

# Penal Transportation as Punishment in Eighteenth Century Britain

BY THEO LYONS

*Since Laws were made for ev'ry Degree,  
To curb Vice in others, as well as me,  
I wonder we han't better Company,  
Upon Tyburn Tree!  
But Gold from Law can take out the Sting;  
And if rich Men like us were to swing,  
'Twou'd thin the Land, such Numbers to string  
Upon Tyburn Tree!*<sup>1</sup>

-John Gay, *The Beggar's Opera*

This verse, taken from John Gay's extremely popular play, *The Beggar's Opera* (1728), is reflective of the level of scepticism with which many of the inhabitants of eighteenth-century Britain viewed the law. In the absence of an organized police force or standing army, British lawmakers sought to use the terror of the gallows to deter potential criminals and maintain social order. Over the course of the century the parliament passed a succession of laws which made over two hundred different offences (largely property-related) punishable by death, and rendered England's criminal code one of the bloodiest in Europe.<sup>2</sup> At the same time, because accused individuals frequently succeeded in obtaining pardons which lessened the severity of their sentence, the number of actual executions taking place appears to have remained fairly constant during this period.<sup>3</sup> A number of theories which attempt to explain this paradoxical relationship, and more generally, assess the ideological underpinnings of eighteenth-century

<sup>1</sup> John Gay, *The Beggar's Opera* (Edinburgh: Oliver & Boyd, 1973), 94.

<sup>2</sup> Douglas Hay, "Property, Authority, and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Penguin Books, 1977), 22.

<sup>3</sup> *Ibid.*, 23.

criminal law, have emerged in recent years. While these discussions extensively analyze the meaning and use of the death penalty, they pay surprisingly little attention to the practice of penal transportation, which had become the fate of an overwhelming majority of Old Bailey felons by 1769.<sup>4</sup> This paper will seek to demonstrate that the emergence of transportation to the American colonies as a key form of punishment during the eighteenth century reflects the degree to which the criminal law was both authored and employed by elites as a means of furthering their own class interests.<sup>5</sup>

In his influential essay, "Property, Authority, and Criminal Law," Douglas Hay argues that the "criminal law was critically important in maintaining bonds of obedience and deference, in legitimizing the status quo, [and] in constantly recreating the structure of authority which arose from property and in turn protected its interests."<sup>6</sup> Hay describes how a land-owning minority of the populace, which filled the ranks of both houses of parliament as well as most legal offices, was able to systematically benefit from numerous aspects of the unreformed law. The ability to grant pardons, to use discretion at all stages of the criminal process, and to exercise delicacy in determining when and how to apply the death penalty enabled the elite to perpetuate the unequal systems of power, ownership, and authority from which they profited

<sup>4</sup> Roger Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies, 1718–1775* (Oxford: Oxford University Press, 1987), 22.

<sup>5</sup> Although the settlement of Australia and the creation of the Botany Bay penal colony was likely the most famous example of penal transportation, in attempting to analyze the emergence of transportation as a form of punishment, it will be helpful to limit this paper's discussion to transportation to the Americas. This is so because large-scale penal transportation was developed and institutionalized over the course of the eighteenth century (following the adoption of the Transportation Act of 1715), while the Australian colony did not begin to receive substantial numbers of convicts until the early nineteenth century.

<sup>6</sup> Hay, "Property," 25.

so greatly. Many aspects of the emergence of penal transportation as one of the courts' principal weapons can be readily understood within the context of this analysis.<sup>7</sup>

Prior to the eighteenth century, banishment had long played a part in the English justice system in the form of a right of exile, which enabled prisoners who had fled to the sanctity of the church to decide to *perdere patriam, quam vitam*.<sup>8</sup> This right to choose to lose one's country rather than one's life was gradually secularized, and by the start of the eighteenth century, it was increasingly offered in the form of a conditional pardon to those who had been sentenced for capital crimes.<sup>9</sup> It was not until the Transportation Act of 1718 that forced transportation to the Americas was formally introduced as a potential sentence for a wide array of crimes.

