Historical reasoning about Indigenous imprisonment: A community of fate?

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ABSTRACT

The high rate of Indigenous incarceration is a problem for public policy and therefore for historical and social analysis. This paper compares and contrasts two recent attempts at such analysis: Thalia Anthony's *Indigenous People, Crime and Punishment* (2013) and Don Weatherburn's *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (2014). My question is: what difference do these books' contrasting narrative models of Australian history make to our thinking about contemporary Indigenous incarceration? My reading reveals several differences and similarities in their perspectives: how they position themselves in relation to the values that shape Australian debate about punishment; their historical understanding of the institutions of 'protection' and of the impact of 'assimilation'; whether the law and order apparatus is systemically biased against Indigenous Australians; and whether Indigenous Australians should be understood as a 'community of fate'.

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Introduction: Kath Walker's prediction

In December 1964, the Secretary of the Queensland State Council for Advancement of Aborigines and Torres Strait Islanders, Kath Walker, predicted that as more and more of her people were assimilated, some would flourish and some would fail. If we see imprisonment as a form of failure, then her prediction seems to have been confirmed: the lives of many Indigenous Australians are punctuated with imprisonment and other adverse contacts with the criminal justice system. Indeed, 'The depth and breadth of Aboriginal contact with the criminal justice system … almost defies belief', writes Don Weatherburn (2014, p. 2). The crude imprisonment rate for Indigenous women in 2012 was 375.5 per hundred thousand, compared with 16.2 per hundred thousand for non-Indigenous women; for men the Indigenous rate was 4227.5, towering over the non-Indigenous rate of 236.9 per hundred thousand (Weatherburn 2014, pp. 2–3). Criminologists have suggested that, for some Aboriginal communities, prison has become part of their domain, and a period in prison a normal and not shameful phase of one's life-course (Cunneen et al. 2013, pp. 144–147).

Are the imprisoned failing, or is Australian society failing to decolonise Indigenous people in such a way as to respect their many differences from the mainstream? One's view on this question will draw on one's deepest understandings of Australian history and of the distribution of responsibilities between colonists and colonised who are also, in common, citizens. In this paper, I contrast two narrative models present in current research in Aboriginal criminology. One, illustrated by Thalia Anthony's *Indigenous People, Crime and Punishment* (2013), emphasises the continuity in Australian colonial history between all forms of institutional control of Indigenous Australians and their current high rates of incarceration; in addition, this model does not treat as significant the high proportion of Indigenous Australians who do not suffer imprisonment or adverse contact with the forces of law and order. This model postulates Indigenous Australia, in effect, as a 'community of fate', that continues to suffer systemic, collective oppression rooted in the colonial past. The other, contrasting model is more attentive to historical discontinuity—in particular to the distinction between recent criminal imprisonment and earlier regimes of institutional management; it is attentive to differentiating effects of assimilation policy *among* Indigenous Australians. In this second model, illustrated by Don Weatherburn's *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (2014), Indigenous Australians have not continued to be a 'community of fate', as some have flourished socio-economically while others live in ways that are both disadvantaged and criminogenic. The two models give rise to different perspectives on public policy. The former model problematises the law itself, and focuses on the issues of judicial authority and judicial reasoning; the approach of the latter model is not to question the law but to pathologise the law-breakers and to seek changes in social policy and in sentencing options that would optimise their social integration.

Let us return to Walker's 1964 prediction. She made her remark at the Centre for Research into Aboriginal Affairs at Monash University, during a conference on 'Aborigines in the economy'. The theme of that gathering was the economics of assimilation; it focused on 'the types of jobs in which Aborigines are at present engaged, their proficiency at their tasks and their earnings from them', and on 'the size, location and skills of the Aboriginal labour force and the extent and diversity of jobs available to provide employment now and in the future' (Sharp & Tatz 1966, p. vii). Although few, if any, of the participants would have questioned the government's assimilation goal to enable Aboriginal people eventually to sell their labour for the award level of wages, two clergy associated with missions, Bishop J.P. O'Loughlin and Pastor Paul Albrecht, sounded a warning. Remote Aboriginal people would be at risk as they transited from the closed and semi-closed mission economies to a world in which they would freely receive and spend more cash than had ever been at their disposal. Pastor Paul Albrecht pointed to alcohol abuse in Central Australia, predicting that it would increase with higher wages.

Responding to O'Loughlin's and Albrecht's warnings of assimilation's perils, Walker drew on personal experience of Queensland Aborigines who had 'got out from under the Act' and made the transition to normal citizenship status. As the Queensland authorities had feared, some Aborigines, when suddenly promoted from 'child' to 'adult', at first misused their money. However, Walker reassured the conference, 'after a while they levelled off' (Walker 1966, p. 186). She then warned:

> There are some who will never ever make the grade, but the average are not any different from any other society or any other race. You all have your rejects. We are no different. We too are quite well aware of the fact that some of our people will not make the grade and we are not as naïve as to think that all of us can be rescued. Some of us will be left behind, as you yourselves have left some of your own people behind (1966, p. 186).

To read recent analyses of the high rate of Indigenous imprisonment is an opportunity to explore one meaning of Walker's prediction that, in their adaptation to the pressures of Australian society and in their seizing of its opportunities, Indigenous Australians would become differentiated. For some Indigenous Australians it has become normal to be at odds with the criminal law, while others are unlikely to be arrested, convicted and imprisoned. Thalia Anthony and Don Weatherburn agree that excessive Indigenous incarceration is a most disturbing product of Australia's colonial history, but these authors have approached in different ways the question of whether, and in what ways, socio-economic and cultural differences among Indigenous Australian are relevant to understanding their high rates of incarceration.

