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and the Widening Net of Penal Sanctions

By
Willow Mary Meyer

A dissertation submitted in partial satisfaction of the
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Doctor of Philosophy
in
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Committee in charge:
Professor David Lieberman, Chair
Professor Marianne Constable
Professor Malcolm Feeley

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Abstract

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Convict transportation is an important, and under-explored, link in the evolution of punishment, and can illuminate the ways that states transform their capacities to exercise penal power. This dissertation argues that eighteenth-century North American convict transportation dramatically “widened the net” of penal sanctions. The increased penal capacity of the state was made possible by the combination of delegation to commercial actors and the increasing involvement of the national government in the financial, political and regulatory aspects of the administration of transportation. Transportation, unlike imprisonment at hard labor, was not seen as violating traditional English liberties because it “widened the net” without creating new state structures and practices, and it drew on the accepted logic of governing the poor through labor.

For
Tim, Wyatt, and Cash

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Chapter One: Introduction, Historical Background and Review of the Existing Literature

I. Introduction

Convict transportation is an important, and under-explored, link in the evolution of punishment, and can illuminate the ways that states transform their capacities to exercise penal power. Although the historical relationship of carceral punishments, such as penitentiaries, to the “widening net” of penal sanctions has been studied at length, convict transportation has received less attention in this context. When transportation, a punishment that effectively combined temporary exile and a term of indentured labor, began to be regularly used as a penal sanction in England in the early eighteenth century, a group of offenders who had previously been largely unsanctioned fell, for the first time, into a pervasive network of public and private social control mechanisms on both sides of the Atlantic. The tendency to locate the origin of expansive penal power in the nineteenth-century “birth of the prison” obscures our view of the relationship between eighteenth-century convict transportation and the growth of state power. The way transportation emerged, the administrative mechanisms that aided its operation, and the social environment that allowed it to flourish provide abundant information about how and why penal regimes evolve, expand, and become entrenched.

The tendency of scholars of crime to focus on the emergence of carceral punishments is not surprising, as Western penal systems continue to be, in many senses, based on ideals espoused in prison reforms and penitentiary models articulated in the eighteenth century. The initial ascendancy of carceral punishments appears to usher in an era, where states punish increasing numbers of people in an increasingly totalizing manner, which continues to the modern day. If we want to understand how and why states have been able to dramatically expand their capacity to punish in the later part of the twentieth century, it is said, we should examine how they first expanded this power through the penitentiary system.

I argue below, however, that transportation is the punishment that ushered in the first dramatic expansion in those subject to penal sanctions and the increased intensity of the punishment to which they were subjected. Despite the fact that transportation is no longer in use, it retains central relevance to the history of contemporary punishment because, among other reasons, it fundamentally and permanently widened the specter of penal sanctions. A closer look at transportation can illuminate topics of modern relevance such as how and why the expansion of the state’s penal power is enacted, the cultural and political mechanisms that allow this process, and the future ramifications of penal transformations.

In presenting this argument, I will, in the first chapter, provide an historical overview of the practice of convict transportation, followed by a discussion of existing literature on this topic. The second chapter sets forth an argument for how and why transportation should be understood as a central moment of penal “net widening.” Transportation, as I will demonstrate, ushers in a dramatic increase in the numbers of people subject to “serious” punishment. The third and fourth chapters outline specific ways in which the combination of public and private mechanisms allowed convict transportation to flourish. The newly formed organization of social control that transportation created was made possible by the pairing of commercial infrastructure with public funding and oversight. In these two chapters I thus explore the interplay between mercantile operations and central government involvement that enabled transportation to

flourish. The fifth, and final, chapter considers transportation in the broader debate about the shifting purposes of punishment in the eighteenth and nineteenth centuries, and in the context of changing understandings of liberty and bound labor. Transportation, which combined penal and labor objectives, was, I argue, legitimized by its capacity to be understood as consistent with multiple penal goals and accepted forms of bound labor.

Although this dissertation takes a historical phenomenon as its primary subject, it is not principally concerned with uncovering new sources of archival data. There have been several excellent studies of transportation that employ more traditional historical methodologies, and I will draw on these extensively in the pages that follow. This dissertation, however, is more centrally concerned with how transportation can illuminate a broad range of questions and theories in several bodies of literature that have not previously been linked in this manner. As such, this dissertation is primarily synthetic and analytic, and seeks to offer new perspectives on existing scholarly debates.

That said, primary source materials form a central component of this dissertation. Records of two convict shipping firms that operated in the final years of transportation to North America are particularly important to this work. The Cheston-Galloway papers provide a detailed record of the structure of the business of the Bristol convict shipping firm Stevenson, Randolph and Cheston. The Duncan Campbell Letterbooks similarly reveal the operation of the convict trade conducted by the London merchant Duncan Campbell. In addition to these collections, the dissertation draws on eighteenth-century writings including manuscripts, Parliamentary debates, sessions papers, Treasury documents, and letters. The above notwithstanding, my emphasis is less on the novelty of the data, and more on analyzing and applying existing historical material in novel ways.

II. Historical Overview of Convict Transportation

In 1718, the British Parliament passed *An Act For Further Preventing Robbery, Burglary and Other Felonies, and For the More Effectual Transportation of Felons, and Unlawful Exporters of Wool; and For Declaring the Law upon Some Points Relating to Pirates*.¹ This Act, which I will refer to as the Transportation Act of 1718, is the most extensive legislation regarding transportation, and it marks a significant moment when the policy became regularized, took on an increased scope, and came into a period of increased use. However, as even the title of the Act suggests, a practice of transporting felons – albeit not in an “Effectual” manner – had already long been established.² Rather than initiating a new punishment, the Transportation Act of 1718 more fully developed a policy that had begun many years prior.

Convict transportation involved both expulsion from the community and forced labor. Thus, transportation can be seen as having its earliest roots in the punishments of exile and penal slavery. The more direct precedents for the regularized form of transportation that Britain embraced in the eighteenth century, however, can be traced to the late sixteenth and early seventeenth centuries. North American transportation can be understood as occurring in three overlapping, progressive phases: from the late sixteenth to the mid-seventeenth century, transportation developed in the dual contexts of responses to poverty and crime; from the mid-seventeenth to the early eighteenth century, transportation was more distinctly situated in the penal context, and was primarily associated with pardons; after 1718, transportation became more administratively developed, and began to be used as a direct sentence for criminals. Although this grouping focuses on the distinctive characteristics of each phase, new meanings and uses of transportation developed alongside existing notions of the punishment, rather than displacing them.

a. Early Transportation: Poverty, Crime and Colonial Labor

Although many others had previously considered putting criminals to labor, Richard Hakluyt (the elder) was perhaps the first English author to propose that the state might harness the labor potential of criminals for purposes of colonial development.³ In 1584 Hakluyt, advocating to Queen Elizabeth for English colonization of the eastern seaboard of North America under the direction of Sir Walter Raleigh, suggested that those who “for trifles may otherwise be devoured by the gallows,”⁴ should be employed as a labor source for overseas settlements. He notes,

many thousands of idle persons are within this realm which having no way to be set on work be either mutinous and seek alteration in the state or at least very

¹ 4 Geo. 1, c. 11. (1718)

² A general treatment of the background of the enactment of the Transportation Act of 1718 is provided by J. M. Beattie, *Crime and the Courts in England, 1660-1800* (Princeton University Press, 1986); A. Roger Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies, 1718-1775* (Oxford University Press, USA, 1990).

³ Richard Hakluyt, *Discourse on Western Planting*, ed. Charles Deane, Collections of the Maine Historical Society, 2nd Ser. (Cambridge, Mass., 1877), 160-61, 36-44.

⁴ *Ibid.*, 160-61, spelling modernized.

burdensome to the commonwealth and often fall to pilfering and thieving and other lewdness whereby all the prisons of the land are daily pestered and stuffed full of them where either they pitifully pine away or else at length are miserably hanged... Whereas if this voyage were put in execution these petty thieves might be condemned for certain years in the western parts especially in Newfoundland in sawing and felling of timber ... and in the more southern parts in setting them to work in mines of gold silver copper lead and iron.⁵

The labor demands of colonial development, as imagined by Hakluyt, were the answer to many problems of crime, punishment and managing the poor. In addition to the benefits of colonial development, convict labor could, he argued, avert emergent criminality and produce more merciful (or at least less wasteful) penal options.

Although Hakluyt's suggestions on this point did not receive much attention from the government, before the end of the century Parliament articulated a similar proposal. The 1598 *Act for Punishment of Rogues, Vagabonds and Sturdy Beggars* authorized dangerous rogues to either be placed in houses of correction or to "be banished out of this Realm and all other Dominions thereof, and ... (to) be conveyed ... beyond the Seas" at the direction of the Justices of the Peace.⁶ Any who returned from this term of banishment were deemed felons, and would be sentenced to death without benefit of clergy.⁷

Parliament's proposal in 1598 does not appear to be directly contemplating that those who are banished will be set to labor. However, in 1606, Virginia was recommended as a place where "idle vagrants might be sent" to work.⁸ In 1611 there was yet another plea for convict laborers in the colonies, with Thomas Dale, the acting governor of the Virginia Colony, asking the Privy Council to send him convicts. Dale writes of the need for manpower to rebuild Jamestown, "on account of the difficulty of procuring men in so short a time, all offenders out of the common goals condemned to die should be sent for three years to the colony."⁹

Although Dale's request, like Hakluyt's, received little direct attention, in 1615 the Privy Council issued this warrant:

Whereas it hath pleased his Majesty out of his singular clemency and mercy to take into his princely consideration the wretched estate of divers of his subjects who, by the laws of the realm, are adjudged to die for sundry offenses, though heinous in themselves yet not of the highest nature, so as his Majesty, both out of his gracious clemency, as also for divers weighty considerations, could wish they

⁵ Ibid., 37.

⁶ 39 Elizabeth I, c. 4. (1598)

⁷ Ibid., 900. A proclamation in 1603 further defined the places rogues could be sent to include "France, Germany, Spain and the Low Countries" as well as the "New Found Land." James F. Larkin and P Hughes, eds., *Stuart Royal Proclamations*: (Oxford, 1973), 1, 27; John H. Langbein, *Torture and the Law of Proof* (University of Chicago Press, 2006), 40-41.

⁸ Salisbury MSS, Hatfield: letter from Sir Walter Cope to Lord Salisbury, quoted in Peter Wilson Coldham, *Emigrants in Chains: A social history of forced emigration to the Americas of felons, destitute children, political and religious non-conformists, vagabonds, beggars and other undesirables, 1607-1776* (Genealogical Pub. Co., 1992), 41.

⁹ Dale says of colonial convict labor, "so do the Spaniards people the Indies." Noel W. Sainsbury, ed., *Calendar of State Papers Colonial*, vol. I, 1860, 12.

might be rather corrected than destroyed, and that in their punishments some of them might yield a profitable service to the commonwealth in parts abroad where it shall be found fit to employ them (members of the Council are empowered) to reprieve and stay from execution such persons as now stand convicted of any robbery or felony (willful murder, rape, witchcraft or burglary only excepted) who for strength of body or other abilities shall be thought fit to be employed in foreign discoveries or other services beyond the seas ... with this special proviso that if any of the said offenders shall refuse to go, or yielding to go shall afterwards come back ...before the time limited by us...be fully expired, that then ...the said offender shall from thenceforth be subject to the execution of law for the offense whereof he was first convicted.¹⁰

This statement concludes with the names of seventeen convicts, all male, who were to be recipients of this “clemency” and were to be delivered to Sir Thomas Smith of the Virginia Company. The passage is rich with themes that emerge repeatedly in the later history of transportation; mercy, justice, deterrence, conceptions of criminality, labor, security, profit and the demands of imperial expansion. These ideas are intertwined here, as they will be, in various forms, in many subsequent discussion of transportation.

The idea of handpicking able-bodied felons for service in “foreign discoveries” was echoed shortly thereafter in an extension of the Privy Council’s provisions in 1619.¹¹ In the later articulation, however, suggestions of mercy are less pronounced, and it is instead emphasized that this means of dealing with criminals will further the penal objectives of deterrence. Convicted felons,

who being persons of able bodies fit for labor may be usefully employed for the great benefit and service of the commonwealth, and to that end may be constrained to toil in such heavy and painful works, as such a servitude shall be a greater terror to them than death itself, and therefore a better example since executions are so common as that wicked and irreligious sorts of people are no way thereby moved by them.¹²

Some might prefer death to servitude, but that they could not elect to be hanged instead of pardoned for service. The King’s “mercy” is now being directed at “Subjects as thus willfully run into their own perdition, to reprieve them from execution of death (although it may be contrary to their own election and will).”¹³ Despite the suggestion that this may literally be a fate worse than death, it is limited in its availability to those who are “of able bodies and stand convicted of felony and not for any murder, treason, rape, witchcraft, robbery on the highway, burning of houses, nor burglaries.”¹⁴ The prospect of receiving a full pardon after a time of servitude is also made to sound more doubtful in 1619:

¹⁰ *Acts of the Privy Council of James I*, vol. 2 (London, 1925), 23.

¹¹ *Ibid.*, (London, 1930), vol. 5, 53.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ The edict goes on to suggest that, in addition to being sent to colonies and plantations, these people might be sentenced to labor in chains at home. Additional emphasis is placed on the harshness of this life in the colonies, including a discussion of the minimum provision of food needed to sustain life. *Ibid.*

if afterwards it shall appear that any of (the pardoned convicts), by his future demeanor and penitence for his former faults shall deserve his Majesty's pardon, his Majesty may then be pleased, upon sufficient certificate thereof and security to be given for his good behavior afterwards, to extend his clemency further and extend him his gracious pardon; otherwise to keep them all under the sword of justice and to cut them off when his Majesty shall please.¹⁵

Under this authority a small number of pardoned convicts – probably not exceeding several hundred – were transported in the first half of the seventeenth century.¹⁶ The 1619 edict sets up a curious juxtaposition of transportation as something that is not harsh enough for those convicted of the most severe crimes, with the acknowledgement that transportation is so harsh that some will prefer death in its place. This ambiguity was replayed repeatedly in the coming years, as transportation is imagined in the contexts of punishment and servitude.

This more distinctly penal tone, however, continued to exist in tandem with the persistent use of transportation to deal with the problems of the poor. In 1618, the Privy Council promulgated an order that one hundred homeless children in the City of London should be transported to Virginia, not as part of a penal policy, but as an effort to employ them.¹⁷ Bridewell, a “hospital” in London designed to treat vagrancy and vice, also began to ship children, as well as vagrants and other “trouble-makers” to the colonies.¹⁸ Bridewell was a place of labor and confinement, but also operated an internal court that occasionally sentenced the “disorderly” poor to transportation.¹⁹ The distinction between voluntary indentured servitude and penal transportation was particularly unclear in these instances, as many of those sent to the colonies made the journey at least nominally voluntarily, and were sometimes provided incentives for their passage.²⁰ The City of London, however, frequently paid the expense of their passage and threatened other sanctions if individuals refused to go to the colonies.²¹

In this first phase of transportation, people were sent to the colonies at the behest of the state, or with the threat of state intervention, as a response to the problems of poverty and crime. Although the distinction between these two types of subjects of transportation was by no means clear in the early seventeenth century, it can be estimated that roughly half of those transported were convicts, while the other half were merely

¹⁵ Ibid.

¹⁶ Abbot E. Smith, *Colonists in Bondage: White Servitude and Convict Labor in America, 1607 - 1776* (University of North Carolina Press, 1947), 93-95; A. Smith, “The Transportation of Convicts to the American Colonies in the Seventeenth Century,” *The American Historical Review* 39, no. 2 (1934): 232-249.

¹⁷ R. Johnson, “The Transportation of Vagrant Children from London to Virginia 1618-1622,” in *Early Stuart Studies: Essays in Honor of David Harris*, ed. Howard Reinmuth (Minneapolis, MN, 1970), 137-51. The children transported from London will be discussed in Chapter Five.

¹⁸ Joanna Innes, “Prisons for the Poor: English Bridewells, 1555-1800,” in *Labour, Law and Crime: An Historical Perspective*, ed. Douglas Hay and Francis Snyder (London, 1987); Paul Griffiths, *Lost Londons: Change, Crime, and Control in the Capital City, 1550-1660* (Cambridge University Press, 2008).

¹⁹ Griffiths, *Lost Londons*, 285.

²⁰ Ibid.

²¹ R. Johnson, “Vagrant Children.”

poor, and often children.²² Of these, perhaps twenty percent were pardoned felons, twenty percent were poor children, and the remainder was comprised of those sent from Bridewell, representing a hazy combination of petty thieves, nightwalkers, minor offenders and the poor.²³

Historians who specialize in punishment often view early interest in transportation as, first and foremost, interest in a penal strategy. Joanna Innes helpfully notes, however, that initial uses of transportation were part of a broader trend of policies toward crime and poverty converging upon one another in the early seventeenth century.²⁴ In 1615, she finds, assize judges began to occasionally use the sentence of imprisonment to houses of correction, which had previously been used to deal with vagrants and the refractory poor. Similarly, transportation began to be used for vagabonds as well as pardoned felons.²⁵ The always somewhat blurry distinction between criminals and the poor was further obscured by this convergence, which locates the strategy of transportation in the dual contexts of penalty and poverty. During this time, dominant proposed penal innovations all centrally featured a component of productive labor: hard labor in corrective prisons, employment in public works, and being transported to work in the colonies.²⁶ Transportation, from its initial inception, existed in these plural contexts.

b. The Middle Years of North American Transportation: Conditional Pardons

The ambiguity of the imagined subject as criminal and poor may have contributed to the interesting relationship between punitiveness and mercy that is present in the earliest conceptions of transportation and that persists through centuries of use. These conflicting impulses are reflected nowhere more clearly than in the evolution of transportation as a form of pardon and eventually as a direct sentence. Early forms of transportation were often conceptualized as reprieves or conditional pardons; technically an alternative to punishment rather than a punishment in its own right.²⁷ In the second half of the seventeenth century, the distinctive features of transportation involved its evolving use in terms of pardon. This was the case until the passage of the 1718 Act, when transportation began to be used as a direct sentence, as well as retaining a role in pardoning.²⁸

In order to understand this evolution, it is first necessary to provide a brief overview of the way offenses were generally categorized in this time period. In the late seventeenth century English courts tried offences that were categorized as felonies,

²² This rough estimate is based on Smith, *Colonists in Bondage*, 93-95 for “criminals” transported, and Griffiths, *Lost Londons*, 284-287, for children and other “rogues” and “vagabonds” transported.

²³ Ibid. See also, Cynthia Herrup, “The Punishing Pardon: some thoughts on penal transportation,” in *Penal Practice and Culture: Punishing the English 1500-1700*, ed. Simon Devereaux and Paul Griffiths (Palgrave Macmillan, 2004), 121-138.

²⁴ Joanna Innes, “The Role of Transportation in Seventeenth- and Eighteenth-Century English Penal Practice,” in *New Perspectives in Australian History*, ed. Carl Bridge (London, 1990); Innes, “Prisons for the Poor.”

²⁵ Innes, “Role of Transportation,” 9.

²⁶ Ibid., 10; Beattie, *Crime and the Courts*, 470-500.

²⁷ Herrup, “Punishing Pardon.”

²⁸ 4 Geo. 1, c. 11. (1718)

misdemeanors, and statutorily defined petty or summary offenses.²⁹ Felonies, which were the most serious offense category, and which in theory carried the penalty of death, created the most serious problems for the administration of punishment.³⁰ The central problem was created by a distinction between “clergyable” and “non-clergyable” felonies. These offense categories emerged from the “benefit of clergy,” which originally referred to the privilege of ordained clerks to be subject to the jurisdiction of the ecclesiastical court – which did not use the sanction of capital punishment - rather than the king’s court.³¹ After the 15th century, the offender who successfully claimed clergy by passing a literacy test was no longer required to be delivered to the ecclesiastical court, and was instead merely branded at the base of the thumb and immediately released.³² The branding was not necessarily intended as a punishment in itself, but rather was employed to enforce the rule that a member of the clergy could only qualify for this immunity one time. Thus the branding was primarily used as a means of communication within a decentralized system of criminal justice.³³

Benefit of clergy quickly evolved into an elaborate legal fiction, and by the late seventeenth century, the last vestiges of pretense that qualifying offenders were members of the clergy were abandoned.³⁴ The use of clergyable discharge had become a largely routinized discretionary mechanism that would allow judges and juries to spare offenders a capital sentence if they had committed a relatively minor offense. In 1706 offenses became statutorily categorized as being either non-clergyable or clergyable.³⁵ The 1706 statute, in effect, made explicitly legal what was in fact already happening, and gave Parliament, rather than judges, more discretionary power. The statutory category of non-clergyable offenses represented more serious violent felonies such as murder, rape, and burglary, as well as covering larceny of items of high value, and particularly rampant problems like pick-pocketing.³⁶ Those convicted of non-clergyable offenses faced hanging unless they could obtain some form of pardon. Clergyable felonies, were met with branding on the thumb and release. As John Beattie has demonstrated in *Crime and the Courts*, renewed consideration of transportation in the 1660s emerged in the context of a search for a “secondary punishment” that could fill the gulf between the capital consequences of non-clergyable convictions and the essential non-punishment of clergyable branding.³⁷

Although the idea of pairing pardons with affirmative obligations such as military service or voluntary banishment had been present since at least the thirteenth century,

²⁹ Felonies and misdemeanors were tried by juries, while petty offenses were tried by Justices of the Peace. Beattie, *Crime and the Courts*, 5-7.

³⁰ Ibid.

³¹ Beattie, *Crime and the Courts*, 141-8, 452, 610.

³² Ibid.

³³ John Bellamy, *Crime and Public Order in England in the Later Middle Ages* (London: Routledge and Kegan Paul, 1973).

³⁴ In order to be eligible for the benefit of clergy, the offender had to prove that he was literate, initially because literacy was deemed a reasonable indicator of who was indeed a member of the clergy. The test of literacy quickly became part of an elaborate legal fiction – both because it allowed lay members who could read to claim a benefit meant for the non laity, and because the test could be administered more or less strictly at the discretion of the judiciary. Beattie, *Crime and the Courts*, 472-475.

³⁵ 5 Anne, c. 6 (1706)

³⁶ Ibid.

³⁷ Beattie, *Crime and the Courts*.

until the 1650s the practice of making reprieves or pardons dependent on future conditions was rare.³⁸ As Cynthia Herrup notes, however, in 1654 convicts regularly began to be granted conditional pardons, and thus “the commonwealth found an administrative tool that was both practicable and valuable.” Transportation immediately became a much more common means of dispensing with pardoned offenders, with as many as two-thirds of pardons issued being conditional on transportation.³⁹

While there were increases in the uses of transportation, they were limited by the reliance on the process of felony conviction and pardon. The interest in using transportation more broadly, beyond the constraints of conditional pardon, was evidenced by two bills, neither of which passed, that were introduced into the House of Commons in 1663.⁴⁰ The first would have authorized “the transporting of felons” and the second would have authorized transportation for “persons convicted of felony within clergy (or) petty larceny.”⁴¹ Beyond showing continued interest in transportation, these Acts indicated further interest in the specific potential for transportation to address the problematic ways in which offenses, and the punishments associated with them, were categorized.

In 1670, when transportation again appeared in the Statutes, it was framed as a response to the problems with benefit of clergy. In 1670 Parliament stipulated that certain types of theft, including the theft of cloth from the rack or “his majesties ammunition,” were excluded from the benefit of clergy, and that those who committed such crimes would “suffer death in such manner and form as if they were not clerks.”⁴² However, the Act also provides that these individuals would be eligible to be transported,

It shall and may be lawful for the Judges or Justices ... to cause such Offender to be transported to any of his Majesties Plantations beyond the Seas there to remain for the Space of seven Years... and during all that Time there to be kept to labour.⁴³

This Act had the effect of making a crime punishable by transportation, when previously it had been eligible for benefit of clergy. This was only accomplished, however, by a statutory re-classification of the offense, followed by a judicial pardon on condition of transportation.

The importance of this distinction is echoed in the 1679 Habeas Corpus Act: “no Subject of this Realm... shall or may be sent Prisoner into ... Places beyond the Seas which are within or without the Dominions of His Majesty His Heirs or Successors and that every such imprisonment is hereby enacted and adjudged to be illegal.”⁴⁴ This qualification echoes long standing concerns about exile.⁴⁵ Although transportation might

³⁸ Krista Kesselring, *Mercy and Authority in the Tudor State* (Cambridge University Press, 2003); Herrup, “Punishing Pardon,” 24.”

³⁹ Herrup, “Punishing Pardon,” 132.

⁴⁰ Beattie, *Crime and the Courts*, 473.

⁴¹ Ibid.

⁴² 22 Chas, II, c.5 (1670)

⁴³ Ibid.

⁴⁴ 31 Chas. II c. 2. (1679)

⁴⁵ According to Blackstone, “no power on earth, except the authority of parliament, can send any subject of England *out of the land* against his will; no, not even a criminal. For exile, or transportation is a punishment unknown to the common law; and, whenever it is now inflicted, it is either by the choice of the criminal himself, or else by the express direction of some modern act of parliament.” William Blackstone,

seem to fall under this Act and thus to be illegal, Parliament was careful to distinguish the practice on the grounds of the “voluntary” nature of conditional pardons:

Provided always and be it enacted that if any person or persons lawfully convicted of any Felony shall in open Court pray to be transported beyond the Seas and the Court shall think fit to leave him or them in Prison for that purpose such person or persons may be transported into any parts beyond the Seas.”⁴⁶

After the passage of the 1670 and 1679 Acts, transportation, was used sporadically, either in conjunction with pardoning, or, through judicial sleight of hand, as a direct sentence. In addition to the limitations of a quasi-voluntary pardon based system of transportation, the years leading up to 1718 saw numerous impediments to implementing a broader system of transportation. Although the Acts evidence an intention to institutionalize transportation, and thus pave way for its greater use, the realization of this ambition foundered because of administrative difficulties and colonial resistance.⁴⁷

c. The Expansion of North American Transportation: Direct Sentences and Administrative Backing

The move away from an emphasis on voluntary banishment, and the concordant move towards using transportation as a direct sentence rather than a condition of pardon, culminated in the second decade of the eighteenth century. Paired with a concerted central government effort to resolve administrative impediments, the policy of transportation flourished in the third phase. This third phase of transportation will be the subject of the majority of this dissertation, and thus less will be said of it by way of introduction.

A new, and more forceful, support for transportation was contained in the 1718 Transportation Act. The 1718 Act made transportation available as a direct sentence as well as preserving its use as a condition of pardon. Most importantly, the operational provisions of the 1718 Act, and the actions the government took after its passage, addressed the primary impediments to transportation’s functioning. These features included provisions for contracting with merchants who would transport convicts, the decision to pay a subsidy to contractors, and the requirement that contractors enter a bond to ship all convicts as ordered.⁴⁸ Transportation to North America flourished in the years between 1718 and 1775, when the American Revolution interrupted the practice. By the time transportation to North America ended, 50,000 convicts had been transported, most of them to Virginia and Maryland.⁴⁹

Commentaries on the Laws of England, vol. 1, 4 vols. (Oxford, 1765); Alan Atkinson, “The Free-Born Englishman Transported: Convict Rights as a Measure of Eighteenth-Century Empire,” *Past & Present*, no. 144 (1994): 88-115.

