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CHAPTER TWO

HISTORICISING COLONIAL AND POSTCOLONIAL INDIGENOUS CRIME AND PUNISHMENT

> [Indigenous practices] are consistent with a state of the grossest darkness & irrational superstition and although in some cases being a show of justice – are founded entirely upon principles particularly in their mode of vindication for personal wrongs upon the wildest most indiscriminatory notions of revenge.
>
> (*R v Murrell & Bummaree* 1836: 239, Burton J notes)

INTRODUCTION

The criminalisation of Indigenous peoples has been a means of control and containment since British colonization of Australia. Punishment of Indigenous peoples in the early colonial period involved violent displays that climaxed in public executions. Although the violence of the early years continues to haunt the criminalisation of Indigenous people and criminal justice processes, overall the late nineteenth century saw a transformation of overt violence into 'epistemic violence' through the production of colonial knowledges and laws (Spivak 1988: 76). White claims to Australian land subjected the Other to an inferior and precarious position that could be undermined and obliterated (1988: 76). This book will shed light on the

precarious subjectivity of Indigenous Australians in the process of criminal sentencing. Courts create knowledge of Indigenous peoples that fits within the normative postcolonial paradigm. These representations wax and wane based on the judicial will to tolerate or exclude alterity.

As a context for the analysis of Indigenous representations in sentencing, this chapter examines the portrayal of Indigenous people on the frontier and in various colonial and state legislation governing Indigenous Australians. It relies on records of Aboriginal Protectors and legislators, media reports and personal accounts by settlers and Indigenous people. These sources reveal that from the late eighteenth century there were persistent attempts to ‘eliminate, restructure and reconstitute Aboriginal identity in the interests of the colonizer’ (Blagg 2008: 3). Key to this process is the classification of Indigenous people as “criminal” as well as their instrumental criminalisation and punishment. Punishing Indigenous people for colonial transgressions or simply because of their “race” was intrinsic to ‘obliging the native to cathect the space of the Other on his home ground’ (Spivak 1985: 253). In other words, it forced the “natives” to become an outsider and experience their home space as an imperial space.

This chapter does not endeavour to explain criminal offending *per se*, but to explore the processes for criminalising Indigenous people, especially in northern Australia, and how they straddled broader control agendas in transforming the ‘space of the

colony into a colonised space' (Blagg 2008a: 131). On the frontier on the cusp of the nineteenth century, it was expedient to dispossess Indigenous people of their land through the violence of the free settler, military corps or under the governor's prerogative. [1] It was generally the squatters, who included wealthy pastoralists known as the 'squattocracy', who were given free rein to 'disperse' (violently eradicate) Indigenous people from their land (Kowald and Johnston 1992: 60). This was backed by a media campaign that depicted Indigenous resisters as outlaws.

[1] For example, the 'black line' was instigated by Governor George Arthur in 1830 in Tasmania to remove Indigenous people from white settled areas. This involved a human chain of over 3,000 convicts, free settlers and troops that pushed Indigenous people out of the settled districts over a six week period (Moses 2000: 99).

Crime was a mode of 'black subjection', but also ascribed the 'Other' with an agency of criminality – being the only form of 'agency recognised by law' (Hartman 1997: 41, 104). In all other facets of life and law Indigenous people were rendered helpless victims who were in need of salvation. Indigenous agents were a threat to the expansion of British colonial capital and the efforts of settlers in quelling this threat were part of the colonial pursuit.

When the colonial legislature and courts were established, they legalised the force inflicted on Indigenous people. Courts that handed down corporal punishment or ordered public executions for Indigenous people served to make an example of those

who resisted colonization. For lawmakers, like the punishment-administering settlers before them, Indigenous people were regarded as only capable of learning through might, and special provisions were inserted into criminal laws to allow whipping and other corporal punishment as a sentencing option exclusively for Indigenous people. Such countenances of the criminal law confirm Agozino's (2004: 344) suggestion that criminal justice is 'inherently a colonial enterprise' where 'repressive technology' is 'monopolised by imperialist countries'. The criminal justice system not only punishes Indigenous people but strives to delegitimise Indigenous sovereignty through the practice of jurisdiction and authority (see Ford 2006: 107).

As these violent punishments went into decline, 'epistemic' violence involving the internalisation of colonial knowledge became the new weapon of control. Indigenous people were detained in administrative and penal institutions and instruction and hard labour became the means for transforming Indigenous lives. In the late nineteenth century and first half of the twentieth century, race-based legislation, known as the Aboriginal Acts, authorised detention on missions and settlements. Later, policies of assimilation placed Indigenous people in the purview

of the police, making prisons the new enclave for Indigenous containment. The courts imposed prison sentences with reference to 'neutral' criminal laws, securing the normative colonial framework. Deterrence was a rationalising, rather than rational, role of the postcolonial criminal justice system (Norrie 2001: 19; Agozino

2004: 345). Criminalisation and imprisonment, as will be contended towards the end of this chapter, have ongoing implications for the management of Indigenous spaces and peoples. When the Indigenous legal domain shows resilience in the face of colonization, such as in the Northern Territory, the penal apparatus of the state has intervened to normalize and civilize.

CONSTRUCTING THE INDIGENOUS CRIMINAL ON THE FRONTIER

On the frontier, forty years before the establishment of the colonial legislature and courts, punishment mostly took the form of summary justice and operated outside of the British rule of law (Bennett 1819: 96). Historian Rolls (1984: 77) wrote that during the colonial period, 'so much of Australia's history took place outside the law [that] there was more attempt to hide it than to record it'. While the heart and soul of frontier culture could be regarded as "lawless", Ford (2006: 97) informs us that "lawlessness" is a 'poor caricature'. This is because the unregulated engagement of settlers and Indigenous people had a productive purpose in fulfilling the 'work of empire' (2006: 97). Decentralised governance was an efficient means of seizing land. Initially, most land was acquired by squatters and they violently responded to Indigenous resistance, along with the assistance of the military in serious cases. These were 'governmental authorities' in their own right, but their exercise of 'governmentality' was not an affront to the sovereign state but the embodiment of its power (Foucault 1979: 79). [2] The acts of free settlers in punishing Indigenous

[2] Also see Agamben's (1998: 59) discussion on sovereignty as 'law beyond the law to which we are abandoned'.

transgressions were a countenance of colonization and condoned by local British authorities. They were a demonstration of the might of the sovereign unleased as 'cruel, savage, beasts' ready to launch punitive, even preventative or vengeful expeditions (Derrida 2009: 209).

The ramification of the devolution of punishment was that Indigenous people were subject to unrestrained brutality. New South Wales grazier Robert Scott in the 1830s commented that violence embodied 'our power to punish' and 'outrage' is apprehended 'in our first intercourse with the natives' (quoted in Harrison 1978: 22). Indigenous people were punished through harsh, sometimes fatal, means without trial or due process. In parts of northern Australia, this approach to punishment lasted into the twentieth century, notwithstanding the formation of courts, state police and later the Federal Parliament under the *Commonwealth of Australia Constitution Act 1901* (Cth). In 1890 the South Australian Minister responsible for the Northern Territory, John Parsons, declared, 'Leave the native question alone and the natives will be obliterated' (quoted in Donovan 1981: 184). Protector of Aborigines for the Northern Territory, Edward Hamilton set the tone for European-Indigenous relations in 1880 by arguing that a strict adherence to the letter of the law was unnecessary and the settler-pastoralist should 'not to be taught to rely on the Police'

in punishing Indigenous people (quoted in Clyne 1987: 183). In safeguarding “their” land, pastoralists often took matters into their own hands by personally administering punishment for trespass and interference with cattle.

