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Human Warehouses for Marginalised Peoples: The Mundane Terror of Imprisonment in the Indigenous Australian Context[1]

Some of the most insidious forms of terror in our historical moment are enacted and justified by government policy. And some of the most shocking examples of this terror appear in the form of the statistical and factual realities of imprisonment in the criminal justice systems of our time. An example is the terrifying fact that, across the world, Indigenous populations are overrepresented in prisons and, more specifically in Australia, that the number of imprisoned indigenous persons is statistically among the highest in the world.[2] Despite comprising less than 3 percent of Australia's population, Indigenous Australians constitute more than 27 percent of Australia's incarcerated population.[3] This gross inequity has prompted a myriad of scholarly articles to call into question the integrity of Australia's criminal justice system.[4] At the same time, statistical facts such as these also exemplify the extent to which the terrifying reality of modern society is often reduced to what I describe as "mundane terrors"—that is, to formulations whose abstract numerical and statistical data

serve to diminish and minimise the cultural significance and real-world experience of these incarcerated humans.

Beyond the sheer facts themselves, however, the procedures that produce these circumstances may also be understood as examples of mundane terror. These procedures include the judicial functions and enforcement methodologies by which criminals are tried and incarcerated in Australia: practices that involve acts both complex and prone to failure. Focusing on the policy frameworks that produce these practices, this essay will compare the apparent aims of imprisonment—at least insofar as they have been codified in various Australian statutes, legislative provisions, and other legal discourse—with the bleak reality of these policies as they are operationalised in Australian jurisdictions. In doing so, this essay aims to demonstrate how the terror of Australia's incarceration predicament is rooted both in the mundane application of the law and what I propose are the insidious motivations underlying imprisonment of Indigenous Australians. Although the industrial prison complex is, at least on one level, a function of the broader system of modern capitalism, the economic and political benefits that indigenous incarceration allows white Australians to enjoy presents, I argue, a remarkable and disturbing reality, one that is contiguous with Australia's history of colonial genocide and dispossession. In arguing this case, the paper will draw on the work of Angela Davis and Chris Cunneen, two scholars whose work variously indicates the ways in which the imprisonment of indigenous populations is crucially tethered to questions of sovereignty, colonial history, and profit-led economic ideology.[5]

Rationales for Imprisonment

Despite evolutions in the ways in which state powers punish individuals, contemporary advocates for imprisonment do not offer arguments that appear significantly different from the traditional discourse on the subject. For example, those who approach the problem from a utilitarian standpoint argue (and have long argued) that the goal of punishment is twofold. Punishment, they propose, is firstly aimed at preventing the specifically punished offender from committing any future crime; however, it is secondly aimed at deterring society at large from committing criminal acts, for the punishment, as a public condemnation of the act itself, exemplifies its intolerability.[6] A different but related justification for imprisonment, summarised by R. A. Duff and David Garland in their

Oxford University Press *A Reader on Punishment*, uses a retributivist logic that avows modern society's ethical duty to actually perform the legal orders of justice through exacting the punishment that it threatens.[7] Still, other commentators, exemplary among whom is Angela Davis, take a historical perspective, arguing that when imprisonment superseded more directly corporeal forms of punishment (such as torture), a new belief system arose in which punitive institutions could henceforth begin to be seen as places of rehabilitation.[8] Of course, the traditional aims of deterrence, punishment, protection and rehabilitation remain codified in various Australian statutes, such as in the *Crimes (Sentencing Procedure) Act 1999* (NSW).[9] And yet, despite the NSW state government's clear attempt to legitimise the continued development of punitive policy through the moral and ethical framework of the law—an attempt well exemplified by the legal provisions themselves—the example of Indigenous Australians allows us to see the extent to which Australia's tiers of government and the legal system have comprehensively failed to achieve their own stated goals.

