

We can do much better

Julian Burnside

It is a great pleasure to give the 2015 *The Examiner* – John West Memorial Lecture.

You sound like an interesting and complex character. Being a mainlander, I did not know of him until I was asked to give this lecture. He must have been a force to reckon with.

West was a Congregational clergyman who was committed to the principles of freedom of conscience. In 1842, he founded *The Examiner* newspaper and became its first editorial writer.

In the Examiner of 12 April 1847 an article by Noel Shaw appeared. It noted that “West began a crusade to end the sending of convicts to the colony. In his first editorial he cried:

‘This is a penal colony, in the eyes of Britain, debased in its character and degraded in its destiny’.”

There were those who wanted transportation to continue. It meant free labour for landowners and others and benefit for those who administered the system. The battle went on.

Surprisingly for the time, in 1847 West parodied Luther’s famous 39 articles when he published a list of 39 reasons why transportation should end.

His argument was headed: “Thirty-nine Articles Against the Continuance of Transportation to Van Diemen’s Land.” It was published in *The Examiner* on 10 April 1847 and was republished on 12 April 1847 as a special supplement.

His arguments set out in the 39 articles are interesting. They include a blend of pragmatism and principle. His reasons included:

- Because the introduction into the community of a large body who are ordinarily persons of vicious character tends to debase the moral tone of society.
- Because the inequality of the sexes transported is an insuperable barrier to moral reformation.
- Because the past management of the prisoner population has been found in the highest degree dangerous to the peace of the colony, and injurious to themselves.
- Because no unwillingness has been discovered in the labouring classes to emigrate to these colonies when suitable means have been adopted for that purpose.
- Because, since the discontinuance of transportation in New South Wales, that colony has greatly increased in population and commerce, its towns have enlarged and its credit has been re-established.
- Because, notwithstanding the higher wages, emigrant labourers by their superior industry and skill are more profitable to the farmer, and their larger wages give employment to the shopkeeper, mechanic and merchant, and thus create a large consuming class solely dependent on the product of the farmer.
- Because mere money considerations, even if they were on the side of transportation, are utterly unworthy as the sole concern of a wise people; because the reputation, moral worth and social merits of a community constitute advantages for which nothing can compensate; and because these are confessedly hopeless if transportation to this colony is to continue.

Transportation to Van Diemen’s Land ended in 1853.

More recently, a letter to the editor of *The Examiner* [1 February 2006] pointed out that:

“His opposition to the transportation of convicts was not based on humanitarian sentiments towards the convicts themselves, but because their presence ‘polluted’ the free immigrants and their descendants in the colony.”

West seems to have anticipated, without articulating, the sentiments of Paul Keating who once commented that in any two horse race you should put your money on self-interest for a win, at least you know it will be trying. His 39 articles against transportation do appear to have a very substantial call on the self-interest of the colonists.

However, on my being invited to give tonight's lecture, I was told that the theme of the lecture was to be related to issues raised by West in his history of Tasmania, which was published in 1852 and that "this gives the lecture a wide scope". West commented on religion and spirituality, sectarianism, Protestant-Catholic relations, church-state relations, Tasmania's aborigines, education, mechanics institutes, libraries and information, journalism, newspapers and communication, temperance, poverty, the status of women, servants and masters, immigration and immigrants, colonial self-government, the rule of law, law and society, violence in society, liberalism, the individual in society, self-help, progress and economic development, insurance and savings banks, and art.

This snapshot of some of his interests suggests that I have a broad canvas on which to work, so settle in

Of course, it would be tempting to take each theme in turn, but I can't. However, it is interesting to start with a couple of observations. First, about sectarianism and Protestant-Catholic relations.

In Australia these days it is very easy to forget how significant and important and divisive the Protestant-Catholic split was.

Until sometime in the middle 1960s, Protestant school kids would chant rude things about Catholics and Catholic school kids would chant rude things about Protestants. I remember hearing those chants as a school child myself. I never quite understood what the fuss was about.

It's easy to forget that until sometime in the mid-1960s in Australia some occupations and professions were the preserve of Protestants and others were the preserve of Roman Catholics.

