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# Sentencing, Punishment and Indigenous People in Australia

Chris Cunneen

*University of New South Wales*

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This paper discusses the sentencing and punishment of Indigenous peoples in settler colonial states, most notably Australia. The paper begins by critically analysing the way non-Indigenous courts have narrated the sentencing of Indigenous people, particularly through what on the surface would appear to be relatively beneficial considerations of disadvantage and the impact of colonialism. It then discusses what are generally referred to as Indigenous sentencing courts. Finally, it reflects on healing as an Indigenous response to social harm. Essentially existing outside of the formal court and correctional systems, healing approaches have grown over recent decades as both an alternative to the philosophical underpinnings of Western punishment, as well as providing practical alternatives to mainstream non-Indigenous correctional policies and practices.

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This paper discusses the sentencing and punishment of Indigenous peoples in settler colonial states, most notably Australia. The paper begins by critically analysing the way non-Indigenous courts have narrated the sentencing of Indigenous people, particularly through what on the surface would appear to be relatively beneficial considerations of disadvantage and the impact of colonialism. It then discusses what are generally referred to as Indigenous sentencing courts. Finally, it reflects on *healing* as an Indigenous response to social harm. Essentially existing outside of the formal court and correctional systems, healing approaches have grown over recent decades as both an alternative to the philosophical underpinnings of Western punishment, as well as providing practical alternatives to mainstream non-Indigenous correctional policies and practices.

### **Introduction**

The over-representation of Indigenous peoples in prison in Anglo Settler Colonial societies is well established (Cunneen & Tauri 2016, pp. 6-9). In Australia, the imprisonment of Indigenous people has been increasing since the 1980s and growing more rapidly than non-Indigenous imprisonment rates. At the June quarter 2017, Aboriginal and Torres Strait Islander prisoners represented 28 per cent of the national prison population, while comprising a little over 2 per cent of the general population (ABS 2017). This paper begins by critically analysing the way non-Indigenous courts have narrated the sentencing of Indigenous people, particularly through what on the surface would appear to be relatively beneficial considerations of disadvantage and the impact of colonialism. It then discusses what are generally referred to as Indigenous sentencing courts. Finally, it reflects on *healing* as an Indigenous response to social

harm. Essentially existing outside of the formal court and correctional systems, healing approaches have grown over recent decades as both an alternative to the philosophical underpinnings of Western punishment, as well as providing practical alternatives to mainstream non-Indigenous correctional policies and practices.

Sentencing and punishment has engaged with the idea of what it is to be *Indigenous* (or the concept of Indigeneity) in differing ways. Some of these judicial and legal understandings might be seen as positive affirmations of Indigenous culture, largely because of the struggle by Indigenous people to change colonial criminal justice systems; other judicial understandings of Indigeneity are essentially negative views of particular ‘racial’ and cultural characteristics assigned to Indigenous people that are seen as criminogenic. This paper examines how the ideas and definitions of Indigeneity become imbued with meaning in the sentencing process: in some situations, being Indigenous is seen as a potentially positive cultural attribute likely to lead to rehabilitation and reform (through for example the role of Indigenous Elders and Indigenous community organisations in the rehabilitative process); while in other cases, being Indigenous is seen as a personal and collective deficit, embodying a negative set of experiences, capabilities and cultural traits.

It is important to acknowledge at the outset the impact of neo-liberalism in creating a more punitive turn in penalty and its impact on Indigenous peoples (Wacquant 2009, Cunneen et al 2013; and for impact on Indigenous policy generally, Strakosh 2015). The emergence of neo-liberalism has coincided with the re-alignment of approaches in punishment, which emphasise deterrence, retribution, and accountability. The values of neo-liberalism include individualisation of rights and responsibilities; the valorisation of

individual autonomy; and the denial of cultural values that stand outside of, or in opposition to, a market model of social relations (Findlay 2008, p. 15). The ascendancy of these values has reinforced a particularly negative view of cultural difference and runs counter to Indigenous values that are based on collectivity, spirituality, and interrelationality between people and nature. Neo-liberal values undermine Indigenous claims to self-determination by oppressing Indigenous values and Indigenous laws based on these values (Strakosh 2015). Indeed cultural difference itself is used to explain crime and the need for particular types of punishment, with a focus on changing Indigenous culture and promoting greater assimilation (Anthony 2013, Cunneen 2007).