In order to describe how their models differ, I introduce the term 'community of fate', borrowing from another analytic context: contemporary political theory about the problem of representing historically disadvantaged groups in contemporary liberal-democratic societies (for example, Dawson 1994; Williams 1998, 2009; Dovi 2002). To be within a 'community of fate' is to share a historically-determined structural position with others of one's category (for example, women, African-Americans) in such a way that one is, in common with others in one's category, systematically disadvantaged.[1] While both Anthony and Weatherburn write as if Indigenous Australians are a community of fate, Weatherburn also qualifies his implicit commitment to that idea by drawing attention to significant differences among Indigenous trajectories, and, on this basis, he invites attention to the policy-relevance of such distinctions among Indigenous Australians. I conclude my comparison of these two books by suggesting that whether we suppose Indigenous Australians to be a 'community of fate' has become a significant interpretive issue for those concerned with Indigenous history and public policy. While my sympathies are more with Weatherburn's approach, I encourage readers to consider seriously the challenge of Anthony's critical criminology.

Assimilation as a differentiator

The agenda of assimilation policy (c. 1940–75) included not only undoubtedly harmful interventions in Indigenous family life and disrespect for Indigenous heritage but also reforms whose impact has been mixed. The repeal of many laws that, in the name of 'protection', had limited the rights of Indigenous Australians, including their welfare entitlements and their rights of free association with non-Indigenous people in towns and cities, was largely completed by the mid-1970s. One of the lasting effects of this program of legal reform and institutional change has been the persistence and arguably the deepening of the problem of the Indigenous criminal and prisoner. Recent criminological writings agree that even these liberalising elements of assimilation have contributed to imprisonment. Anthony writes that under assimilation policy many hitherto sequestered and excluded Aborigines were admitted to towns, cities and roads where it was difficult for them to find jobs and where their unorthodox comportment has been readily invigilated and, in some respects, criminalised (Anthony 2013, pp. 47–48). Similarly, Cunneen and his co-authors see assimilation policy as having weakened the 'disciplinary regimes of the reserves, settlements, missions and pastoral stations'; the resulting

[1] Neither Anthony nor Weatherburn uses the term 'community of fate' and each has neither endorsed nor criticised my use of that term (in an earlier draft) when reading their work. My use of the phrase should not be understood as referring to any inherent feature of Indigenous Australians. I do not believe that Indigenous Australians share any inherent features other than those they share with the rest of the human species. I emphatically reject any inference that Indigenous Australians are inherently criminal.

urbanisation of Aborigines intensified 'non-Indigenous racial concerns' (Cunneen et al. 2013, p. 32). For Weatherburn, the way that assimilation contributed to Aborigines' high rate of imprisonment was that it granted them access to alcohol and to cash welfare payments at a time when, coincidentally, they were less likely to be under the discipline of employment (Weatherburn 2014, p. 17).

In these same writings, we are less likely to see it acknowledged that assimilation has also enabled many Indigenous Australians to adapt socio-economically, and that such people avoid adverse contact with the justice system. However, Weatherburn's analysis presents two glimpses of those who—in Kath Walker's words—have 'made the grade'. Weatherburn examines a cohort of Indigenous and non-Indigenous residents of New South Wales born in 1984. A higher proportion of the Indigenous (75.6 per cent) than the non-Indigenous (16.9 per cent) members of this cohort had been cautioned by police, referred to a youth justice conference or convicted of an offence (Weatherburn 2014, p. 5). *It is significant that almost one quarter of the Indigenous cohort (24.4 per cent) had no such contact.* As well, Weatherburn has developed a mathematical model of the dynamics of the Indigenous prison population, showing that a large proportion, at any time, consists of people who have been imprisoned before (Weatherburn 2014, pp. 105–109). If a relatively small proportion of the Aboriginal population generates the relatively high rate of Indigenous imprisonment, then we have further reason not to overlook the significant phenomenon of Aboriginal people who do not have adverse contact with the legal system. While, from the point of view of many Indigenous Australians, brushes with the law and even imprisonment have become 'normal', it would be inaccurate (and insulting) to typify early 21st century Indigenous Australia as criminal and incarcerated. Many Indigenous Australians have flourished materially, in terms of self-respect and in keeping out of the criminal courts; they have 'made the grade' without losing their identity as Aborigines and Torres Strait Islanders. They are unlikely to fall foul of the law or to go to prison. As Walker predicted 50 years ago, the Indigenous fate became differentiated as assimilation policy terminated the supervisions and restrictions that 'protection' had imposed.

However, at the same time as it became possible to see this differentiation emerging within the Indigenous population, a discourse arose that emphasises Indigenous commonalities. A 'pan-Aboriginal' or Indigenist perspective has arisen since the 1930s, largely in order to deny the significance of differences of 'caste' or 'blood'—distinctions expressed with divisive consequences by the legislation that, under assimilation policy, governments have since repealed. The memory of white authorities' invidious 'caste' distinctions has lingered long after these distinctions have lost their purchase on law and administration. That bitter memory is the basis of a fervent discourse of shared Indigenous heritage and fate.