It's easy to forget that until fairly recently that the political party known as the Liberal Party which, until fairly recent years was indeed Liberal, was a bulwark of the establishment and was overwhelmingly Protestant in its makeup. In the Liberal Government of Malcolm Fraser in the 1970s, Philip Lynch was conspicuous for the fact that he was a Roman Catholic. How times have changed.

If I can be permitted an observation from my personal life, I recall having a conversation with my grandmother when she was in her late eighties. She was speaking to me of a man she had known sometime before the Second World War. She obviously thought very highly of him and she told me a great number of his fine qualities. Then she paused and leaned forward and said confidentially "mind you, he was an out-and-out Catholic". I have always remembered that conversation because it seemed to capture precisely the sentiment of a bygone age.

It's easy to forget also the way the Protestant-Catholic split expressed itself in an audacious terrorist attack 410 years ago. We scarcely take time to remember these days the Gunpowder Plot of 5 November 1605. During the reign of Henry VIII, Henry parted company with the Roman Catholic Church and established the Church of England. His purpose was not spiritual: he wanted a divorce and the Pope would not allow it. His daughter, Elizabeth I, oversaw the enactment of increasingly harsh anti-Roman Catholic measures during the later years of her reign. When Elizabeth died and the throne was taken by James VI of Scotland who became James I of England, it was hoped that the treatment of Roman Catholics might be a little more gentle. It was not to be. James took the throne in 1603 and very soon even harsher Roman Catholic measures were being passed by the Parliament and approved by James I.

The Plague in London had delayed the opening of the new Parliament. Eventually, it was fixed for 5 November 1605. On that day, the Commons, the Lords and the Royal Family would all be collected together in the Great Hall at Westminster. A group of disaffected and very pious Roman Catholics – all of them members of the Catholic aristocracy – decided that the only way they could combat the mistreatment of their group was to destroy the entire establishment at a single stroke and so they decided that they would blow-up the Parliament building on the day the Parliament was to be opened.

By chance, word of the Plot got out and the night before the Parliament was to open a search was undertaken of the entire Parliament building. In a room underneath Parliament Hall John Johnson (also known as Guy Fawkes) was discovered with 36 barrels of gunpowder. If the gunpowder had

been detonated, the entire building would have been destroyed. He was tortured in order to discover the whereabouts of the other plotters and he and the other plotters who were found were ultimately tried for treason. By an odd historical anachronism, their trial started on Australia Day, 26 January 1606 although that day did not become significant to us until 1788. The first person on the indictment was Father Henry Garnet, a leading Roman Catholic priest who had absolutely nothing to do with the Plot. He and all the others were convicted and were sentenced to death by being hung, drawn and quartered.

It is a curious thing that in modern times a number of western countries have been persuaded to pass draconian laws which limit our freedoms and which are directed at combating terrorism, on the premise that terrorism sprung into existence fully formed on the 11 September 2001. That thinking entirely overlooks the Gunpowder Plot which was in every respect more audacious and more imaginative than the attack of September 11.

It is easy to forget that the tension between Protestants and Roman Catholics which marred the history of 20th Century Ireland is mirrored in the great schism within Islam. The Muslim religion has two branches: the Sunni and the Shia. That split mirrors the doctrinal differences between the Protestants and the Roman Catholics. That split is being played out violently in many places. So for example, the Taliban in Afghanistan are hell-bent on wiping out the Hazara. The Taliban are Sunni Muslims and the Hazara are Shia Muslims. In Syria and Iraq at the moment the Islamic state adheres to the Shia branch of Islam while Iraq and Syria attempt to fight to uphold the Sunni branch of Islam. As in most religious conflicts, neither side can claim any special merit and neither side has a monopoly on brutality.

As Australia sends forces into Iraq for the avowed purpose of resisting the spread of the Islamic State it is worth considering whether it would have been useful during the Irish troubles for a Middle Eastern country to send armed forces into Northern Ireland with a view to helping resolve the conflicts there. A moment's reflection suggests that it would have been pointless.

Rule of Law – Law and Society

I was interested to learn that John West was interested in the rule of law. It's a subject which is not widely understood by lay people (and maybe by some lawyers).

