

University of New South Wales
University of New South Wales Faculty of Law Research Series
2011

Year 2011

Paper 13

Imprisoning Rationalities

Eileen Baldry*	David Brown†	Mark Brown‡
Chris Cunneen**	Melanie Schwartz††	Alex Steel‡‡

*University of New South Wales

†University of New South Wales

‡University of Melbourne

**James Cook University

††University of New South Wales

‡‡University of New South Wales

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/unswwps-flrps11/art13>

Copyright ©2011 by the authors.

Imprisoning Rationalities

Eileen Baldry, David Brown, Mark Brown, Chris Cunneen, Melanie Schwartz,
and Alex Steel

Abstract

Imprisonment is a growth industry in Australia. Over the past 30-40 years all state and territory jurisdictions have registered massive rises in both the absolute numbers of those imprisoned and the per capita use of imprisonment as a tool of punishment and control. Yet over this period there has been surprisingly little criminological attention to the national picture of imprisonment in Australia and to understanding jurisdictional variation, change and continuity in broader theoretical terms. This article reports initial findings from the Australian Prisons Project, a multi-investigator Australian Research Council funded project intended to trace penal developments in Australia since about 1970. The article begins by outlining the notion of penal culture that provides the analytic lens for the project. It outlines various intersecting areas of study being undertaken before focussing on just three features of the contemporary penal field – restrictions upon presumptions of bail, the rise of post-sentence indefinite detention and the role of supermax confinement. Each in their own way exemplifies an aspect of and contributes to what we conclude to be the revalorisation of the prison in Australian culture and society.

Imprisoning Rationalities

Eileen Baldry, Professor, School of Social Sciences and International Studies,

David Brown, Emeritus Professor, Faculty of Law, UNSW, Australia

Mark Brown, Senior Lecturer, Criminology, University of Melbourne, Australia

Chris Cunneen, Professor, Cairns Institute, James Cook University, Australia

Melanie Schwartz, Lecturer, Faculty of Law, UNSW, Australia

Alex Steel, Associate Professor, Faculty of Law, UNSW, Australia

Abstract

Imprisonment is a growth industry in Australia. Over the past 30-40 years all state and territory jurisdictions have registered massive rises in both the absolute numbers of those imprisoned and the per capita use of imprisonment as a tool of punishment and control. Yet over this period there has been surprisingly little criminological attention to the national picture of imprisonment in Australia and to understanding jurisdictional variation, change and continuity in broader theoretical terms. This article reports initial findings from the Australian Prisons Project, a multi-investigator Australian Research Council funded project intended to trace penal developments in Australia since about 1970. The article begins by outlining the notion of penal culture that provides the analytic lens for the project. It outlines various intersecting areas of study being undertaken before focussing on just three features of the contemporary penal field – restrictions upon presumptions of bail, the rise of post-sentence indefinite detention and the role of supermax confinement. Each in their own way exemplifies an aspect of and contributes to what we conclude to be the revalorisation of the prison in Australian culture and society.

Introduction

Penological theory and research within criminology has been reinvigorated in recent years by the seemingly inexorable rise of prison populations in most western nations. The terrain of this work has been marked out by important new ideas, such as the ‘new penology’ (Feeley and Simon, 1992), ‘culture of control’ (Garland, 2001) and ‘new punitiveness’ (Pratt et al, 2005), and more recently by claims about an emergent ‘carceral state’ (Gottschalk, 2008; Social Research, 2007). Underpinning this work has been a veritable drum roll of statistics, first signalled in the US by the arrival at a prison population of 1 million, but then in June 2002 it was recorded that 2 million (mainly young, mostly male, increasingly Black and Latino) bodies were behind bars, and so the counting continued. In Australia prison populations have been subject to many of the same upward pressures and, like the United States, this has involved significant over-representation of particular communities: in Australia most notably

Indigenous people. Moreover, jurisdictional variations have also mirrored US patterns, with some places, such as the Northern Territory, imprisoning at rates amongst the highest in the world, while others, such as Victoria, seem almost models of Scandinavian-style restraint. Imprisonment in Australia thus exhibits many of the hallmarks of what has made the US such a crucible for recent work in penology.

Yet for reasons that are not wholly clear, Australian criminology has on the whole elided consideration of the place of growing prison use in penal politics and in social trends more broadly (but cf., Brown and Wilkie, 2002; Zdenkowski and Brown, 1982). One factor that seems to have impeded thinking about the Australian prison in national terms and surveying its influence at the national level is the fact that, unlike either New Zealand or England and Wales, the Australian prison stands atop eight different state or territory systems of criminal law and criminal justice. While the services of the Australian Bureau of Statistics and the Productivity Commission (through its annual Report on Government Services) have enabled Australian criminologists to look at correctional data in state-wise and national terms, it has been far more difficult to reconcile the apparently different social, political and cultural contexts within which the Australian prison is embedded and operates. It is in this context that the Australian Prisons Project was conceived. It is a multi-investigator, Australian Research Council funded, collaborative project designed as a way of bringing the Australian experience of prison development and reform together with broader penological theory, while at the same time breaking down the balkanised view of prisons in Australia by framing the project at a national, rather than state or territory-based, level. We aim in this article to indicate some of the key dimensions of penal change explored in the project. The remainder of the article is divided into two parts. We set out in Part One the idea of penal culture as the unifying theoretical frame through which we explore Australian developments in penality since the start of the 1970s. We follow this in Part Two with an analysis of some of the key changes across different areas of penal change including bail, preventive detention and the use of secondary punishment. Each of these, we believe, is key to understanding not only the shape of recent Australian imprisonment *practices* but also the way prisons in Australia have come to operate as important *cultural* institutions and signifiers of wider social forces and trends.

I. Penal Culture

An understanding of penal culture allows us to explore the public sensibilities that underpin the penal values of a particular society. We use the notion of ‘penal’ in the context of a wider concept of penality which refers to the broad field of institutions, practices, discourses and social relations which surround the ideas and practices of punishment. It is a view that sees punishment as far more than a calculative task by sentencers or a technical apparatus administered by experts. Similarly penality implies a study of punishment that extends beyond the effects on a discrete offender to the social meaning and cultural significance of punishment.

