

‘Policy on the Run’

**Transportation, the Law, and Empire: The Case of Van
Diemen’s Land**

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#763122

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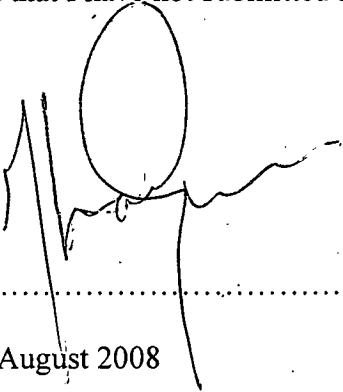
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DECLARATION

I certify that this thesis is all my own work, except as indicated and acknowledged, and that I have not submitted it for the award of any other degree or diploma.

A handwritten signature in black ink, consisting of a large, stylized 'G' followed by a horizontal line and a small flourish.

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ABSTRACT

The approach to the bicentennial of the British settlement of Australia in 1988 generated renewed interest in a broad spectrum of Australian history. One genre that was heavily revised was that of convict studies. Convicts and convictism and their role in the early development of white settlement have been much re-examined. A significant body of work has been focussed on convicts as unfree labour and unwilling emigrants. Because of this focus emphasis has been placed on convict agency and their ability to resist the system. As a body they have been dissected into micro groups to explain how the system then impacted on the individual. Few works have looked the other way and seen how the individual impacted on the system. By both their presence and their agency, convicts forced changes to the way in which the Empire conducted transportation. This thesis examines these aspects to see how this took place. That examination is then taken further to look at how changes to the system of transportation impacted not only on the obvious relationship between the various Australian colonies, but also those colonies relations with others within the British Empire, and ultimately on how it impacted on relations between the colonies and the metropolis. While writers such as Hirst, Sturma, Neal, and Atkinson have examined aspects of convict impact on colonial society and its development, their work has been largely introspective with their focus on New South Wales prior to 1840. This thesis aims to broaden the examination to include the effects created by continued transportation to Van Diemen's Land and, later, Western Australia.

ACKNOWLEDGEMENTS

It would be highly remiss of me not to publicly acknowledge and thank those who have helped bring this thesis to life, and who have provided the support necessary to enable me to write it. Despite the fact that the PhD journey can prove to be very much a lonely road at times, along the way a number of people have contributed in thought, advice and encouragement. In many ways the thesis is a team effort, with many of the team unaware of their part in it.

To the staff of the School of History and Classics at the University of Tasmania in Launceston I would like to thank you all for your part in my journey. To my principle supervisor, Dr Hamish Maxwell-Stewart, I thank you for the freedom you have given me to write this thesis in much my own way and in my own style. I hope this thesis is ample reward for the enthusiasm and encouragement you gave me as an undergraduate

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Two research trips were necessary to view original sources. The first, to the National Archive at Kew in London, was made available through grants from the School of History and Classics and I thank them for their support, without which the visit would not have been possible. The second was a flying visit to the Public Records Office of Victoria to view Legislative Council archives. I thank Robert McDonald at the Victorian Legislative Council for allowing me to use their records, and Marcus Dowd and the other staff at the PROV who made the visit so smooth – and highly profitable.

I have been fortunate that almost all the material I have had to work with has been in English. Two documents did require translation and I thank Ric Fletcher for his assistance with the one in Afrikaans and Dutch, and Anita Pfleger for translating an article on German convicts and their transportation.

Whilst this thesis has proven a solitary undertaking, there have been others who have shared much of the journey and supplied friendship, laughter and encouragement along the way. In this regard I extend my thanks to Damian Collins, Kelly Brandenburg and Nicole Lehmann. A special thank you to Jess Whelan who has proven to be more than a colleague and whose advice and friendship helped me through some very difficult times. I hope her journey on the same road is also soon successfully over.

I would also like to acknowledge the role of Dr John Carter, from the Ministry of Culture in Ontario, Canada, who from a distance has offered friendship and encouragement to complete my journey. Not only did he send me research materials he had unearthed in Canada, but also provided me with an opportunity to publish some of my findings. John also put me in touch with Patricia Kennedy who so generously shared much of her own work with me. To both I offer my thanks.

To Jill Wilkinson, who so freely gave of her time to proof read this thesis, I also extend my thanks. Perhaps one day I can return the favour. To Megan Gunn and my children Hannah, Rowena and Frank, I thank you for the opportunity you have given me and the support you lent, despite its cost to you all. I cannot adequately enunciate my thoughts in this regard but have confidence you know the level of my thanks.

I save my greatest thanks for my wife Anne Green, the person who held the light on the path when the journey was darkest and I was floundering and lost. You have never fully understood just how important your guidance, your encouragement, your advice and your love have been in getting me to finish this journey successfully. This thesis brought us together at a crucial time in both our lives and in that regard it will always have a particular significance and its own meaning. Despite thoughts to the contrary, my journey has never really been alone for you have always been there and for that I cannot thank you enough. I look forward to the day we can repeat the journey but with you in the lead.

DEDICATION

I would like to dedicate this thesis to my late father David Gunn, from whom I inherited my love of books and history. He gave me gifts that I cherish as much today as I ever have.

LIST of CONTENTS

Abbreviations	p. ix
Introduction	
Introduction	p. 1
Review of Literature	p. 7
Chapter Outline	p. 24
Chapters	
One - A prison wall 14,000 kilometres thick.	p. 33
Two - An old case through (Jane) New eyes.	p. 48
Three - And then there were two.	p. 65
Four - Strange ideas of freedom.	p. 80
Five - A diversity of systems.	p. 97
Six - Touched by the breath of penal atmosphere.	p. 129
Seven - The notorious Johnny May...	p. 158
Eight - Objectionable on the grounds of equity and policy...	p. 180
Nine - The duty of all true and loyal subjects.	p. 221
Ten - Transportation by stealth.	p. 242
Conclusion	p. 255
Appendices	p. 266
Bibliography	p. 267

ABBREVIATIONS

The following abbreviations have been used in this thesis.

ACA	Anti Convict Association
ACN	An Chartlann Náisiúnta (National Archives of Ireland)
ADB	Australian Dictionary of Biography
AOT	Archives Office of Tasmania
BPP	British Parliamentary Papers
CSO	Colonial Secretary's Office
HRA	Historical Records of Australia
HRNSW	Historical Records of New South Wales
IUP	Irish University Press
NA	National Archives of Britain
NSW	New South Wales
PROV	Public Records Office of Victoria
SCNSW	Supreme Court of New South Wales
SRNSW	State Records of New South Wales
UCT	University of Cape Town
VDL	Van Diemen's Land
nd	No date (of publication)
p, pp	Page, pages

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Introduction.

INTRODUCTION

This thesis is about problematic bodies – convict bodies. For over two and a half centuries the English, later British, Government practiced a policy of transporting felons to the colonies, first to those in North America and then, when they were lost, Australia. As a policy it was *ad hoc*, constantly adapting to match the realities of the British Empire's global nature and the diversity of the political relationships within it. It was not, as convention would have it, a single continuous unchanging and controlled policy or system of transportation. To define it in modern political vernacular, transportation policy was policy made on the run.

As a result, members of the convict class, defined as serving convicts and those who were free by servitude or remission, often found themselves in destinations where they were not wanted. Sometimes their presence was at the behest of administrations, either those in London or the colonies, while at other times it was through the agency of the convicts themselves. That agency could be either active or passive, but both forms generated tensions, not only between the individual colonies of the Empire, but also between the colonies and Britain. Such tensions generated reaction often in the form of political rhetoric. Given that the source of this tension was the problematic bodies of the convicts themselves, they placed unexpected pressure from below forcing numerous changes to British policy.

The concept of agency is central to this thesis. As social historian Walter Johnson has noted, much of the recent historiography of slavery has focussed on 'agency' as defined as a form resistance often expressed through a desire to preserve a sense of dignity or an ability to direct ones own actions.¹ Such definitions imply a conscious act by an individual. Whilst this thesis accepts such an interpretation it also seeks to explore the notion that some convicts exercised agency, not through conscious activity, but by unconscious presence. At times convict bodies turned up in locations that posed awkward administrative questions for others. Such unexpected intrusions led to their agency being, as Johnson also expresses it, the 'instrumentality of another's purpose'.² No matter how defined, agency is a necessarily flexible concept.

¹ W. Johnson, 'On Agency', *Journal of Social History*, Fall 2003: 37, p. 115.

² Johnson, 'On Agency', p. 116.

Perhaps the best way of expressing this is that convicts, like other historical actors, were far from passive objects. They affected change consciously and unconsciously as well as being the subjects of power.

The historiography of the British system of convict transportation has largely neglected its impact on intercolonial relations. Whilst aspects of that impact have been touched upon in a number of works, there have been few attempts made to draw out broader or recurring themes.³ Certainly the presence of the convicts themselves and the resultant influence that they exerted on policy remains to be examined. Despite the passage of time it is still necessary to rescue the transported from the grip of nineteenth century historians like John West who portrayed them as a worthless class with no political role or importance.

Within the British Empire the impact of convict transportation from Britain was greatest in the Australian colonies. There were two reasons for this; the first being the numbers they received, the second being their political geography. Other British colonies had been recipients of transported convicts; an estimated 50,000 were sent to the North American colonies, 9,000 to Bermuda, 9,000 to Gibraltar, and 4,000 to Barbados. Even when totalled these figures represent less than half of the almost 160,000 collectively sent to New South Wales, Van Diemen's Land and Western Australia.⁴

Transportation from Britain had been an irregular punishment during the seventeenth and early eighteenth centuries. In 1718 the British Parliament passed 'An act for the further preventing robbery, burglary, and other felonies, and for the more effectual transportations of felons, and unlawful exporters of wool, and for declaring the law upon some points relating to pirates'.⁵ Despite the references to the unlawful exportation of wool and the desire to deal with pirates, the primary intent of the Act was to standardise the process of transportation of convicted felons out of Britain. It

³ For example the anti convict legislation introduced by Victoria in 1852, and examined in depth in this thesis, is discussed in John Ward's book *Earl Grey and the Australian Colonies* where it gets two pages and is presented as part of the anti-transportation movement. J. Ward, *Earl Grey and the Australian Colonies, 1846-1857* (Melbourne, 1958), pp. 218-20.

⁴ For the Australian colonies, Bermuda and Gibraltar see S. Nicholas & P.R. Shergold, 'Transportation as Global Migration', in S. Nicholas (ed.), *Convict Workers* (Cambridge, 1989), p. 30. For the figures to the North American colonies and Barbados see M. Bogle, *Convicts* (Sydney, 1999), pp. 7, 19.

⁵ British Statute 4 George I, c11.

brought together the powers contained in a number of previous Acts that allowed transportation to be imposed as a punishment. It was significant in that its purpose was to standardise policy.⁶

The Act failed in two respects. The first, and most crucial, was that it resulted in neither a standardisation of policy nor in its method of implementation. The second was that it also failed its *raison d'être*, that being to act as a significant deterrent to the criminal population of Britain. Nor was it a policy uniformly applied, for the bulk of those transported under the Act were drawn heavily from the prisons of London and the Home Counties. Even here it was unevenly applied and whilst estimates vary, it is claimed that only one third of those sentenced to transportation were ever sent out of Britain.⁷

Despite its flaws the Act remained the principal piece of legislation which governed the removal of convicts to Australia. Here, however, it ran up against the political geography of the antipodean colonies. Initially transportation to New South Wales created few problems because of the isolated nature of the convict's location. This had changed markedly by the time transportation to eastern Australia ceased in 1853. Settlement had spread widely within New South Wales, while other colonies had been created adjacent to it. The movement of the convict class between colonies, with or without official sanction, had become common place. The status quo was shattered however by the creation of the supposedly non-penal colonies of South Australia and Victoria. Although the convict free claims of both were problematic, their maintenance of the pretence of exclusive free settlement was enough to fuel intercolonial tensions.

In the Australian context, convict presence impacted on the relationships of empire in one of three primary forms, the first being escapes. The presence of escapees and absconders in the free colonies of Victoria and South Australia generated a degree of antagonism towards their penal counterparts of New South Wales and Van Diemen's Land. While this thesis explores those fears in greater depth, it will also explore the

⁶ Nicholas & Shergold, 'Transportation as Global Migration', p. 30.

⁷ W. Oldham, *Britain's Convicts to the Colonies* (Sydney, 1990), p. 4. For more on the actual numbers see pp. 9-32.

manner in which escape created other inter relational tensions, particularly between the free colonies and Britain. Victoria and South Australia both felt a lack of support from imperial authorities in their attempts to deal with the problems escapees generated. There were also concerns about who should pay for the costs of arresting, prosecuting, and returning escapees. These had a particular impact on the colony of Van Diemen's Land.

Despite the fact that they brought skills vital for the survival of the embryonic settlements of Adelaide and Melbourne, by the early 1840s the convict class had become unwanted in both and were increasingly blamed for their escalating crime rates. The penal colonies had no enforceable measure to stop exiles, as individuals with all the rights and privileges of a free born Englishman, moving to other British colonies. The imperial authorities, whilst they did have a degree of control over pardoned convicts, would not allow restrictions to be placed on their movement between the Australian colonies, forbidding only their return to Britain. The free colonies raised complaints that Van Diemen's Land, in particular, was granting pardons on the condition that recipients left that colony. Such argument was bound to cause friction between the colonies, but it also raised tensions between the free colonies and Britain. As with the escapees, the free colonies sought the help of the powers in London to put a stop to the alleged practices of Van Diemen's Land's Governor Denison in liberally dispensing pardons to all and sundry, and again they expressed their disappointment when this was not forthcoming.

The third form to impact on relationships of empire was the practice of transportation itself. It was a policy that was in no way uniformly applied by Britain to its dependencies. The pariah like status of penal colony was a designation laid down by the Privy Council in consultation with the Crown. In fact few British colonies were specifically ordained 'penal colonies'. In 1848 the Council declared the Cape of Good Hope, New South Wales, Van Diemen's Land, Norfolk Island and Bermuda as colonies to which 'Felons and other Offenders in the United Kingdom, then being, or thought to be, under sentence of transportation' were permitted to be conveyed.⁸ At the moment of declaration the five immediately found themselves in a different

⁸ Quoted in P.B. Blanckenberg, 'When the Cape was declared a Penal Settlement', unpublished manuscript, Cory Library, Rhodes University, pp. 2-3.

relationship with both Britain and its other colonies. The declaration also changed the relationships between the five.⁹

In the wake of the 1848 order, convicts already serving in Bermuda were shipped on board the transport *Neptune* to the Cape Colony. This thesis will investigate the chain of events set in motion by that decision, and the arrival of the *Neptune* at the Cape. Those events would not only draw the relationship of the individual colonies with Britain into question, but would also query the tripartite relationship that existed between Britain, colonists, and colonial governors.

The notion of Imperial power is a complex one. There was no question in the mind of the colonists, both at the Cape and in the Australian colonies, that they were citizens of the British Empire. Rather, the question posed by the presence of the *Neptune* was that of whether Britain exercised power over the colonists, or only on behalf of them. The actions of the Cape's Governor added another dimension to this complexity. In refusing to allow the convicts to land, he and his Executive Council argued that the decision fell within the Governor's discretion. Yet, as Governor, he acknowledged a lack of power to order the departure of the *Neptune* from the colony. That power was reserved for the Colonial Office, of which Earl Grey was the embodiment.

The incidents at the Cape also focused attention on the unique relationship Van Diemen's Land had with both Britain and its Empire. Britain used its imperial authority to send a percentage of her criminal population to its most remote possession. It required tandem legislation by the other colonies to turn Van Diemen's Land into the Empire's gaol. The events of the *Neptune* spotlighted the fact that the island colony was, as the Editor of the *Hobart Town Courier* disparagingly expressed, 'the sink of the empire - the dusthole of the world'.¹⁰

In the seventy years that followed the settlement at Sydney Cove, the British Empire expanded on a global scale to a point where its authority encompassed almost a fourth of the world's population. In some instances this expansion was clearly directed by

⁹ A curiosity of the 1848 order was that it did not refer to Gibraltar to which convicts had been sent since 1842. Another, but more subtle, omission from the Council's order of the south east Asian penal colonies of the Straits Settlements, made up of Penang, Singapore and Malacca.

¹⁰ *Hobart Town Courier*, April 10. 1850, p. 2.

the British Parliament, as in the case of New South Wales. Other acquisitions were gained by conquest, cession, or yielded up and then retained on the basis that they were militarily, or economically, strategic to British interests.¹¹ The most significant expansion in both area and people during this period was on the Indian sub continent where the British parliament exercised indirect control through the agency of the British East India Company. Yet, with the exception of New South Wales, and even that is disputed, there was no clear and coherent plan by the British Government to obtain a global empire during this period.¹² Rather it was an opportunistic accumulation of colonies.

This seventy year window of growth coincided with the major era of penal transportation to Australia, in particular the colonies of New South Wales and Van Diemen's Land.¹³ In some respects the growth of the two mirrored each other. The loss of the North American colonies was also the loss to Britain of her destination for its convicted felons. Yet like the growth of empire, transportation and its place in the British punishment regime was to become the victim of reactive decision making, constantly evolving policy, and the whims of the governors of remote colonies forced to make decisions without the benefit of instant advice from the authorities in Britain.¹⁴ Such a fragmentary infrastructure was always likely to generate problems between colonies for which there was no immediate bureaucratic remedy. The infusion of convicts into this situation, especially in the Australian context, was at first no more than a nuisance. By the time convict transportation ceased to eastern Australia in 1853, the convict question had so soured the relationships of empire that some extremists were advocating 'angry and forcible separation from the Mother Country' as the only solution.¹⁵ This thesis will explore these issues through an examination of a series of case studies.

¹¹ For example the Cape Colony ceded to Britain during the Napoleonic wars by the Dutch but not returned following peace in 1815, and Malta in 1814.

¹² See G. Martin, *The Founding of Australia* (Sydney, 1978) as a summary of the debate.

¹³ While transportation continued to Western Australia until 1868, of the estimated 162,119 convicts transported to Australian colonies only 9636 were sent there. This thesis will concern itself mainly with the eastern colonies as they received the overwhelming majority of convicts and because that is where the majority of the issues discussed in this thesis were present. For figures transported see C. Bateson, *The Convict Ships 1787-1868* (Glasgow, 1985), pp. 379, 396.

¹⁴ S.C. McCulloch, "'The Man on the Spot': Independence of the Australian Governor, 1788-1850", *Albion: A Quarterly Journal Concerned with British Studies*, Volume 3, No. 4, Winter 1971, pp. 177-181.

¹⁵ Ward, *Earl Grey and the Australian Colonies*, p. 222.

REVIEW OF THE LITERATURE

In the mid 1970s inspired by historians Carlo Ginzburg and E.P. Thompson a new genre of historical writing appeared. These studies sought to explore the lives of ordinary people.¹⁶ Their aim was to reveal history through the eyes of everyday men and women, those who saw life at ground level. It was 'an endeavour to discern through the lives of individuals or families the broader contours of the social and cultural landscape'.¹⁷ The genre came to be called micro history and its purpose was to challenge the traditional presentation of history through 'both liberal and Marxist theories of modernization'.¹⁸ The growth of micro history coincided with the lead up to the bicentenary of European settlement in Australia in 1988. The approach of that event triggered an increased interest in the nation's history and proved to be a watershed in terms of its historical writing. Nowhere was this more marked than in the area of convict studies and, given the timing, it is not surprising that much of this output was informed by the micro history approach.

By its very nature, the shift to micro history resulted in historians turning away from the type of broad spectrum studies of Australian convictism, best exemplified by the work of A.G.L. Shaw. In their place were works with a more specific focus on sub groups of convicts, for example females and the Irish. These sought to recover the individual through such means as categorising and interpreting the tattoos on their bodies, or the retrieval of their voices through texts and memoirs.¹⁹ While this new body of work has given historians a far greater understanding of whom and what the convicts were, it has proven one dimensional in that little has been provided in the way of an inter-colonial understanding of transportation. Much of it has displayed a tendency towards a form of colonial exclusivism. This has stemmed from the process of the micro focus, which has resulted in artificial borders being put in place, segregating the experiences of New South Wales, Van Diemen's Land and Western Australia. No heed has been taken of their close proximity and the regular inter-

¹⁶ J. Lepore, 'Historians Who Love Too Much: Reflections on Microhistory and Biography', *Journal of American History*, Volume 88, Issue 1, June 2001, p. 131.

¹⁷ R. Hoffman quoted in Lepore, 'Historians Who Love Too Much', p. 132.

¹⁸ M. Peltonen, 'Clues, Margins, and Monads: The Micro-Macro Link in Historical Research', *History and Theory*, 40 (October 2001), p. 347.

¹⁹ See especially I. Duffield & J. Bradley (eds.), *Representing Convicts* (London, 1997).

colonial movement of people, goods and ideas. Similar issues arose with the movement of convicts from other parts of the Empire to Australia.

Although they had always been actors on Australia's historical stage, earlier historians had tended to marginalise, rather than centralise, convicts. Many of the very early works published on the Australian colonies, those of David Collins and Watkin Tench for example, were historical narratives. They outlined for the inquisitive readers of Britain the birth and first unsteady steps of a colony on the opposite side of the globe. Such work was often marked by a considerable descriptive discourse on geography, the indigenous population, and the unusual flora and fauna.²⁰ By the 1820s a growing market had developed for texts that were designed to encourage emigration, often presented in the guise of recollections of migrants who had 'made good', exemplified by those of George William Evans, Henry Widowson, and Edward Curr.²¹ In the case of both genres the issue of convicts, whilst invariably identified as part of the colonial setting, was down played to the role of labour force. Little attempt was made to place transported criminals into any sort of social or economic perspective, and they were seen to have had no active role in the political development of the colonies.

During the latter half of the nineteenth century the portrayal of convicts moved from that of labour force to one of interesting historical characters. They provided the basis for entertaining tales of bushrangers, escapees, pirates, and the occasional personal success, often realised despite the need to overcome severe adversity. Many of these tales were then formed into fictional accounts of early Australia, best exemplified by Marcus Clarke's gothic novel *For the Term of His Natural Life* which was loosely based on some factual events and persons.²² Some nineteenth century works on Australian history, for example Charles White's *Convict Life in New South Wales and*

²⁰ For example see David Collins, *An Account of the English Colony in New South Wales* (London, 1798), and Watkin Tench, *1788* (republished Melbourne, 2002).

²¹ G.W. Evans, *A Geographical, Historical, and Topographical Description of Van Diemen's Land* (London, 1822); H. Widowson, *Present State of Van Diemen's Land comprising an account of its Agricultural Capabilities with Observations on the Present State of Farming Pursued in that Colony and Other Important Matters* (London, 1829); E. Curr, *An Account of the Colony of Van Diemen's Land principally designed for the Use of Emigrants* (London, 1824).

²² For more on this see the appendix of the book in which Clarke lists his sources of material; M. Clarke, *For the Term of His Natural Life* (Hawthorn, 1970), pp.442-45. See also J.C. Horner, 'The Themes of Four Tasmanian Convict Novels', *Tasmanian Historical Research Association*, Volume 15, No. 1, June 1967, pp. 18-32, and L.L. Robson, 'The Historical Basis of *For the Term of His Natural Life*', *Australian Literary Studies*, Volume 1, No. 2, December 1963, pp. 104-21.

Van Diemen's Land, addressed the convict issue in greater depth, but still suffered lapses into sensationalism.²³ Subsequent works in the first half of the twentieth century tended to follow this path, often repeating assertion and generalization as fact and failing to rigorously interrogate the contemporary evidence through empirical research.²⁴

Since the 1950s a far more scholarly approach has been adopted. The first significant shift occurred in 1956 when A.G.L. Shaw published *Convicts and the Colonies*. Despite the passing of over fifty years, Shaw's work remains one of the backbones of convict studies within the British Empire and, in particular, Australia. Given the limited resources available to him at the time of writing it is a masterpiece of research. His book looks in depth at how the system worked, who the convicts were, and how they impacted on the economic development of Australia. Shaw was the first to place the Australian convict experience into a broader context by studying convictism as an offshoot of the British penal system. Perhaps because of the limitations he was under, one aspect that Shaw did not attempt to analyse was the impact that convict transportation had on colonial society in both the penal and non penal colonies within the British Empire. As a natural outcome of this he did not examine political and social reactions to it by those colonies.

Shaw was the first convict historian to recognise and acknowledge that the system of transportation to Australia set in place in 1787 was significantly amended over the course of the following eighty years. He noted that during this period a number of key changes were made that resulted in a plurality of models, all with their own unique characteristics. Shaw was, for example, able to identify the changes that resulted in both the Stanley and Earl Grey schemes of transportation to Van Diemen's Land in the 1840s. These indicated flexibility and adaptation but he did not then assess their impact to see if such characteristics were mirrored in the relationships Van Diemen's Land then enjoyed with the other Australian colonies, in particular with Victoria and

²³ C. White, *Convict Life in New South Wales and Van Diemen's Land* (Bathurst, 1889). See for example Chapter XVIII, pp. 386-97, 'A Horrible Story' which details the story of Alexander Pearce, and Chapter XX, pp. 403-95, 'Remarkable Convicts', both of which dwell on the sensational.

²⁴ For example Coultman Smith's *Shadow Over Tasmania* which proclaims on its fly to be 'the whole story of the convicts; fact not fiction', C. Smith, *Shadow Over Tasmania* (Hobart, 1941).

to a lesser extent New South Wales and South Australia. He looked at these changes in transportation simply as the various constituent parts of one overarching policy.

Shaw's ground breaking work was joined in the 1960s by that of Lloyd Robson whose *Convict Settlers of Australia* looked at the demographics of those transported rather than the mechanics of transportation. Robson's work heavily utilised statistical analysis in an attempt to reveal who the convicts were. He looked in particular at their origins in Britain, their occupational and religious backgrounds and the nature of the crimes for which they were convicted. Robson relied heavily on the written record to produce a set of data that was in turn used to generate the human face of those transported, an image of their appearance, accents and ages, and an attempt to understand the circumstances that had led to their transportation.²⁵

When examined from this standpoint Robson achieved the desired result. Yet while his statistical returns form a valuable contribution to our knowledge of the convicts as individuals, it cannot, and does not, inform us as to the impact the numbers had on colonial society. A particular flaw with Robson's work is that it is highly focussed on New South Wales. While it has, for example, tables on the occupation of convicts sent there, it has none for those despatched to Van Diemen's Land. As an assessment of convictism in an Australian context this is perhaps its greatest weakness. In line with this, no attempt was made to determine if the two quite distinct destinations were also subject to two distinct sets of convicts or, to extrapolate Shaw's work, two distinct systems. Contemporary evidence from the 1840s would suggest that colonial society did see them as distinct destinations, but this is not reflected by Robson's approach.²⁶

Despite the work of Shaw and Robson, convicts remained very much buried within broad-scale Australian historical writing until the early 1980s. In *Convict Society and its Enemies* John Hirst set out to ascertain how the penal colony of New South Wales had evolved into a free society.²⁷ Instead his scholarship resulted in an assessment that argued legal and societal freedoms had been present from the very start of

²⁵ Robson spells this out in his preface to the book. See L.L. Robson, *Convict Settlers of Australia* (Melbourne, 1973), p. v.

²⁶ For more on this see this thesis Chapter 3, pp. 65-79.

²⁷ J.B. Hirst, *Convict Society and its Enemies* (Sydney, 1983), p. 7.

colonisation in 1788 and in the process he challenged many of the myths and generalizations that had permeated Australian perceptions of the convict era.

A major focus of Hirst's work is the impact on colonial society that resulted from the moralists' attacks on transportation. To a large extent, these attacks were driven by the perception the moralists had of colonial society and its moral workings. A key component of this was the 'evil' influence that flowed from the convicts, simply by their presence in the colonies rather than the actuality of their agency. The argument of Hirst is similar to that of this thesis but differs in that his approach is very much focused on New South Wales.²⁸ He reflects on how convictism impacted on society there and how that society was then portrayed by those within it. As a consequence his work contains little reference to Van Diemen's Land or Port Philip, two isolated references to South Australia, and none to Western Australia. Hirst does not therefore examine how convictism and transportation impacted on colonial societies other than that of New South Wales.

When Hirst's work moves to addressing convictism as it developed in the 1840s, following its cessation to New South Wales, his focus is almost purely on the anti transportation movement rather than the ongoing presence of convictism in the colony. As a result he chooses not to focus on the outcomes of the anti transportation movement and the impact they had, especially in the Australian colonies. One outcome was the suggested introduction of colonial passports that would identify those with a convict background in an exclusionary manner. Hirst refers to this proposal, but in keeping with the focus of his work does not develop the thread beyond just that.²⁹

A study contemporary to that of Hirst is Michael Sturma's *Vice in a Vicious Society*. This work can be viewed as a study of crime in New South Wales, but Sturma examines more than simply crime. The book is also an examination of the corruption of colonial society from within, viz. by the presence of a convict class. To demonstrate this Sturma looks in depth at both the incidence of crime and the identity of those who committed it. The intent in such an examination is to test the belief

²⁸ Hirst acknowledges this with the book's sub title, 'A History of Early New South Wales'.

²⁹ Hirst, *Convict Society*, p. 126.

commonly held in Victorian Britain, and its colonies, that criminality was hereditary. Sturma also questioned the parallel belief that criminality was contagious.

In examining the 1840s crime rates for New South Wales Sturma looks at contemporary reports which placed much of the blame for the upturn in crime on the presence of expirees and absconders from Van Diemen's Land.³⁰ In part the outcome of Sturma's examination is an assessment of the impact these men had on crime but he does not investigate what this then meant in terms of intercolonial relations. In that context Sturma's work does not challenge the integrity of the evidence offered, nor examine the possibilities of it being deliberately constructed and presented in a manner designed to achieve particular political ends. The fact that placing the blame for escalating crime rates on the presence of convicts was a key plank in the anti transportation movement's platform is not effectively explored. Again, like Hirst, Sturma's focus is almost solely on New South Wales, a fact he readily acknowledges in his introduction.³¹

David Neal's *The Rule of Law in a Penal Colony Law* is a unique study in that it is effectively a history of the genesis of law in the Australian colonies.³² It examines how British law arrived here and how it was put in place. It traces the establishment of the courts system and demonstrates how legal structures were effectively a brake on the power of the early governors, an area this thesis touches on but in terms of the relativity of their inter-colonial authority, an area Neal does not investigate. Unlike Sturma and Hirst, Neal offers a more imperial perspective on his topic, recognising that the legal system in Australia did not develop in isolation but as part of the British Empire. This was even more so in New South Wales given that it was the first colony within the empire to be founded and administered directly from London, as opposed to the chartered colonies of the America's or the East India Company's possessions on the Indian subcontinent.

Neal's work examined how the growth of law in New South Wales was more than the simple building of physical structures such as court houses and the mimicry of court

³⁰ M. Sturma, *Vice in a Vicious Society* (St Lucia, 1983), pp. 53-54.

³¹ Sturma, *Vice in a Vicious Society*, p. 5.

³² D. Neal, *The Rule of Law in a Penal Colony* (Cambridge, 1991).

procedure. Crucial to his argument is that common law in the colonies threw up its own precedents. Given the fact that the colony under discussion was established as a penal one, this resulted in issues unlikely to arise in Britain. One such example was the Jane New case, a matter this thesis also examines in depth.³³ Neal writes on the case from the point of its traditional significance as a legal precedent, that being as a test of the Governor's powers to revoke the assignment of convict labour. Whilst not at the core of Neal's work, the issues surrounding the Governor's powers and his exercise of it is an important aspect of the book. Neal discusses this mainly in the internal context of the ongoing struggle between Governor and magistracy but also touches on the legal relationship that existed between Governor and Downing Street. It does not attempt to put the Jane New case into an inter-colonial context, that being it resulted in a clash of authority between colonial governors and established the separate nature of New South Wales and Van Diemen's Land. This thesis will show that the issue of convictism was often, and not insignificantly, the trigger for such disputes.

Neal's focus on the origins of the legal system in the Australian colonies by necessity, focuses heavily on the period immediately following on from settlement in 1788 through until the mid 1830s. As a consequence the question of the relative powers of the colonial governors has little scope for inquiry as the period predates all other Australian colonies being independent of New South Wales bar Van Diemen's Land from 1825, and the far distant Swan River settlement in 1829. By the nature of the period he examines the work does not address how issues arising from changes made to the system of transportation in the 1840s impacted on the law and its application in South Australia and Victoria in particular. Indeed, the subtitle of Neal's book spells this limitation out, it being *Law and Power in Early New South Wales*, not Van Diemen's Land. The issue of convicts using the courts to protect themselves, a matter Neal touches upon but in no great depth, is a subject this thesis will examine in greater detail.

In 1988 *Convict Workers*, a collection of essays on convictism, was published after seven years of research. Edited by Stephen Nicholas, the book was an attempt to

³³ See this thesis Chapter 2, pp. 48-64.

revise the traditional view of the convict that he claimed had taken root under Shaw and Robson. As with Sturma, Nicholas intended to overturn the view that convicts sent to Australia were part of a professional and distinct criminal class.³⁴ This revisionism was also influenced by a desire to show that convict transportation was part of a wider global picture of forced migration that included slavery and indentured service. To achieve this Nicholas claimed that the book would be a 'quantitative history of forced labour...which combines the insights of the historian with the formal theory and quantitative technique of the economist'.³⁵

Certainly the contributors to *Convict Workers* have benefited from the primary material that has become available since the pioneering work of Robson. Their research has given a clearer insight as to who the convicts were, how they were employed and how they were fed. However their focus on convictism as unfree labour has resulted in a view very much restricted to their economic and social impact within the colony of New South Wales. It is a view not extended to its neighbouring colonies nor to the British Empire in general. While the authors do recognise that transportation within the British sphere consisted of more than the simple British-Australian nexus, there is no attempt to position their analysis and assessment into an imperial transportation framework nor to consider it in light of the changes made to the system over 80 years. While it recognises convict transportation in a global context, the book also views it in isolation, for the work, like that of the predecessors it aims to overturn, is very much a case study restricted to New South Wales.

Amongst the essays included in *Convict Workers* is one by Deborah Oxley on female convicts. Her work recognises that transportation was imposed on both males and females but does not investigate the imbalance of the sexes in terms of those transported. Around twenty percent of the convicts sent to the Australian colonies were female, but when referenced to crime in Britain and the prosecution rates of women there this figure can be seen as an under representation. Clearly there was some sort of differentiation within the system of transportation and the selection policy of those to be sent, one that was based on the gender of the convict. Oxley in her later work *Convict Maids*, along with Kay Daniels in her book *Convict Women*,

³⁴ S. Nicholas & P. Shergold, 'Unshackling the Past', in *Convict Workers*, pp. 4-6.

³⁵ Nicholas & Shergold, 'Unshackling the Past', p. 3.

has demonstrated that the female convicts made a differing impact on colonial society than that of the men.³⁶ The focus of both works however remains not that impact, but rather the attempt to overturn the popular image of convict females as wanton whores transported as part of a professional and hereditary criminal class.

More recently Kirsty Reid has built on this legacy by exploring the role of gender within Australian colonial society. As with the work of Hirst, much of Reid's study revolves around the perceptions of her topic. Like Oxley and Daniels, she successfully challenges the broad spectrum historical view of female convicts as unbridled sexual beasts. Reid takes her work one step further however by arguing that the very presence of the female convicts resulted in changes to how convictism was implemented. Their presence in the colonies determined that a 'greater control' over them would lead to an increase in morality.³⁷ This impact materialised in the adoption of a policy that saw convict women only assigned to married persons. If no suitable person was available then their assignment was to the government factory.³⁸ In this regard her work parallels but does not mirror the aims of this thesis.

If nothing else, Reid's work highlights the fact that there was no single system of transportation for she demonstrates there were at least two, for women were treated and employed in a different manner to men. She also brings into question the often painted picture of the convict structure as being inflexible and unyielding by noting that society in Van Diemen's Land was able to resist transportation and that this manifested itself in the agitation for its abolition.³⁹ Reid's work also explains the absence of women at the core of this thesis by noting that, whilst a smaller percentage than male convicts in colonial society, convict women were a more stable sector. Unlike the men whose capacity for escape from the colonies was aided by opportunities as remote shepherds or as seamen on ships, especially from the island colony of Van Diemen's Land, the avenue of escape from the system for females was often through marriage.

³⁶ K. Daniels, *Convict Women* (Sydney, 1998); D. Oxley, *Convict Maids: The Forced Migration of women to Australia* (Cambridge, 1996).

³⁷ K. Reid, *Gender, Crime and Empire* (Manchester, 2007), pp. 113-15.

³⁸ Reid, *Gender, Crime and Empire*, p. 115.

³⁹ Reid, *Gender, Crime and Empire*, p. 235.

Much of this revisionist work has been overshadowed by that of Robert Hughes in *The Fatal Shore*. Whilst this work can be criticised for its refocussing on convictism's darker side of excessive punishment and brutality, on one point Hughes' work should be acknowledged. In the face of proliferating micro histories, Hughes has attempted to cover transportation on a national scale, not merely that of New South Wales, and not stopping with the cessation of transportation to Van Diemen's Land in 1853. In a truly Australian sweep the work also includes Morton Bay and Western Australia. There is no attempt however to explain the impact that convictism had outside its immediate area of occupation in the colonies, except to argue that convictism had placed an economic brake on the development of both Western Australia and the newly named Tasmania. Whilst Hughes is seemingly ignorant of the impact that the Victorian gold rush had on Van Diemen's Land's economic growth, he is fully aware of the tensions and outcomes caused by the mass migration of ex convicts to the former from the latter.⁴⁰

The approaches of Hughes and Nicholas to the economic impact of convictism and the resultant outcomes are comparable with that of R. M. Hartwell's *The Economic Development of Van Diemen's Land*. The work is one of few that examines the island's very early European history and charts the growth of that colony from 1820 through to 1850.⁴¹ Despite the passage of time, Hartwell's work remains the only attempt to analyse the economic input of convict labour in a Van Diemen's Land context. In keeping with the school of thought at the time, Hartwell concluded that colonial growth was due to factors such as the whaling industry, the wide scale issuing of land grants by Governor Arthur, the growth of urban manufacturing industries, and the development of a banking sector. All are marked by a lack of convict involvement. The focus on economic development results in little, if any, attempt to place the convict into a social or political context and thus removes any possibility of their impacting on colonial relations.

Hughes's work provides little real analysis of the change in the convict system from assignment to probation. Whilst he discusses Stanley's changes these are presented more as an aside in a flurry of sweeping generalisations about Governor Sir John

⁴⁰ R. Hughes, *The Fatal Shore* (London, 1996), p. 580.

⁴¹ R.M.Hartwell, *The Economic Development of Van Diemen's Land, 1820-1850* (Melbourne, 1954).

Franklin's gullibility and the political woes of his successor Sir John Eardley Wilmot.⁴² Hughes has painted the system as totally inflexible yet his writings reveal contradictory events that challenge this notion. He notes, for example, that Governor Gipps was able to recant over the scheme of rewards put in place on Norfolk Island by Alexander Maconochie, but is then unable to change Lord Stanley's ideas when he became determined in his plan to amend transportation. The fact that subsequent changes were then made to Stanley's system by succeeding Colonial Secretaries, first by Gladstone then by Earl Grey, are glossed over. Indeed Grey's system, which was the basis of transportation to Van Diemen's Land and then Western Australia for the following 20 years, is allotted just one page of explanation.⁴³

In 1849 the convict transports *Hashemy* and *Randolph* arrived in New South Wales, the former at Sydney and the latter in Port Phillip. The two ships conveyed convicts transported under the Grey scheme to a colony that saw itself as no longer a penal destination. This was particularly so in the Port Phillip district, an attitude reflected in the bulk of the historiography. A further shipment, by means of the convict transport *Neptune*, was sent to the Cape Colony, another destination that saw itself as free of the convict taint. While Hughes mentions these events to varying depths, he fails to place the refusal of the colonists to accept the convicts into the context of the social upheaval that spawned the anti transportation movements and the subsequent impact their success had on how convicts were retrospectively treated. The events surrounding the *Neptune* in particular will be examined in greater depth in terms of their Empire wide ramifications by this thesis.

The impact of convictism on intercolonial relations was greatest in the Australian colonies for the obvious reason of their adjacency and common borders. A transnational approach to the topic is restricted by the focus placed on the Britain-Australia nexus and the fact that few historians have devoted their studies to the other convict systems that existed within the British Empire but were located outside that nexus. One who has is Clare Anderson who has looked in depth at transportation from south Asia and particularly that of convicts from the Indian colonies to Mauritius

⁴² Franklin was Governor of Van Diemen's Land from 1837 until 1843 and was succeeded by Sir John Eardley Wilmot who faced the ignominy of being recalled in 1846.

⁴³ Hughes, *The Fatal Shore*, p. 553.

between 1815 and 1853.⁴⁴ In *Convicts in the Indian Ocean* Anderson has examined transportation in a south Asian context with particular regard to the social impact it had on family. She has also looked at its socio economic impact on Mauritius. Her study has been an important addition to the field for it has allowed a comparative study of the systems to be possible. Unlike the Australian situation however, Mauritius had no adjoining colonies on which its convicts could impact in the way that those in Van Diemen's Land, for example, impacted on Victoria and South Australia.

Anderson's second book, *Legible Bodies*, has looked at attempts by the Indian authorities to deal with the all important issue of convict identification. This question is addressed both from the need to identify the convict as an individual and the need to identify convicts as a class. It investigates the use of tattooing, photography, fingerprinting and anthropometry as measures to achieve this. The issue was one that had resonance with the Australian colonies where questions of identity would lead to inter-colonial tensions, but this is not an aspect that Anderson's work focuses on.

Another to look at south Asian transportation is Satadru Sen who has worked in the field of convicts sent from India to the Andaman Islands. Sen's work focuses on the disparity between the aims of the British system as implemented to firstly North America and later Australia with that of the imperative of the Indian system. The former, he argued, was intended to utilise punishment to achieve a reformation of the mind. This eventually manifested itself in the move to a system of penitentiaries as the replacement of transportation from Britain. This shift in penal thinking largely flowed from the 1830s onwards but Sen's work notes that while this change had occurred in relation to British prisoners, by the 1850s Indian prisoners were treated differently. Instead, the Indian imperative was that of removing a dangerous class from a turbulent society.

⁴⁴ C. Anderson, *Convicts in the Indian Ocean: Transportation from South Asia to Mauritius, 1815-53* (Basingstoke, 2000), and *Legible Bodies: Race, Criminality and Colonialism in South Asia* (Oxford, 2004).

To achieve this it was decided that reformation of the mind could better be conducted overseas and so the Andaman settlement was established.⁴⁵ Sen views the system in terms of racial boundaries. The point of the Andaman settlement was to reform the prisoner to the accepted social, political, and physical order of colonial India.⁴⁶ There was no intention of reformation so as to fit into a British culture as was the intent with the penal settlements in Australia, and those elsewhere in the Empire.⁴⁷ While the contributions of both Sen and Anderson are important in understanding the diversity that was transportation within the British Empire, neither historian has as their primary focus convict impact on its relationships.

Unlike the Andaman Islands and Mauritius, the colonies of North America did have common land borders joining those colonies that accepted convicts with those that did not. In comparison to the Australian scenario, little has been written on the system of transportation applied by the British to these colonies. Of that which has, the work of Peter Coldham bears strong similarity to that of Shaw and Robson in that he too has sought to return individuality to the convicts. He does not however examine the impact convicts had on colonial society or its neighbours.⁴⁸ Roger Ekirch, as does Coldham, also provides a good background to the history of the system thus allowing a comparative study with the Australian colonies. Ekirch progresses one step further in examining the impact of convicts after the expiration of sentences and looks at those who returned to England. His final chapter is devoted to returnees and absconders from the system but this is examined only in the context of their personal experiences and reoffending rates. There is no attempt to contextualise the impact of their return in terms of the implementation of the system or its impact on intercolonial relations.⁴⁹ Certainly from Ekirch's work it would appear that absconders provided minimal discomfort to colonial American society.

⁴⁵ S. Sen, *Disciplining Punishment: Colonialism and Convict Society in the Andaman Islands* (New Delhi, 2000), p. 13.

⁴⁶ Sen, *Disciplining Punishment*, p. 248.

⁴⁷ Britain also had penal colonies at Bermuda and Gibraltar but these differed in structure and nature to the Australian settlements.

⁴⁸ P.W. Coldham, *Emigrants in Chains: A Social History of Forced Emigration to the Americas 1607-1776* (Baltimore, 1992).

⁴⁹ R. Ekirch, *Bound For America: The Transportation of British Convicts to the Colonies, 1718-1775* (Oxford, 1987). See in particular Chapter 7, 'Coming Home' in reference to absconders and expirees.

One book which takes a slightly different approach is A.E. Smith's *Colonists in Bondage* which looks at convict transportation to the British colonies of North America in the context of forced migration. As such it also examines indentured servants. Smith briefly investigates the resistance of some colonies to the arrival of convicts and the use of legislation in an attempt to prevent their importation, aspects of which this thesis touches upon.⁵⁰ Again the focus of Smith's work is on the place of convicts in the broader history of early immigration into the North American colonies. The other major writing on the topic is that of Wilfrid Oldham, whose *Britain's Convicts to the Colonies* is basically a history of transportation as practiced by the British. Written in the 1930s, it belongs to the older genre of narrative administrative history and whilst it may be dated the book is a valuable tool in understanding how the systems which applied in the Australian colonies had evolved from earlier practices. Oldham's work links the other major works on North American convictism with that of the Australian colonies, but whilst it touches on the exclusionary acts it does not examine them in any depth.⁵¹

In *The Fatal Shore*, Robert Hughes attempted to reposition Australian convictism and to place it into the broader context of British imperial policy. To achieve this it required removal from Australian social ownership. Hughes saw transportation and convictism as reflective of British society, replete with its focus on rank and privilege. He placed heavy emphasis on the role of Empire and imperial thought, as the theory behind transportation. This was, Hughes claimed, to be typified by the settlement of Van Diemen's Land which was to display 'a rigidly patterned Georgian fabric of rank and power' but which in fact it failed to do.⁵²

Given the emphasis and claims of Hughes, it is remarkable to find what little attention either the importance or impact of convicts and transportation has received in imperial studies. Transportation was practiced by the British for the entire eighteenth century, yet the volume of the *Oxford History of the British Empire* that covers that period has

⁵⁰ A.E. Smith, *Colonists in Bondage: White Servitude and Convict Labor in America 1607-1776* (New York, 1975), pp. 119-22.

⁵¹ Oldham, *Britain's Convicts to the Colonies*, pp. 29-32.

⁵² Hughes, *The Fatal Shore*, p. 127.

no indexed reference to either convicts or transportation.⁵³ Its companion volume for the nineteenth century contains two fleeting references to the presence of convicts in the Antipodean colonies, and one to transportation in reference to its negative impact on free migration.⁵⁴ This silence on a significant British policy is mirrored in other Empire histories, for example Kathleen Wilson's *A New Imperial History*.⁵⁵ Wilson claims that the work was to refocus the relationships of Empire, and to challenge the 'assumption of imperial power'.⁵⁶ To achieve this there was to be an 'insistence upon a connection' between the activities at the fringe and of those in the metropolis, and that 'interrelations between empire and British society are always to the fore'.⁵⁷ Despite these claims the work has no indexed references to transportation or convicts. This silence is further reflected in John Gascoigne's broad examination of the recent historiography of the British Empire which does not feature the words 'convict' or 'transportation' in its text at all.⁵⁸ Even works looking at the role of law in the British Empire have paid the topic scant regard. *Law, History, Colonialism: The Reach of Empire* has one entry for convicts but notes that they had no 'public or legal forum for their views'.⁵⁹

While Hughes managed to escape from a nationalist paradigm, he simply ended trapped in another, that being an imperialist. In so doing he failed to recognise that convict transportation was not merely a British system, in that, others employed it before the British and some ran in parallel to it. The body of literature on these systems is small but worthy of examination for it is valuable in any attempt to place the British-Australian school of study into a global context.

All the historiography on systems of non British penal transportation that have been examined in the course of this thesis has proven of little use given their internal focus. Timothy Coates' book on the convict system implemented by Portugal between 1550

⁵³ P.J. Marshal (ed.), *The Oxford History of the British Empire: The Eighteenth Century* (Oxford, 1998).

⁵⁴ A. Porter (ed.), *The Oxford History of the British Empire: The Nineteenth Century* (Oxford, 1999).

⁵⁵ K. Wilson, *A New Imperial History* (Cambridge, 2004). The work contains no indexed references to convicts or transportation as a policy.

⁵⁶ Wilson, *A New Imperial History*, p. 4.

⁵⁷ Wilson, *A New Imperial History*, p. 13.

⁵⁸ J. Gascoigne, 'The Expanding Historiography of British Imperialism', *The History Journal*, 49, 2 (2006), pp. 577-92.

⁵⁹ D. Kirkby & C. Coleborne, *Law, History, Colonialism: The Reach of Empire* (Manchester, 2001), p. 52.

and 1755 is fairly indicated by its title *Convicts and Orphans: Forced and State Sponsored Colonizers in the Portuguese Empire*.⁶⁰ The focus of the book is on the use of both classifications of unwilling migrants as settlers in the Portuguese colonies of the Atlantic and New Worlds. As such, it is a study more of the political, economic and demographic necessities of the Portuguese Empire rather than the impact of convictism on relationships within it. It makes no attempt to gauge the impact convicts had on neighbouring colonies, although this was probably minimal given the widespread nature of the Portuguese Empire and the era under discussion.

The same is true for Ruth Pike's work on the Spanish system.⁶¹ Like Coates, Pike notes the Spanish use of convicts and other unwanted members of the metropolitan population as colonisers of the New World colonies. Again there is no attempt to examine the system in the way the British-Australian system has been and neither Iberian system has resulted in a large body of work. What has been written has tended to be more penological and colonial history rather than an examination of convict experience or social impact.

The only other western European nation to implement transportation on a substantial scale was France. Despite their system existing for a longer period than the British transported to Australia, little is available on it, with one of the few to examine it being Stephen Toth.⁶² As with Pike and Coates, Toth has aimed his work beyond both the individual and the place, and concentrates heavily on the French criminal and penal systems. He is thus mainly focused on the identity of the *bagne* and while he questions the relationship it has with the metropolis, in this instance Paris, he does not reflect on how these penal colonies impacted on others. Toth also looks in depth at the work of fellow historian Alice Bullard whose work on New Caledonia is similar in nature to that of Sen, on the Andaman Islands. Bullard's claim, supported by Toth, is that the colony there was set up to achieve a dual purpose. The first involved the Communards exiled to New Caledonia from France after the 1871 uprising and the second involved the island's indigenous Kanaks. Convictism was to inculcate both

⁶⁰ T. Coates, *Convicts and Orphans: Forced and State Sponsored Colonizers in the Portuguese Empire, 1550-1755* (Stanford, 2001).

⁶¹ R. Pike, *Penal Servitude in Early Modern Spain* (Madison, 1983).

⁶² S. Toth, *Beyond Papillon: The French Overseas Penal Colonies, 1854-1952* (Lincoln, 2006). The work derives its name from the novel *Papillon* by Frenchman Henri Charriere, who claims it to be a factual account of his life in the notorious French penal colony of Devil's Island.

with French culture and identity. This is similar in conclusion to Colin Forster who argues that the purpose of French convictism was simply to build an empire rather than fix a domestic crime problem, and as such was similar to the purpose of both the Portuguese and Spanish.⁶³

A number of historians have examined convict impact on society in an Australian colonial context, and touched on their agency in change that occurred. None has examined in any great depth either the impact convicts, and convictism, had on intercolonial relations, or the consequent outcomes. Many have simply accepted that change occurred without consideration of the driving factors behind it. It is against this background that I have sought to place my thesis. It fills a gap in the historiography with regard to the impact of convicts and convictism on non penal colonies, and the convict as agent of change in intercolonial relations. That change was generated by both their presence and their agency. Convicts required rules and regulations for their management. This was so even after they had left the system as either expirees or emancipists, or as absconders. These rules and regulations impacted on free and convict alike, as did reaction to convict agency from both colonial and imperial authorities.

⁶³ C. Forster, *France and Botany Bay* (Melbourne, 1996). See in particular his first chapter, pp. 7-41.

CHAPTER OUTLINE

This thesis sets out to demonstrate, through a series of case studies, how convicts impacted on relationships of Empire. This was brought about through the significant measure of control they had over themselves and their situation, despite the opposing traditional portrayal. As a result of this agency convicts and their actions impacted on the relationships both between colonies, and between colony and metropolis. The limitations placed on a doctoral thesis do not allow scope to examine this topic to its fullest. Rather this thesis will dissect the impact convicts had with a specific focus on those of the Australian colonies, and those involving Van Diemen's Land in particular.

The first chapter provides an overview of the colony of New South Wales in the immediate years following its settlement in 1788. This thesis is not an examination of the background reasons as to why that colony was first established but of the problems that subsequently arose. In much of the historiography New South Wales has been presented as an ideal location for a penal colony because of its relative isolation. Robert Hughes wrote that the 'very air and sea, the whole transparent labyrinth of the South Pacific, would become a [prison] wall 14,000 miles thick'.⁶⁴ Chapter 1 examines how this isolation was quickly eroded by intercolonial and international trade and how the constant departure of shipping gave convicts the ability to pass through this prison wall with relative ease. This resulted in a new raft of administrative powers being invoked to act as a deterrent.

The chapter looks at how absconding convicts very quickly became a concern to the authorities in the nearest British controlled territories, those being the Indian possessions of the East India Company. Concern was twofold and centred not only on the arrival of escapees but also those whose sentences had either expired or who had been pardoned. The issue highlighted the disparate power and authority of the various colonial governors, and their ability to control the movement of emancipists and expirees was drawn into question. Much of the early correspondence on this issue is

⁶⁴ Hughes, *The Fatal Shore*, p. 1.

readily available in both *Historical Records of Australia* and *Historical Records of New South Wales*.

Intercolonial friction over convicts did not appear in an Australian colonial context until the separation of Van Diemen's Land from New South Wales in December 1825. Despite this severing the administration in both colonies continued to act with regards to the movement and location of convicts as if still one legal and political entity. This continued as the status quo until January 1829 when the New South Wales Supreme Court handed down a sentence of death on a convict named Jane New, having found her guilty of shop lifting. Jane New had her sentence remitted by Governor Sir Ralph Darling but was then, on his orders, removed to the Female Factory at Parramatta.

Whilst both the offence and the sentence are of little relevance to the direction of this thesis the circumstances surrounding the Jane New case were not. It has been portrayed in Australian historical and legal literature almost totally in one of two ways. The first is from a purely legalistic point of view, focussing on the writ of *Habeus Corpus* taken out on her behalf and the court case that followed. That case has traditionally been studied in the context of its challenge to the authority of the Governor to revoke assignment. The second approach stems from the social uproar the case caused in Sydney at the time involving claims of sexual impropriety against court officials and members of the legal profession. As a consequence it has been sensationalised by a number of writers who have used the case as a basis for their writings.⁶⁵

There is a third aspect to the case that has not been previously examined. The judgement finally handed down by the three judges who heard her case raised questions that went to the heart of the relationship between New South Wales and the newly formed Van Diemen's Land. At the time of her trial Jane New was still under

⁶⁵ For example, George Forbes, *Under the Broad Arrow* (Sydney, 1913), professes to be based on despatches regarding the case between Governor Darling and Justice Francis Forbes with Sir George Murray as Secretary of State for War and the Colonies. The story is so grossly distorted as to be better classified as a work of fiction. A more recent work by Carol Baxter, *An Irresistible Temptation: The True Story of Jane New and a Colonial Scandal* (Sydney, 2006), revolves solely on the romantic nature of events and whilst an accurate account it has no focus on the legal precedents the case set, nor the ramifications for intercolonial relations.

sentence of transportation to Van Diemen's Land but was assigned to her husband James. He had been granted permission by Van Diemen's Land's Governor, George Arthur, to remove her to New South Wales. The chapter examines the background to this permission and how at her trial it was deemed invalid, thus making her illegally at large. As a result of the ruling there arose a need to reassess the relationship between the two colonies and how they interacted. Subsequent legislative changes were of significance to all colonies of the British Empire.

Chapter 3 outlines the evolution of the system of management of transportation as it was employed to, and in, the Australian colonies. Whilst bearing some of the features of that used by the British to their North American colonies, transportation to New South Wales was distinguished from that system by the ongoing involvement of the government in its implementation. The thesis looks at how, following the establishment of Van Diemen's Land in 1803, the settlement there developed its own hybrid system. Its hallmark was a higher degree of government knowledge as to the identity and location of convicts under its control. This was escalated by the arrival of Arthur as the island colony's governor in 1824 and the convict record system he overhauled and refined. It was the emergence of this second distinct system that led to the circumstances surrounding the Jane New case.

The elevation of Van Diemen's Land to the status of independent colony in 1825 also saw the development of its own colonial administration, one no longer subservient to that of New South Wales. Chapter 3 examines the genesis of the petty bickering that came to mark correspondence between the two colonial bureaucracies and the subsequent breakdown in communication that hampered attempts to manage the movement of convict escapees, expirees and emancipists between the colonies. The creation of a second colonial bureaucracy resulted in the question of their relative powers and also those of the colonial governors, with particular regard to the granting of pardons. The intercolonial migration of pardoned convicts was to become a major source of tension between colonies. It was a question raised, but not resolved, in the Jane New case and would remain a vexed point in intercolonial relations well into the 1850s.

Chapter 4 investigates the power of the convict department and challenges the view that it was all powerful, and that all convicts were brutalised and degraded.⁶⁶ Through a series of case studies it shows that such claims are the exception rather than the rule. The convicts had an ability to invoke their legal rights and often did so. This was especially so in magisterial cases involving illegal detention. These studies demonstrate that when taken to a higher court on appeal there was little, if any, empathy shown by colonial judges towards the magistracy, and no leniency shown where the law was breached. Such cases also demonstrate a lack of class solidarity.

The magistracy underpinned the system of convict management at a local level. When convicts were able to successfully challenge its decisions the threatened result was the collapse of control. To avoid this, legislation was passed, but there was often inconsistency between the colonies as to the powers so obtained. The result was a series of legal loopholes able to be exploited by convicts and emancipists to their advantage. When coupled with a bureaucracy determined to uphold the rights of the individual, the inevitable outcome was accusations of inaction and ineffectiveness. As the levels of movement between the colonies increased, friction arose over the apparent inability of the convict departments to deal with escapees and absconders.

In 1838 the British Parliament put in place a committee chaired by Sir William Molesworth to investigate the efficacy of transportation as a punishment. Chapter 5 looks at the rationale behind the creation of the Molesworth Committee and the impact its report was to have on the Australian colonies. The report recommended a move away from the assignment of convicts to individual masters and to a system of graded punishment that came to be known as the probation scheme. In terms of Australian colonial relations its biggest impact was the ending of transportation to New South Wales and the consequent isolation of Van Diemen's Land as the continent's only penal colony. The 1840s proved a turbulent time for transportation and the Committee's recommendations were never fully implemented due to changes of government in Britain.

⁶⁶ See for examples C.E. Carrington, *The British Overseas: Exploits of a Nation of Shopkeepers, Part 1 Making the Empire* (Cambridge, 1968), p. 336; Hughes, *The Fatal Shore*, pp. 118-19.

This thesis examines the impact the changes made on Van Diemen's Land; changes that resulted in a drastic increase in numbers of convicts in the Van Diemen's Land system. The end result of this was a flooding of the labour market at a time of economic depression. For convicts holding pardons the immediate solution was to emigrate to the other Australian colonies, particularly to the Port Phillip district of New South Wales and the free colony of South Australia. Their migration was not met with enthusiasm and questions regarding the conditions of their pardons were raised. This led to accusations that Van Diemen's Land authorities were deliberately pardoning convicts on the condition they left that colony.

In Chapter 6 the thesis looks at how the creation of free, or non penal, colonies adjacent to New South Wales and Van Diemen's Land generated new and more accessible destinations for both convicts and ex convicts alike. The moral philosophies of the new colonies meant that such a presence was bound to throw up a new set of intercolonial tensions. Victoria followed the lead of South Australia in seeking the power to ban expirees and emancipists from its territory. London refused the request, fearing ramifications for the free movement of men and women throughout the Empire. The colonies failed to see that interpretation, preferring to hold such persons responsible for the high levels of crime they experienced.

The chapter then looks at the problems created by the intercolonial migration of expirees and emancipists, and how perceptions of them were exacerbated by the presence of absconders from the penal colonies. Many of the problems stemmed from the issue of identification in an age prior to photography and fingerprints. Building on the bureaucratic issues outlined in Chapter 4 the thesis again uses case studies to demonstrate both the problems caused by an inability to identify and those of false identification. It examines how this confusion was used by absconders to nullify many measures of control, for example the crime of returning from transportation. It also argues that convict authorities lacked both a desire and a legislative ability to act in many instances. As the 1840s progressed, the economic strains placed on Van Diemen's Land as a result of the increase in convict numbers came into play. Accusations were raised in the free colonies that an official policy existed in Van Diemen's Land that saw pardons granted subject to migration from the colony. It was a policy allegedly designed to shift the economic burden onto other colonies. Be it

true or not, the perception naturally engendered a great degree of bitterness between colonies, and between colonies and London.

In Chapter 7 all the foregoing issues are drawn together in the case study of John May. He brings together all that this thesis offers, for May is a man of many parts, both an absconder and an expirée, an intercolonial and imperial transportee, a professional thief and career criminal with a criminal family. He was transported twice, first under the assignment system and then under probation May practiced his craft at various times in the Port Phillip district of New South Wales and later Victoria, South Australia and Van Diemen's Land. His story has been recovered through the newspaper reports of the day and matched with the official records of the authorities in the three colonies.

May's story demonstrates many aspects of the major themes that underpin this thesis. As a former convict from Van Diemen's Land he is seen as an undesirable element in Port Phillip and a contributor to their escalating crime rate. May was clearly a criminal, but the accusations went further, claiming him to be the leader of a professional criminal gang, the Melbourne Thieves Association. Attempts by the police to deal with him and his like through the courts were thwarted by the protection of their rights. Confusion over identification of who were free and who were absconders was exploited to advantage. Ironically the police, those who could identify them as absconders, were drawn mainly from a convict background and this fact was used to undermine their credibility in court.

May used his knowledge of the system to protect himself from it. By understanding how information was gained and used, he was able to corrupt its functionality by falsehoods. Initially protected by the law, his criminal behaviour highlighted to the residents of Port Philip the inability, or lack of desire, on the part of authorities to protect them from his ilk. Public perceptions led to very real tensions not only between the colonies but also with London who were portrayed as part of the problem, not the solution.

Chapter 8 examines the reaction of the authorities, in particular those in the newly created colony of Victoria, to the problems manifested in John May. Their principal

weapon was a series of anti convict legislation designed to stop both convict and ex convict from entering the colony. The thesis examines the reaction to the acts by the residents of Van Diemen's Land who were the most severely affected of the Australian colonists. The legislation impacted not only on those of the convict class but on the island's entire population who were also slurred by the requirement to produce evidence of their freedom upon demand. The selective nature of its implementation also reflected the role of class within society at the time.

The chapter also examines the basis for the justification of the acts, that being the freely held belief that it was migration from Van Diemen's Land that was responsible for an upsurge in crime in the free colonies. The figures for crime in Melbourne are challenged and an argument mounted that other groups within that community had the capacity to be responsible. Further examination reveals little evidence to support the claims of an upsurge. These claims are put into the context of a Victoria in tumult, brought about by the discovery of gold and the flood of migrants that followed. The colony sought to reinvent itself as a moral, upstanding society, one that had no place for emancipists and expirees. The purpose of the acts was also to reinforce this ideal, while the distortion of the figures also aided the political agenda of the growing anti transportation movement. The impact of convictism on intercolonial relations, and that between the colonies and London, had reached its zenith.

In Chapter 9 the thesis broadens its scope to look at the impact of convictism on colonial relations outside the Australian colonies. It is focussed on an incident at the Cape Colony involving the convict transport *Neptune* which arrived there in 1849. The Cape laid claim to not previously being a convict destination and its colonists mounted an active and militant campaign to stop the human cargo being brought ashore. The case study demonstrates the capacity of the colonists to redefine their relationship with the imperial power. The incident also brought into open question the power of the colonial authorities in relation to Britain, for the governor found himself both colonial and imperial representative. The incident had empire wide significance for all colonies in this regard. It also demonstrated that there was a lack of uniformity in how those relationships were implemented,

The arrival of the *Neptune* also revealed a lack of uniformity in how transportation was implemented across the British Empire. The ship had sailed from Bermuda where most of its convicts had spent at least two years labouring on the Royal Navy docks. The usual procedure for convicts sent to Bermuda, and also Gibraltar, was to be returned to Britain for the completion of their sentence. Their removal to the Cape in this instance was as part of the scheme created by Earl Grey in 1846. In defence of the shipment, Grey claimed that its convicts had all been sentenced for famine crimes committed in Ireland. The shipping indent does not support this fully, with one third of the convicts sentenced in England or Scotland.

Investigation of the incident at the Cape also draws into focus another practice designed to remove unwanted elements from British society. This was the assisted emigration of orphans, a practice that the Cape colonists had experienced and rejected. Despite claims by the British government that such schemes were not transportation by stealth, the *Neptune* demonstrates the capacity of authorities to mould the truth to gain the outcome. This theme is expanded upon in Chapter 10 which looks at how the British government addressed colonial concerns about the transporting of convicts and the resultant exposure to the unwanted criminal classes of Britain. In response to these concerns and the pressures being generated on colonial and imperial relationships, the British wound down numbers and finally ended transportation to Van Diemen's Land in 1852.⁶⁷ Evidence brought to light during research for this thesis establishes that this was only partly true and that the policy of publicly visible transportation was replaced by one of transportation by stealth. The British turned to subsidising the emigration of criminals by channelling them through appropriate benevolent organisations. This brings back into focus the accusations made, but denied, in Chapter 5 that Denison had an official policy of granting pardons on the basis that the recipient left Van Diemen's Land.

Transportation by stealth was not an unknown practice. The chapter examines how it was an official policy in some European countries in the mid nineteenth century but has only ever been previously studied in a restricted light, primarily as a German policy. In the Australian colonies the press regularly raised accusations that expirees

⁶⁷ It continued the practice to Bermuda until 1863, Western Australia until 1868 and Gibraltar until 1875. Indian convicts continued to be sent to the Andaman Islands until 1920.

and pardon holders were encouraged to emigrate from Van Diemen's Land in particular, and that claims by convict authorities that they were powerless to stop them were simply a cover for official sanction. Subsidised emigration schemes from Britain have long been questioned in a similar vein, that being as a cover for the purging of the criminal classes. The thesis concludes by examining the possibility that Britain addressed concerns about the stresses placed on the relationships of empire by transportation by simply removing it from public view.

Kirsten McKenzie has recently examined in depth colonial society in two of the port towns of the British Empire, they being Sydney and Cape Town. Her aim was to demonstrate how the empire was linked by the movement of people between the colonies and how that involved the movement of knowledge, ideas, questions and solutions. By using case studies McKenzie has been able to demonstrate that colonies impacted on each other in ways that were often other than formal or political, and in a manner that was lasting. McKenzie has noted there is a very real need to see our history in a broader perspective.⁶⁸ This thesis shares that philosophy. By demonstrating how the convict system affected the relationships of empire through its impact on intercolonial politics and lawmaking, social relations and crime, it reinforces the conclusions she has drawn.

⁶⁸ K McKenzie, *Scandal in the Colonies*, (Melbourne, 2004), p. xii.

Chapter One.

A prison wall 14,000 kilometres thick.¹

¹ R. Hughes, *The Fatal Shore* (London, 1996), p. 1.

Transportation of convicts to the Australian colonies was designed to remedy a problem for the British government. Following the War of Independence and unable to empty its overflowing gaol population into the North American colonies, the British turned to New South Wales. In solving one problem however another was created. Like a stone thrown into a calm pond, the solution of the late 1700s would send out ripples that would spread well into the late 1800s and in some respects are still being felt in Australia today.

Whilst the penal colony at Port Jackson was at the opposite ends of the earth to London it did not exist in total isolation. From its earliest days the colony was forced to interact with other British possessions, particularly those on the Indian sub continent. While considered to be an isolated penal colony, contact with the outside world provided opportunities for escape. As the only port on the south west Pacific rim it was visited by French and American ships and inevitably some prisoners managed to stow away. Escape created a complex set of problems. Some were logistical, such as the organisation of search parties; some were economic, involving the costs of such escapes to the government of the colony and the bureaucratic arguments as to who was liable for them; and others were philosophical, revolving around the punishment of caught offenders. Legal and legislative issues arose as to what powers were held by various colonial authorities and how these could be used to detain or repatriate escapees. Arguments about what legal steps could be taken to dissuade the public from abetting escapees would come later as the free population of Britain's antipodean possessions expanded.

