

# **Colonialism and Criminal Justice for Indigenous Peoples in Australia, Canada, New Zealand and the United States of America.**

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## *Abstract*

Colonial processes impact the involvement of Indigenous Peoples in criminal justice. Despite differences, there is a distinctive pattern that can be seen in the criminal justice systems of the above-given four countries. Indigenous People are over-represented as offenders and victims. This overrepresentation has been caused by colonial processes marginalizing Indigenous Peoples. These processes include depopulation, legal control, the use of ideology through religion, education, media, urbanization, and paternalism. Governments have avoided addressing marginalization by focusing on the indigenization of criminal justice services. Dominant governments must take into account historical processes when developing policies and making decisions about Indigenous Peoples, or their efforts to end over-representation will be doomed to continuing failure.

## *Introduction*

The four countries that will be discussed in this study are Australia, Canada,

New Zealand, and the United States. In each of these countries, Indigenous Peoples are overrepresented in the criminal justice system as offenders. The Indigenous Peoples of these countries were subjected to invasion by “settlers” from European countries during the colonial period from roughly 1492 to today. The objective of these settlers was primarily to remove the rich resources of these countries to Europe to enrich the reigning powers. In order to attain these resources, many tactics were used to remove them from their “rightful owners,” (a European concept), the Indigenous Peoples of the lands. The processes employed were remarkably similar in each country and produced remarkably similar results—the socioeconomic and political marginalization of the Indigenous Peoples of these countries. One of the most damaging aspects of marginalization, for individuals and communities, is criminal justice involvement.<sup>1</sup> Even though the Indigenous Peoples of these four countries have distinct cultures, histories, economies, and legal and political relations with the dominant Euro-based society, they share the similarity of colonialism. Colonialism refers to the expansion of European powers into non-European lands by conquest. According to German scholar Jurgen Osterhammel, it is “a relationship of domination between an indigenous ... majority and a minority of foreign invaders. The fundamental decisions affecting the lives of colonized people are made and implemented by the colonial rulers, in pursuit of interests that are often defined in a distant metropolis. Rejecting cultural compromises with the colonized population, the colonizers are convinced of their own superiority and their ordained mandate to rule.”<sup>2</sup> This process has changed more recently to one of “neo-colonialism,” a concept that refers to the continuation of economic exploitation by former colonial powers through the control of economic development<sup>3</sup> as well as the control of educational and cultural institutions.<sup>4</sup>

This study argues that criminal justice must be added to this list of neo-colonially controlled institutions because colonial processes cannot be ignored when describing the relationship between criminal justice systems and Indigenous Peoples. It is essential to recognize the historical role of these processes and, even more importantly, their continuing impacts.

### ***Over-representation of Indigenous Peoples in Criminal Justice***

While there have been some improvements since the early 1970s, based on the available statistics,<sup>5</sup> governmental and other reports, research projects, and anecdotal evidence; the Indigenous Peoples in each of the four countries are incarcerated in higher numbers than they should be based on their proportion of each country’s population. Indigenous Peoples in these countries do not have the same relationship with the criminal justice system as non-Indigenous citizens do.

*Australia*

In Australia, Aboriginal inmates comprise 20 percent of the prison population,<sup>6</sup> whereas they comprise 2.1 percent of the total population.<sup>7</sup> This is an imprisonment rate of 15 times that of the non-Aboriginal population. Their proportions are higher in many state prisons, for example, the Northern Territory has the Highest Number of Aboriginal inmates with 63.6 percent of its inmate population being Aboriginal. In Western Australia, the Aboriginal inmate population is 20 times higher than the non-Aboriginal population, and in South Australia, the Aboriginal inmate population is 16 times the number of non-Aboriginals.<sup>8</sup> Aboriginal incarceration rates have been increasing faster than those of non-Aboriginals in the last 20 years, and Aboriginal Peoples are also over-represented in police custody.<sup>9</sup> Additionally, both Aboriginal women and Aboriginal children are over-represented in the justice system.<sup>10</sup>

