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### Mapping the Conditions of Penal Hope

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#### **Abstract**

This article examines the conditions of penal hope behind suggestions that the penal expansionism of the last three decades may be at a 'turning point'. The article proceeds by outlining David Green's (2013b) suggested catalysts of penal reform and considers how applicable they are in the Australian context. Green's suggested catalysts are: the cycles and saturation thesis; shifts in the dominant conception of the offender; the global financial crisis (GFC) and budgetary constraints; the drop in crime; the emergence of the prisoner re-entry movement; apparent shifts in public opinion; the influence of evangelical Christian ideas; and the Right on Crime initiative. The article then considers a number of other possible catalysts or forces: the role of trade unions; the role of courts; the emergence of recidivism as a political issue; the influence of 'evidence based'/'what works' discourse; and the emergence of justice reinvestment (JR). The article concludes with some comments about the capacity of criminology and criminologists to contribute to penal reductionism, offering an optimistic assessment for the prospects of a reflexive criminology that engages in and engenders a wider politics around criminal justice issues.

#### **Keywords**

Hope, 'turning point', penal reductionism, catalysts, reflexive critical criminology.

#### **Introduction**

In this paper I would like to raise the relatively unfamiliar concept of hope in the penal field. Elliot Currie's (2013) paper in the previous issue of this journal stresses the importance of hope: hope in the sense of people believing that some improvement in their life situation is possible, and that such hope might be opened up by a combination of a social consciousness and the practice of social solidarity. I wish to focus on the hope, firstly that nearly three decades of penal expansionism may be ending, and secondly that criminology is well placed to contribute to such a reform process.

I say the 'unfamiliar' concept of hope because of criminology's long tradition of 'miserablism', born of detailing and documenting the atrocities of capitalism, the distortions and aberrations produced in the war of all against all, the crimes of primitive accumulation, the creation of wealth and empires through plunder, seizure and extermination. Current forms of capital accumulation involve the extraction of super profits through the rip in and rip out activities of

big mining; the attempt to monopolise food production through genetic control; ecocide and the destruction of our environmental heritage for profit; the criminalisation of those seeking to migrate to create a better life for themselves and their families; the extraction of super profits and consequent social immiseration involved in the proliferation of new forms and outlets for gambling; the subordination of colonial populations, of women, of those of different sexual orientations; and so on.

As criminologists we have become adept at telling these stories of gloom and doom in the form of unrelenting critique. And of course in the penal field we have much to be miserable about, as reflected in a range of developments outlined in much recent criminological work. These include:

- Increasing prison populations in many jurisdictions over the last three decades –the phenomenon of ‘mass incarceration’ (Garland 2001a) or ‘hyperincarceration’ (Wacquant 2009);
- Ever increasing Indigenous disparity in prison populations (Cunneen et al. 2013);
- The emergence of ‘popular punitiveness’ or ‘the new punitiveness’ (Pratt et al. 2005);
- The ‘death of the social’ (Rose 1996);
- The demise of the ‘penal welfare complex’ and the emergence of a ‘culture of control’ (Garland 2001b);
- The hollowing out of the welfare state (Taylor 1999);
- The emergence of a ‘cultural politics of exclusion’ (Young 1999) and the ‘vertigo of late modernity’ (Young 2007);
- The growth of social anxiety and the attendant growth of xenophobia and ultra nationalism;
- The ‘corrosion of character’ (Sennett 1998);
- The fetishisation of individuality;
- The ‘eclipse of the solidarity project’ (Garland 1996: 463), the weakening of the idea that we are ‘all in this together’;
- The rise of the ‘risk society’ and of ‘risk crazed governance’, the audit culture, KPIs and neo-liberal managerialism (Carlen 2005, 2008);
- The criminalisation of migration (Grewcock 2010; Weber and Pickering 2011).

This partial list contains only some of those concepts thrown up in the criminological literature and mentioned in the first two days’ sessions at the *Crime Justice and Social Democracy: 2nd International Conference*, hosted by the Crime and Justice Research Centre, QUT Brisbane, July 2013, at which the collection of papers in this and the previous issue of this journal was given.

These rolling narratives of critique that concentrate on depredation, injustice, greed, inhumanity, oppression, incivility and crime, have tended to feed into an imaginary which is dulled to the possibilities of things being other, of resistance, of dreams, of hope. We have been good on Gramsci’s pessimism of the intellect, but not so good on his optimism of the will (Gramsci 1971: 175).

