

**31st JOHN WEST MEMORIAL LECTURE
DELIVERED BY
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TRANSPORTATION REVISTED: LESSONS FOR MODERN PENAL POLICY?

Good evening and thank you for inviting me deliver the John West Memorial Lecture for 2019.

I begin by paying my respects to the traditional and original owners of this land—the palawa people. I acknowledge today’s Tasmanian Aboriginal community, who have survived invasion and dispossession, and continue to maintain their identity, culture and Indigenous rights.

John West and transportation

John West arrived in Hobart Town in 1838 with his wife and five young children, a free settler, in contrast to some other newspaper proprietors and editors, such as John Davies, co-founder of the Mercury, who was transported to Van Diemen’s Land in 1831 for fraud.¹ In fact West was a congregational minister, sent out by the Colonial Missionary Society at the request of the Van Diemen’s Land Congregational Church which was seeking ministers. He soon moved to Launceston, and despite the fact that Launceston already had a Congregational minister and a Church, the Tamar Street Chapel, West decided to stay and formed a second congregation, considering himself not ‘one to be relegated to the bush’ as an itinerant missionary.²

He quickly became one of Launceston’s leading citizens. In addition to his clerical duties, he was instrumental in establishing the Mechanics Institute, the City Mission, interdenominational High Schools in Hobart and Launceston (he was opposed to state aid to religious schools, telling Bishop Nixon ‘to confine his pretensions to his flock’)³ and of course he is best known for founding the Examiner in 1842, together with James Aikenhead. He took an active part in the paper’s production and wrote a great deal for it until his appointment in 1854 as editor of the Sydney Morning Herald by another Congregationalist, John Fairfax, who was

¹ Alison Alexander, *Tasmania’s Convicts: How Felons Built a Free Society*, Allen & Unwin, 2010, 143.

² AGL Shaw (ed), *John West, The History of Tasmania*, Angus and Robertson’s Australian Classics Edition, 1981, xii.

³ The Examiner, 2nd December 1843.

attracted to West's political views and his leadership of the anti-transportation campaign.⁴

It is his opposition to transportation that caught my attention. Why did he oppose it? Where does transportation fit in the history of punishment? And does it have any lessons for the way we treat offenders today?

Fitting transportation into the history of punishment

From 1718, before imprisonment became central to the punishment of offenders, transportation was the dominant penal sanction in Britain. Capital punishment was prominent on the statute books but in practice only the most serious felonies resulted in execution. Transportation reached its peak in the 1830s and then steadily declined to be replaced by imprisonment as the principal form of punishment for indictable offences.⁵ From the British perspective, transportation or exile was an important penal measure, and one that has sometimes been neglected by penologists in favour of a focus on the shift from capital and corporal punishment to imprisonment in a penitentiary.

To place transportation in a broader scheme of the history of punishment in Western societies, six stages can be identified:⁶

- a pre-state stage where restorative justice and banishment are dominant;
- a weak state stage where corporal and capital punishment are dominant (the 12th to 18th centuries);
- a period when transcontinental movement of convicts was dominant because of its use as an instrument of imperialism;
- a strong state stage where professional police and penitentiaries dominate;
- a welfare state stage where new therapeutic professions such as social work colonise what becomes known as probation-prison- parole;
- a contemporarily evolving new regulatory state phase with a revived restorative justice but also a diversity of penal cultures with a political climate of punitiveness driving up the imprisonment rate in Australia and many western countries.

⁴ Shaw n 2, xix.

⁵ By the 1860s over 90 per cent of those convicted of indictable offences were being sentenced to terms of imprisonment: Mike Maguire, Rod Morgan and Robert Reiner, *The Oxford Handbook of Criminology*, 3rd ed, OUP, 2002, 224.

⁶ John Braithwaite, 'Crime in a Convict Republic' (2001) 64 *Modern Law Review* 11 at 12, 50. The last dot point has been adapted to include the concept of a punitive turn.

Transportation to Van Diemen's Land

Between 1803 and 1853 approximately 75,000 convicts served time in Van Diemen's Land. Most were shipped from British and Irish ports and the remainder either locally convicted or transported from other British colonies. These 75,000 convicts represent about 45 percent of all convicts landed in Australia and 15-20 percent of those transported within the British Empire in the period 1615-1920.⁷

To understand why John West and others were opposed to transportation, it is necessary to know something of transportation's assignment system and the probation system which replaced assignment.