In *The Fatal Shore* Robert Hughes argued, 'in Australia it was easy [for convicts] to escape. The hard thing was [for them] to survive'.¹ Hughes' observations are most certainly correct for the first forty years or so of European settlement. However the process of escaping required more than mere survival however. It also required a destination, and end point at which to aim. The early convicts in New South Wales had little choice when it came to their destination. They were forced to run either to the sea or into the bush. Early reports from the colony at Sydney Cove mention regular attempts by convicts to escape by concealment aboard outbound shipping.

¹ R. Hughes, *The Fatal Shore* (London, 1996), p. 103.

Watkin Tench who arrived on the First Fleet as a Captain-lieutenant in the marines noted that within weeks of the landing at Sydney Cove, in January 1788, a party of convicts had attempted to make their way south to Botany Bay where the ships of the French explorer Jean-Francois La Pérouse lay at anchor.² As a matter of courtesy, La Pérouse returned them to Captain Arthur Phillip the governor of the fledgling colony, who duly punished them.³

In August 1790 Phillip wrote to Evan Nepean, Under Secretary at the Home Office, regarding Joseph Sutton, a convict who had been found concealed in the hold of the *Neptune*. Better known as one of the transports that constituted the infamous Second Fleet, the vessel was due to sail the following day from Port Jackson for Canton, China. Phillip noted that 'preparation had been made when the people stowed the hold for concealing convicts'. He believed that a number of convicts were as yet undiscovered and remained hidden on board. Phillip was adamant that the master of the *Neptune*, Donald Trail, should be prosecuted as a disincentive to others to assist convicts making good their escape.⁴

Trail was also in trouble for other reasons. Prior to the *Neptune* sailing a number of convicts, who had survived its voyage out, appealed to the colony's judge advocate in an attempt to have property, seized by Trail, returned to them. Included amongst the items claimed were clothing and money. Trail disputed some of the claims arguing that much of the property had been destroyed under orders from Lieutenant Shapcote the naval agent. Fortuitously for Trail, Shapcote had died during the voyage's leg from Cape Town to Sydney.⁵ Neither Trail's innocence nor his guilt in this attempted escape was ever established for it would appear the authorities did not have him charged over this incident upon his return to Britain. He did not entirely escape examination however for he was the subject of private charges of wilful murder

² W. Tench, *1788* (Melbourne, 2002), p. 44; D. Collins, *Account of an English Colony in New South Wales* (Melbourne, no date but 1910), p. 14.

³ J. Dunmore, *Where Fate Beckons: The Life and Times of Jean Francois de la Perouse* (Sydney, 2006), p. 247. It is suspected that in fact one or two did make good their escape via the French. See note 8, p. 275 for further detail. See also An Officer, *An Authentic and Interesting Narrative of the Late Expedition to Botany Bay* (facsimile edition, Sydney, 1978), p. 23.

⁴ Phillip to Nepean, 23 August 1790, in A. Britton (ed.), *Historical Records of New South Wales, Volume I, Part 2* (Sydney, 1892), p. 394. David Collins notes that two men and one woman were found 'concealed amongst the firewood' on board. See Collins, *Account of an English Colony*, p. 95.

⁵ Collins, *Account of an English Colony*, p. 95.

brought against him as a result of the death rate amongst the convicts on the voyage out.⁶

With the colony's shipping initially at minimal levels it should have been a relatively simple matter to guard against seaborne escape. In order to protect the cargo from pilfering and to stop convicts secreting themselves aboard, inbound shipping was kept under guard once it arrived. Departing ships suspected of containing escapees were 'smoked' in an effort to flush out convicts secreted away in nooks and crannies. In July 1794 William Wilkinson, master of the *Indispensable*, reported that his ship had been smoked 'for six or seven hours' prior to its departure from Port Jackson. This had succeeded in forcing the appearance of one convict from below decks who was promptly taken into custody by the guard placed aboard upon the order of Major Francis Grose, the colony's Lieutenant Governor.

Even after the ship had been smoked the guard, consisting of a sergeant and four private soldiers, remained aboard the *Indispensable* until it sailed two days later. A mile off Sydney Heads both the pilot and guard departed the ship and the *Indispensable* made sail for China. Even precautions such as these did not always succeed. Once well to sea Thomas Pitt, a passenger and recently ennobled as the second Baron Camelford, produced an escapee, Richard Haynes, from his cabin. Pitt, despite his social standing, was clearly complicit in Haynes' use of the cabin as a hiding place. A short time after Haynes' appearance the captain of the *Halcyon*, travelling in company with the *Indispensable*, hailed Wilkinson with the news that he too had an escapee on board. A third convict, Thomas Scott, was discovered on the *Indispensable* four days later.⁷ It is of little wonder then that one early colonial historian noted 'scarcely did a ship quit the coast during the first years of the colony without discovering, mostly too soon for the culprits, their concealment'.⁸

⁶ C.M.H. Clark, *A History of Australia, Volume 1: From the Earliest Times to the Age of Macquarie* (Melbourne, 1974), p. 123. Clark gives the deaths as 158. Bateson gives the deaths as 150 men and 11 women. The discrepancies most probably lie in the fact that many died in hospital in Sydney within days of arriving there. Tench gives the figures as 530 embarked, with 163 deaths. See C. Bateson, *The Convict Ships 1787-1868* (Glasgow, 1985), p. 31; Tench, 1788, p. 131.

⁷ Report of Captain Wilkinson on Convict Stowaways, in F.M. Bladen (ed.), *Historical Records of New South Wales (hereafter HRNSW), Volume II* (Sydney, 1893), pp. 295-96.

⁸ J. West, *The History of Tasmania* (AGL Shaw, ed., facsimile edition, Sydney, 1981), p. 432.

The alternative to stowing away was to sail away in one of the colony's fleet of small boats used for fishing and transportation around Sydney Harbour. It was the government fisherman, William Bryant, who placed himself into the annals of Australian history by spiriting himself, his wife Mary and two children, along with seven others away from Sydney in March 1791. In ten weeks the group reached Koepang in Timor, a voyage of over 5,000 kilometres. Subsequently arrested by the Dutch, they were eventually shipped back to Britain. Disease took its toll however and only Mary and three others set foot in Portsmouth.⁹ As a result of this escape in order to 'deter the convicts from attempts to take them off', Governor Phillip issued orders limiting the size of boats that could be built. Regulations were also introduced covering those convicts allowed to be on the water at night.¹⁰

Escape into the bush provided an alternative to seaborne flight. Many convicts, despite the long voyage out from Britain and advice to the contrary, seem to have maintained a belief that free settlements could be found within walking distance of Sydney. In November 1791 a group of twenty men and one pregnant woman had set off to walk to China. The party were all recent arrivals from Ireland. Sent to Parramatta, 15 miles west of Sydney, they were apparently under the belief that China was a mere 100 miles to the north and separated only by a river. It was a belief that Tench called 'folly' and David Collins, the colony's judge advocate, labelled 'chimerical'.¹¹

As Hughes has noted, it was not lack of opportunity to escape that defeated the convicts, but the inability to survive having done so. Within a week most had returned to the settlement, either brought in by the military sent to find them or driven back by hunger. West in his *History of Tasmania* repeats this story, albeit somewhat embellished. He claims that the only way that such attempts were stopped was by the Governor equipping a party of the strongest convicts with provisions and allowing them to head off in the direction of 'China'. They eventually returned, but West believed that the flame of hope was never quite extinguished and a slight belief was

⁹ The escape of Bryant is well documented. A number of accounts of it have been published, the most thorough being CH Curry, *The Transportation, Escape and Pardoning of Mary Bryant* (Sydney, 1963). Shorter versions can be found in W. Hirst, *Great Escapes by Convicts in Colonial Australia* (East Roseville, 1999), pp. 12-32, and Hughes, *The Fatal Shore*, pp. 205-09.

¹⁰ Collins, *Account of an English Colony*, p. 115.

¹¹ Tench, 1788, pp. 208-09; Collins, *Account of an English Colony*, p. 131.

retained that escape in that direction was possible.¹² This lack of understanding of distance in the new colony was underlined when in 1803 Collins was sent to found a new settlement on the shores of Port Phillip Bay. Six convicts absconded with the intention of walking back to Sydney, over 900 miles away.¹³ Peter Cunningham, a surgeon superintendent on several convict transports to New South Wales between 1819 and 1828, noted the belief held by some Irish convicts that Ireland lay to the south of New South Wales because that was where it was colder and Ireland was a cold country by comparison to the colony.¹⁴

Phillip had recognised early that the greatest opportunity to escape was presented to convicts by the small but constant levels of shipping traffic. In 1791 the *Daedalus* had arrived from the north west coast of America. Phillip was under instruction to retain the ship for short term duties in and around the fledgling colony. He wrote to Lord Grenville, the Home Secretary, of his concerns at having such vessels in the harbour, fearing that:

...some bad consequences may attend employing such vessels for any length of time in this country, where there are several hundred men, many of whom are seamen, who would at any hour risque (sic) their lives, if they saw the least probability of escaping.¹⁵

As early as 1792 the colony was regularly trading with Calcutta, Batavia and various Chinese ports, along with Britain and Ireland. Whalers and sealers from the United States were also visitors, using Sydney as a base from which to fish the rich southern waters.¹⁶ These visitors did not have to carry convicts away to pose a threat to security, for they could also facilitate escape. Bryant had been aided in no small part by his purchasing of a quadrant, compass, chart, gun and ammunition from the master of the *Waaksamheyd*, a Dutch vessel that had arrived in Sydney Harbour from Batavia in December 1790.¹⁷ Even ordinary seamen were part of the process, being able to

¹² West, *The History of Tasmania*, p. 431.

¹³ J. Curry, *David Collins; A Colonial Life* (Melbourne, 2000), p. 207.

¹⁴ P. Cunningham, *Two Years in New South Wales* (London, 1827), p. 200.

¹⁵ Report by Phillip to Grenville, 5 November 1791, in A. Britton (ed.), *HRNSW, Volume I, Part 2* (Sydney, 1892), p. 534.

¹⁶ Clark, *A History of Australia, Volume 1*, p. 130.

¹⁷ Curry, *Mary Bryant*, pp. 11, 14.

provide convicts with knowledge of both the coast of New South Wales and of prospective destinations. Given the limited geographical knowledge held by many of the convicts this was amongst the most valuable of commodities that an absconder could acquire.

For its first decade the presence of a penal settlement at Port Jackson was of little concern to other European colonies, the closest of which was Batavia in the Dutch East Indies. Its impact on them was minimal for, while escape was constant, it was a mere trickle. The overwhelming majority of escapees did not actually leave the confines of New South Wales. As the colony grew the presence of convicts created a new problem – one that required a totally different solution to that of escape. This was the problem of emancipists, those convicts who were free by the expiration of their sentence.¹⁸

The first indication that emancipists might become a source of intercolonial friction came in November 1799 when Indian government officials at Fort William sent Governor Hunter a list of convicts then resident in Calcutta.¹⁹ The letter was signed by Richard Wellesley, the Governor General of Bengal, Sir Alured Clarke, Commander in Chief of the British Army in India, and a number of other minor officials. Concern was expressed that some on the list may have quit Sydney without Hunter's permission and advised him that any on the list he identified as such would be repatriated if he expressed 'a wish to that effect'.²⁰ The letter clearly made the point that any convict transported to New South Wales should be discouraged by Hunter from seeking to settle in any of the British settlements in India. This advice was aimed at both absconders and emancipists. To achieve this end Hunter was

¹⁸ Whilst technically the term 'emancipist' refers to one who is freed from servitude, in this case by pardon, in the colonial context of the time, the term came to mean all who had become ex convicts, either by emancipation or by the expiry of their sentence. It is in this sense that the term will be used throughout this thesis. For more see 'Emancipist' in both J. Bassett (ed.), *The Concise Oxford Dictionary of Australian History* (Melbourne, 1994) p. 101, and A. Laugesen, *Convict Words: Language in Early Colonial Australia* (South Melbourne, 2002), p. 71.

¹⁹ Fort William was located in Calcutta (now Kolkata) on the banks of the Hooghly River. It had been built by the East India Company in the mid 1700s.

²⁰ Letter from Indian Government officials to Hunter, 11 July 1799, in Bladen, *HRNSW, Volume IV* (Sydney, 1896), pp. 111-12.

requested to take all possible means to prevent the commanders of ships departing Sydney from landing or leaving members of either category 'in any part of India'.²¹

The correspondence apparently failed to elicit a response. When the *Minerva* arrived in Fort William a short time later carrying amongst its passengers a number of former convicts, a second letter was sent. Again concern was expressed that unless action was taken by Hunter 'persons from whose establishment in these possessions the most prejudicial consequences are to be apprehended both to the British character and interest'. Amongst suggestions offered to achieve this outcome was that all convicts whose terms of servitude had expired, be put on ships sailing direct for English ports. Further, all ships bound for any port in India were to pay a 'penalty bond' forfeit upon permitting any transportee, on board, to land in India. It was further suggested that copies of such bonds should be forwarded to the relevant Indian authorities addressed to the port at which the ship was to call.²²

To assist Hunter, Wellesley enclosed a proclamation which had been widely published in the various Indian Presidencies.²³ Under the proclamation all persons who had been transported to New South Wales and who had 'clandestinely established themselves' at Calcutta or its surrounds were ordered to leave India by 1 March 1801. Failure to do so would result in their arrest and deportation to England under an Act of Parliament which deemed them to be a person 'resorting to India without license'. The East India Company had put in place an exclusionary policy, designed to keep out of its Indian territories merchants and missionaries who might 'inflamm[e] the religious sensitivities' of the indigenous population.²⁴ The same Act and procedure was to be extended to apply to any person transported as a convict to New South Wales and who landed in India following the date of proclamation, that being 2 July 1800. Absconders were to be arrested and deported to Sydney by the first available means.²⁵

²¹ For more on the Indian aspect of this see C. Anderson, 'Multiple Border Crossings: Convicts and Other Persons escaped from Botany Bay and residing in Calcutta', *Journal of Australian Colonial History*, Volume 3, Issue 2 (October 2001), pp. 1-22, but especially pages 3-5.

²² Letter from Indian Government officials to Hunter, 11 July 1799, in Bladen, *HRNSW, Volume IV*, pp. 111-12.

²³ Letter from Indian Government officials to Hunter, 3 July 1800, in Bladen, *HRNSW, Volume IV*, pp. 110-11.

²⁴ J. Broadbent, *India, China, Australia: Trade and Society 1788-1850* (Sydney, 2003), p. 82.

²⁵ Proclamation by Wellesley, 2 July 1800, in Bladen, *HRNSW, Volume IV*, pp. 270-71.

By the time this correspondence arrived in Sydney, Hunter had been recalled to Britain. His replacement as Governor of New South Wales was Philip Gidley King who caused the proclamation to be published in Sydney in December 1800. King also took up the suggestion of bonds as a further deterrent to both emancipist and ship's master. Henceforth all ships departing the colony for destinations in the Indian or Pacific oceans were required to enter into a bond of £500, to be forfeited if they carried away convicts. A separate bond, also of £500, was to be forfeited if they carried away any person who had been a convict, that is an emancipist, without the Governor's express permission. A further £500 bond was to be forfeited if the ship was to land either an absconder or an emancipist within any of the Indian possessions. The bonds were to be redeemable at any of the Indian ports, presumably upon the granting of an 'all clear' to the passengers list.²⁶

Wellesley again wrote on the same date that King issued the Indian proclamation,. He acknowledged that King had no authority to detain emancipists in the colony after their period of servitude had expired, but pressed him to implement the bonds, unaware that King had already taken steps to do so. King replied in January 1801 acknowledging that he had received a letter containing the names of twenty two men then residing in and around Calcutta. He pointed out to Wellesley that every precaution was taken to prevent *serving* convicts leaving on ships bound for India, in other words from escaping.

Once that escape had occurred, however, the issues became more complicated. There was a question of what authority the Governor had over a convict that was no longer within his jurisdiction. This in turn was linked to the question of whether the Indian authorities had the power to arrest an escapee, and if so, on what charge. It was not simply a question of the escapee's status, but that some statute of the jurisdiction the escapee was in had to have been breached. It was a question that other colonies would also have to address in future years and one that this thesis will return to in greater depth. The second issue was one that would also reappear in the years ahead, especially with regard to the Australian colonies. As it turned out, all those named in

²⁶ Government and General Order by King, issued 18 December 1800, in Bladen, *HRNSW, Volume IV*, p. 271.

the letter were emancipists.²⁷ But just what was the level of authority the Governor had over convicts once their time had expired? Did King have the authority to detain a convict once his sentence of transportation had lapsed?

The question of detaining convicts had in fact previously been raised by King in correspondence to the Home Secretary, the Duke of Portland. King had written in his then capacity as the Lieutenant Governor of Norfolk Island, concerning a number of emancipists who were still resident there. Despite some of these men having been free for a considerable period of time, King advised Portland that he was not permitted to let them leave because of a standing order to that effect issued by his superior at the time, Major Grose.²⁸

In response, Portland had issued clear instructions to Hunter upon his appointment as the colony's governor. He informed him that he was not to:

...lose a moment's time in informing [King] that in cases where the terms for which convicts have been transported are expired the law has not vested him with any discretionary power what ever, and that it is his duty to permit such convicts to depart whenever they chuse [sic] it, unless they happen to be legally detained in consequence of some new offence.²⁹

In his evidence to the 1812 Select Committee on Transportation Hunter advised that the 'Governor never prevents their return; they are never prevented returning when their terms are expired'.³⁰ William Bligh, who was to eventually succeed King, reinforced this understanding in his evidence to the same committee.³¹ All three men

²⁷ Wellesley to King 18 December 1800, Bladen, *HRNSW, Volume IV*, p. 272.

²⁸ Grose had in fact left the colony for England in December 1794. No copy of the standing order or the reason for it has been located. Presumably it had been issued when Grose was Acting Governor following the departure of Phillip in December 1792 and one that had not been rescinded.

²⁹ Portland to Hunter, 11 August 1796, in F. Watson (ed.), *Historical Records of Australia (hereafter HRA), Series I, Volume I* (Sydney, 1914), p. 582.

³⁰ British Parliamentary Papers (hereafter BPP), 'Evidence of Hunter, Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, pp. 23-24 (IUP, *Crime and Punishment: Transportation, Volume I*).

³¹ BPP, Evidence of Bligh, 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, p. 46 (IUP, *Crime and Punishment: Transportation, Volume I*).

were fully aware that any attempt on their part to detain an emancipist would be a breach of law and would leave them liable to a charge of wrongful imprisonment.

In response to the suggestion that he place all outgoing emancipists on ships heading directly to British ports, King advised Wellesley that there was no provision on the part of either the authorities in Britain or at Port Jackson to provide a passage home for those 'whose terms of transportation are expired'.³² Certainly in the initial stages of settlement this had not been possible in any event. Hunter advised the 1812 inquiry that the convict transports were contracted only to deliver to Port Jackson and that once the convicts were disembarked the contract was complete. The ships were then under contract to the East India Company and were to call at its settlements to collect cargoes for Britain. As such the Governor had no control over the vessels and could not send emancipists home on them.³³ Phillip had suggested as early as 1791 that the contracts be altered to allow him greater control, but this suggestion does not appear to have been taken up.³⁴ Thus, the Governor would seem to have had no control over the destination of a departing emancipist.

In reality however the Governor did have a significant measure of control. New South Wales was a penal colony and as such no person or ship could depart Port Jackson without the authority of the Governor. King had inherited the Governor's instructions first issued to Phillip in 1787 under which he had been given authority to forbid all trade with the 'settlements of [the] East India Company, as well as the coast of China, and the islands situated in that part of the world, to which any intercourse has been established by any European nation'.³⁵ The governor was to use every possible means to prevent this.

In his reply to Wellesley, King enclosed a copy of the certificate given to those entitled to leave New South Wales. He noted that any person arriving in India

³² King to Wellesley, 6 January 1801, in Bladen, *HRNSW, Volume IV*, pp. 287.

³³ BPP, Evidence of Hunter, 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, p. 23 (IUP, *Crime and Punishment: Transportation, Volume I*).

³⁴ Phillip to Nepean, 14 December 1791, in Watson, *HRA, Series I, Volume I*, p. 317.

³⁵ Phillip's instructions, 25 April 1787, in Watson, *HRA, Series I, Volume I*, p. 15. The same clause was still included in the Governor's instructions at least to the time of Lachlan Macquarie in 1809. See BPP, 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, p. 103, clause 11 (IUP, *Crime and Punishment: Transportation, Volume I*).

without the certificate could be regarded as a runaway and returned to Sydney by the 'first conveyance'.³⁶ Thus the withholding of the certificate theoretically allowed him to stop departure. King also noted that captains were now required to post bonds in regard to those they conveyed from the colony. Again, this allowed a certain measure of control. Hunter had noted that during his time masters of vessels carrying away persons without the governor's authority had their pay docked by the Navy Board who had the ships under contract.³⁷ The power this gave King was suggested when he later wrote to the Duke of Portland that the measures put in place would 'prevent much of the emigration that had been made from this colony'.³⁸

Ironically the departure of emancipists also created problems for New South Wales. In December 1791 Phillip had written to the Under Secretary of State for the Home Department, Evan Nepean, over his concerns. Phillip enclosed a list of all emancipists who had, to that point, left the colony. His major worry was that only those who were able bodied were leaving, many working their way home to Britain on ships short of crew.³⁹ The impact of this on the fledgling colony was twofold. Firstly, it removed many of the men with requisite skills needed for the survival of settlement, and secondly it did little to reduce the numbers dependent on the government store for food and clothing. Hunter claimed that, during his tenure, despite the arrival of new convicts and the colony's rising birthrate, the population of New South Wales had, because of departures, actually diminished.⁴⁰

During the 1790s the issue of emancipists leaving the colony was regularly referred to in official despatches. By the time Hunter wrote to Portland in 1797 the problem had taken a new form. His concerns were that American whaling ships were taking away emancipists as crew. Hunter wrote 'I have determined that during this time of war none shall be permitted to leave this colony in a foreign ship'. Because of the war with the French, he felt it his duty to prevent any loss of His Majesty's manpower at a time when they might well be needed. He expressed the opinion that the Royal Navy,

³⁶ King to Wellesley, 6 January 1801, in Bladen, *HRNSW, Volume IV*, pp. 287-88.

³⁷ BPP, Evidence of Hunter, 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, pp. 23-24, (IUP *Crime and Punishment: Transportation, Volume I*).

³⁸ King to Portland, 10 March 1801, in Bladen, *HRNSW, Volume IV*, p. 317.

³⁹ Phillip to Nepean, 14 December 1791, in Watson, *HRA, Series I, Volume I*, p. 317.

⁴⁰ BPP, Evidence of Hunter, 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, p. 24 (IUP, *Crime and Punishment: Transportation, Volume I*).

who had a squadron based at the Cape of Good Hope, should look to New South Wales emancipists as a source of seamen.⁴¹

Despite the system he had put in place at the behest of Wellesley, by March 1805 King had arrived at the conclusion that it was ineffectual and a new solution was sought. He wrote to the Secretary of State for War and the Colonies, the Earl Camden, advising that he had issued a regulation designed not only to prevent convicts absconding from the colony but also to prevent the emigration of those who had become free.⁴² The proclamation indicated that both convicts and free men and women had been leaving the colony without his permission. King was concerned that some of the free were debtors escaping their legal liabilities.

As a result King changed the rules governing the port and revoked the tenth article of the Port Orders. Forthwith all ships in port and those arriving were to post a bond of £800, and in conjunction two freeholders of Sydney were to post bonds of £50 each. These bonds were to be forfeited if the ship carried off any resident of New South Wales, be they free or in servitude, who did not hold the Governors Certificate to do so. The penalties also extended to ships leaving port without the governor's permission, whether they were carrying passengers or not. Further the system of bonds pertaining to China and India were to remain in place. Finally the names of all persons wishing to leave the colony were to be posted on the doors of the courthouses in Sydney and Parramatta, and on the storehouse at the Hawkesbury. These were to be put up no later than seven days prior to the intended departure date.⁴³ This system of public notification was in place at least until 1810.⁴⁴ Clearly such orders, whilst being a deterrent to absconders, were aimed at emancipists and free men alike.

The Governor could also exercise a measure of control over an emancipist's destination if he was subject to a pardon. The power to remit a convict's entire, or part, sentence was initially granted to Phillip and subsequently to his immediate successors. Absolute pardons were rarely given, the most common form being

⁴¹ Hunter to Portland, 20 June 1797, in Watson, *HRA, Series I, Volume I*, p. 25.

⁴² King to Camden, 30 April 1805, in Watson, *HRA, Series I, Volume V* (Sydney, 1915), p. 305.

⁴³ Proclamation of Governor King, 30 March 1805, in Watson, *HRA, Series I, Volume V*, pp. 315-16.

⁴⁴ BPP, Evidence of William Richardson, 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, p. 56 (IUP, *Crime and Punishment: Transportation, Volume I*)

conditional. Phillip's instructions noted that all remissions of sentence were to be endorsed making it clear that a convict could not:

...return within any part of our kingdom of Great Britain or Ireland during the term or time which shall thus remain unexpired of his or her original sentence or order of transportation on pain that the remission...be wholly null and void.⁴⁵

Pardons were often conditional upon remaining within the Australian colonies, but some were issued allowing a return to Europe. David Collins, the colony's first Judge Advocate noted that renowned pickpocket George Barrington was conditionally pardoned by Phillip almost upon arrival in Sydney in 1791. Barrington had been sentenced in 1790 to transportation for seven years, but found himself, through the grace of the Governor, to all intents and purposes free, but not, as Collins expressed it, 'so absolutely free as to return to England at his own pleasure'.⁴⁶

Returning to Britain from transportation, whilst it may have been discouraged, was not an offence provided the sentence had expired. Given the attitude of the Indian authorities, it was a logical destination especially as it provided the possibility of reunion with family. Little academic study has been done in this area but it seems clear from the evidence presented to the 1812 inquiry that returning to Britain was common practice. Both Hunter and Bligh gave evidence to the inquiry to the fact. Also called to give evidence was James Harris, transported for seven years in 1802 and who had returned to Britain after his sentence expired.⁴⁷

Returning from transportation had been a problem for the British when the North American colonies had been used as a destination. The *Transportation Act* of 1718 had in part been introduced to remedy the problem of those who failed to remove themselves from Britain having been sentenced to do so.⁴⁸ The problem was further addressed in 1720 when a second act made it clear that any return was subject to the

⁴⁵ Phillip's Instructions, 25 April 1787, in Britton, *HRNSW, Volume I, Part 2*, p. 414.

⁴⁶ Collins, *An Account of the English Settlement*, p. 162.

⁴⁷ BPP, Evidence of James Harris, 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, p. 49 (IUP, *Crime and Punishment: Transportation, Volume I*).

⁴⁸ This Act was 4 George I, c11. G. Durston, 'Magwitch's Forbears: Returning from Transportation in Eighteenth Century London', *Australian Journal of Legal History*, Vol 9, 2005, p. 138.

death penalty and that 'return' included any escape from custody, or being at large in Britain after the sentence was passed.⁴⁹ This remained in force after the formation of the convict colony in New South Wales, although the available evidence would seem to indicate that few escapees returned, or at least if they did were apprehended. An examination of the records of trials at the Old Bailey between 1790 and 1834 shows only eleven cases where convicts were convicted of returning from New South Wales before their sentence had expired. Of the 106 cases examined the overwhelming majority were for convicts who had escaped custody whilst either still in England or who had deserted the military after enlisting as a condition of pardon. Almost all those found guilty were sentenced to death, with only one re transported.⁵⁰

The greatest deterrent to departure was one the Governor had little control over, that being the cost of the passage back to Britain. James Harris told the 1812 committee that the fare was £50.⁵¹ As a skilled tradesman he had been able to earn ten shillings a day in Sydney. At that rate it would take him almost six months to accumulate the fare – longer once living expenses were taken into account. Harris however was skilled as a shipwright and so was able to work his passage home, an option denied to the unskilled, the aged, and infirm.⁵² Women too were disadvantaged. Bligh claimed in his evidence that most stayed in the colony. Hunter, however, stated that the women needed to make 'an interest' with the ship's officers. Another witness, Maurice Margarot, when asked in evidence, was a little less subtle, stating that they returned 'by prostitution'.⁵³

The impact of convicts on relations with other colonial possessions was minimal up until the early 1800s. This was largely because of the small number of individuals

⁴⁹ This Act was 6 George I, c23. Durston, 'Magwitch's Forbears', p. 139.

⁵⁰ Figures deduced from an examination of the records available on line at www.oldbaileyonline.org accessed 3 July 2007. The one case of re transportation was James Williams alias Charles Edwards alias James Hooper, tried 4 September 1834. It is not clear from the transcript if Williams had ever left Britain. Dr Hamish Maxwell-Stewart has evidence of several returnees being reprieved and transported to Macquarie Harbour. H. Maxwell-Stewart, personal communication, 2008. For more on returning from North America see G. Morgan and P. Rushton, *Eighteenth Century Criminal Transportation: The Formation of the Criminal Atlantic* (Basingstoke, 2004), pp. 98-126.

⁵¹ BPP, Evidence of Harris, 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, p. 50 (IUP, *Crime and Punishment: Transportation, Volume I*).

⁵² BPP, Evidence of Harris, 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, p. 49, (IUP, *Crime and Punishment: Transportation, Volume I*).

⁵³ BPP, Evidence of Bligh, Hunter and Margarot, 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, pp. 46, 23, 55 (IUP, *Crime and Punishment: Transportation, Volume I*).

involved, the limited amount of shipping, and the effectiveness of legislation in the Indian possessions. After 1801, on the subject of convicts the records show no further correspondence between India and Sydney. Returning to Britain also seems to have been a non issue, certainly if the numbers of convictions are a guide. However as the 1800s unfolded Britain would expand its empire and with it create the opportunity for convictism to generate new problems. Problems were minimised whilst New South Wales remained the only Australian colony. In 1804 two out settlements were created in Van Diemen's Land and this would eventually have a significant impact on New South Wales and indeed the British Empire as a whole. This was no better exemplified than by the Jane New case.

Chapter Two.

An old case through (Jane) New eyes.¹

¹ This is the title for a forthcoming journal article in *Tasmanian Historical Studies* based on this chapter.

In January 1829 the New South Wales Supreme Court handed down a sentence of death on Jane New, following her conviction for shop lifting. As the result of judicial process this was remitted by Governor Sir Ralph Darling and on his orders she was then removed to the Female Factory at Parramatta. Jane New is best known in Australian legal and historical circles for the subsequent writ of *habeas corpus* taken out on her behalf and the court case that followed.¹ This has traditionally been studied in the context of the power of the governor to revoke assignment.² The case was far more complicated than that. The opinions finally handed down by the three judges who heard her case raised questions that went to the heart of the relationship between New South Wales and the newly formed colony of Van Diemen's Land. These questions stemmed from the fact that Jane New was a serving convict who, at the time of the offence, had been assigned to her husband. Her case would lead to changes in how the two colonies interacted and would force a change in law that was of significance to all colonies of the British Empire.

Jane New was neither stranger to shoplifting nor the courts. She had appeared under her maiden name of Jane Henrie in the dock at the Chester Quarter sessions in April 1824 charged with having stolen a quantity of black cloth. Found guilty the court sentenced her to be transported to Van Diemen's Land for seven years. Henrie was transferred to London where she was placed aboard the convict transport *Henry*. On 12 October 1824, the vessel put to sea and the following February, after a voyage just a few days short of four months, arrived safely in Hobart Town, Van Diemen's Land.³ Also known by the alias Maria Wilkinson, Jane Henrie's conduct register shows that during her time in the system in Van Diemen's Land, she was neither convicted nor punished.

This lack of a record in Van Diemen's Land might cause one to believe that Jane Henrie was an innocent abroad, one of those supposed to have committed no real crime other than that occasioned by necessity in an age where social security was non-existent. However her conduct record reveals a great deal more with closer

¹ From the Latin *habeas corpus ad subjiciendum* meaning 'you shall have the body subjected to examination'. In common parlance it is a legal writ or order issued that challenges the right to imprison an individual.

² C.M.H. Clark, *A History of Australia, Volume II: New South Wales and Van Diemen's Land 1822-1838* (Melbourne, 1968), p. 102; A.G.L. Shaw, *Convicts and The Colonies* (London, 1966), pp. 231-32.

³ C. Bateson, *The Convict Ships, 1787-1868* (Glasgow, 1985), pp. 346-47, 358-59.

examination. Jane was described in her entry as a notorious character with bad connections who had served twelve months in gaol in Liverpool for a prior offence. The entry reveals that her family were also of a criminal persuasion. It noted that her mother had been transported on board the *Grenada* to New South Wales.⁴ Other records indicate that her mother was Elizabeth Wilkinson, sentenced to seven years transportation at the Lancaster Quarter sessions in July 1823.⁵ Elizabeth, like her daughter, had also sailed from London, departing just ten days prior to Jane.

Along with another female, Josephine Townley, Elizabeth and the thirteen year old Jane had been jointly convicted in the Lancaster Quarter sessions in 1818, of stealing two pairs of boots valued at a penny a pair. The low value of the boots allowed the trio to avoid the mandatory death penalty. Elizabeth was convicted a further two times in 1820, again at Lancaster, but not in company with her daughter. Jane did appear that year however in company with an Ann Ogden. Before the Lancaster bench the pair was twice convicted with theft. It was for these offences that Jane had served her twelve months in Liverpool Gaol.⁶

Three months after Jane Henrie set foot in Hobart Town, the *Adrian*, from Britain, arrived in the Derwent River carrying on board Van Diemen's Land's new Lieutenant Governor, George Arthur.⁷ Arthur was aware that his predecessor, Colonel William Sorell, had faced a number of difficulties in running the most southerly of British colonies. Not the least amongst them had been the physical distance between Hobart and Sydney, which often resulted in inordinate administrative delays, and which in turn had led to a popular perception amongst the island's population that they were deliberately neglected. In 1824 this had resulted in a petition by 102 landholders and merchants that called for a resident government in Hobart, in effect to raise Van Diemen's Land to the status of independent colony.⁸

⁴ AOT, Convict Department Conduct Registers, CON 40/5, Jane Henrie per *Henry*, 1824.

⁵ C. Forell, 'Rebels Choices: The Lives of Ellen Murphy and Jane New as Convicts, Thieves, Domesticates and Wives in Colonial Australia', pp. 16-17 [http://works.bepress.com/caroline_forell/1, accessed 24 May 2007]

⁶ Forell, 'Rebels Choices', pp. 16-17.

⁷ M. Levy, *Governor George Arthur: A Colonial Benevolent Despot* (Melbourne, 1953), p. 3.

⁸ Levy, *Governor George Arthur*, pp. 37-38.

To alleviate these issues Arthur had sought from, and been granted by, the Colonial Office greater autonomy than his predecessors. He arrived with authority to set up a Supreme Court of Civil Criminal and Ecclesiastical jurisdiction and the power to draft laws that would be passed automatically by the Legislative Council of New South Wales. As Lieutenant Governor, Arthur also had the right to dissent from imposing any New South Wales acts that he deemed inappropriate for Van Diemen's Land, the power to appoint local Magistrates, and the authority to remit sentences and grant pardons and reprieves. On paper Arthur's position remained deferential to that of Sir Thomas Brisbane, the then Governor of New South Wales and who was, as such, the titular Governor of Van Diemen's Land.⁹

In December 1824, on his way to Sydney where he had been appointed to succeed Brisbane, Sir Ralph Darling called at Hobart Town. Darling brought with him the proclamation that severed Van Diemen's Land from New South Wales and granted it the status of independent colony sought by many of its settlers. Darling retained the position of Governor of the island, although his authority in this capacity was only valid when actually within the colony. Given that Darling did not return and that his eventual successor Sir Richard Bourke never set foot in Van Diemen's Land, it left Arthur effectively the new colony's ultimate authority.¹⁰

Upon arrival Jane Henrie had been assigned to work for Robert Officer and his young family at New Norfolk, a farming community on the Derwent River 38 kilometres north of Hobart Town. Officer himself had been in the colony little longer than his servant, having only arrived in 1822 on the *Castle Forbes*. During that time he had become well known for his sympathetic treatment of convicts, having once responded to criticism by stating that he did not wish to be 'known as a mere slave driver'.¹¹ Whilst working for the Officers Jane met fellow convict James New. New, by that stage a ticket of leave holder, had also been transported to Van Diemen's Land for seven years. He had been convicted of grand larceny at the Old Bailey in April 1820,

⁹ Levy, *Governor George Arthur*, p. 39.

¹⁰ Levy, *Governor George Arthur*, p. 39.

¹¹ Anon., 'Officer, Sir Robert (1800-1879)', *Australian Dictionary of Biography, Volume 2, 1788-1850* 1-Z (Melbourne, 1967), pp. 297-98.

having stolen 260 pounds of liquorice root from James Moore, an employer of members of New's family.¹²

In June 1826 Jane Henrie and James New applied, as was required by Convict Department regulations of serving convicts, to Lieutenant Governor Arthur for permission to marry. This was granted and following the reading of banns the two were married by the Church of England minister H. R. Robinson in New Norfolk on 24 July. Jane was married under her alias of Maria Wilkinson although there is no explanation as to why. Certainly there would appear to be no element of subterfuge as the marriage register also recorded her name as Jane Henry (sic).¹³ It does however introduce the issue of dual identity by convicts, an issue that will be developed elsewhere in this thesis.

By 1827 James New was licensee of the Spread Eagle, a public house and store in Hobart Town that sold, amongst other items, silk and materials. As was the customary practice Jane was assigned to New when, in April that year, he became free by servitude. New visited Sydney the following month and it would seem that he decided his future lay there rather than in Hobart Town. His desire to move was impeded by the fact that Jane still had three years of her sentence to serve and, as such, he needed permission from the authorities to take her out of the colony. Arthur granted this permission on 26 September 1827 and the couple sailed for Sydney the following day on board the *Medway*.¹⁴ Little could any of the parties have envisaged the legal storm into which they were both figuratively and literally sailing.

In Sydney the couple settled in the Rocks, where New first became the licensee of the Mermaid and then the Shipwright's Arms public houses. Living in Cambridge Street, they were just around the corner from Jane's mother Elizabeth who lived in Cumberland Street. Despite her husband's apparent success in business, within three months Jane had returned to her criminal ways. In December 1827 she was accused of having shoplifted twenty-eight yards of chocolate coloured silk from Madame

¹² AOT, Convict Department Conduct Registers, CON 31/29, N61 James New per *Maria* 1, 1820. Proceedings of the Old Bailey on line, ref: t18200412-171, Trial of James New [http://www.oldbaileyonline.org/html_units/1820s/t18200412-171.html, accessed 24 May 2007].

¹³ AOT, Registrar Generals Department files, RGD 36/1, 970/1826.

¹⁴ Opinion of Mr Justice Dowling, in F Watson (ed.), *Historical Records of Australia, Series I, Volume XIV* (Sydney, 1922), p. 772. Forell, 'Rebels Choices', pp. 30-31.

Josephine Rens, a shop owner in George Street. For some reason that was never explained, during all that followed Jane was not arrested, despite the matter being reported to police.¹⁵

It was not until a second alleged incident of shoplifting by Jane in August the following year that she was arrested and tried. Found guilty on August 12, Jane had her sentence of transportation extended twelve months and she was returned to her husband James. Ten days later she was again arrested, this time in relation to the theft of the silk from Madame Rens. Brought before the bench the magistrates had her charged and ordered her kept in custody. Bailed a week later, Jane was eventually tried in January 1829. Governor Darling was to later allege that between the offence involving Madame Rens and her second trial Jane had been involved in a number of other incidents of shoplifting.¹⁶

On 5 January 1829 Jane was found guilty and sentenced to death. She was not without influential friends however, many in key administrative posts within the colonial bureaucracy. An appeal to the colony's Executive Council was organised seeking a grant of mercy, but before this could be considered Chief Justice Francis Forbes, a member of the council and one of the bench that had sentenced her, raised concerns of a procedural nature. In a stroke of luck for Jane, it transpired that she had been indicted under a statute that had been repealed in London prior to her committing the offence in August 1827.¹⁷ The new statute designed to replace it was not enacted in New South Wales until April 1828, that is, after the offence. The Executive Council ruled her conviction null and void on the basis that she had been indicted under a statute that had not existed at the time of the offence. This decision was referred by Darling to the Supreme Court who not surprisingly, given Forbes' actions, upheld it.¹⁸

No doubt the expectation of Jane and James New was that, having had the conviction of Jane ruled illegal, she would be returned to James given his status as her assigned

¹⁵ Forell, 'Rebels Choices', pp. 44-46.

¹⁶ Forell, 'Rebels Choices', p. 47.

¹⁷ She was not the only one to so benefit. Forbes had raised the matter of 25 prisoners who had been convicted under statutes repealed by Peel's British Act 7&8 George IV, c27. All subsequently had their convictions declared void.

¹⁸ Despatch from Darling to Murray, 20 May 1829 in Watson, *HRA, Series I, Volume XIV* (Sydney, 1922), p. 762. Forell, 'Rebels Choices', pp. 52-53.

master. This did not occur. Darling upon signing the remittance of her sentence ordered the Sheriff's department to place Jane in custody at the Female Factory at Parramatta, in part to end her 'depredations' on the shopkeepers of Sydney. It was this decision that elevated the case of Jane New from one of simple shoplifting to one of imperial importance. She became the centre of a legal debate over the power of the Governor to revoke assignment.¹⁹

Darling's order set in train a legal case that raised a number of key issues involving the nature of convictism in the Australian colonies. At the very core was a challenge to the authority and power of the Governor himself. The principal issue was whether or not the governor of a colony had the power to revoke assignment and was based on an argument that the master had a property right in the assigned convict. In March 1829 Francis Stephen filed a writ of *habeas corpus* on behalf of James New in the New South Wales Supreme Court. Stephen was the son of Justice Stephen and appeared alongside W.C. Wentworth who, apart from his legal practice, was also owner of the Sydney newspaper, *The Australian* and a staunch critic of Darling's regime.²⁰ The writ had been issued after New had gone to the gaol to reclaim his 'property' following Jane's remittance, only to be told that she had been transferred to the Female Factory at Parramatta. The pair argued that there was no apparent legal reason for Jane's imprisonment, thus the writ.

Despite his reluctance, Chief Justice Forbes was persuaded that the matter should proceed. The legal significance of the issues, at its heart, is reflected by the fact that Darling was represented at the hearings that followed by Alexander Baxter, the Attorney General, and John Sampson, the Solicitor General. He was opposed by Stephen and Wentworth as counsel for New, two of the best practitioners in the colony. It was argued that Darling's actions were tyrannical and illegal in that he had no power to revoke an assignment. The issue of Jane New was simply another chapter in a longer running battle between the Governor and the colonial masters. In July 1827 Darling had issued a proclamation that, in part, stated Section Eight of the Act 5 George IV, c84 and allowed the governor to both assign the service of a convict and

¹⁹ Forell, 'Rebels Choices', pp. 53-55.

²⁰ Clark, *A History of Australia, Volume II*, p. 102.

to modify that assignment 'in such a manner as justice and good policy may require'.²¹

Darling's motives in pursuing the matter have been questioned with two schools of thought emerging. One is that it was simply morally based in that Darling had a low opinion of the morality of female convicts, believing them to have been 'thoroughly abandoned' and of 'depraved disposition'.²² The intrigue surrounding Jane New had ensured that she rapidly became a *cause célèbre*. Given her status as a convict this was neither socially acceptable nor desirable in the Governor's eyes. Whilst this ideal may have some basis in fact, it would seem far more likely that his actions were politically opportunistic. The matter gave Darling the opening to reassert control over the landed classes, the biggest 'consumer' of convict services.

The involvement of Forbes in the Jane New case left him open to a charge of bias. In 1827 he had handed down a ruling that tickets of leave were unlawful because they 'violated the property rights of the masters of assigned convicts'. This had resulted in an Imperial act being passed the following year entitled the Australian Courts Act.²³ In part the Act specifically stated that governors had the power to revoke assignment *and* to grant remissions of sentence, in other words issue Tickets of Leave. The question now was whether Darling could, under this statute, revoke Jane's assignment *without* granting her a remission of sentence.

The case, as Forbes subtly put it, had reached a point of 'considerable delicacy'.²⁴ On March 21 the three judges, Forbes, John Stephen and Dowling, handed down their opinions. Forbes noted that the court had two questions to rule upon. The first was whether Jane's sentence for stealing from Madame Rens had been legally remitted or not. If it had not Jane was clearly under the control of the Governor as a convicted felon. All three agreed that on this charge Jane had been legally freed. The second question was one of far greater complexity. It was whether the Governor had the

²¹ Government notice dated 30 July 1827 reproduced in Clark, *A History of Australia, Volume II*, p. 102.

²² Darling quoted in D. Oxley, *Convict Maids* (Cambridge, 1996), p. 199.

²³ This was the British Act 9 George IV, c83. See in particular section 9.

²⁴ Quoted in Forell, 'Rebels Choices', p. 59.

power to revoke her assignment to her husband and either reassign her or retain her in the service of the government.²⁵

Both Forbes and Dowling in handing down their opinions indicated that if they had been asked to decide who had the superior property interest in the assigned convict, the governor or the master, they would have found in favour of the master. Stephen simply concurred with Forbes' opinion. This was not the decision of the court. Dowling noted that the Colonial Secretary of New South Wales, Alexander Macleay, had stated in an affidavit that Jane New had never been assigned in New South Wales by its governor, and this provided the three with a legal loophole through which they could wriggle out of Forbes' 'delicate' position. Forbes noted that Jane New had been legally and properly transported to Van Diemen's Land for the purpose of her serving a seven year sentence there. The seven years he commented were yet to elapse, further noting that no remittance of the sentence had been granted to Jane.

The three ruled that under the Acts of Parliament allowing transportation to take place, transportation was to a specific destination which, in the case of Jane New, was Van Diemen's Land. Forbes took the stance that if a prisoner was then transferred to another colony, even with the authority of the first colony's Governor, then they were no longer within the provisions of those Acts and not subject to the legal consequences of them. Prisoners could not be transferred because the Governor did not have the authority to transfer the property of their services. Jane New, given that her sentence had yet to expire and that no remittance had been made, was, he concluded, a prisoner of the Crown illegally at large in New South Wales and as such was offending against the 'laws of Empire'. She was ordered detained until such time as she could be returned to Van Diemen's Land.²⁶

The ruling of the Supreme Court was seen as a victory for two groups within New South Wales society. On the one hand the convict masters took the ruling as a legitimisation of their priority of right to the labour of their assigned servants. As such it was a guarantee of their right to a cheap labour force and gave control of the broader convict workforce to them, at the expense of the Governor and the Convict

²⁵ Opinion of Forbes C J, in Watson, *HRA, Series I, Volume XIV*, p. 766.

²⁶ Opinions of Forbes C J, Stephen and Dowling in Watson, *HRA, Series I, Volume XIV*, pp. 765-77.

Department. The second group were the emancipists, championed by W.C. Wentworth through his newspaper *The Australian*. Any action resulting in a weakening of the power of the Executive Council and the colonial bureaucracy was welcomed by them as they were perceived to run New South Wales for the benefit of Britain at the expense of the colonists. As is often the case, the sweet taste of victory did not linger long. Both Darling and Arthur quickly sought clarification in the form of imperial interpretation of the decision from London.

On May 20 Governor Darling wrote to the Secretary of State for War and the Colonies, Sir George Murray, setting out the particulars of the Jane New case. Darling drew particular attention to one of the unsung outcomes the case now presented, that being the apparent inability of himself and Arthur to move convicts between the two Australian colonies. Darling wrote:

But I beg Sir, to draw to your attention to the very serious inconvenience which must be experienced, should the Governor of this Colony and Van Diemen's Land not have the authority to remove a Convict from one to another.²⁷

It was noted that the many such movements that had to date been ordered, had not been done for insignificant or trivial reasons. Many had been made as a standard form of securing the safety of prisoners, who had given evidence in trials, and who were believed to be in mortal danger as a consequence. Others were moved for more humane and civilising reasons such as reuniting husbands and wives. Darling concluded by noting that a number of current serving convicts had been transferred between the two colonies, but that the opinion of the judges in the Jane New case had now rendered such actions as illegal removals. Darling's sole concern would seem to be the status of such convicts. It should be noted that such concerns did not extend to those who had, subsequent to their arrival in either of the Australian colonies, been sentenced to transportation in colonial courts. The judge's decision did not impact on the movement of those convicts.

²⁷ Despatch from Darling to Murray, 20 May 1829, in Watson, *HRA, Series I, Volume XIV*, p. 763.

Within a fortnight of Darling's despatch, Lieutenant Governor Arthur also wrote to the Colonial Office in London seeking advice. Arthur's despatch was not directed to Murray but rather his under secretary, Horace Twiss. His choice of recipient may at first appear unusual but Arthur, a thorough and more experienced governor than Darling, sought clear legal advice and set his sights accordingly. Twiss, as well as being the member for Wootton Bassett in Wiltshire, was also a lawyer and had been in practice at the bar since 1811. He was an experienced and learned counsel and such were his skills that in 1825 the Prime Minister, Lord Liverpool, had appointed him counsel to the Admiralty and judge-advocate of the fleet. In 1827 his skills had been further acknowledged when he was raised, at the bar, to King's Counsel.²⁸ As such he was clearly in a better position to offer Arthur sound legal advice than Murray. In fact Murray himself was to also seek the advice of Twiss on the matter.

In his despatch Arthur noted that it had long been the practice to move convicts between New South Wales and Van Diemen's Land and vice versa. It was a practice that predated his appointment and he assumed it had been based on the rationale that both were convict colonies and, as such, the law that applied to the convicts as a class was the same in both places and therefore had the same effect. Arthur also noted that in the case of husbands and wives who had both been transported, but were separated in the colonies, this movement was an integral part of the system of reform. It allowed for the reunion of couples to be offered as an incentive. The wife would only be moved to the location of her husband once they had both demonstrated a measure of contrition and improvement.

This was an issue to which Arthur had clearly given much thought. He was concerned that in reuniting couples who had been separated in the transportation process, the two Governors, for both were involved in the decision making process, may have been 'interfering with the premeditated arrangements of the Secretary of State for the Home Department'. Arthur was concerned that such couples may have been deliberately separated for reasons not communicated to the colonies. As a consequence, two years previous he had written to Henry Capper, the Superintendent

²⁸ W.P. Courtney, 'Twiss, Horace (1787-1849)', rev. H.C.G. Matthew, *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/27917>, accessed 21 May 2007]

of the Convict Establishment in England, seeking clarification that such a course of action was acceptable. His reply advised that the colonial practice of uniting the wife with the husband had been given the unqualified support of Sir Robert Peel, the Home Secretary at the time. In this official capacity it was Peel who decided who was transported, to where, and when, but in practice it was Capper that made the final decision.²⁹

Arthur informed Twiss that various legal points had been brought up at Jane New's trial, but the key point he was concerned with was her status as a convict. The court had ruled that the Governor of New South Wales had no control over her. Instead she was to be regarded in New South Wales as a prisoner of the crown illegally at large, despite having the authority of the Van Diemen's Land administration to be there. Arthur was also concerned that the court had ruled that the Governor did not have the power to revoke assignment. Forbes had questioned whether Jane New could be gaoled in New South Wales as this would effectively place her under the authority of Darling whilst she was still under the supposed authority of Arthur.³⁰ By gaoling her Darling would also be revoking her assignment to her husband, something Forbes doubted he had the authority to do. Arthur believed that the confusion had arisen from the fact that New South Wales and Van Diemen's Land had become separate colonies, and that the Act under which transportation was taking place, 9 George IV, c83 section 9, did not reflect this. Darling's despatch had been referred by Secretary Murray to the British Attorney General and Solicitor General who both advised that the Governor did in fact have the power to revoke assignment and that the judges had erred in their interpretation.³¹

In April 1830 Murray acknowledged Darling's correspondence. He noted that he was aware that a significant number of convicts destined for New South Wales had been detained in Van Diemen's Land. He advised Darling that a bill would be brought before parliament and that a law would be introduced to allow this to happen. Crucially such a law would be retrospective to fix any further problems. The bill that was enacted was 1 William IV, c39 which enabled the Governors of New South

²⁹ Despatch from Arthur to Twiss, 2 June 1829, P. Chapman (ed.), *HRA, Series III, Volume VIII* (Melbourne, 2003), p. 393.

³⁰ See note 409 in Chapman, *HRA, Series III, Volume VIII*, p. 900.

³¹ See note 409 in Chapman, *HRA, Series III, Volume VIII*, p. 903.

Wales and Van Diemen's Land to alter the destination of convicts not only at the time of their arrival in the colony but at any stage prior to the expiration of their sentence.³²

The significant number of convicts Murray was alluding to was 99 female convicts who had arrived in Hobart, en route to Sydney, in July 1828 on board the *Mermaid*. Also on board were stores for Van Diemen's Land and after off loading these it was realised that considerable ballast would be needed to make the vessel safe to sail on to Sydney. Arthur was aware that the crops had failed in New South Wales and as a consequence there was at the time a surplus of convict labour in that colony. As the *Mermaid's* contract stated that the convicts could be conveyed to either of the two colonies, he had taken the decision to retain the 99 women in Hobart. Arthur's concern was that the decision in the Jane New case meant that he had no legal authority over them, that they had been 'illegally detained'.³³

Arthur turned to Attorney General John Montagu and Solicitor General Alfred Stephen for advice, they being his legal experts in the colony. Stephen was the son of Justice John Stephen who had heard the Jane New case, and the brother of Francis who had brought in it the writ of *habeas corpus*. Arthur neatly summed up the situation by stating that the decision in New South Wales meant that 'an offender transported or whom it has been directed to transport to Van Diemen's Land cannot be removed to New South Wales and subjected there to all the liabilities of a Convict originally transported to that Colony'.³⁴

For the benefit of Montagu and Stephen, Arthur had studied the sailing instructions issued by the Navy Board to the Surgeon Superintendent on each convict transport. He noted that the destination of the convicts was stated in the instructions but that the contract, between the Commissioners of the Navy at the direction of the Secretary of State, and the Contractor, was at variance. The contract stated that the master of the ship was to proceed to Port Jackson *or* Hobart Town 'either or both, and that he is to

³² Murray to Arthur, 7 March 1830 and 26 September 1830, in Chapman, *HRA, Series III, Volume VIII*, p. 903. The Act is also referred to as 11 George IV, c39.

³³ Arthur to Murray, 7 August 1829, in Chapman, *HRA, Series III, Volume VIII*, p. 468.

³⁴ Arthur to Montagu and Stephen, 30 April 1829, in Chapman, *HRA, Series III, Volume VIII*, p. 399.

there deliver the convicts...as he may be directed by the governor, Lieutenant governor, or Commander in Chief...'.³⁵

Arthur also noted that all convicts had originally been transported to New South Wales because that was the only colony. Van Diemen's Land was simply an out settlement of it. In 1812, following a suggestion by Governor Lachlan Macquarie, the *Indefatigable* had delivered convicts direct from London to Hobart Town but for reasons unknown this practice was not continued. The direct link was not re-established until 1818 when it was introduced on a permanent basis.³⁶ Convicts had continued to be sent on to Van Diemen's Land from New South Wales for a number of reasons. These included secondary punishments at penal stations such as Macquarie Harbour, and for the reasons Darling had offered, they being reunion with family members, and for the safety of prisoners who had provided evidence at trials and who, as a consequence, were deemed to be in personal danger.³⁷

Montagu and Stephen responded to Arthur in August 1829. In effect much of their response supported the stance taken by Forbes and his colleagues. They informed him that in their opinion any direction given by one of the Principal Secretary's of State giving a specific destination must be adhered to in order that the transportation be lawful. Further, under the Act 5 George IV, c84 there was no provision for a governor to work a convict outside the colony. This effectively meant that the assignment of Jane New could not be legally enforced.³⁸ The pair did differ in opinion as to the Governor's power to revoke assignment only for the purpose of awarding a Ticket of Leave. Montagu noted that the power to remit sentences was retained by the Crown but had passed via the Act 30 George III, c47 to the governor.³⁹

Sir George Murray did not respond to Darling until January 1830. He expressed surprise at the decision reached by the Supreme Court in the Jane New case, stating

³⁵ Arthur to Montagu and Stephen, 30 April 1829, in Chapman, *HRA, Series III, Volume VIII*, p. 400.

³⁶ Bateson, *The Convict Ships*, p. 202.

³⁷ Arthur to Montagu and Stephen, 30 April 1829, in Chapman, *HRA, Series III, Volume VIII*, p. 401.

³⁸ Montagu and Stephen to Arthur, 4 August 1829, in Chapman, *HRA, Series III, Volume VIII*, p. 487.

³⁹ Montagu to Arthur, 15 August 1829, in Chapman, *HRA, Series III, Volume VIII*, p. 493. The purpose of the Act is clear from its title 'An Act for enabling his Majesty to authorise his governors or lieutenant governors of such places beyond the seas, to which felons or other offenders may be transported, to remit the sentences of such offenders'.

that the Act 9 George IV, c83 had been specifically drawn up to confer on the governors the power to revoke assignment with unlimited discretion. To support this position he enclosed an opinion on the matter written at his behest by Horace Twiss. The decision clearly did not surprise Twiss, who started by noting that it would have been popular amongst the masters of New South Wales. Twiss however did not address the issue of Darling's power to revoke an assignment made by Arthur, or at least not overtly. As he saw it the bench should have 'kept aloof' from that argument and adhered to the case before it which was, as he put it, the 'right of a Convict, transported to V[an].D[iemen's]. Land, to be resident in N[ew].S[outh]. Wales before the term of transportation was expired'.⁴⁰

Whether the opinion of Twiss was ever shown to Forbes is not known, but he later wrote to Murray explaining in greater detail the rationale behind the actions and decisions made by the court. Forbes noted that the case had never been about the power to revoke; in fact this had never been an issue in any court case brought before them. By making the argument that Jane New was transported to Van Diemen's Land and not New South Wales, and thus dealing with her as a prisoner illegally at large, they had completely avoided this more delicate issue.⁴¹

Apart from Twiss, Murray had also sought the opinion of the British Attorney General and the Solicitor General on the power to revoke. Both were of the opinion that Section 9 of the Act 9 George IV c83 clearly gave the governor that power. Indeed they were of the opinion that the act had been specifically drawn up with this as its intention.⁴² On a cautionary note, Darling was advised that if his power to revoke was again directly challenged in the colonial court and the judges again ruled that he had no such power, then he was to immediately desist from revoking any assignments until the decision was either 'reviewed by His Majesty in Council, or the law placed beyond doubt by the authority of Parliament'.⁴³

Murray however had already made all this clear in a despatch to Darling in July 1828. This had related the fact that the Act, entitled 'An Act to provide for the

⁴⁰ Enclosure by Horace Twiss, in Watson, *HRA, Series I, Volume XV* (Sydney, 1922), p. 349.

⁴¹ Letter from Forbes to Murray, 19 July 1830, in Watson, *HRA, Series I, Volume XV*, p. 667.

⁴² Despatch from Murray to Darling, 30 January 1830, in Watson, *HRA, Series I, Volume XV*, p. 346.

⁴³ Despatch from Murray to Darling, 30 January 1830, in Watson, *HRA, Series I, Volume XV*, p. 347.

Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof and for other purposes relating thereto', was to be introduced.⁴⁴ In clause 21 Murray advised Darling that the power of the governor to issue Tickets of Leave and to withdraw assignment was 'so obviously essential to the good government' of the colonies that the new act had been worded to make this quite clear and 'beyond dispute'.⁴⁵ This had been in part as a result of questions Forbes had raised about preceding legislation. In Forbes' opinion a convict master could reassign without the permission of the Governor. Murray conceded Forbes had been correct but that this had now been tidied up by the new Act.⁴⁶

Murray then moved on to address the issue raised by both Darling and Arthur of the intercolonial movement of convicts. He wrote:

His Majesty's Government are of opinion that the Governor's have not the power to alter the destinations of Convicts, except for the purpose of transporting those who shall have committed new offences from New South Wales or Van Diemen's Land, as the case may be, to some settlement of a more penal character; nor does it appear to His Majesty's Government to be requisite that any addition should be made to the powers of the governors in these respects.⁴⁷

In effect Murray was saying that all movement of convicts between the two colonies post December 1825, which were not the result of a colonial sentence of transportation, were illegal.

Murray, or at least one of the under secretaries in the department of War and the Colonies, must have quickly realised that such a ruling would have a severe impact on the day to day management of the two penal colonies. For reasons not explained, Murray quickly changed his mind and two months later he advised Darling in a second despatch that:

⁴⁴ This was the British Act 9 George IV, c83.

⁴⁵ Despatch from Murray to Darling, 31 July 1828, in Watson, *HRA, Series I, Volume XIV*, p. 270.

⁴⁶ Despatch from Murray to Darling, 30 August 1828, in Watson, *HRA, Series I, Volume XV*, p. 361.

⁴⁷ Despatch from Murray to Darling, 30 January 1830, in Watson, *HRA, Series I, Volume XV*, p. 348.

...His Majesty's government will lose no time in making some provision, by which the Governors of New South Wales and Van Diemen's Land may be authorized, under special circumstances, to alter the destination of convicts, either on their first arrival at the place to which they may have been transported, or during any period prior to the termination of their sentence...

To avoid any further difficulties and to eliminate any potential problems this power was to be made retrospective.⁴⁸ These potential problems and legal twists were later pointed out by Darling in a despatch to Murray. He noted that the irony of the Jane New case was that she had in fact been transported to New South Wales, as at the time of her arrival in 1824 Van Diemen's Land was a dependency of the mainland colony.⁴⁹

As a consequence of the Jane New case the relationship between New South Wales and Van Diemen's Land had to be redefined. Some questions however remained unanswered, in particular the levels of authority the governors actually had, especially in relation to each other and in the management of the convicts. This would lead to friction between Sir Richard Bourke, Darling's successor as Governor of New South Wales, and George Arthur. The case also tells another largely unacknowledged side of transportation. Many writers on Australian history have portrayed convicts as though they existed in some sort of legal vacuum, the exposed and defenceless victims of a cruel and arbitrary punishment regime administered by the various government agencies.⁵⁰ The focus has been on the levels of punishment with little or no reference to the rule and role of law.⁵¹ The example of Jane New demonstrates that this was not

⁴⁸ Despatch from Murray to Darling, 2 April 1830, in Watson, *HRA, Series I, Volume XV*, p. 391.

⁴⁹ Despatch from Darling to Murray, 9 August 1830, in Watson, *HRA, Series I, Volume XV*, p. 664.

⁵⁰ For example C. Smith, *Shadow Over Tasmania* (Hobart, 1941) and C.F. Carrington, *The British Overseas: Exploits of a Nation of Shopkeepers, Part 1 Making of the Empire* (Cambridge, 1968). For more on this see this thesis Chapter 4, pp. 79-95, which discusses the power of the convict departments and the counter arguments put forward to the 'legal vacuum' claims. This notion has been challenged in more recent historiography by historians like David Neal, Bruce Kercher and Alan Atkinson. In a Van Diemen's Land context recently published works by both Hamish Maxwell-Stewart, *Closing Hell's Gates: The Death of a Convict Station* (Crow's Nest, 2008), and James Boyce, *Van Diemen's Land* (Melbourne, 2008) have also challenged the idea.

⁵¹ B. Kercher, 'Perish or Prosper: The Law and Convict Transportation in the British Empire 1700-1850', *Law and History Review*, Volume 21, No. 3, (Autumn, 2003), p. 529.

the case for all. Indeed in many instances it was the convict who was protected by the law, and it was the system that was left exposed.

Chapter Three.

And then there were two.

A number of important questions were raised as a result of the Jane New case. The most significant, in reference to this thesis, was that of the powers of the governor of a colony relative to those colonies not under his authority. In the instance of Jane New this was the power of Arthur over a convict transferred to New South Wales from Van Diemen's Land. By inference it therefore raised the reciprocal question of what power he had over convicts transferred to Van Diemen's Land, not only from New South Wales but also from other British colonies. Part of this question was the level of Darling's authority over a convict transferred from New South Wales. The answers to these questions had Empire wide implications but the reality of the situation was that only New South Wales and Van Diemen's Land were in a position to make such transfers. At that time they were the only two penal colonies to which British convicts were being sent, Bermuda being regarded more as an off shore British prison.¹

These questions were lost however as the main focus of the outcome of the case centered on the court's ruling that the movement of serving convicts between colonies was considered illegal. This decision only related to the transfers that took place following the elevation of Van Diemen's Land from the status of out settlement to a colony in its own right, which is between 1803 and 1825. As Arthur had noted to Twiss, after Van Diemen's Land had become an independent colony its legal and political relationship with New South Wales continued as before, and remained based upon assumptions of authority. Past practices were simply carried forward and were not subject to any form of reassessment, yet these practices were themselves problematic and contributed to the Jane New situation. This is more easily understood if we look at how transportation evolved, with specific reference to Van Diemen's Land.

Much of the problem stemmed from New South Wales' evolution as a penal colony. Following the loss of the North American colonies in the War of Independence, the British authorities had been faced with the need for a new overseas repository for their transported felons.² Whilst the intention may have been to continue the system used in

¹ Indigenous convicts from the Indian possessions were being sent to a separate set of penal colonies, the Straits settlements and Mauritius, with some having been previously sent to Sumatra.

² There has been considerable debate over the actual reasons for the founding of New South Wales. It is not within the scope of this thesis to argue why it was, but to argue what the outcomes of it being a penal colony were. For the arguments see G. Martin, *The Founding of Australia* (Sydney, 1978). For

the North American colonies, this was not possible because the political structure of New South Wales was vastly different to the North American and West Indian colonies. Virginia and the southern colonies were originally founded under charter, but became, in the words of the nineteenth century political economist Herman Merivale, a Royal government, that is a bicameral legislature with one assembly appointed by the colonists and one appointed by the Governor. Colonies such as Pennsylvania, Delaware and Maryland had proprietary governments, in that the proprietor or company of proprietors could nominate a council and sometimes the governor. The third category were Charter governments, those in which the King had parted with his rights to the colonists, and it was the colonists who elected both houses, and often the governor. The New England colonies, such as Massachusetts Bay, fell into this third category.³

The colonization of New South Wales required a new model of governance. Given its proposed nature as a penal colony, the initial European population, at least, was to consist solely of either convicts under the control of government, or civil officers and the military who were employed by it. There would be no 'free' population likely to seek input into its governance. As such the colony was to be run by a governor, appointed by London, who was subsequently vested with a degree of autonomy significantly higher than any previously seen within the British Empire. The colony had no form of constitution and as a result 'the governor had more power than any other colonial governor, and more power in New South Wales than any king in England since at least the time of James I'.⁴

From its very beginning the new colony suffered a measure of confusion regarding its structure and authority, which in part the Jane New case was to exemplify. Letters from the Under Secretary of State for the Home Office, Evan Nepean, reveal that Lord Howe, the First Lord of the Admiralty, believed the new colony would be governed simply under military law. This would certainly be the case for soldiers of

transportation to North America see in particular P.W. Coldham, *Emigrants in Chains: A Social History of Forced emigration to the Americas 1607-1776* (Baltimore, 1992), A.R. Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies, 1718-1775* (Oxford, 1987), W. Oldham, *Britain's Convicts to the Colonies* (Sydney, 1990), and A.E. Smith, *Colonists in Bondage: White Servitude and Convict Labour in America 1607-1776* (New York, 1985).

³ H. Merivale, *Lectures on Colonization and Colonies* (London, 1861), pp. 94-95.

⁴ D. Neal, *The Rule of Law in a Penal Colony* (Cambridge, 1991), p. 32.

the military contingent sent, but not for the convicts or any free person. Howe believed that punishment would be administered at the discretion of the governor but instead, the colony was given both civil and criminal courts.⁵

The evolution of transportation as a system of punishment in many ways mirrored the growth of the British Empire in the 1700s and 1800s. This was reflected in the power of the governor and the relationship between metropolis and colony. The structure of the North American colonies had resulted in a 'weak empire with a scattering of power'. Their loss saw a move towards 'a more authoritarian one in which power and law were directed from London'. Bruce Kercher has argued that from 1776 onwards, Britain exercised increasing levels of control from London over her colonies. As a consequence of this the system of transportation employed also changed. Unlike the system that had been in place with the North American colonies where the rights to a convict's labour had been sold to individuals, under a system Kercher has argued was closer to banishment or exile, convicts sent to the Australian colonies were to be subjected to a 'monitored punishment' whose administration was to be administered by London through its colonial governors.⁶

The claims of an increased structuring in metropolitan control however are clearly not in evidence when looking at the relationship between Van Diemen's Land and New South Wales. That relationship was based on assumptions and common practice. From its very beginning the relationship had been questioned by administrators, despite it being clearly spelt out by the authorities in London. Lord Hobart, the Secretary of State for the newly created Department of War and the Colonies had advised Governor King that 'the intended settlements are considered as dependencies upon your Government, and that the Lieutenant-Governor is placed under your orders'.⁷ The 'intended settlements' included one on the Derwent River in Van Diemen's Land and another at Port Phillip. David Collins, formerly the judge advocate in New South Wales, was appointed Lieutenant Governor of the latter.

