,000 whereas Victoria's is 111.7 (ABS, 2012a, p. 25).

The situation for Indigenous people in prison has progressively deteriorated at a much faster rate than for non-Indigenous Australians. In the 20 years to 2008, the Indigenous imprisonment rate rose from 1234 to 2492 per 100,000 of population, while the non-Indigenous rate was both significantly lower and increased at almost half the Indigenous rate (ABS, 2008; Carcach & Grant, 1999; Carcach, Grant, & Conroy,

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, 2007b). 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: while the non-Indigenous imprisonment rate in Western Australia in 2012 was 165.6 per 100,000 (ABS, 2012a, p. 57), the rate of Indigenous imprisonment (male and female) was 4113.7, and the Indigenous male rate was 7238.7 (ABS, 2012b, p. 24). By the end of 2012, the number of Indigenous people imprisoned in Australia had reached 27% of the total prison population while they comprise just over 2% of the general population. The Indigenous rate of imprisonment was 15 times higher than the non-Indigenous rate (ABS, 2012a, p. 8).

There has also been an 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 there has been a welcome drop over the past two years, with women comprising 7% of the Australian prisoner population in 2012 (ABS, 2012a, p. 8) and with the actual number of women prisoners remaining small compared to men, their proportion of the total prison population has increased over the longer term. Over the last decade (2002–2012) the number of women prisoners increased by 48% compared with 29% for men (ABS, 2012a, p. 9). 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.

The proportion of Indigenous women prisoners increased from 21% of all women prisoners in 1996 to 30% in 2006 and to 31% in 2011 (ABS, 2006, 2011, p. 58). In 2012 Indigenous women comprised a staggering 34.2% of the female prisoner population in Australia (compared with the equivalent Indigenous male proportion of 26.7%) while they represent only 2% of the female general population (ABS, 2012a, p. 58). Between 2011 and 2012, Indigenous Australian women's imprisonment jumped by 20% compared to an increase for non-Indigenous women of 3% (ABS, 2012a, p. 51). The rate of Indigenous women's imprisonment in 2012 was 405 per 100,000 of adult Indigenous females compared with 16.5 per 100,000 for non-Indigenous females (ABS, 2012a, p. 58). Thus the Indigenous women's rate of imprisonment was 23 times higher than the non-Indigenous women's rate.

Successive Aboriginal and Torres Strait Islander Social Justice Commissioners have criticized the over-representation of Aboriginal people and Aboriginal women in particular, in prison (Calma, 2004; Jonas, 2002). Commissioner Jonas referred to Indigenous women in prison as living in a 'landscape of risk' and suffering at 'the crossroads of race and gender' (Jonas, 2002, p. 177). Nearly two decades ago Cunneen and Kerley (1995, p. 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% higher than the non-Indigenous male rate (ABS, 2012a, p. 58). The often taken-for-granted 'truth' that men are more

likely to be imprisoned than women is simply false when race and gender are considered simultaneously: Indigenous women are far more likely to be imprisoned than non-indigenous men.

A closely allied factor in the growing rates of imprisonment has been the increase in the rates of imprisonment of people with mental and cognitive impairments. This has been a concerning trend across the western world (Harrington, 1999). In Australia though, it has been most marked among women and Indigenous Australian prisoners (Butler, Andrews, & Allnutt, 2006). Women with mental health disorders are more highly over-represented among the prison population than men and when compared with national norms, with Indigenous women the most highly over-represented (Butler & Allnutt, 2003; Indig, McEntyre, Page, & Ross, 2010; Tye & Mullen, 2006). For example, 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 more quickly (Baldry, 2010). 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). This transcarceration shift from psychiatric institution to prison has impacted on Indigenous women: they represent the most rapidly increasing group of prisoners and are also the most over-represented among prisoners with impairments.

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% and 41% of sentenced prisoners will be re-incarcerated in two years and around 66–70% re-incarcerated at some time in their lives (ABS, 2010b; Payne, 2007). The same phenomenon looked at from a different perspective shows that almost half (48%) of non-Indigenous prisoners, and almost three-quarters (74%) of Indigenous current prisoners had a prior adult sentence of imprisonment (ABS, 2012a, p. 51). We also know that re-imprisonment rates for Indigenous women are nearly twice as high as they are for non-Indigenous women (Bartels, 2012, p. 1). 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 12 month period than the annual census figure would indicate (Lind & 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, and Indigenous women are also more likely to be serving shorter sentences than non-Indigenous women (Bartels, 2012: 3).