Under the assignment system, which operated until about 1840, the majority of convicts were assigned to private individuals with whom they lived. A small proportion of male convicts were retained for public sector tasks as varied as clerks, flagellators, overseers, seamen, blacksmiths, masons, bricklayers and carpenters. Van Diemen's Land was 'anything but a vast gaol', with the assigned convicts labouring under little or no restraint. Those in the public sector were generally housed at night in secure accommodation but it was not unusual for some skilled prisoners to rent rooms in town.⁸

If convicts behaved well, they gained a ticket of leave, which meant they could work for a wage and live independently, although they could be restricted to a certain police district. If they continued to behave well, they gained a conditional pardon and finally a free pardon with no restrictions.

Convicts who breached the rules and regulations could be brought before the magistrate's bench and punished with an array of punishments from cautions, floggings, a sentence in the cells, treadwheel and the public stocks. Sentences to road and chain gangs could be awarded and a bench of more than one magistrate could sentence a prisoner to a penal station (Macquarie Harbour, Maria Island and later, from 1830 to 1877, to Port Arthur or its outstations).⁹ Female convicts were punished by being returned to the Female Factories where they were put to work at the washtubs. In the early years of settlement (until 1817), female convicts were also flogged. My husband Dick Warner's ancestor, Elizabeth Bruce, a first fleeter, who served her sentence of transportation for stealing on Norfolk Island, was punished in 1790 with 25 lashes for letting the pigs out – 'neglect of duty by suffering the hogs to get into the garden', and on 15 February 1791, she was given 75 lashes for stealing and killing a hen.

⁷ Hamish Maxwell-Stewart, 'Convicts' *The Companion for Tasmanian History*.

⁸ Maxwell-Stewart, n 7.

⁹ Maxwell-Stewart, n 7.

Assessments of the assignment system varied. On the positive side it had many benefits. Settlers gained cheap labour which allowed them to develop their land. Convicts had a means of being integrated into the community. Rather than being confined in a prison, most of them lived in ordinary households performing ordinary work.¹⁰ After his visit to Van Diemen's Land in 1836, Charles Darwin wrote:

As a means of making men outwardly honest, of converting vagabonds, mostly useless in one country, into active citizens of another, and thus giving birth to a new and splendid country, [assignment] has succeeded to a degree perhaps unparalleled history.¹¹

In some ways convicts were better off than free English workers. On average their diet was better, with more calories per day than the working class in Britain; they worked shorter hours, were better housed, better clothed and they had better access to medical care.¹² They had a lower death rate than soldiers in barracks. It was healthier to be a convict than a working-class British citizen or a soldier.¹³

Another advantage that assigned convicts had over working-class British citizens was that their punishment was more regulated than punishments of servants in Britain, where a master had the right to correct a servant or apprentice using corporal punishment.¹⁴ Masters of assigned servants were not authorised to punish convicts but were required to take them before a magistrate. While this was 'rough justice' in comparison with contemporary lower courts, between a quarter and a third were acquitted.¹⁵ Moreover, taking a convict before a magistrate was often inconvenient, and a majority of employers believed that kindness and firmness was a more effective way to persuade convicts to work better than taking them before a magistrate. Some did of course rely upon punishment and others (estimated at a fifth in a study of Arthur's assignment system) were slave drivers.¹⁶

So in practice, many convicts were never or seldom punished; of the men, three quarters were never in chain gangs or penal stations. Even when they were flogged, they rarely received more than 50 lashes, which was lenient compared with punishments administered in the armed forces.¹⁷ It has been estimated that the probability of being beaten every year during a five-year sentence was one in a thousand and that roughly two thirds of all convicts received one or no floggings during their period of sentence.¹⁸

¹⁰ Alexander, n 1, 36-37.

¹¹ As quoted by Alexander, n 1, 37.

¹² Braithwaite n 6, 22.

¹³ Alexander, n 1, 37 citing Maxwell-Stewart.

¹⁴ William Blackstone, *Commentaries on the Laws of England*, Book 1 Chapter 14, (at note 20); Braithwaite, n 6, 20.

¹⁵ Braithwaite, n 6, 20.

¹⁶ Alexander, n 1, 39.

¹⁷ Alexander, n 1, 37.

Other examples of procedural fairness are that convicts could and did press charges against their masters for ill-treatment and that those assigned to work for landowners could obtain a writ of habeas corpus to protect them from being locked up without trial.¹⁹

Historian Alison Alexander is not alone in concluding that assignment was a successful way of integrating convicts back into society. However, contemporary views of it differed. Many colonists supported assignment as it suited their economic interests. Others, including critics of transportation, were opposed to it. So, in contrast to Darwin's impressions, the Vicar General of the Catholic Church in New South Wales, William Ullathorne, who visited Van Diemen's Land and Norfolk Island, painted the 'blackest possible picture of the convict colonies'²⁰:

Fifty thousand souls are festering in bondage ... We have taken a vast portion of God's earth, and have made it a cess-pool ... we have poured down scum upon scum, and dregs upon dregs, we are building up with them a nation of crime.

