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Indigenous punishment in Australia: a jurisprudence of pain ?☆

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1. Introduction

When considering the nature of indigenous imprisonment in Australia there is a need to situate the subject in a proper historical and political context. An understanding of that context is crucial, as the imprisonment of indigenous persons has been one of the most emblematic representations of the collective disadvantage of indigenous communities in Australia. The historical and political context is important because of the enduring nature of overrepresentation of indigenous persons at all stages of the criminal justice system in Australia (Hinton, 1997, pp. 111–116; Cunneen and McDonald, 1996, Chapters 2–3; Harding et al., 1995, Chapter 5; Cunneen and White, 1995, pp. 135–153). In such a context, the application of the criminal law to, and punishment of, indigenous persons is not the neutral application of such laws but a process that has a political and historical significance. In short, indigenous imprisonment cannot be understood in the absence of those wider power relations that have shaped the nature of the colonial response to indigenous communities, both historically and as a matter of contemporary reality in Australia (Cunneen, 2001, pp. 1–9).

The act of imprisoning an indigenous person has a political dimension. To suggest that imprisoning of indigenous persons is a political act is not to seek to ask for 'special treatment' for indigenous persons, but to claim that the history and development of a colonial nation-state such as Australia cannot, and ought not, be separated from the operation of the criminal justice system. Colonialism and dispossession have had enduring and substantial negative effects. And to the extent

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that the use of imprisonment has been used so substantially against indigenous communities, it converts criminal behaviour of indigenous persons into a political matter. The argument that will be developed is that not only is the current operation of the criminal justice system disadvantageous and positively destructive to the interests of indigenous communities by undermining the 'social capital' of those communities, but also in the manner in which that the same system cultivates and perpetuates the 'otherness' of indigenous persons (Said, 1978; Sercombe, 1995; Ross, 1998). As imprisonment provides such an evocative representation of that otherness, it requires a thorough assessment as to what such treatment represents.

2. Self-determination and indigenous imprisonment: making the connection

Indigenous imprisonment is part of the political process that has direct historical continuity with the processes of colonization and dispossession (Reynolds, 1989; Broome, 1994; McGregor, 1997) and the establishment of colonial Australia as a penal colony (Hughes, 1986; Gasciogne, 2002, pp. 123–145). Consequently, the question arises as to the role, if any, of the principle and practice of self-determination in the correctional context. Self-determination has as its core premise the notion that it is preferable for indigenous communities within the post-colonial nation state to have a high degree of control over their own affairs. As Roberts (1994, p 259) notes:

> While there is no commonly agreed definition in Australia of self-determination, and its meaning is contested, there does appear to be general agreement that central to self-determination is the right of indigenous Australians to make decisions on issues relating to them and to manage their own affairs.

Self-determination has been a key feature of indigenous affairs in Australia since the election of the Whitlam Labor Government in 1972. The most obvious manifestation of that principle in practice, although it is more appropriately described as 'self-management' given the lack of legislative powers and inability to determine its own budget (Sanders, 1993, pp. 60–61), was the establishment in 1990 of the peak representative indigenous body, the Aboriginal and Torres Strait Islander Commission (ATSIC) (Roberts, 1994, p. 274). The idea of self-determination in the Australian context has been more narrow in practical terms than it has been defined under international law (Pritchard, 1996; Alfredsson, 1998) and the prospect of indigenous communities being able to create a sovereign territory or territories, and to exercise true autonomy, within the Australian nation-state seems remote (see generally Saunders, 2000). Indeed, the legislation creating ATSIC, the *Aboriginal and Torres Strait Islander Commission Act 1989* (Clth) although acknowledging in the object of the Act the 'past dispossession and dispersal of the Aboriginal and Torres Strait Islander peoples and their present disadvantageous position in Australian society' (s 3), makes no reference to the principle of self-determination. Rather the object of the Act is 'to promote the development of self-management and self sufficiency' amongst indigenous communities (s 3 (b)).

