

## Chapter Two

### Historical Prelude: The Transportation and Penal Reform Debate and the Western Road

Aspects of the British transportation penal reform debate are embodied in the form and function of the road gang system as it evolved in the 1820s and 1830s. The system also reflected localised security concerns and was intended to constrain as well as to deter, reform and punish. Its emergence was associated with efforts to establish the effectiveness of transportation over the penitentiary as a penal methodology.<sup>1</sup>

Complicating the issue, the road gang policy, as instituted by Governor Darling in 1826, saw more prisoners sentenced to the roads, where they could be more usefully employed than in isolated penal colonies. 'Outrages' by bushranging absconders from the gangs provided a well-spring of alarm that was fuelled by the colonial press as part of a campaign against impositions on the liberty of free citizens caused by the pervasive convict presence. Settlers, particularly those who did not personally benefit from convict labour, became aligned with British anti-transportationists. The penal status of the colony and the power of the Governor came under attack. The governors came under intense pressure to quell criticism, emanating from both the United Kingdom and the colony, of the cost of transportation and the effectiveness of colonial penal policies.

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<sup>1</sup> E.G. Stanley to Governor Bourke 15 January 1834, *HRA*, Ser.1, Vol. XVII, Library Committee of the Commonwealth Parliament, Sydney, 1923, pp.197-200.

## **Chapter Two: The Transportation and Penal Reform Debate and the Western Road**

The establishment and management of the stockade and convict work places, on the Western Road from Mt Victoria to Bathurst in the 1830s, was the product of tensions between the above concerns and the drive for the economic advancement of the colony via infrastructure development.

### **Crime and Transportation Before the American Revolution**

The transportation of convicts from Britain originated in the sixteenth century when persons who had been capitally convicted were given, in a demonstration of mercy, the alternative of voluntary banishment. The prisoner made the choice of exile or death. In the seventeenth century transportation was increasingly prescribed and in 1679 the Habeas Corpus Act legalized the existing practice of pardoning criminals by royal prerogative, conditional to an agreed term of banishment. A 1717 Act of Parliament (4 George 1, c.2) prodded the formalisation of the system by providing for transportation to America where there was a shortage of servants.<sup>2</sup>

The nominal penalty for felonies such as highway robbery, house breaking, beast stealing, grand larceny, murder and arson, was death. The legislative changes developed in response to the criminalization of formerly non-criminal activities and increased penalties for lesser crimes. For example, the Black Act enabled the conviction of small farmers and tenants who were resisting encroachment on their customary rights ‘... over game, wood, dead-fall, peat and other bounty of nature, which the gentry had formerly accepted as part of the binding order of custom in the countryside’.<sup>3</sup> It criminalized ‘stealing hedges, underwood, fruit from trees and timber, damaging orchards, hop-bines or woodland and taking fish from ponds or breaking ponds to let fish escape.’<sup>4</sup> Such acts were a legitimization of the assertion of property rights over customary and common rights. By the end of the Napoleonic Wars, in the nineteenth century, there were some 225 offences bearing the death

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2 L.L. Robson, *The Convict Settlers of Australia*, Carlton, Melbourne University Press, 1965, p.5; A.G.L. Shaw, *Convicts and the Colonies*, Carlton, Melbourne University Press, 1977, pp. 24-25; 30-31.

3 Michael Ignatieff, *A Just Measure of Pain*, The Macmillan Press, London, 1978, p.17.

4 *Ibid.*, p.16.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

penalty and the law had attained the popular epithet, the “Bloody Code”. Over the eighteenth century, transportation became a major ingredient of English criminal law and the most common punishment for non-capital felonies in England.<sup>5</sup>

While the Bloody Code appeared inflexible, there was in practice a great deal of room for judicial discretion or executive clemency. The undeveloped prison system and a reluctance of judges to prescribe the death penalty for newly criminalized activities resulted in the criminal justice system’s reliance on transportation of convicts beyond the seas. In the 1750s, one third of the prisoners sentenced to death in the Home Circuit had their sentences commuted to transportation. From that time there was growing doubt among judges as to the fairness of imposing the death penalty for minor infractions. Juries were similarly reluctant. It became common to convict people charged with grand larceny (which was a capital offence) with petty larceny (which was punishable by transportation) by valuing the goods at less than a shilling regardless of their true value.<sup>6</sup> Surviving petitions in the Home Office records, support this version of the system at work. Prisoners who were guilty of traditional capital offences, such as murder, were unlikely to have their sentence commuted and were generally left to the executioner. But many convicted of lesser capital crimes were transported to the American colonies, in particular Maryland and Virginia, where convicts were bought by settlers for the term of their sentence from contractors who transported them there. Some colonists preferred them to slaves.<sup>7</sup> Later they were transported to New South Wales. Prisoners at the No. 2 Stockade Cox’s River had initially been brought to justice in Great Britain and Ireland under this extremely harsh regime.

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5 J.M. Beattie, *Crime and the Courts in England, 1660-1800*, Oxford 1986, pp.506-13; Ignatieff, *op. cit.*, p.19.

6 Ignatieff, *op. cit.*, p.19. Douglas Hay, ‘Property, Authority and Criminal Law’ in Douglas Hay et.al., *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England*, Allen Lane, London 1975, pp.17-22.

7 A.G.L. Shaw, *op. cit.*, pp. 24-25; 31; Ignatieff, *op. cit.*, pp.15; 19; PRO: Home Office, Criminal Petitions Series 1, 1819-1839, HO17.

## **Chapter Two: The Transportation and Penal Reform Debate and the Western Road**

Transportation was intended to deter criminals while at the same time supplying labour to the colonies. For Britain, transportation had long been part of colonial policy as well as a method of punishment. Theoretically, it was a cheap deterrent. Recalcitrant offenders were removed and provided with an opportunity for a fresh start underpinned by honest employment. Furthermore, transportation promoted economic development in colonies that were unattractive or inaccessible to free labour.