Ullathorne described a degenerate place where convicts were slaves subjected to sickening floggings, widespread drunkenness and he was most worried by 'indescribable evils', by which he meant homosexuality. By the 1830s assignment's critics complained of the inconsistent treatment of assigned convicts which could be either too harsh or too lax and neither reformed the prisoners nor deterred potential offenders in Britain.

The Molesworth Report embraced these objections and linked transportation with slavery and condemned the assignment system as a mere lottery, a failure in reforming convicts and 'inefficient, cruel and demoralising.' No doubt there were abuses. West recounts the story of Clapperton, who was a renowned cook and greatly trusted by his employer, Mr Alfred Stephen, a lawyer and former Attorney-General. After Clapperton was convicted of embezzlement and sentenced to a further 14 years transportation, he was snapped up by the Colonial Secretary, Captain John Montagu, as his cook. This was a story which for West 'illustrated a system which sent one man to toil on the chain, and another to wear the livery of the second officer of the government.'²¹

As a result of the Molesworth Report, transportation to New South Wales ended and, in Van Diemen's Land, assignment was replaced by the probation system, which aimed to deter potential offenders and to punish, deter and reform those who had offended.

¹⁹ Braithwaite, n 6, 20.

²⁰ Alexander, n 1, 123.

²¹ West, n 2, 474. This assignment did not last as Stephen reported the matter to Lieutenant Governor Franklin who sent Clapperton to work on the roads.

Under the probation system a series of probation stations were constructed in the 1840s and male prisoners were required to spend a period of probationary labour on the roads or other public works, usually six months but determined by the length of their transportation period — only then could they be hired out to private individuals. Good conduct led to a ‘ticket-of-leave and then a pardon.

The main probation station for female convicts from 1843-1837 was the *Anson*, a hulk moored in the Derwent River. There convict women were kept for six months training in domestic skills before being eligible to become probation pass-holders, with an entitlement to half-wages in the first year, with the other half paid into a bank account for reclaiming when granted a ticket of leave.²² There were many contemporary positive accounts about the effectiveness probationary period on the *Anson*. Louisa Ann Meredith, who received servants from the *Anson*, wrote:²³

Simply judging from the superior usefulness, willingness, and orderly, decent, sober demeanour of the women I have taken from the ‘Anson’, over all others of their unfortunate class that I have known, I must believe the system pursued there by Mrs Bowden [the matron] to be an excellent and effective one, and rendering the greatest possible benefit to the colony generally.

However, in general probation was a failure. West attributed its failure to the negligence of the government and the lack of employment opportunities for convicts after their probation period.²⁴ The huge numbers of convicts going through the system and needing work also coincided with an economic depression. Together with inadequate funding, probation was unable to achieve its reform objectives.²⁵ Its failure turned the majority of colonists, including West, into intransigent opponents of transportation itself. And when it was abolished it was a day of great celebration.²⁶

Underlying West’s criticism of both probation and transportation appears to be his general belief in the inherent criminality of the majority of convicts, many of whom he considered intellectually deficient.²⁷

²² Joan Kavanagh and Dianne Snowden, *Van Diemen’s Women: A History of Transportation to Tasmania*, The History Press of Ireland, 2015, 132-140

²³ Kavanagh and Snowden, n 22, 139.

²⁴ West, n 2, 510,

²⁵ Michael Sprod, ‘Probation System’, *The Companion to Tasmanian History*, 2006.

²⁶ See Marion Sargent, ‘Colony freed from cruelty’ *Sunday Examiner*, 10 March 2019, p 14

²⁷ West, n 2, 518.

Who were the convicts?

There have been varying assessments of convicts over the years and the debate is ongoing. For West most were habitual criminals, petty thieves, incapable of shame or gratitude. He had more time for highway robbers (because they exhibited courage and resolution which could be redirected) and those transported for agrarian and political offences who, he said, were often honest men.²⁸

Early Twentieth Century historians James Watson and George Wood argued that convicts were victims of economic hardship, petty offenders or political prisoners.²⁹ For contemporary Australian historian Robert Hughes convicts were predominantly drawn from the ranks of the professional criminal class, which produced crime in the same way as hatters produced hats and miners coal.³⁰ Manning Clark, amongst others, had a similar view.

