

# Transportation as a form of punishment: a history



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**Contemporary commentators argued that “ transportation was no punishment at all”. Do you think that this is an accurate statement of realities of transportation to America and Australia in the eighteenth and nineteenth centuries?**

## **Introduction**

In this paper, it shall be contended that at a superficial level, there is a measure of accuracy to the sentiments expressed in the quotation contained in the title statement. The perception of appropriate punishment that formed the public consciousness of the criminal justice system in Georgian England, where over 140 offences carried the immediate prospect of a capital penalty upon conviction, is the point of commencement. The preservation of a convict's life in a far off land was often perceived not as a true criminal sentence but as a lesser but equally effective form of pardon.

Public aversion to transportation as a true form of criminal sentencing intensified in the Victorian era. As the concept of the penitentiary replaced the earlier notions of banishment and its inherent cleansing of the social fabric of the ‘ criminal classes’, a seemingly free passage to an ungoverned land such as Australia was incompatible with the formidable images of Millbank prison and the panopticons modeled on the earlier work of Jeremy Bentham.

The superficial impression created by the contemporary commentators concerning the relationship between transportation and conventional notions of criminal punishment is submitted in this paper to be incomplete. This paper will explore a number of important corollaries that radiate from these conventional concepts, the chief of which is the development of the

Australian ‘ convict republic’ and its success in effecting reformation and societal integration of criminals that was never achieved in its English counterpart.. In addition to the physical risks posed to the convict cargo transported by eighteenth and early nineteenth vessels travelling from England to the distant lands of America and later to mysterious and unexplored Australia, transportation represented a form of unwilling emigration, often as a result of conviction for offences that by modern standards might warrant, at most, a non custodial disposition.

These points shall be developed within the following framework. It is important to appreciate the timeline within which transportation was available as a criminal sentence in England. The timeline may be divided into five distinct components: the period prior to the 1718 legislative reforms; the enactment of the *Transportation Act* , 1718 until the outbreak of the American Revolutionary War, 1776; the period of the prison “ hulks”; the commencement of Australian transportation, 1787 and the early Australian colonies; the reform of the Australian penal colony structure until the cessation of Australian transportation, 1840.

The analysis of the periods of transportation necessarily involves a comparison between the rationales employed by British authorities to justify transportation to America and that invoked with respect to Australia. The Australian colonial initiatives in turn reflected a powerful sea-change in public sentiment concerning transportation after the Bigge report of 1822. The twin Georgian era motivation to rid Britain of its criminals through banishment correspondingly populated a geopolitically strategic south Pacific colony. The penitentiary movement and its attendant principles of social

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control and reformation of the criminal classes at large ultimately became the principle focus of England's Victorian system of criminal sentencing and punishment..

The Australian penal colony experience is given primacy in this paper due to its extent and the various social forces that influenced its course between the sailing of the First Fleet to Australia in 1787 and the end of transportation sentences in the British criminal justice system to New South Wales after 1840. In direct reference to the quotation cited in the title, special reference is made to the contemporary transcripts of the proceedings at the Old Bailey in the relevant period. The cases and secondary authorities cited in support of the propositions advanced here are not submitted not as exhaustive but as illustrative of the points advanced.

### **The origins of the transportation sentence in English criminal practice- The American colonies**

Banishment as exile from one's homeland is an ancient sanction. <sup>[1]</sup> In English law, the practice did not originate with the passage of the *Transportation Act* in 1718. As early as 1674, a female defendant named "Mall. Floyd" was sentenced at the Old Bailey "...to be transported to some of the Plantations beyond the Seas". <sup>[2]</sup> Floyd was convicted of stealing children's clothing; hers is the earliest transportation sentence noted in the Old Bailey records. <sup>[3]</sup> These transcripts reveal that in over 50 cases recorded in the London courts between 1676 and 1684, transportation was the sentence imposed. In the majority of transportation cases, the offender was convicted of petty theft or larceny. <sup>[4]</sup>

