Condemned to the colonies. Penal transportation as the solution to Britain's law and order problem

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There are many reasons why companies and governments organise migration. For example, to profit through the sale of slaves, solve labour shortages, reduce pressures caused by excess population, expatriate political enemies or to colonise. For a period of 250 years, mainly over the eighteenth and nineteenth centuries, Britain found another motivation, a punitive one. It embarked upon and sustained a system of coerced penal migration, exiling around 225.000 people to destinations 'beyond the seas' as punishment for breaking the law. This was an unusual way of organizing migration. While the policy was undeniably part of a criminal justice strategy, it was crafted to fit a second purpose, that of imperial expansion. Domestic and international agendas were simultaneously served through penal transportation. The nature and organisation of penal transportation, why this practice emerged when it did, what forces kept it going, and why it came to an end, form the subject matter of this paper.

Early origins of penal transportation

Transportation was a very Imperial solution to a domestic penal problem. The problem was how to punish criminals, and the answer was with exile, but without an Empire there would be nowhere to send miscreants. Such a penal strategy was thus restricted to powerful countries with overseas possessions. Transportation wedded penal and colonial policies in a second sense: it also created a role for criminal justice in imperial expansion by using convicts as empire-builders. Richard Hakluyt pointed out this possibility in the 1580s when he wrote that convicts, 'condempned for certen yeres in the western parts [might] be raised againe, and doe their countrie goodd service.'[1] The policy offered reform of the offender, and service to the Empire.

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[1] A. Roger Ekirch, *Bound for America. The transportation of British convicts to the colonies 1718-1775* (Oxford 1987) 7.

In Britain, enforced migration as punishment has a history that spanned three centuries. To understand the place of penal transportation in criminal justice history, it is necessary to begin with the structure of England's legal system.[2] In particular, it is important to grasp the primacy of the death penalty, and the growing pressures leading to the development of alternative, 'secondary' punishments. This is the history of transportation versus incarceration. While ultimately the latter triumphed – a legacy which continues today – there was a lengthy period where the punishment of felons lay in death or exile.

Crimes fell into one of two categories: misdemeanours (minor) and felonies (serious). With time these categories became muddied (particularly following law reform in the 1820s), but to begin with they were quite distinct. Misdemeanours were typically summary offences (dealt with by a manor court or magistrate), involving petty theft and crimes of civil disobedience. These were punishable with fines, whippings, a few hours in the stocks or pillory, or a few days incarceration. Felonies were indictable (tried before a Quarter Session or Assize court). These were deemed serious offences and ranged from theft above the value of one shilling, through assault and robbery, to rape, murder and treason. All felonies were punishable by death. Execution was the 'capital' or 'primary' punishment. For a very long time indeed, judges lacked any alternative sentence as there was no 'secondary' punishment.

This is not to say that everyone found guilty on a charge of felony was executed. Far from it. 'Pious perjury' saw juries convict offenders of lesser crimes than charged with (these were known as partial verdicts and involved, for example, reducing the value of a theft from two shillings to sixpence, thus demoting the offence from felony to misdemeanour).[3] Then there was the hope, cherished by all who were sentenced to death, of being recommended to mercy, and pardoned. At this point in proceedings, a guilty person in receipt of a pardon would be returned to society. Most significantly, courts reduced the number of executions through recourse to 'Benefit of Clergy'. Benefit of Clergy has been described as 'the massive fiction that tempered in practice the harshness of the common law rule that

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[2] For an overview, see J. Innes, 'The role of transportation in seventeenth and eighteenth century English penal practice' in: C. Bridge ed., *New perspectives in Australian history* (London 1990) 1-16.

[3] J.M. Beattie, *Crime and the courts in England 1660-1800* (Oxford 1986) 424.

virtually all felonies were capital offences'.[4] Originally, from the fourteenth century, this was an exemption for clerics allowing them to be tried in the King's Court but punished by an ecclesiastical one. Eligibility was restricted to ordained clergy, whom courts identified through the application of a literacy test, a practice which continued until 1706. Allowing courts to determine literacy opened up an avenue to secularise Benefit and empower courts with discretion. The test they developed was 'reading' Psalm 51. This became known in common parlance as the 'neck verse', for obvious reasons. Any man who could recite the psalm could ask the judge for Benefit and, if bestowed, walk free, whatever the crime.[5] From 1487 branding was introduced for those granted Benefit, with the brawn of the thumb marked with 'T' for thief or 'M' for murderer, in an unconvincing attempt to restrict access to Benefit to one occasion only.[6] Prior to 1693, women did not have equal claims to Benefit, and there existed the anomalous situation where a woman would be condemned to death for a crime for which a man would not. Over the seventeenth century, Benefit of Clergy was gradually extended to women, although not fully so until the century's close.[7]

Benefit of Clergy was thus a powerful tool for ameliorating the ferocity of the capital code and for giving courts discretion, and over time was extended to cover more and more men, and eventually women. Countervailing the expansion of this mitigation, was a contraction in the number of crimes that were 'clergiable'. Following the death of a master at the hands of his men, 'petty treason' (killing their lord) was removed from Benefit in 1497. So began a process of rebuilding a capital code, that is, a set of laws whose violation was punishable with death. Over the ensuing fifty years, murder, rape, housebreaking, highway robbery, horse-stealing, and theft from churches were also withdrawn from Benefit. There followed pickpocketing, and burglary. Serious crimes (ones threatening violence), and those difficult to stamp out, were gradually removed from Benefit. At this

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[4] Beattie, *Crime*, 141.
[5] By 1485 nearly all felonies were clergiable.
[6] The 1487 statute limited the guilty to claiming Benefit of Clergy once only, but in practice, second offenders were not consistently denied Benefit, creating another element in judicial discretion. From 1576 Benefit meant immediate discharge. There was an option of detaining such a clergied felon for twelve months, but this option was rarely exercised: Beattie, *Crime*, 142.
[7] Beattie, *Crime*, 142.

point, most larceny remained clergiable and most thieves were not hanged, but a growing number of offenders did face the death penalty, escape from which could only be secured through a pardon, granted by Court or King, that returned to them their freedom.

