

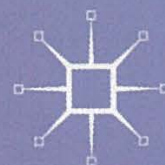
PALGRAVE  
STUDIES  
IN PRISONS  
AND PENOLOGY



# Justice Reinvestment

Winding Back Imprisonment

DAVID BROWN  
CHRIS CUNNEEN  
MELANIE SCHWARTZ  
JULIE STUBBS  
COURTNEY YOUNG



*Palgrave Studies in Prisons and Penology*

This is a unique and innovative series, the first of its kind dedicated entirely to prison scholarship. At a historical point in which the prison population has reached an all-time high, the series seeks to analyse the form, nature and consequences of incarceration and related forms of punishment. *Palgrave Studies in Prisons and Penology* provides an important forum for burgeoning prison research across the world.

*Series editors:*

**Dr. Ben Crewe**

Institute of Criminology, University of Cambridge, UK

**Professor Yvonne Jewkes**

Department of Criminology, Leicester University, UK

**Dr. Thomas Ugelvik**

Associate Professor in the Department of Sociology, Political Science and Community Planning, UiT The Arctic University of Norway, Norway

*Series advisory board:*

**Anna Eriksson**, Monash University, Australia

**Andrew M. Jefferson**, DIGNITY – Danish Institute Against Torture

**Shadd Maruna**, Queen's University Belfast, UK

**Jonathon Simon**, University of California, Berkeley, USA

**Michael Welch**, Rutgers University, USA

*Titles include:*

Jamie Bennett

THE WORKING LIVES OF PRISON MANAGERS

Global Change, Local Culture and Individual Agency in the Late Modern Prison

David Brown, Chris Cunneen, Melanie Schwartz, Julie Stubbs and

Courtney Young

JUSTICE REINVESTMENT

Winding Back Imprisonment

Deborah H. Drake, Rod Earle and Jennifer Sloan (eds)

PALGRAVE HANDBOOK OF PRISON ETHNOGRAPHY

Mark Halsey and Simon Deegan

YOUNG OFFENDERS

Crime, Prison and Struggles for Desistance

Andrew M. Jefferson and Liv S. Gaborit

HUMAN RIGHTS IN PRISONS

Comparing Institutional Encounters in Kosovo, Sierra Leone and the Philippines

Keramet Reiter and Alexa Koenig (eds)

EXTREME PUNISHMENT

Comparative Studies in Detention, Incarceration and Solitary Confinement



Vincenzo Ruggiero and Mick Ryan (eds)  
PUNISHMENT IN EUROPE  
A Critical Anatomy of Penal Systems

Peter Scharff Smith  
WHEN THE INNOCENT ARE PUNISHED  
The Children of Imprisoned Parents

Marguerite Schinkel  
BEING IMPRISONED  
Punishment, Adaptation and Desistance

Phil Scraton and Linda Moore  
THE INCARCERATION OF WOMEN  
Punishing Bodies, Breaking Spirits

Thomas Ugelvik  
POWER AND RESISTANCE IN PRISON  
Doing Time, Doing Freedom

---

**Palgrave Studies in Prisons and Penology**  
**Series Standing Order ISBN 978-1-13727090-0 hardback**  
*(outside North America only)*

You can receive future titles in this series as they are published by placing a standing order. Please contact your bookseller or, in case of difficulty, write to us at the address below with your name and address, the title of the series and the ISBNs quoted above.

Customer Services Department, Macmillan Distribution Ltd, Houndmills, Basingstoke, Hampshire RG21 6XS, England

---

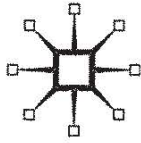
# Justice Reinvestment

## Winding Back Imprisonment

David Brown, Chris Cunneen, Melanie Schwartz,  
Julie Stubbs and Courtney Young  
*University of New South Wales, Australia*

palgrave  
macmillan





© David Brown, Chris Cunneen, Melanie Schwartz, Julie Stubbs and Courtney Young 2016

All rights reserved. No reproduction, copy or transmission of this publication may be made without written permission.

No portion of this publication may be reproduced, copied or transmitted save with written permission or in accordance with the provisions of the Copyright, Designs and Patents Act 1988, or under the terms of any licence permitting limited copying issued by the Copyright Licensing Agency, Saffron House, 6–10 Kirby Street, London EC1N 8TS.

Any person who does any unauthorized act in relation to this publication may be liable to criminal prosecution and civil claims for damages.

The authors have asserted their rights to be identified as the authors of this work in accordance with the Copyright, Designs and Patents Act 1988.

First published 2016 by  
PALGRAVE MACMILLAN

Palgrave Macmillan in the UK is an imprint of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan in the US is a division of St Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

Palgrave® and Macmillan® are registered trademarks in the United States, the United Kingdom, Europe and other countries.

ISBN: 978–1–137–44910–8

This book is printed on paper suitable for recycling and made from fully managed and sustained forest sources. Logging, pulping and manufacturing processes are expected to conform to the environmental regulations of the country of origin.

A catalogue record for this book is available from the British Library.

A catalog record for this book is available from the Library of Congress.