In a detailed study of the contemporary problem of Indigenous imprisonment, Chris Cunneen observes that, despite the large-scale incarceration of Indigenous people, the incarceration model has failed to achieve its avowed aims in the Indigenous context. Prison, Cunneen suggests, seems neither to protect nor to deter Indigenous offenders, and almost never does a term of imprisonment rehabilitate the offender. As Cunneen suggests, prisons cannot guarantee the protection or safety of Indigenous communities, however, higher rates of incarceration more readily predicts Indigenous communities's exposure to victimisation. Logically speaking, if prisons were successful at rehabilitating individuals then communities with high levels of incarceration should expect low victimisation rates. However, this is not the reality for Indigenous communities, as Cunneen notes, as the recorded rates of victimisation among Aboriginal people, and especially among women, are drastically higher than those that are recorded in relation to the population in general (which is to say the non-Indigenous population). For instance, Indigenous women are forty-five times more likely to experience domestic violence than non-Indigenous women.[10] The data show that the imprisonment of Indigenous men seldom deters these offenders from re-offending, and even more rarely allows for rehabilitation; rather, the rate of recidivism among Indigenous men remains the highest among all Australian demographic categories, suggesting that the incarceration model, in the Indigenous Australian context, deviates considerably from the stated aims of

rehabilitation and protection and instead serves to create a recidivistic class of disadvantaged, and sometimes violent, individuals.[11]

Davis argues that the practical realities of the modern prison system preclude any possibility of rehabilitation, not only because prisons have long been shaped by the principle of "less eligibility"—which effectively strips these institutions of any rehabilitation facilities—but also because, as neoliberal societies witness the increasing privatisation of their prisons, the focus of those who own and operate these prisons has shifted from rehabilitation to retention.[12] As Davis suggests, it seems hard to imagine how an institution that is effectively designed under the aegis of less eligibility to deprive its prisoners both of liberty and resources might help to foster "productive members of society."[13] Rather, it seems easier to agree with the evidence that "imprisoned men return" from prison "more violent" than they had been before entering prison.[14] Indeed, the failure of the traditional aims of the prison system in general, and of less eligibility in particular, demonstrates just how outmoded our theories of punishment have become. And since so little attention has been paid to the penal system's negative outcomes, recent history has allowed governments to increasingly entrench the prison system's operations, promoting it as a disciplinary apparatus rather than a conduit of social reform and rehabilitation, even as a range of complex private interests and prejudicial social ideologies undergird its modern operations.

The way in which the Australian law has developed in respect of the retributivist model expresses, at least implicitly, an aspiration to homogenise or make uniform the application of the law in the face of the heterogeneous range of defendants who come before the courts in Australia, distinguished by race, gender, and class. This, of course, has long been in keeping with the principle of eligibility, a central tenet of which has been, as a report of 1834—the British Royal Commission on the Poor Law—indicates, the "application of administrative uniformity."[15] In a contemporary context, however, politically conservative governments have co-opted the retributivist argument that a punishment should be proportionate to the relevant crime, using it to introduce mandatory sentencing rules that restrict judicial autonomy, and hamstring the judiciary's ability to give due consideration to the effects that social inequality have had on the nature and frequency of certain offences.[16] In other words, a legal discourse espousing equality and consistency has been misapplied, through mandatory sentencing procedures, to systematically disadvantage socially and economically marginalised individuals, especially Indigenous Australians, who may commit offences for reasons other than an inherent criminality.

It is important to acknowledge that the modern application of imprisonment rationalities and practices has had a disproportionate effect on Australia's Indigenous population. This is reflected in the fact that the rate of incarceration of Indigenous people in Australia greatly outstrips the incarceration rate of Australia's non-Indigenous population. In June 2015, the Australian Bureau of Statistics (ABS) reported that "Aboriginal and Torres Strait Islander prisoners represented 28% of the total full-time adult prisoner population" while this group accounted for only "approximately 2% of the total Australian population aged 18 years and over."[17] What should also be of interest to criminologists and scholars of punishment, however, is that the rate of Indigenous imprisonment in Australia is almost equal to the overall crime rate in the country for approximately the same period.[18] For instance, the ABS reported in February 2015 that there was a "national offender rate of 1,997 offenders per 100,000 persons aged 10 years and over in 2013–14," which equates to an Australian crime rate of 1.997 percent.[19] In a separate report published in June 2014, the ABS reported that, in 2013, the "age standardised imprisonment rate for Aboriginal and Torres Strait Islander prisoners at 30 June 2013 was 1,959 Aboriginal and Torres Strait Islander prisoners per 100,000 adult Aboriginal and Torres Strait Islander population."[20] That is, the rate of imprisonment within the Aboriginal population is approximately 1.95 percent. So, for the approximate period of 2013–14, the rate of imprisonment within the Aboriginal population almost equalled the total crime rate for Australia: while just under 2 percent of all Australians were prosecuted (but not necessarily convicted) for crimes, about the same figure, 2 percent, of all Indigenous Australians were imprisoned.