In terms of the broader political context in Australia, the general political situation is highly unfavourable. At the time of writing we face either the continuation of a demoralised and policy bereft Australian Labor Party or a potential Abbott conservative government. The political climate is marked by a cynical anti-politics public sentiment and a public and media discourse which is uncivil, abusive, misogynist and xenophobic: a climate in which the Murdoch Press and big mining are somehow able to pass off rapacious self interest as the national interest, climate change as fraud, environmental depredation as good for growth, refugees as criminals and queue jumpers, Muslims as terrorists, women leaders as ‘wrecking the joint’, and welfare as ‘bludging’.

I am not suggesting we all hold hands and join Monty Python in singing *Always Look on the Bright Side of Life*. Nor am I suggesting we adopt the myopia that Keith Hayward entertainingly critiqued at the conference whereby resistance is found everywhere: in the bars of Ibiza, the handcuffs of S and M, the mere mention of Lou Reed, or the wearing of Che Guevara t-shirts (although I have to confess to have had the iconic image on the bottom of my surfboard in the 1960s. In defence I note that the board was made in a friend's backyard and I sprayed the image on myself, so hardly a triumph of consumerism). But I am suggesting it may be worthwhile examining some of the sources of penal optimism.

Simon and Sparks, editors of the mammoth *Handbook of Punishment and Society* speak of a 'hopeful orientation towards the future, even in the face of the seemingly inexorable weight of the historical record' (Simon and Sparks 2012: 16). I have argued in a number of publications (Brown 2010, 2011, 2012) that we may be at a 'watershed' or 'turning point'. In a similar analysis David Green (2013a, 2013b) refers to a 'window of opportunity' and 'shifts in the penal climate' (see also Cunneen et al. 2013). The intention here is to look through this 'window of opportunity' to survey the landscape.

Green (2013b) provides a map of the conditions of optimism and possibilities of change, and of the relation between them. It is an intermediate form of analysis, covering the ground on which broad analyses translate into politics and programs. It raises key questions such as: what are the sources and forms of optimism; how well based are they; which are the constituencies which are potentially shifting; what are the conditions of change?

Such an analysis raises a political quandary: hope that political change is possible is in itself a condition necessary to stimulate change. But if the prognosis is excessively optimistic and misreads the possibilities and prospects for change, then it induces cynicism when change does not materialise, and retards reform. In penological terms, it is back to 'nothing works'. If change can be achieved without substantial structural change, what does this suggest about analyses such as Wacquant's that 'the invasive, and expensive penal state is not a deviation from neo-liberalism but one of its constituent ingredients' (2009: 308) which suggests the complete overthrow of neo-liberalism is necessary for progress to occur? What does it suggest about the contrasting views of Tonry (2011) and Clear (2011) over the possibilities of 'justice reinvestment'? Or the general question of the prospects for a reversal of the punitive turn?

### **Penal reform: Catalysts and prospects**

This paper will address some of these questions and issues by briefly outlining David Green's suggested catalysts and prospects of penal reform and then considering how applicable they are in the Australian context. Among the many historical, political, social and cultural differences between the USA and Australia is the division of power in the respective federations, with Australia having no federal prison system. Also, despite an increasing swathe of Commonwealth criminal law in areas like drugs, customs, corporations, immigration, taxation, terrorism, and so on, day-to-day criminal justice agencies, practices and programs – especially sentencing and prisons – are largely State matters. As in the US, illustrated in the comparison between Maine (151 per 100,000) and Louisiana (853 per 100,000) (USDJ 2009) there are significant State by State differences, not the least in imprisonment rates, with Northern Territory (NT) rates up above US national rates at 825.8 per 100,000, high rates in Western Australia (WA) (267.3), followed by New South Wales (NSW) (171.2), South Australia (SA) (160.1) and Queensland (158.9), with low rates in Victoria (111.7) (ABS 2012: Table 3.3). It should be mentioned that the 'war on drugs' has not had such a hold or such significant consequences in Australia in the form of mandatory sentencing or 'three strikes' sentencing policies as in the US.

## 1. Cycles and Saturation Thesis

The first of Green's penal reform catalysts draws on Bernard and Kurlychek's (2010) analysis of juvenile justice trends and the idea of cycles revolving between lenient and harsh policies. With overall declines in State and Federal US prison populations in 2008 the argument is that three decades of mass imprisonment has led to a 'saturation' effect and the cycle is now on the downturn towards greater leniency. Taking this suggestion at face value, any evidence for a similar cyclical effect in Australia is mixed.