Such liberty for convicted criminals – secured through Benefit or pardon – was not always politically palatable. Nor was the alternative, of hanging more of them. A 'secondary' punishment was needed. For an imperial nation such as Britain, exile to the colonies, for a period of penal servitude, offered an attractive package. The earliest British statute embodying this principal dates back to 1597, with 'An Act for the punishment of rogues, vagabonds and sturdy beggars'.[8] Almost as soon as English colonies were founded in North America there were attempts to transport convicts to them. In 1614, a few years after the founding of Virginia in 1607, James I ordered that felons reprieved from capital punishment could be sent to labour in the colonies. The numbers sent were small, probably a mere several hundred before the English Civil War (1642-1649). Under Cromwell, transportation continued: in 1654 pardons from death were granted on the condition that the convicts were transported 'to some English Plantation' and that if they returned within ten years the pardon would be cancelled.[9] Estimates of annual numbers of criminals who were exiled over the course of penal transportation are presented in Figure 1. It should be remembered that there was always a gap between the numbers sentenced to transportation, and the numbers actually sent; the Figure records the latter.[10]

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[8] Ekirch, *Bound*, 1.

[9] Beattie, *Crime*, 472. See also C. Herrup, 'Punishing pardon. Some thoughts on the origins of penal transportation' in: S. Devereaux and P. Griffiths eds, *Penal practice and culture, 1500-1900* (Basingstoke 2004) 121-138.

[10] The proportion actually transported varied between 30 and 75 per cent over the period 1811-1848. A.G.L. Shaw, *Convicts and the colonies. A study of penal transportation from Great Britain and Ireland to Australia and other parts of the British Empire* (Melbourne 1981) 150.

Fig. 1: A history of British penal transportation, 1614-1868
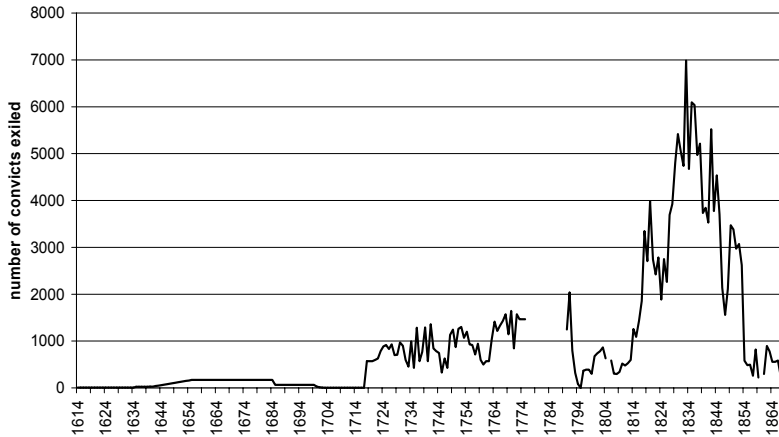
Source: 1614-1717: figures are based on Abbot Emerson Smith, *Colonists in bondage: white servitude and convict labor in America 1607-1776* (New York 1947). Smith lists all recorded cases. Where Smith says figures are underestimates (e.g. five offenders transported) we have doubled his figures. John Beattie offers a different account, with an estimate of a 'few hundred' per year: J.M. Beattie, *Crime and the courts in England 1660-1800* (Oxford 1986) 472. 1718-1775: figures are based on Figure 4 of A.R. Ekirch, *Bound for America: The transportation of British convicts to the colonies 1718-1775* (Oxford 1987) 23. This figure gives numbers transported from London, Middlesex, Buckinghamshire and the Home Counties. We have estimated total numbers by inflating these annual figures in proportion to the global estimates given by Ekirch of the ratio of these counties' contributions, to totals for England and Wales, Ireland and Scotland. Ekirch's figures are based on the subsidy paid to shippers, which ended in 1772; after this date he estimated arrivals from J. Howard, *Account of the Principal Lazarettos*. 1788-1868: figures are based on Charles Bateson, *The Convict Ships* (second edition; Glasgow 1985), Appendix. These have been augmented to include the comparatively small number of convicts transported by Britain from other colonies to Australia, recorded in *Guide to Convict Records in the Archives Office of NSW*, No.14 (second edition; Sydney 1981), Appendix A; and P.R. Eldershaw, *Guide to the Public Records of Tasmania Section Three Convict Department* (revised; Hobart 2003) Appendix 3.

During the first decade or so of the Restoration there was considerable interest by judicial authorities in transportation of those convicted in the courts. Not only did this include offenders sentenced to death and then

pardoned, but also those found guilty of lesser charges, and clergied felons. In 1661 parliament passed 'An Act for the better relief of the poor of this Kingdom' and shortly after, in 1666, 'An Act to continue a former Act for preventing of theft and rapine upon the Northern Borders of England'. To begin with, banishment was entwined with concepts of crime and poverty, but in 1666 the motivation was political. The target group were 'moss-troopers' from Scotland who made incursions into Cumberland and Northumberland. Both acts created transportation to American plantations as an 'option' that the guilty felon could nominate in place of death. This was a legal nicety, as common law and the *Habeas Corpus Act* made it illegal to impose a sentence of exile.[11] Transportation thus became an alternative to Benefit, and to pardons. In John Beattie's view, judges used their power to grant or withhold Benefit to manipulate defendants into petitioning for transportation. In the 1670s, the transportation option was extended through 'An Act for taking away, the Benefit of Clergy from such as shall steal cloth from the rack, as from such as will stea[l] or imbezil his Majesty's ammunition and stores', and 'An Act to prevent the malicious burning of houses, stacks of corn and hay, and killing or maiming of cattle'.[12] Transportation thus became the alternative to death, pardon, and Benefit; in short, to death or freedom.