We know then that there is a likelihood of multiple imprisonment experiences over a lifetime particularly for Indigenous people and specifically for Indigenous women. Simultaneously there is a greater proportion of Indigenous people and women generally among those serving short sentences, and 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, disability 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 have experienced a rapid rise in their rates of imprisonment, a common element across all groups is the presence of Indigenous women. We now turn our focus on Indigenous Australians and Indigenous women in particular, to draw out our argument.

Penal modernity and postcolonial penality

As we noted in the introduction, the rapid increase in imprisonment rates 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 penal modernity developments discussed earlier adequately explain the gendered and racialised outcomes of the current increases in penal severity? Why is it that Indigenous 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 postwar 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. Drawing on a longer historical perspective, Davis (1998, pp. 98–99) makes the same point regarding African Americans in the US, who, not being seen as 'rights bearing individuals', were subject to separate racialised forms of punishment. Systems of punishment, which differentiated between the colonisers and the colonised, were foundational to the colonial state. For example, Ross (1998, p. 3) has noted America's Indigenous people were imprisoned in a variety of ways and confined in forts, boarding schools, orphanages, jails and prisons and on reservations. Racial understandings of Indigenous people played a constitutive role in defining penal strategies and different types of punishment (Cunneen, in press). Drawing on the work of Edward 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?

The idea and practices of penal excess were central to the constitution of the colonial state (Brown, 2002, p. 403). 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] In commenting on

apparently new trends in penality, Brown argues that 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' (2005, p. 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 late modern, neo-liberal states to represent racialised others 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 (1993, p. 20) has argued that the 'rule of colonial difference' was marked by race and operated to limit participation in governmental and civic life.[3] 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 Indigenous people, particularly Indigenous women.

Patriarchal colonialism

We acknowledge that there are strongly divergent views in feminist scholarship, emerging from the many theoretical and ideological feminist positions regarding the conception and definition of patriarchy and its place in a post-modern, pluralist world. Some view it as universalising and eschew its use altogether (see discussions in Mandell, 1995 and Nicholson, 1990). But, in trying to understand and explain the evidence of the gross over-representation of Indigenous people (particularly women) in systems of control, especially the prison, we are drawn to aspects of the socialist feminist traditions in relation to patriarchy. We reject an essentialist view and acknowledge, as Indigenous writers have noted, that 'oppression takes different forms, and that there are interlocking relationships between race, gender and class which make oppression a complex sociological and psychological condition' (Smith, 1999, p. 166). Socialist feminist perspectives, as they have developed over decades, encompass the ancient and systemic nature of patriarchy, the emergence of many patriarchies and the deep relationship of patriarchy to political and economic structures (see for example Calixte, Johnson, & Motapanyane, 2005; Eisenstein, 1979; Lerner, 1986; Walby, 1989). The linking of the concepts of colonialism and patriarchy has been an important part of the development of Indigenous women's understanding of feminism. We recognise the importance of their perspectives on patriarchy (see Grande, 2003; Jaimes Guerrero, 2003; Moreton-Robinson, 2000; Smith, 1999) in our analysis.

For Indigenous scholars, colonialism is the ultimate source of oppression. According to Moreton-Robinson (2000, p. xxiv) white feminism has 'concealed the colonising process by relegating Indigenous women to the imagination'.[4] An analysis of colonialism is

a 'central tenet of Indigenous feminism' (Smith, 1999, p. 152) and decolonisation begins with 'the understanding that the collective oppression of Indigenous women results primarily from colonisation' (Grande, 2003, p. 329). While Indigenous writers have rejected an essentialist view of patriarchy, they have embraced the combination of patriarchy and colonialism (patriarchal colonialism) as a way of situating Indigenous women's experiences. Moreton-Robinson and Walter (2009, p. 99) for example draw upon this development in their view that the lives of Indigenous women are framed by 'the omnipresence of patriarchal white sovereignty'.