By casting the Indigenous person as a violator of the colonial project, punishment was reasoned as a rational response. In contrast, the Northern Territory Office of the Government Resident (1929: 3) regarded courts and prisons as a blunt tool for deterring Indigenous people. Violent summary punishment was perceived as effective in sending a message to a “primitive” race who could only understand their

wrong by the immediate dispensation of physical force (Harrison 1978: 22). The *Northern Miner* defended settlers’ shooting of Indigenous people to avenge crimes on the basis that ‘the one argument a blackfellow understands is that delivered from a rifle or a six shooter’ (Fitzgerald 1986: 206-7). The manager of an early Queensland pastoral station advocated shooting as the only punishment ‘which Northern Queenslanders have never found to fail’ (quoted in Kowald and Johnston 1992: 60). Edward Palmer (1903: 213), wrote in his observations on the settlement of Queensland, ‘The pioneers cannot be condemned for taking the law into their own hands and defending themselves in the only way open to them, for the blacks own no law themselves but the law of might’. Indigenous laws, in fact, form strict regulatory systems for governing relationships to land, culture, kin and ceremony (Gaykamangu 2012: 238; Loy 2010). While they are not predicated on Western judicial and parliamentary frameworks or embedded in written texts, Indigenous

laws have rigorously maintained the cohesiveness of Indigenous communities for tens of thousands of years (Gaymarani 2011: 283). However, the colonizers' denial of Indigenous systems of laws created a fiction of a homogenous order where only whites possessed law-making capacity.

These colonial imaginings of Indigenous lawlessness coincided with contemporary eugenicist understandings of criminals, marked by the emergent criminology of Cesare Lombroso in the nineteenth century. Biological backwardness of the darker races was grounds for inflicting the death sentence because they had no capacity for rehabilitation (Lombroso 1876/2006: 180). Lombroso (1876/2006) studied what he referred to as 'born criminals' by identifying prisoners' physical appearance and brain capacity. He asserted the ape-like atavism of 'born criminals' was evidenced *inter alia* by their darker skin and smaller brains. These "racial" features resulted in criminals having 'primitive behaviour' and lacking remorse, moral indifference and indolence (Anthony and Anthony 2008: 44). Agozino (2004: 350) linked the rise of the

discipline of Criminology to 'a time that colonial administrations imprisoned most parts of the earth'. Colonial locations were regarded as lawless to justify the imposition of British law (2004: 347).

In colonial northern Australia, a central locus of this book, the government and media framed Indigenous people as barbaric due to their destruction of cattle (Anon 1884: 5). The alternative narratives about Indigenous people being deprived of their

sustenance by the colonial land takeover and Indigenous views of animals on their land as part of their food chain were subverted. Hysteria over cattle killing and cattle theft fuelled a great deal of the settlers' punitive activity. 'Destructive and murderous blacks' were portrayed by pastoralists as one of the most serious threats to the emerging pastoral industry (Kelsey 1938: 400). This generated a moral panic which created hostility towards Indigenous people and enforced a white consensus on their criminality. Because of the immediate proximity of Indigenous people to pastoralists, the media promoted a view that pastoralists were best positioned to punish Indigenous crimes of 'larceny of beef' and 'killing cattle' (Anon 1899: 4). Constable Willshire (1896: 43) justified shootings by station owners in response to cattle offences on the grounds that they really knew the 'wild natives'. Northern Territory explorer and pastoralist Nat Buchanan remarked:

> Every man was his own policeman; and the letter of the law was often ignored in favour of summary justice. ... [T]he white man far removed from the restraints of formal law sometimes perhaps rivaled his black brother in savage reprisal ... . Imprisonment for cattle killing was quite impracticable: and if no punishment were inflicted it would have been impossible to settle country.
>
> (Nat Buchanan quoted in Buchanan 1933: 117)

Any Indigenous person was a target in the pursuit to punish cattle killers. The

killing of one beast could implicate the whole Indigenous group who would be rounded up and dealt with violently (Bolton 1981: 126). Some of these punitive episodes materialized in massacres such as the ‘Sandover Massacre’ in the Northern Territory in the 1920s that saw more than 100 Alyawarra people killed as the result of a station manager losing cattle (Johannsen 1992: 66; also see Askins 1965: 56; Elder 2003: 181-215; Green 1995). Reverend J.B. Gribble (1884: 206-7) wrote about Queensland settlers who would ‘go out in parties fully armed’ to pursue Indigenous cattle spearers and sheep stealers. Northern Territory Government Resident and Resident Judge in the late nineteenth century, Charles Dashwood, drew attention to the uncontrollable shooting of ‘natives right and left’ in response to cattle interferences (Select Committee on The Aborigines Bill 1899: 24). ‘Swift retributive justice’ continued into the twentieth century, according to Government Resident, C.E. Herbert, who found that it had ‘beneficial effect’ despite admitting that ‘innocent persons have suffered with the [Indigenous] offenders’ (Herbert 1907, 1905: 17). The Native Police Forces, consisting of Indigenous troopers under the authority of European officers, were also responsible for some of these unrestrained punitive expeditions in seeking to assist station owners, and were found to be ‘completely out of legal control’ (Select Committee of the Queensland Legislative Assembly Inquiry into the Native Force 1861, quoted in Rowley 1970: 161; also see: Rusden 1883: 232).

By the twentieth century, especially when Indigenous people were employed in

large numbers by pastoralists, the pastoralist's domain could be described as micro-jurisdiction in northern and central Australia. Pastoralists wielded power over Indigenous workers and their families on cattle stations. Its jurisdiction eluded

governance by colonial and later state and territory administrations.[3] The remoteness of pastoral properties meant that they were often beyond the purview of central authorities. Parliaments generally sanctioned pastoralists' control of Indigenous people and their use of punishment (especially for trespass, cattle killing or where Indigenous people resisted employment) because of the productivity of pastoralism in the north and the civilizing effect of work for Indigenous people. Nonetheless, the pastoralists' domain would deliver some benefits for Indigenous people who were granted latitudes to participate in ceremonies and maintain cultural traditions where they conformed to the rules of the pastoralists by way of work and discipline (discussed below). For pastoralists, they prospered by producing a chiefly loyal and dependent Indigenous workforce by virtue of their connections to their land and kin on cattle stations (McGrath 1987). A legacy of the cattle era when Indigenous people lived together on stations is the continued practice of their laws and ceremonies today.

The authority of the police in the north was insignificant compared with that of the pastoralist. In 1899 there were fourteen police in the Northern Territory that spans

1.5 million square kilometres (Aborigines Select Committee 1899: 22). Much of this land was designated pastoral land. In the absence of police, pastoralists were made to deal with the 'natives' by taking 'the law into their own hands' (station manager quoted in Reid 1990: 119). This was especially so in the process of seizing land and suppressing Indigenous resistance. It has been noted in relation to northern Queensland, that while the police undertook their own punitive expeditions against Indigenous people, pastoralists took a much heavier toll on the Indigenous population, including killing them *en masse* such as at Cullin-la-Ringo in 1861 (Kidd

[3] The Northern Territory was annexed by South Australian administrators in 1863 and was transferred to the Commonwealth under the *Northern Territory (Administration) Act 1910* (Cth).

1997: 10; Palmer 1903: 213). After the land takeover, Indigenous people were initially forced to work for the white manager through violent means. The judicial system did not keep in check these depredations, due to their acquiescence to pastoralists' power, their influence in parliament and the fact that courts in the north were not properly constituted until well after colonization (Gunn 1990: 141; Mildren 2011: 35). The Northern Territory Supreme Court was established under the Commonwealth's *Supreme Court Ordinance 1911,* and even then Justices of the Peace (who were often pastoralists themselves) continued to adjudicate day-to-day matters (Anon 1899a: 6H). Collecting sufficient evidence for a successful prosecution against pastoralists was also treated by the Northern Territory Government Resident as a futile task

(Mildren 1994: 21; Austin 1988: 92). Therefore, even when punitive processes became formalised through the courts and the law evinced a semblance of normalizaton, it rarely intruded on the pastoralists' domains. This lasted well into the twentieth century in northern and central Australia.

