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# **Downsizing Prisons in an Age of Austerity?**

## **Justice Reinvestment and Women's Imprisonment**

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### **Abstract**

Justice Reinvestment is being actively promoted as one means of reducing high levels of incarceration through diverting expenditures from prisons to fund services intended to provide support and supervision for offenders within the community and to prevent crime. At a time of financial stringency, the huge expenditure necessitated by high incarceration rates is being re-examined. There is growing recognition that high levels of incarceration are ineffective in reducing recidivism and may be criminogenic and damaging in other ways for individuals and communities. Based on claims that Justice Reinvestment schemes in the US have produced promising results, some activists and politicians in Australia have urged the adoption of Justice Reinvestment. This advocacy has emphasised the need to find mechanisms to reduce the very high levels of incarceration of Indigenous people. Women's imprisonment rates have increased substantially in recent years and to a greater extent than rates for men. This pattern has been observed in several jurisdictions and is even more pronounced for Indigenous women. This paper critically examines features of Justice Reinvestment, such as its endorsement of 'evidence based policy' and risk assessment tools, to question whether these features are likely to promote the interests of women.

## Introduction

Justice Reinvestment is being promoted as an effective means of reducing high levels of incarceration through diverting expenditures from prisons to fund services within the community intended to prevent crime and provide support and supervision for offenders. Based on claims that Justice Reinvestment (JR) schemes in the US have produced promising results (Clement et al. 2011), there is growing support for the adoption of Justice Reinvestment elsewhere including in the UK, Australia and New Zealand (Brown et al. 2012). For instance, several pilot schemes are underway in the UK (Fox et al. 2013a) and the Senate Legal and Constitutional Affairs Committee of the Australian Parliament recently endorsed JR following an inquiry into the value of a justice reinvestment approach to criminal justice in Australia (Senate Committee 2013). Prison populations have increased substantially over the last two decades or so in many western nations, but recidivism rates have remained high and there is little evidence of improved public safety (Clement et al. 2011). These factors, together with the straightened financial circumstances currently faced by many governments, have been associated to some extent with a reassessment of the human and financial costs of the heavy reliance on incarceration that is common to many criminal justice systems (Frost and Clear 2012). Justice Reinvestment has emerged in this context as an innovative response that is said to have the capacity to reduce the reliance on incarceration, generate savings on correctional expenditure and improve public safety.

Given the apparent appeal of JR to activists and policy-makers, it is timely to consider whether it might offer a means of reversing the growth in women's incarceration rates. Imprisonment rates for women have increased to a greater extent than rates for men in several jurisdictions including Australia, the US, England and the Netherlands (Kruttschnitt et al. 2013, p.19; Martin et al. 2009, p.879). Typically the greatest increases have occurred in rates of imprisonment of racialised women, such as Indigenous women in Australia (Stubbs 2013) and Canada (Office of the Correctional Investigator, 2012) and women of colour in the US (Barlow 2012). However, the substantial growth in women's imprisonment rates has attracted relatively little scholarly attention despite the burgeoning field of comparative studies in penology over a similar period (Kruttschnitt et al. 2013, p.19). Unfortunately, the extant literature concerning JR pays scant regard to women as offenders.

This paper begins by examining the concept of JR which, despite its common usage, remains conceptually vague. Part Two examines whether the principles and practices that have been identified as hallmarks of JR are a good fit with the characteristics and circumstances of women offenders, and especially Indigenous women. Since pathways to crime differ for women and men (Daly 1998, Simpson et al. 2008), and the limited research available indicates that women's experiences of re-entry to the community following incarceration also differ (Frost and Clear 2012, La Vigne 2009), there is reason to question the adequacy of gender neutral JR programs. Part Three considers questions of evidence and measurement. Justice Reinvestment is said to be evidence based, but what counts as evidence? Also, the relative neglect of women

offenders in the correctional literature provides reason to question whether an evidence base can be established to guide more gender inclusive JR responses (Gelsthorpe and Hedderman 2012, p. 385). Justice Reinvestment relies heavily on risk assessment instruments to direct scarce correctional resources to high risk offenders, but the validity of such tools for use with women and minorities remains contentious (Hannah-Moffatt 2009). The final section identifies some possible ways in which JR might need to be realised to ensure that women, and Indigenous women in particular, are not relegated to mere afterthoughts of Justice Reinvestment.

### **Part 1 Justice Reinvestment (and JRI)<sup>1</sup>**

The term Justice Reinvestment was coined in the US by Susan Tucker and Eric Cadora who advocated a new approach to public safety that would re-direct some prison funding to build human resources and infrastructure in communities most affected by incarceration (Tucker and Cadora 2003). The apparent early success of JR in some jurisdictions, such as in Michigan (Greene and Mauer 2010, pp.39-41), Connecticut, Kansas, Texas, Rhode Island and Arizona (Austin et al. 2013, p.6) fuelled interest elsewhere, especially in the prospects of reducing correctional expenditure. For instance, a pilot scheme in Connecticut is said to have saved \$30 million between 2003 and 2005 through measures focused on parole eligibility and reducing probation violations (CSG 2010 cited by Clear 2011, p.588) and Texas is said to have saved \$1.5 billion in construction costs and averted \$340 million in annual operating costs (CSG 2013, p.1). Justice Reinvestment has been taken up across the US in some way in at least 27 states (Austin et al. 2013, p.1) and includes both state-wide and local level initiatives.

While the emergence of JR in the US is not attributable to any single factor, the current fiscal crisis has been described as ‘[b]y far, the most proximate catalyst’ for JR (Frost and Clear 2012, p. 637). The Report of the US National Summit on Justice Reinvestment and Public Safety (Clement et al. 2011, p.1) noted that ‘[o]nly Medicaid has grown faster than corrections as a proportion of state spending.’ Correctional spending in the US increased by 303% between 1987 and 2008 as compared to 125% for education (Clement et al. 2011 pp. 2-3) while recidivism rates had remained the same or in some places had worsened. The early success attributed to JR in ‘cutting both crime and costs’ is said to have generated public support for evidence based policy as indicated by polling (PEW 2012) and has garnered political support including from conservative legislators (PEW 2013). Others note that with falling crime rates, fear of crime is no longer so salient and has been overtaken by other concerns such as terrorism, jobs and health and that the destructive effects of the ‘war on drugs’ has encouraged public support for more effective alternatives (Austin et al. 2013, p.3) creating possibilities for reforms that research and advocacy organisations have been promoting for a long time (Cadora 2014, p.278).