When contemporary intellectuals present Indigenous Australians as a people united by their historic fate, by their styles of sociality and by their interests, they frequently use the example of the 'half caste'/ 'full blood' distinction in order to question the ethics, politics and descriptive adequacy of *any* socio-political description that highlights distinctions, including distinctions of region, class and cultural orientation. For example, the Indigenous lawyer Louise Taylor, discussing the possibility of a treaty between Australia and its Indigenous peoples in 2003, questioned the distinction, that some sceptical commentators had made, between the Indigenous 'elite' and other Indigenous Australians. The political significance of making this distinction, she wrote, was that it alienated '"professional" Aboriginal people from our remote or rural (read real, authentic) brothers and sisters' (Taylor 2003, p. 92). She declared that Aboriginal elites share with Aboriginal non-elites the defining experiences of being Aboriginal; thus they could 'authoritatively speak on … subjects which are of major significance in rural and remote communities' (Taylor 2003, p. 93). To draw attention to class distinctions among Indigenous Australians seemed to Taylor to be similar in its political logic to the older government practice of differentiating 'full-blood' from 'half-caste' Aborigines; both practices have resulted in, or would now lead to, the spurious disqualification of certain people as 'Aborigines'.

Undoubtedly, the assertion of Indigenous commonality has had important political work to do. According to Jeremy Beckett, such emphasis on the shared historical fate and distinct entitlements of Indigenous people has been encouraged by the political culture of welfare capitalism in Australia and elsewhere. The rhetoric in which welfare is claimed and granted in societies such as Australia is 'moralistic', he suggests: to be Indigenous is to present oneself as distinctly deserving:

> This kind of political culture offers indigenous minorities the possibility of transcending their small numbers and powerlessness, while giving governments the opportunity of demonstrating their humanity at what may be relatively small cost. Thus in Australia, Aborigines as well as various immigrant groups have judged it more advantageous to follow this strategy rather than play class or party politics (Beckett 2014, p. 170).

The pertinent point, for this paper, is that the political discourse of Indigeneity tends to refuse or downplay class identities; in the mobilisation of 'Indigenous' as a category naming a politically powerful claim, the idea that Indigenous Australians have become socio-economically differentiated among themselves is discounted. We should take Beckett's term 'moralistic' in a neutral sense. He is not complaining that the representations of Indigenous commonality make a gratuitous appeal to our conscience; rather his point is that much contemporary Indigenous discourse highlights the moral dimension of the Indigenous/non-Indigenous distinction. To evoke the moral unity of Indigenous people vis-à-vis their historic adversary,

colonising authority, puts in question, or pushes to the background, other distinctions that one might make, such as the distinctions of class, cultural disposition and moral outlook that may be emergent among Indigenous Australians and that can be found also among non-Indigenous Australians.

This emphasis on the moral dimension of the Indigenous/non-Indigenous distinction and the corollary assertion of Indigenous normative unity is evident in the following statement by the late Ruby Langford, a writer whose subjects included the life of her sometimes convicted and imprisoned son Nobby and brother Kevin. Asked by Robyn Hughes to explain her intentions in writing *Haunted by the Past* (Langford 1999), Langford began by noting that 'we're the most incarcerated people in Her Majesty's jails in this country'. Asserting that Nobby's initial conviction had been 'wrongful', she continued:

> My son's not a bad, evil man. He's done some stupid things and been easily led and stuff like that, but we're all human, but nobody's been murdered or maimed, and his continual fight to just get justice, you know? And Aboriginal people don't have justice. How can we be the most bad, evil people in the whole of this now multicultural Australia when we're not quite two percent, as I said, of a total population which now stands at 18 million? You know? We don't have any justice because Aboriginal people always had to conform to the laws of the invading powers of our country, because we were never allowed to be ourselves. We had assimilation forced on us, had to give away language, identity and become like white people. And even today, governments do not classify urban Aboriginal people with a degree of Abo ... caste of, you know, caste in us, like half-caste, quarter-caste, you can't say that today. You're either Aboriginal or white, but years ago it used to be you were half-caste, quarter-caste, full-blood, three-quarter-caste, one-eighth-octoroon, you know? This is how they defined us. But even today the governments of Australia define us, urban Kooris of mixed blood, as not real Aboriginals. Aboriginals here according to them are the traditional tribal ones out in the desert sitting on a rock with a spear in his hand. You see, this is how they've always defined us, but we define ourselves as the children of the Indigenous people, you know, the ancestors of the Indigenous people, and we're sick of other people telling us who we are (Hughes 1995, pp. 59–61).

In these words, we see several themes of contemporary Indigenous self-representation: that the unjust structure of Australian society stems from the unjust foundational act of colonisation; that this injustice has long been expressed in demands that Aboriginal people conform to colonists' rules, demands that continue in the contemporary criminal justice system; that colonial authority has denied

Aboriginal people self-representation and that Aboriginal people are fighting that denial by asserting the common Aboriginality of 'urban' and 'tribal', 'half cast' and 'full blood'. The post-assimilation political discourse that has championed self-determination and Indigenous rights has presented Indigenous Australians as a wrongfully treated and morally unified people that must be recognised, collectively, as entitled to respectful acts of recognition and restitution.

These themes resonate strongly in contemporary criminology that explains high rates of Indigenous imprisonment by referring to the shared historical trajectory and aggregate socio-economic disadvantage of Indigenous Australians. That many Indigenous Australians are not convicted of offences and do not go to gaol are facts of little significance in this narrative of oppressed people-hood.

However, Weatherburn's *Arresting Incarceration: Pathways Out of Indigenous Imprisonment*, while not denying that Indigenous Australians have been collectively subject to colonial oppression, offers an alternative explanatory model that draws attention to certain differences that have emerged among Indigenous Australians. In paying attention to the fact that many Indigenous people have no adverse contact with the criminal law and are unlikely to be imprisoned, his work elaborates, in effect, Kath Walker's 50-year-old prediction that Aborigines would differ in their ways of using the freedoms conceded by assimilation. Whereas Anthony consistently postulates Indigenous Australians as a community of fate, Weatherburn is more open to seeing policy-relevant differences among Indigenous Australians. In the rest of this paper I explore further the differences between Anthony and Weatherburn.