The situation in NSW, with a recent fall in imprisonment rates, an apparent governmental intention to reduce the numbers on remand (NSWLRC 2012), together with some limited juvenile justice reform, might fit this thesis. The suggestion would be that the hard punitive line pursued by both political parties since the mid 1980s might have produced a widespread media and public cynicism about its efficacy and a greater preparedness to accept alternative approaches, at least with juveniles and less serious offenders. Here there might be evidence of a law and order saturation effect brought about by pre election 'auctions' (and popular criminological critiques of this). But then we see the opposite process occurring in Victoria, where the conservative Coalition government seems determined to stimulate law and order populism, interpret the lower Victorian imprisonment rates as a failure rather than a success and follow the very NSW path which is being partially abandoned. In the two highest imprisoning jurisdictions, the NT and WA which would seem to be prime candidates for 'saturation' through penal excess, the respective governments seem determined to plough ever onwards, although following a major riot at a juvenile detention centre in early 2013 there were some indications of a possible change of policy direction by the WA government.

## 2. Dominant conceptions of the offender

Green's second catalyst is the suggestion that prisoner reentry discourses based on diagnostic frames, are eating into the dominant individual responsibility model, opening up space for a greater focus on the social and economic determinants of crime. In the Australian context there is little general evidence of a significant shift in conceptions of the offender or a rise in the take up of prisoner reentry discourses. There are individual cases, one being a recent homicide in Kings Cross Sydney, which received saturation media coverage and was subsequently discussed largely in governmental rather than individual culpability terms (Quilter 2013). The usual concerns about out of control, drunken and violent youth was little in evidence, with the case largely framed as involving issues of liquor licensing control, the responsible service of alcohol, the policing of entertainment precincts, public transport options, town planning, the power of the liquor lobby and the hoteliers association, and so on. But behind this framing lay years of work by the NSW Bureau of Crime Statistics and Research (BOCSAR), Sydney City Council, the NSW Police, local government and medical and health authorities over the association between alcohol consumption and violence in designated entertainment precincts such as Kings Cross and various regulatory strategies. This case seems suddenly to have broken this work out into the wider public and political debate. However I would be very cautious about generalising from this one example to discern a trend. Rather there is constant flux, depending on context, individual and subjective factors and media framing.

## 3. GFC and budgetary restraints

As Green notes in his third catalyst, 'it is undoubtedly the case that both federal and state governments have become preoccupied with ways of saving money, and increasingly since the financial collapse of 2008'. (Green 2013b: 17). This is also a factor in Australian jurisdictions, although Australia came through the GFC in much better shape than the US and most – if not all – other countries, for reasons we don't need to rehearse here, so the impact is less significant. In NSW, prisons are being closed and projections suggest further closures. Other States are still expanding, particularly WA, which has great mineral wealth. Budget savings are attractive to governments, particularly where the argument is that the money is being wasted, as evidenced

by high recidivism rates and the increasing recognition that imprisonment may be criminogenic. But savings are hard to quantify, and the cost argument lacks detail and always runs the risk of being trumped in a law and order crisis by more expressive and visceral concerns, especially those generated around brutal and horrific cases. Historically penal expenditure in response to rising prison populations has been viewed as largely immune from cost-benefit analyses.

#### 4. The crime drop

Green's fourth potential is the big drop in US crime rates, a phenomenon seen in many other jurisdictions. The argument here is two-fold. First, that because of the drops in crime, crime is no longer such a pressing public and thus political concern. The second, that such crime drops are in some quarters (however implausibly) attributed to the intervention of criminal justice agencies, bolstering the notion that criminal justice interventions work. There are jurisdictional differences in Australia but the overall pattern seems to be substantial drops in most categories of crime. Homicide rates have dropped from 1.9 per 100,000 population to 1.3 between 1990 and 2007 (AIC 2013). Assault and sexual assault have only started to drop slightly in the last few years. But as Weatherburn and Holmes put it, there have been 'remarkable falls' (Weatherburn and Holmes 2013: 5) in most jurisdictions and in overall national figures for property crimes. For example recorded rates of robbery offences fell nationally by 49.1 per cent between 2001 and 2012, burglary by 57.3 per cent, motor vehicle theft by 62.2 per cent and 'other theft' by 39.3 per cent over the same period (Weatherburn and Holmes 2013: 1).

The main explanations of drops in property crime in Australia, such as those offered by BOCSAR, include:

- drops in the availability of heroin ('heroin shortage') (Degenhardt and Day 2004; Moffatt et al. 2005; Weatherburn et al. 2003);
- increased employment opportunities and high wages;
- demographic changes (that is, changes in the proportion of young men aged 16-24 in the general population);
- changes in vehicle, household and private security (Prenzler et al. 2009).

Weatherburn and Holmes suggest that there is 'some evidence' that changes in policing policy, tactics and management such as a focus on hotspots, repeat offenders and 'Compstat' strategies 'may have reduced crime in NSW, although whether its effects were transient or long-lasting remains unclear' (Chilvers and Weatherburn 2011; Weatherburn and Holmes 2013: 6).