This view, namely that the majority of convicts were habitual or professional criminals trained in crime from the cradle, was challenged by the work of a group of economic historians.³¹ Based upon a sample of almost 20,000 convicts who arrived in New South Wales between 1817 and 1840, they concluded that the convicts were ordinary British and Irish working-class men and women. A significant proportion were skilled workers, proportionately the same as in the English workforce in 1841. They were physically fit and of working age, with 80 per cent of them aged between 16 and 25 years old. This seems to be the currently accepted orthodoxy among historians.

John Braithwaite, a criminologist, argues that without being a 'professional criminal' or a member of the 'criminal class' one can be a serious repeat offender; and many convicts were. He cites the fact that only 11 per cent of convicts sent to Van Diemen's Land were first offenders; that their crimes were considered too serious for more minor options such as the stocks, flogging, fines or a warning following a period confinement before trial; that the risk of getting caught and convicted was not high and the majority of those detected and transported would have likely to have committed many offences. So, while there is no evidence that most convicts were dangerous or members of a criminal class, we cannot conclude romantically that they were a combination of poachers, waifs stealing loaves of bread to feed their starving siblings, trade unionists, and political prisoners.³²

²⁸ West, n 2, 518.

²⁹ Braithwaite, n 6, 31.

³⁰ Robert Hughes, *The Fatal Shore*, 1987, 165 quoted by Maxwell-Stewart n 7.

³¹ Stephen Nicholas (ed) *Convict Worker: Reinterpreting Australia's Past* (Cambridge University Press, 1988).

³² Braithwaite, n 6, 31-33.

From penal colony to a low crime society

In the 1857 Tasmanian census, 60% of adult males were convicts or ex-convicts.³³ How was it that a place with such a high proportion of convicted criminals was transformed from a penal colony to become a low crime society in the last decades of the century and one of the most serene places on earth?

There is a strong case to argue that transportation and the convict system was a successful experiment in rehabilitation — that Australian convicts and their children in general turned away from crime. The majority story is one of reintegration of the reformed criminal into respectable society.³⁴

This is not to say that transportation was a good thing. Many convicts were treated appallingly harshly, many died before they even arrived in Australia. It was too often akin to slavery. Governor William Denison's description of his journey to Port Arthur, which included being conveyed by convict railway with his luggage in a wagon pushed by convicts across the neck to Frederick Henry Bay at what is now Lauderdale, was confronting, even in 1847. He wrote:³⁵

I must say that my feelings at seeing myself seated, and pushed along by these miserable convicts, were not very pleasant. It was painful to see them in the condition of slaves, which, in fact, they are, waiting for me up to their knees in water.

And West, who deplored the violent and degrading treatment of convicts, reported that in one road gang, 3,300 lashes were administered in a single morning. Infant mortality at the Female Factory in South Hobart and at the Queen's Orphanage in New Town was appalling. And to quote John Braithwaite, it has to be acknowledged that more fundamental evil of transportation was that 'the crimes of the convicted were expiated through the theft of an entire continent from its rightful owners, mass murder of Aboriginal people, destruction and partial decimation of a splendid tapestry of cultures'.³⁶

Why did transportation work as well as it did to rehabilitate so many?

Braithwaite argues that there are two critical features which apply to transportation during the assignment period. First, it did offer convicts hope, a stake in the future and the real possibility of reintegration into respectable society,

³³ Henry Reynolds, 'That hated stain: the aftermath of transportation in Tasmania' (1969) 14 *Historical Studies* 19-31.

³⁴ Braithwaite, n 6, 18.

³⁵ Richard Davis and Stefan Petrow (eds), *Varieties of Vice-Regal Life (Van Diemen's Land Section)*, Tasmanian Historical Research Association, 2004, 49.

³⁶ Braithwaite, n 6, 19.

namely, a ticket of leave, a conditional pardon and then a free pardon with opportunities for upward mobility unimaginable in Britain. Certainly, there was a stigma associated with having been a convict, but colonial society in Van Diemen's Land went to great lengths to ignore and even hide this. In contrast, the probation system failed because reintegration into respectable society became much more difficult because of the shortage of work for pass-holders.

Assignment offered family reintegration, economic reintegration, social reintegration and religious integration. Marriage was encouraged because it was seen as vital to rehabilitation; well-behaved convicts with wives in Britain were eligible to have them and their families shipped to the colony free of charge. Economic reintegration was facilitated in numerous ways. Assigned convicts were paid a modest amount at government regulated rates but many masters secured the best convicts by tempting and retaining them with side-payments. And convicts had the right to work at market rates for other masters when they had completed their assigned hours before being granted a 'ticket-of-leave', an idea that evolved into what we know today as parole. When granted a free pardon, emancipated convicts were given grants of land, animals, tools and seeds, sufficient for them to become economically viable settlers.