⁴⁶ 31 Chas II c.2 (1679)

⁴⁷ These shortcomings of the middle-phase of transportation will be discussed at length in Chapters Three and Four.

⁴⁸ 4 Geo. 1, c. 11. (1718)

⁴⁹ Ekirch, *Bound for America*, 27.

The extreme dependence on convict transportation led to a penal crisis when the practice was discontinued.⁵⁰ Although among some penal reformers transportation had long been unpopular, there was not a readily available alternative to the practice, and a return to the system of branding and release in use prior to 1718 was untenable.⁵¹ More than three quarters of convicted felons in London, and considerable numbers outside the metropolis were being sentenced to transportation in 1775, and the need to do something with these massive numbers of people sparked a period of intense debate and penal innovation.⁵²

Prison hulks were employed as a stop-gap measure while new locations for transportation were considered, prison reform was discussed and in some cases implemented, and the desirability of a national penitentiary system was debated.⁵³ The Penitentiary Act was passed in 1779, although the realization of penitentiaries was still decades away. In 1787, after an extremely unpopular experiment with prison hulks, transportation was resumed, this time to Australia.⁵⁴ Australian transportation continued for the better part of a century, and was finally abandoned in favor of the penitentiary system that had been developing concordantly. Although the absolute numbers of convicts sent to Australia were higher than those sent to North America, the proportion of transports to North America relative to the total numbers convicted was considerably higher.⁵⁵

When the regular use of North American transportation began, it was an alternative to the perceived failings of a penal system that centered on capital and corporal punishments. By the time North American transportation ended, it was being primarily compared to carceral punishments such as penitentiaries and workhouses.⁵⁶ Transportation, because it is situated between these two regimes, is uniquely situated to illuminate one of the most fascinating eras of penal evolution.

⁵⁰ Ibid., 229-230.

⁵¹ Beattie, *Crime and the Courts*, 560-565.

⁵² Ekirch, *Bound for America*, 229-234.

⁵³ Wilfrid Oldham, *Britain's Convicts to the Colonies* (Library of Australian History, 1990); Simon Devereaux, "The Making of the Penitentiary Act, 1775-1779," *The Historical Journal* 42, no. 2 (June 1, 1999): 405-433.

⁵⁴ A.G.L. Shaw, *Convicts and the Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire* (London: 1971).

⁵⁵ Ekirch, *Bound for America*, 27; R Hughes, *The Fatal Shore* (Vintage Books, 1988).

⁵⁶ Transportation will be discussed in the context of this shift between capital and corporal punishments in Chapter Five.

III. Literature Review

The above historical overview introduced several themes that will be important to the following discussion. A further exploration of these, and other, themes in the extant literature, de-coupled from the chronology of transportation, will serve to emphasize the conversations this dissertation seeks to enter, as well as some of the gaps it aims to fill. Although many features of transportation have been discussed in scholarly writings, and several careful and thorough histories of the practice exist, there remain many facets of transportation that have not previously been explored.

Existing literature on transportation can be understood as building on four general themes of particular interest to this dissertation: first, how transportation transformed penal practices in England; second, the physical operation of transportation, especially the role of markets and merchants; third, the colonial aspects of transportation; and fourth, the relationships between England and the colonies implicated by transportation. Although there is overlap between these themes, they provide a useful means of discussing the extant literature.

a. Transportation as an English Punishment

One theme in the existing literature on transportation focuses on how the punishment was situated in, and subsequently transformed, penal practices in England.⁵⁷ John Beattie, in *Crime and the Courts*, provides the definitive statement of how transportation transformed the administration of criminal justice in England. Beattie argues that transportation was adopted as a result of the search for a secondary punishment that was more severe than branding or whipping but that was not as severe (or socially disruptive) as capital punishments.⁵⁸ Beattie's insightful and thorough treatment of transportation demonstrates that the adoption of transportation increased sentencing options, and highlights the idea that what was truly innovative about transportation was that it created a direct sentence for those convicted of clergyable (non-capital) punishments.⁵⁹ Cynthia Herrup builds on the theme of how transportation introduced flexibility into existing penal options. Herrup is more directly concerned with the way transportation changed the nature of the pardoning process, from a reliance on reprieves and free pardons to

⁵⁷ I focus primarily on England, although transportation was used more broadly in Britain and in Ireland. There are several studies of transportation from Ireland, most importantly Reese. Bob Reece, in a study of transportation to America and Australia, calls attention to the largely neglected topic of Irish convicts. In his treatment of North American transportation, Reece emphasizes the problems created in Ireland when the convict trade was interrupted by war and describes the subsequent attempts to transport convicts by stealth. Bob Reece, *The Origins of Irish Convict Transportation to New South Wales* (Palgrave, 2001).

⁵⁸ Beattie, *Crime and the Courts*.

⁵⁹ An earlier treatment of transportation and its effects on penal policy in England is provided by Leon Radzinowicz. Sir Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, 6 vols. (London: Stevens & Sons, 1948); Phillip Jenkins, "From Gallows to Prison? The Execution Rate in Early Modern England," in *Crime, Police, and the Courts in British History*, ed. Louis Knafla (Meckler, 1990). Radzinowicz does not treat the topic in any depth, however, and his account has largely been superseded or corrected by Beattie. Jenkins describes transportation in terms of the declining "penal death rate" in the eighteenth-century, suggesting that transportation was primarily a substitute for execution. Phillip Jenkins, "From Gallows to Prison? The Execution Rate in Early Modern England," in *Crime, Police, and the Courts in British History*, ed. Louis Knafla (Meckler, 1990). Beattie's account also provides a corrective to this assessment, though he does not directly engage with Jenkins' assertions.

conditional pardons.⁶⁰ The new form of “punishing pardon” that transportation created radically transformed the administration of criminal justice by administratively streamlining conditional pardons, and by introducing a new level of flexibility into judge’s sentencing decisions.⁶¹

Beyond sentencing flexibility, authors have considered other features of transportation’s novelty and appeal as a punishment in England. Rusche and Kirchheimer, in a chapter on transportation in their *Punishment and Social Structure*, argue that transportation should be understood as a move away from capital punishment, and as a means of harnessing the labor potential of criminals. In this respect, they say, it should be understood as the equivalent of galley servitude.⁶² John Langbein, in a less functionalist account, similarly suggests that transportation emerged in England in an effort to provide an equivalent to French and Spanish galley servitude.⁶³ The appeal of transportation, according to these authors, is that it harnessed useful labor, as did galley servitude on the Continent. Joanna Innes stresses a different aspect of labor and transportation, suggesting that the punishment’s labor term was typical of a broader convergence of policies toward crime and poverty in the early seventeenth century.⁶⁴ Paul Griffiths provides support for this claim by discussing the use of transportation in Bridewell.⁶⁵

Malcolm Feeley argues that the essential appeal of transportation is that it was “an innovation devised by entrepreneurs and that it cost the state virtually nothing.”⁶⁶ Although Feeley articulates this position most clearly, the assessment that transportation’s was adopted as an inexpensive and easily administered punishment is echoed in many other accounts of transportation.⁶⁷ James Willis endorses this characterization of transportation, and also extends the argument by asserting that transportation was adopted (instead of the penitentiary system) because transportation was a “local” punishment that was more consistent with cultural understandings of liberty in the eighteenth century.⁶⁸ Simon Deveraux, focusing primarily on the Australian

⁶⁰ Herrup, “Punishing Pardon.”

⁶¹ Ibid.

⁶² Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (New York: Russell and Russell, 1939), chap. 7.

⁶³ Langbein, *Torture*, 40-41. While modern scholars have made the comparison between galley servitude and transportation explicitly, there is little evidence that the relationship was well developed by contemporaries

⁶⁴ Innes, “Role of Transportation.”

⁶⁵ Griffiths, *Lost Londons*, 284-287.

⁶⁶ Malcolm Feeley, “Entrepreneurs of Punishment: The Legacy of Privatization,” *Punishment and Society* 4, no. 3 (2002): 328-9; “Privatization and Punishment: Lessons from history,” in *Social Science, Social Policy, and the Law*, ed. Robert A. Kagan, Austin Sarat, and Patricia Ewick (Russell Sage Foundation, 1999), 41-67; “The Privatization of Punishment in Historical Perspective,” in *Privatization and its Alternatives*, ed. William Gormley (Univ of Wisconsin Press, 1991), 199-225.

⁶⁷ See e.g., Farley Grubb, “The Transatlantic Market for British Convict Labor,” *The Journal of Economic History* 60, no. 1 (2008): 94-122; Rusche and Kirchheimer, *Social Structure*, 58. See also Chapter Four below.

⁶⁸ James Willis, “Transportation Versus Imprisonment in Eighteenth- and Nineteenth-Century Britain: Penal power, liberty, and the state,” *Law and Society Review* 39, no. 1 (2005): 171-210; James Willis, “Punishment and the Cultural Limits to State Power in Late 18th-Century Britain,” *Punishment Society* 10, no. 4 (2008): 401-428; James Willis, “ ‘Going to hell in cradle’: The relationship between Transportation and Imprisonment in Eighteenth- and Nineteenth-Century Britain: Punishment, Liberty, and the State” (Yale University, 2000).

context, considers the more distinctly penal aspects of the cultural acceptance of transportation, and argues that transportation's essential appeal was that it could be seen as consistent with multiple conceptions of the purpose of punishment.⁶⁹

These authors provide a compelling case for transportation's appeal as an inexpensive punishment that introduced sentencing flexibility, put convicts to labor, and was consistent with both eighteenth-century understandings of liberty, and a broad array of penal purposes.

b. The Operation of Transportation

A second theme in studies of transportation considers the historical details of its operation, primarily in terms of the structure of the trade and the nature of the market for convicts. Roger Ekirch provides the most comprehensive discussion of the mechanics of transportation, from merchant relationships, to shipping patterns, to methods of convict sale.⁷⁰ Wilfred Oldham broadens the scope of inquiry, comparing the operation of North American transportation, the prison hulks, and Australian transportation.⁷¹ Others have looked in more detail at specific facets of North American transportation. In his *Policing and Punishment*, John Beattie provides a detailed account of how transportation came to be administratively successful. Beattie emphasizes the role of William Thomson, the Recorder of London, in drafting 1718 Act, in overseeing the practice in London, and in ensuring that merchants were provided subsidies.⁷² Kenneth Morgan provides an account of one convict shipping firm, describing how they organized their trade to maximize profits.⁷³ Farley Grubb, in a pair of articles, uses economic modeling to suggest that the operation of transportation was structured by a market assessed discount on convict's labor.⁷⁴

These accounts provide historical detail that explains how convict transportation operated, emphasizing in particular the role of convict merchants.

c. Convicts in the Colonies

The colonial face of transportation comprises a third theme in discussions of transportation. Abbott E. Smith's pioneering *Colonists in Bondage* provides an early discussion of transported convicts in seventeenth- and eighteenth-century North America. *Colonists in Bondage* emphasizes the similarities between convict labor and voluntary indentured servitude, noting that the lives of convicts and indentured servants in the colonies were "indistinguishable."⁷⁵ Roger Ekirch, in *Bound for America*, argues that Smith overstates the relationship between convicts and indentured servants. Ekirch finds that convicts, who weren't transported to North America until the eighteenth century,

⁶⁹ Simon Devereaux, "In Place of Death: Transportation, Penal Practices, and the English State, 1770-1830," in *Qualities of Mercy: Justice, Punishment and Discretion*, ed. Carolyn Strange (Vancouver, 1996).

⁷⁰ Ekirch, *Bound for America*.

⁷¹ Oldham, *Convicts to the Colonies*.

⁷² J. M. Beattie, *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror* (Oxford University Press, 2001).

⁷³ K. Morgan, "The Organization of the Convict Trade to Maryland: Stevenson, Randolph and Cheston, 1768-1775," *The William and Mary Quarterly* 42, no. 2 (1985): 201-227.

⁷⁴ Farley Grubb, "The Market Evaluation of Criminality: Evidence from the Auction of British Convict Labor in America, 1767-1775," *The American Economic Review* 91, no. 1 (2001): 295-304; Grubb, "Transatlantic Market."

⁷⁵ A.E. Smith, *Colonists in Bondage*; "Seventeenth Century Transportation." Frederick Schmidt provides a more narrow account, focusing on the details of convict labor in Virginia, in his doctoral thesis, "British Convict Servant Labor in Colonial Virginia" (College of William and Mary, 1976).

when indentured servitude was declining, were more likely to work alongside slaves, rather than with other white servants.⁷⁶

d. Crossing the Atlantic

The tendency of scholars to discuss the English side of transportation separately from the colonial aspects of transportation has recently been challenged by Gwenda Morgan and Peter Rushton, in their *Eighteenth Century Criminal Transportation*. Morgan and Rushton emphasize that convict stories were exchanged via the print culture of the eighteenth-century British Atlantic.⁷⁷ News, about crime and other topics, also travelled with convicts in both directions. Morgan and Rushton call this the “criminal Atlantic” and emphasize the role of transportation in providing one of the earliest international debates on crime and national identity. This theme is developed in treatments of convict runaways that emphasize the transatlantic exchange of knowledge about convicts.⁷⁸

Alan Atkinson and Bruce Kercher have also considered the way that convict transportation revealed relationships between England and the North American colonies. Although both are primarily concerned with the Australian context, they each have considered the extent to which the offender’s convict status followed him across the Atlantic. Kercher is particularly concerned with the extent to which felony attainment followed the convict to the North American colonies.⁷⁹ Atkinson is primarily interested in the changing nature of understandings of empire, and thus he considers the extent to which convicts retained a “degraded status” as criminals in the colonies.⁸⁰

This area of inquiry considers transportation in the context of relationships between England and the North American colonies, with a particular emphasis on the flow of information and the status of offender in the colonies.

e. Adding to the Literature

This dissertation spans the above themes. In considering transportation’s impact on England’s penal practices I initially focus on the consequences of the widespread use of transportation. Transportation, I argue, enabled a dramatic expansion of the state’s capacity to punish. By focusing on how transportation changed existing practices, the extant literature has not sufficiently emphasized the ways that transportation initiated a new trend of expansive punishments. In Chapter Two I thus document the ways that transportation “widened the net” of penal sanctions.

In Chapters Three and Four I discuss how this dramatic expansion of penal capacity was made possible. In doing so, I contribute to the historical literature on the operation of transportation, as well as proposing a counter-narrative to characterizations of transportation’s appeal as a primarily “private” punishment. I argue that the ability to conduct a large-scale penal project was enabled by pairing commercial infrastructure with the increasing financial and administrative capacity of the national government. Whereas existing accounts have tended to describe transportation as driven by profit-

⁷⁶ Ekirch, *Bound for America*, chap. 5.

⁷⁷ Gwenda Morgan and Peter Rushton, *Eighteenth-Century Criminal Transportation: The Formation of the Criminal Atlantic* (Palgrave Macmillan, 2004); “Print Culture, Crime and Transportation in the Criminal Atlantic,” *Continuity and Change* 22, no. 1 (2007): 49-71.

⁷⁸ Gwenda Morgan and Peter Rushton, “Running Away and Returning Home: the Fate of English Convicts in the American Colonies,” *Crime, History & Societies* 7, no. 2 (2003): 61-80.

⁷⁹ Bruce Kercher, “Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700–1850,” *Law and History Review* 21, no. 3 (2003).

⁸⁰ Atkinson, “Free-Born Englishman.”

seeking merchants, I instead focus on the interdependence of state and commercial efforts. In making this argument, I look at the operation of two dominant convict firms, as well as detailing the ways the central government shaped and supported transportation through use of subsidies, legal and political force, and regulatory action.

In Chapter Five I argue that in order to understand transportation's ability to "widen the net," we must also consider why eighteenth-century transportation was regarded as a legitimate use of coercive force. I first explore transportation's appeal as a punishment that was consistent with multiple penal goals, expanding this framework to the North American context, and considering penal purposes against backdrop of the shift "from scaffold to penitentiary." I then focus on the ability of transportation, unlike domestic imprisonment at hard labor, to not seem like an affront to liberty. While existing accounts have argued that transportation was accepted despite its use of coerced labor, I argue that labor played an important role in legitimizing the punishment. In making this argument, I develop the suggestion that transportation should be understood in the dual contexts of poverty and penalty, and provide a new perspective on the relationship between indentured servitude and convict labor. I also "cross the Atlantic" in a different way, demonstrating that English understandings of convict treatment in the colonies provided a familiar frame of reference that made the punishment seem more legitimate in England.

Chapter Two: The Widening Net of Penal Sanctions

Surprisingly little attention has been directed to the question of how the introduction of transportation affected the numbers of persons who were sanctioned in the eighteenth century, and the severity of the penalty they received. Social historians of criminal justice interested in empirical studies of secular patterns have tended to focus on shorter-term fluctuations in prosecutions, rather than longer term increases in punishment.¹ The tendency has been, for instance, to chart indictment patterns in terms of war and dearth and to explore the extent to which these reflect changes in the number of crimes actually committed.² While this focus is important, it may miss a different kind of secular trend that manifests in terms of penalties. In focusing on the “front end” issue of changing prosecution numbers in the eighteenth century, social historians have tended to neglect trends in the “back end” issue of increases in punishment over time.³

Scholars who have studied transportation specifically have also tended to neglect the association of transportation with an increase in punishment, focusing instead on how the policy was administered and the degree of flexibility it introduced.⁴ While many features of transportation have been explored in great depth, there has been less attention to an overarching analysis of how transportation is situated in the expansion of serious punishments. Since the publication of Beattie’s *Crime and the Courts*, the dominant view has been that transportation’s importance lay in providing a middle ground between minor punishments and capital sanctions.⁵ In this capacity transportation provided a means of punishing offenders that was less severe than capital punishments and more severe than whipping or branding. Despite the more than twenty years that this understanding has prevailed, there has not been a general examination of the role transportation played in the long-term increase in the number of individuals punished, and the increasing severity of the punishments to which they were subjected.

I. “Net Widening”

In other contexts, the theme of the expansion of punishment has been more thoroughly explored. One framework that links changing forms of punishment to patterns

¹ An overview of this area of inquiry is provided by Joanna Innes and John Styles, “The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England,” *The Journal of British Studies* 25, no. 4 (October 1, 1986): 208-215.

² J. M. Beattie, “The Pattern of Crime in England 1660-1800,” *Past & Present*, no. 62 (February 1, 1974): 47-95; Douglas Hay, “War, Dearth and Theft in the Eighteenth Century: The Record of the English Courts,” *Past & Present*, no. 95 (1982): 117-160; Peter King, *Crime, Justice and Discretion in England 1740-1820* (Oxford University Press, 2000), 145-152; “War as a Judicial Resource. Press Gangs and Prosecution Rates, 1740-1840,” in *Law, Crime and English Society 1660-1830*, ed. Norma Landau (Cambridge University Press, 2002), 97-116.

³ Although this has not been the subject of sustained debate, the topic is addressed in Beattie, *Policing and Punishment*, 45-73; and *Crime and the Courts*, chaps 7-9.

⁴ But see Feeley, “Privatization.”

⁵ Beattie, *Crime and the Courts*; Ekirch, *Bound for America*. The idea that transportation is primarily a replacement for capital punishment can be found in discussions of declining execution rates. See e.g. Jenkins, “Gallows to Prison.” The dominant view of historians of punishment, however, is that transportation was a replacement for death in two more limited senses, both of which are consistent with it having the primary purpose of providing a new means of more harshly punishing offenders. First, that it was a condition of pardon from a death sentence, and thus was in these cases quite literally a replacement for death, as well as being a replacement, in another sense, for unconditional pardons. Second, it was a response to the problem that expanding the number of death sentences enacted was not viable, and it “replaced” capital punishment as the means by which the marginal offender would be punished – though this is better conceptualized as supplementing than replacing.

of increasing punishment is that of “net widening.” Although “net widening” can be understood as any form of expansion in social control, the term is typically used to describe the process by which penal reforms that are adopted as milder substitutes in fact expand the scope of punishment.⁶ These ostensibly less punitive reforms have an expansive effect because they are used as supplements to, rather than substitutes for, previous punishments.⁷ Despite the intentions of those who pursue them, reform movements, especially those that are rehabilitative in nature, are thought to draw more offenders into the penal system, to subject them to more invasive forms of punishment, and to create new institutions of social control. “Net widening” has been applied to explanations of the growth of the penal state in the context of the birth of the modern prison, nineteenth century prison reforms, and (the context in which the term was initially coined) twentieth century diversionary programs such as parole and community corrections.⁸

Although my argument is framed in terms of penal “net widening,” it approaches the inquiry differently than do typical accounts in several ways. First, rather than beginning with a reform movement and identifying the consequences in terms of an increase in social control, I instead begin by documenting an increase in the numbers of individuals subject to punishment and then explore factors that enabled this growth. Second, I focus on transportation, rather than prisons, because, as I will argue, transportation marks the first large-scale national punishment. Well before the rise of a national prison system, transportation dramatically expanded the number of offenders subject to serious punishment. Third, unlike accounts of “net widening” in the context of carceral punishments, my account of “net widening” does not focus on the byproducts of reform movements. “Net widening” in the context of transportation is qualitatively different because expansion is its explicit goal, rather than an unintended consequence of other reforms. The architects of eighteenth-century transportation, unlike the reformers of the later eighteenth, nineteenth, and twentieth centuries, explicitly aimed to expand the “net” of penal sanctions. Fourth, although most accounts of penal “net widening” focus on the development of “new institutions of social control,” transportation sheds light on a form of expansion that is comprised of what we might more accurately think of as “old institutions of social control”: penal exile and indentured servitude. Transportation thus emphasizes the “net widening” capacity of penal continuity, as well as that of penal change.

The focus on transportation invites a different view of “net widening,” and thus proposes a counter narrative to dominant historical accounts of the expansion of penal power. A “net widening” study of transportation also has the potential to shed light on the penal expansion of the last decades of the twentieth century and the first decade of the twenty-first century, especially in the United States. These years have seen more

⁶ J. Austin and Barry Krisberg, “Wider, Stronger and Different Nets: The Dialectics of Criminal Justice Reform,” *Journal of Research in Crime and Delinquency*, no. 18 (1981).

⁷ *Ibid.*

⁸ Austin and Krisberg, “Wider”; Janet Chan and Richard Ericson, *Decarceration and the Economy of Penal Reform*, Research Report. (Centre of Criminology, University of Toronto, 1981); Stanley Cohen, *Visions of Social Control: Crime, Punishment, and Classification* (Cambridge: Polity, 1985); David Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little Brown, 1971); David Rothman, *Conscience and Convenience: The Asylum and Its Alternatives in Progressive America* (Boston: Little Brown, 2002).

offenders sentenced to harsher punishments, but have been largely void of systematic efforts to rehabilitate or divert offenders, or to innovate penal sanctions.⁹ So strongly has “net widening” been associated with reform and rehabilitative thinking in the context of a carceral penal regime that there has not been an effort to re-examine the type of “net widening” that has historically occurred in non-reform contexts.¹⁰ Transportation, I argue, has much to reveal about a different type of “net widening,” and can illuminate the ways in which the coercive power of the state can, over time, expand and become entrenched.

a. Terminology of “Net widening”

The term “net widening” originated in the observation that programs in the late 1960s, designed to reduce the number of offenders in prison or before courts, have actually increased the coercive control of the state.¹¹ Programs such as parole, juvenile justice or community corrections, rather than being “alternatives” to incarceration, were “complements” to existing institutions that extended the state’s reach.¹² Once the term was popularized in debates about the reforms of the 1960s, scholars began to apply the framework to a broader range of historical penal phenomena.

“Net widening” is often used to describe quantitative observations such as the increased number of people being drawn into penal institutions. From the first uses of the term, though, the quantitative increase was understood to be paired with a qualitative increase. According to those advancing the idea of “net widening,” the penal system did not merely start pulling more persons in, it also affected individuals in more profound ways than before, for instance causing them greater loss of liberty or subjecting them to new institutional forms of coercion. This combination of quantitative and qualitative components of “net widening” was conceptualized by Austin and Krisberg as “nets” that are “wider,” meaning more people are subject to punishment; “stronger,” meaning more intense punishments; and “different,” meaning promulgated in new institutional forms.¹³

Cohen, expressing the same idea somewhat more precisely, described these three components as

- (1) there is an increase in the total number of deviants getting into the system in the first place and many of these are new deviants who would not have been processed previously (wider nets);
- (2) there is an increase in the overall intensity of intervention, with old and new deviants being subject to levels of intervention ... which they might not have previously received (denser nets)

⁹ David Garland, *Mass Imprisonment: Social Causes and Consequences* (Sage Publications, 2001); Loic Wacquant, “Deadly Symbiosis: When Ghetto and Prison Meet and Mesh,” in *Mass Imprisonment: Social Causes and Social Consequences*, ed. David Garland (Sage Publications, 2001).

¹⁰ But for explanations that are post-rehabilitation, see, Malcolm Feeley and Jonathan Simon, “The New Penology: Notes on the Emerging Strategy of Corrections and its Implications,” *Criminology*, no. 30 (1992): 445-471; Malcolm Feeley and Jonathan Simon, “Actuarial Justice: The emerging New Criminal Law,” in *The Future of Criminology*, ed. D Nelkin, 1994, 172-201.

¹¹ Austin and Krisberg, “Wider.”

¹² A. Scull, *Decarceration: Community Treatment and the Deviant - A Radical View* (Cambridge: Polity, 1984); Chan and Ericson, *Decarceration*; Stanley Cohen, “The Punitive City: Notes on the dispersal of social control,” *Contemporary Crises* 3, no. 4 (1979): 339-363; Maeve McMahon, “Net Widening: Vagaries in the Use of a Concept,” *British Journal of Criminology* 30, no. 2 (1990): 121-149.

¹³ Austin and Krisberg, “Wider.”

(3) new agencies and services are supplementing rather than replacing the original set of control mechanisms (different nets).¹⁴

If we combine these three aspects, the image of wider, denser, different nets is one of “a system in perpetual expansion, with deviants continually subject to new, more intrusive forms of social control which are woven into ... new networks of penal control.”¹⁵

When I say that transportation “widened the net” of penal sanctions, I mean to be evoking all three of these features associated with expansion. The “net widening” of transportation manifests in more individuals being subjected to punishments (“wider nets”), and more “serious” punishments – as I define the term below - being inflicted (“denser nets”). Transportation, although it is comprised of familiar elements of social control, also manifests a new organizational means of carrying out punishments, and thus can also be understood as a “different net.” Because I am interested in the overall picture of the expansion, and because beyond a certain level of abstraction the distinctions between wider, denser and different nets are not meaningfully sustained, I do not continue to classify changes discussed in terms of whether they are manifestations of wider, denser or different nets. As a general matter, however, the remainder of Chapter Two is primarily concerned with wider and denser nets, insofar as I am addressing how more individuals were subject to more invasive punishments. Chapters Three and Four, which discuss the actors and institutions that administer transportation, can be understood in terms of “different nets.”

b. Net widening, Revisionist Theories, and the Eighteenth and Nineteenth Century Context

Studies of “net widening,” from their inception, drew force from their consonance with “revisionist” theories of penal change.¹⁶ Revisionist theories are best understood by contrast to prior “traditional” or “reformist” theories of penal change. Traditional histories of eighteenth- and nineteenth-century crime and punishment focus on the ability of reformers to replace capital or corporal punishments with a more humane, reformatory, imprisonment-based penal regime.¹⁷ These reformist authors emphasize the humanity of the new carceral regime, celebrate progress from the past, and glorify the values and the practices of modernity. The now dominant responses to this perspective, “revisionist,” theories of penal change, argue that the benevolently intended reforms of the eighteenth and nineteenth century brought about a dramatic expansion in the exercise of coercive

¹⁴ Cohen, *Visions*, 44.