Additionally, the systematic hyper-imprisonment of Indigenous people in Australian prisons is further demonstrated by a comparison of the imprisonment rates of Indigenous and non-Indigenous Australian adults. The same ABS report also noted that "the equivalent imprisonment rate for non-Indigenous prisoners was 131 non-Indigenous prisoners per 100,000 adult non-Indigenous population": approximately 0.13 percent. To put this in perspective, this means that, for the approximate period of 2013–14, the incarceration rate of the non-Indigenous population was only 0.13 percent while, for the Indigenous population, it almost totalled 2 percent.[21] The ABS reported in the same June 2014 report that the "rate of imprisonment for Aboriginal and Torres Strait Islander prisoners was 15 times higher than the rate for non-Indigenous prisoners" at 30 June 2013, and that the "highest ratio of Aboriginal and Torres Strait Islander to non-Indigenous imprisonment rates in Australia was in Western Australia," where there are 21 times

more Aboriginal and Torres Strait Islander prisoners than non-Indigenous prisoners.[22]

Faced with these and similar statistics, commentators in both the global and Australian contexts have recently argued that no positive link can be drawn between crime rates and incarceration rates.[23] In Australia, this finding is suggested by an alarming statistical juxtaposition: since 2000, the imprisonment rate of Indigenous Australians has increased by more than 57 percent, while for non-Indigenous Australians the imprisonment rate has remained almost stable.[24] That such a staggering increase in imprisonment rates has arisen for only Indigenous Australians is telling: it indicates, if not confirms, that Indigenous Australians have been subject to prison penalties in cases where non-Indigenous Australians might have escaped incarceration. And, if we accept the increasingly commonplace view of criminological and sociological scholars that there is no deducible or correlative relationship between crime rates and imprisonment rates, then the staggering rates at which Indigenous Australians are imprisoned begins to appear even more egregious, highlighting the urgent need for academics and politicians alike to revaluate the fundamental aims of imprisonment. Among the many questions raised by these reports, one that most readily arises is not simply *cui bono*, "Who is it that benefits?" but *quid bonum*, "What is the benefit?" More specifically, what political, social and economic advantages does Australia enjoy when it disproportionately imprisons its Indigenous population?

Scholars who answer this question often suggest that the Australian government has sought to criminalise the Indigenous population for one or more of three reasons—or in the pursuit of one or more of three advantages: imprisonment allows the state to advance its colonial claim to sovereignty; it enables it to legitimise the institutional authority of the criminal justice system; and imprisonment serves to render an otherwise "problematic" native population either incapacitated or "profitable" within the normative capitalist framework.

Imprisonment as a Means for Asserting Colonial Sovereignty

Affirming the first of these reasons, Cunneen identifies a strong relationship between sovereignty and Indigenous prison over-representation.[25] Because sovereignty was never ceded, Cunneen observes, and because Indigenous people across the world have not consented to "the exercise of

sovereign powers in relation to criminal jurisdiction," many Indigenous peoples—and I would include Indigenous Australians among them—continue to possess a competing claim to sovereignty. "From an Indigenous perspective," Cunneen further notes, "sovereignty can be conceptualised in terms of jurisdictional multiplicity and divisibility rather than monopoly and unity."[26] To conceive of a nation's sovereignty as a monopolistic or monolithic jurisdictional authority—one that seeks not to divide its own authority with an Indigenous population, but only to maintain its own unity—is to acknowledge the absence of authority from which that state governs its Indigenous peoples. It is to consider the illegitimate origin of any of the institutions that the state imposes on the native population, and the wholesale disregard for that population's own laws and its own long established methods of self-governance.[27]

In her recent book titled *The White Possessive*, Aileen Moreton-Robinson introduces her history of Australian sovereignty in the unambiguous language of legal wrongdoing:

> Patriarchal white sovereignty is a regime of power that in the Australian context derives from the illegal act of possession and is most acutely manifested in the form of the state and the judiciary.[28]

The way in which this regime of power persists, however, was made somewhat clear in the finding of the Australian High Court in the *Yorta Yorta* decision of 2002, [29] where the court reasoned that, once the British Crown's assertion of sovereignty had been made, it was impossible at law for two systems of governance to concurrently exist: "what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty" (44). The essential feature of this judicial observation, of course, is that from the very moment in which the British Crown asserted its sovereignty the development of an Indigenous system of governance was frozen in time. And yet while the court noted that no Indigenous laws could be developed after that moment of the assertion of a new sovereignty, it also suggested that what laws and customs *had* been developed prior to the new sovereign claim—albeit *only* those laws—should remain legally recognisable today. The court put this principle in the following way:

> Because there could be no parallel law-making system after the assertion of sovereignty it also follows that the only rights or interests in

> relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom (44).