Notwithstanding the narrow conception of self-determination preferred by governments under Australian law, the principle and practice of self-determination cannot be separated from the nature of indigenous imprisonment. The absence of self-determination on the part of indigenous communities, due to colonization and dispossession, has had enduring and corrosive effects on those same communities and has resulted in the extensive criminalization of indigenous communities (Rowley, 1972; Reynolds, 1989; Bird, 1987; James, 1999). A distinguishing aspect of colonial rule in Australia was the fact that decisions were made in the alleged 'best interests' of indigenous communities. Such policies were often entrenched, and viewed by the non-indigenous community as part of the natural order of things. Questions of autonomy and self-determination for indigenous communities were not part of that colonial discourse. Such policies resulted not only in the development of intrusive and paternalistic government departments, such as child welfare (Haebich, 2000) and aboriginal protection boards (Broome, 1994, pp. 71–73), but in the intrusive practices of law enforcement agencies such as the police (Cunneen, 2001), which subjected indigenous communities to a higher than normal degree of state regulation (Broadhurst, 1997, p. 415; Broome, 1994, pp. 98–99). Imprisonment, however, stands as the most complete and obvious example of a pattern of non-indigenous control and represents the enduring manifestation of the legacy of colonial rule.

Before considering the relationship between self-determination and indigenous imprisonment, it will first be necessary to consider some of the common themes in the history of indigenous imprisonment in Australia. To do so, it is proposed to consider two aspects of that history. First, the imprisonment of indigenous prisoners on Rottnest Island, Western Australia between 1838 and 1931. Second, there will be an analysis of the *Royal Commission into Aboriginal Deaths in Custody* (hereafter 'RCIADIC'). The reason for the consideration of these matters is how they construct the nature of indigenous imprisonment. The former, as an example of the 'otherness' of indigenous persons and their harsh treatment in an evolving colonial nation-state, and the latter for its attempt to humanize the criminal justice system from the perspective of indigenous persons. There are, however, strong continuities between the imprisonment of indigenous persons at Rottnest Island and the findings of the RCIADIC and the nature of contemporary indigenous imprisonment: over-representation of indigenous persons in prison (Dalton, 2000; Williams, 2001), terms of imprisonment for property offences, offences against the person and public order offences (Broadhurst, 1997, pp. 428–429, 447; Kerley and Cunneen, 1995, pp. 533–536; Cunneen, 2001, pp. 24–28) and the harm caused by imprisonment to indigenous communities.

3. Separate and different: indigenous prisoners on Rottness Island, 1838–1931

The placement of indigenous prisoners on Rottnest Island between 1838 and 1931 represents an example of the construction of the 'otherness' of indigenous communities. By means of geographical exclusion, the only prisoners sent to this

Island were indigenous males. Indigenous female prisoners were not sent to Rottnest Island and served their terms of imprisonment at local jails and Fremantle Prison (Green and Moon, 1997, p. 9). Green and Moon (1997, p. 8) provide a succinct summary of the use of that Island:

> Over a period of almost 100 years, at least 3,670 Aboriginal men went to Rottnest — some as young as eight years and others in their seventies. Dozens were repeat offenders; one man served eleven terms on the island. More than 370 men never left Rottnest.

The use of Rottnest Island, which is a comparatively small island approximately 25 km from the major port city of Fremantle, possessed a high degree of symbolism: not only were indigenous persons deprived of traditional lands, but they were sent from communities, throughout what is now the State of Western Australia, to exile on the island to serve a term of imprisonment. To complete the dispossession of indigenous communities of the Island, whose indigenous name is Wadjemp and was occupied by the ancestors of the modern Nyungar people (Green and Moon, 1997, p. 12), indigenous prisoners were prohibited from participating in traditional activities upon pain of receiving criminal penalties (Green and Moon, 1997, p. 21). The establishment of Rottnest Island occurred shortly after the founding of the city of Perth in 1829 and the beginning of the frontier wars between indigenous communities and the emerging colony that were to last until the early 20th century (Connor, 2002, pp. 68–83).