In practice, transportation was not a sufficient criminal disincentive and crime continued to increase. The more developed and ordered a colony, the less dissuasive transportation as a punishment became. In the second half of the eighteenth century, coinciding with the inception of the New South Wales colony, calls for alternatives to transportation and the death penalty were on the increase.<sup>8</sup>

### **Transportation, Prison Reform and the Inception of the New South Wales Penal Colony**

For much of the eighteenth century, short terms of imprisonment were used to punish minor offences. Such sentences were usually for a year or less and never longer than three, and rarely punished felonies. Major crimes were punished in the higher courts of assize or quarter sessions with banishment, whipping, hanging or the pillory.

Increased crime, in 1750, after the demobbing of troops returned from the War of Austrian Succession, strained the prison system. The resultant overcrowding led to outbreaks of disease that posed a broader public health menace. In April 1750, two Newgate prisoners infected the Old Bailey courtroom with typhus. Fifty people died, including the judge, jury, lawyers and many spectators. This alarming disaster in the premier machine of the British criminal justice system, sparked a move for improvements in prison hygiene. In the aftermath, doubts were raised about the efficacy of capital penalties for petty crime which were a major cause of congestion

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<sup>8</sup> Shaw, *op. cit.*, pp.17-18.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

in the system. Magistrate Henry Fielding unsuccessfully suggested a new house of correction for Middlesex. The then novel objective of correction of the mind of the offender via religious instruction, labour, discipline and solitary contemplation was put forward.<sup>9</sup>

Twenty years later, when the demobilization following the Seven Years' War resulted in a 35% increase in crime<sup>10</sup>, the effectiveness of transportation was once again called into question. Under Secretary of State, Sir William Eden published a treatise, *Principles of Penal Law*, in 1772 that questioned the deterrent value of transportation to a country:

... as fertile, as happy, as civilized, and in general as healthy, as that which he had offended.<sup>11</sup>

Eden was referring to the American colonies but this same theme ultimately played a significant role in later attacks on transportation to the Australian colonies.

Just prior to the American revolt in 1775, John Howard, a philanthropist and member of the Nonconformist religious sect, sought spiritual fulfilment through a belated life vocation in prison reform. He conducted a comprehensive study of the British prison system and published the results in *The State of the Prisons* in 1777. His reform proposals included plans for a house of correction (penitentiary) and a model for its operation. Like Fielding's proposal, it too was directed at reforming prisoners rather than physically punishing them. Under Howard's scheme prisoners were to be adequately fed and housed while subject to strict discipline and hard labour. They were to be kept in separate cells, given improving literature and visited by a chaplain. In theory, the isolation and contemplation, guided by the chaplain, would

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<sup>9</sup> Ignatieff, *op. cit.*, pp.24-25; 45-47.

<sup>10</sup> Statistics from this period need to be viewed with caution due to unscientific collection methods.

<sup>11</sup> Sir William Eden cited in Shaw, *op. cit.*, p. 41.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

bring prisoners to an understanding of their aberrant behaviour and thus reform them. It was intended to be neither physically comfortable nor torturous.<sup>12</sup>

There was a belief in the late 1770s that crime was on the increase. Criminals had not been deterred from their criminal ways, because, it was felt, of the unlikelihood of getting caught, the possibility of a pardon, or a reprieve via transportation. The loss of access to the American colonies sparked a crisis for the system. But no alternatives to transportation acceptable to the British Government were forthcoming. As the crisis was assumed to be temporary, in 1776 Parliament authorized hulks to be moored in the Thames to accommodate prisoners. They were to be put to hard labour and hopefully shipped off to America, once the revolt had been crushed.<sup>13</sup>

By 1778 the hulks had become so overcrowded that a parliamentary inquiry into the system was instituted. The Commons Committee favoured the construction of penitentiaries based on Howard's philosophy of punishment and reform.<sup>14</sup> An influential circle of Quakers and intellectuals, centred around Whig politician Lord Shelburne and included Jeremy Bentham and Samuel Romilly, had embraced Howard's ideas. In the words of Ignatieff:

The prison reformers believed that punishment had lost its moral authority among the poor because those who inflicted it had been allowed unlimited discretion.<sup>15</sup>

A bill was passed for the establishment of two penitentiaries. But the government was reluctant to fund their construction and was further deterred by the prospect of criminals being eventually released into the community.

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12 J.B. Hirst, *Convict society and its enemies*, George, Allen & Unwin, Sydney, 1983, pp.9-10; Ignatieff, *op. cit.*, pp. 51-53.

13 Shaw, *op. cit.*, pp.44-49; Hirst, *op. cit.*, p.10; Ignatieff, *op. cit.*, pp. 57-65.

14 Robson, *op. cit.*, p.6; Shaw, *op. cit.*, pp.41-42.

15 Ignatieff, *op. cit.*, p.77.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

After the cessation of hostilities with the Americans, Britain attempted to resume transportation but was rebuffed. With no other sites being considered appropriate, in October 1785 Arthur Phillip received his commission as Governor of the New South Wales colony. In 1788 the Transportation Act was extended to include the intended New South Wales settlement.<sup>16</sup> Offenders viewed as a threat to and a pollutant of the social order were to be transported to New South Wales (and later Van Diemen's Land) at Government expense and assigned to the governor to be servants of the Crown. Initial objections to the proposal included its expense, distance, violation of the East India Company charter and the claim that transportation would encourage rather than deter criminals. There were also moral objections to the founding of a society of 'thieves and ruffians'.<sup>17</sup>