# Contents

<i>List of Illustrations</i>	vi
<i>Acknowledgements</i>	viii
<i>List of Abbreviations</i>	ix
<i>Books by the Authors</i>	xi
Introduction	1
1 Justice Reinvestment: A Response to Mass Incarceration and Racial Disparity	17
2 How Has Justice Reinvestment Worked in the USA?	54
3 The Politics of Locality and Community	94
4 Justice Reinvestment, Evidence-based Policy and Practice: In Search of Social Justice	141
5 How Does Justice Reinvestment Travel? Criminal Justice Policy Transfer and the Importance of Context: Policy, Politics and Populism	189
6 Conclusion	239
<i>Appendix: Record of Interviews in the USA and Australia</i>	251
<i>Notes</i>	256
<i>List of Cases</i>	257
<i>List of Legislation</i>	258
<i>References</i>	259
<i>Index</i>	283

# List of Illustrations

## Figures

1.1	US Incarceration – Rates of supervision comparing total correctional population, with offenders subject to community supervision (probation and parole), and federal, state and jail populations in 2013	19
1.2	US Incarceration – Rates of custody comparing federal, state and local jail populations in 2013	21
1.3	US Incarceration – Persons subject to correctional supervision in 2013 comparing groups across demographic lines, using a 1 in X analysis	25
1.4	US Imprisonment – Rates of custody (state and federal prison) for US males, by age and race/ethnicity in 2013	26
1.5	US Imprisonment – Rates of custody (state and federal prison) for US females, by age and race/ethnicity in 2013	26
1.6	UK Imprisonment – Rates of imprisonment for England and Wales in increments from 1980 to 2014	40
1.7	UK Incarceration – Number of persons comparing types of supervision (remand, sentenced prisoners and persons on probation or parole)	41
1.8	Australian Incarceration – Crude imprisonment rates, per state and territory, in increments from 1980 to 2014	45
1.9	Australian Imprisonment – Rates of imprisonment vs violent crime from 1995 to 2013–14	46
1.10	Australian Imprisonment – Age standardised imprisonment rates, by state and territory and Indigenous status in 2014	46
1.11	Australian Imprisonment – Male rates of imprisonment by age and Indigenous status in 2014	48
1.12	Australian Imprisonment – Female rates of imprisonment by age and Indigenous status in 2014	49
2.1	JRI Step 1	76
2.2	JRI Step 2	76
2.3	JRI Step 3	77
2.4	JRI Step 4	77
2.5	Five Steps to Local JRI	78



**Table**

1.1	UK Imprisonment – Prison population by self-identified ethnicity in 2004 and 2013	42
-----	---	----

# Acknowledgements

We would like to gratefully acknowledge the contribution of the many individuals who have worked on various aspects of the research which form the basis of this book. They include Samara Hand, Laura Heaney, Eleanor Holden, Louise Lau, Shannon Longhurst and Scarlet Wilcock.

We would also like to acknowledge the assistance of the various government and non-government organisations in both the USA and Australia. A full list of the interviews we conducted and the relevant organisations can be found in the Appendix. The material published in this book cannot be considered as either endorsed by these organisations or as an expression of their policies or views.

The Australian Justice Reinvestment Project was generously funded by the Australian Research Council (DP130101121).

# List of Abbreviations

ACLU	American Civil Liberties Union
ACT	Australian Capital Territory
AJR Project	Australian Justice Reinvestment Project
ALP	Australian Labor Party
ATSISJC	Aboriginal and Torres Strait Islander Social Justice Commissioner
BJA	Bureau of Justice Assistance
CBA	cost–benefit analysis
CBT	cognitive behavioural therapy
CEPP	Center for Effective Public Policy
CJI	Crime and Justice Institute
COAG	Council of Australian Governments
CRJ	Community Resources for Justice
CSG	Council of State Governments
Cth	Commonwealth
EBP	evidence-based policy (and/or practice)
FUSE	Frequent User Service Enhancement program
FY	financial year
GFC	Global Financial Crisis
HCJC	House of Commons Justice Committee (UK)
IPP	Imprisonment for Public Protection (UK)
JR	Justice Reinvestment
JRI	Justice Reinvestment Initiative
LCARC	Legal and Constitutional Affairs Reference Committee
LNC	Liberal-National Coalition (Australia)
MOJ	Ministry of Justice (UK)
NAAJA	North Australian Aboriginal Justice Agency
NATSILS	National Aboriginal and Torres Strait Islander Legal Services
NeON	Neighborhood Opportunity Network (NYC)
NGOs	non-governmental organisations
NSW	New South Wales
NT	Northern Territory
NYC	New York City
PbR	Payment by Results



x *List of Abbreviations*

QLD	Queensland
SA	South Australia
SIBs	Social Impact Bonds
SIDL	Spatial Information Design Lab
SROI	Social Return on Investment
TCJC	Texas Criminal Justice Coalition
WA	Western Australia
WACOSS	Western Australian Council of Social Services
WIPAN	Women in Prison Advocacy Network
WSIPP	Washington State Institute for Public Policy

# Books by the Authors

## Brown

- Brown, D., Farrier, D., McNamara, L., Steel, A., Grewcock, M., Quilter, J. and Schwartz, M. (2015) *Criminal Laws: Materials and Commentary on Criminal Law and Process in NSW*, (6th edition) The Federation Press: Sydney.
- Cunneen, C., Baldry, E., Brown, D., Brown, M., Steel, A. and Schwartz, M. (2013) *Penal Culture and Hyperincarceration: The Revival of the Prison*, Ashgate: London, UK.
- Brown, D., Farrier, D., Egger, S., McNamara, L., Steel, A., Grewcock, M. and Spears, D. (2011) *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales*, (5th edition) The Federation Press: Sydney.
- Brown, D., Farrier, D., Egger, S., McNamara, L. and Steel, A. (2006) *Criminal Laws: Materials and Commentary on Criminal Law and Process in NSW*, (4th edition) The Federation Press: Sydney.
- Pratt, J., Brown, D., Brown, M., Hallsworth, S. and Morrison, W. (eds) (2005) *The New Punitiveness: Trends, Theories, Perspectives*, Willan Press: Devon.
- Brown, D. and Wilkie, M. (eds) (2002) *Prisoners as Citizens*, The Federation Press: Sydney.
- Brown, D., Farrier, D., Egger, S. and McNamara, L. (2001) *Criminal Laws: Materials and Commentary on Criminal Law and Process in NSW*, (3rd edition) The Federation Press: Sydney.
- Hogg, R. and Brown, D. (1998) *Rethinking Law and Order*, Pluto Press: Sydney.
- Brown, D., Farrier, D., Weisbrot, D. (1996) *Criminal Laws: Material and Commentary on Criminal Law and Process in NSW*, (2nd edition) The Federation Press: Sydney.
- Brown, D., Farrier, D. and Neal, D. and Weisbrot, D. (1990) *Criminal Laws in NSW: Cases and Materials*, The Federation Press: Sydney.
- Hogan, M., Brown, D. and Hogg, R. (eds) (1988) *Death in the Hands of the State*, Redfern Legal Centre Publishing: Sydney.
- Blackshield, A., Brown, D. Coper, M. and Krever, R. (1986) *The Judgments of Lionel Murphy*, Primavera Press: Sydney.
- Zdenkowski, G. and Brown, D. (1982) *The Prison Struggle*, Penguin: Melbourne.