IMPOSING BRITISH JURISDICTION: LAND, SOVEREIGNTY AND CRIME

The codification of British rule in Australia provided a legal dimension to colonization. This took place irrespective of settlers and military officers remaining a law unto themselves. British laws were received in the 1820s in New South Wales, Australia's first colony, and almost forty years after its colonization in 1788. The New South Wales Supreme Court formalised its exclusive criminal jurisdiction over Indigenous offenders in the mid-1830s. This paved the way for the normalization of colonial punitive authority over Indigenous people – at least outside of remote frontiers where punishment continued to be inflicted informally. The juridification of British domination through statutes, precedent and proclamations presented the appearance of resolution being achieved (or capable of being achieved) between the colonized and colonizer (Bourdieu 1987: 848). Through juridification power comes to operate as a 'self-evident and normal' dimension of everyday *habitus* (the

dispositions that inform assumptions, knowledge and values) (1987: 848). The realisation of British land takeover of the south-eastern coast in the 1920s was crucial to the normalization of colonial governance through laws rather than violence. It created 'illusions and impressions' about Australian space as universal British space,

notwithstanding that most land remained occupied by Indigenous peoples (Hage 1998: 155). Overt violence outside of the law continued in the form of settler retribution for Indigenous resistance to land dispossession, including in northern Australia until the 1920s. However, towards the end of the nineteenth century there was increasing recourse to the Anglo-Australian law to enforce punishment on Indigenous people. The imposition of the British legal system legitimated the subjugation of Indigenous people and their legal systems (Brogden 1987: 13).

A raft of British legislation introduced the Westminster system of centralised government to Australia. The *New South Wales Act 1823* (Imp) established a Legislative Council and Supreme Court in New South Wales and Van Diemen's Land (Tasmania) and thereby replaced military rule in the colonies. The King's appointees would advise the New South Wales Governor in the exercise of his legislative powers and these decisions were subject to veto by the British government. The Chief Justice had oversight of all legislation to ensure it was consistent with English law. Colonial laws were received into British colonies under the *Australian Courts Act 1828* (Imp). This was part of the Reception Acts, which implemented British law into the colony of New South Wales. It provided that all laws of England that were applicable to the new colony's circumstances were automatically incorporated into New South Wales and Tasmanian municipal law. It took 150 years later before it was declared that the Reception Acts operated retrospectively from 1788 – under the *Imperial Acts Application Act 1969* (NSW) –

reinforcing the artificial legal basis of British title against Indigenous possession .

The reception of English law gave the British Crown a supreme legal claim to land based on the doctrine of tenures. It meant all lands of Australia became in law the property of the King of England (*Attorney-General v Brown* 1847: 317–18). Because 'feudal tenure' was 'universal in the law of England', the New South Wales Supreme Court in 1847 held that 'we can see no reason why it shall be said not to be equally in operation here' (1847: 316). Based on this feudal notion, all land holdings had to be traced to the Crown. Brennan J in *Mabo v Queensland (No.2)* (1992: 46, hereafter '*Mabo*') articulated that 'every parcel of land in England is held either mediately or immediately of the King who is the Lord Paramount'. This meant that settlers required a Crown grant to validate their possession. Claims made otherwise, including where settlers had entered into treaties with Indigenous people (for example the 1835 Batman Treaty in Victoria with the Kulin people) were invalidated because settlers did not have capacity to confer possessory title (Attwood 2009; Kenny 2008: 38.6). Indigenous rights to land ownership were nullified, although their legal status was not tested in courts until well into the twentieth century (see *Milirrpum v Nabalco* 1971).

Courts dismissed challenges to Crown title brought by squatters, pastoralists and miners who sought to acquire land by means other than Crown grant. The Crown's superior title arose because the colony of New South Wales was held to be 'without

settled inhabitants or settled law' when the British first occupied (*Cooper v Stuart* 1889: 291). The Privy Council decision in *Cooper v Stuart* symbolises the fantasy of European universality that was espoused by colonial courts. Furthermore, the New South Wales Supreme Court in *Attorney-General v Brown* (1847: 316) declared that since settlement the 'waste lands' of the colony were in the 'Sovereign's possession; and that, as his or her property, they have been and may now be effectually granted to subjects of the Crown'. The Crown, as the '*universal occupant*', is guaranteed all titles (1847: 317-18). The myth of an uninhabited land arose from a Eurocentric view

that Indigenous peoples were 'too primitive to be regarded as the actual owners and sovereigns' of the land (Reynolds 1996: x). It resonates with John Locke's (1924: 141) notion of 'just acquisition', later adopted by English jurist William Blackstone (1979: 104), that cultivation of land would 'first begin a title of property'. The New South Wales Supreme Court quoted Blackstone's commentary that the Crown has rights where colonial lands are 'desart [sic] and uncultivated' and all English laws are 'immediately' in force where lands 'are claimed by right of occupancy only' (see *R v Murrell & Bummaree* 1836; *Attorney-General v Brown* 1847: 317-18). In these decisions,

the Court interpreted Crown title to land as arising from Indigenous inhabitants lacking numbers, civilization and proprietary rights sufficient to claim the land (1836: [211]; 1847: 317-18). By eliding Indigenous rights to land, the Crown could assert sovereignty and the 'genocidal dimension of settlement' could be rendered opaque (Havemann 2005: 63).

The repercussion of non-recognition was that Anglo-Australian criminal laws and courts had exclusive authority over Indigenous people. This included the authorisation of exceptional types of punishment for Indigenous offenders. The universality of the Crown and its system of punishment ruled out Indigenous disciplinary processes coexisting with Anglo-Australian processes. Unlike in other British settled colonies such as Canada, New Zealand and the United States where colonial governments entered into treaties with Indigenous people, in Australia the non-recognition of Indigenous people undermined legal pluralism in the formal sense. Officially, crimes could only be adjudicated by colonial courts in accordance with colonial laws rather than through Indigenous law systems. Therefore, for crimes committed by an Indigenous offender against an Indigenous victim ('*inter se* crimes'), they would be punished by the courts notwithstanding Indigenous community claims to authority over their members. Nonetheless, the policing of *inter se* crimes was not common in the colonial era where Indigenous communities

functioned beyond the gaze of the police, allowing Indigenous law and punishment to persevere in remote areas (Finnane 2001: 303).

Indigenous defendants who had been accused of *inter se* offences contested the New South Wales Supreme Court's capacity to try and punish them. Their challenge to the Court's jurisdiction was on the basis that they sought to be punished by their Indigenous laws. In *R v Murrell & Bummaree* (1836), the Court denied the Indigenous

defendants this right. At the trial of Indigenous defendant Jack Congo Murrell for the murder of an Indigenous man named Jabbingee the defence argued that Murrell was not guilty but nonetheless he should be tried and potentially punished by his customary laws. His people lived in the white settlement of Windsor in north-west Sydney, where their laws continued to be practised. The defence further posited that New South Wales was occupied by Murrell's, and the victim's, people before the King of England and continues to be regulated by customary law. It argued that because New South Wales was not conquered, ceded or occupied exclusively by the British, Indigenous people were not bound by British law. Indigenous law should apply and if Murrell is found guilty, Jabbingee's family and friends should be entitled to punish him by customary spearing.

In establishing that it had jurisdiction to try Murrell and Bummaree, the Supreme Court held that Indigenous peoples are not 'entitled to be recognised' as 'sovereign states' that are governed by their own laws (*R v Murrell & Bummaree* 1836: [211]). This is because upon colonization they had not reached the 'numbers' and 'civilization' to form their own government and laws (1836: [211]). In the judgment notes, Burton J juxtaposed the fair and rational common law guided by principles of equality and procedural fairness, against the 'practices' of Murrell's community that are based on notions of retribution. These practices 'are consistent with a state of the grossest darkness and irrational superstition'. They 'are founded entirely upon

principles ... of vindication for personal wrongs' and 'the wildest most

indiscriminatory notions of revenge' (1836: 239-40). The Court therefore justified the colonial usurping of Australian land by its perception that the land was without a sovereign (which is the only recognised form of Western authority and power) before it was taken into lawful and 'actual possession by the King of England' (1836: [211]-[212]).