In the following pages, we argue for the specific explanatory power of patriarchal colonialism in understanding the extreme rates of criminalisation and incarceration of Indigenous women. We also argue that it impacts on Indigenous women in different ways to Indigenous men; these particular impacts are explored below. This analysis provides an understanding of the continuities of control and punishment of Indigenous women inadequately accounted for by other theoretical approaches.

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, p. 123) famously remarked in the early 1970s, 'it is still true . . . one can be incarcerated either for crime or for being Aboriginal'. Rowley's comment highlights that 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 Hogg, 2001; Purdy, 1996). These racial discourses have been and remain gendered: Indigenous women were separated from other women because of perceived biological and culturally-defined racial differences: as sexually promiscuous, incompetent mothers and so forth. We explore below how race discourses have structured (and been structured by) specific types of punishment.

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, in 1871, reflecting changing sensibilities around punishment, the Western Australian parliament passed legislation, which required that all executions take place within the walls of the prison. However, the legislation was soon amended to allow for the public execution of Aboriginal people (Capital Punishment Amendment Act 1871 (39 Vict. No 1) (WA)). The Attorney General noted that 'The object of this measure was to strike terror into the heart of other natives who might be collected together to witness the execution of a malefactor of their own tribe' (Hocking, 1875, p. 30). The law allowing the public execution of Aboriginal people remained in force in Western Australia until repealed in November 1952 (Markovich, 2003).[5] Similarly the extended use of physical punishments and restraints (lashings, floggings, chaining) for Aboriginal offenders continued until well into the 20th 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: lacking requisite levels of civilisation, Indigenous people were seen to only understand spectacles of physical punishment.[6] Senior members of the judiciary (such as Judge Wells from the Northern Territory Supreme Court) viewed execution and flogging as the most appropriate forms of punishment for Aboriginal people until well into the 1930s (see Cunneen, 1993; Markus, 1990).

The formal and informal segregation of all institutions (including schools, hospitals, employment, places of entertainment) along racialised lines was commonplace and applied also to places of detention, such as Rottnest Island[7] (Finnane, 1997, p. 36). 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 (1987) 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. (pp. 43–44)

The development of 'protection' legislation from the end of the 19th century saw many Indigenous Australians, 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, 2001).[8] Other semi-formal processes of racialised justice abounded through curfews and segregation (Cunneen & Robb, 1987), while child removal policies created further generations of institutionalized Indigenous people (National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC), 1997). These policies and practices reflected various racial assumptions, some built on 'science' like eugenics, others reflecting popular prejudices about the incapability of Indigenous people to live like civilized white folk. Indigenous Australians subjected to the types of punishments discussed above did not appear in the accounting ledgers of the prisons of the day, but were, nonetheless, imprisoned as if they had been locked in the formal prison system.

Aboriginal women were subjected to criminal law and penal sanctions in both similar and different ways to Aboriginal men in the early colonies. Both were, for example governed by various aspects of 19th 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 20th 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, p. 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 and girls in particular, via institutional means and the conflation of classism, racism and sexism, than the Parramatta Female Factory and Girls Home in NSW (Parragirls, n.d.). It began in 1821 as a welfare institute for convict women and their children, and quickly became the Parramatta Female Factory where convict women were incarcerated, required to work, and were subjected to rape and abuse. In 1848, the factory morphed into a Lunatic asylum incarcerating women for 130 years, a large number of them Indigenous women (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 the Norma Parker women's prison.

This one location and institution with its many manifestations exemplifies the various forms used to control Indigenous, poor, disadvantaged women and those with mental and cognitive impairment and shows the continuum of punishment and control over time. The history of this site of control over women, from the 1820s to the 2000s, demonstrates patriarchal colonialism's power to adapt and endure. Garland (1985, p. 155) indicates that it is 'those institutions and ideologies that can most easily absorb different elements and adapt to one strategy after another that survive in the social realm'. The prison is such an institution: 'the product of layer upon layer of organizational forms, techniques and regulatory practices' (Garland, 1985, p. 155).