The point of the rule of law is that it stands in contrast to the rule of men. The idea of the rule of law is that all people are governed by the law regardless of their station.

The origins of the rule of law can be traced back to the Gunpowder Plot. When John Johnson was found with 36 barrels of gunpowder, James I personally gave written authority for his captors to torture him. Under the law of the time, torture was illegal just as it is now. But James I was ruled beyond the law and was capable of authorizing torture. His invitation to use torture was eagerly taken up and John Johnson was broken on the rack.

There were uncanny parallels of the same kind of thinking. After September 11 when President George W. Bush established a special prison at Guantanamo Bay, in Cuba. Guantanamo Bay is a piece of Cuba which is on perpetual lease to the United States. Its initial purpose was to provide a coaling station for steamships. The legal theory which inspired the establishment of Camp X-ray at prison at Guantanamo Bay was that people held there would be held beyond the reach of United States' law and (by definition) beyond the practical reach of Cuban law. In an uncanny echo of James I in 1605, a high-placed lawyer in the Department of Justice gave written authority for various forms of interrogation of prisoners which (on any view) amount to torture. Waterboarding is just one example. There are many others. It was a distressing thing to see the world's greatest democracy retreat to the early 17th Century in its response to the terror attack of September 11.

Of course in Australia we tend to follow the United States in many things. The Tampa affair which some people still remember began on the 26 August 2001. The Tampa was a Norwegian container vessel which rescued 438 Afghan Hazaras as their boat sank in the Indian Ocean. Many of them were in a weakened state and a number of pregnant women needed urgent medical attention. The Captain of the Tampa headed towards Christmas Island, a small remote part of Australia off the north-west coast. The Howard Government refused the Tampa permission to enter Australian territorial waters off Christmas Island. The Captain of the Tampa disobeyed Howard and the Tampa

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steamed into territorial waters off Christmas Island and into Australian history. The SAS came out to the Tampa and took control of the bridge at gunpoint. Then followed a stand-off. Four hundred and thirty-eight Afghans were held hostage on the steel decks of the Tampa in the tropical sun. The matter went to the Federal Court on Friday, 30 August 2001. The Commonwealth insisted that Justice North should hear the trial immediately, beginning on the Saturday. He agreed. The trial ran Saturday, Sunday, Monday, Tuesday, Wednesday and on Wednesday afternoon the 5th September, the Judge adjourned to consider his decision. He handed down his decision at 2.15 in the afternoon, Melbourne time, on the 11 September 2001. It was unfortunate timing.

It is very easy to forget how closely connected chronologically the Tampa episode and September 11 were.

During the Tampa episode, the Howard Government came up with the idea of moving asylum seekers to offshore detention in Manus Island (part of Papua New Guinea) and Nauru (a tiny independent nation in the Central Pacific). The legal theory which the Commonwealth has advanced on a number of occasions is that what happens to refugees on Manus and Nauru is beyond the reach of Australian law. Since both those places receive billions of dollars from Australia in exchange for them warehousing refugees on Australia's behalf, their legal systems are not enthusiastic to ensure proper treatment of refugees sent to them.

This miserable system continued in operation from September 2001 until about 2006. By that time, Manus had been emptied and all the remaining refugees were being held on Nauru. Although the Howard Government had promised the refugees that none of them would ever set foot in Australia, eventually the people who remained on Nauru were moved to Australia and many of them have now become Australian citizens.

During the Rudd/Gillard/Rudd Government, boats started arriving again and once Mr Abbott became leader of the Opposition, he began complaining loudly about the fact of boat people arriving in Australia. As Prime Minister, Julia Gillard reintroduced the idea of sending boat people to Manus and Nauru.

I hope John West would have been appalled. After all, what we are doing is effectively the same as transportation but with one major difference: the people we take, by force and against their will, from one country to another are not criminals: they are not "illegal", they have broken no law by coming without papers and without an invitation asking for protection.

Here is how we got to be this way. In early April 2014, Scott Morrison was crowing about the fact that, for 100 days, no refugee boats had arrived in Australia.