¹⁵ McMahan, “Net Widening.” The tone of concern in some early discussions of penal net widening is portrayed well by Austin and Krisberg, “Widening the net” describes the nightmare of the benevolent state gone haywire. This horror has already been vividly portrayed in Orwell’s *1984*, Solzhenitzen’s *Cancer Ward*, Kesey’s *One Flew over the Cuckoo’s Nest*, and Burgess’s *Clockwork Orange*. Social scientists and criminologists have just caught up with the humanists.” “Wider,” 188-9.

¹⁶ *Ibid.*

¹⁷ Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*; S Webb and B Webb, *English Prisons Under Local Government* (London: Archon Books, 1922).

power.¹⁸ Imprisonment, according to the revisionists, did not introduce a more humane form of punishment as much as it ushered in a more totalizing, invasive, and “severe” penal system.

The authors associated with the revisionist perspective are discussing broader phenomena than “net widening,” but their theories seem to provide a deeper theoretical basis for “net widening,” and also to link “net widening” with the birth of the prison.¹⁹ This relationship is seen most clearly in the use of the work of Michel Foucault to explain expansions of penal power. Recent reform-oriented “net widening” diversionary tactics are said to reveal the same processes of the expansion of power that Foucault identified in the birth of the modern prison.²⁰ In this application, the aspect of Foucault’s thesis that has had the most traction develops out of the observation that, while occasional displays of terror on the scaffold might have seemed harsh, the “reform” of penal laws ushered in a more invidious carceral penal regime that dominated through disciplinary knowledge of the offender. The “gentle,” “reformed” punishment of incarceration is emblematic of a shift whereby power is exercised in a more pervasive, efficient, and totalizing manner, and penalty is interpreted as a productive technique of power/knowledge.²¹ Just as Foucault demonstrated that “the birth of the prison” refined and expanded mechanisms of discipline and control, so too, authors who write about “net widening” argue, did prison reforms in the nineteenth century, and new penal programs in the twentieth century, lead to these results.

Some have gone so far as to say that this is a necessary outcome, and that “all attempts to ameliorate the social system, in particular the criminal justice system, only lead to the dispersion and extension of social control.”²² Sociologist Dany Lacombe has noted the tendency of authors who write in the “net widening” tradition to overstate Foucault’s thesis about “the gradual refinement and expansion of mechanisms of control and discipline in modern society” as saying that “every attempt to reform society, to give people more freedom ineluctably becomes its opposite- a technique of domination.”²³ In taking an explicit effort to increase penal sanctions as the object of inquiry, this study avoids this problematic tendency of the “net widening” framework.

It is important that the expansion made possible by transportation was not the counterintuitive byproduct of benevolent reforms; it was the result of deliberate policy. Nor was the new transportation policy a standalone measure; rather, it was one prong of a broader system of initiatives designed to entrench and expand governmental control in response to threats from within and without. According to Beattie, transportation was “one aspect of a policy of tough-mindedness with respect to perceived threats to domestic tranquility and to the survival of the Hanoverian succession and the Revolution of 1689

¹⁸ Michel Foucault, *Discipline and Punish: The Birth of the Prison*. (New York: Vintage Books, 1979); Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution* (New York: Pantheon Books, 1978); Rusche and Kirchheimer, *Social Structure*.

¹⁹As McMahon puts it, “the net-widening argument has critical theoretical appeal as it demonstrates that analyses of contemporary penal developments reaffirm the penetrating observations of influential revisionist historians.” McMahon, “Net Widening,” 125.

²⁰ Cohen, *Visions*. For a critical view of this interpretation see Dany Lacombe, “Reforming Foucault: A Critique of the Social Control Thesis,” *British Journal of Sociology* 47, no. 2 (1996): 332-352.

²¹ Foucault, *Discipline and Punish*.

²² Lacombe, “Reforming Foucault,” 333.

²³ *Ibid.*, 336.

itself – a mindset that produced the Riot Act of 1715 and the infamous Black Act of 1723.”²⁴ In addition to the efforts to quash civil unrest and punish non-capital felons more substantially, the years leading up to the passage of the Transportation Act saw laws passed that encouraged victims of crime to prosecute and rewarded them for the trouble and expense of doing so; changes in policing policies and practices; other crime deterrent initiatives, like street lighting in London; and the emergence of lawyers as counselors in the criminal courts.²⁵ Transportation must be understood as one component of a broader set of initiatives that combined to, quite intentionally, “widen the net” of penal control.

It is also not a coincidence that measures to make transportation more effective were put in place in 1718 amidst the widespread perception that crime was on the rise, especially in London. In part, these increased anxieties can be attributed to the rise of print culture generally and to the newfound availability of crime and punishment literature.²⁶ The Old Bailey Sessions Papers, as well as other published accounts of trials, punishments and hanged speeches, contributed to the cultural perception of increased criminality, as did the proliferation of offender biographies and fictional literature dealing with themes of crime and punishment.²⁷ In part these fears of crime can also be attributed to the arrival of peace in 1713 after years of war with France. The demobilization of the military meant that thousands of unemployed young men were set loose and a spike in prosecutions (and almost certainly also in crimes) ensued.²⁸ Whether or not crime levels were in fact on the rise is the subject of much debate, but, regardless of what in fact was happening, contemporaries thought crime was on the rise.²⁹

If there was any doubt that transportation was intended to be an act of “net widening,” further indications can be found in the text of the Act of 1718. The preamble of the Act makes this purpose abundantly clear, noting that the adoption of transportation is mandated because “the punishments now in force against the offences of Robbery, larceny and other felonious taking and stealing of Money and goods have not proved effectual to deter wicked and evil disposed persons from being guilty of the said crimes.”³⁰

The Act not only describes the intention of creating a more effective punishment; it also highlights the particular type of offense that it is primarily seen as concerning: property offense. The “net widening” of the early eighteenth century was in part a response to a changing commercial climate, especially within London.³¹ The growth of wealth within the city, the development of a middle class, the influx of poor looking for

²⁴ Beattie, *Policing and Punishment*, 231.

²⁵ *Ibid.*, 2-14.

²⁶ Peter King, “Newspaper Reporting, Prosecution Practice and Perceptions of Urban Crime: the Colchester Crime Wave of 1765,” *Continuity and Change* 2 (1987): 423-54.

²⁷ Lincoln Faller, *Turned to Account: The Forms and Functions of Criminal Biography in Late Seventeenth- and Early Eighteenth-Century England* (Cambridge, 1987); Philip Rawlings, *Drunks, Whores, and Idle Apprentices: Criminal Biographies of the Eighteenth Century* (Routledge, 1992); Beattie, *Policing and Punishment*, 3.

²⁸ Beattie, “Pattern of Crime,” 94.

²⁹ Hay, “War, Dearth and Theft”; Beattie, “Pattern of Crime”; Innes and Styles, “The Crime Wave.”; For the argument that contemporaries thought crimes was on the rise, Ekirch, *Bound for America*, 14.

³⁰ 4 Geo. 1, c. 11. (1718)

³¹ Beattie, *Policing and Punishment*, 5, 8-9, 466-470.

work, and the development of a more anonymous urban culture all constituted aspects of this change.³² The new transportation policy developed in this context, and it was a direct effort to increase the numbers punished in response to perceptions of new social problems.

The argument that transportation dramatically altered the way that criminal justice was carried out in Britain is by no means novel, although the implications of the practice for penal “net widening” have not been thoroughly explored. As noted above, John Beattie, in his seminal *Crime and the Courts*, has explored transportation’s role in the search for a “secondary punishment” that was more severe than branding or whipping, but less severe than death.³³ Beattie’s 2001 *Policing and Punishment* fleshes out and expands this theme, demonstrating transportation’s particular importance for penal policy in London, and exploring the pivotal role played by William Thomson, the Recorder of London, in both drafting the 1718 legislation and overseeing the practice in early years.³⁴ In both books, Beattie emphasizes that transportation dramatically altered the administration of criminal law.

Malcolm Feeley also discusses the dramatic effect North American transportation had on the eighteenth-century criminal justice system. Feeley uses an examination of convict transportation to illuminate modern debates about the privatization of punishment.³⁵ Feeley argues that punishments conducted by private entrepreneurs have the effect of expanding the sphere of public social control over time. Transportation, Feeley notes, was not an alternative to capital punishment, but was an addition that “dramatically expanded the state’s repertoire of punishments and its capacity to punish.”³⁶ Feeley’s point about the expansion of penal power is consistent with Beattie’s argument, and both agree that transportation transformed the administration of punishment by providing a new “direct sentence” rather than merely providing an alternative to capital sentences. Feeley further advances the conversation by theorizing that transportation’s success owed to the “entrepreneurial energies” that, once unleashed, in transportation became institutionalized.³⁷ In the following chapters I continue this line of inquiry by discussing the particular type of “net widening” that transportation brought by proposing an alternative hypothesis about transportation’s unique role in the expansion of the coercive power of the state.

II. Framework

The question is thus, did the adoption of a more administratively viable form of transportation in 1718 cause more people subjected to be subjected to more serious forms of punishment over time?

In answering this question, I argue that there is a meaningful and important difference between “serious” and “trivial” punishments. I then track the changes in the proportion of serious to trivial punishments used over time, as well as the increase in the absolute numbers subjected to serious punishments. The data demonstrate that transportation ushers in a dramatic increase in serious punishments.

³² Ibid., 6-9.

³³ Beattie, *Crime and the Courts*, chap. 10.

³⁴ Beattie, *Policing and Punishment*, chap. 9.

³⁵ Feeley, “Privatization”; “Privatization and Punishment”; “Entrepreneurs.”

³⁶ Feeley, “Privatization and Punishment,” 47.

³⁷ Feeley, “Entrepreneurs.”

a. Transportation as Net Widening: The View from London

In charting the “net widening” brought about through transportation, I use data from the Old Bailey Sessions Papers online (OBSP), a digital record of the proceedings of the central criminal court in London.³⁸ Information drawn from this source supports claims about how transportation was used as a penal sanction only in London itself. To make a more general claim, further research on sentencing patterns in other areas, particularly rural areas, is necessary. Comprehensive data about crime and punishment was not collected and published during this time and thus the extent to which London diverged from other areas in terms of use of transportation cannot be determined precisely.³⁹ It is certain, though, that use of transportation was more extensive in London than elsewhere. This can be explained by numerous factors, including the perception of a greater crisis of criminality and advantageous shipping conditions.

Following the Act of 1718, every county was required to transport those sentenced or reprieved from the assizes. Additionally, local Justices of the Peace could – and did to varying degrees – use transportation as a sentence at the quarter sessions.⁴⁰ Morgan and Rushton have gathered some information about the uses of transportation in various counties and conclude that, although variations over time and between regions defy classification, to some extent the use of transportation roughly tracks “the availability of ships and the willingness of shippers.”⁴¹ Beattie’s research considers the question of variation in a more limited area, but provides detailed data. Beattie shows that, from 1718 to 1775, 56% of non capital offenders in Surrey and Sussex were transported.⁴² This contrasts to the approximately 75% who were transported from London in the same time period.⁴³ Existing research therefore suggests that transportation became the dominant sentence in many parts of the country, but not to the same extent it did in London. The conclusions in the following pages are thus meant to suggest the presence of a general pattern, but the magnitude of the observed shift is considerably larger in London than elsewhere.

Use of London data is nonetheless recommended by several factors. First, as a practical matter, information about London sentencing has survived in greater quantities and is available in a form that permits a large scale inquiry about broad changes in sentencing patterns over time. Second, convenience aside, London’s central political and social importance in national affairs makes it a fitting site for a broad based inquiry into penal policy.⁴⁴ London was at the center of discussions of crime and punishment, and city officials – and in the case of transportation particularly the Recorder of London –

³⁸ The full title of the Sessions Papers is *The Whole Proceedings on the King’s Commission of the Peace, Oyer and Terminer, and Gaol Delivery for the City of London; and also the Gaol Delivery for the county of Middlesex; Held at Justice-Hall in the Old Bailey*. The editors of the online database use the title “Old Bailey Proceedings,” however I will refer to this collection as the Old Bailey Sessions Papers (OBSP). I will reference specific trials by “reference number” in the online database, found at <http://www.oldbaileyonline.org/>.

³⁹ Morgan and Rushton, *Criminal Transportation*, 33.

⁴⁰ *Ibid.*, 20.

⁴¹ *Ibid.*, 56.

⁴² Beattie, *Crime and the Courts*, 507.

⁴³ Beattie, *Policing and Punishment*, 444. See also Tables Three and Seven below.

⁴⁴ *Ibid.*, 8-12.

were involved in drafting and enacting national policy.⁴⁵ The policy shifts associated with expansion are of central importance to this inquiry and thus attention to what was happening in London is in many ways fitting.

I use the OBSP in several ways. First, I present quantitative data that show that the adoption of transportation initiated a dramatic expansion in the number of offenders who were subjected to serious punishment from 1710-1775, and that the trend continued from 1787-1866. Although the data presented are quantitative in nature, they are not given in the form of nuanced statistical findings. For purposes of demonstrating, in the most straightforward manner, a particular framing of a general secular trend, relatively untransformed quantitative data is presented.⁴⁶

b. Limitations of the Data

Although the OBSP is generally considered to be accurate, it has some problematic qualities for the purposes of quantification.⁴⁷ In its early years of publication (before 1710), many trials held at the Old Bailey were not included. Because the OBSP was published for a popular audience, more mundane cases were especially likely to be omitted.⁴⁸ I have nonetheless started my analysis with 1700, in an effort to establish a longer baseline for comparison. The data are adjusted to compensate for omitted data. Additionally, since my principle consideration is the increase in “serious” punishments over time, the omission of smaller offenses from the OBSP is likely to skew the data towards understating, rather than overstating, the claims I advance.

It is also important that the punishments described in the OBSP are the sentences handed down, not the punishments carried out. The descriptions do not tell us which defendants were successful in obtaining pardons, which is particularly important for calculating the execution rate. While the number of sentences of death or transportation that were handed down may be independently interesting, it does not shed direct light on the question of “net widening,” understood as the increase in the number of persons actually subjected to serious punishments. In many individual cases one can determine whether a sentence of death or transportation was carried out, but I have not attempted an

⁴⁵ Ibid., chap. 9.

⁴⁶For an interesting statistical study of transportation and “net widening” see Ashley Rubin’s forthcoming work. Rubin uses the OBSP to ask the question of whether transportation is a replacement for, or a supplement to, existing forms of punishment. Her findings, which are considerably more statistically nuanced than those presented here, are that to some extent it is both – transportation may have been responsible to some extent for the decline in uses of execution as well as being an addition to the existing penal armory. Rubin’s results provide a more detailed, textured analysis of the specific form the “net widening” took, and I regret that timing prohibits me from incorporating her results more fully in this discussion. Because of the different way the questions are framed, however, the results of Rubin’s study do not affect the results of the current study, beyond confirming the general “net widening” trend observed. The key distinction for Rubin is the interplay between capital sentences and transportation – a distinction that is intentionally overlooked in the present project, for reason I describe below. Ashley Rubin, “Penal Transportation in Eighteenth-Century London: Death Penalty Replacement or Netwidening Innovation?” (forthcoming).

⁴⁷ Simon Devereaux, “The City and the Sessions Paper: ‘Public Justice’ in London, 1770-1800,” *The Journal of British Studies* 35, no. 4 (1996): 466-503; John H. Langbein, “Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources,” *University of Chicago Law Review* 50 (1983): 1-136.

⁴⁸ Devereaux, “Sessions Paper.”

inquiry of this magnitude. I rely instead on general heuristics, developed by other scholars, in estimating the numbers of sentences carried out.

A commonly cited conservative estimate is that half of those sentenced to death at the Old Bailey in the eighteenth century were in fact pardoned.⁴⁹ Although this has been refined over time, it remains a reasonably close estimate. V.A.C. Gatrell has provided more exact figures for the Old Bailey, calculated from the findings of an 1819 committee on criminal law, and published in the Parliamentary Papers.⁵⁰ I rely on Gatrell's estimates for rates of pardon from death. Gatrell shows that pardoning rates ranged from a low of 42% in the 1750s, to a high of 97% in the 1830s.⁵¹ In calculating pardoning rates over long samples of time, I use a weighted average of Gatrell's figures.⁵² When I analyze the data by year, I correlate the pardoning rates directly with the data in a given period.

Of those pardoned from capital sentences, many were pardoned on condition of transportation.⁵³ Beattie shows that in Surrey from 1722-1748 more than one-third of offenders who were sentenced to death were eventually transported, and that in London more than 48% of offenders sentenced to be executed for property offenses were transported.⁵⁴ To complicate matters further, offenders were sometimes pardoned from direct sentences of transportation. Beattie estimates that until 1730 approximately 10% of those sentenced to transportation were granted free pardons, with the proportion pardoned from transportation declining sharply from 1730 onward.⁵⁵ Based on these findings, I will assume that 30% of those sentenced to death were pardoned on condition of transportation after 1718. The percentage of those receiving free pardons is then calculated as the remainder of defendants not executed, after deducting for Gatrell's variable pardoning rates, and the 30% transported. I also add to the total of free pardons the 10% of offenders who were pardoned from direct sentences of transportation from 1718 to 1730. Slight variations in these formulas in individual tables are noted where relevant.

An additional caveat about my framing of the data is that it does not account for the effects of transitions between times of war and peace. The War of Austrian Succession (1740-1748) and the Seven Years War (1756-1763) fall within the primary period considered. It is well established that the outbreak of war led to a reduction in indictments, while the return of peace saw an increase in indictments.⁵⁶ In my second phase of analysis, the effect of war on transportation sentences is evident, although the overall trend of "net widening" is not diminished by these fluctuations.⁵⁷ Perhaps the more allusive feature of wartime changes, however, is Peter King's finding that during periods of mobilization, pre-trial enlistments were used as an alternative to prosecution.⁵⁸

⁴⁹ This estimate original derives from John Howard, *The State of the Prisons in England and Wales, with preliminary observations and an account of some foreign prisons* (London: T. Cadell and N. Conant, 1777). It is relied on by Ekirch, *Bound for America*, 34. See also Beattie, *Crime and the Courts*, 518.

⁵⁰ V. A. C. Gatrell, *The Hanging Tree: Execution and the English people, 1770-1868* (Oxford University Press, 1994), 616.

⁵¹ *Ibid.*, Table 1.

⁵² Gatrell gives his estimates of pardoning rates in 5-10 year periods.

⁵³ Ekirch, *Bound for America*, 35.

⁵⁴ Beattie, *Crime and the Courts*, 514.

⁵⁵ Beattie, *Policing and Punishment*, 440-441.

⁵⁶ Beattie, "Pattern of Crime"; Hay, "War, Dearth and Theft"; Innes and Styles, "Crime Wave."

⁵⁷ See Figures 1-4 below.

⁵⁸ King, "War as a Judicial Resource."

Although these individuals who were diverted pre-trial do not show up in counts of punishments handed down, they should be considered examples of individuals who were subject to the state's coercive authority. The long time periods I use for purposes of analysis, however, make the results less sensitive to short term fluctuations.

II. Serious and Trivial Punishments

In presenting these data, I am particularly interested in the group of punishments that I label "serious." For this time period, however, the identification of the relative "seriousness" of a specific penalty requires interpretation.

a. Trivial Sanctions

Although fines, branding, whipping, and the pillory were obviously unpleasant, they are comparatively trivial in the sense that they involved immediate and unconditional release back into the community. These sentences, which typically attached to lesser crimes, were also the punishments to which convicts facing transportation appealed to have their sentences reduced.⁵⁹ At the Old Bailey, where the court effectively operated an internal system of pardoning from sentences of transportation until the early 1730s, the court institutionalized the practice of reducing sentences of transportation handed down in one session, to whipping or branding in favorable cases in subsequent sessions.⁶⁰ Although current sensibilities might suggest that corporal punishments are categorically more severe than temporal punishments, this was clearly not the case in the early eighteenth century.

Branding, although it has extreme associations, was often the mildest punishment. It usually consisted of burning the thumb, and was primarily intended as a means of identifying recidivists.⁶¹ The Old Bailey clerk, Lewis Ryder, said defendants who were allowed clergy had "very good recommendations and (assurances) that they should be taken care of not to commit the like"⁶² Additionally, "branding" often consisted of merely being touched by a cold iron. Zacharais Conrad von Uffenbach, a German traveler who gave an account of an Old Bailey session in 1710 noted that while some were actually branded, others were "only touched with a cold iron to put them to shame."⁶³

Whipping often appeared to be more severe than clergyable branding, and yet it typically attached to less serious offenses. In the late seventeenth and early eighteenth centuries, offenders sentenced to be whipped were often tied shirtless to a cart and whipped as they were pulled through public streets.⁶⁴ Sometimes this sentence was mitigated to private whipping in the gaol or house of correction, but this was an exception, not the norm.⁶⁵ Whipping, although often the punishment used for the least

⁵⁹ Ekirch, *Bound for America*, 62; Beattie, *Crime and the Courts*, 509.

⁶⁰ An example that demonstrates this logic is provided by Lord Chief Raymond, who in 1728 described an offender who could have received either branding or transportation, but "no body appearing on his behalf and no Account being given to him, I left him for Transportation." Quoted in Beattie, *Crime and the Courts*, 510.

⁶¹ Pieter Spierenburg, "The Body and the State, Early Modern Europe," in *Oxford History of the Prison*, ed. Norval Morris and David Rothman (Oxford University Press, 1995), 49-77.

⁶² Quoted in Beattie, *Policing and Punishment*, 439, footnote 35.

⁶³ *Ibid.*, 447. The mildness of this punishment can be overstated, however. It is likely the case that when servants were concerned, if the thumb was actually burned, this identification of the individual as a felon would make it difficult for him or her to find future employment. *Ibid.*, 32.

⁶⁴ *Ibid.*, 444.

⁶⁵ *Ibid.*

serious offenses, was clearly a humiliating form of public punishment. At the conclusion of the ordeal, however, the offended was discharged, immediately and unconditionally, back into the community. Punishments of branding, whipping, fines and the pillory are quite distinct in this respect from what I call the “serious” punishments of death, transportation, and, to varying degrees, imprisonment at hard labor.

b. Serious Sanctions

Transportation, although it was often used as a condition of pardon from death, is better understood as a serious sanction. While it may seem counter-intuitive to group transportation with death, the distinction may be less pronounced than is typically assumed. An estimated 10-15% of transported convicts died on the overseas passage – with some journeys documenting death rates of above 25%.⁶⁶ Many more died before their terms of labor had expired, and those who survived generally lacked the resources to live at more than a subsistence level in the colonies.⁶⁷ With the exception of convicts who had connections and outside assistance, very few convicts who were sent to North America would ever return to their home in England or be reunited with their families.⁶⁸ Catherine Davis, a relatively well-to-do offender who did manage to return from a term of transportation and was re-convicted for theft, provides another example of the tendency for some convicts to view the sentences of transportation and death as comparable: “(Davis) begged the Court to give her what punishment they pleased, and not transport her; for she would rather be hanged than transported again.”⁶⁹ It is, Davis’ example notwithstanding, certainly the case that a distinction could be, and was, made by most convicts in preference of transportation over death. It is also the case, though, that transportation was considerably more “serious” than punishments of whipping and branding – both in terms of likely capital consequences and in terms of re-release.

Labeling imprisonment as a “serious” punishment is perhaps the most contestable characterization, as types of imprisonment, as well as sentence length, varied a great deal throughout the time periods discussed. In particular, a strong case can be made that, especially in the late seventeenth and early eighteenth century, a sentence of a short stint in Bridewell would be considered a very minor sanction. In the late seventeenth century, many petty thefts in London were punished by a sentence to Bridewell, while the more serious felony thefts were subject to branding.⁷⁰ As we will see below, however, imprisonment was not a quantitatively significant sentence in the initial time periods, and is not central to the analysis. If imprisonment were excluded from the data in Tables 1-4, or counted as a trivial punishment, the pattern that I have identified would be largely unaffected. I leave it labeled as serious, however, because imprisonment does form a substantial component of the sentences in the nineteenth century, and by this time it had taken on more distinctly severe penal characteristics.

2. Periods of Analysis

In the first section, I separate the data into two discrete periods: 1700-March 1718 and April 1718-1775. The first of these represents the beginning of the period for which

⁶⁶ Ekirch, *Bound for America*, 103-108, 111.

⁶⁷ AE Smith, *Colonists in Bondage*, 303-304.

⁶⁸ G Morgan and Rushton, “Running Away.”

⁶⁹ Catherine Davis, alias Mary Shirley. May 10, 1744. OBSP online reference number t17440510-26. Davis was, in fact, transported again.

⁷⁰ Beattie, *Policing and Punishment*, 31-32.

the Old Bailey Sessions Paper is relatively complete, and concludes before the passage of the Transportation Act of 1718.⁷¹ The 1718 Act is of crucial importance to this analysis because it gave courts, for the first time, the authority to sentence offenders found guilty of clergyable offenses to a sentence of seven-year transportation.⁷² The 1718 Act also notably extended the sentence of seven years transportation to those convicted of petty larceny, who had previously been primarily punished by whipping. The Act reiterated the courts' authority to use transportation for fourteen years as a condition of pardon for non-clergyable offenses. Because I am interested in the effects of the 1718 Act, I have split the data for the year 1718. I include the first two sessions of 1718, before the Act came into effect, in the first period. The second period commences with the April session after the Act came into effect.

Following these two initial periods, I briefly discuss a third period, 1788-1868, the years that saw the use of transportation to Australia and increased reliance on imprisonment as a punishment.⁷³ I do not, here, or elsewhere in this dissertation, devote substantial time to discussing the penal changes of the nineteenth century. I include these data, however, to demonstrate that the net widening brought about by North American transportation extended beyond the life of this specific punishment.

For each period, I present data that show the sentences received by those found guilty, both in absolute terms and adjusted for pardoning rates. Following this, I show similar data, for the first two periods only, that tracks yearly fluctuations in sentencing patterns. The purpose of including this is to demonstrate that the long time horizons used in the first analysis do not mask important variations in the trends identified.

⁷¹ Although the OBSP is relatively complete in these years, many cases, and three full years of data are missing. I adjust for this in the calculations below.

⁷² The OBSP indicates that the proportion of individuals found guilty did not increase meaningfully throughout the period. This result is discussed in more detail in Rubin, "Penal Transportation."

⁷³ I do not present data from 1775-1787. This decade represents the years after transportation to North America was discontinued, but before a new penal alternative had been found. This was a tumultuous time period, when a new penal option was sought, and when there was a large disconnect between sentences handed down and those carried out. Most offenders continued to be sentenced to transportation, but many were confined on prison hulks instead. I will discuss this time period in Chapter 3 and 4, but have not attempted to incorporate it into the current analysis.

