Punitiveness in Australia: electronic monitoring vs the prison

Punitiveness in Australia: electronic monitoring vs the prison[1]

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Abstract

Internationally, the 200 year honeymoon with the prison may be ending. Research showing that imprisonment is ineffective in reducing crime is finally being heeded by some conservative governments committed to cost cutting. But, as this case-study of Victoria, Australia, again highlights, punishment regimes are neither universal nor rational. Bucking the trend, prison numbers in Victoria have increased dramatically over the last decade and are set to rise higher. The lingering lure of the prison here, we argue, is a manifestation of Australia's colonial history in which punitiveness has always competed with pragmatic innovation. Although the research findings are inconclusive, we contend that Electronic Monitoring (EM), while differently fraught, better meets the key objectives of sentencing. Using a counterfactual social science thought experiment in the form of an imagined Cabinet submission, we show how political decision makers might be persuaded to effect a shift from prison to EM if it is framed within the competing visions of Australian national identity. We argue that understanding how social policy decisions are made sharpens the scholarly research agenda and also highlights how the convergence of a unique set of non-rational cultural assumptions can shape major shifts (or near misses) in the history of punishment in a particular society.

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INTRODUCTION: A WATERSHED IN THE HISTORY OF PUNISHMENT?

We may well be facing a new watershed in the history of punishment. There is growing evidence that internationally, the 200 year honeymoon with the prison just might be coming to an end. The trend, even among conservative governments, is to question the reliance on this expensive and ineffective mode of punishment. In the US, where this dependency on prison has been most pronounced, there is a growing, bipartisan, realization that continued reliance on punitive sentencing approaches, and the corresponding growth in expenditure on corrections,[4] is both unsustainable and ineffective [e.g. 127]. A combination of budget pressures, along with a more sophisticated understanding of the weaknesses of the prison in efficiently reducing crime [199], is presenting a "rare opportunity in criminal justice" to make significant reforms [185].

Some commentators have declared that the American "era of ever-increasing 'mass incarceration' is ending" [112]. Although such a proclamation may be premature [43],[5] the early signs are promising. Increasingly, there is a "political premium" in favor of containing growth in the corrections system [7]. For example, in 2013, the US Department of Justice wrote to the US Sentencing Commission outlining changes in sentencing and correctional policies across US states.[6] The letter noted that ([199], p. 3):

> The dichotomy of determinate and indeterminate sentencing is breaking down and is being replaced by a pragmatism that recognizes that (1) budgets are finite; (2) imprisonment is a power that should be exercised sparingly and only as necessary; and (3) while determinate sentencing elements do indeed promote some of the core purposes of sentencing, reducing

[4] The 2015 Federal Budget requests almost $7 billion for the federal Bureau of Prisons [200].

[5] Many legislative reforms to date have been relatively minor [191], some of the changes have been driven by a minority of large states [43], and indeed the period immediately preceding the current increase in imprisonment was also one where the "use of the prison as a mechanism of social control seemed to be on the decline" ([129], p. 117).

[6] The US Department of Justice is required to, at least annually, "submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work" ([202], Title 29, § 994 (o)).

reoffending and promoting effective reentry are also core goals that can be successfully achieved and must be included in any effective sentencing and corrections framework.[7]

We have, though, been here before. In the 1970s, optimistic predictions about the demise of the prison were turned on their head [see generally, 81, 159, 188]. After a longish period of relative stability, late 20th Century sentencing policy actually re-bonded with the prison—most notoriously in the US where the imprisonment rate increased five-fold from the 1970s [38, 201]. While the move to punitiveness was not universal,[8] there is no doubt that sentencing became harsher in many other liberal democracies such as the UK, Australia, and New Zealand [10, 37, 66, 136, 179, 188].

But the current US turnaround on imprisonment, even in this age of rapid knowledge transfer, is actively being ignored in many of these bedfellow jurisdictions. Governments in Australia, for instance, are bucking the trend. Imprisonment rates in the two most populous states, Victoria and New South Wales (NSW), for example, have risen significantly over the last decade to around 130 and 185, respectively, per 100,000 people [12], and are likely to go higher [205, 210]. In this article, we seek to account for the continuing, irrational appeal of the prison for policy makers in Australia and to imagine how political decision makers might be persuaded to wean themselves off this attachment.

We begin by outlining the hold of the prison in Victoria, one of the more liberal jurisdictions in Australia. Recognizing that the history of punishment is neither universal nor rational, we outline Australia's attachment to the prison as a legacy of a colonial history where excessive punitiveness has always competed with the tradition of pragmatic innovation in this former convict settlement. We argue that understood in this frame, an emergent mode of punishment,

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7 The letter also outlines a range of "justice reinvestment" reforms—which reinvest spending on corrections, diverting that expenditure to early, community-based interventions—which had been implemented, or were (at the time) to be implemented, in 27 US states ([199], p. 3ff).

8 Canadian rates, for instance, remained relatively stable [66], and some Scandinavian countries experienced significant decreases [190].

Electronic Monitoring (EM), could be positioned as a viable political substitute for the prison. Comparing the inconclusive research findings, we contend that EM would, "rationally", be a more effective way of achieving accepted sentencing outcomes in many cases. We go on to use a quasi-counterfactual "what if" method—increasingly accepted in historical/political inquiry to help reframe thinking about controversial or contested social outcomes—in the form of an imaginary Cabinet submission. We use this genre to show how EM might be presented to political decision makers as a substitute for the prison, including how the various political risks of so dramatic a change in punishment policy might be addressed.

The foray into Australian history and the counterfactual policy genre, we conclude, anticipates the demise of the prison—the punishment mode of the Industrial Age—to a shift to the differently fraught, but perhaps "lesser evil" of EM—a punishment mode more closely aligned with the possibilities and technologies of the Virtual Age and, indeed, one specifically well attuned to Australia's national history of innovative sanctioning via close surveillance and community control of prisoners.

1. THE PULL OF THE PRISON IN AUSTRALIA

Since the 1980s, Australia's imprisonment rate has risen by about 90% to 184 per 100,000 people [12, 181]. To be sure, at least some of this can be attributed to high levels of growth in imprisonment rates of Australia's Indigenous population [16]—the imprisonment rate of Indigenous men is close to that of African American men in the US, at 3,966 per 100,000 [12]—but this shift is also evident in traditionally low-imprisonment Australian jurisdictions, such as Victoria, once regarded as "the Scandinavia of Australia" [32].

In Victoria, for instance, between 2002 and 2014 the imprisonment rate has increased by over 35% [11, 172]. This increase was due to a concerted effort by successive conservative and even more liberal governments who, as part of their law and order political campaigns, have both

directly and indirectly championed the imposition of longer sentences by judges, the elimination of judicial discretion for the sentencing of particular kinds of offences,[9] and the withdrawal of suspended sentences as a major dispositional option, as well as increasing the use of pre-trial remand for accused persons [172].[10]

At first glance, the current Victorian imprisonment rate of 129 per 100,000 does not seem to be cause for alarm. It is, for instance, below the world imprisonment rate of 144 per 100,000 [208], in line with the Organization for Economic Co-operation and Development average of about 129 per 100,000 (once the USA is excluded) [208], and is only the sixth highest rate among the eight Australian states and territories [11].[11] Victoria's imprisonment rate also still looks modest by the hyper-incarceration standards of the USA [38]. However, locally, the change is profound: Victoria has not seen such high levels of imprisonment since the late 19th Century, when it was still a young, mostly male, colony [75, 115], and in recent times has generally been recognized as one of Australia's less punitive jurisdictions [32].