He did not mention that a number of boats had tried to get here, and that their occupants were sent back to Indonesia in orange lifeboats. The fact that they tried to get here is significant, because we can be confident, on the evidence of the past 15 years, that a high proportion of them were genuine refugees legally entitled to protection. But that is not something that engages Morrison's Christian spirit.

Neither is he concerned, it seems, that the people we pushed back will make landfall in Indonesia, a country which has not signed the Refugees Convention and that they risk being sent from Indonesia back to their country of origin, where they face persecution.

So that is the source of Morrison's delight: we are indirectly sending people back to a place of persecution, in plain defiance of our central obligation under the Refugees Convention.

But he is also pleased with himself because he can say he has saved them from drowning.

Let's be very clear about this: every death at sea is a tragedy. No-one wants to see refugees die in their attempt to escape persecution, but the often-recited concern about refugees drowning is just hypocritical propaganda.

People like Abbott and Morrison express their concern about refugees who drown. They are not sincere, but it provides a vaguely respectable excuse for harsh policies. Let me be plain about this: when Abbott and Morrison say they are worried about refugees drowning on their way to Australia, they are lying: they are deceiving the public. It opens the way to mistreat asylum seekers who have not drowned, and helps them pursue the darker purpose of keeping refugees out.

The following facts are uncontroversial:

Boat-people come here principally from Afghanistan, where the Hazaras are the target of Taliban genocide, and from Sri Lanka, where the Tamils are being persecuted in the wake of their failed liberation movement. Those two groups have dominated boat-people numbers in the last few years.

Hazaras and Tamils are really desperate in their bid for freedom. Apart from any other consideration, a person has to be desperate to take the risks they in fact take in their attempt to reach safety.

Most boat-people who arrive in Australia end up being assessed as genuine refugees, legally entitled to our protection: over 90% of them are ultimately successful in their asylum claims. This compares with a success rate of about 40% among asylum claims of people who arrive here by air on short term visas, such as business, tourist or student visas. The different success rates are readily explained: the boat trip is dangerous: it is a mark of sincerity that a person takes the risks it involves.

Some of the boats carrying asylum seekers sink, and some of the refugees drown. The numbers who have drowned is not clear, but it looks like about 2-3 per cent of them since 2000.

A person facing death or torture is not likely to be deterred by the prospect of being locked up in a detention centre, or even by the risk of drowning. Desperate people will take desperate measures. The experience of the Jews in the 1930s and the Vietnamese in the late 1970s tells us that. Common sense and ordinary experience tell us that. Over the years I have asked Hazaras I know personally, and who came here as boat-people, whether they had been aware of the risks before setting out. Some did. I asked them why they took the risk: they said that the Taliban represented a greater risk. Others did not: they did not know where they were being taken. For that group, deterrence is not a relevant consideration.

It is also significant that, at present, asylum seekers who get to Indonesia face the real prospect of being mistreated and jailed by the Indonesian authorities if they are caught. In addition, they are not permitted to work or to send their children to school. I suspect that most Australians faced with the same problem would choose the same solution: take a risk and get on a boat.

One of the strangest phenomena in Australian politics over the past decade is that we are apparently willing to revile and mistreat people who act exactly as we would if we had the misfortune to be in their shoes.

John West had practical objections to transportation. I suspect that he might have had moral objections to Australia's current refugee policy. The problem with our refugee policy is that it is based on a lie and is directly inconsistent with our social values.

The lie is that boat people are "illegal". They are not. They do not break any law by coming here seeking protection. Furthermore, we are not being flooded by boat people. The largest number of boat people to have arrived in Australia in the last 40 years is 25,000. If that seems a big number, the annual rate of voluntary migrants who move to Australia to live here permanently is approximately 200,000 people per year.

Historically, the arrival rate of boat people in Australia tends to track in parallel with the number of refugees on the move all around the world. That's just another way of saying that when trouble starts somewhere in the world and people start moving in order to get to safety, a tiny percentage of them will end up in Australia. Australia is a fairly generous country, and should not resent the fact that a small percentage of the world's refugees get here asking for help. Another point of comparison which is useful is to look at the number of people living in the community who have overstayed their visas. Typically, these are American or British backpackers who have come here on a holiday and just stayed on after their tourist visa expired. At any one time, it is estimated that there are about 50,000 of these people in the community. Against that, 25,000 boat people arriving in one year doesn't seem like any great demographic problem.

