

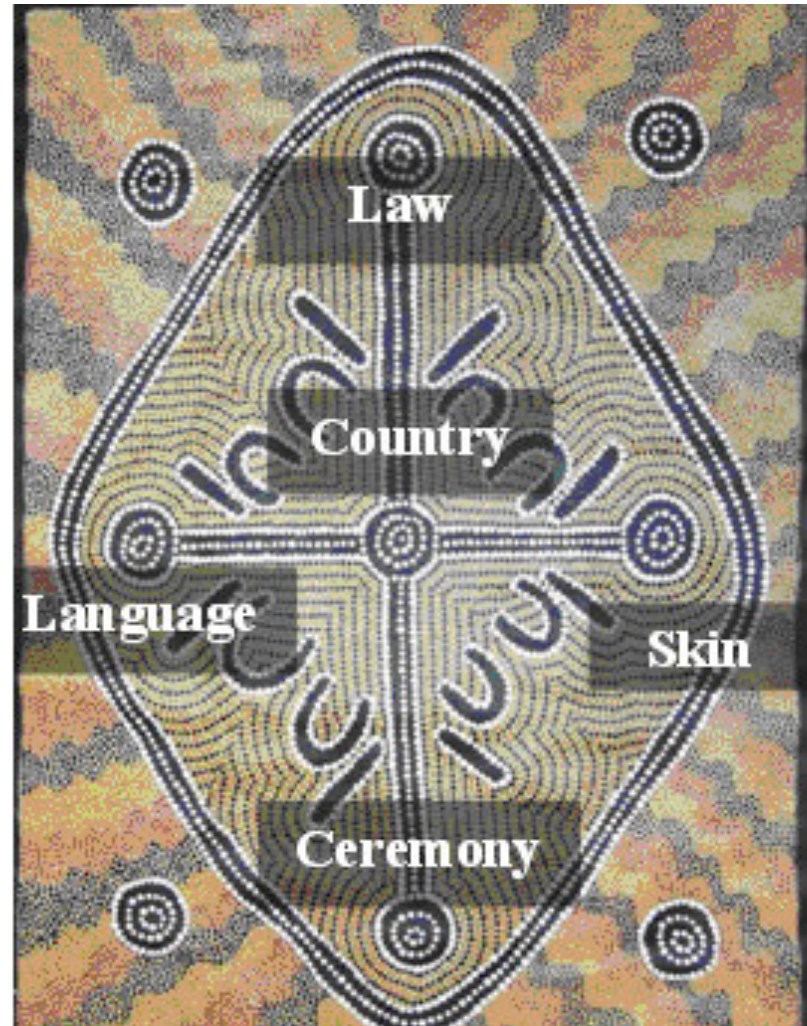
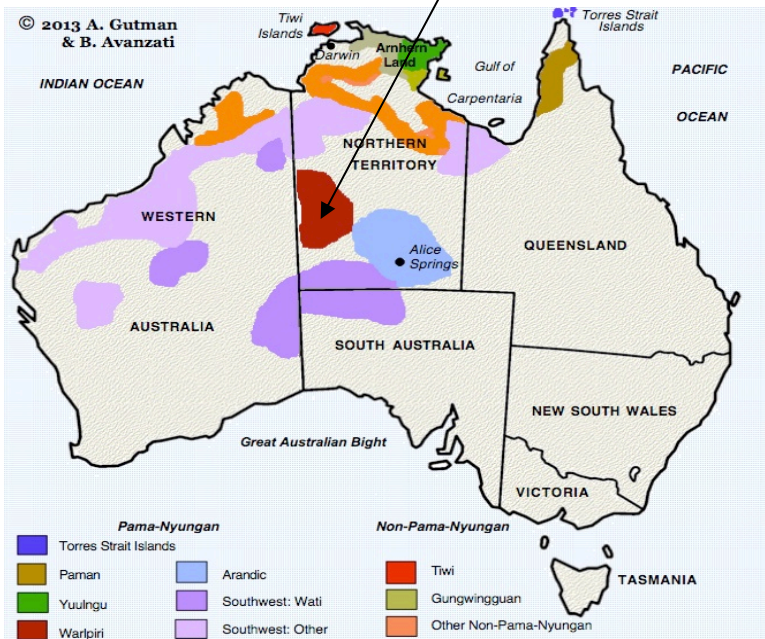


COLONIAL JURISDICTION, INDIGENOUS SOVEREIGNTY & LEGAL HYBRIDITY

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Warlpiri *ngurra-kurlu*



Source acknowledgment: Miles Holmes and Wanta (Stephen Patrick) Jampijinpa
<https://www.ecologyandsociety.org/vol18/iss3/art19/>
(Figure 2)