During the course of the history of Rottnest Island the number of prisoners varied between six and 167 indigenous males (Green and Moon, 1997, p. 23). Intriguingly, also, were the resources devoted in an emerging colony to the relocation of indigenous prisoners from all parts of Western Australia to the Island. Distances of hundreds, sometimes thousands in the case of prisoners from northern parts of Western Australia, of kilometers were involved and the cost and logistics would have been significant.

Part of the colonial discourse justifying this government policy contained certain essentialist attitudes concerning the temperament of indigenous persons, and their perceived reaction to the experience of imprisonment. It would seem that part of the intent of the legislators when utilizing Rottnest Island as a penal space, apart from the reducing the chances of escape (Eckermann, 2000, p. 214; Midford 1988, p. 169), was the belief that indigenous prisoners would be more adversely affected than non-indigenous prisoners by traditional cellular confinement on the Australian mainland (Green and Moon, 1997, pp. 14–16). The idea that indigenous persons would prefer imprisonment on Rottnest Island did not rely on empirical evidence but was, it seems, a cultural colonial 'hunch' that indigenous persons would prefer a place of confinement that did not place the same degree of spatial confinement as a traditional prison cell would (Finnane, 1999, pp. 60–62). Thus, Rottnest Island prison had features of the core themes in the history of the treatment of indigenous communities in Australia: excessive bureaucratic control; a high degree of paternalism; indifference to the concern of indigenous communities and a failure to accord indigenous communities any participation and control over matters that

directly affected them. There is also the creation of the nexus between death and imprisonment for indigenous communities as 370 out of the 3670 indigenous prisoners sent to Rottnest Island never left the island (Green and Moon, 1997, p. 8).

Despite the somewhat dubious humanistic motivations for the establishment of Rottnest Island, indigenous prisoners sent to that island were forced to endure harsh conditions of confinement. The history of the island is littered with numerous government inquiries into those conditions. Poor dietary regimes, chronic overcrowding, use of chains to secure prisoners, regular outbreaks of diseases such as influenza, and allegations of arbitrary use of force and whippings were the common subjects of such inquiries (Green and Moon, 1997, pp. 23–63; Finnane, 1999, pp. 115–116; Midford, 1988, p. 169). Public execution of prisoners also took place in front of other inmates, to supposedly heighten the deterrent aspect of that particular punishment (Green and Moon, 1997, pp. 64–67). The use of chains on indigenous prisoners was also common in the northern areas of Western Australia (Green and Moon, 1997, pp. 46–47, 53–54). After the closure of the penal settlement at Rottnest Island, Thomas and Stewart (1978, p. 122) note that indigenous prisoners 'were dispersed all over the state, although they were kept apart from white prisoners'. The separation of indigenous and non-indigenous prisoners continued until the early 1970s in Western Australian prisons (Thomas and Stewart, 1978, p. 123).

What is significant about Rottnest Island, apart from the dehumanizing treatment of indigenous prisoners, is the silence of indigenous persons in the process of punishment. In short, imprisonment is viewed from the perspective of those in power; in this case the government of the day and the correctional administrators responsible for that Island. The silence of the indigenous prisoners, their pain and how they dealt with the privations of Rottnest Island are as a result entirely a matter of speculation (Midford, 1988. p. 169). An exception is provided by Green and Moon (1997, p. 22) who note the descriptions by a more perceptive non-indigenous commentator of the Island's impact on indigenous communities, Henry Trigg, who describes (he was writing in 1842) the psychological devastation on indigenous prisoners in startling terms:

> The prisoners will sit down and weep most bitterly, particularly old men, or those who have left wives and children on the main: and when they see the smoke from the fires at the place where they have been accustomed to meet when unshackled and free, memory wanders over the scenes of bygone days, they seem intensively alive to their lost Freedom, and lamentably bewail their captivity.