The great problem is that a refugee policy is so utterly irreconcilable with our view of our own character. Boat people are generally transported to another country – Manus or Nauru – and there they are mistreated with a view to persuading them to agree to return to the country from which they fled.

An employee of Transfield told me recently that the purpose of the mistreatment of a number of asylum seekers on Manus is to break their spirit. For example, a little while ago approximately 100 detainees were rounded up from the four compounds in Manus. The people chosen were perceived as the leaders of the various ethnic groups in the four compounds. The 100 detainees were all taken to Lorengau on Manus Island and were put in jail. They were not charged with anything. There is no suggestion that they had committed any offence. They were simply jailed. But the jail facilities are incapable of dealing with 100 people so there were no beds for them and no bedding. There were no showers. They spent a week in Lorengau jail sleeping on the floor without blankets and without the possibility of having a shower. They were eventually returned to the detention centre, all of them visibly broken in spirit.

It is still difficult to believe that Australia is capable of permitting such obvious cruelty and to do it with a view to persuading people not to even think of asking us for help.

We pride ourselves as a generous and decent country. Our behaviour contradicts that view.

People held onshore face indefinite detention. Indefinite detention is precisely what its name suggests: people who have not committed any offence at all are held in a prisonlike environment for as long as it takes to process their claim for protection. This may be a few months or a few years, but no-one is able to tell any detainee how much longer it will be before they are released.

The mandatory detention regime was put to the test some years ago in relation to Mr Al Kateb.

Al Kateb had come to Australia as a boat person. He applied for protection. He was locked up in Woomera which he found unbearable. His claim for asylum was initially rejected. He was entitled to appeal that decision and would probably have succeeded. But he knew that that would extend his stay in detention and he couldn't bear it. So he asked the Department of Immigration to simply remove him from Australia. The Migration Act said that a non-citizen without a visa had to remain in detention until he got a visa or was removed from Australia. Al Kateb asked to be removed.

But he couldn't be removed from Australia because he was stateless. There was no country to which he could be sent. The Howard Government argued all the way to the High Court that Mr Al Kateb – not a threat to anyone, not suspected of any offence – could remain in detention for the rest of his life. The High Court by a 4-3 majority agreed that that's what the Act means and with that meaning it is constitutionally valid.

Here is a snapshot of what we are doing. When boat people arrive at Christmas Island, they have typically spent eight or 10 days on a rickety boat. They have typically come from landlocked countries and have typically never spent time on the ocean. Typically, they have had not enough to eat and not enough to drink. Typically, they have had no opportunity to wash or to change their clothes. Typically, they arrive distressed, frightened and wearing clothes caked in their own excrement.

They are not allowed to shower or to change their clothes before they are interviewed by a member of the Immigration Department. It is difficult to think of any decent justification for subjecting them to that humiliation.

When they arrive, any medical appliances they have will be confiscated and not returned: spectacles, hearing aids, false teeth, prosthetic limbs, are all confiscated. If they have any medications with them, those medications are confiscated and not returned. According to doctors on Christmas Island, one person has a fulltime job of sitting in front of a bin popping pills out of blister packs for later destruction.

If they have any medical documentation with them, it is confiscated and not returned. The result of all of this is that people with chronic health problems find themselves denied any effective treatment. The results can be very distressing. For example: a doctor who worked on Christmas Island told me of a woman who had been detained there for some weeks and who was generally regarded as psychotic. Her behaviour was highly erratic for reasons that no-one understood. The consultation with this woman was very difficult because, although the doctor and the patient were sitting across a table from each other, the interpreter joined them by telephone from Sydney. Eventually, the doctor worked out that the problem was that the woman was incontinent of urine. She could not leave her cabin without urine running down her leg. It was driving her mad. When the doctor worked out that this was the cause of the problem, she asked the Department to provide incontinence pads. The

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Department's initial response was "we don't do those". The doctor insisted. The Department relented and provided four incontinence pads per day: not enough, so that the woman needs to queue for more but the incontinence pads made a profound difference to her mood and behaviour.