## Cunneen

- Cunneen, C., Baldry, E., Brown, D., Brown, M., Schwartz, M. and Steel, A. (2013) *Penal Culture and Hyperincarceration*, Ashgate: Farnham.
- Cunneen, C. and White, R. (2011) *Juvenile Justice: Youth and Crime in Australia*, (4th edition), Oxford University Press: Melbourne.
- Cunneen, C. and Hoyle, C. (2010) *Debating Restorative Justice*, Hart Publishing: Oxford.

- Behrendt, L., Cunneen, C. and Libesman, T. (2009) *Indigenous Legal Relations in Australia*, Oxford University Press: Melbourne.
- Cunneen, C. and Anthony, T. (eds) (2008) *The Critical Criminology Companion*, The Hawkins Press (an Imprint of Federation Press): Annandale.
- Cunneen, C. (2001) *Conflict, Politics and Crime: Aboriginal Communities and the Police*, Allen and Unwin: Sydney.
- Cunneen, C. and Stubbs, J. (1997) *Gender, 'Race' and International Relations*, Institute of Criminology Monograph Series: Sydney.
- Cunneen, C., Fraser, D. and Tomsen, S. (eds) (1997) *Faces of Hate, Essays on the Incidence and Nature of Hate Crime in Australia*, Federation Press: Annandale.
- Cunneen, C. and Libesman, T. (1995) *Indigenous People and the Law in Australia*, Butterworths: North Ryde.
- Cunneen, C. (ed.) (1992) *Aboriginal Perspectives on Criminal Justice*, Institute of Criminology Monograph Series: Sydney.
- Cunneen, C., Findlay, M., Lynch, R. and V. Tupper (1989) *The Dynamics of Collective Conflict*, Law Book Company: North Ryde.

## **Stubbs**

- Stubbs, J. and Tomsen, S. (eds) (forthcoming 2015) *Australian Violence*, Leichhardt, NSW: Federation Press.
- Cunneen, C. and Stubbs, J. (1997) *Gender, Race and International Relations: Violence against Filipino Women in Australia*, Institute of Criminology: Sydney.
- Stubbs, J. (ed.) (1994) *Women, Male, Violence and the Law*, Institute of Criminology: Sydney.

## **Schwartz**

- Brown, D., Farrier, D., McNamara, L., Steel, A., Grewcock, M., Quilter, J. and Schwartz, M. (2015) *Criminal Laws: Materials and Commentary on Criminal Law and Process in NSW*, (6th edition) The Federation Press: Sydney.
- Cunneen, C., Baldry, E., Brown, D., Brown, M., Schwartz, M. and Steel, A. (2013) *Penal Culture and Hyperincarceration*, Ashgate: Farnham.

## **Young**

- Zahra, P. and Young, C. (2014) *Zahra and Arden's Drug Laws in NSW* (3rd edition), Federation Press: Annandale.



# Introduction

## Point of departure

This book has its point of departure in a previous work, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Cunneen *et al.*, 2013), which involves some of the same authors. That book sought to identify ‘changes in penal culture over the last 40 years, which have led to the re-valorisation of imprisonment as a frontline criminal justice strategy’. The notion of penal culture was used: ‘to refer to the broad complex of law, policy and practice which frames the use of imprisonment, and to the broad system of meanings, beliefs, ideas and symbols through which people understand and make sense of the prison’ (ibid.:1–2). The chapters explored what we called the ‘penal/colonial complex’; local variations in imprisonment rates within the Australian federal system; the emergence of risk in correctional paradigms; the positioning of three particular social groups within penal regimes: those with mental and cognitive impairment, women, and Indigenous and racialised peoples, and the reconstitution of the prison as a ‘therapeutic institution’; the reinvigoration of the prison through the emergence of new penal subjects, such as terrorists and sex offenders; and the way that the prison is reproduced and spread through the growth in transcarceral regulation and forms of popular culture.