Notwithstanding the growing enthusiasm for JR, the concept remains vague (Brown et al. 2012) and malleable, and as described below, the meaning of JR has shifted over time. Justice

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<sup>1</sup> In this paper I use the term Justice Reinvestment (or JR) except when I refer specifically to the approach developed under the US Justice Reinvestment Initiative (JRI). Many, but not all, US schemes arose from JRI.

reinvestment has been described as ‘an idea still in its infancy’, but also as ‘an innovation with no obvious downside’ (Frost and Clear 2012, p. 637). As a ‘a broad strategic approach’ but not a theory, it leaves many questions unanswered, such as who to divert from prison and by what means, how to quantify savings and where to reinvest (Clear 2011, p. 589). The term JR is sometimes deployed broadly to include any criminal justice reforms (Austin et al. 2013). This is a reminder that many initiatives that are commonly associated with JR, such as enhanced post-release support for prisoners and community based programs, have a long history unrelated to JR, but the broad use of the term risks JR losing any distinctive meaning. At the same time there has been a narrowing of the meaning from JR within a social justice context to ‘criminal justice redesign underpinned by Justice Reinvestment theory’ (Fox et al. 2013b, p. 38). When aligned with social justice, JR programs attempt ‘to prevent criminality’ and ‘address its underlying causes in communities and families’, focusing on alternatives outside the criminal justice system (CJS) and ‘the interlinking of localised costs and benefits - including social costs and benefits - where real opportunities arise for innovation and cost savings’ (ibid). By contrast criminal justice redesign underpinned by JR ‘places little attention on what is happening beyond the criminal justice system or on preventing criminality in the first place’ and is likely to see ‘money saved from successful interventions ... go on closing the fiscal gap’ (ibid).

Early proponents of JR saw its progressive possibility in an age of mass incarceration, and recognised the disproportionate effect of incarceration on people of color and their communities. The impact of mass incarceration is highly concentrated in a relatively small number of neighbourhoods and more narrowly concentrated than patterns in crime (Barlow 2012, p.5). The intent of JR was ‘to reduce corrections populations and budgets, thereby generating savings for the purpose of *reinvesting in high incarceration communities* to make them safer, stronger, more prosperous and equitable’ (emphasis added, Austin et al. 2013, p.1). Some JR advocates emphasized the need to map assets in local communities to identify community needs for reinvestment (Spatial Information Design Lab 2009). Initial versions of JR followed a four step approach:

- 1) Analyze the prison population and spending in the communities to which people in prison often return.
- 2) Provide policymakers with options to generate savings and increase public safety.
- 3) Quantify savings and reinvest in select high-stakes communities.
- 4) Measure the impact and enhance accountability (Austin et al. 2013, p.7).

However, over time asset mapping and the focus on community development has been given less attention in US programs. Proponents of JR now commonly describe reinvestment as being directed towards ‘high performing public safety strategies’ (Urban Institute 2013) rather than towards the communities most affected by incarceration as envisaged by Tucker and Cadora (2003).

While JR seeks to make savings from correctional budgets, there are initial costs before any savings can be realised. Across the US, JR programs have been funded in various ways, including via the US Department of Justice, by state governments, charitable trusts and private foundations and in a few cases by social impact bonds. The Council of State Governments (CSG), the Urban Institute, PEW Charitable Trusts and VERA Institute of Justice have been important in providing technical assistance for JR.

Justice Reinvestment in the US is coming to be defined through practice and as shaped by tender requirements, technical assistance programs, educational resources and toolkits (e.g. Ho et al. 2013) and by political pragmatism. While the aims, approaches and performance measures are intended to reflect local circumstances, common features are emerging associated with the federally funded Justice Reinvestment Initiative (JRI), which some scholars distinguish from the original vision of Justice Reinvestment (Austin et al. 2013, p.1). The Justice Reinvestment Initiative is said to be less focused on reducing prison populations or reinvesting in communities with high incarceration rates than on reducing costs (Austin et al. 2013, p.7). It has a strong focus on a ‘what works approach’<sup>2</sup> to reducing recidivism and guiding public expenditure, and emphasises: focusing on those individuals most likely to re-offend; programs based on ‘the best available science’; improvement in community supervision; and, the use of ‘place-based strategies’ (Clement et al. 2011, pp.6-7). Recent publications emphasise the need for performance incentives whereby agencies that are successful in meeting targets can share in some of the savings (Clear 2011, VERA 2012). Much of the JRI literature deals with the state level and with legislative reforms, calling into question the extent to which ‘place-based’ initiatives that are responsive to local needs are a hallmark of JRI. However, a number of local programs have commenced and a recent government funding program for technical assistance at the local level may generate more localised developments.

Claims about the success of JR (and JRI) in the US are contested. Success is commonly measured by estimated future savings in averting projected growth in prison numbers (CSG 2013), and less often by actual decreases in prison numbers (Clement et al. 2011, p.58). Others argue, inter alia: that it is difficult to isolate the effects of JR from other factors, some of which predate JRI; that while prison populations have stabilized or demonstrated small declines in JRI states, similar trends have occurred in non-JRI states; and, they have questioned whether the projections of growth in prison numbers against which outcomes have been measured were valid (Austin et al. 2013, p.11). Concerns also have been raised that in achieving political support JRI has marginalized other more far-reaching but politically risky reforms that are needed to drive incarceration rates down and that the legislative initiatives associated with JRI often have been seen by state lawmakers as ‘the terminus of reform aspirations’ (Cadora 2014, p. 282). Thus, while JRI might have contributed to halting growth in incarceration or to small reductions in some states, in the absence of more substantial reforms it may ‘institutionalize incarceration rates

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<sup>2</sup> In the criminal justice context ‘what works’ has come to stand for a form of evidence based policy, commonly associated with quantitative research.

at historic highs' (ibid).. However, others see hopeful developments which may support JRI initiatives. For instance, D'Amico et al. (2013) note that prisoner re-entry programs funded under the *Second Chance Act* (US) (2008), some of which are run in conjunction with JRI, are beginning to demonstrate 'cultural change', adopting a more holistic approach based on a stronger ethos of rehabilitation in contradistinction to the previous emphasis in such programs on rule enforcement.