Disillusionment with transportation had set in and its pre-eminence in the punishment arsenal was lost. In the 1790s it was ordered in less than 50% of convictions, whereas prior to 1775 the rate had been more than 70%. Nevertheless, despite the qualms of vocal reformers, transportation and hanging remained the major punishments for serious crimes of violence against the person and for crimes against property.<sup>18</sup> Transportation, capital punishment and prison reform had a complicated and interdependent relationship into the nineteenth century. The prescription of hanging for serious crimes discouraged prosecutions and convictions and the reluctance of judge and jury to send prisoners to their deaths resulted in the banking up of the justice system and overcrowded prisons. Of 1,872 people detained in Newgate on charges of larceny between 1803 and 1810 only one was eventually executed.<sup>19</sup> Between 1810 and 1819 the number of adult males committed to trial rose from 66 per 100,000 to more than 210 per 100,000. The population of Newgate which was built to house 500 prisoners, never fell below 800. Across the country, some 100 institutions meant to hold 8,545 prisoners were actually accommodating

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16 Shaw, *op. cit.*, pp.45; 48-49.

17 Sir Nathaniel Wraxall cited in Shaw, *op. cit.*, p. 51.

18 Ignatieff, *op. cit.*, p.92.

19 Samuel Romilly, *Observations on the Criminal Law of England*, 1810, p.15 cited in Ignatieff, *op. cit.*, p.170.

## **Chapter Two: The Transportation and Penal Reform Debate and the Western Road**

13,057. This meant that the prison reform methods, espoused by Howard and his successors, such as solitary confinement and the classification of prisoners could not be implemented.<sup>20</sup> In economic downturns and after the demobilisation of troops, when prisons became even more pressured, the hulks and transportation to Australia were an integral part of the solution.

Employment opportunities provided by the Napoleonic Wars kept the crime rate down across 1805-1814 and the hulks in England were sufficient to accommodate criminals who were utilized in the dockyards and encouraged to join the army. Transportation decreased and between 1802 and 1809 on average less than 350 were transported each year. After 1810 the crime rate again became a controversial issue and the hulks were once more a scandal. After demobilization and the post 1815 trade depression, the cost of poor relief doubled and the numbers committed to trial rose rapidly. As the New South Wales colony became firmly established and some convicts made fortunes and others wrote home urging their family and friends to join them, the question of its deterrence and punishment values began to be treated with greater credence.<sup>21</sup>

### **British Penal Reformers and the New South Wales Penal Colony**

The British government attempted to diffuse pressures for construction of a penitentiary system where punishment and reform could be closely supervised. Successive governments balked at the huge initial expense of such a system. The pressure on New South Wales governors to achieve closely supervised punishment and reform was as much to do with providing less ammunition for the advocates of the penitentiary system as with the parsimonious attitude of the British administration both domestically and in the colony. The prison reform debate in Great Britain had a direct impact on the experience of convicts transported to New South Wales.

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<sup>20</sup> Ignatieff, *op. cit.*, pp.154-155.

<sup>21</sup> Shaw, *op. cit.*, p.127; Hirst, *op. cit.*, p.20.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

One of the most prominent, early and persistent opponents of transportation was Jeremy Bentham. A penitentiary, in the form of the 'panopticon', a building which allowed for the minute control and observation of individual prisoners, had been designed by Bentham and he coveted the contract for its construction and ongoing management. He claimed that it would provide a low cost and effective solution to the penitentiary problem and embarked on a 21-year campaign for its adoption. Bentham's argument in favour of this solution was shored up by attacking transportation.

Bentham contended that transportation was a poor punishment due to the uncertainty of its severity as a punishment. Its effectiveness was also undermined, he argued, because it was inflicted away from the sight and sound of those it was meant to deter. As a means of reform it also failed because the primary objective of those for whom the convict worked was to extract labour rather than to reform them. Furthermore, whereas the convicts transported to America had entered a moral society, those sent to New South Wales were received into a criminal society. There were insufficient respectable people in New South Wales, in Bentham's opinion, to maintain order and discipline.<sup>22</sup> As Hirst wrote, Bentham created a theme that ultimately did 'fatal damage to the colony's reputation'.<sup>23</sup>

Penal reformers were quick to use the costs of the New South Wales colony in their assault on an intransigent government that would not address the criminal problem. Bentham and his colleagues and successors argued that the cost of imprisonment and reform within a panopticon-style institution would be reduced to zero due to employment of the inmates. The British government was just as determined to minimise any opportunities for complaint. Consequently there were constant pressures on colonial governors to reduce costs in New South Wales. It is a recurring theme evident in the correspondence between the Colonial Office, the Treasury and

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<sup>22</sup> Ignatieff, *op. cit.*, pp.109-110; Hirst, *op. cit.*, pp.12-14.

<sup>23</sup> Hirst, *op. cit.*, p.14.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

the various New South Wales governors from Governor Hunter's administration onwards.

Bentham was supported by, among others, William Wilberforce, an evangelical Christian and anti-slave campaigner, who had a strong interest in the moral reform of society at all levels. It was Wilberforce who nominated the evangelical Reverend Richard Johnson as the New South Wales colony's first chaplain. Not only did the convicts reject Johnson's puritan ethic, but the civil and military officers were also unsympathetic. According to Hirst at that time in Great Britain, 'worldly parents were horrified at their children taking up serious religion. They thought they would isolate themselves from all decent company and be unable to find marriage partners'. By the time of Wilberforce's death in 1833 'family prayers, church going, at least outward respectability would become the norm'.<sup>24</sup> Johnson reported to Wilberforce the depravities of the convicts and officers, many of whom had convict mistresses. In response, Wilberforce lobbied for more clergy and teachers, arguing that religion brought decency and order. The Reverend Samuel Marsden and bibles were sent, but to little effect. While Johnson returned in 1800, Marsden remained in the colony reporting to Wilberforce who became one of the most consistent critics of New South Wales society.<sup>25</sup> The convicts in New South Wales could, claimed Wilberforce in 1819, 'form a nucleus of contagion in that part of the world'. Hirst argues that the evangelicals raised the tone of the transportation debate by bringing to it 'God's purposes and national righteousness'.<sup>26</sup>

Other law reformers influenced by Bentham included Sir Samuel Romilly, who was also influenced by the continental Enlightenment and the philosophers of the French Revolution. Also prominent were James Macintosh, a Whig, who argued in the House of Commons in 1823, for the introduction of trial by jury and other rights for

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<sup>24</sup> Hirst, *op. cit.*, p.16.