The wording of the Transportation Act itself offers some valuable insight into the purpose for which this punishment was introduced. The preamble explicitly frames the measure in the context of robbery, theft, and other property-related crimes which "currently prescribed punishments have not proved effectual to deter."<sup>10</sup> This reflects the degree to which, as Hay argues, the strictness of the law was intended to prevent crimes against property by inspiring terror in potential offenders. By arming the courts with a new source of terror, the Transportation Act was effectively strengthening the status-quo, and delaying more serious

<sup>7</sup> In seeking to demonstrate that penal transportation was introduced as a means of maintaining elite control, this paper will focus on corporal punishment, capital punishment, and transportation, while devoting relatively little space to alternative forms of punishment, such as imprisonment. This focus can be justified by the fact that imprisonment played a relatively minor part in British criminal law at the time; large-scale capital punishment and then penal transportation were employed in Britain as an *alternative* to a modern penal system such as that advocated for by reformers such as Bentham.

<sup>8</sup> Baron William Eden Auckland, *Principles of Penal Law*, London, 1771, *Eighteenth Century Collections Online*, Gale Group, 26, <http://gdc.gale.com/products/eighteenth-century-collections-online/>.

<sup>9</sup> *Ibid.*, 30.

<sup>10</sup> *An Act for the further preventing robbery, burglary, and other felonies, and for the more effectual transportation of felons, and unlawful exporters of wooll; and for declaring the law upon some points relating to pirates*, London, 1718, *Eighteenth Century Collections Online*, Gale Group, 183, <http://gdc.gale.com/products/eighteenth-century-collections-online/>.

reforms of the judicial system. The drafters proceed to suggest that convicted individuals may be sentenced to transportation to the Americas for either seven, or fourteen years, depending on the severity of their crime.<sup>11</sup> In order to ensure that the convicts actually do go into exile, the courts are urged to contract with private individuals who, in exchange for transporting them to the colonies, “shall have a property and an interest in the service of such offenders” for the duration of their sentence.<sup>12</sup>

With this policy, the Members and the Lords were essentially proposing to sell the slave-labour of criminals to any merchant willing to carry them across the Atlantic. As the preamble emphasizes, the legislators were confident that this would be a commercially viable policy: “In many of his Majesty’s colonies, there is great want of servants, who by their labour and industry might be the means of improving and making the said colonies . . . more useful to this nation.”<sup>13</sup>

In *The Rationale of Punishment*, Jeremy Bentham observes that wealthy convicts—if there were any—would be able to quite legally buy their freedom from the contractors upon their arrival in America, since the law only prescribed exile, and the forced labour was itself merely incidental to the sentence.<sup>14</sup> Expanding on this point, Bentham suggests that “the individual was therefore punished with bondage rather for his poverty than for the crime he had committed,” before speculating that “the most culpable, those who had committed great crimes and who had contrived to secure the profits of their crimes, were least punished.”<sup>15</sup> This enormous disparity in the way in which rich and poor convicts would have been affected by a transportation

<sup>11</sup> Ibid., 184.

<sup>12</sup> Ibid., 185.

<sup>13</sup> Ibid., 183.

<sup>14</sup> Jeremy Bentham, *The Rationale of Punishment*, Great Books Series (Amherst: Prometheus Books, 2009), 265.

<sup>15</sup> Ibid.

sentence brings the assumption that the legislators were purely motivated by an interest in justice into considerable doubt. Furthermore, the legislators' implied assumption that the vast majority of convicts *would not* be able to gather the funds required to buy their freedom is indicative of the fact that the Transportation Act was a targeted measure, formulated with poor thieves in mind.

In a rather more approving account of the Transportation Act, Theodore Barlow suggested that if criminals convicted of "Petit Larcenies, which are now punished by whipping" were to be regularly transported for their first offence, they "might grow good for something, and not become Proficients in their Art by frequent Crimes."<sup>16</sup> This comment was in keeping with the tone of the Act itself, which "provided an alternative, not just to hanging, but more importantly to the secondary punishments of the whip or branding iron."<sup>17</sup> In this sense, the legislature's decision to use the Transportation Act as a means of replacing corporal punishment with transportation to the colonies can be understood as a manifestation of the deeply conservative notion that the poor are a morally corrupt group who, in the absence of harsh judicial interventions, will naturally and invariably descend into criminal behaviour. As David Mackay puts it, the government saw penal transportation as a means of bringing about "the removal from England of what were regarded as worthless and unproductive elements of the population."<sup>18</sup>

<sup>16</sup> Theodore Barlow, "The Justice of Peace: A Treatise Containing the Power and Duty of That Magistrate," London, 1745, *Eighteenth Century Collections Online*, Gale Group, 1, <http://gdc.gale.com/products/eighteenth-century-collections-online/>.

