Crime in a Convict Republic

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'I t is much easier to extirpate than to amend Mankind.'
Sir William Blackstone

Five stages in the history of regulation are derived from the literature as a starting framework for this essay. These stages are outlined in the first section. This five-stage model is then confronted and revised in light of the neglected case of the Australian penal colony. It is juxtaposed throughout the paper with the history of the regulation of crime in the US. Australian convict society is found to be brutal yet forgiving. We conclude that surprisingly high levels of procedural justice and reintegration in Australian convict society drive down crime rates at a remarkable rate in the nineteenth century. In contrast American slave society is characterised by procedural injustice, exclusion and stigmatisation, which delivers high crime rates. Following Heimer and Staffen's theory, reintegration and procedural fairness are found to arise in conditions where the powerful are dependent on the deviant.[1] Acute labour shortage is the basis of a reintegrative assignment system for Australian convicts to work in the free community. While convicts change Australia in very Australian ways, we find that many of these developments are not uniquely Australian and so a revision of the five-phase model is proposed. The revision also implies that Foucault's distinction between governing the body versus governing the soul (corporal/capital punishment versus the penitentiary) is less central than exclusion versus inclusion (banishment versus restorative justice) to understanding all stages of the history of regulation.

A Perspective on the History of Regulation

The historical vision of criminologists, sociologists and philosophers of punishment alike is impoverished at this point in history. Mainstream thinkers have limited ways of comprehending core problems of theft and violence beyond prescribing the right dose of imprisonment. The most important alternative current, dominated by Michel Foucault's *Discipline and Punish*, is very much a 'history of the present' in the way the rise of the penitentiary is read as the enduring central question rather than a phase![2] Rusche and Kirchheimer provided a Marxist history of punishment that was ignored for its first three decades of existence, enjoyed an honoured place in curricula for little more than a decade, only to be ignored again with the passing of Marxism's intellectual heyday.[3]

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1 Carol A. Heimer and Lisa R. Straffen, 'Interdependence and Reintegrative Social Control: Labelling and Reforming ''Inappropriate'' Parents in Neonatal Intensive Care Units' (1995) 60 *American Sociological Review* 635–654.

2 Michel Foucault, *Discipline and Punish; The Birth of the Prison*, translated by Alan Sheridan (London: Allen Lane, 1977).

3 G. Rusche and O. Kirchheimer, *Punishment and Social Structure* (New York: Columbia University Press, 1939).

Part of my intellectual agenda is to de-centre the penitentiary, and indeed punishment, in the history of regulation. In doing so, there is an important place for Rusche and Kirchheimer's materialist analysis,[4] for the disciplinary analysis of *Discipline and Punish*, and for the governmentality of the late Foucault as well.

Rather standard readings of the sociology of punishment literature are combined to identify a core Western sequence in the history of regulation with five stages:

1. A pre-state stage when restorative justice and banishment are dominant;
2. A weak state stage where corporal and capital punishment dominate;
3. A strong state stage where professional police and penitentiaries dominate;
4. A Keynesian welfare state stage where new therapeutic professions such as social work colonise what becomes probation-prison-parole; and
5. A contemporarily evolving new regulatory state phase of community and corporate policing (with a revived restorative justice).

The first stage in this history of regulatory institutions is a pre-state period lasting to about the 12th century in many European societies. This is the stage currently attracting much attention in the writing of restorative justice scholars.[5] According to Weitekamp, until the 12th century restorative justice (participatory dialogue oriented to healing rather than hurting) was the dominant form of regulation in pre-state societies, banishment and capital punishment significant back-ups to it.[6] For many parts of Europe local predominantly kin-based restorative justice dominates the king's punitive justice for four or more centuries beyond the 12th century, for example in Scotland.[7] Like all divides in the posited sequence, there is much variation in the overlapping of boundaries. Beyond the West, for example in Africa, local restorative justice remains more important than state punishment until and even throughout the 20th century.

The second stage is the period of weak Western states, from 12th to 18th centuries in much of Europe. Weak kings crush indigenous restorative traditions and inflict ever more horrible physical punishments on the bodies of their subjects. It was Michel Foucault who identified this stage and distinguished it from the third stage. Foucault perceptively sees physical punishment as the king inscribing his power on the bodies of subjects, signifying the awe of his rule by highly public forms of humiliation of those who defy it.[8] These spectacles occur on the scaffold, at the flogging post, the stocks and through branding, for example. Crime is no longer committed against victims:

> [C]rime signified an attack upon the sovereign, since the law represented and embodied the sovereign's will. Punishment is thus an act of vengeance, justified by the sovereign's right to make war on his or her enemies and conducted in appropriately warlike terms. In keeping with the military sources of this sovereign power, justice is a manifestation of armed violence, an exercise in terror intended to remind the populace of the unrestrained power behind the law. The body of the condemned here becomes a screen upon which sovereign

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4 *ibid.*
5 Daniel Van Ness and Karen Heetderks Strong, *Restoring Justice* (Cincinnati: Anderson, 1997).
6 E. Weitekamp, 'The History of Restorative Justice' in Gordon Bazemore and Lode Walgrave (eds), *Restorative Juvenile Justice* (Monsey, NY: Criminal Justice Press, 1999).
7 Robert E. Mackay, 'The Resuscitation of Assythment? Reparation and the Scottish Criminal' (1992) 3 *Juridicial Review* 242–55; Jenny Wormwald, 'Bloodfeud, Kindred and Government in Early Modern Scotland' (1980) 87 *Past and Present* 54–97; Ian D. Whyte, *Scotland Before the Industrial Revolution* (London: Longman, 1995) 217.
8 See also Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression, from a Preindustrial Metropolis to the European Experience* (Cambridge: Cambridge University Press, 1984).

power is projected, or more precisely a flesh upon which the marks of power can be visibly engraved.[9]

But there is more to the story than Foucault's way of seeing it. Weak kings actively wanted to crush indigenous informal justice because there was political power in centralising prerogatives of mercy into their own hands, more so when punishment was awesome. Hence the demise of restorative justice and the rise of corporal and capital punishment reflect conscious tactics by weak princes to prevent the disintegration of their centralising projects. Foucault sees a shift away from this mode of exercising power between about 1750 and 1820, though Spierenburg's subsequent work shows a more gradual abandonment of spectacles of corporal punishment in Europe between 1600 and the early twentieth century.[10]

The third stage is the rise of a strong central state which pursues consistency in the administration of punishment. For most of Europe this occurs throughout the nineteenth century. Oliver MacDonagh's history of the Passenger Acts is the seminal study of the centralising Victorian administrative state.[11] British hegemony makes Britain the central site of a shift in the nature of regulation which rapidly globalises. Most importantly, its London and Irish models of a professionalised quasi-military police come to be utterly globalised. Peel is rightly seen as a pivotal figure, investing in police to increase the certainty of punishment while reducing its severity by eliminating capital punishment for most offences and replacing it with transportation. At the same time, his government embraces a debate on the future of another Benthamite move – the penitentiary. Beccaria and Bentham are justifiably seen as the central theorists of this third stage, though John Howard was the actor with practical influence in his own time.

Foucault seems mistaken to see the shift from the second to the third stages as *the* decisive modern penal shift. Garland shows for England that there is a late Victorian and Edwardian shift to an individualised, indeterminate, rehabilitative regime that rejects consistent Benthamite calibration of deterrence.[12] This is our fourth stage. In English prisons, this was more or less complete by World War I. It is part of a wider shift that gathers momentum throughout the first three quarters of the twentieth century – the rise of the welfare state with its therapeutic professions and the centralised Keynesian regulatory state. In some important ways the welfare state actually rises earlier in Bismarck's Germany and in colonies that are wealthier than Britain itself – New Zealand and Australia.[13] The centralising regulatory project of the nation state that begins with the Passenger Acts ends with Keynes (and partly at the hands of Keynes).

Keynes is the most influential author of the Bretton Woods agreements. These render states as much objects as subjects of regulation at the hands of institutions such as the IMF, the World Bank and the GATT. At Havana in 1948 agreement is also reached for Keynes's international antitrust agency (the ITO). But national sovereignty fights back to pre-empt this regulator of states. Even so, as Chandler's work shows, the modelling of US antitrust regulation paradoxically fosters the global growth of massive multi-divisional corporations (as the alternative to

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9 David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: University of Chicago Press, 1990) 140.

10 Foucault, n 2 above; Spierenburg, n 8 above; Garland, n 9 above, 158.

11 Oliver MacDonagh, *A Pattern of Government Growth, 1800–1860* (London: MacGibbon and Kee, 1961).

12 David Garland, *Punishment and Welfare: a History of Penal Strategies* (Aldershot: Gower, 1985).

13 Note the causal connection discussed later between transportation and the exceptionally early rise of the welfare state in Tasmania.

cartels).[14] In 1995 for the first time, a majority of the largest 'economies' in the world are corporations rather than nations. States become objects as well as subjects of corporate regulation. Pre-eminently important to the regulation of states are the Big Five accounting firms and the corporations that give states their credit ratings – particularly Moody's and Standard and Poors. Like the stock exchanges and banks, the latter mediate and centralize the regulatory messages from the decentralised choices made in globalising markets. Reinsurers like Lloyds of London regulate what states can do in the regulation of national insurance markets. All of this has implications for how the regulation of property crime proceeds. For example, restorative justice for property crime becomes quite different in a world where insurers are the real bearers of most losses and policing is captured by an insurance actuarialism.[15]

The punitive/rehabilitative state is caught up in this fifth phase – which some refer to as the new regulatory state.[16] Under the new regulatory state, there can be more state officials in business regulatory agencies than there are uniformed police for controlling individuals[17] and there are more private than public police.[18] At first the collapse of confidence in the state of the last quarter of the twentieth century, the 'nothing works' era in criminology, fuels a brief return to Beccarian classicism from 1975, particularly in the states which are at the 'cutting edge' of criminology – the US, the UK and Sweden. Neo-classicism quickly loses popularity among criminologists, however, as it is seen as rationalising rising Western imprisonment rates and as co-opted by law and order politicians. Obscure New Zealand emerges at the 'healing edge' of a new restorative justice, just as it is at the cutting edge of dismantling the Keynesian welfare state[19]. Singapore is another example of this conjuncture – at the same time as it is the most economically liberalizing state in the world (at least in free trade) it adopts 'restorative justice' as the mission of its juvenile justice system. This juxtaposition has a hard-edged fiscal side – restorative justice appeals as cheaper than the penitentiary for those who believe in the small state. It also fits with the new regulatory state idea that states should steer rather than row.[20] Restorative justice in the New Zealand model can be read as the state steering civil society, especially extended families, to take responsibility for delinquency control.

Clifford Shearing sees restorative justice and actuarialism in a late-Foucauldian frame of 'government at a distance'.[21] Restorative justice in criminal law follows patterns set in the corporate sector. Decades before the restorative justice

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14 Alfred D. Chandler, Jr, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, Mass: Belknap Press, 1977) and Alfred D. Chandler, Jr, *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge, Mass: Belknap Press, 1990).

15 Malcolm Feeley and J. Simon, 'Actuarial Justice: The Emerging New Criminal Law' in D. Nelken (ed), *The Futures of Criminology* (London: Sage, 1994); David Garland '"Governmentality" and the Problem of Crime: Foucault, Criminology, Sociology' (1997) 1 *Theoretical Criminology* 173–214.

16 G. Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77–101; M. Loughlin and C. Scott, 'The Regulatory State' in P. Dunlevy, I. Holliday and G. Peele (eds), *Developments in British Politics 5* (London: Macmillan, 1997); Christine Parker, *Just Lawyers* (Oxford: Oxford University Press, 1999); John Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40 *British Journal of Criminology*, 222–38.

17 Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Melbourne: Oxford University Press, 1986).

18 Braithwaite, n 16 above.

19 I acknowledge Howard Zehr as the author of the 'healing edge' metaphor in a restorative justice presentation I heard him give in Florida in 1998.

20 D. Osborne and T. Gaebler, *Reinventing Government* (New York: Addison-Wesley, 1992).

21 Clifford Shearing, 'Violence and the Changing Face of Governance: Privatization and its Implications' (Cape Town: Community Peace Foundation, 1997).

movement, the International Chamber of Commerce was globalising commercial arbitration as an alternative to state courts;[22] courts operate in the shadow of informal commercial mediation. Consistent with Shearing's analysis, in Australia we were able to engage with praxis in what we now call restorative justice a decade earlier in corporate regulation than in criminal justice. While today restorative justice remains a radical alternative for the policing of serious common crime it is the mainstream for policing serious corporate crime.

The five stages of pre-state restorative justice, weak state corporal punishment, centralized Benthamite penitentiaries, Keynesian welfare state probation-prison-parole, and new regulatory state community policing are hardly neat. While I suspect they are more than an heuristic, fine-grained historical work is needed to flesh out their usefulness. The good thing about neat divides that have more than a grain of truth is that they are good to muddy. At all stages of human history, there is evidence of vibrant traditions of restorative justice surviving in civil society.[23] The aspiring kings of weak states and the Benthamite dreamers of strong states failed to kill it off. The prison was not born with Bentham's panopticon – the Greeks, Egyptians and Romans had them, as it would seem did most pre-modern civilisations.[24] Nor is there any period of history where torture of the body, executions and banishment have not survived somewhere in the West. This need not be inconsistent with a core Western historical sequence from restorative justice being more dominant to corporal/capital punishment being more dominant to imprisonment being more dominant.

My approach in this paper is indeed to muddy this five-stage core sequence by juxtaposing the history of a state that does not fit it very well (Australia) with one that fits it reasonably (the US). In the restorative justice movement there has been a lot of learning from 'Confucian' states like Japan, China and Singapore that deviate markedly from the posited core Western sequence. They have had such an ideological commitment to respecting robust extended families and communitarianism that we can study them to understand the possibilities for restorative justice in new Western regulatory states. For example, we have learnt from the empirical work of David Bayley and others on Japanese Koban policing and from Chinese *Bang Jiao* programmes.[25] And we have learnt from weak states like Papua New Guinea which have never acquired the strength to master either the restorative or the retributive traditions of their pre-state societies.[26]

The method then is to formulate historical models of regulation that describe real changes, not just imagined changes, and then enrich our understanding of the limits of their truth-value by studying contexts where they are not so. This is the way I understand David Garland's project.[27] In this essay, the penal history of my own country is the foil for such a method.

22 Yves Dezalay and Garth Bryant, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996).

23 John Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' in M. Tonry (ed), 25 *Crime and Justice: A Review of Research* (Chicago: University of Chicago Press, 1999).

24 Edward M. Peters, 'Prison Before the Prison: The Ancient and Medieval Worlds' in Norval Morris and David J. Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (New York: Oxford University Press, 1995).

25 David H. Bayley, *Forces of Order: Police Behavior in Japan and the United States* (Berkeley: University of California Press, 1976); Hong Lu, 'Community Policing – Rhetoric or Reality? The Contemporary Chinese Community-Based Policing System in Shanghai' PhD dissertation, Arizona State University, 1998.

