

Chapter 3. The Bloody Code

Most Australians are well aware of the horrific punishments inflicted on those found guilty of even minor crimes under the old British regime before some measure of reform of the criminal law took place in the late 1820s and early 1830s, roughly two-thirds of the way through the Transportation period. Hanging, flogging, and transportation beyond the seas or to prison hulks was the punishment for everything from murder to petty theft. For minor offences there were the pillory, the stocks, or committal to the old unreformed gaols and castle dungeons where storms of infectious diseases regularly swept away a significant proportion of the inmates.

This tells us little about the true experience or the reality of law and order in the Britain of the time. In actual fact, the severest punishment, the death penalty, though often pronounced was enforced reasonably sparingly, and transportation had been the main punishment for most crimes for many years before 1788.

If we look at the convict experience through the eyes and the story of an ancestor, our perspective is even more likely to be distorted, for all too often we are looking at what the convict officials in particular saw as the great success of the system. After all, you are a descendant, you are the evidence that it was all for the best, it all worked out well in the end.

However this is a very skewed perspective. Firstly, only a small minority of male convicts, and possibly only a bare majority of the female convicts, ever married or had descendants in the Australian colonies. Secondly, the vast majority were never in serious danger of being executed, however scary the prospect loomed to the individual facing the possibility of the hangman. Thirdly, a considerable majority of those found guilty of crimes that could lead to transportation were not transported at all; they were either sentenced to minor punishment or even when sentenced to transportation many were never sent.

The period of transportation of female convicts to the eastern colonies lasted for sixty-five years, 1788 to 1853, while the entire period of

transportation of convicts from Britain to the Australian colonies lasted for eighty years, 1788 to 1868. This was also a period of modernisation in the British legal system.

To fully understand how all these parts of the jigsaw fit together, it is necessary to look at the British system of law and order from the other end, and begin with how that system threw up some people who were eventually sent to Australia.

The Modern and the Medieval: a patchwork not a plan

In the English or more generally the British tradition, somewhere between the Glorious Revolution of 1688 and the present day the recognisably modern world emerged. But it is not always easy for us to work out just which elements of the modern are already present at a given time, as distinct from those which seem to be modern but actually are not; and those which seem on the face of it to belong in the medieval world but which can, with an adjustment of thought, be seen have modern elements of thought behind it.

During the period that affected the transportation of convicts to Australia, there were quite extraordinary changes to the British criminal laws under which convicted felons were sentenced and there were, for instance, considerable differences between English and Scottish laws as well as considerable difference between the ways laws were applied in England and Wales, Scotland and Ireland. Most of us looking back to the legal system of the 1880s, well after transportation had ended, would readily appreciate the system of criminal law and order that prevailed at that time. However, the same cannot be said of the Britain of the 1780s, the era of the Bloody Code when the American War of Independence had made transportation of convicts impossible.

The terror factor

During the mid-1700s minor offences often attracted the death penalty, and this led the parliament to consider that more horrific crimes obviously required much more serious punishments than mere death. The terror factor in the punishments becomes more obvious. In 1752 the punishment for murder was supplemented by “some further Terror and peculiar Mark of Infamy” which consisted of immediate sentence of death upon conviction (rather than waiting for the last day of the Assizes) and execution within

two days (so that appeals for clemency could not be heard). Meanwhile the convicted prisoner was to endure solitary confinement on bread and water until the execution.

After death the punishment was not yet complete and the body was to be handed over to the surgeons for dissection or to be hung in chains, and the convicted were to forfeit all their lands and goods. Severe penalties were prescribed for others who assisted in any way to avoid the strict carrying out of all details of the punishment including seven years transportation for rescuing or burying the body before dissection or the completion of the period of hanging in chains. The relatively immediate execution was obviously designed to strike terror, in that it restricted the possibility of applying for mercy. Solitary confinement meant that family and friends would have no chance to visit and say farewell. The diet of bread and water struck at the traditions of a last meal, and the fact that many eighteenth century executions were carried out on people who were drunk, sometimes to the point of total insensibility. But it was the last three conditions, of expropriation of property, dissection and hanging in chains, that probably caused the most terror.

Murder of a husband: ‘burnt with fire until dead’

Women could be sentenced to be dissected under the terms of the 1752 Act but did not suffer the indignity of hanging in chains, though an even more horrific fate awaited those found guilty of petty treason. Petty treason, literally the lesser forms of being a traitor, referred to murder of either a lord by a vassal, a master by a servant or a husband by a wife and also to certain crimes against the state especially coining (counterfeiting, clipping, altering or colouring coin of the realm). The penalty for male coiners had for long been hanging, but until 1790, three years after the First Fleet sailed for Botany Bay, the sentence for women was still to be “drawn to the place of execution, and there burnt with fire until she was dead”.