Having thus identified some of the ways in which the prison had been reinvigorated, normalised and reproduced, we questioned whether ‘after nearly 30 years of increasing imprisonment rates we were at something of a conjuncture or turning point, presaging a period of falling imprisonment rates, a movement away from the era of mass imprisonment’ (ibid.: 194). What were the prospects for ‘winding back imprisonment?’ It was at this point, among the various forces that might herald

a 'turning point', that the emergence of 'justice reinvestment' strategies was discussed. While noting that in the longer term it may turn out to have been a 'passing fad' we raised the possibility (and hope) that:

it is a notion that captures the deep disillusion with more than three decades of popular punitive approaches to law and order across the political spectrum and gives expression to the desire for more social and cost effective strategies to rebuild local communities blighted by crime and other forms of social dysfunction. (ibid.: 175)

We emphasised throughout *Penal Culture and Hyperincarceration* the highly selective nature of imprisonment rates, with particular reference to race and to mental and cognitive impairment, and to the way racial disparities (Aboriginality in the Australian context) were obscured by reliance on national or state prison census figures. Accordingly, our conclusion was 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. (ibid.:195)

This conclusion was thus the departure point for the current project. We had already been struck by the spectacular rise of justice reinvestment on the political and policy agenda internationally (Allen and Stern, 2007) and the way that in Australia, the idea was gaining traction among politicians and community advocates (Brown, 2010, 2011a, 2013a; Brown, Schwartz and Boseley, 2012) with particular emphasis on its potential in the Indigenous context (Schwartz, 2010). A research project was born; we were successful in an application to the Australian Research Council for a grant beginning in 2013.

### **The justice reinvestment groundswell in Australia**

In Australia the interest in justice reinvestment is being expressed in both government and community sectors. The call has been led by the Aboriginal and Torres Strait Islander Social Justice Commissioners



(ATSISJC) (2009), beginning with the 2009 *Social Justice Report*. Also in 2009, the Legal and Constitutional Affairs Reference Committee (2009) recommended a pilot program of justice reinvestment strategies and exploration of the potential for justice reinvestment in regional and remote Indigenous communities. Building on this momentum Schwartz argued that ‘justice reinvestment could be part of a justice renewal strategy for Indigenous people’ (2010:12) which points to the links between important national Indigenous policy documents and the foundational principles of justice reinvestment, including the Australian Federal Government *Social Inclusion Agenda* (2009) and the *National Indigenous Law and Justice Framework 2009–2015* (Standing Committee of Attorneys General, 2010). The Framework sought to build a government and community partnership approach to law and justice issues to reduce the evident levels of disadvantage that are directly related to adverse contact with the justice systems (ibid.: 6). Schwartz (2010: 7–8) argued:

The Framework sets out five core goals, three of which are equally central tenets of justice reinvestment. The goal to ‘[r]educe over-representation of Aboriginal and Torres Strait Islander offenders, defendants and victims in the criminal justice system’, commits to an expansion of diversionary programs and other interventions for Indigenous people. Like justice reinvestment, the Framework recognises the centrality of community ownership and responsibility to the development of successful initiatives, calling for communities to be partners in the ‘identification, development and implementation of solutions’. Goal 3.2, to ‘[r]ecognise and strengthen Indigenous community responses to justice issues to support community ownership of safety and crime prevention’, is likewise consistent with the collaborative, community centred approach in justice reinvestment. Goal 5 ... is to ‘[s]trengthen Indigenous communities through working in partnership with governments and other stakeholders to achieve sustained improvements in justice and community safety’. This goal focuses on building community resilience and emphasizes the fact that maintaining ‘not simply functional but thriving communities, healthy families and individual wellbeing is crucial to improving justice outcomes.’ The strategies nominated for achieving these goals are, as in the justice reinvestment approach, not necessarily focused on criminal justice, but are geared to allowing communities to develop their own capacity and their own solutions. These include to ‘[c]ontribute to the provision of measures needed to sustain the



social and cultural resilience of strong communities' by providing the support necessary to develop leadership, and to engage in community affairs, policy development and service delivery. Community justice groups are singled out as vehicles to establish links between health, education, housing, employment and welfare services so that an integrated approach to crime prevention can be developed (references omitted).

In 2010, the Australian Greens adopted justice reinvestment as part of their justice policy platform, and a review of the New South Wales (NSW) Juvenile Justice system proposed the implementation of justice reinvestment strategies in the juvenile context (Noetic Solutions, 2010). In 2011 the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs lent its support to justice reinvestment in its report on the over-incarceration of Indigenous young people, *Doing Time – Time for Doing* (HRSC, 2011). Three months later, a Northern Territory government review (2011) of its youth justice system supported the use of justice reinvestment to address youth incarceration. *Doing Time's* recommendation that further research be conducted to investigate the potential for justice reinvestment in Australia (Rec. 40) was accepted by the federal government, and the National Justice CEOs established a working group to develop options for working towards justice reinvestment in Australia.

In 2012 the ALP federal government, with the support of the Greens, initiated a Senate inquiry into the value of justice reinvestment in Australia. The Inquiry was chaired by South Australian Greens Senator, Penny Wright. The terms of reference for the inquiry included:

- c) the over-representation of disadvantaged groups within Australian prisons, including Aboriginal and Torres Strait Islander peoples and people experiencing mental ill-health, cognitive disability and hearing loss;
- d) the cost, availability and effectiveness of alternatives to imprisonment, including prevention, early intervention, diversionary and rehabilitation measures;
- e) the methodology and objectives of justice reinvestment;
- f) the benefits of, and challenges to, implementing a justice reinvestment approach in Australia;
- g) the collection, availability and sharing of data necessary to implement a justice reinvestment approach;

- h) the implementation and effectiveness of justice reinvestment in other countries, including the United States of America;
- i) the scope for federal government action which would encourage the adoption of justice reinvestment policies by state and territory governments... (LCARC, 2013: iii)

The outcomes of the inquiry are discussed in Chapter 1.

## **Indigenous democracy**

In an early contribution to the Australian debate it was noted that the processes which characterise justice reinvestment aligned well with what was acknowledged to be the most desirable approach to program implementation in Indigenous communities.