### **Sentencing as a Deficit Discourse**

Historically, Indigenous people in Australia were seen as not belonging to ‘civilised nations’ that could be recognised as sovereign states governed by their own laws. Indigenous law was seen as merely *customary* – an essentially imperialist concept which negated the integrity of Indigenous law and imposed the centrality of the law of the coloniser. Indigenous people in Australia were considered subjects of the Crown under a unitary system of colonial law. Since 1975 racial discrimination has been prohibited by the Commonwealth *Racial Discrimination Act*. Sentencing principles apply equally irrespective of the ‘race’ or cultural background of an offender. The Australian High Court in *Walker*, held that:

It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle (*Walker v The State of New South Wales* [1994] 182 CLR 45 at 49, per Mason CJ).

Australian courts have consistently held that Aboriginality is not a mitigating factor in sentencing (ALRC 2006, p. 720), most recently in the High Court decision *R v Bugmy* (2013) 302 ALR 192. However, this does not mean that a judge cannot take into account matters related to the offender's background when sentencing. As an Indigenous person, that might include socio-economic disadvantage, health problems, removal from family and so on. Such considerations are consistent with the principle of individualised justice. The circumstances where Aboriginality is relevant to sentencing can be categorised into three broad areas: factors relevant to the background of Indigenous offenders; factors relevant to the communities from where the offender and/or victim came; and factors relevant to traditional law and custom (NSWLRC 2000, pp. 43-51). For example, circumstances of an Indigenous offender that may be relevant in a particular case include:

- whether a custodial sentence is unduly harsh given the background and circumstances of the offender;
- the offender's residence in a remote community and problems associated with living on reserves or in remote areas;
- the unique difficulties faced by Indigenous people adjusting from a remote traditional community to an urban environment;
- the endemic nature of hearing loss among Indigenous people and its consequent social and psychological effects; and
- discrimination, exclusion and disadvantage in the background and upbringing of an Indigenous offender, including harsh treatment, dispossession and separation from families.

In *R v Fernando* (1992) NSWCCA 58 at 62-63, Justice Wood found that the Aboriginality of an offender does not necessarily mitigate punishment but may explain the particular offence or the circumstances of the offender. He set out the so-called *Fernando Principles* which recognise social disadvantage and the role of alcohol and violence in some Aboriginal communities, and their impact on Aboriginal offending. Justice Wood noted that “the problems of alcohol abuse and violence... to a very significant degree go hand in hand within Aboriginal communities” (*R v Fernando* at 62). For Justice Wood these ‘endemic problems’ in Indigenous communities including poor self-image, absence of education and work opportunities and “other demoralising factors” need to be recognised by the court when sentencing. However, whether the principles will be taken into account or not will be determined by the court in each individual case. Superior court decisions have restricted the application of *Fernando* (Anthony 2013). Furthermore, *Fernando* appears to have been interpreted in a way that offers little application to Indigenous women – despite their rapidly growing imprisonment rates (Cunneen et al 2013: 104-106). In one of the few cases (*R v Trindall* [2005] NSWCCA 446) where the *Fernando* principles were raised by defence lawyers in relation to an Aboriginal woman, they were seen by the court not to apply (Manuel 2009), with the court failing to recognise the specific gendered impacts of colonialism including family disruption, child removal and sexual assault.