### United Kingdom

Early interest in JR among UK prison reformers reflected concerns that criminal justice policy had become too centralised and that local control and accountability would produce better outcomes and be more cost effective (Allen 2007, p.6). However, an early pilot study noted that because prisons are funded centrally, there was little local interest in reducing imprisonment rates as any savings did not accrue at the local level (Allen 2007, p.6). Challenges in adapting JR for the UK context were identified including a lack of basic data which hampered attempts to map criminal justice or to develop options, although the limited data available demonstrated high geographical concentrations of offenders and associated high correctional expenditure, and very high correlations between the number of offenders and the index of deprivation of an area (Allen 2007, pp.22-6). The findings of the pilot study were broadly consistent with a more expansive vision of JR. They highlighted the need for neighbourhood management principles, the devolution of more control of criminal justice interventions to local residents and greater integration of services with a focus on resettlement of offenders. They also encouraged a focus on diversion for people such as 'women, young people and the mentally ill' who go to prison unnecessarily and not simply 'back end' criminal justice practices such as parole and re-entry as is commonly the case in JR schemes (Allen 2007, p.32).

Justice Reinvestment was given broad endorsement by the House of Commons Justice Committee (Justice Committee (UK) (2009) and several pilot studies are in progress in the UK which differ in their approach and objectives but draw on JR. However, these have been described as not the 'full JR model' but more narrowly focused on 'redesigning criminal justice to reduce costs' (Fox et al. 2013a, p.45). A pilot prison program at HMP Peterborough is funded by social impact bonds with start-up capital raised from philanthropic sources hoping to receive a return on their investment. Payment by the Ministry of Justice is dependent on meeting agreed targets in reducing *recidivism*. The focus of the trial is mainly on testing a new funding model (Disley et al. 2011, p.44). The forms of offender support are not innovative; instead they extend community based supervision to prisoners released after serving sentences of less than 12mths who otherwise do not receive support. Another prison trial operates at HMP Doncaster, a private prison operated by Serco, and targets all prisoners on release. Serco receives upfront payments to run the prison and will receive a bonus payment if it exceeds the target for reducing recidivism but it also takes on risk in that if it fails to reduce recidivism by an agreed amount, it will forgo up to 10 percent of its funding (Lanning, Loader and Muir 2011, p.36). By contrast, a different model of JR which is not narrowly focused on recidivism but also endorses diversion and

community based rehabilitation, has been developed by Lanning et al., (2011), based on a case study undertaken in Lewisham. The authors developed a framework for adapting JR to permit local funding and control and to create incentives at the local level.

The Ministry of Justice also has six pilot schemes underway intended to ‘incentivise’ local partnerships to *reduce the demand on the criminal justice system* and thus reduce costs for adult and youth offenders; payments are to be made to those localities that reduce demand beyond an agreed threshold with payments required to be used by the local partnerships to fund agreed services intended to reduce offending. A process evaluation found considerable variation across sites, and challenges faced by the schemes including inadequate incentives to encourage local agencies to engage, the complexity of metrics used to measure performance and the absence of robust data. Some sites valued the flexibility that the model offered them and this drove innovation but in other sites there was limited change or innovation; some schemes were too small in scale. All sites were said to have suffered from inadequate resourcing and cuts to public sector expenditure (Wong et al. 2013). However, preliminary results indicate that five of the six sites met the targets for demand reduction and thus qualified for payments; the apparent failure of the sixth scheme has not been explained (Ministry of Justice (UK) 2013a).

It is feared that a limited vision of JR is emerging in the UK in the context of substantial cuts to public sector expenditure and the ‘Big Society’ agenda of the government in which the voluntary and community sector is seen as having a greater role in the provision of public services (Fox et al. 2013a, p. 39 and ch. 9). For instance, offender management in the UK is being transformed through competitive tendering intended to reduce costs and provide greater opportunities for the private sector to ‘move into new markets’ (Ministry of Justice (UK) 2012, p.9). Government rhetoric claims that the supervision of low and medium risk offenders will be provided by ‘the best of the private and voluntary sectors, working together with the public sector’ following a competitive process to award rehabilitation contracts worth 450 million pounds annually; ‘[p]roviders will only be paid in full if they are successful at reducing reoffending, helping drive innovation and getting best value for hard working taxpayers’ (Ministry of Justice UK, 2013b, no page number). Within this context, JR has become narrowly aligned with ‘payment by results’, an approach that Fox et al. (2013a, p.40 and ch 9) observe remains unproven, may not be the most effective or innovative way to reduce offending and appears unlikely to address community problems associated with offending (ibid p.199). Cuts to services associated with austerity measures adopted by government may also undermine the community infrastructure necessary to support rehabilitation (Lanning et al. 2011, p.22-3).

### Australia

In contrast to the US (Austin et al., 2013) and the UK, where there has been surprisingly little explicit focus on racial disparities in incarceration rates in the JR literature or programs, Australian advocates typically highlight the potential of JR to drive down Indigenous incarceration rates. The former Aboriginal and Torres Strait Islander Social Justice Commissioner (2009, p.56), Tom Calma, was among the first to promote JR which he saw ‘as a

pragmatic solution to the problem of Indigenous imprisonment .... based on some sound principles that meld with Indigenous perspectives and approaches'. The national justice policy of the National Congress of Australia's First Peoples (2013) advocates trials of JR in Indigenous communities with the highest rates of incarceration. Proponents of JR in the Australian context commonly emphasise the potential it holds for (re)building community capacity using place-based strategies that respond to local needs and conditions (Schwartz 2010) to address the social determinants of incarceration and contribute to social inclusion (Guthrie et al. 2013). This vision of JR is said to have the potential to reduce incarceration rates especially for Indigenous people, to benefit victims of crime through reinvestment in community services and to respond to particularly vulnerable groups such as Indigenous young people and people with psychosocial, cognitive or other impairment (Gooda et al. 2013).

Justice Reinvestment has not been adopted at any level of government in Australia but it has received some support at federal and state government level. For instance, in 2010 an independent review of Juvenile Justice in the state of NSW recommended Justice Reinvestment as the preferred approach to guide the future of juvenile justice because of its potential to produce 'tangible benefits' including long term returns on investment (Noetics Solutions 2010 p.175ff). Australian Parliamentary committees have also endorsed JR in several inquiries. Recent examples include a report on Indigenous youth and criminal justice (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011) and a major review of the feasibility of JR (Senate Legal and Constitutional Affairs Committee 2013, hereafter 'Senate Committee'). The latter report recommended *inter alia* that the national government take a lead role in supporting the development of JR in Australia (rec. 5) and funding (rec. 7) for trials to be implemented including in at least one remote Indigenous community (rec. 6). However, JR did not receive bi-partisan support; coalition members from the conservative Liberal and National Parties presented a minority report which was more skeptical about JR which they saw as a matter for state governments rather than the national government. Only the Greens political party has taken up JR as party policy.

