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Bentham, convict transportation, and the Great Confinement Thesis

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Since the 1970s the literature on the evolution of British criminal justice systems has been dominated by the history of prisons and penitentiaries.¹ The ‘great confinement thesis’ – a narrative that seeks to explain the history of judicial sanctions as a function of state power – has shaped much of that literature. According to its proponents, where central authority was weak, systems of kin-based restorative justice dominated. As early modern states evolved, monarchs imposed their authority through the use of judicially sanctioned violence. The development of more effective institutions of government was accompanied by a rise in professional police forces and other systems of surveillance. Bentham’s proposal for a panopticon is often seen as a pivotal moment in this transformation. In Michel Foucault’s words, it formed a blueprint – not just for a new form of prison – ‘but also for a hospital, for a school, for a workshop’. It was in short a template ‘for all institutions’.²

The great confinement thesis refocused attention on Bentham’s work, particularly his plan for a panopticon. As Peter Renfield put it, the scrutiny of Foucault and his followers assured the emergence of ‘Bentham’s architectural ode to surveillance’ from ‘the dusty closet of history’.³ While Bentham’s proposal for a system of colour-coded national penitentiaries became associated with a forward-looking concept (rather than a design failure), his opposition to penal transportation helped to associate the overseas deployment of convict labour with the use of the whip and other outmoded forms of punishment. As a result, transportation has often been regarded as something of an historical curiosity – an ‘archaic and unscientific punishment’ that survived into the nineteenth century by accident rather than design.⁴

The first half of this chapter will revisit Bentham's opposition to transportation, in order to illustrate the ways in which his arguments have helped to shape the subsequent literature. The second will critically examine two assumptions that underpin the 'great confinement thesis'. The first of these is the notion that a direct developmental pathway can be traced between the establishment of the bridewell in the late sixteenth century and the rise of the penitentiary in the nineteenth century. The second assumption is that the transportation of offenders to overseas colonial possessions was decisively rejected in the first half of the nineteenth century in favour of the penitentiary. As the chapter will show, both of these arguments are flawed.

Bentham and transportation

Bentham's opposition to penal transportation was first laid out in 'A View of the Hard-Labour Bill' in 1778, and then expanded upon in his two 'Letters to Lord Pelham' and 'A Plea for the Constitution' in 1802–3.⁵ His main concerns were that transportation was an unequal and disproportionate punishment which had the additional disadvantage of being anachronistic and costly. Its only benefit in his eyes was that it put the labour of convicts to productive use, although he argued that this could be better achieved in a domestic penitentiary system. Bentham also shared Cesare Beccaria's principal objection to transportation. Both thought it was an inappropriate punishment because it extracted labour from the body of the condemned at a place that was far distant from the location of the original crime, and thus failed to act as a sufficient deterrent to other would-be offenders.⁶ As Bentham noted in 'A View of the Hard-Labour Bill', transportation had 'at all Times been found insufficient, both for the Reformation of Criminals, and also for the deterring others by Their Example'.⁷ Finally, Bentham argued that the colony was bound to fail because of the disproportionate number, and poor quality, of women dispatched to Botany Bay.⁸ It was thus doomed to demographic extinction.

Bentham was on solid ground in terms of his first objection. There was indeed a large discrepancy in the terms served by prisoners sentenced to be transported and those imprisoned in the first half of the nineteenth century. As convicts were questioned about their previous encounters with the courts on arrival in the Australian penal colonies, it is possible to use this confessional data to compare the variation in transportation and imprisonment sentence lengths imposed upon

this cohort (Table 2.1). Counting life as 21 years, the mean length of a transportation sentence was 13 years compared to just 0.39 years for all previous convictions that resulted in a sentence to imprisonment. Even prosecutions for forgery and other offences against the currency, an offence which Georgian and early Victorian courts tended to treat with some severity, resulted in mean prison terms of under a year compared to nearly 14 years' transportation. Some of the discrepancies in sentence tariffs in Table 2.1 can be explained by differences in sentencing court. Thus, many of the former convictions reported by transported convicts are likely to have been awarded by magistrates' benches or petty sessions. While such summary courts were empowered to sentence an offender to a term of imprisonment in a house of correction, periods of confinement in these institutions were usually short – a matter of weeks or even days. The data nevertheless highlights the issue that concerned Bentham, namely the huge increase in tariff between sentences to imprisonment and transportation.

Table 2.1: Male convicts, sentence length comparisons.

	Sentenced to imprisonment		Sentenced to transportation	
	Number	Mean sentence length (years)	Number	Mean sentence length (years)
Offences against the person	2,987	0.22	1,490	15.41
Offences against property	29,327	0.51	40,456	11.12
Forgery and offences against currency	326	0.90	947	13.82
Offences against good order	4,467	0.15	215	10.54
Other civil offences	1,317	0.24	1,127	13.77
Offences against military discipline	1,450	0.32	856	13.00
All	39,874	0.39	45,091	12.94

Note: a sentence for Life was calculated at 21 years.

Sources: Tasmanian Archives and Heritage Office (TAHO), CON 31, 33, 40 and 41.

This difference in sentencing patterns was driven by economics. As imprisonment was costly, terms were deliberately kept short. This was true of both houses of correction and county gaols. By contrast, the minimum sentence to transportation in the seventeenth century was fixed at seven years, that is, much longer than any custodially-based form of punishment.⁹ This was designed to ensure that convicts remained saleable in the transatlantic market in unfree labour. A seven-year sentence was considerably longer than the mean length of contract signed by an indentured servant. There were pragmatic reasons for this, as the prior criminal record of convicts made them less attractive to colonial buyers.¹⁰ Such disadvantages could be offset by increasing the term that each prisoner was bound to serve – a longer sentence effectively discounted the services of prisoners, making them more attractive to colonial masters.

Unlike in the Atlantic economies of the seventeenth and eighteenth centuries, the labour of convicts was not sold to private sector buyers in the Australian colonies. Nevertheless, sentence length continued to be an important driver of the colonial economy. While the work performed by prisoners built the infrastructure upon which an expanding colonial economy depended, settlers further benefited from the labour of prisoners assigned to the private sector for free prior to 1840 and lent out at minimal rates thereafter. Although masters had to house, clothe and feed their convict servants, in the 1830s these costs amounted to an estimated 59 per cent of a free wage. While the amount of saving to the private sector fluctuated over time, the foregone earnings of convicts effectively subsidized the income of their masters.¹¹ It is thus no surprise that in most years the demand for convict labour outstripped supply. Available labour depended, not just upon the number of convicts landed in the Australian colonies, but on the length of time they were bound to serve without wages. Thus, although the property rights the state acquired in the body of a convict were no longer sold as in the seventeenth- and eighteenth-century Atlantic, the scale of profits that accrued from their exploitation still depended upon the length of time they were unfree. The upshot of this was that a recidivist's first encounters with the court system were likely to result in very short custodial terms, followed by a 3,318 per cent increase in tariff severity when the court decided on a transportation sentence rather than another term of imprisonment. That increase in time enabled the British to use the labour of thieves to steal a continent.

In Bentham's view the problem was even greater than this, since each sentence to transportation was in effect two sentences – a fixed

term to be spent in bondage and the balance of the convict's life in exile.¹² It mattered little in his eyes if each prisoner was technically free to return to Britain and Ireland once their sentence had expired, if he or she was not provided with the material means to accomplish this act.¹³ If Australia was a gaol, it was a place from which the vast majority of those condemned to serve would never leave. This was a point that was certainly not lost on the British government. By the mid-1820s it had established a system of graduated transportation experiences. Convicts sentenced to hard labour overseas might serve their time out in the hulks, never actually leaving the confines of a metropolitan port, be sentenced to Bermuda where they would be returned to the British-based hulk system after serving a proportion of their sentence, or be dispatched to New South Wales or Van Diemen's Land.