So, Dick's ancestor, first fleeter Elizabeth Bruce and her convict partner Francis Flexmore were granted 20 acres of land on Norfolk Island after their term had expired. When the Norfolk Islanders were re-settled in Van Diemen's Land in 1808, they were granted 40 acres in the Queenborough area which was added to. In 1819 Flexmore was a constable supplementing the income from the farm which grew wheat, potatoes, cattle, pigs and 400 sheep. In 1821 another 50 acres was granted at Glen Fern, Kempton where Elizabeth and Francis moved, leaving eldest son George at Queenborough. The family flourished and became quite prosperous. The Norfolk Island emancipists were treated, it seems, as free settlers, and the fact they had been convicts was not mentioned.³⁷

As well as integration into agriculture, convicts were also integrated into the professions. The first practising lawyers in New South Wales were convicts and Governor Macquarie appointed three non-lawyer emancipists as magistrates, something that would have been unheard of in England. Some of our leading colonial architects were convicts, notably Francis Greenway in Sydney and James Blackburn in Van Diemen's Land. And ex-convicts such as Charles Davis became successful members of the business community³⁸ and even newspaper editors, as noted at the beginning of this lecture.

³⁷ Alexander, n 1, 11.

³⁸ Alexander, n 1, 112-113.

In addition to family and economic reintegration, ‘convicts enjoyed a surprising level of social integration.’³⁹ Braithwaite states that Governor Macquarie (1810-1821) was the first Governor to invite ex-convicts to his table,⁴⁰ and suggests that we could say that the term restorative justice was invented by Lachlan Macquarie.⁴¹ Our early Lieutenant-Governors in Van Diemen’s Land went further than inviting convicts to their table as Alison Alexander explores in her book, *Governors’ Ladies: the Wives and Mistresses of Van Diemen’s Land Governors*.

Religious reintegration was important to Macquarie. Welcoming convicts to the bosom of the church was attempted by promoting the work of the British and Foreign Bible Society and the Sunday School movement.⁴²

The second critical feature of transportation was that there was a measure of procedural justice for convicts. Punishment of them, although often harsh, was regulated, and in many cases was not invoked in favour of more effective means of making the most of the convict’s labour. There were brutal masters but they did not become wealthy in the way the firm and fair masters did. In relative terms, the discipline and punishment of convicts was more humane than the punishments imposed on soldiers and working men and women in Britain. We now understand that perceptions of procedural justice and fairness shape the public’s view of authority and willingness to obey the law. Even if the system is harsh, the perception of fairness of procedures can deliver high compliance. As Braithwaite explains, ‘Brutality is more bearable when its end can be imagined and seen and when its excesses can be challenged by fair procedure.’⁴³

These two elements of reintegration and procedural justice are interrelated. Convict society experienced high levels of reintegration that promoted high levels of procedural justice and vice versa. Labour shortages put pressure on masters to hold on to their convicts by being fair. Convicts could work slow for masters who were not liked and be sent back for reassignment to a better master. Reintegration and procedural fairness can arise in conditions when the powerful are dependent on the weak.

My emphasis on re-integration, adopting Braithwaite’s approach, perhaps needs some qualification when considering the probation period and the post-penal depression years of 1856-1870 in Tasmania, at a time when other colonies were booming. There was a rapid withdrawal of imperial funds from the colony; the old settled districts had reached a peak of productivity; whaling was in decline; and ship-building had all but ceased. Those who had acquired their landholdings in the

³⁹ Braithwaite, n 6, 28.

⁴⁰ Braithwaite, n 6, 28.

⁴¹ Braithwaite, n 6, 27.

⁴² Braithwaite, n 6, 28.

⁴³ Braithwaite, n 6, 21.

older settled districts (the midlands and the Derwent Valley) continued to thrive, but apart from the wealthy large landowners who were sustained by strong wool prices, the colony was in depression. Living standards and wages fell. The population declined, with more leaving than arriving. There was little to attract them. Available land was in densely forested areas which was difficult to develop. Notwithstanding the name change to Tasmania in 1856, its reputation as a penal colony, reinforced by the propaganda of the opponents of transportation that it was a site and source of moral contagion, was hard to live down.⁴⁴

The prisoners released from Port Arthur in this period were often shunned and found it difficult to obtain work. For the emancipists who had not become integrated into society before this period, there were economic and social barriers to upward mobility.⁴⁵ The economy did not improve until the 1870s when there were mineral discoveries and pioneers tackled settlement in the dense forests of the North West, North East and the Huon, where a more inclusive social structure prevailed than the gentry-dominated society of the midlands and the east coast.⁴⁶

Crime and punishment after transportation

I have explained that transportation was a primary penal policy of Britain between 1718 and 1875 and the standard punishment until the 1840s.⁴⁷ From the 1840s the penitentiary replaced it as the dominant form of punishment. For many reformers, including West, the penitentiary or prison was envisaged as an institution where offenders would be taught the habits of industry and reformed. It was seen as an enlightened and humane response to offending. Another way of looking at it is that in stark contrast with assignment, imprisonment removes offenders from the community, from their observation and from its participation in their punishment.