A growing prison population is already putting significant pressure on existing correctional infrastructure. In 2012, reviewing the effectiveness of the Victorian Department of Justice's prison capacity planning and prison infrastructure and support services, the Victorian Auditor-General expressed concern that "the capacity of the male prison system to cope with the increase in prisoners is becoming unsustainable" ([204], p. ix). This concern proved correct—prison overcrowding has become so acute that shipping containers are now being deployed to (ware)house the overflow [9], with warnings that prison riots and violence may be the looming sequelae of such strained conditions [34, 206].

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9 For example, the introduction of the offences of causing serious injury in circumstances of gross violence, for which courts must, subject to limited exceptions, impose a custodial sentence [168].

10 As in many Australian jurisdictions, this trend has been accompanied by an associated increase in the real net operating expenditure on prisons ([13], Table 8A.8). In Victoria, expenditure has risen by almost 20% during the 2008–9 to 2012–13 period, to over $500 million.

11 Victoria does, however, have a relatively small Indigenous population compared to other states and territories with higher imprisonment rates. In Australia, the Indigenous population is significantly over-represented in prison, at a rate of close to 2,500 per 100,000 [12].

The upward trajectory of the imprisonment rate is likely to continue. In the 2014–15 Victorian State Budget, approximately $285 million was allocation to expand the capacity of Victoria's corrections systems "to implement sentencing and parole reforms and to meet the increasing demand for prison beds" ([205], Budget Paper no. 3, p 3 & Table 1.11). We know that adding prison beds is a worrisome trend because social scientists have shown that, to coin a phrase, "if you build it, they will come" (for example, Guetzkow and Schoon, cited in [120], p. 679). This is particularly likely because the privatization of the prison system now means that there is a profit motive in expanding such services [174].

The irrationality of such developments in Victoria, and Australia more generally, is highlighted by the fact that the pull to prison is occurring despite a generally falling crime rate [172, 210], a demographic shift to an aging population indicative of still further reductions in these rates over time [162], and a generally positive experience with diversionary schemes and alternative sentencing dispositions such as drug courts [215]. The prison also preserves its hold in this jurisdiction despite the long-standing, and increasingly mounting, evidence of its ineffectiveness as a means of reducing crime [see, for example, 62, 68, 129, 147].

The prison's appeal for politicians also runs contrary to the Government's own expert advice on "what works" in sentencing.[12] In an environment where "evidence-based policy" has become the new mantra of policy development [93, 94], the disregard of the international research and the local data and advice which challenges the efficacy of imprisonment is remarkable. It is clear that evidence about the effects of prison on crime cannot be driving such policy. How then do we account for the persistent and irrational appeal of the prison for governments in Australia? And what, if anything, can be done to change their mind?

[12] The Victorian Sentencing Advisory Council—an independent statutory body established to research sentencing and advise the Attorney-General on sentencing matters ([168], part 9A)—for example, reviewing the international literature, concluded that prison is relatively ineffective in both incapacitating and deterring offending [156, 157].

We argue that contrary to the great universalizing theories which have dominated punishment theory, the micro-politics of the local have a huge influence on the course of punishment at different times and different places. Linking the rise of the prison to "modernity", for example, does not explain the quite different histories of imprisonment in Europe and America [188, 214]. It also fails to account for local anomalies like the attachment to imprisonment in Australia at a time when it is seemingly losing its appeal elsewhere [see also 188].

If we take Garland's thesis about the inexorable connection between punishment and culture seriously [81], then both the explanation, as well as any new rationale for a significant change in punishment regimes, need to be grounded in local traditions and cultural assumptions. In the next section we provide a short contextual account of the unique history of punishment in Australia.

2. THE COLONIAL CONTEXT OF PUNISHMENT IN AUSTRALIA

In a globalised world, we are predisposed to seeing most things, especially the prison, as an international institution with minor local variants ([180], p. 167). In Australia, the history of punishment, including Australia's strong attachment to the prison, is probably better analyzed as the legacy of a unique colonial enterprise.

Our past casts a long shadow on the particular form of the law and order discourse in Australia, explaining why we simultaneously remain wedded to the prison while also preserving an apparent aptitude for innovation and a willingness to experiment with alternatives.

(a) The pragmatic innovation strain

It is now almost forgotten that Australia was the great social experiment of the 18th Century. Establishing a penal colony was a desperate final resort for a British government which had run

out of ideas about what to do with the teeming numbers on prison hulks along the Thames and a population that was becoming increasingly sceptical about the effectiveness of the "Bloody Code" which led so many to the gallows for a host of relatively minor crimes [67, 90]. The 18th Century penal sanctions were at crisis point and demonstrably ineffective in stemming the apparent wave of lawlessness and, more importantly, assuaging the public's fear of the criminal classes [122, 145].

The discovery of the Great South Land by Captain James Cook in 1770 meant that this vast island offered a radical solution, which could also support other imperial strategic imperatives.[13] Transportation of convicts to an inhospitable, distant "prison without walls" for the flotsam and jetsam of British society was a major factor in the settlement of what would eventually become Australia. Here, the convicts could eke out a new life—as far from Britain as one could get. Jeremy Bentham invoked the harsh reality, "[t]he moon was then, as it continues to be, inaccessible: on earth there was no accessible spot more *distant* than New South Wales" ([22], p. 186).

While Bentham was scathing about the absence of the necessary general deterrent effect on the British population if convicts were so far "out of the view" ([22], p. 174), transportation did at least provide a secure incapacitation option for a public demanding that crime be reduced and criminals managed.

It is hard to imagine now the great excitement in contemporary philosophical and policy circles at the natural experiment in rehabilitation that this new penal option afforded [88, 121]. In 1802, a French expedition spent 5 months in Port Jackson and the report, by Francois Peron, enthused, "[t]he colony's population was for us a new subject of astonishment and reflection.

[13] The reasons for the settlement of Australia have been one of the most contested issues in Australian history. A place to which convicts could be transported competes in some historians' accounts with the need to secure a stable supply of flax for shipping [76] and to advance British imperial interests, including domination of this part of the globe [23].

Never perhaps has a more worthy object of study been presented to statesman or philosopher" (Peron, 1807, cited in [30], p. 102). Could convicted felons really be given a second chance? Could this society of convicts fashion a new social order, and what would this look like? The novel sentencing alternative of transportation also implicitly tested the contemporary version of the "nature vs nurture" debate—was criminality and badness really "in the blood"? [30].