The *Fernando* principles are a prime example where the Aboriginality of the offender is based predominantly on a set of negative characteristics. The principles, and their interpretation in later case law establish a hierarchy of Aboriginality to the extent that the principles are seen as more appropriate in their application to Indigenous people from rural or remote areas - a familiar trope in judicial pronouncements on

Aboriginality - see Cunneen (1993), Behrendt et al (2009) and Anthony (2013) for cases referring to this well-rehearsed distinction.

The *Fernando* principles also established that for an Indigenous person:

who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him (*sic*) and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality (*R v Fernando* at 63).

On this point the court was reiterating, seemingly in more humane terms, what had been a common understanding and practice since the early days of the colony - that specific forms or modalities of punishment were applicable to Indigenous offenders. Australian justice systems materialise this cultural understanding of penalty today in a variety of ways, one of which is through self-conscious attempts on the part of correctional services to create 'Indigenous' prisons (Cunneen et al 2013, pp. 113-14, 146-47).

The communicative and performative aspects of *Fernando* are seen in the act of first determining the actual harms of colonialism and then deciding which Indigenous *individuals* may have suffered social, economic and psychological damage as a result. This individualising discourse has left open the subsequent reading down of these principles to the extent that they apply to fewer and fewer Aboriginal people before the



courts<sup>1</sup>. The outcome is that courts perform a communicative act of recognition of colonialism as injurious, while continually reducing in practice the group of Aboriginal people to which those injuries apply. Colonial impact is judicially recognised in an inconsistent manner along various dichotomies (such as urban / rural) and social divisions (gender), while it is simultaneously made to disappear as a contemporary *structural effect* in the lives of most Aboriginal people.

Australian courts may also take ‘into account’ customary law when sentencing an Indigenous person. They generally do so in two ways. The first is when the person has been or will be subject to traditional Indigenous punishment as recognised by the court. The second is through recognition that customary law may explain the reason for the commission of a particular offence (see NSWLRC 2000, pp. 85-106 and LRCWA 2006, pp. 178-184). In both circumstances customary law *may* mitigate the sentence imposed by the court. However, the context in which Indigenous law is recognised in the colonial courts is highly individualised and determined on a case-by-case basis.

Anthony (2013, pp. 192), after a comprehensive analysis of the sentencing of Indigenous people by Australian courts, notes that:

The sentencer’s recognition of Indigeneity is a problematic premise for legal pluralism in the Australian criminal justice system. At best, the sentencer’s use of discretion can instrumentally structure sentences to soften the devastating effect of incarceration on Indigenous Australians... At worst, recognition in sentencing can produce harsher penalties to deter the practice of Indigenous cultures and

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<sup>1</sup> Manuel (2009, p. 8) reviewed 102 cases involving Aboriginal offenders after *Fernando* and found that the principles were applied in 29 cases.

customary laws. It can never foster Indigenous laws because the source of recognition presides in the dominant Anglo-Australian institutions.

Sentencing in Australian courts have failed to have any impact on the increasing imprisonment rates of Indigenous people. The way Indigeneity is considered by the mainstream courts remains captured within individualised conceptualisations predicated on various deficit discourses associated with being Indigenous, and operate to reinforce the centrality and legitimacy of the non-Indigenous legal system. Such an approach can encourage “culturalist responses to structural oppression” (Turnball 2014, p. 400), while denying the independent integrity and legitimacy of Indigenous law. Further, the structural effects of colonialism in determining the exclusionary and marginalised position of Indigenous people within the Australian polity become relegated to the characteristics possessed by individual offenders.

### **The Lack of Sentencing Alternatives, Programs and Services for Indigenous people**

The limited response of the courts to Indigenous values and laws is compounded by the lack of non-custodial sentencing alternatives, programs and services and their often Eurocentric nature. Indigenous people, as both offenders and victims, lack the same access as non-Indigenous people to the programs and services offered by the criminal justice system (Cunneen 2005, LRCWA 2006, Mahoney 2005). These include the absence or highly restricted availability of, or some cases the unsuitability of:

- non-custodial sentencing options;
- services for Aboriginal victims (particularly of family violence and sexual abuse);
- interpreter services;
- offender programs (for example, for sex offenders, violent offenders);

- programs and counselling for substance abuse; and
- programs for young offenders.