From the 1670s, however, transportation practice waned, not through lack of enthusiasm by judicial authorities for a 'middling' punishment between death and freedom, but because the process of transportation of convicts to America itself broke down. Organisation was *ad hoc* and private, relying on shipping merchants transporting sentenced offenders whom they were permitted to sell as indentured labour in America. (A rich convict might buy their freedom.) The system failed. Merchants would only take from the gaols those convicts destined for transportation whom they considered could be sold for a suitable return. This meant that many of those, whom the king had pardoned on condition of being transported, especially women, remained in England.[13] Moreover, the colonists in Virginia and Maryland, and to a lesser extent in the West Indies, attempted to restrict or prohibit the import of convicts. By the

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[11] Abbot Emerson Smith, *Colonists in bondage. White servitude and convict labor in America 1607-1776* (New York 1947) 91.
[12] Leon Radzinowicz and Roger Hood, *A history of English criminal law and its administration from 1750. Vol. 5: The emergence of penal policy* (London 1986) 465.
[13] J.M. Beattie, *Policing and punishment in London 1660-1750* (Oxford 2001) 294.

1690s, prisoners in England were still being conditionally pardoned to transportation, but few were actually going. A telling indication of the failure of the system was the practice of allowing such convicts to transport themselves: they were permitted to leave prison if they gave sureties that they would sail to America.[14]

The wars immediately following the 1688 Revolution (1689-1697 and 1702-1713) created a crisis for the English penal system. The rate of crime increased, especially at the cessation of hostilities in 1697 and 1713. The penalties for property crimes were made harsher, with more and more offences removed from the Benefit. These included: sheep stealing; theft from the mails; breaking into houses, shops, warehouses and stealing to the value of five shillings or more; shoplifting to that value; theft from stables to that value; theft from a bleaching green of linen or cotton worth ten shillings or more; theft of goods valued at or above forty shillings or more from a ship in a navigable river or from a wharf; and the list goes on. New offences were also invented, such as the 1715 Riot Act. The infamous 1723 Waltham Black Act added fifty capital offences, in part by redefining what constituted private property. Hitherto public property like hares and fish became private and subject to game laws, while popular wage supplements such as gleanings and sweepings, and taking firewood from the forest, similarly became outlawed.[15]

So commenced the creation of England's 'Bloody Code', a vast body in excess of two hundred offences (possibly as many as 250) all punishable with death. There was a heightened perception of a need for an effective alternative to capital punishment. Imprisonment for up to two years with hard labour had been made available to courts by an Act in 1706, but this was not considered a severe enough punishment and transportation remained the favoured option. Transportation, however, had proved to be unworkable in practice. In a desperate, but perhaps significant, gesture, in 1697 the government paid merchants eight pound per head to transport fifty women convicts to the Leeward Islands.[16]

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[14] Beattie, *Crime*, 483.
[15] For one study on this area see David Jones, *Crime, protest, community and police in nineteenth-century Britain* (London 1982).
[16] Beattie, *Crime*, 482.

An effective system of transportation

In the sixty years between the Restoration in 1660 and the South Sea Bubble in 1720 England experienced a series of economic changes dubbed by historians the 'Commercial and Financial Revolution'. This revolution had far-reaching social effects, including on crime and penal policy.

The Commercial and Financial Revolution was in large measure a result of the development of the Atlantic economy and England's importance in it. England's imperial footholds in the Americas from the first half of the seventeenth century greatly expanded after 1660. The growing English colonies required ever rising flows of labour, much of it fulfilled by the introduction of slave labour from Africa organized mainly by English merchants. Exports of agricultural staples such as sugar and tobacco flowed eastward to English and Scottish ports; colonial shipbuilding materials and skills were increasingly used in the expansion of England's merchant marine; and England's manufactured goods were shipped directly to its American colonies, as well as to trading posts on the West African coast as part of the business of supplying the plantation colonies in America with slave labour. The Atlantic economy became the focus of England's wars with its European rivals. During this sixty year period, England fought two wars against the Dutch and two against France and its allies, lasting a total of 25 years. Success in these conflicts expanded England's naval power and the size of its colonial empire in the Americas. England – from 1707 Britain – was emerging as the world's leading power.[17]

The rise of the Atlantic economy had two effects on penal policy. The trade and wealth it stimulated led to the growth of London and other port cities with an inevitable increase in crime. The revolution made England materially wealthier. There was an increase in consumption, in trade, transport and commerce, and in the conspicuous display of personal wealth.[18] The opportunities for crime against property therefore also increased – from shoplifting to highway robbery. Second, England's imperial rivalries, which were both a cause and result of the expansion of the Atlantic economy, led to a succession of wars, the ending of which was always accompanied by a 'crime wave', raising the spectre of widespread social upheaval.

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[17] G. Raudzens, *Empires. Europe and globalization 1492-1788* (Stroud 1999) 115-118.
[18] N. Glaisyer, *The culture of commerce in England, 1660-1720* (Woodbridge 2006) 1-8.