While crime is always a media staple it is possible that drops in crimes such as break and enter have lessened community concerns about crime in general, but nothing like as markedly as in the US. It is difficult to chart the relationship between falling crime rates and public perceptions for, as various studies have shown, public perceptions of whether crime is increasing or dropping are wildly inaccurate and highly dependent on media framing (Butler and McFarland 2009; Roberts and Indermaur 2009).

#### 5. The prisoner reentry movement

Green's fifth suggestion is that the rise of the 're-entry' discourse in the US has provided a way out of the polarised 'soft' / 'hard' politicised debate and opened up a space for post release provision, exemplified in the *Second Chance Act* (2007). While social movements and some governments are promoting prisoner reentry debates and programs, it is not clear as yet that this is a major new push in the Australian context. Most jurisdictions have seen a tightening of parole eligibility, WA in particular, and a rise in parole revocations. Risk concerns, including the political risk of major reoffending, has bitten deeply in probation and parole practice. Here there has been a shift to measurement and metrics such as drug testing regimes and away from individualised social work and welfare mentoring and assistance. The desire to reduce

recidivism has led to contradictory developments, both increasing and constricting reentry assistance programs and accelerating transcarceration through high surveillance community based programs and post release conditions.

## **6. Apparent shifts in public opinion**

Green's sixth catalyst is the assertion that 'Scholars studying the nature of public opinion and attitudes about punishment have for three decades provided convincing evidence that American publics are much less than monolithically punitive' (Green 2013b: 21). Particular attention is devoted to the Hart poll in 2002 which purported to show a significant shift away from punitive attitudes between 1994 and 2001 (Hart Research Associates 2002). Whether such shifts are apparent or not, Green's point is that they have given hope to those in policy and lobbying that there is more room for manoeuvre than previously thought, more space for optimism. There is insufficient evidence in the Australian context known to the author, to indicate if such shifts are either apparent, or thought to be under way.

## **7. The influence of evangelical Christian ideas**

Green's seventh catalyst is the role being played by evangelical Christian beliefs in criminal justice debates, within a highly religious society compared with western states generally. He fleshes out this argument in greater historical detail elsewhere, charting the contesting traditions of Calvinism and Quakerism in American evangelical Protestantism (Green 2013b). The suggestion, taken up in the eighth and final catalyst, is that much of the running on penal reductionism, justice reinvestment and prisoner reentry has been driven by the evangelical Christian right.

Religion is far less important politically in Australia; we are far more secular politically. The established churches have played varying, waxing and waning roles in penal reform movements. The on-the-ground welfare arms of some churches such as the Salvation Army, Anglicare and Mission Australia have been engaged in various forms of practical post release prisoner assistance. Individual prison chaplains such as Father Brosnan and Father Norden in Victoria have been influential in public debate. Combinations of churches or individual churches have, from time to time, issued joint statements and publications calling for penal reform and greater investment in post-release assistance (see, for example, Inter-Church Committee on Prison Reform 1994; Australian Catholic Bishops Conference 2011-2012). But the US-style evangelical movement is far less significant and they have shown little interest in criminal justice issues either in support of greater punitiveness (at least as organisations, if not as individuals) or in penal moderation and reduction. The role of religion in the history of Australian penalty is significantly under-researched. It is arguably most marked in the role of churches in running Aboriginal missions in the late nineteenth century and first half of the twentieth century.

An interesting question in the current context of a national Royal Commission into Institutional Responses to Child Sexual Abuse – especially, it seems, in the Catholic church – is whether it will lead the church to take more seriously issues such as the adequacy of traditional criminal law notions of individual culpability. Questions such as, for instance, whether aspects of church doctrine and practice, male dominance, hierarchy, authority, obedience, celibacy, absolution and so on, have operated as conditions sustaining long-term sexual victimisation? Will we see a rise in interest in debates around restorative justice, truth and reconciliation procedures, compensation and apologies, forgiveness, and redemption (Death 2012, 2013; Cossins 2008; O'Leary 2003)?

## **8. The Right on Crime initiative**

In perhaps the most specifically US development, Green notes the way new groupings arising from the Christian right, such as Right on Crime and the Prison Fellowship, have taken a leading

role in arguing for penal reduction and diversion. There is little if any evidence of the emergence of such groupings in Australia. The cautious steps to some reform in NSW taken by the Attorney General Greg Smith seem to stem not from his socially conservative brand of Catholicism or his alignment in the hard right faction of the NSW Liberal Party but from his previous experience as a prosecutor in the Director of Public Prosecutions. In this position he gained an experiential awareness of the limits of criminal justice responses and of the criminogenic effect of prison, especially on juveniles. While penal and criminal justice reform is taken up from time to time by individual figures on the right, there is no substantial lobby in Australia of the sort described by Green.