<sup>17</sup> Gwenda Morgan, *Eighteenth-Century Criminal Transportation: The Formation of the Criminal Atlantic* (New York: Palgrave Macmillan, 2004), 44.

<sup>18</sup> David MacKay, *A Place of Exile: The European Settlement of New South Wales* (Melbourne: Oxford University Press, 1985), 9.

Penal transportation thus appears to have been introduced as both a means of strengthening the status-quo by adding new terror to the criminal law, and as a cheap and easy way of disposing of socially undesirable segments of the population. Beyond this, the manner in which the sentence of transportation was actually employed also lends considerable support to Hay's theory of elite control. In practice, transportation often provided courts with a much-needed alternative to capital punishment, which arguably helped to perpetuate the existence of England's bloody criminal code. As MacKay points out, "the death sentence had to be meted out with discretion and a sense of proportion, in order to maintain the appropriate level of terror. If used inappropriately, its credibility would be questioned and popular outrage might result."<sup>19</sup> Echoing these sentiments, Roger Ekirch suggests that "in the long run, transportation . . . strengthened the death penalty by making it more tolerable to the public."<sup>20</sup>

By allowing the courts to temper the number of executions that actually took place, and adjust the level of punishment according to the political circumstances—what Hay refers to as "Delicacy"—the practice of penal transportation effectively became a necessary condition for the maintenance of a system of law and order which substituted terror for organized policing.<sup>21</sup> Furthermore, because it was the Justices of the Peace who chose whether or not to request that convicted capital offenders be pardoned from execution on condition of transportation, and the representatives of the King that decided whether or not to accept such requests; the process of

<sup>19</sup> Ibid., 11.

<sup>20</sup> Ekirch, *Bound for America*, 33.

<sup>21</sup> Hay, "Property," 49.

pardoning allowed elites to exercise mercy in a way that constantly strengthened and reinforced their claims to authority.<sup>22</sup>

If, as Hay maintains, the existence of the gallows concentrated significant—and politically useful—power in the hands of the elite, the existence of transportation as an alternative punishment had the effect of multiplying this power enormously. By allowing the courts to choose between death and banishment, and by creating a system in which a sentence of transportation as opposed to one of death would be seen as merciful, the architects of the law vested enormous power in the courts. This directly contributed to the reification of the law, and was calculated to generate respect, deference, and obedience.

In trying to assess the practical implications of penal transportation, it is important to consider whom this policy most frequently affected. As has already been stated, most transports were only convicted for minor offences; pardoned criminals escaping the death penalty represented “as little as a third” of the total number transported.<sup>23</sup> Ekirch observes that most convicts were young and “minimally skilled . . . belong[ing] to that segment of society most vulnerable to economic dislocation.”<sup>24</sup> Sentences of transportation became more frequent “whenever economic conditions sharply deteriorated. At those times, anywhere from 20 to 45 per cent of England’s population may have lacked the means to . . . feed themselves.”<sup>25</sup> The practice of penal transportation was therefore intrinsically linked to, and shaped by, wider socioeconomic issues. Indeed, it targeted and terrorized the disenfranchised poor who had lost

<sup>22</sup> Ibid., 48–9.

<sup>23</sup> Morgan, *Eighteenth-Century Criminal Transportation*, 43.

<sup>24</sup> Ekirch, *Bound for America*, 55.

<sup>25</sup> Ibid.

their means of subsistence when the enclosure of the commons and the sweeping reforms that accompanied the Agricultural Revolution effectively forced them off the land.

In this context, the fate of thousands of vagrants who were deemed to be “incorrigible rogues” and transported from Ireland, and to a lesser degree, England, without any attempt at a “formal indictment and jury trial” is a remarkable example of the extent to which the practice of transportation was shaped to serve the interests of those in power.<sup>26</sup> The government was able to easily manipulate the criminal law in order to persecute a hungry and entirely disenfranchised minority which they (perhaps rightly) deemed to be a threat to social stability. Between 1737 and 1743 over half of all Irish transports were “vagabonds.”<sup>27</sup> Thanks to this, convicted felons actually represented a minority of those who were transported during this period. This brazenly unjust use of the Transportation Act effectively served to make poverty, unemployment, and discontent crimes in and of themselves.

