Just Deserts in Post-Colonial Society: Problems in the Punishment of Indigenous Offenders

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Introduction

A distinctive feature of the administration of the criminal law in Australia has been the disproportionate representation of Indigenous persons in the criminal justice system.[1] The use of imprisonment against Indigenous persons continues to be an evocative symbol of the plight of Indigenous persons and their relatively disadvantaged position in Australian society.[2] Arguably, the overrepresentation of Indigenous persons in the criminal justice system is a consequence of the invasion of Australia and the resultant dislocation of existing

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1 See for instance Williams P, *Deaths in Custody: 10 Years on from the Royal Commission*, Trends and Issues in Crime and Criminal Justice, Australian Institute of Criminology, Canberra, 2003. In the Victorian context see Office of the Correctional Services Commissioner, *Statistical Profile: The Victorian Prison System 1995/1996-1999/2000*, Department of Justice, Victoria, 2001 which noted, at p 51, that in the Victorian prison system in the year ending 2002 there were 993 Indigenous persons in prison per 100,000 population. At the end of the September quarter in 2003 the imprisonment rate for Indigenous persons per 100,000 population was 1214.7. See Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody: Discussion Paper*, Department of Justice, Victoria, 2004, p 15.

2 On all measures relating to quality of life such as mortality, life expectancy, income, employment and education Indigenous persons perform worse than non-Indigenous persons. On this aspect of contemporary Indigenous existence see Roberts D, "Self-Determination and the Struggle for Aboriginal Equality", in Bourke C, Bourke E & Edwards B (eds), *Aboriginal Australia*, 2nd ed, University of Queensland Press, QLD, 1998, pp 259-284. This situation has not changed. See Editorial, "The Black Side of the Lucky Country", *The Age*, 29 April 2004, p 9.

Indigenous communities.[3] Colonialism, with its attendant dispossession of Indigenous communities, presents as a possible important explanation for the overrepresentation of Indigenous persons in the criminal justice system.[4] In short, the historical fact of dispossession stands as the probable cause of the historical and current disenfranchisement of Indigenous communities. The consequences of that disenfranchisement have left Indigenous communities economically weak, socially alienated, and over-represented in the criminal justice system.

Such an account of the reason for the contemporary overrepresentation of Indigenous persons in the criminal justice system is controversial to the extent that it attempts to make a causal connection between the practice and ideology of colonialism, the consequences of dispossession, and the administration of criminal justice. Postulating such a link poses problems of causation. It is also contrary to the primacy placed on individual responsibility for breach of the criminal law that forms the basic requirement of criminal culpability under Australian criminal law.[5] The 'benefit' for the non-Indigenous community, and for those wishing to deny the devastating effects of imprisonment upon Indigenous communities, of not adopting the framework of dispossession is that the use of prison and other instruments of social control[6] disproportionately used against

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3 For historical accounts of the dispossession of Indigenous communities see Rowley C, *The Destruction of Aboriginal Society*, Penguin, Ringwood, 1970; Reynolds H, *Dispossession*, Allen & Unwin, Sydney, 1989; Ryan L, *The Aboriginal Tasmanians*, 2nd ed, Allen & Unwin, NSW, 1996. The dispossession of Aboriginal communities has also been expressly recognised by the High Court of Australia. See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 68-69 per Brennan J; at 109-110, 120 per Deane & Gaudron JJ.

4 For an overview of theories of Indigenous offending see Broadhurst R , "Crime and Indigenous People" in Graycar A & Grabosky P, (eds), *The Cambridge Handbook of Criminology*, Cambridge University Press, United Kingdom, 2002, pp 256-280.

5 See generally *Falconer* (1990) 171 CLR 30. See also Ashworth A, *Principles of Criminal Law*, 2nd ed, Oxford University Press, Oxford, 1995, pp 95-96; McAuley F & McCutcheon JP, *Criminal Liability*, Round Hall Sweet & Maxwell, Dublin, 2000, pp 121-129; Kutz C, "Responsibility" in Coleman J & Shapiro R, (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of Law*, Oxford University Press, New York, 2002, pp 548-587.

6 Such as child welfare agencies and other actors of the state who were involved in the pursuit of the policy of assimilation. Those policies and their devastating effects upon individuals were documented in the report of the Human Rights and Equal Opportunity Commission *Bringing Them Home: A Report of the Inquiry*

Indigenous communities becomes a *technical* and *apolitical* matter. In such an account the history of colonial relations is ignored and excluded from any narrative, legal or otherwise, as to what is "just punishment" for Indigenous persons. Thus, the issue of dispossession is put to one side as an issue of politics and historical memory that operates independently from the principles and practice of the criminal justice system. Past injustices become matters of regret and concern, but the operative effects of injustices and dispossession are viewed as redundant. The author proposes to challenge such a conception of crime and punishment, and to suggest how those matters of historical record have contemporary resonance in the punishment of Indigenous persons.

According to the dominant narrative, the overrepresentation of Indigenous persons is merely a matter for 'reform': significant reforms to the practices of the criminal justice system will result in a more progressive system. The hope is for a more just and fair criminal justice system. Prison in such a post-colonial context is an unfortunate but necessary response to Indigenous criminality that should reduce over time as a result of reforming the criminal justice system. The problematic nature of this account is that prison is neither subject to critical analysis nor imagined to be a possible site of contest between the Indigenous and non-Indigenous community. The author contends that such an instrumentalist and consensual view of Indigenous crime and punishment is untenable in a country with Australia's history. This history dictates that colonialism and dispossession[7] are relevant

into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, AGPS, Canberra, 1997. This report was responsible for the term 'stolen generation' gaining popular usage. A comprehensive history of this high level of intervention by state agencies in Indigenous communities throughout Australia, particularly regarding children, is documented in Haebich A, *Broken Circles: Fragmenting Indigenous Families 1800-2000*, Fremantle Press, Fremantle 2000. The ideology and practice of assimilation and the belief that the Indigenous race was liable to disappear was, of course, not solely an Australian phenomenon. For a useful comparative study of the colonial and neo-colonial practice of Aboriginal assimilation see Armitage A, *Comparing the Policy of Aboriginal Assimilation*, University of British Columbia Press, Canada, 1995. See also McGregor R, *Imagined Destinies*, Melbourne University Press, Melbourne, 1997.

7 The first most significant act of dispossession was the act of the British Empire declaring the continent of Australia *terra nullius*. That legal fiction enabled the acquisition of Indigenous lands throughout Australia. The illegitimate basis for the dispossession of Indigenous lands, and the justifications put forward for those actions, are described in Reynolds H, *The Law of the Land*, Penguin, Victoria, 1987. The fiction that Australia was unoccupied when British colonists arrived

not only to the operation of the criminal justice system, but also to the punishment of Indigenous persons. The ubiquitous use of imprisonment against Indigenous communities must be reckoned with because of the extraordinary overrepresentation of Indigenous persons in the criminal justice system.

To consider further the problem of the punishment of Indigenous offenders in a post-colonial society such as Australia, and how the question of Indigenous punishment may be reframed or reargued, the concept of "just deserts" will be used. The choice of just deserts as a concept to interrogate what are perceived to be settled understandings concerning Indigenous crime and punishment within Australia is quite deliberate in that the concept itself imposes a moral framework within which to judge the disproportionate imprisoning of Indigenous persons. In what follows, there will be an analysis of the notion of just deserts as it appears in legal thought.[8] In particular, the concept of just deserts will be considered in the context of the experience of Indigenous communities and their treatment by the criminal justice system. There will be a detailed exposition of the principles of just deserts as a penal theory. Following that exposition, the analysis will shift to consider how specific sentencing practices have rendered invisible those matters of historical fact that can offer an explanation for Indigenous overrepresentation in the criminal justice system. The discussion of sentencing practices will use judicial decisions as 'texts' to critically examine the assumptions upon which the sentencing of Indigenous offenders is based.