As we now know, transportation turned out rather well. This "Nation of Rogues" [145] quite quickly acquitted itself reasonably well as a society and went on to lead the world in the development of social reforms of all kinds, including early female suffrage and the provision of welfare rights, such as the aged pension and free universal education [122, 151]. It is one of the great ironies of history that the country that provided the living proof that grand rehabilitation schemes can work, indirectly provided the impetus for the birth of the prison by refusing to take more convicts from Britain. In the current context, it is even more ironic that that same nation is growing the prison at time when other countries are poised to move on.[14]

The acute labour shortages in the Australian colonies provided the impetus for another innovative sentencing option reputedly pioneered here [19, 28]—the Ticket of Leave scheme—which allowed sentenced offenders to complete their sentence working and living in the community [28, 106].[15] In the Australian colonies at least, Ticket of Leave prisoners were subject

[14] Jeremy Bentham vigorously opposed transportation, initially to the American colonies and later to NSW, because it undermined his hopes (and potential profits) of the adoption of his Panopticon. Indeed, the commitment to transportation to NSW and later Van Diemen's Land (now Tasmania) brought his longstanding negotiations for building and managing his model prison system unstuck [102] and he died in 1832, before he had the pleasure of seeing his hopes finally realized. From 1840 onwards, under the leadership of Governor Bourke, the Australian colonies started to resist further convicts and the scheme was formally abolished in 1850 (slightly later in Western Australia, which was always somewhat maverick, where the last convict ship arrived in 1868 [87]). The British government then resurrected plans for a national system of prisons leading to the building of Pentonville in 1842 [31]. There was no turning back.

[15] The origins of the Ticket of Leave are generally attributed to Britain's penal colonies in Australia, and although details are uncertain there is evidence suggesting that the practice dates back to Australian settlement in the late 18th Century [19, 28]. It later spread to the UK in the mid 19th Century, to deal with prisoners locally [28, 186]. While rehabilitation and reintegration were features of the scheme—for example, there was concern over whether too-onerous surveillance requirements would hinder reintegration [187]—the early Ticket of Leave programs were motivated by more pragmatic concerns: in England, Ticket of Leave was used as a response to growing prison populations and the need to maintain prison discipline after the abolition of transportation and

to stringent surveillance [1, 186].[16] It was generally regarded by contemporaries to have worked well and is credited with making a major contribution to the success of the early economy [1, 186]. Current parole and probation practices are often seen to be the successors of this original radical Australian sentencing innovation [71, 106].

In recent times, Australian contributions to rehabilitative sentencing options have also been influential. For example, John Braithwaite's ideas in *Crime, Shame and Reintegration* [29] spawned an entire "alternative" system for managing, initially, juvenile offending, via a system of mediation which brought offenders, victims, and their families together [58, 175].

However, in tandem with the experimental and pragmatic strands of Australian history there has also been a dark side—the competing hyper-punitiveness born of the experience of being a frontier society and (former) penal colony.

(b) The punitive strain

The fear of losing control of a dangerous population, coupled with the early harsh conditions in a frontier society, meant that early Australia outdid Britain and other parts of the world in the brutal severity of punishment and forms of social control [41, 182].

In the early days of penal settlement, there was alarm, even in England, at the harshness of the conditions imposed on the convicts. The French commentator who in 1802 was so excited about the natural experiment taking place in Port Jackson, juxtaposed his positive conclusions

the prospects of an early release which accompanied it [19, 28]; and in Australia, to deal with the lack of non-penal labour, which was considered superior to free penal labour [186].

[16] Therry, an Irish-born Australian judge writing in the mid 19th Century, notes that in Australia, a key condition of being granted a Ticket of Leave was the offender residing within the "district therein specified … [and] presenting himself and producing his ticket before the magistrates at the period prescribed by the regulations", and being prohibited from moving to another district without express permission ([186], p. 509). As such, "the police of the district in which he dwells may be aware he is there, and thus have the opportunity of knowing him and watching his movements" ([186], p. 511). Similarly, Aislabie notes than in these towns Ticket of Leave holders "were very closely watched…[t]hey were not shielded as [in England] by multitude" ([1], p. 6). Aislabie further suggests that unlike in England (where Ticket of Leave holders would conceal their status for fear of harassment), the Australian system "owed its success to *publicity*. Everybody knew, or might learn, every thing about a ticket-of-leave man" ([1], p. 3), as being a Ticket of Leave holder was actually an asset when it came to seeking employment given their supposedly better behaviour than other former prisoners.

against the general understanding in his homeland and elsewhere in Europe that the colony was awash with vicious criminals but that their treatment in the Colony was brutal and excessively punitive.

Although convicts were gainfully and productively employed, any infraction of the rules was viciously punished. Flogging in the Colony, for instance, was more common, much more brutal, and persisted far longer than in England [71]. About 40% of the male population had been flogged, with up to 50 lashes. Many of the "Emancipists", former convicts who became successful businessmen, wore the scars of their corporeal punishment on their backs all their lives. Recidivists were also confined to even more remote and brutal settlements, including transportation to the terrifying penal colony of Port Arthur in Van Diemen's Land (now Tasmania) [71].

It is this brutal and brutalizing behavior which is the leitmotif of Marcus Clarke's fictional opus, *For the Term of His Natural Life* [41]. More recently, the horror and the social sublimation of this less savory part of our past was forcefully captured by Robert Hughes in his epic international best-seller dealing with the early history of his birthplace, *The Fatal Shore* [101], in which he argues that the horror of Australia's convict past was deliberately repressed because the "convict stain", until the mid 20th Century, was regarded as a shameful past, best forgotten.

But the most profound evidence of the persistent punitive strain in this "land of opportunity" emerged most clearly since the 1970s, through the systematic exposure by historians of the mistreatment of the Indigenous population, then and now. The hyper-incarceration and the high death rate of Indigenous Australians in Australia's prisons led to the establishment of the 1987–1991 Royal Commission into Aboriginal Deaths in Custody [163]. In the evidence presented to the Commission, and in its subsequent findings, there was frank admission of the colonial connection between Australia's brutal historic policy of dispossession of a people and the incarceration of them, then and now, for being poor and marginalized [56].

Now, one might object and point out that all societies, to a greater or lesser extent, exhibit a tension between liberal and punitive tendencies. That may well be true, but the particular complexion here is uniquely post-colonial, and continues to shape policies and attitudes today. In Australia, whenever we feel under threat, we tend to regress to dubious utilitarian ideologies about general deterrence, including harsh and unnecessarily inhumane forms of incarceration. Today, this is manifested in, for example, Australia's harsh asylum seeker policies (based around "offshore processing" outside of Australia in conditions which the United Nations High Commissioner for Refugees has protested about as being inhumane [197, 198]),[17] and the "revalorization of the prison in Australian culture and society" ([16], p. 24), including in restrictions on bail, indefinite detention, and post-sentence supervision and detention [16]. Such developments, while contemporary, are, "upon closer reflection, also clearly continuous with earlier patterns of thought and forms of social organization and practice" ([16], p. 36).

Given this cultural backdrop, how might we shift public and political opinion in Australia away from its deep-seated fallback punitiveness? We argue that in the first instance, we need a viable "containment"-type sentencing option which can compete politically with the prison. Below, we argue that the emergent, but diverse, sanction of EM could be a significant contender to the prison in meeting many of sentencing's crime-control objectives.

3: ELECTRONIC MONITORING AS THE ALTERNATIVE TO PRISON

EM comes in various forms and utilises a range of technologies (see, for example, [50], p. 57–68). It usually involves monitorees being fitted with tamper-proof electronic devices which transmit signals to correctional authorities, allowing them to determine whether the wearer is

[17] By international standards, the number of people that make their way in desperation to Australian shores is not great either in absolute or relative measure ([196], p. 26; [152]). Yet, we have adopted one of the most punitive approach of anywhere in the Western world, "with both major political parties pursuing electoral success by promising increasingly harsh measures directed at deterring asylum seekers from coming to Australia by boat" ([196], p. 26).

abiding by certain conditions ([65], p. 2). EM's focus has generally been on containing and incapacitating offenders, or a "transfer model" (control being "transferred" from the jail to the home: [35], p. 5). As such, the conditions to which monitorees are subject typically involve geographical constraints including curfews, attending work or study, or avoiding certain locations.