⁵ Nepean is quoted in J. Curry, *David Collins: A Colonial Life* (Melbourne, 2000), p. 30.

⁶ B. Kercher, 'Perish or Prosper: The Law and Convict Transportation in the British Empire 1700-1850', *Law and History Review*, Volume 21, No. 3 (Autumn, 2003), p. 531.

⁷ Despatch from Hobart to King, 14 February, 1803 in F. Watson (ed.), *Historical Records of Australia (hereafter HRA)*, Series I, Volume IV, (Sydney, 1915), p. 9.

Collins was well aware that the new settlements were to be subservient to Sydney. In the commission issued to him regarding the establishment of Port Phillip there was also a clear distinction made between it and Van Diemen's Land. The commission limited Collins' authority to the southern coastline of New South Wales but north of 'Basses Strait'.⁸ The Port Phillip exercise proved a failure and Collins decided to move his expedition to Van Diemen's Land where Lieutenant John Bowen had recently established a settlement at Risdon Cove on the Derwent River. Having initially considered moving to Port Dalrymple in the north, Collins for military reasons settled on the Derwent as his destination.⁹

It was not until May 1804 that Collins eventually took charge of the fledgling settlement.¹⁰ In the meantime he had decided to relocate his party from Risdon Cove on the eastern side of the Derwent to Sullivan's Cove on the western shore. There can be no doubt that Collins understood the relationship between his settlement and New South Wales. He acknowledged this when he wrote to King regarding the relocation to Sullivans' Cove. In a clear expression of his junior status Collins commented 'I certainly should have waited Sir, until this measure had received the Sanction of your approbation...'¹¹

Collins clearly believed that he had a significant degree of autonomy when it came to running the settlement and in particular the individuals that constituted it. In February, having been at the Derwent not quite a month, he wrote to King regarding some of the convicts he now found under his authority. The men had been convicted at a sitting of the criminal court in Sydney and sentenced to time in Van Diemen's Land. Collins was unimpressed at the decision and wrote:

Your Excellency was Pleased to say in a former Letter, that no one should come to the settlement which I have formed without my particular application. I find, since my arrival here, that several flagitious Characters have been adjudged by the Sentence of the Criminal Court to serve a certain Number of Years at Risdon Creek.

⁸ Watson, *HRA, Series III, Volume 1* (Sydney, 1921), p. 785, note 11.

⁹ Watson, *HRA, Series III, Volume 1*, p. xx.

¹⁰ Watson, *HRA, Series III, Volume 1*, p. xxv.

¹¹ Despatch from Collins to King, 29 February, 1804 in Watson, *HRA, Series III, Volume 1*, p. 223.

...These circumstances induce me to request that your Excellency will prevent this Settlement being made a Place of Confinement for People, who I must ever consider more hardened and atrocious than those who may be imported from the Jails of England. Were the Sentences of the Criminal Court to be carried into effect without your concurrence, I should not hesitate to send their Culprits back, as I conceive the consent of any State must first be obtained, before it could be made the Seat of Transportation. This however not being the Case I claim your Excellency's Promise that no one shall be sent hither that I do not apply for.¹²

Collins' comments clearly argue against the notion promulgated by some colonial historians that Van Diemen's Land was settled as a penal settlement. In 1835 Henry Melville had published his *History of Van Diemen's Land* in which he had claimed that between 1803 and 1817 the colony:

...had been a penal settlement of the Sister Colony; it was at first a jail and *nothing but a jail* on a large scale, and for many years no free emigrant was allowed to settle therein.¹³

It was a claim later repeated by John West in the 1850s. It was he who made the statement that the island had been settled as the 'Botany Bay of Botany Bay', a place of exile for the worst offenders in New South Wales.¹⁴ More modern historiography has questioned this, particularly Alan Atkinson who has claimed that 'there was no idea to begin with that Van Diemen's Land should be part of [the] penal system'.¹⁵

In truth the answer most probably lies somewhere between the two. Quite clearly there was every expectation that the new colony would have a convict presence, for both Bowen and Collins had arrived with convicts as the principal component of their parties. They were also the only workforce available. There was no question that Van

¹² Despatch from Collins to King, 29 Feb 1804, in Watson, *HRA, Series III, Volume 1*, p. 226.

¹³ H. Melville, *The History of the Island of Van Diemen's Land* (Adelaide, 1967), p. 2.

¹⁴ J. West, *The History of Tasmania* (Facsimile edition, Sydney, 1981), p. 33.

¹⁵ A. Atkinson, 'Writing About Convicts: Our Escape From The One Big Gaol', *Tasmanian Historical Studies*, Volume 6, Number 2, 1999, p. 20.

Diemen's Land was seen in some sort of politically separate light. King's commission as Governor of New South Wales makes this quite clear. It defines his authority as covering the area extending from Cape York in the north to as far south as South Cape at latitude 43° 39' south, the southern tip of Van Diemen's Land.¹⁶

When Collins died suddenly in 1810 his widow in England, Maria Collins, wrote to the Transport Office seeking assistance in her application for a pension. In support of her claim Maria Collins made note that the widow of the late Governor King had been in receipt of £200 a year since his death in 1808. Sir Rupert George, one of the Commissioners for Transport at the time that Collins had been sent to found Port Phillip, wrote to an undersecretary for the colonies, Robert Peel. George did not support Maria Collins' comparison, noting that King was 'Governor, and Collins Lieut. Governor of a part of the same colony'.¹⁷

Collins' comments to King regarding the unwanted convicts does make it clear that Collins at least did not see Van Diemen's Land's role as being the Botany Bay of Botany Bay. He was wrong with regard to his authority to refuse convicts, even if King had given the promise alluded to. Both the Derwent River settlement and Port Dalrymple in the north were outstations of New South Wales and as such were of the same status as Norfolk Island. The order to transport issued by the Privy Council made that quite clear. Issued in February 1803 it stated in part that it was up to the King in Council to 'declare and appoint to what place or places, part or parts beyond the Seas, either within His Majesty's Dominions, or elsewhere out of His Majesty's Dominions, such Felons or other Offenders shall be conveyed or transported'.¹⁸ This certainly included Van Diemen's Land for the order went on to state that the location of such places could be '...the coast of New South Wales or some one or other of the Islands adjacent'.¹⁹ It was not in the power of either King or Collins to overrule such a decree.

Despite the claims of Melville and West there is little evidence of the island being founded as a gaol for Sydney. Indeed analysis of the convict population would

¹⁶ Watson, *HRA, Series III, Volume I*, p. 785, note 11.

¹⁷ Letter from George to Peel, 15 May 1811, reproduced in Curry, *David Collins*, p. 309.

¹⁸ Order by the Privy Council, 16 February 1803, in Watson, *HRA, Series III, Volume I*, p. 12.

¹⁹ Order by the Privy Council, 16 February 1803, in Watson, *HRA, Series III, Volume I*, pp. 12-13.

suggest a totally different picture. Following the departure of Bowen's party for Sydney in August 1804 Collins was left with a relatively small convict presence.²⁰ At that time it numbered 279 and this figure fell slowly over the subsequent six years. In June 1806 the figure was 254 males; in September 1808 it was down to 198; and by March 1810, at the time of Collins' death, the figure was just 166.²¹ The numbers at Port Dalrymple were similar. In August 1806 there were only 107 at that settlement and although Collins had been led to believe that more convicts were to follow from England this did not eventuate.²² Instead convicts continued to be transferred to the island from Sydney, but as the numbers reveal, this was never on a grand scale.

Following the death of Collins the numbers remained minor. In 1816 his replacement as the island's Lieutenant Governor, Thomas Davey, advised Lord Bathurst that in the three years from 1813 only 175 convicts had arrived in Van Diemen's Land from Sydney.²³ Part of the problem stemmed from Governor Lachlan Macquarie's public works policy which resulted in the retaining in New South Wales of the most skilled men.²⁴ The numbers under Davey did not start to increase until 1816 when just over 300 were sent to Hobart for assignment. This was almost double the number sent over the previous three years. Despite this, in 1817 when William Sorell arrived to replace Davey as Lieutenant Governor, the convict population at the Derwent had only risen to 355.²⁵

Sorell's arrival marked a dramatic increase in numbers due, in the main, to two factors. Firstly severe flooding in New South Wales in 1817, 1819 and again in 1820 significantly contributed to a drop in demand for convict labour in that colony. Secondly from 1818 transports began arriving in Van Diemen's Land direct from Britain. In that year three ships brought 565 males and in the following year another three ships delivered a further 312. Thereafter numbers increased rapidly. In 1820 over 1300 convicts arrived, followed by a further 1000 in 1821.²⁶ By the time Sorell

²⁰ Watson, *HRA, Series III, Volume I*, p. xxv.

²¹ Watson, *HRA, Series III, Volume I*, p. xxviii.

²² Convict Return for 12 August 1806, in Watson, *HRA, Series III, Volume I*, p. 497.

²³ Watson, *HRA, Series III, Volume II* (Sydney, 1921), p. 770, note 73.

²⁴ L. Mickleborough, *William Sorell in Van Diemen's Land* (Hobart, 2004), p. 53.

²⁵ Return of Male Convicts, 9 April 1817, in Watson, *HRA, Series III, Volume III* (Sydney, 1921), p. 553.

²⁶ Mickleborough, *William Sorell*, p. 54.

departed the colony in 1824 the convict population had risen to 6100, an almost twenty fold increase during his seven years in office.

The decision to despatch transports direct to Hobart underscored the unique relationship the out settlement of Hobart had with Sydney. None of the other principal out settlements in New South Wales at that time, namely Norfolk Island, Moreton Bay, Port Dalrymple and Newcastle, received convicts direct from Britain. Newcastle and Norfolk Island were both supplied with convicts from Sydney and it was not until 1840, and the change from the assignment system to probation, that the latter received them direct.²⁷ The numbers sent also reflect the fact that whilst the authorities in London may have had measured control over the colonies, the decisions they made sometimes demonstrated a clear lack of measure over the outcomes. Macquarie had recommended to London that one ship be sent direct to Van Diemen's Land every two years. This, he planned, would restrict the numbers sent to 300 convict arrivals, of which he recommended 200 be male and 100 female.²⁸ Clearly the advice of Macquarie, for reasons that were never explained, was ignored.

One area where the measured control promised from London was not apparent was in the task of keeping an accurate account of the convicts, their crimes, sentences and location. Indeed the whole system, both in New South Wales and the out settlements in Van Diemen's Land, was based on a decided lack of bureaucratic organisation. Early Van Diemen's Land simply mirrored the mother colony. From Phillip onwards the governors sent a constant stream of complaints to London regarding the lack of paperwork sent out with each batch of convicts, a situation which continued at least until the time of Sir Richard Bourke's governorship in 1834.²⁹ It was not until the arrival of Sorell in 1817 that a system was put in place to record the arrival, sentence and distribution of convicts arriving in the colony. The records system in Van Diemen's Land was supervised by Adolarius Humphrey and Peter Mulgrave, the magistrates in Hobart and Launceston respectively.³⁰ Under Sorell two systems for managing convicts began to emerge, one in New South Wales proper and one in Van

²⁷ Convicts were sent direct to Norfolk Island between 1840 and 1850 and to Moreton Bay in 1849 and 1850 only. Western Australia received them from 1850 until 1868 but was always separate to New South Wales. See C. Bateson, *The Convict Ships* (Glasgow, 1985), pp. 395-96.

²⁸ Mickleborough, *William Sorell*, p. 56; Watson, *HRA, Series III, Volume II*, p. 355.

²⁹ Mickleborough, *William Sorell*, p. 137, note 48.

³⁰ Mickleborough, *William Sorell*, p. 60.

Diemen's Land. It was he who took responsibility for the allocation of the convicts upon arrival, unlike in Sydney where this was handled by the Chief Engineer and the Superintendent of Convicts.³¹ Sorell's central record keeping was not taken up in New South Wales until the arrival of Darling in 1824 and the system he put in place in Van Diemen's Land was to be heavily developed by his successor, George Arthur.³²

This then was the situation that Arthur inherited and which led in part to the circumstances that resulted in the Jane New case. The practice of transferring convicts between the mother colony of New South Wales and the out settlement of Van Diemen's Land had simply evolved, for there was no formal protocol and this had simply continued once the two were officially separated. Under the terms of Lieutenant Governor George Arthur's commission of 1823, he was subservient only to the Imperial Government and to the Governor of New South Wales, Sir Thomas Brisbane. However, later that year in a letter to Brisbane from Lord Bathurst, the then Secretary of State for War and the Colonies, the authority and jurisdiction Arthur was to have, was made quite clear. Brisbane was made aware that Van Diemen's Land was to be made a 'separate and independent Government', although not immediately. Arthur was to be given distinct powers and which the letter sets out.³³

In 1831 while the ramifications of the Jane New case were still being addressed Darling was recalled as Governor. In October that year he left Sydney for Britain to be replaced by Sir Richard Bourke who had previously been the lieutenant governor of the colony of the Eastern Cape in southern Africa. In 1832 Viscount Goderich, who had replaced Bathurst at the War and Colonies office, wrote to Bourke clarifying his status in relation to Van Diemen's Land. Goderich noted that Bourke's commission appointed him as Governor of New South Wales and Van Diemen's Land:

...not withstanding you hold His Majesty's Commission as Governor of Van Diemen's Land, it is by no means intended that you should exercise any control over or interfere with the *Civil*

³¹ Mickleborough, *William Sorell*, p. 59.

³² Mickleborough, *William Sorell*, p. 77.

³³ Despatch from Bathurst to Brisbane, 28 August 1823, in Watson, *HRA; Series I, Volume XI* (Sydney, 1917), p. 112.

Affairs of the Government, which is considered wholly distinct and independent from your own command, excepting so far as may relate to *Military* matters.

Goderich went on to point out that this would only be allowable if Bourke was to actually set foot on Van Diemen's Land, at which point he, rather than Arthur, would exercise government. Upon his departure from the colony this would again revert to Arthur.³⁴ The military aspect of control was exemplified in 1828 when the 40th Regiment headquartered in Hobart was ordered to proceed to India. It was Darling, not Arthur, who declined to have them sent.³⁵

Goderich reinforced the distinction between the two governments of the Australian colonies when he further noted for Bourke's benefit:

I regret that General Darling should have taken with him to England all the Communications, which he may have received from Colonel Arthur in his capacity of Governor of New South Wales, or at all events that he did not leave Copies of them for your information; for, although these communications may not have been of the nature of Official Reports (the independence of the two Commands would of course prevent their being so designated)...³⁶

The clear inference from this is that Arthur, whilst responsible for keeping Darling informed of events and actions in Van Diemen's Land, was not required to report to him in an official capacity. Thus the two had an equality in their respective authorities.

In October 1832 Bourke wrote to Lord Glenelg regarding the transportation of convicts from New South Wales. He was referring in particular to colonial convicts, that is, men and women who had either been born in the colony or who had arrived there free. Bourke's concern was that some of these people, having been found guilty

³⁴ Despatch from Goderich to Bourke, 5 July 1832, in F. Watson (ed.), *Historical Records of Australia; Series I, Volume XVI* (Sydney, 1923), p. 673.

³⁵ J.G. Steele, *Brisbane Town in Convict Days 1824-1842* (St. Lucia, 1975), p. 46.

³⁶ Despatch from Goderich to Bourke, 5 July 1832, in Watson, *HRA; Series I, Volume XVI*, p. 674.

of felonies, were being sentenced by magistrates to transportation. He felt it was not 'convenient to have [such persons] kept...in servitude within the colony'.³⁷ The practice in the past had been to transport them internally to a penal settlement such as Newcastle or Moreton Bay, but it had also included Macquarie Harbour in Van Diemen's Land. Bourke felt that sending colonial convicts to such places was inappropriate as it forced them to mix with hardened criminals who had either been reconvicted or sent there as incorrigibles. He also felt it inappropriate to assign such convicts within New South Wales and thought it would be far better if they could be assigned to settlers in Van Diemen's Land, a significant distance from family and friends. To this end he advised Glenelg that he had declared Van Diemen's Land a 'place to which criminals of this class are to be transported' under the Act 6 Geo. IV.³⁸

That Act had been specifically drawn up to address the issue of punishing offences committed by transportees in the colony and also to better regulate the powers of justices of the peace in New South Wales. The King, with the advice of the Privy Council, already had the power to appoint any place, either within the British Empire or outside of it, as a place to which felons sentenced to transportation could be sent.³⁹ Under this Act that authority was extended to any Colonial Governor, Lieutenant Governor, or any other person that was administering the government of a British possession. They could now appoint the place to which any offender sentenced to transportation could be sent. Once there convicts were to be subject to the same rules and subject to the same legal conditions as if they had been transported from Britain.⁴⁰

Bourke's purpose in writing was to tidy up some of the legalities surrounding the issue of intercolonial transportation. He enclosed, for Glenelg's benefit, a copy of an act passed by the Legislative Council of New South Wales that gave the Governor the

³⁷ BPP, Despatch from Bourke to Glenelg, 20 October 1832, in 'Report from the Select Committee on Transportation', 1837, Volume XIX, Appendices, p. 306 (IUP, *Crime and Punishment: Transportation, Volume 2*).

³⁸ This was the British Act 6 George IV, c69, *An Act for Punishing Offences committed by Transports kept to Labour in the Colonies: and better regulating the Powers of Justices of the Peace in New South Wales*.

³⁹ Under the British Act 5 George IV, c84, section III. *An Act for the Transportation of Offenders from Great Britain*.

⁴⁰ BPP, Order in Council issued 28 November 1856, reprinted in 'Further Correspondence on the Subject of Convict Discipline and Transportation', 1857, [2197], Vol XIV, p. 138 (IUP, *Crime and Punishment: Transportation, Volume 14*).

power to sentence colonial convicts to be transported 'to such place beyond the seas within His Majesty's dominions as shall be duly appointed for such purpose by the governor for the time being in pursuance of the directions of the statute and of His Majesty's order in council...' ⁴¹ In effect this was power he already had.

The act did not mean that those convicted and sentenced in New South Wales could be sent to any British colony. It was a two tiered process, in that any place the Colonial Governor chose must have already been so proclaimed by the King in Council. Within New South Wales there was already provision for penal settlements, in particular Norfolk Island, which had been abandoned in 1814; Macquarie Harbour established on Van Diemen's Land's rugged west coast in 1822; and Port Macquarie established the previous year. In 1824 Bathurst instructed Brisbane to re-establish Norfolk Island as a penal settlement. Bathurst made clear his intentions for the settlement to Brisbane. He informed him that 'to this island the worst description of Convicts in New South Wales and Van Diemen's Land must progressively be sent'. ⁴² It was to serve that colonial role until the arrival of Alexander Maconochie in 1840, by which time it held 1400 prisoners, all doubly convicted, and had attracted the dubious title of 'Ocean Hell'. ⁴³

Brisbane found Norfolk Island with its rugged coast line and lack of a suitable harbour difficult to access on a regular basis and so had decided to reserve it for 'Capital respites and other higher class of offences'. Port Macquarie he found 'almost useless' as the numbers of free settlers in the area had resulted in facilities which assisted in the absconding of convicts. Some offences required convicts to be removed from 'one part of the colony to another' and with Macquarie Harbour no longer available Brisbane saw the need for a new outsettlement. In mid 1825 he advised Bathurst that Moreton Bay, the site of modern Brisbane, would be established to fill this niche. ⁴⁴

⁴¹ BPP, NSW Statute 3 William IV, Number 3, cap. 5, in 'Report from the Select Committee on Transportation', 1837, Volume XIX, Appendices, p. 307 (IUP, *Crime and Punishment: Transportation, Volume 2*).

⁴² Despatch from Bathurst to Brisbane, 22 July 1824, in Watson, *HRA, Series I, Volume XI*, p. 332.

⁴³ A. Maconochie, *Norfolk Island* (reprinted Hobart, 1973), p. 8; M. Treadgold, 'Economic Development', in R. Nobbs (ed.), *Norfolk Island and its Second settlement, 1825-1855* (North Sydney, 1991), p. 74.

⁴⁴ Despatch from Brisbane to Bathurst, 21 May 1825, in Watson, *HRA, Series I, Volume XI*, p. 604.

What of the other issue that Jane New had raised, that being the power of a Colonial Governor to authorize convicts to be in another's domain? Jane New was found to be a prisoner at large in New South Wales despite her husband James having obtained the permission of George Arthur for her to be there. The crucial part of Forbes' opinion in making that ruling was that no remittance of the seven year sentence she was serving had been granted. Jane did not hold a ticket of leave, let alone any form of pardon. She was quite simply still under sentence. Would Forbes' opinion have been different if she had held a ticket of leave or a conditional pardon? Would Darling have been required to recognize the status of a remittance granted by Arthur?

Tickets of leave, a form of sentence remittance under which a convict was allowed to work for a wage, were introduced in New South Wales at a time when the Government found it had too many convicts to support. It was to become an integral part of the convict system in the Australian colonies in particular.⁴⁵ Strictly speaking Jane New could not have been permitted to go to New South Wales on a ticket of leave for part of the condition in receiving one was that the bearer was required to muster on a regular basis. Failure to attend resulted in the ticket being withdrawn. Forbes' opinion in effect meant that there could be no compunction on a ticket of leave holder to attend, nor was there any system in place to enforce such a muster.

The power to grant pardons as a remission of sentence was given to Phillip in his commission as Governor of New South Wales. A more 'detailed amplification' of his powers was given in the instructions which accompanied it. Under these Phillip was granted:

...full power and authority to emancipate and discharge from their servitude any of the convicts under your superintendence who shall, from their good conduct and a disposition to industry, be deserving of favour.⁴⁶

⁴⁵ J.B. Hirst, *Convict Society and its Enemies* (Sydney, 1983), p. 54.

⁴⁶ Instructions to Governor Phillip, 25 April 1787, in Watson, *HRA, Series I, Volume I* (Sydney, 1917), p. 14.

No limitations were placed on the numbers that could be pardoned nor was there a required minimum period of time for which they had served. As a consequence many 'gentlemen' convicts received pardons almost as soon as they arrived in Sydney.⁴⁷ The only condition remained their inability to return to Britain. These gubernatorial powers were reiterated in all subsequent commissions and instructions issued to the governors of New South Wales. They remained in force until instructions were issued to Bourke in 1831.⁴⁸

In 1812 a select committee of the British parliament, empowered to look into transportation, expressed concern that there were no constraints in place governing the issuing of pardons. In their findings the committee could see no reason as to why the Governors should enjoy the power to grant partial or full remissions, a power they suspected was open to abuse. They suggested that 'no pardon whatever, real or conditional, be granted but through the Secretary of State'.⁴⁹ Macquarie disagreed with the intention of reducing the Governor's role simply to recommending pardons. He proposed that a set of regulations be drawn up setting the minimum period a convict would have to serve before becoming eligible for a pardon. This was subsequently agreed to by the Secretary of State and as a result the power to pardon was retained.⁵⁰

When William Sorell returned to London from Van Diemen's Land in 1824 he wrote to Bathurst on the subject. He commented on Arthur's appointment as Lieutenant Governor of the island and recommended that amongst the powers he was to be given should be the power to mitigate the sentences of convicts.⁵¹ In essence this was agreed to. Arthur was to put forward the names of candidates for this privilege and Brisbane was instructed to simply authorise the decision. Brisbane was explicitly forbidden from conducting his own assessment of any case. With regard to men and women

⁴⁷ Hirst, *Convict Society*, p. 85.

⁴⁸ For the relevant Commissions and Instructions see respectively Watson, *HRA, Series I*: for Hunter, *Volume I*, pp. 515, 521; for King, *Volume III*, pp. 384, 391; for Bligh, *Volume VI*, pp. 1, 8; for Macquarie, *Volume VII*, pp. 183, 190; for Brisbane, *Volume X*, pp. 589, 596; for Darling, *Volume XII*, pp. 99, 107; and for Bourke's commission, *Volume XVI*, p. 837.

⁴⁹ BPP, 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, p. 13 (IUP, *Crime and Punishment: Transportation Volume I*).

⁵⁰ Hirst, *Convict Society*, p. 85. See also Macquarie to Bathurst, 28 June 1813, in Watson, *HRA, Series I, Volume VII*, pp. 777-79, 782-85.

⁵¹ Letter from Sorell to Bathurst, 26 November 1824, in Watson, *HRA, Series III, Volume IV* (Sydney, 1921), p. 577.

convicted and transported from Britain it was made clear that Parliament had granted to the Governor in Chief, that being the Governor of New South Wales, the power to shorten or remit sentences. Again, Brisbane was instructed to act only upon Arthur's recommendations and to give effect to them.⁵² Clearly then the power to exercise the Royal Prerogative was to lie with the Governor of Van Diemen's Land once the separation in government and the elevation to separate colony was made.

Little thought seems to have been given to the legal implications of separation upon pardons. Initially there was no problem as the two colonies continued to act as one. The decisions in the Jane New case meant that this was no longer to be. The legal status of a convict pardoned in Van Diemen's Land, once in New South Wales, had become vague and undefined. As the colony of South Australia was created and the remote Port Phillip district of New South Wales was established this situation was to only get worse. By the 1840s the question of the Governor's authority in issuing pardons would become a source of great friction between colonial governments.

⁵² Despatch from Bathurst to Brisbane, 28 August 1823, in Watson, *HRA, Series I, Volume XI*, p. 112.

Chapter Four.

Strange ideas of freedom.¹

¹G.A. Robinson in his journal entry for 8 January 1838 in N.J.B. Plomley (ed.), *Weep in Silence: A History of the Flinders Island Aboriginal Settlement* (Hobart, 1987), p. 519.

One of the enduring myths about the early colonial period in the Australian colonies is that it was a society in which the power of the ruling class had stripped away the legal rights of convicts and, in doing so, had removed the obligations of those managing them. The myth was aided in its growth by reports of conditions in the colonies, often deliberately sensationalised to achieve political outcomes. One example of this was Chartist leader John Frost, who had been transported to Van Diemen's Land in 1839. Upon his return to Britain in 1856 he undertook a lecture tour during which he often claimed he was exposing the 'conduct of the authorities'. He regaled his audiences with tales of brutality and insensitivity, including one of a blind man flogged for failing to recognise the Commandant at Port Arthur.¹

It is a myth that has become deeply entrenched, perhaps no more so than by Marcus Clarke in his classic Gothic tale *For the Term of His Natural Life*.² The book traces the misfortune of Rufus Dawes, convicted of a crime he did not commit and who was brutalised as he passed through the convict system of Macquarie Harbour, Port Arthur, and Norfolk Island. The oft repeated theme is one of powerlessness at the hands of an inhumane and uncaring administration. Yet the Jane New case suggests that this was certainly not the situation for all. In fact, from earliest settlement, some convicts were able to protect themselves by the use of the law to the extent, at times, that the Government itself was disadvantaged.

In 1812 the British Parliament set up a committee to inquire into transportation to New South Wales and its efficacy as a punishment. Amongst the themes examined by the committee was the indiscriminate punishment of convicts and the allegations of inhumane and cruel treatment at the hands of the administration. A number of witnesses were called to be examined, amongst them Maurice Margarot, an expiree who had served 14 years in the colony. At one stage the following evidence was recorded:

¹ K. Reid, 'The Horrors of Convict Life: British radical visions of the Australian penal colonies', para 4, accessed at <http://hdl.handle.net/1983/989> accessed 3 April 2008. To be published in *Cultural and Social History*, 2007.

² M. Clarke, *For the Term of His Natural Life* (Hawthorn, 1970). The story was originally published in the *Australian Journal* between 1870 and 1872 and first published as a novel in 1874. It was later adapted as a script and made into Australia's first feature length film in 1908. Whilst a fictional account, many incidents in the novel are based on actual events.

Question: Had any officer, of his own authority, power of ordering a convict to be flogged?

Margarot: Yes, every officer.

Question: Had he the power legally, or was it an abuse of his office?

Margarot: I apprehend it to be an abuse, for I cannot conceive of a power in England that could delegate such a power to him.

Question: And was their power frequently so abused?

Margarot: Yes, every day, and every hour in the day almost.

Question: And had the convicts so punished, any means of obtaining redress?

Margarot: None, but the consequence was, that many of the convicts have taken to what they call the bush, the woods, and perished there.³

There is a serious danger in taking such first hand evidence at face value. Like all claims, the background of the witness needs to be examined to establish the veracity of his tale. Margarot was a Scottish radical who had lived in Paris in 1789, at the time of the Revolution. Upon returning to Britain he had joined the London Corresponding Society and had quickly risen to become its president. In November 1793 he attended and spoke at the British Convention of the Friends of the People held in Edinburgh. As a result he was arrested and charged with sedition and in January the following year was sentenced to 14 years transportation. Upon arrival in New South Wales Margarot had taken up his status with the Acting Governor Francis Grose. He argued, unsuccessfully, that he had been sentenced merely to transportation by the court and that he was not therefore liable to perform compulsory labour. Whilst Grose refused to accept the proposition that Margarot was semantically a free man, he did exempt him from compulsory labour, a not uncommon indulgence for the so-called 'gentlemen convicts' sent to Sydney.

³ British parliamentary papers (hereafter BPP), Evidence of Maurice Margarot, 2 March 1812, 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, p. 54 (IUP, *Crime and Punishment: Transportation, Volume I*).

During his time in New South Wales Margarot became a stern critic of the military elite. As an educated man he was able to communicate regularly with associates in the War and Colonies Office in London. He was highly critical of the economic power that the New South Wales Corps had and gave evidence to the committee on the subject. In part he claimed that he had refused to sign a 'combination bond' circulated by the officers of the Corps under which the signatories would not underbuy or undersell each other, in effect creating a monopoly of trade. Margarot stated that his refusal to sign had 'jarred' the officers, the consequence of which was 'if you offended one you offended the whole: and any prisoner that had the misfortune to offend any one officer would be sure to get a flogging from some other'.⁴

In further evidence Margarot stated that as a result of not signing he was persecuted by the officers. In January 1808 the military had arrested Governor William Bligh and seized control of the colony. The expiration of Margarot's sentence coincided with the uprising and he accused the officers of malice, illegally detaining him in the colony. As a consequence, Margarot had been unable to return to Britain until 1810.⁵ He attempted to claim compensation from the British government for the extra two years he claimed he had been forced to serve, but was unsuccessful.⁶

Margarot's background draws the factuality of his claims into question. E.P. Thompson in his history of the English working class describes him as suffering from 'the characteristic vice of the English Jacobins – self dramatization', a suggestion reinforced by examination of other evidence offered to the inquiry.⁷ Robert Campbell, a merchant with 12 years experience in Sydney, was also called and was questioned regarding the nature of hearings involving convicts. Campbell advised that no magistrate could sentence one of his own convict servants to be flogged. Instead the convict was required to appear before another, supposedly impartial, bench.

⁴ BPP, Evidence of Maurice Margarot, 2 March 1812, 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, p. 54 (IUP, *Crime and Punishment: Transportation, Volume I*).

⁵ M. Roe, 'Margarot, Maurice (1745-1815)', *Australian Dictionary of Biography, Volume 2, I-Z* (Melbourne, 1967), pp. 206-07; H.V. Evatt, *Rum Rebellion*, (Sydney, 1944), p. 25.

⁶ C. Emsley, 'Margarot, Maurice (1745-1815)', *Oxford Dictionary of National Biography*, Oxford University Press, September 2004; online edition, May 2006 –

<http://www.oxforddnb.com/view/article/63599>, accessed 15 August 2007.

⁷ E.P. Thompson, *The Making of the English Working Class* (London, 1991), p. 134.

Whilst there may have been a degree of bias shown by magistrates hearing a case involving one of their own kind, Campbell clearly intimates that the type of arbitrary and on the spot punishment that Margarot claimed was not the standard nor accepted practice. A significant portion of the magistrates were educated and wealthy men who would have little class affinity with the vast majority of convict masters, many of who were emancipists or from the middling classes.⁸ Campbell, like Margarot, also had issues with the New South Wales Corps. He informed the hearing that the colony would have been a happier place if none of its officers had been magistrates. Again it needs to be borne in mind that as a merchant he had a vested interest in breaking the monopoly held by the Corps. He was also heavily supportive of the ousted Bligh.⁹

The type of evidence about conditions in early New South Wales given by Margarot was repeated in a number of other first hand accounts of the colony. John Mortlock, sentenced to transportation for a period of twenty one years in 1843, wrote of the daily floggings on Norfolk Island.¹⁰ William Gates, transported with others from Canada after the 1838 rebellion, wrote of their work conditions that 'so long as we could possibly crawl about, or could lift a finger, we were brutally compelled to the task'.¹¹

Similar comments had also been made regarding life on the hulks in Britain. Thomas Watling, transported in 1791 for forgery, had written home to his aunt that he had seen:

...so much wanton cruelty practised on board the English hulks, on poor wretches, without the least colour of justice, what may I not reasonably infer? – French Bastille, nor Spanish Inquisition, could not centre more of horrors.¹²

⁸ J.B. Hirst, *Convict Society and its Enemies* (Sydney, 1983), p. 109.

⁹ BPP, Evidence of Robert Campbell, 10 April 1812, in 'Select Committee Report with Minutes of Evidence and Appendix', 1812 (341), Volume II, p. 70 (IUP, *Crime and Punishment: Transportation, Volume 1*); M. Steven, 'Campbell, Robert (1769-1846)', *Australian Dictionary of Biography, Volume 1, 1788-1850 A-H* (Melbourne, 1966), pp. 202-06.

¹⁰ J.F. Mortlock, *Experiences of a Convict* (Sydney, 1966), p. 70.

¹¹ W. Gates, *Recollections of Life in Van Diemen's Land* (Sydney, 1961), p. 49.

¹² T. Watling, *Letters from an Exile at Botany Bay to his Aunt in Dumfries* (Sydney, 1945), p. 23.

Watling's comment presents us with a different view of colonial practices. It highlights that such behaviour was not an experience unique to New South Wales nor Van Diemen's Land, but was little different to that in England. John Hirst has noted that the practice of masters beating servants, apprentices, wives and children was common place in Britain at the time and regarded as 'natural and right'.¹³ Michael Sturma takes this one step further by claiming that 'literature about the colony and its penal background sometimes approached a subtle form of pornography'. As examples he notes the 'vast' body of work available in Victorian Britain on flagellation, the heavy focus on bestiality and sodomy 'hinted at to the limits [of] propriety', and the obsession shown with the overt sexuality and promiscuity of female convict servants when painting a picture of the colonies.¹⁴

The darker side of these themes has reappeared time and again as a claim about the early Australian colonies. Despite the pioneering writings of Clark, Robson and Shaw in the 1950s and 1960s, historians continued to regurgitate the myth rather than the evidence. British historian C.F. Carrington wrote in 1968 'All convicts were brutalised and degraded, but many eventually made their fortunes at Botany Bay and lived in viscous luxury ever after'.¹⁵ Despite the obvious rhetoric such claims and focus have been continued in some contemporary writings, including Robert Hughes in *The Fatal Shore*. Hughes was very much of the opinion that convicts were powerless individuals with no legal recourse and constantly subjected to the inhumanity of their guards. The cause of this in Hughes' eyes lay squarely on the British government who had failed to equip 'its colony with a normal judicial framework and would not do so' until the arrival of Macquarie in 1810. Hughes simplistically dismisses the justification for this as resulting from a 'general attitude... that one did not need full civil courts in a jail'.¹⁶ The outcome was that 'the question of the rights of convicts was barely worth raising in New South Wales between the departure of Arthur Phillip in 1792 and the arrival of Governor Lachlan Macquarie in 1810'.¹⁷ As a consequence civil law was shrouded in confusion.

¹³ Hirst, *Convict Societ*, p. 58.

¹⁴ M. Sturma, *Vice in a Vicious Society* (St Lucia, 1983), p. 3.

¹⁵ C.E. Carrington, *The British Overseas: Exploits of a Nation of Shopkeepers, Part 1 Making the Empire* (Cambridge, 1968), p. 336.

¹⁶ R. Hughes, *The Fatal Shore* (London, 1986), p. 118.

¹⁷ Hughes, *The Fatal Shore*, p. 119.

In perpetuating the myth of inhumane treatment and a complete lack of legal rights Hughes ignored the evidence that indicated that this was not universally the case. From its earliest settlement there were both civil and criminal courts in the fledgling colony. Certainly it is true that neither convict, emancipist nor the few free settlers would appear before a jury, but this was not because of a belief that 'one did not need full civil courts in a jail' but rather 'because it was considered impossible to recruit suitable juries'.¹⁸ This situation was reflected in the fact that convicts were to be allowed to appear as witnesses in court, a legal right that felons in England did not have, nor had that been the case for convicts sent to some of the North American colonies. Such a right had once been the case with convicts transported to Virginia but that right had been removed by legal statute in 1748.¹⁹

Whilst the courts in New South Wales and Van Diemen's Land may have been somewhat imperfect in their protection of convicts from 'inhumane' masters, the evidence shows that they were, to an extent, protected by law.²⁰ The courts would, for example, interfere if a punishment was considered too heavy.²¹ David Neal, in his work on the development of law in early New South Wales, has argued that the very nature of the colony as a penal settlement meant that the law was well known. As a result of this the Government Departments that administered convicts, colloquially referred to in both New South Wales and Van Diemen's land as the Convict Departments, were forced to be bound by the law, rather than having the unbridled ability to flaunt it. The heavy focus of many works on punishment and its infliction has meant that this aspect of convict society has been ignored.

One of the first steps that Arthur took upon assuming office was to build on the system of convict records left to him by Sorell. Arthur's purpose was to remove, as far as possible, the type of confusion over identification of convicts that had existed since 1788. In 1824 the British Parliament passed a new Transportation Act which contained provisions that each convict transport would carry paperwork that would include amongst other details those of the convicts crime, sentence, age, and trade.

¹⁸ A. Atkinson, 'The Free-born Englishman Transported: Convict Rights as a Measure of Eighteenth Century Empire', *Past and Present*, Number 144, August 1994, p. 110.

¹⁹ Atkinson, 'The Free-born Englishman Transported', p. 102.

²⁰ Hirst, *Convict Society*, p. 109.

²¹ Hirst, *Convict Society*, p. 58.

Yet by late 1827 such paperwork was still not being sent to either colony. Arthur noted in one despatch that because of the lack of paperwork it was not possible to 'prove that the offenders transported from England' were convicts.²² He decided to deal with the matter in his own way.

Arthur put in place a system of state control based on knowledge – knowledge of who the convict was, what he looked like, where he was assigned, his crime and prison record at home, and how he conducted himself in the colony. He assigned law stationer Edward Cook, sentenced to life and transported in 1825, to work in the office of Adolarius Humphrey, the Chief Police Magistrate. Cook's function was to record the details of all convicts then on the island, and all new arrivals, going back as far as Collin's arrival in 1804. In this task he often worked in collaboration with Josiah Spode the Muster Master. The result was Arthur's so called 'panopticon without walls', a system that was supposed to produce the ultimate level of control through constant surveillance and knowledge.²³

In 1834 the *Hobart Town Gazette* reinforced this image of control when it wrote that 'it [was] indispensably necessary that the identity, situation and conduct of every convict throughout the colony should be known to the government'. Yet by then it was already apparent that the total measure of control desired, the total knowledge of convicts and their status, had not been achieved. Ironically, the attempts to make the system more efficient through increased knowledge had resulted in a greater degree of protection for the convicts. This was highlighted by a number of legal cases involving illegal detention of convicts after their sentence had expired. While the status of Jane New had been questioned in one regard, these cases involved the question of status in another. Jane New was clearly still a convict under sentence and therefore the boundaries of legal action were clear. What of those supposedly still under sentence, what power did they have, and what boundaries?

²² P.R. Eldershaw, *Guide to the Public Records of Tasmania: Section Three Convict Department* (Hobart, 2003), pp. 5-6.

²³ Eldershaw, *Guide to the Public Records of Tasmania*, pp. 5-6; Hughes, *The Fatal Shore*, p. 382. Although Hughes uses the term it is not his neologism. S. Petrow, 'Policing in a Penal Colony: Governor Arthur's Police System in Van Diemen's Land, 1826-1836', *Law and History Review*, Volume 18, Number 2 (eJournal), para. 26, notes that G.T.W.B. Boyes used the term 'optical apparatus' in 1836 to describe Arthur's police system.

In May 1833 the Supreme Court in Hobart heard a brace of cases, the decisions in which struck right to the heart of Arthur's convict management system. They drew into open question the power of the colony's magistracy, the structure through which Arthur effected day to day control of his convict system. The cases involved two men arrested as suspected runaways and gaoled without a hearing. The two, Samuel Fletcher and George Martin, successfully sued Police Magistrate Malcolm Lang Smith and Justice of the Peace F. Skardon for wrongful imprisonment.²⁴

Fletcher and Martin, both expirees, had been arrested and charged with assault and affray in April 1831. The two appeared before the Court of Quarter Sessions at Richmond and having been found guilty both were sentenced to twelve months imprisonment with hard labour, Martin to serve his sentence in chains.²⁵ By trade they both were sawyers and as such their skills were in demand. Instead of being imprisoned the two were sent to cut timber for the building of the Orphan School at New Town, to Hobart's north. Once there they took 'French leave and decamped'. Advertised as runaways in the *Gazette*, on 6 January 1833 the pair were arrested near Norfolk Plains and taken to the Perth lockup.²⁶

The two sawyers appeared before Messrs Smith and Skardon and pleaded that they were free men, a not unusual defence for the time. The two magistrates were not convinced and detained the pair in the lockup while further inquiries were made as to their claims of identity and status. Eventually, after 23 days, Fletcher and Martin were despatched to Hobart, later claiming that the weather during their trip south was severe and had impacted on their health.²⁷ Once there they argued their case that they were not absconders or runaways, but free men wrongfully arrested. According to one contemporary report their argument centred on the fact that their original sentence had expired and that their second sentence, imposed by the Richmond court, had been 'expressly for imprisonment and hard labour'.²⁸ By having been sent to the Orphan School rather than to gaol, Fletcher and Martin claimed the second sentence had been

²⁴ Skardon variously appears in contemporary reports as Skaldon and Skardin. As such, he is also an example that it was not only convicts who were subject to name changes.

²⁵ AOT, LC 219/1/1, Registrar of Quarter Sessions: Alphabetical List of Persons tried before the Quarter Sessions May 1825-September 1839.

²⁶ Norfolk Plains is the area around what is known today as Longford in northern Tasmania.

²⁷ *Colonist*, 21 May 1833, p. 3.

²⁸ *Launceston Advertiser*, 16 May 1833, p. 3.

‘abandoned’ because it had not been imposed.²⁹ The court record shows that the two were free by servitude at the time of their trial at Richmond.

The two were declared free men and so turned their focus to seeking legal recompense for their experiences. Following a preliminary hearing the two sued Smith and Skardon in the Supreme Court. The matter was heard as four separate cases over two days before Chief Justice John Pedder with Fletcher’s two matters heard on May 9, and Martin’s the following day. In handing down his findings Pedder showed little evidence of any affinity with the magistrates. He expressed a clear view on the role of the legal system in protecting the rights of all, stating ‘when a charge is brought before a Magistrate, and entertained by him, he is bound to fully investigate and adjudicate in the same’. This, he claimed, Smith and Skardon had not done and their neglect had resulted in imprisonment and ‘unwarranted hardships’. He dismissed the defence offered by the pair who stated that the District Constable had assumed them to be runaways and that this had been supported by their descriptions in the *Gazette*. Pedder noted that Fletcher and Martin had stated in court that they were free men. No matter what their status, such a claim warranted investigation, something the Magistrates had failed to do. Instead their inaction had led to ‘a sin against the freedom of the subject’.³⁰

Pedder then delivered the verdict of the jury who found in favour of Fletcher and Martin and awarded compensation against the two Magistrates. They were to receive £10 each from Skardon, and £15 each from Smith.³¹ Presumably as a ‘paid professional’ Smith was held to be in greater error. In reporting the matter the *Tasmanian* newspaper noted again the issue of individual rights. Its Editor wrote that the jury had decided the case on its merits, by implication ignoring the men’s backgrounds as convicts. The case was purely about the actions of the Magistrates and how their actions had affected ‘the dearest birthright of Englishmen – viz. their

²⁹ *Tasmanian and Southern Literary & Political Journal*, 10 May 1833, p. 151.

³⁰ *Colonist*, 21 May 1833, quoting comments of Pedder in *Fletcher v Skardon*, Supreme Court of Van Diemen’s Land, 9 May 1833, available online at <http://www.mq.edu.au/sctas/html/1833cases/FletchervSkardon,1833.htm>.

³¹ The money seems to have had little impact on Fletcher who was charged on June 3 with breaking into the house of publican Thomas Dean. See *Tasmanian and Southern Literary & Political Journal*, 7 June 1833, p. 182.

personal freedom, without being at all biased by the false light and undue influence either of power or place'.³²

Not all were in agreement with the decision. The *Hobart Town Chronicle* was critical of it, stating that the Magistrates ought to be guaranteed against such actions. They feared that the decision would lead to its natural 'fatal outcome', an increase in bushranging. They were supportive of the actions Smith and Skardon had taken, noting that the Magistrates, having doubts about the veracity of the claims before it, had followed the correct course of action. At the earliest possible moment the two had been forwarded to be dealt with by 'the proper authority at headquarters'.³³ The fact that it took 23 days for that moment to occur does not appear to have been a consideration of the editor. The *Colonial Times*, a long standing critic of Arthur's regime, went a stage further. It claimed that the unpaid magistracy to which Skardon belonged 'have become terrified' by the case and were now not prepared to act at all. It further alleged that the Police Magistrates had now retained Thomas Rowlands, who had appeared for Fletcher and Martin, in case any more 'mistakes' should come to light.³⁴

If, as the *Colonial Times* claimed, the Magistrates refused to hear cases where the status of the individual was open to question it would result in the collapse of Arthur's panopticon. Without the availability of the Justices of the Peace to sit as Magistrates the day to day management of the convicts would become unworkable. Aware that any solution needed to pass the rigorous legal examinations of Pedder and the puisne judge, John Montagu, Arthur resorted to having a statute put through the Legislative Council that was drawn up to close loopholes. In 1835 'An Act to consolidate and amend certain of the Laws relating to the Courts of General Quarter Sessions, and to the more effectual Punishment and Control of Transported and other Offenders' came into being.³⁵

³² *Colonist*, 21 May 1833, p. 3, cc. 3-4; *Tasmanian and Southern Literary & Political Journal*, 10 May 1833, p. 151.

³³ *Hobart Town Chronicle*, 14 May 1833, p. 2, cc. 3-4.

³⁴ *Colonial Times*, 21 May 1833, p. 2, c. 5. Until recently the paper had been owned by Henry Melville, a staunch critic of all things Arthur. Melville would be imprisoned in 1835 for contempt of court, having written an article regarding a cattle rustling case. See, H. Melville, *The History of the Island of Van Diemen's Land from the Year 1824 to 1835 Inclusive* (London 1835).

³⁵ Van Diemen's Land Statute 6 William IV, No. 2.

The Act contained a number of significant clauses designed to reinforce the power of the Government system. The first of these was its definition of a 'transported offender' as any person whatsoever who had been transported to Van Diemen's Land for an offence. With the experience of the Jane New case still relatively fresh, all those convicts, originally sentenced to New South Wales, were included by definition. Having thus defined them, a second section then covered proof necessary to establish who was a transported offender. Whilst the onus of proof remained on the accuser, the level of proof was diminished from that which had been previously required. No documentation for example would need to be produced in making the accusation, common reputation would merely suffice. A further section made it lawful for any person who had reasonable cause to believe that a person was an absconded offender to arrest them without warrant.³⁶

Yet despite these attempts, problems continued to arise and the system continued to demonstrate imperfections. On 27 April 1836, seven years to the day after he had been convicted in Nottingham, Isaac Burrows presented himself to the Commandant's office on Flinder's Island to claim his freedom. Unfortunately, for the events that would unfold, George Augustus Robinson, the Commandant and resident Magistrate, was not present on the island, having gone to Hobart. Instead the settlement, and all those in it, were under the direction of the surgeon, Dr Allen. Burrows informed Allen that he was now a free man and as such had no intention of labouring for the Government. Allen 'expostulated' with him over the 'impropriety of his conduct' in downing tools but to no avail.³⁷

On 2 May Allen, in an attempt to deal with Burrows' refusal to work, banished him to nearby Green Island, marooning him there with adequate provisions, but no method by which to leave. The settlement journal reveals that Burrows was still there on 11 June, almost six weeks later, and Robinson upon his return from Hobart noted seeing

³⁶ The power to arrest suspected absconders predates this Act. See the comments of Montagu in *R. v Greenwould*, Supreme Court of Van Diemen's Land, 1 April 1834, available online at <http://www.mq.edu.au/sctas/html/1834Cases/RvGreenwould,1834.htm>.

³⁷ Settlement journal for 27 April 1836, in N.J.B. Plomley (ed.), *Weep in Silence: A History of the Flinders Island Aboriginal Settlement* (Hobart, 1987), pp. 637-38.

Burrows on the island on June 16.³⁸ Burrows appears to have been sent back to Hobart on the government vessel *Tamar*, which had brought Robinson and a new work gang of convicts back to Flinders Island. This did not sail on its return journey until 11 July and called at Green Island the next day.³⁹

Once in Hobart, and with his free status confirmed, Burrows sought and won compensation of £50 for his detention. This was included in the estimates for the 1837 budget, but was queried when forwarded on to Britain by the Secretary to the Treasury. Arthur had by now been recalled to London and it was his replacement, Sir John Franklin, who was asked to explain why the payment had been made. In July 1841 he wrote to Lord Russell stating that the payment was 'for illegal detention and deportation from Flinders Island to an adjacent island'. Franklin further explained that he had taken the matter to the Executive Council who had considered that it bore similarities to another case, that being one involving convict Thomas Stephens. Stephens had also been detained after expiry of his term of transportation, but his case was compounded by the fact that he was administered corporal punishment during the interval between expiry and freedom. Franklin was quick to note that that case had occurred prior to his own arrival in the colony.⁴⁰

Despite this, the same situation was to again occur on Flinders Island. At midday on 5 January 1838 John Hickling, a brickmaker by trade, appeared at the office of Robinson and informed him that he was 'entitled to his freedom, the term of his sentence having expired'.⁴¹ Like Burrows, Hickling was also a native of Nottingham and had been sentenced in 1831 to transportation for seven years for stealing. As a skilled worker he was much in demand, and he was eventually sent to Flinders Island in 1836 to assist in the construction there of the Aboriginal settlement at Wybalenna. Remarkably, given the much vaunted nature of Arthur's convict record keeping and the case of Burrows, Robinson still held no paperwork regarding the length of sentences for the men under his command. As such he had no idea whether Hickling was telling the truth or not.

³⁸ Settlement journal, entries for 2 May and 11 June 1836 and Robinson's journal for 16 June 1836, in Plomley, *Weep in Silence*, pp. 639, 642, 359.

³⁹ Robinson's journal entries for 11 and 12 July 1836, in Plomley, *Weep in Silence*, p. 364.

⁴⁰ AOT, Franklin to Russell, 21 July 1841, GO 38/890-891.

⁴¹ Robinson's journal entry for 5 January 1838 in Plomley, *Weep in Silence*, p. 518.

Robinson had learnt from the Burrows case that he simply could not keep Hickling in custody, nor could he work him, if in fact he was free by servitude. He told Hickling to report back the following day which he did at 10 am. Robinson had settled on a course of action by then which was to issue Hickling with a pass to travel to Hobart and present himself there to the Principal Superintendent of Convicts who could then deal with the claims. This had become standard practice in the Australian colonies although, during his tenure, Darling had attempted to stop it in New South Wales. He had instructed the local Magistrates there, dealing with such claims, to correspond with Sydney, rather than issue passes for them to attend in person.⁴²

On 8 January Hickling again presented himself at Robinson's office and complained that he was being kept on the island against his will, claiming that it was akin to false imprisonment. Robinson was faced with the fact that, while he was happy to issue Hickling a pass to travel to Hobart, there was no vessel immediately available to take him. He noted in his journal that:

Those men have strange ideas of freedom. They imagine the government are bound to give them a passage to H[obart] T[own] or Launceston immediately they become free or to pay for their time...nor was I aware the government was bound to find him a passage unless they liked, for if they had the power to send him here, which they assuredly have, he was then in precisely the same situation that persons are in that become free in V[an] D[iemen's] L[and].⁴³

Robinson went on to note that, if Hickling could establish his right to an immediate return to Hobart at the Government's expense, then logic would say he was also entitled to claim a return passage to Britain, a situation which, as we have discussed, the home Government had been keen to rule out. The end result was that Hickling was forced to stay on the island for the next ten weeks during which he continued to

⁴² Hirst, *Convict Society*, p. 108.

⁴³ Robinson's journal entry for 8 January 1838 in Plomley, *Weep in Silence*, p. 519.

complain to Robinson that he was being illegally detained.⁴⁴ Upon his return to Hobart Hickling engaged Thomas Rowlands to act on his behalf in a case against the Government. Rowlands wrote to the Colonial Secretary seeking compensation for Hickling's detention on the island. The matter was passed on to Sir John Franklin who in turn referred back to Robinson for comment. Robinson prepared a report for Franklin on events surrounding Hickling's detention and this in turn was passed on to both the Crown Solicitor and the Attorney General for comment. The outcome of this action is not known, but given the precedents it is likely that it was successful.

The grounds for Burrows successful action must surely have been his banishment to Green Island, yet Hickling too saw himself isolated on Flinders Island and used this as the basis of his argument. Robinson was well aware of the convict's general dissatisfaction at being assigned there, seeing it as a type of secondary punishment not fairly enforced. The convicts showed 'discontent in having been separated from their companions' and complained of 'other deprivations' resulting from it. As a consequence Robinson believed a number of convicts deliberately created trouble in an attempt to be shipped back to mainland Van Diemen's Land. When James Backhouse and G. W. Walker, two Quakers asked to report on the convict population for George Arthur, had visited the island in January 1834 they noted that the convicts felt the 'monotony and privations' of the place and that they regarded 'the place as one of secondary punishment'.⁴⁵

The preceding cases have demonstrated that many convicts held a clear understanding of their rights under English law. The cases looked at have all involved convicts whose sentences had in fact expired and were therefore protected as free men. The question remains as to whether those still under sentence were protected by the law in the same way. The answer is yes. Perhaps the most famous example is also the first civil suit heard in Australia and which involved two convicts, Henry Kable and his wife Susannah, transported on the First Fleet. The pair successfully sued Captain Sinclair of their transport, the *Alexander*, after a parcel of goods they had brought

⁴⁴ Tamsin O'Connor has noted that James Morriset, the Commandant at the Newcastle penal settlement, similarly expressed concerns that the failure to remove time expired men from that settlement may lead to his prosecution, presumably for false imprisonment. T. O'Connor, 'Buckley's Chance: Freedom and Hope at the Penal Settlements of Newcastle and Moreton Bay', *Tasmanian Historical Studies*, Volume 6, No. 2 (1999), p. 120.

⁴⁵ Backhouse and Walker's Report on a visit to the settlement, in Plomley, *Weep in Silence*, pp. 270-71.

with them was plundered. The intriguing aspect of the case is that under English common law of the time, felons were considered as civilly dead, and as such had no rights in a court of law. The Kables therefore had no right to sue.⁴⁶

While the government might have overlooked the legalities in the Kable's case, in others they went to extremes to uphold them. In March 1844 four Irishmen, Thomas Toomey, Francis Connell, Cornelius Naughton and Patrick Finn, had appeared before the Spring Assizes in Limerick, charged with committing highway robbery. Prior to the start of the trial there was the usual need to select a jury panel. During this process a number of the potential jurors put forward were challenged by the four. The judge assigned to hear the matter overruled the challenges and empanelled the jury. The four were subsequently found guilty and all received a ten year sentence to be transported to Van Diemen's Land. They were transferred to Dublin where they were placed aboard the convict transport *Cadet*. On April 9 they sailed and after 137 days at sea the four landed in Hobart.⁴⁷

Under the system then in place the four were assigned to a probation station, there to serve the first fifteen months of their sentences. As was common practice with co-accused the four were split up when placed in Van Diemen's Land. Finn was sent to Buckland on the east coast, Toomey to Impression Bay on the Tasman Peninsular, Connell to Seven Mile Creek in the central highlands and Naughton to Broad Marsh just north of Hobart. Naughton never served out his time however, for on 14 January 1845, less than five months after arriving, he died on.⁴⁸

Two years after the four had been transported a similar instance, regarding the refusal to uphold challenges to prospective jurors, was referred to the House of Lords on appeal. The House ruled that the refusal to allow the challenges to stand was an error in law and had resulted in a mistrial. As a consequence the instance of the four Irishmen two years earlier was also brought to the attention of the authorities. It was decided to inform the four that their rights had been breached and they were invited to sign a memorial asking to be sent back to Ireland for a retrial and to have a Writ of

⁴⁶ D. Neal, *The Rule of Law in a Penal Colony* (Cambridge, 1991), pp. 5-6.

⁴⁷ C. Bateson, *The Convict Ships* (Glasgow, 1985), pp. 366-67.

⁴⁸ AOT, Convict Department records, CON 33/58, 13684 Patrick Finn, 13758 Cornelius Naughton, 13788 Thomas Toomey and 13666 Francis Connell, all per *Cadet*, 1844.

Error issued. Despite the fact that the three remaining men were in Van Diemen's Land, and therefore under the authority of Eardley Wilmot, it was Sir George Gipps who was advised to return the four men as soon as was possible if they so desired.⁴⁹

In December 1846, Toomey, Connell and Finn were withdrawn from their probation gangs and placed on board the *Psyche* bound for England.⁵⁰ From there they were returned to Ireland and in November 1847 the three appeared before the Queens Bench in Dublin. A Mr Moore, acting for all three, moved in court that a Writ of Error be issued and that a new trial be ordered. A Mr Langford appeared for the Crown in the matter and admitted that the error had indeed occurred. The three had the writ issued on their behalf and were then detained in custody to be returned to Limerick, there to undergo the retrial.⁵¹

The actions of Burrows and Hickling in declaring themselves free also tells us about the systems of management in place at the time. Both were correct in the dates they appeared, being exactly seven years from their date of conviction. In fact they knew more about their status than the administration did. Despite the popular belief that Arthur had put in place a highly organised system that created massive amounts of records, his 'island panopticon' clearly had faults. In these two instances no copies of the relevant documents were forwarded to the settlement on Flinders Island. These faults would be exploited again and again by other convicts, often to the Government's disadvantage. The two cases led to a policy where it was better to err on the side of caution than to suffer legal redress.

It is clear that from the very beginning of European settlement in 1788 many convicts were aware of their legal rights and that the courts were prepared to enforce them. Convicts were always at a disadvantage, however, and the records show that success by convicts in court was far lower than that of the masters. In 1833 in the Scone District of New South Wales, six masters were brought before the Magistrates by their

⁴⁹ NA, Home Office Files, HO 45/1195.

⁵⁰ AOT, Convict Department records, CON 33/58, 13684 Patrick Finn, 13788 Thomas Toomey and 13666 Francis Connell, all per *Cadet*, 1844.

⁵¹ *Dublin Evening Mail*, 15 November 1847, p. 4, c. 5.

convict workers on a variety of charges relating mainly to their food and clothing. All charges were proven. In the same period 210 charges were laid against convicts.⁵²

Although transportation to New South Wales ended in 1839, by 1841 there was still a large number of convicts remaining under sentence in the colony, yet only five out of 161 cases in the higher courts in that year were brought by convicts.⁵³ Despite this low number, it remains a fact that convicts were able to use the law to protect themselves. By the 1830s convicts were well versed in using the law to enforce their rights and the Governments of Van Diemen's Land and New South Wales were conditioned to help them, albeit generally unwillingly. The creation of the colony of South Australia and the settling of the Port Phillip district in that decade would create a different legal environment. It would also result in Governments that were hostile to the rights of serving convicts and ex-convicts alike. These supposedly 'convict free' colonies were soon to encounter transported men and women who knew the limitations of the legal system. Colonial attempts to quash emancipist rights were to be met head on, not just by those individuals they sought to control, but by both colonial and imperial Governments anxious to uphold the principle of citizenship. It was to bring a whole new raft of tensions to intercolonial relations.

⁵² Hughes, *The Fatal Shore*, p. 306.

⁵³ Sturma, *Vice in a Vicious Society*, p. 90.

Chapter Five.

A diversity of systems.

On August 3, 1838 Sir William Molesworth rose in the House of Commons and tabled the second and final report of the Parliamentary Select Committee on Transportation he had chaired. During the preceding sixteen months the Committee had held thirty eight meetings, the majority of which were called for the express purpose of taking testimony. Twenty three witnesses had been invited to appear before it and between them their oral evidence alone had taken up over 450 pages. The witnesses had backed up this testimony with 356 pages of supporting documentation and five pages of maps.¹ As a result, changes to transportation, as a system, were made which would impact on the Australian colonies.

The report made six recommendations, including one that transportation to New South Wales and the settled areas of Van Diemen's Land should cease immediately. The report, and perhaps more specifically Molesworth himself, have often been attributed with bringing about the end to transportation.² While transportation to New South Wales ceased in 1839 it continued to its dependency of Norfolk Island.³ Van Diemen's Land received convicts until 1853, and transportation to Western Australia remained until 1868. The changes made to transportation, following the Molesworth Committee inquiry and report, had a major impact in the Australian colonies. The most serious change was the drastic increase in the number of convicts sent to Van Diemen's Land. This rapidly flooded and choked the probationary system which had been introduced to replace the much maligned system of assignment. The glut thus produced would eventually only be relieved by the large scale movement across Bass Strait to the Port Philip district of New South Wales and to a lesser extend South Australia of the labour force, generated by the probation. In Port Philip much of the rhetoric thrown up by the Molesworth Committee with regard to the increased levels of crime transportation was alleged to have created, was regurgitated in attacks on the probationers from Van Diemen's Land. As with much of the work on convict transportation, almost all the focus on the impact and outcomes of the Molesworth Committee has been on New South Wales.

¹ J. Ritchie, 'Towards Ending an Unclean Thing: The Molesworth committee and the Abolition of Transportation to New South Wales, 1837-40', *Historical Studies*, Volume 17, Number 67, pp. 148-49.

² See for example Mrs Fawcett, *Life of the Right Hon. Sir William Molesworth* (London, 1901), pp. 135-53.

³ Administration of Norfolk Island became the responsibility of Van Diemen's Land in 1844.

Before a discussion of the changes that followed the Molesworth report, it is necessary to first understand the circumstances surrounding the creation of the Committee and the system of transportation they examined. Only then can the changes they recommended be put into the context of the Australian colonies and the wider British Empire. It is then possible to examine and assess the impact the Committee's conclusions had on colonial society and how the changes resulted in a heightening of intercolonial tensions.

By the mid 1830s the transportation of convicts to the Australian continent had not only increased the source of political tensions between colonies, but had also become the subject of increasing parliamentary scrutiny in Britain. The focus of much of the attention was on two aspects of transportation. The first was its efficacy as a punishment, with a growing school of thought that the assignment of convicts led to an insufficiency of deterrence to the criminal classes of Britain. The second was its cost to the colonies in both a moral/social and financial sense.⁴ Such attention was not new, for punishment and the role of transportation had been regularly the subject of parliamentary inquiry; one had been held in 1810-11, another in 1831-32. J.T. Bigge had also examined it in his reports to Parliament in 1822-23 following a seventeen-month sojourn in the Australian colonies where he had gathered evidence on a range of issues.⁵

By a motion in the House of Commons on April 8, 1837, a committee was formed to 'inquire into the System of Transportation, its Efficacy as a Punishment, its Influence on the Moral State of Society in the Penal Colonies, and how far it is susceptible of Improvement'.⁶ It was to be chaired by the mover of the motion, Sir William Molesworth, the then member for East Cornwall, and an active and vocal opponent of transportation.⁷ Despite claims that Molesworth was the principal parliamentarian in the ending of transportation, as early as the publishing of John West's *History of*

⁴ S. McConville, *A History of English Prison Administration, Volume I, 1750-1877* (London, 1981), p. 187.

⁵ J. Ritchie (ed.), *The Evidence to the Bigge Reports, Volume One* (Melbourne, 1971), p. xi.

⁶ Sir William Molesworth, *Report from the Select Committee of the House of Commons on Transportation: together with a letter from the Archbishop of Dublin on the same subject: and notes* (London, 1838), (reprinted Adelaide, 1967), p. 7.

⁷ In July 1837 Molesworth was elected the member for Leeds, having alienated himself from the Whigs in Cornwall. Fawcett, *Sir William Molesworth*, p. 131.

Tasmania in 1853, commentators have argued that the decisions on transportation arrived at, by the Committee, were premeditated.⁸ West noted that its recommendations 'were carried into effect only so far as suited the convenience of the ministers'.⁹ The Whigs had already shown their hand on the matter of transportation, long before the Committee was ever convened. As early as 1834 the *Edinburgh Review* had published an article, unsigned, but attributed to Lord Howick, proposing that convicts be punished in England, then encouraged to emigrate to the colonies by the promise of small parcels of land.¹⁰

In many respects the proposals and conclusions the Committee arrived at had been trumped by recommendations from both the Secretary of State for the Home Office, Lord Russell, and the Secretary of State for the Colonies, Lord Stanley. Prior to the report being tabled both indicated that transportation to the Australian colonies might be discontinued as a matter of course. This pre-emptive argument is supported by the fact that Russell had corresponded with Molesworth just days before his motion in the House of Commons, agreeing to the appointment his Committee. The two then consulted and Russell drew up the list of proposed members.¹¹

The Committee Parliament appointed consisted of Molesworth and fourteen other members. Whilst it is not the intention here to examine the politics of this Committee in depth, some idea of the member's political and economic persuasion is valuable in assessing the report they released. Molesworth's personal views on punishment were heavily influenced by the Benthamite theory that incarcerating prisoners in prisons rather than transporting them was both socially and economically more beneficial.¹² The design of these prisons was to be based on the reformer Jeremy Bentham's concept of the panopticon in which prisoners were to be housed in buildings that

⁸ For an example of the claims see Fawcett, *Sir William Molesworth*, p. 152. The reality is that transportation to New South Wales ended in 1842 but continued to Van Diemen's Land until 1853 and to Western Australia until 1867. Anne Green has argued that the move to end transportation to Van Diemen's Land had little to do with Molesworth but coincided with the arrival of Denison as the island's governor in 1847, a position I agree with. See A. Green, 'Against the League: Fighting the Hated Stain', BA Honours dissertation, University of Tasmania, 1994, particularly p. 4.

⁹ J. West, *The History of Tasmania* (Sydney, 1981), p. 475.

¹⁰ J.M. Ward, *James Macarthur: Colonial Conservative, 1798-1867* (Sydney, 1981), p. 65. Howick would later become the third Earl Grey.

¹¹ Fawcett, *Sir William Molesworth*, p. 131.

¹² N. Townsend, 'A Mere Lottery: The Convict System in New South Wales Through the Eyes of the Molesworth Committee', *Push From the Bush*, Number 21, October 1985, p. 60.

radiated from a central hub. They operated on the simple theory that a minimal number of guards located in the central hub was thus able to achieve maximum observation and control of the complex. Molesworth was also a supporter of Edward Gibbon Wakefield and his concept of systematic colonisation – process that proposed colonial waste lands be sold rather than granted, and the proceeds thus raised be used to pay to assist working class migrants who would provide the necessary colonial labour force.¹³

Given the makeup of the Committee and the recommendations they arrived at, it is worth noting that Wakefield was also of Benthamite persuasion. Having himself experienced first hand imprisonment, he believed that punishment should act as a reformatory measure and thus be a deterrent to crime.¹⁴ Deterrence he believed was in proportion to the certainty of the punishment, not in proportion to the severity of it. As part of his colonization concept, Wakefield saw no place for convicts as a labour force for they were a disincentive to the labouring classes to emigrate.¹⁵

Molesworth was also a self declared radical, but was not alone in this, for the Committee also had as members Charles Buller and John Temple Leader. Buller was an electoral neighbour of Molesworth for he represented the borough of West Looe which bordered that of East Cornwall. Buller was also both a follower of Wakefieldian principles and of Benthamite reforms and had a close personal as well as political relationship with Molesworth.¹⁶ When the latter became ill in 1836, it was Buller who handled his political affairs, including writing some of his speeches.¹⁷ Leader, the member for Westminster, was also a close personal friend of Molesworth and in 1835 the two shared a house in Eaton Square in an effort to engender better personal relations between the radical members of parliament.¹⁸

¹³ P. Burroughs, 'Molesworth, Sir William, eighth baronet (1810-1855)', *Oxford Dictionary of National Biography*, Oxford University Press, September 2004; online edition, May 2006 – <http://www.oxforddnb.com/view/article/18902>, accessed 26 September 2007; F. O'Kane, 'The Molesworth Committee', *Agora*, Volume VI, Number 5, October 1972, p. 152.