It will be suggested that in Australia the concept of just deserts cannot operate fairly and effectively without a consideration of the history of the relationship between Indigenous and non-Indigenous

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was categorically rejected in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. The importance of that decision is not only that it established a concept of proprietary interest known as native title. Its enduring significance lies also in its reworking of the history of Australia. As a result, relations between the Indigenous and non-Indigenous community were placed on a different level to reflect that new understanding of history. Namely, that dispossession did occur as a social, historical and legal fact. In short, any future history of Australia would have to reckon with that fact. The decision of the High Court of Australia had significant cultural, moral and rhetorical force. See generally Rowse T, "Mabo and Moral Anxiety" (1992) 52 (2) *Meanjin* 229.

8 Von Hirsch A, *Doing Justice*, Will & Hang, New York, 1976; Braithwaite J & Petitt P, *Not Just Deserts*, Oxford University Press, Oxford, 1990; Heffernan W & Kleinig J, (eds) *From Social Justice to Criminal Justice*, Oxford University Press, Oxford, 2000.

communities. To develop this argument, key themes in the existing case law on Aboriginality and sentencing will be critically analysed, with particular emphasis on how those cases omitted important aspects of Indigenous history while purporting to take into account matters relevant to the mitigation of penalty. It will be contended that, owing to the omission of the colonial context in contemporary sentencing jurisprudence, Australian law cannot claim that just deserts occur in the punishment of Indigenous persons.

Just Deserts as a Sentencing Philosophy

Intuitively, the principle of just deserts is an appealing basis to justify the punishment of offenders.[9] It functions as a type of retribution whereby punishment inflicted upon a person is determined by her or his deserts, rather than any possible future consequences that may accrue for the offender, or the community, because of the use of punishment.[10] The concept of 'just', importing as it does the idea of fairness,[11] coupled with 'deserts', a familiar basis upon which to morally praise or blame persons for their conduct only in proportion to what they deserve,[12] is predicated on a particular view of society. In such a society, each individual is responsible for her or his actions and broader social forces cannot be taken into account.[13] Importantly for the proponents of just deserts, it is a concept that has a critical advantage over other theories of punishment in that it sets a limit to intervention by the state. It does so by proscribing the punishment of persons for consequentialist ends such as rehabilitation, or by punishment of the offender on the basis that he or she should be used

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9 Von Hirsch in *Doing Justice* described the concept of 'desert' as figuring prominently "in every day thinking about punishment" Note 8 at p 45. However, that does not mean that intuition should be the basis for a sentencing system. On this point see Bagaric M & Edney R, "What's Instinct Got to with it? A Blueprint for a Coherent Approach to Punishing Criminals" (2003) 27 (3) *Criminal Law Journal* 119, p 120.

10 See generally Armstrong K, "The Retributivist Hits Back", in Acton HB, (ed) *The Philosophy of Punishment*, Macmillan Press, London, 1969, pp 138-158.

11 In the sense described by John Rawls in *A Theory of Justice*, Oxford University Press, Oxford, 1971, pp 11-17.

12 Nussbaum M, *The Fragility of Goodness*, Cambridge University Press, Cambridge, 1986, pp 41-44.

13 The author thanks the anonymous reviewer for this point.

as a vehicle for general deterrence.[14] As a matter of political philosophy just deserts is claimed to be a satisfactory account of punishment, especially given that persons under such a philosophy are treated as ends and not means.[15] Persons are respected as rational agents who are punished not for what they may become as a result of punishment but because they have broken the criminal law. Under such a model of criminal responsibility offenders will be punished only to the extent of the harm they caused, and the degree of their culpability will be assessed objectively.

The contemporary intellectual justification of just deserts for the punishment of persons for criminal behaviour was put forward by Andrew Von Hirsch in *Doing Justice: The Choice of Punishments*.[16] Von Hirsch outlined a theory of punishment that did not concentrate on either the rehabilitation of the offender or the type of punishment that would deter the offender or others tempted to break the criminal law. Instead, the focus was on the offence committed by the offender. Punishment under such a model would only be justified by reference to the harm produced by the offender's conduct in conjunction with her or his level of culpability.[17] The offender's deserts were the key to determining the level of intervention by the state in the offender's life through the sanctions of the criminal law. Such an account of

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14 A philosophy of living that attaches significance to the consequences of conduct is generally known as Utilitarian. That is, the correctness or otherwise of human conduct is to be resolved by the consequences of an action. There is not sufficient space here to consider in detail either utilitarian arguments for the institution of punishment or the significant contributions of those who argue that punishment is to be justified independently of the consequences. Suffice to say that debates on punishment have mostly been between utilitarians and retributivists who focus on the correctness of punishment *in and of itself* as the moral question to be considered and answered before punishment is justified. See generally Bagaric M, *Punishment and Sentencing*, Cavendish Publishing, London, 2001.

15 In this manner it is similar to the Kantian concept of obligation and duties, and the establishing of a moral basis for actions that persons should always be ends and never means. See Kant I, *Groundwork of the Metaphysics of Morals*, Harper & Row, New York, 1964, pp 82-83.

16 Von Hirsch, note 8.

17 Von Hirsch, note 8, pp 46-47. Von Hirsch's account appears to allow for traditional defences such as insanity, duress, mistake of fact, and necessity. Such defences necessarily concentrate closely on the individual and her/his *mens rea.* Von Hirsch's account takes as a given the appropriateness of existing legal categories of criminal behaviour. Under his account, issues of social background and the administration of criminal justice against particular groups would be accorded little, if any, weight.

punishment was justified independently of the efficacy of punishment in deterring or reforming the offender.[18] Punishment was to be allocated to an individual on the basis of the harm caused by her or his criminal behaviour, coupled with a consideration of her or his individual culpability. The concept of just deserts, in contending that punishment should be calibrated between offence, harm and culpability, is very similar to the concept of proportionality as understood under Australian criminal law.[19]

Part of the appeal of the just deserts concept is that persons are treated as ends rather than means.[20] In short, persons who are deemed suitable for punishment for breach of the criminal law are not to be punished in the hope or expectation that such punishment will be beneficial for the wider community or, indeed, the offenders themselves.[21] Human dignity and respect for persons are putatively some of the ends to be achieved by the just deserts approach to punishment. According to Von Hirsch, it is the simplicity of the justification for punishment under the just deserts model of sentencing that is also appealing. Offenders are simply punished according to their deserts: in short, for the harm caused by their conduct and their responsibility for that conduct.[22] Thus, in determining the appropriate level of punishment, a just deserts model of sentencing looks backwards to the conduct of the person in terms of the seriousness of the harm done, and the degree to which he or she ought to be held responsible for that conduct.[23] It is also clear that Von Hirsch's model of punishment is rather narrow in terms of how it assesses human conduct generally, and the assumptions it makes about human nature and the causes of criminal conduct.

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18 Von Hirsch, note 8, pp 46-53.

19 Fox R, "The Meaning of Proportionality in Sentencing" (1994) 19 *Melbourne University Law Review* 489. The key authorities on proportionality in sentencing under Australian criminal law are *Veen* (1988) 164 CLR 465; *Chester* (1988) 165 CLR 611, and *Hoare* (1989) 167 CLR 348.