It has been established that, from the beginning, most white colonists perceived and reported on Aboriginal societies' gender relations through their own sexist, classist cultural framework (see, for example, 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 continue in contemporary Australia. Dodson for example, noted that one judicial officer 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, p. 136). The significantly greater extent to which Aboriginal women are brought before the courts and sentenced to imprisonment for less serious offences and public order offences compared with non-Aboriginal women (Bartels, 2012, p. 3; Stubbs, 2011, p. 53), and the extent to which Aboriginal women recycle through prisons,[9] reinforces a view of Aboriginal women as a criminal class.

The civil rights turn

We turn now to the 1960s because from this period onwards there were significant legislative and policy changes brought about through the repeal of discriminatory

state and territory legislation in Australia as part of the general move towards assimilation and integration. The process of colonialism in Australia was changing, although the new policies of assimilation still presupposed the fundamental inferiority of Indigenous people's laws, customs and culture (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. The state Aboriginal child removal policies also changed with the dismantling of race-based Aboriginal-specific legislation and the imposition of general welfare legislation, but with Aboriginal women increasingly being subjected to surveillance by mainstream welfare authorities. Aboriginal mothers were seen as negligent in their housekeeping, home making and parental responsibilities and had their children removed on these grounds (Goodall, 1995, p. 96; NISATSIC, 1997).

This civil rights era also saw the national referendum in 1967 that overwhelmingly approved changes to the Australian Constitution confirming the power of the Commonwealth to make laws for Australian Aboriginal peoples and their inclusion in national census. The 1967 referendum reflected a national mood for full citizenship rights for Indigenous people. The 10 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 Aboriginal girls for decades (National Museum of Australia, n.d.).

The 1960s to the 1980s in Australia also saw the deinstitutionalisation of long term psychiatric patients and closure of 'mental asylums' gain pace and a decade later the deinstitutionalisation of those with intellectual disability. Psychiatric hospital beds decreased from 281 per 100,000 in the 1960s to 40 per 100,000 in the 1990s (Petersen, Kokanovic, & Hansen, 2002, p. 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. As noted above, child welfare legislation moved from race-specific to a 'universal' framework focussing on Aboriginal women's (in)ability to conform to white standards. Criminal justice was also changing. Based on her research in Western Australia, Purdy (1996, p. 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 that state. In addition the movement of Indigenous people into urban areas intensified non-Indigenous people's racial concerns. From the evidence available it would appear that, from the early 1970s Indigenous people were increasingly policed by way of public order offences (Cunneen, 2001) and were appearing in the mainstream prison system more frequently (Hogg, 2001). Additionally there is a direct link between the growing imprisonment of Aboriginal women and child welfare removals. Most Aboriginal women prisoners have children

and most of them have their children removed (Lawrie, 2003; McCausland & Baldry, 2013). In other words, the expanding Indigenous women's prison population has direct consequences for increased Indigenous child removal. This reproduces social disadvantage and criminalisation for another generation, given that substitute care is associated with poorer long-term life outcomes and that the risk of juvenile offending is increased for the children of imprisoned parents (Clear, 2007, p. 96).

A penal expansionism flourished increasingly from the 1980s, with profoundly negative impacts on Indigenous imprisonment rates, particularly for women (Baldry et al., 2011; Cunneen et al., 2013).[10] Sentencing and punishment was and is one of these latter day means by which greater levels of control are imposed on Indigenous people, funnelling them into the prison in significantly greater proportions than non-Indigenous Australians.

Sentencing and Aboriginality

Concepts of race, gender and culture underpin sentencing and punishment in contemporary Australia. 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. Both views of Indigenous culture have racial and gendered assumptions. An example of where the Aboriginality of an offender in sentencing is based predominantly 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 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 recognised 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, & Libesman, 2009; Cunneen, 1993, for earlier cases).

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. Australian justice systems 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 to create Indigenous prisons and facilities such as Balund-a and Yetta Dhinikal in New South Wales. These Indigenous facilities are specifically for Aboriginal men.

The endemic problems identified by Justice Wood are different from the specific issues facing Indigenous women. As Stubbs (2011, p. 58) notes, there are 'very few cases in which the *Fernando* principles had been considered or applied to women defendants, and no real elaboration of how the principles might relate to women'. In one case where the *Fernando* principles were raised in relation to an Aboriginal female defendant, they were seen not to apply. Manuel (2009) notes in *R v Trindall* (2005) NSWCCA 446 the evidence established that the Aboriginal woman was raised by a relative from the age of four.