<sup>25</sup> Hirst, pp.16-17.

<sup>26</sup> cited in Hirst, *op. cit.*, p.19.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

emancipists in New South Wales and Henry Brougham (a later Lord Chancellor), who was a slavery abolitionist as well as a penal reformer. All from 1810 used Bentham's arguments to attack transportation, but it was not until the 1830s when the Whigs replaced the Tories that their arguments received a more sympathetic hearing.<sup>27</sup>

In the meantime, during the upsurge of crime of the 1820s, prison reformers who were arguing for adequate food and hygienic living conditions in prisons, were thought to be suggesting that prisoners should be offered conditions superior to free labourers. At this time, wage regulation and the Statute of Artificers were falling into disuse and the state's obligation to relieve poverty was under question. The right of the state to intervene in the free market to regulate for workers' safeguards was denied by proponents of *laissez faire* economic policy. In line with demands for an increase in the just terrors of the law, the government also attempted to ensure that no transported convict had an easy time of it.<sup>28</sup> However, transportation was never as cheap as desired and tensions were produced with the colonies as the British government attempted to place the cost of the system on colonial treasuries.

### The End of Transportation

In the 1830s, after the election of a Whig government, a great deal of reform legislation was enacted in Britain, including reform of the criminal law. Central control was established over existing prisons and the construction of penitentiaries was commenced. At this time, the anti-slavery argument was carried over to the transportation issue. The society of New South Wales was seen to be as tainted as a slave society, and was viewed as corrupt due to the impact of transportation. This argument was particularly damning for both the colony and for transportation. The majority of the government, however, continued to see transportation as a cheap and convenient solution to the criminal problem. It was largely Lord John Russell, Home

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<sup>27</sup> Hirst, *op. cit.*, p.15; Ignatieff, *op. cit.*, pp. 65-66.

<sup>28</sup> Ignatieff, *op. cit.*, p.166; Hirst, *op. cit.*, p.20.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

Secretary and Lord Howick, Under Secretary of State for the Colonies, who were opposed to transportation and who saw it as an evil. But even Russell and Howick did not want to see transportation stopped entirely, but rather for assignment to be discontinued.<sup>29</sup>

In the colony, implementation of increased discipline in response to the debate meant increased cost and was incompatible with private assignment. But colonists objected to the concept of paying for the services of convicts either as individuals or collectively by the state and they resisted shouldering the financial burden of increased security. As financial demands by the British increased, concerns about the corruption of society by the criminal element were raised more vociferously in the colony. Free workers added their voices to the cacophony of complaints. They complained of the competition of convict labour and that political and social freedom in New South Wales was restricted by the presence of the convict and ex-convict population.<sup>30</sup> If there was not a financial benefit to the colonists, then transportation was not to be endured. In Shaw's view transportation was abandoned:

Not because it was too severe, but because it was not severe enough, and neither reformatory enough nor cheap enough to justify overriding colonial wishes, once these wishes had been clearly expressed.<sup>31</sup>

In 1837, William Molesworth, a Radical M.P., who was totally opposed to transportation in all forms, successfully moved for the creation of a select committee inquiry into transportation. Russell, who had decided to end assignment, co-operated with him. Howick was also appointed to the committee which ultimately brought about the cessation of transportation to New South Wales, but Russell and Howick were able to prevent Molesworth from recommending in the final report its total

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<sup>29</sup> Hirst, *op. cit.*, pp.21-25.

<sup>30</sup> Shaw, *op. cit.*, pp.18-19.

<sup>31</sup> Shaw, *op. cit.*, p.20.

demise. They were happy to see the system condemned and to use the evidence to support the changes they had already decided upon.<sup>32</sup>

Although three-fifths of all convicts transported to Australia were sent after 1830, between 1832 and 1837 the British criminal law underwent reform and the prison acts of 1835 and 1839 finally began to create a national prison system. Imprisonment was introduced as an alternative to transportation and transportation was reserved for increasingly more serious crimes. From 1840 transportees were directed to the less developed Van Diemen's Land.<sup>33</sup>

### **Reforms in the New South Wales Penal Colony in the 1820s**

Under Governor Macquarie (1810-1821), it was claimed, convict labour in New South Wales had been insufficiently regulated. Worse, the place had the ambience of a prosperous colony rather than an austere milieu thought to be more appropriate for a penal settlement. The 'Commission of Inquiry into the State of the New South Wales Colony' by J. T. Bigge,<sup>34</sup> which had as its main objective the investigation of 'the administration of the settlements, as fit receptacles for convicts',<sup>35</sup> resulted in changes to the convict system. These changes were implemented across the 1820s in response to the Bigge Report and the transportation debate. They included the abolition of convict service as a method of payment to settlers and officials, closer supervision of assignment, establishment of central records, indulgences granted only for good behaviour and the stiffening of punishment at penal settlements. Despite tightening of the system by Governor Brisbane in the early 1820s, the British government remained dissatisfied.

The next governor, Ralph Darling (1825-1831), extended the recommendations of the Bigge Enquiry. He was instructed not to give ex-convicts land and to make the

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32 Hirst, *op. cit.*, p.26.