¹⁴ Wakefield had been gaoled in 1826 following an abduction and unlawful marriage to an heiress.

¹⁵ Fawcett, *Sir William Molesworth*, pp. 135-37.

¹⁶ J. Gascoigne, *The Enlightenment and the Origins of European Australia* (Cambridge, 2002), p. 130.

¹⁷ Fawcett, *Sir William Molesworth*, p. 115.

¹⁸ See relevant entries for each - P. Burroughs, 'Molesworth, Sir William, eighth baronet (1810-1855)'; H. J. Spencer, 'Buller, Charles (1806-1848)'; and Sidney Lee, 'Leader, John Temple (1810-1903)', rev. H. C. G. Matthew, all cited from online edition of *Oxford Dictionary of National Biography*, Oxford University Press, 2004. See also Fawcett, *Sir William Molesworth*, p. 71.

The committee was also representative of mainstream British politics, having as members political heavyweights in both Lord John Russell, the leader of the Whigs in the House of Commons, and Sir Robert Peel, leader of the opposition Conservatives. Russell was also Home Secretary and as such held control of the process of transportation. The governing Whigs were further represented by Benjamin Hawes, Francis Baring, Sir George Grey, Sir Charles Lemon, William Ord, Lord Viscount Howick and Lord Viscount Ebrington, but could also depend on the support of Sir Henry Ward. Peel's sole support from the Tory ranks was their party whip Sir Thomas Fremantle.¹⁹

Hawes was to later serve under Howick, by then 3rd Earl Grey, in the Colonial Office. Although a Whig, he also had radical leanings and was a supporter of systemized colonization in New Zealand. Sir George Grey first became the Home Secretary, and later Colonial Secretary, in successive Whig ministries. Both he and Ebrington also belonged to the religious movement known as Evangelicals. Ward, whilst a Liberal, was to later serve in a Whig ministry, being appointed under Russell Secretary to the Admiralty in 1846. He had also been Chairman of the parliamentary inquiry in 1835-36 into colonial lands and had supported Wakefield's plan for colonization of New Zealand, despite it not being a British possession at the time.²⁰ The committee numbers were rounded out by Fitzstephen French who was, like Ward, considered a Liberal.²¹

The personal nature of British politics of the time is also reflected in the membership of the Committee. Baring, a son of the banking family was, by marriage, both a nephew in law to the 2nd Earl Grey and brother in law of Sir George Grey. He too had sat on the colonial lands inquiry headed by Ward, and had encouraged Wakefield to

¹⁹ See relevant entries for each – G. Martin, 'Hawes, Sir Benjamin (1797-1862)', and T. Secombe, 'Fremantle, Thomas Francis, first Baron Cottesloe, and Baron Fremantle in the nobility of the Austrian empire (1798-1890)', rev. H.C.G. Matthew, and D. R. Fisher, 'Fortescue, Hugh, second Earl Fortescue (1783-1861)' all cited from on line edition of *Oxford Dictionary of National Biography*

²⁰ R. Garnett, *Edward Gibbon Wakefield* (London, 1898), pp. 125-26, 220.

²¹ See entries for French, Col. Rt. Hon. Fitzstephen, and Ward, Sir Henry George in M. Stenton (ed.), *Who's Who of British Members of Parliament, Volume I 1832-1885* (Cambridge, 1976), pp. 150 & 398. The committee also had as members prior to November 1837, Ridley Colborne, William Hutt, Fowell Buxton, Thomas Lennard and Charles Bulwer. Of these, only Hutt and Bulwer could be considered radicals and Molesworth supporters. For more on this see Ritchie, 'Towards Ending an Unclean Thing', pp. 146-48.

form the New Zealand Committee to push for its colonization.²² Viscount Howick, later to be 3rd Earl Grey, was first cousin to Sir George Grey.²³ Sir Charles Lemon, who, like both Molesworth and Buller, held a Cornish seat in the Commons, was a cousin, on his mother's side, of Charles Buller.²⁴

When analysed from this perspective, the actual political leanings of those constituting the Committee would seem to bring into question the notion that the Committee was biased from the start. The claim by John Ward, that 'the committee was selected to lean towards systematic colonization on [Wakefieldian] principles and against transportation', would not at first seem supported by the evidence of the political backgrounds of many of its members.²⁵ Certainly it is true that a number of the Committee were involved in systemized colonization schemes. Molesworth, Buller, Ward, Hawes, Bulwer, Lemon and William Hutt, a later addition to the Committee, had all been members of the South Australian Association set up in 1834, as had Hutt's brother John. Baring had an involvement with the New Zealand Association, which he chaired, and of which Molesworth was also a member. Howick, whilst not actively involved at association level, was also known to be a Wakefieldian supporter, although he disagreed with him over the association's plans for New Zealand.²⁶

John Ritchie's analysis is somewhat different. His assertion is that Molesworth himself was working towards a pre-ordained goal, in particular the societal cleansing of New South Wales, a colony he considered the moral quagmire of empire. This was to be simply fixed by removing the source of its evil, that being the transportation of convicts and the degradation unavoidably shipped with them, and which was then perpetuated by the assignment system. Ritchie also notes a second motive driving Molesworth, that being the eventual need to replace convict labour in the colonies.

²² Garnett, *Wakefield*, p. 127.

²³ See relevant entries for each - D. Steele, 'Baring, Francis Thornhill, first Baron Northbrook (1796-1866)', D.F. Smith, 'Grey, Sir George, second baronet (1799-1882)', and P. Burroughs, 'Grey, Henry George, third Earl Grey (1802-1894)', all cited from online edition of *Oxford Dictionary of National Biography*

²⁴ See entry for Lemon, Sir Charles, in Stenton (ed.), *Who's Who of British Members of Parliament, Volume I 1832-1885*, p. 234.

²⁵ Ward, *James Macarthur*, p.75.

²⁶ D. Pike, *Paradise of Dissent* (Melbourne, 1967), p. 84; Garnett, *Wakefield*, pp. 149-50.

Ceasing transportation, therefore, was the means that would allow systematic colonization to be more effectively adopted.²⁷

Ritchie's position is similar to that of Frances O'Kane who argued that the true motives of the Molesworth Committee were not solely concerned with ending transportation because of its ineffectuality as a punishment, nor driven by an evangelical desire to redeem men's souls. Nor was it a result of philosophical debate over the nature and purpose of punishment. Rather, there was an important desire to stop transportation delivering cheap labour to the colonies. O'Kane argued that some members of the Committee saw the presence of convicts in the colonies as a disincentive to the unemployed and poor emigrating from Britain. Whilst increased crime rates in Britain were a concern, so too was the alleviation of its growing number of paupers.²⁸

The counter claim to these arguments is that the Committee was merely a tactic employed by the Whigs for their own political purposes. This is not unsympathetic to Ritchie's position, for he quite clearly saw a difference between the aims of Molesworth, and those of the ruling Whigs, and there is nothing inconsistent in having more than one motivation for the Committee's establishment. In his history of Australia's constitutional development, A.C.V. Melbourne argued that by 1836 it was clear that the Colonial Office had decided to abolish transportation to New South Wales, albeit gradually.²⁹ By allowing Molesworth to conduct his inquiry, two outcomes were thus achieved. The first was that the radical element in Parliament was somewhat 'reigned in' and distracted from other issues. The second was that the inquiry served to dampen rising opposition to transportation by members of New South Wales society. It would also go some way towards satisfying the growing calls for representative government there.

From May 1837 the Committee began to take evidence from selected witnesses. In July they informed the House of Commons that they were unable to conclude their inquiries before the House rose for its summer recess. At the start of the new session in November, the committee, with four changes of personnel, to continue their

²⁷ Ritchie, 'Towards Ending an Unclean Thing', p. 150.

²⁸ O'Kane, 'The Molesworth Committee', pp. 167, 170.

²⁹ A.C.V. Melbourne, *Early Constitutional Development in Australia* (St Lucia, 1963), p. 231.

inquiries was reappointed.³⁰ The report eventually produced by the committee has been the subject of criticism on two major grounds. The first of these was the selective nature of the witnesses called before it. Of the seven major witnesses only Justice Forbes could reasonably offer a legal opinion and an understanding of crime in New South Wales. Lieutenant Colonel George Arthur was the only witness with any real experience of conditions in Van Diemen's Land, despite it representing one third of the Australian convict population in 1836.³¹ Of the other five witnesses two, in James Mudie and Ernest Slade, used their testimony as a personal attack on the policy and administration of Governor Bourke with whom they had scores to settle. Another witness, the Presbyterian minister John Dunmore Lang, was decidedly anti-transportationist, seeing in convictism a 'gross wickedness' and a capacity for 'licentiousness' that constantly destroyed the moral fabric of New South Wales society.³² The witnesses were clearly chosen with a belief that their testimony would provide the evidence needed to end transportation.

For many years the evidence presented by these select witnesses has also been used as illustrative of the nature of both convictism and the convicts themselves. More recent works such as Stephen Nicholas' *Convict Workers*, and Norma Townsend's article 'A Mere Lottery', have challenged the nature of the evidence given and shown the extent to which it was 'tailored' to fit the outcome.³³ The results of the Committee's report have been clouded by argument as to whether or not Lord Russell and Lord Stanley had intentions to end transportation. Despite this, the Committee's recommendations did not result in the end of transportation. Nor was it ended by the ideas of Russell and Stanley. Instead they merely presided over a major change, yet little has been written on what the impact of the change was on the Australian colonies and the relations between them. To adequately discuss the changes it is necessary to understand both the evolution and nature of assignment and the probationary system that followed it.

³⁰ C.M.H. Clark, *A History of Australia, Volume II: New South Wales and Van Diemen's Land, 1822-1838* (Melbourne, 1968), p. 339.

³¹ Molesworth, *Report from the Select Committee*, p. 32.

³² D.W.A. Baker, 'Lang, John Dunmore (1799 - 1878)', *Australian Dictionary of Biography, Volume 2* (Melbourne, 1967), pp. 76-83.

³³ S. Nicholas (ed.), *Convict Workers: Reinterpreting Australia's Past* (Cambridge, 1989); Townsend, 'A Mere Lottery', pp. 58-86.

Britain's first major foray into the transportation of convicts had been to their North American colonies. In its initial phase in the 1600s, criminals reprieved from execution were often handed over to merchants and colonists, who were then able to dispose of their services overseas. The practice was, however, neither widespread nor common, and the legality of removal from Britain has been questioned by some authorities.³⁴ Other criminals received Royal Pardons on the undertaking they depart Britain, often at their own cost. This practice formed the basis of transportation to North America between 1655 and 1718.³⁵

In late 1717 the British Parliament introduced a Bill that was to result in a more streamlined and structured system of transportation. It was hoped that it could deal with the perceived escalation of crime in Britain's changing society. The Bill, 4 George I, c. 11 was enacted the following year and had its purpose clearly enunciated in its title, 'An Act for the further preventing robbery, burglary, and other felonies, and for the more effectual transportation of felons...' The Act contained a number of significant innovations, senior among them being that the pardons process was no longer the key to transportation. Instead, transportation could now be imposed by the courts as part of the sentencing process. Those guilty of non capital crimes were faced with transportation for a period of seven years, whilst receivers of stolen goods would be sent for fourteen.

A second important innovation was that henceforth Treasury would actively subsidise the costs of transportation, initially at the rate of £3 for every convict landed in the American colonies.³⁶ Contained within this provision was the effect that the British authorities removed from the shippers the power to 'pick and choose' which convicts they took. Previously the merchants had heavily favoured those whose labour would attract the greatest demand in the colonies, they being young, fit males. As a part of the shipping package, the property rights to their labour was invested in the contractors, who in turn could on sell those rights once in the colonies. Transportation in this guise saw the extraction of convict labour in the North American colonies

³⁴ W. Oldham, *Britain's Convicts to the Colonies* (Sydney, 1990), p. 2.

³⁵ A.E. Smith, *Colonists in Bondage: White Servitude and Convict Labor in America 1607-1776* (New York, 1975), p. 91; A.R. Ekirch, *Bound For America: The Transportation of British Convicts to the Colonies, 1718-1775* (Oxford, 1987), pp. 17-18.

³⁶ The rate was to rise rapidly after its introduction. See Ekirch, *Bound For America*, p. 71.

falling solely on private individuals.³⁷ It also allowed many of the more affluent convicts to buy their freedom and thus avoid the enforcement of the labour component.

As has already been discussed, New South Wales was a new style of colony. There were initially no free settlers, so the system of extracting the convicts' labour through them as it had been the case in the North American colonies could not apply in New South Wales. Nor could the property rights to their labour be sold. The instructions issued to founding Governor Captain Arthur Phillip make it clear that property rights in convict labour were to be vested in the office of Governor, and the convicts were to be kept to the public works. Upon departure from England these property rights were to be initially transferred by the Crown to the masters of the ships employed to transport the convicts to New South Wales. Upon arrival there, Phillip was instructed to:

...obtain an assignment to you or the Governor-in-Chief for the time being, from the masters of [the ships], of the servitude of the several convicts for the remainder of their times or terms specified in their several sentences or orders of transportation.³⁸

Upon disembarking, Phillip was instructed to make the cultivation of the land and the procuring of grain and other ground provisions a priority. Further, he was authorized to distribute the convicts in whatever manner he thought would best achieve this aim.³⁹ Phillip's aim was, however, to be sorely tested. The embryonic colony faced an almost immediate food shortage, the combined result of a poor harvest, and the loss of supplies through theft and destruction.⁴⁰

In an effort to get sufficient land cleared and under cultivation to meet requirements, Phillip tried three approaches. He first put everyone to work for the Government, but this proved to be at the cost of adequate supervision. There also proved to be the

³⁷ For a fuller description of how transportation to the North American colonies worked see Ekirch, *Bound For America*, especially chapters 1, 3 & 4; W. Oldham, *Britain's Convicts to the Colonies*, chapter 2; and Smith, *Colonists in Bondage*, chapter 6.

³⁸ Instructions to Phillip, contained in F. Watson (ed.), *HRA, Series 1, Volume 1*, pp. 11, 714, note 4.

³⁹ Instructions to Phillip, contained in Watson, *HRA, Series 1, Volume 1*, p. 11.

⁴⁰ Despatch from Phillip to Sydney, 12 Feb 1790, contained in Watson, *HRA, Series 1, Volume 1*, pp. 141, 143-44. The colony was initially placed on two thirds rations on 1 November, 1789.

unavoidable economic costs such as seed, livestock and tools. His second solution was to leave all convicts to their own devices, but although he had the authority to do this, its ultimate result would have been virtual emancipation for all. Phillip determined such an outcome to have been at odds with the purpose of the colony in the first instance, that being as a place of punishment. Phillip's third option was to develop a system where convicts worked as servants to private masters, with the Government retaining ultimate authority over them, and it was this approach that was found to be the most successful.⁴¹

Phillip's instructions had allowed for the granting of land to emancipated convicts and to other settlers, including the military. To these he assigned convicts to help with clearance and cultivation. In 1790 Phillip wrote to Lord Sydney, then Secretary of State for the Home Department, outlining the method of assignment he had put in place. Whilst it may have proven expedient, he clearly did not see it as a long term measure. Phillip informed Lord Sydney that although he had found it necessary to assign convicts to the officers it was his intention to discontinue this as a practice as it was 'attended with many inconveniences'.⁴² This intention was not to be carried through however, and the practice was to continue, in New South Wales at least, until 1840.

The assignment system as it came to be known had two major benefits, neither of which could be ignored by the authorities in Britain. The first was that agriculture was clearly more productive in the hands of private individuals than under government control. Phillip was temperate in the granting of land to the military, and tried to retain government farming, whereas his temporary successors, Grose and Paterson, upon his departure in 1792 proved the opposite. By the time Governor Hunter arrived in 1795 only one eighth of the New South Wales wheat crop was under government tillage.⁴³ Despite orders from London seeking a reversion to Phillip's policy, and a capping of the number of convicts each master could have assigned to him, Hunter

⁴¹ B. Dyster, 'Public Employment and Assignment to Private Masters, 1788-1821', in Nicholas, *Convict Workers*, p. 128.

⁴² Despatch from Phillip to Sydney, 12 Feb 1790, contained in Watson, *HRA, Series 1, Volume 1*, p. 146.

⁴³ G.J. Abbott, 'Economic Growth', in G.J. Abbott & N.B. Nairn (eds), *Economic Growth of Australia 1788-1821* (Carlton, 1969), p. 143.

chose to maintain the status quo.⁴⁴ He wrote to the Home Secretary, the Duke of Portland, informing him that:

The number of convict labourers allowed...to the civil and military officers, who have farms, appear to me to have been the principal means by which this colony has arrived at that state of improvement in which I have found it: I have, therefore, thought fit to continue them...⁴⁵

Hunter then proceeded to touch on the second benefit the assignment system produced, that being the removal of the cost of convict maintenance from the Government to the master. This benefit was particularly attractive to the British Government who constantly sought the minimization of the costs of their colony half a world away. It was a point Portland was to highlight in correspondence to Hunter the following year. As well as conceding his agreement that settlers were more agriculturally productive than the Government, Portland warned that the cost of convicts assigned to individuals who materially benefited from them, could not be worn by society in general. He further stated:

The more convicts that can be made over to individuals and taken off the store the greater will be the advantage [to the Government]; but it must be understood that these individuals, of whatever description, and in whatever situation they may happen to be, who take the convicts, must support them at their own expence...⁴⁶

Assignment as it evolved served therefore both as an extraction of labour and an economic saving to the Government. As the number of free colonists grew, so did the practice of assigning convict labour to them. In an effort to clarify this somewhat *ad hoc* system, in 1801 Hunter's successor Philip King issued a set of regulations for assigned servants. This effectively codified the tripartite relationship of convict,

⁴⁴ Despatch, Portland to Hunter, 10 June 1795, contained in Watson, *HRA, Series 1, Volume 1*, p. 495.

⁴⁵ Despatch, Hunter to Portland, 25 October 1795, contained in Watson, *HRA, Series 1, Volume 1*, 1914), p. 534.

⁴⁶ Despatch, Portland to Hunter, 11 August 1796, contained in Watson, *HRA, Series 1, Volume 1*, p. 580.

Crown and master. Under it the legal rights of all parties were made clear. The cost of clothing and feeding the convict, once assigned, was clearly spelt out as being at the expense of the master. Those unable to afford any initial expense in these areas were to be extended credit by the Commissariat, repayable annually by 31 December. While the orders effectively allowed for the transfer of the right to extract convict labour from the Crown to private masters, under them the Crown did not forfeit its ultimate control. Rather, it reinforced its right to withdraw the assignment at any stage, and through the process the Crown also gained a measure of control over the masters.⁴⁷

There was always a question of legality in such a system. The 1812 Committee of Inquiry seems to have had as its focus more the condition of assigned convicts rather than their actual legal status. O'Brien notes that this Committee examined few facts stemming from the period prior to King's 1801 orders.⁴⁸ The legal status was however raised by John Bigge in his report on the state of New South Wales drawn up in 1819. Bigge was expected to report on the efficacy of transportation as a punishment, in part as a response to criticisms of Macquarie's apparent leniency in the issuing of pardons and tickets of leave.

Bigge's report was eventually handed to the British Parliament in 1822, and amongst the many aspects it raised of colonial life in New South Wales, the question of the legality of assignment was relatively minor. However what Bigge did query as regards assignment was the legality of the transference of the property in a convict's service. It also questioned the right of the Governor to then assign such rights, and the subsequent validity of the master's title. Bigge's opinion was reflected in a letter to Undersecretary Horton at the Home Office in 1827, from the Chief Justice of New South Wales, Francis Forbes. He wrote:

...servitude was rather an argumentative inference from the tenor of the sentence of transportation, than a clear penalty of the law, and

⁴⁷ Despatch, King to Portland, 10 March 1801, contained in Watson, *HRA, Series 1, Volume VIII* (Sydney, 1916), p. 37; E. O'Brien, *The Foundation of Australia*, (Sydney, 1950), p. 240.

⁴⁸ O'Brien, *Foundation of Australia*, p. 240.

the title of the assignee to the services and the control of the convict rested upon a still less intelligible basis...⁴⁹

It was this issue that was eventually brought to a head in the Jane New case. Forbes' comments were made before that case came before him and before the home authorities had clarified the legalities of assignment. Given the concerns raised by Bigge, the British parliament had moved to address them. In 1824 a new law, 5 George IV, c. 84, was enacted covering transportation from Britain. Appropriately entitled 'An Act for the Transportation of Offenders from *Great Britain*', it was designed in part to replace a number of laws due to expire, and to allow any sentence of transportation imposed under them to be enforced. It was also considered 'expedient that the Laws relating to [transportation] should be revised and consolidated into one Act'.⁵⁰

The Act went further than any of its predecessors. It clearly defined the fact that property in the convict's labour was to be invested in the governor of the colony to which the individual was sent, and that such property was to remain for the duration of the sentence. The Act also gave explicit authority that the:

...the Property in the Service of such Offender shall be vested in the Governor of the Colony for the Time being, or in such other Person or Persons; and it shall be lawful for the Governor for the Time being, and for such other Person or Persons, whenever he or they shall think fit to assign any such Offender to any other Person for the then residue of his or her Term of Transportation...and the Property in the Service of such Offender shall continue in the Governor for the Time being...⁵¹

It was this version of transportation, the 'assignment system', that Molesworth and his Committee had investigated. It came as no surprise – given the makeup of the Committee – that when finally presented to Parliament, the report strongly

⁴⁹ Forbes to Horton, 6 March 1827, contained in F. Watson (ed.), *HRA, Series IV, Volume 1*, p. 696.

⁵⁰ British Statute 5 George IV, c84, paragraph I.

⁵¹ British Statute 5 George IV, c84, paragraph VIII.

recommended that transportation in its then form be discontinued. The report stated that the system of assigning convicts to colonial masters was fundamentally flawed in terms of its efficacy as a punishment. The Benthamite ideal, that deterrence was in proportion to the certainty of the punishment, not in proportion to the severity of it, could not be attained under assignment for the system contained an 'inherent defect, namely that it is as uncertain as the diversity of temper, character, and occupation amongst human beings can render it'.⁵² Put simply, the role of the assignor was filled by too greater a diversity of human nature to make the guarantee of punishment a certainty. If, the committee contended, transportation was to continue. It needed to address this issue of effective punishment and the certainty of it. Their recommendation was that labour be extracted not by assignors but under the direction of 'Government officers'.

A total of six recommendations were contained in the report, they being

- 1- That transportation to New South Wales and the settled districts of Van Diemen's Land cease as soon as was practicable.
- 2- That crimes punishable by transportation be punished by confinement and hard labour either at home or abroad for periods of between two and fifteen years.
- 3- That penitentiaries only be built abroad in colonies where there was no existing free settlement, and that such settlement not be allowed.
- 4- That the awarding of 'time off' a convict's sentence for good behaviour be better regulated.
- 5- That a system be developed that encouraged ex convicts to leave Britain after completion of their sentence.
- 6- That convicts sent abroad to serve their sentence be compelled to leave that place upon the expiration of their sentence.⁵³

To argue its case, the Committee initially put forward the proposition that an alteration to the system was 'absolutely indispensable'. That alteration was the immediate discontinuation of the assignment system as it had evolved in the Australian colonies since 1788. For guidance, Molesworth's Committee turned to the

⁵² Molesworth, *Report from the Select Committee*, p. 40.

⁵³ Molesworth, *Report from the Select Committee*, pp. 48-49.

United States of America, praising the system in place there of road gangs which dealt with the convict population. That system extracted punishment through employment in silent road gangs during the day, with individual cells being used to house convicts at night. Silence, and compliance, was achieved by the use of force by overseers, and was both immediate and painful. Likewise, the success of such a system in the Australian colonies would depend upon 'the dread of immediate pain [being] constantly before [the convicts'] eyes'.⁵⁴

Such a recommendation highlights the selective nature of the approach taken by Molesworth and his Committee. It could be argued that what was being recommended was little different to that already tried, or in place, at such penal settlements as Norfolk Island, Macquarie Harbour and Port Arthur. All used ganging on public works, with barracks accommodation at night, yet much of the evidence tabled, especially that relating to New South Wales, had been highly critical of road gangs. As it was, the Committee did not pursue this option, dismissing it with the argument that the economic benefits to New South Wales did not measure up to the costs of both convict labour and the infrastructure required to house and feed them at remote locations. Further, the costs of employing extra troops to enforce silence and security – convict constables were to be done away with – made such a system impractical.⁵⁵

Economics constituted a key rationale within the report for the discontinuation of transportation. The Committee heavily used the evidence of both Lieutenant Colonel Arthur and Captain Maconochie to demonstrate that, apart from the moral degradation, the system was costing the British taxpayer dearly. Maconochie gave evidence that 1/9 out of every 3/- worth of labour was lost when it came to the public works program in Van Diemen's Land. Using the evidence of the former Governor Arthur, the Committee estimated that simply replacing assignment to private individuals by employment on public works projects would increase the cost to Britain of transportation by £300,000 per annum. The figure was higher than that, however, for it was not inclusive of the cost of extra troops and infrastructure. As a consequence, simply amending the system in this way could not be recommended.⁵⁶

⁵⁴ Molesworth, *Report from the Select Committee*, p. 41.

⁵⁵ Molesworth, *Report from the Select Committee*, p. 42.

⁵⁶ Molesworth, *Report from the Select Committee*, p. 42.

Having made its initial recommendations the report put forward a final one, that the system should be abolished and replaced by a totally new one. The 'separate system' and the penitentiary, as then used in the United States, was dismissed as an option on the basis of expense. The silent system, whilst recognised as being a more cost effective alternative, was dismissed as being inferior in outcomes. The third system considered by the committee was that proposed by Alexander Maconochie. This consisted of two key components. The first was that convicts be grouped together and made responsible for the behaviour of each other. This was then tied to the second, which saw the degree of punishment and reward based on a marks system. Thus, peer pressure was required if the individual was not to be punished for the actions of others.

The committee chose to recommend an amalgam of the three, picking and choosing what they considered the best aspects of each. Convicts were to be sent to solely penal colonies from which they were to be repatriated once their sentence had expired. The recommendation made it clear they did not want the type of penal/free colonies into which New South Wales and Van Diemen's Land had developed. Further, to avoid the moral degradation that was perceived as being inevitable if convict and free coexisted, if penitentiaries were to be erected in either colony they were to be located far from the settled areas. Indeed, to avoid all possible contamination convicts were not to become settlers, as this would be 'merely to repeat the error committed in creating such societies as now exist in Australia'. Punishment was therefore to be inflicted by labour in penitentiaries either at home or abroad, while all short sentences were to be served in Britain.

These conclusions only managed to create a new dilemma however, it being by no means apparent where convicts could be sent. The committee were firm in their recommendation that transportation to New South Wales, *in toto*, and to the settled districts of Van Diemen's Land should cease immediately. Bermuda, already a penal destination, was not considered a permanent or long term solution. Tasman's Peninsula and Norfolk Island, whilst then in use, were considered to have their own drawbacks, the Tasman being too close to settlement and Norfolk Island lacking in agricultural sustainability. New destinations or new colonies, it would seem, would

have to be found, but on this point Molesworth and his Committee offered no suggestions.

In many respects the proposals of the Molesworth Committee were only a slight variant of those initially proposed by Lord Stanley in an 1833 despatch to Arthur, the then Governor of Van Diemen's Land. Stanley had based much of his opinion on a report presented to Arthur by Quakers James Backhouse and George Washington Walker following their tour of the island prison the previous year.⁵⁷ The report was subsequently forwarded on to London. The two discuss in detail the use of rewards in modifying convict behaviour, and the role of the Bible and hard work in convict redemption.

Stanley used the report to draw the conclusion that the levels of punishment then inflicted, by way of a deterrent, produced 'little effect upon those of their companions in crime in this country', that being Britain. This problem was exacerbated further when the lot of the assigned convict, at the hands of a disparate collection of masters, was also considered. Whilst recognizing the economic imperative of convict labour in the developing colonies, Stanley also expressed doubts about its efficacy.

As with the Molesworth Committee, Stanley weighed up the possibilities of the solitary system in use in the United States and the advisability of immediate transportation once sentenced. His conclusions were that the prisons required for the solitary system would prove too expensive by comparison to transportation. Stanley also questioned the ability of the prisons to reform convicts, as opposed to simply punishing them. Stanley saw the removal of convicts from the kingdom as a better option for society than retention, but was also opposed to the use of the hulks as holding centres for those awaiting transportation. Whilst he saw them as leading to moral breakdown, Stanley also recognized that they were a necessity, given the inevitability of shipping delays caused by the irregular availability of transports, and the need to centralise convicts from across England, Scotland and Ireland prior to departure.

⁵⁷ British Parliamentary Papers (hereafter BPP), The Report of James Backhouse and George Washington Walker, reprinted in 'Correspondence between the Colonial Secretary and the Governor's of the Australian Provinces', 1834 (82), Vol. XLVII, pp. 9-13 (IUP, *Crime and Punishment: Transportation, Volume 6*).

Stanley arrived at the conclusion that reformation could be best achieved if immediate assignment could be done away with, and a heavier form of punishment inflicted. This was to be implemented in one of two ways, either by a compulsory labour element prior to assignment in the colonies, or through the immediate sending of 'notorious' prisoners to penal stations, exemplified by Norfolk Island and Port Arthur. In effect a two tiered system was to be introduced. Those transported for minor offences could still be assigned upon arrival, while 'notorious' offenders were to be subject to heavy labour. The level at which a convict entered this system was to be determined in England at the time of sentencing, not upon arrival in the colonies.

To underscore his conclusions, Stanley suggested mandatory periods during which hard labour was to be performed. Prisoners sentenced to life were to be confined for no less than seven years to the likes of Macquarie Harbour, Norfolk Island, or other such facilities. A further period of five years of hard labour in chain gangs was to follow before assignment or other alternatives could be considered. For those sentenced to seven or fourteen years a minimum of one third of their sentence was to be served following this format. Stanley recognized that there was only limited space available to implement his suggestions, and that it may not be possible to implement his proposal immediately. Nonetheless, he made his beliefs and intentions clear when he wrote to Arthur informing him that 'excepting upon grounds of economy, I cannot however see any reason why all newly arrived convicts should not, without exception, be sent to labour at the public works'.⁵⁸

Despite the similar approaches to the issues by Lord Stanley and the Molesworth Committee, Stanley never advocated the cessation of transportation as the Committee was to do five years later. Neither approach was to be implemented, however, for the Whigs, despite the report, chose to implement their own conclusions, or at least those of Lord John Russell. Believing that the recommendations of the Committee contained substantial questions involving expenditure, he sought to counsel his colleagues before any decision was made.

⁵⁸ BPP, Despatch from Stanley to Arthur, reprinted in 'Correspondence between the Colonial Secretary and the Governors of the Australian Provinces, Despatch from Stanley to Arthur', 1834 (82), Vol. XLVII, pp. 17-19 (IUP, *Crime and Punishment: Transportation, Volume 6*).

In January 1839 Russell wrote to Sir George Grey outlining his views on the issue. Given that both had been members of the Committee, the very existence of the memo draws into question the validity of the Committee's existence and purpose. Russell had no dispute with the finding that assignment was ineffective, informing Grey that 'crime [was] not punished as crime', citing the employment of clever convicts as clerks, even if sentenced for embezzlement. Yet others, he further noted, were unjustly punished for lesser crimes.⁵⁹ Russell re-examined the evidence given to the Committee by Chief Justice Francis Forbes and the Bishop of Australia William Broughton, both of whom had argued for the retention of transportation. Whilst conceding that some perils stemmed from it, both witnesses had believed that the overwhelming majority of those transported had reformed, to the point that they were good members of society.

It was the area of economics, however, which drew Russell's reluctance to end transportation to the fore. Obviously its ending would require the substitution of another method of punishment with the only realistic option explored being an expansion of the prison system. In this regard there were two variants in vogue at the time, one known as the 'separate system, and the other as the 'silent system'. Under the first, convicts were held alone in individual cells, in which they worked, ate and slept. The silent system was similar in that convicts ate and slept in their own cells but were let out to work under supervision labouring in enforced silence in larger groups.⁶⁰

No matter which system was chosen it would require capital expenditure to build new prisons. Russell believed that the £15 it cost to ship convicts to the Australian colonies was a far better economic proposition. Specially constructed prisons were also significantly more expensive per prisoner to run and maintain than shipping costs. The house of corrections at Wakefield cost £14/0/3¼ per inmate per annum, while that at Cold Bath Fields was only slightly cheaper at £13/15/2. Both costs pale when compared with the recently completed General Prison at Millbank which, at £24/6/6 per annum per prisoner, was far more expensive to run. Even the cheap

⁵⁹ BPP, Despatch from Stanley to Arthur, reprinted in 'Correspondence between the Colonial Secretary and the Governors of the Australian Provinces, from Stanley to Arthur', 1834 (82), Vol. XLVII, pp. 17-19 (IUP, *Crime and Punishment: Transportation, Volume 6*).

⁶⁰ I. Brand, *The Convict Probation System: Van Diemen's Land 1839-1851* (Hobart, 1990), note on p. 14.

alternative of the £7/14/2 it cost per annum for prisoners on the hulks Russell saw as expensive.

Russell argued that these figures did not reflect an accurate comparison for they were merely annual costs. Rather, they needed to be multiplied by four, representing the average number of years each prisoner served in prison, to give an accurate cost of their housing in Britain, as opposed to the one off cost of shipping. Russell noted that the numbers then being transported would cost on average £120,000 a year if retained on hulks, £220,000 a year in silent prisons and £360,000 in the separate system. Transportation was costing £60,000. To round out his economic thrust, Russell also noted that convicts sent to Bermuda were actually cost effective, returning to the Government £13/3/6 per head for labour and works done there.⁶¹ The rejection of the Molesworth desire to end transportation was made as a matter of simple economic expediency. It was cheaper to transport than to incarcerate.

Russell was also unsupportive of the sixth recommendation the Molesworth Committee had made, that being the removal of convicts from the colony once their sentence had expired. Implicit in this was the suggestion that convicts be returned to the metropolis. He noted for Grey's benefit that 'very serious evils would be incurred, if we were to undertake to bring home from Van Diemen's Land, and Norfolk Island, the most atrocious criminals of the United Kingdom'. The plan that Russell proposed would see all those sentenced to seven years transportation either kept in England or sent off shore to Bermuda. In both places they would be employed at the various Royal Navy dockyards and lodged in hulks. Numbers employed in the dockyards at Portsmouth, Chatham, and Woolwich were to be increased from 1900 to 2800 while those at Bermuda would be raised to 1000. It was also proposed that convict labour be reintroduced to the dockyards at Devonport and Sheerness, and also introduced to Pembroke, and that this would employ a further 300 men at each. To augment this, Russell conceded it would also be necessary to build a separate system penitentiary

⁶¹ BPP, 'Notes on Transportation' written by Lord Russell and sent by SM Phillipps to Sir George Grey, 8 January 1839, cited in 'Papers Relative to Transportation and Assignment of Convicts', 1839, [582], Vol. XXXVIII, pp. 4, 5 (IUP, *Crime and Punishment: Transportation, Volume 6*). Samuel March Phillipps was the permanent Under Secretary at the Home Office.

with a capacity of no less than 500 men. By this means, only 2000 convicts a year would need to be transported to Van Diemen's Land and Norfolk Island.⁶²

Given his position as Home Secretary, Russell's opinion on transportation was crucial for it was the Home Office that controlled the whole process of transportation, deciding who was sent and to where, and overseeing the actions of the Admiralty whose role was that of transport organiser. The Colonial Office only stepped onto the transportation stage once convicts arrived at their colonial destination. Russell intended sending life and long sentence men to either Norfolk Island or to Port Arthur. There they were to become part of a probationary system under which the convict was to spend an initial period of his sentence put to 'the most irksome description of labour'.⁶³

It was not dissimilar to the system proposed by Stanley six years earlier but with slight variation. After their initial period of labour convicts whose behaviour was deemed sufficiently reformed would move through a series of phases that would result in their being granted a ticket of leave. With this the convict could then seek employment on his own behalf. There was to be no assignment to private masters. The whole system was designed to guarantee a level of punishment missing under assignment and to reward the reformed criminal. The end product was to be a production line of colonial workers, turned out at a rate somewhere between one and two thousand a year, a figure with which Van Diemen's Land's economy was believed able to cope.

The plan, which looked so fine on paper, was never implemented in the way Russell had envisioned. In August 1839 as the result of an unconnected piece of political pragmatism, Russell exchanged offices with the Marquess of Normanby and thus became the Secretary of State for War and the Colonies.⁶⁴ This did not impact

⁶² Letter from Fox Maule to Sir George Grey, 30 January 1839, cited in 'Papers Relative to Transportation and Assignment of Convicts', 1839, [582], Vol. XXXVIII, p. 16 (IUP, *Crime and Punishment: Transportation, Volume 6*).

⁶³ 'Notes on Transportation' written by Lord Russell and sent by S.M. Phillipps to Sir George Grey, 8 January 1839, cited in 'Papers Relative to Transportation and Assignment of Convicts', 1839, [582], Vol. XXXVIII, p. 9 (IUP, *Crime and Punishment: Transportation, Volume 6*).

⁶⁴ J. Prest, 'Russell, John [formerly Lord John Russell], first Earl Russell (1782-1878)', cited from the online edition of *Oxford Dictionary of National Biography*. Normanby had returned from Ireland in

significantly on transportation, however, as it was to continue to New South Wales until 1840. In 1839 a total of 3,733 convicts arrived in the Australian colonies, 1,427 of them in Van Diemen's land. In 1840 these figures dropped to 3,077 and 1,267 respectively. The following year, however, saw three significant events, the first being that without New South Wales as a destination the numbers to Van Diemen's Land increased. In the first six months alone just over 1,600 convicts had landed in Hobart.⁶⁵ The second was that, in March, the House of Commons, in an attempt to alleviate the overcrowding in the hulks, voted in favour of transporting the seven year sentence men previously held in Britain under Russell's scheme.⁶⁶ The final, crucial, factor was that in August the Whigs lost power and the Conservative Lord Stanley became Secretary of State for War and the Colonies.

Under Stanley, Russell's system was slightly modified. Incarceration was to be in five stages, the first and most severe to be served on Norfolk Island and reserved for life sentence men and those transported for 15 years or more. The second stage was to be served in probationary gangs based at a string of probationary stations located across Van Diemen's Land. These gangs were to consist of men who had served their initial period on Norfolk Island or who, being shorter sentence men, were deemed deserving of less harsher treatment. The gangs themselves were to be graded in terms of the physical degree of their labour. Thus, convicts could be rewarded for good conduct by being moved to a gang performing less taxing work. Stage three allowed a convict who had thus far behaved to obtain a probationary pass which entitled him to gain waged employment. Again this was divided in subclasses to allow reward and punishment. The fourth stage saw the granting of a ticket of leave and the final stage was a pardon, be it conditional or absolute. Time spent moving through the stages depended on behaviour, but as a rule of thumb it should take no less than half of the original sentence.⁶⁷

1839 and had accepted the position of Colonial Secretary on the understanding that he and Russell would at some stage exchange offices.

⁶⁵ Figures for convict arrivals have been extracted from C. Bateson, *The Convict Ships, 1787-1868* (Glasgow, 1977), pp. 391-93.

⁶⁶ McConville, *English Prison Administration*, pp. 190-91; A.G.L. Shaw, *Convicts and the Colonies* (Melbourne, 1977), pp. 278-79.

⁶⁷ McConville, *English Prison Administration*, pp. 191-92. For a fuller and more detailed explanation see Despatch from Stanley to Franklin, 23 November 1842, in Watson, *HRA, Series I, Volume XXII*, Appendix 1, pp. 514-23. See also Brand, *The Convict Probation System*, pp. 17-20.

The most significant change in terms of the medium and long term impact it would have on intercolonial relations was the decision by Stanley to increase the numbers transported. In November 1841 he advised Sir John Franklin, the noted explorer who had become the successor to Arthur as Governor of Van Diemen's Land, that it was the intention of the Home Office to increase the total sent each year, with an extra 1,000 to be sent in 1842. Such an increase would result in the largest annual influx that Van Diemen's Land experienced during its fifty years as a penal destination. In reality the numbers that arrived were far greater. By July Franklin had become so concerned that he wrote to Stanley. Already arrivals from England and Ireland had reached 2,500 for the year. Franklin's immediate problem was accommodation for them. By year's end the number had peaked at 5,321, four times the figure for 1840 and a figure unsurpassed in previous and subsequent years.⁶⁸

The timing of the change in policy could not have been worse for Franklin. The increase in sheer numbers alone was likely to have caused problems in creating a larger pool of unskilled and semi skilled labour than could be absorbed by the Van Diemen's Land economy. Franklin had advised Russell in December 1841 that the colony could not 'bear a large and indiscriminate influx of labourers'.⁶⁹ His thoughts were mirrored somewhat by Captain Swanston, managing director of the Derwent Bank in Hobart Town. In 1843 he wrote to a colleague in Britain that:

...should the home government persist in sending the convicts from all parts of the world to this colony and make it the general prison, property will be in a few years valueless and not a place fit to live in.⁷⁰

The downturn in the British economy that had resulted in the increased prison population was also reflected in the colony. The Van Diemen's Land economy depended heavily on exports, both to Britain and to the Australian colonies. The newly opened up areas of South Australia and Port Phillip had seen the island ideally positioned to service these new markets with exports of sheep and other agricultural

⁶⁸ Brand, *The Convict Probation System*, pp. 16-17.

⁶⁹ Brand, *The Convict Probation System*, p. 17.

⁷⁰ Cited in K.E. Fitzpatrick, *Sir John Franklin in Tasmania 1837-1843* (Melbourne, 1949), p. 329.

products. Exports to all markets had peaked in 1840 at £876,007 but by 1844 this figure had plunged by more than half to only £408,799.⁷¹

The financial situation was further complicated by two elements. The first was that no thought seems to have been given to the fact that an increase in convict numbers, of the dimension experienced, would necessitate an increase in administration and therefore an increase in costs that had not been budgeted for. As an example Franklin advised Stanley that the need to supply clothing to convicts had risen from £4,216 in 1840 to £8,460 in 1842. This had resulted in a need to employ extra staff in the Clothing Branch of the Convict Department.⁷²

The second element was that the increased taxation that had been created whilst the economy was in its boom cycle was subject to a time delay before its collection by the Colonial Treasury. As a consequence the resultant financial bonus did not appear in the colonial accounts until the following year and as such the impact of the depressed economy was not at first apparent. In 1842 the Government's capital reserve topped £76,000. The failure of receipts to grow and the increased costs to the colony of Stanley's changes to transportation were fully felt by 1843 when the capital reserve was cut to £35,000 and in 1844 it dropped to a parlous £2,690. With the reserve held largely in the colony's banks the impact flowed into the broader economy, stifling any recovery.⁷³

By December 1843 Matthew Forster, the Comptroller-General of convicts in Van Diemen's Land, had become concerned at the impact the economic downturn was having on employment. In a report to Franklin's successor, Sir John Eardley Wilmot, he noted that 'unless some very material change should take place in the financial state of the colony' a considerable number of pass holders would be returned to the government for maintenance. Figures supplied by Forster showed that of 3,654 convicts who had emerged at that point from the first stage of the Stanley scheme, 945

⁷¹ R.M. Hartwell, *The Economic Development of Van Diemen's Land 1820-1850* (Melbourne, 1954), p. 201.

⁷² Fitzpatrick, *Sir John Franklin*, pp. 331-32.

⁷³ Hartwell, *Economic Development of Van Diemen's Land*, pp. 238-39.

were unemployed.⁷⁴ Eardley Wilmot passed these concerns on to Stanley in May 1844 stating that the situation had 'not much hope of diminishing'. The situation had been compounded by Stanley amending the probationary period for seven year men, reducing it to 12 months without consultation with the convict officers. Forster in a second report noted that it was a change which gave him 'the greatest anxiety' and he believed it was a decision that would result in 'large bodies of pass holders [being] maintained for some time to come...and the number will rapidly increase now that the periods of gang labour are so much shorter'.⁷⁵

In an effort to improve the situation Eardley Wilmot wrote to Stanley in July seeking to have removed tariffs on Van Diemen's Land wheat entering Britain removed. He wrote:

Allow Van Diemen's Land wheat to be imported duty free, and you will break at once the bonds which chain the enterprise and industry of this country, which weigh down to insolvency nineteen-twentieths of the landed proprietors of this territory, which affect indirectly every tradesman and artificer in this island, and which totally prevent the employment of those passholders which are dead weight upon British funds for want of employment, and who, unless means are devised "to encourage the agricultural interests of the colony," will render the population of this country a pauper population instead of one able and willing to support itself.⁷⁶

Given that the tariffs were not removed, it would seem that the Lieutenant Governor's impassioned plea had fallen on deaf ears in London. In January 1845 Forster once again noted the dismal state of the economy and his opinion that the surfeit of labour was a long-term problem. He informed Eardley Wilmot that in his opinion 'no

⁷⁴ BPP, Eardley Wilmot to Stanley, 8 January 1844, Enclosure 8, 'Correspondence between the Secretary of State and the Governor of Van Diemen's Land', 1845 (659), Vol. XXXVII, pp. 25-26, 29 (IUP, *Crime and Punishment: Transportation, Volume 7*).

⁷⁵ BPP, Despatch from Eardley Wilmot to Stanley, 29 May 1844, in 'Correspondence between the Secretary of State and the Governor of Van Diemen's Land', 1845 (659), Vol. XXXVII, pp. 35, 41 (IUP, *Crime and Punishment: Transportation, Volume 7*).

⁷⁶ BPP, Despatch from Eardley Wilmot to Stanley, 14 July 1844, in 'Correspondence between the Secretary of State and the Governor of Van Diemen's Land', 1845 (659), Vol. XXXVII, pp. 38-39 (IUP, *Crime and Punishment: Transportation, Volume 7*).

probable improvement in the state of the colony will be sufficient to enable the settlers to take off the redundancy of labour'.⁷⁷ Forster's views were to be supported by Dr John Hampton who arrived in February as surgeon superintendent on the convict transport *Sir George Seymour*. Hampton almost immediately wrote to his superiors in Britain noting that there were an 'immense number of probationary pass and ticket of leave men unemployed'. Hampton gave the figures as 6,094 of the latter and 2,210 of the former, or a quarter of the island's convict population of just under 24,000. Hampton gave even greater cause for concern by noting that another 3,926 were due to come out of the first stage of Stanley's system at the end of the year and would then themselves be unemployed.⁷⁸

The colonial authorities in Van Diemen's Land were confronted with a problem of significant magnitude. With little, if any, hope of an economic solution to the mounting problem of unemployed pass holders there was only one other remedy: reduce their numbers. In July 1845 Forster had the following notice published in the local papers:

Notice is hereby given to all holders of conditional pardons, who may be desirous of having such pardons extended to the limits of the Australian colonies and New Zealand, that, upon making their applications for the said indulgence to this office, they will be laid before the Lieutenant-governor, in order that those approved of by his Excellency may be immediately granted.⁷⁹

Forster had arrived at a practical system for reducing numbers – simply facilitate their leaving the colony. His solution was to distort the system and grant tickets of leave and conditional pardons to those deemed worthy of them. In this way at least they would alleviate the pressure on the colonial treasury as the Government was not liable

⁷⁷ BPP, Report from Forster to Eardley Wilmot, 27 January 1845, in 'Correspondence between the Secretary of State and the Governor of Van Diemen's Land', 1845 (659), Vol. XXXVII, p. 70 (IUP, *Crime and Punishment: Transportation, Volume 7*).

⁷⁸ Brand, *The Convict Probation System*, p. 30; see also BPP, Report from Forster to Eardley Wilmot, 1 December 1843, in 'Correspondence between the Secretary of State and the Governor of Van Diemen's Land', 1845 (659), Vol. XXXVII, pp. 25-26 (IUP, *Crime and Punishment: Transportation, Volume 7*).

⁷⁹ BPP, Notice issued by Forster, 21 June 1845 cited in letter from Croucher to Gladstone, 17 February 1846, in 'Correspondence relating to Convicts in Van Diemen's Land holding Conditional Pardons', 1846 (692), Vol. XXIX, p. 1 (IUP, *Crime and Punishment: Transportation, Volume 7*).

to maintain those holding such remissions of sentence.⁸⁰ Events that followed make it unclear if responsibility for this idea lies solely with Forster, or if Eardley Wilmot was a party to it. Indeed subsequent circumstances would suggest that it may in fact have been conceived as a policy by the British Government but not so acknowledged. Eardley Wilmot's impassioned plea may not have fallen on deaf ears at all.

Reaction to Forster's notice by other colonies was almost instantaneous. In early August Charles La Trobe, Superintendent of the New South Wales out settlement of Port Phillip, wrote to the Colonial Secretary in Sydney, Edward Deas Thompson, inquiring what steps the colony was to take in terms of 'cognizance of persons who may arrive from Van Diemen's Land, under the authority of pardons issued by [its] Lieutenant governor'. Gipps wrote to Stanley advising that he had no desire to prevent the entry into New South Wales of those holding conditional pardons but that he had concerns for the dangers to the colony that such a practice could have if the pardons were being issued 'without the utmost possible caution'.⁸¹

Gipps proposed certain measures that he felt would alleviate potential problems. Deas Thomson, in a reply to La Trobe in which Gipps' lack of authority to intervene was made clear, outlined these. He suggested that any conditionally pardoned men or women arriving in New South Wales be required to register their abode with the authorities, and to have their physical description taken. Upon this condition being met they would be issued with an endorsement that made the conditional pass valid. Gipps argued that this was very much like the conditions that were applied to those returning to the colony from Norfolk Island and thus all that was needed was an extension of the local Act that covered it.⁸²

Having advised La Trobe of his thoughts Gipps put the suggestions to Stanley. As a matter of course he sent a copy of his despatch to Eardley Wilmot who politely but

⁸⁰ AOT, GO 33/49, p. 280, Forster to Eardley Wilmot, 17 September 1844; GO 33/50, p. 441, Forster to Eardley Wilmot, 27 January 1845.

⁸¹ BPP, Despatch from Gipps to Stanley, 13 August 1845 enclosing letter from LaTrobe to Deas Thompson, 29 July 1845, in 'Correspondence between the Governor and the Secretary of State on the subject of Convict Discipline', 1846 (36), Vol. XXIX, pp. 68-69 (IUP, *Crime and Punishment: Transportation, Volume 7*).

⁸² BPP, letter from Deas Thompson to La Trobe, 8 August 1845, in 'Correspondence between the Governor and the Secretary of State on the subject of Convict Discipline', 1846 (36), Vol. XXIX, p. 69 (IUP, *Crime and Punishment: Transportation, Volume 7*).

firmly refused to act on them. He responded to Gipps that the suggested requirements materially impacted on the status of the individuals who had been pardoned. Eardley Wilmot further pointed out that all that Van Diemen's Land was doing was allowing men and women who had undergone a 'long and trying probation' to enjoy the status they had thus earned. This he compared with the situation Van Diemen's Land found itself in, that being the destination for the worst of New South Wales' criminals, those 'trebly and quadruply convicted' men. Eardley Wilmot noted that this also came at a financial cost as more police were needed as a result and that these were paid for, not by New South Wales, but by his administration. William Gladstone who had succeeded Stanley as Secretary of State for War and the Colonies met his response with agreement.⁸³

It was not just in New South Wales, however, that concerns over the new policy were raised. Serious concerns were also raised by those connected with the colony of South Australia. One such group was the South Australian Association, set up in December 1833 with the purpose of securing a charter to found the colony along the lines of Virginia, Massachusetts and Pennsylvania.⁸⁴ In February 1846 its Secretary, J.H. Croucher, wrote to Gladstone expressing concern that Forster's notice would see a flood of pardoned men and women into the young colony. Thus the 'privileges of the colony of South Australia are directly invaded and its inhabitants threatened with what they justly consider a great moral calamity'. Croucher brought to Gladstone's attention the fact that many of the emigrants to the colony specifically chose it, because it was free of the convict taint and that 'to permit the introduction of persons stained with crime and familiar with vice, is to inflict on it one of the greatest evils that can possibly befall (sic) a rising settlement'.⁸⁵

Croucher also argued that allowing those with conditional pardons, technically still under sentence, admittance to South Australia was not allowed under the colony's

⁸³ BPP, Letter from Eardley Wilmot to Gipps; 8 November 1845, and Despatch from Gladstone to Eardley Wilmot, 22 April 1845, in 'Correspondence between the Governor and the Secretary of State on the subject of Convict Discipline', 1846 (402), Vol. XXIX, p. 40-1 (IUP, *Crime and Punishment: Transportation, Volume 7*).

⁸⁴ Pike, *Paradise of Dissent*, p. 64.

⁸⁵ BPP, Letter from Croucher to Gladstone, 17 February 1846, in 'Correspondence relating to Convicts in Van Diemen's Land holding Conditional Pardons', 1846 (692), Vol. XXIX, pp. 1-2 (IUP, *Crime and Punishment: Transportation, Volume 7*).

charter which he claimed excluded the transportation to it of anyone convicted in a court of justice in Britain. His letter drew a curt response written by Lord Lyttleton on Gladstone's behalf. Lyttleton noted that those granted conditional pardons had been given them 'at the Queen's behest' and that the change of condition was approved by the British Government. The conclusion that can be drawn from his comments is that the focus of the decision making is clearly in Britain and while the idea may have originated with Forster, without imperial sanction it could not proceed. Lyttleton finished by noting that South Australia had been given no pledge about the exclusion of convicts, except that none would be transported there resulting from crimes committed in Britain.⁸⁶

In March 1846 Croucher wrote directly to Lyttleton. He again claimed that the colony had been granted a 'chartered exemption from the curse of convictism' and that his Association regarded Forster's notice as a 'virtual violation' of the Act that established South Australia. This stance was supported by David McLaren who also wrote to Gladstone in his capacity as the Secretary of the South Australian Company, a joint stock venture with large land holdings in the colony.⁸⁷ Lyttleton once more responded, this time to McLaren. He stated that the Government had no intentions of passing any measures that banned the movement of 'any persons who, having once been convicts, had received the Queen's pardon'.

Again Lyttleton's tone is that the decision rests with the British Government, not the colonial powers, and that it is a decision of importance on an empire wide scale. It is one that concerns the rights of the individual. Lyttleton noted that:

...it is impossible that Her Majesty should be advised to withhold
from convicts, to whom the mercy of the Crown has been extended,

⁸⁶ BPP, Letter from Lyttleton to Croucher, 26 February 1846, in 'Correspondence relating to Convicts in Van Diemen's Land holding Conditional Pardons', 1846 (692), Vol. XXIX, p. 2 (IUP, *Crime and Punishment: Transportation, Volume 7*).

⁸⁷ BPP, Letter from McLaren to Gladstone, 16 February 1846, in 'Correspondence relating to Convicts in Van Diemen's Land holding Conditional Pardons', 1846 (692), Vol. XXIX, p. 4 (IUP, *Crime and Punishment: Transportation, Volume 7*); Pike, *Paradise of Dissent*, p. 121.

access to any part of Her Majesty's dominions, except only that part in which their crimes were committed.⁸⁸

If this were to be done for one colony it would need to be done 'in favour of all'. The outcome of that course of action would be to condemn all convicts to remain in Van Diemen's Land 'to the extreme distress of that colony'. In effect it would mean that virtually all convicts would remain exiled for the course of their lives.⁸⁹

In June 1846 Peel's Conservative Government in Britain resigned and the Whigs returned to power. Gladstone wrote to Earl Grey, his successor as Colonial Secretary, outlining the problems the current system of transportation suffered, describing it as 'thoroughly corrupt and a source of exuberant corruption'. He advised Grey that transportation to Van Diemen's Land was to be suspended for 18 months, in part to alleviate the remaining backlog of unemployed pass holders. Suspension would allow people to move through the system; pass holders to ticket of leave, ticket of leave to pardons, after which it was expected they would quit the colony. This strategy, Gladstone believed, would release the pressure on the system and reduce the number of unemployed at the hiring depots 'probably to 8 or 10,000'. He also advised Grey that he had recalled the unfortunate Eardley Wilmot and appointed Captain William Denison as his replacement.⁹⁰

Grey was handed Lord Russell's transportation system that had collapsed through the weight of Stanley's numbers. Like Stanley before him, Grey was to make modifications to the system in an attempt to alleviate Britain of its unwanted convict population. He also had to deal with a number of colonial issues that had come to light as a result of Stanley's changes. Not the least amongst these was the active resistance by South Australia to the immigration of expirées and emancipated convicts, a resistance that was to be copied in the Port Phillip district of New South Wales. No matter what changes Grey made, intercolonial frictions over convicts

⁸⁸ BPP, Letter from Lyttleton to McLaren, 26 February 1846, in 'Correspondence relating to Convicts in Van Diemen's Land holding Conditional Pardons', 1846 (692), Vol. XXIX, pp. 5-6 (IUP, *Crime and Punishment: Transportation, Volume 7*).

⁸⁹ BPP, Letter from Lyttleton to McLaren, 26 February 1846, in 'Correspondence relating to Convicts in Van Diemen's Land holding Conditional Pardons', 1846 (692), Vol. XXIX, pp. 5-6 (IUP, *Crime and Punishment: Transportation, Volume 7*).

⁹⁰ Brand, *The Convict Probation System*, pp. 65, 67.

would continue to increase during the late 1840s. Grey found himself walking a political tightrope stretched between the rights of convicts at one end and the rights of the free settler at the other.

Chapter Six.

Touched by the breath of penal atmosphere.¹

¹ With apologies to Dr W.D. Bernard and the *Port Phillip Herald*, 20 December 1844.

The sentiments expressed by J.H. Croucher were not new. The assertion that colonists chose to migrate to South Australia because it was free of the convict taint, mirrored similar perceptions held by neighbouring colonists at Port Phillip. William Kerr, the Editor of the *Port Phillip Patriot* wrote in November 1844 that Australia Felix, a glorifying name often used to describe the district, had been 'hitherto uncontaminated' by convictism despite, he acknowledged, its 'contiguity to the penal settlements' of Van Diemen's Land.¹ His perception of the colony was not one shared by all social commentators of the time; in particular Dr W.D. Bernard. Bernard, whose authority on matters penal seems to have been based solely on the fact that he had once visited Pentonville Prison, presented a different assessment of the district in an article published in the rival *Port Phillip Herald* the following month. He noted that while Port Phillip itself was not a penal colony it was quite clearly touched by the 'breath of penal atmosphere', again a reference to its proximity to Van Diemen's Land. As such Bernard argued the colony could not claim to be truly 'pure' or free.² Despite the questionable semantic accuracy of Bernard's assessment of the status of Port Phillip, clearly neither he nor Kerr saw Bass Strait, the body of water that separated the colony from Van Diemen's Land, as a sufficiently effective barrier in keeping out Croucher's 'great moral calamity'.

Despite these protestations both South Australia and Port Phillip had been impacted on by convict transportation, albeit not totally in the same manner. Port Phillip was, and remained until 1851, a part of New South Wales. As such, between its initial settlement in 1835 and the ending of transportation to that colony in 1840, much of its Government workforce consisted of convicts, one such example being the survey parties that were responsible for opening up the district to free immigrants.³ Other convicts were brought by their masters overland from Sydney to help in the working of new properties and businesses in fledgling Melbourne. Earl Grey noted, in response to its push for the abolition of transportation, that the Port Phillip district owed its prosperity to convictism. He continued that its residents:

¹ I. Wynd, *The Pentonvillains* (Geelong, 1996), p. 5.

² *Port Phillip Herald*, 20 December 1844; Wynd, *The Pentonvillains*, p. 6.

³ See for example the list of convicts attached to the survey party of H.W.H. Smythe in July 1838 contained in M. Cannon & I. MacFarlane (eds), *Historical Records of Victoria, Volume 5* (Melbourne, 1988), p. 229.

...having therefore voluntarily located themselves in the vicinity of penal Colonies for the sake of advantages arising from that vicinity could not now with any show of reason or justice demand that Transportation...be abandoned to suit their convenience.⁴

The district had also been the destination for almost 1,700 convicts sent from Britain between 1844 and 1849. These were the so-called 'Pentonvillians', those convicts who accepted exile to the colony in return for sentence remissions. This policy had been introduced by Lord Stanley as part of his plan to ease the strain on the British prison system. Its initial intention had been that short sentence prisoners would serve the first eighteen months of their sentence in a British prison. Conditional upon their behaviour they were then to be sent to Van Diemen's Land where upon arrival they would receive a ticket of leave. Aware of the labour crisis that colony was experiencing and concerned about the negative impact that its convict society potentially could have on these 'reformed' prisoners, Stanley opted instead for Port Phillip as their destination. Despite protests from the colonists there, when the first shipment arrived in November 1844 the men were quickly taken up by employers desperate for labour.⁵

Unlike the Port Phillip district, South Australia was exempted from Stanley's exile scheme. Under the *South Australian Act* of 1834 it had been specifically guaranteed that it would not be subject to the reception of convicts. The Act in part states:

No person or persons convicted in any court of justice in Great Britain or Ireland or elsewhere shall at any time or under any circumstances be transported as a convict to any place within the limits here-in before described...⁶

⁴ Earl Grey Papers, GRE/B150/B1-9, 'Minutes of conversation with Mr King at the Colonial Office 1852', 3rd Earl, Colonial Papers Transportation, Item 7, pp. 14-15, held by Durham University, microfilmed copy, reel 80.

⁵ A.G.L. Shaw, *Convicts and the Colonies* (Melbourne, 1977), pp. 314-15.

⁶ British Statute, 5 William IV, (1834). The full title of the Act is 'An Act to empower His Majesty to erect South Australia into a British Province or Provinces and to provide for the Colonization and Government thereof'.

As Lyttleton had pointed out to both Cr  ucher and McLaren, this clause was only deemed applicable by the British government in relation to the transportation of convicts from Britain directly to the colony. This therefore excluded the Exiles but did not exclude expirees from New South Wales and Van Diemen's Land. Ironically it was the arrival of such men that greatly aided the infant colony and arguably ensured its success. They brought with them the knowledge of local conditions so vital to survival and so lacking in the emigrants fresh from Britain.⁷

In reality South Australia and Port Phillip had little hope of ever stopping the influx of expirees. Nor could they hope to prevent the arrival of a second kindred group, one that would equally be the source of friction. This group consisted of the escapees and absconders from both New South Wales and Van Diemen's Land and their potential as a source of social danger was officially recognised by suggestions that South Australia raise a militia to protect its citizenry.⁸ The provisions proved a totally inadequate deterrent. As early as June 1837 the *South Australian Gazette and Colonial Register* had warned its readers that it had 'reason to believe that several runaway convicts from New South Wales [had] already found their way to Adelaide'.⁹ The Governor, Sir John Hindmarsh, was cautioned that absconding sailors and convicts, over forty in number, were known to be in the new settlement.¹⁰ In 1840 his successor as Governor, Lieutenant Colonel George Gawler, noted that such were the problems of the land border that an army of ten thousand men could not stop ingressions from New South Wales, including those from its southern outpost Port Phillip.¹¹

The simplistic solution to escape was to capture and return the convicts. This solution was erroneously based on the premise that the colonial authorities had an absolute power to act in this capacity. As has been established, this was far from clear.¹² Thus the first obstacle to overcome was one of legislative authority, putting in place the necessary laws, regulations and orders that allowed for capture and return.

⁷ D. Pike, *Paradise of Dissent*, pp. 284-85.

⁸ Pike, *Paradise of Dissent*, p. 283.

⁹ *South Australian Gazette and Colonial Register*, 3 June 1837.

¹⁰ Pike, *Paradise of Dissent*, p. 285.

¹¹ Gawler to G.F. Angas, quoted in Pike, *Paradise of Dissent*, p. 287. Gawler was Governor from 1838 until his recall in 1841.

¹² See this thesis Chapter 4, pp. 79-95.

Absconders and escapees from New South Wales created problems for authorities in the Indian colonies as early as the 1790s. By the 1820s the islands of New Zealand, Fiji, Mauritius and Batavia, along with Valparaiso, China, and the Cape colony had joined India as a destination for escapees.¹³

Despite this it was not until the late 1820s that the authorities in Britain acted to tighten the legislation that dealt with the problem. Even then the issue was only addressed in a reactive manner. It came as the result of an escape by five convicts from Van Diemen's Land in 1829. The five had concealed themselves on board the *Lady Rowena* whilst it lay at anchor in the Tamar River in the colony's north. The ship was due to sail direct for Britain under the control of its captain Bowen Russell. In a sworn affidavit Russell declared that he was not aware of the absconders' presence on board until they had been at sea for around fifty days. With the aid of James Cole, a member of the crew, the men had been secreted in the ship's hold and he had then supplied the five with water and food.¹⁴

As a consequence of foul weather the *Lady Rowena* was forced to put into Rio de Janeiro for repairs and for the crew to recuperate. Upon arrival Russell handed the men over to Rear Admiral Thomas Baker who was stationed there as the Royal Navy's Commander in Chief on the South American coast.¹⁵ Baker then informed the acting British Consul General in Rio, A. J. Heatherley, of the events and asked that he take 'the necessary measures for their disposal'. Heatherley found himself in a legal bind regarding his authority over the five. He informed Baker:

I beg to say I have no instructions from HMs Government directing me how to dispose of Men brought from New South Wales under the circumstances of the five Men in question.¹⁶

¹³ For an example of New Zealand see *Hobart Town Gazette*, 9 September 1826, p. 1, for the Cape colony G.McC. Theal, *Records of the Cape Colony, Volume 18* (London, 1897-1905), pp. 493-94, and *Volume 19* pp. 299-303, and Mauritius see AOT, GO 33/95 pp. 675-728. For Valparaiso and Batavia see Appendix 9 in P. Chapman (ed.), *Historical Records of Australia (hereafter HRA), Series III, Volume VIII* (Melbourne, 2003), pp. 1260-63.

¹⁴ Affidavit of Russell in Chapman, *HRA, Series III, Volume VIII*, p. 720.

¹⁵ J.K. Laughton, 'Baker, Sir Thomas (1771?-1845)', rev. Andrew Lambert, *Oxford Dictionary of National Biography*, Oxford University Press, 2004.

¹⁶ Heatherley to Baker, in Chapman, *HRA, Series III, Volume VIII*, p. 720.

Heatherley also demonstrated a measure of confusion over the relationship between the two Australian colonies and the fact that they had been separate entities for four years. He noted that the men had stowed away at Launceston, in Van Diemen's Land, but in the same sentence was unsure of his authority to act in the circumstances and just how he was to 'dispose of Men brought from New South Wales'.

Despite the self questioning of his legal authority to deal with the matter, Heatherley acted in a classic bureaucratic manner. He decided to have the men forwarded on to Britain by the next available ship, this being HMS *Menai*, so that the problem could be dealt with there.¹⁷ Upon arrival in Portsmouth the five were transferred from the *Menai* to the hulk *Leviathan*. It was at this point that the legalities of the actions became questionable. Authorities were required to discharge one of the absconders, Joseph Passmore, as his initial period of transportation had expired during the course of events. This was not the case with the other four, and Alexander McKay, James Wilson, Thomas White and John Taylor were all ordered to be returned to Van Diemen's Land per the *Mary*, due to sail on 18 December 1829.¹⁸

Heatherley's dilemma highlights the nature of transportation within the British Empire. It was a bureaucratic structure the organic nature of which was constantly fed a diet of unforeseen circumstances. When events out of its normal sphere of operations occurred, there was often no pre existing response that could be implemented. Red tape often constricted what responses were possible, often to the advantage of the convict. The situation was further exacerbated by the time delays generated by the global nature of the empire. It resulted in policy on the run. Heatherley's confusion over the men's departure point, believing Van Diemen's Land to be one and the same with New South Wales, underlines how the two colonies were still indistinguishable to many in the colonial service.

The matter of the *Lady Rowena* and the resultant situation in Rio de Janeiro was brought to the attention of the Sir George Murray, then the Secretary of State for War

¹⁷ Letter from Heatherley to Baker, 29 July 1829, in Chapman, *HRA, Series III, Volume VIII*, pp. 719-20.