III. The Data

TABLE 1. *First Period, Sentences at the Old Bailey, 1700-March 1718*⁷⁴

Punishment	Sentences	Sentences per year*	Percentage of Total	Percentage Adjusted for Pardoning Rates**
Death	527	35	23	10
Transportation	6	>1	>1	>1
Imprisonment	3	>1	>1	>1
pillory	14	>1	>1	>1
branding	760	51	33	33
whipping	472	32	20	20
fine	39	3	2	2
Military naval duty	6	>1	>1	>1
No punishment	43	3	2	14
Multiple punishments	150	10	6	6
Unknown	302	20	13	13
Total	2322	154	100	100

*The OBSP is less complete in the years prior to 1710. Notably it is lacking data for the years 1701, 1705, and 1706. I adjust for this absence in the per/year calculations, considering this a 15-, rather than an 18-year period.

** I use the estimate that 67% of offenders were granted a free pardon. Free pardons are classified as “no punishment” in the adjustment. For a discussion of pardoning rates, see above at page 28.

Source: OBSP

⁷⁴ All data is tabulated by defendant, limited to those found guilty. Calculated from the OBSP online, <<http://www.oldbaileyonline.org/>>.

TABLE 2. *First Period, Trivial and Serious Sentences at the Old Bailey, 1700 to March 1718.*

Punishment	Sentences	Sentences per year	Percentage of Total	Percentage Adjusted for Pardoning Rates**
Serious	542	36	23	11
Trivial*	1478	99	64	76
Uncategorized	302	20	13	13
Total	2322	145	100	100

*The category “multiple punishments” from Table 1 is, in this period, almost entirely comprised of a combination of two trivial sanctions. I thus attribute ninety % of the sentences in this category to trivial punishments, and ten percent to serious punishments

** See Table One for pardoning rates.

Source: OBSP

Tables One and Two establish a rough baseline. Transportation is not a quantitatively meaningful sanction, and most offenders are punished by branding or whipping, and many are granted free pardons. 76% of offenders who are found guilty and sentenced to punishment receive trivial punishments, while only 11% receive serious punishments. Tables Three and Four, which document sentencing patterns after the adoption of the 1718 Transportation Act, present a stark contrast.

TABLE 3. *Second Period, Sentences at the Old Bailey, May 1718-1775.*

Punishment	Sentences	Sentences Per year	Percentage of Total	Percentage Adjusted for Pardoning Rates*
Death	3104	54	16	7
Transportation	13112	230	68	71
Imprisonment	33	>1	>1	>1
Pillory	18	>1	>1	>1
Branding	870	15	4	4
Whipping	1330	23	7	7
Fine	44	>1	>1	>1
No punishment	48	>1	>1	7
Multiple punishments	368	7	2	2
Unknown	442	8	2	2
Total	19369	337	99	100

* In adjusting for pardoning, I estimate that 56% are pardoned from death sentences. This is calculated as the weighted average of pardoning rates for this time period, discussed above at page 28. Free pardons are classified as “no punishment” in the adjustment. I estimate that 4% are pardoned from sentences of transportation, and that 30% sentenced to death receive a pardon on condition of transportation. While these estimates mask variation over time, a more detailed yearly analysis will be performed below.
Source: OBSP

TABLE 4. *Second Period, Trivial and Serious Sentences at the Old Bailey, April 1718 - 1775.*

Punishment	Sentences	Sentences per year	Percentage of Total	Percentage Adjusted for Pardoning Rates*
Serious	16249	285	84	77
Trivial	2678	47	14	21
Uncategorized	442	8	2	2
Total	19369	340	100	100

* See Table Three for a discussion of pardoning rates used.

Source: OBSP

Tables Three and Four show that the changes between punishments in the first and second period are dramatic. In Table Three, the percentage of offenders sentenced to branding, whipping, fines and the pillory had declined dramatically. The most remarkable difference, however, is transportation. In the previous period, transportation was insignificant. In the second period, it represents the punishment that 71% of offenders receive.

Table Four represent this shift in terms of serious and trivial sanctions. The proportion of those receiving serious and trivial punishments is almost completely inverted. While in the first period 76% received trivial punishment, in the second period only 21% received trivial punishment. Similarly, in the first period only 11% received serious punishments, while in the second period 77% received serious punishments.

The absolute numbers of offenders punished also increased. About 50 fewer people are sentenced to a trivial punishment each year in period two than were so sentenced in period one. But 250 more people were sentenced to serious punishment each year in period two. Some of these differences can be attributed to the growth of population, and the incomplete records before 1718. Even if we discount the increase by half to account for these factors, approximately 100 more offenders received a sanction each year in the second period, and the entire increase is comprised of serious punishments.

Although dominant historical accounts of “net widening” focus on carceral punishment, these data indicate an important “net widening” associated with a shift from the predominant trivial punishments of branding and whipping, to the most common serious punishment, transportation. This is important because it demonstrates that the trend toward serious punishments began long before the rise of carceral punishments. Transportation was the punishment that substantially widened the “net” of penalty, drawing in thousands of individuals who, prior to 1718, would have had every expectation of being immediately and unconditionally released back into society.

Although I will not discuss in any detail the penal regime that was introduced after the end of North American transportation in 1775, I briefly present sentencing

figures for this time period to demonstrate that the “net widening” brought about by transportation was not temporary. I pass over the years 1776-1786, and begin the third period with the departure of the “First Fleet” to Australia in 1787. I do not analyze sentencing patterns in the intervening decade because it was an extremely tumultuous period, in which there was, moreso than usual, a large disconnect between sentences handed down and punishments received. Because I can not do justice to the complexity of these factors, and because this analysis is not central to quantitatively demonstrating the permanence of the net widening trend, I exclude these years from the data.

TABLE 5. *Third Period, Sentences at the Old Bailey, May 1787-1868.*

Punishment	Sentences	Sentences per year	Percentage of Total	Percentage Adjusted for Pardoning Rates*
Death	6002	74	6	1
Transportation	31313	386	30	32
Imprisonment	50308	621	48	48
pillory	1	>1	>1	>1
branding	1	>1	>1	>1
whipping	1880	23	2	2
fine	1488	18	1	1
No punishment	2841	35	3	3
Military duty	77	>1	>1	>1
Multiple punishments	8400	104	8	8
Unknown	2491	31	2	7
Total	104802	1292	100	100

*Pardoning rates used for calculations are 87% pardoned from death. This is based on a weighted average calculated from sources described above at pp. 17-18. There was great variation in the fate of pardoned felons in this period, and the proportion receiving death sentences was small. I therefore do not attempt a detailed analysis of post-pardoning results, instead classifying these as “unknown,” and removing them from the analysis. As few given death sentences were likely to have received free pardons, this underestimates the trend of “net widening.”

Source: OBSP

TABLE 6. *Third Period, Trivial and Serious Sentences at the Old Bailey, 1787-1868.*

Punishment	Sentences	Sentences per year	Percentage of Total	Percentage Adjusted for Pardoning Rates*
Serious	87699	1083	83	78
Trivial	6211	77	6	6
Uncategorized**	10892	134	10	15
Total	104802	1292	99	99

*See Table 5 for pardoning rates used.

** Multiple punishments, as well as pardons from death sentences are uncategorized in this period.

Source: OBSP

In this third time period, we see the shift to imprisonment as the dominant punishment, while transportation retains a substantial presence. Death sentences have declined, and trivial punishments of whipping, branding and fines have almost disappeared. The most important shift between the second and third period is not between the categories of serious and trivial punishments, but rather in the distribution within serious punishments. Imprisonment has emerged alongside transportation as an important source of serious punishments. The number of prisoners sentenced each year has also grown remarkably, demonstrating as a raw number a fourfold increase in prisoners facing punishment. Although population growth and incomplete data explain much of this discrepancy, there remains an important expansion in the numbers receiving punishment.

TABLE 7. *Comparison of proportion of Serious and Trivial Punishments from 1700-1718, 1718-1775, and 1787-1868**

Punishment	1700-1718	1718-1775	1787-1868
Serious	11%	77%	78%
Trivial	76%	21%	6%
Uncategorized	13%	2%	15%
Total	100%	100%	99%

*Figures represent sentences as a percentage of total sentences, adjusted for pardoning rates as described in Tables 1, 3, and 5.
Source: OBSP

Table Seven summarizes the data from these three periods, and reveals the magnitude of the shift toward serious punishments that occurred in 1718 after the passage of the Transportation Act. While these figures mask important variations within each period, they provide an important “big picture” view of secular trends in punishment.

TABLE 8. *Transportation, Death and Trivial Punishments from 1700-April 1718, May 1718-1775*

Punishment	1700-April 1718	May 1718-1775
Death	10%	7%
Transportation	>1%	71%
Whipping	20%	7%
Branding	33%	4%
Pillory	2	>1
Uncategorized	13%	2%
Total	100%	101%

*Adjusted for pardoning rates. See Tables 1 and 3 for pardoning rates used, and page 28 for pardoning calculations.
Source: OBSP

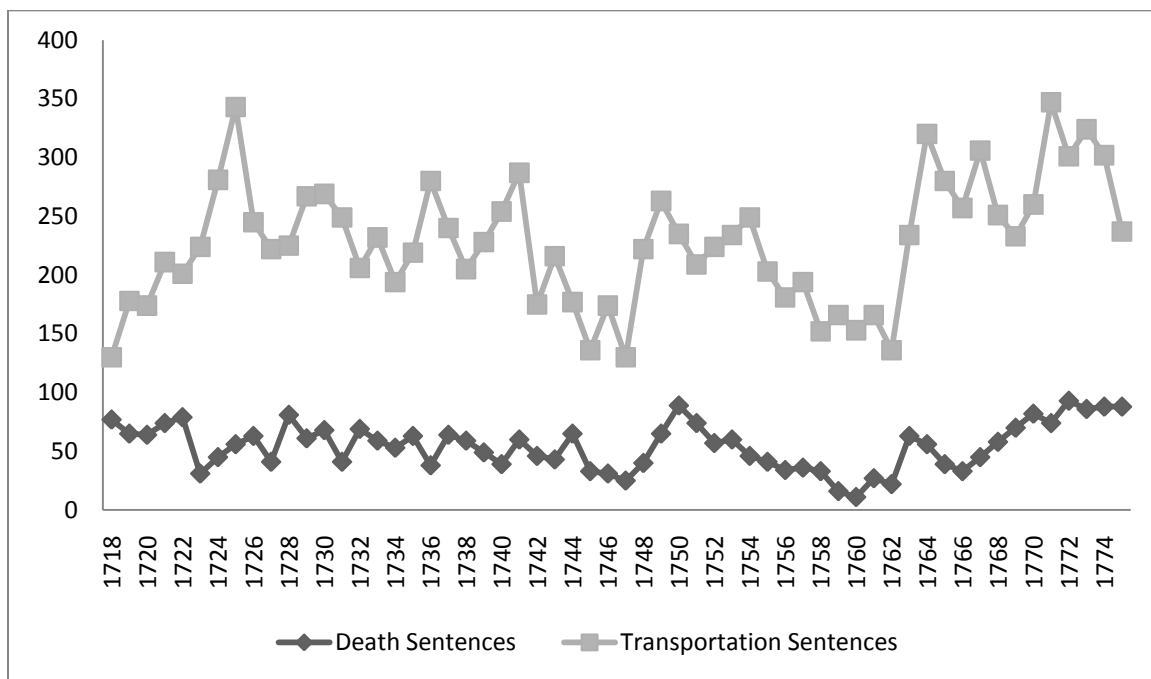
The crucial difference between the first two periods is highlighted in Table Eight. Transportation was almost entirely absent in the first period, and it is by far the most prominent sentence in the second. Whipping and branding, which comprised the largest proportion of sentences in the first period, are reduced to just over ten percent of total

punishments. Transportation to North America brought about the large-scale use of serious punishments, and the “net,” once widened under transportation, was permanently widened.

IV. Data by year

In order to provide a slightly more detailed view of the distribution of serious and trivial punishments described above, I have calculated yearly totals for the second period of analysis, April 1718-1775. Because these years are those in which North American transportation was primarily employed, a closer look at how serious and trivial punishments are distributed within the period is instructive. My primary purpose in providing these data is to demonstrate that post 1718 “net widening” was brought about by transportation, and was not driven by exceptional times of high use within the period.

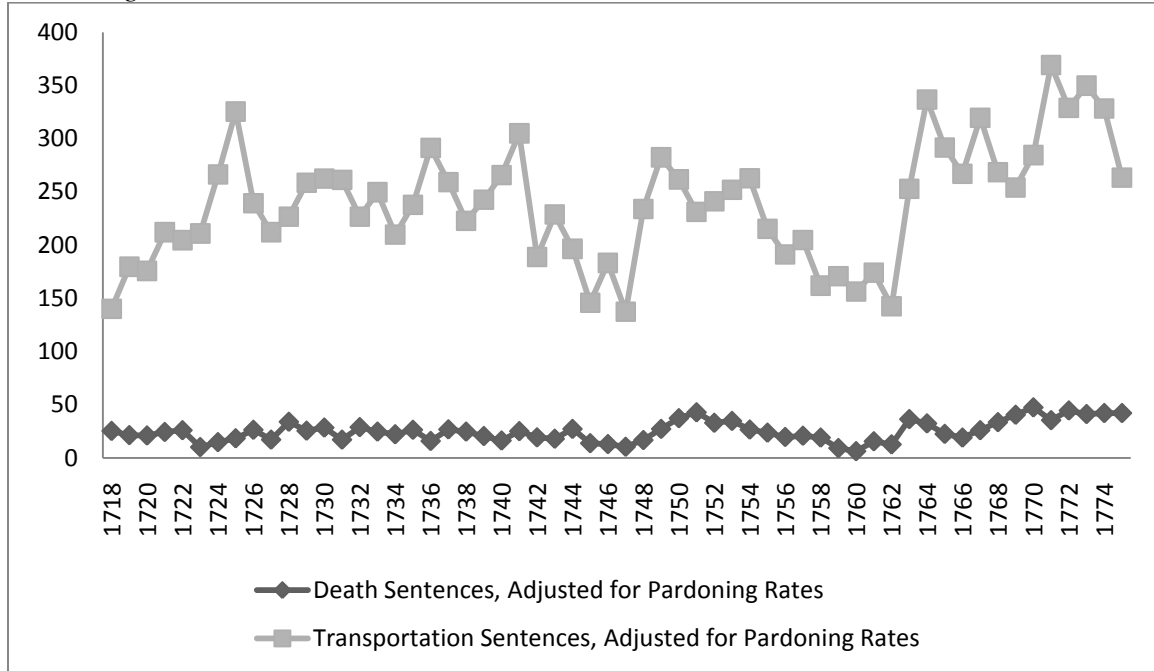
FIGURE 1. *Transportation and Death Sentences, April 1718-1775.**



* Not adjusted for pardons.

Source: OBSP.

FIGURE 2. *Transportation and Death Sentences, April 1718-1775, Adjusted for Pardoning Rates.**



* Pardoning rates used are as follows: 1718-1725, 67% pardoned from death; 1726-1750, 58% pardoned from death; 1751-1760, 42% pardoned from death; 1761-1770, 52% pardoned from death; 1771-1775, 65% pardoned from death; 1718-1730, 10% pardoned from transportation; 1718-1775, 30% of those pardoned from death in each period pardoned on condition of transportation, remainder granted free pardons. Sources for pardoning rates discussed above at page 28.
 Source: OBSP

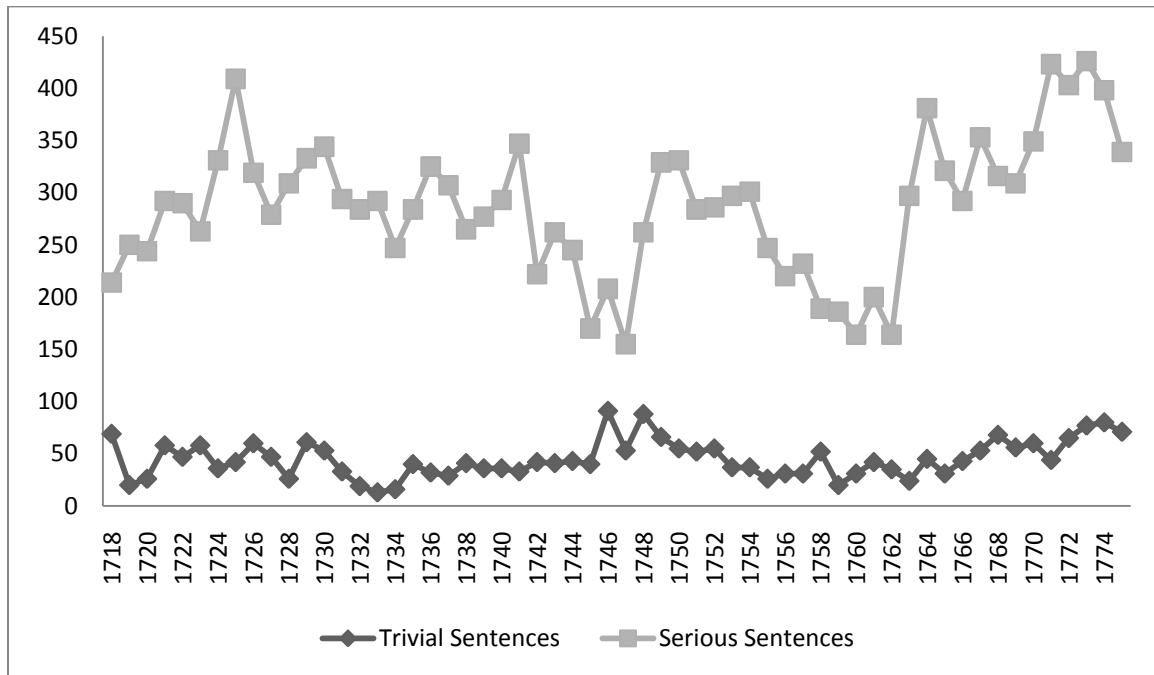
Figures One and Two depict the overall relationship between death and transportation sentences. The decrease in individuals sentenced to both death and transportation during the two periods of war is evident. During the War of Austrian Succession, 1740-1748, and the Seven Years War, 1756-1763, a decline in transportation and death sentences is seen, and an increase of sentences at the conclusion of these wars is also evident. The effects of war on penal processes have been documented and discussed elsewhere in several histories of the period. For present purposes, it is important, however that these periods of decreased punishment do not diminish the overall trend of net widening.

Near the end of North American transportation, there is a slight decline from 369 transportation sentences in 1771, to 263 sentences in 1775. As will be discussed in Chapter Three, these years witnessed the removal of a Treasury subsidy for merchants shipping convicts from London. After 1772 there was a decline in the numbers of convicts who arrived in the colonies each year, and the suggestion has been made that this can be attributed to the decreased profitability of the trade.⁷⁵ However, these data

⁷⁵ Grubb, "Transatlantic Market"; Ekirch, *Bound for America*, 224-227.

indicate that the decline was also present in sentencing patterns, which were ostensibly unaffected by the short-term decreased profitability of the trade.⁷⁶

FIGURE 3. *Serious and Trivial Sentences, April 1718-1775.**

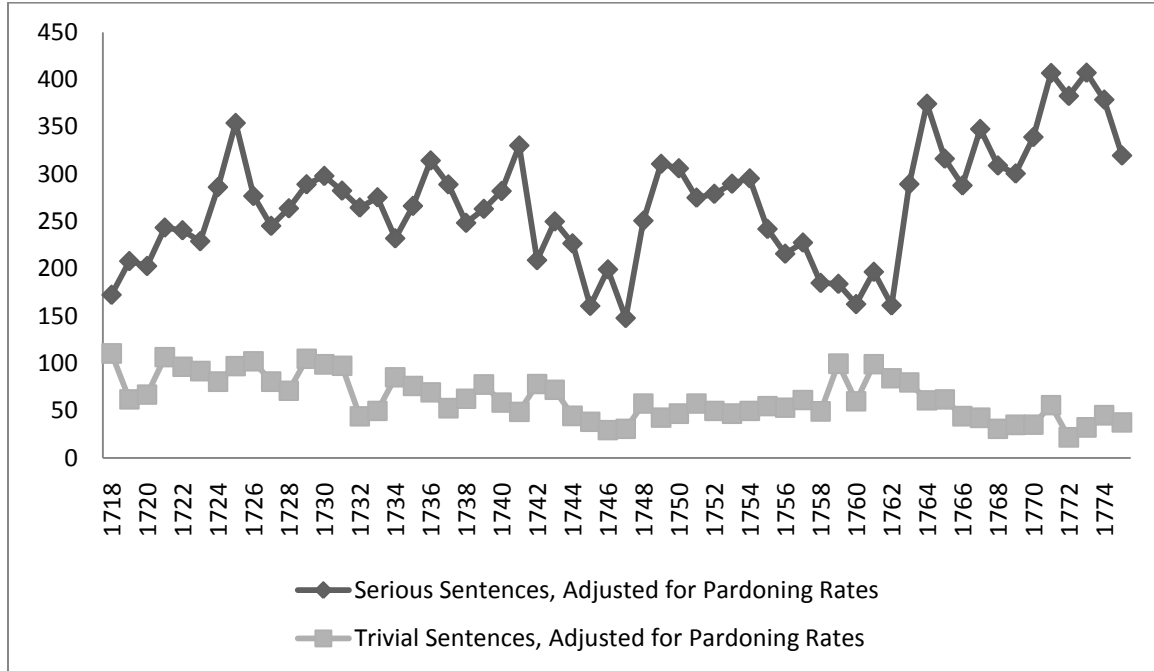


* For definition of serious and trivial offenses see above at page 28.

Source: OBSP.

⁷⁶ The letterbooks of Duncan Campbell, the London contractor in this period, do not reflect a decreased interest in transporting convicts after 1772. See below, Chapter Three.

FIGURE 4. *Serious and Trivial Sentences, April 1718-1775, Adjusted for Pardoning Rates.**



* For pardoning rates see Figure 2. Those granted pardons on condition of transportation are classified as “serious,” free pardon are classified as trivial.

Source: OBSP.

Figures Three and Four indicate that, although we saw above that the net widened dramatically in 1718 with the adoption of an effective transportation policy, it did not continue to “widen” at the same rapid pace in this period. The use of trivial punishments declined slightly, and the use of serious punishments increased slightly, resulting in a greater discrepancy between the two near the end of the period. As seen in Table Seven, however, by far the most significant shift in the use of serious and trivial sanctions, remains the adoption of the 1718 Transportation Act.

Conclusion

In shifting the analysis of historical “net widening” from imprisonment to transportation, we see a very different narrative about the growth of penal power. The “expansion” associated with imprisonment should not be discounted, but a fuller account of “net widening” is enabled if we consider transportation. Transportation not only ushered in an increase in the number of offenders punished each year, it also affected a dramatic shift in the proportion of offenders sentenced to serious punishments. Transportation both “widened the net,” and “thinned the mesh.”

Subsequent chapters explore several themes related to this insight. The next two chapters attend to the development of the administrative infrastructure of transportation, and the roles played by merchants and the national government in the processes of net

widening. Malcolm Feeley, as noted above, has suggested one interpretation of the role of merchants. Drawing on the framework of privatization, Feeley suggests that the punishments encouraged by the involvement of profit-seeking private actors eventually became entrenched and subsumed as governmental functions. I seek to add to this theory by examining how transportation can be understood from its inception as a manifestation of stronger public and private involvement in punishment.

Chapter Three: Merchants and Convict Transportation

Transportation was the first large scale national punishment used in England and it was initially made viable by the private trade mechanisms that provided its infrastructure. In the following discussion I outline how the business of transportation operated and how its commercial nature shaped the practice, allowing it to flourish. As I will argue, eighteenth-century penal practices existed at the nexus of public and private spheres. The dramatic expansion of penal capacity that transportation enabled depended on both the particular character of extant labor markets and the increasing financial and administrative capacity of the national government. The operation of commercial penal transportation illuminates how the pairing of public and private capacities enabled more people to be consistently subjected to serious punishments, entrenched the state in a more involved position in the administration of punishment, and permanently altered the way the means and ends of punishment were conceptualized.

In 1718, as discussed above, the British parliament passed an Act that made convict transportation available as a punishment for petty larceny and non-clergyable felonies.¹ Although transportation was a common condition of pardon for non-clergyable offenses during the later seventeenth and early eighteenth centuries, the Transportation Act of 1718 marks a significant moment when transportation became available as a direct sentence for petty larceny and for clergyable offenses that had previously met punishments of a more transitory nature such as whipping, branding, and short term confinement.² Because the means of transporting convicts had long been irregular and undependable, adopting transportation as a punishment for a broader class of offenses did not, in itself, ensure that more people would be transported. Administrative impediments often caused those who had been pardoned on condition of transportation before 1718 to never be transported at all, and there is no reason to suspect that merely enlarging the class of offenders subject to the punishment would have altered this.³ As I will argue, the remarkable expansion in the use of transportation instead arose largely from changes in the commercial-governmental relationship that made large-scale, consistently administered transportation a viable business opportunity.

The difficulties with transporting offenders prior to 1718 occurred primarily because the administration of this punishment was largely private, in the sense that market limitations, rather than penal objectives, shaped the way that the punishment was carried out. A convict who was pardoned on condition of transportation was typically required to independently contract with a merchant for his or her passage to the colonies.⁴ There were no consistently effective regulatory measures in place to ensure this contract had been made, or to require the merchant to seek out such “customers.”⁵ Thus, these convicts often remained in Britain.⁶ The 1718 Transportation Act reveals a keen awareness of the need to respond to this problem, noting “Many of the offenders to whom

¹ 4 Geo. 1, c. 11

² Ibid. For a discussion of transportation as a common condition of pardon see Cynthia Herrup, “Punishing Pardon.”

³ Beattie, *Policing and Punishment*, 294-6.

⁴ Ibid., 443.

⁵ A Smith, “Seventeenth Century Transportation.”

⁶ Beattie, *Crime and the Courts*, 479-483; Smith, *Colonists in Bondage*, 97-109; Beattie, *Policing and Punishment*, 443.

royal mercy hath been extended upon condition of transporting themselves...have often neglected to perform the said condition, but returned to their former wickedness.”⁷

A second limitation of the more purely private administration of transportation was that, in the absence of regulation, many merchants refused to transport women and elderly convicts.⁸ The profitability of transporting convicts derived from the sale price of a term of their labor in the colonies, and this provided the incentive for merchants to ship the convicts. Thus, the likelihood that an individual would be transported was correlated not with penal objectives, but with the expected value of his or her labor.⁹

In an attempt to eradicate the inconsistency that undermined penal objectives, the 1718 Act, and a second Act in 1720, put in place regulatory features that would alter the extant system of private administration of transportation.¹⁰ These regulatory features will be discussed at length in Chapter Four, but a few aspects are particularly important in framing the current discussion of merchants. Notably, the Acts revoked the convict’s privilege of contracting for his own passage, and instead required that convicts be transported by merchants that contracted with the government. Furthermore, and perhaps most importantly, the merchants also were bound by the Acts to take all convicts as ordered, rather than just taking the most marketable convicts.