Moreover, the Commercial and Financial Revolution significantly improved the capabilities of the central government by providing it with a secure fiscal system which more efficiently siphoned some of the increased private wealth into the public coffers.[19] Together these changes created the preconditions which transformed what had hitherto been the desultory and *ad hoc* practice of penal transportation into a well-organized and properly funded administrative machine which delivered a large and consistent exodus of British criminals. The end of the War of Spanish Succession in 1713 created a moral panic amongst the ruling elite about the rise of crime and unrest, especially in London. The Hanoverian succession to the British throne in 1714 produced a more active and resolute central government which was blessed with the financial support required to implement its policies. The expansion and economic growth of England's American colonies increased their demand for labour and underpinned the willingness of individual planters to extend their purchase of coerced labour to imported felons.

Fig. 2: Distribution of punishments at the Old Bailey, London, 1670s-1830s
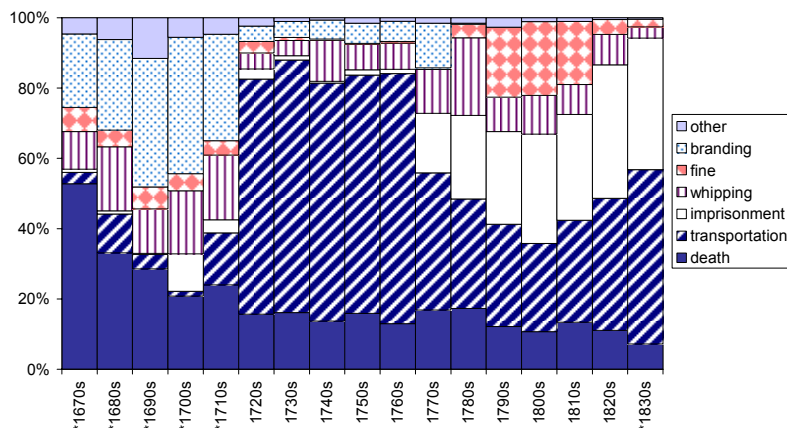
Source: Summary statistics based on cases taken from the Proceedings of the Old Bailey, www.oldbaileyonline.org accessed on 19-01-2007. (*) indicates incomplete

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[19] P.K. O'Brien and P.A. Hunt, 'The rise of the fiscal state in England, 1485-1815', *Historical Research* 66 (1993) 129-176.

decades. Note that a large proportion of those sentenced to death had their sentences commuted to transportation.

The 1718 Transportation Act thus proved not to be another failed legislative measure but rather an effective instrument for responding to the perceived rising flood of crime in Britain. The Act had three elements which made it successful, at least in these terms. Firstly, it extended the scope of the punishment of transportation to criminals other than just those reprieved from a death sentence. Such men and women still made up some of the growing number of transported convicts, but were now joined by those found guilty of larceny and who were directly sentenced to transportation. Figure 2 clearly shows the immediate impact this legislation had on sentencing practices at the Old Bailey in London. A large proportion of those sentenced to death (the dark series at the bottom of the figure) were in practice being exiled, but after 1718 the ranks of the pardoned were swamped as sentencing to transportation expanded in scope. Secondly, the Act was effective in ensuring that a high proportion of those sentenced to transportation would in fact be sent. It provided a financial incentive to merchants to ship convicts to America by paying a subsidy. In order to receive the subsidy the merchant had to ship all the convicts sentenced to transportation held in the gaols: picking and choosing the most valuable convicts was no longer permitted.[20] Thirdly, the development of the Chesapeake colonies provided a source of demand for convict labour which ensured that the merchant could nearly always dispose of his cargo at a substantial overall profit.[21] These three elements meant that in the future far more of those found guilty of crimes in Britain would be forcibly exiled to the New World, a trend evident in Figure 1.

The policy of penal transportation, however, contained within it the seeds of its own destruction. Its success depended on economic growth in the receiving economies. Indeed, by supplying labour to these colonies, transportation contributed to their economic expansion. If the colonies were depressed, or trade was interrupted by war, the transportation machine faltered. But over time colonial economic success undermined transportation as a penal policy. In the first place, the great expansion of Atlantic commerce enhanced the volume of merchant shipping between American

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[20] Beattie, *Policing*, 430.
[21] Smith, *Colonists in bondage*, 122; David W. Galenson, *White servitude in colonial America: an economic analysis* (Cambridge 1981) 157.

and British ports. The more frequent the number of sailings from American ports the easier it was for transported convicts to return to Britain, thus removing one of the key advantages of transportation of ridding the mother country of its criminal element.[22] Secondly, the more the American colonies progressed economically and socially, the less the penalty of transportation served to deter criminal activity by fear. Indeed, it might be seen by some as more of an opportunity to make a better life in the New World than as a harsh and terrifying punishment. There was always a drawback to penal transportation from the deterrence point of view that the punishment took place out of sight of the rest of the (potentially criminal) populace, but at least in the beginning the punishment held some element of terror to counteract this. But as the colonies took on the appearance of desirable places to which to be consigned (and easier to return from if things did not work out) the deterrence flaw was greatly exacerbated. Thirdly, as the colonies became more developed they became more vociferous in their opposition to being used as a dumping ground for Britain's moral refuse. Undoubtedly there was great hypocrisy in slave-owning Maryland and Virginia attempting to take the moral high ground by disputing the mother country's propriety in arranging to sell her convicts to its planters, but it proved a useful political stick with which to beat Britain as the American colonists asserted themselves in the years before their Revolution.[23]