The phenomenon of punishment is not a singular object of study. There is a variety of often contradictory and competing discourses on punishment including judicial decisions, parliamentary reports, commissions of inquiry, media and popular culture depictions, government policy, academic research and prisoner activist voices. The concept of penality allows us to approach this broader, complex and multidimensional realm of punishment, and understand the connections to legal, social, political and economic policy, while seeing the influence they have on punishment and the social field more generally. In this respect we are, for example, exploring representations of imprisonment in films like *Stir* (1980), *Ghosts of the Civil Dead* (1988) and *Chopper* (2000) to locate prison imaginings in their historical and social context and to look at them in light of Michelle Brown’s (2009) notion of ‘penal spectatorship’. The three films spread across three decades show different understanding of penality: the emergence of prisoners as political subjects in the 1960s and 1970s; the more general shift in penal culture from a rehabilitative ideal prior to the containment and ‘nothing works’ emphasis of the 1980s; and, finally, a key transformation in late modernity – the rise of celebrity to replace notions of class or traditional conceptions of authority.

The concept of culture is more difficult to define than penality. It is more widely used in both everyday language and in academic discourse. It is used as an analytical concept or tool (referring to meaning through symbols, language and other signifiers), and as a description (referring for example to prison culture, youth culture, or a national culture). Garland (1991, 2001, 2006) has provided the most systematic use of the concept of culture in relation to punishment. For Garland, punishment is a cultural

artefact which embodies and expresses society's cultural forms (1991: 193). Culture includes both 'mentalities' (intellectual systems and forms of consciousness) and 'sensibilities' (structures of affect and emotion). Socially constructed sensibilities and mentalities form the cultural patterns that influence how and why we punish and structure the way we 'feel' about offenders and their punishment. Mentalities provide an intellectual framework which explain and justify why and how we do and do not do certain things as punishment (assess, classify, segregate, train, etc). Cultural sensibilities rule in some forms of punishment as 'appropriate' and rule out others as 'unthinkable' (for example, as cruel, barbaric, repugnant).

Garland argues that our approach to cultural analysis should not be limited to textual or discourse analysis – although documents and rituals are the most obvious – and perhaps the easiest sites for understanding culture. He suggests extending analyses into areas that are less convenient methodologically such as technologies, spatial arrangements and bodily postures. He makes the point that the cultural domain is not exclusively discursive insofar as it can be exemplified in ritual practices, and modes of behaviour. In this context Norbert Elias's (1984) work on the civilising process is also of interest to our project. In Elias' detailed examination of changing norms, expectations and behaviour, he characterises the trends he identifies over several centuries as a 'civilising process'. There is no moral prescriptiveness in Elias's work – by the term 'civilising' he seeks to thematise changing patterns of behaviour and cultural values over time. These patterns include "a tightening and differentiation of the controls imposed by society upon individuals, a refinement of conduct, and an increased level of psychological inhibition as the standards of proper conduct become ever more demanding" (Garland, 1991:217-8; see also Pratt, 2002).

We emphasise the point, however, that seeing punishment as a cultural artefact, as a cultural expression should not be divorced from:

the fact that punishment is also, and simultaneously, a network of material social practices in which symbolic forms are sanctioned by brute force as well as by chains of reference and cultural agreement (Garland, 1991:199).



In other words, seeing punishment in terms of cultural expression does not exclude analysis of power, material interest and social control. Indeed we argue the necessity of combining these differing levels and modes of analysis. Lacey (2008) for example insists on the need to combine cultural analysis and political economy. She argues that the rise of penal populism does not characterise all late modern democracies. “Rather certain features of social, political and economic organisation favour or inhibit the maintenance of penal tolerance and humanity in punishment” (Lacey, 2008: xvi). She maintains that an analysis of the political-economic system as well as the cultural climate is necessary for understanding the institutional processes which frame criminal justice policy.

We see punishment as a communicative and didactic institution. It communicates meaning about power, authority, legitimacy, normality. Penalty defines and depicts social, political and legal authority, it defines and constitutes individual subjects and it depicts a range of social relations. How we understand appropriate or acceptable punishment is contextualised within broader social and cultural norms. The way we punish offenders is understood within particular cultural boundaries which define gender, age, race, ethnicity and class. These boundaries are not static. They are constantly being drawn and redrawn, and penalty itself plays a part in constituting these relations. We highlight this issue with respect to Indigenous people, women and people with mental illness.

Our cultural understandings of ‘Aboriginality’ have permeated the development of penalty in Australia with formal and informal differences in punishment existing from the nineteenth century through to the present. Some historical examples include the continuance of public executions of Aboriginal offenders after their cessation for non-Aboriginal offenders, and similarly the extended use of physical punishments (lashings, floggings) for Aboriginal offenders well into the twentieth century. The segregation of penal institutions along racialised lines has also been common place. Historically these different modes of punishment were justified by (and reproduced) racialised understandings of Aboriginal difference (Cunneen, 1993).

Today we understand both sentencing and punishment through concepts of race and culture: witness for example the consideration of the Aboriginality of an offender in

sentencing (instantiated in the *Fernando* principles: *R v Fernando* [1992]) or the growth in Koori, Nunga and Murri courts, circle sentencing courts (Marchetti and Daly 2007) and Indigenous prisons such as Balund-a and Yetta Dhinikal in New South Wales. Yet within this context of cultural definitions and understandings of 'Aboriginality', we have also seen Indigenous Australians' imprisonment rates rising rapidly. In the 20 years to 2008 Indigenous imprisonment rates rose from 1,234 to 2,492 per 100,000 of population, while non-Indigenous rates were both significantly lower and increased at almost half the rate, from 100 to 169 per 100,000 of population (Australian Bureau of Statistics, 2008; Carcach and Grant, 1999; Carcach et al, 1999).