An examination of 9,398 convict men discharged from the hulks in the Thames and Solent estuaries in the decade 1835–45 reveals that age, sentence, marital status, literacy and occupation all influenced convict outcomes (see [Appendix 1](#) for a detailed breakdown of these results). Those who were aged between 17 and 25 were at greater risk of being transported compared to younger and older convicts who were disproportionately pardoned or transferred to other domestic institutions without setting foot on a transport vessel. Sentence length also played a powerful role in the decision to transport a convict. Convicts with seven-year sentences (the shortest period a convict could be transported for) were less likely to be sent into exile. Social capital also influenced the probability of a convict leaving domestic shores. Those who could read and write, or claimed white-collar occupations, were at significantly less risk of being shipped to a penal colony.

Selection also played a part in determining which colony a convict was sent to. Construction workers were statistically more likely to end up in Bermuda or Gibraltar where their services could be put to good use in naval dock construction and maintenance. Conversely, those with a record of military service were disproportionately sent to Australia to be deployed as constables, overseers and flagellators. Bermuda and Gibraltar men differed in other ways too. As with their former hulk mates who remained in Britain, they were more likely to be sentenced to seven years. Importantly, they were also more likely to be married. This suggests that consideration of a convict's familial relations played a role in the state's decision whether to condemn them into permanent exile or not. As Bermuda and Gibraltar men were returned to Britain to be released back into metropolitan populations post-sentence, married convicts dispatched to those colonies could be

expected to be reunited with their families should they survive the experience. Thus, the operation of the trans-imperial transportation system in action provides de facto evidence that the fault lines predicted by Bentham eventuated in ways that were sufficiently problematic to necessitate intervention to ameliorate their impact.

There were other ways in which it might be argued that a sentence to transportation was unequal and disproportionate. Bentham was particularly concerned about the degree to which it placed convicts in a state of servitude, subjecting them to the ‘uncertain and variable direction of a private master’.¹⁴ Transportation’s dependence on the vagaries of colonial labour markets ensured that prisoners were punished, not according to the perceived severity of the offence for which they were transported, but their colonial utility. Thus, textile workers were much more likely to be flogged compared to clerks, ploughmen and carpenters because there was no colonial demand for their skills.¹⁵ There were other pernicious effects too. The prosecution risk, and hence the chances of being punished, were higher for convicts assigned to urban areas than for those engaged in agricultural work.¹⁶ This was in part a product of more intensive policing – a feature of colonial towns – which in turn increased surveillance rates. Masters based in urban conurbations also had easier access to courts as well as labour depots and other sites where convicts waiting to be assigned were housed. By contrast, those in rural locations were likely to incur greater costs in bringing a convict servant to trial and greater delays in receiving a replacement, consideration of which is likely to have impacted upon the decision to prosecute.¹⁷

While Bentham had good reason to question the degree to which the punishment of transportation fitted the crime, his other objections appear to have been based on less solid reasoning. He was incorrect in his assumption that the poor quality and small number of women transported would doom the convict settlement to demographic failure.¹⁸ While he was correct in predicting that fertility rates amongst transported women would be lower than those in the general British and Irish population, this turned out to be due to the impacts of punishments on female bodies rather than the alleged vices of the transported (see below). He also failed to appreciate the extent to which cheap labour and handouts of former First Nation land for minimal rents would attract British and Irish settlers with capital. Fertility rates amongst this group were much higher than for convicts and former convicts ([Figure 2.1](#) below). While the number of European women in Van Diemen’s Land lagged behind men, a product of the smaller

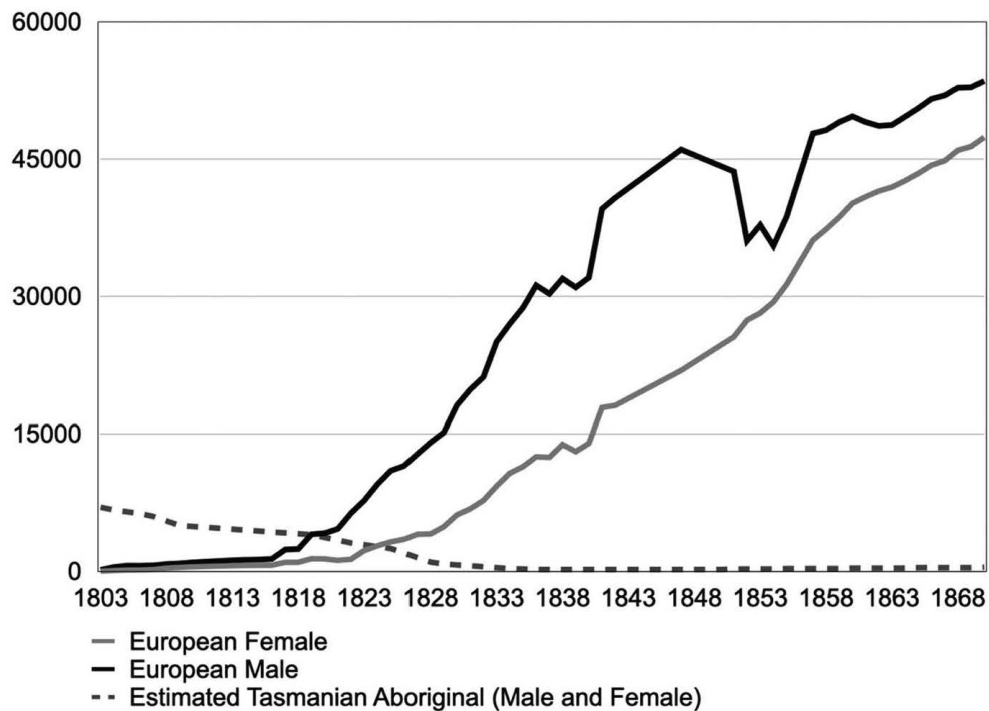


Figure 2.1: Population of Van Diemen's Land/Tasmania, 1803–70.
Source: Australian Bureau Statistics, 2014.

number transported relative to male convicts, the European population nevertheless rose sharply. Notoriously, this was in sharp contrast to the fall in the Indigenous population.

The crux of Bentham's opposition to transportation, however, was founded on a belief that transportation could not meet the proper ends of punishment, while a system of national penitentiaries could, and would prove a cheaper alternative to operate. He was convinced that savings would result from the installation of more efficient surveillance systems, which would lead to a reduction in the costs of employing warders and other staff. He also argued that effective monitoring would lead to an increase in the profits derived from the employment of prisoners.¹⁹ A reduction in the rate of recidivism might also result in further savings to the state. He gambled that, collectively, these factors would outweigh the costs of building and maintaining a series of panopticons.

In this Bentham was almost certainly wrong. His 1787 plan for a panopticon would have housed about 224 inmates.²⁰ The 1791 revised plan expanded the number of floors from four to six but reduced the number of cells on each floor to just 24. This version could accommodate only 144 prisoners if solitary confinement was employed. In the course of rethinking his redesign, however, Bentham abandoned

his previous enthusiasm for the principles of solitary. This was an inevitable concession. As subsequent penal architects would discover, solitary was a costly experiment. Yet, even if four prisoners were put in each cell, the maximum capacity of the second version of the panopticon was 664 – less than the 775 convicts transported on the First Fleet.²¹ Although the government at one stage toyed with constructing a panopticon that would house a thousand convicts, it is difficult to see how this number could have been accommodated within any of Bentham's designs, unless more than one panopticon was incorporated into a single institution. Bentham himself appears to have never fully grasped these logistical constraints. As Tim Causer points out, he even suggested that upon the completion of his panopticon a fleet might be dispatched to Botany Bay to reimport the inhabitants of Britain's far-flung thief colony.²² Even allowing for deaths at sea, the number of returned exiles is likely to have swamped his surveillance machine.