Imprisonment remains the primary sanction for serious crime in Britain and Australia and much of the Western world. And the imprisonment rate (that is, how many people out of 100,000 inhabitants are in prison) is used as a common yardstick by criminologists to measure how societies respond to criminal behaviour.

I want to question our continuing heavy reliance on imprisonment as a means of controlling crime and reintegrating offenders back into society. And to ask whether there are more effective ways of responding to crime. Our imprisonment rate in Australia has been steadily increasing in the face of its huge costs and evidence that it is not an effective means of reducing crime.

⁴⁴ Reynolds, *A History of Tasmania*, Cambridge University Press, 2012, 164-186.

⁴⁵ Reynolds, n 44, 175.

⁴⁶ Reynolds, n 44, 189-210.

⁴⁷ Mark Finnane, *Punishment in Australian Society*, OUP, 1997, 6-7.

Imprisonment is, in theory, the sanction of last resort, to be imposed when a non-custodial option is inappropriate. It is the default. When other options do not seem to work with a particular offender, there is always prison, the dependable, credible and well-resourced back-stop. It 'is the only option that does not have to prove itself'.⁴⁸ And when the offence is a serious one, imprisonment is often regarded as the only way in which the seriousness of the offence can be recognised and responded to. A drug trafficker must be sentenced to imprisonment, to denounce the offending, and to deter potential drug traffickers. A child molester must be sentenced to imprisonment for the same reasons including that this is what such offending deserves and anything less fails to acknowledge this. This is a mindset which is difficult to change.

Imprisonment rates in Australia and Tasmania

In 1875 Tasmania still had a high imprisonment rate, 630 per 100,000. By 1887 it had plummeted to be below average by international standards. The reason for this was a drop in the crime rate – higher court convictions per 100,000 were considerably lower than in Eastern Australia and had been dropping since 1866. And yet it had more convicts, more of the worst convicts and kept receiving them for longer and less hope of making up for this limitation on its human capital through immigration. Braithwaite's explanation for how Tasmania became the least crime-ridden colony after having been the most crime-ridden is plausible. Picking up on historian Henry Reynolds's account of the aftermath of transportation, he attributes it, in part at least, to investment in social welfare and policing of a sort that would requalify its convicts as good citizens. Tasmania spent more on prisons and charitable institutions than other colonies, 17 per cent of the budget in 1866 compared with 6 per cent in New South Wales and 4 per cent in Victoria. At the end of the 1880s, Tasmania spent 40 per cent more per capita on hospitals and charitable institutions than the rest of Australia.⁴⁹

That Tasmania had become one of the most peaceful places on earth by the beginning of the Twentieth Century is a reasonable assertion. In the decade 1911-20, the imprisonment rate had dropped further to be 30 per 100,000, lower than any developed country in the world today.⁵⁰ But what has happened since in Tasmania and in Australia as a whole?

By 1900 the rate of imprisonment was 168 per 100,000 of people aged 10 and over in Australia. This dropped to a low of 57 in 1941 (the middle of World War II; then increased after the war until 1970 and then dropped again. In 1976 it stood at 78 per 100,000 of people aged 10 and over.⁵¹ The 1970s was a progressive period

⁴⁸ Cyrus Tata, 'Reimagining punishment and justice', (2016) 4 (1) *Scottish Justice Matters* 22, 24.

⁴⁹ Reynolds, n 44, 173.

⁵⁰ Braithwaite, n 6, 36.