As such, Indigenous Australia's claim that it enjoys a sovereign right that precedes the more recently asserted sovereignty of the British Crown is a legitimate assertion. Indeed, it is a claim that poses a very real threat to patriarchal white sovereignty. And it is toward the eradication of such a threat, I argue, that the criminal justice system can be—and has been—directed in Australia.

In other words, the authority and legitimacy of the criminal justice system plays a crucial role in maintaining the *assumption* of patriarchal white sovereignty in Australia. Or, to put it another way (in the way that Moreton-Robinson articulates), it is within the very *assumption* of white sovereignty that "the roots of strategies of exclusion and assimilation"—one of them the criminal justice system itself—"are epistemologically and ontologically buried." Indeed, the very "existence" of Indigenous sovereignty, as Moreton-Robinson continues, is "both refused and acknowledged through an anxiety of dispossession, which rises to the surface when the nation as a white possession is perceived to be threatened." The fear and terror of the return of Indigenous sovereignty manifests in the form of this anxiety of dispossession; and this is most effectively reflected and repressed in Australia's criminalisation and hyper-imprisonment of Indigenous Australians. Denying Indigenous Australians their implied constitutional freedoms allows patriarchal white Australia to maintain its sovereignty, and also functions to undermine that group's political power, to deny them their right to self-determination, and to perpetuate their oppression, all the while weakening their claims to sovereignty and nullifying their political agency.[30]

Although the above assertions may appear both to oversimplify and overstress what is a complex political and legal issue, Australia's colonial history of punishment makes readily intelligible the fact that the aim of imprisoning the Indigenous population is to reinforce the claim to white patriarchal imperialism. Sharon McIvor, an Indigenous women's rights advocate featured in a filmed panel discussion titled *Let's Talk Incarceration*, explains how this history of isolating Indigenous people—politically, socially, economically, and territorially—was the necessary means used by the colonialists to achieve their end: to free up land for settlers and assert their sovereign dominance.[31] In this way, the hyper-imprisonment of

Indigenous Australians can be understood similarly to the way in which Davis views the disproportionate incarceration of African Americans: both represent the modern extension of a history of racialised punishment, the object of which is to secure and guarantee white dominance.[32]

Imprisonment as a Mechanism from which to Derive Political and Economic Profit

Another one of the apparent aims of hyper-imprisonment is the exploitation and monetisation of the prison industry in a modern capitalist society. Davis argues that the increasing privatisation of prisons and the emergence of the prison industrial complex have driven, and continue to drive, the aims of imprisonment towards a capitalist logic predicated on profit.[33] This notion is relevant in Australia where, as Cunneen notes, prisons are increasingly privatised and expanded.[34] In another sense, imprisonment in Australia can also be understood as achieving the aim of economic "waste management" by making Indigenous people "profitable." Coined in the context of the modern prison system by Jonathan Simon in 2007, the expression "waste management" refers to the practice by which individuals deemed "unprofitable" due to their social economic status (SES) or the threat they pose to the wider community are physically separated or sequestered from that wider community.[35] In the Australian context, Indigenous Australians may be considered "unprofitable" on at least two counts: not only do they constitute the poorest demographic within society, but their very existence threatens to destabilise the fragile claim that white patriarchal Australia has made to sovereignty, together with the economic privileges that accompany such a claim. More broadly, the rise of global capitalism has deprived groups of people (already marginalised by race, class and gender) of such basic modern human necessities as healthcare, housing, and education. Within the profit-driven, neoliberal system, marginalised groups are rendered only ever as a surplus expense, the cost of their lives a problem to be remedied. As Davis observes, no sooner do policymakers turn to the question of how to transform this human expense into a profitable investment than they conclude "the only way to make them profitable is to put them in prison."[36]