The rise in convictions following the end of the Napoleonic Wars would have presented even greater logistical challenges. A penitentiary on the scale envisaged by Bentham would have been woefully insufficient to house the 3,056 convicts landed in the Australian colonies in 1820, for example. Yet, this considerably understates the problem as it assumes that each prisoner would only serve a year in custody. By 1828 the number of serving convicts in Australia had mushroomed to 23,574. Even accounting for a reduction in the amount of time served by each prisoner, panopticon construction would have surely struggled to keep pace with the British Empire's capacity and desire to dispatch convicts to its penal colonies. The initial plan to set the minimum sentence of confinement in a national penitentiary to five years would have necessitated the rapid construction of multiple institutions as each previous design became clogged with serving prisoners. Populating the panopticon was an altogether different proposition to populating a continent.

Bentham used the authority of the 1798 Finance Committee's Report on police and convict establishments to support his case for the panopticon, despite the fact this Committee had used his own inflated estimates of transportation costs.²³ Yet, even these figures fail to support Bentham's argument. Frank Lewis's detailed reconstruction of the costs and return to the British government suggest that, although transportation was initially expensive, by 1805 the net costs were about the same as warehousing convicts in hulks moored in British estuaries. By 1810 the equation had tilted decisively in favour of transportation. Lewis estimates that, on average, a male convict aged 20 or more transported

to the Australian colonies yielded a small net profit to the government of £2 per year, while a similar convict housed in a hulk accumulated a loss of £10.7s.²⁴ Hulks, however, were relatively cheap to operate compared to a penitentiary. Millbank Penitentiary, constructed on the site originally purchased in 1799 for Bentham's panopticon, though managed according to considerably different principles, had cost £500 per cell by the time of its completion in 1821. At full capacity its annual running costs were £16 per inmate, but its many design failures meant that for most of its operational life it was half empty.²⁵ Even discounting its considerable establishment costs, the first attempt at a national penitentiary proved much more expensive than transportation.

As had been recognized as early as 1779, the expense of building and maintaining a system of penitentiaries was unlikely to be met by the profits extracted from the labour of prisoners.²⁶ The problem was exacerbated by adherence to the principles of solitary confinement, which limited the nature of work that could be performed by inmates to tasks such as weaving, picking oakum, laundry and sewing. It soon became obvious that the labour of prisoners would do little to defray maintenance costs – a marked contrast to penal transportation.²⁷

Other early attempts to construct penitentiaries on the Bentham model proved equally problematic. The institution that adhered most closely to Bentham's design – Pittsburgh's Western Penitentiary – was such an utter failure that it was razed to the ground in 1826, just seven years after its completion.²⁸ Richmond Gaol in Dublin fared little better. The sister project to Millbank Penitentiary, this establishment opened its doors in 1820 but discharged its last prisoner 11 years later in 1831.²⁹ The new penitentiaries failed in other ways too. Millbank, an attempt to stitch seven panopticon-inspired buildings together within the confines of one structure, was widely regarded as a design failure. Its many miles of corridors were punctuated by angled corners and circular staircases that were notoriously difficult to navigate. Worse still, its elaborate internal ventilation system allowed prisoners to communicate with each other. Not only did Millbank fail to provide an efficient means of observing prisoners, but it failed in its objective of establishing total segregation. By 1835 the state conceded the need to establish a prison inspectorate to oversee the operation of penitentiaries – surely an admission of failure.³⁰ Given the unpromising nature of these early penitentiary experiments, it is perhaps not surprising that as late as 1867, the year before the final convict vessel arrived in Western Australia, there were still only nine national penitentiaries in England and Wales.

Transportation and the birth of the prison

As John Braithwaite has argued, the rise of the prison has been ‘read as the enduring central question’ by many historians interested in the evolution of European criminal justice systems.³¹ Yet, the slow development of the penitentiary presents a problem for the great confinement thesis, at least in its conventional form. While there were many county gaols, until the mid-nineteenth century these were primarily used to house those awaiting trial or inmates on very short sentences. As can be seen from [Table 2.2](#), prior to 1780 less than 5 per cent of Old Bailey verdicts resulted in a sentence to imprisonment. Five times as many prisoners were sentenced to be branded and whipped as those ordered to be confined. Accounting for capital felons reprieved on condition of transportation, ten times more prisoners were condemned to colonial servitude than the number domestically incarcerated. Even after 1780 the rise of the prison was a protracted affair. In the years from 1781 to 1816, when the first cohort of prisoners entered through the forbidding gates of Millbank, the proportion sentenced to transportation and imprisonment was about the same. While the cessation of transportation to the American colonies precipitated a sentencing crisis, the courts resorted to a variety of options to address this, including non-custodial alternatives such as corporal punishment and fines. From 1817 to 1842, the year Pentonville opened, the share of sentences to imprisonment increased to 46 per cent. At 37 per cent, however, transportation was the second most common sentencing option. It was only after the establishment of a national penitentiary system in the years following 1842 that the share of sentences to transportation started to markedly decline. Between the years 1843 and the arrival of the last transport vessel in Western Australia in 1868, penal servitude accounted for just 13 per cent of Old Bailey verdicts compared to 83 per cent of cases resulting in a prison sentence.

While both Foucault and J.H. Langbein traced the origins of confinement in Britain to the development of bridewells in the sixteenth century, it is difficult to see how this worked in practice.³² There was never a straight line of development between these two institutions. For the most part, houses of correction and county gaols and lock-ups remained small-scale institutions consisting of little more than a few rooms until at least the Howard reforms of the late eighteenth century. In part this was because of political opposition, as many argued that subjecting prisoners to hard labour was a continental

Table 2.2: Sentences recorded in Old Bailey Proceedings, January 1674–December 1780, by percentage.

Sentence	1674–1780	1781–1816	1817–42	1843–68
Death	19.31	12.82	6.58	0.41
Transportation	47.28	26.77	37.38	12.60
Imprisonment	4.85	27.09	46.29	81.98
Branding	12.59	0.07	0.00	0.00
Corporal punishment	11.08	11.78	4.83	1.01
Military duties	0.47	0.30	0.00	0.00
Fines, sureties etc.	2.99	18.05	2.62	1.12
Pardoned or sentence respited	1.44	3.12	2.29	2.87
	100.00	100.00	100.00	100.00

Source: Tim Hitchcock, Robert Shoemaker, Clive Emsley, Sharon Howard and Jamie McLaughlin *et al.*, *The Old Bailey Proceedings Online, 1674–1913* (www.oldbaileyonline.org, version 7.0, 24 March 2012).

practice the adoption of which ‘would draw too great an Odium on the Government’.³³ Yet, without the extraction of labour from the bodies of inmates, incarceration remained a prohibitively expensive option. As late as 1776 the total number of convicted prisoners incarcerated in England and Wales was estimated to be just 1,647, little more than the 1,147 transported annually to the American colonies.³⁴ The majority of gaol inmates were either debtors or prisoners awaiting trial. The only exceptions to this were those sentenced to transportation who were awaiting sale to a contractor.³⁵

Yet, these numbers only tell part of the story. As most seventeenth- and eighteenth-century carceral institutions were poorly funded, gaolers relied on fees levied upon inmates to supplement meagre or non-existent salaries. Prisoners regularly had to pay for the use of their cell, bedding, food and even their release (although the latter was made illegal in 1774).³⁶ Thus, while prisoners were invariably sentenced to short terms in custody, many were incarcerated beyond the expiration of their sentence because they had become indebted to their gaoler. This rendered them liable to quasi-transportation. Gaolers redeemed debts in the same manner as crimps profited from the labour of indebted sailors. The only means that many prisoners had of regaining their freedom was to sign an indenture – in effect

condemning themselves to further years of unfreedom by selling their labour to a colonial shipping merchant who would in turn sell on the indenture for a profit in the colonial market for bonded servants.³⁷ Interestingly, Bentham's suggested release mechanism from a penitentiary bore many similarities. Once a sentence had been served, the prisoner either had to find a householder willing to pay a £50 good behaviour bond, or join the military; if unable or unwilling to do either, they would enter the 'subsidiary panopticon', a much more relaxed regime, but still a form of confinement.