The increase in Indigenous imprisonment appears to be not the result of increasing crime, but rather more frequent use of imprisonment for longer periods of time (Fitzgerald, 2009), something the noted increases in cultural expressions and recognitions of Aboriginality have done little to ameliorate. Indeed discourses speaking to the implied primitiveness of Aboriginality have re-emerged. Witness the Howard Government's *Crimes Amendments (Bail and Sentencing) Act* in 2006. Presented as a response to family violence in Indigenous communities it actually restricts courts taking customary law into consideration in bail applications and when sentencing.

The extraordinary growth in women's imprisonment clearly reflects a changed environment in our cultural understanding of the appropriateness of gaol for women. While debates in the 1980s were still focussed on drastically reducing the number of incarcerated women and emphasised the importance of alternatives to custody, contemporary penal discourse on women no longer seems to identify any *particular* barriers to imprisonment based on gender and while it may identify specific criminogenic needs for women, prison itself is seen as no less appropriate punishment for women than it is for men. In this climate women's imprisonment rates have increased rapidly. In 1983 women formed 3.9% of the Australian prisoner population, in 1993 the proportion was 4.8%, in 2003, 6.8% and in 2009 it was 7% (Australian Bureau of Statistics, 2010; Biles, 1984; Walker, 1982-1990). Incarceration rates for Indigenous women have been far greater than for non-Indigenous women. The most recent longitudinal comparison was made in 2006 when the proportion of Indigenous women prisoners had increased from 21% in 1996 to 30% in 2006 of all women

prisoners (Australian Bureau of Statistics, 2006). The rate of Indigenous women's imprisonment in 2009 was 359 per 100,000 of adult Indigenous females compared with 16 for non-Indigenous females (Australian Bureau of Statistics, 2010). Changing sensibilities about both race and gender have clearly impacted on the propensity to incarcerate Indigenous women.

Similarly the available data would suggest that warehousing large numbers of people with mental health issues has become normalized. Internationally, the evidence shows that the rate of prisoners with mental health disorders has been increasing. Although there are no longitudinal Australian data on this, the perception amongst correctional authorities and service providers is that numbers and proportions have increased over the past 2 decades (White and Whiteford, 2006). In recently gathered data, people with these disabilities are significantly over-represented amongst prisoners when compared with the general population, with rates 3 to 6 times higher (Butler et al, 2006). Persons with complex needs are even more likely than those with a single diagnosis, to be caught in the imprisonment cycle (Dowse et al, 2009) and women with mental health disorders are more highly over-represented amongst the prison population than men (Butler et al, 2006).

Even if we accept Harcourt's (2006:1752) argument of 'the remarkable continuity of confinement and social exclusion' which has characterised the use of asylums, mental hospitals and prisons over the twentieth century, a significant cultural change has occurred from the 1960s and 1970s with the reduction in mental hospital admissions (Doessel, 2009), the closure of mental institutions and the effective transfer of large numbers of the mentally ill to prison. Although the problem in official discourse is often defined as one of providing appropriate treatment for the mentally ill in prison, there is far less questioning of the role of prison itself as an institutional response to mental illness.

Much criminological work has attempted to explain the changing penal responses to Indigenous people, women and people with mental illness, including: the role of substance abuse, disadvantage and poor health (Wundersitz, 2010); racism, discrimination and the impact of colonisation (Cunneen, 2009); psychiatric and intellectual disability deinstitutionalisation (Aderibigbe, 1996), leaving the poor and

disadvantaged, with complex needs to become homeless and offend (Rose, et al 1993); and the large number of negative policy and legislative changes over the past 20 years (Baldry et al 2008; NSW Legislative Council Inquiry into the Increase in Prisoner Population, 2001). Yet we believe a focus on penal culture will encourage a broader and more historically sensitive approach to the relationship of vulnerable groups to mechanisms of punishment and control. We are inclined to see current arrangements not simply as the result of changing ‘policy settings’ but also as the genealogical descendents of major cultural forces shaping Australian society.

There are various dimensions of penal culture that are of particular interest to us in the Australian context. We do not attempt to cover all the potential sites of penal culture in this article. Rather we focus on a number of key areas including the rise of risk-thinking through specific rationalities and practices such as the legitimization of pre-trial detention; definitions of dangerousness; and the acceptance of incapacitation for particular types of offenders.

II. Rationalities and Practices of Risk and Danger

The cultural meanings, which imbue and are conveyed by penalty also reproduce ideas about the psychology and ontology of individuals, those defined as criminal, as terrorist, as justifying preventive detention or an unacceptable risk, as well as those defined as ‘normal’. These cultural meanings address us as moral agents, as rational and responsible individuals, or perhaps as those without moral agency, as beyond redemption. We might consider in this context three influences in redefining penalty and revalorising the prison in contemporary Australia: the removal of presumptions in favour of bail, the use of preventive detention and the influence of the war on terror.

Restricting Bail and Increasing Imprisonment

The use of remand has grown significantly in all Australian jurisdictions since the 1970s with an increase in the use of remand as a percentage of imprisoned people rising from 7.8% in 1978 to 23% in 2008 nationally, and to 35% in the Northern Territory (Biles, 1990, ABS 2008). This dramatic increase has had a significant impact on overall prison numbers. For example, the NSW Bureau of Crime Statistics

and Research found that 25 per cent of the increase in Indigenous imprisonment rates in NSW between 2001 and 2008 was caused by more Indigenous people being remanded in custody and for longer periods of time (Fitzgerald, 2009).

But beyond the impact on prison numbers, remand is a useful prism through which to view penal culture for a number of reasons. First, it is a fundamental principle of criminal law that a person cannot be legally punished unless they have been found guilty of a crime. This means that in order to keep a person in custody on remand, a court must rely on reasons other than those associated with punishment. Historically, the primary justification for remand was a fear that the accused would flee the jurisdiction. The extent to which modern bail legislation provides additional reasons to refuse bail illuminates the further uses to which non-punishing imprisonment is currently put.

Secondly, remand and bail was historically a discretion exercised by courts and the extent to which that discretion has been constrained or re-directed by government provides an insight into the ways in which a changing penal culture has seen increased attempts to directly influence the operation of the courts. Thirdly, a comparison between the degree of government intervention through bail legislation and the prevailing remand rates in specific jurisdictions provides some measure of the extent to which attempts to control or influence judicial decision-making are accepted or resisted by individual judicial officers. This provides some insight into the dynamics of penal culture as it is played between government and the judiciary. Fourthly, the combination of these factors permits a reflection on whether national trends and a national penal culture can be ascertained, at least as it is reflected in approaches to bail, or whether there is instead an atomistic jurisdiction by jurisdiction approach to imprisonment.