33 Shaw, *op. cit.*, p.148.

34 Report published by the House of Commons in July in 1823.

35 'A Copy Of The Instructions Given by Earl Bathurst to Mr Bigge...' in *The Bigge Reports*, Facs. Edn., Libraries Board of South Australia, Adelaide, 1966, Vol.1, p.1.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

sentence of transportation itself more severe. The cost to the British Treasury of support of the convict population was simultaneously to be reduced. Darling found that many men had been internally transported to the colonial penal settlements for trivial offences and some had been sentenced illegally. The settlements, of which Norfolk Island was the most persistent, included Port Macquarie and Moreton Bay. These sites had been established, post Bigge Enquiry, as punishment and isolation sites for convicts who had re-offended in the colony. From 1825 Norfolk Island was the ultimate place of punishment and convict degradation.<sup>36</sup> A new Act introduced by Darling, which used road gangs as punishment gangs increased the labour supply by keeping the numbers sent to penal settlements at a minimum. This freed non-recidivist road workers for assignment.<sup>37</sup>

The Act reduced costs while enabling the development of another layer in a system designed to both punish and reward, via transfers to and from situations of varying isolation and adversity. It was an attempt to make the sentence of transportation more onerous than it had been under Governor Macquarie and his predecessors. From that time in New South Wales, male convict re-offenders could be banished to a road gang to work, in irons, at distant locations. Labourers were made available for the creation of important public facilities in unattractive locations where non-convict labour was difficult to obtain. Secondly, felons were kept out of the sight and the minds of the civilian population and thirdly, it provided a deterrent and punishment for recidivists. While the Act did not provide for the degree of classification and control of punishment demanded by advocates of the penitentiary, the reform was a refinement and a tightening of the system. Darling also favoured an initial assignment of work in irons on the roads by all transportees prior to their assignment to settlers, but was unable to implement this because of the private demand for

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<sup>36</sup> Shaw, *op. cit.*, p.189.

<sup>37</sup> Governor Darling to Earl Bathurst, 31 August 1826, *HRA*, Ser. 1, Vol. XII, pp.513-514.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

labour. There was also a view that additional punishment without additional offence, if not legally questionable, was unjustly harsh.<sup>38</sup>

The Act was an attempt to dovetail the requirements of the penal system to the demands of an increasingly free society in need of public infrastructure development. However, while the work was hard, the irons did not prevent escape and one result was more runaways and bushrangers; disorder rather than order.

In a further tightening of discipline, new regulations for penal settlements were instituted in 1827 and 1829. At Moreton Bay in 1827 more than a third of the men were punished in six months.<sup>39</sup> On Norfolk Island and Macquarie Harbour in Van Diemen's Land, prisoners were worked in irons from that time. Floggings on Norfolk Island under Commandant Morrisett, between 1829 and 1834, were at the rate of one per annum per man, four times the colonial average.<sup>40</sup>

### The Road Gang System

As part of the implementation of the new system, the Office of Inspector of Roads and Bridges was created by Darling to oversee the development of the colony's roads.<sup>41</sup> Each major road was allocated an assistant surveyor to supervise works along a particular line of road. Construction was to be by convict labourers under the immediate supervision of soldiers from veteran companies and staff corps. But Darling reported in March 1828:

... their [the Corps] Misconduct has since obliged me to withdraw them, and Convicts now do the duty of Overseers, who receive a small

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38 Shaw, *op. cit.*, pp.144-145; 195; 231-233; Atkinson, *op. cit.*, p.88.

39 A.G.L. Shaw, *op. cit.*, p.204.

40 Shaw, *op. cit.*, pp.203-206.

41 Darling to Earl Bathurst, 26 April 1827, *HRA*, Series I, Vol. XIII, The Library Committee of the Commonwealth Parliament, Sydney, 1920, pp.268; 614-615; *Concise Guide to the State Archives*, Introduction to Surveyor of Roads and Bridges, Record Series, p.1.

gratuity according to their Merit and responsibility of 6d., 10d. or 1s  
3d a day ...<sup>42</sup>

Major Edmund Lockyer, who headed the Department of Roads and Bridges, re-organized the gangs into a hierarchical structure. This was another tightening of regulations and an attempt to classify and standardise management. Iron gangs were to consist of up to 60 men under the supervision of a principal overseer with three assistants. A 'Road Party', which worked un-ironed, was to be made up of 50 better behaved men under the supervision of a principal overseer and two assistants. Well behaved and skilled men were to work un-ironed in a 'Bridge Party' of up to 25 men under the supervision of a single overseer.<sup>43</sup> The gradation allowed for the classification of prisoners and institutionalised a means by which good behaviour and work could be rewarded, while advancing the development of roads in the colony. Nevertheless, Darling needed to justify the increased expenditure occasioned by these reforms. In doing so he revealed the characterisation of these convicts at the time, viz.:

When the character of the Individuals comprising the Road parties is considered, being the very refuse of the whole Convict Population, combined with the important work in which these Parties are engaged making the great leading Roads throughout the Colony, the very moderate Expense of their Superintendence cannot fail to surprise every one ... when it is considered that the very worst characters are sent out to this Country, and that the Individuals now alluded to form a part of the worst of these, being to use a popular phrase "Double distilled Villains".<sup>44</sup>

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42 Governor Darling to Right Hon. W. Huskisson, 28 March 1828, *HRA*, Series I, Vol. XIV, The Library Committee of the Commonwealth Parliament, Sydney, 1922, pp.69-72.

43 Grace Karskens, 'Defiance, Deference and Diligence: Three Views of Convicts in New South Wales Road Gangs', *Australian Historical Archaeology*, Vol.4, 1986, p.19; Grace Karskens, "*The Grandest Improvement in the Country*": An Historical and Archaeological Study of the Great North Road, NSW 1825-1836, MA Hist. Arch. Thesis, University of Sydney, 1985, p.58.