Australia has weathered the global financial crisis well by comparison with other countries (OECD 2012 p.1) and the need to reduce correctional expenditure has not been given the same emphasis by governments as evident in the US (Clement et al. 2011 pp. 2-3) and UK (Justice Committee (UK) 2009, para 59-74). Indeed, it remains the case that prison expansion is welcomed by some Australian political leaders who promote new prisons on the basis of untested assumptions that they will provide economic benefits, especially to rural communities (Cunneen et al. 2013, pp.132-7). The federal government has recently announced substantial cuts to legal aid, including to Indigenous legal aid schemes, likely to exacerbate pressure on courts and potentially increase prison numbers; those costs will mostly fall on state governments who have primary responsibility for criminal justice.

While the potential for financial savings in correctional budgets has been given some attention in the Australian context, it is not seen to be the primary rationale for JR. The Senate Committee (2013 para [3.31]) noted that '[t]he increase in prisoner numbers is putting financial



strain on the Australian justice system, which is quickly becoming unsustainable'; net operating expenditure on corrective services grew by 4.8 per cent in the year to 2011–12, reaching \$3.1 billion (ibid para [3.3]). The committee noted the high cost of criminal justice interventions for Indigenous people: 'for every one dollar spent on a non-Indigenous person in the public order and safety area, government spends about \$5.83 per Indigenous person' (ibid para [7.31]).

However, it is significant that the committee (ibid para [6.80]) concluded that the most important potential benefits from JR were not the economic savings for governments but rather the benefits to individuals and communities in addressing the social determinants of incarceration. Thus, the vision of JR endorsed by the committee is an expansive one aligned with the social justice orientation identified by Fox et al. (2013b).

Several coalitions are actively working to promote the adoption of JR in Australia, especially for Indigenous young people, and some groups are working with communities to lay the ground work for pilot studies in specific locations (Guthrie 2013).

## **Part 2 Women and Justice Reinvestment**

Proponents of JR are insistent that it is a data-driven approach and evidence based (Clement et al. 2011). Given that emphasis, it is surprising that JR literature rarely considers gendered and racialised patterns in incarceration, or in the processes that drive incarceration and their implications. In part that may reflect the inadequacy of many administrative datasets for such an analysis. Under JRI, technical assistance providers are funded to work with states and local jurisdictions to improve databases necessary to analyse the drivers of incarceration, generate cost effective policy options and provide evaluation data. Setting aside questions about the limitations of administrative data per se for these purposes, the inclusions and exclusions in such datasets are crucial; what is and can be counted shapes what counts as evidence.

The brief overview of patterns in women's imprisonment rates that follows is limited by the paucity of available data, but nonetheless provides evidence of the value of an intersectional analysis (Crenshaw, 1991) within JR and the need for serious attention to racialised and gendered patterns in incarceration (Bosworth and Kaufman 2013, Pollack 2013).

### Women's Incarceration

Research in several countries has documented women's distinctive pathways to offending (Daly 1998, Simpson et al. 2008), and the different characteristics, offence profiles and sentence lengths typical of women inmates. Researchers have consistently noted that women prisoners tend to commit mostly non-violent offences and are sentenced for less serious offences and for shorter periods than men; they often have histories of physical and or sexual abuse, high rates of drug and mental health problems, and complex needs (United Nations Office on Drugs and Crime UNODC 2008 ch. 1). For instance, a UK study documented gender differences in characteristics of prisoners and in links to reoffending. Women were more likely than men to have used 'class A' drugs prior to incarceration, to report that their offending was to support someone else's drug use, to have higher rates of mental health problems, and the study found that

women with anxiety and depression were more likely than other women or men to be re-convicted within a year of release (Light et al. 2013). Consistent with these characteristics, numerous inquiries and reviews (UNDOC 2008 ch. 3, Corston 2007) have advocated the greater use of strategies designed to keep women out of prison, for instance, via decriminalisation, diversion, the repeal of mandatory sentencing provisions and a greater use of community based sanctions and community-based treatment and services.

Research also demonstrates marked gender differences in trends in incarceration. There has been substantial growth in women's imprisonment rates over recent decades evident in numerous countries (UNODC) 2008) but little research on the drivers of this increase. In England and Wales the number of women in prison more than doubled between 1995 and 2010 and has since decreased a little but remains at an historically high level. The Corston Report (2007, p.27) noted that Black and ethnic minority women made up 28% of the women's prison population, more than three times their proportion in the population. Baroness Corston was unequivocal that women's imprisonment is often 'disproportionate and inappropriate' (Corston 2007, p.i) and the lengthy sub-title to her report on women's imprisonment - '*The need for a distinct, radically different, visibly led, strategic, proportionate, holistic, women-centred integrated approach*' - left no doubt about the approach that she recommended.<sup>3</sup> Those recommendations have not been fully implemented or adequately funded (Prison Reform Trust 2013; Justice Select Committee UK Parliament 2013). It is also disturbing that recent programs announced by the UK government demonstrate that punitive politics have inflected initiatives that are supposed to assist women offenders. For instance, the UK Justice Minister announced a scheme of targeted support to help women offenders 'break the cycle of crime and abuse' but stressed that '[t]his approach will be underpinned by tough reforms that will see every community order include an element of punishment such as a curfew or unpaid work' (Ministry of Justice 2013b, no page number).