In addition, the impact of the use of that Island on indigenous communities, both on and away from the island, is neither acknowledged nor subject to analysis. This neglect of the indigenous experience of imprisonment, and the devastation of such imprisonment upon indigenous communities, extends to modern understandings of indigenous imprisonment.

4. A more humane criminal justice system: the Royal Commission into Aboriginal Deaths in Custody

The *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) that reported in 1991, after being established in October 1987 to investigate the 99 indigenous deaths in police and prison custody throughout the States and Territories of Australia between 1 January 1980 and 31 May 1989, stands as a landmark report on the nature of the relationship between the indigenous persons and the criminal justice system. It was established by the Hawke Labor Government after community disquiet and protest, particularly in indigenous communities in all states and territories of Australia and after intensive lobbying by the Committee to Defend Black Rights (Kelly, 2002, p. 24), that indigenous prisoners were dying in police and prison custody at a disproportionately alarming rate (Broome, 1994, pp. 224–225; Broadhusrt, 1997, p. 408). Commissioner Elliot Johnston QC produced a report with 339 recommendations. Those recommendations involved matters of police and prison protocol and procedure, as well as more general recommendations aimed at addressing the underlying reasons for the high level of indigenous contact and involvement at all stages of the criminal justice system. In addition, the RCIADIC also emphasized the importance of self-determination in countering the social and economic disadvantage that has contributed to indigenous involvement with the criminal justice system (Johnston, 1991).

The RCIADIC also represents an attempted reckoning of the non-indigenous community with the devastation that is wrought upon indigenous communities by the criminal justice system. It was perhaps the first time in Australian colonial history that the non-indigenous community was made aware of the impact of the criminal justice system upon indigenous communities, as well as the insidious and pervasive nature of the lived experience of indigenous persons who regularly confront acts of racism (see generally Cowlishaw, 1986). That was certainly the experience of Royal Commissioner Elliot Johnston (1991, p. 20) who noted:

> I say very frankly that when I started upon my work with this Commission I had some knowledge of the way in which broad policy had evolved to the detriment of Aboriginal people and some idea of the consequences. But, until I examined the files of the people who died and the other material which has come before the Commission and listened to Aboriginal people speaking, I had no conception of the degree of pin-picking domination, abuse of personal power, utter paternalism, open contempt and total indifference with which so many Aboriginal people were visited on a day to day basis.

The RCIADIC recommendations sought to ensure that indigenous persons subject to police involvement were treated with appropriate respect and that the duty of care owed to indigenous prisoners was more rigorously discharged to prevent further deaths in custody. The RCIADIC represents an attempt to render manifest the pain of indigenous imprisonment and to put forward an explanation to the indigenous and non-indigenous communities for the disproportionate number of indigenous deaths in custody. Similar to the manner in which the Australian Human

Rights and Equal Opportunity Commission Report *Bringing Them Home* (1997) has, through the use of narrative and stories, rendered explicit the silent, hidden suffering of indigenous communities of forced separation as a key effect of child welfare laws and policies in Australia (see generally Haebich, 2000), the RCIADIC was able to document the complex and manifold reasons behind the tragic individual life stories that made up the RCIADIC brief.

Importantly, the RCIADIC did not concern itself solely with police protocol and custodial procedures, but sought to connect indigenous overrepresentation in the criminal justice system to the history of colonial Australia and the resulting configuration of power relations that had marginalized indigenous populations. For the RCIADIC, there was a crucial role to be played by the notion of self-determination in improving the material and spiritual conditions of indigenous Australia as a necessary precursor to falling rates of indigenous representation in the criminal justice system. In addition, the RCIADIC was an important document to the extent that it began to open up the 'silence' of indigenous imprisonment and the collective nature of the harm caused to indigenous communities by imprisonment. It is to that silence, and its consequences that I will now consider.