The specific way the trade in convicts was carried out, the actors involved, and the interaction between public and private agents is the subject of the following two chapters. Because of the involvement of merchants, it is tempting to characterize transportation as one economic historian has: as “a vast experiment in privatizing post-criminal justice.”¹¹ This interpretation, however, does not capture the truly novel aspect of the eighteenth-century experiment with penal transportation: the way public and private capacities were joined. Although the public and private faces of transportation were in fact inextricable, I will first present a merchant-centered account of convict transportation, and will then turn to a more dedicated discussion of the way the government became involved in the punishment.

The Business of Convict Transportation

I begin with an overview of convict shipping as well as the convict business on the “receiving end” in the colonies. I then give a brief introduction to a few aspects of eighteenth-century trade that lend context to the discussion of the convict business. Finally, I present the results of primary source research to provide a more in-depth analysis of two convict shippers who were central to the convict trade: a prominent Bristol firm, Stevenson, Randolph and Cheston, and a notable London merchant, Duncan Campbell. The business of Stevenson, Randolph and Cheston is illuminated by a comprehensive set of business records and letterbooks that reveal how the firm conducted its trade.¹² The discussion of Campbell’s business draws on a surviving set of his business letterbooks covering the period 1772-1788, as well as his private letterbooks for 1766-1797 and miscellaneous papers.¹³ The objective in providing this information is to

⁷ 4 Geo I, c. 11.

⁸ Ekirch, *Bound for America*, 70.

⁹ Beattie, *Crime and the Courts*, 480-483.

¹⁰ 4 Geo. I, c. 11(1718); 6 Geo. I, c. 23 (1720)

¹¹ Grubb, “Market Evaluation,” 295.

¹² Cheston-Galloway Papers, Boxes 5-15, 18-19. Maryland Historical Society, Baltimore.

¹³ Duncan Campbell Business Letterbook, Mitchell Library Sydney, Australia; Duncan Campbell Private Letterbook, Mitchell Library Sydney, Australia. (on microfilm, Williamsburg Library)

demonstrate how the nature of the commercial enterprise shaped the punishment of convict transportation, and, in the next chapter, how pairing this system with increased governmental involvement shaped the nature of the eighteenth-century convict trade.

I. The Convict Trade

The merchants who shipped convicts were a varied group in some respects, but most lacked high political or social standing.¹⁴ Although John Stewart, a convict shipper himself, claimed they were the “lowest” class of carriers, most of the merchants were men of modest fortunes.¹⁵ Many of the convict merchants had experience in shipping and selling laborers. Some had participated in the indentured servant trade, and several had experience in the slave trade.¹⁶ The overlap with other trade in labor was substantial in terms of the past vocations of the merchants and in terms of the infrastructure of the indentured labor trade, but there does not appear to have been extensive concurrent shipping of convicts and other bound laborers. For instance, the four companies who individually shipped more than 10 loads of convicts to Maryland from Bristol and London between 1746 and 1775 shipped approximately 5,000 convicts. In the same time period, these companies shipped only 233 indentured servants and five slaves.¹⁷ Despite the rarity of co-shipping, the trade in indentured servants and slaves foundationally shaped the practice of selling convict labor.¹⁸

None of the merchants carried convicts exclusively, but for the main firms, convict sales constituted an important part of their business. For the primary convict shipping firms, the trade in convicts, in isolation, appears to have been overall profitable. Although they had to ship all convicts regardless of the sale value of their labor, the convict trade had benefits that the slave trade lacked. The merchants did not need as much capital to begin operating, their supply of human labor was virtually guaranteed, they made shorter voyages than slavers, and they often received a subsidy in addition to their other profits.¹⁹

After 1718, each county was responsible for shipping all the convicts slated for transportation at the assizes. They were also responsible for shipping any convicts sentenced by local magistrates at the quarter sessions.²⁰ From 1718 to 1772, merchants who shipped convicts from London and the Home counties were eligible to receive a subsidy for each convict shipped, which was paid by the Treasury.²¹ This subsidy augmented the price they received for selling the convicts’ labor in the colonies. In other regions, there was more variability with respect to additional funds paid to merchants. The provincial contractors received a fee, paid from funds that were raised as a levy by the county, but there were differences in the size of the subsidy over time and among

¹⁴ Ekirch, *Bound for America*, 74.

¹⁵ Peter Wilson Coldham, *Bonded passengers to America, Vol. I* (Genealogical Pub. Co, 1983), 144.

¹⁶ Morgan and Rushton, *Criminal Transportation*, 24-5. Convict merchants who were also slave traders included Jonathan Forward of London, Samuel Sedgley of Bristol, James Gildart of Liverpool, and Walter Lutwidge, and Peter How of Whitehaven.

¹⁷ Ekirch, *Bound for America*, 75.

¹⁸ This is the subject of Ch. 6 below. See also Smith, *Colonists in Bondage*, Ch. 6

¹⁹ David Richardson, “The British Empire and the Atlantic Slave Trade 1660-1807,” in *The Oxford History of the British Empire* (Oxford University Press, 1998); Ekirch, *Bound for America*, 76-77.

²⁰ G Morgan and Rushton, *Criminal Transportation*, 24.

²¹ 4 Geo I, c. 11.

locations. These merchants often negotiated with the magistrates to determine the amount they would receive per convict they shipped.²²

There was also more variability in the provinces with respect to arrangements such as who paid the jailers for delivering the convicts. The prison reformer John Howard notes the wide variance in fees “allowed [to jailers] for conveying convicts sentenced to transportation to the respective seaports; and for paying the merchant or contractor what he was supposed to demand for their passage.”²³ Because of this variability, shippers from the provinces often had to rely more on the profitability of the sale of the convicts’ labor than on the benefits conferred by accepting the convicts. As I will argue below, this lack of administrative regularity, predictability, and central coordination is likely an important reason why the practice of convict transportation did not flourish to the same extent in the provinces as it did in London and the Home Counties.

The best existing estimate, provided by Roger Ekirch, is that of the seven assize circuits of England, 8.5% of convicts who were sentenced to transportation came from the Northern circuit, 6.5% from the Midland circuit, 10.9% from Oxford, 5.6% from Norfolk, 12.8% from Western, 1.7% from Wales and Cheshire, and 54.1% from the London, Middlesex and Home circuit.²⁴ Where a convict was sentenced and where he embarked from might be very different. Convicts were shipped from many ports, but London and Bristol dominated the trade. London produced a disproportionate share of convicts, but an even greater proportion of convicts shipped from London because the port drew convicts from other areas.

Maryland Shipping Returns from 1746 to 1775 indicate that of the 9,323 convicts for whom a record was entered, 56.2% embarked from London, 35.8% embarked from Bristol, and the remaining 8% embarked from other ports such as Barnstaple, Bideford, Liverpool, and Newcastle.²⁵ This dominance is not surprising considering that London and Bristol more generally accounted for the vast majority of exports during this time period.²⁶ The fact that the majority of the convicts shipped from these two ports highlights an administrative difficulty faced by the merchants: the convicts had to be gathered from various regions, some of which were some distance from the intended point of embarkation, before shipments could be made.

By the final decade of American transportation there was a greater degree of concentration of convicts in the two ports of Bristol and London.²⁷ Within these ports, the bulk of the trade became consolidated in relatively few hands, suggesting that the trade was becoming more specialized as time went on. There were 34 known merchant firms that shipped convicts from London to Maryland in the years 1746-1775. Of these, 24 firms only made one shipment of convicts. Another 5 firms only made 2 shipments. The remaining 6 firms made between 5 and 19 shipments, and accounted for more than 55% of the convicts shipped. There were 8 known merchant firms that shipped from Bristol to Maryland in the years 1746-1775. Only 2 of these made more than 2 shipments, and

²² K. Morgan, “Organization,” 210; Smith, *Colonists in Bondage*, 113-115.

²³ John Howard, *State of the Prisons*, 169.

²⁴ Ekirch, *Bound for America*, 22-5.

²⁵ Technically Scotland/Wales was not an assize circuit, but for purposes of this discussion it can be grouped with the other six circuits. Ekirch, *Bound for America*, 72-73.

²⁶ K. Morgan, *Bristol and the Atlantic Trade in the Eighteenth Century* (Cambridge University Press, 1993).

²⁷ Ekirch, *Bound for America*, 22-25.

between them accounted for almost 90% of the Bristol trade, making this an even more specialized practice than in London.²⁸

Once in the colonies, the convicts were governed through the regulatory mechanisms that were used to govern other classes of laborers. The focused insistence in the 1718 Act on ensuring that all offenders were shipped highlights the apparent lack of concern for what might happen to the convict upon arrival, and the market for labor primarily defined their fate in the colonies. The logic of the punishment assumed that they would be sold as indentured servants, as indeed most were. The preamble of the 1718 Act expresses this assumption most directly, noting that it might be a means to remedy the “great want of servants” in “His Majesties Colonies and Plantations in America.”²⁹ However, as a matter of law, servitude was not a necessary condition of the sentence. The vast majority of convicts could not afford to purchase their freedom, and thus for them, servitude became a de facto condition of their sentence.³⁰

Most convicts were shipped to Virginia and Maryland, although there was no legal imperative to send the convicts primarily to this region.³¹ The most likely reasons that the trade was set up in this way are that the merchants had business connections there as well as ready access to “back haul” goods, and there was ample demand for labor.³² By 1779, the convention of disposing of convicts in Virginia and Maryland was so well established that Duncan Campbell informed a parliamentary committee that he would not be able to sell convicts outside the Chesapeake “in any considerable number, which was the reason he declined contracting for them upon the revolt of the colonies of Virginia and Maryland.”³³ The shipping patterns of convicts were also to some extent determined by the import patterns of other labor sources, especially sources of unfree labor. Galenson suggests that the Chesapeake was one of the few staple-producing regions that relied heavily on black slave labor but continued to rely on the labor of white immigrants throughout the eighteenth century.³⁴

Convicts were very much in demand in the colonies (although there were, as we will see in the subsequent chapter, popular and political objections to their importation), and thus they were put on sale as soon as possible upon arriving in the colonies. Unlike indentured servants, who typically made a direct contract for labor with the buyer, the contract for convict labor was more akin to that of slave labor, insofar as the contract was made between a buyer and a factor.³⁵ Most firms thus contracted with a resident factor to sell their convicts as well as other goods. While most of the convicts were sold on the “open market,” a number also had been pledged to specific individuals who had standing orders for particular types of convicts. These standing orders give some indication of the types of characteristics that were valued by purchasers: age, honesty and regional origin

²⁸ Ibid., 73, 75.

²⁹ 4 Geo I, c. 11.

³⁰ Smith, *Colonists in Bondage*, chap. 2.

³¹ Aaron S. Fogleman, “From Slaves, Convicts, and Servants to Free Passengers: The Transformation of Immigration in the Era of the American Revolution,” *The Journal of American History* 85, no. 1 (1998): 43-76. The idea that convicts were transported to Georgia, rather than Virginia and Maryland is a common misconception.

³² Smith, *Colonists in Bondage*, 117.

³³ *Journals of the House of Commons*, 1779, 19 Geo. III, 310-311.

³⁴ David W. Galenson, *White Servitude in Colonial America* (Cambridge University Press, 1984), 124-5.

³⁵ Schmidt, *Convict Servant Labor*, 133-134; K Morgan, “Organization,” 215.

were among those characteristics mentioned.³⁶ Convicts who had a skill, such as carpentry, weaving, or farming were also in high demand, and thus sold for higher prices than unskilled laborers.³⁷

Despite negative associations with their convict status, these “seven years servants” were seen as a good bargain as a labor source in comparison to both non-convict indentured servants and slaves. The average cost for an unskilled indentured servant was slightly less than £10, while the average price for a male convict was £13.³⁸ The seven year sentence that applied to most convicts was nearly twice the standard four-year term of servitude to which most indentured servants were bound, so the price per labor year was considerably lower for convicts.³⁹ Furthermore, convict servants were often precluded from requirements to pay freedom dues upon the completion of their sentences.⁴⁰ These dues, which were paid to most indentured servants, were upwards of £3.⁴¹ In comparison to slaves, convicts were often preferred because of the lower absolute price. An adult male slave in the late eighteenth century was typically sold for between £34 and £45, and many planters who operated on a smaller scale could not procure the credit to make this high initial investment, even if the ultimate yield would be more substantial.⁴² This meant convicts were more often purchased by planters who operated on a modest scale, and were less frequently purchased by large plantation owners who could afford slave labor. An exception may have been convicts who were tradesmen and convicts with strong agricultural backgrounds, who were more commonly sold for between £15 and £25. Convicts with particularly marketable skills could be sold for as much as £45, but this was very much the exception.⁴³

Most convicts were sold in small lots of five or fewer. This was the preferred method of sale by the factors in Virginia or Maryland, as the prices they obtained were higher by this method.⁴⁴ When market conditions were poor (for instance when unusually large numbers of Irish servants arrived between 1771 and 1775) or when less desirable convicts remained in a given lot, they were “lumped” and sold wholesale. The purchasers of larger groups of convicts typically purchased the convicts in the ports and then moved them for sale in inland towns where the scarce supply drove up prices.⁴⁵ However, because convicts represented a smaller capital investment in comparison to slaves, it was not as economically advantageous to bring them long distances for sale.

³⁶ K. Morgan, “Organization,” 231; K. Morgan, “English and American Attitudes,” 321.

³⁷ K. Morgan, “Organization,” 216.

³⁸ Ekirch, *Bound for America*, 125.

³⁹ There is some debate as to how long convicts sentenced to fourteen year sentences of transportation typically labored. Some authors, including Farley Grubb, have assumed that they labored for the entire fourteen year period. Others, including Roger Ekirch, who have looked for examples of labor terms longer than seven years have not found evidence for this. Grubb, “Market Evaluation”; Ekirch, *Bound for America*; Kercher, “Perish or Prosper.”

⁴⁰ It is not clear whether convicts received freedom dues before 1753. After 1753 they explicitly did not have a legal right to them. ‘An Act for the better government of servants and slaves’, 1753, *Hening’s Statutes at Large*, VI. 359; Smith, *Colonists in Bondage*, 239.

⁴¹ Ekirch, *Bound for America*, 125.

⁴² Alice Jones, *Wealth of A Nation to Be: The American Colonies on the Eve of the Revolution* (Columbia University Press, 1980), 117-119.

⁴³ K. Morgan, “Organization,” 217; Ekirch, *Bound for America*, 125-127.

⁴⁴ Ekirch, *Bound for America*, 122.

⁴⁵ *Ibid.*, 123.

Thus, final sales typically were transacted in closer proximity to trading centers, resulting in a greater concentration of convicts in these areas.⁴⁶

The retail purchasers of convicts were a heterogeneous group in some respects, with a variety of tradesmen represented among them. Planters, however, were by far the most predominant purchasers.⁴⁷ Some of these planters who employed convicts had large-scale operations; most planters, however, who operated on a grand scale could afford the larger initial capital investment required for the purchase of slave labor, and thus were less likely to utilize convicts in meaningful numbers.⁴⁸ More commonly, the retail purchaser of convicts was a planter of modest means – wealthy enough to hire bound labor, but without the means to procure slaves. A group of Virginians in 1749 described the purchasers of convicts as the “poorer Sort of Planters” who had “large families to support, and not enough Money to buy a Slave,” and were thus “obliged to buy Convicts who, having a long Time to serve and only the first Purchase to pay, came cheaper to them.”⁴⁹

Because pricing and access were the primary determinates of where convicts would settle, it is not surprising to find that they predominantly inhabited areas in the Chesapeake that had the greatest demand for inexpensive labor.⁵⁰ In Virginia, convicts were most prevalent in the “Northern Neck” region, between the Rappahannock and Potomac Rivers, where there was an emergent and expanding – but not yet fully developed – tobacco- and grain-based economy.⁵¹ In Maryland, a similar pattern can be seen, with most convicts residing in Baltimore, Charles, Queen Anne’s and Anne Arundel Counties. These counties were easily accessible from the colonies’ principal ports, and contained regions where tobacco, wheat, and corn were produced.⁵² In these counties, convicts represented 12% of productive adult laborers – with other white laborers constituting 22% of the total, and the remainder being slaves.⁵³

a. The General Trade Environment

Shippers of convicts, like others who traded in various forms of bound labor, did not ship human freight alone.⁵⁴ Rather, human cargo comprised one commodity among other forms of cargo. In the outbound journey to the colonies, merchants were more likely to ship heavier and more costly finished goods, while in the “back haul” they typically shipped lighter but bulkier agricultural product.⁵⁵ An attempt was made to balance imports and exports and not to send ships “light freighted” in either direction. Because the lighter “back haul” goods generally used less space per value, pairing them with high-value/low-weight per space human cargo was one way merchants

⁴⁶ Ibid., 142; Fogleman, “Slaves, Convicts, Servants.”

⁴⁷ Ekirch, *Bound for America*, 130.

⁴⁸ Ibid.

⁴⁹ Ibid., 131.

⁵⁰ Smith, *Colonists in Bondage*, 116-119; K. Morgan, “Organization,” 202.

⁵¹ Fogleman, “Slaves, Convicts, Servants.”

⁵² Ekirch, *Bound for America*, 142.

⁵³ Fogleman, “Slaves, Convicts, Servants,” 158.

⁵⁴ For a discussion of the need to understand the profitability of the slave trade as composed of more than the profitability of human labor alone, see Stanley L. Engerman, “The Slave Trade and British Capital Formation in the Eighteenth Century: A Comment on the Williams Thesis,” *The Business History Review* 46, no. 4 (1972), 430-443.

⁵⁵ Grubb, “The Market Evaluation of Criminality.”

supplemented their loads. The extent to which merchants specialized in one good or another varied – for some, human cargo was their primary focus, and other goods were used to fill in. For others, the emphasis was inverted, and convicts or indentured servants would be used to supplement a shipment primarily made up of other goods. Regardless of where emphasis lay, the trade in human cargo must be understood as one component of a broader picture of trade.

Through the course of the eighteenth century the Atlantic trade flourished. It was the century when “the integrated transatlantic economy attained its fullest articulation.”⁵⁶ To note this, however, is not to ignore the many risks, uncertainties, and logistical problems that attended trade relationships. The sheer organizational challenge of coordinating shipping and delivery on any type of schedule was daunting. Problems with inland transport could lead to delays in obtaining full loading; bunched arrivals could lead to insufficient quayside space or warehousing capacity.⁵⁷ Natural hazards such as storms, shipwrecks, and unfavorable sailing winds paired with the evolving bureaucracy of customs requirements or the need to form convoy assemblages, could introduce additional levels of delay.⁵⁸ The organization of the Atlantic trade was additionally complicated by the myriad unaffiliated actors involved. Unlike the trade between Britain and the Indian Ocean and China, which was largely controlled by the monopolistic East India Company, the Atlantic trades were characterized by the participation of numerous private firms, most headquartered in England.⁵⁹ There were also a significant number of merchants based in the colonies who were largely dependent on their “correspondents” in Britain.⁶⁰ Planters, factors, warehousemen, merchants and shopkeepers, all operating more or less autonomously, had to interact for eighteenth-century trade to function.

The chief considerations for most merchants operating within this decentralized multi-actor system of trade – and convict shippers were no exception – were securing credit and securing payment. The trade in convicts and other forms of bound labor can thus be understood in the context of what has been termed “an empire of credit.”⁶¹ Imperial trade ushered in a new web of credit relationships and cashless payment mechanisms that both stimulated the economy and introduced insecurity. Adam Smith characterized the efforts of colonists to secure capital as endeavoring to get ahead “by running as much in arrear to their correspondents, who supply them with goods from Europe, as their correspondents will allow them.”⁶² It would, however, be incorrect to identify colonists as exclusively debtors and British merchants as creditors. As has been noted, “most entrepreneurs were, at one and the same time, borrowers and lenders,

⁵⁶ John McCusker and K. Morgan, *The Early Modern Atlantic Economy* (Cambridge University Press, 2000), 1.

⁵⁷ Peter Mathias, “Risk, Credit and Kinship in Early Modern Enterprise,” in *The Early Modern Atlantic Economy*, ed. K. Morgan and J. McCusker (Cambridge University Press, 2000).

⁵⁸ *Ibid.*, 22.

⁵⁹ Jacob Price, “The Imperial Economy 1700-1776,” in *The Oxford History of the British Empire*, ed. P. J. Marshall (Oxford University Press, 1998), 91.

⁶⁰ *Ibid.*, 92. After 1740 Scots merchants, particularly from Glasgow, played a bigger part in the markets, and this ushered in a period of increased market control.

⁶¹ H. V. Bowen, *Elites, Enterprise, and the Making of the British Overseas Empire, 1688-1775* (Palgrave Macmillan, 1996), 92.

⁶² Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Cannan Edition (New York, 1937), pp. 567-68 quoted in K. Morgan, “Remittance Procedures in the Eighteenth-Century British Slave Trade,” *The Business History Review* 79, no. 4 (2005): 717.

debtors and creditors.”⁶³ The merchant’s ability to extend credit depended on having the resources available, which in turn depended on their capitalization, securing prompt payment, reinvestment of earnings, borrowing on bond, and obtaining commercial credit from suppliers.⁶⁴

From the point of view of the typical convict merchant, situated in Britain and possessing a modest capital stock, it was important not to draw too frequently on capital and to secure full remittances as quickly as possible. Credit was less available to these small to mid-size firms than it was to the larger firms who enjoyed the leverage to obtain extended credit, and thus there was less leeway in their payment arrangements.⁶⁵ Since most convicts were sold in Virginia and Maryland they, like slaves and other indentured servants, were typically sold on short-term credit.⁶⁶ This meant the factors selling convicts had to secure funds from purchasers within a twelve month credit period and remit the proceeds back to the Britain-based firm. These remittances rarely took the form of money, for reasons which included problems with local currency and the insecurity and constricted supply of coinage.⁶⁷ It was far more common for remittances to take the form of produce, and in particular in Virginia and Maryland, tobacco.

Because commodities such as tobacco could be easily used as homeward remittances, some of the coordination problems of trade were eased in Virginia and Maryland. This in turn increased the scale of debt, as where it was easier to make remittances, British merchants were more comfortable extending credit. Thus, Virginia and Maryland, where the vast majority of convicts were sold, carried greater debt loads than any other colonies.⁶⁸ The Chesapeake debt load was also a function of the growing wealth of these colonies. From 1721 to 1775 – a period almost identical to the years of transportation’s most active use – the tobacco trade tripled.⁶⁹ Throughout the eighteenth century there were ebbs and flows in trade generally, and the convict trade specifically, caused by many factors, but the availability of credit and capital were often central to the equation.

While new credit networks introduced new possibilities for wealth, a lack of information about price and quality frequently made remittances problematic.⁷⁰ In an effort to shield themselves from risk of non-payment or problematic forms of payment, merchants relied extensively on networks and personal connections.⁷¹ Family ties were relied on whenever possible, as kinship could provide a bond of personal confidence that was otherwise lacking and could provide an additional source of last-resort credit.⁷² With

⁶³ T. S. Ashton, *An Economic History of England: The 18th Century* (London 1955), 206.

⁶⁴ Jacob Price, *Capital and Credit in British Overseas Trade: The View from the Chesapeake, 1700-1776* (Harvard University Press, 1980).

⁶⁵ Mathias, “Risk, Credit and Kinship,” 23; Jacob Price, *Perry of London* (Harvard University Press, 1992).

⁶⁶ Morgan, “Remittance Procedures in the Eighteenth-Century British Slave Trade.”

⁶⁷ *Ibid.*

⁶⁸ Price, *Capital and Credit*.

⁶⁹ *Ibid.*, 16.

⁷⁰ K Morgan, “Remittance Procedures.”

⁷¹ Jacob Price, “The Great Quaker Business Families of the Eighteenth Century: The Rise and Fall of a Sectarian Patriciate,” in *Overseas Trade and Traders* (Variorum, 1996); Jacob Price, “English Quaker Merchants and the War at Sea 1689-1783,” in *Overseas Trade and Traders* (Variorum, 1996). David Hancock, *Citizens of the World: London Merchants and the Integration of the British Atlantic Community, 1735-1785* (Cambridge University Press, 1997).

⁷² Mathias, “Risk, Credit and Kinship.”

the growth of the Atlantic economy, however, merchants increasingly found themselves by necessity trading with those with whom they had no direct personal acquaintance, and attempts to ascertain reputation and to gauge credit standing and creditworthiness were a persistent preoccupation.⁷³

In turning to a discussion of the convict trade and to an inquiry into specific firms, three themes mentioned above will be of primary significance: the difficulties of disaggregated market participation, the calculation of profits based on all types of cargo, and the way credit relationships shaped the trade. In the Bristol convict trade in particular, we see the competitive participation of multiple shippers, factors and entrepreneurs leading firms to specialize and seek monopoly, while in the London trade we see the government creating mechanisms that essentially bestow monopoly. The firms' efforts to maximize the profitability of the convict trade, however, formed just one component of their efforts to be profitable overall, as we will see most clearly in the London records. Credit insecurities are central to both accounts, with Bristol particularly illuminating the (failed) quest for personal security through reliance on kinship, and London illuminating the problematic relationship of credit, perception and profitability.

b. Bristol and London

Because of their dominance in the trade, I focus on Bristol and London firms to illuminate a few further features of the trade in convicts.⁷⁴ For Bristol, I use the records of Stevenson, Randolph and Cheston, the firm responsible for shipping the majority of convicts from Bristol in the second half of the eighteenth century. In London, I focus on Duncan Campbell. Campbell operated both before and after the subsidies had been removed, and his career thus can illuminate several interesting aspects of that transition. In Chapter Four, I return to a discussion of Campbell, as he also continued to have involvement with the convicts after the American trade was dissolved. Campbell's records provide insight into the ways that transportation became entrenched, both by government dependence and established trade patterns, over the course of the eighteenth century.

1. The Bristol Trade

Although fewer convicts shipped from Bristol than from London, Bristol was an extremely important port for the convict trade, and this is especially the case for convicts shipped to Maryland. From the 1750s, Bristol convict shipping was characterized by the market dominance of a major firm, with intermittent interlopers. In the 1750s and 1760s, the firm Sedgely, Hillhouse & Randolph was responsible for shipping almost all of the convicts who departed from Bristol.⁷⁵ After this firm went bankrupt due to an inability to collect on debts, Randolph joined two new partners. The new firm, Stevenson, Randolph

⁷³ Jacob Price, "Joshua Johnson in London, 1771-1775: Credit and Commercial Organization in the British Chesapeake trade," in *Tobacco in Atlantic Trade* (Vavonium, 1995).

⁷⁴ For a discussion of minor ports in the convict trade see Morgan and Rushton, *Criminal Transportation*, 21-24.

⁷⁵ Smith, *Colonists in Bondage*, 329.