44 Governor Darling to Right Hon. W. Huskisson, 28 March 1828, *HRA*, Series I, Vol. XIV, pp.69-72.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

Darling further argued that the 1,260 men then employed on the roads had averted the necessity of establishing yet another costly penal settlement, where they would be 'eating the Bread of Idleness'.<sup>45</sup>

### Development of the Western Road Network In Line with Penal Reform

#### Methodologies in the 1830s

When Surveyor-General Thomas Mitchell, surveyed the new line of road to Bathurst, via the Mt Victoria descent from the Blue Mountains in June 1830, he selected a site for a barracks at the foot of Mt Victoria, which became known as No.1 Stockade.<sup>46</sup> No. 2 Stockade Cox's River was constructed in 1832 under Mt Walker and No.3 Stockade was constructed in 1835 at the base of Hassan's Walls. Another stockade was also established at Bowen's Hollow about this time and it was sometimes referred to as the Lumber Yard. At various times unironed road and bridge parties were also located at Meadow Flat, Honeysuckle Hill/Flat, Stoney Range, Diamond Swamp and the River Lett. **[Figure 1.3]**

An important aspect in the transportation and prison reform debate in Great Britain was the classification of prisoners which enabled the better targeting of punishment, opportunities for grading of punishment and ameliorating the chances of corruption.<sup>47</sup> An ad hoc system encouraged criminality because the criminal would not believe in the certitude of detection, conviction and punishment. The crime rate in both Britain and New South Wales could be remedied if the uncertainty of the criminal justice system could be removed.

Attempts were made to refine classification on the road aside from the obvious distinctions between the ironed and unironed. It was even considered important that the ironed men and the un-ironed men were kept entirely separate, even if working in

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<sup>45</sup> *Ibid.*

<sup>46</sup> Mitchell to Alexander Macleay, 23 June 1830, *HRA*, Series I, Vol. XVI, Library Committee of the Commonwealth Parliament, Sydney, 1923, pp.135-137.

<sup>47</sup> Shaw, *op. cit.*, p.267.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

proximity.<sup>48</sup> In late 1830, Mitchell, investigated the feasibility of separating offenders who had been sentenced to work on the roads by the Supreme Court and quarter sessions, from those who had been convicted under the summary jurisdiction of the magistrates. Applying this strategy he was able, at least temporarily, to send the more serious offenders to work at the station under Gibraltar, on the Great South Road, keeping the lesser offenders on the Western and Northern roads.<sup>49</sup> But there were conflicts between the requirements of the penal system and those of road building. Work was often required in populous places that did not suit the classification of available prisoners.<sup>50</sup>

Darling's successor, Governor Richard Bourke (1831-1837) continued the process of regularising the system and enhancing security. This included a more intensely regulated assignment system as well as enhanced scrutiny of the situation of convicts in government service. Increasing security concerns were embodied in the construction of stockades. These resembled small villages in which the penal accommodation was surrounded by a high fence and required more time and labour than previously expended on the accommodation of convict road workers. The assignment system went from an almost informal institution to a system of procedures formulated by Bourke that occupied eight pages in the *Government Gazette* of 2 May 1832.<sup>51</sup> Inevitably, complaints arose from opposing movements on the transportation issue. The concerns included the cruelty of the system, the number of convicts employed on public works that could be privately assigned, bushranging by absconders from gangs, the conflict between the security demands of the military and the practicalities of road building, and the slow pace of works. The outcome was that the administration of the system was difficult and controversial.

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48 SRNSW: Col. Sec., Copies of Letters Sent to Surv. Gen., 16 Feb - 31 Jul 1833, 4/3914, p.319. R.3017.  
49 SRNSW: Col. Sec., Copies of Letters Sent to Surv. Gen., 20 May 1830 - 7 Oct 1830, 4/3908, p.523.  
R.3015; Col. Sec., Copies of Letters Sent to Surv. Gen., 8 Oct 1830 - 20 Apr 1831, 4/3909, p.50. R.3015.  
50 SRNSW: Surv. Gen., Letters Received from Surveyors, 2 Jan 1830 - 25 July 1831, 2/1561.2, p.409.  
R.3080.

51 Cited in Hirst, *op. cit.*, p.90.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

In 1832, a British Select Committee on Secondary Punishment concluded that transportation alone was an inadequate punishment unless prisoners were also sent to road gangs. But there were also concerns that such punishment led to depravity and extra expense. The committee ultimately recommended improving the punishment system in the British dockyards. As this required greatly expanded accommodation, transportation still needed to be relied on in the interim and therefore needed to be made more severe. As a consequence, the Governor's power to grant tickets-of-leave was restricted and ticket holders were deprived of the right to own property.<sup>52</sup> In 1834 an attempt to classify prisoners prior to their departure from Great Britain according to the 'magnitude of their offences' saw some newly arrived prisoners temporarily accommodated in the stockades. However, the policy was eventually found to be illegal and had to be withdrawn.<sup>53</sup> Alternatives to transportation and the punishment of convicts once transported had been canvassed in Britain, where it continued to be felt that:

... the life which a few of the Convicts are compelled to lead at Norfolk Island and at other of the minor penal Settlements ... [produces] but little effect upon those of their Companions in Crime in this Country upon whom it is intended chiefly to operate, when they contemplate the lot of by far the greater number of Prisoners who are assigned to Settlers, and the comparative ease and freedom from restraint which they then enjoy.<sup>54</sup>

In early 1834, when Governor Bourke was informed that the British Government intended to continue transportation and to impose punishments additional to it, he warned against:

...sacrificing the probability of reforming the transported offender in the Australian Colonies to the hope of deterring the unprincipled

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<sup>52</sup> Shaw, *op. cit.*, pp.144-145.