We have approached bail and remand through a focus on the nature and scale of legislative intervention since the 1970s to compare this with existing research on remand numbers and jurisdictional cultures. The method used has been to analyse the number of discrete Acts of Parliament that amend the existing Bail Acts and which contain provisions that either change presumptions in relation to bail or create

additional conditions to be considered before granting bail: in other words, amending legislation that can be seen to be punitive in nature.

From the late 1970s the law on bail was codified, with most jurisdictions introducing a presumption in favour of bail of varying strength. Legislative amendment since the time of introduction has overwhelmingly seen a retreat from that position, with jurisdictions increasingly limiting the discretion of courts to grant bail. As legislatures retreat from the presumption in favour of bail, they have done so by focusing either on a particular characteristic of the accused, or the type of offence with which they have been charged. While the codification of bail laws were done as a result of a thorough reflection on the role of remand in the justice system and its broader social impacts, many of the amendments since the 1970s have been political responses to horrific crimes, and have lacked any stated reference to broader impacts.

Restrictions on the availability of bail by requiring judicial examination of particular characteristics of individuals – such as flight risk, propensity for violence, lack of community ties – will inevitably be applied on a case-by-case analysis and provides for politicians little *a priori* definiteness of effect in a law and order climate. Consequently, most restrictions on bail have concentrated on more simplistic restrictions based on the type of offence charged. Initial exceptions to the presumption concentrated around the most violent of offences – armed robbery – and burglary.

Restrictions on bail eligibility can be seen to mirror broader penal concerns about danger and risk associated with particular types of offenders and crimes. Beyond armed offences, one of the first categories of crime to have presumptions against bail created were drug offences, and since the 1980s the availability of bail for those accused of these crimes has been increasingly tightened – on five separate occasions in NSW. A similar progressive tightening of bail for those accused of domestic violence offences has occurred since the later 1980s. Western Australia and NSW have also been at the forefront of removing bail eligibility for those accused of being repeat offenders. These restrictions on bail provide for simple, strong political statements about “locking up” “offenders” but have the potential to incarcerate large

groups of accused without proper analysis of whether such deprivation of liberty achieves any justifiable social ends.

As noted, across Australia the degree of legislative intervention into judicial discretion has varied markedly. NSW has been the most interventionist jurisdiction. In the period 1992-2008, NSW passed no less than 23 amending pieces of legislation containing punitive elements. This was completely out of step with other Australian jurisdictions: the ACT (9); Western Australia and Northern Territory (7); Victoria (6); South Australia (4); Queensland (3); and Tasmania (1). This raw statistic alone suggests that NSW may well be an example of penal exceptionalism within Australia.

One might therefore expect NSW to have the highest rate of remand per 100,000 adult population, and South Australia one of the lowest. However the figures show that while all remand rates show a strong trend upward since the 1970s, South Australia's rate remains consistently higher (43.5 in 2004) than the national average (20 in 2004), while Victoria has consistently the lowest rate (15.9 in 2004) (Sarre et al, 2006, citing ABS data). There are differences in the basis on which eligibility for bail is determined between these jurisdictions, but not differences that would produce this widely divergent result.

Research by Bamford et al (1999) has demonstrated that the key to the higher remand rate in South Australia lies in the less transparent procedures and more punitive attitudes of police and bail granting authorities in South Australia. This suggests that parliamentary intervention is relatively ineffective in reducing imprisonment rates, if the courts do not share that goal.

On the other hand the degree of intervention by NSW appears to parallel significant rises in the NSW remand population (Lulham and Fitzgerald, 2008). This is perhaps unsurprising in that as parliaments remove a court's discretion to release an accused on bail, remand rates would be expected to rise. Such an outcome does however require a predisposition to oppose discretionary bail by law enforcement, and suggests that police in NSW are supportive of the parliamentary intention to restrict bail eligibility. It also suggests that while parliaments might well be able to directly

increase rates of incarceration, their overall ability to influence the practices of police and courts may be more limited.

Indefinite detention and the expansion of post-sentence supervision & detention

Provisions for the indefinite detention of serious offenders are a long standing feature of Australian criminal justice systems, most notably evidenced in the sentence of life imprisonment. The idea of imprisoning people indefinitely by means other than a life sentence, however, has risen and fallen in favour over time. At the turn of the 20th century all Australian states adopted indeterminate sentencing laws modelled upon the *Habitual Criminals Act 1905* (NSW). Around mid-century anxieties about the psychopathic offender became prominent and were reflected in the emergence of defective offender statutes and revisions to habitual offender legislation, traces of which remain today such as in Queensland's *Criminal Law Amendment Act 1945* and NSW's *Habitual Criminals Act 1957*. Yet by the 1980s most of these had fallen into disuse or irrelevance. As early as 1968 Victoria's Director of Prisons was able to describe the state's indefinite detention provisions as a dead letter, with only one offender having been sentenced under s 537 of the *Crimes Act 1958* (Vic) in the whole preceding decade (Daunton-Fear, 1969).