20 See also on this point Hudson B, *Penal Policy and Social Justice*, Macmillan, London, 1993, p 56.

21 Von Hirsch, note 8, p 70.

22 Von Hirsch, note 8, p 46.

23 Von Hirsch, note 8, pp 79-81.

Empirically Unsound: The Problem with Just Deserts

The major criticism of the just deserts approach to sentencing focuses on the culpability of the offender and the somewhat mythical notion that, in terms of opportunities and resources, all persons in a community are equally positioned to conform their behaviour to the requirements of the criminal law. Proponents of the just deserts approach to punishment ignore the empirical reality that in a society people enter the criminal justice system with sometimes radically different personal histories, particularly in terms of their position in the social and economic strata.[24] In addition, the notion of race is deemed irrelevant and not a legitimate consideration for mitigating or aggravating the punishment of an offender. In the context of the operation of the criminal justice system, the formal equality and equal treatment of offenders as reasonable assumptions are taken as a given. In such an account the exercise of power outside the legal system remains unchallenged. As a result, those non-legal power relations that constitute the Indigenous subject are ignored.[25]

In such circumstances, and accepting that there are major differences between offenders entering the criminal justice system, determining just deserts becomes problematic not only because of the problem of adopting a consistent and fair method of dealing with such differences in terms of calculating deserts, but also because the reality is that not all offenders are equal in their ability to conform to the requirements of the criminal law. Von Hirsch in *Doing Justice* recognised the difficulty of achieving just deserts in an unjust society, and he has attempted to deal with this significant challenge to the concept.[26] The challenge is: in the context of an unjust society how can individuals from disparate positions in the social and economic hierarchy be deserving of equal punishment? However, Von Hirsch's treatment of the problem of inequality and the punishment of persons amounts to a

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24 See, for instance, Hudson B, *Justice through Punishment*, Macmillan, London, 1987; Hudson, note 20; Hudson B, "Beyond Proportionate Punishment: Difficult Cases and the 1991 Criminal Justice Act" (1995) 22 (1) *Crime, Law and Social Change* 59; Hudson B, "Punishment, Poverty and Responsibility: The Case for a Hardship Defence" (1999) 8 (4) *Social & Legal Studies* 583.

25 Foucault M, *Language, Counter Memory, Practice,* Cornell University Press, New York, 1977, pp 205-217.

26 Von Hirsch, note 8, pp 143-149.

mere acknowledgement of the problem, and leaves the dilemma of inequality and difference unanswered.[27] Further, Von Hirsch's concept of culpability is narrow and is exemplified by his reliance on traditional criminal law categories of blame and responsibility.[28] Instead of the term culpability being a source of contest, or possibly a site of difference between different communities, it is simply assumed to be a reflection of a verifiable fact. To that extent, Von Hirsch reifies and ascribes a transcendental quality to culpability rather than treating it as a social and legal construct.

A Different Type of Deserts: Barbara Hudson and the Theory of Social Culpability

Barbara Hudson has been critical of the account given by Von Hirsch in dealing with the problem of the unjust society, and also of how the just deserts concept of punishment can operate in a society divided by differences in opportunities and disproportionate economic and political power.[29] The work of Hudson is particularly important in this regard as she has contended that the approach of Von Hirsch, and others who support his position,[30] is misguided because it does not give sufficient weight to the social and economic circumstances of offenders appearing before the criminal courts.[31] Von Hirsch's approach, relying on the somewhat artificial notion of "individual responsibility" as the fundamental basis for criminal liability and punishment, and ignoring the fact that all individuals rely to some extent on social capital,[32] takes no account of the social and economic context from which offenders emerge. In Hudson's view, the punishment of offenders is 'just' in such circumstances only when

27 Von Hirsch, note 8, pp 148-149.

28 Von Hirsch, note 8, pp 79-83.

29 Hudson, note 20, pp 38-43 & pp 49-53.

30 For instance see Morse S, "Deprivation and Desert" in W Heffernan & Kleinig J, note 8, pp 114-160.

31 Hudson, note 24, pp 93-114.

32 The term "social capital" combines intellectual concepts from sociology and economics to provide what is contended to be a more nuanced and sophisticated understanding of the resources of a community. For an overview of the theory of social capital see generally Baron S, Field J & Schuller T, (eds), Social *Capital: Critical Perspectives,* Oxford University Press, Oxford, 2000.

adequate account is taken of that context. The culpability of offenders is not uniform but different, and is determined by their particular position in society. This empirical fact requires recognition by the criminal justice system. According to Hudson, the unequal allocation of social and economic resources, and the consequences of this over the life course of offenders entering the criminal justice system, must be reckoned with in order to establish a proper basis for their punishment.[33]

Hudson's focus is on the second limb of the concept of just deserts relating to the culpability of the offender, and leaves to one side the assessment of the nature of the offence. Hudson concentrates on how current practices in the criminal justice system take into account matters such as social and economic disadvantage. Hudson then suggests a new understanding of responsibility that would measure the differential levels of culpability and display a greater degree of sensitivity to the empirical reality of the differing positions of particular groups in the community. Under Hudson's model, differences in social and economic resources and opportunities are particularly relevant, and need to be considered when determining the appropriate level of punishment for a particular offender.[34] Instead of the rather abstract person evident in Von Hirsch, Hudson's reworking of social culpability into the just deserts model appears to provide a more nuanced and sensitive account of persons, and of the question of when, and in what manner, they may be properly punished.

The significance of Hudson's approach is that it signals a shift from the individual focus evident in both the criminal law and the theory of just deserts, where much reliance is placed on the 'individual' who simply 'chooses' criminal behaviour in a reflective and rationalist manner after calculating its expected benefits and burdens.[35] By considering the reality of social and economic disadvantage, and adapting that knowledge to the manner in which the criminal justice system operates, particularly at the sentencing stage, Hudson suggests a possible way of ensuring that just deserts are achieved from the perspective of offenders. Hudson terms such a type of culpability as

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33 See generally Hudson, note 24.

34 Hudson, note 24, p 585.

35 This is exemplified in "rational choice" theories of criminal behaviour. For an example see Clarke R, (ed), *Situational Crime Prevention*, Harrow & Heston, New York, 1992.

"social culpability".[36] By doing so, Hudson attempts to shift the crime and punishment framework from a concentration on the individual and rational agent to a more holistic account including an appreciation of the social and economic context from which the offender emerged.[37] In terms of incorporating race into the framework of her analysis, Hudson attempts to do so,[38] but her argument is less than compelling because it is submerged in numerous other considerations concerning class and gender rather than being a comprehensive treatment of race.[39]

The Relevance of Von Hirsch and Hudson to Indigenous Punishment

The debate between Von Hirsch and Hudson as to the content of the concept of just deserts, and how it plays out in specific penal practices, is typical of what may be termed the "philosophers argument" about crime and punishment.[40] In this type of argument an attempt is made to return to first principles and to ask the basic question: why punish at all? This is a threshold consideration requiring that the ends sought by the institution of punishment be articulated and in some way justified. The key assumption of these models is that there cannot be a discussion concerning the means of punishment without first establishing the ends sought by instituting punishment. In addition, arguments as to ends must be answered before there can be any argument as to how, and to what extent, a person ought to be punished. When the first question is answered, almost always in the affirmative,[41] the focus then shifts to the allocation of punishment. In

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36 Hudson, note 20, pp 125-129.

37 For a practical illustration from the criminal justice system recognising the complexity of the causes of Indigenous offending, and the need to design rehabilitative programs that are holistic in nature see King M, "Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush" (2002) 26 (4) *Criminal Law Journal* 260.

38 Unlike Von Hirsch who gives no consideration to the issue of race.

39 Hudson, note 20, pp 125-129.

40 See, for instance, Duff R & Garland D, (eds) *A Reader on Punishment*, Oxford University Press, Oxford, 1994.

41 Apart from the perspective of Abolitionists who are opposed to the current institutions of punishment and contend that the current practices of the criminal justice system, particularly imprisonment, ought to be replaced with far more

short, putting it rather crudely, how much punishment does this type of conduct deserve and to what extent, if any, should that punishment be mitigated by reference to relevant factors such as class. Both Von Hirsch and Hudson situate the question of crime and punishment within this *narrow* traditional framework.