EM traces its technological roots back to the early 1960s, initially being developed as a behavioral-modification tool in experimental and clinical psychology ([166], p. 234). It has been applied to criminal justice since 1983, when a New Mexican judge purportedly procured its development to track the location of probationers ([33], pp. 104–105; [73], p. 131).

By 1986, EM had spread to at least 53 programs in the US [Schmidt, 1987, cited in 33]. Against a background of rising prison populations and costs, developing technology, and a greater acceptance of intermediate sanctions more generally, the use of EM continues to grow apace internationally [134].[18]

EM can be used pre-trial, as a primary sentence, in custodial monitoring (such as tracking prisoner movements in custodial facilities), and post-sentence. It currently operates in each form in Australia [176].[19] To date, however, it has not typically been conceived of as a direct substitute to imprisonment.

EM as a primary sentence could, though, provide a viable alternative to imprisonment as the dominant sanction for more serious offending. To become a realistic substitute, EM must, at

[18] By 1992 and 1993, Lilly (1993, cited in [193], p. 121) put the daily count of US offenders under EM at between 30,000 and 50,000. And, by 2010, estimates suggest that there have been some 500,000 people subject to EM in the US and Europe [65].

[19] For example, in Western Australia and South Australia, EM is used pre-trial as a condition of bail ([213]; [15], Schedule 1; [149]). In the Northern Territory and NSW, EM can be ordered as a primary sentencing option, either as a direct alternative to a sentence of imprisonment ([169], section 48E), or as part of a non-custodial corrections order ([49], eg sections 200 and 210). Western Australia ([167], section 30), Queensland ([59], section 16A), and NSW ([49], section 128) have legislation that allows for EM to be used to monitor offenders following their release from prison.

a minimum, satisfy the crime-control purposes of sentencing at least as well as, or better than, imprisonment. In particular, a case for EM as a substitute punishment must show that it:

a) protects the community through the incapacitation of offenders;
b) deters sentenced offenders and others in the community from offending;
c) rehabilitates offenders to reduce recidivism; and
d) provides, and is seen to afford, proportionate punishment of offenders for their crimes.

A comprehensive meta-review comparing EM to the prison is not yet possible. There are too many varieties of apples of imprisonment to be compared to the diverse range of EM oranges,[20] but the data that we do have suggests that EM is a superior sanction if we use these sentencing objectives as our criteria.

(a) Incapacitation

Primarily a tool of surveillance, EM does not physically incapacitate offenders per se ([133], p. 53). EM can only inhibit offending through surveillance of offenders: at best, it offers early warning that a monitoree might offend [86], or deters monitorees from offending due to the increased likelihood of detection.

There is limited reliable research on whether EM reduces offending while offenders are being monitored [154]. However, criminological theory would hold that EM may have a quasi-incapacitative effect through its surveillance function [e.g. 153]. And, there is evidence suggesting that, relative to those not monitored, offenders subjected to EM are less likely to

[20] EM for instance is not a distinct punishment in its own right and there are wide variations in the types of technology used, the populations subjected to it, and its use as a back door (post sentencing) or front door (pre sentencing) disposition. In some jurisdictions, EM is a standalone sanction whereas elsewhere it is part of package of other interventions [134].

offend [17, 65, 113, 138] (but see [154]),[21] and that EM can be used as a "suppression" program which can place those who breach conditions of their sentence into custody before the commission of another offence [86].

Although prison does physically incapacitate offenders, albeit usually temporarily, the effect of this on crime is unclear. While some research shows that increasing the prison population reduces crime through incapacitation [116, 178],[22] other research indicates that the effect is modest [212], that this inverse relationship between crime and imprisonment diminishes as imprisonment rates increase [117],[23] and that the crime-reducing benefits of incapacitation may be offset by the crime-promoting effects associated with a high number of ex-prisoners in the community [62].[24] Accordingly, additional crime committed by EM monitorees (compared to incapacitated inmates) is likely to be more than offset by reductions in post-release crime of prisoners if EM proves to be a more effective rehabilitator, and avoids the other social costs associated with high rates of imprisonment that may contribute to crime.

(b) Rehabilitation

EM was initially designed as a rehabilitative tool. The predecessor to modern EM devices—Schwitzgebel et al.'s [166] "Behavior Transmitter-Reinforcer" (BT-R)—was designed with

[21] For example, a study of offenders placed on home confinement in Florida found that there was an almost 95% reduction in the likelihood of revocation for a new offence for offenders subject to EM compared to those not [138].

[22] On one estimate, for each 1% increase in the imprisonment rate there would be a 0.2–0.4% decrease in crime [178]. However, the significant methodological difficulties in accurately determining the incapacitative effect of prison should be noted [146].

[23] In fact, the effect may even become positive with high imprisonment rates [117].

[24] While selectively incapacitating high-risk offenders is likely to be more successful in reducing crime, in practice this can be difficult to implement due to challenges in accurately predicting the likelihood of reoffending [146]. It also raises concerns over differential treatment of offenders [157], and the associated increase in prison costs may exceed any benefit of reduced crime [25].

primarily therapeutic applications in mind, influenced by principles of operant conditioning ([33], p. 102).[25]

Notwithstanding this, EM is typically not utilized as a "treatment" to rehabilitate offenders ([154], p. 232). Rather, it is used as a control-orientated sanction, and as such cannot be expected to influence offenders' long-term behavior and reduce recidivism post-monitoring ([85], p. 73; [53], p. 154; [154]). Empirically, this appears to have been borne out [4, 26, 27, 154; cf 124].

EM is, however, well-suited to a rehabilitative function. Not only can it be used to monitor and enforce offender engagement in other effective rehabilitation services [26, 184], EM can also function as a rehabilitative tool delivering evidence-based, cognitive-behavioral treatments [3, 53]. EM could, for instance, incorporate rewards and punishments to promote desirable behavior and address offenders' criminogenic needs [77, 78], and be used to disrupt routine activities which provide opportunities for crime and replace them with prosocial alternatives ([52], p. 33). For example, offenders who punctually attend employment or go straight home after work instead of meeting with antisocial associates or accessing places where they are likely to get into trouble could receive instantaneous rewards [see also 100].

Additionally, by allowing offenders to retain some degree of control and autonomy over their lives, and remain better connected with family, friends, employment, and community life, EM can facilitate overall offender wellbeing and promote desistance from crime [203, 209]. It also affords a greater role for offenders' family, (prosocial) friends, and community in their rehabilitation ([52], pp. 33–34).[26]

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[25] Schwitzgebel et al. suggested that the information the BT-R transmitted could be "arranged into 'behavioral feedback' systems which [could] have considerable therapeutic potential" ([166], p. 234).

[26] Recall that Australia's early Ticket of Leave system owed some of its success to the publicity of the sanction and involvement of the community. See above n 16.