¹⁸ Letters from Phillips to Twiss, 18 November 1829, and Croker to Phillips, 24 September 1829, in Chapman, *HRA, Series III, Volume VIII*, pp. 718-19. Consultation of the convict records reveals that only McKay and White were retransported on the *Mary*. The fate of Wilson and Taylor has not been ascertained. See AOT, CON 31/26 for McKay, CON 31/43 for White.

and the Colonies. From the tone of his correspondence on the matter, to both Governor Darling in New South Wales and Governor Arthur in Van Diemen's Land, it is clear Murray was not impressed with the circumstance. To both he communicated his displeasure regarding the number of escapes from the two Australian colonies and instructed both to take steps to remedy the problem.¹⁹ Arthur advised Murray that the problem of absconders had dwelt heavily on his mind for some time but that he had drafted an Act that he hoped would address the issue. At a cursory glance its purpose would appear to be to prevent the harbouring of 'felons or other offenders' but its underlying design was to impede escape. In effect the new act made it a fineable offence to help in any way a convict's escape, be it in providing shelter, transport, provisions, or any other form of assistance.

Two aspects of the Act were of particular importance. Firstly the Act defined tickets of leave as not being a form of sentence remission. The practical application of this was that control of the convict remained with the Convict Department who could revoke the ticket at its discretion. This was unlike a conditional pardon that was only subject to revocation if the conditions were breached and thus only allowed limited control by the authorities. The other aspect of the Act was that it removed the time limitations that had allowed convicts such as Passmore to go free, despite having absconded. In simple terms it stopped the sentence clock at the time of absconding. Henceforth the elapsing of a sentence would not place the offender beyond the recrimination of the law. Absconders caught after their sentence had expired would now be treated:

...in every respect as he or she might have been dealt with and punished for and in respect of the same Offence before his or her term of Transportation had expired or been remitted and the same as if such term were still unexpired and unremitted.²⁰

¹⁹ Despatch from Murray to Arthur, 24 November 1829, in Chapman, *HRA, Series III, Volume VIII*, pp. 267-71, 718. See also note 817, p. 994.

²⁰ Van Diemen's Land Act 10 George IV 8, entitled 'An Act for amending the Laws to prevent the harbouring of felons or other offenders and to restrain their tippling and gambling' reprinted in Chapman, *HRA, Series III, Volume VIII*, pp. 267-71.

Upon his appointment in 1824 Arthur had made his thoughts on the status of Van Diemen's Land quite clear. In his opinion the island was 'solely and entirely a Penal Colony' and to his mind this was not altered by the fact that 'a large percentage of the inhabitants happened to be free immigrants'.²¹ Yet Arthur was forced to take into consideration these free settlers when drafting rules covering the absconding of prisoners. His immediate reaction to the instructions from Murray was to order his public officers to 'act upon the Port Regulations which relate to the searching of vessels'. From the evidence already presented in relation to New South Wales this clearly was not going to be a finite solution to the problem.

In ordering a more conscientious approach by port officials Arthur simply managed to exacerbate the situation and as a result alienate many of the free. Despite his belief that the island was a penal colony many of its inhabitants had thoughts to the contrary. Arthur noted in a despatch to Murray that:

...the merchants already complain of the inconvenience to which these necessary regulations expose them, and I apprehend it will be necessary to have recourse to a legal enactment to enable the port officer to enforce the measures...²²

There is little doubt the enforcement attracted opposition, especially from the now flourishing merchant class. Henry Melville, the editor of the *Colonial Times* and a vociferous opponent of Arthur's regime, referred to it as the 'harrassing [sic] and oppressive Harbours Act'.²³

Given this situation Arthur decided to tackle the problem in a different manner. If he was unable to deter the free settlers and ships captains from aiding and abetting the convicts, then the solution was to provide the ultimate deterrent to the absconders themselves. He wrote to Murray recommending that all absconders face the death penalty. Arthur noted that under section 22d of the Transportation Act then in place,

²¹ M.C.I. Levy, *Governor George Arthur, A Colonial Benevolent Despot* (Melbourne, 1953), p. 127.

²² Despatch Arthur to Murray, 21 May 1830, in Chapman, *HRA, Series III, Volume VIII*, pp. 267-71.

²³ H. Melville, *The History of the Island of Van Diemen's Land from the Year 1824 to 1835 Inclusive to which is added a few words on Prison Discipline* (London, 1835), pp. 93-94. Melville, a newspaper proprietor in Hobart, was a critic of Arthur's and had been imprisoned in November 1835 for contempt of court, having published a criticism of the verdict in a court case.

any convict found illegally at large in any part of the King's Dominions was liable to the punishment of death, yet such a measure had seldom been invoked.²⁴

A review of cases heard in Britain between 1814 and 1834 shows that of the 137 persons charged with being transports at large, not a single one was executed.²⁵ Certainly, few absconders reached Britain, even when escaping from the comparatively closer North American colonies when they were used by Britain. Only two of the 125 runaways advertised in North America from the five thousand transported from northern England between 1718 and 1776 were prosecuted in England for having returned from transportation.²⁶ One examination of the Old Bailey case list revealed that during the same period there were only 242 trials held there for returning from transportation. That figure represents only 2% of those sentenced to transportation in that same court.²⁷

During the period of transportation to North America, at least another 35 convicts were charged with 'infringing their terms of transportation', that is running away before being transported.²⁸ After transportation to the Australian colonies began in 1788 a similar pattern emerged with the vast majority of those charged with returning from transportation in fact being escapees from the hulks. Such was the minimal nature of the offence in Britain that no national plan was put in place to deal with the problem 'because the extent of the problem did not seem to justify it'.²⁹

Despite this Arthur felt that the power to execute should be expanded to include those found 'illegally at large...in the Dominions of any Foreign state, or at sea, attempting to escape from Transportation'.³⁰ This recommendation was eventually put to Viscount Goderich who had succeeded Murray by the time the despatch arrived in Britain. Goderich rejected the proposal on the grounds that 'the law of the Country

²⁴ Despatch from Arthur to Murray, 4 June 1830, in Chapman, *HRA, Series III, Volume IX*, p. 349. The relevant act was the British Act 5 George IV, c. 84.

²⁵ R. Hudson, *Hudson's English History* (London, 2005), p. 128.

²⁶ G. Morgan and P. Rushton, *Eighteenth Century Criminal Transportation: The Formation of the Criminal Atlantic* (Basingstoke, 2004), p. 116.

²⁷ G. Durston, 'Magwitch's Forbear: Returning from Transportation in Eighteenth Century London', *Australian Journal of Legal History*, 2005, Volume 9, p. 150.

²⁸ Morgan and Rushton, *Criminal Atlantic*, p. 116.

²⁹ Morgan and Rushton, *Criminal Atlantic*, p. 126.

³⁰ Despatch from Arthur to Murray, 4 June 1830, in Chapman, *HRA, Series III, Volume IX*, p. 349. See also note 53, p. 795.

within whose territory or flag he might be so found could not be superseded by a British statute'.³¹ Yet again the convict was to receive both the benefit and the protection of the law.

Colonial authorities, once given the legislative power to act then had to be able to invoke it. The problem that had to be overcome for this to happen was the crucial one of identifying who was free and who was bond. Initially this had not been a problem in the Australian colonies as the population was sufficiently few for all inhabitants to be known to the authorities or to each other. Absconders were therefore helped by the growth of the free population. When coupled with increased migration the identification of absconders and ex convicts became more difficult. There were simply more faces to look at in an age where the human memory was yet to be enhanced by photography. Identification therefore relied heavily on two factors, one being accurate records and the other an individual's ability to remember. In Van Diemen's Land, William Gunn, the sometime superintendent of the Convict Barracks, was widely regarded as having the capacity to recall every convict that had passed before him. Linus Miller, transported from Canada in 1839, later wrote that Gunn:

...has only to see a prisoner once, to be able to detect him in almost any disguise for years afterwards. It is said he can call every prisoner in Van Diemen's Land by name, when he meets them, tell the name of the ship they arrived, the year and day, their original sentences, additional sentences received in the colony &c., &c.: in short he never forgets...³²

While men like Gunn were the exception rather than the rule, the ability to remember was considered a necessity in dealing with the problem of absconders. As crime began to rise in South Australia its Police Commissioner, Major T.S. O'Halloran, defended his own situation by protesting that the withdrawal of police from along the Murray River had allowed 'undesirable characters' to enter the colony overland from New South Wales. To alleviate the problem O'Halloran asked Gawler for permission to

³¹ Despatch from Goderich to Arthur, 14 May 1831, in Chapman, *HRA, Series III, Volume IX*, note 347, p. 866.

³² Quoted in C. Pybus & H. Maxwell-Stewart, *American Citizens, British Slaves*, (Melbourne, 2002), p. 68.

establish a police station on the river at Morphett's Ferry. In particular he sought the services of an 'old and intelligent constable, well acquainted with runaway convicts and other notorious characters escaping from neighbouring colonies, in order to identify them'.

For his own reasons Gawler rejected the request but clearly O'Halloran did have men on staff with the capacity to identify absconders. In 1841 he was able to inform Gawler that eight men had been arrested as absconders and returned to New South Wales, while a further five men suspected of being absconders were returned in 1842. The following year O'Halloran was able to report to Gawler's replacement, Sir George Grey, that no absconders, only two men on suspicion of being so, had been arrested in the colony. His quarterly report noted with some satisfaction that the colony 'had nearly ceased to be a refuge for runaways'.³³

Certainly contemporary South Australian reports blamed much of the crime committed in the colony on former convicts although the evidence for this was slender. In 1841 Dr McShane, an emigrant agent in Adelaide, advised a House of Commons Select Committee that, in his opinion, around one hundred absconders had entered South Australia, presumably over the five years since settlement. McShane's evidence supports the claim that during the three year tenure of Gawler, as the Governor of South Australia, 'fewer than twenty' absconders and suspected absconders were returned to New South Wales and Van Diemen's Land. Ironically, given what was to follow, a number of these had absconded from Port Phillip, at that stage still under the authority of Sydney and Governor La Trobe.³⁴

The drop in the number of absconders to South Australia may have been as a result of O'Halloran's efficient staff or equally their inadequacy to identify who was who. A further scenario, and one more likely, is that numbers dropped as a result of the opening up of the Port Phillip district, a closer and therefore an easier and quicker destination for those escaping Van Diemen's Land and the settled districts of New South Wales. In 1836 George Stewart, the Police Magistrate at Campbelltown, was

³³ Pike, *Paradise of Dissent*, p. 290.

³⁴ Pike, *Paradise of Dissent*, p. 288.

sent by Governor Bourke to Port Phillip to investigate law and order there.³⁵ Stewart reported to Deas Thomson in Sydney that there were only two known absconders from Van Diemen's Land in the district, the pair having hidden away on the *Caledonia* when it had sailed from Launceston.³⁶

By the following year the situation had changed markedly. William Lonsdale, the newly appointed Police Magistrate and quasi superintendent for Port Phillip, wrote to Deas Thomson expressing his concern that the young colony had become the place of 'assemblage of persons who during the greater part of their lives have subjected themselves to the particular vigilance of the police they have lived under'.³⁷ As a result the concept that Gawler would reject for South Australia, of using constables 'well acquainted with runaway convicts and other notorious characters' to catch them, was to be trialled in the Port Phillip district.

In early 1837 the Van Diemen's Land authorities appointed two convict constables, John Allsworth and James Rogers, to work with the New South Wales constabulary. Their prime purpose was to operate in the Port Phillip district and to identify or detect runaways from the island colony. One was to be based at Williamstown, the other at Point Henry; these two places considered the major points of disembarkation for anyone travelling from Van Diemen's Land.³⁸

An unforeseen problem arose regarding Allsworth who was the holder of a conditional pardon. Questions were raised as to whether its conditions allowed him to be outside the colony of Van Diemen's Land. In a sense it was a similar question to that which had arisen in the Jane New case. In an effort to avoid a repeat of the outcome of that case, Deas Thomson sought to clarify Allsworth's status. He wrote to John Montagu who by this stage had been elevated to the position of Colonial Secretary of Van Diemen's Land. Thomson advised him that Bourke had decreed that the benefit of the conditional pardon held by Allsworth in Van Diemen's Land would be continued in

³⁵ This refers to Campbelltown in New South Wales, not to be confused with Campbell Town in Van Diemen's Land.

³⁶ Stewart to Thomson, 10 June 1836, in P. Jones (ed.), *Historical Records of Victoria, Foundation Series (Hereafter HRVFS), Volume I* (Melbourne, 1981), pp. 39-40.

³⁷ Lonsdale to Thomson, 13 March 1837, in Jones, *HRVFS, Volume I*, p. 118.

³⁸ Lonsdale to Thomson, 23 May 1837, in Jones, *HRVFS, Volume I*, p. 188. Williamstown served as the major port for the fledgling town of Melbourne, and Point Henry filled the same role for Geelong.

New South Wales. In October Allsworth resigned the post and as a consequence was promptly ordered by Lonsdale to return to Van Diemen's Land.³⁹

Rogers remained a constable until May 1838 when he too resigned. Lonsdale advised Mathew Forster that John Doyle, a military pensioner who had been employed in Van Diemen's Land as a constable, was to fill the vacant position. Forster rejected the appointment, presumably on the authority that Van Diemen's Land was paying the wages. He claimed that Doyle had little knowledge of the '*persons of convicts*'. Rogers was eventually replaced by the aptly named Thomas Clues.⁴⁰

The ability to identify was not always a prerequisite in the successful arrest of absconders. On occasion the lack of an ability to recognise provided the authorities with an advantage. The subtle shift in the absconder's status from convict to 'stranger' could sometimes prove to be their undoing. One such occasion occurred in October 1849 when Martin Flinn was advised that six suspicious looking men had come ashore in a whaleboat on the Gippsland coast of Bass Strait. This landing took place about a mile from Port Albert, the major port in the area, where Flinn was the Chief Constable. It was immediately suspected that the men were absconders from Van Diemen's Land, despite there being no description of the six and no advice that such a group had absconded from that place. Flinn ordered the roads out of the area closed off and set out in pursuit, following a trail of sightings of a group of men unknown in the district. By the fifteenth of the month all six had been taken into custody and brought to Melbourne for trial as prisoners of the crown illegally at large.⁴¹ Such methods of detection clearly worked in areas of small population, but by the 1830s and 1840s were unsuited to the larger urban area of Sydney, and the rapidly growing towns of Melbourne and Adelaide.

Flinn's action in arresting the six on suspicion of being absconders highlights another issue authorities were required to address. Whilst colonial laws were in place that allowed for apprehension merely on suspicion of being runaways, the common law principle of *habeas corpus* meant that a charge then had to be laid to allow further

³⁹ Lonsdale to Forster, 7 October 1837, in Jones, *HRVFS, Volume I*, p. 189.

⁴⁰ Forster to Lonsdale, 10 July 1838, in Jones, *HRVFS, Volume I*, pp. 192-93.

⁴¹ *Port Phillip Gazette*, 18 October 1849, p. 2, & 20 October 1849, p. 2.

detention.⁴² To achieve this, authorities needed to clearly establish the status of individuals as being either bond or free. Only then could the correct charges be laid and a successful prosecution achieved. Identification however was not always as straightforward as might be expected.

In September 1830 three men by the names of England, Mackay and Coombs were arrested in the Swan River colony on suspicion of being absconders. Despite their claims that they were free men, the colony's authorities persisted with the stance that they were prisoners of the crown illegally at large. Unable, or unwilling, to prove otherwise, Captain Stirling the colony's Lieutenant Governor, ordered the three be sent to Sydney despite the assumption that they had escaped from Van Diemen's Land.⁴³

Upon arrival the three were placed in irons on board the hulk *Phoenix* and after five or six days they were examined by the Superintendent of Convicts, Frederick Hely, at Hyde Park Barracks. Despite protestations that they were free men, and offering to produce witnesses to that effect, the three remained in detention until released by a Supreme Court writ of *habeas corpus*. They were then promptly arrested by the Sheriff on a warrant issued by Hely and charged with being prisoners of the crown illegally at large. A second writ of *habeas corpus* was again issued and the three were freed once more.

England and Mackay then successfully sued both the New South Wales and Western Australian authorities for false imprisonment.⁴⁴ At England's hearing, Justice Dowling raised the issue of identification. In summing up he noted that 'the detention of these men has not been legally justified; it has not been made out that they were convicts', and further commenting that 'it had not been made out that [England] was a runaway convict'. Despite the fact that the Act under which Hely had charged the men with being illegally at large, placed the onus of proof on the accused to establish

⁴² For example, in New South Wales the Act 11 George IV, Number 10, and in Van Diemen's Land the Act 6 William IV, Number 2.

⁴³ Mackay v Sandilands, Supreme Court of New South Wales (hereafter SCNSW), reported in *Sydney Gazette*, 31 March 1831.

⁴⁴ According to John West, Mackay received £200 compensation. See J. West, *The History of Tasmania* (Sydney, 1981), p. 433.

their free status, Dowling ruled that 'by presumption of law, every man, even in this country, is supposed to be free, until the contrary be proved'.⁴⁵

When Mackay appeared before the full bench, Chief Justice Forbes reinforced the stance taken by Dowling, stating that 'the mere fact of these persons coming from Swan River in irons could not be sufficient to incarcerate them' as convicts. He noted that even if a man or woman arrived in the colony as a convict there were still processes that established their status as such, these being the indent describing the convict, the crime they had committed and the term of servitude.⁴⁶ The cases also established the reach of the legal authority each colony possessed. Forbes questioned the jurisdiction of the magistracy in New South Wales to deal with offences committed in Van Diemen's Land, in this instance absconding. He stated 'if the Magistrates of this colony have jurisdiction over runaways from Van Diemen's Land, they have also jurisdiction over every offence committed there'.

Clearly this was not the case. Forbes did draw comparisons with the Jane New case however, but drew the important distinction that New was able to be dealt with because she had admitted to being a prisoner still under sentence in Van Diemen's Land. In the case of England, Mackay and Coombs none had made that admission.⁴⁷ This somewhat pedantic approach was not new. In the 1700s returnees from the American colonies could not be charged with being 'at large' if they were only identified as such whilst in custody. In effect they had to be arrested and charged with the offence literally whilst at large; a distinction the Old Bailey was strict in enforcing.⁴⁸

Twenty years later such problems still existed. In July 1852 Lonsdale, by then elevated to the position of Victorian Colonial Secretary wrote to Henry Chapman, his counterpart in Van Diemen's Land, in relation to seven men then held in the Melbourne lockup. The seven, named as James Howard, John Malloy, Charles Jenkins, William Rose, William George Mathews, George Brown and Samuel Turner

⁴⁵ England v McQuoid and Murray, SCNSW, reported in *Australian*, 25 March 1831.

⁴⁶ Mackay v McQuoid and Murray, SCNSW, reported in *Australian*, 12 February 1831.

⁴⁷ Mackay v McQuoid and Murray, SCNSW, reported in *Australian*, 12 February 1831.

⁴⁸ Durston, 'Magwitch's Forbearers', p. 154. See also similar points of law raised by Plaistowe on behalf of John May on p. 173 of this thesis.

had been arrested as runaways in Victoria. This fact had already been conveyed to the office of the Comptroller General of Convicts in Hobart who had responded that none of the men were listed with that department as runaways. Lonsdale's concern was that the men had been personally identified as such. The lockup also held a man wanted in Van Diemen's Land to answer a charge of murder. A Hobart policeman, sent to Melbourne to escort him back, had seen the men when at the lockup and identified them as absconders. Confused by the conflicting claims as to their true status Lonsdale chose to seek clarification from Chapman.⁴⁹

Four of the men, Rose, Mathews, Brown and Turner, had been arrested near Western Port in the Gippsland region having supposedly been involved in a robbery of a Mr Bennison. Unfortunately for the police Bennison had gone away following the robbery and as a result no identification of the accused had been possible. The other three men, Howard, Malloy and Jenkins, had been arrested in Port Albert after failing to produce satisfactory evidence of their civil status. The three had landed from a boat that was found to be fully provisioned and complete with sails, oars and charts. When confronted by a constable they had been unable to produce a certificate of freedom or discharge papers from the military. Further suspicion was raised by the fact that they had in their possession a number of blankets marked with a broad arrow and the initials BO, the Board of Ordinance, and thus an indication that they were government property.⁵⁰ The local Harbour Master, David Fermaner, dismissed the possibility that they were shipwrecked, as he was unaware of any local wrecks. He further offered his professional opinion that the three were not seamen.⁵¹

Descriptions of all seven men were sent to the Comptroller General's Department in Hobart in late June. The response to this inquiry for identification and confirmation was less than helpful. The Victorian authorities were advised that attempts had been made to identify the men but given the probability that the men were using false names, finding them in the records was difficult. It clearly was possible for in the Swan River matter both England and Mackay had been found to be using aliases.

⁴⁹ AOT, CSO 24/200/7453, letter from Lonsdale to Chapman, 2 July 1852, p. 142.

⁵⁰ T. Dunning & H. Maxwell-Stewart, 'Mutiny at Deloraine: Ganging and Convict Resistance in 1840s Van Diemen's Land', *Labour History*, May 2002, Number 82, p. 47 note 32; Susan Hood, Port Arthur Historic Site Management Authority, personal communication, 13 December 2007.

⁵¹ AOT, CSO 24/200/7453, Papers relating to suspected runaways held in Melbourne.

England, whilst transported under that name, was arrested under the guise of being David Gorbit.⁵² Mackay was the reverse, revealed as having been convicted and transported as Archibald Bensurilla, although his real name was John Mackay. Hely under cross examination told the court that this discovery had been made by comparing Mackay with the physical description of Bensurilla contained in a list of runaways from Van Diemen's Land published in June 1828.⁵³

The process of identification was based on the detailed system of description lists, the 'Black Books', which Arthur had convict clerk Edward Cook draw up in 1827. Cook's work was based heavily on information collected at the time of a convict's arrival in the colony. Preceding disembarkation each convict was interviewed individually and details of his or her background were gleaned and duly noted in the registers. William Gates, transported from Canada with Linus Miller wrote a detailed description of the process:

Before leaving the boat, we were visited by what is termed the board of health. Mr Gunn, the Chief Superintendent, with two or three clerks, were in the cabin. Before them we were brought separately, to undergo a most searching examination. Questions were asked, and answers given – as to our names, ages, trades, nativity, religion, whether married, if so, where lived the wife – what the number of children – their sexes and ages – whether our parents were alive – their ages, religion, residence – place of nativity – amount of education – whether we could read and write ourselves – where arrested – where, and when, and for what tried – how long sentenced – when we left Canada – what were our numbers – and what scars on our persons.⁵⁴

Much of this information had been taken down prior to departure from Britain and the questioning on arrival was thus able to reveal untruths and inaccuracies. The convict was not unaware of just what information was already in the hands of the interviewer.

⁵² England v McQuoid and Murray, SCNSW, reported in *Australian*, 25 March 1831.

⁵³ Mackay v Sandilands, SCNSW, reported in the *Sydney Gazette*, 31 March 1831.

⁵⁴ W. Gates, *Recollections of Life in Van Diemen's Land* (Sydney, 1961), p. 39.

As a consequence not only were the 'facts' able to be checked but often new information gleaned.⁵⁵ After the details of the convict's character had been drawn out, a second examination was made, this time to obtain a physical description. Miller also explained this process.

At the close of this examination, we were taken into another room, stripped of our clothes, and a minute description of every scar, blemish, or mole on our persons, placed on record. There was another officer among the rest, who eyed us most searchingly, and who also put upon record a faithful description of our features, color of hair, eye-brows, eyes, number of teeth lost, appearance of nose, ears, chin, mouth, &c., together with our height and weight. By this method, and to which every person is forced to submit, such a minute description is obtained, that it is utterly hopeless for a prisoner to think of escaping from the infernal clutches of those petty tyrants, that hold such detestable sway in that prison land.⁵⁶

The dual process was not unique to Van Diemen's Land but was also followed in New South Wales.⁵⁷ It also formed the basis for later criminal records in all Australian colonies, including the Victorian prison records, where the physical descriptions were to be augmented by photography.

When a convict was reported as having absconded these records were used to compose a description. In Van Diemen's Land the practice was for this to be published in the *Hobart Town Gazette*. This description was usually published just once but on occasion it was reissued. Copies of the *Gazettes* were then circulated to all relevant officials including local police offices and Magistrates. Every six months the details and descriptions of those still at large were consolidated into what was known as the Half Yearly List and again circulated. In the case of the seven men in Victoria, officials had checked the *Gazettes* from 1 January 1852 but had not checked the Half Yearly lists of runaways. The officials advised that given these half yearly

⁵⁵ J. Backhouse, *A Narrative of a Visit to the Australian Colonies* (London, 1843), p. 18.

⁵⁶ Gates, *Recollections of Life*, p. 40.

⁵⁷ F.X. Prieur, *Notes of a Convict of 1838* (Sydney, 1949), p. 81.

lists were forwarded to Victoria they assumed the authorities there had already checked them.⁵⁸ William Nairn, Assistant Comptroller in the Convict Department, responded to the inquiries regarding both groups of men by categorically advising Lonsdale 'I am to acquaint you that the records of this office furnish no evidence of any of the men referred to being prisoners of the Crown illegally at large'.⁵⁹

Lonsdale was not satisfied with the way the matter had been dealt with and continued to press the Van Diemen's Land authorities for an explanation. Intercolonial parochialism quickly surfaced. Attorney General Hamilton denied any failings by the officials in Hobart, claiming that the descriptions of the men provided by the Victorians had been so totally inadequate as to make identification unlikely. He reiterated the claims that false names had also contributed to the difficulties. Chapman also advised Lonsdale that the fault lay squarely with the Victorian authorities who had failed to provide a decent description of the arrested men. It was a barely disguised critique of the Victorian professionalism, claiming that the information provided contained 'details as vague and indefinite as the descriptions in a French passport in times of peace'. They had not provided 'all unusual marks on the bodies of the men such as scars, initial letters, and other peculiarities'. Chapman then went on to claim that if such information had been provided three of the men, probably four, and possibly all would have been identified. He advised Lonsdale that if only one of the men had been identified it would have led to the identification of the rest.⁶⁰

Given that the system of books would eventually amount to over 74,000 entries, finding an individual to extract their description was itself problematic.⁶¹ Initially the books were indexed by assigning each convict a unique identifier based on the first initial of their surname coupled to sequential numbers, for example 1A, 2A, 1B, 2B, and so on. When coupled with the name of the ship on which they arrived in the colony and the use of their surname it created a unique reference.⁶² The key remained the individual's name however and this highlights why aliases were so prevalent.

⁵⁸ AOT, CSO 24/200/7453, p. 159.

⁵⁹ AOT, CSO 24/200/7453, p. 166.

⁶⁰ AOT, CSO 24/200/7453, p. 166.

⁶¹ P.R. Eldershaw, *Guide to the Public Records of Tasmania: Section Three, Convict Department* (Hobart, 2003), p. 60.

⁶² This system was changed following the abolition of assignment.

The system suffered from the age in which it was created. A change in a convict's name could result, not from a deliberate act of deceit, but from a simple linguistic error. While written records have no accent, in an age where the written record of names was dominated by phonetic spelling, homonymic variation could occur because of dialectic differences.⁶³ Written records were also subject to the literacy levels of the writer. In the journals of G.A. Robinson, written in Van Diemen's Land in the 1830s, the convict servant Catherine Henrys is also recorded as Kathleen Henricks and Kathleen Hendriss. Another convict servant, William Henley, is also variously recorded under the surnames Henty, Hurly, Hurley and Hailey.⁶⁴ In terms of intercolonial communication, what was heard then written down in the interview process at one end, may well not be what has been heard and written down in the process at the other.

Lonsdale's inquiry went to the heart of the problem that convicts, ex-convicts and absconders were now causing for authorities in all the Australian colonies. It had become increasingly difficult to identify individuals and their status, especially if they wished to conceal their true identity. In this instance all seven men in the Melbourne lockup were using aliases and this fact does support both Hamilton and Chapman's argument that this had made identification difficult. Four of the men in Rose, Mathews, Brown and Turner had only absconded in the three months prior to their arrest in Victoria, yet if the system put in place by Arthur was as efficient as believed, their identification should have been relatively straightforward. The *Hobart Town Gazette* would have taken little searching, especially given Turner was gazetted as absconding in June, only a matter of weeks before the first inquiry. Molloy was a slightly different case, having run the previous year in January. Significantly, neither Howard nor Jenkins had been reported to the Comptroller General's office as

⁶³ I. Winchester, 'What Every Historian Needs to Know About Record Linkage for the Microcomputer Era', *Historical Methods*, Volume 25, Number 4, Fall 1992, p. 151. It was a problem not unique to the convict records. One survey of population data in the United States of America shows that between 1850 and 1880 only 78% of men and 62% of women were recorded under the exact same name from one census to the next. See C. Pouyez, R. Roy and F. Martin, 'The Linkage of Census Name Data: Problems and Procedures', *Journal of Interdisciplinary History*, Volume XVI:1, Summer, 1983, p. 132.

⁶⁴ 2353H William Hurley was transported on the *Moffat* in 1838 to Van Diemen's Land – see *AOT*, CON 31/21. For the various spellings of his name see N.J.B. Plomley (ed.), *Weep in Silence: A History of the Flinders Island Aboriginal Settlement*, (Hobart, 1987), pp. 760, 764, 986. For 1263H Catherine Henrys, per *Arab*, 1836 to Van Diemen's Land, *AOT*, CON 40/6, see the same publication, p. 469.

absconders. Only in their case does Nairn's assertion of the men being unknown as absconders ring true.⁶⁵

One method of facilitating the arrest of absconders was by greater communication between the relevant authorities. The two convict departments in Sydney and Hobart had corresponded, regularly sending each other their *Government Gazettes*, containing details of absconders and their physical descriptions. Hely had stated that he was in receipt of the *Gazettes* from Hobart in 1831. For a reason that remains unknown, by the late 1830s this aspect of the system had broken down. Van Diemen's Land claimed they had been sending the *Gazettes* but that New South Wales had not reciprocated. As a consequence authorities in Hobart Town stopped sending them.⁶⁶ In 1839 the Colonial Secretary's Office in Sydney requested its Van Diemonian counterpart to once again resume sending copies, a request that was agreed to, 'whenever possible'.⁶⁷ It would seem that the two saw themselves as independent entities, rather than as parts of one all inclusive system.

In April 1852 Lonsdale had written to Chapman asking if the lists of absconders published each week in the *Hobart Town Gazette* was the sum total of all prisoners missing. The letter was referred to John Hampton in his capacity as the Comptroller General of Convicts and he advised Chapman that the list was only for those absconding that particular week. Hampton advised that the Half Yearly lists consolidated all those missing into one document. It also included ticket of leave holders who failed to muster when required. Copies were then sent to the police authorities in each of the other Australian colonies. In response to this La Trobe wrote asking if the Victorian authorities could be sent six copies of the list so that it could be more widely distributed.⁶⁸

⁶⁵ The actual identity of the seven were James Howard real name James Pinch, per the *John Calvin*, 1848, Molloy was John Clarke, *Maria*, 1849, Jenkins was George Anderson, *Pestonjee Bomanjee*, 1845, Rose was Charles Filer, *Duncan*, 1841, Mathews was William Blacker, *Pestonjee Bomanjee*, 1847, Brown was Henry Jones, *Sir Robert Peel*, 1844 and Turner was Thomas Dudley, *Anna Maria*, 1848. Turner, that is Dudley, is also listed under the alias of Henry Hatton. All had been transported to Van Diemen's Land.

⁶⁶ AOT, CSO 5/83/1811. Correspondence between New South Wales and Van Diemen's Land regarding absconders, pp. 107-09.

⁶⁷ AOT, CSO 5/191/4642, p. 304.

⁶⁸ AOT, CSO 24/195/7194, Correspondence between the Colonial Secretaries of Victoria and Van Diemen's Land regarding lists of absconders, pp. 224-29.

Having the legislative authority to act and the ability to positively identify absconders as such, still did not guarantee that action would be taken. Certainly instances such as that of Mackay and England made colonial authorities wary of making mistakes and thus, at times, reticent to act. In 1837 the New South Wales revenue cutter *Prince George* was sent to search in Bass Strait for four convicts who had escaped from Flinders Island. The cutter's commander, Captain Roach, spotted smoke rising on Curtis Island and went to investigate. Roach sent Chief Officer Scott ashore where he came across a man and woman and their three children. The two adults claimed to have been left on the island to collect sealskins for sealers by the name of Wright and Long operating out of Sydney. Further questioning revealed they had been left on the island in 1835 with nine months supply of food. It had proven a dour existence, for the couple claimed they had buried two children whilst on the island and with supplies gone, had lived on a diet consisting heavily of seabirds and penguins. To support their claims Scott asked to see the sealskins the pair had collected but despite the assertion of having been there for two years the man was able to produce only nine skins as evidence of his story.

The man was believed by the search party to be a convict named John Lee, a free sealer but who was suspected of being involved in a robbery of the Supply Mill in the Tamar Valley in Van Diemen's Land. His female companion was believed to be an absconder from Hobart. Roach decided to leave the couple in situ but reported details of the matter to Captain Matthew Friend, the Port Officer for George Town on the north coast of Van Diemen's Land. Friend offered a reward to any ship's crew that called at the island and brought the pair to George Town, provided they turned out to be runaways. The Crown Solicitor stepped in and advised Friend that the 'capturing' of runaways in this manner was an illegal act. Friend was informed that even if the two were subsequently convicted this may not release the authorities from the illegality of the act.⁶⁹

The problems colonial authorities faced with identification of status were compounded by the fact that they were dealing not merely with absconders but also with expirees and pass holders. The movement of pass holders between colonies was

⁶⁹ AOT, CSO 5/38/787, pp. 45-60.

also a source of concern, compounded by the fact that the conditions attached to them were subject to variation. John Allsworth's conditional pardon, for example, had been granted under a set of criteria that required the holder to reside in the colony of issue. The power to pardon had rested with the Governors since Phillip's time and they were commonly granted to those who had displayed evidence of good behaviour and reformation of character. If such evidence continued the conditional pardon could be made absolute but it was not a privilege extended to those convicted of heinous crimes, for example, treason. As a consequence of this process it was argued that many of those convicts holding pardons were 'amongst the best conducted and well disposed of the population' by comparison with many expirees who could become free, despite showing no such reform.

This system was changed in October 1843 when the British Government passed legislation that removed from the Governors the power to grant absolute pardons.⁷⁰ They retained the power to grant conditional pardons but only to convicts that had served a minimum of half their sentence. In rare instances it was possible for this condition to be waived, but only if the Governors of both New South Wales and Van Diemen's Land believed the situation warranted it, on the grounds of public safety concerns for example. This condition did not apply to the Crown which retained the prerogative to pardon 'unfettered'.⁷¹

Colonial authorities could now only recommend convicts for pardons which then had to be endorsed by the Crown. It was claimed that between November 1843 and December 1844 a total of 300 Van Diemen's Land convicts were recommended for a pardon but not one was granted by the British Government. As a consequence the practice of applying for absolute pardons fell somewhat into disuse and was replaced by conditional pardons that the Governor then endorsed as being valid in other Australian colonies.⁷²

In May 1851 Superintendent La Trobe wrote to the Colonial Secretary in Hobart in relation to three convicts that had arrived at Port Phillip with conditional pardons. The

⁷⁰ This was under the British Act 6 Victoria c7.

⁷¹ Stanley to Franklin, 25 November 1842, in F. Watson (ed.), *Historical Records of Australia, Series I, Volume XXII* (Sydney, 1925), p. 522.

⁷² *Launceston Examiner*, 17 October 1854, pp. 2-3.

three were William Crane, Ellen Jackson and Robert Smith. Crane had originally been convicted in Ireland in 1830 and transported to New South Wales. Having served out his time he was again convicted in Maitland, in August 1842, of burglary and sentenced to ten years transportation, first to Norfolk Island and then in Van Diemen's Land. He had received a conditional pardon in October 1850.⁷³

La Trobe argued that under the terms of his conviction he was forbidden to return to that colony until his original sentence had expired. La Trobe noted that Port Phillip was still a part of New South Wales but that even if it was 'erected, as proposed, into a distinct colony, in [Crane's] and in all similar cases, it might be held to be against the spirit, if not the strict letter, of the Act of Parliament' for him to return. La Trobe suggested that in all future cases where a convict transported from New South Wales was issued with a pardon it needed to be made quite clear to them that emigrating to the soon to be colony of Victoria was strictly forbidden.⁷⁴

The case of Jackson and Smith threw up a different set of issues. Both had been transported from Britain and La Trobe questioned the authority of the Van Diemen's Land Executive to grant them a pardon that allowed them to reside in Port Phillip. His argument was that such permission would not be questioned if it had been granted in Britain and the convicts had arrived in the colonies with it. La Trobe also noted that the pair had failed to report to the Police Magistrate's Office and collect 'the instruments' of their pardons that had been forwarded there from Hobart. This, he noted, was a breach of their conditions and, more significantly in La Trobe's eyes, rendered them as convicts illegally at large.⁷⁵

The matter was drawn to the attention of Eardley Wilmot's successor as Governor, Sir William Denison. He referred the matter of the letter and its contents to his senior law officers but received conflicting advice. The Attorney General, Hamilton, saw the letter as raising two issues, not one. The first of these revolved around whether Crane had been granted a pardon with the expressed condition that he not return to New

⁷³ William Crane, per *Lady Franklin*, 1844, originally to New South Wales per *Hercules*, 1830. He received his Certificate of Freedom on 16 October 1852.

⁷⁴ AOT, CSO 24/279/6102, letter from La Trobe to Bicheno, 22 May 1851, pp. 87-98. The Colony of Victoria was created in 1851.

⁷⁵ AOT, CSO 24/279/6102, letter from La Trobe to Bicheno, 22 May 1851, pp. 87-98.

South Wales or the Port Philip district.⁷⁶ If this was the case then Crane had clearly breached the condition and the pardon would be subject to forfeit. The second issue concerned the power of the Police Department to stop Crane, or indeed any other convict holding a pass, from boarding any vessel bound for New South Wales.⁷⁷

In fact neither Crane, nor Jackson, nor Smith had possessed their pardons at the time they had left Hobart and so could not have produced them if asked upon boarding. Once the three had been gazetted as pardoned they had booked and paid for their fares to Melbourne. When they subsequently presented themselves to collect the relevant paperwork it could not be issued because Denison, who was required to sign the pardons, was absent from Hobart. The three complained that if they could not take up their fares it would result in a financial impost as the tickets were non refundable. Confronted with this situation, and aware of the implications of any accusation of false imprisonment, the Comptroller General's department had agreed to forward the paperwork to Port Phillip for collection.⁷⁸ It was the failure of Crane, Jackson and Smith to collect the documentation that had drawn them to the attention of the authorities.

The advice from Alban Stonor, Denison's Solicitor General, in part disagreed with that of Hamilton's. In the case of Crane, Hamilton had argued that to be enforceable the pardon had to specifically state that Crane had been forbidden from entering New South Wales as a condition of it being granted. Stonor did not believe that Port Phillip could be a separate geographical entity that had been fully expunged from the territory of New South Wales and yet consider itself a part of that colony for the purposes of denying a civil right to a person. This was especially so if that denial would result in a person's incarceration. He thus argued that Hamilton's interpretation would be invalid. Crane or any other individual with such a condition attached to their pardon could only be arrested in New South Wales, not in the soon to be Victoria. For that to be possible Victoria would need to pass a law to that effect, but this, Stonor argued, could not be applied retrospectively.

⁷⁶ *AOT*, CSO 24/279/6102, letter from Hamilton to Denison, 14 June 1851, p. 99.

⁷⁷ *AOT*, CSO 24/279/6102, letter from Hamilton to Denison, 14 June 1851, p. 100.

⁷⁸ *AOT*, CSO 24/279/6102, note from Comptroller General's Department, pp. 101-05.

Stonor agreed with Hamilton regarding the power of the Police Department to detain those convicts holding pardons and attempting to leave Van Diemen's Land. In his opinion they had no legal authority to prevent *any* convicts holding pardons from boarding any vessel, no matter what their destination. It was his belief that any conditions restricting where a pardon holder could go only came into effect at the time of them landing in such a place, not upon boarding the vessel. Any holder of a pardon he argued 'is entitled to all the privileges of a free subject'.⁷⁹ Denison also sought the advice of Joseph Milligan, at one time the Officer in Charge of the Department of Convict Discipline, who disagreed with Stonor on the first point, but agreed with his argument over police powers.⁸⁰ Both men made note that it was accepted fact that any pardon granted was required to be a benefit to its recipient, rather than a disadvantage to them.⁸¹

Pardons could also prove problematic for those charged with issuing them. In August 1848 Henry Bourke went to the Police Office in Launceston to collect his conditional pardon. To establish the fact that Bourke was who he claimed to be, and was thus entitled to the paperwork, he was asked a series of questions by Mr Rolls, the Police Clerk. One of these was in regard to his original crime in Britain for which he had been sentenced to transportation. Bourke refused to answer and so, in turn, was refused the paperwork. The matter was brought before Ronald Campbell Gunn, a magistrate in Launceston and brother of William Gunn, who pronounced from the bench that the question from Rolls was necessary, as the clerk needed to be certain that the paperwork was going to the correct person.

The matter was passed to Bicheno for comment. He supported the decision made, noting that the question by Rolls seemed justified in the circumstances. The matter ended with Denison who referred it to William Nairn to find out the correct procedure. Nairn's response was that the question was one never asked of an expirée. Bicheno then wrote to Gunn advising him that the question did not need asking as the information did not appear on the pardon form. He then wrote to Bourke advising him that Rolls had been wrong to ask the question, but was obliged to establish and

⁷⁹ AOT, CSO 24/279/6102, letter from Solicitor General to Denison, pp. 110-18.

⁸⁰ AOT, CSO 24/279/6102, letter from Milligan to Denison, p. 119.

⁸¹ AOT, CSO 24/279/6102, notes by Milligan and Stoner on Hamilton's letter, p. 122.

confirm the identity of the individual receiving the paperwork. In this instance Rolls had overstepped the bounds of his authority. Bourke was advised that his pardon could be collected upon payment of the usual fee of 5/6d.⁸²

In dealing with escapees and absconders, colonial authorities had to be able to identify who they were looking for, and where they were. They also required the legal authority to act. Having those necessities in place left one other issue to be addressed. The authorities required a *desire* to act. In 1849 four men, Riley, Rogers, Lynch and one other, were accused of committing a murder at Port Sorell on the mid north coast of Van Diemen's Land. The four had then made good their escape by means of a whaleboat, which they used to board an American vessel off the coast. This vessel then called in to South Australia where the four disembarked. The authorities sent a party of constables in pursuit and the four were eventually captured and returned to Van Diemen's Land to stand trial. The incident raised concerns for Denison who wrote to Earl Grey as the Secretary of State for the Colonies about the matter.

Denison's major concern was with the costs incurred by the pursuit and return of the four men, all of whom were Imperial convicts, that is they had been convicted in Britain, not in the colonies. Maintenance of Imperial convicts had become the responsibility of the Van Diemen's Land authorities in 1846 under an agreement with the British Government. In return the British had agreed to pay two thirds of the annual costs of the Police and Gaols budget. In fact, however, the maximum payment of £25,000 per annum provided to the Van Diemen's Land authorities fell short of the agreed sum. Denison's concern was that the cost of pursuit in this instance had totalled £450/10/5 a significant figure when given the size of the annual payment.⁸³

Denison had split the cost into two, the first amount of £234/13/11 being the costs incurred in Van Diemen's Land, but not reflective of the costs incurred by having '60 or 70' police scour the colony for upwards of a month in pursuit. The second sum of £215/16/6 was incurred by pursuit in South Australia, including a reimbursement of

⁸² AOT, CSO 24/59/2144, letter of complaint from Bourke to Bicheno, 25 August 1848.

⁸³ S. Petrow, 'Claims of the Colony: Tasmania's Dispute with Britain over the Port Arthur Penal Establishment, 1856-1877', *Tasmanian Historical Research Association*, Volume 44, Number 4, p. 231. I. Brand, *The Convict Probation System: Van Diemen's Land 1839-1854* (Hobart, 1990), p. 32 gives a figure of £24,000.

their police costs, accommodation and transport. These costs, he informed Grey, would normally be split equally between the Colonial and the Commissariat chests but because of the per capita payment he had debited it all against the colony. Denison argued that it was unfair to burden the colony with expenses that were incurred outside of the colony, such as those in South Australia, especially given that they were incurred 'directly adverse to [Van Diemen's Land's] interests'.

Denison believed that Britain should pay these latter costs and asked Grey to reimburse Van Diemen's Land the £215 expended in South Australia. He then took his argument a step further, informing Grey that:

It is evident that as far as the Colony is concerned it would be in its interest that such offenders as these should not be brought back here to recommence their career of Crime, but should be allowed to escape.

Bearing in mind that the four had committed murder it was a remarkable stance to take.⁸⁴

The arguments over costs also occurred between colonies. In August 1852 a list of property found on arrested absconders in Victoria was forwarded to Hobart. John Howard had been found with £6/17/-, a gold ring and a silver watch, while Samuel Turner was in possession of £7/10/6 and also had a silver watch. Both pale into insignificance when compared with another prisoner returned as part of the same shipment. John Smith, yet another found to be operating under an alias, in this instance as Daniel Fagan, was found to have on him the considerable sum of £552/-/-. This represented over ten years wages for a labourer, yet Smith had only arrived in Van Diemen's Land in 1843, and would then have spent 18 months in a probation gang where he was not paid a wage. Smith was also in possession of a gold watch, a

⁸⁴ AOT, GO 33/67, despatch from Denison to Grey, 20 April 1849, pp. 288-92. A breakdown of the costs appears on page 294.

gold chain and a gold ring, and was the owner of a horse complete with saddle and bridle.⁸⁵

In response to the list, Chapman corresponded with Lonsdale and asked for the property to be forwarded to Hobart where it would be kept until the relevant owner's sentence was completed. Lonsdale's response was one of acquiescence. He informed Chapman that the Victorian government was quite happy to return the property, provided 'all expenses incurred subsequent to the apprehension' of the men were paid by the Van Diemen's Land authorities. In November Hamilton noted that the expenses 'occasioned by the transmission of Runaway Convicts from Victoria to Van Diemen's Land' would be paid by the island colony.⁸⁶

In October 1852 there was further correspondence regarding the costs incurred in returning twelve prisoners to Van Diemen's Land. In this instance one of them, a man called Burns, was a free man charged with murder. Denison noted 'of course the Convict Department does not pay for free men therefore the expense of Burns received from Victoria must be met by this colony'. The cost in this instance was £9/7/-.⁸⁷

By the 1840s circumstances had created far greater opportunities for absconders than had existed at the time of European settlement in 1788. New South Wales was no longer as isolated as it had been as the separate colonies of Van Diemen's Land and South Australia now abutted it. Moreover settlement was no longer limited to the immediate area surrounding Port Jackson. Settlers now stretched from beyond Morton Bay in the north to Bass Strait in the south, a vast area of over one million square kilometres. It was six times the size of England and as such provided ample opportunity for absconders to disappear. Importantly the convict awareness of the Australian geography had also improved. There was little thought now of walking to China. Instead they could walk to Adelaide.

⁸⁵ AOT, CSO 24/203/7633, letter to Colonial Secretary's Office dated 30 Aug 1852, p. 286.

⁸⁶ AOT, CSO 24/203/7633, correspondence regarding absconders held in Victoria, pp. 287, 289.

⁸⁷ AOT, CSO 197/7327, correspondence between the Colonial Secretaries of Victoria and Van Diemen's Land regarding costs of prisoners.

Absconders and expirees became increasingly blamed for escalating crime rates in both South Australia and New South Wales, and in particular the Port Phillip district. The difficulty was that these colonies were constituted in a different manner to those of the East India Company's. Where the Company had legislative control over who could or could not enter their colonies or dependencies, this was not the case in the Australian colonies. They had no control over movement of people between them, and as Lyttleton had pointed out to McLaren, this included emancipated convicts and expirees. Indeed, as he had also noted, the British government had no intention of imposing such restrictions.

The greatest difficulties lay in the fact that the authorities were forced to operate in a form of shadow land. They were confronted with rising social tensions that were blamed on a group of people they could not clearly identify. This group were believed to consist mainly of escapees and absconders, expirees and pass holders but an inability to identify meant the authorities were forced to act on belief rather than fact. Confusion was enhanced by the number of individuals who operated with multiple identities. When arrested this confusion was often used as a legal defence. It was a situation that was particularly frustrating in the 'free' colonies of Victoria and South Australia and led to increased intercolonial friction, particularly in relation to Van Diemen's Land. Their solution was to try and restrict who could enter the colony, just as the Indian colonies had done, yet the questions remained. Was the Dickensian scenario of a criminal underclass real or imagined, and was this shadow land really populated solely by migration from Van Diemen's Land?

Chapter Seven.

‘The notorious Johnny May...’¹

¹ *Melbourne Morning Herald*, 7 October 1854, p. 5.

In May 1849 the Melbourne *Argus* reported that a certain Sergeant Ashley had 'stated at the Police Office yesterday, that the city was overrun with Pentonvillians'. These men, it was asserted, had formed themselves into criminal schools in the Dickensian traditions of Fagin and Oliver Twist. Their purpose was allegedly twofold; gambling, and to lure unsuspecting visitors to Melbourne, especially those from the bush, into their lairs with the intentions of robbing them.¹ The predominant group at the centre of these allegations was known as the 'Thieves Association' and was the subject of much attention by the Melbourne Police Force.

Contemporary newspapers often refer to criminals brought up for trial as being members of the Association. One, John May, an expirée from Van Diemen's Land, was said to be its head. Two months after Ashley's comment was reported in the *Argus*, May, in company with Joseph Shelton, was charged with 'being found in Swanston-street under suspicious circumstances'. May, the bench was informed, had been arrested a number of times for vagrancy, whilst Shelton had only recently been released from gaol having served 12 months for robbery.²

May was accused of belonging to a group of organised ex convicts, a collection said to consist of professional criminals, absconded convicts, liberally awarded pass holders and unreformed expirées, that were blamed for the increasing levels of crime in Melbourne. His police and gaol records clearly establish him as a professional criminal but he was not a Pentonvillian, nor an absconder. May was not even a pass holder. The records of events that both preceded and followed his court appearance demonstrate that May was a man with a shadowy past whose true identity was never clearly established by authorities in four colonies. He is an almost perfect example of the problems the convict class created for colonial authorities and the tensions that resulted.

At the age of 18 John May had originally arrived in Hobart Town on the *Neptune* in January 1838. He had been convicted at the Liverpool Quarter sessions the previous July for stealing seven handkerchiefs and had received a seven year sentence of transportation. When questioned upon arrival it was revealed, that despite his age, he

¹ *Argus*, May 15 1849, p. 2.

² *Argus*, 17 July 1849, p. 2; *Melbourne Morning Herald*, 18 July 1849, p. 2.

had already been charged with vagrancy six times in England and gaoled at least three times as a result. May had been sent to the hulks for three months, where he took little time in placing himself on the wrong side of the authorities. Part of his time there was spent in irons after he had been found guilty of fighting. It was to prove a portent for his life in Van Diemen's Land.

May arrived in Van Diemen's Land in the last days of convict assignment and was initially employed in Government service as a messenger. It would seem that he showed signs of reform for in the first eighteen months of his time in the colony his conduct register reveals no breach of the Convict Department regulations. This changed in September 1839 when the bench found him guilty of being drunk and disorderly. Such was the nature of convict discipline that May was sentenced to sleep for seven nights in a cell, yet still allowed to keep and perform his duties as a messenger by day.

Only six weeks after his first punishment, May was charged with disorderly conduct. For this he was sent to the tread wheel for 21 days and lost his position as a messenger. He was reassigned to the public works, and thus his punishment was also to incur a physically harder work load. Within a week he was again charged, this time with gross misconduct. Sentenced to six weeks hard labour with a road gang at Mount Direction, located half way between Launceston and George Town, he was found only a week later drunk and his time with the gang was doubled to twelve weeks.³ In the ensuing months further charges of wasting his provisions, absence without leave, misconduct and drunkenness added to his growing record.

The system of hard labour clearly did not prove effective in rehabilitating May's character, nor was he deterred by the punishment inflicted on him. In April 1841 he was brought before the Magistrate and was again charged with misconduct. The matter revealed that far from reforming May, the system appeared to have hardened him. It also revealed his violent nature, not noted in the official record since his punishment for fighting on the hulks. Having been reassigned following his release from the road gang, May was involved in an altercation and when the police were

³ For May's full conduct record see *AOT*, CON 31/32, 1601M, John May per *Neptune*, 1838 – 7 Years for stealing.

called to restrain him he had not only resisted arrest but had attempted to obtain possession of one of the constable's firearm. The hearing was told that May intended to abscond with the weapon and that he had also threatened his mistress with bodily harm. Found guilty, he was sentenced to twelve months hard labour in chains. It was further recommended that he be removed from the northern area of the colony and sent to serve his time with the Jericho Chain Gang, located on the road to Launceston about forty five miles north of Hobart Town.

Again May proved to be a man undeterred by severe penalty. In March 1843 he once more appeared before the bench, on this occasion charged with insubordination. For this the sitting magistrates extended his period of transportation by two years and took the penultimate step in punishment by recommending that as a dangerous character he be sent to Port Arthur. It was an admission by the system that May's rehabilitation was a failure. Two days later Van Diemen's Land's Lieutenant Governor, Sir John Franklin, approved the Magistrates recommendation and May was despatched to the colony's penal settlement.

In November 1844 Franklin's successor, Sir John Eardley Wilmot, granted May a remission of sentence, on the basis that his initial seven year sentence for stealing had expired. Given his new found status as a free man, and no longer the concern of the convict authorities, May then disappeared from the official record. This brought to a close the first part of his story and from subsequent events it can be assumed that he had emigrated to Port Phillip to start a new life.⁴ The second part of his story started with his arrest in company with Shelton and the charge of 'being found in Swanston-street under suspicious circumstances'.⁵

May and Shelton had been observed by Detective Alcock of the Melbourne Detective Force loitering near the confectionary shop of a Mr Doyle. May, it was alleged, had even had a 'lunar', or peer, through Doyle's keyhole before noting the police presence and fleeing into nearby Elizabeth Street where he and Shelton were taken into

⁴ From his subsequent prison records it is known that he went to Port Phillip per the *Raven* in 1846. By that stage he had gained a wife, at least a common law one, and daughter, most likely in 1845. See *PROV*, VPRS 515/3/01865, p. 550.

⁵ Shelton had been transported to New South Wales per *Recovery* in 1836. He had been tried for stealing and sentenced to 7 years and was transported as Edward O'Hallam. He had received his free certificate in NSW in 1845. See *AOT*, CON 31/22.

custody. The two appeared before a single magistrate empowered to hear such charges. They would appear to have been lucky for the bench that day was occupied by Henry Moor Esquire, a lawyer elected only days before as the member for Geelong in the New South Wales Legislative Council. Given Moor had served as provisional Chairman of Port Phillip's Committee for Anti-Transportation he was to prove lenient towards the two despite their records.⁶ He decided to give them both a chance, and a severe lecture was followed by advice 'to leave town and look for employment as soon as possible'.⁷

Moor's decision elicited little comment from the *Argus*, one of Melbourne's three daily newspapers of the time and a staunch advocate of cleaning up Melbourne's criminal population. Perhaps this silence was due to the fact that less than twelve months previous Moor had won a substantial damages case against William Kerr, its editor. Kerr had heavily lampooned Moor in verse, questioning his suitability for the role of Magistrate and alluding to his patronage of 'bawdy houses'.⁸ Somewhat surprisingly, Moor's decision was criticised by the Editor of the rival paper the *Melbourne Morning Herald*, a Moor supporter in general and a critic of Kerr. The *Herald's* Editor noted what he referred to as Moor's 'Mistaken clemency'.⁹ It was to prove a profound prediction.

Within a week May was back before the bench. He had been observed 'prowling about a house in Little-Bourke-street'. His observer was Sergeant Patrick Stapleton of Melbourne's police force who, being aware of May's 'previous character as a burglar', approached him seeking an explanation of his presence in such a place at two in the morning. Given that May's own residence was also in Little Bourke-street it is surprising that he did not offer this as an excuse for his presence there. Instead it was alleged May drew a large knife and threatened to stab his inquisitor. May was arrested and placed before the bar. His solicitor, Francis Edward Paynter, sought to have Chief Constable Joseph Bloomfield clarify exactly what May was to answer to,

⁶ F. Strahan, 'Moor, Henry (1809-1877), in *Australian Dictionary of Biography (hereafter ABD)*; Volume 2, 1788-1850, I-Z (Melbourne, 1967), pp. 251-52.

⁷ *Melbourne Morning Herald*, 18 July 1849, p. 2.

⁸ Strahan, 'Moor, Henry', *ADB*; Volume 2, I-Z, pp. 251-52.

⁹ *Melbourne Morning Herald*, 18 July 1849, p. 2.

as two charges had been read out, one of being a rogue and vagrant, the other of attempted murder.¹⁰

Paynter's question resulted in the Chief Constable deciding to prosecute May for vagrancy. This was not surprising given the nature of the New South Wales *Prevention of Vagrancy Act 1835*, which placed the burden of proof on the accused rather than the accuser. In part the Act required:

...every person who having no visible lawful means of support, or insufficient lawful means...shall be deemed an idle and disorderly person, within the true intent of this Act, and it shall be lawful for any Justice of the Peace to commit such offender (being thereof convicted before him by his own view, or by the confession of such offender, or by the evidence on oath of one or more creditable witness or witnesses) to His Majesty's nearest Gaol or House of Correction, there to be kept to hard labour for any time not exceeding three calendar months.¹¹

In effect the Magistrate had to be convinced the accused was not a vagrant rather than the police proving he was.

Chief Constable Bloomfield, for reasons not stated in reports, then chose to change his mind and indicated to the Magistrate, Mr Edmund Westby, his intention to proceed with the second charge, that of attempted murder. Perhaps he felt that a three month sentence would not deter May from a life of crime, or that he had a good opportunity to rid Melbourne for some considerable period of one of its better known criminals. Magistrate Westby noted that the increased severity of the charge meant that he could not hear it alone and so May was held over to reappear later in the

¹⁰ *Melbourne Morning Herald*, 24 July 1849, p. 2.

¹¹ NSW Statute, 6 William IV, no. 6, (1835), 'An Act for the Prevention of Vagrancy and for the Punishment of Idle and Disorderly Persons, Rogues and Vagabonds, and Incurable Rogues, in the Colony of New South Wales', section II.

week.¹² Unfortunately for the Chief Constable his judgement, like that of Magistrate Moor the week before, was also to prove faulty.

Before May was led away the Presiding Magistrate decided to deliver to the court a lecture on the evils of crime which, in his opinion, were threatening to engulf Melbourne. Many 'respectable persons', fresh off the boats from Britain were, he claimed, often forced to seek accommodation in the 'disreputable lodging houses in which the city abound[ed]'. This led to their enforced association with men and women such as May, 'vagabonds' and 'scoundrels' whose moral standards tainted the newcomers and whose goods they plundered. In rounding out his rhetoric he flagged his intention to rid the city of such individuals for the betterment of the district's reputation and welfare. He asked that those members of the press present, particularly note that in his opinion ninety nine in every one hundred crimes committed to trial in Melbourne were committed by Pentonvillians or expirees.¹³

In making such a generalisation, Westby was not merely espousing the view commonly held in Melbourne but the view held throughout New South Wales and South Australia generally. Westby was not using the term Pentonvillians in its rudimentary sense, which is in reference to those convicts transported under Lord Stanley's exile scheme. Instead he was using it in its broader Port Phillip sense which by 1849 had come to be applied to any ex convict, including expirees, ticket of leave holders and those holding pardons. The term had very quickly evolved a more pejorative synonym, that being 'Pentonvillain' and had appeared within six weeks of the first arrivals in Melbourne in November 1844.¹⁴ Whether 'Villians or 'Villains, it included amongst its number characters such as May; men and women regarded as professional criminals.

Unlike the criminalization of the poor that had dominated English social theory prior to this point in time, the so called free colonists believed they were able to point to a

¹² *Melbourne Morning Herald*, 24 July 1849, p. 2 & 8 September 1849, p. 2. There is some dispute over which Magistrate actually heard the matter. The *Melbourne Morning Herald* states it was Westby but the *Geelong Advertiser* gives the Magistrate as a Mr Hull. None of the other Melbourne newspapers state a name. See *Geelong Advertiser*, 28 July 1849, p. 1.

¹³ *Geelong Advertiser*, 28 July 1849, p. 1.

¹⁴ A. Laugesen, *Convict Words: Language in Early Colonial Australia* (South Melbourne, 2002), p. 154. 'Pentonvillians' is first recorded in the *Melbourne Weekly Courier*, 21 December 1844, p. 2.

specific group of intercolonial migrants responsible for nearly all crime.¹⁵ Statistics were regularly collected and published to demonstrate that crimes were committed by men with either a previous criminal record in the colonies or who had been transported, especially to Van Diemen's Land. Included in these statistics were often those who had the 'misfortune' to have resided in the island colony at some stage and who had no previous criminal record. By the end of the 1840s the strong beliefs held by the general public in this regard were regularly reinforced by comments made by authoritative figures such as Sir Alfred Stephen. Since his time in Van Diemen's Land as Arthur's solicitor general, Stephen had been appointed the Chief Justice of New South Wales. In August 1849 he was reported as stating:

There is one circumstance connected with Australian Criminal Statistics which I take the opportunity of mentioning in this place. The three heaviest calendars in Sydney, within the last three years, have been those in August and March last, and in the previous month of June. In the August calendar there were 27 prisoners, of whom only 9 were always free, the remaining 18 being persons originally transported. In the March calendar there were 23 prisoners, of whom only 6 were always free. In the late calendar there were (including Quarter Sessions cases) no less than 65 prisoners of whom only 16 were always free. The remaining 49 were persons originally transported, five transported to Van Diemen's Land and 44 to this colony. One of these calendars there were eight cases of rape, or murder, or attempt to commit those crimes. Of the prisoners charged in these eight case, one was an aboriginal, and the other seven were all ticket-of-leave holders or men free by servitude.¹⁶

There can be only one purpose drawn from his comments and that is a desire to show that if the influx of Pentonvillains was halted the level of crime would be significantly impacted upon.

¹⁵ On the criminalization of the English poor, for example, see: E.P. Thomson, *The Making of the English Working Class* (London, 1991), pp. 59-61; P. Linebaugh, *The London Hanged* (London, 2003), p. 71.

¹⁶ *Maitland Mercury* quoted in *Argus*, 8 August 1849, p. 2.

Later that month the *Sydney Morning Herald* published figures in relation to the criminal statistics for the Middle District of New South Wales. These had been laid before the Legislative Council by Stephen and the newspaper noted

The analysis of Criminal Convictions ...gives clear proof of the truth of those observations which we have hazarded at various times as to the extent of the resultant evils of Convictism. We had it stated that out of 115 persons convicted in August, 1841 (sic), and March and June of this year 84 had been originally transports, and that those offences that display the greatest degrees of brutality were committed by these prisoners. The other 31 were convicted chiefly of petty crimes. We understand that the criminal Returns for Port Phillip Courts present precisely the same features – namely, a few larcenies committed by persons who have come free, and the larger bulk and heavier character of offences (as rapes, murders, and assaults) by persons who have become free by servitude. These facts are very instructive.¹⁷

While New South Wales held a residual population of expirees and ticket of leave holders, South Australia could claim no such heritage. Alone amongst the Australian colonies it could boast of never being designated a penal destination yet it too suffered the effects of convictism. As with New South Wales, figures were produced to show that crime in the colony was largely the result of ex convicts migrating there from not only Van Diemen's Land but also New South Wales. In 1851 South Australia's Governor, Sir Henry Fox Young, noted that during the period 1839 to 1850 a total of 197 prisoners had been transported from South Australia to Van Diemen's Land. Of these, 62 had stated they came to the colony from New South Wales and 81 from Van Diemen's Land or Port Phillip. A further 54 were listed as sailors, soldiers or emigrants. Young also made the point that only five European men had been executed in that same period of time – three of whom had come from Van Diemen's Land and the other two from New South Wales. He advised Earl Grey that whilst no record had

¹⁷ *Sydney Morning Herald* quoted in *Argus*, 13 August 1849, p. 2.

been kept of how long those men had been in South Australia he had been assured by the Sheriff, Charles Newenham, that it was 'generally known to have been but a short time'.¹⁸

On 16 August 1849 against this background John May's trial for attempted murder took place. He appeared before the Chief Justice, Sir William a'Beckett at the Supreme Court, and from the newspaper reports appears to have conducted his own defence. Stapleton gave evidence that on the night in question he had observed May reclining against the wall of the premises of a Mr Nicholson. He had approached him to seek a reason for his presence at such a time and place. May had responded by stating that it had nothing to do with Stapleton and then was alleged to have countered with a threat to take him in to the watch house. At this point May produced a knife and 'holding it near the witness' threatened to 'rip him up', an act consistent with the violence he had shown in Van Diemen's Land.¹⁹

In fear of his life Stapleton had counselled May not to act rashly. At that point a second policeman, a Sergeant Heffernan, had appeared and May had fled. Pursued by the two he ran into his home nearby, described in one report as a 'house of ill repute'. A third policeman, Constable Williamson, had by then arrived and the three entered the house and arrested the noted ruffian. In the process of doing so May had again displayed a degree of violence and one newspaper report claims that Williamson narrowly escaped a desperate lunge of the knife by May.²⁰

At this point Justice a'Beckett decided to intercede in the proceedings. He observed that Stapleton had no right to bail up any man in the streets when they were going about their lawful business. He noted that the Sergeant had stated in evidence that May had been observed simply standing quietly on a street corner. It was Stapleton who had accosted May and threatened to take him to the watch house. This, a'Beckett asserted, was an exceeding of his authority and made Stapleton the aggressor in the matter. The judge had no intention of sanctioning the action of Constables to interfere

¹⁸ British Parliamentary Papers (hereafter BPP), Despatch from Young to Grey, 14 April 1851, reprinted in 'Further correspondence on the subject of Convict Discipline and Transportation', 1852 [1517] Volume XLI, p. 250, (IUP, *Crime and Punishment: Transportation, Volume 11*).

¹⁹ *Port Phillip Gazette*, 18 August 1849, p. 2.

²⁰ *Port Phillip Gazette*, 26 July 1849, p. 3.

where they had no right to do so. Justice a'Beckett brought his intercession to a close by stating that he himself 'should not be inclined to submit to any questions being asked at whatever hour of the day or night he might think proper to walk in the public thoroughfare'. He ruled that May had no case to answer and dismissed the charge. May walked from the court free.²¹

The action of a'Beckett can be seen as yet another case of the law protecting the rights of the individual against the unwarranted intrusion of the state. It could also be viewed as another example of the rights of convicts and ex convicts being protected by the law, despite the strong public belief that May was a Pentonvillain and thus by implication responsible for much of Melbourne's crime. His actions can also be interpreted in a third manner, one based on class and which highlights the more subtle problems that convictism created for authorities.

The Melbourne Detective Force had been formed in 1844 by Bloomfield. It consisted of Detective Sergeant James Ashley and four constables. Bloomfield was to later claim that while the detectives constituted only 10% of the total police force they had caught more thieves than the rest of the force combined. Yet society had reservations about the detectives for they were seen as having a very un English approach to police work akin to the employment of spies and provocateurs, a concept more European than British. For their success they depended heavily on the informer and in so doing they themselves occupied a position in the shadow land of Port Phillip.

The likes of Stapleton and most of his work colleagues were themselves ex convicts, recruited because of their ability to identify and, as Forster had expressed it to Lonsdale, for their knowledge of the 'persons of convicts'. E.P.S. Sturt, the first Superintendent of the Melbourne and County of Bourke Police, in giving evidence to the 1852 Select Committee on Police, informed them that it was police policy to recruit emancipists as detectives because 'they were better acquainted with the style and character of the arrivals from Van Diemen's Land'.²² The concern of a'Beckett was not that such men were employed to deal with May and his colleagues but that they would over extend their authority to confront the free and respectable.

²¹ *Port Phillip Gazette*, 18 August 1849, p. 2.

²² R. Haldane, *The People's Force; A History of the Victoria Police* (Melbourne, 1986), pp. 17-18.