Also in its judgment, the Supreme Court adopted a circuitous legal reasoning in relation to its jurisdiction. Burton J held that the Court had a right to try Murrell because 'this Court has repeatedly tried and even executed aboriginal natives of this Colony' (1836: 214). This has resonance with Bourdieu's (1987: 831) notion of 'symbolic violence' whereby categories of doctrine apply because people submit to them. The offender agrees 'to play the game, to accept the law for the resolution of conflict' in lieu of physical violence (1987: 831). As expressed in Murrell's case, jurisdiction was founded on the fact that the courts tried him and other Indigenous people before him. But to regard Indigenous submission to the judicial process as free choice neglects that British jurisdiction was predicated on force. Furthermore, the Supreme Court relied on the 'law of England' as the basis for rendering Murrell 'amenable to the Jurisdiction of His Majesty's Court of Kings Bench' (*R v Murrell & Bummaree* 1836: 213). This reasoning removed the need for explanation of why the English law prevails over Indigenous law in the first place. The Court situated itself as law interpreter rather than law maker so it could take 'refuge behind the appearance of a simple application of the law' (Bourdieu 1987: 823). This absolved

the Court and placed the source of British authority beyond challenge.

LEGISLATED EXCEPTIONALISM: PUNISHMENT ON THE BODY

The introduction of British statutes did not instantaneously replace physical violence with symbolic control. Rather, legislation juridified force against the 'target' body

(Foucault 1979: 82), by providing corporal punishment and public executions as sentencing options for Indigenous offenders. The former was specifically set aside for Indigenous offenders, while the latter was available for both Indigenous and non-Indigenous offenders. The British sovereign, its courts and police had a monopoly over legitimate violence by the late nineteenth century. Criminal law justified its ongoing infliction on the Indigenous body through the rational application of rules. Making an example of offenders through severe punishment enforced a 'policy of terror: to make everyone aware through the body of the criminal, of the unrestrained presence of the sovereign' (Foucault 1979: 49). Legalised terror was invoked where symbolic violence and strategies of self-discipline were ineffective in subjugating Indigenous souls. Therefore, unlike Foucault's concept, targeting the body was not mutually exclusive to targeting the soul because the colonizer was wrestling with an uneven colonial project.

The ultimate punishment that the colonial courts served was public executions, including public hangings for Indigenous people. In Western Australia, the *Capital Punishment Amendment Act 1871* provided for the public execution of condemned

Indigenous peoples. These executions lasted until the late nineteenth century, while they ceased for non-Indigenous people in most colonies by the 1860s. In jurisdictions where public executions were available for both Indigenous and non-Indigenous offenders, courts were more inclined to use these sentences for Indigenous people. Edmonds (2010: 151) notes that 'colonial officials designed these colonial exercises in terror specifically for Aboriginal people'. Public executions were sanctioned by the law and had important performative currency for the maintenance of the colonial state. The affective power of punishment in symbolising 'the power of the sovereign over the subject' is set into sharp relief with public executions (2010: 151). For Foucault (1979: 48), the public execution is a ceremony that eclipses and restores the

power of the sovereign by focusing all eyes on the 'invincible force' for which a rebellious subject is met.

The public nature of executions reinforced the social order, while keeping the Indigenous population in check. In sentencing an Indigenous offender to public execution, Stephen J of the New South Wales Supreme Court pointed to the 'necessity of making examples' of Indigenous offenders (*Maitland Mercury*, 16 September 1843: 3, quoted in Harman 2008: 202). Stephen J has been described as the 'hanging judge' and 'condemned all the Aboriginal defendants to judicial execution' (2008: 173, 217). Executions were perceived by the colonizers as 'educating

“untutored savages” in the rule of law’ (Finnane and McGuire 2001: 281). This led to the judicial execution of over 100 Indigenous men in New South Wales ‘because of their ignorance – or deliberate flouting – of the English derived colonial laws’ (Harman 2008: 202). In the Northern Territory in 1893, Dashwood J sentenced to death ten Indigenous people convicted of murder within his first three days. This included a man named Wandi Wandi, who was ordered to be publicly hanged at the scene of his crime and in the presence of members of his tribe (Mildren 2011: 24). By the 1930s the death penalty was no longer mandatory for Indigenous offenders in the Northern Territory, but the Supreme Court under Wells J continued to order capital punishment (2011: 106). The Court’s *discretion* to apply the death penalty made the sovereign’s ultimate penalty appear fair because it was determined on the merits of the individual case. However, Wells J would become infamous for his bias in the case of *Tuckiar v The King* (1934). In that case, Wells J refused to admit cultural evidence and provide a fair trial to an Indigenous defendant who was sentenced to death for murdering a police officer. On appeal, the High Court of Australia unanimously overturned the conviction, reinstating the rationality and fairness of the law.

Legislation conferred courts with discretion to order corporal punishment exclusively for Indigenous offenders. After this sentencing option had been phased out for non-Indigenous people in the 1870s, whipping remained available for Indigenous people in Western Australia (Haebich 2000: 210). Corporal punishment

extended to any male Indigenous offender for ‘any felony or misdemeanour’ under the *Summary Trial and Punishment of Native Offenders Ordinance 1849* (WA) and then again in the *Aboriginal Offenders Amendment Act 1892* (WA). In 1892, Western Australian Attorney-General, Septimus Burt, justified the whipping of summary offenders in the following terms: ‘You can only deal with [Indigenous offenders] like you deal with naughty children – whip them . . . Give them a little stick when they really deserve it, and it does them a power of good’ (quoted in Finnane and McGuire 2001: 284). Premier George Leake defended whipping on the grounds that ‘Aborigines’ should ‘realise their responsibilities through their skins’ (quoted in Haebich 1992: 73). Local justices of the peace could order whippings for cattle killing and other minor crimes, which legalised the devolved punitive practices on the frontier (Pedersen and Woorunmurra 2000: 31-2, 89; Melbourne Correspondent 1904: 5). Furthermore, Indigenous workers could be whipped and imprisoned for five years for leaving their place of servitude, whereas the maximum punishment for non-Indigenous workers was three months’ imprisonment because they were protected by the *Master and Servants Act 1842* (WA) (Haebich 2000: 210). Hard labour on Rottnest Island, a penal island off Western Australia, was enforced through ‘flogging and chaining to a wheelbarrow’, which parliamentarians in 1895 believed would ‘reduce the incidence of spearing of cattle’ (quoted in Finnane and McGuire 2001: 284).

Western Australia’s codified punishment on the Indigenous body reverberated in

other Australian colonies. The South Australian government enacted the *Breach of Contract Act 1842* with the *Aboriginal Native Offenders Act 1849* to regulate Indigenous

employment, including by allowing 'whipping of up to two dozen lashes in lieu of or in addition to imprisonment' where an Indigenous worker objected to employment conditions or absconded (Thorpe 1992: 90-1). Under the *Breach of Contract Act* (SA), which also applied to the Northern Territory, Indigenous workers who objected to employment conditions or absconded were liable to this corporal punishment. Long after the legislation was repealed, Wells J of the Northern Territory Supreme Court in the 1930s advocated 'a good flogging' for Indigenous offenders due to their inferior intelligence and the fact they were getting 'cheekier' and it was the only punishment they appreciated (quoted in Douglas 2005: 160). Prominent public servant responsible for Indigenous affairs in the Northern Territory, T.G.H. Strehlow, also endorsed whipping to demonstrate authority over Indigenous people (Rowse 1992: 91). Such punitive approaches to Indigenous people undergirded the new Anglo-Australian order.

The enactment of special punishments for Indigenous defendants would transform the punishment inflicted on Indigenous people on the frontier to a juridified exercise of power. Special punishment did not deviate from the rule of the colonial sovereign but was a mark of its power (Agamben 1998: 17, 36). It positioned the sovereign's authority to respond to colonial demands. Punitive exceptionalism persisted despite the Supreme Court of New South Wales proclaiming that Indigenous and non-

Indigenous people were equally subjected to the law and 'equally entitled to the protection of the law' (*R v Murrell & Bummaree* 1836). Such reasoning merely served to highlight the hegemonic force of Anglo-Australian laws. Zones of racial exceptionalism would be extended under Aboriginal Protection legislation in the early twentieth century. This conferred broad powers to 'protectors' and other government officials to control Indigenous lives. In using these powers, government officials, especially those in institutions, would subject Indigenous people to whipping, chaining and other brutal disciplinary measures (see National Inquiry

into the Separation of Aboriginal and Torres Strait Islander Children from their Families 1997: 100, 128, 139-40; Kidd 1997: 35, 211). However, in the main, the brutal expressions of colonial discipline would become increasingly sublimated into channels of self-discipline in the Protectionist era.