Aboriginal over-representation has been related to marginalization by academics and a long list of commissions and other scrutinizing bodies, such as the Royal Commission on Aboriginal Deaths in Custody (1991) and the UN Committee on the Elimination of Racial Discrimination (2000).<sup>11</sup> Services that have been established for Aboriginal Peoples around the country center on assisting Aboriginal Peoples caught up in the dominant system; very few existing programs address Aboriginal marginalization. In other words, the critique and recommendations of these scholars and reform bodies are finding their way into Australian state policy slowly, if at all.<sup>12</sup>

*Canada*

In Canada, the over-representation of Aboriginal inmates in federal prisons is worsening. Whereas Aboriginal Peoples are counted as about 2 percent of the adult Canadian population (2.8 percent of the total population), they comprised 11 percent of admissions to federal prisons in 1991-1992, 15 percent in 1996-1997, and 18 percent in 2001.<sup>13</sup> The presence of Aboriginal offenders varies greatly by province, and is closely related to the proportion of Aboriginal people in the population of each province. The highest percentage of Aboriginal offenders is found in the Northwest Territories (91 percent), followed by Saskatchewan (68 percent), and the Yukon (63 percent).<sup>14</sup>

In a brief survey, it was found that about 23 percent of female inmates in provincial or territorial correctional facilities were Aboriginal women and 20 percent of the female inmates in federal prisons were Aboriginal.<sup>15</sup> These were higher percentages than for male Aboriginal offenders who comprised 18 percent of the provincial and territorial inmates, and 14 percent of the federal inmate population in this survey.<sup>16</sup> The proportion of federal Aboriginal female inmates has increased 23 percent as of 2001.<sup>17</sup> Aboriginal young offenders are also over-represented in custody facilities.<sup>18</sup>

Scholars and government bodies alike acknowledge the relationship between marginalization and criminal justice involvement.<sup>19</sup> For example, statistician Anne Finn et al, citing the Royal Commission on Aboriginal Peoples,<sup>20</sup> states that

“economic and social deprivation is a major underlying cause of the proportionately high rates of criminality among Aboriginal people.” Similarly, according to the Correctional Service of Canada “Poverty, inadequate educational opportunities, unemployment, poor living conditions, alcohol abuse and domestic violence, all contribute to Aboriginal people coming into conflict with the law.”<sup>21</sup> In other words, current impacts of colonialism are recognized by the state in Canada, but these impacts are seldom attributed directly to specific colonial processes. There is a widespread tendency among government policy-makers not to look to the past for the colonial roots of underlying marginalization issues, but to focus more on current criminal justice issues.

### *New Zealand*

In 1997, of all sentenced and remanded inmates, 44 percent of the men were Maori and 42 percent of the females were Maori.<sup>22</sup> In 2002, of all the males sentenced to prison, 52 percent were Maori, and of all the female offenders sent to prison, 62 percent were Maori. Young Maori offenders (ages 14-17) are also over-represented in court statistics. In 2000, 56.4 percent of cases presented in court involved Maori young people.<sup>23</sup>

The number of Maori charged with criminal offenses increased six fold between 1961 and 1984, but only doubled for non-Maori.<sup>24</sup> The rate of prosecutions of Maori compared to non-Maori was much higher than for non-Maori, 69 per 1,000 for Maori, compared to 19.3 per 1,000 for non-Maori, as well as for convictions with 50.2 percent for Maori and 12.2 percent for non-Maori.<sup>25</sup>

The impacts of colonization on current Maori marginalization have been recognized by scholars, social action groups, and some government committees.<sup>26</sup> Despite studies and reports with important recommendations aimed at decolonization such as, for example, that the Department of Social Welfare should consider “incorporating the values, cultures and beliefs of the Maori people in all policies developed for the future of New Zealand,”<sup>27</sup> implementation has been met with a consistent lack of resources and “white backlash” such as the abolition of the Department of Maori Affairs and its replacement with a much smaller, policy-only body.<sup>28</sup>