The problem with this type of framework is that it tends to merely cast in a new light the perpetual dilemma in debates on crime and punishment. Within this fulcrum, it is assumed that it is possible to answer the basic question regarding the justification for punishment. This interminable debate is marked by different views of human nature and metaphysical questions concerning the nature of the mind and personality. The fundamental assumptions of the criminal justice system are neither questioned nor challenged as the product of arbitrary and contingent choices. Consequently, inevitability is assumed in the structure and practice of the criminal justice system. The issue of race, and the different historical and contemporary treatment of persons because of their race, is not part of that debate. Such matters are excluded as possible sources of understanding and explanation. Indeed, the mere possibility that race could be used as a basis for differential treatment is ignored.[42]

In such a framework of crime and punishment, particularly when attempting to adapt it to Indigenous punishment in a post-colonial society such as Australia, race is deemed irrelevant: it is not to be taken into account. The argument being posited at a high level of abstraction and generality, the effects of power and extra-legal concepts such as race are placed to one side. The aims, ends, justifications and principles of punishment being at the forefront of analysis in the recurring intellectual debates, the issue of race is rendered invisible. Consequently, the criminal justice system continues to impose 'pain', the core function of punishment,[43] without properly considering the cumulative effects of such practices on Indigenous communities.[44]

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socially productive forms of social control. See Mathiesen T, *Prison on Trial*, Sage, London, 1990, p 141. Also see Bianchi H & Van Swaaningen R, (eds), *Abolitionism*, Amsterdam, Holland, 1986.

42 For a contrary view see West C, *Race Matters*, Vintage, New York, 1993.

43 Christie N, *Limits of Pain*, Martin Roberston, Oxford, 1981, pp 5-6.

44 Most theories of punishment focus on the particular offender who stands for punishment and omit to consider the consequences for families and communities of particular penal practices such as terms of imprisonment. In recent years in the United States, particularly in the context of an ever increasing population,

Relying on the myth of neutrality, and denying the colonial history of Australia and its negative impact on the Indigenous community, creates a justification of punishment that is flawed because it fails to recognise the nexus that has arisen in Australia between crime, race and punishment. Race is not only relevant but has always fulfilled a constitutive function in the operation of Australian society. In short, Von Hirsch and Hudson offer little, if any, understanding of how just deserts may be achieved in a society such as Australia where there is a problematic relationship between the Indigenous and non-Indigenous community. Their lack of concern with such a particularly powerful organising tool as race, and their acceptance of the current legal framework as correct and uncontested, means that they have little to offer, either by way of an explanation or a possible normative framework, with regard to the issue of crime and punishment as it affects Indigenous communities.

Just Deserts, Sentencing of Indigenous Offenders and the Question of Dispossession

When applied to the punishment of Indigenous persons in the post-colonial context of Australia, the intuitive appeal of Von Hirsch's theory is somewhat less than compelling. The simplicity of Von Hirsch's model is perhaps reflected in the narrow focus of sentencing under Australian criminal law, an approach that generally confines the matters that may be taken into account to a limited aspect of the individual's life course.[45] There is no attempt to construct a view of deserts which covers not only the life course of the individual but also deals with those *intergenerational and historical forces* that may be traced as operational causes for the current offending behaviour. Adopting such an approach would ensure not only that the prospects of life chances and opportunities within an individual's life are taken into account, but also that there is a recognition of the continuing relevance of matters that existed prior to the life of the Indigenous person currently appearing for sentence.

researchers have attempted to document and research the collateral consequences of imprisonment that exist *beyond* the offender. See generally Mauer M & Chesney-Lind M (eds), *Invisible Punishment*, The New Press, New York, 2002.

45 See, for instance, Fox R & Freiberg A, *Sentencing*, (2nd ed), Oxford University Press, Oxford, 1999.

In the context of Indigenous offenders, Von Hirsch's narrow time frame and sentencing practices ensure that the assessment of culpability is limited at most to the life course of the particular offender. Such an assessment is divorced from a more contextual based assessment of culpability that would consider how race assists to construct and chart an individual's life course, not only during one life course but also over and between successive life courses.

Matters such as historical dispossession and racial discrimination are excluded from the compass of Von Hirsch's argument, as are social and economic exclusion. Because of its temporal constraints, Von Hirsch's model of just deserts could not accommodate such matters in relation to Indigenous offenders. Moreover, his acceptance of the appropriateness and fairness of existing criminal law administration means he cannot adequately deal with the claims of those groups in a community who, for a myriad of reasons, have been and are subject to greater levels of state surveillance and control.[46] This is particularly relevant to Indigenous communities. Owing to the role of the police in the maintenance of law and order, and the tendency to over-police Indigenous communities, Indigenous communities have had successive problematic relationships with the police forces of Australia.[47]

Thus, the model suggested by Von Hirsch is woefully inadequate to measure the social culpability of Indigenous persons. Such a model will not permit an assessment of deserts based on what has occurred *prior* to the birth of the offender. The model focuses on the criminal act and on the offender over a relatively short period of time, and thus mirrors the approach of modern sentencing jurisprudence.[48] The effects of intergenerational trauma upon Indigenous communities through the actions of the state are ignored. The failure to consider those wider matters in a model such as Von Hirsch's does not mean that the intergenerational consequences *do not exist*. They *do exist*, but they are not represented in the dominant story of the law and the administration of crime and punishment. They are a type of

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46 Contrast the approach of Von Hirsch with Hudson, who at least notes the effects of policing practices on subsequent outcomes in the criminal justice system.

47 For an excellent account of the relations between Indigenous communities and the police, and how those relations are constructed by dispossession and colonialism see Cunneen C, *Conflict, Politics and Crime*, Allen & Unwin, Sydney, 2001, chs 3 & 10.

48 Fox and Freiberg, note 45.

marginalised knowledge having a currency only in the context of the relevant Indigenous community.

Under Von Hirsch's model of punishment, harm and culpability are determined within a narrow framework dictated almost wholly by the doctrines of criminal law and its official story of crime and punishment. The criminal law is posited as being unproblematic and not a contested site of difference. Administration of the criminal law is thus seen as neutral and objective. Significantly, aspects of over-policing and surveillance of Indigenous communities, particularly in the context of street or public order offences, are viewed as separate from the question of punishment even though part of the same transaction. The failure to make the administration of the criminal law problematic reflects not an objective reality but the non-Indigenous community's experience of the law as a source of empowerment, and as a fair and impartial process. The reality for Indigenous communities is radically different: any adequate account of the punishment of Indigenous persons needs to take this into account.

Social and economic disadvantage may figure tangentially in the framework of Von Hirsch's model, but the strength of the model is argued to lie principally in its efficient application whereby harm and culpability determine the extent of state intervention in an offender's life. The model deems offenders to be equally positioned: their differences being measured solely by their disparate levels of harm and culpability. Matters such as colonialism and dispossession do not, and could not, form part of the framework of just deserts under this model. This is primarily because of its individual focus, and the quarantining of matters such as race relations and colonial history outside the model. Those matters are assumed to operate independently from the workings of the criminal justice system. However, if a different approach is taken and a reworking of existing assumptions is made placing primacy on the experience of Indigenous communities, the content of just deserts becomes problematic, and the official approach most manifest in a model such as Von Hirsch's becomes contested.

Similarly, Hudson's approach with its focus on social and economic disadvantage is narrow in terms of what her model of "social culpability" takes into account. Such a model is of little utility in attempting to understand the relationship between Indigenous communities and the criminal justice system. Like Von Hirsch's model, it lacks a consideration of colonialism and dispossession as

possible explanations for Indigenous offending, and as being relevant to the question of punishment. A supposed truism under the Hudson model that poverty produces crime[49] is assumed to be correct notwithstanding the fact that a significant proportion of Indigenous persons do not commit criminal offences despite their limited social and economic opportunities.[50] More insidiously, such an approach focuses the analysis upon Indigenous persons as the 'problem' to be solved,[51] and removes the focus from colonial and neo-colonial practices. The role of police as amplifiers of Indigenous deviance and victimisers, especially in the context of public order offences,[52] is ignored. Hudson, although somewhat more focused on race than Von Hirsch, neglects how the concepts of race and crime work together to produce a particular epistemology concerning crime and punishment. The role of the state in producing those power relations is rendered invisible and unproblematic, resulting in an indemnity for the deleterious effects of state practice, of which overrepresentation of Indigenous persons in the criminal justice system is only one manifestation.