FROM BODY TO SOUL: "PROTECTIVE" CONTAINMENT

The legislative drift towards Protectionism signalled an abandonment of the idea that Indigenous Australians would die out. This idea was premised on a Social Darwinist view of Europeans as a superior and out-surviving race. It represented Indigenous people as 'as a backward remnant' that is swept under by progress and white humanity refined humanity (Dodson 1994: 7). For colonists it meant that Indigenous extermination was not a criminal act but the 'expediting of nature' (Dodson 1994: 7). Indigenous people who escaped or survived extermination in the nineteenth century were resettled on unusable land [4] under a policy of

"Segregationism". It involved the placement of Indigenous people on missions and settlements controlled by the Church or state as a means of 'smoothing the dying pillow' (Bolton 1982: 59). Although the policy of Segregationism was meant to provide comfort for Indigenous people in their inevitable demise, the conditions on missions and settlements were dire. A rapid reduction in the Indigenous population in the nineteenth century was facilitated by the spread of diseases in these enclaves as well as ongoing colonial violence (Briscoe 2003: 187).

While the 'dying out' theory lost its veracity by the late nineteenth century, colonial portrayals of the inferiority of Indigenous people remained strong. On the cusp of the twentieth century, Protectionist policies were introduced to mark a new wave of exceptionalism for Indigenous people. They suspended the rule of law for

[4] For example, land designated under the *Waste Lands Act 1842* (SA).

Indigenous people in every facet of their lives. They were 'citizens without rights' through this policy of legal exclusion (Chesterman and Galligan 1997). Nonetheless, Protectionism in its official guise was a more subtle form of power, characterised by ideologies of welfare and civilization. This power involved detaining Indigenous people on 'welfare-penal institutions', which mostly included missions and government reserves, but also extended to cattle stations and other private enterprises or homes (Hogg 2001: 357). Indigenous people were made to live and work on these settlements, and became dependent on them as sources of food,

clothing and shelter given that they were deprived of their land and its sustenance. On these sites of welfare colonialism, food rations could be used as punishment, where 'tucker' was denied to Indigenous people who failed to wash or work (Rowse 1990: 185). However, Protectionism's defining feature was the instilment of self-discipline through work, instruction and routine. In this respect it replaced 'modes of violent control' that featured heavily in the dispossession process on the frontier (Finnane and Paisley 2010: 144).

Protectionism was prescribed by the Aboriginal Acts,[5] which was a series of statutes across the newly federated Australian states and territories to control Indigenous peoples. It established or strengthened the powers of Aboriginal Protection Boards and Chief Protectors, who oversaw a network of protectors (see *Aborigines Protection Act 1909* (NSW) s 6; *Aboriginal Protection Act 1869* (Vic) s 4; *Aborigines Act 1905* (WA)

[5] See for example: *Aboriginal Protection Act 1869* (Vic); *Aborigines Protection Act 1886* (WA); *Aboriginal Protection Act and Restriction of the Sale of Opium Act 1897* (Qld); *Aborigines Protection Act 1909* (NSW);

Aborigines Act 1911 (SA); *Aboriginals Ordinance 1911* (Cth); *Aboriginals Ordinance 1918* (Cth). Although

by the mid-1800s Protection Boards were operating in the south-eastern colonies such as New South Wales and Victoria, they were not established in Australia's north until the turn of the twentieth century. Nonetheless, at this later juncture all the Boards were restructured to reflect contemporary thinking on the far-reaching powers of the Aboriginal protectorates.

s 6; *Aboriginals Ordinance 1918* (Cth) s 4; *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 6). Protectors sought to control Indigenous lives through placing restrictions on their movements, culture, language, family life and marriage, employment and money. Through this control, the state and its agents would shift from their negative constraints on the target body to more deeply inscribed power on the target 'soul' (Foucault 1979: 82, 101). For example, the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) portended protection from the 'worst excesses of white violence' by enabling Indigenous peoples' removal to isolated missions and reserves for close monitoring and alteration of their daily lives (Chesterman and Galligan 1997: 40). In many ways it was an extension of Segregationism but with vast codified powers allocated to governments to manage and provide salvation for the Indigene. Colonial values, ethics, routines and language were enforced through repetitive daily and working rituals as well as religion and instruction. In this way moral constraints became internalized and modes of 'self-constraint' replaced modes of 'social constraint' in this 'civilizing process' (Elias 1978: 127). State 'regulatory and corrective mechanisms' sought to 'qualify, measure, appraise, and hierarchize, rather than display itself in its murderous splendor' (Foucault 1981: 144). This 'finely tuned' authority, as Foucault (1979: 78) describes, is part of a 'more effective spinning of the web of power over everyday life' (Hoy 1986: 136).

There was nothing home-grown about the policy of Protectionism and its institutional architecture. The British parliament promoted the policy across its

colonies in light of the Report of the British House of Commons' Select Committee on Aboriginal Tribes (1837). Its recommendations provided a framework for the administration of Indigenous affairs in the colonies, including in Australia, until the mid-twentieth century. As an alternative to 'extermination', the Committee advocated restrictive policies mixed with education and instruction, especially in

Christianity, for the attainment of Indigenous civilization (Armitage 1995: 5). It regarded Britain has having a 'higher purpose' in bestowing 'civilization and humanity, peace and good government' to all ends of the earth (quoted in Select Committee 1837: 105). The Report explicitly denounced Australian Indigenous peoples as 'barbarous', and 'utterly disregarded' their claims to sovereignty and propriety (Brennan et al 2005: 53). The Select Committee on Aboriginal Tribes (1837: 116-23) recommended:

- British control of Indigenous subjects
- Appointment of 'protectors' (who could provide Indigenous peoples with a restricted status under the law and subject them to summary discipline)
- Integration of Indigenous peoples into established institutions of British society (particularly the wage economy)
- Special recognition of the situation of Indigenous children, who were considered particularly open to change, education and salvation
- A recognised place for organised Christianity as an essential element in the process of producing citizens.

The Aboriginal Acts adopted many of these recommendations and were overlaid with an ideological emphasis on civilizing Indigenous people through displacing their culture, language and identities. While this civilizing process depended on transforming Indigenous behaviours and relationships, it was supplemented with punishment for Indigenous transgressions. The Acts made it an offence to leave a designated area (such as a settlement), marry or work without the protector's permission, have sexual relations with non-Indigenous races, spend or receive money from employment without the protector's permission, and practise Indigenous laws, customs or ceremonies (see: *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) ss 31-2; *Aboriginals Ordinance 1918* (Cth) ss 5, 45).

Protectors had the power to punish offenders for 'breach of the Regulations relating to the maintenance of discipline and good order upon a reserve' (see: *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 31(13)-(14)). The police could also administer punishment under the Aboriginal Acts (see: *Aboriginals Ordinance 1918* (Cth) ss 11(3), 17(2), 18(1), 55-6, 63). Many police, however, served as protectors, blurring their punitive and welfare roles. Employers of Indigenous workers could also take on the role of protector, which has been described as akin to 'leaving a hawk to protect a chicken' (Underwood 1906: 2677).

Physical punishment was replaced by a normalizing power focused on life and its

'value and utility' (Foucault 1981: 144). Integral to the value of Indigenous lives was their labour power. Work meant that Indigenous people could be 'subjected, used, transformed and improved' (Foucault 1979: 136). Foucault (1979: 136) maintained that the body only becomes useful for the sovereign if it is both a productive body and a subjected body. In the Northern Territory, Indigenous labour was essential to the profitability of this predominant beef industry in the twentieth century. Indigenous people were widely recruited through processes of terror, although later became dependent on cattle stations for their sustenance (Bleakley 1929: 6; Austin 1988: 92). In south-eastern Australia, Indigenous people were made to work on missions and settlements, although less commonly in private enterprise. Work set in motion daily routines that restructured Indigenous lives. In the Northern Territory, along with northern Western Australia and Queensland, workers lived on cattle stations and brought up their families under the supervision of managers, and spent long days engaged in regulated tasks such as mustering, gardening, fencing, road works and domestic labour on stations (McGrath 1987). Everyone in the Indigenous family worked, including young children and the elderly. Employers provided Indigenous workers with food, clothing and accommodation, often in the form of

'humpies' but rarely cash wages, enforcing a relationship of dependence (Anthony 2007: 7).