⁵¹ Satyanshu Mukherjee, *Crime Trends in Twentieth-Century Australia*, Australian Institute of Criminology and Allen & Unwin, 1981, pp 97-99.

when measures were taken to reduce admissions to prisons and a prisoner's length of stay. But by the second half of the 1980s imprisonment rates began to increase, reflecting a similar development in most Western countries.⁵² While there are quite significant differences between the various Australian states and territories, all reflect this same upward trend.⁵³ In 2017-2018, 10,904 offenders were sentenced to custody in a correctional institution in Australia, representing almost 9% of all sentenced offenders. In higher courts 71% were sentenced to imprisonment.⁵⁴

Tasmania followed the national trend in imprisonment rates, although after a high in 2005 of 150 per 100,000 it declined for a decade only to rise again. The latest statistics show a rate of 153 per 100,000 for the September quarter of 2018 with only the ACT lower. The Australian average daily imprisonment rate for this quarter of 2018 was 222 per 100,000 of the adult population.⁵⁵ Particularly concerning is the over-representation of Aboriginal and Torres Strait Islander people in our prisons: it is at least 13 times higher than for non-Indigenous Australians.

While there did seem to be a clear link between crime rates and imprisonment rates in the second half of the Twentieth Century, the reasons for the increased imprisonment rate in Australia in the last two decades is not explained by increases in crime rates. Crime rates reached a peak in the 1980s but have been trending downwards since the turn of this century, particularly for robbery, theft and homicide and since 2008 there has been a drop in assaults. There have been increases in reports of child sexual assault, family violence and fraud offences including cybercrime. But in total, crime has gone down since the 1980s.

The costs of imprisonment

Imprisonment is costly and more costly than non-custodial sanctions. A recent Australian Institute of Criminology Report compared the costs of imprisonment with community corrections taking into account net operating expenditure, capital costs, lost productivity and savings such as reduced government payments and found that the total net cost of imprisonment was \$391 per prisoner per day compared with the total net cost of community corrections of \$18 per offender per day.⁵⁶

The effectiveness of prison

Some prisons do provide a range of training and work ready skill development; however, the evidence is that prisons are not effective in achieving two of the

⁵² Hilde Tubex et al, 'Penal diversity within Australia' (2015) 17 (3) *Punishment & Society* 345, 365.

⁵³ Tubex, n 52, 346-347.

⁵⁴ Australian Bureau of Statistics, *Criminal Courts, 2017-2018*, Tables 7, 57.

⁵⁵ Australian Bureau of Statistics, *Corrective Services, Australia, September quarter 2018*, Cat no 4512.0.

⁵⁶ Anthony Morgan, *How much does prison really cost? Comparing the costs of imprisonment with community corrections*, AIC Research Report, No 05, 2018, 40.

primary goals of custodial sentences: rehabilitation and deterring offenders from reoffending.

There is no evidence that increasing the length of prison sentences is effective in terms deterring potential offenders.⁵⁷ As for specific deterrence — about 60 % of Australian prisoners have previously been released from prison and returned.⁵⁸ It is no more effective than community corrections in preventing further offending. For example, both Don Weatherburn (using New South Wales data) and Karen Gelb and colleagues (using Victorian data), found that offenders who received a term of imprisonment were slightly more likely to re-offend than those who received a non-custodial sentence.⁵⁹

Rather than preventing re-offending prisons can increase its likelihood. Professor Eileen Baldry, a leading Australian academic on imprisonment, states that prison can:⁶⁰

make a person a target for re-arrest and re-imprisonment; it disrupts social connections and locks people into serial institutionalization, does not guarantee good or appropriate treatment and often any treatment started is not continued in the community upon release; it makes homelessness more likely, creates connections with criminal culture, ensures the learning of prison culture to survive and often causes self-harm and depression.

Moreover, imprisonment affects families of prisoners. Children lose parents and the impact is often intergenerational. UK data shows that the children of prisoners are six times more likely than their peers to become prisoners.⁶¹

I accept that prisons are a necessary part of our criminal justice system. And that there needs to be an appropriate response to those who break the law. Without engaging in the debate about the abolition of imprisonment, or whether we should substitute the concept of punishment with regulation and the normative ideals of retributive justice with restorative justice, there is a strong case to say that imprisonment is over-used and has not been a successful means of successfully reintegrating offenders into society as successful and productive citizens.

We do not need the imprisonment rate to be as high as it is. Sweden's imprisonment rate is 60% lower; Ireland's is 46% lower, and Canada's 30% lower than Australia's.⁶² Finland is an example of a country that has managed to reduce

⁵⁷ Donald Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Advisory Council Victoria, 2011.

⁵⁸ Australian Red Cross, *Rethinking Justice, Vulnerability Report*, 2016, 15.

⁵⁹ D Weatherburn, 'The effect of prison on adult-re-offending'. *Crime and Justice Bulletin*, no 143, 2010; K Gelb, G Fisher and N Hudson, *Re-offending following sentencing in the Magistrates' Court of Victoria*, Sentencing Advisory Council, 2013; see also Ritchie n 57.