An alternative approach to that suggested by Von Hirsch and Hudson would involve inverting the problem as it is currently framed, and

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49 See Vold GB, Bernard TJ & Snipes JB, (5th Ed), *Theoretical Criminology*, Oxford University Press, New York, 2002, pp 84-99. The relationship between crime and poverty is not uni-causal and there has been great difficulty in isolating poverty as the *sole cause* of criminal offending. This is particularly because criminologists have been unable to account for the empirical fact that the majority of persons from impoverished backgrounds do not commit criminal offences despite that disadvantage.

50 This argument applies equally to non-Indigenous offenders.

51 See the comments of Roberta Sykes who notes, in the context of a discussion of Indigenous crime and punishment: "I am personally very tired of reading articles and statistics that speak only to the impact of Black criminality on the criminal justice system – the number of Blacks in the prison population, for example. If we are conducting an exercise motivated by the best interests of the Black community, the manner in which information is gathered would be very much different. We would measure instead the extent of damage done to the Black community by the incarceration and loss of so many of its people. We would talk about the effect of having one quarter and one fifth of all black males between the ages of 15 and 30 caught up in the justice system." Sykes R, "Self-determination: Implications for Criminal Justice Policy Makers" in Hazlehurst K, (ed), *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, p 23. Also see Davis A, *Are Prisons Obsolete?* Seven Stories Press, New York, 2003, pp 25-39.

52 See, for instance, Cunneen C, "Aboriginal Young People and Police Violence" (1991) 49 *Aboriginal Law Bulletin* 8.

suggesting that the legacy of colonialism in terms of Indigenous offending should not be confronted by reforming the criminal justice system, but by devising ways the non-Indigenous community and its institutions can become less involved in Indigenous communities. In short, a type of political philosophy akin to a type of liberalism where difference is recognised and state intervention is narrowly circumscribed in recognition of the historic levels of intervention in Indigenous communities.[53] This type of approach would perhaps be of benefit in that it would concentrate on the actions of the state against Indigenous communities, rather than the simple positing of the need to 'reform' the criminal justice system to make it more 'fair' for Indigenous offenders. Importantly, such a model would give proper weight to the experience of Indigenous communities and the pain and suffering produced by the criminal justice system. Having considered theoretical models, the author now considers a particular aspect of Australian colonial history concerned with the types of punishment inflicted against Indigenous communities.

Waves of Pain and Suffering: Indigenous Punishment in Australia and the Legacy of Colonialism

Part of the strength of the ideology of colonialism and its continued effects is that existing institutions and practices are viewed as having a degree of inevitability. Existing practices become normalised and a particular perspective of the relationship between life and law is maintained. Approaches to crime and punishment evident in the works of Von Hirsch and Hudson are part of that discourse, as are traditional sentencing practices that are temporally limited. Justifying Indigenous punishment in the absence of a problematic moral and political framework is quite simple. However, if the perspective is moved beyond the life course of the individual Indigenous offender to Indigenous communities a different understanding promises to emerge. This shift of analysis to the community level permits a radical re-evaluation of the practice of crime and punishment. Such a perspective is in contrast to the conventional and settled understanding evident where the disproportionate imprisonment of Indigenous

53 Behrendt L, *Achieving Social Justice*, Federation Press, New South Wales, 2003, pp 81-84.

persons is simply accepted as part of the criminal justice system in Australia.

To trace the history of imprisonment of Indigenous persons in Australia is to be confronted with an endless debate about reducing the disproportionately high level of imprisonment against Indigenous communities, and how that may best be achieved. Although the Royal Commission into Aboriginal Deaths in Custody (the RCIADIC) was posited as having achieved a 'new' and almost revolutionary understanding of the relationship between the criminal justice system and Indigenous persons,[54] this is not entirely true. The reason for considering the RCIADIC may not have been as 'new' as commonly claimed is that the question of Indigenous crime and punishment has always been a part, or concern, of the emerging Australian Nation State as it displaced and dispossessed the Indigenous population.[55] The question of the social control of Indigenous communities, particularly through the operation of the criminal law, has always been a central concern of the non-Indigenous community.[56] Throughout Australia's history the multiplicity of contexts where policing and punishment of Indigenous individuals has been protracted and systemic suggests that the practices of the criminal justice system have been central to the governance of Indigenous communities.

An illustration of that perpetual discourse is evident in 19th century debates in what is now Western Australia. Those debates are

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54 Perhaps because the findings of the report were novel to the non-Indigenous community who were unaware of the entrenched difficulties that confronted Indigenous persons. As Royal Commissioner Elliot Johnson QC stated : "I say very frankly that when I started upon my work with this Commission I had some knowledge of the way in which broad policy had evolved to the detriment of Aboriginal people and some idea of the consequences. But, until I examined the files of the people who died and the other material which has come before the Commission and listened to Aboriginal people speaking, I had no conception of the degree of pin-pricking domination, abuse of personal power, utter paternalism, open contempt and total indifference with which so many Aboriginal people were visited on a day to day basis." From Johnston E, QC, *Royal Commission into Aboriginal Deaths in Custody: Overview and Recommendations*, AGPS, Canberra, 1991, p 20. Those descriptions fit well with Critical Race Theorist Katheryn Russell's analysis, in the context of the United States, of such acts as examples of "micro aggressions". See Russell K, *The Color of Crime*, New York University Press, New York, 1998, pp 138-141.

55 Wood G, *A History of Criminal Law in New South Wales*, Federation Press, NSW, 2002, pp 26-30.

56 See generally Cunneen, note 47, ch 3. Also see Connor J, *The Australian Frontier Wars*, University of New South Wales Press, Sydney, 2002.

significant in that they display some parallels with the RCIADIC. In the 19th century in Western Australia there were numerous government inquiries into how best to deal with the problem of crime and punishment in relation to the Indigenous communities on the newly established frontier. One solution adopted was the establishment of Rottnest Island as a penal colony solely for male Indigenous persons. The basis for this solution was that traditional confinement in cells in an ordinary prison was viewed as culturally inappropriate and harmful to Indigenous inmates.[57] Arguably, such reformers were informed by humanist concerns and an appreciation that Indigenous offenders stood in a different relation to the government solely by virtue of their Aboriginality. In this colonial penal dialogue the emergence of Indigenous prisoners as 'different' and 'other' was confirmed, and race as an organising principle became relevant and central to the emerging criminal justice system of Western Australia. In this type of penal formation Aboriginality and not the nature of the offence was the issue: it therefore involved a conception of what type of citizens Aboriginal people were and how they should be punished.

Despite this recognition of the 'difference' of Indigenous persons, and of their likely response to confinement in a cell, the actual procedures adopted against the Indigenous communities in Western Australia were much less humane. The penal practice involved the transportation of Indigenous prisoners from communities throughout Western Australia to Rottnest Island. In addition, there was a high mortality rate at the Rottnest Island prison. This resonates with the establishment of a further investigation approximately one hundred years later in the form of the RCIADIC.[58] The separation of Indigenous persons from their communities and traditional lands does not appear to have been a consideration in this colonial penal logic. In hindsight, the use of Rottnest Island between 1838 and 1931 can be seen as indicative of the penal structure emerging in Western Australia, and as being directed at Indigenous communities.

The imprisonment of Indigenous persons on Rottnest Island and what it represents may seem novel, but of little contemporary relevance to the punishment of Indigenous persons. However, a close examination

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57 Green N & Moon S, *Far From Home*, University of Western Australia Press, Nedlands, 1997, pp 14-16.

58 Green N & Moon S, note 57, pp 64-67.

of the assumptions underlying the use of Rottnest Island indicates that there is a historical continuity with the contemporary punishment of Indigenous persons. First, the formulation and administration of such a punishment regime is imposed upon the Indigenous community. Any question of consultation with the Aboriginal community, or of the adaptation of Aboriginal customary law, is neither seriously raised nor considered. Second, the consequences of such a penal practice for Indigenous communities, and the contribution of such a penal practice to the dislocation of Indigenous communities, are ignored.[59] Finally, the justification for this type of penal practice is that it is in the best interests of Indigenous offenders because of their supposed "special needs".