> [She] was reportedly sexually abused as a child by another relative, came to Sydney as a young teen where she lived without family support (but within the Indigenous community) and quickly became pregnant, developed a drug addiction and engaged in offending behaviour. Hall J said (at [26]–[27]):
>
> Having considered this matter, I am of the view that the *Fernando* principles do not apply to the applicant . . . The applicant's family and social factors are, beyond question, tragic but are not referable to the applicant's membership of the Aboriginal society as such but are unfortunately more generally associated with the destructive effects of drug addiction. In other words, I do not consider that the applicant's Aboriginality is relevant to explain or throw light on the particular offences and the circumstances of the applicant. It is but one factor in an otherwise complex set of negative factors. (Manuel, 2009, pp. 11–12)

With Aboriginal women absent from consideration in the *Fernando* principles and a perceived male norm seen to apply, it perhaps not surprising that the court in *Trindall* failed to recognise the specific gendered impacts of colonialism including systemic family disruption, child removal and sexual assault.

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 & 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. 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. There is little known about Indigenous women's participation in these specialist courts other than that they comprise around a quarter or less of participants (Bartels, 2012, p. 5). Furthermore, Aboriginal sentencing courts are essentially peripheral to the workings of the mainstream criminal justice system. Although there will be regional variations, we estimate that well over 95% of Indigenous people in Australia continue to appear in mainstream court settings.[11]

The evidence is also clear that Indigenous women are under-represented in mainstream community corrections relative to their representation in the prison system (Bartels, 2012, p. 2). It also appears that the development of therapeutic courts has provided only limited access to Indigenous women. Stubbs (2011, p. 57) noted the barriers Aboriginal women have in accessing and completing programs such as the NSW Magistrate's Early Referral into Treatment program (MERIT). Complex needs, high levels of victimisation, familial responsibilities including child care, transport and the

urban-bias in the location of these alternatives all restrict access. Stubbs (2011, p. 57) concludes that 'the potential benefits of the programs are diminished or unavailable to Aboriginal women because standardised, mainstream programs have not anticipated their needs'.

The rise of 'risk thinking' and the 'criminogenic needs' model with cognitive behavioural programs has also worked against reducing Indigenous incarceration, particularly where Aboriginal women do not satisfy criteria for entry into therapeutic court programs or are denied access to community corrections because of, inter alia, prior offending record, previous convictions for violence offences, or breaches of bail (Cunneen et al., 2013).[12] It has also been noted that risk assessment tools re-cast risk as a failing of the individual rather than arising from profound collective economic and social disadvantage. These tools are controversial, especially in their use with Aboriginal women precisely because of Aboriginal women's racialised and gendered position of structural disadvantage (Hannah-Moffat, 2009). Race and gender continue to be interwoven into contemporary penality either through specific considerations of 'culture' which are male focussed, or through legislative and administrative practices which provide for 'formal' equality but which deny Indigenous women access and further entrench systemic discrimination.[13]

Contemporary penal politics and the 'new barbarism'

In recent years, violence in Aboriginal communities has become the focal point of government concern and in many cases (such as the Northern Territory Emergency Response (NTER)) the major rationale for significant shifts in criminal justice and social policy. Patriarchal colonialism provides an important lens through which to consider contemporary understandings of violence and the nature of government Intervention. Within the dominant penality, there is little understanding that violence in Aboriginal communities can be 'sourced in the invasion and colonisation of Australia . . . [that] violence is inherent in the colonial project' (Watson, 2007, p. 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. Indigenous academics, Cripps and McGlade (2008, p. 243) have noted that government responses to family violence (including criminal justice responses) have 'mostly been culturally inappropriate and ineffective'.