The governors of bridewells and city and town corporations utilized a similar system to offset their costs. Between 1617 and 1648 the Bridewell court books contain orders for the transportation of 1,106 individuals condemned to service in Barbados, Virginia, Bermuda and 'the sea'.³⁸ While it is unlikely that all of these were actually contracted to shipping merchants, the court books contain details for only a third of those committed to Bridewell.³⁹ In the first half of the sixteenth century this institution alone may have condemned several thousand to transportation. Nor was it a practice confined to London. Scottish and other English towns and cities also organized for the transportation of vagrants and petty criminals, effectively apprenticing the convicted poor into colonial labour.⁴⁰ Transportation was thus neither a small-scale practice, nor a process that operated independently of the workhouse and prison. Instead, the bridewell, gaol and the overseas plantation were formally and informally connected through economics. The cost of incarceration was effectively offset, either through the direct sale of the convict's labour, or by turning a blind eye to practices that allowed poorly paid officials to profit through informal sales. Thus, the operation of bridewells and county gaols was always entangled with the evolution of transportation. The two systems needed each other. Without the sale of inmate labour into transatlantic markets, it would have been impossible to operate a parsimonious domestic system of confinement. In short, there were never two competing policies, a nascent shore-based apparatus of confinement aimed at fashioning docile bodies, and a more archaic alternative strategy that pitched transported labour into the bloody world of the Atlantic plantation. In reality these two criminal justice systems were always attached at the hip.

Thus, the operation of penal transportation was critical in driving many of the outcomes hitherto credited to domestic systems of incarceration. This was particularly the case with the reduction in the execution rate, which was inversely correlated with the number of

prisoners shipped overseas.⁴¹ As the numbers show, the shift in the public exercise of judicial violence – a central feature of the ‘great confinement thesis’ – was driven, not by the rise of the prison, but by the off-shoring of Britain’s and Ireland’s system of criminal correction. That off-shoring process, however, had other deeper connections to the rise of criminal justice surveillance systems.

There has always been a tendency to see transportation as a judicial sanction that operated externally from any institution – a form of criminal justice on the loose. Yet, this is only because the institutions critical to the operation of transportation, the plantation and the ship, have not been traditionally conceived as sites of surveillance. This is to some extent puzzling as both fit neatly into Foucault’s carceral archipelago argument. As we have seen, for him the significance of Bentham’s design for a panopticon was that it operated as a blueprint for all manner of other institutions. Yet, in similar fashion, the ship and the plantation were regimented places of labour where time was strictly regulated. Both have been claimed as important early forms of industrialization that informed later management practices. As Du Bois put it, the plantation ‘corresponds’ to the modern factory in its ‘worst conceivable form’. For him, the connection between the two systems was the way in which work was organized so that it could be constantly surveyed. This was the role performed by drivers and overseers who were the equivalent of factory line managers.⁴²

On board a ship it was the petty officers who were charged with maintaining a watchful eye on the other members of the crew. Yet, it was the industrial management of ship-board time that distinguished maritime work from other early modern forms of labour.⁴³ The ship’s bell beat out the divisions into which the day was divided, which itself was separated into watches, each watch being further divided into eight half-hour increments. At sea, a bell rang every half-hour ensuring that all worked, ate and slept to the same rhythm. This was factory discipline at work – a form of regimentation experienced by tens of thousands of workers at sea before factory walls sprung up in significant numbers on land.⁴⁴

Both of these panoptic devices were critical to the management of convict labour in Australia. Indeed, far from being a form of transoceanic paddy wagon whose sole task was to convey the body of the condemned to the site of colonial labour extraction, the ship was a floating system of prison management. While every transportation vessel operated as a place of confinement, they also contained a schoolroom and a hospital. It is also easy to forget the extent to which they also functioned as a

workspace. Divided into watches, decks or divisions, convicts were put to work scrubbing deck, washing clothes, airing bedding and sewing, as well as performing that most prison-like of tasks – picking oakum. The transport vessel was in effect multiple institutions wrapped up in one. As such it played a crucial role as an umbilical cord that linked metropolitan and colonial places of incarceration. Its key task was to discipline convict bodies while on the move. In short it was a machine designed to convert the ‘idle poor’ into penal labourers. While Bentham saw the transport ship as merely a cost that could be used to highlight the virtues of a more sophisticated shore-based form of management, there is an argument that this remarkably flexible device constituted a floating panopticon in its own right.

Transportation to Australia was panoptic in other ways too. As well as its human cargo, the transport vessel conveyed much in the way of paperwork to Australia. This included the indent, the legal document that transferred labour rights in the sentence of convicts to the colonial administration, and British and Irish hulk and gaol reports. These documents formed the nucleus of an archive designed to manage the operation of an increasingly complex colonial penal system. After 1816, all convicts were interrogated on arrival. As part of this ‘rite of passage’ each was informed that the colonial administration already knew much about their circumstances and that any lies detected as part of the interrogation process would result in punishment.⁴⁵ Colonial officials credited such checks and balances with ensuring that the information elicited from convict charges was broadly correct. Subsequent cross-tabulations of the details coughed up by convicts support this assessment.⁴⁶ As well as a record of next of kin, place of birth, literacy, age, conviction history and workplace skills, a detailed physical description of each convict was also committed to file.

As the Antipodean penal system evolved, it developed ever more elaborate record-keeping practices. By the mid-1820s colonial surveillance and documentation techniques were already in advance of their metropolitan counterparts.⁴⁷ This included the use of identifiers to ease the task of tracking information that referenced the same convict across multiple record series. It also included the conduct records, a precursor to the prison licence system introduced in Britain in 1857.⁴⁸ This elaborate series of registers summarized successive court encounters, enabling colonial officials to appraise the extent to which an individual convict might merit an indulgence as a reward for meritorious conduct or alternatively greater levels of punishment. Many other legal structures created to regulate Antipodean convict lives were subsequently

adopted by British and Irish penal managers. The ticket of leave, for example, pre-empted parole, and the mark system was incorporated into British prisons from 1861 following what was seen as its successful Australian implementation.⁴⁹

A good case could be made, however, that the operation of convict management in Australia outstripped anything implemented in pre-twentieth-century Britain. Importantly, it was the lack of walls that drove Antipodean record-keeping innovation, a point not lost on one of the chief architects of the Australian penal system, George Arthur, Lieutenant-Governor of Van Diemen's Land from 1824–36, who claimed that 'Bentham's notion that gaolers should possess a personal interest in the reform of convicts is beautifully realised in Van Diemen's Land'.⁵⁰ Arthur understood that what Bentham meant by reform was the transformation of the dissolute and idle into compliant workers. This after all was the central aim of the panopticon – a mill designed to grind rogues honest.⁵¹ The aim of Britain's trans-imperial carceral archipelago was the manufacture of 'docile bodies'.⁵² Convict management in Britain's far-flung penal colonies took this one stage further by lessening the dependency of any social engineering process on a single institution, or even a series of institutions operating in parallel. What was unique about the exercise of criminal justice in Australia was that it was threaded across hundreds of private and public sector enterprises. This was an open institution enabled by record-keeping that penetrated so many aspects of everyday life routines that it anticipated the closed-circuit television camera. What was particularly remarkable about this criminal justice record-keeping triumph was the manner in which it facilitated the turning of urban spaces into open gaols.