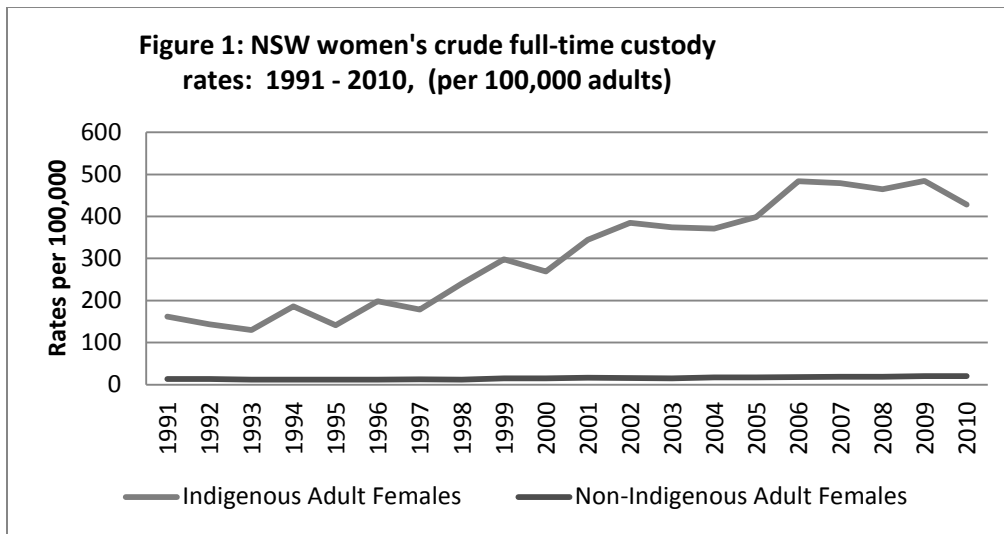
In the US, between 1980 and 2000 the incarceration for women rate rose by 650 %, compared with 300% for men (Haney 2004, p.334). As Sudbury has noted, the greatest increases have been for 'poor, young, racialized women and girls' (2005, p.xiv cited by LeBaron & Roberts 2010, p. 26). In Canada, over the past decade imprisonment rates for Aboriginal women increased by 85% as compared with 26% for Aboriginal men while the 'Caucasian offender population remained stable' (Office of the Correctional Investigator 2012, p.32). Statutory sentencing reform (*Criminal Code* s.718.2, *R v Gladue* [1999] 1SCR 688) requiring that particular attention be paid to the circumstances of Aboriginal people, and that sentencing judges use alternative measures to incarceration, has failed to reverse this trend (Williams 2007, Martel, Brassard and Jaccoud 2011). Canadian women's prisons are reported to be experiencing overcrowding, increasing incidents of violence, unrest, and self-harm and the use of force especially against women who have mental health issues, and against Aboriginal women (Office of the Correctional Investigator 2012, p.41). This growth in women's imprisonment is occurring at a

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<sup>3</sup> However, note the failings of Canadian reforms with similar aspirations: Hannah-Moffatt 2002.

time of significant budget cuts in accordance with the government’s deficit reduction strategy (Office of the Correctional Investigator 2012, p.43) which suggests that prison conditions are likely to worsen.

In Australia, women’s rates of imprisonment have increased markedly, including for unsentenced inmates (Stubbs 2013), and the rate for Indigenous women has increased more than for any other group. From 2000-10, the Indigenous women’s imprisonment rate increased by 58.6 % as compared with 22.4 % for non-Indigenous women, 35.2 % for Indigenous men and 3.6 % for non-Indigenous men (SCRGSP 2011, 4.130 & Table 4 A12.7); this growth built on substantial increases in the previous decade.<sup>4</sup> By 2010, the national imprisonment rate for Indigenous women was 381.6/100,000 compared to 24.4/100,000 for non-Indigenous women. Indigenous women were 21.5 times more likely to be imprisoned than non-Indigenous women, while Indigenous men were 17.7 times more likely to be imprisoned than non-Indigenous men (ibid, 4.133). Imprisonment rates differ substantially between Australian states and territories. Figure 1 shows the trends in women’s imprisonment rates over the last two decades in New South Wales (NSW), which is the most populous state, and demonstrates the very substantial increase in rates for Indigenous women as compared to non-Indigenous women. Almost one-third of women in prison in NSW are Indigenous as compared with just over one in five men (Corrections NSW 2013).



Source: Corrective Services NSW, data provided to the author.

<sup>4</sup> The Aboriginal and Torres Strait Islander Social Justice Commissioner (2005) noted that ‘[b]etween 1993 and 2003 the general female prison population increased by 110 %, as compared with a 45 % increase in the general male prison population. However, over the same time period the Indigenous female prison population increased from 111 women in 1993 to 381 women in 2003. This represents an increase of 343 % over the decade’, p. 15. Available from: [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport04/2WalkingWithTheWomen.html](http://www.hreoc.gov.au/social_justice/sj_report/sjreport04/2WalkingWithTheWomen.html) [Accessed 10 January 2014].

Such trends in part reflect the differential impact of harsher criminal justice practices on Indigenous people (Fitzgerald 2009, p.6, Stubbs 2013). Evidence suggests that harsher bail determinations have remanded more women into custody, and that more intensive scrutiny of compliance with bail conditions and conditional forms of release has contributed to this trend; the number of Indigenous people incarcerated for breaching orders or conditions of release has increased substantially (Bartels 2010). Women may be at heightened risk of breach where the conditions or programs that they are required to enter are inappropriate to their needs and circumstances (Stubbs 2013).

#### Factors contributing to women's incarceration

US commentary on the growth in women's incarceration has highlighted the profound effect of the 'war on drugs' on women. Research indicates recent changes in the racial mix of women incarcerated. After more than three decades of growth during which increases in women's incarceration outstripped men's, incarceration has declined or stabilized in some parts of the US. Since 2000, the incarceration of Black women has declined, largely due to reduced incarceration for drug offences, while incarceration for Hispanic women and white women has continued to increase. Racial disparities remain substantial and, as at 2009, Black women were incarcerated at 2.8 times the rate of white women (Mauer 2013, p.2). As the US has moderated the response to drug crime, at least in some states (Mauer 2013), increased recognition is being given to other drivers of women's incarceration such as the effects of harsher sentencing, especially that focused on repeat offending rather than serious offending, determinant sentencing that undermines judicial discretion, parole violations and an increase in the number of, and more arduous conditions for, community sanctions (Kruttschnitt 2011, p.915). Women's greater likelihood than men of having a drug history, responsibility for children, unemployment and homelessness make it harder for them to comply (Kruttschnitt 2011, pp.904-5), a situation that is exacerbated by cuts to welfare and services. As Bumiller observes, this is not just about demographics, but rather the penal system, welfare state and labour markets are gendered systems (2013, p.15).