The actual executions were usually a little more humane than the sentence suggests. For at least most of the eighteenth century it was accepted that rather than being “drawn” (that is dragged) along the street by horses, the condemned would symbolically travel on a hurdle, sled or in a cart. It was also accepted that the executioner would strangle the woman before the fire had time to reach her, though to do so was strictly against the law and was in itself the capital crime of murder. Because the original crimes covered under petty treason were derived from treason itself, the rules

regarding the criminality of accessories to even a very minor degree after the fact were extremely stringent so that someone with almost no knowledge or connection to the crime could be found guilty.

Such was the case in 1777 when a fourteen year old girl was having the faggots stacked around her body when the execution was stopped by Lord Weymouth who was just passing by at the time. Her crime was to have attempted to hide, at her master's orders, some white-washed farthings, and thus be guilty of being an accessory to coining but only through an extraordinarily distant chain of connection. The *Quarterly Review* said: "a mere accident saved the nation from this crime and this national disgrace". She was reprieved, though whether to merely hang or be transported we do not know. One wonders whether Lord Weymouth would have intervened had the condemned been middle-aged, or perhaps unattractive, or perhaps had been the much more culpable person who had actually carried out the coining.

In 1789 Christian Murphy was the last woman to be strangled and burnt in front of Newgate. The executioner, perhaps learning from previous experience, heaped so much wood around the body that it was completely covered. Within Newgate, and within earshot of the crowd that gathered to watch the execution, were women who had been sentenced to death, at least one by burning. It was only later that they were pardoned and transported to Botany Bay on the *Lady Juliana*.

In the following year the law was changed to exclude burning and the punishment for petty treason was changed so that, like murderers, women were now liable to be drawn and hanged within two days of their trial and then dissected by the surgeons.

Transportation before Australia

Transportation as a punishment similar in import to the later transportation of convicts to Australia was introduced to English Law by the Transportation Act 1718, though the concept and practice of transporting convicts had a much longer history. The 1718 Act came about because punishments for aggravated and ordinary thefts had not led to a decline in offences. Consequently transportation to the American and Caribbean colonies for seven years could be ordered by the courts for non-hanging (non-capital) offences while anyone pardoned for a capital offence would be punished by transportation for fourteen years. Any convict returning to

Britain before serving the full period of transportation would be hanged.

Within a few years of the 1718 Act, transportation had become a popular punishment for people convicted of non-capital property offences. In the Surrey Courts, roughly 60% of the men and 45% of the women found guilty of such offences were sentenced to exile in America. Before the Act, more than half of both male and female offenders had been branded and discharged.

The other big change was that now both petty larceny and grand larceny (small and large theft) were transportable offences. Many offenders who prior to 1718 would have been merely whipped and discharged for petty theft could now be transported instead. Before 1718 grand larceny was a capital crime and the juries could significantly mitigate the punishment by deciding whether to reduce the charge from grand larceny to petty larceny by stating a lower value to the goods stolen. After 1718 the punishment was entirely at the judge's discretion. Neither of these changes worked to the advantage of the accused.

When transportation to the American colonies suddenly ceased in 1776 due to the American rebellion and then independence, no decision was made as to how to handle the emergency. Instead, England's tradition of judicial hairsplitting and pettifogging took on a decidedly ridiculous and farcical nature, humorous only if you weren't one of the poor wretches who received the brunt of its savage punishments. With no transports being sent, Newgate was soon full of prisoners sentenced to be transported but with literally nowhere to go. Initially, many of the men were sent on board ships on the Thames, but there was no legal right to keep them there nor to alter their punishment to a lesser or a different form. It was obvious that the government didn't have a clue as to what to do. Under-secretary of State William Eden wrote that the convicts were to be taken:

immediately aboard some proper vessel ... in the usual manner, ...after which the matter will, as soon as possible have every proper consideration, and such further steps be taken as may be thought expedient.

What eventually turned out to be the 'expedient' further steps, following 'every proper consideration', was worthy of a Monty Python or a Blackadder comedy. The government had no alternative but to set the convicts free, either by sending them to the army or navy, or merely by

giving them an instruction that they were to transport themselves. Historian JM Beattie questions whether either the convicted or the authorities thought they were being serious in this, and it is unclear whether anybody actually did transport themselves although presumably those who didn't were liable to be punished for 'returning from transportation', which was itself a capital offence.