Which morality is the problem?

As you would expect of authors on this topic, both Anthony and Weatherburn are politically self-aware; each seeks to situate him/herself in relation to what they see as the most powerful tendencies in Australian culture that shape our institutions of social control.

In company with a strong Durkheimian tradition in the social study of punishment (Garland 1990, pp. 23–92) Anthony understands punishment regimes as enacting and reproducing an Australian *conscience collective*—a hegemonic tradition of conscious and unconscious, morally-textured imagining of commonality and difference in Australian society. Distancing her own views from this determining mindset, her account of Australian sentencing is presented as illustrating and confirming the critical descriptions of Australian culture by Ghassan Hage (1998) and Jennifer Rutherford (2000). Anthony makes several allusions to Hage's account of the dominant representations (conscious and unconscious), in racial and ethnic terms, of the 'national space' of Australia. 'The white fantasy that treats Indigenous people as outsiders emerges from the history of white dominance and colonization' (Anthony 2013, p. 70). To similar effect, she cites Jennifer Rutherford's Lacan-inspired critique

of 'the colonizing state's psyche and relationship with the Other', a relationship that enacts, through official punishment, the link between 'morality and aggression in Australian history' (Anthony 2013, pp. 20, 54, 180).

When Weatherburn evokes a prevailing Australian morality, he explicitly positions himself as *not* contesting it. He suggests that it would be to 'put your head in the sand' to ignore or oppose what he understands to be the moral sensibility pervading Australian public discussions about crime and punishment: 'the almost universal belief that people who continually or seriously breach the law should not "be allowed to get away with it"' (Weatherburn 2014, p. 88). However repellent his readers may find that powerful morality when it gives rise to Indigenous incarceration, it has to be accepted as a constraint on public policy, he suggests. A 'lasting reduction in the number of Indigenous Australians in prison' will not be brought about by a cultural politics that seeks 'dramatic changes in sentencing and penal policy' (Weatherburn 2014, p. 88). Thus Weatherburn pragmatically situates himself alongside or inside the Australian public's way of thinking about crime and punishment (as he understands it). He is interested in non-dramatic reform, based on rigorously evaluated program experiments (and his book is rooted in a literature of applied social science). In contrast, Anthony distances herself from the prevailing moral tradition as colonialism's obnoxious legacy. Consistent with this difference, Anthony and Weatherburn differ in what they take to be problematic. For Anthony it is the way judges enact colonial sovereignty when dealing with sentences and bail applications; for Weatherburn it is the way some Indigenous Australians behave.

It is a strength of Anthony's book that she devotes many pages to the changing themes of judges' sentencing discourse—the crucial expression of the ethos of settler colonial punishment. When judges are faced with an Indigenous offender or defendant, they draw on available representations of 'the Indigenous', and the content of these representations is a major determinant of Indigenous incarceration. Until recently, sentencing authorities recognised Indigeneity as a mitigating factor: the grounds for leniency were either that the Indigenous person was a member of a distinct normative culture with its own punishments or that his/her life had been so harsh and deprived (by Australian standards) as to warrant leniency. However, in recent times, sentencing authorities have taken a more critical view of the convicted person's distinct normative culture. Judges have regarded the Indigenous milieu less as a source of culturally appropriate punishments and more as an encouragement to criminal behaviour. In a parallel change, courts have been less ready to *assume* that an Indigenous life is harsh and deprived. Both shifts in judicial opinion have made judges less willing to spare offenders a custodial sentence or to reduce such sentences. Anthony asserts that this recent re-imagining of the Indigenous criminal has contributed to higher rates of incarceration.

In setting out this recent history, Anthony is not merely regretting that judges have shifted from one set of representations of Indigeneity that tend to reduce incarceration to another set of representations that tend to increase it. More fundamentally, she questions whether, in criminal sentencing, the state should assume an unaccountable prerogative to recognise Indigeneity. Whether that recognition works to the benefit (leniency) or detriment (severity) of Indigenous Australians, it is problematic, she argues, because Indigenous authority plays little or no part in the recognition process. In the reformed settler-colonial state that Anthony advocates, Indigenous and non-Indigenous authorities would share the responsibility/privilege of recognising the 'Indigeneity' of convicted persons and of sentencing them. She conjectures that this sharing of authority would lead to what she considers to be a better punishment regime: a lower rate of Indigenous imprisonment.

Weatherburn's book has a different focus. Accepting (however pragmatically) the prevailing Australian views about culpability, he does not ask how judges have been thinking about 'Indigeneity'; rather his main question is: why does a relatively high proportion of the Indigenous population commit so much crime of such a severe nature as to incur long periods of imprisonment? The quality of judicial thought is not irrelevant to Weatherburn—judges' willingness to consider non-custodial sentences is one theme vital to his book—but he is much more interested than Anthony in the socio-economic and criminal characteristics of convicted Indigenous Australians.

Racial bias in the law and order system?

Do statistics on conviction and incarceration support the thesis that the Australian law and order system, from surveillance to sentencing, is loaded against Indigenous Australians? Weatherburn devotes fourteen pages to expressing his doubts about 'systemic bias'. He argues that there is no convincing evidence that Indigenous over-representation in prison is the result of deliberate racial discrimination by agents such as police (in their surveillance, arresting and charging) and judges (in their sentencing and bail decisions). Nor is he persuaded that excessive Indigenous incarceration is the result of certain laws and punishment practices that—intentionally or not—are more likely to implicate Aborigines. That the system results in high rates of Indigenous incarceration is not enough to justify labelling the system as 'racist', he argues. Weatherburn insists that we cannot judge the system's racial character on the basis of outcomes (such as incarceration rates) alone: we need to see evidence of 'malevolent intent or wilful neglect' (Weatherburn 2014, p. 54). To explain why Indigenous offending, arrest and imprisonment rates are much higher than non-Indigenous rates, he looks to socio-economic factors that are present in the lives of incarcerated people: poor parenting (with child abuse/neglect), low levels of formal education, unemployment, substance abuse.