There are limited Indigenous-specific programs to reduce offending behaviour, and an absence of effective supervision for community corrections in rural and remote communities. For example, interviews with judicial officers in New South Wales found that the majority of judges and magistrates were prevented from using periodic detention when sentencing Indigenous offenders because of the lack of facilities (NSWLRC 2000, p. 154). The lack of appropriate programs may partly explain higher recidivism rates because there are fewer opportunities for rehabilitation (LRCWA 2006, p.85, Mahoney 2005). The Australian Law Reform Commission (ALRC 2006, p. 723) found that rehabilitation programs were not appropriately tailored to the needs of Indigenous offenders: “effective rehabilitation programs for [Indigenous] offenders should be adequately resourced, incorporate principles of Aboriginal healing, and provide ongoing assistance to participants to avoid... further offending”.

The absence of effective community-based sanctions for Indigenous offenders contextualises the developments in Indigenous courts and Indigenous healing that are discussed further below. As Milward (2012, p. 31) has argued in relation to Canada, “calls for greater Aboriginal control over justice are motivated in large degree by a desire for autonomy to develop community-based alternatives to incarceration”. A further Indigenous driver for change has been the relative failure of indigenisation and ‘culturally appropriate’ programs that were popular from the late 1980s onwards in settler colonial states (Cunneen 2001, Tauri 1998).

### **Indigenous Sentencing Courts: Affirmation of Indigenous Values?**

In sentencing and punishment not all understandings of Indigeneity are negative. The growth in Indigenous sentencing courts in Australia (for example, Koorie, Nunga, Murri and circle sentencing courts) over recent decades is the outcome of Indigenous activism and official accommodation (Marchetti & Daly 2007, Marchetti & Downey 2014). The aims of Indigenous sentencing courts include providing better sentencing outcomes, empowering Indigenous communities, reducing recidivism, and achieving restorative justice outcomes between offenders and victims. The courts provide an opportunity for Indigenous people to be involved in the sentencing process at a relatively formal level, although on terms set by the government and the judiciary. The courts provide the space to hear the views of a particular community in relation to matters such as whether the offender should return to the community, the seriousness of the offence, the offender's character and the nature of an appropriate penalty. Punishment is understood as the outcome of decision-making by judicial officers and non-judicial Indigenous members of the court. In this context, Indigenous culture is seen as a positive contributor to the reform of Indigenous offenders.

Circle sentencing has been operating for Indigenous offenders in NSW since 2002. Circle sentencing guidelines, procedures and criteria are established through the *Criminal Procedure Regulation 2000* [2000-435]. The objectives of the circle sentencing court are, inter alia, to increase the participation and confidence of Aboriginal communities in the sentencing process; to support to victims; to provide more appropriate sentencing options; reduce recidivism; and to provide for the greater participation of Aboriginal offenders and their victims in the sentencing process (Potas et al 2003, p. 4). The fundamental premise underlying circle sentencing is that the

community holds the key to changing attitudes and providing solutions. The court's deliberations have been typified as power-sharing arrangements. 'It is recognised that if the community does not have confidence that the power-sharing arrangements will be honoured, the prospect that circle sentencing will be successfully implemented is likely to be diminished' (Potas et al 2003, p. 4).

Other Indigenous sentencing courts (Koori, Nunga, Murri courts) typically involve an Aboriginal Elder/s, Aboriginal community justice group members or an Aboriginal justice officer sitting with a magistrate. Elders can provide advice to the magistrate on the offender and about cultural and community issues. For example, offenders might receive customary punishments or community service orders as an alternative to prison. The offender is required to have pleaded guilty to the offence. The Court setting may be different to the traditional sittings. The offender may have a relative present at the sitting, with the offender, his/her relative and the offender's lawyer sitting at the bar table. The magistrate may ask questions of the offender, the victim (if present) and members of the family and community in assisting with sentencing options (see Cunneen 2005, Marchetti & Daly 2007).