### *United States*

In the United States, Native Americans comprise 1.1 percent of all adults under correctional care, custody, or control, but comprise only 0.9 percent of the total American population.<sup>29</sup> This is only a slight over-representation in comparison to the high proportion of Native Americans in some state prisons. They comprise, for example, 31 percent of the inmate population in Alaska, 25 percent in South Dakota, and 18 percent in Montana and North Dakota.<sup>30</sup> Over 4 percent of the American Indian adult population in the U.S. had been imprisoned compared to 2 percent of whites, 10 percent of Blacks, and less than 0.5 percent of Asian-Americans. Native American women are most likely to be over-represented although few statistics are available, such as in Montana where

Associate Professor of Native American studies Luana Ross found that 25 percent of the women prisoner population she studied were Native American.<sup>31</sup> Native American juveniles are also over-represented making up about 60 percent of juveniles held in Federal custody.<sup>32</sup>

American scholars recognize that marginalization is related to criminal issues and that colonialism is still having an impact on criminal justice.<sup>33</sup> Even so, there is little connection made between marginalization and colonialism by state decision-makers. Because the United States has two other minority groups, African-Americans and Latinos, who are present in much larger numbers in the criminal justice system, Native Americans have been the subject of little recent criminal justice policy, and there has been little to no action to end marginalization.

### *Colonialism and its Goals*

Marginalization is a direct result of colonialism. Well-practiced tactics were used to remove the control of Indigenous Peoples over their resources. Before colonization began, Indigenous Peoples in each country had their own social structures. The societies were self-governing. They had structures that ensured the transmission of knowledge and culture, and had effective economic systems. The societies had structures that ensured that its members learned appropriate behavior and were encouraged to conform if they strayed. These structures were damaged by a combination of several colonial processes. Presently, they are re-emerging in modified forms.

When two different races of people come together, lives are changed, sometimes for the better, but often for the worse. The Europeans' search for gold, precious metals, and fossil fuels demonstrates such a meeting with an outcome that adversely transformed the United States, Canada, New Zealand, and Australia as well as their Indigenous Peoples through social conflict that is still occurring today. That Indigenous traditional cultures and beliefs were able to survive at all through the centuries of European domination demonstrates the high degree of strength found in the sense of ethnic identity among most of the Indigenous Peoples in these four countries.

Indigenous Peoples were perceived as an exploitable group, or disposable resource, to be used as laborers to extract highly desired, extremely profitable resources. It should be noted, however, that the main resource was, and remains, Indigenous lands. Land, and land ownership, has always been the central theme in European colonial practices and politics in order to gain control of the mineral resources in and upon that land. According to Professor of Geography, James M. Blaut, "colonialism in its various forms, direct and indirect, was an immensely profitable business and considerable sums of money were invested in efforts to learn as much as possible about the people and resources of the regions to be conquered, dominated, and perhaps settled, and to learn as much as possible about the regions already conquered in order to facilitate the administration and economic exploitation of these regions."<sup>34</sup> This meant

removing the Indigenous Peoples' control, a process that continues today in each country under consideration here.

### *Colonial Processes*

Colonization is more than just a convenient economic domination of one people by another. Colonization undermines the political, military, social, psycho-culture, and value system of the colonized and imposes the values and culture of the colonizer. For the sake of economic control, the main impetus behind any colonization, the colonizer must devise ever-new means of oppressing the colonized.<sup>35</sup> The most significant past and present colonial processes when discussing over-representation of Indigenous Peoples in the criminal justice system are: depopulation; legal control; the use of ideology through religion; education and media; urbanization; and paternalism.