Yet within quite a short time the idea of indefinite detention reappeared. This began in the context of concerns about the threat posed by violent offenders (mirroring contemporaneous debates in the UK: Floud and Young, 1981; Gunn and Farrington, 1982). It took form in ad hominem legislation directed at specific violent individuals in Victoria (Garry David in 1990) and NSW (Gregory Kable in 1994), with each case reflecting the politically charged status of violent offenders at that time (for a discussion see Gerull and Lucas, 1993). This period also saw a progressive re-introduction and shoring up of indefinite sentencing options across Australian states and territories. Nevertheless, it was still possible in 2000 for Arie Freiberg, a long-time observer on sentencing matters, to remark that the history of indefinite detention laws in Australia showed them to be 'almost completely irrelevant to the control of criminal individuals or populations' (Freiberg, 2000: 58). Such was Freiberg's faith in judicial distaste for such laws he felt able to proffer the view that despite the recognised 'failures' and 'inadequacies' of the criminal justice system, Australian

‘judges ... were not prepared to countenance legislative alternatives which were regarded by them as being more dangerous than the dangerous they sought to govern.’ (2000: 58). One question we have asked in the Australian Prisons Project is whether or not that conclusion is still valid. To answer this question we need to break it into two parts. First, has indefinite detention continued to be a minor feature of the Australian penal landscape, albeit in ways that mirror established state and territory jurisdictional differences in approach to punishment (such as those reflected in remand practices)? And second, has the judicial resistance to preventive and predictive confinement, so noted by Freiberg and instantiated in the High Court’s decision in the case of *Kable*, been maintained? The answer to the first question in fact is relatively straightforward. The use of indefinite sentences does indeed mirror existing jurisdictional differences in punishment. New South Wales, Queensland and Western Australia, for example, all embrace in a comparatively strong way forms of preventive confinement achieved through the sentencing process while Victoria, despite being a large state with indefinite sentencing provisions on its books since 1993, makes very little use this tool. Overall, rates of sentenced preventive detention fell during the 1990s and have remained stable since then. So it is to the second question that we now turn.

Post-sentence preventive confinement

It is in the area of post-sentence preventive confinement that the greatest change and expansion in prison use for indefinite, preventive purposes has occurred. The development of Australian post-sentence supervision and detention schemes is now fairly well documented and critiqued (eg., Doyle and Ogloff, 2009; McSherry and Keyzer, 2009). These schemes provide for the continued detention, or intensive community supervision, of sex offenders who would otherwise be released at completion of a finite sentence of imprisonment. Five Australian states now have such provisions, beginning with Queensland in 2003, then South Australia in 2005, NSW and Western Australia in 2006 and finally Victoria, which since 2005 had had an extended supervision regime, in 2010. While supervision under these schemes might appear *prima facie* a lighter penalty, the Victorian experience indicates otherwise. Supervision in the community often proves impossible, leading to individuals being housed within a prison, or in prison-like circumstances, in a manner that the Victorian

Supreme Court described as making citizens ‘a prisoner in all but name’ (*TSL v Secretary to the Department of Justice*, 2006). Data on the uptake of this new penal option has also been rather more difficult to obtain than might be expected, given the overtly populist impulse that appears to lie behind the new measures. Table 1 shows the number of Australian citizens held under preventive, post-sentence, detention or supervision arrangements in the five states where such measures are available.

Table 1. Post-Sentence Detention and Supervision in Australia¹

	NSW ²	Vic ³	Qld ⁴	SA ⁵	WA ⁶	Aust
Applications made to date	44	-	94	38	29	165
Applications granted	28	45	81	10	27	191
Supervision: No. currently serving	27	26	46	n/a	10	109
Detention: No. currently serving	2	n/a	31	10	14	57

1. Source: Individual jurisdictions

2. At September 2009.

3. At mid-year 2009. Detention not available until January 2010. Application data not released. Detention facilities are provided at Ararat Prison for up to 40 people on supervision orders who cannot be placed in the community.

4. At October 2009. Number serving detention orders comprises 19 ordered to indefinite detention plus 12 detained following breach of community supervision conditions.

5. At September 2010. A further three applications are pending.

6. At June 2010. Number serving is reduced by 2 individuals deceased. Two further applications, pending resolution have resulted in 1 interim continuing detention order and 1 no-order, so true total is 31 applications. Three applications were dismissed, but one dismissal overturned on appeal. One supervision order expired and no application for renewal.

The expansion of this new form of penal confinement has been quite rapid. For instance, between 1992 and 2009 the Queensland courts handed down 36 indefinite

sentences, or roughly two per year. Yet between 2003 and 2009, as Table 1 indicates, those courts granted 81 post-sentence supervision or detention orders. In October 2009 31 sex offenders were under an order of post-sentence indefinite detention, either directly or through breach of supervision conditions, equating to roughly four and half indefinite detention orders per year: more than double the rate at which similar sentences were handed down for all types of offending. It must also be noted that Table 1 provides raw figures, not accounting for total eligible population. Thus, while NSW and WA are almost equivalent in the number of applications granted, NSW has a general population three and a half times greater than WA.

We are thus left with a complex picture of indefinite detention in modern Australian imprisonment. While the use of indefinite sentences declined during the 1990s and has remained fairly stable since, new post-sentence detention schemes offer a potentially more expansive role for penal confinement. How such schemes alter imprisonment practices is something we are only just beginning to discern. But the growth of these measures does point to one more feature in a changing cultural landscape of imprisonment, wherein the prison is increasingly imagined as a viable solution to unsavoury and disagreeable characters as well as to criminal offending itself.

Effect of terrorism: 'supermax', 'radicalisation' and 'policy transfer'

One significant development in the international political landscape over the last decade, heightened by the September 11 2001 terrorist attacks in the USA, has been the way the spectre of terrorism, the technologies of risk and the politics of fear they engender, have generated an increasing emphasis on issues of 'national security'. Fear of terrorism has been the justification for a range of security based measures, practices and discourses, including a raft of anti-terrorist legislation creating new criminal offences, extensions of police powers, and the use of preventive detention. Domestic criminal justice processes have been subject to a politicisation, manifest in overreaching claims of executive sovereignty, lack of respect for the separation of powers, political trumping of judicial decisions and the use of the criminal process, the courts and the correctional system as 'a form of political theatre.' (Brown, 2009:

63) In the penal sphere the terrorism debate and the imprisonment of a number of people charged with, and in some cases convicted of terrorist related offences, has generated three key developments.

First it has given prominence and legitimacy to the relatively new figure of the 'supermax' prison. 'Supermax' refers most commonly to a high security unit within an existing prison to which those both remanded for trial and convicted of terrorist related offences, along with a diverse range of other high security classification prisoners, are sent, such as Goulburn High Risk Management Unit (HRMU) in NSW and Melaleuca and Acacia units at Barwon prison in Victoria. Second it has generated concerns about 'radicalisation', fears that prisons may become terrorist incubators as terrorist sympathisers in prison recruit other prisoners to the cause. Third it is seen as a stimulus for a globalising tendency in penal regimes through which a range of security measures and regime developments are 'imported' in the process of an (often US inspired) policy transfer.