But the aim of "waste management" extends beyond the actual facilitation of imprisonment, for it affects the Australian Government's budget re-allocations for other penal matters too.[37] While government budgets have increased their spending on the prison industry, they have

done so at the expense of rehabilitation services, Indigenous Affairs programs, and welfare.[38] If one seriously considers the fact that Indigenous Australians are the most disadvantaged group in Australia—both in terms of socio-economic status and access to services[39]—the additional fact that this same group has the highest incarceration and recidivism rate in the country makes clear that the prison system, at least in effect, operates to contain and isolate these socially and economically "problematic" citizens. For it is, at least in the cold language of rational economics, a more "profitable" option to imprison such citizens than to assist this group in the community.[40] In this way, Indigenous bodies become the "raw material" of a prison system governed by neoliberal economic principles—principles that prioritise the most politically expedient method by which to invest in the Indigenous population. This most expedient method involves spending money on prisons rather than on developing social reforms and policies aimed at equality. In such a context, it cannot be surprising that, in Indigenous communities, Australia records higher re-imprisonment rates than high-school retention rates.[41]

The Insidious Cycle of Imprisonment

Perhaps the most sinister terror to be addressed concerning Indigenous imprisonment is the fact of its very invisibility. Entrenched, legally explicable, self-justifying and self-affirming, the incarceration model has inaugurated a vicious cycle of criminalisation whose proportions seem largely unknown among those in the wider community. It is self-perpetuating in that the overrepresentation of Indigenous people in prison allows the state and its authorities to perpetuate a racialised discourse about crime while many of those affected by it are silenced—a discourse that serves only to reaffirm an array of misguided and outmoded models of criminality, such as the proposition that those in the Indigenous population, by dint of their ethnicity alone, are more likely to be criminals.[42] This racialised discourse has particularly affected Indigenous males, who are represented as delinquent (because they experience higher rates of alcoholism, incarceration and unemployment) and dangerous (because higher rates of domestic violence within Indigenous communities, as well as higher levels of recidivism, have been recorded). Furthermore, policymaking and large-scale interventionist government projects—such as, most notably, the so-called NT Intervention under the *Northern Territory National Emergency Response Act 2007*—construct Indigenous masculinity as sexually predatory.[43] A

discourse that valorises the autonomy, responsibility and rights of the individual, assumes the possibility of free and rational choice, and devalorises communitarian initiatives, including social welfare: this racialised discourse has become a familiar one in neoliberal states.[44] In other words, the modern neoliberal state develops a governmental climate of praise and blame (epideixis), espousing a "responsibilising" narrative that assigns blame to the individual for offending.[45] But in doing so, the state also conceals or obscures the social reality of inequality, depriving those affected of a voice, and disguising its operations in narratives of praise, aspiration, and adulation: nationalism, economic growth, and freedom.

The criminalisation of the Indigenous population is profoundly disempowering. Considering the paranoid nationalism of the Western globalised world post 9/11, it is "conceivable," as one critic notes, that it is at least in the interest of representatives of such states to "incite and exploit public fear (perhaps through media coverage) in order to achieve some set of related political goals," including such goals as supplemented governmental powers through tougher stances on crime.[46] This has seen, as Cunneen writes, the "development of technologies for identifying, classifying and managing groups sorted by 'dangerousness,'" technologies which, coincidentally, involve indices that effectively target Indigenous populations—indices such as school absenteeism, histories of drug and alcohol problems, and domestic homicide—to assess risk characteristics.[47] This, in turn, grants government a mandate to implement panoptic forms of surveillance in relation to Indigenous communities, which, as Foucault suggests, equips the state to criminalise an entire social demographic, and foster an environment that produces a predictably delinquent and recidivistic class of offenders.[48]

There can be little doubt that imprisonment has devastating effects on Indigenous individuals and communities. The hyper-incarceration of Indigenous Australians not only dispossesses and disconnects this group from their culture and community, but criminalises this group in such a way that future minoritisation, oppression, and imprisonment are virtually guaranteed. From these observations, one may draw at least two firm conclusions about the aims of imprisonment in Australia: the first, that multiple governments have failed to achieve the state's traditionally stated goals of protection, rehabilitation, and deterrence; and the second, that these governments have succeeded in affirming white colonial sovereignty, entrenching institutional legitimacy, and rendering a population at first problematic, and then profitable. This essay has aimed to propose a series of reasons as to why the rates of incarceration of Indigenous Australians

are demonstrably higher than those with respect to non-Indigenous Australians. It has argued that the practices and policies of imprisonment in Australia represent not merely the functional processes of governmental criminalisation but the systematic continuation of a colonialist history—one whose existence in fact depends on the suppression of its Indigenous population. It is hoped that this paper has made clear that this system and its aims will require significant re-evaluation if they are to serve the ends of making the Indigenous right to sovereignty and self-determination a reality. Without drastic and far-reaching reform, prisons will tragically remain what Cunneen calls "human warehouses for marginalised peoples," and continue to represent one of the most pernicious terrors for Indigenous Australia.[49]