The unfortunate nexus that has developed between crime, Indigenous communities and punishment as a result of penal practices such as the use of Rottnest Island forms part of the contemporary debate. It is only within such an historical context that the contemporary practices of crime and punishment, and other state actions against Indigenous communities, and their impact on Indigenous communities, can be properly understood. The disproportionate representation of Indigenous persons in the criminal justice system, particularly in prison, despite the RCIADIC and the supposed implementation[60] of its recommendations, perhaps evidences an embedded relationship between Indigenous communities and the criminal justice system that has developed over generations. Thus, it is questionable whether there has ever existed an adequate account of Indigenous punishment under Australian law.[61] An *adequate* account of Indigenous punishment *must* include an account from the perspective of the Indigenous

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59 An exception to that trend has been the development of Aboriginal courts that operate alongside the mainstream legal system. For an overview of the Nunga Court in South Australia, see Welch C, "South Australian Courts Administration Authority: Aboriginal Court Day and Aboriginal Justice Officers" (2002) 5 (14) *Indigenous Law Bulletin* 5.

60 An important decision on the practical role played by the RCIADIC recommendations and how they are not adequately assisting all Indigenous offenders is provided in *R v Scobie* (2003) 85 SASR 77. For further analysis of this case Edney R, "*R v Scobie*: Finally Taking the Recommendations of the Royal Commission into Aboriginal Deaths Seriously?" (2004) 6 (2) *Indigenous Law Bulletin* 20.

61 See generally Edney R, "Indigenous Punishment in Australia: A Jurisprudence of Pain?" (2002) 30 *International Journal of the Sociology of Law* 219, pp 225-227.

communities throughout Australia, including an account of how imprisonment has compounded their already existing disadvantages.[62]

The problematic aspect of the punishment of Indigenous persons in the context of the current criminal justice system is that it tends to deny the collective nature of the experience of Indigenous persons who have been exposed to the corrosive effects of colonisation. The harms suffered by Indigenous communities are given little currency in such a sentencing framework, confined as it is to matters of social and economic disadvantage and difficulties with alcohol that, while important, are manifestations of something far deeper. Matters of cultural destruction, the placement of Indigenous communities in reserves and missions,[63] the removal of children on the flawed assumption that such children were in danger of harm,[64] and the urge to assimilate the Indigenous community with the non-Indigenous community in the expectation that Aboriginality would itself disappear,[65] are some of the legacies of colonialism and dispossession. Under the current sentencing framework, such matters are viewed as too far removed in space and time to be relevant to the sentencing of an Indigenous offender. Significantly, this allows the political aspect of the punishment of Indigenous persons to be put to one side and quarantined as a matter of history. It is proposed to examine the existing authorities on Aboriginality and sentencing within this framework and, through a close reading of the assumptions underpinning those decisions, to consider whether the resulting jurisprudence represents a just outcome for Indigenous communities. It is not proposed to outline in any significant detail the practice or procedure of sentencing: the concern is with investigating the themes that recur in judicial statements concerning the sentencing of Indigenous persons.

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62 For a perspective that uses the insights from those who been subject to social and economic oppression and how the legal system may recognise those collective harms see Matsuda M, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 *Harvard Civil Rights-Civil Liberties Review* 323.

63 For an example of such a reserve in Victoria see Attwood B, "Space and Time at Ramhyuck, Victoria, 1863-85" in Read P, (ed), *Settlement*, Aboriginal Studies Press, 2000, 41-54.

64 See Human Rights and Equal Opportunity Commission, *Bringing Them Home*, note 6.

65 See generally McGregor, note 6.

Australian Case Law on Aboriginality and Sentencing

The key assumption underpinning the Australian case law on Aboriginality and sentencing is that when sentencing an Indigenous person account may be taken of social and economic advantage.[66] It is not Aboriginality in and of itself that is relevant to sentencing. Rather, it is the social and economic disadvantage that arises because of the person's membership of the Indigenous community that may mitigate an otherwise just and proportionate punishment.[67] The existing authorities suggest that in such circumstances the penalty imposed might be moderated to take into account social and economic disadvantage. Race by itself, however, is not a relevant consideration,[68] neither mitigating nor aggravating the offender's punishment. This may be described as a liberal approach to crime and punishment in that it has a particular allegiance to formal equality and the rule of law. The operative assumption is that of equal opportunity and treatment, and of the primacy of the individual as the essential construct guiding the criminal justice system. Such a model of sentencing assumes that there is no discrimination between persons as to the extent of punishment, and that the significant matters are the nature of the offending and the constellation of applicable mitigating and aggravating factors. How have the courts constructed Aboriginality when determining the question of punishment for an Indigenous offender? It is important, when examining this question, to closely consider how courts have

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66 See, for instance, *Jabaltjari v Hammersley* (1977) 15 ALR 94; *R v Davey* (1980) 50 FLR 57; *R v Harradine* (1992) 61 A Crim R 201; *Yougie* (1987) 33 A Crim R 301; *Houghagen v Charra* (1989) 50 SASR 419; *R v Woodley* (1994) 76 A Crim R 302; *R v Juli* (1990) 50 A Crim R 31; *R v Gibuna* (1991) 54 A Crim R 347; *R v Russell* (1995) 84 A Crim R 386; *Robertson v Flood* (1992) 111 FLR 177; *R v Pearce* (1983) 9 A Crim R 146; *R v Rogers* (1989) 44 A Crim R 301; *R v Bulmer* (1986) 25 A Crim R 155; *R v E (A Child)* (1993) 66 A Crim R 14. For a contemporary restatement of those matters see *R v Fuller–Cust* (2002) 6 VR 496 at 520-521 per Eames J.

67 *Neal v R* (1982) 149 CLR 305 at 326 per Brennan J.

68 See *R v Fuller–Cust* (2002) 6 VR 496 at 520 per Eames J: "Sentencing principles are the same for all Victorians. Race is not a basis for discrimination in the sentencing process. Nothing I say in these reasons should be taken as suggesting that Aboriginal offenders should be sentenced more leniently than non-Aboriginal persons on account of their race. The offences committed by the applicant, and admitted by him, are extremely serious – as I shall discuss. That is not to say, however, that considerations and factors of race may not be taken into account on sentencing, where they are relevant."

'framed' the causes for Indigenous offending and the appropriate response by the criminal justice system.

In *Fernando*[69], Wood J delivered a significant judgment on the relationship between Aboriginality and sentencing. His Honour's list of principles relating to Aboriginality and sentencing has proved influential, and has been expressly approved in a number of subsequent decisions in jurisdictions throughout Australia.[70] *Fernando* is an important judgment because it represents an attempt to collate the existing authorities on Aboriginality and sentencing, and to distil certain principles from them. The principles stated in *Fernando* were:

> The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offender's membership of such a group.
>
> The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.
>
> It is proper for the court to recognize that the problems of alcohol abuse and violence that to a very significant degree go hand in hand within Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.
>
> Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed that punishment provides. In short, a belief cannot be allowed to go

69 *R v Fernando* (1992) 76 A Crim R 58.

70 See, for instance, *Stone* (1995) 84 A Crim R 218; *Russell* (1995) 84 A Crim R 386; *Police v Abdulla* (1999) 74 SASR 337 at 342 per Perry J; *R v Fuller-Cust* (2002) 6 VR 496 at 515 per Batt J & at 520-522 per Eames J.

> about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.
>
> While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities where poor self-image, absence of education and work opportunity and other demoralizing factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worse effects.
>
> That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.
>
> That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reasons of social or economic factors or 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 and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.
>
> That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might be otherwise attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.[71]

This lengthy extract from *Fernando*, subject to minor modifications in subsequent cases, represents the modern legal approach to the sentencing of Indigenous offenders, and provides a possible method to

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71 *R v Fernando*, note 69, at 62-63 per Wood J.

assess the level of culpability and deserts for offending behaviour.[72] Whether it is the appropriate method, or framework, for Indigenous crime and punishment will be discussed shortly. First, it is necessary to carefully consider the judgment in *Fernando* and the assumptions underpinning Wood J's analysis.