26 Sinclair Dinnen, 'Restorative Justice in Papua New Guinea' (1997) 25 *International Journal of the Sociology of Law* 453–72.

27 n 9 above.

Two Eighteenth and Nineteenth Century Frontier Societies

The United States and Australia have much in common. They were both frontier societies during the same historical period – forged from rather similar surges of immigrant stock. Both frontiers were rich and suffered chronic labour shortages. Both were dominated by initial English immigration, had hugely influential Irish immigration during the nineteenth century, large influxes of Chinese during their gold rushes mid-century, and only later large surges of continental European immigration. Both advanced their frontiers through violence directed against the indigenous peoples of the land they occupied, indeed by genocide against some tribes. Influential historians of both nations have argued that their national identities were forged by the struggles at their frontiers.[28]

Another thing they have in common is that at these European frontiers they forged the most influential penal ideas of the nineteenth century. This has always been recognised about US history; but it has been a suppressed fact of Australian history until recently. These US ideas were a failure in their own terms, though they were interpreted by Americans and Europeans as a success. The Australian ideas were a success in their own terms, though Australians, who believed them to be a success at the time, came to follow the English analysis (of Bentham) that they were a failure. De Tocqueville was the other European who was influential in defining the American penitentiary as a success and transportation of convicts to Australia a failure. Great distortion arose from both the shame Australia acquired about its past and the pride of Americans in theirs. Americans were fiercely proud of their republican penitentiaries in the 1820s and 1830s. Benjamin Rush juxtaposed them with 'Capital punishments . . . the natural offspring of monarchical governments'.[29] At the very moment in American history when republican freedom was acquiring its deepest meaning, America took pride in institutions of unfreedom.[30] It became permanently attached to the myth that crime was a price of freedom,[31] that freedom was so dangerous it had to be checked by remorseless unfreedom. The imprisonment rate in America has substantially and consistently increased since the mid-nineteenth century while it fell in Australia throughout the nineteenth century and beyond.[32]

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28 For the US see Frederick Jackson Turner, *The Frontier in American History* (New York: Holt, 1948), and for Australia see Russel Ward, *The Australian Legend* (Melbourne: Oxford University Press, 1958).

29 David J. Rothman, 'Perfecting the Prison: United States, 1789–1865' in Norval Morris and David J. Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (New York: Oxford University Press, 1995) 114.

30 David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little Brown, 1971).

31 In referring to this as a myth, I am thinking, inter alia, of the evidence that societies with higher scores on political freedom have lower homicide rates (John Braithwaite and Valerie Braithwaite, 'The Effect of Income Inequality and Social Democracy On Homicide' (1980) 20 *British Journal of Criminology* 45–53).

32 M. Calahan, 'Trends in Incarceration in the United States Since 1880' (1979) 25 *Crime and Delinquency* 9–41; W. Clifford and R.W. Harding, 'Criminal Justice Processes and Perspectives in a Changing World' in *Australian Discussion Papers for the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders* (Canberra: Australian Institute of Criminology, 1985) 50. Of course the imprisonment rate fell as a result of the cessation of transportation and the arrival of more free immigrants. However, it also fell dramatically long after transportation had ended, falling from 500 per 100,000 in the 1850s to 50 by 1920, see Satyanshu K. Mukherjee, John Walker and E. N. Jacobsen, *Crime and Punishment in the Colonies* (Sydney: University of New South Wales Printing Unit, 1985) 154.
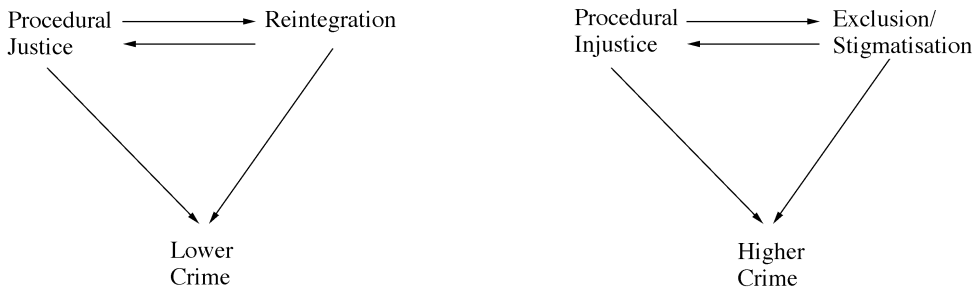
Australian convict society   US slave society

Procedural ——————————→ Reintegration   Procedural ——————————→ Exclusion/
Justice ←——————————   Injustice ←——————————   Stigmatisation

                    ↓ ↓   ↓ ↓
                  Lower   Higher
                  Crime   Crime

Figure 1: Starting model for the analysis of a convict and slave society

I will argue that during the nineteenth century, Australia was transformed from being a high crime frontier society to a low crime society, while the US was transformed from a low to a high crime society. The key difference here is that to some degree the US in the 19th century is understood as a slave society, Australia as a convict society. This of course does not mean that most citizens in either case were convicts or slaves any more than to refer to frontier society implies that most citizens lived at the frontier. It means that the slave system, the convict system and the frontier had major and enduring effects on these societies. In the case of slavery, we might formulate this institution as important to understanding why well beyond the demise of slavery we can explain differences in crime rates in US cities by putting variables into regression analyses like percent black, black-white income differences and South/non-South (the Southern subculture of violence thesis).[33] Figure 1 summarises a theory of the way this difference played out.

These crucial differences between the two European frontiers were interconnected. Britain was shipping convicts to North America until the American Revolution, albeit in much smaller numbers than were later shipped to Australia. While American colonists initially wanted these convicts, by the time of the revolution African slavery was more profitable and capable of providing a more or less complete solution to its labour shortages. Selecting Africa's fittest workers made for higher labour productivity than having England ship its least desired workers. The continued vomiting of its unwanted criminals into North America was one of the colonists' many grievances against England. 'Send them back rattlesnakes', was Benjamin Franklin's rhetoric. George III vowed in a 1783 letter to Lord North that after the revolutionary war was won: 'Undoubtedly the Americans cannot expect nor ever will receive any favour from Me, but the permitting them to obtain Men unworthy to remain in this Island I shall certainly consent to'.[34] On the other side, after decades of unsuccessful attempts by the government of Virginia to get Britain to end the transportation of convicts, in 1740 it honoured a request from Britain for the Spanish war by sending them ex-

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33 R.D. Gastil, 'Homicide and a Regional Culture of Violence' (1971) 36 *American Sociological Review* 412–27.
34 Manning Clark, *A History of Australia, Vol I: From the Earliest Times to the Age of Macquarie* (Melbourne: Melbourne University Press, 1962) 64.

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convicts![35] In 1775 Americans physically prevented convicts from landing, just as a shipload was sent home from Nova Scotia in 1789. It may be underestimated as a grievance motivating the Revolution, as might moral superiority to Britain be underestimated as an explanation for post-revolutionary pride in American penitentiaries

Australia became the receptacle for what were regarded as the dangerous classes of England and Ireland after the revolutionary war was lost. Indeed, it was colonised for the explicit purpose of acting as a penal colony. England never considered population of Australia by slaves; by then the English social movement against the slave trade was in full swing. In North Queensland, there was a brief and very modest experiment with Melanesian indentured labour on sugar plantations.

Up front, it is worth stating that in a nineteenth century society more transfixed by eugenics as the century proceeded, transportation supplies a natural experiment of the genetic explanation of crime. England in the nineteenth century hung its most dangerous felons and transported those it regarded as second only to the executed in levels of dangerousness. The convicts were what it regarded as its most degraded residuum. Tasmania had the highest number of convicts of any Australian state (42 per cent of the total), the most serious convicts were selected to go there rather than to the mainland, it had the lowest amount of free migration and experienced a continuation of transportation until 1853 (only Western Australia was later). Consequently, more than in any state, most of the genetic stock remained of convict descent until the end of the nineteenth century. By then Tasmania had a much lower crime rate than the rest of Australia. I will show it became one of the most serene places on earth by the 1880s. In contrast to recruitment from the high-crime British urban slums, US slave traders recruited from societies in which such ethnographic evidence as we have suggests stealing from fellow citizens was well regulated by restorative justice and banishment. The US slave traders recruited the fittest slaves they could find on the continent: those with the resilience of mind and body to survive the terrible voyage to America. They were the people the exporting society could least afford to lose.

The Kables Move to Sydney[36]

Nineteen year old Susannah Holmes was sentenced to death in 1783 for breaking into a house and stealing a quantity of linen and silverware. The judge recommended that special circumstances warranted the extension of Royal Mercy, which was indeed extended. The sentence was commuted to transportation to America for 14 years. In 1786 while still awaiting transportation to a destination closed by the American Revolution, she fell pregnant in Norwich Castle Jail to another teenage housebreaker awaiting transportation, Henry Kable. Henry's father and older accomplice in the housebreaking had both gone to the scaffold; Henry had also won Royal Mercy. Susannah and Henry applied for permission to marry. This was refused.

In 1786 the first fleet of convicts to colonise Botany Bay was being assembled. When it was realised there was a shortage of female prisoners, the women in

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35 A.G.L. Shaw*, Convicts and the Colonies* (London: Faber and Faber, 1966) 32.
36 I rely more than any other on David Neal's account of the Kables' story here, see David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (New York: Cambridge University Press, 1991) 1–9.

Norwich Castle Jail, including Susannah were transported to Plymouth. Desperately but unsuccessfuly Henry pleaded to be allowed to marry and accompany Susannah and the baby. When Susannah arrived at the hulk *Dunkirk* in Plymouth harbour, the babe was torn from her on the captain's orders. John Simpson, a turnkey who observed this after ferrying Susannah out to the hulk, took the baby into his care, travelled with the infant to confront the unsympathetic staff of the Home Secretary Lord Sydney with the tragedy. Then he waited at Lord Sydney's house until he rushed up to him on his stairs to persuade him to allow Henry and Susannah to be married and reunited with their baby. Perhaps Lord Sydney was a politician with an eye for a good story, because Simpson's 700-mile round trip mercy dash with the child hit the headlines. A public subscription purchased a parcel of clothes and other valuables for the Kable family to take to Botany Bay.

In 1788 when the Kables disembarked at Botany Bay after an horrendous voyage below decks where many convicts perished, the parcel had disappeared. The Kables issued a writ naming the ship's captain as a defendant. In the first civil case in New South Wales, the court found for the convicts and ordered the captain to pay fifteen pounds to the Kables. It was a remarkable case because under English law at the time, the convicts had no right to sue. Even more remarkable was that they won their case against as powerful a figure as a ship's captain.

Just a couple of years later Henry became a constable of police and then for seven years Chief Constable of Sydney. He was dismissed from this position in 1802 after misbehaviour concerning conflicts with his trading activities. Chief Constable of colonial towns was a role many other ex-convicts subsequently filled, many corruptly. Henry and two partners subsequently became principal ship owners and among the very richest of the colony's mercantile class.

The Kables' story illustrates the central facts about transportation: the heartbreaking separation of families, the murderous voyage, the exploitation of convicts at the hands of the dregs of the British military who were often the bigger criminals, and hope, hope at the grace of a humane turnkey, but most significantly, hope from the fairness of a Governor and Judge Advocate who believed that unless convicts enjoyed the protection of the rule of law from the predations of their military jailers, a convict colony could not survive.

Procedural Justice in the Australian Convict Colony

A conclusion of this essay is that the Australian convicts and their children turned away from a life of crime. It is not my purpose, however, to argue that transportation was a good thing. It was not. There was the terrible suffering mentioned the last paragraph. But the more fundamental evil was that the crimes of the convicts 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.

It is not my conclusion that the convict colony lacked brutality. In the use of the lash and the scaffold, it was horribly brutal. Historians differ on whether the lash was used more or less brutally in the Australian convict system than in the American slave system. I suspect that how one comes out on that question depends on which times and places one chooses to make the comparison between the two continents. But surely no place in America was as vicious as Captain Logan's Brisbane settlement, Captain Logan for whose murder both the Aborigines and the

convicts clamoured to claim credit.[37] On balance, I read the bits and pieces of records on the frequency and severity of flogging as showing that the flogging of Australian convicts probably was more brutal than that of North American slaves. It was not restricted to men until 1817, the number of lashes was awesome, at its worst it spattered the floggers' faces with blood leaving pieces of flesh scattered over the ground.[38]

More brutal though it may have been, Australian flogging was ordered in a more procedurally fair fashion. While American slave-owners stood over their property with a whip, administering it on the spot, Australian masters of convicts had to send them to a hearing before a magistrate before the lash could be administered by a constable. Many of the constables were ex-convicts who might be bribed to be less brutal with their work[39]. This was institutionalised at first as part of Governor King's programme to regulate the abuses of power of the New South Wales Corps.[40] Consider in historical context the procedural innovation involved here. Masters of convicts were being required to have their corporal punishment authorised by a court when British naval and military commanders were not so constrained, when masters under English common law could flog apprentices and indentured workers on the spot, schoolmasters could do so to students, and it was not long since husbands had a right/duty to do so to recalcitrant wives.

As illustrated by the Kables' case, Australian convicts had a right to hold property and sue to protect it, to sell part of their labour, to appear as witnesses in court cases, and to write petitions to a Governor who mostly treated them seriously. English prisoners did not enjoy these rights. Convicts could and did press charges against their masters for ill-treatment in ways that are impossible in contemporary Australian prisons.[41] Convicts were well advised to be sure of their ground before complaining. Atkinson reports that there were 210 charges against convicts by masters before the Scone bench in 1833 compared to only six by convicts against masters.[42] But all six did succeed. While magistrates' courts administered a rough justice even worse than contemporary lower courts, between a quarter and a third of those prosecuted before the colony's criminal court were acquitted.[43] Perhaps most remarkably, convicts assigned to work for landowners could obtain a writ of *habeus corpus* to protect them from being locked up without trial. Without a court order a convict could not even be put in irons for any reason other than prevention of escape. In a famous case Justice Stephen in 1827 upheld a writ of *habeus corpus* from some convicts who had been locked up for five or six weeks for cattle stealing without being sent to court. The judge ordered the prisoners to be released, finding that ''the rights of prisoners were as sacred in the eye of the law as those of free men''.[44] Contemporary criminal lawyers would view this as an extension of *habeus corpus* to prisoners under sentence to contest an administrative decision to

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37 Raymond Evans and William Thorpe, 'Power, Punishment and Penal Labour: Convict Workers and Moreton Bay' (1992) 25 *Australian Historical Studies* 90–111.

38 n 36 above, 36–37; and especially at Moreton Bay, Evans and Thorpe, *ibid*. On the other side, see Stephen Nicholas, 'The Care and Feeding of Convicts' in S. Nicholas (ed), *Convict Workers: Reinterpreting Australia's Past* (Sydney: Cambridge University Press, 1988) 180–183; J.B. Hirst, *Convict Society and Its Enemies: A History of Early New South Wales* (Sydney: George Allen & Unwin, 1983).

39 Hirst, *ibid* 61.

40 *ibid* 58.