Doctors are required to determine within 48 hours whether a person is suitable to be moved to Manus Island or Nauru. The tests which are necessary for that assessment take seven days to complete. They are not given the opportunity to complete the tests properly. The detainees are nevertheless moved to Nauru or Manus Island.

In offshore detention, detainees are given no sense of safety and no reason for hope. They are told that the length of their stay is impossible to assess and that it may be as much as five years. They are told that they will never be allowed to settle in Australia. They are housed in conditions which are uncomfortable and dangerous and calculated to persuade them to abandon their claims for protection and return instead to face persecution.

Three months ago a single woman who was being held in Nauru complained repeatedly to the Department of Immigration that there was a man who was constantly harassing her. She told them she felt at risk. She complained that, because she was housed in a tent, she was not able to lock herself in at night. She complained that this made her feel very unsafe.

Nobody took any steps to protect her.

The man she complained about raped her. Neither, the Australian Department of Immigration and Border Protection nor the Nauru police have taken any steps at all in relation to the matter. The woman is pregnant as a result of the rape.

In February 2014 Reza Barati was killed on Manus Island. Initially, Australia said that he had escaped from the detention centre and was killed outside the detention centre. Soon it became clear that he was killed inside the detention centre. It took nearly five months before anyone was charged with the murder of Reza Barati. Nobody has yet been brought to court.

Just a couple of weeks after Reza Barati was killed, I received a sworn statement from an eyewitness. The statement included the following:

"J ... is a local who worked for the Salvation Army. ... He was holding a large wooden stick. It was about a metre and a half long ... it had two nails in the wood. The nails were sticking out ...

When Reza came up the stairs, J ... was at the top of the stairs waiting for him. J ... said 'fuck you motherfucker' J ... then swung back behind his shoulder with the stick and took a big swing at Reza, hitting him on top of the head.

J ... screamed again at Reza and hit him again on the head. Reza then fell on the floor ...

I could see a lot of blood coming out of his head, on his forehead, running down his face. His blood is still there on the ground. He was still alive at this stage.

About 10 or 15 guards from G4S came up the stairs. Two of them were Australians. The rest were PNG locals. I know who they are. I can identify them by their face. They started kicking Reza in his head and stomach with their boots.

Reza was on the ground trying to defend himself. He put his arms up to cover his head but they were still kicking.

There was one local ... I recognized him ... he picked up a big rock ... he lifted the rock above his head and threw it down hard on top of Reza's head. At this time, Reza passed away.

One of the locals came and hit him in his leg very hard ... but Reza did not feel it. This is how I know he was dead.

After that, as the guards came past him, they kicked his dead body on the ground ..."

It is difficult to understand why nobody has yet faced a court and been convicted of the murder of Reza Barati.

Not many Australians know about the Al Kateb case. That's a pity, because, even with our convict past and a history of transportation, I suspect that most Australians would be appalled at the idea of

locking up and mistreating innocent human beings and holding them in detention, if necessary for the rest of their life.

Unfortunately, this wilful mistreatment of asylum seekers is supported by a majority of the public because they believe that they are being protected from dangerous criminals. They have been persuaded that boat people are criminals because successive governments have referred to them as “illegals”. It’s been going on for 14 years. When the current government came to office, the Department of Immigration and Citizenship was renamed the Department of Immigration and Border Protection. “Protection” implies a threat. It is skilful dog-whistling because the public are induced to think that we are being protected from criminals and protecting us from criminals must necessarily involve harsh treatment of those criminals. If it was true, it would make sense. But it is not true – it’s a cynical lie which has led the whole of Australia into tolerating things which no civilized country should ever tolerate.

It may take a long time for this country to come to its senses. Ending slavery took a long time, because vested interests had powerful arguments that explained why slavery was good for society. Ending transportation took a long time, because there were powerful arguments which explained why transportation was good for society. Ending our mistreatment of asylum seekers may take a long time, because dishonest governments are capable of putting forward arguments which suggest that mistreating boat people is a good thing for society. But it is not good for society: it has led us into very dark territory where our conduct as a nation betrays our vision of ourselves. We can do much better.