The Aboriginal Acts gave protectors broad powers to handle Indigenous workers.

This included the power to punish them for refusing employment or disobeying the working conditions that were determined by protectors and employers collectively (see: *Aboriginals Ordinance 1918* (Cth) s 29(2); McCaffery 1953; d'Abbs 1994: 2). In the Northern Territory, Western Australia and Queensland, protectors granted employers licences to recruit countless Indigenous workers, including children, and revoke their industrial rights (see for example, *Aboriginals Ordinance 1918* (Cth) s 22). The Northern Territory Chief Protector could exempt employers from the payment of wages to Indigenous workers under Regulation 14 of the Northern Territory's *Aboriginals Ordinance 1918*. [6] Western Australian Indigenous stockworker John Watson (1988: 221) stated that the police, as official protectors, gave managers licences to 'work them as they saw fit' and 'take charge of their welfare'. This in turn meant that on pastoral stations the manager was granted 'the status of "protector"' in which he 'could do pretty much as he liked' (Lawford 1988: 15). Ruby de Satge, who worked on a Queensland station, described the Aboriginal Act in the following terms, '[T]he Act means that if you are sitting down minding your own business, a station manager can come up to you and say, "I want a couple of blackfellows" ... Just like picking up a cat or a dog' (quoted in Huggins 1987-1988: 7).

[6] In relation to Indigenous people employed by governments across Australia, their wages were paid into a trust fund, which rarely made the hands of Indigenous workers. These trust fund monies were used by governments as if it were part of its general revenue. This expropriation is the subject of

ongoing ‘stolen wages’ claims (see: Kidd 2003: 13-16; Anthony 2007: 4-5; Standing Committee on Legal and Constitutional Affairs 2006).

Although protectors were charged with supervising Indigenous workers, pastoralists, irrespective of whether or not they were also protectors, performed the day-to-day oversight and management of the lives of up to hundreds of Indigenous workers on their stations. Governments regarded pastoralists’ arrangements with Indigenous workers as instrumental to the Protectionist policy. The Chief Protector of Aborigines in the Northern Territory in 1913 declared that working Aborigines on pastoral stations under the care of the manager would fulfil the government’s Protectionist objectives (cited in Reid 1990: 195), and the Department of Territories admitted that ‘pastoralists in maintaining aboriginal dependents [sic] are doing the job which would otherwise fall to the Government’ (Marsh 1954: 1). The process of self-discipline on cattle stations involved techniques of instilling work routines and divisions of labour, hierarchies and respect for white employers (McGrath 1987: 174). Rowse (1987: 82) suggests that relations of trust, loyalty and stability existed between station managers and Indigenous workers. Stations provided not only rations and predictable routines and rituals, but also a refuge from the ‘outside’ where there was a ‘landscape of terror’ (1987: 82). Indigenous people were also able to maintain their land, culture and kin because it assured their labour power (Driver 1949, Hasluck 1988: 54). The process of Indigenous recruitment and employment in the cattle industry has nonetheless been likened to slavery (Gray 2007) or feudalism (Anthony 2003).

Violent punishment was not entirely superseded by ‘the gentle way in punishment’ for Indigenous workers (Foucault 1979: 104). Foucault (1979: 105) informs us that recourse to violence is not excluded after the demise of the sovereign’s punitive spectacle. Indigenous stockmen continued to be punished by shootings or ‘flogged to death’ for wrongdoings such as losing a horse (Gribble 1884: 30-1). Discipline was particularly fierce for those who questioned the authority of the station manager. A musterer at Meda Station in the Kimberley, Jimmy Bird (1988: 98), claimed that

“whitefellas” ‘would pull their gun out and kill any Aborigines who stood up to them. And there was none of this taking your time to pull [up] your boots either. No fear!’ Corporal punishment was also dispensed on Indigenous children to predispose them to the pastoralist’s authority (McGrath 1987: 107-8). Stockworker Barney Barnes remembers ‘trouble on the station’ resulting in an Indigenous boy being shot in a grotesque display:

> Shot him! He was a good young boy; I don’t know why they did that. He didn’t do anything wrong. There were a lot of people there at the time who saw it happen. Women and children were there. Right, then they got wood and woodheap and some kerosene. They chucked that boy on top and lit the fire up. They didn’t bury him in a grave, they just chucked him on the fire. Everybody was watching, but they couldn’t do anything. Some of them started crying but the manager pointed the gun at them and told them, “Shut up before I blow you buggers out!” Some of the fellas

> started grumbling amongst themselves, but the manager went at them with his gun and made them go back to work.
>
> (Barnes 1988: 268)

The frontier violence was never far away from the implementation of Indigenous policies in successive periods. Even as the epistemic violence of Protectionism took hold, a reversion to overt violence loomed, especially for violations of the Aboriginal Acts. Protectionism sought to rationalize the power that was posited by arbitrary violence. At the same time, the colonizing state could create an 'imperial fantasy that colonial appropriation was a form of paternal recognition and gift bestowal' (Povinelli 2002: 131). It produced a façade of colonization as a 'gradual and peaceful transition from savagery to civilization' (2002: 131). The normalization of the colonizer's governance would continue to gain traction in the successive Indigenous policy era of Assimilationism.

NORMALIZATION OF INDIGENOUS PUNISHMENT IN THE AGE OF ASSIMILATION

Assimilationist policies eclipsed the separate legal and administrative apparatus under the Aboriginal Acts. From the mid-twentieth century Indigenous people were no longer occupied exceptional legal zones. They were governed by mainstream laws and released from institutions into towns, albeit on their periphery, in an attempt to integrate Indigenous people into the white community. In place of

discriminatory Aboriginal Acts, generic welfare legislation provided a normalized regime for the control of Indigenous people. Indigenous people came to be defined by their welfare status rather than their race. The Northern Territory Chief Protector of Aboriginals was redesignated as the Director of Welfare who was the guardian of all wards that included most Indigenous people. Northern Territory's *Welfare Ordinance 1953* (*C*th) did not mention 'race' but referred to the status of 'ward', classified 'by reason of his manner of living, his inability to manage his own affairs, his standard of social habit and behaviour, his personal associations ...'. Indigenous people as wards of the state under the *Welfare Ordinance* had their health, housing and education managed by welfare departments rather than Aboriginal Affairs departments. Similarly in Queensland, the Director of Welfare authorised the removal of Indigenous children with reference to their neglect or abuse rather than their Aboriginality, although such legislative change did not take hold until the 1980s (O'conner 1993: 13). [7] Under this legislative framework the overrepresentation of Indigenous child removals increased, highlighting the culturally destructive nature of this policy under the guise of neutrality (1993: 16).

[7] The *Aboriginal and Torres Strait Islander Affairs Act 1965* (Qld) explicitly allowed Aboriginal children to be removed from their families until 1984, when the *Community Services (Aborigines) Act 1984* (Qld) was introduced with general application.