& Cheston, also dominated the trade, shipping 93% of the convicts known to have been sent from Bristol to Maryland.⁷⁶

It seems likely that at least part of the reason the trade in Bristol was concentrated in relatively few hands was because the administration of the business was, in some senses, more complicated there than it was in London. The Bristol merchants gathered convicts from more areas that required extensive overland travel, there was more variability in the prices they received, and they relied more on individual relationships with jailers and local Justices of the Peace. The convicts who shipped from Bristol had diverse geographic origins, drawing from 15 counties or more in a single ship.⁷⁷ The merchants Stevenson, Randolph and Cheston boasted that they personally “emptied 26 gaols.”⁷⁸

From the extensive records of the firm Stevenson, Randolph and Cheston, we are able to gain insight into many aspects of the business of convict transportation. As discussed above, some firms placed relatively more emphasis on human cargo as opposed to other goods, and Stevenson, Randolph and Cheston certainly fall into this category. Stevenson, Randolph and Cheston specialized in the convict trade and depended heavily on it; only two of 22 outbound voyages the firm made did not contain convicts, and they eventually commissioned a ship that was specifically outfitted for the convict trade.⁷⁹ This ship was, Cheston said, “better calculated for servants than any vessel we have hitherto had, and by bringing them in healthy saved us a large sum of money which we generally lose by deaths & pay for Nursing & Doctors.”⁸⁰ Beyond the specifically designed ship, the firms’ emphasis on human cargo is additionally seen in their lack of interest in other goods. For example, in a letter from England Stevenson writes, “I have shipped Mess. Price and Withered the chief part of the Goods they ordered, some of them we are obliged to leave behind as all the Convicts will be aboard today and the wind is fair and the Goods cannot be down by the Trows till tomorrow, but We could not think of detaining the Vessel as it might totally ruin the Voyage.”⁸¹ This relative disregard for goods is also apparent in Stevenson’s suggestion that few goods should be sold at the firm’s store in Maryland: “it is rather a clog to have too large a cargo on the first opening of a Store, as a Man cannot expect to sell so much, as when he has been well established & it will be more for our interest to make a quick sale & returns.”⁸² No such ambivalence was expressed about securing and selling convicts. In sharp contrast, we see Stevenson

⁷⁶ K. Morgan, “Organization,” 206-207.

⁷⁷ Ibid., 211. Morgan provides a table of the counties from which convicts shipped for Maryland in 1770-1774, based on the Maryland shipping returns.

⁷⁸ Devon Quarter Sessions Aug. 30, 1773, quoted in Morgan and Rushton, *Criminal Transportation*, 22-23. This estimate may have been an exaggeration.

⁷⁹ Cheston to Stevenson, Randolph & Cheston, Dec. 23, 1774. Cheston-Galloway Papers, Box 9; Morgan, “Organization,” 211.

⁸⁰ Cheston to Stevenson, Randolph & Cheston, Dec. 23, 1774. Cheston Letterbook, 1772-1776, Cheston-Galloway Papers, Box 8.

⁸¹ Stevenson to Cheston, 12 Sept. 1768, Cheston Incoming Letters 1767-April 1771, Cheston-Galloway Papers, Box 9.

⁸² Stevenson to Cheston, Apr. 9, 1768, Ibid.

declaring that he had to leave Bristol for five days to go “after some of the convicts, which some underhand methods were made use of to get from us.”⁸³

There are two main reasons the firm took such an interest in transporting “all the convicts the assizes may produce.”⁸⁴ One is merely that convicts were potentially very profitable, and the other is that by maintaining as close to a monopoly as possible, Stevenson, Randolph & Cheston could keep operating costs down. The correspondence among Stevenson, Randolph, and Cheston reveals a competitive business environment and the firm’s efforts to thrive by gaining monopoly power over the acquisition of convicts. The decision to have Randolph join Cheston and Stevenson as a third partner was based largely on the fact that his inclusion would bring the firm closer to having a monopoly in the convict trade, as it would eliminate the competition from Randolph operating separately. “If we were to join him,” Stevenson wrote to Cheston in 1768, “there would be no competitors in the business & the convicts will all fall into our hands.... You will think well of this matter, as should we not join Him we cannot expect to have above one half of the Convicts.”⁸⁵ Eliminating competition was important for several reasons, including that the monopoly would keep the gaolers from driving up prices for delivering the convicts. As Stevenson noted, if they did not include Randolph, “the Gaolers will endeavor to make the most of (us) by playing one off against the other.”⁸⁶ Payment arrangements with jailers were an important component of the Bristol business, and Stevenson’s correspondence indicates the wide possible range of payment scenarios. He notes that previously they had been paying the jailers who delivered the convicts to the merchant at the ports 2 Guineas; and that after Randolph joined the firm and gave them an effective monopoly, “as instead of giving 2 Gus a head for the convicts, some we give nothing at all, a few we get money from & a few others we only give a Guinea.”⁸⁷

Stevenson, Randolph and Cheston were successful, for the most part, in obtaining a near monopoly for about a decade; the firm shipped 93% of the convicts from Bristol to Maryland between 1768 and 1775.⁸⁸ By 1769, owing in large part to the addition of Randolph, they were congratulating themselves on having “secured all the Gaols round about.”⁸⁹ One way that they were able to maintain this dominance was by carefully cultivating relationships with Justices of the Peace, who awarded the contracts. For instance in 1773, the firm indicated that despite standing orders, a convict should be sold to the Reverend Dunford because “his Brothers are Justices & Men of consequence in Hampshire who it is our interest to oblige.”⁹⁰

⁸³ Stevenson to Cheston, May 23, 1770, *Ibid.* There was no requirement that a county continue to use the same firm, as Stevenson knew. Morgan and Rushton, *Criminal Transportation*, 21-22.

⁸⁴ Stevenson & Randolph to Cheston, Aug 17, 1773, Cheston Incoming Letters, June-Oct. 1773, Cheston-Galloway Papers, Box 12.

⁸⁵ Stevenson to Cheston, Aug. 5 1768, Cheston Incoming Letters, 1767-April 1771, Cheston Galloway Papers, Box 9.

⁸⁶ *Ibid.*

⁸⁷ Stevenson to Cheston, Sept. 12, 1768, *Ibid.*

⁸⁸ K Morgan, “Organization,” 206. Percentage calculated from entries in the Annapolis Port of Entry Books.

⁸⁹ Stevenson to Cheston, May 23 1770, Cheston Incoming Letters, 1767-April 1771, Cheston-Galloway Papers, Box 9.

⁹⁰ Stevenson, Randolph & Cheston to Cheston, Sept. 5, 1773, Cheston Incoming Letters, June-Oct. 1773, Cheston-Galloway Papers, Box 12.

Keeping market dominance, however, was not always easy. In the 1770s, Randolph sharply criticized Devon for not being “loyal” to their contracts, which the firm understood to grant them exclusive right to the convicts. Randolph writes, “You’ll excuse the freedom of my pen when I say how much I have been mistaken in the integrity of your magistrates, we have been strangely and cruelly misled in this affair.”⁹¹ Instead, Devon had used a merchant who was, according to Randolph, inexperienced in the trade. He characterizes his competition as a merchant “who had a chance vessel fitting out and as trade was dull thought they could make a little freight out by getting your convicts.”⁹² Instead of allowing this interruption in their business, Stevenson, Randolph and Cheston purchased the convicts from the interceding merchant for two guineas each. This likely means they took these convicts at a loss, as they usually got paid three guineas a head for the convicts they got in Bristol, and five a head for those they had to collect in Exeter.⁹³

There is evidence from other shippers who were unable to secure exclusive contracts that Stevenson, Randolph and Cheston’s preoccupation with obtaining and maintaining monopolies was justified. In the 1740s and early 1750s, for example, a bidding war between two rival London-based firms for the convicts produced by the city of Coventry saw the firms receiving only £3.3s. for convicts shipped, rather than the traditional £4.4s. they were used to being paid. The firms, forced to compete with one another, eventually offered to accept “as low terms as any other person” and frequent shipments, which would lower the costs associated with jailing convicts awaiting transportation.⁹⁴

Thus, one reason securing convicts from all the jails would be so important to Stevenson, Randolph and Cheston was that a monopoly kept competition from driving up the costs of operating their business in England. The other reason for this concern is that they were responding to a very real demand for labor in Maryland. Cheston, writing from Maryland, frequently notes standing orders for convicts.⁹⁵ Because the firm had obligations to meet in the colonies and a commitment to remove convicts within two months of signing a contract in England, securing convicts from all the jails and scheduling their shipment promptly was a matter of importance. The ships were usually sent just after the Spring and Autumn assizes, and thus the convicts arrived in Maryland in June/July or October/November.⁹⁶ The firm tried to keep as close to this schedule as possible, as apparent in a tense letter sent by the firm to Devon’s magistrates:

We are to observe to you, we receive the convicts from 26 different goals in which there will be at least 70 or 80 Transports in the course of a few days and our ship *Isabella* will be at her usual mooring near the hotwells ready to receive them on Monday the 20th Tuesday 21st and Wed 22nd of next month, which is as late in fall as we dare venture to stay for fear of being beaten off the coast of America. Under these circumstances what would the magistrates of other counties

⁹¹ Devon Quarter Sessions, Mr. Foulkes and Chancellor Carrington, June 19, 1770 quoted in Morgan and Rushton, *Criminal Transportation*, 22.

⁹² Devon Quarter Sessions, Aug. 30, 1773, *Ibid.*

⁹³ *Ibid.*

⁹⁴ Coventry Transportation Records, 1742-1751, quoted in Ekirch, *Bound for America*, 81.

⁹⁵ Standing orders are mentioned in Cheston's letterbooks and in a memoranda book, 1773-1776. Cheston Galloway Papers Boxes 5 & 8. More information about the skills of convicts that were particularly valued can be found in Ekirch, *Bound for America*, 126.

⁹⁶ Ekirch, *Bound for America*, 121.

think of our conduct were we to alter the time of our sailing to accommodate the County of Devon only.⁹⁷

The final, and perhaps most obvious, reason that Stevenson, Randolph and Cheston were attempting to secure as many convicts as possible is that the trade itself was profitable. As a Virginia factor noted, by convicts “the most is made.”⁹⁸ It appears to be the case that the convict trade was the most profitable part of Stevenson, Randolph and Cheston’s business. In the words of Stevenson, the convict business “if properly managed will in a few years make us very genteel fortunes. The sales of the convicts run up amazingly in a little time.”⁹⁹ Stevenson was very much aware of the firm’s dependence on this income source, adding: “the Trade would not be worth carrying on without the convicts.”¹⁰⁰ It has also been estimated that Stevenson, Cheston and Randolph made profits of approximately 26% on convicts for 16 voyages.¹⁰¹ By contrast, the average profit for the slave trade was 8-10% in this time period.¹⁰² This does not, however, mean that the convict shippers had overall profits that doubled or tripled the percentages of those in the slave trade. The 26% profit on convicts is simply that – the average return on shipping convicts, not accounting for overhead, all expenses, or losses the firm faced in other markets. The 8-10% figure commonly cited for the slave trade has been generated by a more holistic consideration of all facets of the traders’ balance sheets.¹⁰³

The profitability of trading in convicts also has to be understood in terms of the firm’s overall security, and it would be incorrect to assume that the firm’s trade was “big business” by the standards of the time. Stevenson, Randolph & Cheston formed a rather small firm, beginning with a capital stock of £9000.¹⁰⁴ By comparison, late in the eighteenth century an average sized trading firm contained four to ten partners and typically had capital in the range of £10,000 - £20,000.¹⁰⁵ At the lower end of the spectrum, £3,000 was considered the bare minimum for having a store – a standard that Stevenson, Randolph and Cheston far exceeded.¹⁰⁶

Like most smaller firms, Stevenson, Randolph and Cheston did not have sufficient capital to endure many unprofitable shipments, and thus they were particularly attuned to swings in supply and demand. For instance, in 1773 the supply of indentured servants unexpectedly jumped, and the price the firm could get for convicts thus dipped. When 121 of Stevenson, Randolph and Cheston’s convicts arrived from Bristol in 1773, Cheston informed his partners, “[a]s a Ship with near 200 being just arrived from London, one from Ireland with a considerable number, and another expected every day,

⁹⁷ Morgan and Rushton, *Criminal Transportation*, 22-3.

⁹⁸ *Harry Piper Letterbook*, quoted in Ekirch, *Bound for America*, 77.

⁹⁹ Stevenson to Cheston, Dec. 30 1769, Cheston Incoming Letters, 1767-April 1771, Cheston – Galloway Papers, Box 9.

¹⁰⁰ Stevenson to Cheston, Jan. 3, 1769, *Ibid.*

¹⁰¹ Smith, *Colonists in Bondage*, 122-3.

¹⁰² James Rawley and Stephen Behrendt, *The Transatlantic Slave Trade* (U of Nebraska Press, 2005), 265; Kenneth Morgan, *Slavery, Atlantic Trade and the British economy, 1660-1800* (Cambridge University Press, 2000), 36-44.

¹⁰³ K. Morgan, *Slavery*, 34-40.

¹⁰⁴ Stevenson to Cheston, Aug. 5 1768, Cheston Incoming Letters, 1767-April 1771, Cheston-Galloway Papers, Box 9.

¹⁰⁵ Price, *Capital and Credit*, 24.

¹⁰⁶ *Ibid.*, 25

these together with the number already disposed of here within these two months will affect the sale.”¹⁰⁷ Expected profits could also be negatively impacted by the market conditions for other goods. When prices for tobacco, corn and wheat dropped, the demand (or, in any event, the ability to pay) for labor dropped as well, again causing convict prices to decline. “These low prices of Produce here,” Cheston wrote from Maryland to his partners, “make it highly disadvantageous to us in the Sale of Servants. The high price which we have got heretofore, has in great Measure been owing to the great demand for wheat, which, if the contrary takes place, cannot be any longer expected.”¹⁰⁸

One way that the firm attempted to increase profits and also to increase certainty was to place Cheston, the junior partner of the firm, permanently in Maryland to act as the factor. This had several benefits, most related to the problems of debt. Stevenson and Cheston were stepbrothers, and having a family member handling the Maryland side of the business provided security for the firm.¹⁰⁹ Prior to Cheston’s relocating to Maryland the firm had used resident factors, Smyth & Sudler, to sell convicts.¹¹⁰ Smyth & Sudler received a 10% commission on sales, as well as 2.5% for risk of debts.¹¹¹ While eliminating this expense was desirable, the more prominent concern for Stevenson, Randolph and Cheston was Smyth & Sudler’s inability to collect on debts. In 1770, Smyth & Sudler failed to remit proceeds within the year, as was required by their contract.¹¹² When, a few months later, Smyth & Sudler asked for an additional commission on their tobacco, Stevenson, Randolph and Cheston terminated the relationship.¹¹³ Cheston moved to Baltimore, and immediately began handling sales, arranging return goods, and attempting to secure payment for outstanding debts owed to the firm.¹¹⁴

The subject of efforts to collect on debts dominated Cheston’s correspondence in the last 5 years of the trade. The increasing difficulties with collecting debt likely reminded the firm of the downfall of their predecessors, Sedgley, Hilhouse and Randolph. The earlier firm had dissolved, leaving Randolph bankrupt, largely because of unpaid Chesapeake debts.¹¹⁵ Cheston attempted to collect on the prior firm’s debts, while simultaneously attending to his own firm’s new debts, travelling throughout the region in these efforts. Most convicts were bought on bond, and Cheston’s factorage book reveals that many of these accounts were overdue. In 1772, Cheston, at the prompting of Stevenson, sued to recover these debts in court, and was for many years afterwards still attempting to obtain payment. The problem of debt was no less serious with goods than it was with convicts. By 1774 Cheston, noticeably wearied by his role as debt collector,

¹⁰⁷ Cheston to Stevenson and Randolph, June 13, 1773, Cheston-Galloway Papers, Box 8.

¹⁰⁸ Cheston to Stevenson and Randolph, Aug. 31, 1774, Cheston-Galloway Papers, Box 5.

¹⁰⁹ Mathias, “Risk, Credit and Kinship.”

¹¹⁰ K. Morgan, “Organization,” 224.

¹¹¹ Ibid.

¹¹² Stevenson Randolph and Cheston to Cheston, March 11, 1775, Cheston Incoming Letters, 1767-1771, Cheston-Galloway Papers, Box 9

¹¹³ Stevenson to Cheston, May 23, 1770, Cheston Incoming Letter, 1767-1771, Ibid.

¹¹⁴ e.g. Stevenson and Randolph to Cheston, Nov. 21 1769, Ibid.

¹¹⁵ K. Morgan, “Organization,” 224. Randolph was able to provide capital stock for the new partnership, despite the bankruptcy because he had “part of his Wifes Fortune [that] cannot be touch'd by the creditors.” Stevenson to Cheston, August 5, 1768, Cheston Incoming Letters, 1767-1771, Cheston-Galloway Papers, Box 9.

had ceased accepting orders for goods from new customers. Cheston complained to his partners that he was “really quite tired of Dunning for debts due for Goods shipped,” and cynically added, “punctuality in this part of the world need never be expected.”¹¹⁶

Despite the diligent efforts of Cheston, and despite the security conferred by having an internal factor and a family member in Maryland, the fate of Stevenson, Randolph & Cheston was similar to that of Sedgley, Hillhouse and Randolph before them. When the trade was interrupted in 1775, Stevenson, Cheston and Randolph had £8,000 in unrecovered debt. The bond of family trust also proved unreliable, and it was discovered later that year that Stevenson had been appropriating funds.¹¹⁷ The firm dissolved in face of these financial setbacks, and Cheston’s correspondence indicates that he spent the last decade of his life trying, with little success, to collect debts owed to the firm.¹¹⁸

The standard story of the extreme profitability of the convict trade may be somewhat tempered by the records of Stevenson, Randolph and Cheston. While the trade in convicts was, in and of itself, profitable, the difficulties of debt and credit relationships and the volatility of the general trade climate meant that even a successful convict firm could not be assured of financial gain. While the problems of Stevenson, Randolph and Cheston were exacerbated by the theft of funds, even without this difficulty the firm was heavily indebted by 1775. It may have been possible for a merchant to make his fortune by shipping convicts; however, this did not ultimately come to pass for Stevenson, Randolph and Cheston.

2. The London Trade

In order to understand the structure of the London convict trade, it is important to realize that the Transportation Act of 1718 was largely a response to the problems of the metropolis.¹¹⁹ This explains why, for instance, the Treasury paid the costs of transporting convicts from London and the Home Circuit assizes. This stands in contrast to the areas outside the capital, where, as seen above, the costs of transporting convicts were paid by the county where the offender was convicted.¹²⁰ Above, we saw Bristol’s leading merchants endeavoring to secure a monopoly; in London, the consolidation of market power into few hands was aided by the system of contract and subsidy. Although there was not a formal monopoly granted, the Treasury only subsidized one merchant at a time; and this, for the most part, kept competition at bay. The subsidies also enabled the government to have more direct administrative oversight and control, topics which will both be discussed below in Chapter Four.

In London, the contract to transport convicts, and the Treasury subsidy that went with it, was an attractive commodity. From 1718 to 1739, Jonathan Forward held the contract. Forward, a merchant based in Cheapside who had experience both in the slave

¹¹⁶ Cheston to Stevenson, Randolph and Cheston Aug 31 1774 Cheston Letterbook, 1772-1776, Cheston-Galloway Papers, Box 8.

¹¹⁷ “Mr. Cheston’s Statement of his claim against the estate of William Stevenson Bankrupt,” in James Cheston Legal Papers, Cheston-Galloway Papers, Box 18.

¹¹⁸ K. Morgan, “Organization,” 225.

¹¹⁹ Beattie, *Policing and Punishment*, 430.

¹²⁰ Beattie, *Crime and the Courts*, 504-5; Ekirch, *Bound for America*, 70; Beattie, *Policing and Punishment*, 431.

trade and in shipping convicts prior to the 1718 Act, received the contract at the recommendation of William Thomson, the Recorder of London and the chief architect of the Transportation Act.¹²¹ In 1739, by which point the London contract was worth more than £1000 per year, the contract went to Andrew Reid, a friend of the Secretary to the Treasury Edward Walpole.¹²² Reid eventually took on additional partners, James and Andrew Armour of London and a Scotsman, John Stewart. Stewart was extremely critical of the way Reid organized the business, and in 1757 the contract was held by Stewart and the Armours alone.¹²³ By 1759, Stewart has disassociated himself from the Armours, and was joined by a fellow Scotsman, Duncan Campbell. Stewart and Campbell became the final government contractors. In 1772, Stewart died and the government elected not to renew the subsidy.¹²⁴ Campbell, however, continued to be the primary convict shipper operating out of London until 1775, when the trade was interrupted by the war.¹²⁵

The subsidy for government contractors shipping out of London was a valuable component of the trade. The subsidy was £3 per head for every convict transported from London and the nearby counties when the 1718 Act was passed, but quickly rose to £4 for county prisoners in 1719. In 1721, the rate rose to £4 for London prisoners as well. In 1722 the subsidy rose to £5 for county prisoners, and 5 years later it rose to £5 for London prisoners. This was the rate until 1772 when the subsidy was discontinued.¹²⁶

Duncan Campbell, unlike most convict traders, had been a ship's captain for some years before establishing himself as a merchant in his own right. Before joining John Stewart in the late 1750s, Campbell traded in the London-Jamaica route. Campbell shipped convicts first as a member of this partnership, and then later in his name alone, until 1775. When Campbell ceased transporting convicts due to the interruption of trade caused by the American Revolution, he was almost immediately hired by the government to create and oversee the controversial prison hulks on the Thames. In 1786, Campbell was involved with, though never directly contracted for, efforts to ship convicts to Australia. Campbell's career therefore spans a number of important moments in the penal revolution of the eighteenth century.

If the dominant theme in Stevenson, Cheston, and Randolph's Bristol trade in convicts was the quest for monopoly, the dominant theme in Campbell's trade is the loss of profits. In 1772, John Stewart, Campbell's partner of many years, was "taken off with the gout, a disorder with which he had long been afflicted."¹²⁷ Although Campbell hastened to assure his correspondents that he would "find little additional burden on that score" as Mr. Stewart "had too many years done little or none of the executive part of the business," in fact the event would have radical consequences for his business.¹²⁸ Never again would the profitability of convict transportation be so great.

¹²¹ Ekirch, *Bound for America*, 70.

¹²² Dora Mae Clark, *The Rise of the British Treasury: Colonial Administration in the Eighteenth Century* (Yale University Press, 1960), 50.

¹²³ Schmidt, "Convict Servant Labor," 38.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, 39.

¹²⁶ Ekirch, *Bound for America*, 71.

¹²⁷ Campbell to Thomson, March 22, 1772, Duncan Campbell Business Letterbook.

¹²⁸ *Ibid.*

In the months following Stewart's death, Campbell saw a series of losses associated with transferring the business to his sole name. His return voyages carried tobacco, sugar and other goods. Some of Stewart's connections in these trades withdrew their business from Campbell, others questioned the state of their accounts and neglected to respond to Campbell's attempts to collect longstanding debts. Further losses accrued to Campbell from administrative challenges associated with Stewart's death. The news of Stewart's demise and that Campbell was operating in his own name did not in all cases reach his business correspondents quickly. Campbell was more than once faced with payments made to the name of "Stewart and Campbell" that he could not accept.¹²⁹ Unfortunately for Campbell, the months after Stewart's death also saw widespread difficulties in the market for tobacco and Campbell experienced losses here as well.¹³⁰

These costs were nothing, however, compared to Campbell's financial setbacks in the convict trade. Within days of Stewart's death Campbell found himself pleading with the Lords of the Treasury to keep the contract for "transporting felons from London, Middlesex, Bucks and the five counties of the Home Circuit."¹³¹ Campbell's reasons included the fact that he and Stewart had, in reliance on the contract they had held for over a decade, constructed "ships of a particular and commodious construction and that they have now sunk in such ships a capital of at least £6000."¹³² A more immediately pressing concern for Campbell, however, was that he had structured his entire trade around the timing of the assizes, as his contract required him to ship convicts shortly after the assizes concluded. In order to keep on schedule, Campbell had to prepare goods for the return journey carefully to ensure that he would be able to make a round trip in Spring, and a second round trip after the Fall assizes. In the Spring, he was concerned about returning in time to collect the Fall convicts, and in Fall he needed to make his inbound journey with tobacco before winter made sailing conditions difficult. Given the slow speed of correspondence, Campbell was unable to retract orders to procure cargo for the return voyage, and thus he would have to send a ship to Maryland to collect Tobacco, even if he had no convicts to ship from London. Thus, he feared, he would be "obliged to send out ships light freighted."¹³³ For these reasons, Campbell urged that the contract be continued through December of 1772. The Lords consented to Campbell's petition, but were only willing to extend the contract to September. In neither request nor response was the issue of the subsidy raised.

By July of the same year, however, Campbell submitted a request for payment and learned that, while he still possessed an effective monopoly on the London convicts, it was not the intention of the Treasury to continue to pay the subsidy of £5 per convict to him. The refusal to pay extended not just to new convicts, but also to convicts "in gaol at the time my partner Mr. Stewart died and which agreeable to the contract with their Lordships were immediately to be taken away, for which service I had a ship lying ready."¹³⁴ Campbell, asked to justify the request for payment responded that, in addition to the extension of the contract, he had

¹²⁹ March – May 1772, Duncan Campbell Business Letterbook.

¹³⁰ Campbell to Tayloe April 21 1772, Duncan Campbell Business Letterbook.

¹³¹ "Transportation of Felons to the Colonies" *Maryland Historical Magazine*, vol 27 (1932), 266.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*, 269.

likewise the honour of a conversation with some of their Lordships and was led to believe ... that as it was necessary this public business should be carried on and that however the contract might be afterwards disposed of I should be paid the five pounds per head for such felons as I transported in the meantime. I have understood that it has been a custom with the Board of Treasury that when a new contract has been made even on a different footing from the old one, that six months has been given to wind up the arrangements necessarily made for carrying on the public business and was informed that their Lordships had upon these principles granted (the contract extension) to the 1st of September.¹³⁵

Campbell's expectations appear to be reasonable, but the Treasury was not persuaded by them. One reason for this may have been the growing sense that the trade had become so profitable that the subsidy was effectively a windfall for Campbell. Certainly this charge had been featured prominently, albeit from biased observers in the colonies, in remarks against Campbell and his partner Stewart. Since convict merchants were given servants to sell, it was argued, the contractors "ought to pay instead of receiving a consideration for the passage."¹³⁶

Campbell's former partner Stewart had become embroiled in a controversy with the government of Maryland that reveals the tensions with and the awareness of the high levels of profitability of convict transportation, especially for the London merchants. After a long history of failing in efforts to regulate convict importations (which will be discussed in Chapter Four) the Maryland legislature finally succeeded in passing an Act that imposed a duty of 20 shillings on "the masters of ships and vessels and others, importing servants into this province...to serve for the term of seven years or upwards." Those who imported servants for less than seven years were required to pay only five shillings.¹³⁷ Although convicts were never mentioned, the intention and the effect of the Act was to tax their import. The Act does not appear to have been designed to stop or slow the influx of convicts (who were a source of contention due to the perception that they were dangerous and imported disease) as previous attempts to regulate transportation had been. Rather, it seems to have been driven by the perception that the London convict trade was extremely profitable.

Stewart, whose partnership likely made higher profits than any other convict firm, objected to the Act and refused to pay the duty.¹³⁸ Although the history of this type of legislation made his refusal predictable, what was new in 1750 was that the colonial backlash evidenced a keen awareness of the subsidies that Stewart's partnership alone received. The governor of Maryland, Horatio Sharpe, wrote upon hearing of Stewart's refusal to pay the duty:

I am sorry Mr. Stewart thinks himself more aggrieved by the Act ... than those who contract for the exportation of the convicts from the inland prisons. Mr Stewart & the other contractor's agents sell the convicts they import from £8 to £20 each, which people here think a pretty good premium for their passage, &

¹³⁵ Ibid.