JURIDIFICATION OF COLONIAL AUTHORITY

R v Murrell (NSW SC, 1836) per Burton J

- Aboriginal people are not law-bearing people: they have superstitions not laws
- Thus legally, Australia was unoccupied when the Crown claimed first title: *terra nullius*
- The Supreme Court does not recognise Aboriginal jurisdiction; only recognises the British rule of law
- Aboriginal people are subject to the universal Anglo-Australian law: they are 'equal' to settlers under the law, with the same rights & obligations₃

EMBERS OF RECOGNITION

Milirrpum v Nabalco & Cth (1971) FLR 141

- Yolŋu people have an “elaborate system of laws” constituting a “government of laws and not of men”

Mabo v Qld (No 2) (1992) 107 ALR 1

- British Crown did *not* acquire exclusive legal possession of all Australian land in 1788
- Aboriginal & Torres Strait Islander peoples continue to have rights to land consistent with their laws
- *Terra nullius* is a fiction.

POST-MABO CHALLENGE TO CRIMINAL JURISDICTION

Walker v NSW (1994) 16 ALR 321

- NSW legislature has power to make laws NSW, including over Aboriginal people.
- Criminal statutes apply to Aboriginal people due to principle of equality before the law.
- No analogy between Indigenous criminal sanctions and native title; no coexistence
- Even if recognition of “customary law”, Crown has extinguished it.

NO RIGHT TO BE TRIED BY INDIGENOUS JURORS

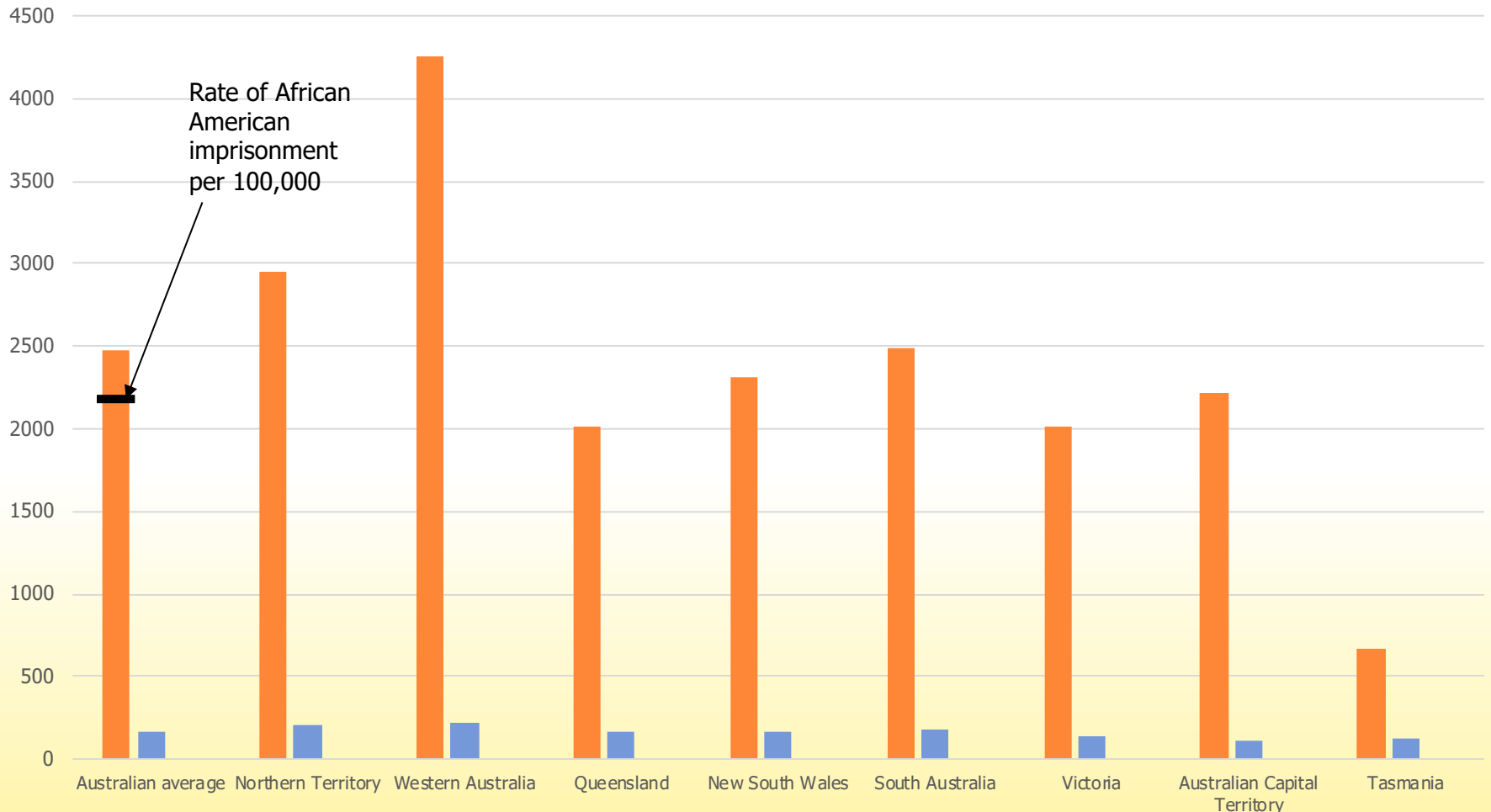
- ***Binge v Bennett* (1988) 13 NSWLR 578**
- ***R v Buzzacott* (2004) 149 A Crim R 320**
- *No special rights to trial by Indigenous peers > Indigenous people are equal before the law thus subject to the same jury selection and criminal laws*