Fernando and the Causes of Indigenous Offending: The Importance of Social and Economic Disadvantage and Alcohol Abuse

When a court sentences an offender it normally has a working theory as to the cause, or explanation, of the offender's criminal behavior.[73] That may be expressed in explicit comments in the reasons for sentence as to why the offending occurred and/or as to the manner in which the sentence is crafted to address certain matters believed to be germane to the offending behaviour. The approach of Wood J in *Fernando* evidences a particular understanding of Indigenous offending from which it is possible to identify two themes claimed to explain, or account for, Indigenous offending. First, the involvement of Indigenous persons in the criminal justice system is the product of deprived social and economic circumstances.[74] Second, the abuse of alcohol is a significant contributing factor to Indigenous offending.[75] According to Wood J, those matters may be properly taken into account to mitigate an otherwise just and proportionate punishment. Importantly, it is not Aboriginality itself that entitles an Indigenous offender to a discount in the punishment that would otherwise be imposed. By focusing on these two matters, Wood J implicitly formed a view as to the *causes* of Indigenous offending. Social and economic deprivation is understood to produce offending in that, owing to the scarcity of resources in Indigenous communities, there is a dissonance between the capacity and the aspirations of Indigenous communities.

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72 I leave aside the particular statutory regimes throughout the states and territories of Australia dealing with sentencing. The reason for doing so is that the level of analysis here is concerned with the broad themes that resonate in Aboriginality and sentencing and how they are understood by appellate courts.

73 *Queen v Olbrich* [1999] 54 HCA at [1] per the court.

74 *R v Fernando*, note 69 at 62 per Wood J.

75 *R v Fernando*, note 69 at 62-63 per Wood J. On this point also see *Ingomar v Police* [1998] SASC 6875 at [33] per Perry J.

Also, especially as regards offences against the person, there is considered to be a nexus between offending and alcohol partially due to those deprived social and economic circumstances.

The problem with the approach in *Fernando* is that the historical reasons for social and economic deprivation in Indigenous communities were not developed. *Fernando* confined itself to surface explanations for Indigenous offending. While social and economic disadvantage and the abuse of alcohol may be important, they merely illustrate the far more entrenched difficulties permeating Indigenous communities.[76] In reality, Wood J's judgment in *Fernando* was the product of accrued judicial wisdom as to the problems suffered by Indigenous communities. However, it is understandable that Wood J did not pursue the logical results of the argument he developed in *Fernando.* Arguably, given the fundamental constitutional principle of separation of powers,[77] such matters are more appropriate for the legislative and executive arms of government.[78] Seen in this light, the decision in *Fernando* reflects the extent of judicial intervention feasible in the sentencing of Indigenous offenders. Moving beyond socio-economic disadvantage and alcohol abuse to their ultimate cause raises the whole question of the moral legitimacy of the punishment of Indigenous offenders in Australian society. Had Wood J explicitly made this connection, and had he then sought to suggest a remedy or attempted to ascribe responsibility to a particular arm of government, such comments may have been seen as a breach of the doctrine of separation of powers.

The judgment in *Fernando* did not consider how the use of alcohol by Indigenous communities was constructed by the non-Indigenous community.[79] This was partly due to Wood J's desire to avoid in the sentencing of Indigenous persons any "racism, paternalism or

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76 See *Police v Abdulla* [1999] SASC 239 at [39] per Perry J; *DPP v Wilson* [2002] VSC 299 at [24] per Cummins J. Also see Nicholson J, "The Sentencing of Aboriginal Offenders" (1999) 23 (2) *Criminal Law Journal* 85.

77 See *Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

78 The author is indebted to the anonymous reviewer for raising this point.

79 Nor the fact that alcohol use by Indigenous communities was in some instances illegal and thus subject to criminal punishment, thereby contributing to the unfortunate nexus between alcohol, criminality and Indigenous communities. See Saggers S & Gray D, *Dealing with Alcohol*, Cambridge University Press, Cambridge, 1998, pp 49-51.

collective guilt."[80] This is an intriguing part of the judgment: it was not the subject of further elaboration. It may have been an attempt to avoid any criticism of the matters suggested to be taken into account in sentencing Indigenous offenders, and to deny that they were in any way inspired by such motives. Unconsciously, it may also demonstrate an uncomfortable awareness of some of the unresolved tensions and contradictions in post-colonial Australia. Namely, dispossession and the effects of colonialism are still relevant and operative causes.

Fernando explicitly recognised the connection between contemporary Indigenous social and economic deprivation and disproportionate rates of offending and imprisonment. The fact that those matters are such a distinctive part of the Indigenous experience may be explained by the history of Australia and the treatment of Indigenous communities since dispossession. The doctrine of separation of powers may explain why the *judiciary* has been reluctant to articulate those wider matters of political and social history that formed the basis for colonialism, and the relationship between the Indigenous and non-Indigenous communities. However, it is unclear why the *legislature* has made no causal connection between the disproportionately high levels of Indigenous imprisonment and the devastating impact of colonialism on Indigenous communities. Appropriate legislation could permit a court to positively affirm the effects of past practices, and specify how they may be properly incorporated into the sentencing process for Indigenous persons.

A somewhat different approach to *Fernando* is evident in the Supreme Court of Victoria decision in *R v Wordie*[81] (*Wordie*). Justice Bongiorno explicitly recognised the problematic nature of the relationship between the Indigenous and non-Indigenous community, and also how in such circumstances the question of 'justice' arises when a court is sentencing an Indigenous person. He also acknowledged the courts' limitation as regards becoming involved as an active player in social change. As noted in the sentencing remarks in *Wordie*:[82]

80 *R v Fernando*, note 69 at 63 per Wood J.

81 *R v Wordie* [2002] VSC 202.

82 *Wordie*, note 81

> You present an extremely difficult sentencing problem. The offences for which you must be sentenced are serious indeed and your sentence must reflect that seriousness. On the other hand it is not difficult to characterize your life as being one of extreme sadness, robbed at an early age of meaning, ambition or realistic hope. This is due partly to an early introduction to alcohol and its subsequent long term abuse, and partly to the immense social deprivation of being a virtual orphan in a community in which so many Indigenous people like you suffer a completely dislocated and dysfunctional existence for reasons which have been much examined but which are far too complex to go into in these sentencing remarks.[83]

Thus, as in *Fernando*, there was explicit recognition of the problems faced by Indigenous persons. However, momentarily, his Honour extended the analysis in an attempt to account for the offender and his life:

> Suffice to say, they are undoubtedly a product of the unjust and immoral social alienation to which Indigenous people have been subject in this country for far too long. Until these issues are seriously addressed there will be many more offenders like you who will have to be sentenced to long prison terms because this society generally neither knows nor cares how to do any better.[84]

In some respects, the comments by Bongiorno J were extraordinary because they turned the responsibility for the situation of Indigenous offending back towards the structure and organisation of the post-colonial society in which Indigenous persons live in a position of "unjust and immoral social alienation".[85] In conclusion, Bongiorno J noted that the sentences to be imposed:

> [A]re no help in seriously tackling the problem of which your offending is only a small part. As a judge, however, I am able to

83 *Wordie*, note 81 at [31].

84 *Wordie*, note 81 at [31].

85 *Wordie*, note 81 at [31]. See also *R v Wise* [2004] VSCA 88 at [31] per Eames J.

> do nothing else but obey the law's commands. The remedy, if there is one, lies elsewhere.[86]

Justice Bongiorno's decision in *Wordie* recognised that the reasons for Indigenous offending are generally well accepted in Australia. The decision also affirmed that the reasons for the offender committing the offence extended back beyond his birth. This opening-up of the time frame is significant because it greatly expands the matters that may be taken into account. Most importantly, the decision in *Wordie* recognised the moral and political aspect of the punishment of Indigenous persons. It thereby represented a departure from *Fernando.*

The decision in *Wordie* opened up the criminal justice system and the treatment of Indigenous persons to questions of power, politics and morality. Therefore, a 'new' justification for the punishment of Indigenous persons is required: one that can reckon with that colonial history. The history of dispossession and of practices such as the removal of children, and the contemporary disproportionate rates of imprisonment, cannot be quarantined as matters simply of history and misfortune. They are matters requiring proper consideration. Such matters are constitutive of the relationship between the Indigenous community and the non-Indigenous community: they ought to be addressed in the context of the issue of Indigenous crime and punishment. In particular, if we take just deserts as a model for the justification of punishment, matters of colonial and neo-colonial history and practice *cannot* be excluded.