Other convicts, particularly the women but also at least one man convicted of the capital offence of highway robbery, were just granted free pardons and immediately sent back into society. JM Beattie gives the extraordinary case of another man condemned to death who was pardoned providing he took on a fourteen year apprenticeship with a small merchant. One wonders how many of these pardoned convicts attended the hanging holidays at Tyburn and other places of execution to watch other people convicted of the same crimes end their days in the excruciating agony of slow strangulation.

No destination but death

Similar levels of farce attended the reintroduction of transportation in 1783, at the end of the American war. As soon as the war was over the courts reintroduced sentences of transportation and the numbers sentenced rose significantly. However, three years later the Corporation of the City of London protested in a petition that there was a 'rapid and alarming increase of crimes' which they believed were caused by the failure of the government to transport at least four thousand persons still in England but who, in the judgement of the law, were 'proper to have sent out of it', but who instead had either already been released or were about to be released.

The government had reintroduced transportation without having anywhere to send the convicts. Somehow or another they seemed to believe that having finished the war, transportation to America would just automatically start up again. It took a while for it to sink in that the newly independent United States would not be happy to take the refuse from their gaols.

As we can see from the London petition, the backlog of convicts who were serving their sentences in prisons or had already been released back into British society was causing a crisis of confidence in the value of penal sentences. The judges recognised this as well, and death sentences and actual executions rose to a fever pitch. There was no perceived alternative.

This was the orgy of public slaughter that marked the years from the Gordon riots of 1780 to the availability of New South Wales as a convict colony in 1788.

The American war had a two-pronged effect on the punishment of serious offenders. The war had deprived Britain of its traditional dumping ground for transporting convicts while the end of the war had drastically increased the number of offenders that the courts wished to seriously punish, as quantities of young men demobilised from the army and navy turned to crime due to the lack of employment and a post-war economic slump.

Meanwhile, some male convicts were being sentenced to the hulks on the Thames and in Portsmouth harbour, though the judges (in Surrey at least) were not keen on this alternative. Women were being sent to the Houses of Correction, but most of those sentenced to transportation ended up serving limited sentences in the prisons before being released back into their former lives of crime, much to the chagrin of worthy citizens like the mayor and aldermen of London.

A bandage for the Bloody Code

Eventually the British government decided to send its convicts to Botany Bay, New South Wales. Transportation to Botany Bay had a great advantage over the American colonies. It was much further away and consequently people sent there were much less likely to return to Britain before their sentences had been served or, for that matter, even after they were free again.

So like execution, transportation to Botany Bay meant that the recidivism rate in Britain could be effectively curtailed, since most of those sent there could be considered to be exiled forever. On the other hand, transportation, unlike execution, was not likely to raise humanitarian concerns about the excesses of the Bloody Code. And indeed as pointed out by Leon Radzinowicz, historian of English criminal law, though many people criticised various elements of transportation as a punishment, throughout its history there was never any fuss raised as to whether the degree of severity of the sentence fitted the degree of criminality of the offence.

Whereas some voices were raised as to whether particular crimes, especially non-violent property crimes, merited the death sentence, there was no parallel protest that many of the crimes of the convicts were not sufficiently

blameworthy to merit three or four years forced labour combined with what, for almost all of them, was effectively a lifetime's exile.

Matching the time to the crime, or not

Whilst transportation was originally designed to provide an alternative for execution, it was never planned to be a replacement for it. However, though it is a very subtle point, there is no doubt that transportation entirely replaced benefit of the clergy and similar forms of automatic release for the guilty and enabled more judicial and royal pardons so that the conditions attached to respite from the gallows were still seen to be very strongly punitive. Though from the bloody 1780s the proportion of pardons increased much more than executions, nevertheless for fifteen years, from the Battle of Waterloo to the end of the 1820s, the number of executions remained high, and still reflected government and judicial attitudes to how best to control crime rates by fear.

What transportation was meant to do was to break up the criminal fraternities that contemporary Britain saw as the cause of most crime. However, the authorities were never quite sure where transportation stood in comparison to other alternatives to the death penalty which had been used hitherto, such as imprisonment and whipping. Imprisonment was considered a harsher punishment than transportation, and the period of imprisonment actually served in place of transportation was significantly less than the period of transportation. For instance, before she was transported in 1825 per the *Midas* as the result of a conviction for larceny, Ann Maloney had previously been sentenced to seven years transportation for shoplifting but had served three years at the Millbank Penitentiary instead. Similarly, on the same ship was Maria Green who had previously been released following five years servitude at Millbank although sentenced to transportation for Life.