These processes include the necessity for bipartisanship and consensus-driven solutions, the devolution of decision-making to the local level, the localization of solutions, and the high-level of input from the high-stakes communities about what might address criminogenic factors in that particular place. The democratic nature of decision-making in the JR methodology is a significant departure from the way that government has traditionally approached policy making for Indigenous communities, but it coheres with what Indigenous advocates have always said about how to give programs implemented in Indigenous communities the best chance of success: by letting communities lead the direction of those strategies. (Brown, Schwartz and Boseley, 2012: 100)

In a report, *Addressing Aboriginal Disadvantage: The Need to Do Things Differently*, the NSW Ombudsman (2011) highlighted aspects of existing Indigenous affairs programming and policy production which were obstructing positive outcomes. The Ombudsman identified the failure to achieve a whole-of-government approach to program management in Indigenous communities; poor communication and co-ordination between relevant agencies; weak accountability mechanisms; and a lack of formal mechanisms to engage Aboriginal people (ibid.: 2.1, 2.2, 3.1). The report concluded that 'government needs to adopt a very different way of doing business with Aboriginal communities. While for many years there has been rhetoric about "partnering" with communities, too often this is not translated into communities having genuine involvement in decision-making about the solutions to their problems.' (ibid.: 2.2) The



report went on to recommend that formal mechanisms be established to engage with Aboriginal people, including providing community leaders with the authority to facilitate outcomes. These recommendations met with high levels of support from Indigenous groups.

In an interview for the project, Sarah Hopkins from the Just Reinvest NSW campaign, encapsulated the importance of Indigenous democracy, given the history of a lack of trust in Aboriginal government relations.

It's an interesting time when it comes to looking at justice reinvestment and Aboriginal communities in New South Wales, because it is the time of this theoretically new idea of local decision-making and different grades of devolving control to Aboriginal communities. But I think that the reality is, if you look at the Aboriginal experience in terms of government, their relationship with government, support from government funding... it's so fraught that this is the only way to do it because there's no trust there... I think for community leaders to actually begin to trust a process I think that's when you see that real community capacity building.

What was striking here then was that in the developing interest in justice reinvestment in the Australian context, parallels were emerging between some of the key principles in the original justice reinvestment process and methodology and the ongoing criticisms by Indigenous leaders and others of the way Indigenous policies and programs were formulated and administered with little or no Indigenous involvement. The potential of justice reinvestment policies in Australia is thus bound up with issues of Indigenous governance, empowerment, self determination and nation-building: what we have called in short hand, 'Indigenous democracy'.

### **'Tipping point' and 'criminogenic' arguments gather force**

The uptake of justice reinvestment in the USA and UK, and the high-level of interest in it in Australia and elsewhere, is in large part a response to the fact that ever increasing imprisonment rates are hugely expensive at a time of fiscal stringency and global financial crisis, and provide very little return in terms of high recidivism rates. There is another argument that is gathering force within criminology, that the effects of mass imprisonment in high-stakes communities, predominantly defined in terms of race, may be counter-productive and criminogenic, contributing to social breakdown and crime (Rose and Clear, 1998; Stemen,



2007; Durlaf and Nagin, 2011; Pritikin, 2008; Daoust, 2008; Vieraitis, Kovandzic and Marvell, 2007; Brown, 2010, 2011a).

Rose and Clear (1998) argued that there was a 'tipping point' in certain communities, where crime increased once incarceration reached a certain level. This was because:

high rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system. As a result, as communities become less capable of managing social order through family or social groups, crime rates go up (ibid.: 457).

The tipping point effect, in particular marginalised and racialised communities, developed in subsequent work (Clear, 2002; 2007a; 2007b; Clear and Frost, 2014; Clear, Rose and Ryder, 2001; Clear *et al.*, 2003; Western, 2002; 2006; Western, Kling and Weiman, 2001; Western, Lopoo and McLanahan, 2004; Mauer and Chesney-Lind, 2002) became a significant component in the development of the 'mass imprisonment' analysis. It revealed the inadequacies of explanations of imprisonment rates and their effects in terms of an accumulation of individual instances of offending. Rather, the issue was about effects on whole communities. As Garland (2001a: 2) put it in the seminal collection on mass imprisonment, it:

becomes part of the socialisation process. Every family, every household, every individual in these neighbourhoods has direct personal knowledge of the prison...through the spouse, a child, a neighbor, a friend. Imprisonment ceases to be a fate of a few criminal individuals and becomes a shaping institution for whole sectors of the population.

One of our interviewees, Eddie Cubillo, National Aboriginal and Torres Strait Islander Legal Services (NATSILS) put it succinctly: 'being Indigenous, you know you're never far from the issues, and coming from the Territory you're either affected by the justice system or having family in it. So, it's a constant I suppose for Aboriginal people'.

The 'tipping point' research spelt out the 'collateral consequences' of mass imprisonment, which include worsening inequality, 'deepened by reducing the pay and employment of ex-prisoners' (Western,

2006: 190). In a book length analysis subtitled 'How Mass Incarceration Makes Disadvantaged Neighborhoods Worse', Clear (2007a: 105) summarised the effects of incarceration on families:

Children experience developmental and emotional strains, have less parental supervision, are at greater risk of parental abuse, and face an increased risk of having their own problems with the criminal justice system. Mothers find it harder to sustain stable intimate relationships with men who have gone to prison, and they have an increased risk of contracting sexually transmitted diseases. Families are more likely to break up, and they encounter economic strains. Girls raised in these high imprisonment places are more likely to become pregnant in their teen years; boys are more likely to become involved in delinquency.