### **Other potential catalysts or forces?**

Of Green's eight suggested catalysts of a more hopeful climate in US criminal justice debates, the above very brief reflection suggested that few of them have obvious purchase in the Australian context. Any saturation effect is highly uneven across the Australian jurisdictions and there is no obvious trend away from the dominant individual responsibility model of culpability. The GFC has had much less effect than in the US, although it probably has sharpened cost based and efficiency arguments and boosted 'what works' and 'evidence based' policy responses. The crime drop may have lowered the public and political temperature of law and order politics and opened up more space for social responses. There is little evidence of any substantial take up of prisoner reentry discourse, certainly nothing like the US *Second Chance Act* (2007) and little evidence of apparent shifts in public opinion. The influence of Christian evangelical ideas in criminal justice debate is minimal and there is no evidence of right wing political or lobby groups supporting penal reduction in Australia. But are there other features in this map of the penal landscape that deserve consideration as possible sources of influence or catalysts for change? The following discussion will provide a brief check list of some of these.

### **The role of trade unions**

An issue not mentioned by Green but brought to the fore by Joshua Page's revealing history of the California Prison Officers Association (CCPOA) (Page 2011, 2012) as a powerful lobby group, is the role of unions and organised labor. In California the CCPOA wielded enormous power in corrections, not just in securing the most favorable pay and work conditions for its ever expanding membership as California's prison population soared, but also as a lobby group opposing any criminal justice, sentencing and parole reforms that might operate to reduce the prison population. Page's account details the way the CCPOA mobilised its power to support 'tough on crime' politicians, prosecutors and judges and to politically attack those with reformist records. The CCPOA developed mutually beneficial alliances with punitive crime victim's groups, promoted three strikes legislation, promoted the strategy of punitive segregation, worked to keep private prison companies out of the penal field and asserted its authority and control in the struggle over 'managerial rights', 'the ability to make and implement policies concerning prison administration' (Page 2011: 14).

The history of the role of trade unions in Australian penal history is yet to be written. As a generalisation, Australian trade unions in the penal sphere, most notably prison officers unions, have been resistant to change within the workplace, but have not embarked on the highly public political campaigns of the Californian union to maintain high imprisonment rates. The concern has been mainly over pay and work conditions, such as manning levels and safety issues, and maintenance of prison officer authority over prisoners which has entailed opposition to democratising reforms within prison practice. In the struggle surrounding the establishment, conduct and attempt to implement the reforms recommended by the Nagle Royal Commission (1978) in NSW, the Prison Officers Vocational Branch (POVB), the prison officers union, played a generally defensive and regressive role, denying the bashings of Grafton and Bathurst, resisting the closure of Katingal and generally attempting to thwart the reform endeavors of new reformist Commissioner Tony Vinson. This is one period where the role of prison officer unions

is documented (see Findlay 1982; Nagle 1978; Vinson 1982; Zdenkowski and Brown 1982). The tendency is not all in the regressive direction, as illustrated by the campaigns of the Prison Union Liaison (PUL) group in Sydney in the 1970s and 1980s (Zdenkowski and Brown 1982: 324-6) and the NSW branch of the Builders Labourers Federation (BLF) (Zdenkowski and Brown 1982: 21-22, 266-7). More recently, opposition to prison privatisation moves by governments in both NSW and WA involved unusual alliances between prison movement groups, such as Justice Action in NSW, and prison officers unions in both States.

### **The role of courts**

In the US Supreme Court decision of *Brown v Plata* the state of California was ordered to release 45,000 of its prisoners on the grounds that 'California's chaotic and capricious ways of incarcerating people was actually criminogenic and led to the destabilisation and increased recidivism of some prisoners (especially those with mental illness' (Simon 2012: 254). While this decision was a decade in the making on the way to the Supreme Court, it does illustrate the potential for Courts to play an important role in penal reduction in the US.

By way of comparison however, there are no equivalent cases and Australian courts have exercised little supervisory jurisdiction over the practices of imprisonment in Australia. Australian courts are limited by the constitutional framework, the absence of a Bill of Rights and of a 'cruel and unusual punishment' clause. The peak of court involvement in prison conditions in the Australian context was in the 1960s and 1970s when there was a shift away from the 'hands off' doctrine articulated by Dixon CJ in *Flynn v The King* (1949) 79 CLR 1. (For a list of cases and sources see Brown et al. 2001: 1475). However, as Edney (2001) argues, this judicial move to conceive of prisoners as legal subjects later gave way to a policy of deference to the judgment and expertise of prison administrators.