41 *ibid* 109–111.

42 Alan Atkinson, 'Four Patterns of Convict Protest' (1979) 37 *Labour History* 28–51.

43 Hirst, n 38 above, 113.

44 *ibid* 118.

reclassify them from a work release programme to maximum security following a further criminal offence. A courageous judgement; yet Chief Justice Forbes backed Justice Stephen when he was subjected to some political pressure over it. It was not an isolated one. A year after the English courts ruled that questions about previous offences could not be asked during criminal trials, Judge Willis refused to allow the NSW Attorney-General to ask a witness 'what were you sent out for?'.[45] Hence, Neal concludes that the courts acted as a *de facto* parliament:

> The American and French revolutions gave political actors in New South Wales recent models for political change. Neither the ideology of universal rights not the strategy of armed revolution was adopted in New South Wales. The presence of Jacobins, Irish rebels and political leaders who were well versed in those ideas and strategies meant that the strategies actually adopted were not adopted in ignorance of other possibilities. [Instead] protagonists relied on their British birthrights and deployed the language of the rule of law to secure them and to forge new social and political order out of the penal colony at Botany Bay.[46]

After the abortive Irish Rebellion of 1804, there was no convict uprising. A single settler employing a number (sometimes dozens) of convicts hundreds of miles from the reach of state authority would seem to have reason for fear. Yet the Australian bourgeoisie lived less in fear of a rebellion of their dangerous classes than was manifest in the fears of the European bourgeoisie of the era or in the fears of American plantation owners of slave uprisings. That, I will argue, was because it was clear to them that the convicts had hope, a stake in the future,[47] and some prospect of fair procedure to deal with the injustices of the present. The literature of the social psychology of procedural justice shows that even in the context of a harsh criminal justice system such as that of the contemporary US, adverse outcomes combined with a perception of fairness of procedures can deliver high compliance with the law.[48] One reason is that when one shares an identity as a citizen of a just legal order, there is a willingness to comply with that order.[49] To realign the identities of convicts to those of law abiding citizens, convicts need to be persuaded that they are now in reach of a society where the rule of law is something that offers practical protection to them and is therefore worthy of being honoured. Brutality is more bearable when its end can be imagined and seen and when its excesses can be challenged by fair procedure. Neither Australian Aborigines nor American slaves could imagine its end in the same way the white Australian convicts could. It is the combination of adversity with perceived injustice that conduces toward defiance of a legal order.[50]

While the adversity of floggings was terrible, mostly it could be avoided by sticking to the rules. The convicts were after all in an utterly open prison where 'the lash had to do the work of the walls, the warders and the punishment cells'.[51]

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45 *ibid* 119.
46 n 36 above, 25.
47 '[E]ach governor, at least until the end of Macquarie's term of office, was diligent in engendering belief in ... providing convicts and emancipists with "a something to lose"' (W. Nichol, 'Ideology and the Convict System in New South Wales, 1788–1820' (1986) 22 *Historical Studies* 13).
48 E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988); Tom Tyler, *Why People Obey the Law* (New Haven, Ct.: Yale University Press, 1990).
49 Tom Tyler and Robyn M. Dawes, 'Fairness in Groups: Comparing the Self-Interest and Social Identity Perspectives' in B.A. Mellers and J. Baron (eds), *Psychological Perspectives on Justice: Theory and Applications* (Cambridge: Cambridge University Press, 1993).
50 Lawrence W. Sherman, 'Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction' (1993) 30 *Journal of Research in Crime and Delinquency* 445–73.
51 Hirst, n 38 above, 68–69.

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Moreover, the leading histories agree that 'the common wisdom remained that kindness and firmness rather than harshness was the best method of dealing with them'.[52] New South Wales even had an early social scientific researcher who interviewed convicts as to whether they would behave better for a good master or a bad one. Many found the question awfully funny, but those who were persuaded to take it seriously felt they would behave better for a good master.[53] Flogging aside, in many respects the adversity of male convicts was less than that of employed men in England. They were better fed than workers back in England. Indeed they received dietary intakes recommended by contemporary Australian standards for younger men and more than Scottish coal miners received in the 1980s.[54] The convicts worked shorter hours,[55] were better housed,[56] better clothed,[57] and had better access to medical care[58] than both American slaves and free English workers (but see the questioning of this conclusion for Moreton Bay by Evans and Thorpe).[59]

How can we make sense of this degree of good treatment? How can we make sense of some of the excess assurance that procedural rights allowed convicts at times, as evidenced by the following:

> 'Do it yourself and be buggered; punish me and be damned', was how one convict greeted his master's enquiry as to why he hadn't done his work. When a magistrate sentenced a young woman to ten days' solitary confinement on the complaint of her master [women could not be flogged after 1817], she turned and spat in her master's face. The magistrate then increased the sentence to 30 days which was the maximum, as the young woman well knew. 'O, thank you, I am much obliged to your worship; thirty days; I am very fond of an odd number, would you be kind enough to indulge me, and make it thirty-one days; do, your worship, I should like to have thirty one'.[60]

The answer to why this was possible is that development of the colony was held back by labour shortages. First, early Governors of the colony formed the view that their primary objective was to get their convict population to be willing workers and that the best way to accomplish this was to institutionalise just treatment. We will see that early implementation of the policy achieved early success after a difficult first few years where chronic starvation confronted the settlement. Second, the judiciary played a central role in pushing procedural justice for convicts in Australia well beyond that enjoyed in England or America. Third, most convicts were put to work by assigning them to masters who believed that they could get the best out of them by being fair but firm. There were brutal masters, but these did not grow rich in the way the fair and firm masters did. A brutal master like James Wright in Canberra (at Lanyon) could turn no fewer than eight of his convicts into bushrangers and thereby render himself bankrupt. Collective agreements among the convicts to work slow for masters they did not like so that the master would send them back to be reassigned to a better master were effective weapons of the weak. Convicts could sometimes pick their own master by conspiring with a wealthy landowner who was a good master to support them in a

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52 *ibid* 71.
53 *ibid* 73.
54 Nicholas, n 38 above, 185.
55 *ibid* 187–88.
56 *ibid* 189–91.
57 *ibid* 194–95.
58 *ibid* 192–94.
59 n 37 above.
60 Hirst, n 38 above, 70–71.

complaint to the governor or a magistrate (who might be a friend of the wealthy landowner) against a bad master for ill-treatment. When the Governor or a Court took convicts off the unjust master, the wealthy landowner could grab them. Or the convict could simply punch the Master on the nose and cop a flogging followed by reassignment.

With that as a main conclusion, there is a need to qualify it considerably. All of the early Governors enjoyed largely unchecked local power and all abused it most unjustly on issues that were important enough to them. Indeed, this was especially true of the greatest, the most visionary and the most reintegrative of the early Governors, Lachlan Macquarie.[61] One of the less great Governors was Captain Bligh, of the *Bounty* fame. His most remembered contribution to the procedural justice debate was: '[t]he law sir! Damn the Law; my will is the law, and woe unto the man that dares to disobey it!'.[62] Bligh's Governorship fell to the only military coup in Australian history. While he was a more complex character than one might gather from the portrayals of him by Errol Flynn and Mel Gibson,[63] he was a man who might have done better in life had he read Tom Tyler's research on the social psychology of procedural justice.

The brutality of Captain Logan at Moreton Bay was not matched by all of the military commanders of the outlying penal establishments where convicts were sent for punishment or of the Women's Factory in Parramatta where many female convicts were incarcerated. Yet most of the commanders of the Norfolk Island prison were rivals to Logan in brutality and injustice. While assignment to work that involved freedom to roam the countryside was the fate of the majority, we must not forget that there was a diversity of convict experiences of Australia. Many did die in chains and in conditions of relentless, savage confinement. More still at the scaffold and on the voyage. Yet there is a need to balance the image of the convict era which tends to focus exclusively on its wretchedness and hopelessness. The tour guide at Port Arthur points to a cliff and says that is where the two convict boys leaped to their death as described in Marcus Clark's novel, *For the Term of His Natural Life*. The boys were at Point Puer, an institution for juvenile offenders established four years before the first such institution was established in England.[64]

'I can do it now.' said Tommy. 'I feel strong.'
'Will it hurt much, Tommy?' said Billy, who was not so courageous.
'Not so much as a whipping.'
'I'm afraid! Oh, Tom, it's so deep! Don't leave me, Tom!'
The bigger baby took his little handkerchief from his neck, and with it bound his left hand to his companion's right.
'Now I can't leave you.'
'What was it the Lady that kidded us' said, Tommy?'
'Lord have pity on them two fatherless children!' repeated Tommy.
'Lets say it, Tom.'
And so the two babies knelt down on the brink of the cliff, and raising the bound hands together, looked up at the sky, and said, 'Lord have pity on us two fatherless children!' And then they kissed each other, and did it.

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61 John Ritchie, *Lachlan Macquarie* (Melbourne: Melbourne University Press, 1986)**.**
62 Bruce Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict* (New South Wales. Sydney: Federation Press, 1996) 10.
63 Greg Dening, *Mr. Bligh's Bad Language: Passion, Power and Theatre on the Bounty* (Melbourne: Cambridge University Press, 1992).
64 Shaw, n 35 above, 244.

While Robert Hughes says that no incident like this is known to have occurred at the boy convicts' settlement at Point Puer,[65] we know that suicide was not uncommon among the convicts. While most of the boys at Point Puer were confined there only for long enough to teach them a trade, while many of them went on to become the business elite of Hobart Town, many were also subjected to remorseless brutality. Simplifying, we might say there are two basic stories of the convict experience. The majority story is one of assignment to work in the Australian bush or as a servant in town (especially for women) by masters who were fair to those who worked well. Yet those same masters could be vicious with defiant convicts. A tiny minority of masters were vicious with all of them. Defiant convicts who were treated savagely tended to become more defiant (see, for example, the analysis of Judge Therry of bushrangers as men who had been repeatedly and unjustly flogged).[66] This put them on a career trajectory to Norfolk Island or some other hell, to the scaffold or to life as a bushranger. The legends of Botany Bay are brimming with stories – here is a fictional and factual one of such defiance, both from the pen of Charles Macalister:

> And some dark night when everything is silent in the town
> I'll kill the tyrants, one and all; and shoot th' Floggers down:
>
> I'll give th' law a little shock: remember what I say,
> They'll yet regret they sent Jim Jones in chains to Botany Bay.
>
> Charles Macalister, *Old Pioneering Days in the Sunny South*
>
> [They] were made of the sternest human stuff possible, and men of that type never flinched under the lash. On two occasions I saw men – after undergoing, one a flogging of fifty, and the other seventy-five lashes, bleeding as they were, deliberately spit, after the punishment, in the flogger's face. One of them told Black Francis 'he couldn't flog hard enough to kill a butterfly'.[67]

In the next section, we tell the majority story, which is one of reintegration into respectable society, of the reformed criminal. Yet we should not forget the minority who were made worse by their convict experience (Figure 2 summarizes the two trajectories). Certainly, the reformed majority did not. They sang the ballads that lionized the likes of Bold Jack Donohoe, they protected the bushrangers from the police. This was because they had known their own Jack Donohoe; they had seen how the system that was forgiving to them could be so vengeful to others. Remarkably, to some degree this sentiment survives in Australia at the end of the 20th century. I noticed it on my son's primary school graduation night, when the children performed the play 'Ned Kelly'. In what other country would this be thought appropriate to such an occasion: a play that treats lovably a recidivist armed robber who callously murdered policemen. It is part of the Australian legend to feel sorry for Ned when he hangs, to agree with him when he tells the judge he will meet him in hell, to resent the police, to be at least somewhat on his side because of the way they treated his Irish convict mum. Even the policeman-parent who sat near me did not think of complaining about the play. You might say Americans have their Jesse James or Billy the Kid, as do other countries. But Ned Kelly is nearer to Jefferson or Lincoln in the sense that matters. For twentieth century Australians, he is the figure from their nineteenth century

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65 Robert Hughes, *The Fatal Shore: The Epic of Australia's Founding* (New York: Alfred A. Knopf, 1987) 602.
66 Judge Therry quoted in Ward, n 28 above, 138.
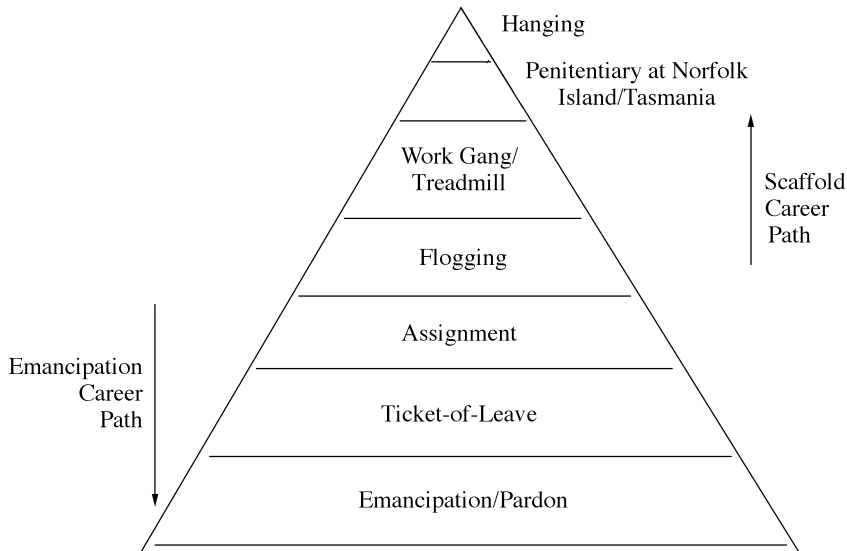67 Charles Macalister quoted in Ward, n 28 above, 34.

Figure 2: Two Career Paths Out of the Enforcement Pyramid of Australian Convict Society

history who is most widely known. Perhaps it is perverse that more Australians have a soft spot for Ned than for Macquarie or Parkes or Macarthur, but this is the fact of the matter.

So we have simplified the procedural justice-injustice story into one of an assigned majority who went straight and a brutalised minority who responded to injustice with escalated defiance. We must at least complicate this simplification now with a crucial third category. Henry Kable falls into it. These were ex-convicts, emancipists, who were reformed from being a powerless underclass criminal in England to being a respectable citizen of the colony who prospered through crimes of the powerful. Such men modelled their exploitative respectability on the illegal trading activities of the officers of the New South Wales Corps. This started in the 1790s when the officers used their power to secure trade monopolies, forbidding anyone else boarding newly arriving ships and buying up all the stock so they could sell it at extravagant mark-ups.[68] Many took their fraudulent business practices into the corrupt conduct of high government office. The tradition continued in the twentieth century: Allan Bond, convicted for burglary as a young English immigrant became a business icon and a competitor for title of the biggest corporate criminal any nation's history has known (in terms of the sheer dollar amounts misappropriated).