Notes

1 I would like to thank Kate O'Halloran and Rafi Alam for their comments on the initial paper that I produced on this subject, and Chris Rudge and the editors of *Philament* for their assistance in preparing this article for publication.

2 Gino Vumbaca,"Prison is not the answer but perhaps justice reinvestment is," *The Sydney Morning Herald*, 4 February, 2015, http://www.smh.com.au/comment/prison-is-not-the-answer-but-perhaps-justice-reinvestment-is-20150203-135hgi.html#ixzz3mANwGxMA.

3 Australian Bureau of Statistics, *Prisoners in Australia*, catalogue no. 4517.0 (ABS: Canberra, 2014), http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0.

4 Eileen Baldry, David Brown, Mark Brown, Chris Cunneen, Melanie Schwartz and Alex Steel, "Imprisoning Rationalities," *Australian & New Zealand Journal of Criminology* 44, no. 1 (2011): 36–37; Chris Cunneen, "Fear: Crime and Punishment," *Dialogue* (2010): 44; Cunneen, "Indigeneity, Sovereignty, and the Law: Challenging the Processes of Criminalization," *South Atlantic Quarterly* 110, no. 2 (2011): 310; Cunneen, "Punishment: Two Decades of Penal Expansionism and its Effects on Indigenous Imprisonment," *Australian Indigenous Law Review* 15, no. 1 (2011): 10.

5 See Cunneen, "Fear: Crime and Punishment," 44–54; and Angela Y. Davis, "Race, Gender and Prison History: From the Convict Lease System to the Supermax Prison," in Don Sabo, Terry A. Kupers, and Willie London (eds.), *Prison Masculinities* (Philadelphia: Temple University Press, 2001), 35–45.

6 See Jeremy Bentham, *The Rationale of Punishment* (New York: Pro-

metheus Books, 2009), 45.

7 R. A. Duff and David Garland, "Introduction: Thinking about punishment," in *A Reader on Punishment*, ed. Duff, R.A and Garland (Oxford: Oxford University Press, 1994), 10.

8 Angela Y. Davis, *Let's Talk Incarceration* (Brisbane Indigenous Media Association (BIMA), 2014), https://vimeo.com/109103262.

9 See *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 3A (a)-(g) ("Purposes of Sentencing").

10 Cuneen, "Indigeneity, Sovereignty, and the Law," 311.

11 Cunneen, "Punishment," 12.

12 Modern prisons are designed on the principle of less eligibility, which proposes that prisons should not feature conditions any better than those faced by the lowest or poorest social class outside of the prison. Generally acknowledged to have been first proposed by Jeremy Bentham, the principle rests on the assumption that prisons cannot be effective deterrents for individuals from low socio-economic backgrounds if the conditions faced by prisoners are superior to those they would otherwise face outside of prison. Moreover, the principle is often understood as a safeguard against the possibility that prisoners will become dependent on the perceived relative benefits of prison life. See Edward W. Sieh, "Less Eligibility: The Upper Limits of Penal Policy," *Criminal Justice Policy Review* 3, no. 2 (1989): 159 and 162; and Davis, "Race, Gender and Prison History," 36.

13 See Davis, *Let's Talk Incarceration*.

14 Cuneen, "Indigeneity, Sovereignty, and the Law," 323.

15 Sieh, "Less Eligibility," 162.

16 On these issues, see Tammy Solonec, "'Tough on Crime': Discrimination by Any Other Name, The Legacy of Mandatory Sentencing in Western Australia," *Indigenous Law Bulletin* 8, no. 18 (2015): 8; and Suvendrini Perera, "Commentary: Australia: Racialised Punishment and Mandatory Sentencing," *Race & Class* 42, no. 1 (2007): 73-81.

17 See Australian Bureau of Statistics, "4512.0 - Corrective Services, Australia, June Quarter 2015," 10 September, 2015, http://www.abs.gov.au/ausstats%5Cabs@.nsf/mediareleasesbyCatalogue/01A3C2BE96FA-6185CA2568A90013631C?Opendocument.