These undermining forces can be seen developing from the 1750s. For the first thirty years after the 1718 Act the system seemed to work well, helped no doubt by the longest period of peace in the eighteenth century, 1713-1739. The end of the War of Austrian Succession in 1748, however, brought about the usual post-war trauma with spiralling crime and social unrest. In the early 1750s the British parliament began to question the efficacy of penal transportation, pointing to its failings in preventing convicts returning to England and its lack of dread. A parliamentary committee recommended replacing transportation with hard labour in chains on England's naval dockyards.[24] This was not acted upon at the time, but was an indication of growing concerns about the effectiveness of transportation in reducing crime in Britain. Such concerns were pre-empted

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[22] Ekirch, *Bound*, 207-212.
[23] Ibidem, 139.
[24] Nicholas Rogers, 'Confronting the crime wave: the debate over social reform and regulation, 1749-1753' in: Lee Davison *et al* eds, *Stilling the grumbling hive. Responses to social and economic problems in England, 1689-1750* (New York 1992) 77-98.

by the actions of the Anglo-Americans in their rebellion against the crown in 1775. Thereafter America was closed to British convicts for good.

The cessation of penal transportation to America led to overcrowding in the major gaols. As a temporary measure, male prisoners awaiting transportation to America were housed in 'prison hulks' – old ships converted for the purpose and moored in the Thames and at Portsmouth and Plymouth – and put to hard labour on the river and in the naval dockyards. A shift in penal policy towards imprisonment at home instead of banishment abroad was foreshadowed by the passing of the Penitentiary Act in 1779, though no penitentiaries were actually built as a result.[25] Nevertheless, imprisonment in the existing Houses of Correction increased in the face of the cessation of transportation, and it can be seen in Figure 2 how the American War of Independence placed incarceration on the justicial menu as never before, in a manner from which modern society has never retreated. At the time, however, this could only be a partial solution, constrained heavily by the lack of suitable places, a problem further exacerbated by the growing numbers being processed by the courts. Transportation was not dead, merely in temporary limbo, as ardent searches were quickly made for an alternative destination.

After a brief exploration of the idea of sending convicts to West Africa (indeed a few hundred were dispatched there) and various other places, the government alighted on an entirely new destination – a place where there were no European settlements and where Britain's military presence was marked only by its absence.[26] In this new location there were no English missionaries to protect, no trading companies to secure, no explorers to rescue, no European power to forestall. And it was about as far away from Britain as the globe permitted. A few points on the eastern seaboard of New Holland had been visited by the English naval officer, Captain James Cook in 1770, and he had taken this opportunity to announce Britain's 'possession' of the eastern half of the continent, but no steps had been taken by Britain since then to make good its claim. A British colony could have been established in Australia without convicts, but penal transportation to Australia was impossible without a colony. If a British colony could not be established beforehand, it must be done at the same time as the convicts' arrival. Thus the First Fleet took the form of a military

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[25] For an interesting account, see Simon Devereaux, 'The making of the Penitentiary Act, 1775-1779', *Historical Journal* 42 (1999) 405-434.
[26] E. O'Brien, *The foundation of Australia* (second edition; Sydney 1950) 111-133.

invasion – a veritable 'convict Armada' – establishing itself in Port Jackson (Sydney) in January 1788.

While the transportation of convicts to America was a 'private' affair, transportation to Australia was government controlled and regulated. Without a pre-existing colony and a demand for indentured workers, no merchant was going to ship convicts at their own expense: the state had to perform or fund the task that private enterprise had previously fulfilled. The First Fleet was naval, but subsequent convict shipping would involve contracting private ships. The next ship to sail to New South Wales was the *Lady Juliana*, a private vessel engaged to move female offenders to the new colony. The master was paid per head per day, and he recorded the longest trip in convict transportation history.[27] Further, there was an additional allocation of funds for any fresh produce acquired at port, and the women were very well fed throughout the passage. Subsequent contracts eliminated the daily rate and additional funding, and voyages were considerably faster, but not necessarily successful. The Second Fleet was an unmitigated disaster.[28] Slave shippers had been recruited to transport the convicts. Their contracts paid a rate per head, but heads were counted on embarkation, not on arrival. The death rate was shocking. While the *Lady Juliana* lost five women out of 226 embarked – a rate of two percent – and delivered a healthy female cargo, the Second Fleet lost over one quarter of the 1.017 men and women that it carried. This figure was *en route*. The carnage continued after arrival. Weak and ill, several died as they disembarked, a further 81 perished in the emergency hospital set up to deal with the crisis, and more than 400 were sick, 'emaciated, starving, racked with fever, defaced by scurvy, and with not even a blanket to cover them'.[29]

This led to further reform of the contractual arrangements and the system settled into a much more successful regime: private shippers were paid on results, they were more tightly regulated by the Transport Commissioners from 1801, and most importantly, from 1815 were required

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[27] The length of the journey gave rise to a claim that this was a 'Floating Brothel', with the master stopping in ports to sell the sexual services of the convicts. See Sian Rees, *The floating brothel. The extraordinary story of the* Lady Juliana *and its cargo of female convicts bound for Botany Bay* (Sydney 2001).

[28] Michael Flynn, *The second fleet. Britain's grim convict armada of 1790* (Sydney 1993).