Caution is necessary in generalising too directly from US experience, since the scale of incarceration in the US is exceptional, because incarceration rates across the US differ markedly (Mauer 2013) and because drug laws and policies in countries such as Australia and the UK have not followed the US 'war on drugs' (see O'Malley 2002). However, more punitive laws in various forms (eg. mandatory sentencing, standard minimum sentences, restrictive bail laws, pro-arrest statutes), harsher criminal justice policies and practices and tighter welfare eligibility and policing of welfare compliance such as have been noted in the US (Beckett and Western 2001, Kruttschnitt 2011) have been experienced in many other countries, albeit inflected by local cultures, conditions and politics (on Canada see, Chunn and Gavigan 2006, on the UK see Player 2014, p281-2, 289).

Wacquant's (2009) analysis of the way in which the penal state and the retrenchment of the welfare state work together in the regulation of marginalised people has been very significant, although subject to some critical assessment as over-generalised, not sufficiently engaged with the complexities of gendered social relations (Bumiller 2013) and glossing over tensions and contradictions within neo-liberalism (Brown 2013). However, cuts to welfare, the feminisation of poverty, changes in the labour market and a shift to low paid jobs (Mosher 2010, Kruttschnitt 2011, p.905) are likely to have exacerbated levels of disadvantage that contribute to women's incarceration in many places and may disproportionately affect racialised women but 'virtually no research has focused on these factors as explanatory components of the rise in the female imprisonment rate' (Kruttschnitt 2011, p.915). While such developments have been well documented by feminist political economists, relatively little attention has been given to how 'gendered insecurity has led some women to engage in criminalized activities' (LeBaron and Roberts 2010, p.27; see also Gavigan and Chunn 2006, Mosher 2010). The absence of such research is likely to hinder the development of JR approaches with the capacity to prevent crime and drive down women's incarceration by focusing on the social determinants of crime.

#### Justice Reinvestment and (for) women

The Australian Senate committee gave welcome attention to the needs and interests of women in their report on JR, including criminalized women, those affected by the incarceration of family members, and victims of abuse. The report acknowledged that 'poverty, poor education outcomes, unstable housing, domestic violence and/or sexual abuse and trauma' contribute to women's incarceration (Senate Committee 2013: para [2.64]), and also noted that:

[t]he social costs of imprisonment are self-evident. With every new generation of criminalised women and children the net widens. Increasing numbers of individuals and families are being drawn into the cycle of criminalisation, child protection, poverty and despair – at great cost to the state. At the same time, they are being drawn away from social and economic productivity and contribution (para [3.29]).

However, they did not specifically address how JR might respond to social disadvantage, nor to the concurrence of victimization and offending.

The analysis above suggests that strategies to reduce women's incarceration rates need to be targeted for women, with a focus on 'front end' measures (diversion, community based sanctions and programs) rather than on 'back end' measures such as parole and post-release support which are commonly used in existing JR programs, and through investments in communities that respond to the social determinants of crime.

In the US, reports prepared to assist the development of proposals for JRI legislation refer to concerns about rising rates of women's imprisonment in very few cases (e.g. Rhode Island, New Hampshire, Oklahoma) but there is little evidence that policies or programs that specifically respond to those concerns have been adopted.

Oklahoma provides an interesting case study. A JRI background report on incarceration rates acknowledged that the state had the highest rate of incarceration for women in the US, at 132 per 100,000 in 2009, and had experienced a 21% increase in the women's prison population over the period 2000-09 (CSG 2011, p.2). However, subsequent documents setting out the analysis and policy options for JRI appear to make no mention of gender or race (CSG 2012a). The reforms adopted in 2012 via House Bill 3052 include enhanced funding for law enforcement to tackle violent crime, risk assessment tools to assist in sentencing, mandatory supervision of all adults released from prison and changes to responses to supervision violations. It has been estimated that these reforms will mitigate growth in the prison population by 1,759 and avert an extra \$120m in expenditure over the period 2012-2021; \$3.7m has been targeted for reinvestment in the criminal justice reforms in 2013 (CSG 2012b). There appears to be no plan to invest directly in communities. The bill has been described as 'weak' and criticised for shifting focus from reducing prison populations to increasing staff for law enforcement and supervision, and to cost cutting (Austin et al. 2013, p.9). The failure to consider gendered and racialised patterns in incarceration undermines confidence that it might offer effective and appropriate programs for women offenders. Recent commentary suggests that the JRI program has not been adequately funded nor fully implemented with doubts emerging about whether it has the full political support of the governor. Oklahoma is failing to meet expectations as prison numbers continue to rise, generating overcrowding (Little, 2013).

By contrast, a local level JRI project in Denver, Colorado still in its early stages shows some promise of developing programs that are more responsive to women, minorities and other vulnerable groups, but also demonstrates challenges that might arise, especially where women are too few to generate adequate savings. An initial assessment had suggested the need to focus on a 'population of justice-involved women with families affected by domestic violence'. However, analysis of the data yielded a 'target population that was too small to meet JRI objectives' and the focus shifted to frequent users of the criminal justice system, who commonly had substance abuse and or mental health problems. Funds have been sought for a front end approach, with plans to include case management, trauma informed services and 'culturally informed care' that explicitly acknowledges gender, race, ethnicity, religion and other social categories (CEPP no date). Of course whether those plans are brought to fruition depends on political support for the proposal, funding and other contingencies.

While the Denver project suggests the possibility of planning JRI programs that are responsive to diverse needs and interests, and to keeping women in focus, that outcome is unlikely without an analytical approach that examines how the drivers of incarceration may work differently for different groups and for those at the intersection of social categories (Bosworth and Kaufman 2013, Bumiller 2013). There also needs to be recognition that gender responsive programming is not of itself an adequate recourse (Hannah-Moffatt 2002); aligned with a narrow vision of JR it may also unwittingly contribute to imposing new controls on women legitimated by a rehabilitative logic invoked in sentencing and post release decisions (Bumiller, 2013, p.21).

There are reasons for concern that common features of JR (or JRI), including how evidence based policy is conceptualised and the forms of measurement used, may be ill-suited to the task of reducing women's incarceration.

### **Part 3 Evidence and measurement – what (and who) counts?**

Each stage of JRI relies on quantification - of current correctional spending and the factors driving incarceration, in generating policy options that are likely to be (cost) effective, in estimating potential savings and analysing the costs and benefits of programs (Clement et al 2011, p.8). Great stock is placed in evidence based policy to ensure that scarce correctional resources are invested in 'effective programs' (ibid, p.23 ff). However, there has been little critical analysis of what counts as evidence, or of the measures used and to whom they are applied. Scant regard has been given to the highly gendered and racialised patterns in incarceration and yet, even in narrowly economic terms, 'it makes little sense to speak of the "average" prisoner' (Lengyel and Brown, 2009, p.47). Moreover, the emphasis on generating quantifiable financial savings within JR, and in other payment by results schemes (Gelsthorpe and Hedderman 2012), may see women offenders as 'too few to matter', repeating past failures of correctional policies to respond to women's needs and interests.