⁶⁰ E Baldry, *The Booming Industry: Australian Prisons*, UNSW, Sydney, 2008.

⁶¹ Australian Red Cross, n 58, 15.

⁶² Australian Red Cross, n 58, 11.

its imprisonment rate at no cost to an increase in crime rates.⁶³ In the 1960s the Finnish government decided to reduce the imprisonment rate to bring it in line with other Scandinavian countries. It reduced the offences which were imprisonable, shortened sentences, increased early release schemes, introduced community sentences and severely restricted the availability of prison terms for young offenders. The imprisonment rate fell between 1960 and 1990 from 165 per 100,000 to 60. This was possible because there was a political will to change and the government sought and accepted advice on alternative forms of punishment. It was assisted by the absence of tabloid press at the time and the fact that crime was not a hot topic that was used to sell media stories.⁶⁴

While Finland was cutting its prison rates in comparison with the rest of Scandinavia, the recorded crime rates were showing a similar pattern across all countries, namely rising from 1950 to 1990 and then levelling off or declining. Prison rates however, remained similar and stable in Sweden, Denmark and Norway but the Finnish rate dropped dramatically.

The Scandinavian story demonstrates that prison populations are not necessarily linked to increases in crime. This has also been shown by looking at crime rates in other countries. While crime rates increased in the developed world from the 1970s to the 1990s, imprisonment rates increased in some countries such as US and the Netherlands, remained stable in Canada and Norway, zigzagged in France and fell sharply in Finland and Japan. There is no necessary relationship between imprisonment rates and crime rates today.⁶⁵

What explains imprisonment rates?

If the crime rate does not explain the continuing rising imprisonment rate, what does? This is a complex question and one that has been much debated in the criminological literature. Broader political frameworks and levels of social inequality seem to be the drivers of contemporary penal policy. I am going to adopt Bronwyn Naylor's succinct summary of this.⁶⁶ Neoliberal countries, such as the USA, Australia and the UK, tend to have higher imprisonment rates, while social democracies such as the Scandinavian countries have low imprisonment rates. Neoliberal societies have higher imprisonment rates because they have social and economic policies that lead to 'exclusionary cultural attitudes' towards deviant fellow citizens. By contrast, European corporatist societies (or 'coordinated market economies') and Scandinavian social democratic societies are said to 'see offenders as needing resocialisation, which is the responsibility of the community as a whole'.

⁶³ For details see Bronwyn Naylor, 'The evidence is in: you can't link imprisonment with crime rates' *The Conversation*, 23 April 2015.

⁶⁴ Naylor, n 63.

⁶⁵ Naylor, n 63, citing research by Tonry and Lappe-Seppala.

⁶⁶ Naylor n 63; See also Tubex et al, n 52, 347-349.

Naylor adds that there is an association between a country's welfare system and rates of imprisonment. The association between increasingly punitive policies and the winding back of the welfare state in the USA and the UK is often mentioned to exemplify this. The US has the highest level of income equality of Western countries and the Scandinavian countries, the lowest. Scandinavia also ranks highest on social expenditure in Europe.

This link between welfare and punitiveness resonates with Brathwaite's explanation for the diminishing crime and imprisonment rate in late nineteenth century Tasmania, that I mentioned earlier, picking up on Reynolds's observation that the investment in social welfare and welfare policies were probably the most advanced and expensive in Australia.

My message is that the extent of the use of imprisonment is a policy choice of governments rather than being driven by public attitudes, which governments tend to interpret as requiring a 'tough on crime' response and which they privilege over expert opinion. We should reconsider our reliance on imprisonment as a sanction, learn from the international comparison of imprisonment rates and from our history and the insights it gives us in relation to exclusion and inclusion. Rather than spending so much on imprisonment, we should use less exclusionary options, more community-based options and invest more in schools, families and communities.

There is no shortage of innovative ideas that are alternatives to the 'tough on crime', 'law and order' option. These include justice reinvestment, restorative justice conferences, drug courts and other problem-solving courts (under the umbrella of therapeutic jurisprudence) and Indigenous sentencing courts (which have elements of problem-oriented, restorative and therapeutic approaches).

In conclusion, I would like to quote the Honourable Michael Kirby, who has said:⁶⁷

We cannot afford to unquestioningly go down the same unreformed path. There are better objects for huge and rising public expenditures than building new prisons. In the past, there have been occasions when politicians have agreed to suspend the 'law and order' option, which they are otherwise encouraged to pursue by shock jocks and other similarly uniformed pundits.

Being tough on crime by increasing the severity of prison sentences does not make us safer.

Thank you.

⁶⁷ Australian Red Cross, n 57, 4.