By contrast, despite its long history of use, there is little evidence supporting prison as rehabilitating offenders [54, 129]. Rather, a significant body of research indicates that imprisonment might have a criminogenic effect [68, 129].[27]

While the empirical evidence to support EM as a long-term rehabilitative tool is lacking, EM shows potential. If programs are designed with therapeutic considerations in mind [154], the indications are that EM offers significant advantages over prison in this regard.

(c) Deterrence

EM is perceived by offenders, and the wider community, to be a less severe punishment than imprisonment [177], prima facie suggesting that the threat of EM will have a weaker deterrent effect. However, there is limited evidence that *severity* of punishment is a substantial factor in deterring offending. Rather, perceived *certainty* of punishment is likely to be more influential [68, 140]. EM has likely advantages over prison. Unlike prison, the highly visible nature of EM—monitorees often wear visible devices and remain in the community—may increase "sanction-certainty estimates" of others in community, allowing the "abstract threat of the law [to come] to life" ([2], p. 176). Further, given that it is less costly than prison, more readily scalable, and is of reduced severity, it is likely that the certainty and swiftness of the sanction would be enhanced [109].

Notwithstanding this, certainty must be coupled with a "sufficiently costly" punishment to have a deterrent effect [68]. For example, the threat of relatively short, but *certain*, periods of imprisonment has proven to be an effective deterrent [91, 211]. The large qualitative difference

[27] Reasons for prison's poor rehabilitative record include in-prison rehabilitation programs typically not according with established principles of effective treatment, factors associated with reduced recidivism not being able to be optimally addressed in prison, and inmate exposure to criminogenic factors in the prison environment (such as prison being a criminal learning environment, strengthening antisocial bonds and weakening prosocial bonds, stigmatizing offenders, and exacerbating other identified correlates of criminal activity, such as unstable employment or housing) ([129], pp.126-128; [3, 119]).

between prison and EM may limit EM's ability to deter crime, if it is not seen as sufficiently "distasteful" ([68], p. 36).

Research into the deterrent effect of prison again suggests significant shortcomings of the sanction. Despite its severe nature, those imprisoned are, on the whole, not deterred from reoffending upon their release [54, 129, 156]. The deterrent effect of prison is hampered by the fact that its use is often far removed, temporally, from the actual conduct [140], and infrequently administered [109]. A term of imprisonment may even *reduce* the specific deterrent effect through the "gambler's fallacy" [148].[28] Further, the general deterrent effect of increased use of imprisonment is, at best, modest [68].

Whether EM will be perceived as "sufficiently costly" remains to be seen. Even if EM is not sufficient, however, it does not follow that it should be rejected as an alternative to imprisonment altogether. Relatively certain, but short, periods of imprisonment could be retained and combined with EM, there likely being little gained from long periods of imprisonment from a deterrence perspective.

(d) Proportional punishment

For most, prison is experienced punitively.[29] For many, albeit not all [132, 203], offenders, EM is likely to be perceived and experienced comparatively less harshly [see, for example, 141, 143].

For some offenders, the circumstances will dictate that only a custodial sentence is just punishment. Nevertheless, EM can still serve sentencing's retributive purposes in other cases. Research into the experience of monitorees identifies that EM's restrictions are experienced punitively in many respects [see, for example, 17, 133, 141, 143, 203]. Monitorees, for example,

[28] That is, some offenders who have been sanctioned consider that such a relatively rare event is unlikely to occur again, and thus "reset" their "sanction-certainty estimate".

[29] The so-called "pains of imprisonment" [183]—deprivation of liberty, goods and services, heterosexual relationships, autonomy, and security—have been well documented [see also 24].

report negative experiences based on the constraints placed upon them by the conditions of their sentence, and the associated loss of liberty [141]. For some offenders, intensive supervision is even ranked more severe than imprisonment [144, 177]. EM is, conclude Payne and Gainey, "painful … [and] punishes offenders and therefore provides a measure of retribution" ([141], p. 159).

In cases where imprisonment is not necessary to proportionately punish an offender, EM may provide an appropriate, parsimonious option which protects the community without being unduly harsh.

(e) Beyond data

EM, it appears, is likely as good as, if not better than, the prison in achieving many of sentencing's crime-control objectives. However, we know that public policy decisions are not based merely on instrumental aims. The weaknesses of the prison in reducing crime have been known for decades [191], yet this has done little to stem its growth. The proponents of "tough-on-crime" laws of the late 20th Century "did not let evidence, or its absence, get in the way" ([191], p. 187).[30] And, to the extent that policy is driven by public opinion [125],[31] we know that opinions about sentencing are influenced significantly by emotional and affective concerns about the role of punishment, rather than its direct effect on crime [74, 110, 165, 195]. Ultimately, it is apparent that if crime prevention (that is, an instrumental rather than punitive approach to punishment) is to provide an alternative discourse to current sentencing trends, it must address the emotional and affective concerns of the public as well ([74], p. 272).

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30 Tonry writes that: "Evidence has not made much difference in recent decades in relation to sentencing laws and policies…Sentencing laws and policies putatively aimed at deterrence and incapacitation could not have been justified when they were adopted on the basis of then-available research findings, and their retention cannot be justified now" ([191], p. 183).

31 At the very least, it impacts policy through acquiescence ([189], p. 11).

Proposing EM as a substitute to the prison is, though, a risky course. It requires a change to the tough law and order rhetoric on which so much public support has been built [36]. Convincing politicians to jump the prison ship depends on mastery of the techniques of political persuasion.

3. GENRES OF POLITICAL PERSUASION

Influencing government policy is an art form. Jeremy Bentham, for example, chose to advocate his Panopticon idea through a public text, *Panopticon; or The Inspection House*, coupled with more direct personal lobbying, including of British Prime Minister Pitt. He also published pamphlets and letters discrediting the competing option of transportation to Australia [102]. The contemporary equivalent of this kind of public advocacy might be a long op-ed piece in the *Times* or the *New Yorker* by a leading intellectual, or indeed a documentary film narrated by, say, a major figure such as a former Vice-President.

While there are a host of private means of influencing decision makers, in a democratic system publicly-based mechanisms, utilizing a variety of genres, are more acceptable as the basis for formulating new policy [44, 60]. For example, government itself sometimes sets up parliamentary or independent committees to investigate and make policy recommendations to it, such as the various inquiries which recommended transportation of convicts to initially the American colonies, and then to Australia [97, 98].

But then, as now, under the Westminster system, the final decision about a major policy remains the exclusive prerogative of Cabinet.[32] The Cabinet process, in turn, relies heavily on the Cabinet briefing paper or submission, prepared by the bureaucracy.

[32] Under the Westminster system, the Cabinet is the Executive branch of government. It comprises Government Ministers who are members of the ruling party in Parliament. The members of Cabinet are bound via political party discipline, to a code of "Cabinet solidarity"—that is, what is said in the Cabinet room stays in the Cabinet room. Leaks do occur from time to time, but that is usually regarded as evidence of instability, and often a good indicator of a leadership challenge and/or impending electoral loss for a government.

The Cabinet submission is a summary genre which collapses the research evidence, including the findings and views of commissioned inquiries and internal research. It also makes use of the work of academics published in reports or in peer-reviewed journals. The academic research though, even on major areas of public policy, is often ad hoc. Constrained by the dictates of scientific method, academics confine the scope of their work and their conclusions to their patch of data. Policy making in the real world, by contrast, mostly has to rely on an imperfect and inconclusive evidence base. Bentham's Panopticon, for instance, was adopted on the strength of his idea and arguments rather than any empirical assessment of so major and expensive a shift in policy.