Ever since Russel Ward popularized the idea in the 1950s, there has been a tendency to view convict labour as a largely non-urban phenomenon, primarily linked with the development of Australia's pastoral and agricultural industries.⁵³ Historically, however, significant numbers of convicts were stationed in towns and cities. At any one point in time, for example, one-third of all male convicts deployed in Van Diemen's Land and two-thirds of all women were located in Hobart Town and Launceston.⁵⁴ They worked in both the private and public sector and occupied all levels of the convict system. Many were undergoing punishment in the female house of correction or public-works chain gangs, while others were assigned to a wide variety of urban-based businesses or worked as domestic servants. Significant numbers held tickets-of-leave that enabled them to seek waged labour.

Thus, while there was no single institutional wall enclosing this penal population, the carceral convict town or city was composed of a host of institutional environments whose collective disciplinary practices enabled the distribution of power throughout the social body. Curfews, high levels of policing and personal identification systems including passes, and an associated paperwork bureaucracy, made it possible to operate a form of panoptic surveillance that went far beyond anything envisaged by Bentham. This was sufficiently complex to affect the selection of convicts for transportation. Those with military skills were disproportionately sent to Australia so that they could assist with the task of placing the eyes of a gaoler on street corners, roads, public houses and other nodes of communication, rather than constraining the gaze of the state to fixed points at the centre of expensive and restrictive buildings (see Appendix 1).

While convict Australia was administratively in advance of the British and Irish penal systems, it had gained a reputation for being inhumane. It is certainly true that, compared to the metropolitan use of judicially sanctioned violence, penal colonies remained brutal places. The crude execution rate in pre-1830 colonial Australia was, for example, 110 times higher than that in England and Wales. Even taking into account differences in population structure – there were fewer children and aged persons in Australia, as well as a sex imbalance that was skewed toward men – this is a striking difference. Yet, as in Britain, there was a marked shift in the use of judicially sanctioned violence in the Australian colonies that started in the late 1820s. This included a pronounced fall in the rate at which colonial felons were executed post-1830. This coincided with the completion of an elaborate system of penal stations and female factories. Thus, convict Australia relied on the public exercise of violence when it lacked institutional structures, but this changed as the colonial state acquired the means to subject an ever-greater proportion of the convict population to secondary transportation.⁵⁵

There were other marked shifts in the way in which the bodies of convicts were subjected to punishment. The pain inflicted on convict bodies was far from trivial (Table 2.3). Close to 1.5 million strokes of the lash were administered in Van Diemen's Land alone, and convict men and women in that colony spent nearly 20 million days engaged in hard labour. Measured in terms of lashes per male convict on strength, the peak flogging year occurred relatively early in 1823, the same year that the Bigge Report was delivered.⁵⁶ Thereafter flogging rates declined sharply (Figure 2.2). A particular surprise was that the

decline was especially marked within the confines of penal stations – although traditionally these have been seen as sites of ultra-violence.⁵⁷ This is an important detail. Just as the rate of execution reduced in line with the capacity to condemn offenders to an expanded system of penal stations, female factories and other punishment locations, so did other legally sanctioned public displays of violence. The temporary rise in flogging in the early 1830s in Van Diemen’s Land coincided with the winding down of Macquarie Harbour and Maria Island, and the development of the much larger penal station at Port Arthur on the Tasman Peninsula. Once Port Arthur had expanded to the point where it could accommodate 1,000 convicts, the downward trajectory in the rate of flogging quickened pace.

Table 2.3: Distribution of punishments for male and female convicts arriving in Van Diemen’s Land, 1803–53.

	Female (total)	Mean per convict	Male (total)	Mean per convict
Strokes of the lash	25	0.0	1,435,775	24.3
Days solitary	278,237	20.9	548,881	9.3
Days hard labour	3,606,776	270.4	16,045,600	272.0

Sources: TAHO, CON 31, 32, 33, 40 and 41.

There were other changes in the way that punishment was administered in the Australian colonies that underscore the extent to which Britain’s far-flung penal colonies experienced a transition in punishments from the body to the mind on a similar scale to metropolitan institutions. As well as declining in frequency, flogging became an increasingly private spectacle – retreating behind the walls of regional lock-ups rather than being conducted in public. Hangings also disappeared behind closed walls in line with British practice, and the gibbeting of the remains of executed prisoners became rare in Eastern Australia after the end of the Napoleonic Wars.⁵⁸

These changes were even more perceptible in relation to the treatment of female prisoners. The only woman ever to be flogged in Van Diemen’s Land was Elizabeth Murphy. She was sentenced on 15 March 1806 ‘to be tied by her Hands to the Cart drawn by the G[aol]. Gang, stripped & receive 25 Lashes’.⁵⁹ By contrast, women were flogged in public in England until 1817 and in private within the walls of an institution until 1820.⁶⁰ Other public punishments were also used in the colonies. On 86 occasions women in Van Diemen’s

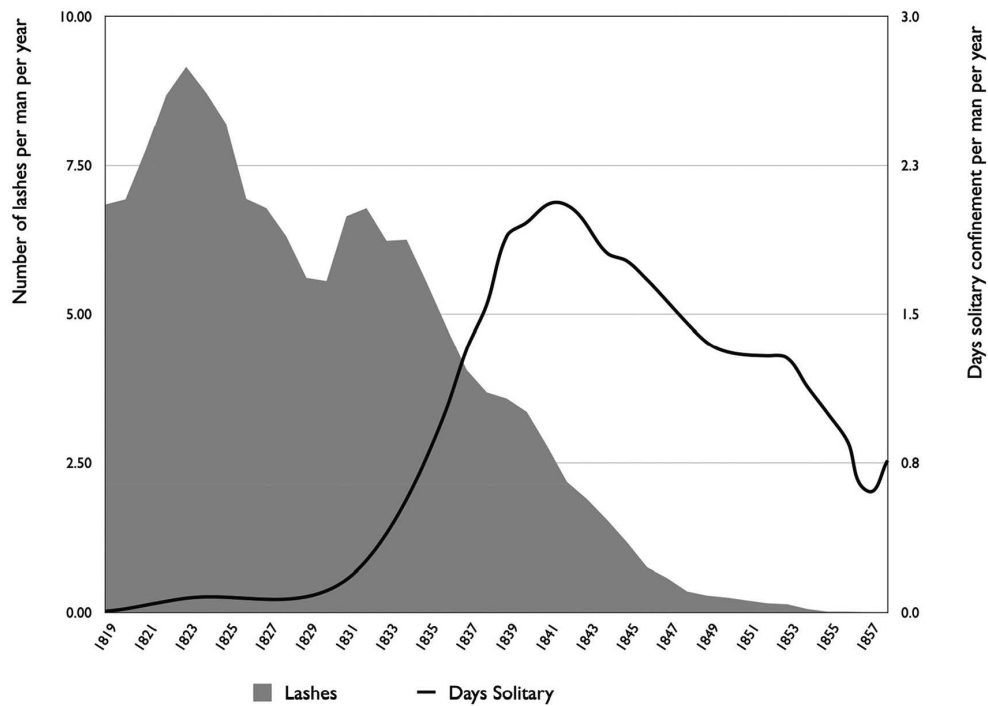


Figure 2.2: The shift from the lash to solitary confinement in Van Diemen's Land (moving five year average).