[29] Charles Bateson, *The convict ships 1787-1868* (Glasgow 1959); Marjorie Barnard, *A history of Australia* (Sydney 1962) 213.

to carry a naval surgeon superintendent.[30] The surgeon supervised the health and wellbeing of the convicts, including the need to take fresh provisions and citrus fruit for the prevention of scurvy. Care was taken in selecting convicts for embarkation – again, the surgeon's responsibility – in order that those with infectious illnesses would be excluded, maintaining the health of the vessel. The outcome was one of the lowest seaborne death rates of the time, at less than three per cent.[31] Compare this with the neglect and overcrowding common in the Atlantic slave trade, which produced death rates as high as one in four on some voyages – one in three in the French trade – and it is clear that considerable care was taken in delivering convicts safely to Australia's shores.[32]

Because the task was not simply the removal of offenders, but the colonisation of a country, transportation to New South Wales (NSW) faced different organisational issues. There was no existing settlement, no clamorous employers in need of cheap labour. These criminal transportees were not indentured; instead, their time remained the property of the state. The state used convicts to build infrastructure, and to staff the settlement. As the colony developed, the state could chose to 'assign' convict labour to private employers, but it never sold them, and it never relinquished ultimate control. Instead, the process of private labour was government regulated.[33] Even this was later criticised as a form of slavery, and when transportation to NSW ended under this taint, a labour system called 'probation' succeeded it in Van Diemen's Land (Tasmania), the other Australian convict colony. Again, state regulation stipulated conditions of employment (clothing, food,

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[30] This was too late to apply to the Third Fleet which had already set sail, although its death rate was less than half that of its immediate predecessor.

[31] Excludes shipwrecks. John McDonald and Ralph Shlomowitz, 'Mortality on convict voyages to Australia, 1788-1868', *Social Science History* 13 (1989) 285-213, there 289. Also see Ian Brand and Mark Staniforth, 'Care and control: Female convict transportation voyages to Van Diemen's Land, 1818-1853', *The Great Circle* 16 (1994) 23-42.

[32] For comparative figures see H.S. Klein, *The middle passage. Comparative studies in the Atlantic slave trade* (Princeton 1978) 232; H.S. Klein and S.L. Engerman, 'A note on mortality in the French slave trade in the eighteenth century' in: H.A. Gemery and J.S. Hogendorn eds, *The uncommon market. Essays in the economic history of the Atlantic slave trade* (New York 1979) 261-272, there 264.

[33] Barrie Dyster, 'Public employment and assignment to private masters, 1788-1821' in: Stephen Nicholas ed., *Convict workers. reinterpreting Australia's past* (Cambridge 1988) chapter 9.

healthcare provision etc.) but this time it oversaw labour contracts between convicts and private and public employers, contracts which stipulated wages and approximated more closely the conditions of free workers, at least in the beginning.[34] However, the end of transportation to NSW was recognised for what it was – a foreshadowing of the end of the system – and from 1840 Britain commenced two decades of heavy investment needed to construct the modern prison system.[35]

The decision to continue the penal policy of transportation and to choose Australia to colonize for the purpose was taken in the midst of another revolution in Britain, though these decisions were not caused by it. The massive economic and social changes which are captured by the term Industrial Revolution were only just beginning to manifest themselves when the First Fleet assembled at Portsmouth. One of the most important effects of industrialisation in Britain was the rapid increase in population and urbanization, especially the growth of its largest city, London. The metropolitan population doubled during the eighteenth century, then doubled again by the middle of the nineteenth, standing at well over two million. Crime only had to grow in proportion and it would seem a crime wave was engulfing the city.[36] The demographic revolution also banished the notion that England was under-populated, a belief that had led some mercantilists to oppose penal transportation for the same reason they opposed all emigration.[37] While Britain was at war with France, shipping shortages constrained the number of offenders being exiled (see Figure 1), but when the war ended shipping became available, coincident with the crime rate skyrocketing. In 1815, for the last time for a century, Britain experienced the domestic social upheaval of the end of a major war and a post-war crime wave. The decades which followed, though free from war, were far from peaceful as the British economy was wracked with the birth

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[34] David Meredith and Deborah Oxley, 'Contracting convicts: the convict labour market in Van Diemen's Land 1840-1857', *Australian Economic History Review* 45-1 (2005) 45-72.

[35] For a general reference see N. Morris and D.J. Rothman eds, *The Oxford history of the prison: The practice of punishment in Western society* (Oxford 1995).

[36] And so some observers believed. See Patrick Colquhoun, *A treatise on the police of the Metropolis: Containing a detail of the various crimes and misdemeanours by which public and private property and security are, at present, injured and endangered: and suggesting remedies for their prevention* (London 1805).

[37] Beattie, *Policing*, 290.

pangs of industrial society and the concomitant spread of urban disamenities. Economic fluctuations were more pronounced between 1815 and 1850 than people had been used to in the eighteenth century, the absence of war notwithstanding. Poverty was more widespread as living standards fell.[38] The turbulent economy and deteriorating social conditions ensured that crime – its causes and remedies – remained firmly on the national agenda in the first half of the nineteenth century. This was an era of social reform, including penal policy.

Agitation against capital punishment had been growing alongside the eighteenth century expansion of Britain's Bloody Code. The gradual removal of Benefit from so many offences and the invention of new capital crimes had reinstated the death sentence as the symbolic (if not actual) centre of criminal justice. However terrifying death, and transportation, were meant to be, their threat was doing little to counteract the seeming crime wave and the growing pressure placed on the courts. As it stood, the legal system was failing. It came in for criticism, for its brutality and its inefficiency.[39] In lieu of effective systems of detection and prosecution, deterrence relied on extreme and exemplary punishment. Such severity had consequences. Not least among these were the efforts of many – unofficial as well as official – to temper the system. Victims were reluctant to prosecute, Grand juries were often unwilling to find a 'true bill' of indictment, trial juries were hesitant to condemn as indicted, preferring acquittal or finding partial verdicts, and judges made recourse to their discretionary powers.[40] This led to the critique, made by Samuel Romilly, that 'the law is nominally too severe, practically not severe enough'.[41] The reformer Fowell Buxton informed the House of Commons that the chances of being detected, convicted and punished for a crime was 1000:1. What an

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[38] There is a vast literature on living standards during industrialization. One very brief overview article is: Hans-Joachim Voth, 'Living standards during the industrial revolution: An economist's guide', *The American Economic Review* 93-2 (May 2003) 221-226.