The first *Transportation Act* apparently codified this common practice <sup>[5]</sup>. The American colonies were the most frequent ultimate destination of the persons sentenced to transportation between 1718 and the outbreak of the American War of Independence in 1776. It is plain that the public policy basis for transportation was multi-dimensional and reflected an inherent tension in English legal practice between the increased number of English criminal offences that nominally carried a capital penalty after 1660, and a recognition that the so-called 'Bloody Code' did not always result in a punishment that suited the crime. <sup>[6]</sup> Transportation and the consequence of banishment to a foreign land was perceived as a relief from the

It is noted in many of the academic authorities that transportation to the American colonies was suspended after 1776. However, the sentences continued to be imposed; between the American war and the first shipment of convicts to Botany Bay in 1787, Old Bailey records indicate that over 8700 persons were sentenced to transportation without necessarily ever leaving England <sup>[7]</sup>. Most of these male convicts served their sentences on the disease infested and crowded "hulks", the prison ships stationed on the Thames whose inmates were used to dredge the river. <sup>[8]</sup>

There is little question given the historical record that transportation to America, assuming that the dangerous Atlantic passage was survived by the convict, represented an opportunity for the offender to live a healthier existence, if not one where citizen status was attainable <sup>[9]</sup>. In contrast the later Australian experience, transportation to America was a practice intended to provide ready labour to the colonial economy. There was no

legal mechanism by which a convict could integrate themselves into free colonial society. Transportation almost inevitably resulted in a life of relatively healthy servitude for the convict in the colony, a result that may have been perceived as preferable to the existence of members of the under classes of their contemporary free English society, or the dangerous and disease carrying “ hulks” where sentences were passed after 1776 <sup>[10]</sup> .

It is of interest that while the American rebellion resulted in the suspension and then the end of transportation to America, by the time the war began the work output of African slaves was regarded by colonial enterprises as superior to that produced by transported English convicts. <sup>[11]</sup> The best of African labour was preferred to the worst of England as previously shipped to the colonies. <sup>[12]</sup>

The transport of convicts to America had also spawned a variety of myths concerning the “ returning felon” and his particular angers to English society. <sup>[13]</sup> Panics of this type were more a creation of fertile media minds of the period than rooted in fact. These fears were also advanced with less force during the period of Australian transport. <sup>[14]</sup> An earlier spur to the notion that transportation was in the general public interest of English society was found in the “ crime wave” popularly believed to be threatening London in the early 1790s. <sup>[15]</sup>

### **Australia**

Whereas the transportation of offenders to the American colonies was a pragmatic legal penalty that achieved the effect of banishment of

undesirables to a place where their labour could be utilized, the commencement of Australian transportation in 1787 engaged more profound and conflicting social policy considerations <sup>[16]</sup>. Such sentences served to remove undesirables from English society; Australia, a land only known to Europeans since 1770, represented a profound colonial opportunity for England. A economically self-supporting colony and its attendant military presence in the south Pacific region was a desired objective of English authorities. <sup>[17]</sup>

Transportation as a tool of criminal sentencing had been challenged prior to the transport of the first convicts to Australia. Jeremy Bentham is the most notable of these opponents, who saw transportation as extirpation when the societal goal ought to be the amendment of human nature through correction <sup>[18]</sup>. His theories of punishment were directed not to the banishment of offenders and the perceived removal of the criminal stain from the societal fabric, but to the principles of reformation of offenders through the use of imprisonment. The panopticon as devised by Bentham combined the concepts of penitence to be served by the offender to the state through separation from society and the labour performed while confined, and the ability of the prisoner to be returned to society an improved person. <sup>[19]</sup> The Bentham model was intended to incorporate a “calibration of deterrence”, where the length of sentence and its severity were matched to the crime committed to produce a reformed convict. <sup>[20]</sup>

It has been noted by Braithwaite that the longer convict passage to Australia was significantly less hazardous to the convicts than that to America.

Incentives were offered by the British authorities to the captains taking convicts to New South Wales for the number of convicts who were brought safely to the colony. The notion of banishment implicit in a transportation sentence was clearly tempered by a desire on the part of English authorities to have healthy and contributing persons in the colony. [21] The same attitude appears in the decision to transport by way of the “floating brothel” female convicts to the colony in 1790, a group of women later characterised as “the founding mothers of Australia”. [22]

It was after the English public became aware of how the transported convicts were housed and treated in the Australian colony after 1787 that provoked the criticisms contained in the title quotation. Bentham’s objections to transportation were rooted in his philosophy of social justice; the sentiments of the detractors of transportation sentences as captured above were motivated by the perception that Botany Bay and the later established Australian colonies permitted criminals to avoid their just desserts. The specific bases for these criticisms are examined below.