The leniency and legal good fortune that he had enjoyed at the behest of Justice a'Beckett does not seem to have been enough to sway May from his life of crime. Only three weeks after May's trial the *Melbourne Morning Herald* ran a small article entitled 'Capture and Arrest of a Notorious Character' amongst its other items of 'Domestic Intelligence'. That notorious character was again John May. His arrest the previous day had involved the entire Melbourne Detective Force, albeit that it consisted of only a Sergeant and three other detectives. Once again May had no intention of making his arrest a straightforward affair and it was reported that he and his wife had put up a struggle to prevent his arrest. May was again accused of attacking his would be arresters with a case knife, being disarmed only after handcuffs had been applied. Even when so reduced his resistance was maintained and he was eventually carted to the watch house in a dray.²³

The following day May made the increasingly familiar journey to be arraigned before the bar at the Police Office. The arrest warrant accused him of participation in a rash of robberies in the Melbourne area, with a particular suspicion of his involvement in a burglary of the Australia Felix Hotel in Bourke Street, not far removed from the May residence in Little Bourke Street. Contemporary newspaper reports of his arrest and subsequent court appearance variously describe him as 'a rogue and vagabond', a 'reputed thief', a 'notorious ruffian and vagrant', 'an expert burglar', a 'most daring ruffian', a 'well known desperate character' and a 'daring personage'.²⁴ They were descriptions May claimed to abhor, protesting to the Magistrate, Melbourne's Mayor Bell, that 'untrue statements relative to himself... appeared every day in the local journals'.²⁵

The *Melbourne Daily News* noted that the intention of the initial charge was to bring May before the court and get him 'into safe quarters for a few months' by once again dealing with him as a vagrant.²⁶ This would seem to have been the case for he was remanded in custody until the following Monday when he was charged under the

²³ *Melbourne Morning Herald*, 8 September 1849, p. 2.

²⁴ See *Melbourne Morning Herald*, September 8 1849, p. 2; *Melbourne Daily News*, 12 September 1849, p. 2; *Argus*, July 23 1849, p. 2; *Port Phillip Gazette*, September 11 1849, p. 2.

²⁵ *Argus*, September 11, 1849, p. 2.

²⁶ *Melbourne Daily News*, September 12 1849, p. 2.

Vagrancy Act with being a known associate of thieves. There was no mention of the alleged burglary of the Australia Felix Hotel. Despite May's plea that he could establish that he had an honest source of income, the Court thought otherwise and May was sentenced to three months hard labour. It did little for May's cause that the two magistrates who constituted the court were the Mayor, William M Bell, as Chairman and Edmund Westby. There was to be no misplaced leniency on this occasion.

With the alleged prime mover of the Melbourne Thieves Association safely incarcerated in Melbourne's gaol, the authorities could well have believed that their troubles, if not the rate of crime, would diminish, at least for three months. This was not to transpire. May once again appeared in the local journals within weeks when the *Melbourne Morning Herald* ran an article alleging that he was more than just a vagrant. It claimed that May was in fact a runaway prisoner of the Crown from Van Diemen's Land.²⁷ Enquiries were made with the Convict Department in Hobart Town seeking information on May's background. They also sought and received a description of another convict, a runaway named John Meyzer. May and Meyzer, the *Herald* alleged, bore an uncanny resemblance to each other. The question the authorities in both Hobart and Melbourne had to address was whether or not they were one and the same.

May and Meyzer encapsulate the problems colonial authorities faced in establishing identity. Meyzer's convict past began in October 1847 when the *Captain Cook* sailed up the Derwent estuary and docked in Hobart Town.²⁸ Unlike May, Meyzer had not been transported from Britain, but, as Governor Young had advised London, Meyzer was one of the 197 convicts who had been sent from South Australia to Van Diemen's Land between 1839 and 1850. These men and women were transported under the authority of a British Act that allowed the Governor or Administrator of any of Her Majesty's colonies and possessions to proclaim any 'place beyond the seas within His

²⁷ *Melbourne Morning Herald*, 22 October 1849, p. 2.

²⁸ *Hobart Town Advertiser*, 29 October 1847, p. 2.

Majesty's dominions' as a place to which convicts could be transported.²⁹ Such places had to be proclaimed by the Privy Council first and included Van Diemen's Land.³⁰

The *Captain Cook* was not a convict transport but an intercolonial trading schooner. The *Hobart Town Advertiser* noted in its shipping column on the day following its arrival that it had brought to the colony a mixed cargo, including tea and sugar, two colonial staples. The 'mixed cargo' also included two Constables in the employ of the South Australian Government, their task to guard the only other passengers on board, Henry Wise, George Counter, John Murray and John Meyzer. The four were all convicts sentenced in the Adelaide Supreme Court to transportation for stealing.

The process upon arrival in Hobart Town was the same for all convicts, no matter from where within the British Empire they had been sent. The four were therefore interviewed by the staff of the Convict Department with all details of their offences and record noted, and their physical description taken. Of the four men landed from the *Captain Cook*, Wise had been in custody the longest. He had been found guilty in June that year of stealing three books and as a consequence had received a seven year sentence of transportation. Counter had been given a seven year sentence for stealing a watch.

Murray and Meyzer had been both sentenced to ten years and had appeared in court on the same day. Murray claimed, during his arrival questioning, to have served in the British Army for 32 years as a member of the 14th Light Dragoons. As such he claimed to have arrived in Sydney twelve years earlier as a military pensioner. Having travelled west to the new colony of South Australia he had gained employment in Adelaide as a coachman and groom before he was charged with stealing two of his master's horses. When quizzed by the Department clerks he admitted to selling both, presumably to supplement his less than generous military pension.

²⁹ British Act 6 George IV c69, 'An Act for Punishing Offences committed by Transports kept to Labour in the Colonies: and better regulating the Powers of Justices of the Peace in New South Wales'.

³⁰ For an example of this see NSW Statute 3 William 4, Number 3, c5., 'An Act to consolidate and amend the Laws for the Transportation and Punishment of Offenders in New South Wales, etc' in BPP, 'Report from Select Committee appointed to inquire into the System of Transportation; its Efficacy as a Punishment; its influence on the Moral State of Society in the Penal Colonies, and how far it is susceptible to Improvement: with Minutes of Evidence, Appendix, and Index', 1837, Volume XIX, Appendix 15, p. 307 (IUP, *Crime and Punishment: Transportation, Volume 2*).

Meyzer also claimed to have arrived in South Australia as a free man. He had been arrested in Adelaide in April of that year and charged with stealing two cows valued at £10 from Henry Price, his master. He was also charged with the theft of a pig valued at £2 10/- from a Richard Francis Newland. Committed to trial at the June sessions of the Supreme Court Meyzer escaped from the gaol before either case could be heard. Recaptured he was brought before the Supreme Court in September where he pleaded guilty to both counts. On the first count, that of stealing the pig, the court found Meyzer guilty and sentenced him to imprisonment for three weeks. It was on the second count, that of stealing the cows, that Meyzer had been sentenced to ten years transportation to Van Diemen's Land.³¹

Upon arrival in Hobart Town the four were placed in the police barracks. Having been transported as part of the probation system they were each due to serve the first fifteen months of their sentence at one of the fifty or so Probation Stations scattered across Van Diemen's Land.³² The four had all been allocated to the same station, that being Fingal in the island's north. To get there would take a number of days and require an escort from Hobart. Meyzer's record in Adelaide would suggest that a great degree of care would need to be taken by the men's escort as they travelled north. Such care was not sufficient however and on Saturday 6 November, Meyzer managed to escape from the party and all efforts to locate him proved fruitless. He had been in the hands of the Van Diemen's Land authorities for only nine days.

Meyzer, it would seem, was a man familiar with disappearing. An examination of his convict record, despite his brief incarceration, reveals he was also known to the authorities by the names Meyers, Mezger, Myers and Myerson. His record in the registers was marked 'absconded' and after six years with no sign of recapture he was struck off the Convict Department strength at the end of 1853. Thus, he was officially declared lost to the system, having spent just nine days contained within it.³³ The

³¹ *South Australian Register*, 15 September 1847, pp. 3-4.

³² The exact figure at the time of their arrival is unknown due to the date of closure of some stations not being recorded. The figure of fifty is a solid estimate based on dates given in I. Brand, *The Convict Probation System: Van Diemen's Land 1839-1854*, (Hobart, 1990), pp. 225-26.

³³ AOT, CON 37/4, John Meyzer, per *Captain Cook*, 1847, p. 990.

panopticon without walls had, in the case of Meyzer, proved far from infallible. Despite their detailed knowledge and description of him he simply disappeared.

Meyzer's disappearance must have inspired both Wise and Counter for within six months both had also absconded. The panopticon proved more successful in this instance for both were quickly recaptured and returned to Fingal. Counter, having served out his fifteen months there, became eligible to seek work on his own behalf. He eventually found employment with a John Merritt at Hobart Town's Old Wharf. In November 1852 he once again absconded, this time presumably making good his escape by sea.³⁴ Counter's destination and eventual fate remain unknown but it is most likely that he became another of the residents of Port Phillip's shadow land.

Wise absconded from Fingal a second time and when caught was charged with, and found guilty of, escaping from a constable. Sentenced to transportation Wise was sent to the penal settlement on Norfolk Island where he arrived in July 1848. He was immediately recognised as being not Henry Wise but William Oxley, transported to Van Diemen's Land on the *Roslyn Castle* in 1828 under a life sentence.³⁵ Once identified, and crucially with a name to match, Wise was immediately exposed by the legacy of Arthur's record keeping. Unveiled, his record informed the authorities that he was an escapee from the system. It also revealed a man who had continually taken advantage of the 'openness' of the assignment system and its lack of detaining walls, to continue a life of crime. Under his original identity as Oxley he had been charged in December 1831 with being feloniously at large, having stolen a pair of boots valued at five shillings, two shirts worth six shillings and an undisclosed amount of tobacco. Despite his existing life sentence a further sentence of seven years transportation was imposed. Six months later he was again charged with being feloniously at large and a second seven year sentence was added to the first. With nothing to lose, five months later Oxley was again charged with escaping from the

³⁴ AOT, CON 37/4, George Counter, per *Captain Cook*, 1847, p. 991. Counter had given his occupation as a seaman and was a native of Bristol, a major British seaport.

³⁵ AOT, CON 37/4, Henry Wise, per *Captain Cook*, 1847, p. 992.

public works and being feloniously at large. Committed to trial in December he was found guilty and a second life sentence was imposed.³⁶

The fourth member of the quartet, Irishman John Murray, was the only one not to abscond. Perhaps because of his age, he was almost sixty when he arrived, Murray quietly served out his probationary period at Fingal. After a somewhat chequered ten years, which included a number of charges involving misappropriating horses, he was declared free by servitude in 1857.³⁷ Murray though, might also be proof of the effectiveness of the panopticon. Perhaps he, like Wise/Oxley, had good cause to keep the gaze of authority from being on him. By maintaining a relatively trouble free existence, a closer inspection was avoided, and he too was able to eventually disappear from official view.

Significantly, the official but brief existence of Meyzer fits neatly into the hole in the official record for May. No further record or reference relative to Meyzer has been located and it was twenty months after he disappeared from Van Diemen's Land that May and Shelton had appeared on the charge of being in Swanston-street and acting suspiciously. It was against this background that May now stood accused of being one and the same person as Meyzer. May's three month sentence for vagrancy expired on 10 December. He had no sooner left the Melbourne Gaol than he was greeted at its gates by his nemesis in the form of the detective force. They promptly arrested him upon suspicion of being a runaway prisoner of the Crown. May was escorted to the Eastern Hill Watch House and placed in a cell while further enquiries into his identity were made.³⁸

Later that morning May was brought before the sitting magistrate, Mr Smith, and investigated. The matter was to last two days. Depositions were presented, along with the physical descriptions of both May and Meyzer taken by the authorities in Hobart Town.³⁹ Mr John Stephen represented May and argued for his immediate release on the grounds that there was insufficient evidence as to May being Meyzer. The

³⁶ AOT, CON 31/29, William Oxley per Roslyn Castle, 1828; *Hobart Town Courier*, 31 March 1832, p. 2. He is erroneously recorded as Robert Oxley in the court report. The date for his final absconding has not been identified.

³⁷ AOT, CON 37/4, John Murray, per *Captain Cook*, 1847, p. 989.

³⁸ *Argus*, 12 December 1849, p. 2; *Melbourne Daily News*, 12 December 1849, p. 2.

³⁹ For a comparison of the physical descriptions of May and Meyzer see this thesis, Appendix 1, p. 265.

physical descriptions he claimed simply did not match. May had hazel eyes, Meyzer's were grey. Further there was 2 ½ inches difference in their heights. Captain Jacomb JP, joining Smith on the bench, was inclined to disagree, declaring he had never seen 'a description more clearly made out'. Suspicion as to guilt was further aroused by an attempt May had made to escape from the watch house. It was decided to remand him until further information could be obtained from Adelaide.⁴⁰

May, unable to physically extricate himself from the watch house, attempted to do so through legal means. He engaged a Melbourne solicitor, John Plaistowe, to act on his behalf. On 21 December Plaistowe appeared in the chambers of Sir William a'Beckett and sought to have a writ of *habeas corpus* issued. The Editor of the *Melbourne Daily News* noted with a touch of black humour that May himself would not be present at the hearing but rather the gaoler would appear for him. This, the Editor noted, was because a'Beckett had a 'praiseworthy respect for his silver spoons'.⁴¹

Plaistowe's argument was simple, that the Magistrates of the Port Phillip bench had no authority to act over a matter that fell within the jurisdiction of Van Diemen's Land. Put simply, he argued that being a runaway prisoner from another colony was not an offence in New South Wales.⁴² Plaistowe's argument bears similarity to the issues raised by Chief Justice Forbes at the hearing of the Swan River matter involving John Mackay. In that instance Forbes had questioned the power of the New South Wales magistracy to deal with absconders from another colony if they did not admit to the fact.⁴³

Plaistowe argued legal semantics in that May was accused of being a *prisoner* of the Crown when there was no such thing, the proper definition being a felon or convict. Plaistowe also argued that May had been committed on *suspicion* of being a prisoner and that mere suspicion in this instance had no legal standing. His argument carried enough persuasion for a'Beckett to decide to refer the matter to the Sydney judges

⁴⁰ *Melbourne Morning Herald*, 14 December 1849, p. 2.

⁴¹ *Melbourne Daily News*, 24 December 1849, p. 2.

⁴² In August that year Plaistowe had represented two others alleged to be runaways, William Davis and Lewis Stanton. As part of their defence he had argued that the Vagrants Act was 'long since abrogated' and thus an invalid tool under which to have the two arrested. See *Port Phillip Gazette*, 30 August 1849, p. 2.

⁴³ See this thesis, p. 141. Forbes had officially retired as Chief Justice in 1838 and had died in 1841.

rather than act on his own opinion. In the meantime he refused the writ and ordered May to remain in gaol where he was to spend a total of six weeks.⁴⁴

In mid January May was once again brought before the investigating Magistrates. Despite his protestations of innocence, they ruled that there was no doubt May was Meyzer and ordered his return to Hobart Town as soon as possible. When asked if he had anything to say to the court May asked that it be cleared of the Chief Constable and the detective force before he spoke. His request was denied. May then argued that the whole process of identification was faulty in that the description of him sent to Adelaide was in fact a copy of the description of Meyzer obtained from Hobart Town. Obviously the two descriptions matched as they were one and the same. Magistrate Smith did not agree and stated his satisfaction with the evidence. Nor did May's pleas meet with support in the press. The *Melbourne Daily News* was later to note 'We may remark that there can be very little doubt that May is actually the runaway prisoner of the Crown he [is] alleged to be'.⁴⁵

May was eventually placed aboard the *Flying Fish* and arrived in Hobart Town on February 6. No doubt the authorities in Melbourne felt they had finally solved their problem by shipping it to Van Diemen's Land. In fact the argument over identity was yet to be resolved. Upon arrival May once again went through the process of questioning by the Convict Department designed to elicit his true identification. May adopted a strategy that threw the process into confusion. He was quite happy to admit he was John May, transported in 1838 for stealing seven handkerchiefs but free by servitude in 1844. The authorities had his records and all that he claimed was supported by them. May stated categorically that he was not Meyzer, knew nothing of Meyzer and denied ever having been in South Australia. The evidence so strong to the Melbourne magistracy, proved to be far weaker across Bass Strait.⁴⁶

May had exposed the same problem with the records that the experience of Wise/Oxley has demonstrated. The ambiguities of written records were mainly

⁴⁴ *Argus*, 25 December 1849, p. 2; *Melbourne Morning Herald*, 24 December 1849, p. 2; *Melbourne Daily News*, 24 December 1849, p. 2.

⁴⁵ *Melbourne Daily News*, 11 April 1850, p. 2.

⁴⁶ AOT, CON 37/4, John Meyzer, per *Captain Cook*, 1847, p. 990; and CON 31/32, 1601M, John May, per *Neptune*, 1838.

overcome by personal identification. Meyzer had been in Van Diemen's Land for only nine days and that had been over two years earlier. The authorities were unable to find an official who could now make a positive identification.⁴⁷ May had spent most of his seven years in Van Diemen's Land north, except for his time at Jericho and at Port Arthur. It is therefore reasonable to assume that when Meyzer arrived in 1847 there would have been few in Hobart Town who could identify him as John May. Meyzer would also have known that his journey to the probation station at Fingal would take him through Jericho. As May had laboured there on the road gang the potential for identification would have been great. It would explain his determination to escape from the escort before he arrived there.⁴⁸

The Arthurian panopticon could see May, but had no legal grounds on which to arrest him. It was not sure it could see Meyzer. The case brings into question the Michel Foucault dictum that 'visibility is a trap'.⁴⁹ Despite a belief that there was overwhelming evidence that the two were in fact one, the Convict Department was constrained by lack of evidence. Its own hard line on regulations was also, it would seem, self imposed. Unable to definitely identify the two as one the authorities in Hobart had no option but to let May go. In early April 1850 reports appeared in the Melbourne press claiming May had returned to the province.⁵⁰ Later in the month this was confirmed by the Mayor who informed a court sitting that he had personally seen 'the notorious John May with a girl in the back yard' of a house of ill repute then under investigation.⁵¹

May reappeared in the official gaze in October 1854 when Detectives Rowley and Williams of the Melbourne Detective force met up with him and another man, identified as William Williams, walking in the street. Williams was carrying a bundle of what appeared to be wearing apparel and which appeared to the two detectives to be suspicious. Upon questioning Williams the detectives were told the bundle was

⁴⁷ *Melbourne Daily News*, 11 April 1850, p. 2.

⁴⁸ Brand, *The Convict Probation System*, p. 225.

⁴⁹ M. Foucault, *Discipline and Punish: The Birth of the Prison* (London, 1991), p. 200.

⁵⁰ *Argus*, 12 April 1850, p. 2; *Melbourne Daily News*, 11 April 1850, p. 2.

⁵¹ *Argus*, 22 April 1850, p. 3. It may be that May moved between the two colonies more than once. A John Mays sailed from Launceston on the *City of Melbourne* for Melbourne on 2 December 1851 as a steerage passenger, free by servitude. For details on this see AOT, POL 20/9/1, p. 473.

clothing sent out to him from England. Not convinced the two detectives decided to accompany Williams and May to their places of residence.

Arriving at a dwelling Williams claimed to be his, they were surprised to meet there Margaret Wood, the wife of John May.⁵² With their suspicions now well aroused the two detectives decided that the house needed to be searched. May had no intentions of staying and as soon as an opportunity arose he made good his escape through the back door. His wife and Williams were then arrested and taken to the lock up before the detectives set out to find May and arrest him. May now resided in a house off Flinders Lane East. Shortly after 9pm that night Rowley and Williams, in company with another detective, Mitchell, and Sergeant Sincock, went to the house but May was nowhere to be found. They waited a short time inside, but when May failed to materialise they decided upon a second course of action.

The four men left the house and took up position nearby in an ambushade. It was not long before a man, presumed to be May, appeared out of the darkness and was quickly seized by Sincock and Rowley. The man proclaimed his innocence stating that he was 'a simple hard working man named Ward' and complained loudly of the treatment he was suffering. He was placed in handcuffs whereupon he demanded to see a Magistrates warrant for his arrest. At this point in time Detective Williams appeared and gleefully declared that the man in custody was none other than the 'notorious Johnny May'.

With May in custody the detectives proceeded to search the house and within minutes evidence of May's criminal career began to surface. Bundles of skeleton keys and pick locks, key making equipment, files, dies, blocks, and sealing wax were all uncovered. Several loaded pistols and a brace of revolvers were also found, along with some saddles, broken cash boxes, jewellery and a large amount of assorted goods, all believed stolen. When confronted with this haul and asked to explain its presence on his property May, ever the optimist, claimed that the police had 'planted'

⁵² May's wife, referred to in many newspaper reports as Margaret Wood, was recorded by the Victorian prison system as Catherine Woods, but her records note that she was also convicted under the names of Margaret Wood, Margaret Woods and Catherine Scott. She, like her husband, had been transported to Van Diemen's Land and was also to have a long prison record. See *PROV*, VPRS, 516/2/01191, entry for 1191 Catherine Woods.

the items with the specific intent to have him charged. He was taken to the police station along with all the items mentioned, so profuse in quantity that a dray was required to transport them.

May, Williams and Wood were brought before the bench and remanded to appear on the following Monday. Also appearing with them was James Haines, known to the police as Dublin Jemmy, and his wife. Both were described as accomplices of the May's. The newspapers were ecstatic that such a criminal gang had been broken up. It was believed that the goods recovered formed the takings of seven major robberies conducted in recent times. May, it was alleged, had also only recently disposed of an amount of jewellery.⁵³ The police had learnt their lessons from May's previous appearances. This time there were to be no charges of vagrancy. Instead he was tried with two counts of being in possession of stolen goods.

May, his wife Maggie and William Williams appeared before the Magistrates on the following Monday morning. Maggie was discharged when Mr Booth, the supposed owner of goods found in her possession, was unable to identify them. Found guilty of receiving, May was sentenced to ten years hard labour on the first count, and seven years with hard labour on the second. Justice Williams ordered the two be served cumulatively. The following day May again appeared charged with having a stolen horse in his possession. Again found guilty, a further seven years were added to the previous days tally.⁵⁴

Almost certainly the notorious John May was also the elusive John Meyzer. Despite both having been caught we are still not able to use the convict records to positively match the two as one, yet John May is more than the topic of an interesting tale. He is very much representative of the paranoia extant in the Australian colonies in the 1840s and 1850s regarding convicts and their unsavoury effects upon society and the actuality of it. It was a paranoia that mirrored British society at the time and that was promulgated by the works of popular writers such as Charles Dickens and Henry

⁵³ *Melbourne Morning Herald*, 7 October 1854, p. 5.

⁵⁴ *Melbourne Morning Herald*, 12 October 1854, p. 5; *Argus*, 20 October 1854, p. 5, and 21 October 1854, p. 5. May was sent to the hulk *Success* at Williams Town and from there, later, to the new Pentridge Gaol. He was eventually released from there in November 1875 having had the balance of his sentences at that time remitted. See *PROV*, VPRS 515/3/01865, p. 550.

Mayhew. He was accused of being an integral part of a criminal gang, the Melbourne Thieves Association. Whether such a gang actually existed in a structured form is doubtful, but May was most definitely a career criminal.

At the very time that Earl Grey as Colonial Secretary was trying to bring the Australian colonies together into a federated body it was the likes of May who provided the tensions that drove them apart.⁵⁵ Frustrated by a perception that all crime in the province of Port Phillip was the product of Pentonvillians, expirees and runaways from their island neighbours, the authorities had resorted to the *Vagrancy Act* in an effort to rid themselves of the problem. Now free from the legislative control of its parent colony the newly declared Victoria, and its Legislative Council, decided to take a different approach. No matter what the outcome of the anti-transportation movement, it decided to introduce legislation that would give the colony the same measure of control over immigration as had been exercised in the Indian possessions half a century earlier. In 1852 the council introduced an Act designed to prevent the likes of May entering the colony. This added further to the tensions over convict emancipation and the issuing of pardons that existed between the governments of Van Diemen's Land and Victoria. Such legislation was also going to create conflict with Britain for with the Act's emphasis on the exclusion of a particular class of person, it was in direct conflict with the British policy Lyttleton had enunciated to J.H. Croucher in 1846.

⁵⁵ For more on this topic see J.M. Ward, *Earl Grey and the Australian Colonies, 1846-1857*, (Melbourne, 1958), especially chapter VII.

Chapter Eight.

‘Objectionable on the grounds of equity and policy...’¹

¹ British Parliamentary Papers, Despatch from the Duke of Newcastle to Governor LaTrobe, 30 September 1853, reprinted in ‘Correspondence on the Subject of Convict Discipline and Transportation’, 1854 [1795], Volume LIV, p. 125 (IUP, *Crime and Punishment: Transportation, Volume 11*).

When the newly created Victorian Legislative Council met for the first time in 1851 one of its first tasks was to deal with a petition from the Anti Transportation League, formed the previous year in Melbourne. Despite historically being portrayed as seeking the end to transportation to the Australian colonies, the Victorian version of the league also actively campaigned for the exclusion of emancipists from that colony. Their petition was duly tabled, but the council declined to legislate in accordance with its expressed wishes. Instead the Council restricted itself to passing a number of strongly worded resolutions on the subject.¹ Amongst the rhetoric that flowed from the Council's debate, Sir John Pakington, who had only recently replaced Earl Grey as Secretary of State for the Colonies, was warned that 'scenes of bloody outrage that would disgrace the English name throughout the world' would take place if the recently discovered goldfields in Victoria were allowed to become a congregating point for ex convicts.²

Men and women in the mould of John and Maggie May had generated considerable public belief that Victoria was under siege from gangs of professional criminals. This idea was augmented by a second strand of thought, that men like May were being deliberately sent from Van Diemen's Land to the Port Phillip district. This second notion grew in strength throughout 1849 and in June that year the *Argus* quoted from a report in the *Hobart Town Advertiser* that the Van Diemen's Land governor, Sir William Denison, had:

...resorted to the issue of conditional pardons to the practiced scoundrels who have served their novitiate in the probation gangs and penal settlements of Van Diemen's Land on the express condition of the recipients leaving the Colony.

The *Argus* went on to note that the unfortunate positioning of Port Phillip, so close to the 'dustbowl of the British Empire', meant it was the natural and logical destination for all such men. There was a very real need, the writer concluded, to offer all possible resistance to the 'double distilled pollution from Van Diemen's Land'.³ A

¹ G. Serle, *The Golden Age: A History of the Colony of Victoria 1851-1861* (Melbourne, 1963), p. 126.

² *London Times*, quoted in Serle, *The Golden Age*, p. 126.

³ *Argus*, 28 June 1849, p. 2.

week later the *Argus* once again took up cudgels with Denison portraying his approach as cynical and hypocritical. It noted that when the British Government had attempted to close the colonial prison on Cockatoo Island, in Port Jackson Denison had refused to accept the relocation of its convicts to Van Diemen's Land.

The belief that Denison was deliberately releasing convicts on conditional pardons, in an effort to rid Van Diemen's Land of them, was not merely restricted to Melbourne and the Port Phillip district. By July 1849 such beliefs had reached as far a field as Maitland in the Hunter Valley, 165 kilometres north of Sydney and over one thousand kilometres from Melbourne. The editor of the *Maitland Mercury* reported to his readers that Denison intended to deluge the colonies with convictism in its worst form. He then went on to reiterate a view similar to that expressed in the *Argus*. Again it was claimed that Denison was granting conditional pardons to convicts in Van Diemen's Land, conditional that is on them leaving the island for the mainland colonies.⁴

The *Mercury's* editor pleaded with the legislature to do something to fix the problem:

Cannot our government adopt some measure to counteract this impudent manoeuvre? (sic) If it be competent to the local authorities of Van Diemen's Land to except that colony from the operation of conditional pardons, cannot our Legislature pass an Act to prevent parties holding conditional pardons from locating themselves here...They are...bound, not only in justice to the community...to resist this nefarious scheme for converting Van Diemen's Land into a conduit through which large numbers of the criminals of the United Kingdom can be passed into this colony, subject to no restraint...We trust that some member will bring the subject under the notice of the Council and the Government without delay; so that some steps may be taken to protect this colony from the effects of

⁴ *Maitland Mercury*, 28 July 1849, p. 2.

the regulation recently issued by the Governor of Van Diemen's Land.⁵

In January 1852 the Legislative Council in South Australia petitioned the British Government regarding convicts being transported to Van Diemen's Land. The petition repeated the claims made by Croucher and McLaren in 1846 that the colony was exempt from the arrival of transported convicts. This was being subverted, they claimed, by the granting of conditional pardons to convicts arriving in Van Diemen's Land, pardons that then allowed the convicts to relocate to South Australia. The petition noted that under the terms of the pardon the convicts could not return to Britain and the same condition was sought for the colony. Upon receiving the petition Pakington rejected the sentiments expressed within it. He again noted that South Australia could have no such exemption, and that the condition that those convicted not return to Britain was also applied to convicts transported from elsewhere in the British Empire. None could return to the colony in which they had been convicted, before their sentence expired.⁶

The real fear was that men on pardons were outside the control of the law. Unlike Ticket of Leave holders they did not have to report for muster or remain within a designated police district. This fear was not only directed towards the Van Diemonians but also towards the Exiles sent out under Grey's scheme. Only a month previously the *Argus* had noted that whilst Port Phillip was:

...to escape the infliction of having ticket-of-leave men dispersed among her population, she will have to receive a class which, it is greatly feared, will prove more dangerous - men over whom there is no check or control on the part of the government, and who are cast loose among the people in the character of free labourers.⁷

⁵ *Maitland Mercury*, 28 July 1849, p. 2.

⁶ British Parliamentary Papers (hereafter BPP), 'Address of the Legislative Council', enclosure 2 in despatch from Young to Grey, 12 January 1852, in 'Further Correspondence on the Subject of Convict Discipline and Transportation', 1852-53, [1601], Volume LXXXII, pp. 128-29, (IUP, *Crime and Punishment: Transportation, Volume 12*); Despatch from Pakington to Young, 16 June 1852, reprinted in BPP, 'Further Correspondence on the Subject of Convict Discipline and Transportation', 1852-53, [1601], Volume LXXXII, p. 130, (IUP, *Crime and Punishment: Transportation, Volume 12*).

⁷ *Argus*, 4 May 1849, p. 2.

Such calls for action failed to elicit the responses sought. They also failed to consider that New South Wales continued to maintain a residual population of ticket of leave and pass holders, although by December 1851 this figure was only 1,640.⁸ The newspaper editors continued to present the problem as being Van Diemen's Land based, with the *Sydney Morning Herald* noting in 1850 that convicts from the island colony had seeped into all the other colonies of Australia.⁹ Given such factors, any solution required a degree of complexity not demonstrated by the newspaper's suggestions. May and Shelton had demonstrated that the Vagrancy Act, whilst capable of clearing such people off the streets of Melbourne for three month periods, was not a long term solution. The creation of Victoria as a separate colony, complete with its own legislative body, presented other solutions.

The response of the Legislative Council to the petition of the Anti Transportation League did not satisfy the Victorian public for long. In April 1852 the *Nelson* whilst at anchor in Hobson's Bay was robbed of 9,000 ounces of gold worth £30,000 by an armed gang. It came at a time when the hysteria was at its highest, and on the same day as a public meeting of the anti-transportation movement. The robbery was immediately blamed on the convict population; indeed a petition to the Queen in 1857 mentioned the *Nelson* robbery as being an outcome of the flood of convicts from Van Diemen's Land. Yet, of the twelve men eventually arrested and charged, only one was specifically stated to be an ex convict who ironically had also served as a policeman.¹⁰

The uproar over the robbery was as much about the police as it was about the criminals. Melbourne's detective force was relatively small and the gold rushes had drawn away so much of its constabulary that on New Years Day 1852 only two of the Municipal Constables were on duty. The Superintendent of Police stated that he had

⁸ BPP, Enclosure 1, in despatch from FitzRoy to Grey, 20 December 1851, reprinted in 'Further Correspondence on the subject of Convict Discipline and Transportation', 1852-53, [1601], Volume LXXXII, p. 109, (IUP, *Crime and Punishment: Transportation, Volume 12*).

⁹ *Sydney Morning Herald*, 23 November 1850, quoted in C.S. Blackton, 'The Australasian League, 1851-1854', *The Pacific Historical Review*, Volume 8, No. 4. (Dec. 1939), p. 388.

¹⁰ A. Sedgley, 'The *Nelson* Robbery: Crime or Anarchy?' *Victorian Historical Journal*, Volume 73, No. 2, (September, 2002), pp. 252-53. On 6 April, John George James was arrested at Williams Town after being identified as the ringleader by Henry Draper, Chief Mate on the *Nelson*, and a man named Davis who would appear to be another officer. James' real name was William Johnston and he had been employed at one stage as a policeman at Hamilton in Van Diemen's Land's Derwent Valley. See *Argus*, 8 April 1852, p. 2.

offered his fifty five constables higher pay but fifty of them had decided on the diggings instead.¹¹ Not surprisingly William Kerr, through his editorial in the *Argus*, blamed the Government for a lack of action over law and order. It claimed the police force was inadequate to provide protection, stating that 'day after day murders and robberies are recorded; people are found dead in the streets, in houses, or on the roads'. The rhetoric did not end there. Two days later it was claimed that the young colony was 'day after day... wading deeper into crime, lawlessness, and insecurity'.¹²

By mid 1852 the perception of public demand was such that the Council concluded stronger measures were necessary. In September they passed a Bill whose specific purpose was to stop transported convicts from entering their domain. The Bill was entitled 'An Act to facilitate the Apprehension and prevent the Introduction into the Colony of Victoria of Offenders illegally at large' and was to be valid for two years from the date of pronouncement.¹³ Interestingly the previous year Van Diemen's Land had also passed an Act similar in title - 'An Act for the better apprehension of Offenders who shall have escaped to Van Diemen's Land or its Dependencies from any other of the Australian Colonies'.¹⁴ The similarities ended with the titles.

Despite La Trobe having the authority to disallow the Victorian Act, he chose to ignore the concerns that were publicly raised regarding the legality of its intent. To become law the Bill required Royal assent and so needed to be forwarded to London. Perhaps because of the concerns, La Trobe delayed sending it until December and when finally he did so he was moved to make a number of points in an effort to justify his action in not rejecting it. La Trobe's despatch began with the telling statement that:

The Act to facilitate the apprehension of offenders is so novel in its character, and so stringent in its provisions, as to demand some

¹¹ Sedgley, 'The Nelson Robbery', p. 253.

¹² *Argus*, 5 April 1852, p. 5; 7 April 1852, p. 4.

¹³ BPP, Despatch from LaTrobe to Sir John Pakington, 2 December 1852, reprinted in 'Correspondence on the Subject of Convict Discipline and Transportation', 1852-53, [1677], Volume LXXXII, p. 146 (IUP, *Crime and Punishment: Transportation, Volume 12*). The Act is 16 Victoria 13.

¹⁴ BPP, 15 Victoria 6 reprinted in 'Further Correspondence on the Subject of Convict Discipline and Transportation', 1852-53, [1601], Volume LXXXII, pp. 74-75 (IUP, *Crime and Punishment: Transportation, Volume 12*).

preliminary explanation of the circumstances under which it was introduced.¹⁵

La Trobe proceeded to provide Pakington with background on the situation in Victoria designed to support the Bill receiving Royal assent. His first point was that the recent discovery of gold there had acted as a social magnet to the neighbouring colonies and that the convict population were as susceptible to its pull as were free men. The massive influx of settlers had left the Victorian authorities unable to exercise the vigilance that was needed to bar the undesirable elements from entering the colony. As a consequence there was now a need for legislation that allowed for the expulsion of undesirables as opposed to simply refusing admittance.

The second point La Trobe raised was that the existing laws in Victoria had little authority to deal with the 'transported convict' as he titled them and to stop them entering the colony, yet few of the arguments he made stood close questioning. La Trobe acknowledged that many ticket of leave men had entered the colony and, having made good on the gold fields, subsequently returned to Van Diemen's Land. In reality he had no means available to him to know this as a fact. Ticket of leave holders were subject to reporting provisions and were required to remain within set police districts, in this instance in Van Diemen's Land. It was purely speculative of La Trobe to argue that many had gone to the goldfields, for any attempt to gather such information would have required absconders to confess that they were runaways.

La Trobe then noted that 'numbers of other classes who have thus effected their escape' were still resident in Victoria and having been set free from the 'coercive discipline' to which they were used, had turned to serious crime. Yet in using the term 'escape' La Trobe ignored the mechanisms that were in place to deal with such men and women. Despite protestations to the contrary, the Victorian police were, as were all other colonies within the Empire, able to arrest and deport convicts that escaped from Van Diemen's Land. In New South Wales, for example, authorities were initially empowered to arrest suspected absconders provided a warrant had been so

¹⁵ BPP, Despatch from LaTrobe to Sir John Pakington, 2 December 1852, reprinted in 'Correspondence on the Subject of Convict Discipline and Transportation', 1852-53, [1677], Volume LXXXII, p. 146 (IUP, *Crime and Punishment: Transportation, Volume 12*).

issued by a magistrate in Van Diemen's Land and then endorsed by a local justice. In 1850 this power was changed to allow warrants to be issued 'in the same manner and upon like grounds as if the said offence was ...committed' within New South Wales. It made it lawful for any peace officer to apprehend a suspected absconder who was then to be returned from whence he had come within six months.¹⁶ As such this power was inherited by Victoria at the time of separation.

Under this legislation any member of the public could detain any other they suspected of being a 'transported felon unlawfully at large'. In such cases, the burden of proof fell onto the accused, who was required to establish that he was not a 'transported felon unlawfully at large'. As was the case with the vagrancy acts, the onus of proof was not on the authorities. There was also provision for the detention of the accused until such time as they could establish their innocence. Accusers were exempt from punishment, that is, there was no recourse for a person who was detained when innocent.¹⁷ Denison fixed the problem with regards to offenders escaping to Van Diemen's Land by introducing legislation that allowed for the detention of such people for varying periods of time until warrants for their arrest could be issued in the place the offence was alleged to have occurred. If this was New South Wales or Victoria, the period of detention was six weeks, South Australia two months, and Western Australia and New Zealand four months. This effectively restricted *habeas corpus*.¹⁸

The passing of such Acts demonstrates a desire by the local legislatures to make hard decisions in relation to law and order in the colonies and their ability to act independent of London. The issue that La Trobe smudged in his despatch to Pakington was that the vast majority of those he was talking about had not escaped but had been granted pardons and were to all intents free to be in Victoria.

Having established, at least in his own mind's eye, that there was inadequate provision in the Victorian legislation to halt the influx, La Trobe then returned to the

¹⁶ This was initially NSW Statute 2 Vic c11 and then 14 Vic c7. See especially clauses 1 and 6 of the second Act. Both statutes remained as is until repealed in 1865 and replaced with the Victorian *Justices of the Peace Statute*, 28 Vic, No. 267.

¹⁷ M. Eburn, 'Outlawry in Colonial Australia: The Felons Apprehension Acts 1865-1899', *ANZLH E-journal*, (2005), pp. 86-87.

¹⁸ VDL Statute 15 Victoria, No. 6.

cause of crime in the colony. He subscribed to the pre-existing argument that the vast majority of crime in Victoria, or at least Melbourne, was being perpetrated by Van Diemonians and Exiles. To this end he offered Pakington the statistics from the returns of the police courts in Melbourne for the six month periods ending 30 September 1851, 31 March 1852 and 30 September 1852. Given that the discovery of gold was to lead to a massive influx of population in the colony for the period under inspection, the significant increase in levels of crime for the same period does not come as a surprise. La Trobe chose to blame most of it on the thousands of Van Diemonians who had flocked across Bass Strait.

The figures La Trobe sent were broken down into crimes committed by those declared to have entered the colony as free men, and those who had been previously convicted, that is they had been transported to any of the Australian colonies as convicts. His intention was to demonstrate the rise in crime and how it was attributable to those of the convict class. The figures demonstrated, over the eighteen month period, a three fold increase in cases taken before the Supreme Court, with three fifths of these cases having been committed it was alleged, by those previously convicted. By comparison, the population of Victoria almost quadrupled between 1850 and 1854, rising from 75,000 to 284,000, the vast bulk being after the discovery of gold in July 1851.¹⁹

Emigrants had rushed to Victoria and the goldfields in such numbers that they soon out numbered those emigrants to the rest of the Australian colonies. The figures, given below, bear closer analysis. Traditionally it has been argued that, in terms of movement from the Australian colonies and New Zealand, Van Diemen's Land supplied the greatest numbers of migrants. The figures suggest that the other Australian colonies also contributed large numbers.

	ARRIVALS	
	<u>1852</u>	<u>1853</u>
Victoria	46,411	50,478
All other Australian colonies	48,253	35,844

¹⁹ M. Cathcart (ed.), *Manning Clark's History of Australia* (Ringwood, 1995), pp. 257, 276.

DEPARTURES

	<u>1852</u>	<u>1853</u>
New South Wales	8,576	14,323
Van Diemen's Land	10,505	12,400
South Australia/Western Australia	10,915	10,355
New Zealand	87	1,219

Given that returns to Britain were minimal, and that there is no data for those travelling overland, it is fair to assume that a significant portion of the influx were, in fact, not from Van Diemen's Land.²⁰

In making his argument La Trobe chose to ignore those parts of the return that did not fit with his claims. The figures reveal that the ratio of free to convict entering the Melbourne gaol over the period had remained consistent at 1:1, although actual numbers gaoled had increased by 150%. To explain this ratio the report disputed the numbers that claimed to be free to the colony, noting many were undoubtedly convicts. Close examination also shows that while the number of cases before the Supreme Court multiplied three fold, the vast increase was in the area of larceny and robbery. Serious crimes committed against the person, murder and rape, soon to be the catch cry in the public debate over levels of lawlessness, showed no increase. While the figures for those charged with larceny display a 1:1 ratio, robbery was more the domain of the former convict.²¹

LaTrobe also chose not to highlight some aspects of the figures, particularly those that point to other possible sources for the increase in crime. One such possibility was another group, seafarers, who were seen that was seen as inhabiting the edges of society. Amongst crimes tried before the Police Magistrate the number of those charged with desertion from ships rose from 12 to 58 over the three periods. LaTrobe saw no reason to point out to Pakington that charges of misconduct by seamen had resulted in 21 cases in the period up to September 1852. Whilst it may seem a small

²⁰ Figures derived from details supplied in the *Argus*, 27 October 1854, p. 5.

²¹ Larceny is taken as being the theft of personal property whilst robbery generally refers to theft on a grander scale i.e. from shops and warehouses.

figure it actually ranked numerically as the third largest offence behind larceny and robbery in company.²²

Details of the Victorian statute, commonly referred to as the Convict Prevention Bill, unleashed a storm of protest in Van Diemen's Land. Not least amongst the protestations were those of Denison who regarded the bill as a clear breach of the Royal prerogative to pardon. He lodged a formal protest with Pakington, bitterly complaining of the 'tyrannical and inquisitorial' nature of the Act. It was, Denison informed Pakington, 'tenfold more objectionable in spirit and in letter than the clauses of the Vagrancy Act of New South Wales' and of which he had also previously complained.²³

Denison strongly argued that the Bill should not receive assent from London. He noted that it contained a number of fallacious statements, including a description of conditional pardons as being of 'similar character' to tickets of leave. Denison pointed out to Pakington that under the Act any convict who had been pardoned under the hand of the Queen could still be treated as a felon. This categorisation would then see them subject to penalties such as imprisonment and the removal of all property. Denison particularly balked at the idea that convicts, free by servitude and therefore 'as free as any other of Her Majesty's subjects', could be imprisoned on the mere say so of any witness who was prepared to testify that the accused had been a transported offender 'at any period within seven years'. His greatest argument lay with the Bill's 15th clause which claimed that nothing in the act could be construed as interfering with the Royal prerogative of mercy, a fact that Denison argued was clearly contradictory to the intent of the preceding 14th clause and which did interfere.²⁴

A copy of the contentious Bill had been forwarded to Denison by Lonsdale within a fortnight of its being passed by the Victorian legislature. Lonsdale advised Denison

²² BPP, Despatch from LaTrobe to Pakington, 2 December 1852, reprinted in 'Correspondence on the Subject of Convict Discipline and Transportation', 1852-53, [1677], Volume LXXXII, pp. 149-50 (IUP, *Crime and Punishment: Transportation, Volume 12*).

²³ BPP, Despatch from Denison to Pakington, 2 October 1852, reprinted in 'Further Correspondence on the Subject of Convict Discipline and Transportation', 1852-53, [1601], Volume LXXXII, p. 63 (IUP, *Crime and Punishment: Transportation, Volume 12*).

²⁴ BPP, Despatch from Denison to Pakington, 2 October 1852, reprinted in 'Further Correspondence on the Subject of Convict Discipline and Transportation', 1852-53, [1601], Volume LXXXII, p. 63 (IUP, *Crime and Punishment: Transportation, Volume 12*).

that the Act was designed 'to obviate the evil arising to Victoria from the continual influx from Van Diemen's Land of offenders illegally at large'.²⁵ Details of the Bill were also widely published in the colonial press. When coupled with La Trobe's tardiness in sending the Bill to Britain, it allowed Denison to have the ear of the Colonial Office for almost two months before they saw the Bill and read La Trobe's defence of it.

The Duke of Newcastle, who had succeeded Pakington, had initially responded to Denison's despatch by writing to La Trobe in May 1853. He advised La Trobe that assent for the Convicts Prevention Bill had been disallowed by an Order in Council. Newcastle noted that the thrust of the Act was supposed by the Victorians to be the exclusion of criminals illegally at large, including those on falsified tickets of leave. This was not the interpretation of the Privy Council who read the act as allowing for the exclusion of convicts in possession of conditional pardons, including those allowed 'by virtue of those pardons to establish themselves in part of Her Majesty's dominions from which the terms of their pardon did not expressly exclude them'. This, Newcastle informed La Trobe, was clearly 'undue interference with Her Majesty's prerogative of pardon, and with those rights of personal freedom which when guaranteed to the convicted offender as a reward for good conduct must be protected in his case as much as that of another citizen'. The Council had therefore found the Bill 'objectionable on the grounds of equity and policy'.²⁶

Newcastle also advised La Trobe that he had received a report from Crawford Pasco, the Superintendent of Water Police in Victoria. This had included an opinion from the colony's Attorney General, William Stawell, to the effect that the Act did not apply to convicts under conditional pardons. Newcastle took this to indicate that the Victorian Government had no intention of imposing the Act on those holding such pardons. La Trobe later responded to this by concurring with Newcastle's remarks, indicating that the Act did not apply to conditional pardon holders, and that his opinion was also based on the advice of Stawell. Whilst this may have been the intention of the Victorians, it was clearly not seen that way by the other colonies, in particular the

²⁵ AOT, CSO 24/205/7734, letter from Lonsdale to Denison, p. 191.

²⁶ BPP, Despatch from the Duke of Newcastle to Governor La Trobe, 30 September 1853, reprinted in 'Correspondence on the Subject of Convict Discipline and Transportation', 1854 [1795], Volume LIV, p. 125 (IUP, *Crime and Punishment: Transportation, Volume 11*).

Government of Van Diemen's Land. They clearly saw the bill as excluding those in Van Diemen's Land issued with a conditional pardon.²⁷

Despite the claims of both the Victorian legislature and La Trobe that the Bill was aimed only at absconders, it is clear that it was also aimed at expirees and emancipists. Even the argument regarding the need to deal with absconders was questionable. Evidence would suggest that any problem that did exist was far more minimal than authorities in Victoria believed. In April 1852 Denison had sent a report to Earl Grey regarding the number of convict absconders from Van Diemen's Land. He advised Grey that 784 convicts were recorded as absconders and thus unaccounted for in that colony's records. Denison qualified his advice by stating that the figure represented the total number of absconders unaccounted for since the settlement of the island in 1804. A total of 62,926 convicts had been sent to the colony to that point in time and thus the absconders represented only 1.2% of that figure.²⁸

Denison's figures translate into an annual average absconding rate of 16.3 convicts, a surprisingly low figure given the perceptions held at the time, especially in Victoria. This figure is supported by information supplied by Governor Arthur to Sir George Murray in 1829. In response to a request from Murray, Arthur advised that only 16 men, no women, were unaccounted for in that year and all were believed to have escaped the island. He provided a breakdown of intelligence as to where the 16 were believed to have gone. This included four to the Bass Strait islands, three on sealing vessels and six to foreign ports. Only two were believed to be in New South Wales.²⁹

In an effort to help deal with the supposed problem in Victoria, Van Diemen's Land sent three police constables to Melbourne in November 1852 to seek out absconders. Having reported to Evelyn Sturt, the Superintendent of Police, the three were

²⁷ BPP, Despatch from the Duke of Newcastle to Governor LaTrobe, 30 September 1853, in reprinted in 'Further Correspondence on the subject of Convict Discipline and Transportation', 1854 [1795], Volume LIV, p. 125 (IUP, *Crime and Punishment: Transportation, Volume 11*).

²⁸ BPP, Despatch from Denison to Earl Grey, 8 April 1852, reprinted in 'Further Correspondence on the Subject of Convict Discipline and Transportation', 1852-53, [1601], Volume LXXXII, p. 72 (IUP, *Crime and Punishment: Transportation, Volume 12*). The actual numbers transported to Van Diemen's Land remain disputed. Eldershaw gives three alternatives for the period 1803-1853 – 73,323, 74,265, and 73,566. P.R. Eldershaw, *Guide to the Public Records of Tasmania: Section Three Convict Department* (Hobart, 2003), pp. 60-61.

²⁹ Despatch from Arthur to Murray, 7 April 1829, in P. Chapman (ed.), *Historical Records of Australia (hereafter HRA), Series III, Volume VIII, Appendix 9*, pp. 1260-63.

despatched to Geelong where he believed their services were most badly needed. Sturt, in advising this to the Colonial Office in London, also noted that the *Great Britain* had departed Melbourne for Sydney a month prior to the men's arrival, taking with it 300 or so characters of 'very questionable notoriety'.³⁰ Given Denison's claim that in total only 784 convicts had absconded from Van Diemen's Land over the past 48 years it is obvious Sturt's 'characters' must also have referred to expirees, emancipists and pardon holders.

Denison's opposition to the bill won few friends amongst the Victorian legislative councillors. In February 1853 the Council noted that while Governor La Trobe had given his assent to the controversial Bill, the Governor of Van Diemen's Land had 'expressed himself strongly hostile to this measure, and declared his determination of using every exertion to procure its disallowance' in London. The Bill, Council members argued, was necessary to render 'the safety and well being of [the] colony, in consequence of its proximity to the penal colony of Van Diemen's Land'. The act was 'universally looked upon in [the] colony as the only available safeguard by which its society could be protected from the continuous inroad of the most desperate and degraded of Britain's criminals from the suffering neighbour colony of Van Diemen's Land'.³¹

The Convict Prevention Bill was to be valid for two years. Given La Trobe's delay in sending it, and the time elapsed in corresponding to and fro, the authorities in London realised that the Bill would have less than a year of its life remaining by the time a disallowance would arrive back in Port Phillip. When coupled with La Trobe's assurances that the provisions of the Act would not be applied to conditional pardon holders, it was decided to simply let the matter rest and the Bill expire. Aware of this, the Victorian legislature circumvented the disallowance by introducing an amendment to the 1852 Bill. This effectively meant that its annulment by Downing Street was itself annulled.

³⁰ BPP, Letter from E.P. Sturt to the Colonial Secretary, 2 December 1852, reprinted in 'Further Correspondence on the Subject of Convict Discipline and Transportation', 1852-53, [1677], Volume LXXXII, p. 153 (IUP, *Crime and Punishment: Transportation, Volume 12*).

³¹ BPP, Extract from the 'Papers and Proceedings of the Legislative Council of Victoria', 4 February 1853, reprinted in 'Further Correspondence on the Subject of Convict Discipline and Transportation', 1852-53, [1677], Volume LXXXII, p. 155 (IUP, *Crime and Punishment: Transportation, Volume 12*).

During this time however the provisions of the Bill were imposed. In February 1853 Pasco, the Superintendent of the Water Police, advised Lonsdale that since the passing of the Act twenty-one cases of persons suspected of being illegally at large had been brought before the bench, only one of whom had been able to satisfactorily establish his credentials as a free man. Four had been discharged as holding conditional pardons, three had been remanded, ten had been returned to 'Tasmania' (sic), whilst of the remaining three, two had been sentenced to three years hard labour and one to one year of hard labour on Victoria's roads.

Pasco went on to report that three ships' masters had also been prosecuted under the Act with the offence of having on board persons who could not prove themselves to be free men as required under the Convict Prevention Bill. All three had been found guilty and fined the maximum £100 each. The only defence they had offered - according to Pasco - was that they had been subject to the scrutiny of the Van Diemonian authorities prior to departure and so believed that everyone they carried was a free man. The Magistrate's response was the suggestion 'they arm themselves with ample proof of the freedom of their passengers, by obliging suspicious characters to produce their certificates of freedom before a passage ticket would be granted'.³²

Of the three captains charged the highest profile was that of Captain George Gilmore, Master of the Australasian Steam Navigation Company steamer *Yarra Yarra*. On 31 January 1853 his ship had been boarded by two Constables upon arrival at Hobson's Bay from George Town in northern Van Diemen's Land. Gilmore's hearing was before the police court in Williams Town on 23 February and demonstrated that Denison's concerns about the 'objectionable' nature of the Act were well founded. Only one witness for the prosecution was called, that being a Constable named Wells. He stated to the court that upon boarding the ship he had identified one of the passengers as a convict he had known to be in a road gang on the island in 1849. Wells having sworn to this assertion, the prosecution case was closed on the basis that it was all the evidence required by the Act.

³² BPP, Letter from Pasco to the Colonial Secretary, 23 February 1853, reprinted in 'Further Correspondence on the Subject of Convict Discipline and Transportation', 1852-53, [1677], Volume LXXXII, p. 156 (IUP, *Crime and Punishment: Transportation, Volume 12*).

Gilmore's defence was presented by lawyer Archibald Michie who claimed that his client could have done no more than he had. The *Yarra Yarra* had been boarded at George Town by the relevant authorities and been cleared to sail. Michie stated that Gilmore could not possibly know if any of his passengers had escaped the scrutiny of the inspection. Pasco himself was the presiding Magistrate and chose to disagree. He felt that Gilmore was at fault, as he should have demanded evidence or proof of freedom from any or all of the passengers he allowed on board. Michie responded by arguing that under the Act Gilmore himself was required to provide evidence of his freedom if so requested, a request that could well prove difficult to meet.³³

Michie's acting on behalf of Gilmore highlights the curious relationships that existed in the colonies at the time. Michie had originally migrated from Britain to Sydney where he had successfully practiced law until his return to England at the end of the 1840s. He migrated again to the Australian colonies via Canada, settling this time in Melbourne in 1852 where he was appointed to the Legislative Council in November of that year.³⁴ What makes his acting for Gilmore so intriguing is that Michie was a man with a long record of involvement in the anti-transportation movement. In 1847 whilst resident in Sydney the movement had endorsed him to stand for the Legislative Council seat of Cumberland County. Although defeated, Michie had remained active and was a prominent speaker at the large public gatherings organised to protest the landing of the convict exiles from the *Hashemy* in June 1849.³⁵ Upon his initial return to England he had been appointed to the London board of the anti-transportationist Australasian League that had been set up in May 1851 encompassing the eastern Australian colonies.³⁶

Pasco's report to Lonsdale following Gilmore's hearing noted the Bill had 'occasioned an antagonistic feeling on the part of Tasmanian traders', and that 'the

³³ *Argus*, 24 February 1853, p. 6.

³⁴ Michie was later to become Victoria's first Queen's Counsel. He also achieved fame as the defence lawyer for the miners charged over the incident at the Eureka Stockade in 1855.

³⁵ H.L. Hall, 'Michie, Sir Archibald (1813-1899)', *Australian Dictionary of Biography (hereafter ADB), Volume 5, 1851-1890 K-Q* (Melbourne, 1974), pp. 246-48.

³⁶ This board consisted of nine men, three each representing New South Wales, Victoria and Van Diemen's Land. Apart from Michie, Charles Adderley who had led the London protests over the *Neptune* (see Chapter 9), also represented New South Wales. Sir William Molesworth was appointed one of the Victorian representatives. For more on this topic see Blackton, 'The Australasian League', p. 391.

master of the principal steamer trading between the colonies' had publicly announced his intention to withdraw his ship from the service because of the Act. His reference was to Gilmore who was forced to write to the *Argus* to clarify the facts. Gilmore stated in his letter that he himself could not withdraw the *Yarra Yarra* as he was not the vessel's owner. What he claimed to have stated to the court was that his prosecution might well result in its withdrawal from the Van Diemen's Land to Victoria run.³⁷

The plight of Gilmore received little sympathy from staunch anti-transportationists like William Kerr. He used his position as editor of the *Argus* to strongly criticise Gilmore, claiming that he had constantly 'defied the law' and had financially benefited from bringing hundreds of men to Victoria in contravention of the act.³⁸ In a rare show of agreement this view was reflected by the *Melbourne Morning Herald* who reported that Captain Gilmore 'according to the public report has been guilty of several very open breaches of Mr Westgarth's act'.³⁹ Despite all the claims, the facts remained that only two had been identified on the *Yarra Yarra* and only three masters had been prosecuted in the six months the Act had been in place, hardly evidence of a mass abuse of the system.

Following the hearing in Williams Town the directors of the Launceston Steam Navigation Company, a rival on the Bass Strait service, petitioned Denison regarding the Act and Gilmore's prosecution. They noted that the Act's provisions against the landing of conditionally pardoned men now placed the intercolonial passenger trade in an 'awkward position'. Denison responded to the company advising that he had already drawn the 'illegal and oppressive character' of the Act to the Secretary of State's notice.⁴⁰

Some Launceston merchants chose to petition La Trobe himself. One was John Crookes, who had only recently been elected to Launceston's first Municipal Council

³⁷ *Argus*, 25 February 1853, p. 7.

³⁸ *Argus*, 25 February 1853, p. 7.

³⁹ *Melbourne Morning Herald*, 23 February 1853, p. 4.

⁴⁰ AOT, CSO 24/217/8253; letter from Denison to Launceston Steam Navigation Company, pp. 105-06.

on an anti transportation ticket.⁴¹ Crookes' major concern was that the Act would cripple the lucrative Bass Strait trade if the Victorians continued to enforce it. Sympathetic to the anti convict sentiments the Act contained he offered a compromise. Crookes put forward a suggestion that the Victorian Government appoint agents in Van Diemen's Land that were able to issue passports to all intending travellers. Whilst appointed by the Victorians they were to be paid for by the steam navigation companies operating between the two colonies. Thus 'holding of a passport properly issued would relieve the Masters of liability' and also ensure the ongoing operation of the trade.⁴² Whilst the proposal was rejected at the time, aspects of it were to reappear in legislation proposed later.

The major objection many had to the Bill was the way in which it was administered. Upon arrival at a Victorian port, constables would board a ship. All passengers were examined and any that were unable to prove their freedom were placed in the boarding boat and taken ashore to the Magistrate, there to be charged. One issue was the summary approach they adopted. The constables did not have to establish the condition of those they arrested, they merely had, under the Act, to believe they were not free.⁴³ The Act also allowed for the prosecuting constable to receive as an incentive half the fine imposed.⁴⁴

A second issue was the inequity of the punishment meted out under the Bill and demonstrated in the *Yarra Yarra* circumstances. One of the two men arrested was John Barry, found guilty of burglary at Wicklow in February 1840 and transported for ten years. He had received his free certificate in 1851 and as such the Van Diemen's Land authorities had no legal right to stop him boarding the ship. Barry was found guilty of breaching the Act and eventually returned to the island. For this offence Gilmore was also found guilty and fined £100. Wells, as the constable who had 'detected' Barry, received half the fine as reward. The other man arrested, William Rose, was also an expiree. He had originally been convicted in Gloucester Assizes in March 1840 of stealing and received his free certificate in April 1848. Despite the

⁴¹ L. Robson, *A History of Tasmania, Volume 1* (Melbourne, 1992), pp. 490, 494, 517-18. Crookes had, at one stage, been Secretary of the Launceston Association for Promoting the Cessation of Transportation. He was elected to the Municipal Council in January 1853.

⁴² AOT, CSO 24/217/8253, correspondence relating to the anti convict legislation, pp. 107-08.

⁴³ AOT, CSO 24/217/8253, correspondence relating to the anti convict legislation, p. 111.

⁴⁴ *Melbourne Morning Herald*, 25 February 1853, p. 4.

comparable status of the two men Rose was not ordered to be returned to Van Diemen's Land but sentenced to work in irons on the Victorian roads.⁴⁵

A month after the trial, Denison received from his legal officers advice on the matter. He was appraised that in the case of Barry his conviction 'on its face is not open to any objection in point of form'. There was no remedy of law available to Barry unless he could prove that the Act was void on the basis of it being 'repugnant to the law of England'. To do this would first require a writ of *habeus corpus* in the Supreme Court of Victoria. Denison would need to then supply certified proof of Barry's status as a free man.⁴⁶

In light of this advice Denison wrote to La Trobe, describing the matter as 'involving both personal and political considerations of very great importance'. He attacked the decision of Pasco in finding Gilmore guilty and fining him for an offence Denison claimed he did not commit. In doing so a 'manifest injustice [had] been perpetrated' on Gilmore by the court. Further to this Rose had been returned to Van Diemen's Land 'against his will', again for an offence he had not committed. Denison warned La Trobe that 'little...will have been done to remedy the evil occasioned by the decision of the Police Magistrate' if steps were not taken to prevent a recurrence of the situation. He finished by referring to the evidence of the free status of both Barry and Rose, noting that:

...from this it [was] evident that these men were free at the time they were punished as convicts improperly at large, and that Captain Gilmore, who was fined for conveying them to Victoria, was unjustly punished.⁴⁷

Denison was not alone in his attack on the integrity of the bill. George Cavenagh, Editor of the *Melbourne Morning Herald*, supported his criticisms. Cavenagh argued that the implications of the Bill were understood but that no rational person would possibly fine a ship's Captain who had made every effort to ascertain the character of

⁴⁵ AOT, CSO 24/217/8253, correspondence relating to the anti convict legislation, pp. 112, 124, 128, 130.

⁴⁶ AOT, CSO 24/217/8253, correspondence relating to the anti convict legislation, pp. 135-37.

⁴⁷ AOT, CSO 24/217/8253, correspondence relating to the anti convict legislation, pp. 142-45, 147.

his passengers. It noted that 'the gratification is too dearly purchased if obtained by an oppressive enforcement of as stringent an enactment as ever appeared upon the legislative records of an intelligent people'. Furthermore the Legislative Council were accused of passing an enactment that 'betokened a feeling of desperation' and that as a consequence Victorians had 'exposed [themselves] to the risk of revenging [their] wrongs upon innocent men'.⁴⁸

Such an attack on the legality of the Victorian actions could not go unanswered and within a month La Trobe had replied. He acknowledged Denison's comments but advised him that his assumptions regarding the Act were wrong, stating that the Victorian Government had every right to deal with members of the 'Prisoner Class' in the way they had. He noted for Denison's benefit that the Act allowed for any person seen at large and 'known to have recently belonged to the Prisoner Class' to be stopped and 'interrogated' over their status. Such persons were 'bound to prove by documents either on his person or of easy access' their free status, and if such evidence was not forthcoming the police had the authority to then arrest. This was no different, he claimed, to the situation in Van Diemen's Land.⁴⁹

La Trobe then shifted the onus by noting that the Van Diemen's Land authorities, through its own official records, had admitted there were 'hundreds of escaped convicts' at large, despite the evidence showing that few absconders made it off the island. He then blamed the expirees themselves for their dilemma, stating it to be their own fault if they could not produce the necessary paperwork upon demand. If some chose to move to Victoria without this paperwork the authorities there had every justification in arresting them.⁵⁰ Van Diemen's Land authorities though were wary of compensation cases if any false detention was argued. La Trobe acknowledged concerns regarding such compensation claims, advising Denison that if any person that had never been a convict was challenged, their inability to prove their freedom would be a consideration and that such a situation would warrant compensation.⁵¹

⁴⁸ *Melbourne Morning Herald*, 25 February 1853, p. 4. The personal nature of the Melbourne press at this time is worth noting. Cavenagh had William Kerr and John Pascoe Fawkner as critics both on a personal and professional level. Both were anti-transportationist.

⁴⁹ AOT, CSO 24/217/8253, correspondence relating to the anti convict legislation, p. 154.

⁵⁰ AOT, CSO 24/217/8253, correspondence relating to the anti convict legislation, pp. 157, 160.

⁵¹ AOT, CSO 24/217/8253, correspondence relating to the anti convict legislation, p. 161.

In an ironic twist to the argument, La Trobe advised Denison that the prosecutions in Victoria should be seen as an aid to the Van Diemen's Land Government. The action against Gilmore was aimed more at the Captains of ships than at the members of the prisoner class. Many of these Captains, he claimed, had openly flouted the Van Diemen's Land Government's attempts to stop escapees. Moreover the Captains had all received warning of the Victorian intent for there were over four months between the Act being passed by the Legislative Council and the first charges being laid, that being those involving Gilmore. La Trobe's final justification was to note that in the six weeks following Gilmore's trial no further charges had been laid, proof that the Act's role as a deterrent was effective.⁵²

These claims by La Trobe bear closer scrutiny. His first claim that no one had been charged between the Act's introduction and the case involving Gilmore would seem to refer solely to ships' Captains. As has been noted, Pasco had advised Lonsdale at the time that 21 cases had already been before the courts.⁵³ A search of the Victorian records, however, shows that Barry was the 45th person convicted under the Act. Pasco also advised that three Masters had been charged, of which Gilmore was the third. The claim that no one had been charged since Gilmore again refers only to ships Masters for the records also show that between his trial on February 23 and the beginning of April another nine were convicted of breaching the Act.⁵⁴

The claim by La Trobe that the lack of charges during this period proved the value of the Act as a deterrent can also be questioned. The lower numbers may also have occurred due to comments made by Judge Barry, first puisne judge in Victoria's Supreme Court. Barry had recently visited Hobart where he had 'ascertained it was the intention of the Van Diemen's Land government' that any runaway prisoners returned to Hobart would be sentenced to three years at Port Arthur.⁵⁵

In April 1853 Lonsdale advised the Colonial Secretary in Hobart Town that a man by the name of Johnston had been arrested on the *Tasmania* on March 1 and had been charged at Williams Town with being an escaped prisoner. In court Johnston's

⁵² AOT, CSO 24/217/8253, correspondence relating to the anti convict legislation, pp. 161, 163.

⁵³ For more detail on this see this thesis, p. 192.

⁵⁴ PROV, VPRS 2599/502, Schedule of Return for Convictions under the Convict Prevention Act.

⁵⁵ *Melbourne Morning Herald*, 23 February 1853, p. 4.

solicitor had produced proof of his freedom, but upon these documents being forwarded to the gaol it was ascertained that the description given on them did not tally with the man in custody. The matter was referred to the Comptroller General who advised that the paperwork was for a Richard Johnston, not William Johnston. A statement was taken from one of the Police Constables, John Smith, who stated that he had known Richard Johnston and that the man in custody was he. Richard Johnston had at one stage been a Constable himself. In May Lonsdale advised that Johnston had been freed on the orders of La Trobe, he being satisfied that Johnston was free by servitude.⁵⁶

La Trobe's suggestions that the Act was doing a service to the Van Diemen's Land authorities did not convince Denison. He responded to La Trobe and once again raised questions regarding the legal and moral authority of the Act. Denison noted that the Government of Victoria had recognised the fact that the men, Rose and Barry, had been free at the time of their trial. This, he argued, was established by the actions of La Trobe in remitting Barry's sentence to work on the roads and dropping the fine payable by Gilmore.

Denison turned his criticisms to a number of aspects of the trial, many of which he felt were of dubious legality. The Williams Town bench, by the evidence of its own returns, stated that under the Act all those accused were assumed guilty unless they could prove otherwise. This was, he told La Trobe, 'a course of proceeding altogether at variance with law and equity'. Denison pointed out to La Trobe that the only evidence offered at the trials of Rose and Barry was that they were once known to be prisoners. Such evidence he described as 'scanty and unsatisfactory'. No reference had been made to the *Hobart Town Gazette* to establish whether they were runaways or not.⁵⁷ The ruling of Justice Dowling in the case of England, that by the presumption of law every man was free until proven otherwise, was completely ignored.⁵⁸ Even more invidious was that by sentencing Barry to work on the roads the court had placed him physically in a position from which it was impossible for him to prove the illegality of his sentence.

⁵⁶ AOT, CSO 24/220/8451, Correspondence between Colonial Secretary, Victoria, and Colonial Secretary, Van Diemen's Land.

⁵⁷ AOT, CSO 24/217/8253, correspondence relating to the anti convict legislation, pp. 170-72.

⁵⁸ See this thesis, p. 141.