Furthermore, the actual journey across the Atlantic was an incredibly dangerous undertaking. Merchants seeking to turn a profit by shipping convicts to America, where they could sell them into forced labour, crammed hundreds of people into the holds of ships.<sup>28</sup> The passage normally lasted about two months, but occasionally took much longer, and disease and starvation took an enormous toll on the numbers of convicts: mortality rates were often as high as 25%.<sup>29</sup> It is not clear that the elites were particularly concerned by these numbers. Indeed, the sentiments expressed by Governor Horatio Sharpe of Maryland, who “wondered ‘whether or no the crowding too great a number of poor wretches into a small compass may not be the

<sup>26</sup> Morgan, *Eighteenth-Century Criminal Transportation*, 38.

<sup>27</sup> Ekirch, *Bound for America*, 30.

<sup>28</sup> Morgan, *Eighteenth-Century Criminal Transportation*, 33.

<sup>29</sup> *Ibid.*

means of destroying some of them” would suggest that the prospect of the convicts simply dying *en route* was not a particularly upsetting one.<sup>30</sup>

Despite this elite apathy, a number of significant individuals did raise concerns about the injustice of transportation at the time. William Eden, one of the key advocates of legal reform, argued that, “transportation [was] inflicted upon offences by no means so heinous in their nature as to require the extirpation of the criminal from the society of his fellow-citizens.”<sup>31</sup> Eden further suggested that in all cases, except where transportation was offered to convicted capital felons as an alternative to the gallows, the use of so harsh a sentence would not be “reconcilable [sic] to the law of nature.”<sup>32</sup> In highlighting the excessive severity of sentencing common thieves to transportation, Eden was effectively appealing to the principle of proportional justice. This idea—that the nature of the punishment must be fitting to the nature of the crime—was also emphasized by William Blackstone in his famous *Commentaries on the Laws of England*. Blackstone criticized the excessive severity of the eighteenth-century criminal law, suggesting that “a multitude of sanguinary laws . . . do likewise prove a manifest defect either in the wisdom of the legislative, or the strength of the executive power.”<sup>33</sup>

Jeremy Bentham, another leading reformer, did an excellent job of illustrating the inappropriateness of penal transportation in *The Rationale of Punishment* (1830):

“I sentence you” says the Judge, “but to what I know not—perhaps to storm and shipwrecks—perhaps to infectious disorders—perhaps to famine—perhaps to be massacred by savages—perhaps to be devoured by wild beasts—Away, take your chance, perish or prosper, suffer or enjoy; I rid myself of the sight of you,

<sup>30</sup> Ibid., 58.

<sup>31</sup> Auckland, *Principles of Penal Law*, 30.

<sup>32</sup> Ibid., 31.

<sup>33</sup> William Blackstone, *Blackstone’s Commentaries on the Laws of England in Four Volumes* (London: Cavendish, 2001), 114.

the ship that bears you away saves me from witnessing your sufferings, I shall give myself no more trouble about you.”<sup>34</sup>

The incredible arbitrariness of transportation meant that this punishment could not possibly be consistent with the principle of proportional justice; without certainty and precision, there can be no proportionality. Since the judge would have had no way of knowing the actual meaning of a sentence of transportation, he would have never been able to actually match it to the severity of a particular crime. The fact that this basic problem did not concern those who designed and regularly employed the Transportation Act, reflects their lack of genuine interest in the fairness of their punishments and the legal rights of those whom they accused. The total and utter apathy with which Bentham’s imagined judge speaks is such that it denies the very humanity of the accused and reduces them to the level of an unwanted dog which must be disposed of sufficiently far from its home in order to guarantee that it will never find its way back.

Bentham goes on to use the logic of utilitarianism to argue that any benefits that might come from transporting criminals to the Americas cannot possibly justify the amount of suffering that is inflicted upon the transported individuals.<sup>35</sup> Penal transportation fails to meet any of the criteria that Bentham sets for an effective punishment: it fails as deterrence, since the public cannot witness the suffering of convicts who have been transported; it fails to reform or rehabilitate; it fails to incapacitate; and it fails to provide compensation to the injured party.