¹³⁶ "Memorial of John Stewart" May 4 1757, *Maryland Archives*, vol. 55, 769.

¹³⁷ "Assembly Proceedings, July 17, 1754, "Proceedings and Acts of the General Assembly, 1752-1754," *Maryland Archives*, vol 50, 562.

¹³⁸ "Memorial of John Stewart," *Maryland Archives*, vol. 55, 760.

hope Mr. Stewart would have no cause to complain of a hard bargain though he was to receive none of the bounty that is allowed by Act of Parliament for transporting felons from England to these Plantations.¹³⁹

In a later letter, Sharpe noted that in the current economy, £6 was considered “a reasonable premium for the conveyance or passage of any person from England thither.”¹⁴⁰ The merchants contracting for the “inland prisons” had a lower stake of course because they shipped smaller numbers of convicts, so it is not surprising in this instance that it is the latter who objected. The important point Sharpe makes here, however, is that the price paid for the convicts is sufficiently high that their sale alone constitutes an ample payment; even without the subsidy, the London contractors were making enough of a profit that they should be able to pay the duty levied.

Caecilius Calvert replied from London. Although not optimistic that he could “keep Mr. Stewart quiet”¹⁴¹ on this point, Calvert echoed the governor’s rationale that enough was made on the sale of convicts as servants “exclusive of the money paid (by the Treasury) for their transportation.”¹⁴² Calvert also made an important distinction about the difference between the penal goals of the subsidy income and the seemingly unrelated, and therefore potentially taxable, business of the sale of servants,

[T]he contractors for the transporting of felons have . . . a proper allowance paid here for such their transportation, giving bond to land them in America; therefore their pretending a property of sale of them for the respective terms of years they are severally condemned to transportation, appears to me unwarrantable it being death to the convict transported to return before the term he or she is transported for is out: Therefore if the contractor sells a convict, it is to be apprehended he sells such convict as if an indented servant.¹⁴³

The goal of the 1718 Act, in Calvert’s framing, was to get the felons out of England, and this is something Maryland ceded that they could not interfere with. The expense of this, however, was, Calvert thought, paid entirely by the subsidy, leaving the sale of convict servants an event which could be taxed just as the importation of any other indentured servant could be taxed. The government of Maryland, of course, was not an impartial judge of the profitability of the convict trade. It is, however, interesting that they were considering what purpose exactly the income from the subsidy and the income from convict sales respectively served. Even when the matter of the 20 shilling duty was finally resolved, Sharpe was still reflecting on the puzzle of the profits made by the London convict merchants, closing a letter to his brother with the rumination, “[a]ll the persons who contract for the transportation of felons from Great Britain except Mr. Stewart of London have paid the duty on such as they imported into this province without murmuring. . . I cannot help thinking that he ought to have readily submitted to the payment of so small a sum when his profits from trading hither are so exorbitant.”¹⁴⁴

¹³⁹ Horatio Sharpe to Caecilius Calvert, Oct. 20 1755, “Correspondence of Governor Sharpe, 1753-1757” *Maryland Archives*, vol. 6, 294-5.

¹⁴⁰ Horatio Sharpe to John Sharpe, Oct. 24 1755, *Ibid.*

¹⁴¹ Caecilius Calvert to Horatio Sharpe, December 23, 1755. *Ibid.*, 329.

¹⁴² *Ibid.*, 330.

¹⁴³ *Ibid.*, 329.

¹⁴⁴ Horatio Sharpe to Joshua Sharpe, May 27, 1757, *Ibid.* vol. 9, 5.

The perception of excess profits in the London convict trade was prevalent since at least the 1750s, but as long as Stewart was alive, he and Campbell enjoyed the benefit of the subsidy. After Stewart's death and Campbell's failed petitions, Campbell tried once more to have the subsidy reinstated, and in doing so provided a balance sheet that contains a telling account of his operations. His account demonstrates that without any subsidy at all, Campbell was making a profit by transporting convicts. The months without the subsidy following Stewart's death, however, reveal such large losses in the tobacco trade that Campbell took an overall loss in his voyages, which is presumably why he submitted these documents in the first place.

From April to July of 1772, Campbell shipped 348 felons at a cost of £1740.9.7. These convicts were then sold in Virginia for a total of £2957.9.0, from which total Campbell deducted £233.6.8 for a commission to his agent in Virginia.¹⁴⁵ Even allowing 10% to compensate for bad debts, Campbell would have been making profits of close to 25% on the unsubsidized convict trade. This is roughly consistent with the estimated 26% profits seen by the Bristol convict firm Stevenson, Randolph and Cheston before local subsidies were accounted for.¹⁴⁶ With the Bristol traders, it is difficult to determine the net effect of local subsidies and payoffs to jailers on profits. With the London traders, however, this is easily seen. Had the subsidy remained in place, the entirety of the £1740 cost would have been covered (348 convicts at £5 per head).

The profitability of the convict trade alone, as revealed by Campbell's own accounts, may explain why the Treasury was so quick to reject his petitions for payment. The subsidy for convicts at this time would have primarily served to help the merchant absorb losses faced in the tobacco trade. When the tobacco trade was profitable, as it was for much of the period during which Campbell operated, he may have made even larger gains. However, when the tobacco business went poorly, losses were absorbed by the convict subsidy, in effect shifting the effort that the Treasury was subsidizing from transportation to the tobacco trade. Campbell's petition shows that from April to July 1772, he shipped 872 hogsheads of tobacco, costing £7669. This tobacco sold for only £4683, and after all accounts were balanced, represented a loss of £2410 for Campbell.¹⁴⁷ The £1740 he had expected to receive in convict subsidy would have taken care of most of this loss, but as the Treasury observed, the subsidy was intended for the cost of shipping convicts, which was well covered by the sale price of the convict's labor.

If any doubt was left as to whether the convict trade was profitable without the subsidy, it can be answered by the fact that even when it became clear that the subsidy was a thing of the past, Campbell persisted in the trade until it, along with the rest of his North Atlantic trade, was interrupted by the outbreak of hostilities in 1775.¹⁴⁸ It is important to emphasize that although he did not receive the subsidy, Campbell retained one key benefit of the contract; it conferred at least some degree of exclusivity. This is, by Campbell's own account, why he persisted with the trade without demanding remuneration. Speaking to a parliamentary committee four years after his last shipment of convicts, Campbell, then running the prison hulks, said of his twenty years' experience

¹⁴⁵ "State of the Contract for Felons," in Smith, *Colonists in Bondage*, 122.

¹⁴⁶ Though again, it must be emphasized that this was the profit on only the convict trade, it does not account for overhead, nor account for other losses.

¹⁴⁷ "State of the Contract for Felons," in Smith, *Colonists in Bondage*, 123.

¹⁴⁸ Ekirch, *Bound for America*, 74, 77.

transporting convicts, “five pounds per man were allowed by the government til the last three years when, in consequence of a competition for the contract, he agreed to take them without any profit but that which accrued to him by disposing of their servitude in the colonies.”¹⁴⁹

From the point of view of the colonists and the Treasury, the mere fact that the convict trade in isolation was profitable was supplied as evidence for the argument that the subsidy was excessive. The question from their point of view was, why, if the convict trade was profitable, did a subsidy need to be paid? I will address this question and the general function of the subsidy in more detail in Chapter Four, but want to emphasize now that the case that the subsidy was unnecessary, even in the 1770s, can be overstated. From Campbell’s point of view, the profitability of his trade could not be reduced to just one component. His outlook included his ability to offset losses on both legs of his journey, and it was important that the subsidy was revoked at a time when tobacco prices were at an unprecedented low. If the government wanted to harness the power of the private sector to ensure that convicts were removed, it might need to insure the profitability of Campbell’s entire enterprise, and not just the profitability of the convict trade. Anything less threatened the regularity of Campbell’s shipments of convicts.

For present purposes, we might instead ask why, after paying £5 per head for half a century, did the government decide in 1772 that a convict subsidy was no longer needed? This removal of the subsidy has been commented on by a few authors who have tended to view it as either evidence that the trade was generating excess profits, or as evidence of a shift in penal policy. Ekirch notes that there was declining support for transportation, and that this might explain the decision to withdraw financial support.¹⁵⁰ Beattie similarly mentions the end of the subsidy in the context of the observation that sentencing patterns were changing and marginally fewer sentences of transportation were being handed down in some parts of the country.¹⁵¹ While the declining enthusiasm for the punishment of transportation and the interest in punishments of incarceration undoubtedly are important components of the willingness to revoke the subsidy, this does not portray the entire story.

A focus on private enterprise, the perception of profits, and the trade climate may add one important element to why the subsidy ended. 1772 is important to this inquiry because it is the year the subsidy ended, but 1772 is also the year a massive credit crisis shook the foundations of Atlantic trade.¹⁵² The years leading up to 1772 were characterized by extreme commercial optimism. The removal of the Townshend duties did not affect the sale of convicts directly, but it did contribute to an increase in speculative exports. Credit was easier to obtain in Britain and thus unprecedented levels of British goods were shipped to the colonies. At the same time, tobacco production was booming after several years of poor crops in the late 1760s. In both 1770 and 1771, there were record tobacco crops, and thus record tobacco importations.¹⁵³ Firms’ expectations were great, and there was a popular perception that profits were easily made. It is in the

¹⁴⁹ *Journals of the House of Commons*, 1779, 19 Geo III, 310-11.

¹⁵⁰ Ekirch, *Bound for America*, 224-229.

¹⁵¹ Beattie, *Crime and the Courts*, 560.

¹⁵² Richard Sheridan, “The British Credit Crisis of 1772 and The American Colonies,” *The Journal of Economic History* 20, no. 2 (1960): 161-186.

¹⁵³ *Ibid.*

midst of the optimism of this financial boom that the subsidy for the convict trade was revoked. By the time this affected Campbell, however, the market had collapsed. The increased supply of tobacco, after a period of lower than normal supply, had the effect of driving the price of tobacco down dramatically.¹⁵⁴ The losses Campbell presented to the Board of Trade in his plea for the subsidy to continue are a result of this financial crisis. Of course, this does not explain why Campbell was not able to get the subsidy reinstated, but it may add an additional explanatory piece to the puzzle of why the decision was made to revoke the subsidy at this particular time. It also tempers the characterization that the convict trade was generating exorbitant profits. The risk of debt, the insecurity of credit, and the dependence on profits on both legs of the trade were all factors in how “profitable” the trade was from the merchant’s point of view.

Notwithstanding the elimination of the subsidy, it was largely business as usual for Campbell after 1772. The conduct of transportation was shaped by the pursuit of profits and the surviving elements of early-modern penal practice. Campbell continued to place an extremely high value on obtaining each and every convict. He continued to hold ships to wait for convicts, and in some cases was willing to go to trouble to obtain just one convict. In the spring and summer of 1772, he wrote to the gaoler at Oakenham no less than four times to attempt to coordinate the shipping of one individual. An exchange with Isaac Strong Esq., Clerk of the Peace, again illustrates Campbell’s commitment to get a lone convict. In June of 1772, Campbell, after apologizing for difficulties with previous letters gone astray, told Strong “[m]y ship in rotation for felons will sail the beginning of next month, and if agreeable to you I will give you timely notice to send up the felon in your gaol.”¹⁵⁵ He followed up with Strong to confirm the ship’s arrival in early July. In mid-July, he anxiously wrote to Strong again, having received the convict, but not the required paperwork,

I now return to you the order of the court, which is not complete until you have certified thereon that I have on consequence of their order contracted and given needful security for the transportation of the above convict, which you will please to do and return to me in course of post as it must accompany the convict abroad and you will please also fill up the usual bond for me to execute¹⁵⁶

He wrote a second time that day to urge Strong to act quickly and noted, “as my ship is to sail the day after tomorrow I shall [need to] overtake her with the above mentioned order of court therefore I request you will lose no time in returning it to me.”¹⁵⁷ Although this degree of diligence seems excessive for only one convict, Campbell, now aware of the possibility of competition for convicts, was likely also thinking of the long term and of an ongoing relationship with Strong that would produce more convicts with fewer difficulties (though in fact he did continue to remind Strong about the necessity of the court order in each of his subsequent dealings with him).

Campbell, as would be expected, also continued to take reasonably good care of the health of the convicts. Convict health was highly correlated with their sale price, and

¹⁵⁴ Price, *Capital and Credit*, 129-136. The Chesapeake merchants, expecting a greater return on their bills of exchange, were thus likely to overdraw their accounts and to be unable to pay debts.

¹⁵⁵ Duncan Campbell to Isaac Strong, June 1 1772, Duncan Campbell Business Letterbook

¹⁵⁶ *Ibid.*, July 14, 1772.

¹⁵⁷ *Ibid.*

this now represented his sole source of income from transportation. Because Campbell shipped a large volume of convicts, he made multiple shipments each year and therefore the prisoners did not spend as long in gaol as they did with provincial contractors. This was one of the biggest factors in Campbell's convicts' health. Campbell himself only had a degree of control over what happened on the ships. Although he could provide standards, and was responsible for the physical layout of the vessels, the shipmasters ultimately controlled conditions on the ships.¹⁵⁸ Although the private nature of transportation would not ensure that the convicts had a comfortable journey, it did, to some extent, motivate merchants to provide for their health.

The private character of the punishment perpetuated some features that contradict our current notions of penal policy, but that were consistent with other forms of early modern punishment. It was possible for convicts to receive special accommodations on board the ship, for instance if they served as servants – or in some cases, mistresses – to the captain.¹⁵⁹ The convicts were allowed, where they had the resources to do so, to bring along goods and provisions that might make the journey less arduous.¹⁶⁰ Campbell was even willing to accept and distribute funds to the transports, as in 1772 when he writes to his ship captain, “you will pay to James John Gilbert alias Phillips a convict on board your ship half a guinea in necessaries or money, his mother having paid me that sum.”¹⁶¹ These types of allowance, however, were not unusual in penal system of the time. It was the convention in gaols (also run for profit) that prisoner's time of confinement was made more or less pleasant depending on the money and connections they had. Food, clothing, and bedding could all be imported if one was lucky enough to have resources, and the size and condition of one's quarters could often be purchased as well. Most prisoners, like most transports, lacked the financial standing to purchase these items. Campbell did provide some clothing in addition to the basic necessities for the voyage, and with each ship that sailed he personally set forth a shopping list for the convicts' apparel. A representative list included “5 dozen canvas frocks, 4 dozen chick shirts, 8 dozen canvas trousers, 5 dozen caps; 18 shirts, 12 handkerchiefs, 12 petticoats, 12 gowns.”¹⁶² He does not appear to have been miserly about this, adding, “you may have a few more shifts and petticoats ready in case they should be wanted.”¹⁶³

In all, the removal of the subsidy appeared to have almost no effect on the way Campbell structured his business. In the following chapter, I will argue that, despite the involvement of merchants such as Campbell, we must think of the eighteenth century as a time when punishment became more “public” in the sense that the government, rather than entrepreneurs, took a larger role in its administration. However, the years from 1772 to 1775 cut against this trend, as they are years in which the convict trade was more “private” than it had been since the first decade of that century. The government kept all regulatory measures (discussed in the next chapter) in place, and still allowed Campbell to attain a degree of exclusivity after he earned the contract, but in revoking the subsidy market forces took a larger role.

¹⁵⁸ Ekirch, *Bound for America*, 101.

¹⁵⁹ Campbell to Patterson, June 6, 1771, Duncan Campbell Private Letterbook.

¹⁶⁰ Ekirch, *Bound for America*, 102.

¹⁶¹ Campbell to Captain McDougal, Sept. 9, 1772, Duncan Campbell Private Letterbook.

¹⁶² Campbell to Bare, April 13, 1774, Duncan Campbell Business Letterbook.

¹⁶³ July 14 1775, *Ibid.*

The practices of the punishment of convict transportation from 1772-1775 were dictated, to as large an extent as possible given existing restrictions, by what practices could sustain and support the business. Yet Campbell continued to operate much as he always had. In 1775, Campbell ceased transporting convicts, though he, like Cheston, was engaged for many years afterwards in trying to collect on debts from his trade. Campbell, unlike Cheston, remained financially solvent and within several years was again accepting government funds, this time for containing convicts on his ships.¹⁶⁴

Conclusion

This chapter has been concerned with the business of convict transportation insofar as it concerned how convicts were shipped and by whom they were sold and purchased. As we have seen, the profits made on convicts were mitigated by the financial volatility of the Atlantic trade. Convict shippers endeavored to keep their profits up by securing a monopoly on convicts and by attempting to offset losses with the subsidies paid for convicts. The trade in convicts had the potential for profitability, and the efforts of merchants to realize these profits structured many features of transportation. In the following chapter, I turn my attention to the role of the central government in transportation and to the interaction of the public and private facets of the punishment of transportation.

¹⁶⁴ Oldham, *Convicts to the Colonies*, 33-45.

Chapter Four: The Role of the Central Government in Transportation

In this chapter I attend to the more public side of transportation by exploring the role of the central government in the business of convict transportation. The issue is critical because other scholars have placed emphasis on private actors and private entrepreneurs in the history of transportation. My own discussion in Chapter Three confirms the significance of these elements. But the recent emphasis on “privatization” threatens its own distortions by neglecting the interdependence of state and commercial efforts. I argue here that it was the combination of delegation to commercial actors and the increasing involvement of the national government in the financial, political and regulatory aspects of the administration of punishment made the expansion of eighteenth-century penal capacity possible.

The involvement of merchants in the administration of transportation has led some to characterize the punishment as an example of “private” or “privatized” punishment. Although there are certainly insights to be gained from this interpretation, I focus instead on the novelty of the increased, not decreased, central government involvement in the administration of punishments of transportation. In 1718, with the passage of the Transportation Act, the central government intervened to a greater extent in the administration of punishments. While this was certainly not the first time the government had promulgated national standards for punishments, there were several novel aspects of the legislation, and the associated commitment of public resources, that identify the 1718 Act as an important milestone in the transition toward greater central government control of punishments.

After 1718 the central government regulated the markets associated with transportation to align penal goals with recently emergent market conditions. This government intervention allowed transportation to map onto a commercial infrastructure and therefore to harness the power of a private, profit driven enterprise. I begin this inquiry with an examination of the ways the 1718 Act and the efforts to ensure its implementation represent a new level of central government involvement in punishment. I distinguish this argument from two ideas in the extant literature: first, that transportation is a primarily or purely a “private” punishment, and second, that it is best understood as a “local” punishment.

a. Public and Private

One of the difficulties of characterizing transportation as more or less of a “private” punishment is that there are not simple, uncontested definitions of “public” and “private” punishments. To complicate the terminology even further, as David Lieberman has noted, “eighteenth-century English law utilized the terms ‘private’ and ‘public’ with a frequency and range sufficient to frustrate any precise or simple definition.”¹ In Chapter Five, I will discuss the “public” and “private” nature of punishments in terms of deterrence, and how visible the act of punishment was to the general community. In this Chapter, however, I use the terms in the limited sense typically employed in modern debates about privatization of punishment, where “public” means administered by the state, and “private” means carried out, usually for profit, by non-state actors.² By

¹ David Lieberman, “Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence,” in *Law, Crime and English Society, 1660-1830*, ed. Norma Landau (Cambridge University Press, 2002), 57.

² See e.g. Feeley, “Privatization and Punishment.”

contrast to privatization debates, however, I am not addressing changes that occur when private actors take over penal functions that were previously administered by the state. In the eighteenth century public and private penal roles were not clearly delineated, and much of the penal apparatus would be considered largely private by today's standards. By no means was it the case in the eighteenth century that policing, prosecution and punishment were understood as the responsibility of state actors.³

One author who prominently situates transportation in the framework of privatization is Farley Grubb, who has claimed that eighteenth-century convict transportation "was a vast experiment in privatizing post-trial criminal justice."⁴ The basis for this characterization rests on the observation that the "the transportation and disposal of convict labor was handled by the private sector for profit."⁵ The problem with this interpretation is that it seems to be comparing transportation to publicly administered punishments that were not yet in existence. Grubb is comfortable making this comparison, and even says explicitly that transportation was adopted in part because "removal though imprisonment was too expensive given the absence of penitentiaries."⁶ Neither penitentiaries, nor any other widespread, systematic, centrally administered, publicly funded punishments were in existence prior to 1718, so the description of the adoption of transportation as "privatization" is not compelling. The presence of "private" actors – in the sense of profit-seeking actors – in the eighteenth-century judicial system was by no means a novel "experiment." Rather, it was the norm from which, over the course of the next centuries, we witness a departure.

Part of the problem for Grubb's perspective is that the word "privatization" describes a trend or a change from a previous status quo. It is not, however, clear what a meaningful baseline of comparison would be, as transportation did not particularly transform an existing punishment. It was, as discussed above, a complement to existing punishments, more than an alternative. Some who were transported would previously have been hanged or whipped, but most would have been granted a clerical release. While transportation might have had a more "private" character than eighteenth-century hangings or whippings, it would seem inaccurate to say transportation thus "privatized" these punishments, because the existing regime of corporal punishments persisted even after the adoption of transportation. To say it privatized clerical release, which was largely a manifestation of the decision to not punish, also does not seem accurate. Since large scale transportation is such an innovation, to discuss it in terms of privatizing is problematic.

³ Bruce Smith, "The Emergence of Public Prosecution in London 1790-1850," *Yale Journal of Law and the Humanities*, no. 18 (2006). Although Smith has persuasively argued that eighteenth-century criminal justice administration was less "private" than has typically been assumed, he is writing against the backdrop of a massive body of literature that has assumed a general absence of state involvement. Smith is concerned with policing and prosecution – which are typically characterized as largely private in the sense that there was not a public professional police force and private individuals (usually the victim) were typically responsible for apprehending the offender, filing charges, presenting evidence to the grand jury and for the trial.

⁴ Grubb, "Market Evaluation," 295; Grubb elsewhere says transportation, "was essentially an experiment in privatizing post-trial criminal justice." Grubb, "Transatlantic Market," 94.

⁵ Grubb, "Market Evaluation," 295.

⁶ *Ibid.*

A variation on this framework that may be more useful is to consider transportation in terms of the “publicization” of punishments. Although I will argue below that the central government was very active in transportation, it is also true that the role of state actors increased relative to the role of private actors in the punishments that replaced North American transportation. It is this increasingly public nature of post-transportation punishments that Malcolm Feeley evokes in his “Entrepreneurs of Punishment.” Although Feeley also uses the language of privatization, he is not suggesting that something inherently public was made private with transportation. Nor does he suggest that government involvement and private involvement are mutually exclusive, or form in any sense a “zero sum game.” Rather, Feeley is concerned with the ways in which penal innovations devised by entrepreneurs ultimately expand and entrench the role of the state.

While recognizing a similar outcome in terms of the expansion and “publicization” of punishment, I differ from Feeley in the characterization of transportation, and the interpretation of how the transition from private to public occurs. Feeley says of transportation, “the genius of this initial innovation rests almost entirely on the fact that it was an innovation devised by entrepreneurs and that it cost the state virtually nothing.”⁷ By contrast, I emphasize that transportation flourished because the central government took an active role in devising and funding a relatively costly new punishment.

Finally, although I have been emphasizing the need to be careful about misapplying the terms “public” and “private” in the criminal justice setting, it is also the case that what I am calling “public” or government functions often themselves manifest a blend of “public” and “private” capacities. Transportation, after all, reveals a blending of private and public capacities that is, as I will discuss below, characteristic of British state-building and empire-building in the eighteenth century. Thus, what I am describing as increasing “publicization,” in the sense of greater government involvement, can be understood as being itself comprised of a symbiotic mixture of public and private components.

b. Central and Local

The transition to a more distinctly modern system of punishment can be understood in terms of an increased commitment of public resources as well as a greater move away from localized administration and toward centralized administration. The general argument that the eventual realization of the penitentiary system represented the culmination of the central government’s “capacity to overcome the opposition of local magistrates and systematically implement and enforce (penal) legislation on a national scale” is a familiar one.⁸ The contrast between the locally controlled prisons and workhouses of the eighteenth century and the centrally controlled penitentiaries of the later nineteenth century is dramatic. Locating the advent of centralized punishment in the penitentiary generally resonates with the tradition of exploring how, over the course of the nineteenth century, the central government increased in size and capacity, while traditional forms of local authority became less dominant.

In identifying penitentiaries as a national punishment, it is often implicitly assumed that transportation should be understood as consistent with a prior penal

⁷ Feeley, “Entrepreneurs,” 328-9.

⁸ Willis, “Transportation Versus Imprisonment,” 175.

moment, where private, local punishments carried the day. James Willis makes this claim explicitly by juxtaposing transportation and the penitentiary and locating the initial emergence of the first “decisive national response” to penal problems in the late nineteenth century.⁹ Willis’ primary concern is with documenting the rise of state organization that makes the penitentiary possible. He thus asks why, given eighteenth-century interest in imprisonment, and given the support of the foremost penal reformers of the day, did it take until the nineteenth century to realize effective national prison policies? Willis convincingly argues that one reason change was slow was that the central government lacked the organizational capacity to ensure that Justices of the Peace made significant efforts toward implementing policies for local prisons. In the absence of central government and initiative and capacity, Willis argues, transportation was an appealing form of punishment. While generally agreeing with Willis’ theory of penal change, I depart from him in terms of characterizing transportation as an alternative to this process of bureaucratization, rather than as a crucial component of it.

Willis characterizes transportation, even nineteenth-century transportation, as diametrically opposed to the centralization impulse associated with penitentiaries. Transportation, Willis says, “did not require any central government interference in local affairs.”¹⁰ Rather, transportation “shifted the burden of penal administration onto private citizens, merchants, and colonists; and allowed Parliament to remain detached from local government.”¹¹ Transportation, he later says, “just like many other eighteenth-century punishments ... was generally a local and community affair that required minimal central government involvement.”¹² Transportation, in Willis’ accounts, is thus a private, local punishment that was used until administrative capacity and political motivation converged to enable penitentiaries.

In my account the contrast between transportation and later penal developments is more of scale than of type. While the central government was more involved in nineteenth-century reforms, its involvement in eighteenth-century transportation was, at the time, dramatic and novel. Although transportation, like eighteenth-century prisons, worked through local officials such as Justices of the Peace and jailers, the central government took the initiative to make transportation policy work by mobilizing and regulating local entities and actors. In this respect it conforms to the pattern Willis identifies for penitentiaries, and is, I argue, an important part of (rather than a departure from, or a punishment that predates) the process of bureaucratization and centralization.

Although I have been referring to the distinction between local and central as though it was self defining, a further word may be in order here. How local and central government combined in the eighteenth-century varied on distinct dimensions, according to the government functions in question. Historians of Britain’s eighteenth-century “fiscal military state” point to specific institutions, such as the excise and navy, which reveal high levels of central government direction and coordination.¹³ But most administrative structures, such as the law governing poor relief or the regulation of

⁹ Willis, “Transportation Versus Imprisonment”; Willis, “Cultural Limits.”

¹⁰ Willis, “Transportation Versus Imprisonment,” 183-4.

¹¹ *Ibid.*, 188.