Anthony acknowledges that while some analyses conclude that the law and order system discriminates against Indigenous Australians, others conclude that the high rate of imprisonment is a fair reflection of the volume and seriousness of the offences for which Indigenous Australians are convicted. Early studies of sentencing outcomes (using data since the 1960s) showed that courts faced with Indigenous offenders were more likely to choose imprisonment as a punishment than in sentencing non-Indigenous offenders (Anthony 2013, pp. 59–60). More recently, many studies show that there is no discrimination or even that there is a tendency to treat Indigenous offenders more leniently.

In the course of Anthony's discussion, a methodological issue of great interest emerges. As Anthony points out, when Indigenous and non-Indigenous cases are compared, the researcher posing the question of 'discrimination' has to make a choice about which variables—unequally present within the two compared populations, but with a significant bearing on the dependent variable: imprisonment—to take into account and to control for. The selection of such variables is a matter of judgment, guided by theoretical models. The conclusions of these studies—whether the high rate of imprisonment can be attributed to systemic racial discrimination—will reflect such judgment. It has been common for research into systemic bias to control for the seriousness and volume of offences, in order to isolate the effect of the independent variable, 'race'. Anthony invites us to consider what we are doing when we choose to control for these variables. She urges us—out of a sense of fairness and historical perspective—to take into account not only the seriousness and volume of offences (as in studies that both she and Weatherburn adduce) but also such 'relevant extra-legal factors' (Anthony 2013, p. 63) as socio-economic disadvantage, membership of the Stolen Generations and alcohol/substance abuse. Anthony calls these variables 'Indigenous-specific offending circumstances'. The justice system cannot help but be biased against Indigenous Australians, she argues, because it is part of a wider social structure that systematically reproduces 'Indigenous-specific offending circumstances'.

In arguing this way, Anthony shifts the discussion from methodology to culpability; or perhaps one could say that she is making us aware that methodological choices imply conceptions of historical culpability. To the extent that the 'offending circumstances' to which she refers are 'Indigenous-specific', these variables would not occur among the non-Indigenous cases. By definition, a statistical comparison of Indigenous and non-Indigenous prisoners that controls for 'Indigenous-specific offending circumstances' is impossible. Anthony's recognition of 'Indigenous-specific offending circumstances' is thus not so much methodological advice for quantitative social scientists but historical counsel for sentencing judges to consider.

However, it seems to me that Anthony's 'Indigenous specific offending circumstances' and Weatherburn's four criminogenic sociological factors substantially

overlap; they both include, for example, socio-economic disadvantage, drug and alcohol abuse. The two authors are pointing to similar sets of social conditions that seem to be associated with high rates of offending and imprisonment, but they frame these factors in contrasting ways. Anthony argues that one way to correct the excessive incarceration of Indigenous Australians would be for sentencing authorities to treat the 'Indigenous-specific offending circumstances' as beyond the offenders' culpability, and as justifying a lesser penalty than would be imposed on offenders not blighted by these 'circumstances'. 'In other words, Indigenous people should be receiving lesser sentences *if* they were to be treated the same' (Anthony 2013, p. 63, emphasis in the original). Regretting that there is an influential tradition—in criminology and in popular morality—of emphasising individual responsibility, Anthony presents Indigenous Australians as a *community of fate*. That is, she presents them as a people afflicted by a shared history of colonial oppression that largely determines the circumstances generating offensive behaviour and that warrants leniency in sentencing.

That Anthony considers Indigenous Australians to be a community of fate emerges particularly strongly in her account of what is known as the 'Fernando' principle—the idea that a judge's consideration of Indigenous offenders' biography and background may justify a lenient sentence. There are stronger and weaker forms of this way of recognising Indigeneity as collective hardship and oppression. In its weaker form, a court will evaluate whether or not a community from which an offender can be seen as coming is 'disadvantaged'. In the stronger form—evidently expressed in some decisions of the higher courts of South Australia (Anthony 2013, p. 148)—an Indigenous offender's membership of a blighted community is assumed because what counts as 'disadvantage' includes the fact *that as a category of the Australian population* Indigenous Australians are excessively incarcerated. Anthony also cites many Northern Territory sentencing remarks that have recognised 'Indigenous problems of alcoholism, poverty and violence as intrinsically connected to colonization, dispossession and displacement' (Anthony 2013, p. 151).

Sympathetic to sentencing policies that recognise disadvantage as Indigenous Australians' aggregate historical dividend, Anthony is critical of the way that such judicial recognition has been weakened, since 'Fernando' was first formulated in 1992, by judges re-imagining 'disadvantage' as 'dysfunction'. She cites cases in New South Wales and in the Northern Territory in which the community has been, in effect, held responsible for being 'dysfunctional' or in which its prolonged disadvantage has been understood as vitiating its 'Indigenous' quality. Her sixth chapter richly documents these trends in judicial reasoning (though she does not present the sentence given in each case that she examines). The aggregate effect of this discursive trend, she asserts, has been to contribute to 'continual rises in prison populations in New South Wales, the Northern Territory and across Australia' since 1991 (Anthony 2013, p. 163).