Sources: TAHO, four per cent systematic sample of every entry in the male convict conduct registers, CON 31, 32, 40, 37.

Land were sentenced to wear an iron collar, and on 111 to have their head shaved. Most of these humiliating spectacles were administered before the opening of the Launceston Female Factory in 1834. As with reliance on the lash and executions, the rate at which female convict bodies were used as public markers of state power diminished after public institutions were erected in major urban centres that possessed sufficient capacity to encompass significant numbers of refractory women.

While the completion of the Launceston Female Factory was a significant marker of this process, this building was important for other reasons too. It was one of a number of colonial correctional institutions that borrowed important design features from Bentham's panopticon. A circular structure at the heart of the institution housed the superintendent and his family. Four accommodation wings for the inmates radiated out from this central inspection facility. This ensured that, as the women in each class worked and exercised in the enclosed yards between each wing, they were under the constant gaze of the middle-class moral entrepreneur charged with regulating their institutional lives.

Such colonial architectural borrowing was far from accidental. Following Bentham, there has been a tendency to see the evolution of metropolitan criminal justice institutions as a process that occurred in opposition to a more free-track, anarchic Australian alternative. Yet the British penitentiary evolved in lock-step with the Australian system. Millbank and Pentonville were designed as holding depots for convicts awaiting transportation. This was similar to the role the Duke of Portland envisaged for the panopticon, much to Bentham's chagrin.⁶¹ As transportation evolved, convicts were liable to spend more time confined within the walls of these institutions before they stepped on board a transport ship. By the mid-1840s nearly all transported convicts had completed part of their sentence in a British and Irish institution where they were subjected to separate treatment – a form of solitary confinement where inmates were worked in their cell in isolation but not deprived of light. From there they were socialized into divisions on board the transport vessel to be schooled and worked in teams.⁶² This regimentation was preserved on disembarkation. Convicts from each arriving transport vessel were sent to particular probation stations to be worked in gangs. From there they could rise to the first class or sink to the third, each movement between classes being noted on individual conduct records and the printed pages of the government gazette. Promotion to the first class enabled the convict to sign a passholder contract with a private sector business. Thereafter continued good behaviour might earn a ticket-of-leave, while further encounters with the magistrates' bench were likely to place the convict back in the clutches of the probation station superintendent or, worse still, a chain gang, penal station or the crime class in the female house of correction. In short this was not two systems in operation, but one integrated experience that started with the penitentiary and ended with that ultimate panoptic experience, work in the carceral colony.

Panopticon versus the penitentiary

While the notion that penal transportation operated in opposition to the aims of the panopticon can be exposed as a fiction, it is also false to argue that the metropolitan penitentiary that emerged post-transportation was Bentham's architectural design in action. As others have pointed out, Bentham's utilitarian supporters were shocked by the lack of emphasis Britain's evolving national penitentiary system placed on productive labour.⁶³ John Stuart Mill, for example, argued that for the

prison ‘to instill a *desire* to work in shiftless and lazy inmates it would need to function as a miniature model of the free-track economy’.⁶⁴ Here the organization of the metropolitan penitentiary contrasted strongly with the colonial deployment of convict penal labour. A good illustration of this is the contrasting domestic and colonial use of treadwheels.

Treadwheels became popular in the early nineteenth century following the installation of William Cubitt’s improved device in the Suffolk county gaol in 1819 – a design that enabled 56 prisoners to be simultaneously punished.⁶⁵ While they were more efficient than solitary cells in that they had the capacity to punish multiple prisoners in shifts, treadwheels were costly and needed to be housed in substantial institutions. Nevertheless, their use was championed by many early nineteenth-century penal reformers on the grounds that they subjected the prisoner to a species of ‘severe, tedious and irksome’ punishment where even ‘the most artful’ could not shirk their share.⁶⁶

By 1842 over half the gaols and houses of correction in operation in England, Wales and Scotland had treadwheels in place. Initially these were used to grind grain, crush beans, cut cork, beat hemp, power looms, break rocks and pump water. Quickly, however, the treadwheel became a machine designed to regulate toil, rather than to put the labour of prisoners to productive use. Many were disconnected from the millstones or other mechanisms to which they had once been attached. Like the hand cranks which were increasingly installed in cells, prisoners were charged with making a certain number of revolutions each day, but the effort they expended was otherwise wasted.⁶⁷ This reflected administrative desires to ensure that the domestic spectacle of punishment was not associated with the exercise of ‘executive tyranny’. As the mounting opposition to transportation to Australia demonstrated, forced public labour was associated in the popular imagination with slavery. The danger was that an increase in central administrative control of the criminal justice system would be interpreted as a threat to liberty more generally.⁶⁸ Yet, this was not the carceral institution at work as envisaged by Bentham.

The post-transportation prison has evolved as an exclusionary device. Rather than preparing prisoners for a life of toil, it has separated them from the workplace, making it difficult to secure work post-release. As Braithwaite argues, this is in stark contrast to the operation of penal transportation.⁶⁹ The irony of course is that if Bentham’s panopticon was ever constructed anywhere, it was in Australia. A way of illustrating the power of the Australian surveillance machine is to explore its impacts on convict fecundity.

As we have seen, Bentham argued that Australia was doomed to demographic failure. He based this assertion on the impact that transportation was likely to have on indigenous populations and his confidence that loose morals and high levels of sexually transmitted disease were likely to inhibit the rate at which the transported convict population would reproduce. While his prediction proved incorrect, this was largely because Bentham failed to appreciate the manner in which the infrastructure developed as a result of penal transportation, and how the prospect of cheap labour and handouts of First Nation land would attract settler capitalists. He was right, however, that birth rates for transported convict women would be low. This does not appear to have been a product of previous exposure to sexually transmitted disease, however. One of the questions female convicts disembarked in Van Diemen's Land were asked was whether they had been 'on the town' – a nineteenth-century euphemism for sex work.⁷⁰ While every month a convict woman confessed to having been engaged in sex work was indeed associated with a reduced likelihood that they would give birth to a child in the colonies, the impact was far less than that associated with a month spent in solitary confinement (see [Appendix 2](#)).

The colonial state had particularly pernicious attitudes when it came to convict families. Most female convicts were forced to abandon their children when they were sentenced to transportation, although about 2,000 accompanied their mothers to Van Diemen's Land. On arrival in Australia these children were sent to the orphan school.⁷¹ The measure was designed to maximize the number of convict women who could be assigned as domestic servants to 'respectable' settlers unencumbered by dependents. Convict women were also prevented from marrying without the permission of the state. In most years this was only forthcoming late in a woman's sentence and where inspection of her conduct record revealed that she had gone more than a year without a colonial charge being entered against her name.⁷²

Disciplinary devices were also created to criminalize convict attempts to form de facto unions. Between 1822 and 1860 a total of 838 charges were laid against convict women for having sex with men or being found secreted in a private place with a man.⁷³ Examples include Emma Holdsworth who was sentenced to six months' hard labour after she was found 'locked up in a bed room in her master's house with a young man'; Mary Smith who was sent to the Female Factory for three months for allowing her master's overseer into her bedroom; and Mary Woodcock who was sentenced to three months in the factory, fourteen

days of which was to be spent in solitary confinement on bread and water, for 'having a man secreted under a bed in the kitchen'.⁷⁴