18 See Cunneen, "Fear: Crime and Punishment," 45; also see Australian Bureau of Statistics, "4519.0 - Recorded Crime - Offenders, 2013-14," 25 February, 2015, http://www.abs.gov.au/ausstats/abs@.nsf/mf/4519.0/.

19 Australian Bureau of Statistics, "4519.0 - Recorded Crime - Offenders, 2013-14," 25 February, 2015, http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2013-14~Main%20Features~Offenders,%20

Australia~3.

20 Australian Bureau of Statistics, "4517.0 – Prisoners in Australia, 2013," 13 June, 2014, http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4517.0main+features322013.

21 Ibid.

22 Ibid.

23 See, for example, Bronywn Naylor, "The Evidence Is In: You Can't Link Imprisonment to Crime Rates, *The Conversation* (April, 2015), http://theconversation.com/the-evidence-is-in-you-cant-link-imprisonment-to-crime-rates-40074.

24 Jessica Kidd, "Over-representation of Indigenous Australians in prison a catastrophe, says Mick Godda, the Aboriginal and Torres Strait Islander Social Justice Commissioner," *ABC News*, 5 December 2014, http://www.abc.net.au/news/2014-12-04/number-of-indigenous-australians-in-prison-a-catastrophe/5945504.

25 Cunneen, "Indigeneity, Sovereignty, and the Law," 309.

26 Ibid., 316.

27 Ibid., 310–317.

28 Aileen Moreton-Robinson, *The White Possessive: Property Power and Indigenous Sovereignty* (University of Minnesota Press, 2015), 138.

29 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422; 194 ALR 538; 77 ALJR 356 (12 December 2002). Also see Shaunnagh Dorsett and Shaun McVeigh, "Section 223 and the Shape of Native Title: The Limits of Jurisdictional Thinking," in Lisa Ford and Tim Rouse (eds.), *Between Indigenous and Settler Governance* (London: Routledge, 2013), 164–5.

30 Cuneen, "Indigeneity, Sovereignty, and the Law," 310–317.

31 Davis, *Let's Talk Incarceration*.

32 Davis, "Race, Gender and Prison History," 38. On this issue, Elizabeth Povinelli further explains the philosophical and practical dilemma in which one group's happiness and "corporeal well-being" is largely contingent on another group's "corporeal misery": see "The Child in the Broom Closet: States of Killing and Letting Die," *South Atlantic Quarterly* 107, no. 3 (2008): 511. In the Australian context, the competition between claims to sovereignty has seen the development of a nation-state that comes at the cost of repressing another nation-state's existence.

33 Davis, "Race, Gender and Prison History," 41.

34 Cunneen, "Punishment," 14.

35 See Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford

University Press, 2007), 143.

36 Davis, *Let's Talk Incarceration*.

37 Cunneen, "Punishment," 14.

38 Ibid.

39 Povinelli, "The Child in the Broom Closet," 512.

40 Davis, *Let's Talk Incarceration*.

41 Cunneen, "Punishment," 14.

42 Cuneen, "Indigeneity, Sovereignty, and the Law," 318.

43 Ibid., and Cunneen, "Punishment," 10. While there can be little doubt that, in modern Australian history, male Indigenous bodies have been subject to more punishment than any other kind of body, my aim in this essay has been to highlight the way in which racial politics—rather than gender politics—affects the Australian criminal justice system. Notably, however, the fastest growing imprisonment rate in Australia is for Indigenous women, which is more than fifty per cent higher than the rate of imprisonment for non-Indigenous males.

44 See Cunneen's summary of neoliberal values in Cunneen, "Punishment," 15.

45 On the "responsibilising" narrative, see Povinelli, "The Child in the Broom Closet," 515.

46 See, for example, Alex Braithwaite, "The Logic of Public Fear in Terrorism and Counter-terrorism," *Journal of Police Criminal Psychology* 28, no. 2 (2013): 100.

47 Cunneen, "Indigeneity, Sovereignty, and the Law," 318–19.

48 Cunneen, "Punishment,"11; also see Michel Foucault, "On Attica," trans. John K. Simon, J, in Sylvère Lotringer (ed.), *Foucault Live: Interviews 1961–1984* (New York: Semiotext(e), 1996), 114.

49 Cunneen, "Punishment," 14.