If, for Anthony, the 'Indigenous-specific offending circumstances' constitute an Indigenous community of fate warranting aggregate exculpation or mitigation, for Weatherburn the factors are criminogenic social pathologies, found among both Indigenous and non-Indigenous offenders, that the state must remedy by applying a battery of public programs. In order to elucidate Weatherburn on this matter, it is useful first to contrast the way that Anthony and Weatherburn use history.

Periodising colonial history

Weatherburn explains contemporary incarceration in a way that distinguishes the causal weight of factors of recent origin from the background story of colonisation. He covers all of colonial history up to the Royal Commission into Aboriginal Deaths in Custody (1987–91) in a mere six pages, before devoting 23 pages to the last twenty years, describing the criminological context and public policy consequences of the Royal Commission. In dealing with the period up to the 1980s, and drawing on the available statistics of imprisonment, Weatherburn follows Mark Finnane (1997) to explain why Aboriginal imprisonment fell (to the best of our knowledge) as state authority over Aborigines grew in the late nineteenth and early twentieth centuries. Factors reducing imprisonment were: the better regulation of police practices, the rise in the demand for Aboriginal employees in rural industries and the voluntary or involuntary inclusion of 'surplus' Aborigines in 'protective' institutions. It is significant that Weatherburn does not treat missions and settlements as essentially carceral institutions but as *alternatives* to imprisonment.

Weatherburn presents employment as an historically dynamic determinant of trends in imprisonment. For Weatherburn, as for Noel Pearson (2009), the mode of Aborigines' material survival as workers is of central importance in understanding their colonial history. Both Weatherburn and Pearson point to what they see as a recent fateful conjuncture in which relaxed state supervision (particularly of some Aboriginal people's use of alcohol) coincided with the falling demand for labour (in regions where Aboriginal people had remained living on or near their ancestral land) and their greater access to cash welfare benefits. From a few regional examples, Weatherburn generalises that this combination generated a wave of criminal behaviour (including violence *inter se*) and a resulting rise in incarceration. For Weatherburn, the drivers of the contemporary rate of imprisonment have been recent contingencies of colonial political economy: Aboriginal people's recent loss of 'their toehold in the mainstream economy', combined with their access to alcohol and to cash welfare payments (2014, p. 17).

Weatherburn distinguishes the history that he offers from the historical analysis on which the Royal Commission into Aboriginal Deaths in Custody relied. Though suspicion of police or custodial malpractice and judicial discrimination actuated the Commission, what the Commissioners had to try to understand sociologically was

this problem of relatively recent origin: the extraordinary rate at which Indigenous Australians were being placed in custody by the 1980s. Weatherburn first lists the factors by which the Commission explained incarceration: unemployment, poverty, alcohol abuse, poor school performance, youth boredom, family dissolution and overcrowded housing. He then reminds us that the Commission embraced all these dimensions of disadvantage within a master concept: disempowerment. In Weatherburn's narrative of public policy since the Royal Commission, the acceptance of the concept 'disempowerment' was a major error. It encouraged public policies that sought to relieve each of the 'disadvantage' factors by measures that purported to empower Indigenous Australians but which failed to reverse the rise in the rate of Indigenous incarceration. From 1992 to 2011, the proportion of the Australian adult prison population that was Indigenous rose from fourteen to 26 per cent (Anthony 2013, p. 57). Weatherburn doubts that we can explain these continuing high rates by pointing to faulty or incomplete implementation of the Royal Commission's recommendations—particularly the recommendations to decriminalise drunkenness and offensive behaviour. His preferred explanations of increasing rates of incarceration are: the rise in urban Aboriginal drug use (with associated property and violence offences) and—encouraged by greater public awareness of domestic violence—the increased willingness of police to tackle violence *inter se*. Weatherburn conjectures that incarceration would have decreased (or not increased as steeply) after the Royal Commission had more money been spent on programs that attacked drug and alcohol abuse, child neglect and abuse and poor school performance.

Weatherburn argues that the single most important disadvantage suffered by Indigenous Australia in the post-Commission period was lack of human capital. When Australia's twenty year economic boom arrived, too many Indigenous Australians of working age lacked marketable skills. As he puts it, 'Indigenous empowerment is impossible when Indigenous people lack the human capital required to take advantage of economic opportunity' (2014, p. 39). Parents are crucial in managing a child's human capital formation, and Weatherburn's summary of the cumulative impact of the colonisation of Indigenous Australians is that it has destroyed many people's capacity for parenting.

> You cannot colonise a country, dispossess the original inhabitants of their land, destroy their traditional way of life, herd them into camps, remove large numbers of their children, put large numbers of their parents into prison and expect to find the parenting process unaffected (Weatherburn 2014, p. 117).

He presents the following 'vicious circle' in which many Indigenous people find themselves:

> Parents exposed to financial or personal stress, or who abuse drugs and/or alcohol are more likely to abuse or neglect their children. Children who are neglected or abused are more likely to associate with delinquent peers and do poorly at school. Poor school performance increases the risk of unemployment, which in turn increases the risk of involvement in crime. Involvement in crime increases the risk of arrest and imprisonment, both of which further reduce the chances of legitimate employment, while at the same time increasing the risk of drug and alcohol abuse. And so the process goes on … (Weatherburn 2014, pp. 86–87).

For Weatherburn, the primary significance of these recently strengthened and uncorrected criminogenic circumstances is not their relevance to sentencing (though he does favour more experiments with alternatives to imprisonment); rather he presents the 'circumstances' as social pathologies that the state should be working to reduce with well-funded, targeted programs. Recently arisen, they are open to correction.