Other claims made by La Trobe also drew Denison's ire. He refused to accept the claim that the police had every right to deal with members of the prisoner class by stopping them and demanding to see paperwork which established they were free. He advised his Victorian counterpart that he 'must labour under some great misapprehension' as to the power of the Van Diemen's Land magistracy or the way in which they could exercise power. Denison made it quite clear that the Magistrates had no powers by law, nor would they be supported by Government, if they chose to act as the bench at Williams Town had done. The situation in Van Diemen's Land was that either the police or the person making the arrest would be required at any trial to supply proof of the status of the alleged offender. This at the very least required a plausible reason, for example the alleged offender's description matching that of an absconder or that of a person wanted by the police. In adopting this stance La Trobe was at odds with the position taken by Justice a'Beckett at May's trial for attempted murder.⁵⁹

The nature of the Act itself also came in for attention with Denison arguing that it was 'highly penal in character'. His opposition to it was based on his belief that any charge that carried with it punishment as 'severe...as three years hard labour in chains' should require great care over the nature of the evidence offered. Yet no such care had been displayed. Denison noted that of the four cases dealt with to that point the only two to have been scrutinised had proven to be miscarriages of justice. In conclusion he noted that one of the basic tenets of British law was that a free man should not be required to carry identifying documentation.⁶⁰

While Gilmore's trial would seem to support Denison's complaints, the Act was clearly not as universally draconian as suggested. The day before Gilmore appeared in Williams Town court a woman identified as Caroline Norris was brought before Heidelberg court by Detective Ashley and charged with being a prisoner of the crown illegally at large. Norris was described to the magistrates, Messrs Thomas and Griffiths, as being the wife of a man called Webb who had been murdered at Black Forest, about 50 kilometres north of Melbourne, some months earlier.

⁵⁹ For a'Beckett's position see this thesis, pp. 165-66.

⁶⁰ AOT, CSO 24/217/8253, Correspondence relating to the anti convict legislation, pp. 176-78.

In giving the evidence for the prosecution Ashley alleged that Norris was an absconder from Van Diemen's Land whose real name was Charlotte Bell. He produced a copy of the *Hobart Town Gazette* from January 1851 that gave a description of Bell, one which Ashley claimed matched that of Norris. Bell had been assigned to her husband James White from whom she had absconded. Ashley then produced White as a witness and he promptly identified Norris as his wife. This evidence was given unsworn thus making it inadmissible. White was asked by the magistrates to swear the oath on the Bible but he declined to do so. Magistrate Thomas asked White if he would not swear because of religious compunctions, that perhaps he was a Quaker. White's bemusing reply was 'no, he was a chimney sweep'. The bench then demanded that White take the oath, but he again refused to do so. He was promptly ruled in contempt of the court and sentenced to seven days in gaol.⁶¹

With a key prosecution witness no longer available Norris was remanded over so that further evidence could be gathered. Two days later the case was resumed when Constable Appleby of Flemington gave evidence that he had known Norris when in Hobart in 1846. At that time he claimed she had been working as an assigned nurse maid for Charles Young and went under the name of Sarah or Susan Bell. Arthur Read, the Attorney for the defence, then pointed out that the *Hobart Town Gazette* stated that Bell had been tried in Worcester in late 1846 and could not possibly have been in Hobart when Appleby claimed. Norris and Bell could not therefore be the same person. If any further proof was necessary Read noted that the description in the *Gazette* gave Bell as having light brown hair whereas Norris had coal black hair. The bench concurred and Norris was released, but not before they had made 'some observations not over complimentary to the discrimination or honesty of the Police by whom she had been arrested'.⁶²

Read's day in court continued when a second client, Walter Fryer, was also brought before the bench charged with being a prisoner at large. Detective Murray, who had

⁶¹ *Argus*, 23 February 1853, p. 6. Bell, that is Norris, had been transported in 1846 for 7 years having been found guilty of obtaining money under false pretences. She had absconded from Van Diemen's Land in November 1850. See *AOT*, CON 41/13, Charlotte Bell, per *Asian*, 1846, 7 years.

⁶² *Melbourne Morning Herald*, 25 February 1853, p. 5.

laid the prosecution, was cross-examined by Read at some length. Murray stated that he had known Fryer in Van Diemen's Land as a 'fourteen year man' who had come out on the convict transport *Lord Lyndoch*, the year of which he was unsure. There seems to have been no attempt to deny identity on the part of Fryer. Oddly Read claimed that the physical description of Fryer published by the Van Diemen's Land authorities did not match that of his client, with the exception of the initials 'WF' tattooed on the inside of his left arm. In fact Fryer's description gives the letters on his inside left arm as being 'TSA', along with a half moon, a bird and a man.⁶³

Unlike Norris, Fryer's defence rested on his claimed status as a free man, rather than on a question of identity. In support of his claim Fryer produced for the bench a Ticket of Freedom in his name and signed by William Nairn of the Convict Department in Hobart. The bench however rejected this as a forgery and the prosecution called Chief Constable Pearce of the District Police as an expert witness. Pearce declared to the court that he knew the signature of Nairn well and that the one on the ticket was not his. Fryer was sentenced to three years hard labour in irons on Victoria's roads under the provisions of the Convict Prevention Act. He was one of the few not repatriated to Van Diemen's Land.⁶⁴

The unusual aspect of this case was that Fryer was indeed a 14 year man transported on the *Lord Lyndoch* as Murray had stated. He had a long history of offences in Van Diemen's Land including insolence, disobedience, assault, being out of irons, absconding, and damage to property. Despite this in May 1849 he had been granted a ticket of leave, and in June 1851 had been recommended for a conditional pardon. He absconded in August the following year before the pardon was granted and, as a consequence, his ticket of leave was revoked. As a prisoner of the Crown illegally at large the Victorian authorities had every right to send him back to Van Diemen's Land and thus both rid themselves of a known felon and save themselves the cost of maintaining him for three years.⁶⁵

⁶³ *Hobart Town Gazette*, 7 September 1852, p. 727; *Melbourne Morning Herald*, 25 February 1853, p. 5.

⁶⁴ PROV, VPRS 2599/502, Schedule of Return for Convictions under the Convict Prevention Act.

⁶⁵ AOT, CON 33/5, Walter Fryer alias Freer, per *Lord Lyndoch*, 1840, 14 years for house breaking.

Over the following twenty months there was a steady flow of convicts through the Victorian courts charged under the Convict Prevention Bill. Parliamentary inquiries in October 1854 revealed that a total of 130 men and 10 women had been so convicted. Sixty four of them, including all the women, were deported to Van Diemen's Land within four weeks or so of their hearings, with another thirteen, who were sentenced to hard labour on the roads, deported after serving part of their sentence. By late 1854 a pattern emerged in which prisoners served six to twelve months on the roads before being deported. At the time of the inquiry forty three remained in various Victorian gaols.

The return makes it clear that whilst the Bill might have been aimed at Van Diemonians they were not the only group targeted. Six men were deported to Sydney and another man was sent back to Swan River. Nor was it just in Melbourne that prosecution took place. Convicts were also prosecuted at Geelong, Bendigo, Ballarat, Castlemaine, May Day Hills, Beechworth, Heidelberg, Williams Town, Heathcote, and Alberton in Gippsland.⁶⁶

The *Argus* continued to attack Denison, disparagingly referring to him as 'The Convict Governor' or 'The Grand Master of Felonry'. He was accused of attempting to lure free Victorians as settlers to Van Diemen's Land. In this the *Argus* saw an insidious plan, that being the emptying out of the convicts and their replacement with a better quality of citizen. To this end it claimed Denison had appointed an emigration agent in Victoria. The attitudes displayed and the class status adopted by Kerr is summed up in his own words 'The fellowship of convicts will never be alluring to honest men'.⁶⁷

In May 1854 Denison again wrote to Newcastle, this time complaining that the objectionable clauses within the Convict Prevention Bill had not been removed. Denison felt 'compelled to bring under [His] Grace's notice' the fact that this had resulted in men being gaoled in Victoria. He enclosed evidence relating to two men granted conditional pardons in 1853 that had been imprisoned under the Bill and then

⁶⁶ PROV, VPRS 2599/P/0000/502, Schedule of Return for Convictions under the Convicts Prevention Act.

⁶⁷ *Argus*, 25 February 1853, p. 6.

returned to Van Diemen's Land. Denison enclosed a memorandum from John Hampton, the Comptroller General of Convicts, verifying that both men had been issued with the pardons. Hampton had noted that the two men 'may consider themselves fortunate' to have been returned rather than spend three years on the roads.

James Penny, the Acting Police Magistrate in Launceston also sent a memorandum to Newcastle. Penny advised that the two men, Daniel Bridges and William Harding, had stated to the Police Bench that they had been apprehended in Victoria, that at the time they had been carrying their conditional pardons and that they had shown and pleaded them before the Magistrate at Heidelberg. The two had been told that they did not count as free men in that part of Victoria. After several weeks in gaol, during which all their property had been confiscated, including a sum of £17, they had then been returned to Van Diemen's Land penniless. Denison also included an acknowledgement from William Gunn, in his capacity as Superintendent of the convict establishment in Launceston. Gunn confirmed that the conditional pardons so produced belonged to Bridges and Harding, adding he was at a loss to understand why they had been returned to Van Diemen's Land when the pair held proper documentation.⁶⁸

Denison noted that La Trobe had 'declined to execute his instructions' in respect of amending the relevant sections of the Bill. In his defence La Trobe informed London that as the Act was due to expire in November it was no longer necessary to take steps to disallow it. The replacement Act was not a concern as it was not yet in any 'official shape'. In the event it was not to be La Trobe's problem as he sailed for Britain in May. His successor, Charles Hotham, arrived in June armed with instructions from Sir George Grey to 'reconcile' the views of the Government in London with those in Melbourne. Hotham also had instructions ordering him to investigate Denison's allegations of men being gaoled under the act. In part Grey's instructions read:

...I have to direct you to ascertain whether the information [Sir William Denison] had received is correct, and if you find this to be the fact, I have to suggest that in order to prevent so obvious an

⁶⁸ Reprinted in the *Melbourne Morning Herald*, 12 October 1854, p. 4.

injustice, and so serious encroachment on the prerogative of the Crown, you should, without delay, cause free pardons to be issued to such alleged offenders against the act.⁶⁹

The situation was confused somewhat by the continued use of the *Vagrancy Act* against those who could also be charged under the Convict Prevention Bill. One example was the case of James Fancourt who had appeared in the City Court and been remanded under suspicion of being a prisoner of the Crown illegally at large. Detective Mitchell informed the bench that he had known Fancourt within the previous three years in Van Diemen's Land where he had been a prisoner. As such he was liable to be sentenced to time on the roads under the Bill or to deportation to Van Diemen's Land as an absconder. Instead Fancourt had just spent twelve months in Castlemaine gaol after being convicted of vagrancy. Fancourt told the court that he was a free man and had been since 1844. The only evidence of this he could offer was to refer the Bench to the Free Gazette. He was remanded for seven days so that further inquiries could be made as to his status.⁷⁰

With the Convict Prevention Bill due to expire in November the thoughts of the Victorian legislature turned to a replacement. The Government put forward the Influx of Criminals Prevention Bill which was read on 11 October. Lonsdale then moved that a sub committee be formed to look at it and make recommendations. The Committee was chaired by himself and included amongst others the Attorney General William Stawell, John Fawkner, James Strachan, Charles Griffith, Augustus Greeves, Henry Miller, William Haines, William Nicholson, and John O'Shannassy. Stawell was an avowed anti-transportationist, having been involved in the formation of the Anti-Transportation League in 1850. The following year he had been appointed to the committee of the Victorian branch of the Australasian League. Fawkner despite, or perhaps because of, his own background was also opposed to convictism. His father had been transported to Van Diemen's Land but was also later convicted and transported from Hobart to Newcastle. Both John Fawkner and his wife, Eliza Cobb,

⁶⁹ Despatch from Grey to Hotham, published in the *Examiner*, 14 October 1854, p. 2, *Argus*, 12 October 1854, pp. 4-5.

⁷⁰ *Argus*, 4 October 1854, p. 5.

had been transported, with Fawkner also sent to Newcastle following his involvement in a failed escape bid made by seven convicts.⁷¹

Little interest was taken in the Bill by most of the Committee members. Greeves did not attend any of the meetings prior to the writing of the report in November, nor did O'Shannassy, while Haines and Miller bothered to attend just once each. One meeting was abandoned through the lack of a quorum, despite the number required being only three. From this it could be fairly assumed that the members had already made up their minds as to how the final report and its recommendations would be framed.⁷²

The residents of Van Diemen's Land followed the events in Victoria closely. The *Examiner* reported in early October that Richard Dry, the member for Launceston in the Van Diemen's Land Legislative Council, intended to move a motion 'to grant free and absolute pardons to all the prisoners in the colony whose liberty would not endanger the public safety'. This it was argued would have the effect of killing the Convict Prevention Bill and any successors. The comments triggered a response from the Victorian Legislative Council. Lonsdale reported to the Council that if the newspaper reports were correct 'it was the intention of the Van Diemen's Land authorities to convert conditional pardons into free pardons, and that in itself would render the provisions of the Convict Prevention Act inoperative'. He argued that it was therefore necessary to implement more practical measures. There were 13,000 convicts in Van Diemen's Land waiting to cross to Victoria. Lonsdale proposed a new measure to 'preclude all persons formerly convicts, in whatever way they had emerged from bondage, from landing in this colony, except under such restrictions as would do away with all fear of the evils to be apprehended from the unrestrained influx of criminals'. He noted it had been an anomaly of the Convict Prevention Bill that it excluded those on conditional pardons, but admitted expirees – members of that 'objectionable class' who were required to show no sign of reformation in regaining their status as free men and women.⁷³

⁷¹ C. Francis, 'Stawell, Sir William Foster (1815 - 1889)', *Australian Dictionary of Biography*, Volume 6, (Melbourne, 1976), pp 174-77; H. Anderson, 'Fawkner, John Pascoe (1792 - 1869)', *Australian Dictionary of Biography*, Volume 1, (Melbourne, 1966), pp. 368-70.

⁷² PROV, VPRS 2599/500, Proceedings of the Select Committee of the Legislative Council of Victoria on the Influx of Criminals Prevention Bill.

⁷³ *Examiner*, 14 October 1854, p. 2; T. Newman, *Representation of the Tasmanian People*, (Hobart, 1994), p. 150.

The need for an innovative solution to the problems Victoria perceived it faced, drew a variety of responses. One came in a letter to the *Argus* signed under the pseudonym 'Felix Australian'. Mr 'Australian' noted that Victoria was now full of 'Bill Sykes' and 'stickers up' from Van Diemen's Land, Sykes being a reference to the character of the same name in the Charles Dickens novel *Oliver Twist*.⁷⁴ The wave of crime clearly being experienced in Melbourne also called for a novel approach. 'Felix Australian' asked why the Victorian Legislative Council could not pass an Act that transported all her convicts, past present and future to England. After all, he concluded, 'one good turn deserves another'.⁷⁵

Feelings on the proposed Victorian legislation also ran high in Van Diemen's Land. There too innovative steps were taken to provide solutions. In Launceston Thomas Riely took the unusual step of paying to have a letter he had written to Sir George Grey printed and published in the *Examiner* newspaper. He gave a long and detailed account of the history of convictism in the colonies, but the point of his letter was an attack on the Convict Prevention Bill. Riely asserted that the first Bill in 1852 had been disallowed only for its amendment to prove harsher and more stringent.

Riely wrote that many thousands of convicts had become free by servitude or by absolute pardon over the preceding 25 years and that 'only a small percentage [had] returned to England'. He therefore argued that the absolute pardons proposed by Richard Dry would have a minimal impact on England and thus should be assented to by London. The Bill was also seen as a source of less known evils, one of which Riely described as being a 'vile system of extorting blackmail'. This was being practiced in Victoria on those who were threatened with exposure as ex convicts. If so exposed they were then at risk of having their goods 'plundered' but Riely believed that Dry's plan would eliminate this.⁷⁶

Riely had also raised the issue of those gaoled under the Bill, of which there were 43 at the time of the parliamentary inquiry. John Hodgson, the member for Melbourne,

⁷⁴ This was Dickens' second novel and first appeared in 1838.

⁷⁵ *Argus*, 14 October 1854, p. 5.

⁷⁶ *Examiner*, 17 October 1854, pp. 2-3.

also raised the matter in the Victorian legislature. Hodgson asked Lonsdale if the Lieutenant Governor intended carrying out the instructions of the Secretary of State to release those held under the Convict Prevention Act. Lonsdale responded that enquiries were being made 'into the causes of incarceration' and if that were the sole reason they would be discharged.⁷⁷

Kerr and the *Argus* also heavily pushed the need for more stringent measures. When two Van Diemonians, Reuben Atkinson and Thomas Hannon, were charged with the murder of Ambrose Marcus, Kerr was able to use them as an example of why the Convict Prevention Bill was necessary and vital.⁷⁸ Yet, as events demonstrated, it was a piece of legislation that worked only in one direction. Earlier in October two men by the names of Richard Prendergast and John Brien also appeared before the District Court charged with murdering Thomas Healey at Sydney Flat, Sandhurst, in July 1852. The two men had fled to Van Diemen's Land where they were arrested in Deloraine by Constable Jackson who had read their description in a copy of the Victorian Government *Gazette*.⁷⁹ There was no suggestion in the evidence offered that the two were convicts of any status.

On the 20th October John Pascoe Fawkner rose to address the Legislative Council on the subject of the Bill. He told the Members present that the disallowance of the 1852 Bill had threatened to sever the connection between the colony and the Motherland. This was regrettable especially given that the vast majority of Victorians supported the Bill and its intentions. Fawkner noted that it had been argued by some that Britain had a right to send convicts to Van Diemen's Land because British money had paid for that colony to be founded. This, he argued, was certainly not the case with Victoria.

Fawkner then went on to make the claim that at the time of the discovery of gold in Victoria there had been 20,000 convicts in Van Diemen's Land. In the two and a half years since, that number had plummeted to just 13,000. Of the 7,000 convicts no longer in the system Fawkner stated he was happy to concede that perhaps a thousand

⁷⁷ *Examiner*, 19 October 1854, p. 3.

⁷⁸ *Argus*, 19 October 1854, p. 5.

⁷⁹ *Argus*, 7 October 1854, p. 5. Sandhurst was part of the Victorian goldfields and is now better known as Bendigo.

had either died or had departed for destinations other than Victoria. That left 6,000 that had therefore, by Fawcner's logic, relocated to Victoria. He further claimed that the reason why Denison was so keen to let these convicts go was purely one of economy in that they were costing the Van Diemen's Land Government £200,000 per annum to maintain. If nothing else the reason to restrict the immigration into the colony of these convicts could be justified by simple economics. Fawcner claimed that their presence in the Victorian colony was costing £500,000 per annum, the figure being half the annual police expenses within the colony.

Discussion was not merely restricted to the members of the Victorian legislature. A large anti convict demonstration was organised for 23 October to be held on the steps of the Melbourne courthouse. The requisition for the meeting had claimed 'the solemn and settled acts of the Victorian legislature [had been] entirely superceded, and unwarrantably interfered with...' by Grey's instructions to Hotham. Further more by its actions the Colonial office were responsible for 'letting loose upon this free colony hordes of unreformed criminals, by whom the lives and property of its inhabitants are endangered'.⁸⁰ In offering its support for the meeting the *Argus* noted, in its editorial, that it was 'the duty of every one who values his property and his life, the welfare of his family, and the reputation of his adopted country, to protect, by his presence at the meeting...'.⁸¹ Handbills with a heavy black border were circulated throughout Melbourne advising the time date and place of the demonstration.⁸²

The newspapers reported the next day that upwards of 10,000 concerned colonists had attended to hear speeches from many of the key players including the radical liberal William Westgarth. It was Westgarth who had first introduced the Convict Prevention Bill into the Legislative Council in 1852, although credit for its drafting actually belongs to Kerr. Westgarth had a long history of opposition to convictism and had been one of the three Victorian delegates elected to attend the conference of the Australasian League for the Abolition of Transportation in 1851. He was also a strong supporter of Edward Wilson, the owner of the *Argus* and a staunch opponent of Sir

⁸⁰ *Examiner*, 31 October 1854, p. 2.

⁸¹ *Argus*, 21 October 1854, p. 4.

⁸² *Argus*, 23 October 1854, p. 5.

Charles Hotham.⁸³ Westgarth informed the gathering that the granting of conditional pardons by Governor Denison was a 'most unwarrantable exercise of the Royal Prerogative'.⁸⁴ This was the thrust of much of the argument over the Bill that, it was claimed, was as much about protecting the rights of the colonists as it was about stopping the influx of convicts. The actions of its supporters were not political but social, moral and religious.⁸⁵

Westgarth then moved a motion of support for the actions of the Legislative Council. In part it read:

...the Sovereign of the British realms neither hath nor ought to have any right, prerogative, or power warranting the letting loose in the colony of Victoria of the convicted criminals of other countries or colonies.

Archibald Michie, who informed the audience that the real source of the problems faced by them was the transportation policy the British government had put in place, seconded the motion. Amid the rhetoric Michie told the meeting that since the introduction of the probation system only the very worst of British criminals had been sent to Van Diemen's Land. The 'Denison pets' or 'Grey pets', as they were referred to, were all hardened criminals. Michie almost lamented the loss of the assignment system that he claimed had seen men transported for only relatively minor crimes such as poaching and smuggling, crimes that he referred to as 'comparatively trifling offences'.⁸⁶

Another to address the crowd was Henry Langlands, a former member of the Legislative Council. Langlands expressed the levels of hysteria the subject had created within Victoria, when he told the demonstration 'Cholera would be preferable to the influx of criminals'. He went on to tell the crowd that London had disallowed the Convict Prevention Bill because it impinged on the prerogative of the Crown.

⁸³ G. Serle, 'Westgarth, William (1815 - 1889)', *ADB, Volume 6*, pp. 379-83; L. Gardiner, 'Kerr, William (1812 - 1859)', *ADB, Volume 2 I-Z*, pp. 50-51.

⁸⁴ *Argus*, 24 October 1854, p. 4.

⁸⁵ *Examiner*, 31 October 1854, p. 2.

⁸⁶ *Argus*, 24 October 1854, p. 4.

Langlands claimed that the greater perversion was in fact the response from Downing Street that allowed Denison to interfere directly in the workings of another colony. In so doing, London was not protecting the interests of the colonists.⁸⁷

As the expiry date for the Convict Prevention Bill neared the Victorians became fragmented in their response to replacing it. Eventually three proposals came in for consideration. William Nicholson introduced one, the New Influx of Criminals Prevention into Victoria Bill. This was substantially the same as the Convicts Prevention Act, but was 'slightly' retrospective. It would apply to all those convicted of a felony in Great Britain or any of her colonies and who had been sentenced to transportation or imprisonment. Further the Bill was to apply to all those convicts who had come to Victoria between the expiry of the Convict Prevention Bill and the enactment of his, Nicholson's, Bill. At the same time the Council had a standing Committee examining the proposed Unreformed Criminals Prevention Bill. Dr Greeves, however, believed that this latter Bill was both hopeless and impractical.⁸⁸

The *Argus* attacked Nicholson's Bill as not being good enough. The colony was being inundated with immigrants from Van Diemen's Land and at the same time Victoria was losing free and respectable citizens. The figures they had published less than a fortnight earlier showed 3301 departing for the United Kingdom in 1853, up from only 840 the year before. Kerr noted that the Convict Prevention Bill had not been the success hoped for. In its two-year existence 164 persons had been arrested under its provisions with 111 discharged for want of evidence. Of the remainder; 22 had been returned to Van Diemen's Land but subsequently freed, 21 were discharged having provided proof of their free status, and only ten were under punishment at the start of 1854. It was believed another 27 had been added to this figure during the course of 1854.⁸⁹

A third Bill was introduced which included a provision that all passengers entering Victoria from Van Diemen's Land would require a passport.⁹⁰ This Bill was pushed by Colonial Secretary, John Foster, but also met with strong opposition from the

⁸⁷ *Examiner*, 31 October 1854, p. 2.

⁸⁸ *Argus*, 4 November 1854, p. 4.

⁸⁹ *Argus*, 31 October 1854, p. 4, 6 November 1854, p. 5.

⁹⁰ *Argus*, 27 October 1854, p. 5.

Argus and its supporters in Westgarth and Stawell. The *Argus* described the Government plan to introduce passports as aligning itself with the enemy, not the anti-transportationists. It accused those in power in Downing Street as having 'deliberately handed over the peaceful colonies to the marauder and the cut throat'.⁹¹

In Van Diemen's Land suggestions that passports be introduced were met with abhorrence. The *Examiner* described the proposed documents as a 'noxious plant' that were used in Europe by countries whose modes of government were viewed as being decidedly 'un British' – the French, Austrians, Italians and Russians. The Editor of the *Examiner* wrote of the suggestion that 'in principle and detail it [was] detestable'. Of even greater concern was that the 'design [of the proposal was] to perpetuate distinctions which every colony in Australia ought to destroy. [The proposal would not be necessary only] if it were possible to single out, clothe in yellow, and subject to surveillance' all ex convicts.⁹²

Proposals to introduce passports, which were seen as a peculiarly continental European practice, were certainly not a new idea. In the early 1840s Alexander Harris, who wrote of his time in the colonies under the pseudonym of 'An Emigrant Mechanic', had touched on their introduction. Harris noted upon his departure from the colonies that the ships' passengers were ordered on deck at the time of departure and examined by 'two dirty constables'. Every person needed to supply proof of their being free and if not were removed from the ship. He noted that the 'great body of wrong arrests passes with impunity'. Only the forward passengers, that is third class, were forced on deck, the captain vouchsafing for the after cabin passengers. Harris believed that all free emigrants should be given a 'protective document' that established their free status.⁹³

The ability to regulate the intercolonial movements of ships' passengers was also a concern Crawford Pasco had raised with Lonsdale in early 1853. Pasco had advised him that the authorities needed to be careful of shipping entering Victoria not only

⁹¹ *Examiner*, 24 October 1854, p. 3 quoting Kerr in the *Argus*.

⁹² *Examiner*, 24 October 1854, p. 2.

⁹³ A. Harris (An Emigrant Mechanic), *Settlers and Convicts* (Melbourne, 1973), p. 227.

from Van Diemen's Land, but also from Adelaide and Sydney. His fear was that the Van Diemonian's would enter Melbourne via those ports to avoid scrutiny.⁹⁴

Under the proposed plan the Victorian Government was to employ agents based in Van Diemen's Land. These would be empowered to issue passports to all those intending travellers who satisfied the requirements of the proposed Bill. John Gleadow, the member for Cornwall in the Van Diemen's Land Legislative Council, then countered this intention. He moved a Bill that would make it illegal for any agent of any colony to issue passports on the island.⁹⁵ The Editor of the *Argus* declared that the so-called Anti Passport Bill had doomed the passport's ability to work.⁹⁶

When the Victorian committee, looking into the Influx of Criminals Prevention Bill, met on 7 November, a petition signed by the colonists and presented by Hodgson was read out. It contained the suggestion that a system of passports be introduced as a means of controlling immigration from Van Diemen's Land. After due consideration the Committee arrived at the conclusion that the concept presented difficulties 'so great that they [could not] recommend the addition' of the proviso to the Bill.

Nicholson's Bill had proposed that all those convicted of felony, except in Victoria, be regarded for a determined period of time as 'offenders illegally at large' and dealt with that way. Part of the rationale behind this was that such offenders could then receive a three-year sentence on the roads. Given that those transported for seven years could not be pardoned inside three and a half years, it meant almost all of their sentence would in fact be served. There were problems with this however as it meant that a seven year man would serve almost his whole sentence but a 21 year man would serve only a little over a half of his. The lesser criminal was thus being dealt with more harshly than the serious criminal.⁹⁷

⁹⁴ Letter from Pasco to the Colonial Secretary, 23 February 1853, reprinted in 'Further Correspondence on the Subject of Convict Discipline and Transportation', 1852-53, [1601], Volume LXXXII. 1853, p. 156 (IUP, *Crime and Punishment: Transportation, Volume 12*).

⁹⁵ *Examiner*, 28 October 1854, p. 2.

⁹⁶ *Argus*, 31 October 1854, p. 4.

⁹⁷ *Examiner*, 11 November 1854, p. 2.

With the various proposals in the final throes of a decision being made, the Launceston *Examiner*, despite its anti-transportationist sympathies, found new criticisms to throw at the Victorians. It claimed that the public indignation in Melbourne was more to do with the interference of a 'distant Secretary of State' and the Governor of Van Diemen's Land than it had to do with the close proximity of so many emancipists. As such it was 'not just to inflict on [emancipists] the vengeance of wounded pride'.

The newspaper also attacked the attitudes and justifications of the Victorians stating that 'it is a farce to talk of respect for the Royal prerogative when actions are so diametrically opposed to professions...' The Editor argued that the Convict Prevention Act had been justifiable when introduced but the ending of transportation had largely done away with that. It finished by arguing Empire loyalty, stating that Tasmania was bound by the actions of Downing Street and that the other Australian colonies had a sense of duty to Tasmania, not a right to blame them.⁹⁸

After weeks of discussion Stawell put together a draft report on the proposed Bill. It contained much of the usual rhetoric regarding the influx of men and women from across Bass Strait. So obvious was the 'magnitude of the evil' the report claimed that there was no need to call for public submissions or input. In fact the Committee had heard from only one witness, that being Captain Andrew Clarke of the Royal Engineers. Clarke had served time in Van Diemen's Land, originally in a supervisory role over convict labour then as Private Secretary to Sir William Denison. He had then been appointed Surveyor General of Victoria in March 1853.⁹⁹ Clarke was examined because of his intimate knowledge of how Denison operated. In particular the Committee wanted to establish if the 'reports extant in this Colony' were true that convicts in Van Diemen's Land were being granted Conditional Pardons without any evidence of their redemption or 'upon express condition of their leaving Van Diemen's Land'. Despite public claims to the contrary, Clarke indicated to the Committee that this was not the case and that such pardons were only ever issued in

⁹⁸ *Examiner*, 14 November 1854, p. 2. Despite the fact that the colony was still called Van Diemen's Land, the use of the name 'Tasmania' was a badge of the anti-transportation movement. The colony officially changed names on 17 December 1855.

⁹⁹ B. Malone, 'Clarke, Sir Andrew (1824 - 1902)', *Australian Dictionary of Biography, Volume 3* (Melbourne, 1969), pp. 409-411.

his experience upon proof of moral reformation.¹⁰⁰ Given this answer it is perhaps not surprising that the Committee decided it needed no further evidence.

Stawell's report noted that a previous Act entitled 'Act for the Apprehension of Offenders Illegally at Large' had been intended to stem the 'tide of crime inundating [Victorian] shores' but had proved ineffectual. Worse, it was unequal in its application, often inflicting unnecessary cruelty on those who by dint of hard work had turned themselves into useful members of society. Further it acted as a deterrent to those settlers who were respectable whilst being inoperative with regard to those who defied the law. It was therefore necessary to put in place a Bill that was better aimed at those undesirables that did not contribute usefully to society. It also recommended the introduction of the passport system. Stawell presented his draft report to the Committee but it did not meet with approval because of the passport provisions. He was outvoted three to one by Fawkner, Griffith and Nicholson, and the provision was withdrawn from the final draft.¹⁰¹

On 21 November the *Examiner* ran an article outlining the introduction of the Convict Prevention Bill into the Victorian Legislative Council. It reported the concerns of one councillor, Peter Snodgrass, who believed the Bill would exclude a certain class of men who were not criminals, those who had served their time. Snodgrass did not believe that the Council had the legislative authority to then subject such persons to further punishment. His concerns were met with the response of George Annand who informed him that 'once a criminal always a criminal'. The Bill was to be applicable to all those persons convicted and whose sentence expired three years before the Bill came into effect.¹⁰² Despite the concerns, the Bill was passed into law and assented to by Hotham, one of his final acts, as he died suddenly in December 1854.

While Victoria reneged on the passport idea, South Australia was later to put it into practice. In 1858 they passed an Act entitled 'an Act to prevent the Introduction into the Province of South Australia of Convicted Felons and other persons sentenced to

¹⁰⁰ PROV, VPRS 2599/500, Proceedings of the Select Committee of the Legislative Council of Victoria on the Influx of Criminals Prevention Bill.

¹⁰¹ PROV, VPRS 2599/500, Proceedings of the Select Committee of the Legislative Council of Victoria on the Influx of Criminals Prevention Bill.

¹⁰² *Examiner*, 21 November 1854, p. 2.

Transportation'. The second clause of this Act was aimed squarely at Western Australia, a convict destination only since 1850. It required any person entering the colony from there to produce a document specifically stating that they were not, nor had ever been, a 'prisoner of the Crown'. Such a piece of paper was required for a number of years following the Act's introduction.¹⁰³

In 1856 Major General Edward Macarthur, as the acting Governor of Victoria, wrote to Herman Labouchere, the Secretary of State for the Colonies. He informed Labouchere that he had assented to a Bill passed in the Legislative Council designed to extend the 1854 amendment Bill for a further period of time. His grounds for so doing were that the late Governor, Hotham, had assented to the original Act and so, on this basis, he was simply maintaining the status quo.

Part of the rationale used was that Victoria had become a wealthy colony, whereas the newly named Tasmania had only recently been a place of exile for the criminals of Britain. Such temptation would prove too much for such men and the public security would be jeopardised. Macarthur noted that as a consequence the 'Royal Prerogative cannot take its free course as in other parts of Her Majesty's dominions'. He further supported his decision by claiming alternate measures, such as the Vagrancy Act suggested by Lord Russell, were of no use in a country as thinly populated as the Australian colonies. The only way to deal with the problem was by applying a stringent law such as the one assented to.¹⁰⁴ Labouchere responded to Macarthur noting that as the extension was of a temporary nature he had no intention of discussing the Bill any further.¹⁰⁵ Macarthur underlined the need for the extension in a return despatch, noting that it was impossible to have a penal colony anywhere on the south and east coasts of the Australian colonies and not have intercourse between convict and free.¹⁰⁶

¹⁰³ A. Hasluck, *Unwilling Emigrants* (Melbourne, 1959), p. 58.

¹⁰⁴ Despatch from Macarthur to Labouchere, 15 April 1856, reprinted in Further Correspondence on the Subject of Convict Discipline and Transportation, 1857 [2197] Volume XIV, pp. 194-95 (IUP, *Crime and Punishment: Transportation, Volume 14*).

¹⁰⁵ Despatch from Labouchere to Macarthur, 8 August 1856, reprinted in Further Correspondence on the Subject of Convict Discipline and Transportation, 1857 [2197] Volume XIV, p. 201 (IUP, *Crime and Punishment: Transportation, Volume 14*).

¹⁰⁶ Despatch from Macarthur to Labouchere, 26 August 1856, reprinted in Further Correspondence on the Subject of Convict Discipline and Transportation, 1857 [2197] Volume XIV, pp. 198-99 (IUP, *Crime and Punishment: Transportation, Volume 14*).

Little more was heard of the act until 1864 when the Launceston *Examiner* carried an article which noted that the Act, after almost ten years of being 'practically in abeyance' had sprung back into life and several apprehensions had been made.¹⁰⁷ The situation was treated with more sympathy for Victoria than for those arrested, despite the Editor noting that the Act was unconstitutional. He described it as an attempt to place an additional sentence on those who have already served their time or been granted pardons. The Editor noted that the Act denied persons so entitled to live anywhere in the British dominions, something that was their 'inherent right'. Despite this it was argued that Victoria had genuine reasons to maintain and enforce the Act. Their criminal population was made up almost exclusively of British criminals that had been 'filtered through penal settlements'.

The belief of the article was that the Victorians had resurrected the Act in an attempt to stop transportation, which was still carried on to Western Australia. The Editor noted that it should not be forgotten that 'Victoria nobly responded to the appeal of Tasmania' at the time the Anti-Transportation League was established. The two therefore needed to be united until every foot of Australia was 'free from the stain of England's outcasts'.¹⁰⁸ The fact that some Tasmanians were impacted upon by the Act was seen as a small but necessary price to pay for the elimination of transportation.

The Act was operative at least until 1869 when John Kenealy, a Fenian transported to Western Australia, was arrested upon arriving at Hobson's Bay. Having been convicted, Kenealy appealed to the Supreme Court at which a number of aspects of the Influx of Criminals Prevention Bill were argued. His defence claimed, amongst others, that the Bill was constructed solely to deal with convicts transported to Van Diemen's Land, that an Act could not simply be extended as it had in 1856 but had to be re enacted, and the traditional argument that the Royal prerogative to pardon could not be impinged upon by colonial legislation. Chief Justice Stawell ruled that none of

¹⁰⁷ *Examiner*, 22 October 1864, p. 3.

¹⁰⁸ *Examiner*, 22 October 1864, p. 3.

the arguments were upheld and Justice Williams concurred. Kenealy's conviction was upheld.¹⁰⁹

In 1857 the Victorian Legislative Council sent Sir Henry Barkly an address regarding transportation to the Australian colonies. In part the Council justified its decision to introduce the anti convict Bills by claiming that they were needed to remedy the crime rates in Victoria. Denison was accused of having 'stimulated' the problem by the granting of conditional pardons, pardons that allowed convicts to travel anywhere but the United Kingdom. As a result, in and around Melbourne the instances of robbery, both of the home and the person, and 'outrages on the public roads', had become a constant occurrence. Serious crimes such as robbery and murder had become rife and the court records showed that the majority of this was all due to convicts 'together with a few free colonists which they had seduced'.¹¹⁰

This popularly expressed opinion was reinforced by those regarded as having expert knowledge in the area. One was John Price who had been at one time Superintendent of the penal station on Norfolk Island. Appointed Inspector General of Penal Establishments in Victoria in 1854, Price later gave evidence to a Parliamentary inquiry into penal discipline in 1856. He advised the Committee taking evidence that 'some thousands' of former Norfolk Island men were in the colony. Given the convict population of the island while Price was commandant from August 1846 until January 1853 it would seem almost every former Norfolk Island resident must have moved to Melbourne.¹¹¹

Public perception of crime in Victoria was not backed up by the figures. Rather it was supported by the rhetoric of the anti-transportationists who, for their own reasons, sought to rid the colony of undesirable elements, especially those that could be connected to the evils of convictism. The situation in Victoria was the culmination of 60 years of transportation to the Australian colonies. As the number of free settlers increased, the point of tension shifted from a clash between convict and system to one

¹⁰⁹ Ryan v Kenealy, reported in Wyatt, Webb and A'Beckett, *Reports of Cases argued and determined in the Supreme Court of Victoria, Volume VI* (Melbourne, 1871), pp. 193-209.

¹¹⁰ Enclosure in despatch from Barkly to Labouchere, 7 May 1857, reprinted in Further Correspondence on the Subject of Convict Discipline and Transportation, 1857 [2197] Volume XIV, pp. 98-9 (IUP, *Crime and Punishment: Transportation, Volume 14*).

¹¹¹ Serle, *The Golden Age*, pp. 126-27.

of colony against colony and threatened to impact on intercolonial trade and movement. Tensions were ultimately released because transportation to Van Diemen's Land ceased and thus was removed the key factor in its build-up.

The irony of the anti convict Acts was that they depended on the very class of person they sought to exclude for their ability to be implemented. Without the informers and the convict Constables it would have been virtually impossible to identify emancipists and absconders at large in Adelaide and Melbourne. The Acts also highlighted the position the local legislature found themselves in relative to the imperial parliament in London. Despite all their protests and machinations the colonists were forced to toe the London line, yet London then turned a blind eye to the impact of the Acts.

The Criminals Influx Bill never received Royal assent, yet remained in place. Its provisions were bodily incorporated into the Victorian *Crimes Act* of 1890 as sections 370 to 385 inclusive, with the sections only repealed when that Act was replaced by the *Crimes Act 1915*. At that point the clauses dating back to the 'temporary' measures of 1854 were at last deleted.¹¹²

The final word on the viability of the Acts should rest with the Editor of the *Launceston Examiner* who wrote, following the new Victorian legislation in December 1854, that the Convict Prevention Act would only stir up felony, not eradicate it. It argued that the elements of convictism would soon disappear if left to do so. It pointed out the pragmatics of the situation and the likelihood of the bill being effective. It claimed that:

No laws will exclude the highwayman or the burglar. Wherever there is booty he will be found despite of legal cordons... They will flock to the goldfields in the garb of gentlemen or arrive with a passport which none will venture to question.... The elite of villains will be there despite every effort to exclude them.¹¹³

¹¹² Victorian statutes 54 Victoria 1079 - *Crimes Act* (1890), and 6 George V, 2637 - *Crimes Act* (1915).

¹¹³ *Examiner*, 5 December 1854, p. 2.

Chapter Nine.

‘The duty of all true and loyal subjects’.¹

¹ *UCT Archives, Pfeiffer Family Papers, document BC 225 (D64/133).*

The British Empire consisted of a collection of territories; controlled by the Privy Council; connected by the fact that the King or Queen of England was their titular head of government; and converted into a bureaucratic and legal entity under the control of parliament.¹ The existence of this Empire, in a legal sense, has been questioned by some modern historians. Hyam and Martin have argued that empires require the existence of a uniform relationship between the imperial metropolis, in this case Britain, and the various dependent territories. Without such a relationship they argue it is not 'possible to generalise about a single empire'.²

This lack of a uniform relationship is evident in my analysis of the impact of penal transportation on the Australian colonies. In fact transportation itself demonstrates the arbitrary manner in which the Privy Council could declare certain places to be penal colonies. In 1848 the Council declared New South Wales, Van Diemen's Land, Norfolk Island and Bermuda as colonies to which 'Felons and other Offenders in the United Kingdom, then being, or thought to be, under sentence of transportation' were permitted to be conveyed.³ Strikingly this list included no reference to Gibraltar to which convicts had been sent after 1842.⁴

The 1848 decree also named the Cape Colony as a destination for convicts. Not previously the recipient of convicts from Britain, it was an Act that outraged that colony's inhabitants. While the protestations of the Port Phillip settlers were fuelled by the rhetoric of speakers such as William Westgarth and journalists like William

¹ J. Muldoon, *Empire and Order: The Concept of Empire, 800-1800* (Basingstoke, 1999), pp. 11, 14 & 136; A. Fitzroy, *The History of the Privy Council* (London, 1928), p. 319.

² R. Hyam & G. Martin, *Reappraisals in British Imperial History* (London, 1975), p. 5.

³ Quoted in P.B. Blanckenberg, 'When the Cape was declared a Penal Settlement', unpublished manuscript, Cory Library, Rhodes University, pp. 2-3.

⁴ A.G.L. Shaw, *Convicts & the Colonies* (London, 1966), p. 333. A more subtle omission from the Council's order was that of the south east Asian penal colonies of the Straits Settlements, made up of Penang, Singapore and Malacca, and those of the Indian Ocean which included Mauritius and the Andaman Islands. Overwhelmingly the convicts sent to these were Indian or Chinese in ethnic origin. Those of European descent sentenced in Britain's Asian colonies were most likely to be sent to Van Diemen's Land. For more on this topic in particular see C. Anderson's two works, *Convicts in the Indian Ocean: Transportation from South Asia to Mauritius, 1815-53* (Basingstoke, 2000), and *Legible Bodies: Race, Criminality and Colonialism in South Asia* (Oxford, 2004), and S. Sen, *Disciplining Punishment: Colonialism and Convict Society in the Andaman Islands* (New Delhi, 2000). See also S. Nicholas & P. Shergold, 'Transportation as Global Migration' in S. Nicholas (ed.), *Convict Workers: Reinterpreting Australia's Past* (Cambridge, 1989), pp. 30-33; H. Maxwell-Stewart, *World Heritage Serial Nomination for Australian Convict Sites – Consultants Report*, prepared for Australian Federal Department of Environment and Heritage, August 2006, pp. 32-33; and M. Bogle, *Convicts*, (Sydney, 1999).

Kerr, public demonstrations were orderly and the issue was left to the elected representatives to solve. Instead it was at the Cape that the issue of inundation by convicts holding conditional pardons or tickets of leave in the guise of Exiles, and where colonial paranoia regarding crime rates and friction over transportation policies, spilled over into violent reaction.

By the mid 1840s it was clear that the flood of convicts arriving in Van Diemen's Land had placed considerable pressures on the colony and that other destinations would have to be examined in order to provide some relief. Stanley had considered the Cape Colony as a possible destination as early as 1842. William Gladstone, who succeeded Stanley as Secretary of State for the Colonies, proposed sending convicts to the Cape Colony in 1846 to work on the building of a breakwater at Cape Town.⁵ This suggestion met with the approval of the colony's Legislative Council, on the proviso that none of the convicts be released into the community.⁶

When Gladstone and the Tories lost office in 1846 the notion of expanding the number of colonies to which convicts could be transported was again entertained by their Whig successors. In September 1847 Sir George Grey, the Home Secretary, wrote to Robert Wilson, the Governor of Bermuda, instructing him to form a board to ascertain if the colony was able to take an increased number of convicts.⁷ Consideration was also given to sending convicts under the Exiles scheme to Ceylon, Natal, the Bahamas and the Turks and Caicos Islands but this was rejected by Earl Grey.⁸ He briefly considered sending them under conditional pardons to New Zealand but the colony's Governor, also a Sir George Grey, rejected the suggestion on the

⁵ British Parliamentary Papers (hereafter BPP), Despatch from Stanley to Maitland, 29 April 1846, reprinted in 'Convicts (Cape of Good Hope)', Volume XLIII, 1849, p. 37 (IUP, *Crime and Punishment: Transportation, Volume 9*).

⁶ BPP, Despatch from Maitland to Gladstone, 10 September 1846, reprinted in 'Convicts (Cape of Good Hope)', Volume XLIII, 1849, pp. 16-17 (IUP, *Crime and Punishment: Transportation, Volume 9*).

⁷ NA, HO 45/1416, Correspondence between Sir George Grey and General Sir Robert Wilson, 16 September 1847.

⁸ BPP, Despatches from Torrington to Grey, 9 October 1848, and from Grey to Torrington, 2 December 1848, and despatch from Pottinger to Grey, 10 March 1847, reprinted in 'Convicts (Cape of Good Hope)', Volume XLIII, 1849, pp. 56-57, 18 (IUP, *Crime and Punishment: Transportation, Volume 9*); NA, CO 301/2, p. 261.

grounds that they would be a bad influence on the 'peculiar character of the numerous and warlike native population'.⁹

The plan to send convicts as Exiles to the Cape Colony was initially greeted by its newly appointed Governor, Sir Harry Smith, with approval. He wrote and advised Earl Grey that the colony could absorb 600 men, not 300 as first proposed. Such was his attitude that in May he urged Grey to send the men and confer 'this boon on Her Majesty's subjects in this colony with as little delay as possible'.¹⁰ In early 1849 Grey outlined to Smith the rationale behind the Government's new policy. In part it was based on a desire to remove criminals from 'their old haunts and associates'. There was a need to 'avoid introducing convicts into any one colony in sufficient numbers to [become] a large proportion of the population. It is precisely in order to avoid that evil that Her Majesty's Government are anxious to disperse them, in comparatively small numbers, in several colonies'. Under the policy, prisoners sentenced to transportation were to serve three periods of discipline, the first in separate confinement in Britain, the second at hard labour on public works in either Britain, Bermuda or Gibraltar, and the third on a ticket of leave in one of the Empire's colonies.¹¹

The 'boon' was not seen as such by all at the Cape. Following the Privy Council's order naming the colony as a penal destination, Smith had forwarded to London a number of memorials and petitions from its inhabitants protesting against the decision.¹² He had also written to Earl Grey in December 1848, advising him in private correspondence of the resolution of the colonists not to accept the proposed convicts.¹³ Despite these protests and the lack of official confirmation, rumours sweeping the Cape persisted; convicts were definitely to be sent. The speed with which these rumours travelled to other imperial destinations demonstrates the highly

⁹ NA, HO 45/1792, correspondence between Earl Grey and Sir George Grey. The reader needs to be aware that there were two Sir George Greys. The first, the Home Secretary, was a first cousin of Earl Grey. The second, sometime Governor of the Cape, South Australia and New Zealand, was a distant cousin to both.

¹⁰ BPP, Smith to Grey, 8 May 1848, reprinted in 'Convicts (Cape of Good Hope)', Volume XLIII, 1849, p. 19 (IUP, *Crime and Punishment: Transportation, Volume 9*).

¹¹ BPP, Grey to Smith, 19 March 1849, and enclosure 17, reprinted in 'Convicts (Cape of Good Hope)', Volume XLIII, 1849, pp. 41-43 (IUP, *Crime and Punishment: Transportation, Volume 9*).

¹² BPP, Enclosures 1 to 3, reprinted in 'Convicts (Cape of Good Hope)', Volume XLIII, 1849, pp. 20-22 (IUP, *Crime and Punishment: Transportation, Volume 9*).

¹³ A.L. Harrington, *Sir Harry Smith – bungling hero* (Cape Town, 1980), pp. 149-50; L.H. Posthumus, *The Remarkable Voyage of the Neptune* (Adelaide, nd.), p. 48.

efficient system of communication that existed between the outposts of Empire, despite the lack of high speed technology.¹⁴

In Bermuda the Irish political prisoner, John Mitchel, had noted in his diary entry for 18 December 1848 that a ship would arrive early in the New Year. Its express purpose was to be the loading of convicts for the Cape. Mitchel was therefore aware of Earl Grey's planned course of action even while the Cape Governor was still in the process of responding to it. Mitchel was also very specific in his knowledge of what that process was to be, stating that the men to go would be "recommended" prisoners ... selected from amongst those who have gone through most of their terms of sentence'.¹⁵

On 12 February 1849, Mitchel again noted in his journal the sending of convicts to the Cape. On that date, Mr Hire, the Convict Superintendent, informed Mitchel that the Bermudan Governor had received instructions to send him to the Cape, where, upon arrival, he was 'to be set at liberty, but within a limited district, and under police surveillance'.¹⁶

Whilst word of Grey's plan had reached Bermuda and Mitchel by December, and confirmation by February, no such word had reached Smith or the colonists at the Cape. While the South African historian A.F. Hattersley has stated that 'the *Neptune* had embarked convicts at Bermuda for transport to the Cape', and that this 'was known in the early days of March', this is clearly wrong.¹⁷ The *Neptune* did not arrive in Bermuda until early April and it was somewhere around this time that the Cape administration learnt that Grey intended to proceed with his plan. It was also in early April that John Montagu, the Cape's Colonial Secretary, advised the Cape Town Municipal Councillors that Smith had been unofficially, but reliably, informed that convicts were to be sent.

¹⁴ McKenzie makes a similar point of empires being 'assemblages of networks of information'. See K. McKenzie, *Scandal in the Colonies* (Melbourne, 2004), p. 6.

¹⁵ Entry for 18 December 1848, in J. Mitchel, *Jail Journal* (London, 1983), p. 89.

¹⁶ Entry for 12 February 1849, in Mitchel, *Jail Journal*, p. 101.

¹⁷ A.F. Hattersley, *Convict Crisis and the Growth of Unity* (Pietermaritzburg, 1965), pp. 41-42.

Reaction amongst the colonists was both swift and vigorous. A protest meeting was organised on 5 April, coincidentally the very day that the *Neptune* arrived in Bermuda. Over the ensuing six weeks, resentment at what was seen by the colonists as a breach of trust, resulted in more petitions being drawn up. Thirty-nine memorials were sent to the Cape Governor in the months of April and May alone. These came from across the colony, representing a broad cross section of society and containing many hundreds of signatures protesting the decision.¹⁸ Smith noted them and forwarded them on to London. Finally, resentment manifested itself in the formation of the Anti-Convict Committee on 31 May, then, through that committee's extension, the Anti-Convict Association (ACA) in Cape Town on 16 June.¹⁹

Opponents of the Grey plan were not shy in wielding emotive claims of the ill effects convictism would bring to a previously untainted colony. Life and property would be made 'insecure', 'degradation and infamy' would be stamped 'on the present and all succeeding generations', free immigration would cease to continue, public schools would be turned into 'nurseries of crime', and the rule of law would succumb, with the courts turned into 'pitfalls and slaughterhouses for the innocent'.²⁰ It was a rhetoric that was mirrored in the anti convict debate in Victoria.

The claim that the Cape had not previously been subject to the 'evil' effects of convictism has retained credence in the modern historiography.²¹ Such claims, again, mirror those in Victoria where Kerr had claimed that the colony was 'hitherto uncontaminated' by convictism during the Anti Convict Act debates.²² As with Victoria, such claims for the Cape colony do not match up with the historical record. Prior to British occupation of the Cape, the Dutch had sent convicts there from the East Indies.²³ Clare Anderson's work, on British transportation within the precinct of

¹⁸ A full list of these is given in W.A. Newman, *Biographical Memoir of John Montagu* (London, 1855), pp. 568-69. See also BPP, 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], p. 8 (IUP, *Crime and Punishment: Transportation, Volume 8*).

¹⁹ K. McKenzie, 'Gender and Honour in Middle-Class Cape Town: the making of colonial identities, 1828-1850', D. Phil. thesis, Oxford University, 1997, p. 313, n. 8.

²⁰ *Cape Gazette*, June 20, 1849, quoted in Blanckenberg, 'When the Cape was declared a Penal Settlement', p. 7.

²¹ Hattersley, *Convict Crisis and the Growth of Unity*, p. 17.

²² See this thesis p. 128.

²³ V.C. Malherbe, 'Khoikhoi and the Question of Convict Transportation from the Cape Colony, 1820-1842', *South African Historical Journal*, 17 (November 1985), pp. 19-20.

the Indian Ocean, has also shown a British parallel. She has noted cases where convicts were re transported from Mauritius and sent to the Cape's prison settlement, Robben Island, in Table Bay. For example, in 1833 two Indian convicts on Mauritius were found guilty of armed robbery with violence and received sentences of twenty years. They were sent to the Cape where they remained until 1840, at which point they were repatriated to Calcutta.²⁴

In 1844 John Montagu, the newly appointed Secretary to the Government at the Cape, visited Robben Island as part of a tour of the colony's infrastructure. This was the same man who had served in the colonial administration of Van Diemen's Land, initially as Private Secretary to Lieutenant-Governor George Arthur, then to the Executive Council, and finally the Legislative Council. Despite also fulfilling the role of Colonial Secretary on occasion, he was not officially appointed to that position until 1835. Sir John Franklin, Arthur's successor, relieved Montagu of the position in 1842, a decision however, not supported by his superiors in London.²⁵ By that time he had risen to be the colony's puisne judge.

Montagu's impressions and thoughts on the Cape were recorded in a report on the colony's punishment system submitted to the Governor. Amongst other observations, Montagu noted the population of Robben Island as '183 convicts, of whom were 116 colored and eight white natives of the colony, and fifty-nine Europeans, of which latter thirty-seven were soldiers'. Montagu also noted that some of the convicts on the island had been subject to re transportation, although he gave no indication of their place or places of origin. The high number of soldiers amongst the island's inmates is also noteworthy. Montagu identified them as military transportees, rather than local offenders, but again gave no place of origin.²⁶ Montagu may have been mistaken, for figures separately compiled by both Malherbe and Duly show an ever increasing number of locally convicted soldiers sentenced to transportation. By 1838, the latest

²⁴ Anderson, *Convicts in the Indian Ocean*, pp. 37, 100.

²⁵ J. Reynolds, 'Montagu, John (1797-1853)', *Australian Dictionary of Biography; Volume 2, 1788-1850, I-Z*, (Melbourne, 1967), pp. 248-50.

²⁶ Report of Montagu to Maitland, 6 January 1844, reprinted in Newman, *John Montagu*, p. 116.

year for which a figure is given, Robben Island was home to 26 such men, with the figure steadily increasing on an annual basis.²⁷

The Cape had thus clearly been a destination for military convicts transported under sentence of court martial from other British colonies. In a despatch to Sir Harry Smith in September 1848, Grey noted that two convicted soldiers, members of the Royal Sappers and Miners, were to be sent to the Cape from Hong Kong to serve seven year sentences. This, Grey explained, was because they could no longer be sent to the Australian colonies, such a course of action 'having under present regulations ceased'. He further noted that in a despatch of September of the previous year the issue of transporting military convicts from Mauritius to the Cape had also been authorised.²⁸

The question of how it came to be that the presence of these men was overlooked during the debate regarding the *Neptune's* convicts, by both the good burghers of Cape Town and subsequent historians, remains unanswered. Perhaps the answer lies in the fact that most of the prisoners were coloured, and that incarceration on Robben Island meant they were out of sight of Cape Town society. What was feared most was that these men would be let loose on the mainland, and that they would be, as the ACA claimed, 'mixed up with [the] peaceable virtuous and unsuspecting population'.²⁹

Yet again the ACA in making its claims, chose to ignore the status quo. Convicts, albeit that they were locally convicted offenders, had been scattered across the colony's landscape at least since the beginning of 1844.³⁰ Like the convicts in the Australian colonies and Bermuda, these had been organised into a system of work gangs employed on public infrastructure projects, in particular road building.³¹ It is not as if they were isolated, small groups. One gang, on average containing 250 men, was responsible for building the road over Cradock Mountain, the Cape's major road

²⁷ L.C. Duly, 'Hottentots to Hobart and Sydney': The Cape Supreme Court's Use of Transportation 1828-38', *Australian Journal of Politics and History*, Volume XXV, p. 45; Malherbe, 'Khoikhoi', p. 26.

²⁸ Despatch from Grey to Smith, 28 September, 1848, quoted in Blanckenberg, 'When the Cape was declared a Penal Settlement', p. 16.

²⁹ 'An Address of the ACA to the people of the Cape of Good Hope', quoted in Blanckenberg, 'When the Cape was declared a Penal Settlement', p. 7.

³⁰ Report by Montagu to Smith, 27 July 1849, quoted in Newman, *John Montagu*, p. 135.

³¹ Hattersley, *Convict Crisis*, p. 15.

route to the east. A second gang worked on constructing the road northeast from the Cape to the Bokkeveld. Thirty-one miles of road traversed the craggy Outeniqua Mountains, and between 300 and 400 convicts were employed on its construction at any given time. Significantly this construction took place between February 1849 and September 1853, contemporaneous with the events surrounding the *Neptune*.³²

The Cape had also experienced another form of transportation, one with penal connections although not one carried out by the British Government. This was the sending of homeless youth, a reasonable percentage of whom had been convicted of crimes in Britain, to the Cape, as migrants. Their passage to the colony was paid for by private benevolent organisations in Britain, at first the Children's Friend Society, and then, later, the Philanthropic Society. Upon arrival in the colony these children were assigned to various persons, the boys as apprentices, the girls as domestic servants. Approximately half the transport costs were then recouped by way of a payment made by the child's master. Hattersley has noted the similarities with the assignment of convicts in British penal colonies, but highlights the fact that the children received wages and were to receive an education, albeit limited.³³

This system was responsible for sending between five and six hundred children to the Cape colonies in the late 1830s. Problems arose, however, when one boy returned to England and was subsequently charged with theft. In court the boy regaled the Magistrate with tales of the treatment suffered by children sent to the Cape, drawing parallels with slavery. His account received wide press coverage in both Britain and the Cape, despite official denial of his assertions. Such was the 'bad press' which flowed from his accusations that a public meeting was called in London in 1841, resulting in the dissolution of the Children's Friend Society.³⁴ It was only natural that the boys, in particular, came to be seen as delinquents and criminal by Cape colonists, despite strong evidence to the contrary.³⁵

³² Newman, *John Montagu*, pp. 171, 188.

³³ Hattersley, *Convict Crisis*, pp. 18-20.

³⁴ T. Jordan, "'Stay and Starve or Go and Prosper!': Juvenile Emigration from Great Britain in the Nineteenth Century', *Social Science History*, Volume 9, No. 2, Spring 1985, p. 149. Jordan states that the Society had sent 1340 children to Cape Town by 1837, bringing into question the true level of the problem.

³⁵ Hattersley, *Convict Crisis*, pp. 22-25.

In April 1849 this form of 'transportation' was resumed when the Philanthropic Society despatched a group of 33 boys to Algoa Bay.³⁶ As with the children sent in the previous decade, most were selected on the basis of their destitution or vagrancy, not criminality. Within months, almost a third found themselves in trouble with the law and this prompted an investigation into the circumstances surrounding their departure for the Cape. It transpired that the British Home Secretary had approached the society to take some juvenile convicts deemed 'likely to profit from educational opportunity and moral supervision.' Eighteen of these were included in the Algoa Bay party.³⁷

The saga of the juvenile immigrants created a feeling of unease amongst sections of Cape society. Certainly it appears that a level of distrust of British officialdom was generated as a result. Given this background, it is no surprise that the decision of the Privy Council to include the Cape on the list of penal colonies prompted a sharp reaction from its colonists.

Grey, in correspondence to Smith, hoped that resistance at the Cape to the now impending arrival of convicts, would eventually subside. He further hoped that the colonists would come to realise that the reception of convicts was not only a service to Britain it was also of economic advantage to the Cape.³⁸ These hopes were fatally dashed with the unveiling of the ACA's most powerful weapon, 'The Pledge'. This document spelt out how resistance, and the ultimate defeat of Grey's plan, was to be achieved. It was the Pledge that the *Neptune* figuratively collided with when it sailed into False Bay that September.

The Pledge put forward by the ACA was radically different to that used by the anti-transportationists in Port Phillip and Van Diemen's Land. Theirs had been a simple boycott of convict labour in preference for free, an attempt to simply 'dry up' the

³⁶ Algoa Bay is approximately 680 kilometres east of the Cape of Good Hope and the site of the present city of Port Elizabeth.

³⁷ Hattersley, *Convict Crisis*, p. 18. The Cape were not the only recipients of such a class. The 'Home in the East', a London philanthropic society, sent delinquents to Canada in the 1850s. See Jordan, 'Stay and Starve or Go and Prosper!', p. 148.

³⁸ Harington, *Sir Harry Smith*, p. 150.

practicality of the system.³⁹ The ACA's plan was for direct action designed to deliver a pre-emptive blow to Grey's intentions. It called upon all members of the Cape Colony likely to have dealings with Smith's administration to refuse to supply it with goods or services that would in any manner 'afford a pretext for the detention of the convicts'. This was presented as the 'duty of all good and loyal subjects', not as a rebellious or disloyal act.⁴⁰ Merchants, bakers, butchers, shopkeepers, and other 'proveditors' were encouraged to deal only with customers they knew to be uninvolved in Government supply. The Pledge was only to be lifted once the departure of the *Neptune* and its human cargo was guaranteed.⁴¹

To ensure that the embargo was enforced, colonists were required to sign an agreement to abide by the terms of the Pledge. The penalty for those who subsequently breached the Pledge was a boycott of their business by other Pledge signatories. Clearly, however, such actions had the potential to hurt some in business, especially those with pre-existing government contracts to fulfil. The ACA met this problem by forming an indemnity fund, consisting of sums of money promised by individuals and businesses. Over 160 donations were promised, totalling almost £1,400, and ranging from as little as 2/6 to £50.⁴²

The names of donors were published, and a perusal of those who lent financial support to the movement gives a strong indication of how opposition to Grey's plan crossed class barriers within the colony. Wealthy merchant John Ebden, a member of the Cape's legislative council since 1834 and first Chairman of the Cape of Good Hope Bank, gave £50. So too Hamilton Ross, a colleague of Ebden's at the bank, and the man credited with hoisting the British flag over the castle at the time of British occupation in 1795. H.T. Rutherfoord, later to be elected a legislative councillor, also gave £50.⁴³ Across the political divide was Ebden's co-architect of the ACA, the radical newspaper proprietor John Fairbairn, a man with 'little regard for distinctions of rank and class', and with a long record of 'stubborn resistance to governmental

³⁹ For more on this see A. Green, *Against the League: Fighting the 'Hated Stain'*, BA Honours dissertation, University of Tasmania, 1994, especially p. 41.

⁴⁰ *UCT Archives*, Pfeiffer Family Papers, document BC 225 (D64/133).

⁴¹ K. McKenzie, 'Gender and Honour in Middle-Class Cape Town', p. 314.

⁴² *UCT Archives*, Buyskes Collection, document BC/57.

⁴³ Hattersley, *Convict Crisis*, pp. 42-43; F. Welsh, *A History of South Africa*, (London, 2000), p. 199.

decisions'.⁴⁴ Ironically, Fairbairn had been the Cape Secretary for the besmirched Children's Friend Society.⁴⁵

The appeal of the ACA was seen as 'universal', embracing 'women as well as men, farmers as well as people of the towns'.⁴⁶ At the first of its great public meetings, held in Cape Town on 19 May, the local press noted that 'all offices, shops etc. were closed, [and that] farmers came in from the country'.⁴⁷ While the leaders were drawn from the middle and upper classes, it was the Cape's poor who provided the numerical presence at these public meetings, and support at public disturbances.⁴⁸ The 19 May meeting was attended by an estimated 5,000 of the colony's population, with the second meeting on 4 July, attracting an estimated 7,000.⁴⁹ The impact of, and support for, the ACA can be judged by the fact that these meetings represented between twenty and thirty percent of Cape Town's population, at that time given as only 23,749.⁵⁰

Further perusal of the published list of donors also reveals how the ethnic divide in the colony was also bridged.⁵¹ Apart from the English and Scottish colonists, over one third of the signatories were Afrikaners.⁵² Somewhat unusually, the ACA drew the support of both the English and Afrikaaner press. Even more unusual was the fact that the ACA derived support from the coloured workers at the Cape. A contemporary description of the meeting noted 'Coloured folk and Malays mingling freely with soberly-clad Europeans'.⁵³ Certainly in contemporary prints of the meetings 'the heterogeneous nature of the crowd, Malays, Cape Mounted Riflemen, and Coloureds clearly mingling with the whites' can be seen.⁵⁴

⁴⁴ Hattersley, *Convict Crisis*, pp. 43-44.

⁴⁵ Hattersley, *Convict Crisis*, p. 20.

⁴⁶ *Colonial Times and Tasmanian*, 19 Feb, 1850, p. 4.

⁴⁷ M. Bull, *Secure the Shadow* (Cape Town, 1970), p. 44.

⁴⁸ McKenzie, 'Gender and Honour in Middle-Class Cape Town', pp. 313-14.

⁴⁹ In much of the literature the figures for attendances seem to have been confused.

⁵⁰ F. Bradlow, 'The Four Pictures of the Great Anti-Convict Meeting in the William Fehr Collection', *Africana Notes and News*, Volume 16, 1964, p. 29. Bradlow notes the crowd of 7,000 is given on a note attached to one of the prints of the event. The total population of the Cape Colony at the time was 'some hundred thousand Christians' as given in *Colonial Times and Tasmanian*, 19 Feb, 1850, p. 4. Hattersley gives a slightly higher figure of 120,000. See Hattersley, *Convict Crisis*, p. 29.

⁵¹ McKenzie, 'Gender and Honour in Middle-Class Cape Town', pp. 313-14.

⁵² A simple reading of the list may not give a true indication of European background. This group most likely included some of Dutch, German, or French Huguenot descent.

⁵³ Hattersley, *Convict Crisis*, p. 46.

⁵⁴ Bradlow, 'The Four Pictures of the Great Anti-Convict Meeting', p. 30.

If Earl Grey and Sir Harry Smith had hoped that the threatened actions of the ACA would never materialise, they were to be sorely disappointed. After five months at sea, the *Neptune* rounded the Cape of Good Hope, sailed north into False Bay and on 19 September 1849 came to anchor off Simonstown, on the bay's western shore. Simonstown at that time was a developing British naval base and garrison town for the Cape Colony, thirty kilometres to its north.⁵⁵ In theory the ship and its convict cargo were now in calm waters, protected from the roaring winds of the southern oceans by the promontory of the Cape which rose dramatically as the town's backdrop. In real terms, however, the *Neptune* had sailed into the eye of a political storm. Its arrival, as McKenzie has argued, 'set in train the most dramatic political events' the Cape had witnessed, and resulted in 'a sustained campaign of civil disobedience' which virtually ground the colony to a halt.⁵⁶

No sooner had the *Neptune* run out its anchors than the ACA set its plan to action. Its local Simonstown branch put in place a 'Committee of Vigilance', a group of 'men with telescopes', according to Mitchel, to 'keep a constant eye upon the *Neptune* and the boats to and fro – also, on the Simonstown shopkeepers, who need watching too'.⁵⁷ It quickly became apparent that the ACA had every intention of imposing the resolution passed on September 4 at a meeting in Cape Town, viz:

... that no contracts of any description should be entered into for the supply, or use, of the Military, Naval, or Civil Departments, until the Order in Council making [the Cape] a Penal Settlement be rescinded ...⁵⁸

Instead of subsiding, as Grey had hoped, the situation escalated. Grey, of course, was located in Downing Street, London, at least two months sailing time from the situation unfolding at the Cape. It was Smith who found himself in the invidious position of having to resolve the crisis. Since he had been tepidly supportive of Grey's

⁵⁵ T.R.H. Davenport, *South Africa: A Modern History* (London, 1987), p. 478; Welsh, *A History of South Africa*, pp. 89, 420.