#### *Depopulation*

The first and greatest contributor to the colonial efforts of the Europeans was depopulation. Europeans brought diseases to the "New World." For example, sociologist Mathew Snipp estimates that the Native American population of North America decreased from about 2 to 5 million pre-contact to a low of 228,000 in 1890.<sup>36</sup> Disease was also an important factor in New Zealand where it has been estimated that about 40 percent of the Maori population died from introduced diseases.<sup>37</sup>

Warfare and massacres also depleted Indigenous populations. According to Professor of Law and Criminology Rick Sarre, "an unofficial policy of Aboriginal eradication began to unfold among the military peacekeepers in late eighteenth-century Australia."<sup>38</sup> This included massacres, waterhole poisonings, and individual shootings. In the United States, there were "military conflict, mistreatment, starvation or malnutrition, depression and loss of vigor or will to live, and exportation into slavery."<sup>39</sup> European guns in Indigenous hands also led to high death rates, for example, in New Zealand and Canada where age-old tribal rivals used the new technology to settle old scores.<sup>40</sup>

Because of these factors, the majority of Indigenous Peoples were left in a highly disorganized state. Land that had been cultivated for centuries by Indigenous Peoples seemed empty, encouraging settlers. It was difficult for the remaining Indigenous populations to mount an effective resistance to physical dispossession. Cultural invasion also needed to be resisted following the loss of knowledge about history, ceremonies, and traditions that resulted from depopulation.

Nevertheless, resistance was mounted both physically as in the New Zealand Land Wars<sup>41</sup> and in the wars in the American West, and culturally, as Indigenous Peoples refused the efforts of European governments to assimilate them. This resistance can still be seen in Indigenous social activism in all countries. Activism

has focused on Indigenous control of social structures such as education, social services, economic development, and criminal justice. Not only has activism contributed to the development of Indigenous-operated justice services, but it has also contributed to further over-representation. When resistance leads to political activism as it has in all four countries, it often results in arrests and further criminal justice involvement of Indigenous Peoples.<sup>42</sup>

### *Legal Control*

To achieve dominance over Indigenous Peoples, Europeans had to come to terms with tribal forms of government from the very beginning of first contact up until today. As European contact with Indigenous peoples increased, the mutual relationship of these nations changed and tribal independence began to fade. The way treaties were written reflected these changes and destroyed tribal governments.

Land was and is the central issue for all four countries. Twisting agreements made through treaties, or outright dispossession of land as in Australia, have led to laws meant to control and criminalize Indigenous populations in order for those in the government to maintain their positions of power and social control. No matter what the resource issue is, social control and all the other aggregate components of power are fundamentally related.<sup>43</sup>

Laws were written which both enabled the removal of resources from Indigenous control and controlled Indigenous Peoples. For example, according to criminologist Juan Tauri, "the formal silencing of Maori justice was deemed an important and necessary element of the colonial process throughout the nineteenth century."<sup>44</sup> As stated in Project Waitangi in reference to New Zealand, "one of the consequences of Western thought about their systems of law is the dismissal of the fact that other societies have laws that are firmly based in their values and culture and administer it in ways that are different from the Western norms."<sup>45</sup> Some of these laws were established ostensibly to "protect" Maori people from crime and to protect their treaty rights, but had other purposes.<sup>46</sup> In Project Waitangi, there is a description of how early settlers and then colonial governments "alienated" Maori land by using legislation, such as the Native Reserves Act (1856), the Native Lands Administration Act (1900) and the Maori Land Settlement Act (1905), which were passed deliberately to abrogate the Treaty of Waitangi (1840) and to make Maori land available to growing numbers of European settlers.<sup>47</sup>

As another example, the ideology of the early Australian colonizers was that "Antipodean 'natives' had no system of law of their own."<sup>48</sup> This played out in British legal cases such as *Cooper v. Stuart (1889)* that found Indigenous land to be available for settlement because it was "practically unoccupied, without settled inhabitants or settled law," and *R. v. Cobby (1883)* which refused to recognize Aboriginal marriages because Aboriginal people "have no laws of which we can have cognizance."<sup>49</sup> A more recent example is the 1998 amendment of the Native Title Act, condemned by the United Nations Committee on the