In contrast, the history of rape and frontier violence is absent from contemporary penal approaches to violence in Aboriginal communities. Indeed, Indigenous law and culture is presented as a significant 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, p. 102). By way of comparison, Indigenous perspectives emphasise self determination and empowerment, community development and capacity building in 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 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, 2007a). Such a view evidences the continuing pervasiveness of a patriarchal colonial consciousness. This stretches back to the early days of colonisation, where, as McGrath (1995, pp. 36–37) has demonstrated, Aboriginal women were presented as 'slaves' and 'chattels' to Aboriginal men, as 'victims of male violence, of primitive rituals, of unrefined lust', while British men were represented as 'heroic rescuers'. The 2007 NTER[14] (the Intervention) as a governmental legislative and policy response to violence against women and child abuse reproduces these particular racialised and gendered understandings of Aboriginality: 'traditional' Aboriginal men were particularly to blame for abuse and violence, and Aboriginal women and children were seen as passive and hapless victims. Presented as a response to family violence in Indigenous communities, the conservative federal 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, p. 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 federal 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 criminalisation and extensive forms of surveillance and control over a range of matters from medical records to school attendance to social security entitlements, all of which specifically impacted on both Aboriginal women and girls.[15]

A consistent criticism of the Intervention has been its clearly neo-paternalistic approach and suspension of human rights (Altman, 2007), reminiscent of late 19th and early 20th century approaches to the control of Indigenous peoples. In this context, it is not surprising that we have witnessed a new level of penal punitiveness in the NT. In the years following the Intervention imprisonment rates grew by 34% between 2008 and 2012 (ABS, 2012a, p. 56). There is inconsistent evidence available in relation to gender. However, it is clear that recently the proportional increase in imprisonment has been more than twice as high for Aboriginal women compared to men.[16] The use of imprisonment in the NT remains a normalised response to Indigenous people, constantly re-invented as appropriate on the basis of cultural difference, and one that impacts differently depending on gender.

Conclusion: Maintaining control

The purpose of our paper has been to explicate the way the institutional frameworks of sentencing and punishment are imbued with cultural meanings and understandings of a gendered 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 21st 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 (missions and 'homes') began to close following 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 closing of psychiatric and other segregating institutions over the 1960s to the 1980s with the deinstitutionalisation 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.

The place of punishment in society has attracted the attention of social theorists for centuries (see, for example, Garland, 1991). We take as a starting point that imprisonment is not simply an outcome of crime. The use of the prison is a selected strategy of the state. In Australia, increases in imprisonment rates have continued while crime rates have levelled or fallen in many categories of crime (NSW Select Committee on the Increase in Prisoner Population, 2001). Unfortunately, the extant literature in general does not consider this issue specifically in relation to Indigenous women. However, Fitzgerald (2009) has shown that the increase in Indigenous imprisonment was not the result of increasing crime, but rather, the result of more frequent use of imprisonment. She analysed the 48% increase in Indigenous imprisonment rates in NSW between 2001 and 2008 and found that 25% of the increase was caused by more Indigenous people being remanded in custody and for longer periods of time, and 75% of the increase was caused by more Indigenous people being sentenced to imprisonment (rather than to a non-custodial sentencing option) and being sentenced to gaol for longer periods of time. None of the increase was a result of more Indigenous people being convicted of a crime.

It is thus worth reiterating that the previously noted increases in cultural expressions and recognitions of Aboriginality within criminal justice systems have done little to ameliorate increasing prison numbers, particularly for Indigenous women. We have argued in this paper that one understanding and explanation of this use of the prison 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. Elements of this reconfigured penality as they apply to Indigenous women include a transcarcerative movement from psychiatric institution to prison, changes in the nature of sentencing and punishment which have failed to include or respond to the specific needs of Indigenous women (such as Aboriginal-specific sentencing principles, therapeutic courts, risk assessment tools and Indigenous prisons). Other forms of surveillance and intervention through child welfare continue to target Indigenous women, removing their children and establishing inter-generational criminalisation.

We have brought together evidence that penality in Australia is founded in and continues to be shaped and reshaped by a pervasive and adaptable patriarchal colonialism. In particular, our argument requires a re-framing of explanations of contemporary penality, which have ignored the importance of a postcolonial perspective. In the words of Moreton-Robinson,

> The law in Australian society is one of the key institutions through which the possessive logic of patriarchal white sovereignty operates. White patriarchs designed and established the legal and political institutions that control and maintain the social structure under which we now live. (Moreton-Robinson, 2004, p. 2)

We argue for the analytical importance of the concept of colonial patriarchy in understanding and responding more effectively to the current position of Aboriginal women in relation to increases in women's imprisonment and the imprisonment of people with mental and cognitive impairment. Concepts like the new punitiveness and the carceral state are overladen with specific historical resonances within a colonial context. It is not accidental that particular racialised and gendered groups like Aboriginal women have borne the brunt of the seemingly 'new' politics of mass incarceration: modalities of punishment may have changed but the targets have remained remarkably consistent.