Investigation of these issues as part of the Australian Prison Project has thrown up a number of difficulties and highlighted the central role of culture and the pertinence of local history in determining the way these developments unfold in the Australian context. In relation to 'supermax' for example, there is a real question as to whether this is simply a vague, catchy, cultural, media and political label for an institution in Australia that has a history going back to colonisation, when places and regimes of 'secondary punishment' were a key component of convict society; 'secondary' because most of those suffering these regimes were 'doubly convicted', transported for an offence in Britain and then convicted of another offence in the colony. Then, as now in 'supermax', the consequences of prolonged isolation were frequently mental disintegration, self harm, suicide and violence (Davis, 1996; Haney and Lynch, 1997).

Post colonisation, most State and Territory penal systems contained specific prison units, wings, or whole prisons, designated as high security, punishment and 'trac' regimes, frequently exhibiting an historical 'progression' from overt physical brutality, such as is well documented in relation to Grafton in NSW (Nagle, 1978; Zdenkowski and Brown, 1982) and Pentridge H Block in Victoria (Jenkinson, 1973-74; Edney, 2006), through to isolation based sensory deprivation regimes such as

those at Katingal and the Goulburn HRMU in NSW (Funnell, 2006) and Jika Jika and Barwon in Victoria (Carlton, 2008). These units were sites of state terror, exercised largely in secret, no longer aimed at shoring up either convict labour or wider class relations, but justified as necessary to keep a minority of ‘intractables’ or the ‘worst of the worst’ under control, and to provide a deterrent to resistance in the wider prison system. To what extent then is ‘supermax’ something ‘new’, an example of US policy transfer, and to what extent is it merely a ‘rebadging’ of long established secondary punishment traditions and institutions?

Regime change by policy transfer?

It has proved difficult to obtain information detailing specific technological, design, hardware, practices, programs or regimes which can be shown to be recent imports into Australian high security units directly from the US by way of policy transfer, apart from the label supermax itself. The use of orange jump suits for certain high security prisoners, the adoption of particular shackles, new classifications of prisoners, increased electronic and other surveillance, may have been influenced by US developments, although some of these may have happened anyway; some, such as the shackles, have long local pedigrees (Derkley, 1995).

Risks associated with terrorism may be influencing the design of new prisons, even in relation to local prisons conceived and marketed as medium security ‘community prisons’ (Kempsey in NSW for example). Such prisons are strengthened against *external* attack as well as internal revolts, hostage taking and escapes, and the capacity to seal off sections of prisons are enhanced. New classifications have been introduced in several States; in NSW for example an AA (men) and Category 5 (women) classification was introduced in the *Crimes (Administration of Sentences) Regulation* 2001.

Longstanding techniques such as strip searching have become more frequent and intrusive, but not just in high security sections, (McCulloch and George, 2008) and urine testing has been stepped up. DNA samples may be taken by force if prisoners are not compliant. There has been a significant upgrading of high tech security devices across Australian prisons, including forms of biometric identification of visitors. Tighter restrictions are evident on access to communications, visitors,

reading matter and there is increased concern about mobile phones and religious practices.

Further research is necessary to discover the extent to which there are links between these developments and US 'supermax' practices or the new 'war prisons' (Butler, 2004) such as Guantanamo Bay. Probably the clearest example of 'national security' and 'terrorism' concerns impacting on high security prison regimes in Australia is the strengthening of liaison between prison management and police, military, security and intelligence agencies, especially in relation to concerns over 'radicalisation' in prison. There has been some sensationalist media coverage of the issue of 'conversions' of prisoners to Islam and potentially to terrorist sympathies (Australian Federal Police, 2006), reflected in stories like 'Hard Men Turn to Islam to Cope With Jail, Goulburn's super mosque', (*Sydney Morning Herald*, Nov 19 2005).

While the numbers of prisoners charged with or convicted of terrorism related offences in Australia is currently small, the significance of the terrorism and national security debate on penal practices and cultures is potentially greater. The vaguely defined but highly politicised and media hyped figure of the supermax, despite its links with colonial histories of secondary punishment and 20th century high security units, which were much more widespread, provides an apparently 'new' justification for a range of 'security' practices. The figure of the 'terrorist' as an alien radicaliser and enemy can serve to reconfigure older classifications such as the 'intractable' and 'worst of the worst', to obscure increasingly restrictive and isolating practices in high security regimes, and to hinder the opening up of such regimes to democratic scrutiny, accountability and the treatment of their inhabitants as political subjects exercising discursive citizenship (Brown, 2008).

Conclusion

The Australian penal landscape has changed significantly over the last three or four decades, the period that forms the focus of the Australian Prisons Project. Much of what has changed we have been unable to touch upon here, such as the nature, location and quality of prison buildings, the daily regimes of prison time or the

provision of work, rehabilitation or post-release programs for prisoners. What we have attempted to set out in this article has been a broader picture, mainly the relentless expansion, over these decades of the penal estate, the penal complex, the imprisonment machine. More people are in prison, both in number and per capita, than might have been imaginable in 1970. When in 1968 the Victorian Director of Prisons declared the state's indefinite sentencing legislation a dead letter, he possibly could not have imagined the vigour with which post-sentence, predictively based, continuing detention schemes would be taken up just over 30 years later. Yet as our discussion of the ever expanding rates of penal confinement of Indigenous Australians and the development of 'supermax' style secondary-punishment units have indicated, many current developments in Australian punishment have complex origins. The sources of such policies might be found at one level in contemporaneous debates on public protection, security, or the intransigence of certain types of crime. But much of what we find in contemporary Australian penal practice also has distinct lineages and connections with earlier attitudes and practices. We have been working with the idea of penal culture as a way of capturing the polyvalent quality described here, where new developments are at once immediately contemporary yet, upon closer reflection, also clearly continuous with earlier patterns of thought and forms of social organization and practice.