[39] See, for example, Randall McGowen, 'A powerful sympathy: Terror, the prison, and humanitarian reform in early nineteenth-century Britain', *The Journal of British Studies* 25-3 (July 1986) 312-334.

[40] Peter King, *Crime, justice, and discretion in England 1740-1820* (Oxford 2000).

[41] Quoted in George Rudé, *Criminal and victim: Crime and society in early nineteenth-century England* (Oxford 1985).

effective justice system required, the reformers argued, was reliable detection, predictable verdicts, proportional punishments, and celerity.

The potential execution of many, in the name of laws that often lacked widespread political legitimacy, fired the search for secondary punishments and ultimately, law reform. The process was stalled by a political backlash in Britain following the French Revolution, but the issue was never going to go away and when the war ended in 1815, reform recommenced. There were some victories in the early nineteenth century with the death penalty removed from shoplifting to the value of five shillings, stealing from dwellings to the value of forty shillings and stealing from vessels to the value of forty shillings. Picking pockets, and stealing from bleaching grounds, followed suit. Momentum then picked up. In 1820 the Black Act was repealed, and in 1827, Robert Peel introduced a profound set of reforms that abolished the death penalty where it seemed anomalous, creating transportation as the alternative. He also transferred many minor property crimes and offences typically committed by juveniles into the arena of the Petty Sessions. This latter move acted to reduce the number of felons sentenced to exile, but the former increased it, amply demonstrated in Figure 1. More capital statutes were repealed in 1834 under John Russell. Over two decades from 1820, the Bloody Code was effectively dismantled, with capital crimes being reduced from around 250 at the start of the century, to just two types of crimes in 1841: murder, and treason. Such recasting of the legal system had only been possible in conjunction with reform of the police and heavy reliance on secondary punishment.[42] The immediate impact of Peel's reforms was not to stimulate the building of a national prison system, but to double the number of convicts transported to Australia. Transportation was arguably at its zenith, at least in terms of the number of people being shipped, from around 1815 to 1853. But the end was nigh. In just a few short years, a penal policy that had carried British justice for one-and-a-half centuries, would come to an abrupt end.

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[42] There is a useful discussion in Chapters 6 and 7 of Rudé, *Criminal and victim.* Also see D. Philips, 'Crime, law and punishment in the industrial revolution' in: P. O'Brien and R. Quinault eds, *The industrial revolution and British society* (Cambridge 1993) chapter 7; C. Emsley, 'The history of crime and crime control institutions' in M. Maguire, R. Morgan and R. Reiner eds., *The Oxford handbook of criminology* (second edition; Oxford 1997) chapter 2.

The end of penal transportation

Transportation to NSW commenced in 1788 and continued until 1840.[43] In the second major convict colony, Van Diemen's Land (now Tasmania), the system continued until 1853. At this point, the system was close to ending. The 1853 Penal Servitude Act anticipated the final demise, converting hitherto transportable offences to sentences of penal servitude served in 'any prison or place of confinement in the United Kingdom or any of Her Majesty's dominions beyond the seas as the Secretary of State might see fit'.[44] A small contingent of more serious offenders continued to be sent to the other side of the Australian continent when, from 1850, Swan River (Western Australia) requested that the British government send transportees to its failing settlement. The request was complied with except that the colony was denied the female convicts it so desperately wanted, and only men were sent. Transportation to Swan River, and Australia, finally ended on the ninth of January, 1868, when the *Hougoumont* disgorged its cargo of 280 criminal men.

In the great book of migration, what drew this chapter on penal transportation to a close? It ends in two parts. First, to America, in what turned out to be a respite rather than the termination of the project. Second, to Australia, some one hundred years later. Both endings have something in common, and that is the success of the penal enterprise in stimulating colonial economic growth. Its own achievement sowed the seeds of its ultimate downfall.

As a policy, enforced migration had simultaneously pushed all three buttons important to penal justice: retribution, deterrence, and reform.[45] In the seventeenth century, retribution and deterrence were unequivocally the driving forces behind criminal justice, although there was always the idea

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[43] Technically, convicts continued to arrive in NSW between 1844-49, with ten ships landing convicts at Port Phillip (now Victoria, but then NSW).

[44] The act also allowed for the freeing upon licence of convicts after serving certain periods of penal servitude, and so probation was born.

[45] See Simon Devereaux, 'In place of death: Transportation, penal practices, and the English state, 1770-1830' in: Carolyn Strange ed., *Qualities of mercy. Justice, punishment and discretion* (Vancouver 1996) 52-76.

that individuals might be rehabilitated by the experience.[46] Transportation offered retribution, as exiling criminals denied them access to family, resources, and society, in the process protecting that society. Dread of exile and enforced labour (particularly alongside slaves in the American case) made it an exemplary punishment second only to death in its ability to terrorise.[47] Over the eighteenth and nineteenth centuries, however, penal thought had embraced the possibility of the reform of offenders to a greater extent.[48] Transportation could fit this role too. It offered hope. It removed offenders from any contaminating criminal milieu, and it gave them opportunities for law-abiding success. Excess population caused unemployment and poverty. Britain's penal colonies offered employment, and at the expiration of sentences, the possibility of land too.[49] Relocating excess labour to countries of labour shortage was a productive strategy that lay at the heart of this blend of Imperial and penal policy.

Those individuals without use at home could become productive members of a new community. This fundamental tension between dread and promise bought both widespread support for the punishment (appealing as it did to the extremes of justice: retribution, deterrence, and

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[46] Beattie, *Courts*, 473: 'The rehabilitation of offenders was not a major consideration in the seventeenth century, but it was obviously recognized as a secondary advantage of transportation.'