<sup>34</sup> Bentham, *The Rationale of Punishment*, 277. Bentham’s words “perish or prosper” also raise the possibility—which has hereto been unmentioned—of convicts actually benefiting from their sentence of transportation. While it is highly probable that some convicts did actually prosper in the New World, the sources discussed thus far overwhelmingly demonstrate that in the vast majority of instances, this would not have been the case. Transportation was intended to deter criminals through terror, and both the astonishing mortality rates of the passage and the forced labour that awaited the transports upon arrival, help to explain why reformers such as Bentham and Eden perceived it to be such a brutal punishment.

<sup>35</sup> *Ibid.*, 267.

From these numerous shortcomings, Bentham is led to conclude that transportation “may be considered as so much gratuitous suffering inflicted without end or object.”<sup>36</sup>

So far this paper has drawn upon both the theory and the practical implications of penal transportation to argue that the rise of transportation as a key form of punishment during the eighteenth century was, in many ways, a clear example of the type of elite control that Douglas Hay suggests characterized the British criminal justice system. In seeking to consider possible objections to this argument, it would be useful to discuss critiques of Hay’s argument itself. Peter Langbein, in his essay, “Albion’s Fatal Flaws,” criticizes a number of aspects of Hay’s account.<sup>37</sup> Langbein is perhaps at his most effective when he demonstrates that Hay’s argumentation tends to overstate the degree to which elites were actually able to succeed in manipulating the system of pardons. Langbein asserts that pardons were in fact consistently used as a means of ensuring that the death penalty was not employed too unfairly.<sup>38</sup> He also suggests that the system of private prosecution included mechanisms that enabled the poor, as well as the rich, to take cases to court, and proceeds to ridicule Hay’s description of the criminal law by suggesting that Hay had perhaps only considered Britain’s notorious poaching laws while formulating his argument.

Generally, though, Langbein merely responds to Hay’s anecdotal evidence by raising his own, contrary anecdotal evidence. Beyond this, he fails to substantively engage with the fundamental logic of Hay’s analysis. Both authors suggest that the eighteenth-century criminal code was unusually bloody because in the absence of organized policing and a developed

<sup>36</sup> Ibid.

<sup>37</sup> John H. Langbein, “Albion’s Fatal Flaws,” *Past and Present* 98, no. 1 (1983): 96–120.

<sup>38</sup> Ibid., 113.

prison system, terror was the only effective means of maintaining order. What Hay's argument seeks to explain (and Langbein's response leaves largely untouched) is the question of *why* the reforms that would address this situation were successfully avoided for such a long time. In responding to this question, Hay situates the criminal law within the wider power structures of British society, and demonstrates that the criminal law was written, and in most cases executed, by elites, in order to serve their own interests. As this paper's discussion of penal transportation has demonstrated, elites actively worked to defend the unreformed law because it really did enable them to enforce social order in a way that created and protected authority, deference, and obedience. In his critique of Hay, Langbein attempts to divorce the criminal law from the broader systems of class and power that pervaded and regulated British society. In doing so, he fatally abstracts from the reality of eighteenth-century England.

Following the adoption of the Transportation Act in 1718, over 50,000 prisoners, many of whom were "vagabonds" who had not been formally convicted of any crimes, were forcibly transported to the American colonies, where they were sold into hard labor.<sup>39</sup> When the American Revolution abruptly cut off the flow of convicts, British legislators were so desperate to find another location to which they could export their undesirables that they approved an extremely expensive plan to develop a penal colony on the other side of the world, at Botany Bay, Australia.<sup>40</sup> The policy of penal transportation was shaped by the landed elite who held sway in both houses of parliament, and was, therefore, suited to their political needs in a number of key ways. By replacing corporeal punishment with a system of banishment, it enabled them to rid themselves of thousands of poor, economically dislocated, petty thieves,

<sup>39</sup> Ekirch, *Bound for America*, 23.

<sup>40</sup> MacKay, *A Place of Exile*, 9.

who might otherwise present a threat to social stability. By providing an alternative to the gallows, it fostered the emergence of a system of discretion that was used to justify the severity of the unreformed law to the poor, and helped to put off the much needed reforms that Bentham, Eden, and Romilly, among others, so passionately campaigned for. The rise of penal transportation thus played into, and effectively made possible, the systems of authority and control that Douglas Hay seeks to describe in "Property, Authority, and the Criminal Law.