#### What works for women?

The 'what works' framework, which was developed in North America and the UK but has been applied internationally (Worrall 2000), has been described as a key element of JRI (Clement et al. 2011). Within the US, JRI is supported by several databases designed to assist practitioners and policy makers identify 'what works'. For instance, CrimeSolutions.gov, which was developed by the Office of Justice Programs rates programs and practices according to effectiveness in achieving goals and the rigor of any evaluation. However, a search of the database generated little that was specific to women offenders.

Some critics have challenged the global application of the what works framework, including its application to racialised groups such as Aboriginal people in Australia (Worrall 2000). Others have noted that the framework 'contends that, with minimal variation, presence of the core risk factors serves to increase the likelihood of offending for both men and women alike' (Martin et al.,2009, p.881). While knowledge of 'what works for men' is imperfect, for women it is even more limited (Gelsthorpe and Hedderman 2012). Little is known about 'what works for women' or the effectiveness of programs for women in prison, virtually no research has focused on women's re-entry (Kruttschnitt 2011, p.898) and there are 'few comprehensive theories of offender change' (Frost and Clear 2012, pp.632-3). The gap in the research evidence is even more glaring when we consider what might be most effective for racialised women. However, as noted above, research has established that there are marked gender differences in pathways to crime and emerging evidence suggests that is also the case for reentry after prison. For instance, a study by the Urban Institute found that:

women have different experiences from men, both behind bars and on the outside. They face reentry challenges with a different set of skills and deficits, and those differences are manifested in higher rates of relapse and recidivism. All this suggests that a focus on women as a distinct subpopulation of persons reentering society is critical to the development of effective policies and practices (La Vigne et al. 2009, p.3).

Despite such findings, there has been a ‘striking’ lack of planning for the re-entry of women offenders (Kruttschnitt 2010, p.38) and few programs to address abuse histories, drug use or poor parenting skills in prison or in transition to release (Kruttschnitt 2010, p.38, Bumiller 2013, p.16).

The absence of targeted programs for women and racialised people and the dearth of research on what might be most effective to support them, demonstrates the inadequacy of the what works framework which offers little to guide practitioners or policy makers working with such groups. It is also likely to exacerbate the current failure within JR (or JRI) schemes to recognise and respond to gendered and racialised dimensions of crime and punishment.

### Targeting risk

The Justice Reinvestment Initiative (US) relies heavily on risk assessment tools to ensure that scarce correctional resources are ‘correctly’ targeted, that is, towards offenders most likely to re-offend so that interventions and supervision are directed to their needs (Clement et al. 2011, p.6). The Report of the National Summit on Justice Reinvestment and Public Safety (US) includes an extensive discussion of the use of risk assessment tools to predict recidivism, guide expenditure, and inform sentencing, release decisions and re-entry programming (Clement et al. 2011, ch.23). They claim that ‘validated risk assessment tools are remarkably effective at identifying who is at a high risk of recidivating’ in order to allow ‘criminogenic’ risk factors to be addressed (Clement et al. 2011, p.12). Intervening with low risk offenders is seen as an inefficient use of resources, and may increase re-offending (Clement et al. 2011, p.17).

Hannah-Moffatt has offered a trenchant critique of the ‘theoretical and empirical premises of gender-neutral, “empirically based” risk tools’ (2009, p.214) and of their administration to women and racialised populations. Even when judged on their own terms, setting aside concerns about their underlying premises, there is good reason to question the universal use of standard risk assessment tools. There is a small but growing literature on using risk assessment tools for non-White males, Indigenous people and women (Shepherd et al. 2013). For instance, a recent meta-analysis of the commonly used risk assessment tool, the LSI, found that it was less accurate for Aboriginal offenders (Wilson and Gutierrez 2014). According to Hannah-Moffatt (2012, p.281) ‘marginalized groups unavoidably score higher on risk assessment instruments because of their increased exposure to risk, racial discrimination and social inequality – not necessarily because of their criminal behavior or the crimes perpetrated’. Some Australian judges have expressed skepticism regarding the use of risk assessment tools for



Indigenous offenders on the grounds that they have not been designed for that purpose and may be culturally inappropriate, and they have even considered whether clinical assessments of risk should be discounted where they are based in large part on risk assessment tools.<sup>5</sup>

There are additional reasons for concern about the likely implications for women of the reliance on risk assessment tools within JRI. Offenders assessed as low-risk may benefit where diversion is an option. However, the emphasis given to re-offending as ‘the risk that matters’, and the focus on high risk offenders, raises several difficulties for women. First, it may encourage narrow, individual based interventions focused only or primarily on criminogenic needs and thus seems unlikely to generate more holistic approaches to supporting women offenders, nor investment in community infrastructure. Secondly, since few women are likely to fall within the ‘high risk’ category, women may not qualify to receive scarce correctional resources targeted to their needs but may nonetheless be caught up by generic programs offered as part of JRI, such as mandatory post release surveillance and new sanctions for parole violation as in Oklahoma, which may have unintended consequences. Austin et al. (2013, p.10) have noted that increased community supervision in the form of closer scrutiny and control may result in higher rates of return to prison.

#### **Part 4 Re-thinking JR in the interests of women**

It is not inevitable that JR be conceptualised narrowly, abandoning community (re)investment in the pursuit of cost savings through the redesign of criminal justice, as has commonly occurred in practice (Fox et al., 2013a) although political considerations are likely to limit the manner in which it is realised and the policy options that are seen as viable. However, even where a more expansive vision of JR cannot be realised, there may well be ways in which JR (and JRI) can be re-shaped to identify and respond more adequately to the factors that drive women’s incarceration rates.