### Elimination of Racial Discrimination.<sup>50</sup>

It is important to note that laws, as well as other parts of the justice system were, and still are, involved in controlling Indigenous Peoples. In Australia, for example, many Aboriginal communities suffer from over-policing and lack of access to legal aid and other justice-related services.<sup>51</sup> In New Zealand, there are long memories of the role of the police in insensitively enforcing discriminatory colonial laws, and the use of Maori “wardens” to supervise Maori people assembled in public places.<sup>52</sup> There have also been accusations of over-policing, disregard for people’s rights and “us” versus “them” mentality towards Maori people.<sup>53</sup>

The courts have played an important role not only by enforcing discriminatory laws, but also by placing individual Indigenous offenders into the system. In New Zealand, for example, the courts are seen as excluding Maori family support systems, being culturally biased, and favoring non-Maori over Maori. It is also difficult for Maori defendants to get adequate and sensitive public defenders and to get a jury of their peers. Judges, while respected, are seen as prejudiced, and the court administration is seen as disrespectful because of its lack of knowledge of Maori culture, names, and courtesies.<sup>54</sup> In Canada, as another example, Aboriginal people are more likely to be held in custody awaiting a court appearance than non-Aboriginals, and have less access to legal aid especially in rural areas.<sup>55</sup>

Laws usurp Indigenous communities from controlling their own members. As a result, the communities became a part of the dominant society’s criminal justice system. As stated in Project Waitangi, “the legal system legitimized the process of colonization and it now has to face the consequences of what it created and shaped.”<sup>56</sup>

### *Ideology*

Colonial ideology developed out of the interests of the ruling classes of Europe. Ideology was and is communicated through religion, education, and the media. According to Blaut, “at all times the dominant group ... has a fairly definite set of concrete worldly interests. Some of these conflict with others, but all tend toward the maintenance of the elite group’s power and position. Because of its power to reward, punish, and control, this group succeeds in convincing most people, including most scholars, that its interests are the interests of everyone.”<sup>57</sup> During the colonial period in each country, scholars developed theories that justified colonialism. In the early years, these theories were based in Christian teachings that encouraged the conversions of “pagans” and “heathens.” As Blaut explains, the colonialists held the belief that “a Christian God will naturally rise His people higher than all others ... the religious argument was so nearly universally accepted down to the nineteenth century that other arguments were not seen as necessary by many European intellectuals.”<sup>58</sup> The belief continues that the white race is superior, that Europeans are more rational than Indigenous Peoples, and that their civilization is superior.<sup>59</sup>



In later years, these theories were based in Social Darwinism that proclaimed Europeans to be the pinnacle of evolution and therefore justified in "sharing" their knowledge and culture with others. Europeans were believed to be superior to others because they "were brighter, better, and bolder" based on their heredity.<sup>60</sup> Some early beliefs argued that white people were members of a different biological species. Therefore, since non-Europeans were not members of the human species, enslaving this species was justified. This gave way to a belief that Europeans were superior based on biological inheritance.<sup>61</sup> As a part of resource acquisition, Indigenous people had to be assimilated into European culture, though not to the point where they could ever become equal members of that society. "Racism, in a word, had as its main function the justification of colonialism and all other forms of oppression visited upon non-Europeans ... racism emerged from prescientific roots and survived as long as it was useful, science or no science."<sup>62</sup>

These ideologies were promulgated by colonial educational and religious institutions. The imposition and control of "formal education" began almost at the very moment Europeans came in contact with the Indigenous Peoples of the four countries. In the United States, the reservation boarding school system was aimed at elimination and assimilation of Native Americans into mainstream society. Justification came in the form of Manifest Destiny, a philosophy by which white European invaders imagined their "superiority" as giving them divine right to take possession of all the lands. European forms of educating the Indigenous Peoples is a continuation of this process, with an outcome that would serve to confine them to sedentary life thereby opening up more land for use by white settlers.