BAIL AND SENTENCING

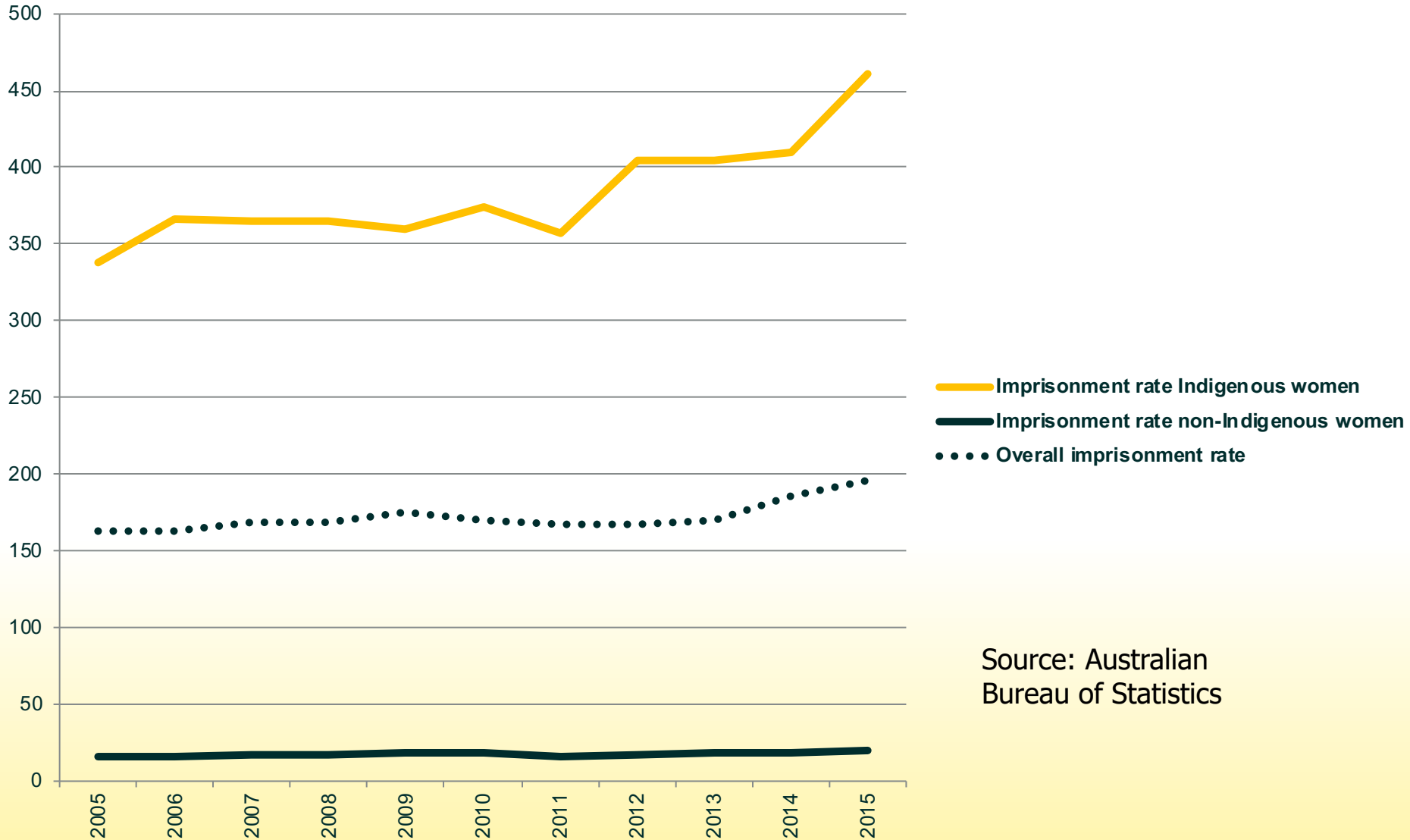
- ***Re Application by Anthony* [2004] NTSC 5:** “It is not permissible for a court to structure orders with a view to facilitating the unlawful infliction of traditional punishment.”
- ***Bugmy* (2013) HCA 37:** “An Aboriginal offender’s deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence.”