<sup>53</sup> *British Parliamentary Papers, Transportation and Punishment, Crime and Punishment Transportation*, Irish University Press, Shannon Vol.6, 1971, p.373; Earl of Aberdeen to Sir Richard Bourke, 4 March 1835, *HRA*, Ser. 1, Vol. XVII, pp.685-687; PRO: T 1/4347.

<sup>54</sup> E.G. Stanley to Governor Bourke, 21 August 1833, *HRA*, Vol. XVII, pp.197-198.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

inhabitants of Great Britain from the commission of crime.

Undoubtedly, if punishment, appalling from its duration as well as its intensity, be heaped on the transport here, however beneficially the history of his sufferings may operate on the fears of the British criminal, it will induce a state of despair in the mind of the convict, which is to be found utterly at variance with reformation.<sup>55</sup>

Bourke's letter is indicative of the increasing desperation of the British authorities to quell criticism and the pressure governors were under from the British authorities. The British government was concerned to dispel the notion that a convict assigned to a settler was better off than the labouring classes in England. The new sentencing policy which specified either servitude in a penal settlement, hard labour in chains or private assignment aimed at reinforcing the deterrence of a sentence of transportation and sought to bring some certitude of punishment to a conviction. It was intended to counter the increasingly positive reputation, in Great Britain, of the New South Wales penal experience and also served to forestall the complete abolition of transportation as advocated by critics of the system.<sup>56</sup> Governor Bourke reminded Under-Secretary Stanley of the Colonial Office that deterrence should not be such an over-riding motive that the severity of the punishment extinguished any possibility of reform. He stated:

... 5 years of slavery before the very best conduct will obtain him any permanent indulgence ... will appear to be a sentence of perpetual severity, and be more likely to impede than promote reformation.<sup>57</sup>

In support of his argument Bourke outlined the measures implemented across 1829 and 1832 to regularise, control and classify punishment in order to bring some uniformity to the system, stop abuses and to bring certainty to the outcomes of poor behaviour on the one hand or of good behaviour on the other. The greater

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55 Major-General Bourke to Mr Secretary Stanley, 15 January 1834 in *British Parliamentary Papers, Crime and Punishment Transportation*, Irish University Press, Shannon, 1971, Vol.6, p.381.

56 Ibid., pp.373-385.

57 Ibid., p.374.

surveillance and record keeping introduced by Bourke in 1832 has benefited this thesis as some, albeit disjointed, records of trials and punishments at No. 2 Stockade Cox's River have survived. These have assisted in the identification of prisoners and the development of limited convict curriculum vitae.

### **Appeasing the Reformers**

In terms of supervising the moral reform and inhibiting the spread of "moral contagion" averred by Wilberforce<sup>58</sup> and other abolitionists, Bourke included in the Regulations for the Superintendents of Ironed Gang Stockades drafted in 1832 the following instruction:

16. No gambling or trafficking in provisions or clothing is to be permitted on any account; and the superintendent will check and discountenance by every means in his power, all indecencies of manner and language among the convicts under his charge. He will also take care that no spirits or other liquors, or any other provisions than those provided by the Government, are allowed ...

...

28. The superintendent will muster every convict under his charge each Sunday, soon after breakfast; and after carefully examining their persons, will read prayers as directed by the regulations for ironed gangs ... He will take care that due decorum is observed by the prisoners ... He will also take care that such of the convicts as chooses to employ their time in reading on Sundays be not interrupted or annoyed in any way by their fellow prisoners.<sup>59</sup>

Bourke made changes to the Summary Offences Act in 1832 which placed restraints on the power of magistrates so as to ensure a more consistent system of punishment. Under 3 William IV No. 3, the number of lashes a single magistrate could order was

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58 Cited in J.B. Hirst, *op. cit.*, p.19.

59 *British Parliamentary Papers, Transportation and Secondary Punishment, Crime and Punishment Transportation*, Shannon, IUP, 1971, Vol. 6, pp.384-385.

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

restricted to a maximum of 50 lashes for an offence. Modifications were also made to the maximum time to be spent in solitary confinement and hard labour for prisoners summarily convicted and the amount of time allowed on the treadmill was increased. New limitations were also placed on the types of cases magistrates could hear. Many more cases were subsequently required to be sent to the quarter sessions. In all courts flogging was limited to 50 lashes maximum for a first offence and 100 for a second. Bourke also favoured more regimented punishment in road gangs. To this end, the surveyors who directed convict work on the roads were made magistrates and thus had the power to order up to 50 lashes. Convict overseers were to be replaced by paid superintendents and constables. By 1834, visiting magistrates were to try more serious offences. As a result of these measures, escapes from road gangs were reduced from 265 in 1830 to 30 per year in 1833-1834.<sup>60</sup>

Prisoners also employed the rhetoric of the debate to further their situation. In May 1833, Nicholson, the surveyor in charge of the Western Road, was informed by men out of irons that in some districts such a “class” of men received an extra pair of shoes and a shirt each year, as did the men in irons. Nicholson sought to implement this on the Bathurst Road because, as he put to the Surveyor General, it was a source of discontent amongst the unironed men ‘... that those considered under penal restraint should possess advantages above those who are not’. A similar situation arose with regard to the issue of blankets and mattresses.<sup>61</sup>

To deal with the issue of the uncertainty of punishment and its lack of uniformity, in 1833 an investigation was undertaken into the possibility of standardising the effects of scourging. Magistrates were ordered to observe all floggings for the month of September and report on their effects in terms of ‘... the amount of bodily suffering which the infliction shall appear to have produced; whether evinced by the effusion

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60 Hirst, *op. cit.*, p.112; Shaw, *op. cit.*, 214; Michael Sturma, *Vice in a Vicious Society*, University of Queensland Press, St. Lucia, 1983, pp. 14; 20; 24.