⁵⁶ McKenzie, 'Gender and Honour in Middle-Class Cape Town', p. 311.

⁵⁷ Entry for 21 September 1849, in Mitchel, *Jail Journal*, p. 164.

⁵⁸ *Cape Town Mail*, 22 Sep 1849, cited in Posthumus, *The Remarkable Voyage of the Neptune*, pp. 158-9.

proposals, he found himself caught in both a personal and professional bind. He could not simply act as the colonists wished and send the *Neptune* away, for as a professional soldier Smith had spent 44 years obeying orders, a fact of which he was proud. To disobey Grey's instructions would be, to Smith at least, tantamount to an 'act of open rebellion', yet to adhere to them would only result in growing chaos.⁵⁹ Since the formation of the ACA, government servants across the Cape had been resigning, including almost all members of the Legislative Council. By September, the business of government was perilously close to becoming unworkable.⁶⁰

Smith acted to remedy the problem in the manner he had been trained to do, literally by the letter. He wrote to Grey outlining the situation, including the rising, and increasingly strident and aggressive, position of the ACA. He sought to have the convicts sent elsewhere – his first suggestion being Western Australia, despite its lack of penal colony status at that time.⁶¹ In July, in an apparent effort to calm the situation, Smith issued a proclamation in which he stated that no convicts would be landed upon arrival 'till Her Majesty's pleasure were known'. Further, he claimed no legal power would allow him the authority to dismiss the ship from the Cape.⁶²

By the time the *Neptune* arrived, no response from Grey had been received and Smith, in the absence of a workable legislature, summoned his Executive Council to Government House.⁶³ The tension of the situation is clear from the minutes. The focal point was the contents of a letter sent to Smith by Ebdon as Chair of a meeting of the Cape inhabitants that sought to have the *Neptune* dismissed. Smith informed the

⁵⁹ G.C. Moore Smith (ed.), *The Autobiography of Lieutenant-General Sir Harry Smith, Volume II* (London, 1901), note, p. 254.

⁶⁰ Moore Smith, *Sir Harry Smith, Volume II*, note, pp. 253-54; Harington, *Sir Harry Smith*, pp. 153-54. The Legislative Council consisted of 5 civilians, all appointed by the Governor, and known as 'unofficials' - see Welsh, *A History of South Africa*, p. 200.

⁶¹ BPP, Despatch from Smith to Grey, 29 June 1849, reprinted in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], p. 39 (IUP, *Crime and Punishment: Transportation, Volume 8*); Hattersley, *Convict Crisis*, p. 48.

⁶² Moore Smith, *Sir Harry Smith, Volume II*, note, p. 254.

⁶³ The Executive Council was made up of Smith, in his capacity as Cape Governor, and his senior officials - see Welsh, *A History of South Africa*, p. 200. This would most likely have included John Montagu as Colonial Secretary, William Porter as Attorney General, and John Wylde as Chief Justice, amongst others. Both Montagu and Wylde had considerable Australian colonial experience - Montagu in Van Diemen's Land and Wylde in New South Wales. A summation of the meeting is Enclosure 12 in a despatch from Smith to Grey, 30 September 1849, reprinted in BPP, 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], pp. 104-06 (IUP, *Crime and Punishment: Transportation, Volume 8*).

council that the state of affairs was without parallel and somewhat critical. He feared that the resignations would continue and include those of Justices of the Peace and Field Cornets.⁶⁴ If this were to occur it would make governing the colony very difficult.

Smith adopted the stance that the convicts should not be landed unless London had been informed of the current state of affairs and issued instructions to that effect. Such a landing may well have involved a need for military force. The minutes express Smith's acute awareness of the dangers of the situation getting out of hand and of violence escalating and his appreciation that the physical nature of the colony made the movement of troops difficult and expensive. The Council's greatest fear was of armed insurrection, not so much in the Cape but in the country districts where 'the extent to which Commando Service, and even their every day life [had] familiarized the population with the use of firearms'. There was also a belief that the situation had reached a point where the Exiles would not find anyone to employ them.⁶⁵

If nothing else, the Council eased Smith's mind by supporting his claim that he had no legal authority to send the *Neptune* away.⁶⁶ Their advice was that a proper authority was needed from London for this to occur. The press carried rumours that the convicts were to be sent to the Asunción Islands but Smith refuted these, stating that he had no authority to so order. To add to the general state of tension he reinforced his inability to act by stating that such an action could well result in the convicts rising up and slaughtering the crew, and then escaping justice through a legal loophole. Smith warned the public that 'interference with the destination of convicts was a measure fraught with the most fatal consequences'.⁶⁷

The ACA were not to be put off by such a simplistic response to their demands and in turn sought their own legal opinions. Four of the Cape Colony's senior solicitors and

⁶⁴ Field Cornets were local government officials who filled administrative and judicial roles, for example Magistrates and heads of the militia. As such they were important arms of law and order.

⁶⁵ NA, Colonial Office files, CO 51/70, Minutes of Executive Council, 22 September 1849, pp. 10-15, 17,, 20.

⁶⁶ Moore Smith, *Sir Harry Smith, Volume II*, p. 254.

⁶⁷ *Times*, 26 November 1849, p. 5; Letter from Private Secretary Gavlock to Ebdon and others, 22 September 1849, reprinted in BPP, 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], p. 101 (IUP, *Crime and Punishment: Transportation, Volume 8*).

advocates, namely Christofell and Johannes Brand, Daniel Denyssen and J de Wet, were all presented with a brief to report on the Governor's powers in relation to this matter.⁶⁸ In particular, the Imperial Acts of 5 George IV, c. 84, and 11 George IV, c. 39 were to be examined and an opinion on six points given. The four solicitors were asked:

1. Whether the Governor has not an equal right to send the convicts away as to keep them here on board ship.
2. Whether he may not legally send the convicts away to some other place pending the reference to Earl Grey, or to send them to another penal settlement, without reference to any future instructions.
3. Whether, if the Governor has not the right to send the convicts away, but the ship should notwithstanding go away, the convicts would be justified in taking life on the high seas.
4. Whether the rights of the Crown as to these convicts are not vested in the Governor, and consequently, as the Crown is expected to order them away, the Governor, in the absence of the Crown, has not the same rights.
5. If the Governor in ordinary circumstances would not be justified in sending the convicts away, are not the present circumstances of the colony such as would justify, if not render it imperative, on him to do so?
6. The Act which authorizes the transference of the convicts from one colony to another, as given above, refers only to Van Diemen's Land and New South Wales, because they were the only penal

⁶⁸ In his response, Denyssen indicated that he was a man of advancing years in the legal profession and had occupied a seat as a judge in the Cape prior to 1806. This evidence would seem to indicate that he was most likely Daniel Denyssen, a Fiscal at the Cape whose eldest son Petrus went on to be a judge. Denyssen was married to Magdalena Smuts, the daughter of Johannes Smuts. A J.J.L. Smuts was a contributor to the ACA's indemnity fund. Denyssen's eldest daughter, also a Magdalena like her mother, had married Johannes de Wet. An Advocate de Wet was also an indemnity fund subscriber. C.J. Brand was Christoffel Josephus Brand, a prominent member of the ACA and who was to later fill the position of Speaker in the Cape Assembly. Brand had been Editor of the *Afrikaaner Zuid Afrikaan*. He was elected to the Cape Parliament in May 1850 and was the father of J.H. Brand who was also a prominent political activist and who later held the position of President of the Free State (see Hattersley, *Convict Crisis*, pp. 86, 125).

settlements then existing. May not the clause of that Act be held to apply to all penal settlements, though not specially named?⁶⁹

Whilst on the surface these questions relate to the *Neptune*, they had Empire wide ramifications. The points raised by the ACA, whilst they question Smith's powers, also question those of every Colonial Governor in the British Empire. They were designed to seek an understanding of the relative authority of the Governor and the Crown. Put simply, the question was whether the Governor was there to govern, or simply to be a conduit for the Colonial Office?

The advice was asked on a number of points relating to two Acts covering the transportation of convicts, they being the Acts 5 George IV, c84 introduced in 1825 and 11 George IV, c39 introduced in 1831 and being the same as 1 William IV, c39. The ACA's interest in the first Act centred on its granting to a colonial Governor a property in the convicts' services and the ability to assign. This was the Act examined in the Jane New case in which it was the ability of the Governor to revoke an assignment that was questioned. At the Cape the question was aimed at establishing whether the convicts on board the *Neptune* had been assigned to Smith and if so, what measure of control he could therefore exercise over them. The Governor had consistently maintained that he had no power over the convicts, and had declined to assume any.⁷⁰

It was the second of the two Acts that was seen to hold the key to the *Neptune* deadlock. This was the Act drawn up as a consequence of the Jane New case the purpose of which was to remove questions of legality regarding the movement of convicts between New South Wales and Van Diemen's Land, given that a convict had been sent to a colony other than their pronounced destination. In part the law allowed that if, for any reason, a master was not able to fulfil his contract to transport a cargo of convicts to their prescribed destination, he had the right to convey them to any other colony, the one proviso being that it had to be a colony to which they could be

⁶⁹ BPP, Document entitled 'Case for Opinion' in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], pp. 117-18 (IUP, *Crime and Punishment: Transportation, Volume 8*).

⁷⁰ BPP, Letter from Private Secretary Gavlock to Ebdon and others, 22 September 1849, reprinted in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], p. 101 (IUP, *Crime and Punishment: Transportation, Volume 8*).

legally transported, that is, a gazetted penal colony. The Act had a further clause which required the Governor initiating any convict transfer to have the agreement of the Governor of the colony that was the convicts' intended destination. At the time of the Act's publication there were only two - New South Wales and Van Diemen's Land.⁷¹

The opinions the ACA received were, naturally enough, that the Governor had every right to send the *Neptune* away. Denyssen, a former Cape Judge who had practiced law in the Cape prior to the colony being ceded to the British, drew on his long legal history in reply. He argued that the relationship of the Governor to the Crown was set by his instructions upon appointment. Without knowing their content it was 'most hazardous' to judge how far Sir Harry Smith could go without specific instructions from London. Instead Denyssen shifted the onus back onto the *Neptune's* Captain, a man named Bance, whom he argued had a responsibility and duty to provide for the convicts' safety. If, he argued:

there is no alternative between perishing from hunger if they remain, or being provided with proper food, if they depart from Simon's Bay, [Bance] must choose the latter course, and by these means save the lives of the convicts, as well as of themselves and their crew.⁷²

Denyssen saw Bance as under no obligation to await instructions from the Governor. Thus it was Bance who could break the deadlock.

Denyssen also argued, despite it not being part of the brief, that the imposition of penal status on the Cape was not allowable. His opinion was based on the convention entered into by the British and Dutch Governments in 1814 that ceded the Cape to Britain. That convention preserved the rights and privileges the colonists had enjoyed under Dutch rule and law. Given that the Dutch had not used the Cape as a penal colony, Denyssen argued that the inhabitants retained the right and privilege to live in

⁷¹ For more on this see this thesis p. 55.

⁷² BPP, Denyssen to ACA, 28 September 1849, reprinted in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], pp. 120-21 (IUP, *Crime and Punishment: Transportation, Volume 8*).

a colony free from penal status. Only with the 'open and implied consent' of the colonists could this be changed, and, he added, given the 'universal and unanimous abhorrence' of the colonists, it was impossible to construe that such consent had been given.⁷³

Christofell Brand concurred with Denyssen on the Governor's powers being conditional of his instructions upon appointment. As such he too could not draw a definite conclusion as to his powers in the matter. The pair also refuted the suggestion that if sent away from the Cape the convicts would have a right in law to rise up. Both agreed that until handed over to an authority on shore, no matter where that may be, the convicts remained legally under the authority of the ship's Captain. Brand noted that if they had such a right on the high seas they also had that right whilst at anchor in Simon's Bay.⁷⁴ De Wet offered only a brief opinion but agreed that without seeing Smith's instructions his powers were not definable, and believed that he had the power to exercise the Queen's prerogative and send the *Neptune* away. He also noted that Smith's commission and instructions as Governor had never been published.⁷⁵

Johannes Brand took the argument one step further. He noted the provisions of the Act allowing convicts to be transferred between the penal colonies of New South Wales and Van Diemen's Land. Whilst acknowledging that the Act, as it was worded, clearly related to those two colonies, he argued that at the time of the Act they were the only two that carried a penal status. Brand's opinion was that the Act, and its provisions, could be applied with regards to any colony that was given penal status subsequent to its passing. Given that the Cape had been so declared, Brand believed that Smith had the power to order the convicts be sent to any of the others, for example Van Diemen's Land.⁷⁶

⁷³ BPP, Denyssen to ACA, 28 September 1849, reprinted in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], pp. 120-21 (IUP, *Crime and Punishment: Transportation, Volume 8*).

⁷⁴ BPP, C.J. Brand to ACA, 28 September 1849, reprinted in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], pp. 118-19 (IUP, *Crime and Punishment: Transportation, Volume 8*).

⁷⁵ BPP, J. de Wet to ACA, 27 September 1849, reprinted in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], p. 121 (IUP, *Crime and Punishment: Transportation, Volume 8*).

⁷⁶ BPP, J.H. Brand to ACA, 27 September 1849, reprinted in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], pp. 119-20 (IUP, *Crime and Punishment: Transportation, Volume 8*).

In late September Smith received private correspondence from Grey in which he promised that no more convicts would be sent. Smith's problem still remained however, as the letter he received was not an official dispatch, and therefore carried no weight in law. Further, Grey's plans still revolved around the landing of the *Neptune's* convict cargo, and, as such, remained unacceptable to the ACA. On 28 September the Association met to discuss the situation. Fairbairn, always more radical and becoming more militant as the standoff continued, led a resolution to extend the pledge to all facets of government. To this point the bans had only allowed for the provision of essential foodstuffs to the army, the navy, and the *Neptune*. On 11 October a further public meeting was called, at which it was resolved that business with the Government in any form would not now be sanctioned. It was further resolved to partially close the shops and institutions, such action to be maintained so long as the *Neptune* remained in Simonstown.⁷⁷

The decision to 'starve out' the government, and, hopefully, bring about the departure of the convict cargo resulted in a split within the ACA leadership. Moderates, led by Ebden, believed that 'for the time being the Governor had done enough by ordering that convicts should not come ashore'. They were further opposed to the decision on humane grounds, that to starve the convicts and make *them* suffer was not the ACA purpose. Ebden, Rutherford, and a number of other prominent merchants resigned in protest, but this merely resulted in the radical Fairbairn exercising greater control.

As October passed with no clear instruction received from Grey, the ACA increased pressure on the colony's Government. It extended the pledge to all matters governmental, even to the point of refusing invitations to balls. Now unchallenged, Fairbairn wielded his power through his newspaper, the *Commercial Advertiser*. Pressure was also increased on those in the business community through the publication of the names of those breaching the Pledge. His lead in so doing was followed by the *Cape Town Mail* and other newspapers.⁷⁸

⁷⁷ Posthumus, *The Remarkable Voyage of the Neptune*, p. 189; Hattersley, *Convict Crisis*, pp. 58-59.

⁷⁸ Hattersley, *Convict Crisis*, p. 59.

Whilst the ACA were able to enforce the Pledge, as time passed economic realities, or as Mitchel expressed it, 'the natural effects of a stoppage of business', began to weaken resolve.⁷⁹ A gang of unemployed men, in an event that underscores the tensions that had been generated, assaulted Fairbairn himself whilst at home. To avert the Pledge and meet supply, a Government bakery was set up, while butchers, hard bitten by the Pledge, supplied meat either through third parties or, surreptitiously, directly to Government. As the months drew on the inhumanity of the ACA and its actions were questioned in the press.⁸⁰

During this time Grey was active in trying to resolve the issues. He considered sending the *Neptune's* convicts to Natal but he understood the agitation had also spread there. Finally as a last resort he ordered the convicts on to Van Diemen's Land. As the *Neptune* had only been contracted to deliver the men from Bermuda to the Cape, a new contract with Mr Lachlan, the ship's owner, had to be drawn up, or an alternative ship had to be secured.⁸¹

After 'wearing the ring of the anchor' for almost five months, the deadlock was finally broken on 12 February 1850 when Grey's long awaited despatch arrived at the Cape.⁸² The following day Mitchel and his fellow inmates were assembled on deck where Captain Bance announced their fate. The *Neptune*, complete with its convict cargo, was to proceed to Van Diemen's Land where the convicts were all, bar Mitchel and any others whose behaviour on the voyage debarred them from it, were to be granted conditional pardons. Mitchel attributes this unusual act to a form of compensation for the long voyage and detention at the Cape.⁸³ His thoughts seem to reflect those of Grey, who wrote separately to Van Diemen's Land's Lieutenant Governor, Sir William Denison, noting that the pardons were to be given on the basis of 'the sufferings & trials to which [the convicts] have...been exposed' since leaving Bermuda.⁸⁴

⁷⁹ Entry for 19 October 1849, in Mitchel, *Jail Journal*, p. 184.

⁸⁰ Posthumus, *The Remarkable Voyage of the Neptune*, pp. 195-226; Hattersley, *Convict Crisis*, pp. 78-79.

⁸¹ NA, CO 879/1/21, Grey to Smith, 4 December 1849, and 5 December 1849.

⁸² Mitchel quotes Captain Henderson, Captain of the *Neptune*, as using this phrase in respect of their time at anchor at Simonstown. Entry for 8 February 1850, in Mitchel, *Jail Journal*, p. 191.

⁸³ Entry for 13 February 1850, in Mitchel, *Jail Journal*, p. 195.

⁸⁴ AOT, GO 1/75 Despatch, Grey to Denison, 17 December 1849, p. 211.

The announcement of their fate seems to have caused little surprise amongst the men on board. After nine days of restocking and replenishing, along with preparation of the obligatory paperwork, the *Neptune* was towed out to sea and set sail for Hobart Town.⁸⁵ Upon arrival 238 of the convicts received conditional pardons as promised and blended into the general population, many simply to vanish from the official record. Mitchel was granted a ticket of leave and sent to live in Bothwell. In 1853 he escaped to the United States. As a result of misbehaviour on the twelve month voyage forty three men, the remnant human cargo, were retained within the convict system for varying periods of time.⁸⁶

By 17 April the *Neptune* had fully discharged its convict duties, culminating that day with an auction of surplus stores and equipment. Three days later Captain Henderson advertised for passengers wishing to travel to Sydney, and on 5 May the *Neptune* once again put to sea.⁸⁷ Below deck were nine passengers and an assortment of hops, hay and potatoes, a cargo, this time, without a whisper of controversy. Its departure from Hobart Town would seem to conclude the narrative, and to a point this is true. Like many involved with convictism before it, the *Neptune* appears to have successfully reinvented itself.

⁸⁵ Posthumus, *The Remarkable Voyage of the Neptune*, pp. 195-226.

⁸⁶ *Hobart Town Gazette*, April 16, 1850, pp. 305-07. It was the responsibility of the Surgeon-superintendent to maintain a record of individual convict behaviour on board ship. These observations were recorded in a journal and at journey's end submitted as part of his report to the Admiralty. No such journal for the *Neptune* has been located. Posthumus quotes a letter in which James Gibson, brother of the *Neptune*'s second Surgeon-superintendent Thomas Gibson, notes no such journal can be found. This he attributes to his brothers illness and sudden death in Hobart only 10 days after arrival. See Posthumus, *The Remarkable Voyage of the Neptune*, p. 330.

⁸⁷ Posthumus, *The Remarkable Voyage of the Neptune*, p. 348.

Chapter Ten.

Transportation by stealth.

The 1840s were to evolve into a decade of ongoing change in Britain's transportation policy with its constant remodelling driven by emerging political, social, economic and demographic pressures both at home and in the colonies. The practical demand for transportation was also impacted on by changes to the legal and judicial systems, and changes to philosophies of punishment resulting in a preference for incarceration in penitentiaries over transportation. Britain was still faced with an unacceptable crime rate however and a prison system that simply could not cope with the resultant numbers. A major stimulus was its burgeoning population. Between 1800 and 1850 the population of England alone had doubled to almost 17 million at a growth rate higher than any other European nation.¹ In the 1840s a growth rate of 13% saw it grow by just under 2 million people.² To relieve the pressure the British Government turned to a policy of subsidised emigration.

In 1848 Earl Grey had written to Sir Harry Smith advising him the Government was prepared to pay a proportion of the cost for emigrants to go to those colonies that would also accept convicts. Under the policy the number of free persons paid for would be equal to the number of convicts that colony accepted, a simple one for one arrangement.³ Towards this end the British Parliament had voted the sum of £30,000 but this sweetener did not generate universal favour for the proposition.⁴ While many colonists across the Empire understood the need to resist the 'pollution' of convictism some also saw the need to resist particular strands of free emigration that were seen to be transportation in disguise.

Accusations of Government duplicity and deception in dealing with the problem of convictism were common place in the Australian colonies. As has been noted, Denison had been accused by the Maitland *Mercury* in 1849 of implementing a 'nefarious scheme for converting Van Diemen's Land into a conduit through which large numbers of criminals of the United Kingdom can be passed into [New South

¹ M.L. Bacci, *The Population of Europe* (Oxford, 2000), pp. 9-10. No suitable data for Scotland and Ireland has been available.

² E.A. Wrigley & R.S. Schofield, *The Population History of England 1541-1871: a reconstruction* (London, 1981), p. 588, Table A6.1.

³ NA, CO 879/1/21, Despatches relative to the Reception of Convicts at the Cape of Good Hope, 18 July 1848, p. 136.

⁴ British Parliamentary Papers (hereafter BPP), Despatch from Grey to Smith, 12 December 1849, reprinted in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], p. 159 (IUP, *Crime and Punishment: Transportation, Volume 8*).

Wales], subject to no restraint'. This he was accused of achieving by means of injudiciously issuing conditional pardons.⁵ It was seen by many opponents as transportation by stealth.

In January 1850 the *Sydney Morning Herald* under the heading 'New Species of Transportation', noted that a whaler called the *Pet* had called at Sydney. Amongst its crew were six ticket of leave holders whose engagement as crew in Hobart Town had been witnessed by the Police Magistrate there. The newspaper drew the conclusion that the departure of the six from Van Diemen's Land therefore had official sanction. Despite the *Pet's* Captain refusing permission for the men to go ashore, a number were later reported to have 'bolted'. The question was asked whether or not a misdemeanour had been committed by the Van Diemen's Land authorities in allowing a prisoner to leave his place of punishment before his sentence had expired or a pardon granted.⁶

The accusations raised at the Cape Colony went considerably further. It was not the colonial authorities that were accused of deception, but the British Government. In July 1849 Smith received one of his many pieces of correspondence from Ebdon written on behalf of the ACA. Amongst the issues he raised was the sending of emigrants to the Cape under the auspices of the Philanthropic Society. In his letter Ebdon accused the Home Secretary, Sir George Grey, of deliberately placing criminals in the society's institution in Britain under conditional pardons. As such the men could then be transported to Algoa Bay in the guise of free emigrants. Ebdon was critical of the fact that the inhabitants of the colony had been given no warning that this was happening. As a consequence suspicions had grown that emigrant ships were now being used for the 'clandestine importation of criminals'. By this means he claimed it was planned to turn 'this free and hitherto unpolluted country into a receptacle for criminals, and to make [Sir Harry Smith], the Governor of a free and loyal people, the common gaoler of the empire!' ⁷

⁵ See this thesis, pp. 180-81. *Maitland Mercury*, 28 July 1849, p. 2.

⁶ Reported in the *Examiner*, 30 January 1850, p. 68.

⁷ BPP, Letter from Ebdon to Smith, 24 July 1849, reprinted in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], p. 66 (IUP, *Crime and Punishment: Transportation*, Volume 8).

Part of the concern expressed by Ebdon was that the Cape Legislative Council had voted funds to help defray emigration costs. Smith in turn accused the ACA of circulating rumours to the effect that these funds were now being used to help the Colonial Land and Emigration Commissioners in 'surreptitiously introducing pardoned criminals into the colony'.⁸ In an effort to defuse the situation Smith had Richard Southby, an emigration agent, investigate. Southby traced the rumours to a Mr Salom who claimed to have ascertained that one of the boys on the emigrant ship *Royal Alice* had been imprisoned three times in Britain. In the presence of Salom, Southby questioned the boy who admitted to having been once gaoled for a month for having received stolen property. A second accused man was also identified by Salom but Southby concluded that 'he had never even been charged with crime before, let alone convicted and gaoled'.⁹

Smith had Southby's findings published in the Cape Government *Gazette*, but advised Earl Grey that few of the Cape inhabitants seemed interested in the facts and were more prepared to believe the accusations and claims of the ACA. He forwarded Ebdon's letter to Grey who in due course responded to what he described as an 'injurious report...industriously disseminated at Cape Town'. Grey reassured Smith that the Emigration Commissioners took great care in selecting those sent to the colonies but conceded that there could be no guarantee in obtaining accurate details on all who applied. Mistakes in this regard he believed to be 'singularly rare'.¹⁰

The practice of transporting convicted felons in the guise of free emigrants was not unknown amongst European nations.¹¹ In the 1830s and 1840s the German states of Hamburg, Saxe-Coburg-Gotha and Hanover sent criminals to the United States of

⁸ BPP, Despatch from Smith to Grey, 17 September 1849, reprinted in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], p. 82 (IUP, *Crime and Punishment: Transportation, Volume 8*).

⁹ BPP, Emigration Notice, 8 August 1849, reprinted in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], p. 83 (IUP, *Crime and Punishment: Transportation, Volume 8*).

¹⁰ BPP, Despatch from Grey to Smith, 11 December 1849, reprinted in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], p. 157 (IUP, *Crime and Punishment: Transportation, Volume 8*).

¹¹ The practice continued well into the 1900s, for example the Cuban Exodus in April and May 1980 in which over 125,000 Cubans crossed to the United States of America. In a study of 549 cases 12% were recorded, after interviews, as having come from Cuban prisons, with 50% having been in gaol at some stage of their lives. See S.M. Unzueta, 'The Mariel Exodus: A Year in Retrospective', a paper prepared for the Dade County Metropolitan Government, Florida, viewed on line at http://cuban-exile.com/doc_026-050/doc0033.html 14 February 2008.

America in the guise of emigrants. British historian Richard Evans has described the policies they implemented as increasingly 'more unscrupulous and filled with subterfuge and deceit' over time. He concluded, however, that by comparison with the number of free Germans that emigrated to the Americas, the numbers of convicts transported by deceit were insignificant. Evans saw the existence of such policies as reflective of the attitudes of certain European governments towards the United States, whose purpose and status they saw as a dumping ground for the human refuse of Europe. He concluded that the practice died out for two major reasons. One was a change in penal philosophy, especially in Hanover, which resulted in an increased number of gaols being constructed, and the second was the passing of laws in the United States that banned the entry of foreign criminals.¹²

Evans saw the policy of transportation by stealth in a restricted light and did not extend it beyond the German states. Indeed he saw it very much as a primarily German policy, noting that neither the French nor the British needed to practice such subterfuge because they, unlike the German states, did possess overseas colonies to which they could despatch convicts. In line with this scenario Prussia had, in 1802, concluded a treaty with the Russians to send criminals there, although this agreement soon lapsed. The Grand Duchy of Mecklenburg had also used Brazil as a dumping ground in the 1820s, supplying it with prisoners to serve as labourers and conscript soldiers.¹³

In the 1840s the United States Government became aware of the German practice, but was not aware of the size of the problem, nor if it was an officially sanctioned policy. A commission was appointed to investigate and ascertain the extent of the matter. In 1847 the United States Government agent in Hanover wrote to the local authorities asking if such a policy, one he described as 'so prejudicial to the welfare of the American Union', did actually exist. There is no record of a response. The Hanoverian Interior Ministry chose to ignore the correspondence and there was no subsequent inquiry, at least not from the Americans. Instead, in 1855 it was the Belgian government that complained. They had in place a policy to send to the United

¹² R.J. Evans, 'Germany's convict exports', *History Today*, November 1997, eVersion accessed 28 April 2004 (http://findarticles.com/p/articles/mi_hb4706/is_199711/ai_n17278017), p. 1.

¹³ Evans, 'Germany's convict exports', p. 1.

States inmates of workhouses and were concerned that Hanoverian practices would jeopardise this.¹⁴

In April 1849 the United States Government enacted new regulations covering immigrants, specifically designed to turn away criminals and other undesirables. These did not specify how criminals and undesirables were to be identified.¹⁵ Carl Warner has noted that until the beginnings of the 20th century the identification of individuals by the United States Government was, by its nature, 'voluntaryist', that being, the individual could choose his or her own identity. Government had no role to play. Few states had regulations requiring the issuing of birth certificates; passports were seldom required for travel; social security was non-existent and the driver's licence was undreamt of.¹⁶ As a consequence of this, those entering the United States faced few requirements to establish just who they were.

In fact, European governments had quickly seized upon this and used it to exploit the situation. The Hanoverians noted that emigrants entering the United States via New Orleans rather than New York were subject to less scrutiny by the authorities, and so chose to ship their criminals there. They also provided passports and transport documents that made no reference to their criminal backgrounds and actively hid their true identity.¹⁷

Whilst it may be correct to assert that the British did not *need* to implement such a policy, Ebdén's claims to Smith raise the question of whether they were. The British had practiced a scheme, not dissimilar in nature, in despatching homeless youth to the Cape through the vehicle of both the Children's Friend Society, and then the Philanthropic Society. As has been noted many of these boys had been convicted of crimes in Britain.¹⁸ The concerns and suspicions at the Cape echoed those raised at

¹⁴ Evans, 'Germany's convict exports', p. 4.

¹⁵ Evans, 'Germany's convict exports', p. 4. Other sources would suggest that such legislation was State as the Federal Government did not introduce such legislation until 1875. See M.M. Ngai, 'The Strange Case of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965', *Law and History Review*, Volume 21, No. 1, Spring 2003, p. 73.

¹⁶ C. Warner, 'Your Papers, Please! The Origin and Evolution of Official Identity in the United States', *The Voluntaryist*, Second Quarter, 2004, eVersion accessed 18 October 2007 (http://findarticles.com/p/articles/mi_qa3894/is_200404/ai_n9395525), p. 1.

¹⁷ Evans, 'Germany's convict exports', p. 5.

¹⁸ See this thesis pp. 227-28.

Port Phillip where there was also opposition to such schemes, especially those involving those described as having been 'shovelled' from the 'reservoirs of juvenile filth and depravity' that were the 'lowest haunts of London, Manchester, and other overcrowded cities'. In the case of Port Phillip the resistance had focussed its cynical eye on the Juvenile Offenders Reformation Society, an organisation whose very name suggested that something untoward was afoot.¹⁹

Ebden's claim that emigration was being used as a cover for the 'clandestine importation of criminals' was never actually refuted by Earl Grey. In his response to Sir Harry Smith with regard to the accusation, Grey merely shifted the focus to the Emigration Commissioners and the pains they took to 'make the best selection' possible. The accusation does not seem to have been pursued and perhaps Grey's seeming denial was cleverer than is apparent, for evidence shows the British, like the Hanoverians, were practicing subterfuge and deceit.

In preliminary discussions regarding the intentions to send convicts from Bermuda to the Cape, Grey had written to Smith outlining the reasons for doing so. He had advised him that a major crisis faced the British Government due to the rebellions in Ireland brought about by the famine there. As a consequence, prison populations had reached a point that could not be sustained and had resulted in a need to 'send them out of the country with the least possible delay'. Grey moved to placate Smith, and the limited local opposition he believed may occur, by claiming that he did not 'propose sending ordinary felons'. Those sent would be 'in general peasants, [who] under the pressure of extreme want, had committed depredations' as a result of the famine. They would be, he assured Smith, 'of a very different description from the criminals usually sent to a penal colony'. Grey finished by adding that some other convicts deserving of indulgences would also be included.²⁰

Examination of the *Neptune's* indent reveals that Grey's description of those to be sent is deceptive in the least. Only two thirds of those on board were Irish with the balance mainly English but with some Scots and nine convicts transported as a result

¹⁹ *Argus*, 24 April 1849, p. 4.

²⁰ BPP, Despatch from Grey to Smith, 6 August 1848, reprinted in 'Despatches relating to the Reception of Convicts at the Cape of Good Hope', Volume XXXVIII, 1850 [1138], p. 72 (IUP, *Crime and Punishment: Transportation, Volume 8*).

of courts martial at various locations within the British Empire. A third had therefore not been convicted as a result of the 'pressure of extreme want' brought on by the Irish famine. Of the Irish, it is true to say that many had been convicted of famine-related crimes such as cattle, sheep, and horse stealing, yet others had been convicted of offences that had a greater degree of criminality such as highway robbery, appearing armed at night and burglary. Sentences fixed for these offences were, in the main, seven and ten years, with only a small number sentenced to transportation for life.²¹

The deceit practiced by the British Government went deeper than the simple misleading statements of Earl Grey. To demonstrate this it is necessary to revisit three convicts discussed previously. Thomas Toomey, Francis Connell, and Patrick Finn, were returned from Van Diemen's Land and placed in Smithfield prison in Dublin following a ruling that the three, in conjunction with Cornelius Naughton who had died in Van Diemen's Land, had been the subject of a mistrial.²² In June 1847 Patrick Finn wrote to the authorities noting that he had been held in Smithfield since 4 May but had not been made aware of why he had been returned to Ireland, nor what fate the Government had in store for him.²³ It was to take another five and a half months before the three finally appeared before the Queen's Bench in Dublin where a Writ of Error was issued and a new trial ordered. The court then ordered them detained in custody to be returned to Limerick, there to undergo a retrial.²⁴

The retrial however did not occur. The Irish Attorney General, Richard Moore, subsequently raised concerns that the period of time that had elapsed since the first trial had led to an absence of material witnesses. This, coupled with other considerations, could well sway a jury to find the men not guilty.²⁵ In December 1847 Moore recommended that the ends of justice would be better answered if the three men were sent to America as free settlers. He noted that in his opinion the three had already suffered enough through the period of time they had already been incarcerated. Moore therefore instructed that arrangements be made for the men to

²¹ 193 of the 282 were Irish, 72 were English and 8 Scottish.

²² See this thesis pages 93-94.

²³ CAN, CRF 1845 T3, document 1.

²⁴ *Dublin Evening Mail*, 15 November 1847, p. 4, c. 5.

²⁵ CAN, CRF 1845 T3, document 6.

have a free passage to New York. They were first to be taken to Liverpool under guard and there placed on board a suitable vessel with instructions that the ship's Captain was to be given the sum of £5 for each of the three and this was only to be handed to them on arrival.²⁶

On 3 January the arrangement was formalised when Toomey, Connell and Finn signed an agreement under which they bound themselves to be sent to the United States 'whenever it shall please the Irish government to send us there free of expenses'.²⁷ The necessary orders and arrangements were made and a note in the Irish Archives file on the matter suggests that this was done on 28 January 1848.²⁸ There is of course a danger in drawing conclusions from just one case but later developments would suggest that this was not a one off solution.

In 1863 the British parliament held yet another of its many inquiries into transportation and prisons. One of those called to give evidence was Sir Walter Crofton, the Chairman of the Directors of Irish Prisons. In response to questions directed to him Crofton revealed that it was believed that around 25% of Irish prisoners had either emigrated or joined the armed forces after being released from prison on tickets of leave. Crofton advised the Committee of Inquiry, that prisoners were given lectures on the benefits of emigration to the various colonies, but no accurate figures of those who took up this option were actually kept.

Crofton clearly stated that the task of finding passages was the responsibility of the prisoners and that this was not done by the Government, although they were given help in locating ships and departure points.²⁹ Earl Grey questioned Crofton if he was aware of:

...any difficulty [that arose] when these men have emigrated from a fear on the part of the shipowners in consequence of laws which

²⁶ CAN, CRF 1845 T3, document 6.

²⁷ CAN, CRF 1845 T3, document 7.

²⁸ CAN, CRF 1845 T3, document 6.

²⁹ BPP, Evidence of Sir Walter Crofton to Questions 3501 to 3506, reprinted in 'Report of the Commissioners appointed to inquire into the operation of the Acts relating to Transportation and Penal Servitude, Volume II, Minutes of Evidence', 1863, p. 295 (IUP, *Crime and Punishment: Transportation, Volume 5*).

...are established in the United States against landing persons who have lately come out of prison?³⁰

Crofton responded in the negative. He then went on to express concerns that such a speculative assessment by him of the percentages migrating had been taken so literally. He further added:

...I think that the less these matters are talked about the better, for there is no doubt that if it is paraded all over the country that so many men emigrate, it will create an alarm which I am sure, after many years trial, has never yet been felt.³¹

In further questions Earl Grey revealed to the hearing his belief that in the United States there were laws in a number of the states designed to prevent the landing of criminals there. He asked Crofton if, in part, reinforcement of these laws was achieved by requiring the emigrant shipowners to post security against any passenger becoming a cost to the country. In response Crofton stated that this was not a requirement or situation of which he was aware. He expressed the opinion that such laws made little difference to departures from Britain for he believed that the majority of emigrating convicts went to Canada rather than the United States. Grey then asked Crofton that if it was made widely known that Irish convicts were emigrating to North America would it, in his opinion, result in it being closed to them as a destination. Crofton did not answer directly but said he thought that most of the men who emigrated were the 'better class'. He also raised the fact that there was nothing, 'no legal power', to stop an Irish prisoner with a ticket of leave from entering England or Scotland.³²

³⁰ BPP, Question by Earl Grey (Q. 3510), reprinted in 'Report of the Commissioners appointed to inquire into the operation of the acts relating to Transportation and Penal Servitude, Volume II, Minutes of Evidence', 1863, p. 296 (IUP, *Crime and Punishment: Transportation, Volume 5*).

³¹ BPP, Answer of Sir Walter Crofton to Question 3510, reprinted in 'Report of the Commissioners appointed to inquire into the operation of the Acts relating to Transportation and Penal Servitude, Volume II, Minutes of Evidence', 1863, p. 296 (IUP, *Crime and Punishment: Transportation, Volume 5*).

³² BPP, Questions and answers, 3511, 3512, 3513, & 3519, in the evidence of Sir Walter Crofton, reprinted in 'Report of the Commissioners appointed to inquire into the operation of the Acts relating to Transportation and Penal Servitude, Volume II, Minutes of Evidence', 1863, p. 296 (IUP, *Crime and Punishment: Transportation, Volume 5*).

Captain Whitty, who had been a director of the convict prisons in London and Ireland, supported Crofton's evidence. He told the inquiry that they actively encouraged emigration. The authorities provided some assistance but for 'obvious reasons' they, like the Hanoverians before them, needed to be 'very cautious'. Convicts were never assisted beyond their gratuities earned during their time in prison. Whitty also confirmed the belief that around 25% of Irish convicts emigrated once released on tickets of leave. When asked if it would create 'great difficulties' if 1,000 were encouraged to emigrate from England and Scotland Whitty replied 'If it became known it might'.³³

The involvement of Government in the process is clear from the evidence given by Whitty. In response to a series of questions from Lord Naas, Whitty clearly advised the committee that those prisoners that emigrated had permission from the authorities in Ireland to go. Not all left Britain, however, for Whitty also informed the committee that a small number were known to have emigrated to England although he believed the majority of those that did were Englishmen convicted in Ireland. Whitty was then questioned as to the status of those men and asked if he was aware of whether the tickets of leave they held gave them permission to be at large in the United Kingdom. Whitty responded that they did but went on to add that he did not know if having entered the United Kingdom they were prohibited from leaving it. The policy would seem to have been that there was no 'expressed prohibition'. Whitty was further asked if he thought a 'licence to be at large in the United Kingdom' implied that the holder could not be at large outside of it. His response was short and explicit; 'It has not been so interpreted by us'.³⁴

Another witness called was William Ranken, the Secretary of the Discharged Prisoners' Aid Society in England. Like Whitty, Ranken's evidence indicates that British authorities were complicit in encouraging the emigration of time serving

³³ BPP, Questions and answers, 3880, 3882, 3884 & 3893, in the evidence of Captain Whitty, reprinted in 'Report of the Commissioners appointed to inquire into the operation of the Acts relating to Transportation and Penal Servitude, Volume II, Minutes of Evidence', 1863, p. 325 (IUP, *Crime and Punishment: Transportation, Volume 5*).

³⁴ BPP, Questions and answers, 4427, 4428, 4429, 4431, 4443, 4444, 4445, & 4446, in the evidence of Captain Whitty, reprinted in 'Report of the Commissioners appointed to inquire into the operation of the Acts relating to Transportation and Penal Servitude, Volume II, Minutes of Evidence', 1863, pp. 368-69 (IUP, *Crime and Punishment: Transportation, Volume 5*).

convicts. He informed the committee that on a regular basis blank forms were sent to the various convict prison governors who then filled in details of men who were 'desirous of obtaining the assistance of the society'. From these forms a list of men the society would assist was drawn up. The type of crime committed was no bar to the society's help, although Ranken noted that those who had committed crimes of violence were only assisted if they agreed to emigrate.³⁵

Ranken advised the committee that his members found great difficulty in placing ex-convicts in employment once their background was known. In part it would seem that encouraging emigration was therefore a simple pragmatic solution to the problem of unemployment and a return to crime. In evidence he revealed that in the six years to 1863 the society had assisted 3,142 discharged prisoners, of which 90% had been men. Not all were encouraged to emigrate. Ranken stated that his society had only assisted 868 to do so, less than a third. This figure was however rising on an annual basis, for in 1861 and 1862 they had assisted 500 to emigrate. He noted that few chose to emigrate to Australia because the cost of the passage was relatively expensive. Instead other venues closer and cheaper were chosen. Ranken advised the committee that in his opinion the numbers prepared to emigrate would increase to half those released if the funds were available to cover shipping costs.³⁶

The British Parliament clearly decided to heed the suggestion of Crofton not to parade the information the committee had gleaned all over the country. As a consequence they were able to maintain transportation by stealth for at least another three decades. In 1892 the United States Government set up a special commission to assess its immigration from European sources. One of the Special Commissioners was Captain Judson N. Cross who was sent to Europe to gather information. Upon returning from his fact-finding mission Cross alleged that Britain had maintained a deliberate policy of deporting its criminals to the United States and to the British colonies for some time. He noted that in 1880 there were about 25,000 convicts in Britain; 10,839 in

³⁵ BPP, Questions and answers, 5311, 5316, 5377, in the evidence of William Ranken, reprinted in 'Report of the Commissioners appointed to inquire into the operation of the Acts relating to Transportation and Penal Servitude, Volume II, Minutes of Evidence', 1863, pp. 432 & 435 (IUP, *Crime and Punishment: Transportation, Volume 5*).

³⁶ BPP, Questions and answers 5319, 5320, 5333, 5334, 5344, 5346, 5373, 5374, in the evidence of William Ranken, reprinted in 'Report of the Commissioners appointed to inquire into the operation of the Acts relating to Transportation and Penal Servitude, Volume II, Minutes of Evidence', 1863, pp. 432-36 (IUP, *Crime and Punishment: Transportation, Volume 5*).

prison and the balance, about 14,000 on tickets of leave. By 1885 the number in prison had dropped to 8,386, but those on tickets had plummeted to only 3,378. Cross noted that by reducing the prison population by 2,500 the British Government made a saving of £87,000 per year, at a rate of £35 per man.

It was the drop of 11,000 in the number of ticket of leave holders that held the greatest concern for Cross. Upon release from prison these prisoners fell into the sphere of the discharged prisoners' aid societies of whom Cross claimed there were 100 operating in Britain. These were paid the monies that the prisoners were supposed to have earned whilst in prison, a figure which generally ranged from £2 to £6. The societies then actively encouraged the prisoners to emigrate and received government financial assistance to do so. The cost of a one way fare across the Atlantic in steerage was an affordable \$17.50 or £3/10. The society would send the former convict to an officer at a shipping port who would organise his ticket.

The prisoners' aid societies also had agents based in the United States. Cross claimed that upon arrival the prisoner would often change his name, but was still bound to report to the aid society officer there. The former convict could then receive financial aid if he needed it. Cross claimed that in this way many life sentence men had been transported to the United States unbeknownst to that country. Part of the conspiracy was that the British bench tacitly allowed the surveillance part of a convict's sentence to be served outside Britain.

The policy was being applied to more than simply criminals. Another commissioner, a Mr Schulteis, also accused Britain of dumping her poor and her 'decrepits' and her 'superannuated poor' on the United States by fostering their emigration. The accusations were again raised, as they had been in Port Phillip forty years earlier, that the impact of this transportation by stealth was an increase in serious crime. Carroll D. Wright, the commissioner for labor, noted that in 1890 immigrants made up 14.8% of the United States population but supplied 48.86% of the homicides reported. This was the result of the 'reckless importation of crime'.³⁷ Yet just as at Port Phillip other possible reasons for this have been ignored, for example that the majority of

³⁷ *The Milwaukee Sentinel*, 14 Dec 1892, p. 4..

emigrants tend to be impoverished by comparison with residents, and that crime was, and still is, heavily linked to economic factors.³⁸

It is clear that transportation by stealth had a long history reaching back into the 1840s as a policy of the British Government. Whilst the Home Office and the courts may not have actively participated, they were certainly guilty of 'turning a blind eye' to the practice. Earl Grey denied the practice existed at the very time Toomey, Finn and Connell were sent to the United States. The British rationale for downgrading and ending official transportation to the Australian colonies, Bermuda, and Gibraltar, was very much based on economic considerations. It would seem that transportation by stealth provided both a pragmatic and economic solution to their ongoing societal problems of crime and poverty. This brings into question the policy of Denison in granting pardons in Van Diemen's Land. Despite all claims to the contrary the evidence from elsewhere in the British Empire would seem to demonstrate that expediency may well have been practiced by Denison in ridding the island of its surplus workforce by allowing them the ability to move to Port Phillip. If Denison was acting in this manner then he was certainly not the only British official to promote a system of publicly invisible transportation.

³⁸ E. Hacker, 'Criminality and Immigration', *Journal of American Institute of Criminal Law and Criminology*, Volume 20, No. 3, November 1929, pp. 429-30. For more on the link between crime and immigration see D.P. Mears, 'The Immigration-Crime Nexus: Toward an Analytic Framework for Assessing and Guiding Theory, Research and Policy', *Sociological Perspectives*, Volume 44, No. 1, Spring 2001, pp. 1-19, especially pp. 2-3.

Conclusion.

This thesis has set out to demonstrate that convict transportation had an impact on British intercolonial relationships. It has shown that a series of 'convict questions' directly shaped the affinity held between several British colonies. In turn that shaping influenced the way those colonies were perceived by London and, as such, they also contributed to the official attitudes displayed towards them. Within much of the historiography convicts have been portrayed as a worthless class with little political importance and few organisational skills.¹ The emergence of works by historians such as John Hirst and Michael Sturma in the 1980s overturned much of this attitude and helped to re-establish an understanding of convict agency. This thesis has followed that path using selected case studies to demonstrate that convict agency crossed boundaries, influencing the political, legal and social relationships of Empire.

The potential that convict transportation had to impact on other British colonies became evident shortly after the settlement of New South Wales in 1788. Clare Anderson has written of those convicts who left New South Wales and settled in the Indian colonies, especially Calcutta, although most of those she examined would appear to have been ex-convicts or emancipists rather than escapees.² Anderson has noted that their presence 'exposed the potential fragility of the convict system' and challenged colonial power.³ This thesis supports her conclusions and has provided further evidence that the presence of convicts in other colonies 'created additional anxieties'.⁴ It has shown that the colonial authorities in Sydney, whilst determined to exert control, were limited in their ability to address the concerns expressed by their Indian counterparts, especially in relation to emancipists and ex-convicts. The presence of escapees in the Indian possessions also highlighted how the plan to use the supposed isolation of New South Wales as a prison failed almost from the start. As a

¹ This started with John West and his *History of Tasmania* but has continued down into much of the modern historiography. A number of influential contemporaries, for example Lord Stanley, disagreed with his assessments. See A. Atkinson, *The Europeans in Australia: A History, Volume 1* (Oxford, 1997), p. 54. Atkinson seems to have followed West's lead and has based his opinion on comments made by David Collins, the Judge Advocate of New South Wales. Atkinson, *The Europeans in Australia*, p. 88.

² C. Anderson, 'Multiple Border Crossings: 'Convicts and Other Persons Escaped from Botany Bay and residing in Calcutta'', *Journal of Australian Colonial History*, Volume 3, Issue 2 (October, 2001), p. 6.

³ Anderson, 'Multiple Border Crossings', p. 3.

⁴ Anderson, 'Multiple Border Crossings', p. 22.

result, while intercolonial tensions may have been few, by the 1790s they were already a by-product of transportation to the Australian colonies.

Intercolonial friction did not appear in an Australian context until the separation of Van Diemen's Land from New South Wales in 1825. The initial tensions were of a different nature to those experienced with the Indian colonies. This thesis has looked at the Jane New case and the impact she had on the relationship between the two Australian colonies. New was neither an escapee, an emancipist, nor an expiree, but was a serving convict with the permission of the Governor of Van Diemen's Land to be in New South Wales. Nevertheless, her trial revealed fundamental flaws in the way convict transportation was implemented in the Australian colonies. It highlighted how the administration in both New South Wales and Van Diemen's Land had failed to come to terms with their status as colonies independent of each other.

As a direct result of the case the Van Diemen's Land Governor, George Arthur, sought clarification from London. In particular he wanted to know whether a governor had the power to move convicts between colonies. It is this aspect of the Jane New scenario that has been explored in this thesis, rather than the traditional focus on the case as a test of a governor's power to revoke assignment. The Jane New case also demonstrated that the agency that convicts could bring to bear on intercolonial relations could be passive. Their simple presence, rather than their behaviour, was able to generate change. This type of agency increasingly recurred as the 1800s unfolded and as the policy of transportation generated a growing population of expirees and emancipists. Reaction to them peaked in the early 1850s with the implementation of anti-convict legislation.

In part, intercolonial tensions in the Australian colonies were a result of the way convict transportation had been implemented. It took a different form to that experienced in British North America. Three factors resulted from this. Firstly, New South Wales and the later antipodean colonies were not set up as chartered or company colonies as had those in North America. Instead they answered directly to

London via the Governor.⁵ Secondly, a different system of transportation was employed. In the Australian colonies Britain, through the Governor, retained an interest in the convicts' labour. The third difference was that New South Wales was founded as a penal, rather than a free, colony. Free emigration was of secondary importance in the first thirty years or so of existence and much the same could be said about Van Diemen's Land. As Governor Arthur expressed it, all who chose to live in Van Diemen's Land chose to live in a gaol. It was his stated opinion that the island was 'solely and entirely a Penal Colony' and to Arthur's mind, this was not altered by the fact that 'a large percentage of the inhabitants happened to be free immigrants'.⁶

The ongoing need for labour in the colonies created a desire for a stable workforce. Thus, by the time of Governor Darling's period in office, the power of the authorities to revoke assignment was openly questioned. While the trial of Jane New has been seen as a legal test of this power, the decision of the court in her case forestalled the issue. It could not be avoided, however, when Darling then withdrew the services of convicts Edward Ledsham, Joseph Monks, and Peter Tyler. Ledsham and Monks had been assigned to the service of A.E. Hayes, the proprietor of the *Australian* and a strong critic of Darling. Tyler had been assigned to newspaper proprietor Edward Smith Hall, of the rival *Monitor*, also a critic of the Governor.⁷ Both men launched successful legal actions over the withdrawal of their convict servants, and while actions were taken against Frederick Augustus Hely, in his capacity as the Superintendent of Convicts in New South Wales, Darling was the true target. The decision of the court was later reinforced by Sir George Murray who informed Darling that his decision to withdraw the services of the convicts had indeed been wrong.⁸

The results in these two cases drew the Governor's power into serious question. More importantly they challenged the traditional portrayal of Convict Department power as unfettered, a view present in much of the testimony tendered to the various transportation inquiries held by the British Parliament. In 1853 John West wrote that

⁵ The exception to this was South Australia but following its financial collapse it too was brought under direct British governmental control in 1842.

⁶ M.C.I. Levy, *Governor George Arthur, A Colonial Benevolent Despot* (Melbourne, 1953), p. 127.

⁷ For Hayes v Hely see *Australian*, 17 March 1830; for Hall v Hely see *Australian*, 19 March 1830.

⁸ Murray to Darling, 3 May 1830 in F. Watson (ed.), *Historical Records of Australia, Series I, Volume XV* (Sydney, 1922), pp. 463-64.

the convict class 'could only be governed by despotism'.⁹ It is this view of colonial administration that has tainted assessments of the convict system ever since. The case studies in this thesis demonstrate that this was not an accurate summary of the situation. Alan Atkinson's work on the bench books of rural New South Wales has shown that many convicts used the court system as a vehicle for lodging protests.¹⁰ In this thesis, Atkinson's findings are reflected in a number of case studies, particularly the trials of Samuel Fletcher and George Martin in Van Diemen's Land, those of England, Mackay and Coombs in Sydney, and the legal suits of Isaac Burrows and John Hickling.

Atkinson argued that at the very least 'convicts certainly thought in terms of rights and claims...' and his rejection of the portrayal of convicts as defenceless victims of a brutal and uncontrolled system is supported by the evidence in this thesis.¹¹ This was not a peculiarly convict experience as E.P. Thompson has noted that the 'moral economy of the poor' in Britain was based on a set of social norms and obligations, and the proper economic function of several parties within the community.¹² As Bruce Hindmarsh has shown, the notion that proper government involved reciprocity was shared by convicts who asserted their rights in a number of key areas. Prisoners in Van Diemen's Land, for example, actively asserted their rights to free time.¹³

The brutality and insensitivity that Chartist John Frost claimed characterised transportation, and that was supplied in both the evidence to, and conclusions of, the Moleworth Committee, is shown as a generalization. Colonial Convict Departments were highly accountable when it came to convict management. Indeed, the case studies demonstrate that colonial administrations were at times compromised by their desires to uphold the rights of the individual under British law, regardless of whether that individual was free or servile. The reaction of the authorities in the non penal colonies to this situation was to pass laws, best exemplified by the anti convict legislation in Victoria, that were often at odds with the basic assumption of the rights

⁹ J. West, *The History of Tasmania* (Sydney, 1981), p. 522.

¹⁰ A. Atkinson, 'Four Patterns of Convict Protest', *Labour History*, Volume 37, 1979, p. 30.

¹¹ Atkinson, 'Four Patterns of Convict Protest', p. 35.

¹² E.P. Thompson, 'The English Crowd in the Eighteenth Century', *Past and Present*, Number 50, 1971, p. 79.

¹³ B. Hindmarsh, 'Beer and Fighting: Some Aspects of Male Convict Leisure in Rural Van Diemen's Land, 1820-40', unpublished paper, p. 4.

of citizenship. A noticeable by-product of this was the creation of serious inter-colonial tensions.

The Molesworth Committee of 1837 was established by the British Government to examine these and other issues and recommend changes. It led to the abolition of transportation to New South Wales and changed the way convict transportation operated elsewhere, abolishing assignment in favour of a system where convicts were worked by the government for a probationary period of time after their arrival in the colony. Well behaved convicts were then to be granted tickets of leave and allowed to work independently. Between 1840 and 1846 the probation system, as it became known, was tinkered with by the imperial authorities.

Following the election of the Whig Government in 1846, Earl Grey implemented further change, including the need for convicts to undergo a period of incarceration in one of Britain's new penitentiaries prior to departure for the colonies. Convicts were then to be landed with either conditional pardons or tickets of leave. The Exiles, as they were termed, were regarded with distain by the 'free' colonies to which they were sent and were viewed as no better than the convicts sent previously to the penal settlements. Neither the probation system, nor the Exiles system which replaced it, solved the problem of intercolonial tensions.

The trigger for much of the intercolonial friction was escape, the medium that allowed convicts to give greatest expression to their agency. Grace Karskens has noted the portrayal of escape in earlier historiography as a mixture of 'thrilling tales' often involving the 'tragic, lonely deaths' of delusional convicts. It was an approach first taken by David Collins and Watkin Tench in the 1790s, and mimicked in more recent work by, for example, Robert Hughes and Warwick Hirst.¹⁴ Despite this, by the 1980s such approach had been generally superseded by a more academic view which saw convicts 'not as objects of pity and delusion, but as active agents of their own destinies'. Karskens has written of escape as a desire, by those convicts involved, to achieve freedom. Such an approach focuses on the consequences for the convict not

¹⁴ G. Karskens, ' "This Spirit of Emigration": The Nature and Meanings of Escape in Early New South Wales', *Journal of Australian Colonial History*, Volume 7, 2005, p. 2; R. Hughes, *The Fatal Shore* (London, 1986), especially Chapter 7 entitled 'Bolters and Bushrangers'; W. Hirst, *Great Escapes by Convicts in Colonial Australia* (East Roseville, 1999). For Collins and Tench see this thesis, p.34.

for the authorities.¹⁵ Escape did more than simply give expression to convict agency. By its implicit definition it also placed convict bodies where they were not wanted or should not have been. As a consequence such convict bodies became problematic and authorities became agents of reaction.

Almost all the historiography on convict escape has, implicit within it, the assumption that an escapee could, and would, be arrested. The case studies presented here demonstrate that this was not always the case. When the *Lady Rowena* arrived in Rio de Janeiro in 1829 there was no legal authority for the five convict escapees aboard to be taken into custody. This fact provoked a reaction from administrations in both Britain and Van Diemen's Land who were aware of the urgent need to update legislation to deal with any future repeat of the situation.¹⁶ David Roberts has noted a similar reaction in New South Wales where the *Harbouring Act* was introduced to allow authorities to better control illicit convict movement in that colony.¹⁷

Through escape, convicts were able to draw into question the authority and structure of empire. The physical size of the Australian colonies and their wide spread populations exacerbated the problem of identity in an age without mass communication. When transposed onto the British Empire, with its global nature, the problem was even greater. In the Australian context, the mixture of penal and free colonies made it increasingly necessary to be able to determine who was who. As movement between colonies increased, this determination was to meet head on administrative desires to uphold the rights of the individual. It resulted in accusations of impropriety between colonial administrations and increasing strains on relationships.

Nowhere in this thesis are the foregoing issues better exemplified than in the case study of John May. Labelled by the police and public alike as a Pentonvillian, he in fact was originally transported in 1837, prior to the implementation of Stanley's scheme. A convict in Van Diemen's Land under the assignment system, he became an expiree. May was one of the countless former prisoners who moved between colonies

¹⁵ Karskens, 'This spirit of emigration', p. 3.

¹⁶ See this thesis Chapter 6, pp. 131-32.

¹⁷ D.A. Roberts, 'A 'change of place': illegal movement on the Bathurst frontier, 1822-1825', *Journal of Australian Colonial History*, Volume 7, 2005, p. 107.

in an attempt to establish a new life. Arrested in Melbourne, he was accused of being John Meyzer, a runaway from Van Diemen's Land who had been sentenced to transportation there following his conviction in South Australia and, as such, an escapee from the probation system introduced into Van Diemen's Land as a result of the Molesworth Committee's deliberations. May was also representative of intercolonial transportation, a part of the Empire's refuse swept into its dust bowl at the bottom of the earth.

The story that surrounded the May case exemplified the paranoia extant in the Australian colonies in the 1840s and 1850s regarding convicts and their unsavoury effects upon society. The inaccuracies in the reporting of his background were symptomatic of the attitudes of many colonists in the so called 'free' colonies of South Australia and Victoria and elsewhere within the Empire. No matter what their actual legal status, be they ex-convicts, absconders, ticket of leave men, or those with conditional or free pardons, the transported were all regularly referred to as the convict class. These attitudes were manifest in a general feeling that society was being overrun by bands of criminals, either absconders from Van Diemen's Land or emigrants from the thieving classes of Britain.

Often such feelings were fuelled by political rhetoric. As the debates surrounding the anti convict acts in Victoria demonstrate, this rhetoric was often not required to match fact. At all times the convict class remained British citizens and retained the rights bestowed on them by British law. As such there was an obligation by authorities to protect both the individual and his rights, even to the point of appearing at times contradictory or self defeating. May's case demonstrates this as the very authority he fled from, the Van Diemen's Land's Convict Department, turned out to be the protector of his freedom. May's case also shows that the Convict Departments were not omnipotent and above the law. Instead they were bound by rules that could not be bent with impunity, in this case to its cost. Confronted with this situation the free Australian colonies resorted to legislation to rid themselves of the 'problem' and argued moral rather than legal rights in doing so.

May's story contains many themes. It is a story of misrepresentation; both by himself and by the authorities that dealt with him. It highlights how a fundamental of British

law, the rights of the individual, was not lost to the convict class and was upheld by the penal authorities and others as a result of the difficulties in identifying individuals in a pre-fingerprint age. For the historian, it clouds the accuracy of the written records because it highlights the preparedness of the press and politicians to apportion blame on the basis of assumption of facts. May's case demonstrates that the assertions of unbridled power, being held by convict departments, were not true. It also showed the failure of the authorities when confronted with the actualities of the era. The various vagrancy acts and anti convict legislation did not work, but only furthered the problems they were designed to alleviate and, as a consequence, greatly soured intercolonial relations.

While John May demonstrated the impact convict transportation had on intercolonial relations, the saga of the *Neptune* at the Cape Colony showed the level of impact it could have on the relationships between governor and governed, and governor and imperial master. The events at the Cape Colony revolved around a society's attempt to rid itself of members of the same unwanted group that afflicted the free colonies in Australia. At the Cape the men transported from Bermuda were to receive tickets of leave and be distributed throughout the colony under the exile system. The Cape colonists resisted this influx in a manner more aggressive than that of their fellow colonists in Melbourne.

The events surrounding the *Neptune* certainly ruined the relationship Sir Harry Smith had previously enjoyed with the Cape colonists. Prior to the arrival of the convicts at the Cape, its citizens had been collecting subscriptions for a statue of Smith and in May 1848 had set up a committee to raise the funds. The committee's work rapidly ground to a halt and the statue was never commissioned, a significant factor in its eventual death being that 'the convict issue hardened opinion against him'.¹⁸ Although the incident did not result in Smith's recall to London it did little to advance his career. He eventually moved on from the Cape but was overlooked for any further appointment as a colonial governor.

¹⁸ A.F. Hattersley, *Convict Crisis and the Growth of Unity* (Pietermaritzburg, 1965), p. 75.

To avoid the issues that manifested themselves at the Cape, the authorities in Britain were prepared to employ a practice of transportation by stealth. Despite studies that have claimed there is no evidence 'that the government immigrants...were the sweepings from brothels and streets of Liverpool and London' this thesis has found evidence that subsidised emigration was indeed used as a means to that end.¹⁹ The practice was wide spread and not limited to the British Empire. It was also employed in relation to other sovereign nations. The fact that the British Government was prepared to condone such practices also draws into question Denison's policies with regard to the issuing of pardons and raises the likelihood that he was acting under imperial authority.

The story of John May and that of the *Neptune* shows that there was no uniformity in the system of transportation within the British Empire. This lack of uniformity was also reflected in the organization and relationships of the Empire. Upon closer examination both events demonstrate that these relationships were confused. Put together the two events tell a part of a story far greater than their sum. It is the story of the fear and paranoia that surrounded convicts in free colonies and how this manifested itself in different ways. The Cape colonists tackled the issue head on, using civil unrest and political pressure to achieve and maintain a free colony by simply not allowing the convicts to land. The proud burghers of Port Philip, feeling themselves tainted by the 'convict stain' that seeped across the Bass Strait, used legislative and judicial processes in what was to prove a vain attempt to rid themselves of the convict scourge. Van Diemonians simply accepted their lot in life, that of being the 'dustbowl of Empire'. Not only did they accept the scrapings of British society, they also accepted the sweepings of the Empire. Instead of the *Neptune* being held up by the anti-transportation movement as an example of what could be achieved there is a strange silence that permeates the literature. Contemporary sources hardly mention it, whilst historians do so even less.

To date few historians have been prepared to argue that convicts could, and did, utilise their agency to achieve significant outcomes. Hamish Maxwell-Stewart in his

¹⁹ R.J. Shultz quoted in R. Haines, 'Indigent Misfits or Shrewd Operators? Government-assisted Emigrants from the United Kingdom to Australia, 1831-1860', *Population Studies*, Volume 48, No. 2 (July, 1994), p. 238.

recent work on the penal settlement of Macquarie Harbour has argued that it was closed for a number of reasons but principal amongst them was 'the work of the prisoners' for:

It was they who undermined the defences of the place...When the laws of the colony had been changed, or distorted, in order to increase the power of the state, this too had been challenged by resort to petitions smuggled out to the higher legal authority. In the end the only way of making the place work had been to seek the compliance of the convict population...²⁰

It is a point similarly made by James Boyce in his recent history of Van Diemen's Land. He notes that 'resistance to...reforms [by the convict population] was...wide ranging, and this both delayed and shaped their implementation'.²¹ Boyce concludes from the evidence available that in many instances convict agency was manifest by the simple act of ignoring the orders regarding such reforms.²²

Kirsten McKenzie has recently examined colonial society in two of the port towns of the British Empire: Sydney and Cape Town. Her aim was to demonstrate how the Empire was linked by the movement of people between the colonies and how that involved the movement of knowledge, ideas, questions and solutions. By using case studies McKenzie has been able to demonstrate that colonies impacted on each other in ways that were often other than formal or political, and in a manner that was lasting. McKenzie has noted there is a very real need to see our history in a broader perspective.²³ This thesis shares that philosophy. By demonstrating how the convict system affected the relationships of Empire through its impact on intercolonial politics and lawmaking, social relations and crime, it reinforces the conclusions she has drawn.

This thesis has also demonstrated the impact that convict transportation had on the notion of imperial power. In 1849, as the arguments over the continuation of the

²⁰ H. Maxwell-Stewart, *Closing Hell's Gates* (Crows Nest, 2008), p. 266.

²¹ J. Boyce, *Van Diemen's Land* (Melbourne, 2008), p. 162.

²² Boyce, *Van Diemen's Land*, p. 163.

²³ K. McKenzie, *Scandal in the Colonies*, (Melbourne, 2004), p. xii.

transportation of convicts to Van Diemen's Land gathered force in Britain, the Editor of the London *Times* asked 'if we are not to use our Colonies for Convict Settlements, what is the good of a Colony?'²⁴ It was not a view shared by the vast majority of the colonists. By the 1850s the impact of convict transportation on antipodean society was seen in such a negative light that some extremists suggested as a solution 'angry and forcible separation from the Mother Country'.²⁵ Clearly the two perspectives could not meet, there was simply no middle ground on which to sustain a policy. The two views sum up the impact of transportation on the relationships of empire. It resulted in a number of problems for which there could be no solution while transportation existed. This impasse arose as a result of the actions of convicts and former convicts. It was their movements as both sanctioned and unsanctioned travellers, and their determination to exploit loopholes in the loose bundle of legislation which passed for a transportation policy, which was responsible for hastening the end of Britain's colonial solution to the problem of criminal deterrence. It is for this reason that we can conclude that the problematic bodies of the convicts and the agency they commanded had far greater impact than has been acknowledged.

²⁴ Quoted in K.E. Knorr, *British Colonial Theories 1570-1850*, (Toronto, 1964), p. 389

²⁵ J.M. Ward, *Earl Grey and the Australian Colonies*, (Melbourne, 1958), p. 222.

Appendices.

APPENDIX ONE

Comparison of Physical Descriptions – John May and John Meyzer

	John May	John Meyzer
Height	5'5"	5'5 3/4
Complexion	Fresh	Fresh
Hair	Dark Brown	Brown
Whiskers	-	Sandy
Eyes	Hazel	Grey
Nose	Crooked	Small
Mouth	Medium	Wide
Chin	Medium	Small
Eyebrows	Light	Lght Brown
Visage	Oval	Oval
Forehead	Low	High
Age	30 (1855)	23 (1847)
Native Place	Liverpool	Borough London
Trade	Baker	Laborer
Religion	Protestant	Protestant
Read/Write	Both	Both
Marks	6 scars on face 2 scars on nose sacr on nape of neck scar on L breast 2 scars above R elbow	Scar left side of mouth A long scar on U Arm
Tattoos	MMHW R 4arm flower R 4arm woman basket of flowers R 4arm JM: : AM : : L4arm sailor with cutlass above 5 dots L 4arm	HWMM woman holding ?? (illegible) letters JM and AM on left arm sailor with (hat?) in hand several blue dots on U Arm

Sources: John May taken from the Victorian Prison Records, *PROV*, 515/3, 01865, p. 550; entry for John May.

John Meyzer taken from *AOT*, CON 37/4, p. 990.

Unfortunately May's description taken at the time of his initial arrival in Van Diemen's Land in January 1838 is not available.

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