For Anthony, by contrast, the problem of Indigenous incarceration is more deeply rooted, and the continuities in the Indigenous condition are more significant than the discontinuities. Anthony's chapter 'Historicizing colonial and postcolonial Indigenous crime and punishment' (2013, pp. 30–54), drawing most of its material from the Northern Territory, argues that the Indigenous criminal is 'a product of the historical relationship between the colonizing state and the colonized' (Anthony 2013, p. 54). To be colonised is to be subject to varied and continuing custodial authority up to and including the contemporary criminalisation of Indigenous Australians. At the root of the criminalisation of Aborigines has been the project of dispossession, she argues. Dispossession has required a massive and continuing project of social control of the dispossessed. She draws attention to two continuities of colonial authority: the authority of private employers (particularly pastoralists) was an extension of the state's formal authority; and the institutionalisation of Aborigines under 'protection' policy has continued in the contemporary punitive detention of convicted Aborigines. Assimilation policy changed colonial authority by granting formal equality to Aborigines. In a related development, the state curbed violence and corporal punishment and elevated imprisonment as the normal and legitimate way to punish. From the point of view of the dispossessed, however, the colonised condition has remained essentially unchanged and is evident, for example, in policing. Anthony acknowledges that colonial authority, in its actual administration of the law, has been slow to criminalise actions *inter se* (Anthony 2013, p. 38), but in gradually overcoming this *de facto* legal pluralism the state has been fulfilling its colonial destiny to make its sovereignty territorial, at the expense of any remnant exercise of Indigenous customary authority.

What of public policy? The dysfunctional parent and the empowered judge

Another way to compare the histories and reforms offered by Weatherburn and by Anthony is to say that the relationship that Weatherburn hopes will change, with the right public policies, is that between certain Indigenous parents and their children; it is the duty of the state to change Indigenous families that are not working well. For Anthony, the problematic relationship is that between judicial authority and Indigenous authority. Let me say a little more about how Anthony narrates the recent history of judicial authority.

In her fourth and fifth chapters Anthony presents a history of Northern Territory Supreme Court's recognition of Indigenous customary law. From the 1930s to the 1990s, judicial recognition of Aboriginal custom took a variety of forms. It included: advocating unsuccessfully that corporal punishment be allowed as a culturally appropriate alternative to imprisonment; conceding shorter sentences for those offenders least changed by colonisation; distinguishing actions *inter se* and either ignoring them or sentencing such offences more leniently; and attributing punitive and rehabilitative responsibilities to the offender's home community. Changing representations of 'Aboriginal culture' informed this variety of recognitions, she points out, but one persistent motive of the judicial knowing of Aboriginal culture was the Court's desire to legitimise colonial law in the eyes of Indigenous Territorians. However, in the 1990s, Northern Territory judges began to see risks in tolerance (and even encouragement) for Aboriginal custom: did not 'custom' legitimise violence (including statutory rape), especially by men against women? Judicial recognition of the interests of victims and of the norms of the wider Australian society began to displace the judges' recognition of local 'custom' as a mitigating factor and as a source of (non-state) social control. The 'community interest' that judges were obliged to take into account came to be more the total Australian community and less the local, 'dysfunctional' Aboriginal community troubled by the offence. Judges became openly sceptical about 'Indigenous law punishment'—not only in sentencing but also in bail hearings that decided whether the accused could be released to return to his/her community for punishment. They dismissed 'Indigenous law punishment' as illicit violence, as uncontrolled 'pay-back', and thus as part of the endemic violence within Indigenous communities.

As policy intellectuals and governments reconsidered 'self-determination' policy, from the late 1990s, Aboriginal 'culture' began to be recognised by sentencing authorities as a contributor to 'dysfunction', particularly in men. To believe in 'Aboriginal society' as something with the capacity to enforce (albeit with harsh measures) its own integrative norms has been an act of faith sustained in policy intellectuals, in politicians and in the public by ethnographic writing and by Aboriginal people's evocations of their collective practices. That faith—which formed part of what Sutton has labelled 'the liberal consensus'—ran strong from the

mid-1970s to the late 1990s (Sutton 2009, Rowse 2013). Anthony's study of what the Territory's judges have been saying since the 1990s amply documents the attrition of belief in 'Aboriginal society', as a positive force, among agents of state authority whose practice has so much shaped the modes of settler colonial rule: judges, magistrates, prosecutors and defenders.

The sentencing and bail decisions that illustrate this trend became the focus of debate among both judges and the wider public, as Anthony shows. To understand where Anthony stands in that debate, we need to recall that her critical standpoint works on two levels. One level is that she deplores the 'judicial backlash' (Anthony 2013, p. 128), preferring judicial representations of custom that affirm Indigenous capacities for self-regulation and that result in shorter custodial sentences or in non-custodial punishment. At a deeper level, her critique questions the constitution of judicial prerogative itself, as recognition 'sways between valorization of the functional role of culture and condemnation of its criminal tendencies' (Anthony 2013, p. 107). Her deeper critique, that is, postulates post-colonial Australia as a dual jurisdiction. She advocates that the courts and agencies of correction and rehabilitation honour Indigenous sovereignty and provide effective roles for Indigenous authorities in the design and administration of sentences. Her concluding chapter strongly asserts the post-colonial principle that it is time for colonial authority to be more accountable to Indigenous law.

These contrasting historical models—one emphasising the continuity of current Indigenous disempowerment with the colonial past, the other lamenting that 'disempowerment' has become the explanatory focus—give rise to differences in the two authors' public policy imaginations. Anthony's radical critique of colonial jurisdiction does not lead her to clearly articulate public policy options for relieving Indigenous Australians of their excessive incarceration. To the extent that there are policy implications in Anthony's book they focus on how judges work, but she is not explicit about how we could make judges more accountable to Indigenous authorities. Whether a more accountable judiciary could be brought about by the legislative unfettering of judges or by submitting them to a new procedural regime that binds them to work in partnership with Indigenous authorities is a public policy conundrum that arises *implicitly* in Anthony's conclusion. Nor does she recommend removing any offences from the Northern Territory's criminal code. She is silent on the question of whether punishment options should be expanded to include corporal punishment (countenanced by some Indigenous authorities).