One magistrate described the Queensland Murri Court<sup>2</sup> sessions as 'intense, emotional occasions with a greater involvement of all parties'; and another magistrate that, "the acknowledgment in a public forum of the Elder's authority and wisdom and their role as moral guardians of the community by the Court honours traditional respect for the role of the Elders. The Elders mean business..." (cited in Cunneen 2005, pp. 148-149). The conditions placed on court orders may involve meeting with Elders or a community

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<sup>2</sup> In 2012 a conservative government in Queensland abolished the Murri Court. However, magistrates continued to hold similar courts by exercising their discretion to list Indigenous matters on a single day and seek input from community members.

justice group on a regular basis and undertaking courses, programs or counselling relevant to their particular needs.

There have been at least ten evaluations of Aboriginal courts in various states of Australia. While comparisons across these evaluations are difficult, Marchetti and Downey (2014, p. 374) note that the evaluations generally show improved rates of court appearances but not a consistent impact on recidivism rates. A common theme in the evaluations is the increased participation and ownership of the program by local Indigenous communities. For example, Potas et al's (2003, p. iv) evaluation of circle sentencing in NSW found more relevant and meaningful sentencing options for Aboriginal offenders; reduced barriers between the courts and Aboriginal people; improvements in the level of support for Aboriginal offenders; support for victims; and the promotion of empowerment of Aboriginal people in the community.

There is a strongly performative element to Aboriginal courts. The emotion described above, and the use of Indigenous flags, art and other cultural objects reinforces the importance of Indigenous culture in the sentencing process. In Canada, Proloux (2005) has argued that the philosophies and practices of Aboriginal peoples are penetrating the formal criminal justice system<sup>3</sup> and we need to understand the cultural creativity involved in this process, although the formal system “still has the power to select where, when and how the cross-cultural penetration occurs” (Proloux 2005, p. 81). His argument also has some validity in Australia. Yet, the question remains open as to whether the courts are “part of an imperfect and incomplete decolonising trend”, as

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<sup>3</sup> In particular, the Canadian context is framed by the Supreme Court decision in *R v Gladue* (1999) 1 SCR 688 and the subsequent development of Gladue courts (for further discussion see the Aboriginal Legal Services, Toronto [website](#)).

suggested by Proloux (2005, p. 92). Perhaps the outcome is a type of postcolonial hybridity, where institutional processes are changed and the outcome is *neither* an Indigenous process nor the dominant non-Indigenous legal process – a form of cultural creativity, as Proloux suggests. However, it is also clear that Indigenous sentencing courts are limited in scope and are usually unable to hear the more serious offences that continue to go before the mainstream courts. Further, it is difficult to see how Indigenous sentencing courts can satisfy the broader demands by Indigenous people for greater autonomy and control over criminal justice more generally.

Despite the accommodations made towards Indigenous values in these specialist courts, the results of these initiatives have not halted the increase in the rate of Indigenous imprisonment, particularly with the move to more punitive approaches to punishment over recent decades (Cunneen et al 2013). There are parallels here with the argument of Turnball (2014, p. 398) that ‘Aboriginalisation’ is a “technique of contemporary colonialism” and “demonstrative of symbolic adaptations, rather than meaningful change or the creation of separate justice processes”. Certainly, Indigenous sentencing courts still enforce the state’s criminal law. Perhaps more problematic is that sentencing itself is at the end of the criminal process. It provides little opportunity to challenge the various processes of criminalisation which precede court.