The Federal Government convened an Australian Conference for Native Welfare in 1951 that adopted the policy of Assimilation as meaning that 'in the course of time, it is expected that all persons of Aboriginal birth or mixed blood in Australia will live like white Australians do' (Hasluck 1953: 16). The official policy of assimilation shared the civilizing language of Protectionism, but was more intent on cultural absorption into non-Aboriginal society (Ellinghaus 2003: 185). The state perceived that Indigenous self-discipline would make it possible for Indigenous people to acquire the status of citizens, once they had overcome their disability that ascribed them ward status. Reflecting this reticence about their capacity, it was not until the late 1960s that Indigenous people attained the full spectrum of formal citizenship rights, including the right to vote in Federal elections, access to mainstream institutions and venues, equal access to welfare payments and the right to equal pay in the Northern Territory (Australian Law Reform Commission 1986: [26]). Indeed, the transfer of Indigenous people from missions and government settlements took up to 20 years and was not fully realised in the Northern Territory until they gained land rights under the *Aboriginal Land Rights Act 1976* (Cth) or in Queensland until Indigenous reserves became self-managed (Queensland Government 2011).[8]

Assimilationism saw the governments force Indigenous subjects to be free liberal subjects, but without requisite opportunities for achieving self-responsibility (Hindess 1996: 106). Equal pay was not matched with equal access to jobs, in fact it precipitated the layoff of Indigenous workers in the cattle industry (Anthony 2007a). Freedom of movement was not matched with access to housing, and for most

Indigenous Australians, access to their land. Consequently, many Indigenous people were freed from the clutches of Protectionism only to be released into the perils of

[8] These provisions are piecemeal and many Indigenous people across Australia continue to seek rights to land and governance.

the towns and cities. Hogg (2001: 358) explains that it was no longer necessary to control Indigenous people with separate administrative measures because they were subjected to the full brunt of market and legal institutions. Consequently, street police were the arbiters of responsibilisation in this new order. They did not 'simply impose the law, they imposed the law of an alien culture' (Blagg 2008a: 131).

From the 1960s the policing of Indigenous people primarily took place on the streets rather than on government settlements or missions. Indigenous people were drawn into the general purview of the police through their occupation of public spaces that were 'worlded' by white power. This 'worlding' saw the inscription of colonzing worldviews, systems, rules, regulations and practices (Spivak 1996). The police exercised their general powers with the effect of disproportionately controlling Indigenous people. The application of neutral criminal procedures and laws presented a systemic disadvantage for Indigenous people who fell outside of white norms. Guha (1998) demonstrates that despite global pressures to an inclusive hegemony, colonial power reverts to exclusion and domination in relation to the colonized. Although criminalisation of Indigenous Australians from the late

twentieth century was a relatively ‘gentle’ form of punishment, it would retreat to violent expressions (Foucault 1979: 104). This is apparent in a well-documented history of deaths in police and prison custody (Cunneen 2001; Royal Commission into Aboriginal Deaths in Custody 1991, hereafter ‘RCIADIC’).[9]

With the decline of corporal punishment and the death penalty for Indigenous Australians, by the late 1960s the ultimate and universal form of punishment was imprisonment. Foucault (1979) in *Discipline and Punish* regarded prisons as a

[9] Imprisonment itself has been described as a form of ‘white on black institutional violence’ that subordinates Indigenous people (Blagg 2008a: 139).

reinvented discipline and new technology of power through the deprivation of liberty rather than the public displays of torture and execution. He claimed that imprisonment is not geared towards deterrence, but is simply part of the ‘general tactics of subjection’ (1979: 272). The tactic of imprisonment was exercised especially on Indigenous people. It became the new site of Indigenous detainment, with Indigenous people ‘grossly over-represented’ in state prisons and police custody (RCIADIC 1991: [1.3.3]; see statistics in Chapter Three). A culmination of higher rates of charges and arrests, especially for minor offences, along with higher bail refusals, convictions and sentences, led to the over-representation of Indigenous people in prisons (Eggleston 1976: 176; O’Shane 1992: 5). Broadhurst (1987: 154) comments that

the repeal of the Aboriginal Acts fuelled a ‘rapid increase’ in levels of Indigenous imprisonment. As a strategy of social control for Indigenous people, detention is entrenched in colonial orthodoxy – whether it is for protective or punitive purposes. It was therefore not a radical shift when administrative detention gave way to punitive detention in the 1960s and Indigenous people were transferred from state welfare institutions and into state prisons. Nonetheless, the sentencing of substantial numbers of Indigenous Australians to prison sealed their fate as a criminal underclass.

THE SPATIAL FIELD OF POSTCOLONIAL CRIME

Since the abandonment of distinct punishment regimes for Indigenous peoples, criminalisation has continued to inform the management of Indigenous space. Policing is a vehicle for the exclusion of the Other and the inscription of legitimate uses and claims to space. These inscriptions have broadened with a wider set of spaces regarded as ‘public space’ for the purposes of policing, including those held under Aboriginal land rights legislation. The policing of Indigenous people in public places is a metaphor for the exclusive right of the state to that space. Hage (1998: 38) claims that the postcolonial state governs through ‘spatial management’ that

involves an ‘imagined privileged relation’ over ‘race’ and ‘national space’. Although policing is an incident of general law enforcement in public, it has distinct implications for Indigenous Australians. The punitive enforcement of colonial strategies and postcolonial policing of public space are part of the same continuum.

Cunneen (1999: 8) claims contemporary policing is an extension of ‘an exclusionary social order’ that can be traced to the Protection period when Indigenous communities were defined as a public order problem requiring strict surveillance, intervention and control.

Spatial management through criminalisation of Indigenous people is especially acute because of their visibility in public space (Cunneen 2008: 44). The police’s ‘preoccupation with public space’ and claims to ‘on the street experience’, including knowledge of people’s movements, inform their cavalier exercise of power in that domain (White 1997: 283). The police impose racial boundaries in public spaces by excluding the Other. The removal of Indigenous people from public space, including through move-on orders, is often referred to as ‘street sweeping’ and ‘social cleansing’ (Graham 1999: 10). Indigenous presence signifies a threat to white claims to public space. In addition, police ‘move-on’ powers facilitate Indigenous dispersal from public spaces, including without evidence that they have or will commit an offence (Eggington and Allingham 2006). Indigenous people caught by these powers have described them as making them feel like they are ‘less of a citizen’ because they are not permitted to ‘hang around in [their] own state’ (quoted in Walsh and Taylor 2007: 164). The policing of public order offences and the exercise of move-on orders bring to the fore the ‘racialized politics of the settler-colonial streetscape’ (Edmonds 2010: 149).

In her seminal book, *Fear, Favour or Affection*, Eggleston (1976: 226-34) documented the intense policing of Indigenous people for street offences in the 1960s when

assimilation policies had taken hold and Indigenous public presence acquired a new dimension. Policing was facilitated by the enactment of summary offences legislation that provided for crimes such as public order offences, including offensive behaviour, offensive language and public drunkenness. The effect was to target Indigenous behaviours in public. This is augmented by other forms of criminalised public activity including trespass, petty theft, property damage and riot. The policing of offensive language especially took on a greater intensity in the public sphere from the 1960s (Hogg 2001). Where police deemed an Indigenous person's language to be offensive, it would set in motion a series of offences, commonly resulting in charges for offensive language, resist arrest and assault police – known as 'the trifecta' (Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner 1996: [4.5]). Since the 1960s Indigenous people have been significantly overrepresented in police charges and prison sentences for public order offending (Eggleston 1976; Allard 2010: 3). This offence category contributes to the overrepresentation of Indigenous Australians in prisons nationally and impacts on their performance of territoriality in public space.

Criminalisation as a technique of spatial management flows onto other areas of governance.[10] The state 'governs through crime' to facilitate wide-ranging social

regulation in Indigenous communities (Simon 2001-2002). Simon (2007: 5) observes that 'technologies, discourses and metaphors of crime' create new opportunities for intrusive governance. A contemporary expression of this governing modality is the *Northern Territory National Emergency Response Act 2007* (Cth) (hereafter '*NTER Act*') and its related measures [11] (collectively known as 'the Northern Territory

[10] The contemporary management of Indigenous space through criminalisation is not without resistance and competing Indigenous spatial claims (see Blagg 2008).

[11] See: *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) and *Social Security and Other*

Intervention'). Acquiring its justification from a moral panic over sexual crime and Indigenous culture, controls and restrictions have been placed on Indigenous land rights, social security, education and housing in remote communities (see Chapter Four; Anthony 2010). This is matched with 'governing crime' through greater policing on Indigenous land in the Northern Territory (Simon 2007: 35). Public policing in remote Indigenous communities was extended through the deployment of Federal Police and the military, the installation of 18 new police stations in communities, the broadening of police powers, and the establishment of crime intelligence taskforces. The Government designated all Northern Territory Aboriginal land, which is held as communal and inalienable freehold title under the *Aboriginal Land Rights Act 1976* (Cth), as 'prescribed areas' (*NTER Act* s 4).[12] In these

areas, alcohol is banned and the police can, without a warrant, randomly enter, search, seize or dispose of any “thing”, namely a vehicle, involved in the carriage or consumption of alcohol (*Liquor Act* (NT) s 95; *NTER Act* s 17). This authorises the police to use their powers on Aboriginal land, including in Aboriginal homes, as if it were a public place (Pilkington 2009: 55, 174).