A New Sentencing Jurisprudence for Punishing Indigenous Offenders?

Judicial creativity and extension of the concepts that are deemed to be mitigating of punishment offer a limited possibility for a 'new' approach to the sentencing of Indigenous offenders. Justice Bongiorno recognised this in *Wordie.* Hopefully, as a result, a more powerful change in terms of sentencing principles recognising that dispossession and the historical record are appropriate matters to take

86 *Wordie*, note 81 at [31] per Bongiorno J.

into account in the sentencing of Indigenous persons will emerge from the legislature. However, in the interim, judicial officers have the potential to provide distinctive 'readings' of the particular Indigenous persons appearing for sentence, and to be more sensitive to their individual life stories. Such an approach necessarily requires a degree of imagination on the part of the judicial officer in order to understand the position and perspective of the Indigenous person being sentenced.

An illustration of imaginative jurisprudence can be found in the powerful dissenting judgment of Eames J in the Victorian Supreme Court decision of *R v Fuller-Cust*[87] (*Fuller-Cust*). That decision involved an appeal against the sentence imposed by a judge who had been openly hostile to a witness from the Institute of Koorie Education at Deakin University who gave evidence on sentence. The sentencing judge attacked the witness as an 'advocate' because he used the words "Stolen Generation" in his written report.[88] In an important judgment, the influence of which is likely to extend beyond Victoria,[89] Eames J first noted:

> Sentencing principles are the same for all Victorians. Race is not a basis for discrimination in the sentencing process. Nothing I say in these reasons should be taken as suggesting that Aboriginal offenders should be treated more leniently than non-Aboriginal persons on account of their race.[90]

Then, Eames J added:

> That is not to say, however, that considerations and factors of race may not be taken into account on sentencing, where they are relevant.[91] [To ignore them is] to ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of

87 *R v Fuller-Cust* (2002) 6 VR 496.

88 *Fuller-Cust*, note 87 at 518-520 per Eames J.

89 *Fuller-Cust* was approved by the Victorian Court of Criminal Appeal in *Wordie* [2003] VSCA 107 at [31] per Cummins AJA. The influence of *Fuller-Cust* resides principally in the fact that childhood separation was not confined to Indigenous families in Victoria but occurred throughout Australia. The *Bringing Them Home* Report divides its findings on the basis of the states and territories of Australia.

90 *Fuller- Cust*, note 87 at 520 per Eames J.

91 *Fuller- Cust*, note 87 at 520 per Eames J.

> his Aboriginality, would be to sentence him as someone other than himself.[92]

After surveying existing authorities, including *Neal v R* and *Fernando*, his Honour traced the history of the appellant. In a sophisticated judgment he referred to the findings of the RCIADIC and the *Bringing Them Home* Report relating to the issue of Indigenous overrepresentation in prison, and to the nexus both reports recognised between childhood separation and subsequent criminal behaviour.[93] In addition, a discerning use was made of institutional and welfare reports concerning the appellant permitting a picture to emerge of the history of the appellant that placed his offending in its proper context. In addition, there were details of the appellant's failed attempts to reconnect with his family, particularly his mother, and of the abuse he suffered during his foster placement. Of greatest significance was the fact that Eames J recognised the powerful role played by race in a society such as Australia. Unlike previous judgments carefully avoiding any implication of "special treatment" for Indigenous offenders, he not only noted the constitutive role of race for the appellant, but also recognised it as part of a collective phenomenon unique to Indigenous communities within Australia. The leap of imagination evident in this judgment is startling. It occurred through a close reading of the Indigenous appellant's life story, combined with an adequate recognition of how his story had only occurred because of his Aboriginality.

Just Deserts in a Post–Colonial Society

As previously noted, proponents of the just deserts approach to punishment emphasise that it is the fairest means to allocate punishment in society.[94] They claim it has a type of intrinsic respect for the individual person because the offender is punished in proportion to her or his deserts and nothing more. Crime and punishment are perfectly calibrated with a proportionality between the harm caused by the offence and the punishment imposed. This method

92 *Fuller- Cust*, note 87 at 520 per Eames J.

93 *Fuller-Cust*, note 87 at 522-526.

94 See Von Hirsch, note 8.

of positioning offence and punishment appears to be a seamless conjunction of arithmetical calculation. Of course, the difficulty is that the relationship between crime and punishment is not mathematical: it is the result of arbitrary choices made by different communities in different times and places as to the best method of dealing with criminal behaviour.[95] Seen in that light, there is nothing natural or inevitable concerning the justification and administration of punishment.

The concept of just deserts, whether in the sense described by Von Hirsch or the revised version articulated by Hudson, does not include all the perspectives of crime and punishment. In particular, race as an important source of power is ignored and treated as an historical relic. This is problematic. Race, particularly in the history of Indigenous and non-Indigenous relations, has been constitutive and defining of all aspects of social, political and economic life.[96] Obviously, a necessary aspect of that social life has been the practice of law and the administration of criminal justice. In any alternative account of Indigenous punishment, just deserts could not fairly operate without a consideration of the dimension of race. Because Indigenous persons have been subject to a high degree of collective suffering due to dispossession, it follows that any question of crime and punishment must factor in the historical record on the issue of culpability, the second limb of the just deserts model.

Such a proposal for the criminal justice system as to how punishment is to be achieved for Indigenous persons involves the *differential treatment* of Indigenous persons. To suggest that this would contravene the rule of law is to continue an approach to sentencing that denies an important part of the story of Indigenous persons in the establishment of Australia as a colonial society through dispossessing them of their homelands. Continuing an individualist ideology as to the punishment of offenders, and ignoring the collective harm experienced by Indigenous persons, ensures that Indigenous persons do in fact stand in a different position to that *assumed by* the legal order. To fail to recognise such difference, particularly when it is

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95 See generally Garland D, *Punishment and Modern Society*, Oxford University Press, Oxford, 1990.

96 Lopez I, "The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice" (1994) 29 *Harvard Civil Rights-Civil Liberties Review* 1, p 3.

connected to specific historical conditions and practices, is to pretend that power does not exist in the world and does not have effects. The contemporary position of Indigenous communities is a clear illustration of the exercise of that power.

Conclusion

The punishment of Indigenous persons is first and last a political and moral question. Thus, considering the notion of "just deserts'" as applied to Indigenous persons requires a different understanding of that term. That different understanding is needed to ensure Aboriginality is properly taken into account. The historical fact of dispossession must be at the forefront of any understanding of the punishment of Indigenous persons. The current judicial and legislative reluctance to articulate the causal basis for the social and economic deprivation and alcohol abuse within Indigenous communities ensures that the effects of dispossession continue to be ignored.[97] While the judicial reluctance may be explained by the doctrine of separation of powers, there is no such excuse for the legislative reluctance. In the absence of such perspectives, the punishment of Indigenous offenders cannot achieve just deserts. Justice Bongiorno's decision in *Wordie* contained a description of the nature of the underlying reasons for Indigenous offending, and Eames J's judgment in *Fuller-Cust* specified a manner whereby sentencing could be made more sensitive to the position of Indigenous offenders. However, the judiciary can only travel a certain distance. Legislative reforms to the criminal justice system are required: reforms that will empower the judiciary in the sentencing process to take adequate account of the historical fact of dispossession and its destructive effects on Indigenous communities. These reforms are matters for the legislatures of Australia, and their genesis depends on the extent to which legislators can take the leap of imagination required to fairly and effectively respond to the continued pain within Indigenous communities throughout Australia.

97 Nicholson, note 76.