In Canada, a very similar process took place. Shortly after Confederation in 1867, Canadian federal authorities, in partnership with religious denominations, launched a national design that would see over one hundred "Indian residential schools" being created.<sup>63</sup> In New Zealand schools, as with Canada and the U.S., the Indigenous language of the students was prohibited. In some instances, in these three countries, corporal punishment was used as a tool to ensure only English would be spoken. Professor of Maori, Ranginui Walker writes that the "damaging aspect of this practice lay not in corporal punishment per se, but in the psychological effect on an individual's sense of identity and personal worth."<sup>64</sup> In Australia, Aboriginal children were seen as a source of cheap and accessible labor. Children were taken from their homes and placed in "proper" Christian homes in order to learn work skills and the Christian faith. These "stolen generations" lost their language and culture, and caused tremendous community and family disorganization.<sup>65</sup>

The media also contributed to colonial ideology. Historically, the media presented stereotypes of Indigenous Peoples to the general population in order to justify the treatment of "savages" in invaded countries.<sup>66</sup> In more recent years, the subordinating process is more complicated and more effective. The media perpetuate stereotypes of and disrespect for Indigenous Peoples. This

can range from the TV broadcasts of old Westerns in which Native Americans are portrayed as ignorant, savage and murderous; to the misrepresentation of Indigenous issues and the lack of Indigenous points of view in news stories; to inaccurate and disrespectful portrayals of Indigenous cultures in day to day broadcasting.<sup>67</sup>

These ideologies of superiority continue today, not only in school systems, but also in the form of racism and stereotyping by members of the criminal justice system of Indigenous offenders, victims, and community members. In Australia, for example, accusations of police racism against Aboriginal people are common.<sup>68</sup> In Canada, the Royal Commission on the Prosecution of Donald Marshall, Jr.<sup>69</sup> also found racism when it concluded that Donald Marshall, Jr., a Mic Mac Indian, should not have been incarcerated:

The criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983. The tragedy of the failure is compounded by evidence that this miscarriage of justice could—and should—have been prevented, or at least corrected quickly, if those involved in the system had carried out their duties in a professional and/or competent manner. That they did not is due, in part at least, to the fact that Donald Marshall, Jr. is a Native.<sup>70</sup>

In New Zealand, there have also been reports of bad relations between the police and the Maori as a result of the police demeaning Maori culture, denying access to authority, abusing and humiliating Maori people.<sup>71</sup> Additionally, the legacy of religious and educational degradation of Indigenous spirituality and culture continues today as evidenced by low individual self-esteem and continuing loss of Indigenous culture and language, which many Indigenous communities and non-Indigenous scholars consider criminogenic conditions.

### *Urbanization*

Urbanization occurred as a part of the effort to integrate Indigenous Peoples into the dominant society. In the United States, for example, this occurred during what professor of American Indian studies, law, history, and religious studies, Vine Deloria, Jr. and professor of political science Clifford Lytle call the “Termination and Relocation Era” when “civilized” Native Americans were encouraged to move into cities to get jobs and education so that reservation land could be opened to Whites.<sup>72</sup> The results in terms of social disorganization and cultural loss to some Indigenous Peoples were devastating.

In New Zealand, the government instituted a policy of integration implemented to hasten assimilation. Integration was supposed to “combine Maori and Pakeha cultural elements in a New Zealand culture whose basic features were unmistakably European in orientation.”<sup>73</sup> The purpose in New Zealand was to turn Maori into an “urbanized proletariat,” a badly needed

workforce in a time of country-wide prosperity after World War II.<sup>74</sup> Over 75 percent of Maori moved to urban areas.<sup>75</sup> This urbanization led to “educational failure, juvenile delinquency, and rising crime,” all symptomatic of family breakdown, loss of traditional social control by elders, and alienation.<sup>76</sup> Similar results came from urbanization in Canada.<sup>77</sup>

This colonial process continues to have influence today as people move to urban areas under-prepared in terms of education, job qualifications, and support networks, putting them more at risk for substance abuse, family violence, and crime.