In the Northern Territory and elsewhere, discipline in the streetscape has taken on new dimensions as the boundaries of normal policing and criminalisation have shifted. A key area has been the policing of minor traffic infringements, such as driving unregistered, uninsured and unlicensed; driving without a seatbelt and not stopping at a ‘stop’ sign. These are regulatory offences that are generally processed by way of a ticket (infringement notice) and a fine. However, in remote Indigenous

Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth). The *NTER Act* and its related legislation have recently been repealed and reinstated in the *Stronger Futures in the Northern Territory Act 2012* (Cth).

[12] These are now known as ‘alcohol protected areas’ under the remodelled *NTER Act* embodied in the *Stronger Futures in the Northern Territory Act* 2012 (Cth) s 27.

communities in the Northern Territory and Western Australia, these offences have fallen within the domains of courts and prisons. Therefore, the spatial extension of normal offending has come to include roads and vehicles. These are not like most crimes that arise from affirmative acts, such as driving dangerously or stealing a

vehicle, but omissions such as *not* having a licence or a roadworthy vehicle or insurance. The problem is compounded by the inadequate licencing and registration services in remote communities (Anthony and Blagg 2012: 53). Driving offences that present no immediate risk and were informally tolerated are now the staples of law enforcement in remote communities. Since the Northern Territory Intervention, there has been a 250 per cent increase in minor traffic offences and half of all offences in Indigenous communities are driving-related (Anthony 2010: 103; Northern Territory Police, Fire and Emergency Services 2003-2010). About 25 per cent of inmates in Northern Territory prisons are driving offenders and 99 per cent of these are Indigenous (McCarthy 2011; Northern Territory Department of Justice 2008: 24).

The punishment of Indigenous drivers straddles an agenda to colonize Indigenous space. Law enforcement of Indigenous driving has an epistemic effect – creating knowledge and truths about Indigenous roads as tantamount to white roads. In reality, roads on Indigenous land bear little resemblance to the urban streetscape in white towns and cities. Bush tracks are the most popular route for traversing Indigenous land and the roads that do exist in communities are unsealed, unguttered and unlined. They lack footpaths, street signs, speed signs, street lights and traffic lights. Nonetheless, there is a zero-tolerance approach to policing unlawful driving that represents the imposition of white rules on Indigenous place (Anthony and Blagg 2012: 37, 39; Pilkington 2009: 63). It fails to take into account that the theory component of licence tests assess driving as it relates to the white

urban streetscape rather than the dirt tracks of remote communities. Further, maintaining a roadworthy vehicle is inhibited where unsealed roads and bush tracks

damage cars and there is an absence of mechanics to service Indigenous people's cars. Policing is based on a fantasy of the racial neutrality of space in the application of the *Traffic Act* (NT) and *Motor Vehicle Act* (NT) to driving in remote Indigenous communities. The Indigenous road interferes with the 'imaginary nation' that presumes a white order (Hage 1998: 47). Policing the Indigenous streetscape normalizes assumptions of the whiteness of this space.

Coupled with this epistemic process of governing Indigenous space, the Northern Territory government has recently begun instrumental change by gazetting Indigenous community roads, implanting road signs and allocating street names (Northern Territory Government 2011). As Carter (2010) reminds us, colonial possession is performed through the mapping and naming of the colonized's space. Street signs designate white names for the newly gazetted streets in the central Australian desert community of Yuendumu. A new 'stop' sign was also implanted at the main "junction" between roads at the centre of the community, with police waiting at the sign to charge drivers who disobeyed the sign. In our fieldwork in Yuendumu, Harry Blagg and I found that there was consternation among community members over police charging those who failed to stop (Anthony and Blagg 2012: 41). Further, a group of Warlpiri people expressed concern that this was just another layer of rules that would make Yuendumu like a 'white-fella' town, with

'no place for *Yapa* [Warlpiri people]' (2012: 41).

CONCLUDING REMARKS: STATE CRIMINALISATION AND THE LEGACY OF NON-RECOGNITION OF INDIGENOUS LAWS

The colonization of Australia involved both the criminalisation of Indigenous peoples and the undermining of their systems of punishment. Indigenous resistance to the colonial project – where they 'evinced a disposition to live in their own country' – was the basis for deeming Indigenous peoples outlaws and punishing

them as though they were 'aggressors' (Select Committee on Aboriginal Tribes 1837: 4). Indigenous people were prohibited from using their laws to regulate crimes either within their communities or against Europeans who transgressed Indigenous laws. The criminal law did not account for Indigenous laws or cultures in determining culpability, such that the recognition of Indigenous laws became confined to the discretion of criminal sentencing courts.

In his article 'The Force of Law', Bourdieu (1987: 816) tells us that the possibilities of the law are constantly constrained by its 'internal logic' and 'power relations'. This logic relegates Indigenous laws to the margins of the dominant Anglo-Australian legal system. It diminishes possibilities for Indigenous laws and justice solutions to coexist with white institutions through legal plurality. The High Court in *Mabo* (1992: 29) elucidated that Indigenous laws cannot coexist with Anglo-Australian laws because it would 'fracture the skeleton of principle which gives the body of our

law its shape and internal consistency'. Subsequently the Court in *Wik Peoples v Queensland* (1996: 179) held that legal developments should be based on 'gradual change' and 'continuity rather than rupture' so it can remain true to the common law's historical foundations. Recognition of Indigeneity in sentencing does not threaten the structure of the Anglo-Australian law but conserves its premise, which Derrida (1989-1990: 1009) describes as repeating its 'value of origin'.

In confirming its authority over Indigenous systems of law and punishment, the High Court rationalised that it was constrained by an 'act of state' that established the colony could not be questioned in the domestic courts (*Mabo* 1992: 31-2). Derrida (1989-1990: 943) explains that the 'origin of authority' has its foundation in self-proclaimed authority. Such a self-proclamation negates challenges to the 'acquisition of sovereignty' and ensure 'that no parallel system of authority can emerge or allocate rights and interests after the assertion of British sovereignty' (Strelein 2003:

4). The fictitious idea that Australia was *terra nullius* has cast long shadows over Indigenous legal authority, long after its fiction has been displaced. While there was scope within the Anglo-Australian law of tenure to coexist with native title, there was no such possibility for coexisting criminal laws. This is because, as the High Court posited, it would threaten the exclusivity of Anglo-Australian criminal law by encroaching on its 'inherently universal' application (*Walker v New South Wales* 1994: 50).

The effect of the High Court rendering Indigenous criminal laws inert is that the Anglo-Australian legal system has authority in capturing and characterising Indigenous offenders. Criminalisation has spanned central and centrifugal, official and unofficial, administrative and penal modes. The Indigenous offender has been variously instantiated as cattle killers, trespassers, primitives and public disorderlies, in order to be caught by the tentacles of state institutions. The contingency of these representations reveals the Indigenous criminal to be a product of a historical relationship between the colonizing state and the colonized. The punishment of Indigenous people acquires legitimacy because of the dominant role of the colonizing state. Criminal law, according to Derrida (1989-1990: 943), justifies inflicting harm on the Other in a way that would otherwise represent 'violence without a ground'.

This book's concern with contemporary judicial representations of Indigenous communities, their laws, identities and cultures is a metaphor for the colonizing state's psyche and relationship with the Other. This psyche is not fixed but, as Rutherford (2000: 188) explains, 'schizophrenic', vacillating between morality and aggression in relation to the Other. Judicial representations of Indigeneity in sentencing meander between lenience delivered with sympathy and severe sentences dispensed with condemnation. These divergent characterisations can be

traced to the bivalent colonial ideologies of protection and punishment; salvation

and extermination. They are overlaid with a claim to sovereignty that undermines the authority and capacity of Indigenous peoples. The effect is to inferiorise the Indigene and facilitate their disproportionate incarceration.

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