It is apparent that front end measures designed to keep less serious offenders out of prison are better aligned with the characteristics of many women inmates, and also men serving sentences for non-serious offences. Lanning et al. (2011, pp.14-16), propose that JR for women offenders should involve: pre-court diversion, revised sentencing guidelines and increased investment in community based alternatives that might increase the confidence of sentencers in non-custodial alternatives. The Women’s Justice Taskforce of the UK Prison Reform Trust (Women’s Justice Taskforce 2011) recommended JR programs for women with savings to be reinvested ‘to support women’s centres and other effective services for women offenders and vulnerable women in the community’ (ibid p.3). Women’s centres were endorsed by a major review of women’s imprisonment in the UK, the Corston report (2007), as key sources of support for women offenders, although many reforms recommended by the report have not been

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<sup>5</sup> *Director of Public Prosecutions (WA) -V- Moolarvie* [2008] WASC 37, Blaxell J; *Director of Public Prosecutions for Western Australia v Mangolamara* [2007] WASC 71, Hasluck J; *Director of Public Prosecutions (WA) v GTR* [2007] WASC 381, McKechnie J. The cases all relate to Aboriginal men being assessed for designation as a serious sexual offender under a Western Australian statute, the *Dangerous Sexual Offenders Act 2006*.

realised. In Greater Manchester, one of the six UK local JR pilots described above (Wong et al. 2013), support has been provided for women's centres as part of the JR initiative, although no other UK schemes appear to focus on women's needs in their programs.

As suggested above there is also a keen need to reconsider questions of evidence and measurement, to ensure that if JR is committed to evidence based policy, that what matters to women, and to differently situated women, is measured and is seen to be legitimate as 'evidence' and is translated into practice. Social Return on Investment (SROI) '[which] measures the value of benefits relative to the cost of achieving those benefits, and does so from the perspective of a wide variety of stakeholders' (New Economic Foundation (NEF) 2008, p.16) is one promising approach that might be used in JR.

The UK New Economic Foundation (2008, p.25) demonstrated the utility of the SROI approach in their report on alternatives to incarceration for women. They critically examined the measures commonly used in criminal justice and noted the disproportionate concern by decision makers with the financial cost incurred by public spending to the neglect of other costs and benefits - 'measuring what matters'. Using SROI they conducted a cost benefit analysis that included factors such as the costs of unemployment and family breakdown that would not normally be measured in cost/benefit analyses, in order to 'take account of the long-ranging effects and costs that imprisonment has on the children of women offenders' (NEF, 2008, p.16). They found that, over ten years, for every £1 spent on support-focused alternatives to prison '£14 worth of social value is generated to women and their children, victims and society generally' (ibid, p.17). This demonstrates the paradox of women's imprisonment (Kruttschnitt 2010, p.39), in that while the number of women imprisoned relative to men is small, the potential negative impact it has on society is very large; women's incarceration is very likely to diminish the prospects of future generations since women are an important 'resource' for their communities and families, and especially their children.

The UK House of Commons Justice Committee (Justice Committee 2009, para 302) recognised the need to develop a better evidence base concerning cost-effective measures, including for key groups such as women, to develop more sophisticated performance measures beyond re-offending rates to recognise benefits that might flow outside the criminal justice system and to a wider range of stakeholders, consistent with a SROI approach (Justice Committee 2009, paras [368-375]). For instance, supporting women in the community may bring financial and social benefits, such as fewer living on benefits and fewer children in care, that don't accrue to the criminal justice system (Gelsthorpe and Hedderman 2012 p. 386). Preliminary evidence of the utility of an SROI approach is available from several pilot studies. A recent study by NEF examined the role of women's community service centres in supporting vulnerable women including offenders on four aspects of well being – meaning and purpose, supportive relationships, optimism and autonomy – and found that 44% demonstrated a measurable improvement in well-being over a 3mth period, with a reduced demand on state services. At around 5% of the costs of imprisonment, the centres were judged to 'good value for money' returning a social value of between £3.40 and £6.70 for each £1 invested (NEF 2012,

p.17). A Northern Ireland study of three women's centres in parts of Belfast with high levels of poverty and social exclusion found that the Falls Rd Centre, which included a program for women offenders and those at risk of offending, produced an estimated SROI of more than £19 for each £1 invested (Women's Service Network, no date, p.26) and all three centres generated positive returns that far exceeded investment. A women's social housing program in Australia found that for every \$1 invested, the social and economic returns of providing low cost housing to vulnerable women and children, including women recently released from prison, was an estimated \$3.14 (Victorian Women's Housing Association 2010).

## **Conclusion**

Justice Reinvestment has been described as Plan B, that is, as a way of getting a 'sensible social policy by the back door' in that it clearly falls short of the broader, social policy initiatives associated with social democratic countries that have kept imprisonment rates down (Stern 2012, p.4). Nonetheless within the Australian context there is optimism that JR might offer an opportunity to change the public and political discourse, away from punitive rhetoric towards recognition of the harmful effects of incarceration especially for Indigenous people and of the need for a markedly different approach. The Australian Human Rights Commission, Indigenous organisations and other non-government organisations and activist groups have offered their support for trials of JR, in partnership with local communities. Such trials will need to guard against the narrowing of the vision of JR that has been noted in other countries (Fox et al 2013b, p. 38) to keep the possibility of a social justice inflected JR alive.

Justice Reinvestment remains a somewhat open concept, which Brown (2013) has observed is not yet anchored by theory or politics, and therein may lay an opportunity for activists and criminologists to engage in shaping emergent meanings and practices. If Eric Cadora (2014 p.281) is correct that JR is beginning to displace other reform options, there is a pressing need to ensure that the interests of women and racialised minorities can be recognised and advanced by JR. As Toni Williams (2008: 96) has argued in a different context, feminist engagement is especially needed to work against those practices that perpetuate the over-incarceration of Indigenous women.

## Acknowledgements

An earlier version of this paper was presented at the Law, Gender, Sexuality: Inequality and Austerity after the Global Financial Crisis Bilkura at the International Institute for the Sociology of Law, Onati, Spain in July 2013. Support for the Bilkura was provided by *Social and Legal Studies*. Thank you to Professor Nan Seuffert for initiating the Bilkura and to the ILS and especially to Dr Angela Melville and Malen Gordo Mendizabal for their hospitality, academic support and assistance. Thank you to my fellow participants in the Bilkura for their insightful comments, scholarly engagement and good company.

This paper draws in part from a study funded by the Australian Research Council (DP130101121 *Justice Reinvestment in Australia: Conceptual Foundations for Criminal Justice Innovation*) being undertaken with David Brown, Chris Cunneen, Melanie Schwartz and Courtney Young. Thanks to them for being wonderful colleagues and to Scarlet Wilcock for her excellent research assistance. However, they are not responsible for any errors that appear in this paper.

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