Another key aspect of the Cabinet submission genre is the respectful presentation of options rather than the recommending of a single course of action. The content of Cabinet submissions, including which options are advanced, are, in theory, usually "frank and fearless" assessments by an independent public service of what is possible and desirable. The latter consideration though implicitly takes into account the ideological perspective of the government of the day, including the watchful eye of their masters on the electorate. Thus, in developing a Cabinet submission, senior public servants prepare their briefs on the basis of the evidence, all the while second-guessing the political and social zeitgeist.

Cabinet decision making, including the policy advice on which it relies, is kept strictly confidential. Governments will not risk exposing their political deliberations to public, especially Opposition and media, scrutiny. Thus it is only in the realm of the "almost possible" hypothetical that we can explore how an astute case in favor of an alternative sanction to the prison might be made out. Such counterfactual approaches have been found to be useful for historical and

Cabinet papers are secret. They are for instance excluded even from Freedom of Information requests and scrutiny. Cabinet decision making processes are only made public after 30 years. In Australia, politics tragics rush to the National Archives website each year on 1 January to finally gain insights into the intrigues and furores of yesteryear.

political inquiry in contentious areas [105, 161], including how prison conditions could be improved through imagined "rational choice" economic strategies.[33]

Below, we engage in such a thought experiment in considering how EM, and its associated political and economic impacts, might be presented to political decision makers as part of a proposal to reduce prison populations by diverting offenders away from the prison. The thought experiment of the "almost possible" has inherent limitations. In putting forward EM as an "alternative" to the prison, for example, we need to leap ahead of the current evidence base and accept that EM has already proven itself as an effective approach to tackling crime (on the other hand, imperfect knowledge is an inevitable corollary of real world decision making), and assume that there is political will to reduce reliance on imprisonment. A counterfactual approach, however, does expose options that might not otherwise be publically aired or which have not yet gained traction in a particular place at a particular time. At the very least, this counterfactual genre can succinctly identify research questions as well as issues that require further investigation.

(a) Cabinet submission

Objectives

1. To brief Cabinet on Electronic Monitoring (EM) as an alternative to imprisonment, having regard to:

    a. the economic impact of a shift from the prison to EM;

[33] See for example, Hawthorn's *Plausible Worlds: Possibility and Understanding in History and the Social Sciences* [92], and Ferguson's *Virtual History: Alternatives and Counterfactuals* [70], a collection of essays by historians exploring different scenarios. Ferguson uses counterfactual history to inform theoretical debates surrounding deterministic theories of history. He contends that contingency in history is significant, since a small number of key changes could significantly change our current world. Cowley, in his *What If?* series [48], includes essays by prominent historians and writers about "how a slight turn of fate at a decisive moment could have changed the very annals of time": [6]. In *Prison Vouchers*, Volohk considers what the "world look would like if, instead of assigning a prisoner to a particular prison bureaucratically, we gave the prisoner a voucher, good for one incarceration, to be redeemed at a participating prison?" ([207], p. 781).

b. potential risks of EM, including net widening and net strengthening, and mechanisms to ameliorate these risks; and

c. managing community expectations and concerns about a shift away from the prison to EM.

Background

Rising imprisonment rate in Victoria

2. The 2014 Report on Government Services noted the continuing increase to Victoria's, and Australia's, imprisonment rate ([13], Table 8A.5). Since 2008–9, Victoria's imprisonment rate has risen by approximately 25%, from 104 to 129 per 100,000 adults [11].

3. There is increasing budget necessity to arrest the growth in expenditure on corrections ([57]; see also [199], p. 3), and concern over the sustainability of this trend [204]. A combination of falling revenue and growing expenses has seen a deterioration in Australian State and Commonwealth budget positions in recent years ([57], p. 11). Although the Victorian 2014–15 Budget indicates surpluses over the Budget and forward estimates ([205], Budget Paper no. 5, Table 1.4), Moody's notes that Victoria is "relying on continued low growth in current expenditures, which could be difficult to sustain", and highlights the importance of maintaining future operating surpluses to fund capital expenditure [128]. Unless efficiency gains can be made, continued growth in prisons is likely to come at the cost of other public services.

4. There is also growing community disquiet over the fiscal and social costs of Victoria's increased reliance on prison [103, 114].

5. Research findings consistently show that high rates of imprisonment are ineffective in reducing crime, and may be counter-productive. The Sentencing Advisory Council,

reviewing international literature, has concluded that prison is relatively ineffective in both incapacitating and deterring offenders [156, 157].

6. Internationally, such considerations are driving a shift away from a reliance on the prison in many American jurisdictions [199].

Electronic monitoring

7. The technology for EM of offenders is rapidly improving and could provide a relatively secure alternative to incarceration for some offenders.

8. EM generally involves monitorees being fitted with tamper-proof devices which transmit signals to correctional authorities, allowing authorities to determine whether the wearer is abiding by required conditions ([65], p. 2). Typically, these conditions involve temporal and geographical constraints, including curfews, attending places of work, study, or treatment, or avoiding certain locations.

9. In Victoria, EM was first used in the monitoring of sex offenders post-release from prison ([173], section 17). In 2013, legislation was amended to allow EM to be ordered as a condition of a community corrections order (CCO) ([168], section 48LA) and of release for offenders on parole ([45], section 74(5)(b)). Legislative amendments in 2014 [46] broadened the scope of EM, allowing for the monitoring of sex offenders ordered to reside in specified residential facilities in the community, with the intention that all sex offenders residing in such facilities will be monitored [47].

10. To date, although legislation countenances the use of EM for all offenders under a CCO, in practice it has not, and can not, be used as a direct substitute for prison.

Proposed electronic monitoring trial

11. On 15 January 2014, the Secretary of the Department of Justice (DoJ) wrote to the Attorney-General outlining a proposal to implement a trial of EM as a sentencing alternative to imprisonment, for low to medium risk offenders. Under the proposed trial, eligible offenders who would ordinarily be sentenced to prison would serve their sentences in the community, under EM. If the trial were successful, substituting EM for imprisonment could be the principal method of reducing Victoria's imprisonment rate by 50% by 2025, as previously targeted.

12. The Secretary has requested Cabinet's in-principle support of the trial.

13. The scope of the trial (including eligibility criteria and conditions attached to a sentence of EM) will be formalized after stakeholder consultation, and further review of the risks and benefits of EM and the most effective way to structure the program to maximize its effectiveness, efficiency, and evaluability will be undertaken. Following further planning, the Secretary will make an additional submission with details of the operation of the proposed trial, for approval by Cabinet.

14. In February 2014, Cabinet was briefed regarding the effectiveness of EM as a sanction and its likely effect on crime.

Issues: economic impact

15. The economic impact of using EM as an alternative to imprisonment is likely to be positive, although the relative costs of EM compared to prison are unclear.

16. EM has significantly cheaper operational costs, per day per offender, than prison. A 2010 NSW Auditor-General report found the daily cost of home detention (supplemented by EM)

to be about 25% of keeping an offender in a minimum/medium security prison ($47 per day per offender compared to $187 per day per offender) [135].

17. Other cost savings of EM include the ability of monitorees to maintain employment (contributing to tax revenue and reducing demand for government resources), perform unpaid community work, and contribute to the costs of their sentence [63, 135].