[47] Ekirch, *Bound*, 156: 'By the late colonial period, thousands of convict servants and perhaps others toiled under debased conditions not altogether different from black slavery. At least for seven years' duration, convicts like slaves encountered rampant exploitation. For any set of labourers, such a prospect would be horrifying. For the white Britons who gloried in their freedom, it seemed downright barbaric.'

[48] Randall McGowen, 'The body and punishment in eighteenth-century England', *The Journal of Modern History* 59-4 (December 1987) 651-679.

[48] It seems to have been the intention of the courts in England in the mid seventeenth century that pardoned convicts transported to the American colonies would receive land at the end of their sentence. Whether or not they actually did so is open to question, but certainly the experience of the much larger numbers transported in the eighteenth century was that they did not receive any material assistance at the end of their sentence, in contrast to the way in which indentured servants were treated at their expiration. According to Ekirch, 'Compared to other white laborers, convict freemen had an especially rough lot.' Ekirch, *Bound*, 183. Land grants were made to some convicts at the expiration of their sentence in New South Wales in the early days, but not after 1820: N.G. Butlin, *Forming a colonial economy* (Cambridge 1994) 129; Dyster, 'Public employment', 128.

reform), *and* heralded its demise, as penal and colonial imperatives turned 'full circle', with opportunities and colonies expanding whilst dread was diminished.[50] Transportation received its first big blow when the American War of Independence permanently closed these colonies, causing a crisis in penal policy.[51]

Within eighteen months of the First Fleet arriving in Sydney, the French Revolution began. By 1793 Britain was at war with France and hostilities lasted until 1815 with a brief peace in 1802-1803. The number of convicts transported to Australia in these years grew slowly as the wars distracted British government initiative and shipping, and kept the crime rate subdued. The courts relied on imprisonment to a greater degree. The big surge in both crime and transportation came with peace after 1815. As occurred after 1718 in the case of transportation to America, there was a period during which the system appeared to be working well, but by the 1830s the tension between the economic development of NSW and the penal objectives of transportation attracted more critical comment. As the colony developed the punishment appeared to lose its terror, and therefore its ability to deter crime. Indeed, some argued the prosperity of the Australian colonies encouraged crime in Britain by encouraging people to commit criminal acts in order to be transported.[52] Although transportation did not share with earlier transportation to America the problem of convicts returning to Britain before their sentence expired – even in the 1830s the journey was too expensive – its failure to terrify was probably more extenuated.

Moreover, with the huge population increase in Britain and the demise of mercantilist ideology in the onslaught of free trade liberalism, emigration of the poor from Britain was now the new Imperial policy. Emigration of free persons to NSW was officially encouraged, and from 1834, subsidised. But the continued transportation of convicted felons to the same destination acted as a deterrent – not to crime, but to emigration.

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[50] David Meredith, 'Full circle? Contemporary views on transportation' in: Nicholas ed., *Convict workers*, 14-27.

[51] Erlich, *Bound*, 139: 'Transportation provoked some of the most heated denunciations of imperial policy voiced by Americans before the Revolutionary era. Probably no other issue excited such hostility during the years of Salutary Neglect.' Benjamin Franklin's suggestion in 1759 that the Americans should send rattlesnakes to England in exchange for convicts is well known.

[52] Meredith, 'Full circle', 22.

There were those who argued that the disadvantages of transportation to Britain could be overcome and that with suitable changes the policy could continue. By the 1830s, however, the tide of radical social reform was in flood in Britain and along with free trade, parliamentary franchise, public health, the legal system, the poor law and the institution of slavery in the British Empire, penal policy was under immense pressure from reformers at home. A parliamentary committee – chaired by an evangelist social reformer and appointed by a reform-minded government – recommended in 1838 that transportation to Australia be ended forthwith.[53] It was – but only to New South Wales. Penal transportation continued to Tasmania until the discovery of gold in eastern Australia in 1851 finally made the destination an absurd one for deterring and punishing British criminals. However, the colony at Swan River, 3.000 miles away on the west coast of the continent, was considered sufficiently remote to be a continuing receptacle for Britain's criminal element, until 1868 when penal transportation from Britain finally stopped, though by this time transportation as a punishment had definitely lost its currency.[54] As the death knell sounded for penal transportation, its chimes heralded what would be the rise of the Modern Prison. So ended a much neglected epoch in British penal history, an epoch which contained all the contradictions inherent in coercive migration: fearful dread, and promise of something better.

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[53] 'Report from the select committee on transportation, together with minutes of evidence, appendix and index' (Molesworth report) *P.P.*, 1838 (669) XXII (IUP *Crime and Punishment - Transportation* 3). Also see M. Kerr, 'The British parliament and transportation in the eighteen-fifties', *Historical Studies, Australia and New Zealand* 6.21 (November 1953); J. Ritchie, 'Towards ending an unclean thing: The Molesworth Committee and the abolition of transportation to NSW, 1837-40', *Historical Studies, Australia and New Zealand* 17.67 (October 1976) 144-164; Noel McLachlan, 'Penal reform and penal history: Some reflections' in: Louis Blom-Cooper ed., *Progress in penal reform* (Oxford 1974).

[54] Also see, David Smith, 'The demise of transportation: Mid-Victorian penal policy', *Criminal Justice History* 3 (1982) 21-45; Kirsten McKenzie, 'Discourses of scandal. Bourgeois respectability and the end of slavery and transportation at the Cape and New South Wales', *Journal of Colonialism and Colonial History* 4-3 (Winter 2003).