New South Wales Governor Gipps wrote to the Secretary of State for the Colonies, Lord Stanley, about this issue in 1843. The female convicts held in prison-like conditions at the Parramatta Female Factory following the cessation of transportation to NSW complained to him that they had been sentenced to transportation, not imprisonment. They argued that sentences for transportation for between seven years and Life had, at the Millbank Penitentiary in London, been typically transmuted into sentences at hard labour for between three to five years, whereas at Parramatta they were expected to serve four to eight years at similar labour and under similar

conditions. Furthermore, they argued, the Millbank prisoners gained a free release after their sentence whereas their own release from Parramatta was highly conditional, not allowing them to return home until they could achieve a free pardon. For Lifers this could mean at least 24 years, sometimes never. Unspoken, but no doubt on their minds, was the fact that the Millbank women found themselves immediately back in British society whereas the NSW women had little chance of ever getting back to Britain. Gipps realised that the women had a valid case and arranged that they be assigned to settlers in spite of the fact that the whole of the then dominant probation period ethic was that private unpaid assignment was unconscionable, bearing too much resemblance to slavery. Obviously, in Gipps' mind it was the lesser of the two evils and there was both merit in the women's case and a degree of justice in his decision.

The balancing of a lesser term of imprisonment versus transportation was offset by the fact that convicts were usually able to gain a ticket-of-leave, that they could work for private masters or the government without being held under close confinement, and that exile was designed to be the principal punishment element of their sentence. The tradition of transported convicts receiving a limited freedom such as a ticket-of-leave, after a fixed period and providing they were of good behaviour, went back at least to the mid-seventeenth century when some sentences of transportation for seven years were phrased: 'the last three for their own benefit'.

Another war ends, another crime wave begins

When the inevitable crimewave got underway in 1815, following the end of the Napoleonic Wars and the resulting unemployment of demobilised young men coincided with the post-war economic depression, the numbers of convicts being transported to New South Wales grew substantially. But this was not just because there were more crimes. Other factors contributed.

No longer was there a need for so many male convicts to be kept in the naval dockyards and Thames-side hulk gangs to provide free labour for the war effort. No longer did the armed forces soak up some of those on the run or those who got caught and chose enlistment rather than prosecution. But most of the increase in convict transportations can be attributed to the response from the British legal system which not only increased death sentences leading to increased use of transportation as an alternative to execution (capital respite) but also hugely increased the numbers directly sentenced to transportation. Not only were more people

being sentenced to transportation but also a much larger percentage were now actually being transported, and not just to New South Wales. Men were also now being transported directly to Van Diemen's Land and as of 1820 women also would be sent directly to VDL.

And no longer was it the case that transported convicts were nearly all serious offenders, repeat offenders or minor offenders suspected of being members of criminal confraternities. A much higher percentage were clearly first offenders. Transportation, rather than being reserved for the worst ne'er-do-wells, was becoming a standard part of British judicial sentencing policy, and at least in England, Wales and Ireland it was increasingly applied to those who in former times would have been whipped or gaoled for a short period. But those options were less and less available because instead of putting more and more resources into building prisons for the rapidly expanding population, the scarce resources were directed towards the convict colonies. The building of prisons in Britain lagged behind the development of the new prison, Australia.

The old order changes...

The period from 1780 to 1850 was a time of immense changes in Britain: demographic, economic, cultural, social and legal. This was the period of a huge increase in the British and particularly the Irish populations. This was also the period of the greatest impact of the industrial and agricultural revolutions and almost calamitous effects of rapid urbanisation. During this period the laws relating to crime, as well as the Poor Laws, the Corn Laws and the laws relating to the legal rights of Catholics were changed dramatically.

In the middle of the period not only was there the Great Reform Bill but also the creation of such modern institutions as gaols and police forces, registration of births, deaths and marriages and great changes to laws and

The 'Black Box'

...This was a box made like a coffin standing on its end - one can neither sit or lie, nor indeed stand comfortably - with little holes at the top to breathe through. It is anything but a pleasant place. It was placed on board for the use of the women - there were some placed in there every day. [As punishment Smith was locked in for 14 hours.]