AUSTRALIA'S INDIGENOUS PEOPLE ARE MOST INCARCERATED IN THE WORLD

Indigenous to non-Indigenous Imprisonment per 100,000: 2018



INCREASED IMPRISONMENT OF INDIGENOUS WOMEN CF NON-INDIGENOUS WOMEN PER 100,000



Source: Australian Bureau of Statistics

DETAINING INDIGENOUS PEOPLE IS NOT NEW: COLONIAL CARCERALISM

1. **Palliative carceralism** – soothing “dying pillow” on missions & government settlements (18th C onwards), coalescing with **enforced displacement & sedentation** around ration depots
2. **Protective carceralism** – controlling lives on Aboriginal protectorates (missions, settlements, homesteads, cattle stations) (from late 19th C)
3. **Welfare carceralism** – assimilation through welfare institutions and homes (from mid-20th C)
4. **Penal carceralism** – prisons, youth detention and police lock-up (late 20th C)

CONTEMPORARY CRIMINALISATION

- High levels of policing Indigenous people on streets, especially in regional and remote towns
- Indigenous people face greater levels of criminalisation at each stage: police contact, arrest, prosecution, bail refusal, sentencing to prison, parole refusal
- Notable over-representation for public order offences, traffic offences, justice breaches & property offences

INDIGENOUS YOUTH

- Increasing Indigenous youth in detention at younger ages
 - Greater profiling & policing, remand & custodial sentences since 1990s
 - Torture in Northern Territory detention
 - Hooding
 - Shackling
 - Forced stripping
 - Freezing and sleep deprivation
 - Chemical gassing

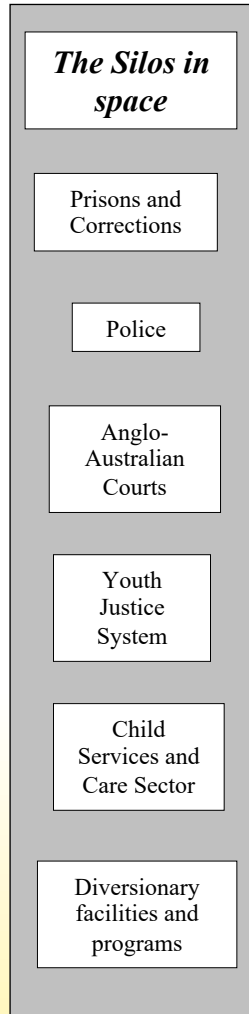
DEATHS IN CUSTODY

Royal Commission into Aboriginal Deaths in Custody
1991 > deaths have increased following commission

No successful criminal prosecutions for an Aboriginal death in custody in Australian history.



Colonial Criminal Domain



The Hybrid Domain

Inter-cultural/law examples:

- Night Patrols
- Community Courts and circle sentencing
- Aboriginal Community Justice Reports
- Aboriginal legal services
- Law and Justice Groups and Plans (e.g. Kurdiji)
- Aboriginal Justice Agreements

Aboriginal Domain

On-place, place-centred and holistic

Law

Country

Elders

Ceremony

Land

Language

- Caring for Country
- Cultural Authority & Governance
- Cultural Health, Security and Wellbeing

HEALING & DECOLONISATION

- **Healing** includes repairing the harms created by prisons for inmates & families and decolonising social structures
- **Decolonisation** replaces cycles of incarceration, dispossession & discrimination with cycles of wellbeing, self-determination and healing
- **No prisons** in Indigenous societies > arguments for prison abolition (Māori scholar Moana Jackson)

INDIGENOUS-OWNED JUSTICE & WELLBEING INITIATIVES

- **Aboriginal women's centres:** e.g. Waminda, (south coast NSW) & Mudgin-gal (Redfern, Sydney)
- **Youth programs:** Aboriginal Girls Circle project (Dubbo); Clean Slate Without Prejudice (Redfern)
- Yuendumu Women's **Night Patrols**
- **Community Justice Groups** (Qld) and **Law & Justice Groups** (NT) > place-centred interventions, strength-based & law-claiming