While no nation may be able to match Australia's record of transforming powerless criminals into productive law-abiding citizens, nor perhaps can any country match its record in turning them into criminal abusers of power. The worst abuses involved mass killings of Aborigines to take vast tracts of land from them. A common career path for the most ruthless 'reformed' criminals in New South Wales was the police. Police were neither well paid compared to hard workers on

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68 Clark, n 34 above, 135.

the land, nor were they well liked. Yet they could make money by being corrupt. This was a configuration of incentives that tended to attract the dregs of convict society into policing. The emancipists themselves regarded other ex-convicts who would choose to earn a living that involved flogging convicts as below respect.

A remarkable statistic for 1825, when the average strength of the Sydney police force was 50: 57 officers were dismissed for misconduct and 25 resigned in one year.[69] An equally stunning statistic from Sturma's study of convictions for serious crimes before the Superior Courts of New South Wales is that the occupation of 10 per cent of those convicted in 1841 was 'policeman'.[70] Things improved, as O'Malley has argued, with this percentage dropping to one per cent a decade later.[71] Most of the early constables and chief constables were, like Henry Kable, former convicts. Many, perhaps most of those who rose to the top were corrupt. As late as 1844 in Melbourne (after transportation to the Eastern mainland had ceased), Chief Constable William Sugden articulated a police policy to enlist emancipists as detectives 'because they were better acquainted with the nature and character of arrivals from Van Dieman's Land'.[72] Things did not improve much in New South Wales until late in the century,[73] even after the *Sydney Police Act, 1833* sought to regularise policing on the model of the London Metropolitan Police. The first police commissioner under the new Act was dismissed over corruption charges and the three succeeding office holders were similarly dismissed for alleged improprieties.[74] These were not always emancipists. Among the three was William Augustus Miles, supposedly the illegitimate son of King William IV appointed through Royal patronage. This was the other side of the white-collar crime problem in Australia: as well as being a dumping ground for convicts, it was also a dumping ground for ne'er do wells who the British ruling classes wanted to keep at a distance. These the most notionally respectable of the colonials (Wentworth being the most influential character of the type) were role models for the most ruthless emancipists. While abuse of power was attenuated when the Australian colonies acquired more robust democratic constitutions with proper separations of powers, there had nevertheless been an embedding of a culture of abuse of power in certain institutions. Hence, for example, in the twentieth century the New South Wales police managed to repeat the feat of a sequence of three corrupt commissioners.

Reintegration

Assignment was the principal vehicle of reintegration. There were cases where wives of convicts became free immigrants to Australia, set up small businesses and succeeded in having their husbands assigned to work for them. More generally marriage was encouraged in the colony because stable family relationships were seen as vital to the rehabilitation of criminals. Men confined in the Sydney convict

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69 Pat O'Malley, *Law, Capitalism and Democracy: A Sociology of Australian Legal Order* (Sydney: George Allen & Unwin, 1983) 53.
70 Michael Sturma, *Vice in a Vicious Society: Crime and Convicts in Mid-Nineteenth Century New South Wales* (St. Lucia: University of Queensland Press, 1983) 88.
71 n 69 above.
72 Robert Haldane, *The People's Force: A History of the Victoria Police* (Melbourne: Melbourne University Press, 1986) 17. See John Blackler, 'The Case of the Missing Australian Policeman: the Investigator in the Fiction of the "Continent of Mystery"', unpublished manuscript, 1998.
73 n 69 above.
74 Blackler, n 72 above.

barracks were allowed to sleep with their wives in the town and were given Friday and Saturday to themselves so they had better prospects of supporting their families. Well-behaved convicts with wives in Britain were eligible to have them and their children shipped to the colony free of charge (from 1816).[75]

The economic reintegration policies were even more humane and innovative than the family reintegration policies. Most convicts could expect to be assigned to work for a master. Mostly this meant a private landowner, but for many it also meant working as domestic servants in towns or for government. Convicts were paid modestly at government regulated rates for this work. But in conditions of acute labour shortage, many masters secured the best convicts by tempting them with side-payments. In addition, once convicts completed their assigned work or assigned hours, they had a right to work at market rates for other masters. As market wage rates were high in conditions of labour shortage, many convicts made good money while on assignment. Responsible conduct on assignment would entitle a convict to a 'ticket-of-leave'. With a ticket-of-leave convicts could work for whoever they chose. The idea of the ticket-of-leave was copied in England later in the century and became the institution that today we call parole. Note that the desire of masters to hang on to their best convicts once they were entitled to a ticket-of-leave was another reason for treating them fairly while on assignment. Finally, pardons were widely granted by the government to well-behaved, highly productive convicts, especially by Governor Macquarie.

We might even say that the term 'restorative justice' was invented by Lachlan Macquarie early in the nineteenth century. He often spoke of 'restoring' convicts to their place in respectable society and was regularly denounced for this usage by exclusives (free settlers) who pointed out that convicts were not members of respectable society at the time of their conviction and Macquarie was in fact elevating them above their station. Another New South Wales invention was the 'certificate of freedom' issued to convicts who were pardoned or who had served their terms. It was necessary in a convict society where sometimes emancipists needed to prove they were free. The certificate claimed that the holder was 'restored to all the rights and privileges of free subjects'.[76] This was another example of where colonial law bestowed more full rights on ex-convicts than English law of the time, where even a pardon was not sufficient to restore certain rights to an ex-offender.

Emancipated convicts were given substantial free grants of land, animals, tools and seeds, sufficient for them to become economically viable settlers. Many became large landholders. They became masters of convicts on assignment themselves. By the 1820s, the fourth decade after the first convicts arrived, ex-convicts were masters of the majority of convicts on assignment, owned over half the wealth of the colony and three quarters of the land.[77] Here is where the contrast with economic integration for American slave society is sharpest. Imagine how different American society would be today if by that date half the wealth in the South was owned by former slaves, if slaves had been given slaves to become slave-owners themselves after just a few years in chains.

The emancipists grabbed their opportunities with both hands. James Ruse was the first emancipist to be granted land in 1790. He was an experienced farmer in

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75 Hirst, n 38 above, 80.
76 *ibid* 108.
77 *ibid* 81.

England and worked out what the military farmers had not managed to do – how to cultivate the soil of the great south land to make it productive. Ruse also introduced the first of many profit-sharing schemes with the convicts assigned to work for him. Emancipists were mostly fair, even generous, in their treatment of convicts under sentence. In a scarce labour market this was another factor that put pressure on the exclusives to hold their convicts by also being fair.

Not only did economic integration thus contribute to procedural justice as a result of this scarce labour market, procedural justice also contributed to economic reintegration. An engineer brought out from England to employ 100 convicts digging a tunnel to carry water, John Busby, kept the best records on how he managed his workforce. At first he achieved good results by sending convicts who behaved badly during the week to work at the colony treadmill on Saturday. After adverse comment on this practice by a magistrate, Busby was advised it was an illegal punishment unless a magistrate approved it. Rather than put up with the delays of sending convicts to court, Busby set them a task for the day which, once completed, allowed the men to be free to earn extra income elsewhere at market rates.[78]

Perhaps more surprising than the integration of emancipists into agriculture and industry was their integration into the professions. William Redfern was appointed principal surgeon, the first of a number of emancipists to rise to the top of the profession of medicine. The first practicing lawyers in the colony were convicts on tickets-of-leave. Macquarie appointed three non-lawyer emancipists as magistrates. Obviously, this would not have been permitted in England. Macquarie's pre-eminent government architect, Francis Greenway, still the most famous architect in Australian history, was a convict. Education was only allowed to be given priority in the colony early in the nineteenth century by appointing convict teachers on tickets-of-leave.

Perhaps the most strategic integration of emancipists into the colony was that from early in the history of the colony emancipists ran successful newspapers. The emancipist press gave Governors a hard time when they buckled to the demands of exclusives.[79] Its very existence consolidated the legal and economic gains emancipists had secured.

In addition to family and economic reintegration, the convicts enjoyed a surprising level of social reintegration. Macquarie was the first Governor to invite ex-convicts to his table, a gesture exclusives resented. Exclusives did respect a strong norm against referring to a convict as a convict, however. The most usual respectful appellation was 'government man'. In all but a few special places or circumstances convicts under sentence wore dress that was varied; in appearance they were indistinguishable from other citizens. While hurtful stigmatisation did occur, there was a lot less of it than convicts suffered in England or perhaps anywhere else.

More important to Macquarie than family, economic and social reintegration was reintegration into the church. To this end, welcoming convicts into the bosom of the church was attempted by promoting the work of the British and Foreign Bible Society and the Sunday School movement.

Unless crime was of such a serious kind that it could not be kept from the police, crimes of one emancipist against another were mostly dealt with informally, if not

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78 *ibid* 66.
79 For instance, see Manning Clark, *A History of Australia, Vol II: New South Wales and Van Diemen's Land 1922–1838* (Melbourne: Melbourne University Press, 1968) 74–75.

always justly by 'kangaroo courts'. Ward's description of how 'collective public opinion' rather than 'state power' maintained order on the goldfields is instructive, as is his observation, astute observer of bush institutions as he was, that 'roll-ups' at Western Australian goldfields and Northern Territory mines were still in the 1930s the method for allowing all miners to participate in the adjudication of justice.[80]

These then are the reasons for my interpretation that Australian convict society experienced high levels of reintegration that promoted high levels of procedural justice and vice versa. While I have not documented the story of the opposite claim about US slave society, I take it to be uncontroversial that slave society was characterized by stigmatisation rather than reintegration, stigmatisation that was mutually constitutive of high levels of procedural injustice. But did the procedural justice and reintegration – the policy of restorative justice – result in lower crime rates, as the theories of restorative justice,[81] reintegrative shaming[82] and procedural justice would predict?[83]

Restorative Justice and the Crime Rate

[I]t is the first time anyone has dared to fashion a society from all that is wicked in another[84]

Jeremy Bentham saw transportation as a threat to his panopticon. He branded it an abject failure as a crime prevention strategy. This was the view that came to prevail in England; it influenced that intellectual of the other great power of the period, de Tocqueville. Australian thinking mid-century came to follow the European orthodoxy. Yet during the period of transportation, Australian thinking was overwhelmingly that transportation worked in reforming criminals. Typical was the view of longstanding New South Wales Attorney-General John Plunkett in 1840 that the convict system: 'has reformed more than any penitentiary or any other system of punishment that has hitherto been discovered'.[85] During the transportation era this was the dominant analysis in the British bureaucracy as well. But British party politics rendered a different story. The Tory side tended to buy Bentham's view that transportation provided uncertain and therefore weak deterrence. They seized on stories of ex-convicts making their fortunes and questioned what kind of deterrence of crime this was. Both the Whigs and Radicals came to equate the convict system with slavery; Wilberforce felt it was degrading for Christian farmers to be masters of slaves. They seized upon stories of flogging and depravity in the colony. Both sides alighted upon travellers' tales that sodomy was rife among male convicts and that female convicts were widely used as whores. This was also a major theme of Tocqueville's critique: 'What Australian society essentially lacks is morals. And how could it be otherwise? ... [Women] lost those traditions of modesty and virtue which characterise their sex in the

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80 Ward, n 28 above, 110–111.
81 n 23 above.
82 John Braithwaite, *Crime, Shame and Reintegration* (Melbourne: Cambridge University Press, 1989).
83 Tyler, n 48 above.
84 Citizen Toulongeon, 3 January 1803, quoted in Colin Forster, 'Part I: Prison and Deportation: Botany Bay and the French Penal Debate, 1814–32', *Working Paper in Economic History*, No. 136 (Canberra: Australian National University, 1990).
85 John N. Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales, 1832–1869* (Canberra: Australian National University Press, 1973) 121.

mother country ... bastards still make up a quarter of the children'.[86] Like Tocqueville, Commissioner Bigge, who was sent out to reign in Governor Macquarie's excesses of integration, saw a need 'to preserve British 'civilisation' from the levelling tendencies of frontier society'.[87]

This was an unassailable Whig-Tory political cocktail, combined with the intellectually respected analyses of Bentham and Tocqueville, for redefining transportation as a policy failure. Yet Australian and English bureaucratic opinion held out against these odds for many decades. Both Bentham in England and Tocqueville in France lost the debates during their own lifetimes, never to see their beloved penitentiaries built. In the twentieth century, the serious historians of the Australian convict experience came to redefine it again.

Robert Hughes concludes with the sweeping claim that 'the assignment system in Australia was by far the most successful form of penal rehabilitation that had ever been tried in English, American or European history'.[88] Australia's leading historians of the convict era mostly agree that it was a violent, uncivil, drunken, corrupt place at first which became more civilized as most convicts turned away from crime to become productive citizens and bore children who became remarkably law abiding. I am thinking here particularly of the histories of Manning Clark, Keith Hancock, John Hirst, Robert Hughes, A.G.L. Shaw and L.L. Robson.[89] But I am also thinking of the first scholarly history of Australia, written by Ernest de Blosseville in 1831, revised in a second edition in 1859, and recently made accessible to Australian historians by Colin Forster.[90] Blosseville's book attracted great interest in a France that was fascinated by the idea of Australia; it won the prestigious Montyon prize of the Academie Française in 1832, a prize that de Beaumont and de Tocqueville won the next year on the opposite side of the debate for their book advocating the American penitentiary.[91]

Blosseville believed that after only four years the colony had been able to put an early disorderly period behind it, that crime had diminished, that the streets of Sydney were by then safer than some of the streets of London. He attributed particular effectiveness to pardons, economic reintegration of offenders and selecting convicts of good character for the Sydney night watch.[92] Blosseville relied on the interesting resource of a French government fact-finding mission which spent five months in New South Wales in 1802. Péron reported for the members of the mission:

> Never perhaps has a more worthy object of study been presented to a statesman or philosopher ... There, brought together, are those terrible ruffians who were for so long the terror of the government of their country: thrust from the bosom of European society ... The majority, having atoned for their crimes by a hard bondage, have rejoined the ranks of the citizens. Obliged to concern themselves with the maintenance of law and order to safeguard

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86 Quoted in Colin Forster, *France and Botany Bay: the Lure of a Penal Colony* (Melbourne: Melbourne University Press, 1996) 104.

87 John Ritchie, *Punishment and Profit* (Melbourne: Heinemann, 1970) 220.

88 n 65 above, 103.

89 Manning Clark, *Manning Clark's History of Australia*, abridged by Michael Cathcart (Ringwood: Penguin, 1992); Sir Keith Hancock, *Australia* (London: Ernest Benn, 1930); n 65 above; n 35 above; L. L. Robson, *The Convict Settlers of Australia: An Enquiry into the Origin and Character of the Convicts Transported to New South Wales and Van Diemen's Land* (Melbourne: Melbourne University Press, 1965).

90 n 86 above.

91 Gustave de Beaumont and Alexis de Tocqueville, *On the Penitentiary System in the United States and Its Application in France* (Carbondale and Edwardsville: Southern Illinios University Press, 1964).