One of the few recent significant decisions is that of *Benbrika* where Bongiorno J in the Supreme Court of Victoria held that oppressive remand conditions infringe the right of an accused person to a fair trial (Carlton and McCulloch 2008). More recently the Australian High Court in *Muldrock* (2011) savaged the NSW standard non-parole legislation which had significantly increased sentence lengths. The exact effect of the decision on NSW sentence lengths is not yet clear.

### **The emergence of recidivism as a political issue**

One development that can arguably be traced in the Australian context is the emergence of recidivism as a political issue. The Productivity Commission has, since 1995, produced a *Report on Government Services* utilising a 'framework of performance indicators' to evaluate government services including Justice and Corrections. In the Justice Preface these include recidivism rates across the States, measured in terms of return to prison within two years as a percentage (Productivity Commission 2013: C22, Table C5). In the 2013 Report the Australian average was 39.3, with both NT (52.4 per cent) and NSW (42.5 per cent) being above the national average. The key criteria in the Corrective Services section tend to be those amenable to measurement, under the headings 'effectiveness' and 'efficiency', while criteria going to 'equity' and 'access' have remained 'to be developed' (Productivity Commission 2013: 8.13, Figure 8.7) since the exercise started. Nevertheless the regular compilation and publication of recidivism rates have provided an edge to arguments that imprisonment is 'inefficient', wasteful and even criminogenic. In this way recidivism rates have become a political issue and governments are sensitive to them. This development has led State governments such as NSW to set targets in a State Plan (NSW Government 2010) to reduce recidivism rates by 10 per cent by 2016. Other jurisdictions have adopted grander targets; the New Zealand government, for instance, has announced a 25 per cent recidivism reduction target.

### **Influence of ‘evidence based/what works’ discourse.**

It seems clear that, rhetorically at least, increasing lip service is paid to ‘evidence based’ or ‘what works’ discourse in political debate over criminal justice issues. This may be partly in response to the GFC and the desire for better value out of the considerable sums spent on criminal justice. What if anything this translates into is highly problematic, for the notions of ‘evidence led’ and ‘what works’ are fraught with questionable assumptions, as Freiberg and Carson (2009) argue. At the more extreme end, evident in the ‘Campbell Collaboration’ stream, the only criminology ‘evidence’ valued is that produced under experimental conditions utilising randomised control trials. Such a standard is fraught with moral, ethical, theoretical and technical dilemmas and limits in the criminal justice sphere. Even assuming ‘evidence’ can be constituted and evaluated in this rationalistic way, the idea that it will necessarily drive political outcomes is fanciful. As David Green notes, ‘Evidence is marshaled to support shifting, *a priori*, normative positions. ...History suggests penal optimism is seldom evidence based, and the enthusiasm with which recidivism reduction has been recently embraced suggests Americans are capable of a considerable collective amnesia’ (Green 2013b: 27).

In the Australian penal and criminal justice landscape ‘evidence based’ is increasingly used by politicians and policy makers as a rhetorical strategy. Often it is code for scepticism at the continuation of law and order politics driven by media and public outrage over particularly heinous crimes which leads to rushed legislative changes usually in the direction of increased sentence lengths, expanded police powers and diminution of due process rights (see generally Hogg and Brown 1998; Weatherburn 2004). As such, ‘evidence based’ claims can have progressive effects in that they direct attention to the available criminological and other research and statistics, even where this is thin and inconclusive, and give greater force to calls for more and better research and research funding. Similarly calls for an evidence base can provide some counter to the tendency evident in the ‘rise of the public voice’ (Ryan 2005) and that of talk-back radio hosts and tabloid news and TV to diminish the role of experts and expertise, evident in repeated attacks on the judiciary for being ‘out of touch’. Calls for ‘evidence based’ criminal justice policies have been a major component in the emergence of Justice Reinvestment.

### **The emergence of Justice Reinvestment**

One of the arguably more optimistic developments not specifically raised by David Green is the emergence of Justice Reinvestment (JR). The term was first coined by Tucker and Cadora in an article in George Soros’s Open Society Foundation (Tucker and Cadora 2003). The context of JR’s emergence was increased disillusionment with three decades of rising imprisonment rates in the US and the racially selective nature of ‘mass imprisonment’ (Alexander 2012). The notion involves the attempt to reduce imprisonment rates by reallocating funds from correctional budgets to finance education, housing, healthcare and jobs in high crime communities to which released prisoners return. The concept was promoted through think tanks and particularly by the State Government’s Justice Centre, a national non-government organisation which provides advice for policymakers and has become the main body for JR implementation in the US. The key methodology is data and asset mapping to identify neighbourhoods with high levels of imprisonment and organisations that provide social support and solidarity in the local context which might be the basis for building social infrastructure. JR is widely credited with being a major catalyst behind the leveling off or reduction in prison populations in a number of states.