Another reason for the failure of Indigenous sentencing courts to impact on Indigenous imprisonment is that they are essentially peripheral to the workings of the mainstream criminal justice system, with comparatively few Indigenous people actually appearing before the specialist sentencing courts. For example, in NSW there is one youth Koori court in operation across the State. Overall, it is difficult to estimate the numbers but

given that there are relatively few Indigenous sentencing courts operating and on an estimate of the small number of the matters they hear, we could surmise that over 95 per cent of Indigenous people continue to appear in mainstream court settings.<sup>4</sup>

So perhaps like the *Fernando* principles noted above, there is a double communicative function fulfilled by Indigenous sentencing courts. On the one hand, Indigenous culture is shown to have an important role in the courts – and justice is served. At the same time, Indigenous sentencing courts are peripheral and tokenistic. It could be argued they divert and incorporate Indigenous activism and demands for change into a ‘manageable’ form that does not alter the broader structures of power. Perhaps the existence of Aboriginal courts changes the working of the non-Indigenous justice system as part of a decolonising process, but it can also be argued that Aboriginal courts are irrelevant to what happens to the majority of Indigenous offenders passing through the mainstream justice system – that in fact they divert critical attention away from the oppressive regimes of sentencing and incarceration where Indigenous peoples are so massively over-represented.

### **Healing v Risk**

The Indigenous approach to *healing* is an integral part of Indigenous justice, and lies at the foundation of changing and reforming criminal behaviour among Indigenous people. Indigenous healing processes have developed in many settler colonial states and focus on a number of different areas. These include residential school survivors, members of the Stolen Generations, and people involved in family violence, child protection, alcohol and other drug addictions, and those in various stages of the criminal justice

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<sup>4</sup> It was estimated in Queensland that less than 0.5% of Indigenous adult matters and 1.5% of Indigenous juvenile matters were determined in the Murri courts (Cunneen 2005b, p. 200).



system (for a variety of specific examples, see Archibald 2006, pp. 39-48, ATSIJJC 2008, pp. 167-176).

As a political process of individual and collective change, healing involves shifting the epistemological priority given to Western understandings of crime and punishment. It begins from a disbelief in the functionality and the legitimacy of state-centred institutional responses. A focus on healing relies on inter-relationality rather than individualism, and the importance of identity and culture in the process of decolonisation. As Archibald (2006, p. 49) states:

The experience of being colonised involves loss – of culture, language, land, resources, political autonomy, religious freedom, and, often personal autonomy. These losses may have a direct relationship to poor health, social and economic status of Indigenous people. Understanding the need for personal and collective healing from this perspective points to a way of healing, one that combines the socio-political work involved in decolonisation with the more personal therapeutic healing journey.

Indigenous healing approaches start with the collective experience and draw strength from Indigenous culture. Inevitably, that involves an understanding of the collective harms and outcomes of colonisation, the loss of lands, the disruptions of culture, the changing of traditional roles of men and women, the collective loss and sorrow of the removal of children and relocation of communities.

Healing is not simply about addressing offending behaviour as an individualised phenomenon. Healing is tied to Indigenous views of self-identity that are defined by kinship (including ancestry and communal bonds), spiritual relationships and responsibilities – all of which are inseparable from each other and the land and nature (Benning 2013: 130). Healing is focussed on addressing various types of trauma: situational trauma caused by discrete events (for example, domestic and family violence); cumulative trauma caused by pervasive distress over time (for example, the long term effects of racism); and inter-generational trauma which is passed down from one generation to another (for example, the forced relocation of communities, the denigration of Indigenous cultures) (ATSISJC 2008, pp. 153-154).

In responding to offending behaviour, healing can be contrasted with the dominant risk/need paradigms in offender management (Ward & Maruna 2007). It is evident that Indigenous developed interventions start from a different place to conventional individualised programmes like cognitive behavioural therapy (CBT). As Benning (2013, p. 134) notes, “CBT prizes the values of rationality and scientific method... CBT tends to reinforce a worldview that is Euro-American, and masculine, and tends to undervalue spiritually orientated worldviews and cooperative interactive styles”.