92 Forster, n 86 above, 79.

the property they have acquired, having become nearly at the same time husbands and fathers, they are bound to their present state by the most powerful and beloved ties. The same revolution, brought about by the same means, has taken place in the women; and miserable prostitutes, gradually restored to more proper principles of conduct, are today bright and hard-working mothers of families.[93]

Arago, who had been a draftsman on the 1802 expedition, revisited Sydney in 1819, concluding in extravagant terms that there had been further progress:

[T]here the forger is employed in useful work, which at first gives him land, then esteem, and finally honours. There the thief, abjuring his blameworthy habits, often attains the magistracy, and even becomes here the scourge of thieves. I have seen a swindler, now honoured with the just confidence of the Government, bestowing upon the children of Sidney as much by his example as by his teaching, principles of the strictest virtue and the greatest honour. One would say that the air of this country, though savages breathe it, purifies the mind and makes every noble sentiment grow within it.[94]

Further French writing on the virtues of the Australian penal colony was prompted by the Maçon Society essay competition of 1827 which invited essayists to attempt a republican analysis of punishment:

Outline, for the replacement of hard labour, a punishment which, without ceasing to satisfy the needs of justice, leaves less degradation in the soul of the condemned; propose measures to take in the meantime so that freed *forcats* are no longer driven to misery by a public opinion which rejects them, and so that their presence no longer threatens the society which receives them.[95]

Tocqueville was the formidable figure on the other side of the debate. Tocqueville, like Bentham, believed transportation created a society 'composed of vicious elements which sooner or later form a people difficult to govern and dangerous to free'.[96] Blosseville was a good friend of Tocqueville and well aware of his views. His conclusion was that Tocqueville had got it wrong, a conclusion based upon Blosseville's careful empirical engagement with what was actually known about the workings of the English penal colony.

I too suspect that it was Blosseville and the contemporary Australian historians who engaged more carefully with such evidence as we have than did Bentham and Tocqueville. Admittedly, it is not evidence of a quality that will be definitive to any contemporary criminologist, including this one. Before turning to that evidence, however, we must consider a matter on which there is raging disagreement among the Australian historians: were the convicts part of a criminal class?

Were the Convicts Serious Criminals to Start With?

From 1913 a reaction to the English reading of the convict experience set in. Watson and Wood argued that the convicts were victims of economic hardship, petty offenders or political prisoners.[97] There were significant numbers of political

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93 Péron quoted in n 86 above, 11.
94 Arago quoted n 86 above, 27.
95 Maçon Society essay competition of 1827.
96 Forster, n 86 above, 115.
97 F. Watson, *The Beginnings of Government in Australia* (Sydney: Library Committee of the Parliament of the Commonwealth, 1913) and G. A. Woods, 'Convicts' (1922) 8 *The Royal Australian Historical Society, Journal and Proceedings* 177–208.

prisoners, at most 4000,[98] but they were a very small proportion of the 187,000 convicts who came out. There were convicts transported for very minor first offences, even for stealing a prayer book. There were also some murderers. But neither serious violent offenders nor petty first-timers were the mainstream. The majority, men and women, were sent out for middling to minor property offences without violence. Only 38 per cent of those who arrived between 1788 and 1853 were first offenders; only 11 per cent for those who went to Tasmania.[99]

Hancock, Clark, Shaw and Robson rightly reacted against the romantic notions of Watson and Wood,[100] but Manning Clark in particular, overreacted. Clark characterised a large proportion of the convicts as professional criminals, which was clearly not the case given what we now know both about the convicts and the nature of English crime.[101] Then came the revision of the revision of the revision with *Convict Workers*, an analysis of convicts transported to New South Wales between 1817 and 1840.[102] Nicholas and Shergold reached a conclusion which seems unexceptionable in respect of most (though hardly all) of the convicts: 'They were not professional and habitual criminals, recruited from a distinct class and trained to crime from the cradle'.[103] However, without being a 'professional criminal' or a member of a 'criminal class' one can be a serious repeat offender and many of the convicts were. Shlomowitz seems justified in questioning Nicholas and Shergold for offering a different interpretation of the origins of the convicts 'without evaluating the evidence used by Clark, Shaw and Robson in support of their interpretation' and for tending 'to take quantitative evidence at face value and to eschew the use of qualitative evidence'.[104] Even at the quantitative level, it is somewhat shocking that they take their own non-random 1817–40 NSW sample so seriously while Robson's random 1787–1852 sample of cases from all colonies is dismissed.

At a time when crime rates in England were undoubtedly at an historically high level,[105] the transported convicts were essentially that group of offenders whose crimes contemporaries believed to be not serious enough for the scaffold, but too serious for more minor options like the stocks, flogging, fines or a warning following a period of confinement served up to the time of trial. Transportees were fewer than a quarter of those convicted.[106] Often, as today, they had committed a number of crimes and the one for which they were convicted was the one that gave the authorities the sentencing result they wanted. In the late eighteenth century transportation was the standard sentence for remitted capital crimes.

Between 1823 and 1827 Peel began replacing the death penalty with transportation for various property offences, partly because juries were refusing to convict under the shadow of the gallows. The beneficiaries of these liberalising laws went to

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98 G. Rudé, *Protest and Punishment: The Story of the Social and Political Protesters. Transported to Australia, 1788–1868* (Oxford: Clarendon Press, 1978).

99 Robson, n 89 above.

100 Hancock, n 89 above; Clark, n 89 above; A.G.L. Shaw, 'The British Criminal and Transportation' (1952) 2 *Tasmanian Historical Research Association, Papers and Proceedings* 29–33; Robson, n 89 above. Watson, n 97 above; Woods, n 97 above.

101 Neal, n 36 above, 50–54.

102 Stephen Nicholas (ed), *Convict Workers: Reinterpreting Australia's Past* (Sydney: Cambridge University Press, 1988).

103 Stephen Nicholas and Peter R. Shergold, 'Unlocking the Past' in S. Nicholas (ed), *Convict Workers: Reinterpreting Australia's Past* (Sydney: Cambridge University Press, 1988) 7.

104 Ralph Shlomowitz, 'Convict Workers: A Review Article' (1990) 30 *Australian Economic History Review* 82, 84; *ibid*.

105 n 82 above, 111.

106 Shlomowitz, n 104 above, 84.

Australia instead. This suggests they would have been mostly middling criminals. Many of them had a level of involvement in crime rather like those who sit in our prisons today. On the one hand, the transportees were less serious offenders because the worst of them were still culled by the scaffold. On the other hand, they were selected from a much higher crime society than today. The majority who were convicted repeat offenders were probably serious recidivists. How could we make this speculation? Well even today self-report studies suggest that the odds of a crime by a young offender leading to a conviction are only about one in a hundred. So the chances that someone who has committed only two offences will be convicted for both of them is about 1 in 10,000. That is today. But in the era before pro-fessionalised policing the odds of crime being undetected were much more favourable to the criminal. It follows that most late eighteenth and early nineteenth century offenders convicted of more than one offence would have committed many offences. This does not mean they belonged to a criminal class or were professional criminals. Among them would certainly be some generally honest dead unlucky first or second time offenders. As with criminal statistics today, we can never be sure how serious an individual criminal is from the official record of her or his offending. Contemporary data suggest that official records of crime correlate positively with more inclusive ways of counting crime and we can only assume, without evidence, that this would likely hold true for 200-year old data. Most criminologists, I suspect, would react as I do to reading the data on the scant criminal histories of the convicts. There is not evidence that these were dangerous people, members of a criminal class. Nor can we conclude romantically that they were a combination of poachers victimized by a cruel aristocracy, waifs stealing loaves of bread to feed their brothers and sisters, trade unionists and political prisoners. Rather to the criminologist's eye they look like a typically disparate tranche of convicted criminals – some of them honest and unlucky folk, some vicious criminals who were lucky not to have been caught for scores of more serious crimes, most of them in-between. They constitute an appropriate data set for testing theories of crime prevention. Certainly the exclusion of most murderers (who went to the scaffold) from the data set does not render them an easy group to reform; on the contrary, murderers have lower re-offending rates than the common property offenders who dominate the Australian convict data.

Why Do the Australian Historians Think Emancipist Families Became Mostly Law-Abiding?

Most of the great Australian historians seem to have been persuaded by the fact that the English Tory, Whig and Radical detractors of transportation argued from abstract reasoning, especially Benthamite reasoning.[107] In contrast, the Australians who argued that transportation was working in reforming criminals argued from rich empirical experience. They told concrete stories of reformed and flourishing law-abiding lives. Most English commentators tended to dismiss the Australian testimony as self-serving or debased opinion inured by the profits and degradation that came from dominating other men as slaves.

But this did not ring true to Australian historians who read the biographies of these men. Some of them had retired to England at the time of their testimony and

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107 Their arguments were revealed in documents such as testimony before British parliamentary enquiries.

had no ongoing financial interests at stake. More importantly, the Australian believers in the reformative accomplishments of transportation were such different men: exclusives and emancipists, judges and governors, businessmen and farmers. Men like King, Arthur, Macquarie, Bligh, Darling, Forbes, Wentworth and Macarthur were so ideologically and philosophically disparate, so often hated one another, yet could agree on their empirical observations of this matter at least. Obversely, the Australian historians tended to dismiss the alarmist testimony of James Mudie about sodomy, sloth, uncontrollable stealing and violence, even that 'all' the convict women were prostitutes, as self-vindicating testimony of a tyrant who had treated his convicts so brutally that they conspired to murder him.[108] Ironically, it was Mudie's stories of depravity which moved those English commentators concerned about the effects of tyranny and slavery.

The centrality of this question of who were the self-serving observers and who were not is perhaps why another kind of evidence that impressed some of the Australian historians was the observations of visitors with independence of judgment who saw the colony first hand. The most frequently cited assessment is that of Charles Darwin who stopped at Sydney Cove on *the Beagle* in 1836: 'As a means of making men outwardly honest, of converting vagabonds, most useless in one country, into active citizens of another, and thus giving birth to a new and splendid country, it has succeeded to a degree unparalleled in history'.[109] It is also worth noting that on the same voyage Darwin was similarly impressed with the accomplishments of Indian convicts banished for life to Mauritius, mostly for gang robbery and murder.[110]

While it was stories of convicts' lives that influenced most historians, some did cite the informal records of masters of convicts such as Potter Macqueen, who claimed that 'of his servants, sixty-three had been reclaimed and received their tickets, one reclaimed had returned to England, and sixty-two though still under sentence were well-conducted; compared with these, twenty-nine were indifferent, seven depraved, eleven had been sentenced to the gangs or penal settlements, and seven, though freed, were worthless. Apparently 126 were reformed . . .'.[111] These kinds of data are not very persuasive and may indeed have been self-serving.

Hughes cites records of Judge W.W. Burton on the backgrounds of the 827 men he tried between 1833 and 1838 to show that only 4 per cent of them were Currency Lads and none of these had committed murder or grand larceny.[112] Hughes uses these data to support the widely reported claim of contemporaries that the descendants of the convicts were a low-crime group. Hughes also looked at all convictions for indictable offences in 1851,[113] concluding that only 6 per cent of them were of Currency Lads and Lasses and that the number of convictions per 100,000 in 1861 was a tenth of the 1831 level.

Ward cites a somewhat different kind of evidence when he quotes from a letter from the Convict Department to the Colonial Adjutant-General assessing the fate of the 60,000 prisoners who had been transported to New South Wales:

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108 James Mudie, *The Felonry of New South Wales* (London: Whaley and Co, 1837).
109 Quoted in n 35 above, 244–45.
110 Stephen Nicholas and Peter R. Shergold, 'Transportation as Global Migration' in S. Nicholas (ed), *Convict Workers: Reinterpreting Australia's Past* (Sydney: Cambridge University Press, 1988) 33.
111 Shaw, n 35 above, 245.
112 n 65 above, 356–57.
113 *ibid*, 587–88.

38,000 are now filling respectable positions in life, and earning their livelihood in the most creditable manner ... Of the residue, death and departures from the colony will account for the greater part; and I am enabled to state that only 370 out of the whole are now undergoing punishment of any kind.[114]

This is so low a rate of re-offending that it is hard for any criminologist to believe.

Perhaps a more persuasive kind of evidence that Australia was a low crime society from the mid-nineteenth to the mid-twentieth century is the persistent reports of citizens feeling no need to secure their property. Ward quotes an observer of the Turon diggings where a high proportion of the diggers 'must still have been ... old hands':

[N]o one scarcely remained to take care of their tents during the day ... [and] ... at night no one ever thought of taking their mining tools away from their claim, and I scarcely ever heard of any being stolen, and no one ever made any hesitation of lending another a crowbar or anything they wanted, no matter whether stranger or not, it was sure of being returned.[115]

Through the 1950s one could tell the same story of the tent cities littered with fishing tackle on Australian beach-fronts; indeed it was widespread for houses in both the city and the bush to be left unlocked until then.

From an even earlier period, Edward Eyre had a property from 1834 on the Molonglo Plains nearby where I am writing at the Australian National University.

I have constantly known two convicts sent down to Sydney quite by themselves, a distance of 200 miles in a dray full of wool drawn by oxen, and having, after depositing their wool at the merchants', to bring back a load of ... clothing, flour, tea, sugar, tobacco and other groceries – luxuries for the master, and even wines, beer and spirits, and yet tho' this journey involved an absence of five or six weeks during which the men were tempted constantly by the presence of so much property and the facility of appropriating it, the instances were very rare in which any plundering took place or loss ensued.[116]

Sir Keith Hancock supports his assertion that convict descendants became law abiding by pointing out the lower crime rate in Tasmania compared to other jurisdictions which received fewer convicts.[117] Hancock sums up by asserting 'the attested fact that the Australian population does not fall below the high average of respect for law which is attained in British communities'[118] This is probably right as a statement of official crime rates in 1930, which were hitting their all time lows in Australia.[119]

Henry Reynolds more systematically explored the Tasmanian thread of Hancock's argument four decades later.[120] Manning Clark also picked it up, asserting, without citing any evidence, that crime was on the decrease in Tasmania by Governor Arthur's departure in 1836.[121] Reynolds shows that in the 1857 census, 50 per cent of the adults and 60 per cent of the adult males in Tasmania were still convicts or ex-convicts. The percentage of those convicted of serious crime who were convicts/emancipists fell from 93 per cent in 1848–49 to 70 per cent in 1866–67, to 44 per cent in 1875. The latter numbers are actually not bad in

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114 Ward, n 28 above, 30.
115 *ibid* 114; see also Clark, n 89 above, 274.
116 Edward Eyre quoted in Hughes, n 65 above, 314.
117 Hancock, n 89 above, 40–41.
118 *ibid* 40–41.
119 Satyanshu K. Mukherjee, *Crime Trends in Twentieth Century Australia* (Sydney: Allen and Unwin, 1981).
120 Henry Reynolds, '"That Hated Stain": The Aftermath of Transportation in Tasmania' (1969) 14 *Historical Studies* 19–31.
121 Clark, n 79 above, 310.

terms of the reform of the convicts. When we bear in mind how disproportionately male the convicts were compared to the rest of the population (combined with the much higher rates of offending by males than females in all societies) we can account for much of their overrepresentation by sex alone. On the other hand, one would think the emancipists were getting to be too old for crime by 1875. Yet at that time Tasmania still had an imprisonment rate higher than any nation in the world has today (630 per 100,000).