In the popular press, the Australia colonies came to be regarded as a place where ‘...There vice is virtue, virtue vice, / and all that’s vile is voted nice’ [23]. Bentham questioned “... whether the world ever saw anything under the name of punishment bearing the least resemblance to it,” [24] a sentiment that reflected a movement within English society to provide a moral underpinning to government policy. [25] From this perspective, rooted in Calvinistic notions of sin and penitence, the certainty and unremitting



harshness of an English prison sentence was to be preferred to the vagaries of a quasi-colonial, ungoverned existence in a tropical land <sup>[26]</sup>.

The first colonial governor, Arthur Philip, provided the best ammunition for the anti-transportation forces, with the sardonic observation that convicts were sentenced to a transportation regime where they were “...no longer be burdened with the support of your wife and family ... removed from a very bad climate and a country over burdened with people to one of the finest regions of the earth...where it is highly probable you may ultimately gain your character and improve your future”, a disposition that the Court was obligated to pass “...in consequence of the many aggravating circumstances of your case, and they hope your fate will be a warning to others”. <sup>[27]</sup>

Emsley has noted that prior to the Bentham led movement to rationalise English criminal justice and sentencing procedures on a reformation centred model, the three chief sentencing tools applied in the courts were death; transportation; corporal punishment, chiefly whipping. In serious matters, the aphorism “ execution or exile” was apt. <sup>[28]</sup> English sentencing law was one of absolutes, where pardons were rendered so often as a response to the disproportionality between what modern justice regards as petty offences and the available penalty that the justice system was rendered an “ unsustainable lottery”. <sup>[29]</sup>

It is suggested that modern commentators such as Hughes have overly romanticised the fate of the first Australian transportees, with descriptions of the Botany Bay colony as a prison “...with a wall 14, 000 miles thick”, where

its convict inhabitants were cast in bondage as a device to rid England of its criminal classes. <sup>[30]</sup> On this reading, the convicts were unwilling emigrants as opposed to a transplanted population. <sup>[31]</sup> This approach places greater emphasis than is reasonable on the sentencing consequence of leaving one's homeland, in contrast to both the quality of life otherwise typically available to these convicts in England, and the opportunities for advancement and full citizenship that evolved in the Australian colony not ever likely to be realised at home.

All commentators are agreed that the Australian penal colonists were overwhelmingly comprised of the very poor urban lower classes from the British Isles. <sup>[32]</sup> . The first shock to any collective perception of what rights might be extended to them new colony must have occurred shortly after the landing of the ' First Fleet' in 1788. The colonial leadership permitted cases involving alleged thefts from convicts to proceed on the strength of convict testimony, a procedure prohibited under conventional English law. <sup>[33]</sup> The right of *habeus corpus* was extended to convicts by the Australian colonial tribunals. <sup>[34]</sup>

These advances are themselves profound and represent an important if oblique rebuttal to the criticisms set out in the title question. Given that the overwhelming majority of transported convicts were convicted of theft and related offences, there is a significant irony in these persons achieving greater common law legal protections and the rule of law in a colony whose courts were convened ostensibly as military tribunals, over the rights available to them in formal law courts of England. <sup>[35]</sup>

The colonial government was also quick to recognise that convicts could own property, marry, and be tasked to civilian authorities such as the police force and the colonial bureaucracy. <sup>[36]</sup> In profound contrast to the American colonial transportation regime, where the convict was afforded no state protections, by 1800 the Australian convicts were a part of a governmental structure that was a wholly delegated institutional authority where the complete integration of the convict into the societal mainstream was not only conceivable, but a common outcome. <sup>[37]</sup>

The colonial administration also imposed more traditional sanctions. In addition to the various regulations by which convicts were assigned to either existing landowners or the colonial administration, there was an element of brutality to the early Australian colony that was not emphasised or understood by critics of convict transportation. Floggings were widely administered without prior legal sanction; hangings were a frequent event. <sup>[38]</sup>