Indigenous programmes start with the collective Indigenous experience: individual harms and wrongs are placed within a collective context. Programmes like CBT do not understand individual change as part of a collective experience, nor the nexus between collective grief and loss and individual healing. Indigenous healing programmes start from this nexus, and focus simultaneously on both the individual and collective experience. They begin with understanding the outcomes and effects of longer-term

oppression, and move from there towards the healing of individuals. They are far more expansive than a narrow ‘criminogenic needs’ definition of rehabilitation which sees the individual as a discrete, autonomous being; isolated and responsible for their own decision-making (Ward & Maruna 2007, pp. 76-88). Indeed, the criminal justice system is often considered as part of the problem rather than as a solution to resolving community dysfunction and disharmony.

Indigenous healing approaches are Indigenous controlled and are consistent with the principle of self-determination. One consequence is the tension that is created between Indigenous approaches and state-controlled offender interventions which rely on various behavioural modification programmes determined by narrowly-defined individualised ‘deficits’. This is particularly so in relation to the criminogenic risk/needs paradigm and CBT programmes. At present the risk/need paradigm and CBT programming dominate adult and juvenile correctional systems throughout Australia. For example, NSW Corrections identify 29 CBT-based behaviour change programs in their prisons (Corrective Services NSW 2016). In addition, Indigenous people score higher on risk assessment tools used in prisons and for offenders in the community, directly compounding the view that being Indigenous is a ‘risk factor’ in itself.<sup>5</sup>

Further, as McCaslin and Breton (2008, p. 518) explain, ‘coloniser programming’ is permeated by a view of Indigenous peoples as the problem and the colonisers as the solution. Governments favour approaches that they can closely administer, control and monitor—and these tend to be programmes reliant on expert interventions that further privilege dominant definitions of crime and disavow the voices of Indigenous peoples.

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<sup>5</sup> For example the Group Risk Assessment Model (GRAM-2) developed by the NSW Bureau of Crime Statistics and Research specifically identifies ‘Indigenous status’ as a risk factor (Stavrou & Poyton 2016, p. 1).

They also tend to be ‘off-the-shelf’ programmes that are not organic to the needs and experiences of Indigenous people and communities (Cunneen 2014, pp. 399-401).

## **Conclusion**

Mainstream non-Indigenous sentencing principles may take account of Indigeneity but this is often in a negative light, seen through the ravages of alcohol, violence and substance abuse, or where Indigenous culture itself is blamed for dysfunctional behaviour. The extent to which being Indigenous is taken into account by the court is founded on an individualised case-by-case basis. The effect is to cast both Indigenous culture and the impacts of colonialism into a space determined by the non-Indigenous legal system. The outcome has been a restrictive reading of the broader role of colonialism in undermining and negating Indigenous law and autonomy. When combined with the neo-liberal punitive turn in penalty, emphasising deterrence, retribution, and individual responsibility, it is not surprising that Indigenous incarceration rates have grown.

There has been a growth in various Indigenous sentencing courts over recent years. These have been important developments, reflecting Indigenous activism and the desire to exercise Indigenous culture and law in responding to Indigenous offending. Yet the extent to which they can change the existing colonial relations of justice is an open question. While Indigenous sentencing courts can to some extent reflect Indigenous values, they are also subject to considerable legal and practical constraints, and constrained more broadly in terms of the exercise of Indigenous autonomy at a time when ascendant neo-liberal values run counter to Indigenous values. Indigenous law and culture are fundamental to the decolonisation process. McCaslin and Breton (2008,

p. 512) discuss the necessity of “reclaim[ing] frameworks that create space for deep healing by transforming the roots of harm, and to critique those frameworks that sabotage healing efforts by reinforcing colonial power”. Unless colonialism is brought ‘front and centre and named as the root cause’ of Indigenous over-representation in the criminal justice system, Indigenous peoples will continue to be oppressed. As one alternative, Indigenous healing processes, based on principles of Indigenous self-determination, offer a different vision of responding to social harm compared to Western epistemologies and theories of punishment.

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