Epidemiologists like Ernest Drucker (2011:9) liken the effects of mass incarceration to a 'large scale disaster', an 'epidemic' (ibid.: 78) or a 'toxic exposure' (ibid.: 113). Drucker argued that mass incarceration 'imposes the same burden for our society as many chronic diseases associated with occupational hazards (for example, coal, asbestos, or nuclear radiation), the physical and emotional trauma of war, or the deprivations of severe poverty and family disintegration' (ibid.: 113–4). He detailed the range of disabilities imposed by time spent within prisons, especially deteriorating health issues, including drug and alcohol problems; exposure to HIV/AIDS transmission; increasing mental health problems; and the prevalence of homicide and suicide in prisons (ibid.: 114–129). In terms of life on the outside, he noted 'chronic incapacitation after prison'; difficulties in obtaining housing and consequent homelessness; bars to employment; bars to receiving public assistance; civil death consequences such as the loss of the right to vote in some states (ibid.: 129–140). Collateral damage to children and the families of prisoners, which Drucker saw as a form of 'contagion', included marriage breakdown, family violence, child removal, shortened life expectancy for children of prisoners and increased likelihood of gang membership, drug use, and criminal offending (ibid.: 141–162).

While all of this research took place in the USA, it seems likely 'that such effects apply in the Australian context, particularly amongst vulnerable populations and communities, such as Aboriginal communities and certain geographical or "postcode" areas, where we may already have reached that "tipping point" where excessive imprisonment rates are actually causing crime' (Brown, 2010:141). One of the obstacles to



broader acceptance of the tipping point and criminogenic arguments and evidence is the belief that the law applies equally to all individuals and groups, reflected in a popular metaphor we heard a number of times in our interviews, that 'a rising tide floats all boats'. This was usually posed to suggest that criminal justice reforms would apply equally and thus remedy racial disparity. However the flaws in the notion can be illustrated by looking at the 'rising tide' of imprisonment. Clearly this does not 'float all boats', as the evidence of worsening racial disparity in Australian imprisonment rates, spelled out in Chapters 1 and 3, demonstrates. To continue the metaphor, not all boats are equally seaworthy; some are holed and need repair; some are adrift, or hauled up on the shore, out of reach of the tides; some are ocean liners moored across from the Sydney Opera House; and others tinnies, long abandoned in suburban backyards. As Weatherburn (in NSW Law Reform Commission, 2012: 62) put it succinctly, 'Whenever the justice system gets tougher, as it has in New South Wales and other states, it always has a bigger impact on Aboriginal people than it does on non-Aboriginal people'. Similarly, it is not automatic that justice reinvestment reforms will necessarily address racial disparity, unless either they are fashioned to achieve this, or they affect policing, or substantive criminal or sentencing laws, which have disparate effects on Indigenous people and other racialised groups. There are preliminary indications that some criminal justice reforms in three US states may have produced drops in both prison admissions and prison populations that are greater for blacks and Hispanics than for whites (CSG Justice Center, 2015a).

The tipping point and criminogenic arguments were supplemented by studies which demonstrated the limited role of imprisonment in reducing crime. Western estimates that the growth in US 'incarceration rates explains only one-tenth of the decline in serious crime at the end of the 1990s' (Western, 2006: 7, 168–188). Spelman (2006: 484) concluded that a 10 per cent increase in imprisonment rates will produce at most a 2–4 per cent decrease in crime rates and that only 25 per cent of the US drop in crime rates could be attributed to increased incarceration rates (see also Spelman; 2000a; Levitt, 2004; Useem, Piehl and Liedka, 2001; Pritikin 2008; Mauer and Chesney-Lind, 2002; Daoust, 2008; Weatherburn, Hua, and Moffatt, 2006). Research indicated that:

incarceration has, at best, a modest effect in reducing crime; that this crime-reduction effect diminishes over time the higher incarceration rates climb; and that in relation to particular communities and groups, such as African Americans in the US and Aborigines in



Australia, it is likely to have a negative or crime-producing effect in the long term. (Brown, 2010: 142)

These arguments are discussed in more detail in later chapters.

## **The research project**

Our conception of the project at this point was as a ground clearing exercise in a social democratic, social justice mode. This is similar to Loader and Sparks' (2010: 124–133) notion of a 'democratic under-labourer', reflecting that the task is not just one within criminology or criminal justice but is also about developing a democratic politics around criminal justice issues. This politics is fashioned, they suggest, by the generation of knowledge, the attempt to understand how criminological knowledge is deployed within criminal justice and political institutions, and the adoption of a normative dimension which seeks to theorise and set forth 'alternative ways of thinking about and responding to crime, and in forging connections with groups in civil society which are seeking to advance an alternative justice politics' (ibid.: 131). Loader and Sparks see the normative task as 'to supply a constant reminder that there is always more at stake in crime-reduction than reducing crime, and hence more to evaluation than finding out 'what works' (ibid.: 127).

While acknowledging the evident promise of justice reinvestment, we were concerned to address the fact that the groundswell of commitment to justice reinvestment in Australia was arising without a clear understanding of (1) the defining features of justice reinvestment; (2) its conceptual and theoretical components; (3) how it related to other concepts in current criminal justice policy; and (4) the possibility and likely effects of its introduction in the Australian context. The danger we saw was that without a robust and critical consideration of the conceptual foundations of justice reinvestment, Australian states risked committing to a policy trajectory without a clear understanding of whether it fitted the particular conditions that attend the high rates of imprisonment among Indigenous people, the disabled and intellectually impaired, and marginalised women in Australia, or its potential effects in practice (Weatherburn, Snowball and Hunter, 2006; Fitzgerald, 2009; Dowse, Baldry and Snoyman, 2009). Given the growing calls for adoption of justice reinvestment in the Australian context, it looked as though policy decisions were likely to be made in the near future. We feared that to make these decisions without addressing some research questions, might distort or undermine the promise of justice reinvestment



in the Australian context. Accordingly we identified four core research questions.