But the Australian Prisons Project has also found evidence of changing rationalities of imprisonment in Australia. At least in some sectors of public life, over-imprisonment is increasingly being defined as a problem that needs to be addressed. The ideas of 'justice re-investment' and 'penal moderation' are two rationalities that argue for a reduction in the use of imprisonment. Much of this argument is based on an economic model of increased *efficiency* in the use of public resources. Justice reinvestment is an emerging approach to over-imprisonment that calculates public expenditure on imprisonment in localities with a high concentration of offenders and diverts a proportion of the expenditure back into those communities to fund initiatives to reduce rates of offending (Pew Centre, 2007). The idea is that under justice reinvestment the channelling funds away from communities into prisons is reversed; money that would have been spent on housing prisoners is diverted into programs and services that can address the underlying causes of crime in these communities. In January 2010, the UK House of Commons Justice Committee (2010) recommended

that prison numbers be cut by a third through the utilisation of justice reinvestment. In Australia recent federal government inquiry reports (Legal and Constitutional Affairs Committee, 2009), human rights reports (Aboriginal and Torres Strait Islander Social Justice Commissioner, 2010) and political party policies (Australian Greens, 2010) have called for an introduction of justice reinvestment strategies. We have yet to see whether a changing rationality of punishment based partly in economic efficiency and partly in appeals to community development will change the cultural place of the prison in the Australia.

Finally, it has been a central aim of this project to view and think about imprisonment in Australia at a national level. Given the sorts of findings reported here, to what extent has this been a productive approach? Can we usefully talk about an Australian penal culture in the face of significant variations in prison rates and practices amongst the states and territories? And as we utilise the analytic concept of culture across the penal field in Australia – perhaps thinking, for example, of bail legislation and trends in custodial remand – can we legitimately say the culture analytic amounts to more than a hold-all category through which distinct state-wise variations of approach and practice are re-described? On the other hand can some of the directions we discuss, such as Indigenous imprisonment, be best understood using a national lens. Certainly these questions of analytic scope and power are not unique to penal culture itself. As the reviews of Loic Wacquant's (2009) *Punishing the Poor* by David Brown and by John Pratt elsewhere in this issue illustrate, it remains unclear whether the idea of a neoliberal penalty can contain the many variations in discourse and practice to be found across western polities. One important outcome of the Australian Prisons Project will be a better sense of the extent to which both the modernist notion of the nation state – of a coherent and integrated Australia – and the analytic device of penal culture together provide useful insights into the trends and crosscurrents of penalty in our society.

Cases

Kable v Director of Public Prosecutions (NSW) [1996] 189 CLR 51.

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

TSL v Secretary to the Department of Justice [2006] VSCA 199.

References

Aboriginal and Torres Strait Islander Social Justice Commissioner (2010) *Social Justice Report 2009*. Sydney: Australian Human Rights Commission.

Aderibigbe Y (1996) Deinstitutionalisation and Criminalization: tinkering in the interstices. *Forensic Science International* 85: 127-134.

Australian Bureau of Statistics (2006) *Prisoners in Australia 2005*. Canberra: Australian Bureau of Statistics.

Australian Bureau of Statistics (2008) *Prisoners in Australia 2007*. Canberra: Australian Bureau of Statistics.

Australian Bureau of Statistics (2010) *Prisoners in Australia 2009*. Canberra: Australian Bureau of Statistics.

Australian Federal Police (July 2006) *National media release: seminar to address radicalisation in prisons*. Canberra: Australian Federal Police Media.

Australian Greens (5 August 2010) *Justice reinvestment for Australia policy initiative: Access to justice a right for all Australians*.

<http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/ygqx60.pdf>.

Baldry E, Dowse L, Snoyman P, Clarence M and Webster I (2008) A critical perspective on Mental Health Disorders and Cognitive Disability in the Criminal

Justice System. In: Cunneen C, Salter M (eds) *Proceedings of the 2008 Critical Criminology Conference*. Sydney: UNSW, 30-45.

Bamford D, King S and Sarre R (1999) Factors affecting remand in custody. *Research and Public Policy Series 23*. Canberra: Australian Institute of Criminology.

Biles D (1984) An Australian Perspective – Women in Corrections. In: Hatty S (ed) *Women in the Prison System, Seminar Proceedings No. 3* Canberra: Australian Institute of Criminology.

Biles D (1990) *Remand Imprisonment in Australia* Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice No.27

Brown D (2008) The Effect of Terrorism and Terrorist Trials on Australian Prison Regimes. *Proceedings of the 2nd Australian and New Zealand Critical Criminology Conference*. Available at: <http://www.cjrn.unsw.edu.au/critcrimproceedings2008>.

Brown D, Wilkie M (2002) *Prisoners and Citizens: Human Rights in Australian Prisons*. Annandale: Federation Press.

Brown M (2009) *The culture of punishment*, New York University Press, New York.

Butler J (2004) *Precarious Life: The Powers of Mourning and Violence*. London: Verso.

Butler T, Andrews G and Allnut S (2006) Mental disorders in Australian prisoners: a comparison with a community sample. *Australian & New Zealand Journal of Psychiatry* 40: 272-276.

Carcach C, Grant A (1999) Imprisonment in Australia: Trends in Prison Populations & Imprisonment Rates 1982-1998. *Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice* 130: 3.

Carcach C, Grant A and Conroy R (1999) Australian Corrections: The imprisonment of Indigenous people. *Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice* 137: 2.

Carlton B (2008) Entombing Resistance: Institutional Power and polarisation in the Jika Jika High-Security Unit. In: Scraton P, McCulloch J (eds) *The Violence of Incarceration*. New York, Oxford: Routledge, 37-59.

Cunneen C. (1993) 'Judicial Racism' in McKillop, S. (ed) *Aboriginal Justice Issues*, Australian Institute of Criminology, Conference Proceedings No 21, Canberra, pp117-134.

Cunneen C (2009) Criminology, criminal justice and Indigenous people: a dysfunctional relationship? *Current Issues in Criminal Justice* 20(3): 323-336.

Daunton-Fear M (1969) Habitual criminals and the indefinite sentence. *The Adelaide Law Review* 3: 335-59.