It is imperative to a complete appreciation of the contemporary commentaries regarding the Australian colonies that their criticisms had a pronounced effect on English policy by the 1820s. Concerns that transportation to the “plantation society” was not sufficiently dreaded were the undoubted motivation behind the investigation conducted by John Thomas Bigge (1780-1843) in 1818 that culminated in his reports concerning New South Wales published in 1822. <sup>[39]</sup> Bigge determined that the stated fears of the English government, that the colony was not properly regarded as “an object of real terror” were justified. Bigge pointed specifically to the <https://assignbuster.com/transportation-as-a-form-of-punishment-a-history/>

colonial administration practices of appointing former convicts to positions as magistrates, and the ability of convict landowners to supervise newly transported convicts in their business enterprises.

The Bigge report and its recommendations formed the basis for a series of intended reforms of Australian colonial practice after the mid 1820s. The chief targets of the report were the alleged corruption permitted by then Governor Macquarie, including the laxness of ex-convicts appointed as district constables; theft from government stores; poor tracking and management of the ticket-of-leave system; deficiencies in the accommodation for female convicts <sup>[40]</sup>. Bigge discounted the ability of the present government to maintain general order and the popular support that the administration enjoyed amongst the colonial population. Bigge's attitudes as expressed in his reports confirmed the contemporary commentator belief that transportation to Australia was a godsend not a penalty, where the moral corruption of the convict classes was wide spread. [41]

The institution of convict chain gangs to perform public labour such as road construction and the development of a comprehensive bureaucracy to support the monitoring of convicts generally and tickets-of-leave in particular were two of the fundamental changes to Australian colonial government. Isolated penal colonies such as Moreton Bay and Norfolk Island were operated with unremitting uniform discipline <sup>[42]</sup>. These institutions quickly acquired the desired reputation as places of dread, consistent with the

domestic notions of punishment and a restrictive existence for their convicts advocated by Bigge and endorsed by influential forces in England. [43]

Once the Bigge reforms were instituted, the ticket-of-leave became the primary means of convict control in the New South Wales colony. As a conditional pardon with a remission component built in, tickets-of-leave were extended to permit further reductions and the availability for speedier conclusion if the holder performed special works in the interests of the colony, such as the capture of an outlaw. [44] The ability to “work off” additional elements of one’s sentence was not a benefit considered by the opponents of transportation. [45] It may be said that the attitudes to convict reintegration evidenced in Australian society were pragmatic and effective; Godfrey and Cox determined that while crimes continued to be committed in the convict society of the colony, the crimes were generally of a lesser degree than those perpetrated in England [46].

These same domestic forces had limited the previous widespread imposition of capital punishment in England. From the 7, 000 executions that are estimated to have been carried out between 1660 and 1800 (and the resulting desirability of mitigation by transportation sentences) [47], by 1830 execution was almost exclusively reserved for convicted murderers. [48] The construction of penitentiaries and the resultant imposition of corresponding incarceration gained general public favour. [49]

The criticism of transportation as “no punishment at all” may have been restricted to the English society establishment. The Old Bailey transcripts

that span the entire period of convict transportation reveal sentiments that suggest the offenders facing such sentences harboured a fear of their imposition. <sup>[50]</sup> Two examples that provide a chronological bracket for this proposition are noteworthy. In 1683, the theft of a silver tankard that resulted in a plea of guilty “ within the Benefit of his Clergy” netted the offender a transportation sentence that he feared. <sup>[51]</sup> More tellingly as late as 1847, when Australian convict transportation was restricted to Tasmania, a robbery victim described the perpetrator as having threatened to make a false complaint of a crime: “...he took it from my pocket—I did not tell him to search my pockets—I parted with it under the dread of transportation—he took it—I did not make any attempt to get it back.” <sup>[52]</sup>

## **Conclusion**

The contemporary criticism of transportation must be considered in the context of the existing English criminal justice system <sup>[53]</sup> . The commentators’ observations were accurate if the viewing prism was that of execution or exile - anything short of death might be considered a measure of leniency. A combination of factors that operated at various junctures over the course of Australian transportation counter these sentiments. Dislocation from the known environment of England to the edge of the earth that was Australia is discounted as a modern human rights impression that itself is outweighed by the miserable future prospects of most transported convicts had they remained in England. The most compelling counterbalance to the critics of transportation is a combination of pragmatic effects. Over 187, 000 presumed undesirable persons were removed from England to Australia between 1787 and 1840; few returned, thus achieving the fundamental

object of the perceived cleansing and security of English society. Conversely, a vibrant group of colonies was established and thereby created permanent economic and geopolitical advantages for England into the twentieth century.