5. The silence of indigenous imprisonment

Notwithstanding the RCIADIC, the omission of indigenous perspectives from the history of punishment in Australia is common; indeed it is part of the construction of the 'otherness' that allows the maintenance of such high imprisonment rates of indigenous persons possible. Indeed, there seems to be an underlying cultural referent that 'that is the way things are' for indigenous communities. The omission is certainly startling given the constancy of the level of overrepresentation of indigenous persons in Australian prisons. The ignorance of the effects on indigenous communities of the imprisonment of so many of their own, unfortunately obscures the centrality of State involvement in the punishment of indigenous persons. It allows for the cultivation and production of a discourse which, relying on liberal premises of individual responsibility and accountability to justify the infliction of punishment, ignore the nature of *group harm* experienced by indigenous communities as a result of imprisonment. This, interestingly, is not solely an Australian phenomenon, as American sociologist James Jacobs notes that it was only comparatively recently (he was writing in 1979) that the question of race came to the forefront of sub-cultural understandings of the prison in that country and efforts made to incorporate the perspective of minority viewpoints (Jacobs, 1979).

Two works of penal history of the two most populous states of Australia, New South Wales and Victoria, both of which have, and continue to, imprison a disproportionate number of indigenous persons (Office of Correctional Services Commissioner, 2001, p. 51), provide some illustrations of the omission of indigenous viewpoints of imprisonment. John Ramsland's *With Just but Relentless Discipline: A Social History of Corrective Services in New South Wales* (1996) purports to be a historical account of the prison system in that State from 1797 until 1996.

Notwithstanding the period covered, at only one point in the text are indigenous prisoners considered. Ramsland (1996, p. 333) notes that:

> The Department of Corrective Services Aboriginal Task Force was established in March 1993. Its main concern was the special needs of Aboriginal inmates throughout New South Wales. Part of its brief was to assist in the prevention of Aboriginal deaths while in prison.

This is the only reference to indigenous imprisonment in New South Wales in this history.

Similarly in Victoria's prison historiography, Peter Lynn and George Armstrong's *Pentonville to Pentridge*: *A History of Prisons in Victoria* is an example of the absence of indigenous perspectives. Apart from the listing of the six aboriginal prisoners to be executed in Victorian prisons between 1842 and 1967 in Appendix I of the text (Lynn and Armstrong, 1996, pp. 202–206) there are only two other references to Aboriginal prisoners (1996, pp. 90, 108). Both references are in relation to Sale prison, located in Victoria on the southeastern coast of Australia, with the only substantial reference noting that:

> In 1887 a small local reception gaol, with a separate dormitory building for Aboriginal prisoners, was opened at Sale to accommodate prisoners from the Eastern Bailiwick (1996, p. 108).

There is no attempt by the authors to ascertain the justification for such separate, but allegedly equal, prison accommodation, and whether or not it was put forward for correctional reasons, or was the result of certain essentialist assumptions about race, crime and punishment. Moreover, there is no consideration of the development of the Ramahyuck Mission Station in Sale, near the prison, by missionaries and the placement of indigenous persons there. By failing to provide the reader with the striking resemblance between the local prison and the Mission in the way that it ordered, managed and disciplined the time and space of the indigenous Kurnai people of East Gippsland in Victoria (Attwood, 2000; also see generally Foucault, 1975) the reader is left with only a partial perspective of the degree of State regulation imposed upon this indigenous community. Even in more radical, reformist texts on imprisonment in Australia such as *The Prison Struggle: Changing Australia's Penal System* (1982) by Zdenkowski and Brown, there is a failure to incorporate the perspectives of indigenous prisoners. There is some reference to the development of Aboriginal legal services in Australia in the early 1970s (Zdenkowski and Brown, 1982, pp. 167, 169, 188, 353), but little on the problematic nature of indigenous imprisonment, and certainly no analysis relating that imprisonment to wider questions of power and possession in the colonial nation-state of Australia.