Davis R (1996) Freedom or unfreedom at Moreton Bay: the structures and relations of secondary punishment. In: Dyster B (ed) *Beyond Convict Workers*. Sydney: Department of Economic History UNSW, 64-82.

Derkley K (1995) Leg-irons: return to the 19th Century? *Law Institute Journal* 69(8): 751.

Doessel D P (2009) "A historical perspective on mental health services in Australia: 1883-84 to 2003-04.," *Australian Economic History Review* 49, no. 2 (July 2009): 173-197

Dowse L, Baldry E and Snoyman P (2009) Disabling criminology: conceptualizing the intersections of critical disability studies and critical criminology for people with mental health and cognitive disabilities in the criminal justice system. *Australian Journal of Human Rights* 15(1): 29-46.

Doyle D, Ogloff J (2009) Calling the tune without the music: A psycho-legal analysis of Australia's post-sentence legislation. *Australian and New Zealand Journal of Criminology* 42(2) 179-203.

Edney R (2006) Contested Narratives of Penal Knowledge: H Division Pentridge Prison and the Histories of Imprisonment. *Current Issues in Criminal Justice* 17(3): 362-279.

Elias, N. (1984) *The Civilising Process*, Oxford: Blackwell.

Feeley M, Simon J (1992) The new penology. *Criminology* 39: 449-74.

Fitzgerald J (2009) Why are Indigenous Imprisonment Rates Rising? *Issue Paper* 41. Sydney: NSW Bureau of Crime Statistics and Research.

Floud J, Young W (1981) *Dangerousness and Criminal Justice*. London: Heinemann.

Freiberg A (2000) Guerrillas in our midst? Judicial responses to governing the dangerous. In: Brown M, Pratt J (eds) *Dangerous Offenders: Punishment and Social Control*. London: Routledge, 51-69.

Funnell N (2006) Where the norm is not the norm: The Department of Corrective Services and the Harm-U. *Alternative Law Journal* 31(2): 70-74.

Garland D (1991) *Punishment and Modern Society - a Study in Social Theory*. Oxford: Clarendon.

Garland D (2001) *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.

Garland D (2006) 'Concepts of Culture in the Sociology of Punishment' *Theoretical Criminology*, vol 10, No 4 , pp. 419-448

Gerull S A, Lucas W (eds) (1993) *Serious Violent Offenders: Sentencing, Psychiatry and Law Reform*. Canberra: Australian Institute of Criminology.

Gottschalk M (2008) Hiding in plain sight: American politics and the carceral state. *Annual Review of Political Science* 11: 235-260.

Gunn J, Farrington D (eds) (1982) *Abnormal Offenders, Delinquency and the Criminal Justice System*. Chichester: John Wiley.

Haney C, Lynch M (1997) Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement. *New York University Review of Law and Social Change* 23(4): 477-570.

Harcourt B (2006) From the Asylum to the Prison: Rethinking the Incarceration Revolution. *Texas Law Review* 84(7):1752-1786.

House of Commons Justice Committee (2010) *Cutting Crime: the case for justice reinvestment*, House of Commons Justice Committee Paper No 1, Session 2009-10.

Jenkinson K (1973-1974) *Report of the Board of Inquiry into Allegations of Brutality and Ill Treatment at H.M. Prison Pentridge*. Melbourne: Government Printer.

Lacey N (2008) *The Prisoner's Dilemma*. Cambridge: Cambridge University Press.

Legal and Constitutional Affairs Committee, Parliament of Australia (2009) *Access to Justice*. Canberra: Department of the Senate, Parliament House.

Lulham R, Fitzgerald J. (2008) *Trends in bail and sentencing outcomes in New South Wales Criminal Courts: 1993-2007* NSW Bureau of Crime Statistics and Research Contemporary Issues in Crime and Justice Number 124

McCulloch J, George A (2008) Naked power: Strip searching in women's prisons. In: Scraton P, McCulloch J (eds) *The Violence of Incarceration*. New York, Oxford: Routledge, 107-123.

McSherry B, Keyzer P (2009) *Sex Offenders and Preventive Detention: Politics, Policy and Practice*. Annandale, NSW: The Federation Press.

Marchetti E, Daly K (2007) Indigenous sentencing courts: Towards a theoretical and jurisprudential model. *Sydney Law Review* 29: 416-443.

Nagle J (1978) *Report of the Royal Commission into NSW Prisons*. Sydney: NSW Government Printer.

NSW Legislative Council Inquiry into the Increase in Prisoner Population (2001) *Inquiry into the Increase in NSW Prisoner Population Final Report*. Sydney: NSW Parliament.

Pew Centre (2007) *Public Safety, Public Spending: Forecasting America's Prison Population 2007-2011*. Washington, DC: Pew Centre on the States.

Pratt, J. (2002) *Punishment and Civilization*, London: Sage.

Pratt J, Brown D, Brown M, Hallsworth S and Morrison W (2005) *The New Punitiveness: Trends, Theories, Perspectives*. Devon: Willan.

Rose S, Burdekin B and Jenkin R (1993) *Human rights & mental illness: report of the National Inquiry into the Human Rights of People with Mental Illness*. Sydney: Human Rights and Equal Opportunities Commission.

Sarre R, King S, and Bamford D. (2006) *Remand in custody: critical factors and key issues* Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice No. 310

Social Research (2007) Punishment: The U.S. Record. *Social Research: An International Quarterly of the Social Sciences* 74(2 – whole issue).

Wacquant L (2009) *Punishing the Poor: The Neoliberal Government of Social Insecurity*. Durham and London: Duke University Press.

Walker J (1982-1990) *Australian Prisoners*. Canberra: Australian Institute of Criminology.

White P, Whiteford H (2006) Prisons: mental health institutions of the 21st century? *Medical Journal of Australia* 185(6): 302-303.

Wundersitz J (2010) *Indigenous perpetrators of violence: prevalence and risk factors for offending*. Canberra: Australian Institute of Criminology.

Zdenkowski G, Brown D (1982) *The Prison Struggle: Changing Australia's Penal System*. Ringwood, Vic: Penguin.