Further, from the perspective of the individual convicts, the Australian colonial experience may be regarded as the most successful system of criminal rehabilitation ever devised, at once brutal yet forgiving <sup>[54]</sup>.

Whether by accident or design, English convicts in Australia were given hope and the opportunity to take a stake in the future; many achieved an integration into a functioning community where their fate otherwise was that of the perpetual impoverished outcast resident on the edges of English society.

## **Bibliography**

Anderson, S. & J. Pratt (2009) 'Prisoner memoirs and their role in prison history' in H. Johnston (ed.) *Punishment and Control in Historical Perspective*, Basingstoke: Palgrave Macmillan

Bartrip, P (1981) 'Public Opinion and Law Enforcement: The Ticket of Leave Scares in Mid-Victorian Britain' in V. Bailey (ed.) *Policing and Punishment in Nineteenth century Britain*, London: Croom Helm. Beattie, J. M. (1986) *Crime and the Courts in England, 1660-1800*, Clarendon: Oxford. Beattie, J. M. (2001) *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror*, Oxford: Oxford University Press

Benis, Toby R. (2003) *Transportation and the Reform of Narrative Criticism*, 45

<https://assignbuster.com/transportation-as-a-form-of-punishment-a-history/>

Bigge, John Thomas (2008) ' Australian Dictionary of Biography'

at <http://www.adb.online.anu.edu.au/biogs/A010093b.htm> (Accessed January 17, 2009)

Braithwaite, J. (2001) ' Crime in a Convict Republic', *Modern Law Review*, 64: 1, 11-50 (also available at: <http://www.aic.gov.au/conferences/hcpp/braithwaite.pdf> (Accessed January 12, 2009)

Brown, A. (2003) *English Society and the Prison: Time, Culture and Politics in the Development of the Modern Prison, 1850-1920* Woodbridge: Boydell Press

Cohen, Stanley (1972): *Folk Devils and Moral Panics*. London: MacGibbon & Kee

Davis, J. (1980) ' The London Garroting Panic of 1862: A Moral Panic and the Creation of a Criminal Class in mid-Victorian England' in Gatrell, Lenman, Parker (eds.) *Crime and the Law: The Social History of Crime in Western Europe since 1500*

Ekrich, A. R. (1987 ) *Bound for America : The Transportation of British Convicts to the Colonies, 1718-1775*, Oxford: Clarendon. Emsley, C (2002) ' The History of Crime and Crime Control Institutions, 1770-1945' in Maguire, M et al (eds.) *The Oxford Handbook of Criminology*, Oxford: Oxford University Press. Emsley, C (2005) *Crime and Society in England , 1750-1900*, Essex: Longman

Feehan, L. (2008) ' Transportation' in Yvonne Jewkes and Jamie Bennett (eds .) *Dictionary of Prisons and Punishment*, Cullompton: Willan



Finnane, Mark (1997) *Punishment in Australian Society*, Melbourne: Oxford University Press. Fitzgerald, Mike et al (1981) *Crime and Society: Readings in History and Theory*, London: Routledge

Godfrey, Barry and Cox, David (2008) 'The "Last Fleet": Crime, Reformation and Punishment in Western Australia', *Australian and New Zealand Journal of Criminology*, 41, 2: 236-258

Henriques, U. R. Q. (1972) 'The Rise and Decline of the Separate System of Prison Discipline', *Past and Present*, 54, 61-93

Hughes, R (1996) *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868*, London: The Harvill Press

Herrup, Cynthia (2004) "Punishing Pardon: Some Thoughts on the Origins of Penal Transportation" In Simon Devereaux and Paul Griffiths (eds.) *Penal Practice and Culture, 1500-1900: Punishing the English*. Basingstoke, 121-37

Hirst, J. (1998) 'The Australian Experience: The Convict Colony' in Morris, N and D. J. Rothman (eds.) *The Oxford History of the Prison: The Practice of Punishment in Western Society*, Oxford University Press, Oxford.