Declaration of conflicting interest

None declared.

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Notes

1. See Baldry et al. (2011) and Cunneen et al. (2013) for a discussion of penal culture in the Australian context.
2. Finnane (1997, p. 35) 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.
3. Davis (1998) makes the same point in relation to African Americans. 'If, as Foucault insists, the locus of the new European mode of punishment shifted from the body to the soul, black slaves in the US were largely perceived as lacking the soul that might be shaped and transformed by punishment . . . As white men acquired the privilege to be punished in ways that acknowledged their equality and the racialized universality of liberty, the punishment of black slaves was corporal, concrete and particular (Davis, 1998, p. 99).
4. This position is consistent with Whiteness Studies which focus on analysis of the constructions of white identity and white privilege. According to Moreton-Robinson (2000, p. vii), 'Whiteness' is 'the invisible norm against which other races are judged in the construction of identity, representation, subjectivity, nationalism and the law'.
5. The public execution of Aboriginal people also remained in place in Queensland, South Australia and the NT after it had been abolished for Europeans (Finnane & McGuire, 2001, p. 282). Finnane notes that Aboriginal people were over-represented in death sentences

during the 19th century (1997, pp. 37, 129–130). Indeed in South Australia, it appears that two-thirds of those hanged in South Australia during the mid 19th century were Aboriginal (Kercher, 1995, p. 12).

6. The Western Australian Attorney-General justified whipping as punishment for 'Aboriginal natives' on the grounds that 'these coloured races' had be dealt with like 'naughty children – whip them . . . Give them a little stick when they deserve it, and it does them a power of good' (cited in Finnane, 1997, pp. 115–116).
7. An island off the coast of Western Australia used during the 19th century, as a prison for Aboriginal persons.
8. For a similar argument in relation to African Americans, slavery, and its aftermath see Davis (1998, 2003), and in relation to Native Americans see Ross (1998).
9. Stubbs (2011, p. 53) refers to a WA study showing that 91% of Aboriginal women in prison had previously been imprisoned and almost half had more than five previous terms of imprisonment.
10. Our argument also resonates here with Wacquant's analysis of the ghetto and subsequent hyper-incarceration in the USA (Wacquant, 2010).
11. For example, it was estimated in Queensland that less than 0.5% of Indigenous adult matters and 1.5% of Indigenous juvenile matters were determined in the Murri courts (Cunneen, 2005, p. 200).
12. In the Canadian context, see Martel, Brassard, & Jaccoud (2011) who argue that there are three 'contradictory logics' at play in the attempt to 'Aboriginalize' prisons particularly in the context of risk-based management.
13. Activism by Indigenous women and supporting community organisations has seen a number of inquiries in Australia and Canada addressing the question of systemic discrimination against Indigenous women in prison, See Stubbs (2011, pp. 48–49) for an overview.
14. The NT Emergency Response, initiated in 2006, used the army, social and welfare workers, and police to impose significant controls on many Aboriginal communities in the NT. This was claimed by the government of the day, led by Prime Minister John Howard, to be necessary to manage behaviour.
15. See the Australian Crime Commission's success in the Federal Court which gave it access to the medical records of eight Indigenous girls under the age of 16, who had sought contraceptive advice from a NT remote area health clinic (Australian Crime Commission v NTD8 (2009) FCAFC 86 (10 July 2009)) against the wishes of the community and without the girl's consent. In relation to school attendance, Aboriginal women are held responsible and bear the brunt of any legal action for non-attendance (see for example, Allison, Cunneen, Loban, Luke, & Munro, 2012).
16. ABS data are available on the number of Aboriginal men and women in NT prisons for 2010–2012. During this period the number of Aboriginal men imprisoned increased by 24%; for Aboriginal women the increase was 59% (ABS, 2010a, Supplementary Data Cubes, Table 13; ABS, 2012a, Supplementary Data Cubes, Table 13). On the paucity of data and evaluation that relates specifically to Indigenous women, see Stubbs (2011) and Bartels (2012).

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