The more revealing comparison in the Reynolds data is that, as one would expect, between 1857 and 1864 Tasmania had substantially higher numbers of Supreme Court convictions per 1,000 population compared to New South Wales, Victoria and South Australia.[122] As Wakefield would have predicted, the Tasmanian crime rate was almost three times as high as that of the wholesome citizens of South Australia.[123] What then seemed to happen was a much more dramatic fall in the Tasmanian crime rate than occurred in the other colonies. Tasmania had 44 hangings from 1856–65 and 4 from 1866–75. It seemed to completely miss the second wave of bushranging that plagued the mainland colonies in the 1860s and 1870s. By 1889 the Tasmanian imprisonment rate had plummeted to be below average by international standards; by the 1911–1920 decade it dropped further to be 30 per 100,000, lower than *any* developed country in the world today.[124] The reason, Reynolds shows, is that between 1883 and 1887 supreme court convictions per 1,000 population were 90 per cent *higher* in Eastern Australia as a whole than in Tasmania.[125] A more impressive accomplishment because Tasmania missed the gold rush and was by far the least attractive destination for free immigrants of all the antipodean colonies. Tasmania had been transformed from being by far the most crime-ridden colony to by far the least crime-ridden. In fact, Tasmania became incredibly peaceful. There were only 22 convictions for homicide in Tasmania in the decade 1875 to 1884. There then follow 32 years without a homicide conviction; the next one is 1916![126] There were 25 rape convictions in 1875–84, but 16 years to the next conviction in 1900; 59 robbery convictions in 1875–84, 3 in 1885–94, none in 1895–1904.[127]

There may be many reasons for this. Tasmania may have missed out on the Kelly gangs of the late nineteenth century because the banks most worth robbing were in Victoria. Reynolds does not discuss this possibility.[128] However, I do think the possibilities he does mention are more interesting and plausible. It seems that Tasmania always recognised that it had a problem with the kind of people providence provided to run its economy and government. It had more convicts and more of the very worst convicts and it kept receiving them for longer than anywhere else. And it had less hope than other colonies of making up for this limitation on its human capital through immigration. So it invested in social welfare and policing of a sort that would requalify its convicts as good citizens. Reynolds shows that Tasmania spent more on prisons and other charitable institutions than the other colonies. Such expenditure accounted for 17 per cent of the Tasmanian budget in 1866, a decade after the end of transportation, compared

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122 n 120 above, 21.
123 Wakefield advocated the idea of South Australia as a colony founded by free settlers.
124 Calculated from Satyanshu K. Mukherjee, Anita Scandia, Dianne Dagger and Wendy Matthews, *Source Book of Australian Criminal and Social Statistics* (Canberra: Australian Institute of Criminology, 1989).
125 n 120 above.
126 n 124 above, 440. There were some murder trials but no convictions.
127 ibid 445.
128 n 120 above.

with 6 per cent in New South Wales and 4 per cent in Victoria. Tasmania was poorer and had less to spend than the booming mainland colonies, but in 1866 it spent £305 per 1,000 people on charities compared to £138 per 1,000 people in the mainland states. Reynolds concludes that Tasmania 'gave birth to welfare policies which were probably the most advanced and certainly the most expensive in Australia'.[129] In addition, the police paid regular visits to ticket-of-leave holders and emancipists at their homes. If their intelligence was that they were straying from the straight and narrow, the police let them know they were being watched. We cannot reconstruct what the welfare-surveillance strategies were that worked so well. But we can be sure that there was a prodigious investment in making them work and that their working was not only reflected in a plummeting crime rate. The consumption of spirits also fell to be exactly half the level of Eastern Australia as a whole by 1889. It was 0.69 gallons per head in 1889, having been 2 gallons a head in the Tasmania of 1857.[130]

In the radically different context of neonatal intensive care units in contemporary Chicago, Heimer and Staffen have developed a theory that gives a good account of why this should have happened in Tasmania and indeed of why conditions of labour shortage in Australia as a whole should have led to the successful reintegration of the convicts.[131] Heimer and Staffen attack my claim that the US is an individualistic society that regulates through stigmatisation, particularly with respect to its underclass.[132] The critique is advanced by revealing a context where American social control is highly reintegrative, especially toward the disadvantaged. This context is the social control of mothers of babies in intensive care units. In this setting, the medical staff need the mothers to do their caring well, to be attentive rather than neglectful with their babies. If they don't teach the mothers to be 'good' mothers, the baby will recurrently come back to the state with renewed intensive care needs. Systematically, the Heimer and Staffen data show that disadvantaged mothers are less likely to suffer stigmatising regulation and more likely to be dealt with in a reintegrative fashion.[133] White married mothers were actually more likely to be dealt with stigmatically when they neglected their baby's demanding care needs than were unmarried teenage African American mothers. Heimer and Staffen developed the following more general theory of labelling (stigmatisation):

> (1) labels are not always applied disproportionately to disvalued groups; (2) when excluding deviants is costly, a group, whether a society, community, or organization, will be more reluctant to label anyone as deviant; and (3) when a group cannot function well without the participation of its deviant members, it will work harder to rehabilitate them.[134]

Australia needed the convicts, so instead of labelling them as convicts, ''government men'' were invited to the governor's table (at least some of them). In circumstances of labour shortage where most of the adults were convicts, Australia could not afford to give up on them.[135] It had to work hard at reintegrating rather than stigmatising them. All these imperatives were simply much more profound in Tasmania because it had less access to free labour and more difficult convicts to contend with.

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129 *ibid* 30.
130 *ibid* 22.
131 n 1 above.
132 *ibid* Braithwaite, n 82 above.
133 *ibid*.
134 *ibid* 636–37.
135 Indeed this was institutionalised in New South Wales: 'no convict was to be assigned to a master who frequently returned convict servants especially for trifling offences, without making efforts to reform them . . .' (Clark, n 79 above).

Reintegration worked everywhere; it simply worked better in Tasmania because the Tasmanians had no alternative but to struggle harder at it.

While the fall in the crime rate was not as sharp in New South Wales as in Tasmania, thanks to Sturma we have superior data for New South Wales.[136] Figures 3 and 4 show the decline from the last decade of transportation (the 1830s) until 1861 in convictions before Superior Courts (which means convictions for the most serious crimes). It was a steep decline for all major offence types. Disaggregating further by offence type, we find that cattle stealing was the property offence that declined most sharply. At its peak in 1835, cattle stealing convictions occur at more than forty times the rate of the low point in 1850.[137] Note that with cattle stealing, all of the decline occurs before the gold rush, and with all the other comparisons most of the decline occurs before the gold rush. Hence we cannot interpret these falls as a result of the change in the composition of the population occasioned by the surge in free immigration prompted by the gold rush, though admittedly there was also a sharp rise in free immigration in the 1830s and 1840s. While it may not be immediately obvious from scanning Figures 3 and 4, the steepest decline is for offences against property with violence. At the 1834 peak the rate there is more than twenty times the rate at the 1857 low. Assault, which is not recorded separately in Figures 3 and 4, also declined more sharply than property offences.[138] From its peak in 1839 to its lowest point at
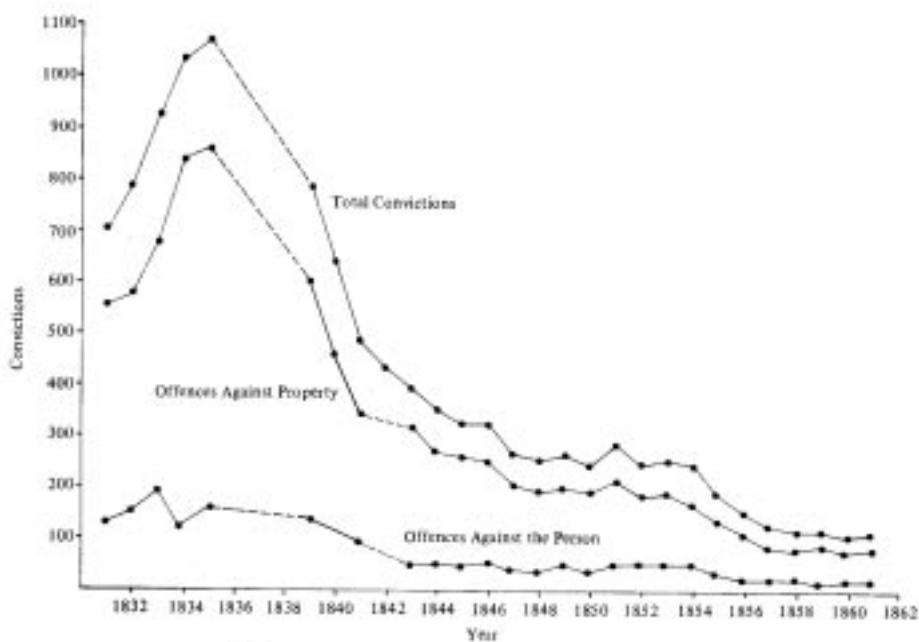

Figure 3: Total Convictions, Convictions for All Offences Against Property and Convictions for All Offences Against the Person per 100,000 Inhabitants, NSW Superior Courts, 1831–61.[139]

136 Sturma, n 70 above.
137 *ibid* 104.
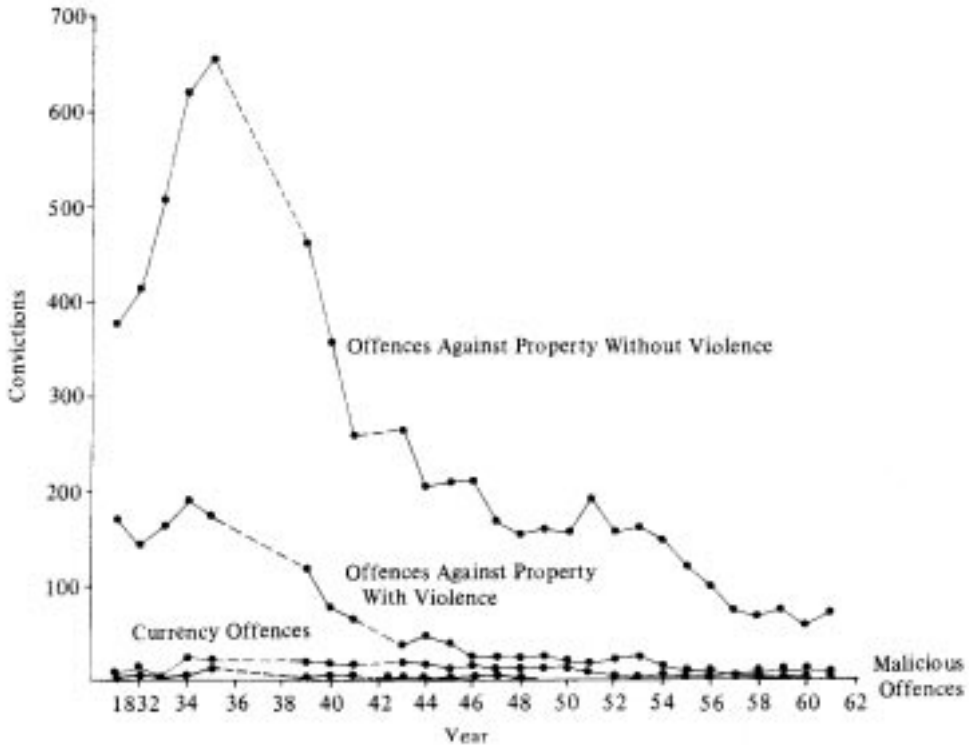138 *ibid* 94.
139 *ibid* 66.

Figure 4: Convictions for Offences Against Property Without Violence, Offences Against Property With Violence, Offences Against the Currency and Malicious Offences Against Property per 100,000 Inhabitants, NSW Superior Courts, 1831–61.[140]

the end of the time period, murder and manslaughter declined at a rate similar to that of property offences. We should take special note of the homicide rate because it is the most serious offence and the most reliably measured: definitions of what constitutes stock theft worthy of prosecution may change over time and the capacity of the police to detect it change as the police become more professional. At all places and times in history, however, when a corpse turns up with a knife in it, this fact tends to be noticed and investigated.

Grabosky's data for Sydney for the decades preceding Sturma's data suggest that violent crime declined from Macquarie's assumption of the governorship in 1810 and continued to fall until Sturma's data pick up the trend.[141] Property crime per 1,000 inhabitants seemed to rise markedly in the 1820s, however.

Grabosky's data also take us beyond the Sturma series. Grabosky concurs with Sturma's judgement that the most reliable measure, albeit with profound

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140 *ibid* 67.
141 Peter Grabosky, *Sydney in Ferment: Crime, Dissent and Official Reaction* (Canberra: Australian National University Press, 1977) 51–68.

limitations, is Supreme Court convictions. Grabosky finds that both violent and property crime continue to decline after 1860, but much more slowly than the sharp declines Sturma documents between 1830 and 1850. Basically crime rates per capita move inexorably but gradually further downwards until the 1930s after which they move gradually upwards. But it never returns to anything like its peak levels. The odds of being murdered in New South Wales today are about 15 times as good as they were at the peak homicide rate of the 1830s. Indeed you were about three times as likely to be murdered in Sydney then compared to the odds of being murdered in a large US city today. We don't know what the homicide rate was in Sydney before the 1830s, before the clear decline in violence that occurred under Macquarie, but it must have been a genuinely dangerous place.

Reynold's data suggest a steeper drop in the other colonies between 1860 and 1887 than is evident in Grabosky's New South Wales data.[142] The fall in Supreme Court convictions in Tasmania is 80 per cent; for Victoria, South Australia and New South Wales combined it is 50 per cent. During this period, during and following the American Civil War there is a sharp upturn in US crime, probably mainly African-American crime.[143]

Grabosky rightly points out that the decline in the maleness of the colony during the century must have been a major factor in the extraordinary decline that occurred.[144] This would also account for why violent crimes (which are more disproportionately male crimes than property offences) declined more sharply than property crimes. The biggest declines in the maleness of the colony, however, occurred before the Sturma series begins in 1831 and the extent of the fall is not something that sex differences in offending rates could begin to wash away. Sturma points out that in 1841 convicts and ex-convicts made up 35 per cent of the population but 70 per cent of the persons tried.[145] Convicts having only twice the crime rate of the free is a remarkably low ratio when one considers that the proportion of women among the convicts was so low. The male and female convicts do indeed seem to have become progressively more law-abiding and reared children who pioneered a low-crime future.