However a recent overview assessment from a number of supporters concludes that ‘while JRI [Justice Reinvestment Initiative] has played a significant role in softening the ground and moving the dial on mass incarceration reform, it is not an unmitigated success story; the picture is complex and nuanced’ (Austin et al. 2013; for various assessments of JR see Fox, Albertson and Wong 2013; a range of articles in a special issue of *Criminology and Public Policy* 2011: 10(3)). Among the criticisms are that outside a few States such as New York, reductions in

imprisonment rates have been slight; there has been a lack of targeted investment in high incarceration communities, JR's original aim; and most schemes have focused on parole and recidivism related projects rather than front-end reductions through legal and sentencing reforms. Despite this sobering assessment the authors conclude that: 'for the first time in several decades, public dialogue seems to be reflecting genuinely progressive principles and values, with regard to reducing mass imprisonment' (Austin et al. 2013: 23).

In the Australian context there is a groundswell of interest in and advocacy of justice reinvestment strategies (for an assessment of its prospects and pitfalls see Brown, Schwartz and Boseley 2012). Difficulties in translating the concept into the Australian situation include the lack of any obvious sponsoring agency such as the CSG in the US; the different political structure which makes it difficult to devolve responsibility and funding to the local level (cf. county administration in the US or local authorities in the UK); the absence of or inadequacies in local data collection necessary to identify high imprisoning neighbourhoods; and the difficulty of developing a bi-partisan approach against the background of a history of state law and order party politics. The obvious focus for JR strategies in Australia is regional and rural towns and locations with high Aboriginal populations. However, given the history of failure of many interventions imposed or 'rolled out' without sufficient local consultation, support and Aboriginal control, JR programs are only likely to be successful where there is a groundswell of support ('buy-in' in the current lingo) and mobilisation, something that is currently under way in at least one regional NSW town involving a range of Aboriginal organisations and groups and the private sector.

An Australian Senate Legal and Constitutional Affairs References Committee Inquiry Report *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (The Senate 2013) recently recommended that the Commonwealth 'adopt a leadership role in supporting the implementation of justice reinvestment, through the Council of Australian Governments' and establish a justice reinvestment clearing house 'to compile, disseminate, and promote research and program evaluation in all communities'. The Report recommended a trial of JR with 'at least one Indigenous community included as a site' (The Senate 2013: xi). A Minority Report by Coalition Senators supported the general principle but opposed the role of the Commonwealth as the 'cockpit for implementation and reform' and argued that any diversion of resources from the courts and the prisons was not warranted on the evidence (The Senate 2013: 126-129).

It is important to identify the difficulties and barriers to the take up of JR policies in Australia but it is also important to recognise that reform endeavors such as penal reductionism require narratives, conceptual vehicles to carry the reform impetus. Such an impetus more readily gains momentum through the appeal of a 'big picture' which attracts the attention of diverse viewers, groups, agencies, political parties, organisations and individuals from a broad constituency. One of the promising aspects of JR is its take up by agencies outside conventional criminal justice system debates, such as the Red Cross. Aboriginal peak and local organisations are driving much of the momentum. One hundred and thirty one submissions were made to the Senate inquiry from a range of organisations including legal aid services, health and medical services, drug and alcohol, Aboriginal Lands Councils, human rights bodies, churches, juvenile justice agencies, universities, NGOs and others.

## Conclusion

The analysis of conditions of hope in the field of penalty such as that usefully undertaken by David Green requires identification of constituencies and issues, a map of the political and cultural field and a recognition of the wide reach of penalty. This intermediate type of analysis opens up the spaces for articulation between overarching and sometimes severely over-determined analysis of penal trends (of the 'late modernity', 'culture of control', 'penal surge', 'new punitiveness' sort) and the empirical minutiae of local developments. This paper makes

only a very preliminary and partial reconnoitre in the Australian context. The picture is less rosy than in the US context, although there are some indicators of a potential shift away from penal expansionism.