Jewkes, Yvonne and Johnston, Helen (2006) 'Prisons in context' in Yvonne Jewkes and Johnston, Helen (eds.) *Prison Readings : A critical introduction to prisons and imprisonment*, Cullompton: Willan

Jewkes, Yvonne and Johnston, Helen (2007) 'The evolution of prison architecture' in Y. Jewkes (ed.) *Handbook on Prisons*, Cullompton: Willan.

Johnston, Helen (2008) 'The Victorian Prison' in Yvonne Jewkes and J.

- Bennett (eds.) *Dictionary of Prisons and Punishment* , Cullompton: Willan.
- Johnston, Helen (2008) ‘ The Separate and the Silent systems’ in Y. Jewkes and J. Bennett (eds.) *Dictionary of Prisons and Punishment* , Cullompton: Willan.
- Johnston, Helen (2008) ‘ Less eligibility’ in Y. Jewkes and J. Bennett (eds .) *Dictionary of Prisons and Punishment* , Cullompton: Willan.
- Johnston, Helen (2006) “ Buried Alive”: Representations of the Separate System in Victorian England’ in P. Mason (ed.) *Captured by the media: Prison discourse in popular culture* , Cullompton: Willan.
- Johnston, Helen (2005) ‘ The Shropshire Magistracy and Local Imprisonment: Networks of Power in the Nineteenth Century’ , *Midland History* , 30, 67-91
- Mayhew, Henry (1851) ‘ The London Labour and the London Poor’ , as reprinted in Peter Quennell (1983) *London’s Underworld* , London: Spring Books
- McGowen, Randall (1990) ‘ Getting to Know the Criminal Class in Nineteenth-Century England’ , *Nineteenth Century Contexts* , 14, 1
- McGowen, Randall (2004) ‘ The Problem of Punishment in Eighteenth-Century England’ in S. Devereaux & P. Griffiths (eds.) *Penal Practice and Culture, 1500-1900 - Punishing the English*, Hampshire: Palgrave Macmillan
- Morgan, Gwenda and Peter Rushton (1998) *Rogues, thieves and the rule of law - The problem of law enforcement in north-east England , 1718-1800* , London: UCL Press, Chapters 6 and 7
- Morgan, Gwenda and Peter Rushton (2004) *Eighteenth-Century Criminal Transportation: The Formation of the Criminal Atlantic* , Basingstoke: Palgrave Macmillan

*Old Bailey Proceedings Online* <http://www.oldbaileyonline.org/static/Legal-info.jsp> (Accessed January 18, 2009)

Pratt, John (2002) *Punishment and Civilization – Penal Tolerance and Intolerance in Modern Society*, London: Sage

Pratt, John (2005) 'Explaining the history of punishment, in B. Godfrey and G. Dunstall (eds.) *Crime and Empire, 1840-1940: Criminal Justice in local and global context*, Cullompton: Willan

Priestley, Philip (1999) *Victorian Prison Lives – English Prison Biography 1830-1914* London: Pimlico

Rawlings, Philip (1999) *Crime and Power – A History of Criminal Justice 1688-1998*, Essex: Longman

Reece, Bob (2001) *The Origins of Irish Convict Transportation to New South Wales*, Basingstoke: Palgrave.

Rees, Sian (2002) *The Floating Brothel: The extraordinary true story of an 18th century ship and its cargo of female convicts*, London: Headline.

Saunders, Janet (1986) 'Warwickshire Magistrates and Prison Reform, 1840-1875', *Midland History* 11, 79-99

Shaw, A. G. L. (1998) *Convicts and the Colonies: A Study of Penal Transportation from Great Britain & Ireland to Australia & other parts of the British Empire*, Ireland: Irish Historical Press.

Sindall, Robert (1987) 'The London garroting panics of 1856 and 1862', *Social History* 12,