As with most historical research on crime, it is impossible to say whether various crimes of the powerful got worse or better in the course of the 19th century. We can be fairly sure that murder of and theft from Aboriginal people was worst earlier in the century. By the end of the century most of the land that was taken through violence had long since been alienated. In our crucial case, Tasmania, by 1818 the Aboriginal population had already halved[146] and in 1876 the last "full-blood" died. In the second important case, New South Wales, it had halved by 1840 and halved again between 1840 and 1860.[147] For Australia as a whole, while massacres of Aborigines continued to be a fact into the twentieth century, most of the decimation of the Aboriginal people occurred in the first half of the nineteenth

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142 n 120 above, 22.
143 M.S. Hindus, *Prison and Plantation: Crime, Justice and Authority in Massachusetts and South Carolina, 1767–1878* (Chapel Hill: University of North Carolina Press, 1980); Ted R. Gurr, 'Historical Trends in Violent Crime: A Critical Review of the Evidence' in M. Tonry and N. Morris (eds), *Crime and Justice: An Annual Review of Research*, Vol. 3 (Chicago: University of Chicago Press, 1981); E. H. Monkkonen, *Police in Urban America, 1860–1920* (New York: Cambridge University Press, 1981) 76–77.
144 n 141 above, 51–68.
145 n 70 above, 77.
146 Lyndall Ryan, *The Aboriginal Tasmanians* (St. Lucia: University of Queensland Press, 1981) 79.
147 L.R. Smith, *The Aboriginal Population of Australia* (Canberra: Australian National University, 1980) 107.

century, and by the 1880s in all or most states the Aboriginal population was no longer falling.[148] While the peak period of white on Aboriginal violence coincides with the peak period of white on white violence (the first four or five decades after settlement), I do not want to imply that the theory of convict reintegration in this essay is also a good theory of genocide.

In summary, we might say that none of the strands of evidence on which the Australian historians rely in reaching their conclusion is very persuasive by the standards of twentieth century criminology. Putting the strands together, however, the most plausible reading of the evidence is that emancipist families did become rather law-abiding. In the Tasmanian case, this seems to have happened to a stunning degree.

Damned Whores and God's Police

Mary Reibey's picture appears on the back of Australia's $20 note. She was a convict who became a business leader, owner of five ships, seven farms, warehouses and numerous buildings in the centre of Sydney. Australians take pride that in few countries could a female convict shake her chains to become a major figure in its mercantile class. But Mary Reiby achieved this by getting her start through wedlock. She married a free immigrant with a business. When he died she built that business into a major trading operation. Absent a strategic marriage and Mary Reiby might not have secured a certain place in Australian history. Admittedly, women enjoyed greater equality of access to the law than in England.[149] Yet while wives did have convict husbands assigned to them to run small businesses like bakeries, the practical reality seems to have been that the husband was the master, the wife only legally so. Many male convicts became business leaders; perhaps Mary Reiby was the only female convict who made it to the top in the business world. Women got fewer opportunities through assignment than men. Assignment to work on the land was rarely available to them. While many secured positions as domestic servants, the stereotype of convict women as uncontrollable whores caused masters to prefer male servants.

I have not found how to disaggregate the data in the last section on crime rates by sex. Nor have I seen data on how many female convicts were given land. We can be fairly sure, however, that little land was given to women emancipists. Men were given 50 acres if they had a wife to support, only 30 if they were single. And they got another 10 acres for each child. The policy was clearly intended to encourage marriage as part of the strategy of reform through reintegration. Pursuant to it, women were denied economic security by any other route than marriage. Various Governors also attempted to enforce policies to deny/withdraw land and convicts to men who lived with 'whores', a situation many of the men preferred over marriage.

There is insight in Anne Summers' celebrated analysis that Australian women were first 'damned whores' and then 'God's police'.[150] Interestingly, it is affirmed by the French histories of the colony recently revealed by Colin Forster.[151] And whoredom was one respect where the Tory and Whig damnations of transportation were not so wide of the mark. Most of the convict women were not stigmatised as

148 n 147 above.
149 Kercher, n 62 above.
150 Anne Summers, *Damned Whores and God's Police* (Ringwood: Penguin, 1994).
151 n 86 above.

whores in England. Even the one fifth who are officially recorded as prostitutes in Robson's data is problematic (see Oxley).[152] Many of them may well have been so classified because they were servants who slept with their master. Note also that prostitution itself was not a transportable offence.

> It is difficult to ascertain how many had been prostitutes before coming to Australia: Robson calculates that about one-fifth had engaged in full- or part-time prostitution. So the wholesale adoption of whoredom on coming to Australia has to be explained in terms of the social climate of the country and the expectations held of women. It was deemed necessary by both the local and the British authorities to have a supply of whores to keep the men, both convict and free, quiescent. The Whore stereotype was devised as a calculated sexist means of social control and then, to absolve those who benefited from it from having to admit their actions, characterized as being the fault of the women who were damned by it.[153]

Caroline Chisholm, pictured on Australia's $50 note, led a social movement and a programme of practical help to protect newly arriving women – free and convict – from whoredom.

> If Her Majesty's Government be really desirous of seeing a well-conducted community spring up in these Colonies, the social wants of the people must be considered. If the paternal Government wish to entitle itself to that honoured appellation, it must look to the materials it may send as a nucleus for the formation of a good and great people. For all the clergy you can dispatch, all the schoolmasters you can appoint, all the churches you can build, and all the books you can export, you will never do much good without what a gentleman in that Colony very appropriately called 'God's police' – wives and little children – good and virtuous women.[154]

Chisholm established, with public subscriptions, what amounted to a national job placement service. Her intelligence networks especially looked for employment opportunities in the bush. But she was not looking for permanent jobs in her 'matrimonial excursions in the Australian bush'. 'Whenever she found a comfortable farm owned by a reputable bachelor or widower, she placed a suitable woman with the nearest married neighbour and "in the natural course of events many suitable and happy marriages were the result"'.[155]

The systematic research of twentieth century criminology does suggest that Caroline Chisholm was right that a happy marriage and a secure job are the two most important life course changes that end criminal careers.[156] It is likely that the women Caroline Chisholm sent all over Eastern Australia to be God's police did play a significant role in civilizing the wild colonial boys.

The Australian legend which the convict identity helped forge was a patriarchal one. Mateship was about male egalitarianism. It etched a culture that remained robustly patriarchal through the twentieth century. At the same time, the excess of being both damned whores and God's police in a colony tamed through their suffering was a crucible that created women of special stuff – Reiby and Chisholm among them. More importantly, it was a crucible for as inspiring a women's

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152 Robson, n 89 above. See Deborah Oxley, "Female Convicts" in S. Nicholas (ed), *Convict Workers: Reinterpreting Australia's Past* (Sydney: Cambridge University Press, 1988) 85–97.
153 Summers, n 150 above, 332.
154 Caroline Chisholm in 1847 quoted in n 150 above, 337.
155 *ibid* 347.
156 Robert J. Sampson and John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life* (Cambridge, Mass.: Harvard University Press, 1995); Elmar G. M. Weitekamp, Hans-Jürgen Kerner, Wolfgang Stelly and Jürgen Thomas, 'Desistance from Crime: Life History, Turning Points, and Implication for Theory Construction in Criminology' in K. Bassman and S. Karstedt (eds), *Social Dynamics of Crime and Control: New theories for a World in Transition* (Aldershot: Dartmouth, 2000).

movement as any nation can claim. A letter to the *Bulletin* signed 'A New Woman' in 1895 captures the way a feminist identity was forged in the fires of being damned whores and God's police:

> What we want is not less parental responsibility, but more, and the great aim of the Woman Movement is to secure equal justice between man and woman, and to uplift the sacred responsibility of parenthood, which has too long been sacrificed to the insatiable Moloch of Lust.[157]

A pre-eminent leader of the first wave women's movement was Louisa Lawson, founder of the feminist newspaper *Dawn*. She was the mother of Henry Lawson, the most influential literary interpreter of the egalitarianism of male mateship in the Australian bush. An egalitarian ethos, even if it is a racist and patriarchal one, is still a resource for those who want to open new frontiers of equality. It is hard to build momentum for egalitarian social movements in nations where appeals to equality have no cultural resonance. In contrast, feminists working in societies where male egalitarianism is strong are in a better position to pull on identity crises that prise open cracks in hegemonic structures (such as contradictions between the position of women and a national identity valuing equality of opportunity).[158]

It is in these terms that I think we can understand the paradox of an Australia which is one of the most culturally patriarchal of European societies, yet which has had greater structural equality between men and women as a result of the effectiveness of a vibrant women's movement. The structural equality I refer to is the fact that Australia was the second nation in the world (after New Zealand) to secure votes for women,[159] and that as a result of pulling on a crisis in our identity as an egalitarian nation in the twentieth century it was able to institutionalise a degree of equality between the average incomes of men and women second only to Sweden. The latter accomplishment is currently crumbling as a result of the demise of centralised labour market regulation.

Not surprisingly in a patriarchal culture, Australian women did not do so well in getting elected by the people. Again, the creative institutional response of the Australian women's movement to this has been inspiring – Emily's List (women raising funds to support female candidates) and manoeuvring around absence in the legislature by staking out presence in the bureaucracy (the Australian invention of the femocrat).[160]

One of the best ways of changing a society that is patriarchal culturally is to institutionalise change that renders it less structurally patriarchal. The cultural change has been slow in Australia, distressingly prone to set-back, yet arriving generation by generation. This is important to reducing crime because societies that are culturally and structurally patriarchal suffer greater crime especially the hidden crimes of family violence and sexual abuse.[161] Women as both God's police

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157 Quoted in n 150 above, 393.
158 John Braithwaite, 'A Sociology of Modelling and the Politics of Empowerment' (1994) 45 *British Journal of Sociology* 445–79.
159 Audrey Oldfield, *Woman Suffrage in Australia: A Gift or A Struggle?* (Melbourne: Cambridge University Press, 1992).
160 Anna Yeatman, *Bureaucrats, Technocrats and Femocrats* (Sydney: Allen and Unwin, 1990). The femocrats in turn cleverly insinuated Australian international leadership through the establishment of the Affirmative Action Agency which was beginning to have success through a creatively cooperative strategy for workplace equality for women before the present government moved to pull its limited teeth.
161 John Braithwaite, 'Poverty, Power, White-Collar Crime and the Paradoxes of Criminological Theory' (1991) 24 *Australian and New Zealand Journal of Criminology* 40–58.

and as feminist institutionalisers of equality have played central roles in rendering the colony of thieves a lower crime society than it otherwise would have been.

Why Was Nineteenth Century Australia Characterised by Male Egalitarianism?

The thesis of Turner is that frontier societies find their identity from struggles on the frontier.[162] Climate and vegetation made the American frontier one of the rugged individualist farmer. In contrast, Ward's Australian frontier was one of holdings that had to be vast to be economically viable and that employed a substantial rural working class to shear the sheep, drove and tend the fences.[163] The trade union movement and the Labor Party rose to prominence in the bush at first, not in urban factories. The shearer's union, the Australian Workers' Union, was the dominant force. Ward shows that the further outback settlement went, the more the population was dominated by former convicts, men and the Irish.[164] Free settlers, women and the English preferred the security of civilisation to the higher pay in an outback plagued by labour shortages.

The harsh conditions of outback work benefitted from the mateship that aided survival during the convict voyage and assignment. Both were republics of sharing and solidarity in opposition to the powerful (the military in Sydney, the squatters in the bush). From the outset, the tales of this solidarity are legendary. When Governor Hunter compelled the convicts to attend religious services in 1798 the church was burnt down by a convict. Hunter was so furious he offered any informer, even one serving a life sentence, a free pardon and passage home plus a reward of £50. No one turned.[165] Foolish, heroic mates whose legend would be manifest in Gallipoli.

When free male immigrants arrived and confronted the choice between the exploitation of the exclusives or the mateship of the emancipists, there were some good reasons for choosing the latter: 'He will find that he can hardly avoid attaching himself to one party: if to the free, the other will say, Let him alone awhile; the swells will pluck him, and then he will come to us'.[166]

There is documentation from as early as 1822 of convicts organizing collectively to withhold labour to enforce demands for higher pay.[167] Convicts were organising as founding members of the Printers' Union while they were still under sentence.[168] Ward argues from a rich fabric of evidence that the mateship of convicts and emancipists was the legend of the outback and that rural working class struggle forged the trade union movement.[169] That trade union movement took male-dominated mateship into the cities. So did the *fin de siècle* literary interpreters of mateship, Paterson and Lawson, and their republican vehicles, *The Bulletin*, the Queensland *Worker*. Paterson's *The Man From Snowy River and other Verses* sold over a hundred thousand copies in the little nation. Lawson came

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162 Turner, n 28 above.
163 Ward, n 28 above.
164 *ibid* 66–67.
165 *ibid* 85.
166 James Dixon (1822) quoted in Ward, n 28 above, 36.
167 Ward, n 28 above, 72.
168 Stephen Nicholas and Peter R. Shergold, 'A Labour Aristocracy in Chains' in S. Nicholas (ed), *Convict Workers: Reinterpreting Australia's Past* (Sydney: Cambridge University Press, 1988) 99.
169 Ward, n 28 above.

to be even more widely read; a hundred thousand lined the streets for his funeral. Later C.J. Dennis moved the sardonic genre to the city with two larrikins who the nation took to their hearts, the bloke of *The Songs of a Sentimental Bloke* and Ginger Mick.

A thesis about bush workers in the pastoral industry seems a strange one to advance in a nation that came to be among the world's most urbanised. Its significance can be and has been exaggerated. Yet it is hard to reconcile an utter rejection of it with *Waltzing Matilda* (the sheep thief hounded to his death by police and squatters) and Ned Kelly. It is hard to say there is no convict stain when we see those old diggers on Anzac Day 'illegally' playing two-up, ritually furtive. Gambling of such simplicity it could be played in 'schools' in the prison yard at Newgate by men bound for Botany Bay. In the nineteenth century so many respectable Australians worked to remove the convict stain. Today many progressives are ashamed of the way the solidarity of mates was mobilised to exclude women, vilify Chinese workers who threatened their wage rates and exterminate Aborigines who grafted to share their own land. Denial does not seem preferable to acknowledging all this as part of the complex fabric of a past on which we must build as we heal.

Beyond Foucault

An implication of our Australian story is that the sociology of punishment is excessively obsessed by the emphasis in Foucault's *Discipline and Punish* (and in mainstream penology) on the birth of the prison as the crucial development.[170] Rather than conceive the crucial divide as between prison and punishment inscribed on the body, I want to conceive the opposition between inclusionary and exclusionary regulation as the much more historically fundamental theme.[171] It is a deliciously paradoxical one. Stan Cohen's contribution to it was to show how inclusionary theories degenerate into oppressive and exclusionary practices (eg netwidening): 'beautiful theories becoming ugly practices'.[172] The story here is more one of ugly theories (purging England of its depraved – Blackstone's extirpation) giving birth to some beautiful practices. Georgia illustrates the more standard Cohen story of beautiful theories. Here the philanthropist prison reformer James Oglethorpe founded Georgia in 1733 to create a colony that avoided extremes of wealth and that attracted victims of both the prison system and religious persecution. Slavery would be prohibited and larger landholdings forbidden by law. He wanted to help convicts, particularly those imprisoned for debt, to work their way to solvency on American land. Oglethorpe's regulations were defied as greedy planters smuggled in slaves to replace convicts.[173] The colony which, unlike Australia, set out to be the egalitarian inclusionary republic, was gone with the winds of exclusion.