James Montagu Smith, on the *Sir Robert Seppings* in 1852

attitudes relating to slavery. It was also the time of the Napoleonic Wars, Irish rebellions and a long series of civil disturbances in England, Wales and Scotland. There were extraordinary social and economic dislocations from the continuing enclosure and privatisation of English common lands, the Scottish highland clearances, repeated and frequent economic depressions, famines, and the effects on trade and industry of rapid technological progress.

At the same time vast numbers of people were removed from the traditional support of the old parishes that supplied the only form of social security. And in the 1840s came the Great Irish Famine when millions of people starved amongst warehouses stuffed with food which was exported to the urban workers in Britain and Europe who could afford it.

By 1880 laws had been codified or expressed in much the same way as they are today, by a parliament which was recognisable as a modern and to some extent democratic institution. If anything, the laws themselves, with the exception of a few archaic leftovers, were extremely modern and readily recognisable.

Throughout this period of enormous change 160,000 Britons were exiled to the Australian colonies, the vast majority never to see their country again. Of these convicts almost 25,000 were women, of whom slightly more than half served their exile in Van Diemen's Land.

...giving place to new

If Britain changed enormously in this period, the Australian colonies changed even more; from the early tent and bark hut camps in the first years to significant small cities and large towns in the latter period; from small gardens, farms and orchards in the first ten years of each settlement to vast sheep runs, wheat farms and cattle properties of the later years. Every female convict did not come from a similar society and background, and when she arrived she did not find herself in a similar situation to those who had come before or would come after. Convict society was dynamic and it changed and developed considerably from period to period and from place to place.

The First Fleet to Botany Bay meant exile to a place that nobody knew at the furthest end of the earth. The last convict transports to Eastern Australia in the early 1850s, on the other hand, were being sent to one of the most

fabulous and most sought-after places to be created in the imagination of nineteenth century Europe. A place where it was thought incredible riches could be just picked up from the ground, and where wealth had no memory, as it did in Europe. A place where if you were used to hard manual work, you had an advantage over the aristocratic and middle classes. A place where Jack was not just as good as his master, but where, with luck, Jack might become better than his master.

The middle period, too was a time when, following the hard early years, many commentators perceived that convicts were going to a situation where they were materially much better off than in Britain and more particularly than in Ireland. It was true that even while they were still assigned servants many, perhaps the majority, ate better, were better clad and had better quarters than the poorest twenty or twenty-five percent of people in Britain from which the vast majority of the convicts came. Physical conditions for the majority of convicts were probably vastly superior to fifty to sixty percent or even more of the Irish peasantry. Social and political commentators were quick to point this out; indeed they often referred to conditions in the English gaols, particularly the Millbank Penitentiary, completed in 1821 and costing over £500,000, in similar terms.

Some contemporary commentators even went so far as to describe transportation as a reward that many honest hardworking folk would love to attain. Some modern Australian historians, particularly in the 1950s and 1960s, were often quick to agree and emphasised how much better off materially the majority of the convicts were. This view was commonplace also in general Australian society, and many triumphalist accounts abound of convict ancestors who deliberately offended in order to get good food and a free voyage to the new country of opportunity.

While there is no doubt that some convicts were deliberate offenders, they appear to have been very few. There is some evidence that some of the Irish during the 1840s may have sought transportation to escape the horrors of the Great Famine.

She refused to eat

One woman and three children [actually five children] died on the voyage ...She refused to eat and literally died of starvation.

James Montagu Smith, on the *Sir Robert Seppings*, 1852

There is also a parallel idea that the occasional kindly magistrate in Ireland during the famine used his official position to throw a lifeline to starving peasants. This is a standard Australian story but the offence most likely to have led to this, vagrancy, was if anything a less common reason for transportation from Ireland during this period. Moreover it fails to take into account the peculiarly and particularly high absolute horror that some amongst the Irish female convicts had of being sent out of their country. This was particularly noted by the Surgeon-superintendents who had experience of shiploads of both British and Irish convicts.

There is no doubt that there were convicts who were victims in being unjustly convicted. Similarly, there is no doubt there were political and social rebels who were transported, though there were virtually none amongst the women, just a bare handful. There is no doubt that most convicts were victims of an unduly vicious and unfairly harsh system of criminal punishment. However, it is readily ascertainable from the statistics that the overwhelming majority of female convicts sent to Australia would have faced significant judicial sanctions whatever day, age or place they were sentenced.

The question though is not whether they should have been punished, the question is whether there was any justifiable reason for punishing them so harshly. The answer to our modern minds is of course that they should not have been punished by what to most was a lifetime of exile, and to that extent and in that way there is no doubt that most were more sinned against than sinning.