While Weatherburn says nothing about the deeper issues of the politics of colonial jurisdiction that animate Anthony, he devotes many pages to discussing particular public policy options that could be on governments' agendas. His policy focus is much wider than Anthony's: how ineffective families are to be helped; as well as how judges could be given more sentencing options. Clearly, he has not lost the faith that

well-targeted public spending can make a substantial difference, in the short-to-medium term, to the lives of Indigenous people. From programs evaluated in other countries, he draws hope that Australian governments can punish certain kinds of offender without sending them to prison, including those who violate community-based orders, those dependent on illegal drugs and juveniles (Weatherburn 2014, pp. 109–115). Going deeper, and on the basis of his view that colonisation has wrecked parenting in many Aboriginal families, he points to five criminogenic factors found in contemporary Indigenous Australia (but not only there) that public programs could tackle: unplanned and/or youthful pregnancy; child abuse and neglect (and he defers judgment on the Northern Territory Emergency Intervention); low school attendance, retention and performance; substance abuse; and unemployment.

Community of fate?

Since 1982, criminologists have been able to assemble data with which to compare, in each jurisdiction, the Indigenous and non-Indigenous imprisonment rates (per 100,000 population). Such comparisons reveal excessive Indigenous incarceration to be a horrendous problem. Perhaps socio-historical analysis can lead to public policy remedies. The most thoughtful commentaries on this phenomenon have come from criminologists and scholars of law and order as a social process. Much of their work is quantitative sociology, but within their work we also find historical narrative, as it seems obvious that Australia's colonial past somehow determines the contemporary inequalities between Indigenous and non-Indigenous Australians. In this paper I have asked: what difference do different narrative models of Australian history make to our thinking about contemporary Indigenous incarceration? To answer this question I have presented contrasts and similarities between two recent studies of factors contributing to excessive Indigenous incarceration. One model emphasises the continuity in Australian colonial history between all forms of institutional control of Indigenous Australians and their current high rates of incarceration; this model does not treat as significant the high proportion of Indigenous Australians who do not suffer imprisonment or adverse contact with the forces of law and order. It postulates Indigenous Australian, in effect, as a continuing 'community of fate', that suffers systemic, collective oppression rooted in the colonial past. The other model is more attentive to historical discontinuity—in particular to the distinction between recent criminal imprisonment and earlier regimes of institutional management—and it can deal with the differentiating effects of assimilation policy among Indigenous Australians. In this second model, Indigenous Australians have not continued to be a 'community of fate', as some have flourished socio-economically while others live in ways that are both disadvantaged and criminogenic. The two models give rise to different perspectives on public policy. The former model problematises the law itself, and focuses on the issues of judicial authority and judicial reasoning; the approach of the latter model is not to question the law but to pathologise the law-

breakers and to seek changes in social policy and in sentencing options that would optimise their social integration.

The historical framings I have reviewed here differ in their openness to the exploration of social differences—'respectability', class—that seem to have emerged, as Kath Walker predicted, since the 1960s. Though Weatherburn generalises about the destructive impact of colonisation on Indigenous Australians, his analysis of what is wrong and his recommendations for action rest on a differentiating account of Indigenous Australians: not all of them have wound up in the vicious criminogenic circle that he has described. Weatherburn's sociology makes three claims that should affect the way we write history. He reminds us that a significant proportion of Indigenous Australians do not have adverse contact with the criminal justice system; he points to the quantitative significance of a recidivist tendency among those who do have such adverse contact; and he identifies criminogenic socio-economic factors in such recidivism that are not unique to Indigenous Australians and that public policy could ameliorate. The word 'recidivism' is not in Anthony's index. It is not part of her analysis to distinguish among Indigenous Australians according to the degree or nature of their contact with the criminal justice system. Their common relation to colonial power is, in her view, of greater significance. The inferred narrative trope that seems to discourage the exploration of significant differences among Indigenous Australians is that they constitute a 'community of fate'—equally implicated as subjects of dispossession, protection and assimilation. The idea of all being equally implicated is reinforced in some of our uses of statistics. Statistical analysis aggregates Indigenous Australians in order to make Indigenous/non-Indigenous comparisons, but the useful exercises of calculating population rates, means and medians should not licence the supposition that Indigenous Australians—imagined as a statistical aggregate—are best understood historically as a community of fate.

In particular, we should reconsider what assimilation did. Kath Walker predicted in 1964 that Indigenous people would respond in different ways to its pressures and opportunities. Don Weatherburn's study vindicates her forecast. A high rate of imprisonment sustained by a high rate of recidivism seems to have been one of the unintended outcomes of 'assimilation'. The difference between those who have flourished in the wake of assimilation and those who have not is relevant to policy. Weatherburn's approach is more productive of options for public policy, and in that sense his historical model is a better history to think with. As well, it encompasses realities that the alternative model obscures. Equally in line with Walker's prediction is the observation that many Indigenous Australians do not have adverse contact with the criminal justice system and, using the opportunities that assimilation and subsequent policies conferred, they are getting by and perhaps doing well. An historiography is truncated if it is exclusively dedicated to accounting for what we nowadays call 'Indigenous disadvantage'; our models of Australian colonial history

must also try to explain Indigenous flourishing and, one hopes, to inspire experiment in policies that enable it.

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