### *Paternalism*

Paternalism is an ideology woven into all the other colonization processes, and creates a tension within those processes. It is the ideology that Indigenous Peoples are like minors or wards who must be protected by the parent-like Europeans. This ideology has been used to justify reserve/reservation/mission systems so that Indigenous Peoples could be isolated from the bad influences of frontier settlement and their remaining resources protected from the greed of settlers.<sup>78</sup> However, as a result of paternalism, Indigenous people could also be kept in one place to be closely supervised and “tutored” in a more appropriate culture, language and work ethic. Paternalism has had insidious results, affecting the ability of individuals and whole communities to effectively self-govern. “Decisions were made about them and for them and imposed on them ... Gradually many of them lost their capacity for independent action, and their communities likewise.”<sup>79</sup> Paternalism also affected the self-esteem of individuals and communities so that self-fulfilling prophecy may play a role in over-representation and lack of community responsibility in initiating criminal justice services (where allowed by the dominant government).

### *Conclusion*

Neo-colonialism continues. Decolonization is occurring within certain social institutions such as education, where Indigenous people have won more control over school curriculum, cultural content, and language instruction. For example, “language nests,” which ensure the continuation of native language instruction, have been created in New Zealand, and Aboriginal-operated K-12 schools are located throughout Canada.

While some decolonization has occurred in criminal justice with the advent of culturally-based services such as Navajo peacemaking and Native Canadian sentencing circles, many Indigenous people still see the criminal justice system as an arm of colonialism. Criminal justice is the most powerful short-term tool at the disposal of any government, in that it can be used to legally dispense violence. Considering how badly the colonially-based criminal justice systems treated Indigenous Peoples historically and today, despite some improvements, it is not surprising that in all the four countries it remains a focus of concern.

Important sections of agreements and treaties, historical and modern day, deal with control of criminal justice. Today, there is still a call for Indigenous Peoples to operate their own justice systems, in cooperation with, but independent of, the colonial based system.<sup>80</sup> Yet despite these calls, state efforts to develop new justice policies and programs are often a-historical, perhaps acknowledging the colonial context, but not critically analyzing colonial processes and their impacts on marginalization as an essential tool in developing effective criminal justice programs.

State governments avoid dealing with marginalization of indigenization. According to Professor of Law Paul Havemann, it is more common for governments to adopt outward indicators of Indigenous culture than to truly allow it to exist on its own terms.<sup>81</sup> Tauri, for example, argues that in New Zealand, the adoption of Maori names for ministries, Maori symbols on letterheads, and cultural sensitivity programs are a form of “image politics” that serve to legitimize non-Maori dominance.<sup>82</sup> It is an alternative to allowing full sovereignty. This process also exists within the criminal justice system. Governments are more likely to financially support indigenized programs that fit comfortably into the current criminal justice system and current conservative public attitudes. In New Zealand, for example, instead of using Maori cultural experts and community locales and resources in sentencing young Maori offenders, it is more common to give the meeting a Maori name, but have it run by white social workers in Department of Social Welfare offices.<sup>83</sup> Yet, it is ironic that in all countries there have been recruitment efforts to hire Indigenous personnel to work in law enforcement, corrections, and community corrections. All recruits, however, must meet non-Indigenous standards for hiring and promotion, and use culturally inappropriate techniques in carrying out their jobs. Navajo Nation police officers, for example, seldom use peacemaking in handling disputes, being more occupationally comfortable in making an arrest.<sup>84</sup>