18. After additional non-operational EM costs and factors are taken into account (for example, welfare payments to offenders in the community, judicial monitoring, or the provision of treatment and rehabilitation programs), the cost differential between the two options is diminished, however [14, 40, 124].

19. Accordingly, EM's potential economic value lies not in its operational costs, but rather its ability to reduce recidivism and thus avert the societal costs associated with crime [160, 216]. Although, in the short-term, inevitably higher crime levels of non-incarcerated populations may result in EM not being cost effective [160] (even if additional crime is estimated to be modest [138]), EM's expected advantages in reducing recidivism in the long-term, at least relative to the prison, are likely to yield significant cost benefits.

20. As more widespread use of EM reduces demand for prison infrastructure, prison's fast-rising capital and operational costs will also be reduced. Eventually, prison infrastructure could be sold off or re-developed for other purposes [104].

21. Key to realizing the likely economic benefits is to ensure that EM remains a genuine substitute for prison, rather than both sanctions being used, and allowed to grow, in tandem.

Issues: net strengthening and net widening

22. A key risk with all forms of intermediate sanctions is that they can result in "net strengthening" and/or "net widening". This occurs where the level of intervention of the

criminal justice system intensifies and an increased number of people are subject to its control [8].

23. In relation to EM, this risk could manifest in two ways [138]:

    a. if EM is used for offenders who would have, absent EM as an option, received a less intense form of non-custodial supervision ("front-end net strengthening/widening");[34] and

    b. if there is an increased likelihood of the imposition of a custodial sentence due to violations of program conditions being more readily detected through closer surveillance ("back-end net strengthening/widening").

24. To date, the experience of American EM programs suggests front-end [26, 138] and back-end effects [86, 138] in some cases, but not others.

Mitigating against front-end net strengthening and net widening

25. The scope and nature of strategies to mitigate against these risks depends on how a particular EM program is implemented. However, two general options should be considered [193].

26. First, Corrections Victoria could be given discretion to allow offenders already sentenced to a term of imprisonment to serve some or all of their sentence in the community under EM. Reduced operating costs for the Department and existing pressures on prison infrastructure are likely to make this an attractive option, promoting the diversion of offenders away from prison.

[34] Although relatively intense supervision is more likely to bring about prolonged and sustained behavioral change [85], intense supervision may be both disproportionally punitive, and may have a criminogenic effect on low-risk offenders [3].

27. This option, however, risks placing undue power with correctional authorities, rather than judicial officers, in effectively determining an offender's sentence and, potentially, in breaching offenders and sending them back to prison.

28. Second, judicial discretion via legislative guidelines could be structured at the sentencing stage to limit EM as a true alternative sentence to imprisonment. For instance, the *Sentencing Act 1991* (Vic) could be amended so that EM can only be imposed for an offence punishable by imprisonment in circumstances where a term of imprisonment has been deemed appropriate, and eligibility criteria are met (for example, [169], section 48B).

29. The effectiveness of such mechanisms is not clear, however. A similar regime exists in relation to suspended sentences, and the Sentencing Advisory Council's research suggests that this has not always been effective in curtailing net widening and sentence inflation ([170], p. 75; [171], p. 92). Canada's experience with "conditional sentences", punitive community-based sanctions intended to only be served where imprisonment would otherwise be appropriate, also suggests such legislative restrictions are not always sufficient [158]. Any legislation should be unambiguous, and clearly understood by sentencers [170].

30. Such a "two stage" approach may also conflict with established sentencing principles or otherwise be unworkable [150].

Mitigating against back-end net strengthening and net widening

31. EM should not be a substitute sentence whereby a breach of a monitoring condition presumptively activates a sentence of imprisonment (cf suspended sentences under [168], section 83AR).

32. Rather, judges should be given broad discretion in how to deal with breaches.

33. Section 18ZL of the *Sentencing Act 1991* (Vic), for example, provides Drug Court sentencers with a range of options to deal with offenders who fail to comply with drug treatment order conditions—a custodial sentence is expressed as the option of last resort.

Private sector concerns

34. Fiscal incentives for private correctional service providers should be aligned to avoid growth in EM presenting as an opportunity to expand, rather than replace, their correctional services to the State [see, for example, 42].

35. Decarceration may also pose contractual issues with private prison providers, and potential (albeit likely unfounded: [107]) resistance from prison-reliant local economies.

36. In the short term, private correctional service providers and impacted communities could be financially compensated for the closure of prison beds, or be paid to provide EM services at a comparative rate as providing prison beds. In the long term, however, private sector involvement in the operation of EM must be considered in light of the tensions between the potential cost savings it brings (although even this is uncertain: [108]) and industry pressure to expand EM's future reach.

Issues: public acceptance of EM

Crime by monitorees and lack of incapacitation

37. Monitorees under EM will inevitably offend in the community at a higher rate than those imprisoned. However, international estimates suggest such offending occurs at modest rates [138].

38. Additionally, although EM technology is advancing rapidly, it remains imperfect. It is, for example, prone to losing signals or being tampered with. At Victoria's Dhurringile Prison,

where it is used to monitor inmates, there have been reports of Corrections Victoria losing contact with inmates up to 70 times per day [99].

39. Such failures are likely to be seized upon in the media [142] and may give rise to community concerns prompting calls for restrictions, as has been the case with parole violations [18].

Leniency

40. There are likely to be community concerns that EM is a "soft" option that is too lenient for some offenders, particularly monitorees being confined in what are perceived to be "luxurious" conditions [14, 139].

41. Internationally, this aspect of EM has also been subject to criticism in the media [142].

Addressing public concerns

42. Perceptions of public punitiveness are typically overstated [89]. International experience suggests that voters are prepared to support sentencing reform [89, 130, 192].

43. There is public support for rehabilitation in punishment [5, 51, 84, 130], including community-based sanctions [83, 194]. Research indicates that in some instances, the public would prefer to spend money on rehabilitation than punishment [130], and are prepared to accept offenders remaining in the community (and hence potentially even re-offending) where they support the underlying objectives being pursued [55, 61, 83, 84, 155].

44. There is increasing evidence that the public will support community-based sanctions if they "intervene sufficiently in the offenders' lives to exact a measure of retribution, … reduce the risk offenders pose, and … increase the chances that offenders will not recidivate" ([194], p. 22). EM can serve these ends.

45. A comprehensive communication and risk management strategy could provide a base level of support for EM. This message will entail the "unselling" of the prison as the answer to

Victoria's law and order concerns, as well as mounting the positive case for EM. Awareness campaigns which increase the public's understanding of the nature of EM (and in particular the punitive conditions which are imposed with it), and its ability to achieve sentencing's purposes, may influence attitudes and generate acceptance for EM [79, 164].

Recommendations

46. That Cabinet:

a. notes the contents of this brief;

b. approves, in principle, the DoJ program to plan and implement an EM trial as a sentencing alternative to imprisonment and instruct that draft legislation be prepared to effect this change in sentencing options and priorities; and

c. commission consultants to develop a communication strategy to explain to the public the rationale and benefits of a move from prison to EM, in preparation for the proposed trial.

(b) Selling EM culturally

The cabinet submission genre summarizes the evidence and offers practical options for policy change. The appraisal of risk, an integral part of both these elements, implicitly takes account of the electoral impact of a shift in government policy.