## Research questions

### *1 Towards a clear definition: what assumptions underpin justice reinvestment?*

One of the main criticisms of justice reinvestment is that it was conceptually vague, meaning different things to different people, so that apparent bi-partisan support was built on unstable ground (Tonry, 2011a). Partly this was because there had been little academic or critical treatment of justice reinvestment. Clear (2011: 587) noted that the success of justice reinvestment strategies in the USA had been achieved despite the fact that it is 'an idea in progress rather than a full-fledged strategy'. Maruna (2011: 661) argued that the concept has been only 'sort of' defined, is not based on a 'strong empirical foundation', and does not really qualify as being a proper 'theory'. While application of justice reinvestment strategies had led to significant savings in corrections costs in numerous US states, Clear (2011: 590) observed that 'the implementation of these strategies has sometimes been problematic' and, at this stage, largely unexamined. In the light of these sorts of criticisms we thought it would be useful to identify firstly, the common threads to various approaches associated with the justice reinvestment banner (primarily in the USA); secondly, the theoretical, legal, criminological and public policy assumptions which underpin these approaches; and thirdly, the broader socio-historical factors that have given rise to current interest in or adoption of a justice reinvestment approach.

### *2 What are the social-moral aspects of justice reinvestment policy and limitations of the rational approach?*

Justice reinvestment is allied with both 'evidence-led' approaches to criminal justice policy and the increasing concern with fiscal imperatives, or 'value for public money', in criminal justice policy and incarceration in particular. We hoped to investigate the extent to which justice reinvestment approaches might overcome a reliance on economic rationalities and be theoretically articulated with various moral and social approaches to penalty. We were also concerned to examine what is accepted as 'evidence' and the need to develop measures relevant to Indigenous and other communities. Among ourselves we were grappling with desires to achieve practical reform effects while also expounding social justice-oriented normative positions. Even where agreement could be reached

on a particular normative position, how is it possible to formulate and deploy such normative positions while acknowledging the complexity and autonomy of politics, being wary as Loader and Sparks (2010: 128) argue, 'of attempts to place theories, topics and methodologies in some kind of hierarchy, or to champion any one of them as the only true path'? Does it, as they argue, involve abandoning 'the hope that criminological knowledge can engineer outcomes, end political discussion, trump the ill informed concerns of others' (ibid.: 131); are our achievements likely to be more modest, perhaps informing public debate, highlighting pitfalls, and advocating for informed change?

### *3 Can place-based approaches respond effectively to entrenched disadvantage?*

Justice reinvestment is often described as a 'place-based' approach in that it uses a geographical bounding of high crime communities as a basis for the delivery of programs. We wished to examine and identify place-based responses to crime in Australia in order to identify key divergences, both theoretical and empirical, from justice reinvestment approaches in the USA. Given that high crime communities in Australia have historically also been spaces of social, economic and political marginality and Indigeneity, we were concerned to ask how justice reinvestment approaches might affect marginalised and socially excluded groups (e.g., Indigenous people, women, people with mental health or cognitive disorders). To pose such questions was only to generate others – how do place-based approaches render social disadvantage? Do they tend to impede or promote recognition of various historical, structural, cultural and interpersonal roots of disadvantage? How do they interact with human rights-based, or 'needs-based,' approaches to working with vulnerable groups? Is a focus on community as a 'whole' likely to mask gendered needs, or fail to take into account underlying community power dynamics (along gendered or other lines) that may be present?

### *4 How might justice reinvestment translate into the Australian context?*

Given that most of the existing literature and programs based on justice reinvestment are from the USA and to a much lesser extent the UK, a key question is how well it might translate into the Australian context. One feature of globalisation is an often rapid and sometimes inappropriate transmission of new concepts and programs to widely different local, regional and national contexts without sufficient consideration of the different conditions of reception. Accordingly we proposed to reflect on



the nature of policy transfer in the criminal justice sphere more generally and to attempt to map out some of the significant differences in political, social, economic and cultural contexts between the USA and Australia that might present barriers to adoption or transmission of US-derived justice reinvestment policies, as well as the 'conditions of penal hope' (Brown, 2013a).

This then was the task we set ourselves. As the research progressed the ground, as always, shifted, as did our take on some of the key issues. One important development was the Senate Inquiry, discussed in Chapter 1. A second important development was a re-evaluation by a significant number of justice reinvestment's early proponents (Austin *et al.*, 2013) which suggested that its original progressive edge, stemming from its origins in a response to the racial selectivity of imprisonment rates under conditions of mass imprisonment, had been transmuted into a program of implementation known as the Justice Reinvestment Initiative (JRI). The program had lost its local neighbourhood reinvestment focus in favour of predominantly back-end efficiency reforms to parole and community corrections aimed at reducing recidivism and revocation rates, outlined in Chapter 2.

### **Program of interviews**

The authors conducted two series of interviews in the USA, one in late 2013 and a second in mid 2014. The first set of interviews concentrated on some of the leading proponents of justice reinvestment, the key think tanks and other leading and long-standing players, located mainly in New York and Washington. The second round of interviews focussed on six states where justice reinvestment schemes had been initiated on the ground so that we could get a more detailed, empirically informed view of justice reinvestment programs in operation in a selection of locations. The states were Hawaii, South Dakota, New York, Rhode Island, North Carolina and Texas. Chapter 2, where we summarise justice reinvestment developments, describes how these states were chosen.