The inclusion/exclusion divide is so interesting and central precisely because its history is one of inverting itself with profound consequences. So our account of transportation is of an exclusionary move which is transformed into inclusion. Foucault did not take transportation seriously, which is odd because he takes

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170 n 2 above.
171 Stanley Cohen, *Visions of Social Control* (London: Polity Press, 1985).
172 *ibid*.
173 Paul Johnson, *A History of the American People* (London: Phoenix, 1997) 91.

Bentham so seriously and Bentham took transportation so seriously that he devoted more energy to fighting it to defend his alternative of the panopticon than to any policy idea. In 1802 he published *Panopticon Versus New South Wales*. Nothing could be more offensive to the principles of the panopticon than convict shepherds separated by large spaces from the nearest shepherds; constant surveillance by a flock of sheep was not what Bentham had in mind. Foucault is remarkably ill-informed in the way he dismisses the historical significance of transportation. He says England abandoned transportation 'at the beginning of the nineteenth century'. Transportation to Australia was not abandoned until 1868 and continued to Gibraltar (where 9,000 were shipped) until 1875. There was more transportation to Australia in the second third of the nineteenth century than in the first. More disturbing is the way Foucault fails to document the significance of his own nation's experience of transportation, of the way Tocqueville lost the French debate and French transportation continued to 1938, albeit at lower volume and with less colonial success than English transportation. As late as 1911 transported convicts represented 13.2 per cent of the population of Guiana,[174] though this was a much smaller destination than New Caledonia.

Nicholas and Shergold point out that after 1820 two and a quarter million convicts were transported to destinations that included Australia, Siberia, Singapore, New Caledonia, French Guiana, Gibraltar, the Nicobar Islands, Brazil, Sumatra, the Andaman Islands, Bermuda, Penang, Malacca and Mauritius.[175] Australia is only significant because of its scale (being second only to Siberia as a destination) and because its impacts are the best documented. In the late nineteenth century, Singapore came to be viewed as a success story of building a strong economic infrastructure with convict labour in the way Australia had been so viewed early in the century. Just as the French sent a mission to Sydney in 1802, the Japanese, Siamese and Netherlands governments sent fact-finding missions to the Straits Settlements in the latter part of the century. Throughout the century, Britain threw its weight around to prevent other states following the path to colonial development it had pursued. For example, it resisted attempts by Austria, Italy and Germany to establish penal colonies in the Pacific. France was too powerful for Britain to resist, though Britain did manage to persuade it that a French penal colony in Western Australia would be ill advised. The state of Hamburg actually signed a contract to ship convicts to the Australian Agricultural Company, but the British Secretary of State, Lord Glenelg put a stop to it with the convicts waiting on the ship. Prussia managed to broker a deal with Russia to send some of its convicts to Siberia and Mecklenburg-Schwerin got past the British by sending some to Brazil.

While this transportation after 1820 accounts for the highest volumes, there was also considerable English transportation of convicts to North America in both the eighteenth and seventeenth centuries and some to Africa.[176] There was also some Swedish transportation to New Sweden (Delaware) during the seventeenth century and a momentary Dutch flirtation with transportation to Surinam.[177] During these centuries and throughout the sixteenth and some of the fifteenth century as well, Spain, France, Austria and most Italian and other Mediterranean states banished

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174 n 110 above, 35.
175 *ibid*.
176 n 35 above, 32–34.
177 Pieter Spierenburg, 'The Body and the State: Early Modern Europe' in Norval Morris and David J. Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (New York: Oxford University Press, 1995) 68.

prisoners to galley slavery, but again in numbers that were modest compared to nineteenth century transportation. Garland points out that both Portugal and Spain used convict labour in their foreign colonies and military settlements from as early as the fifteenth century.[178] In the great European wars of the second half of the eighteenth century, the protagonists used convicts to fight and even took criminals from other countries that did not want them.[179] No fewer than 97 percent of the non-capital convictions decided by Amsterdam's court were to banishment between 1650 and 1750.[180] Similarly in American cities of the same period, the absence of a police force meant that social control operated largely informally so long as undesirables could be excluded: newcomers would be 'warned out' unless they could vouch for their respectability with say a letter from their minister or property.[181]

A problem with the sociology of punishment has been a tendency to take Foucault too seriously as an historian, especially on this question of the dismissal of transportation. Spierenburg and Finnane can be exempted from this charge,[182] and Garland also at least in passing concedes some importance to transportation in the mid-nineteenth century.[183] So I submit we have a sociology of punishment too obsessed with the politics of imprisonment to the neglect of the more abstract politics of exclusion and inclusion (of which the politics of imprisonment is a crucial part). An attraction of explanatory theories of exclusion and inclusion is that they map onto normative theories of restorative and retributive justice, a central mapping for those of us who aspire to integrate explanatory and normative theory.[184] From this normative perspective the contest between whether to imprison or to put someone in the stocks is not as central as the contest between whether to seek restoration or retribution. One reason the latter is more normatively central is that it implies asking the question of whether one should punish at all; or rather, restorative justice means stakeholders deliberate in a way where punishment might never be considered as a means of securing symbolic and material restoration. What follows is that regulation is a more fruitful topic of study, in terms of both normative and explanatory theory, than punishment. In this respect, the late Foucault of governmentality has the greater appeal than the Foucault of *Discipline and Punish*.[185]

What also follows is that my five-stage history of institutions of regulation is flawed. Between the weak state stage where corporal and capital punishment dominate (the second stage) and the third strong state stage where professional police and penitentiaries dominate we need to interpose a briefer stage where banishment is revived to being a dominant form of punishment, at least for a number of major nations such as England and Ireland, France, Holland, Spain, the Northern Italian States, and Russia. The shift from banishment being a minor form

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178 n 9 above, 99.

179 n 3 above, 29–30.

180 n 177 above, 62–63.

181 David J. Rothman, 'Perfecting the Prison: United States, 1789–1865' in Norval Morris and David J. Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (New York: Oxford University Press, 1995) 112.

182 Spierenburg, n 8 above; Michael Finnane, *Punishment in Australian Society* (Melbourne: Oxford University Press, 1997).

183 n 12 above, 7.

184 John Braithwaite and Christine Parker, 'Restorative Justice is Republican Justice' in Lode Walgrave and Gordon Bazemore (eds), *Restoring Juvenile Justice: An Exploration of the Restorative Justice Paradigm for Reforming Juvenile Justice* (Monsey, NY: Criminal Justice Press, 1998).

185 Garland, n 15 above; n 2 above.

of punishment to being a dominant form occurs at different periods between 1500 and 1900 in different states, depending on where labour shortages occur in the launching of imperial expansion. In short an important partial explanation of the rise and fall of banishment from the home state to the periphery of its imperium is provided by Rusche and Kirchheimer's materialist theory.[186] This means that the resurgence of banishment actually completely overlaps the chronology Foucault favours for his transition from inscribing the body to disciplining the soul.

Just as prisons existed throughout recorded history, so did banishment and so did the infliction of pain on bodies. Figure 2 shows that in nineteenth century Australia, penitentiaries, banishment, corporal/capital punishment and restorative justice all co-existed. My point is one about the chronology of different techniques and institutions of regulation becoming dominant. The conclusion is that the domination of imprisonment is preceded by a brief domination of banishment. Hence the revised sequencing of institutional dominations is restorative justice, corporal/capital punishment, banishment, centralised Benthamite state penitentiaries, Keynesian welfare state probation-prison-parole, and now the contemporary uncertain unfolding of a new regulatory state of neo-liberal governmentalities (community policing, restorative justice, actuarialism, government at a distance).

The era of the domination of the Western debate by transportation was not so long. Yet how can we give centrality to the thinking of Bentham and Tocqueville in that debate without understanding how and why they lost it in their own lifetimes?

Australian transportation was the work of a hegemonic power. Transcontinental shifts of convict labour, especially by Britain and Russia, were of a piece with millions of indentured Melanesians, Chinese and Indians and millions of African slaves who were moved to spaces where labour was scarce as part of empire-building strategies. In the process of penality being an instrument of imperial expansion, it was transformed in paradoxical ways. It showed us how well restorative justice might work with slum dwellers from the largest metropole. Macquarie's Sydney reinvented what we now describe as restorative justice and Macquarie even used the language of restoration. The colony invented the ticket-of-leave, which was modelled in England and became parole.[187] It established an institution for juvenile offenders and stopped executions in public for the same reasons that these things occurred in England decades later.[188] In its English-driven reaction against the restorative justice of the ticket-of-leave, Australian convict administration produced Edmund Du Cane (1885), who became the driving administrative force and theoretician of severe centralised Benthamite state penitentiaries in Britain. Du Cane was both the author and pre-eminent implementer of the principle of lesser eligibility. At the Norfolk Island penal settlement, Alexander Maconachie had the opportunity to implement the marks system of his new synthesis of progressive movement from confinement to

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186 n 3 above, and John Braithwaite, 'The Political Economy of Punishment', in E. L. Wheelwright and K. Buckley (eds), *Essays in the Political Economy of Australian Capitalism*, Volume IV (Sydney: ANZ Books, 1980).

187 Finnane, n 182 above, 162.

188 Governor Bourke ordered that executions be carried out in private after a convict named Jenkins made a famous traditional speech from the drop: 'Well, good bye my lads, I have not time to say much to you; I acknowledge I shot the Doctor, but it was not for gain, it was for the sake of my fellow prisoners because he was a tyrant, and I have one thing to recommend you as a friend, if any of you take to the bush, shoot every tyrant you come across, and there are several now in the yard who ought to be served so' (Ward, n 28 above, 139).

reintegration into the community. This approach was the dominant influence on the US reforms in the aftermath of the 1870 National Congress of Penitentiary and Reformatory Discipline[189] and the Irish system of Sir Walter Crofton[190] and central to understanding how Keynesian welfare state probation-prison-parole evolved everywhere.[191] Assignment was copied by the French in their penal colonies as 'assignation'. In the Straits Settlements Indian convicts were given 'tickets-of-leave' on the Australian model and like the Australian emancipists often showed great entrepreneurial flare in running businesses.[192] Doubtless there may be second-order effects here in other parts of the world which are yet to be researched. What we can say is that when Foucault dismissed transportation as something the English abandoned 'at the beginning of the nineteenth century', he dismissed something that mattered.[193]

Conclusion

By the end of the nineteenth century Australia was a low crime society and perhaps as prosperous and egalitarian as any society in the world, certainly in terms of workers' wages, which were higher than in the US and Britain. Where the convict presence was greatest, the fall in the crime rate was steepest. I have argued that mutually reinforcing policies of reintegration and procedural justice toward the convict majority during the first half century of European settlement was one reason for this. This contrasts with another frontier society, the United States, where stigmatisation and procedural injustice toward slaves produced a high crime society. The descendants of the slaves continued to be poor and stigmatised at the end of the century, surrounded by burgeoning wealth beyond their reach. While crime rates of convict descendants seem to have declined to approximate that of the general population, the descendants of the American slaves committed homicide at about eight times the rate of descendants of the free.[194]

Australia also ended the century as a patriarchal and racist society with strong traditions of corruption and abuse of power. It had decimated the Aboriginal owners of the continent, the earth, the whales. Moreover, in the twentieth century Australia lost the lead it had held over other countries in prosperity and income equality. As Russel Ward has argued, while the US was a frontier of rugged individualism, the Australian frontier was a collectivist one of working class solidarity informed by convict irreverence for authority. However, it formed a working class that was born to knock those who set themselves above their mates. It was Tories like Menzies, Bruce, Deakin, Fraser and Reid who were seen as born to rule. These men were born to rule by British aristocratic legends, or a bunyip version of them. The monarchy had great resonance with an Australian bourgeoisie who suppressed the convict stain and with women who feared male trade union

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189 Some of the Declaration of Principles of the American Prison Association was taken word for word from Maconochie's writing.

190 Eduado Rotman, 'The Failure of Reform: United States, 1865–1965' in Norval Morris and David J. Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (New York: Oxford University Press, 1995) 173.

191 John Vincent Barry, *Alexander Maconochie of Norfolk Island: A Study of a Pioneer in Penal Reform* (Melbourne: Oxford University Press, 1958).

192 n 110 above, 33.

193 n 2 above.

194 My thanks to Professor Robert Silverman for accessing US Uniform Crime Report which shows a rate of homicide for African-Americans of 39.1 per 100,000 and a rate of 4.9 for European-Americans.

domination. It was a literate working class which read and talked about politics a lot, but mocked intellectuals. It failed to deliver an egalitarian twentieth century Australia, cut down its own tall poppies, preferring an informal mateship that mocked engaged and disciplined political solidarity. It was more comfortable with defeat at Gallipoli than victory with Fisher, Scullin, Chifley or Whitlam.[195] Then nor would it have tolerated a Hitler, Stalin or Péron. No doubt the light on Australia's hill still has more than a touch of 'convict republicanism'.[196]

This work began by positing five stages in the history of regulation: a pre-state stage when restorative justice and banishment were dominant, a weak state stage where corporal and capital punishment dominated, a strong state stage where professional police and penitentiaries dominated, a Keynesian welfare state stage where new therapeutic professions such as social work colonised what became probation-prison-parole, and a contemporarily evolving new regulatory state phase of community and corporate policing (with a revived restorative justice). I conclude that the rise of the penitentiary is preceded by a period when transcontinental movement of convicts was dominant because of its use (like slavery and indentured labour) as an instrument of imperialism. Restorative justice, corporal/capital punishment, banishment, imprisonment and government at a distance have all, in that order, had their period of dominance. Equally they have all been part of the regulatory story of all periods of recorded history.

For the Foucault of *Discipline and Punish*, the penal divide is between disciplining the body versus the soul, scaffold or penitentiary. Australian history illustrates the richer insight from seeing the most fundamentally recurrent historical tension as between inclusion and exclusion,[197] between the normative ideals of restorative and retributive justice. The way we have construed Heimer and Staffen's theory as relevant to both nineteenth century Tasmanian convicts and twentieth century African-American mothers illustrates the value in generality of explanation from researching the inclusion-exclusion opposition.[198] Heimer and Staffen's general claim, which we have supported, is that when those with the power to stigmatise are dependent on the deviant, they opt for reintegration more than stigmatisation.

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195 C.J. Dennis's Ginger Mick believed in livin' and lovin' without holding any hope for the future of Australia. But through Gallipoli he reveals larrikinism in the words of Henry Lawson and Manning Clark as 'chivalty – upside down':

> An' each man is the clean, straight man 'is Maker meant 'im for,
> An' each man knows 'is brother man at last.
> Shy strangers, till a bugle blast preached 'oly brother'ood;
> But mateship they 'ave found at last; An' they 'ave found it good.

196 J.B. Hirst, ''The Australian Experience: The Convict Colony'' in Norval Morris and David J. Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (New York: Oxford University Press, 1995).
197 See Jock Young, *The Exclusive Society* (London: Sage, 1999).
198 n 1 above.