The omission, and silencing, of the perspectives of indigenous prisoners is remarkable. It continues to this day in terms of the research conducted on indigenous imprisonment; although there are, of course, exceptions (see, for instance, Kerley and Cunneen 1995). Indigenous prisoners in this penal dialogue are viewed as objects, not subjects, and their understanding of imprisonment, particularly through the use of narrative and stories, is ignored by methodological

frameworks that fail to incorporate the perspectives of indigenous prisoners (see generally Edney 1999). There have been attempts to capture the experience of imprisonment of indigenous persons beyond statistical measures (see, for instance, Gorta and Hunter, 1985; Midford, 1988; Kerley and Cunneen 1995) but such studies have been rare in the tradition of Australian criminological research. Consequently, the study of indigenous imprisonment has been characterized in some ways by the paternalism and powerlessness that has been the experience of indigenous prisoners while in custody (Bates, 1988, p. 197). In addition, not only is the subjective experience of indigenous prisoners excluded as a source of knowledge, the families and the communities in which imprisonment has a devastating and withering effect upon are ignored. In a later section of this paper, it will be contended that any understanding of indigenous imprisonment requires a reckoning of the harm caused to indigenous communities by that process.

6. Imprisonment and self-determination — a desirable practice?

Punishment by imprisonment represents perhaps the antithesis of what is required by the principle of self-determination. Autonomy, empowerment, independence, self-sufficiency and control are pivotal assumptions underpinning the philosophy of self-determination. As applied to the correctional context, which places a premium on security and control (Burns, 1969; Sparks et al., 1996; Edney, 2001) there seems to be little, if any, relevance of self-determination as an organizing philosophy for corrections. Perhaps the difficulty of conceptualizing a prison order based on the principle of self-determination is that the concept is antithetical to the nature of the prison environment, although there have been attempts in Canada to structure prison orders on the principles of self-determination in the belief that such practices may make penal practices more responsive to the concerns of indigenous prisoners (see Hannah-Moffat, 2000; LaPrairie, 1994). For some Australian suggestions see Council for Aboriginal Reconciliation (1994, pp. 21–23), Blow (1992), Coombs (1994), and Brennan (1993).

The difficulty with the application of the concept of self-determination to the penal context is that it may give legitimacy to wider power relations that sustain the marginalisation of indigenous communities and allow the cultivation of a 'blame the victim' rhetoric. Thus through strategies of 'responsibilization' (Garland, 1999, 2001; Hannah-Moffat, 2001), which have become an integral part of the penal landscape, the individual subject becomes both the cause of the problem *and* the solution to their criminality without a consideration of wider social, economic and political forces. In the context of Australia, questions of national responsibility and the history of dispossession of indigenous communities may not necessarily make the principle of self-determination such a desirable penal strategy from the perspective of indigenous persons in the operation of prisons. Indeed, it could be argued that to apply the principle of self-determination to the correctional context is to legitimate the use of imprisonment against indigenous communities. Instead, self-determination is important to indigenous imprisonment to the extent that it ensures, outside

of the prison context, that it guarantees a quality of life that will reduce the probabilities of indigenous involvement with the criminal justice system.

7. Social capital, imprisonment and indigenous communities

For indigenous communities the criminal justice system is a source of harm. If anything, the operation of that system has aggravated the social and economic disadvantage of indigenous communities. It has done so historically and continues to do so. Moreover, that same system has, by the means by which it imposes punitive forms of punishment such as imprisonment, undermined what may be termed the 'social capital' of indigenous communities. The term 'social capital' provides an important analytical framework to measure the effects of imprisonment. It does so by extending the analysis of the impacts of imprisonment from beyond the individual subject to the term of imprisonment to the families and communities of the person subject to that punishment.