As Tauri comments, based on Canadian examples, indigenization “serves as an inexpensive and politically expedient strategy that allows the Government to be seen to be ‘doing something’ about the Indigenous crime problem without seriously affecting State control of the justice arena.”<sup>85</sup> It is a means of co-opting “their justice philosophies and practices within forums that are controlled by the State.”<sup>86</sup> This echoes sociologist Menno Boldt’s conclusions based on a lifetime of research into Canadian Indigenous issues that show state policies have been and will continue to be designed to serve national interests rather than to resolve issues arising out of colonialism.<sup>87</sup> “If Indians are to achieve justice, that is, survival and well-being as Indians, there must first occur a paradigmatic shift in Canadian policy-making, from the imperatives of the ‘national interest’ to a coequal emphasis on Indian interests.”<sup>88</sup>

Indigenization of programs and staff continues colonialism, and could be considered a neo-colonialism process developed for use in maintaining the marginalization of Indigenous Peoples. It is image politics, and is a way of avoiding Indigenous empowerment or self-determination. Tauri argues that in

New Zealand, more “jurisdictional autonomy” is needed for Maori people if Indigenous over-representation in the criminal justice system is to be ended.<sup>89</sup> As well, efforts must be comprehensive, not fragmented, so that a complete system of justice is provided by Maori people for Maori people. This same argument could be made for Indigenous Peoples in the other three countries.

Each country, to some extent, has begun the development of Indigenous-operated justice services. Some of these are heavily indigenized, while some are less so. In Australia, there is a Legal Rights Movement that exists in most states. In Canada, there are Native court worker programs in most provinces and territories. In New Zealand, there is the Hamilton Abuse Intervention Project, and in the United States, there are the Navajo Nation peacemakers. This is only a sampling of the Indigenous-operated programs that have grown over the last 30 years in these countries.

A great deal more research needs to be done to document Indigenous justice practices and values in each country with the aim of using this information as the basis for new Indigenous-operated and controlled programs. Continuing communication and exchanges among Indigenous Peoples in these and other countries are necessary to learn new tactics for countering colonial policies in the area of criminal justice.

Despite these changes, it is necessary to recognize that criminal justice inequities alone cannot be addressed. For over-representation to end, it is necessary to look at the whole gamut of colonially-produced marginalizations. Policy-makers continue to underestimate the issues that must be dealt with in their relationships with Indigenous Peoples. Simply hiring more Indigenous people, giving lip service to the incorporation of Indigenous culture, implementing sensitivity training, or even allowing Indigenous Peoples to operate their own criminal justice services based on European-style institutions, is not enough. Criminal justice cannot be achieved without attacking head on the continuing impacts of colonial processes. Yes, new culturally based criminal justice programs are a good stop-gap, and more cultural sensitivity by non-Indigenous service providers is certainly desirable. In order for over-representation to be truly ended, however, the larger marginalization issues growing out of colonialism must be tackled, and tackled immediately: employment equity, educational opportunities, cultural and language revitalization, economic development in communities, recognition of legal rights and statuses, land claim settlements, enforcement of penalties for discrimination and hate crime, and the cessation of many other inequities. These inequities are inter-related. One cannot be changed without the others. This is a massive project for policy-makers, but it must be done. Otherwise, efforts to end Indigenous over-representation in the criminal justice systems will be doomed to continuing failure.

## Notes

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2. J. Osterhammel, *Colonialism: A Theoretical Overview* (Princeton: Markus Wiener Publishers, 1997).

3. J. M. Blaut, *The Colonizer's Model of the World* (New York: Guilford Press, 1993).

4. Bill Ashcroft, Gareth Griffiths, and Helen Tiffin, "General Introduction," in *The Post-Colonial Studies Reader*, ed. Bill Ashcroft, Gareth Griffiths, and Helen Tiffin (London: Routledge, 1998), 1-4.

5. Yet again presenting statistics of Indigenous over-representation and marginalization can lead to perpetuating stereotypes of Indigenous offenders and this study recognizes that this is a very real danger, but without these statistics, it is difficult to evaluate the extent of the problem that colonial processes have caused, and if things are starting to improve.

6. Australia Bureau of Statistics, *Corrective Services, June Quarter, 2000* (Sydney: Australian Bureau of Statistics, 2000).

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