In the penultimate chapter of *Penal Culture and Hyperincarceration: The Revival of the Prison* (Cunneen et al. 2013), the authors examine various developments which feed into a more hopeful, 'turning point' analysis. These include falling crime rates; pressures from the GFC; the emergence of high recidivism rates as a political issue; some limited evidence of political convergences on the right; the promise of justice reinvestment; and the possible reconceptualisation of 'popular punitiveness'. The conclusion is somewhat pessimistic, based largely on the argument that insufficient attention has been paid to the 'penal/colonial complex', colonialism, post colonialism and race in the construction of imprisonment rates, leading the authors to conclude that:

... while the moment looks promising in terms of rolling back nearly three decades of increasing imprisonment rates and their drivers, unless reform movements confront the highly selective nature of penalty and the way it bears so disproportionately on marginalised groups, then any gains to be made through political and popular attitudinal shifts through widespread adoption of policies such as justice reinvestment or penal reductionism, are likely to be limited in practice.(Cunneen et al. 2013: 195)

The second focus of hope raised at the beginning of this paper was that of the capacity of criminology and criminologists to contribute more generally to penal reductionism and to an engagement with the various pressing issues of our time. If the conference that spawned the collection of papers in this and an earlier issue of this journal is anything to go by, I believe there are grounds for optimism in relation to the health of criminology, and for the prospects of a criminology that engages in and engenders a wider politics around criminal justice. To have appeal, such a politics must have a moral dimension. It should seek to mobilise public outrage over what Russell Hogg (2013) calls the 'crimes of the 1%', for example. Without being chauvinist, I doubt the necessity in the Australian context to call for a 'public criminology' (Loader and Sparks 2010) for it is already being waged across a wide range of issues.

To single out just two areas well reflected at the conference and in the collection, we have seen the rise of Green Criminology, represented in the work of Nigel South, Rob White, Reece Walters and others, and the area of immigration / refugees / trafficking / borders / state crime, represented in the work of Michael Grewcock, Leanne Weber, Sharon Pickering and others. Here are two relatively new areas in which major advances in criminological scholarship have been made and, moreover, made in relation to the 'crimes of the powerful' and 'state crime'. Green criminology in particular is in the 'crimes of the powerful' mode but has broadened its subject matter out to include much of what sustains daily life, the health of populations and of the planet, such as water, air and food quality and availability. In grappling with such fundamental issues that affect us all, Green Criminology talks simultaneously to the local and the global, internationalising criminological concerns, holding out the prospect of opening up further fronts and escaping the militantly oppositional class character which constrained its forbears' replication and impact.

Little if any of the research presented at the conference or embodied in the set of papers emanating from it is clothed in scientism. Most of it is presented in a way that is translatable into social, political and economic impact. It is capable of, and is, being fed into the justice struggles of our age. It bears the lineage of various traditions in criminology, from Sutherland, C Wright Mills, interactionism, social deviancy theory, the "new criminology", left realism, abolitionism, the 'crimes of the powerful', transitional justice, state crime, cultural criminology, and so on.

Its credibility, purchase and effects depend on maintaining an open, reflexive approach, a humility, a recognition that we don't have all the answers, or even the right questions. The sources of discontent with and resistance to the depredations of capitalism cross a myriad of political lines and constituencies, so that we need a mature, non-sectarian approach to effectively engage with this diversity. This is even more the case where contemporary conflicts generate contradictions, disputes and antagonisms which cross traditional party, class, gender, interest group, generational, racial and other lines. What we are seeing in, for example, debates over widespread tax avoidance by the rich, coal seam gas mining, climate change, refugee policy, institutionalised sexual abuse, corruption and forms of environmental despoliation, are coalescences and alliances between traditionally opposed groups, which find common cause but for very different reasons and with different interests in mind.

A reflexive critical criminology needs to be able to respond to these unstable alliances by providing research and advocacy which assist in the formulation and articulation of demands which can be linked into a popular democratic movement and politics. This involves the recognition that the progressive character of social movements does not reside within either the particular issues they espouse or the institutional or social location of their protagonists, but in the way that the issues are articulated into demands and fashioned into a broader popular democratic political program.

The conference from which these papers emerged began with Uncle Joe Kirk's powerful story of the local Aboriginal people's totem, the fresh water eel, whose mothers die after spawning. The baby eels venture out into the Brisbane River, later to return to the creeks and tributaries where they were spawned, just as the original Aboriginal inhabitants of the area are returning, reestablishing connection, spirituality and belonging, even after the trauma of removal and separation.

I would like to think of the people who attended the conference and its predecessor, as those baby eels, although some of us are of advanced years, venturing out into the big river of the wider body politic, returning to the creeks and tributaries of the diverse rendezvous discipline of criminology, and there spawning the sorts of research, ideas, teaching and practice that seeks to foster social justice, equality, and stewardship of the planet, of the sort that was seen and heard and engaged with at the conference and is partly represented in the published collection of papers.

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