The term 'social capital' is a relatively new concept in social theory (Baron et al., 2000), combining intellectual concepts from sociology and economics and thereby attempting to provide a richer and more sophisticated understanding of the operation of the social order (Coleman, 1988, pp. 95–96). And although it is a concept that lacks a degree of analytical precision and ability to be quantified, it does provide a useful means of measuring the resources of communities that may be omitted from traditional accounts of human action. At its core, social capital posits a community consisting of a range of interpersonal relations, in the form of social networks that contribute to the optimal functioning of a community (Schuller et al., 2000, p. 1). It is the nature and quality of those relationships that is pivotal to the degree of social capital that exists in a particular community.

Hagan and Dinovitzer (1999) have sought to apply the concept of social capital to the imprisonment of African American persons in the United States. The authors note (Hagan and Dinovitzer, 1999, p. 122), when discussing the disproportionate number of African American persons in custody that country (for a discussion of that overrepresentation see Tonry, 1994) and the effects on those communities that:

> The collateral consequences of imprisonment may be extensive. The most obvious concern is that the effects of imprisonment damage the human and social capital of those who are incarcerated, their families, and their communities, including the detrimental impact of imprisoning parents on their children. Less obvious concerns involve foregone opportunities to invest in schools and the selective direction of existing and new resources away from minority to majority group communities where prisons are being built and operated. More specifically, imprisonment may engender negative consequences for offenders whose employment prospects after release are diminished; for families who suffer losses both emotional and financial; for children who suffer emotional and behavioral problems due to the loss of a parent, financial strain, and possible displacement into the care of others; for communities whose stability is threatened due to the

loss of working males; and for other social institutions that are affected by the budgetary constraints imposed by the increases in spending on incarceration.

The benefit of a 'social capital' approach to imprisonment is that it permits a calculation of the harms of imprisonment to extend beyond their most obvious manifestation. In short, it places punishment in its proper social context. In the United States context, Tonry (1995) has argued that the 'burden on black Americans' is so manifest in the statistics of the criminal justice systems of that country, that the crime control policy of the United States is morally indefensible (Tonry, 1995, pp. 28–47).

The social capital concept may also be useful for Australian indigenous communities, for which the idea of prison means something far different than for non-indigenous communities in terms of the adverse effects produced as a consequence of the 'pains of imprisonment' (Eggleston, 1976, p. 190). In addition, the effects of imprisonment in conjunction with the numerous other social, economic and health indicators on which indigenous communities fair poorly, in comparison with non-indigenous communities (Bennett, 1999, pp. 3–10), ensures that 'aboriginal communities are continually fragmented' (Wilson, 1982, p. 77). Put simply, the social capital of indigenous communities is continually undermined. Punishment by way of imprisonment does so, by not only the higher proportion of indigenous persons who are subject to imprisonment, but because of the cumulative effects that such high imprisonment rates have on indigenous communities. Those effects are so significant, having been compounded over generations, that imprisonment for indigenous communities is foremost a political issue and thus central to the content of self-determination in the post-colonial context of Australia (Midford, 1988, pp. 176–177). Importantly, the processes of imprisonment, in combination with other social and economic disadvantage, may undermine the ability of traditional understandings of crime and punishment and the resources of a particular indigenous community to deal with problematic behaviour within those communities. The erosion of indigenous institutions has been unfortunate in that they have historically provided not only those relationships and networks that contribute to the cultivation of social capital, but also the development and nourishing of the formal and informal mechanisms of social control (LaPrairie, 1992, pp. 287–288; see also generally Rose and Clear, 1998).

As previously outlined, indigenous imprisonment in Australia requires its own theory and history. The absence of such an understanding is significant and prevents not only an understanding of the nature of that imprisonment but also the effects on indigenous communities that, unfortunately, are distinctive and unique. Such an understanding is necessary, if only to register the harm and suffering that imprisonment imposes upon indigenous communities. The history that we do have is one characterized by the omission of indigenous voices and understandings. Put simply, the stories told by indigenous communities about imprisonment are not considered. Consequently, there is not an experiential account of indigenous imprisonment and its compounding effects upon generations where in an indigenous community the imprisonment of a family member becomes normalized and accepted

by the non-indigenous community as an unhappy vicissitude of life for indigenous communities with some hidden and uncontrollable cause. In sum, the concept of 'social capital' allows for the consideration of the devastation wrought upon indigenous communities by imprisonment and which transform what may be an individual tragedy for a non-indigenous person and his or her community, to an occurrence for indigenous communities that makes that same process loaded with historical and political significance.