Convict servants who fell pregnant were sent to the house of correction as a matter of course. Thus, Ann Boys was deprived of her ticket-of-leave and sent to the Cascades Female Factory in Hobart Town when she was discovered to be pregnant.⁷⁵ Mary MacDonald, an assigned servant working for Mrs Midwood who ran a seminary for young ladies in Elizabeth Street, Hobart Town, was sent to the female factory with instruction that she was to be transferred to the crime class as soon as she was delivered of her child.⁷⁶ Isabella McMaster was sent to the 'house of correction for females' for 12 months as she was 'far advanced in pregnancy' and 'consequently useless'.⁷⁷ Concealing a birth was also an offence. Ann Lawrie was given nine months' hard labour for 'refusing to acknowledge that she was pregnant half an hour before she gave birth to a still born child'.⁷⁸

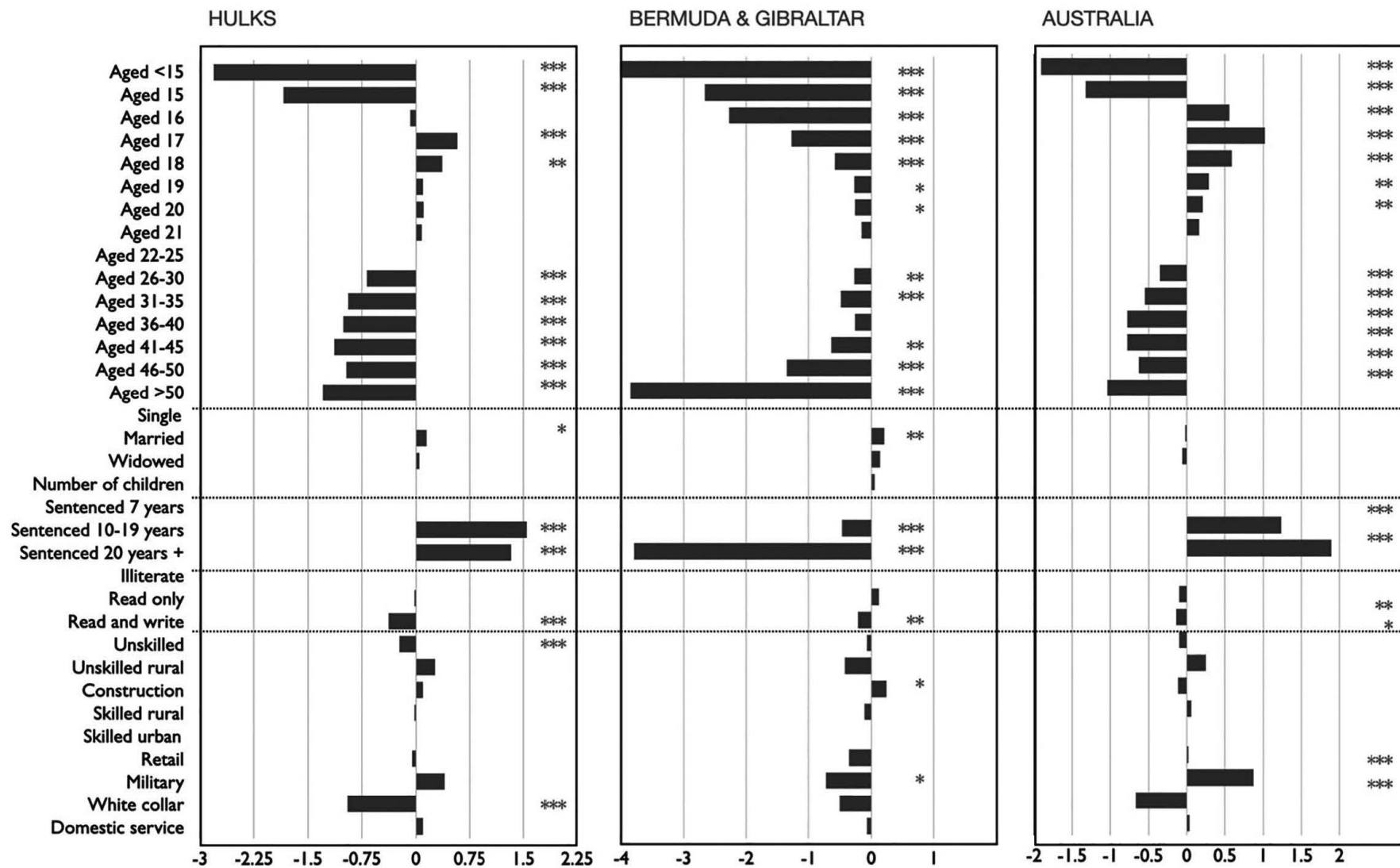
After giving birth, convict mothers who had been committed to a female factory were permitted to wean their children. Thereafter they were separated – the convict being shifted to a separate yard to undergo a period of six months' punishment under watchful eye of the superintendent and his family.⁷⁹ This mostly consisted of labour at the washtubs servicing the laundry requirements of the state and nearby private households. Suitably chastized female convicts were redeployed into assigned service, whereas their children were sent to what were euphemistically known as orphan schools where, after the age of 12, they too could be apprenticed out as cheap labour.⁸⁰ The factory was thus much more than a disciplinary institution – it was an ancillary device designed to facilitate the servicing of colonial middle-class households. In order to work, however, it needed to operate as a part of a wider system of surveillance that extended far beyond the walls of any single institution. The inverse relationship between the number of children born to convict mothers and their documented history of solitary confinement provides a stark illustration of the extent to which state control extended in the penal colonies.

The carceral archipelago in its colonial guise was a sophisticated machine – a system of overlapping panoptic devices that was sufficiently powerful to tailor the birth rate in order to suit colonial labour demands. This was a surveillance system that was not restricted to the view from a central tower anchored at the heart of a single correctional building. This colonial panopticon had the power to peer into smoke-filled taverns and under beds in private households, effectively curtailing both convict sexual proclivities and desires for family

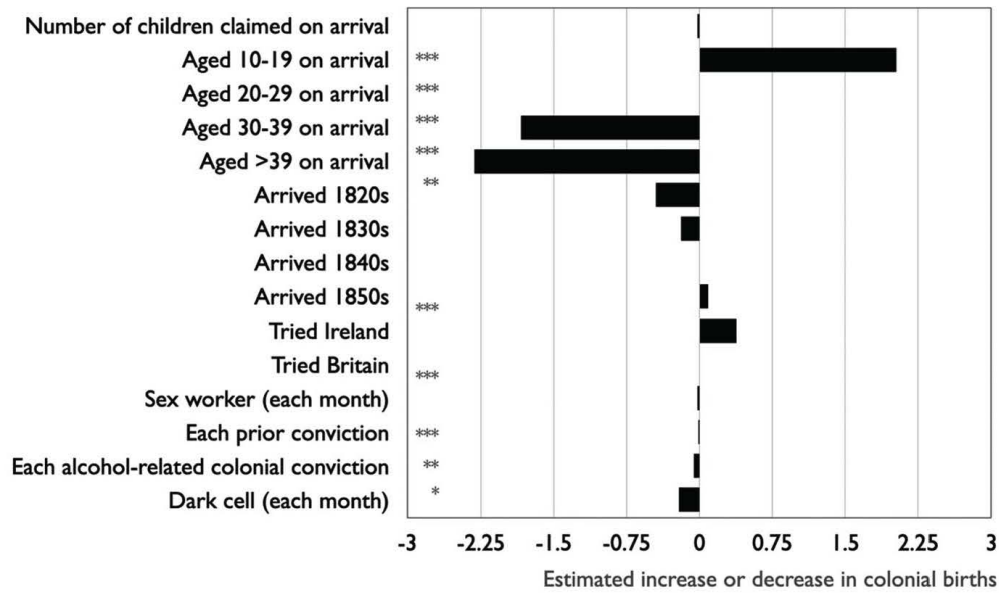
formation. In short, it was a system designed to maximize production at the expense of reproduction. What makes this exercise in biological engineering particularly chilling is the way in which the supposed lax morals of female convicts were used to justify both the exploitation of their labour and their biological rights. This extended far beyond anything that Bentham had in mind, although – as Foucault pointed out – it aligns closely with the logical trajectory of panoptic thought. Contrary to the ‘great confinement thesis’, however, the way that trajectory played out in Australia had little to do with the penitentiary, which developed into an exclusionary and costly blind alley.