The first round of US interviews in particular tended to confirm the split argued by Austin *et al.* (2013) between the original conception of justice reinvestment and the form it had taken in the process of implementation (JRI). Two key features of this split were the general lack of neighbourhood reinvestment and the almost total absence of any discussion of the racial disparity of imprisonment rates. Such reinvestment that is taking place in the USA typically involves boosting parole and probation officer numbers, programs and training, in an attempt to stem the flow of revocations into prison, especially revocations on



'technical' grounds. Racial disparity seemed an absent discourse, largely unspoken and apparently unspeakable, too sensitive to confront directly, something 'everybody knows', but cannot address. The second round of interviews basically confirmed but also mitigated these impressions somewhat, and brought home to us the varied nature of developments in different states and locations, and thus the importance of context. We were struck by the political appetite for change amongst all our interviewees, whatever their affiliations and perspectives; an appetite for change reflected in both debates around justice reinvestment, and debates around criminal justice reform not conducted in the terms of justice reinvestment, such as the need for juvenile justice reform. The two rounds of US interviews were followed with a program of Australian fieldwork. These interviews focused on a range of advocacy organisations which reflected the interests of criminalised women, Indigenous peoples and people with mental illness and cognitive impairment. The discussion centred on the possibilities and challenges that justice reinvestment presented for their constituents.

We are indebted to all those people who agreed to be interviewed, all very busy and many in very senior positions, who so willingly gave of their time, extended us considerable hospitality, and were so open in their responses to our questions, in some cases also answering follow-up questions. A list of those interviewed and their organisational affiliation is attached as an appendix.

We have attempted to use the interview material liberally throughout our discussion. We hope this provides a more grounded and earthy feel, as often results from oral as against written responses. We were struck by the enthusiasm, commitment and frankness with which interviewees from widely different perspectives offered responses to our questions and tolerated our outsider ignorance of US conditions, politics, cultures and sensibilities. Part of the requirement for success of any social movement is its ability to inspire, and we were inspired in various ways by the passion and pride with which those we interviewed explained developments they had been involved in and worked for.

## **Structure of the argument**

Chapter 1 locates the emergence of justice reinvestment in the USA, and also the UK and Australia, in the historical context of responses to the phenomenon of mass imprisonment, which has neighbourhood, vulnerable communities and racial disparity at its core. Tracing the concept from its origins as conceptualised by Tucker and Cadora



(2003), through its early development in the USA as a product of many masters, and its progression towards the JRI, the chapter concludes with an overview of the momentum building around justice reinvestment in the Australian context. Having highlighted key moments during the history of justice reinvestment, this chapter serves as a means of grounding the discussion to come and contextualising the portability analysis.

Chapter 2 outlines some of the key features of the justice reinvestment approach before providing a critical assessment of the conceptual shifts that occurred in the process of implementation in the US context, the shift from justice reinvestment to JRI. This is illustrated through information obtained from interviews with leading participants in JRI implementation. While providing key empirical information, neither of these chapters is simply descriptive; they offer a critical overview of the history of the emergence, political uptake and implementation in the US context, elaborating on the critique offered by Austin *et al.* (2013).

Chapter 3 examines the claims of justice reinvestment to be a place-based strategy. It unpacks the meaning of place-based and draws distinctions between 'top-down' and 'bottom-up' approaches to public policy development and implementation and considers how place-based approaches might coalesce with a social-justice vision of justice reinvestment. We seek to unpack the various meanings of 'community' and consider their impact on our understanding of 'place' and justice reinvestment more generally. There is specific consideration of whether a place-based approach is likely to provide adequate recognition of the needs of three social groups who have been particularly affected by the growth in imprisonment: people with mental illness and/or cognitive impairment, women and Indigenous peoples. We draw attention to a case study of the Just Reinvest NSW initiative in Bourke, Australia, which we see as an especially instructive example of a bottom-up approach to justice reinvestment that has been developed and sustained through community initiatives.

Chapter 4 critically examines the methodologies promoted under the 'evidence-based' and 'what works' frameworks used in justice reinvestment. It traces the kinds of economic analysis commonly used and how evidence is conceived and applied, and how a focus on cost cutting and evidence-based programs can work against the possibility of social justice and rights-based approaches. It considers the extent to which different groups, such as those with mental illness and/or cognitive disability, women or racialised people, are recognised, or remain invisible, within these frameworks. The chapter demonstrates that the methodological



choices made are not just technical matters but also have significant implications for who benefits from justice reinvestment.

Chapter 5 addresses the issue of portability – how well does justice reinvestment travel? Wacquant's (2009a; 2009b) arguments about the globalisation of a US-derived punitive common sense, and Jones and Newburn's (2007) testing of such claims in the UK context, are examined. This is followed by a brief overview of policy transfer in Australia. The issue of context is essential to any consideration of policy transfer and the chapter examines a number of potential barriers to the reception of US notions of justice reinvestment in Australia. Among the issues considered are: differences in legal and political structures; differences in the extent to which there is widespread acknowledgement that mass incarceration has resulted in a 'broken' system; differences in the levels of bipartisanship and in the role played by faith-based constituencies; and differences in the capacity for co-ordination among various criminal justice agencies. The chapter goes on to scrutinise the notion of policy formulation and transfer more carefully in an attempt to highlight problematic conceptions of policy transfer. These include simplistic notions that policy is the direct manifestation of the intentions of policy-makers, which can be simply 'rolled out'. This is followed by a discussion of the inadequacies of rationalist conceptions of policy-driven processes, reflected in the common 'roll out' metaphor, and in the ever-present possibility of populist backlash.

Chapter 6, the conclusion, offers summaries of the arguments in each chapter, followed by a distillation of our own position on the way justice reinvestment might be most fruitfully promoted in Australia.

The book draws on a broad range of critical criminological, penological and criminal justice scholarship in support of the positions being argued and will hopefully be read not just as a work of critical scholarship for teaching and research purposes but also as a useful resource for a wide range of policy-makers, and others interested in debates about incarceration, including those within government, non-government and not-for-profit organisations, politics and the media.