8. Pain and indigenous imprisonment

The pain and suffering inflicted upon indigenous communities by imprisonment has been neglected in traditional, mainstream accounts of imprisonment in Australia. The lack of consideration of that pain is both a political act, as well as a community tragedy. As Elaine Scarry notes in her seminal work *The Body in Pain* (1985), pain has the effect of destroying language and thus prohibiting the creation of meaning that can be related to others. Pain does so because of its central feature that another person cannot experience it, even if he or she is next to you (Scarry, 1985, p. 3–5). Pain is also political. For indigenous communities the collective nature of the 'pain' of indigenous communities produced by the operation of the criminal justice system is unshared and not experienced by the non-indigenous community. Applying Scarry's argument to indigenous imprisonment, the pain of indigenous imprisonment is not widely known and experienced beyond indigenous communities. Certainly, the statistics that are presented in numerous reports and documents, outline the aggregate pain of indigenous communities, but those statistics do not tend to do justice to the collective stories of indigenous persons to whom the State is inflicting pain upon. And although the notion of 'aggregate pain' is problematic and may lack a degree of quantifiable and conceptual precision, it may be useful as a metaphor to describe the collective, or group, harm suffered and sorrow produced within indigenous communities as a result of imprisonment.

In addition, the focus on pain may also allow the community to whether the current policies towards reducing criminal behaviour in indigenous communities are justified. As Dr. Roberta Sykes (1985, p. 25) notes:

> It seems that the only way to unravel this mess is by working backwards—by asking Blacks where they hurt, and by isolating those parts of the machine which are causing pain at any particular point.

Dr. Sykes, in a withering account of the effect of the criminal justice system on indigenous communities, foreshadows the idea of 'social capital' as a necessary matter to consider when assessing the effects of imprisonment upon indigenous communities. Sykes (1985, p. 23) argues:

> I am personally very tired of reading articles and statistics that speak only to the impact of Black criminality on the justice system—the number of Blacks in the prison population, for example. If we were conducting an exercise motivated by

the best interests of the Black community, the manner in which information is gathered would be very much different. We would measure instead the extent of damage done to the Black community by the incarceration and loss of so many of its people. We would talk about the effect of having one quarter and one fifth of all Black males between the ages of 15 and 30 caught up in the justice system.

9. Conclusion

The high levels of indigenous imprisonment have long been a concern in Australia. Indeed, indigenous persons in Australia have been described as one of the most imprisoned groups in the world (Clifford, 1982). Unfortunately, that situation remains the same (Williams, 2001). The imprisonment rates are problematic for the indigenous communities whose members are required to serve terms of imprisonment. The treatment of the indigenous prisoners placed on Rottnest Island exemplifies that the criminal justice policy within a community is determined by those in the community who are in possession of the greatest power and thus able to convert their understandings of criminal behaviour into particular styles of penal practice. Indigenous persons have never really been in that position; instead they have been the 'other' of that process. Punishment, since the invasion of Australia, has always been the prerogative of non-indigenous institutions that have not taken into account the pain indigenous communities have endured. The failure to register that pain, which was briefly articulated as a result of the RCIADIC, in traditional accounts of the history of punishment in Australia is unfortunate. It is also part of the process that ensures that the overrepresentation of indigenous persons in custodial institutions, unless there is a sustained effort by the non-indigenous community to not only understand that pain, as far as that is possible, but to be able to articulate a public philosophy that it is wrong that indigenous communities should suffer in this way.

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