Appendix 1: Probability of being transported

These three logistic regression models explore the probability that male convicts would be transported to particular destinations. The models use records for 9,398 convicts housed in British hulks in the period 1835–45. The first panel shows the probability that convicts of different ages, marital status, sentence lengths, literacy levels and occupation in British hulks would be embarked on a transport vessel. If the result is negative, convicts with that attribute were less likely to be transported and more likely to serve out their sentence in the hulk without ever departing overseas. The second panel explores the probability that a convict would be transported to the Royal Navy dockyards in Gibraltar and Bermuda; the third panel shows the probability to New South Wales and Van Diemen’s Land. The stars indicate the probability that each result could occur by chance: *** = 1% probability that this is the case; ** = 5% probability and * = 10% probability.



Appendix 2: Factors influencing colonial birth rates for convict women



*** = significant at 1 per cent level
 ** = significant at 5 per cent level
 * = significant at 10 per cent level

Note: This Ordinary Least Squares regression estimates that the average number of colonial births for a woman born in Britain (as opposed to Ireland) who arrived in Van Diemen's Land aged in her twenties in the 1840s was 2.8. The model plots the estimated variation for a series of independent variables. As expected, convict women who were aged 19 or less had a greater probability of giving birth in the colony while those aged over 30 were substantially less likely to raise a colonial family. The decade of arrival also made a difference, reflecting the ways in which the rules regarding convict marriage were relaxed in the post-1840 period. Irish women had a greater probability of conceiving in the colony than their English, Welsh and Scottish counterparts. While a record of sex work, prior convictions and alcohol-related offences were all associated with decreased fertility, the negative penalty was not as great as a month in solitary.

Notes

- 1 Foucault 1977; Ignatieff 1978, 102.
- 2 Foucault 1977, 75.
- 3 Renfield 2000, 52.
- 4 Willis 2005, 174; Causer 2019, 4.
- 5 Causer 2019, 1.
- 6 McConville 1981, 83.
- 7 Devereaux 1999, 428.
- 8 'New Wales' in Bentham, ed. Causer and Schofield 2022, 4.
- 9 Balak and Lave 2002, 911.
- 10 Grubb 2001, 297.
- 11 Panza and Williamson 2019, 582–3.
- 12 'Letter to Lord Pelham' in Bentham, ed. Causer and Schofield 2022, 112.
- 13 Jackson 1989, 236.
- 14 Causer 2019, 4.
- 15 Maxwell-Stewart 2015, 182–93.
- 16 Read 2020, 210.
- 17 Dillon 2008, 188; Hindmarsh 2002, 164.
- 18 'New Wales' in Bentham, ed. Causer and Schofield 2022, 4.
- 19 Dobson and Fisher 2007, 312.
- 20 1787 design for the Panopticon. Plate 1 in Bentham 1796.
- 21 Steadman 2007, 10–11.
- 22 Causer 2019, 5.
- 23 Jackson 1988, 48–55; Causer 2019, 7.
- 24 Lewis 1988, 507–24.
- 25 McConville 1981, 137; Willis 2005, 189.
- 26 Devereaux 1999, 422–3, 430.
- 27 McConville 1981, 141.
- 28 Dobson and Fisher 2007, 308.
- 29 Heany 2003.
- 30 Willis 2005, 190.
- 31 Braithwaite 2001, 11–14.
- 32 Foucault 1989, 40–1; Langbein 1976, 39.
- 33 Ekirch 1990, 230.
- 34 Roth 2006, 253.
- 35 Willis 2005, 177.
- 36 McConville 1981, 66–73; Devereaux 1999, 409; Willis 2005, 186.
- 37 Baine 1993, 1–19.
- 38 Beier 1978, 219; Waring 2017, 33.
- 39 Dabhoiwala 2006, 805–6.
- 40 Morgan and Rushton 2013, 9, 15–17; Newman 2015, 73.
- 41 Maxwell-Stewart 2020, 10.
- 42 Quoted in Sell 2015, 55.
- 43 Rediker 2007, 9.
- 44 For a wider discussion of these issues see Thompson 1967, 56–97.
- 45 Maxwell-Stewart 2016, 48–9.
- 46 Oxley 1996, 98–128; Maxwell-Stewart and Bradley 1997, 81–4.
- 47 Maxwell-Stewart 2016, 414–17; Roberts 2017, 588–606.
- 48 Forsythe 1978, 73.
- 49 Winter 2016, 6; Millett 2007, 51.
- 50 *Commons Sessional Papers* (1837) xix. 375.
- 51 'Postscript—II' in Bentham, ed. Bowring 1838–43, iv. 226.
- 52 See Foucault 1995, 293–308.
- 53 Ward 1958.
- 54 Ewing 1824–48.
- 55 Maxwell-Stewart 2020.

- 56 This three-volume report written by the former Chief Justice of Trinidad, John Thomas Bigge, recommended sweeping changes to the administration of convict discipline and management in Australia. See also Evans 2009.
- 57 Edmonds and Maxwell-Stewart 2016.
- 58 Anderson 2020.
- 59 Tasmanian Archives and Heritage Office (hereafter TAHO), CON 40/1/7, 5.
- 60 McConville 1981, 143.
- 61 'Editorial Introduction' in Bentham, ed. Causer and Schofield 2022, xxix, and relatedly at lxii.
- 62 Gibbs 2001, 61.
- 63 Pratt 1993, 384–6.
- 64 As quoted in Evans 1982, 297.
- 65 Shayt 1989, 910–11.
- 66 C.C. Western as quoted in McConville 1981, 241.
- 67 Shayt 1989, 910–11.
- 68 Willis 2005, 199.
- 69 Braithwaite 2001, 45–6.
- 70 Leppard-Quinn 2013.
- 71 Frost 2012, 98–142.
- 72 Reid 2007, 138.
- 73 TAHO, CON 40 and 41 series. A huge debt of thanks is due to the Female Convicts Research Centre who transcribed the 84,344 bench encounters summarized in these two series. These were coded by Kelsey Priestman for the *Founders and Survivors* project. Charges against the rules and regulations governing sex account for 1 per cent of all court appearances by female convicts.
- 74 TAHO, Emma Holdsworth, 3 August 1853, CON 41/1/32, 85; Mary Smith, 21 December 1831, Con 40/1/9, 99; Mary Woodcock, 15 August 1837, Con 40/1/9, 325.
- 75 TAHO, Ann Boys, 11 May 1843, CON 40/1/2, 56.
- 76 TAHO, Mary MacDonald, 13 April 1830, CON 40/1/7, 46.
- 77 TAHO, Isabella McMaster, 13 April 1832, CON 40/1/7, 48.
- 78 TAHO, Ann Lawrie, 21 September 1853, CON 41/1/35, 128.
- 79 Kippen 2005.
- 80 Frost 2012, 80–121.

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