Public servants and politicians are skilled readers of the zeitgeist. Their assessment is not directly informed by theory, but theories of punishment, and social theory more generally, are relevant because we know that public views about punishment are not driven solely by crime control-orientated goals. Introducing, or in this case, substituting, one dominant form of punishment for another requires analysis of the factors, emotional and affective, most likely to influence local acceptance of a shift in the mode of punishment.

The introduction and expansion of EM in South Korea, for example, was apparently relatively easy. Public pride in that society's technological capabilities as well as trust in the beneficence of the national company Samsung, the purveyor of EM, has been a major force in its ready acceptance there [39]. In the USA, Lilly and Nellis argue, the tradition of American can-do pragmatism, which embraces science and technology as the positivist path to future progress, is a rich vein into which EM could also readily fit [118]. In this post colonial society, the most appropriate cultural context is the ubiquitous discourse about Australian national identity. Here we are never far from our history and the shifting and competing representations of it invoked for diverse political purposes, including punishment.

The colonial complexion of the early history of Australia has shaped the three main controversies about Australia's history: (1) Why was Australia first settled? Was the primary motive the establishment of a penal colony, or was it to serve other more covert imperial needs and interests? (2) Who were the convicts? Were they truly "bad" professional criminals or just (skilled?) "workers who stole" on occasion and/or from need [30, 82, 137]? And, finally, (3) What was the nature of the social system created by the convicts? Was it an enlightened "convict republic" committed to the rule of law [95, 131] or a harsh and brutal culture which also massacred and abused the Indigenous population?

After almost two generations of historical research effort and much heated debate, most scholars now conclude that the truth probably lies somewhere between each of these polarities—the motive was mixed, the convict population was mixed, and, most significantly for present purposes, brutality and innovation were mixed. There is resistance to attempts to publically confront aspects of our far-from-glorious past of brutality. It was discredited by conservative forces, including the then Australian Prime Minister John Howard, as biased and unpatriotic "Black Arm Band History" [126]. The ensuing debates, dubbed "the History Wars", dominated much of Australia's political discourse in the 1980s and 1990s because Australia's self-image as

"good" or "bad" was, and still remains, a key, and hotly contested, element of the contemporary nationalist narrative [123].[35] Nationalist pride, shame, and fear are all active ingredients in the strange cocktail of emotions that crime and punishment excites here.

Any pitch for EM in Australia therefore needs to send a mixed message. On the one hand, it can draw on the record of our success as an "innovative society" including, and especially, in punishment. It would not be too great a stretch to cast EM as the technological successor to the Ticket of Leave scheme which was so successful in providing an economic base for our earlier prosperity, as well as social integration for our, now admired, convict forebears. At the same time, the positive message will also need to assuage fears about an undercontrolled criminal element let loose in the "Lucky Country".[36] The marketing of EM would thus need to simultaneously emphasize Australian innovation and global leadership in punishment as well as establishing EM's punitive credentials. Australia's experience of punishment and our attitudes to it are peculiar and paradoxical.

We like to imagine ourselves as a young country, which has created a land of opportunity for its citizens through good government and pragmatic innovation. The flip side of this positive nationalist narrative is that it may promote the view that those who do offend in this "Lucky Country" are especially deserving of harsh punishment, because they have rejected the advantages patently made available to them by turning to crime [64, 111]. It could also reinforce the idea that those who don't succeed, the "undeserving poor", do so because of personal failure [69, 111]. Their situation taps into our underlying insecurities, because "crime [acts] as a lens through which to view the poor—as undeserving, deviant, dangerous, [and] different" ([81], p.

35 While there are still strains, the formal government apology in Parliament by Prime Minister Kevin Rudd in 2008 is acknowledged as a critical symbolic gesture in Black/White Reconciliation.

36 Donald Horne in his now classic 1964 text [96] used the term ironically to critique the values of Australia of the 1960s. In popular parlance though, the term has now become a nationalist understanding of Australia and Australian's privileged place in the world. Related to this sentiment is an insecurity that all other peoples covet Australia and our way of life, and that, given half a chance, they would overrun us and destroy it.

102). Here we see the beginning of more "aggressive controls for an 'underclass'" ([81], p. 148). The sad lesson of history is that a people once subjected to social exclusion do not necessarily learn from having been in that place before and can in fact see no reason why others should be spared what they have managed to overcome.

CONCLUSION: ELECTRONIC MONITORING AS "THE LESSER EVIL"?

Depending on whether one holds pragmatic or dystopian views about technology and the rise of surveillance society, the extension of social control via technology is either inevitable, or a truly horrifying prospect. We do not naïvely advocate EM as "the" solution to crime. We cannot escape the Foucauldian insight that all forms of punishment are inevitably fraught because they reflect the social, economic, and cultural strains of the society which creates them [72, 80].

EM has serious shortcomings—some already obvious, others will come to light progressively. The technology is far from perfect, the effects on crime remain unclear, and it also presents serious net widening and net strengthening effects which will be hard to overcome, especially in a society that is predisposed to be punitive. But at the very least, managing and minimizing the negative aspects of any punishment regime means that social scientists cannot just confine their work to the ex post facto measurement of impact and effectiveness. There is a place for anticipating shifts in punishment and for engaging with what that might mean culturally.

The prison—an 18th Century industrial concept of punishment—has finally been exposed as ineffective at reducing crime. Newer forms of punishment, like EM, more compatible with the 21st Century virtual age, are probably destined to replace the prison in time.

The work of John Bender [20] on the cultural precursors to the Penitentiary in the literature and art of the 1700s suggests that creative products are pre cognitive instruments that anticipate and contribute to the development of not only abstract thought but also to the creation of material institutions and forms, such as the acceptance of particular forms of punishment. If we were to

undertake a similarly comprehensive inquiry about the contemporary cultural landscape, we might well conclude that the acceptance of EM as a virtual punishment is near at hand. Detective and spy films, for example, regularly portray surveillance technology as the principal method of crime detection and counter-espionage. In popular science fiction, the technology is even shown to anticipate and pre-empt crimes before they are committed. Indeed, it was a Spiderman comic which is said to have prompted the initial use of EM in criminal justice ([33], pp. 105). Now that GPS tracking for ordinary life activities is the norm, the use of EM for offenders may even be seen as unexceptional, especially in Australia, an "early adopter" of technology and a proven laboratory for radical experiments in punishment.

But for the moment in Victoria, and Australia more generally, the prison maintains its lustre. Our tradition in this former penal colony is typically to also hang on to harsh and outdated forms of punishments, such as flogging, capital punishment for a luxuriant range of offences, and now imprisonment, well after other jurisdictions have given them up.

We could accept this feature of Australian approaches to punishment, be patient and wait it out. Meanwhile larger sections of the Australian population will serve out harsh and unnecessary punishments for a longer time. On the other hand, if forms of punishment are less about rationality and more about understanding and accommodating cultural predilections, social scientists could be more engaged in influencing the course of policy in this area.

We have argued that a careful and moderated case for the innovative but unproven technology of EM is our best chance yet to end the 200 year honeymoon with the prison. Jeremy Bentham, the architect of the prison and the great-grandfather of utilitarianism, might even have agreed with us. "But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil" ([21], p. 83)— in this case to displace the system of prisons that Bentham himself inspired.

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