61 SRNSW: Surv. Gen., Letters Received from Surveyors, Nicholson, 14 Feb 1832 - 22 Dec 1834, 2/1562, pp. 224; 230; 258. R.3080

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

of blood, or by laceration, or other symptoms of bodily injury...'. Each lash was to be counted and care taken that it was administered 'with due force' and that the standard instrument was used. Three prisoners, who also did time on the Western Road, were part of this experiment. All three received 50 lashes at Hyde Park Barracks, viz.:

- Twenty-six year old John Dowlan who had absconded: 'This boy was flogged six months ago; he cried out at the first lash; the skin was lacerated at the 13th lash; the blood came at the 19th lash, and ran down at the 24th lash. Twelve lashes would have been sufficient punishment.'<sup>62</sup> (Within the month Dowlan had again run away, this time from No. 6 Iron Gang on the Western Road)
- Twenty-three year old William Parr, who earlier in the year had been recaptured after running from the No. 9 Road Party at Mount Victoria and who refused to work. The report recorded: 'This man was flogged once before; the skin was lacerated at the 20th lash; the blood came at the 31st lash; he did not cry out.'<sup>63</sup>
- Twenty-three year old John Jones, who turned up on the Western Road in 1837 and 1838 was sentenced for 'Refusing to work, and mutinous and insolent language to overseers and constables'. The report of his flogging noted that: 'This man was flogged about six weeks ago; the skin was lacerated on the 12th lash, and blood came at the 30th lash. The man did not call out; his skin appeared hard, I should say from former punishments.'<sup>64</sup>

In April 1835, Deputy Surveyor General Perry described three classes of convict workers on the roads: firstly, there were the useful mechanics; secondly, the intelligent and well conducted labourer, including bullock drivers; and thirdly, the

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62 Return of Corporal Punishments inflicted by Sentences of the Hyde Park Barracks Bench, from 4th to the 30th September 1833.... in *British Parliamentary Papers, Transportation and Secondary Punishment, Crime and Punishment Transportation*, Shannon, IUP, 1971, Vo.6, p.395.

63 *Ibid.*, p.394.

64 *Ibid.*

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

insolent, ignorant and incorrigible character that was on the road because he was useless and dangerous elsewhere. Perry put forward that in order to encourage better behaviour a classification system entailing a system of rewards needed to be implemented, viz.,

... if the men were all to remain on the same footing it would perhaps be considered unjust to exact more exertion from one than another. If all had the same treatment in every respect, the same prospect of release from constraint the probability is that their exertions would be the same but by placing the intelligent, well conducted and useful men in a good situation with respect to indulgences as if they were assigned to private service, they become attached to the work and as these indulgences by usage become necessities and suppression of them as a punishment for trifling irregularities has the effect of diminishing the number of cases referred to the magistrates.<sup>65</sup>

Perry's proposal, or some derivative of it, was implemented on the Western Road. Forty men of the 'second class of convicts' were despatched to the Western Road in August 1835. As an incentive, these men were to be given the same allowances of tea, sugar and tobacco as surveying parties but had to forgo claims to be returned to assignment.<sup>66</sup>

The reforms reflect the debate in England concerning the corruption of New South Wales society that came about through the exercise of summary power, an accusation that had successfully been levelled at the slave trade. It also reflected the criminal reformists' concern to instil work habits and a shift in focus to reform of the mind rather than the body. On the roads it meant greater bureaucratization. Both Darling and Bourke were subjected to a sustained campaign of opposition in part because of

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65 SRNSW: Surv. Gen., Copies of Letters Sent to Col. Sec., 21 Feb 1835 - 31 Dec 1835, 4/5401, pp. 78-79. R.2840.

66 SRNSW: Col. Sec., Copies of Letters Sent to Surv. Gen., 12 Apr 1834 - 31 Dec 1834, 4/3916, p.30. R.3018; Surv. Gen., Copies of Letters Sent to Col. Sec., 21 Feb 1835 - 31 Dec 1835, 4/5401, pp.228; 268. R.2840;

## Chapter Two: The Transportation and Penal Reform Debate and the Western Road

their administration of the convict system. Darling was accused of being cruel and tyrannical and Bourke, because of his sentencing reforms, of being too lenient.<sup>67</sup>

The above accounts demonstrate the efforts made by the administration to meet criticisms concerning the efficacy of the penal system. They also illustrate its shortcomings on the reform issue. Bushranging absconders from the convict gangs lent credence to claims by prison reformers that transportation failed to reform. The activities of the absconders prompted numerous practical and administrative changes by Governors Darling and Bourke, who were under intense pressure from the British administration to 'hose down' the debate.

Over the ten years from 1826 some 5,000 men or 18% of males transported to the Colony spent some time in irons.<sup>68</sup> By 1836 there were a thousand men in gangs in New South Wales. From 1837 they were entirely under the command of the Royal Engineers and all were ironed. The British interest in the situation on the ground in New South Wales was by no means merely theoretical or a case of out of sight, out of mind. The tour of convict facilities by Quakers Backhouse and Walker is indicative of the localised pressure exerted by the debate in the United Kingdom. Backhouse and Walker toured facilities, conducted interviews and reported on the convict system for the Society of Friends in Britain. Backhouse concluded that death would be preferable to a sentence to an ironed gang.<sup>69</sup>

This chapter has explained the over-riding parameters that influenced and complicated decisions in the colony. They had a direct impact on the convict experience in New South Wales, but not always the impact that was intended. In subsequent chapters the reality of the Western Road experience is examined in detail. The contexts of road building and security and convict workers add other dimensions to an understanding of how the system worked and how it was intended to work.

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67 Hirst, *op. cit.*, pp.176-177.

68 Shaw, *op. cit.*, p.216.

69 *ibid.*, p.13.