¹² *Ibid.*, 199

¹³ John Brewer, *The Sinews of Power: War, Money, and the English State, 1688-1783* (Harvard University Press, 1990); Philip Harling and Peter Mandler, “From ‘Fiscal-Military’ State to Laissez-Faire State, 1760-1850,” *Journal of British Studies* 32, no. 1 (1993): 44-70.

markets, conformed to a pattern in which central government created the basic rules and requirements while the costs and implementation were assigned to local bodies. This allowed for a high level of local variation and innovation. Even in those areas where new structures were developed largely as the result of local initiatives, such as in the case of turnpike trusts or the established of “courts of request” to handle small debt disputes, central government still acted by authorizing the project, typically through the enactment of a private Act of Parliament.¹⁴

England can be understood as having a “national” system of penal law as early as the twelfth century, when, among other things, at least one jail in each county was placed under the control of a royally-appointed sheriff.¹⁵ However, until the nineteenth century the administration of royal government continued to be decentralized and to rely extensively on unpaid, voluntary, and geographically distant magistrates. The 1718 Act was thus a policy of central government in the literal sense that it was, like other laws governing serious crimes, the “King’s law.”¹⁶ Nation-wide penal laws were made in Westminster and physically brought into the counties twice a year by circuit judges.¹⁷ Prior to 1718, however, local officials were responsible for actually punishing offenders when these laws were violated.¹⁸

The 1718 Act thus increased central government presence by requiring local officials to support the implementation of a new penal option.¹⁹ The requirement that counties transport all convicts sentenced to transportation at the assizes also, practically speaking, committed the counties to a new set of expenditures. Funds had to be raised to pay subsidies to merchants, and had to be collected for dealing with consequences of losing community members – such as supporting families if a “bread-winner” was transported.²⁰ Transportation can also be understood as a way the central government involved the localities not just in a national penal project but also in the national project of empire building. In the early eighteenth century few places, beyond London, Bristol and other port cities, had developed Atlantic trade relationships.²¹ By requiring the localities to provide convict laborers to be sold in the colonies, the central government was also enlisting the localities in the project of peopling colonies. Similarly, by committing local authorities to developing an elaborate system of trade in convicts, national transportation policies created and fortified provincial trade links.

I thus argue that transportation was neither a move toward “privatization” nor a distinctly “local” punishment. Rather, it was a crucial step in the process towards greater central government involvement in the administration of punishment. In the following pages, I discuss the ways in which transportation can be understood as predating the penitentiary as a “decisive national response” to penal concerns, and one that set the stage

¹⁴ Paul Langford, *Public Life and the Propertied Englishman* (Oxford, 1991), 139-86.

¹⁵ Sean McConville, “Local Justice: The Jail,” in *Oxford History of the Prison*, ed. Norval Morris and David Rothman (Oxford: Oxford University Press, 1995), 299.

¹⁶ Ibid.

¹⁷ Devereaux, “In Place of Death.”

¹⁸ McConville, “Local Justice.”

¹⁹ Beattie, *Policing and Punishment*, 431; Beattie, *Crime and the Courts*, 504-5; Ekirch, *Bound for America*, 71.

²⁰ Ekirch, *Bound for America*, 11-12.

²¹ Morgan and Rushton, *Criminal Transportation*, 20.

for the coming years of increased central government control of punishments. This can be seen in three areas in particular: first, the process of awarding subsidies; second, the increased intolerance of colonial attempts to interfere with the practice; and third, the increased regulation and administrative control of the shipping process.

a. Subsidy

The central government's new role in transportation manifests nowhere more clearly than in the dedication of public funds to the penal project, particularly in the form of subsidies to the London merchants. Despite the characterization of transportation as an "inexpensive" punishment, transportation was, relative to existing expenditures on punishment, an enormously expensive undertaking. Between 1718 and 1772 the Treasury had paid more than £86,000 in direct subsidies to merchants who shipped convicts from London and the Home Counties.²² In addition, the Exchequer paid sheriffs 2s.6d. per week for maintaining in prison convicts awaiting transportation.²³ By contrast, 1s. per week was the most that would typically be paid out of public funds to maintain a prisoner in gaol in the eighteenth century.²⁴ The size of the expenditure on transportation was, by this comparison, quite high.

North American transportation established the precedent for large central government expenditures on transportation, and the years after North American transportation ended saw dramatically more expensive punishments. The cost of housing a prisoner on the hulks was approximately £38 per year.²⁵ Transportation to Australia was estimated in 1810 to cost the central government £100 per convict, per year.²⁶ Even when this number was reduced in the 1820s to closer to £30, it still dwarfed the previous expenditures on North American transportation.²⁷ The fact that North American transportation was less expensive than the hulks and Australian transportation should not be taken as an argument that it was an "inexpensive" punishment by the standard of the time. On the contrary, it was the first large-scale centrally-funded penal project, and one that set the stage for later, even larger, financial commitments.

It may be that the government was well poised in 1718 to accept the burden of the new punishment because the recent "financial revolution" had expanded its capacities to gain access to the nation's wealth.²⁸ The financial and organizational requirements of war had required the state to develop a more effective means of raising revenues. Just as the financial revolution enabled the British state to undertake unprecedented levels of wartime expenditure, so too did it enable it to take on the financial commitments of punishment.²⁹ The effects of these new penal expenditures were profound – both on the short-term realization of the widespread use of transportation and on the long-term development of a centrally-funded penal system.

²² Ekirch, *Bound for America*, 71. Calculated from the Treasury Money Books.

²³ Innes, "Role of Transportation," 15.

²⁴ *Ibid.*, 15-6.

²⁵ Beattie, *Crime and the Courts*, 592; Innes, "Role of Transportation," 21.

²⁶ R Hughes, *Fatal Shore*.

²⁷ Innes, "Role of Transportation."

²⁸ Brewer, *Sinews of Power*; Beattie, *Crime and the Courts*, 504; Peter Dickson, *The Financial Revolution in England: A Study of the Development of Public Credit 1688-1756* (Macmillon London, 1967).

²⁹ Brewer, *Sinews of Power*.

History of the subsidy

Prior to the 1718 Act, merchants had often been subsidized for transporting convicts, as well as military and political prisoners, but payment had been arranged in an ad hoc fashion with individual proposals to the Treasury for each shipment of individuals.³⁰ Subsidy amounts varied, as did the types of individuals who merchants were willing to ship. Less profitable individuals, such as women or the elderly, were often unable to find a shipper willing to take them.³¹ The years leading up to the 1718 Act saw contracts that would form the backdrop and the precedent for more regularized arrangements. In December 1716, just a few months after the Treasury had contracted to transport Scottish rebels at forty shillings apiece, Francis March proposed taking a group of fifty-four felons from Newgate to Jamaica at the same rate.³² This seemed to suit all, and thus March was paid £108 for the service by the Treasury. However, the keeper of Newgate prison, William Pitt, almost immediately submitted another bill to the Treasury for over £170 to recompense for irons, passage to the ship, and the expense of “passing a Pardon.”³³ This amount was paid in full, but, perhaps because of this unexpected double bill, these were the last group of convicts shipped before the 1718 legislation.

Immediately following the passage of the 1718 Act, but before arrangements for payment had been finalized, Jonathan Forward, the London merchant and former slaver, applied to take a group of 40 convicts to Maryland, and did so at no charge. Forward then proposed that for subsequent shipments he be paid £3 a head for London convicts and £5 a head for convicts from elsewhere.³⁴ The House of Lords initially resisted the proposal that Forward, or any other, merchant should be paid to transport the convicts, as there was concern that the Act did not provide a means that would guarantee that the convicts would actually be removed.³⁵

Thomson, the recorder of London and the author of the Transportation Act, was adamant that the subsidy was necessary. He recommended Jonathan Forward be given the contract for shipping convicts and argued that his proposal was a bargain since it would include fees paid to officials and costs associated with conveying the convicts to the ships. The experience of paying a merchant for transportation, then paying considerably more to the keeper of Newgate for associated expenses, would have been fresh in their minds. Thomson hastened to assure the House of Lords that these additional expenses would be paid by Forward.³⁶ Writing to the Treasury about the same matter, Thomson noted that, of the £3 initially allotted for local convicts, Forward must pay 20 shillings per head for fees of officers, and from the £5 per head for those transported “from other parts...he must have correspondents and pay some fees also.” Thomson explained,

(Forward) took away 40 the other day without reward, but cannot do so any more, considering death, sickness, and other accidents. There are now about 100 lying ready for him, for which he has ships prepared. No one else is ready to take them at so low a rate. It would be of great service to the public to have them carried

³⁰ A. Smith, “Seventeenth Century Transportation.”

³¹ Ekirch, *Bound for America*, 70-72; Innes, “Role of Transportation,” 13.

³² Treasury Money Book, 224, 281. Smith, *Colonists in Bondage*, 112.

³³ *Ibid.*

³⁴ Beattie, *Policing and Punishment*, 430.

³⁵ *Ibid.*

³⁶ *Ibid.*

away every year. By the late Act there is no power in the court to order the under-sheriff to defray these expenses. P.S. – Believes the Government will save considerably in rewards for highwaymen and housebreakers by this method. The last contract was 40s. per head, delivered on board, but the charges of irons and other expenses to get them to the ship cost the Government as much more per head, so that this is really cheap. ... To be consider'd when the Clerk of the Pipe hath returned an account of the charge the Crown hath been at for apprehending felons.³⁷

The Treasury began paying the subsidy shortly thereafter, and in 1720 a second Act (also authored by Thomson) passed that gave local magistrates the authority to contract with merchants, and required merchants to enter into a bond to take all convicts as ordered.³⁸

While the subsidy did bring a large measure of regularity to the shipment of convicts, it did not entirely ensure that the merchants would behave exactly as hoped in the early years. In the 1720s in London, an informal sentence revision process at the Old Bailey meant that many females were spared from their initial sentences of transportation.³⁹ Since these were the least profitable convicts, Forward was spared some of the impact of the de facto requirement that he take all convicts regardless of their value. In the early 1730s, with the end of the informal system of sentence revision, Forward began to be less regular about his shipments and was accordingly chastised several times by the Court of Aldermen for his delays.⁴⁰ This does not appear to have been a problem with subsequent contractors.

The subsidies also did not entirely succeed in producing monopolies, as seen when the contract changed hands. The contract did not, after all, oblige a particular Justice of the Peace to use a specific merchant; rather, it specified that only a particular merchant would be paid for convicts shipped out of certain areas. When Forward eventually lost the contract in 1739, he was thus informed “my Lords have signed a contract for Andrew Reid, of London, merchant, to be the transporter of felons, and that if he (Mr. Forward) intermeddles in such transportations after the date of Reid's contract their Lordships shall not think themselves obliged to defray the charge thereof.”⁴¹ Forward did indeed “intermeddle” in the trade, and continued to occasionally ship convicts from both London and the provinces throughout the 1740s, without receiving remuneration from the Treasury.⁴² The shipping of provincial convicts was nothing new for Forward. He had been engaged in this practice at the expense of the counties for almost the entirety of the time he held the London contract.⁴³ What was new, however,

³⁷ Calendar of Treasury Papers 1714-19, 389

³⁸ 6 Geo. I, c. 23 (1720). Although I am discussing the government's financial support here, there is also evidence of other types of tangible support for merchants. During the war of Austrian Succession when sea lanes became even more dangerous London contractor Reid requested and was granted protection for his loads of convicts. Schmidt “Convict Labor,” 37.

³⁹ Beattie, *Policing and Punishment*, 448, footnote 65.

⁴⁰ *Ibid.*

⁴¹ April 12 1739, “Treasury Books and Papers,” W Shaw, ed., *Calendar of Treasury Books and Papers*, vol. 4: 1739-1741, 1901.

⁴² Schmidt, “Convict Servant Labor,” 34.

⁴³ Ekirch, *Bound for America*, 74.

was his taking convicts from London without pay, and thus interfering with the contract held by the new government contractor, Andrew Reid.

The puzzle then arises, if Forward was willing to take convicts at no expense to the government, why did the Treasury continue to pay the subsidy for more than 30 years? Certainly, as we saw in the previous chapter, there were contemporaries who claimed that it was folly: given the obvious profitability of the trade the contractors “ought to pay instead of receiving a consideration for their passage.”⁴⁴ Farley Grubb has advanced an alternative explanation for the puzzle, arguing that the Treasury subsidy persisted because it gave the merchant an incentive to act as a “watchdog,” and that from its very inception “the purpose of the subsidy was to monitor colonial legislation.”⁴⁵ His rationale is that by “creating a dominant shipper who earned profits in the convict trade” there would be built in incentives for the merchant to object to unfavorable legislation. The evidence for Grubb’s claim is that “only the shipper who held the Treasury Contract complained to the Crown about colonial laws that inhibited convict importation.”⁴⁶

This rationale is unlikely. In debates about the purpose of the subsidy, the explicit reason provided was that the subsidy would assist in providing regular and equal shipments of all sentenced convicts, and there is no reason to suspect this was not a genuine assessment of the subsidy’s purpose. As we will see below, there was, unrelated to the subsidy, political will thrown into the project of quashing colonial resistance. Even if it was determined that an additional “watchdog” was needed for the convict trade, it seems dubious that a mechanism costing less than £86,000 (the total of Treasury subsidies) could not be found.⁴⁷

The answer to why the subsidy persisted surely lies in many factors, but those explicitly discussed when the subsidy was adopted seemed to retain particular relevance: considerations of the regularity of shipments and the desire to ensure that all convicts, regardless of the value of their labor, were transported in accordance with their sentences. We do not know which specific convicts Forward was taking when he “intermeddled” in the London trade after losing the contract. It would, however, be very surprising to learn that he was shipping women or elderly convicts if he could avoid doing so. Evidence that Forward shipped some convicts without subsidy should not be taken as evidence that a merchant would take all convicts – in a consistent, timely fashion, regardless of tobacco prices or other market difficulties – without any subsidy in place.

The experience of transportation prior to 1718 provided one example of potential irregularity. The persistent problems of transportation in the provinces, where transportation was less routinized, provided another. Although all merchants engaged in transportation were prohibited from picking and choosing among the felons and transporting only the more valuable ones, there was nothing to keep them from having variable rates when they shipped from the provinces. Thus, a smaller contractor from the

⁴⁴ May 4 1754, “Observations on the Memorial of John Stewart,” *Maryland Archives*, Vol. 55, 769.

⁴⁵ Grubb, “Market Evaluation,” 118-119.

⁴⁶ *Ibid.*

⁴⁷ Grubb’s assessment also likely overstates the differential in profitability between the convict trade for a London contractor and for a provincial contractor such as Stevenson, Randolph & Cheston. Although the Bristol firm had higher and less predictable expenses and more administrative challenges, as we saw above, they were receiving subsidies of roughly equal size to those paid in London. The difference was not in how much was paid, it was in who was paying the subsidy, and transactions costs associated with obtaining payment.

provinces said, “what we shall take (by way of payment) will depend somewhat on the age, constitution and trades of the persons to be transported.”⁴⁸ Another local contractor stipulated “if he be either too old or too large I cannot take him for under £5.”⁴⁹ This variability on a larger scale, particularly in London, could have the effect of undermining the consistent, reliable administration of the punishment and thus undercut the progress made in the years since 1718.

The Treasury subsidies represented a major financial expense for the Crown, as we have seen above. The costs for the localities, which were not covered by the subsidies, were also dramatic. An example of the scale of provincial financial outlays can be seen in Gloucestershire. From 1727 to 1773, 642 convicts were sentenced to transportation in the quarter and assize sessions, which is a fairly typical number of transportees for a county of this size. The direct costs associated with transporting these convicts over the course of these years amounted to £4,230. Gloucestershire’s budget from 1727-1773 was £46,364, meaning that transportation expenses amounted to almost 10% of the county’s entire operating expenses.⁵⁰ Furthermore, these numbers understate the financial impact of transportation on Gloucestershire because they represent only the direct expenses of transportation, such as fees paid to the merchants for shipping convicts, to the gaolers who conveyed the convicts to the merchants, and to the clerks for transportation certificates. In addition to these expenses, the county would also have been paying fees indirectly associated with transportation such as additional gaol expenses for housing convicts and poor relief for the families of transported convicts. The difficulties of housing convicts awaiting transportation were felt particularly acutely in counties that did not have easy access to major ports. Although convicts in London and Bristol might wait on average only one to two months before being transported, convicts in outlying areas might be held for 5 months or more before a contract was concluded, and then several additional months before the date of shipment.⁵¹

Although in retrospect the total cost to transport convicts seems relatively inexpensive, in fact the scale of financial commitment to punishment was both dramatic and novel. We find numerous examples of counties reacting to the financial burdens placed on them by transportation. Warwick JPs in 1730 attempted to get relief by petitioning the Treasury to be included in the existing subsidies, but were told “My Lords say no public money is in their power to defray this expense, and that the contract with Mr. Forward which is for transporting felons at the King's expense will not be enlarged.”⁵² In 1736, Hertfordshire was compelled to levy a special tax to raise £174 to ship convicts.⁵³ The city of Coventry complained that transportation expenses were “a heavy affair upon our poor small jurisdiction.”⁵⁴ The size and the novelty of the central and local government expenditures on eighteenth century transportation suggests that, at the time, it was neither the costless nor wholly “private” punishment that others have suggested.

⁴⁸ Ekirch, *Bound for America*, 80-81.

⁴⁹ Ibid. Size could be problematic given the small quarters on the ships.

⁵⁰ Ibid.

⁵¹ Ibid., 87.

⁵² November 18 1730, W Shaw, *Treasury Books*, vol. 1: 1729-1730 (1897)

⁵³ Ekirch, *Bound for America*, 80.

⁵⁴ Coventry Transportation Records, cited in Ekirch, *Bound for America*, 81.

b. Colonial regulation

Another important step the government took toward establishing the convict trade after 1718 was to ensure that there was not interference from the colonies. Although labor demands were great, the idea of being a dumping ground for convicts was not appealing to many living in the colonies, and efforts to stop the shipping of convicts had interfered with the functioning of the transportation system in the past.

The problems of the central government not taking a heavy hand prior to 1718 can be clearly seen at the turn of the eighteenth century. In 1697, in an effort to make the system of transportation work more effectively, the Lords of Trade and Plantations suggested that a penalty bond of £100 should be exacted to ensure that all convicts pardoned for transportation would labor in the plantations for a minimum of four years. Furthermore, the Recorder of London was ordered to ensure that all convicts shipped out, not simply the most marketable ones, but the “good with bad.”⁵⁵ These two initiatives (the efforts to require a bond and to ensure that even unmarketable convicts were transported) evidence awareness of problems that the 1718 and 1720 Acts would eventually address. In 1697, however, they had no effect. In part this was because, as the Recorder of London said, he was unable to find shippers for all convicts “because the laws made in the plantations against receiving them” presented problems.⁵⁶ A more thorough response, one that dealt with both regulating merchant practices and defeating colonial interference, was needed.

The problem of colonial resistance can be seen particularly clearly in the dealings of the Council of Trade and Plantations in 1697. In February of that year the Council Secretary, William Trumbull, was first seen trying to discern “in which of the Plantations the malefactors to be transported might be found most useful.”⁵⁷ The unwelcome reply he received was that “the only place disposed to receive them is Barbados” but that they will take “no women, children nor other infirm persons.”⁵⁸

In July of the same year Trumbull was tasked specifically with finding a place to ship “fifty women convicts now lying in Newgate for transportation.”⁵⁹ In this instance, many of the administrative and financial difficulties had been addressed, as the Lords of Treasury had appointed shippers who will transport the women “at the King’s charge.” The question of where the women would be sent, however, remained a stumbling block and the question was again referred to the Council of Trade and Plantations. The question was posed to the Agents of the Colonies in England as to what the opinion of each colony was on this matter. Negative responses were almost immediately received. Virginia and Maryland replied within a matter of days to inform the Board that “Virginia and Maryland ... have found the entertainment of convicts to be prejudicial and have passed a law against the importation of them.”⁶⁰ The Agent suggests that Jamaica or Barbados might welcome them, but within two days Jamaica had written to inform the Board otherwise. The 50 women convicts

⁵⁵ Coldham, *Emigrants in Chains*, 54.

⁵⁶ *Ibid.*

⁵⁷ Council of Trade and Plantations to Mr. Secretary Trumbull. Feb 1, 1697, Fortesque, ed. *Calendar of State Papers Colonial, America and West Indies*, Vol. 15: 1696-1697 (1904).

⁵⁸ *Ibid.*

⁵⁹ James Vernon to Council of Trade and Plantations, July 1 1697, *Ibid.*

⁶⁰ The Agent for Virginia and Maryland to William Popple, July 6 1697, *Ibid.*

would be of no use to us in Jamaica, nay, we would not receive them except on condition of receiving one hundred and fifty male convicts with them. It is men that we want, having sustained great losses by the earthquake and the sickness that followed it, and particularly by the men-of-war having frightened away many of our men to other Colonies and turned fifteen times as many men as they pressed into pirates. The women would only be a burden to us and would contribute nothing to our defence.⁶¹

Shortly thereafter, Barbados also refused to admit the women, stating “it will be of no convenience nor advantage to Barbados to have them sent thither, for no English women are there put to work in the field, and the people will not be willing to take such as those into their houses, so that they will be altogether useless.”⁶² The Agent for Barbados suggested perhaps Virginia and Carolina would take them, as they are “places where white women work in the field.” Virginia was not interested, but a slightly more equivocal response came from the Agent of Carolina, who thought the Lords Proprietors of Carolina might acquiesce, though he adds “what reception they will find there I cannot say.” He also adds that “most of the rest of the West Indian settlements (if not all, to my certain knowledge) will not receive women-convicts.”

New England also declined, noting “we have always desired to be excused.”⁶³ New York reported that it would not outright refuse to receive the women, so long as “they are young and fitted for labour, and provided that they be committed to some person who will take care for their clothing and diet after arrival until they can be otherwise provided for, and who will dispose of them in service for some certain number of years, not less than four nor exceeding seven.”⁶⁴ These requirements appear to have been considered too stringent, as transportation to New York was not considered further.

By the end of the month, the Board wrote to the Lords Justices to inform them that the only colony ready to receive the convicts was the Leeward Islands who had written, unenthusiastically, “it may not be improper to send them... recommend them to the Chief Governor to dispose of according to their conditions and circumstances.”⁶⁵ The reasons colonies did not want convicts, especially women convicts, were varied, and can be seen in these letters as well as in colonial regulations prohibiting their importation. For instance, Virginia’s statute, referenced in the above letter, read,

“lest the honor of his majesty and the peace of this colony be too much hazarded and endangered by the great numbers of felons and other desperate villains sent hither from the several prisons in England, (we)... order, that for prevention and avoiding the danger which apparently threatens us, from the barbarous designs and felonious practices of such wicked villains, that it shall not be permitted to any person trading hither to bring in and land any jail birds or such others, who for notorious offences have deserved to die in England... And we have been the

⁶¹ The Jamaican Merchants to Council of Trade and Plantations, July 8 1697, *Ibid*.

⁶² The Agents for Barbados to Council of Trade and Plantations, July 27, 1697, *Ibid*.

⁶³ Coldham, *Emigrants in Chains*, 55.

⁶⁴ The Agents for New York to Council of Trade and Plantations, July 20 1697, *Calendar of State Papers Colonial*.

⁶⁵ The Agents for the Leeward Islands to William Pople, July 6 1697. *Ibid*.

more induced to make this order, by the horror yet remaining amongst us, of the barbarous design of those villains in September 1663 who attempted at once the subversion of our religion laws liberties, rights and proprieties...nor hath it been a small motive to us to hinder and prohibit the importation of such dangerous and scandalous people, since thereby we apparently loose our reputation, whilst we are believed to be a place only fit to receive such base and lewd persons.⁶⁶

After 1718, there continued to be colonial apprehension and attempts to stymie the trade. The difference between the pleading of Trumbull and the decisive opposition of the Crown after 1718 was marked. While the convict trade became even less popular in the colonies as the eighteenth century wore on, it gradually did become clear that the government was now determined to see it succeed, and was willing to quash colonial efforts to the contrary.

Almost immediately following the passage of the 1718 Act, the assemblies of both Virginia and Maryland attempted to intervene. In early 1719, the Maryland assembly raised the issue and proposed an Act to deal with its concerns, but the upper house tabled the Act, anticipating that the governor would refused to sign it.⁶⁷ By way of explanation for the postponement, the upper house noted the Act “does not directly prohibit the importation of them yet it effectually discourages any persons from buying them, which must needs be a great detriment to any merchant who shall undertake the transportation of such convicts. Therefore we have great reason to believe his Excellency the governor will not pass a law, so contrary to his instructions.”⁶⁸

In 1722, Virginia went a step further and succeeded in passing a law on the matter by inserting a long set of elaborate provisions regarding convicts in an Act concerning servants.⁶⁹ The 1718 Act sent a strong enough signal to Virginia that the colony understood that an outright attempt to ban the importation of convicts (such as their 1670 rule had attempted) would not be allowed. Instead, they attempted to frustrate the importation through a system of regulations and fees. Citing frauds committed by convict shippers and crimes committed by convicts as a rationale, the law required shipmasters to sell convicts for their entire term of transportation, and to reveal the true cause of their transportation to the buyer, on penalty of £10 for failure to do so. The law also required shipmasters to give a bond of £50 to not let convicts on shore before they were sold, and required everyone involved in the sale process to give a bond of £100 for their good behavior for the first two months after the sale date. Each person who purchased a convict was required to bring the individual to the first or second court after the sale, to document the name and offense for which the convict was transported, and to enter into recognizance of £10 for the good behavior of the convict.⁷⁰

Had this Act been allowed, it would have made the practice of transporting convicts so burdensome that the practice of transporting convicts to Virginia likely would

⁶⁶ *Hening's*, 510.

⁶⁷ *Archives of Maryland*, vol. 33, 345, 349-50.

⁶⁸ *Ibid.*

⁶⁹ *An Act for amending the Act concerning servants and slaves, and for the better government of convicts imported, and for the further preventing clandestine transportation of persons out of this colony*, Colonial Office, Acts of Virginia, unpagued. This law is listed, but not printed in *Hening's*, vol. 4, 106.

⁷⁰ *Ibid.*

have been discontinued. As soon as the Act was reported in England, however, the Board of Trade took swift, decisive action to repeal the law. Jonathan Forward, then the government contractor, sent a letter to the Board of Trade in July 1723.⁷¹ He maintained that the entire system of transportation would be undone by this legislation. It would, he said, “disable me from performing my contract with the government for transporting felons, and in great measure destroy the intent of the Act of Parliament lately passed for that purpose.”⁷² The Board of Trade heard Forward on the subject and the next day referred the matter to their attorney, Mr. West. West replied within a week, agreeing with Forward: “The restrictions imposed . . . amount to a prohibition of any convicts being imported. If this example should be followed by other Colonies, the execution of the Acts of Parliament concerning transportation will be rendered wholly impracticable.” In August the Privy Council, acting on the advice of the Board of Trade, disallowed the Virginia regulation.⁷³ The swift action on the part of the Board of Trade and the Privy Council gave a clear sign of how seriously this matter was taken, and that there was no room for negotiation.

The Maryland legislature, not heeding this example, nonetheless passed an Act with even more stringent terms in 1723, entitled “An Act to Prevent the great Evils arising by the Importation of Convicts into this Province and for the better Discovery of such when Imported.”⁷⁴ Like the Virginia Act, the reasons for the concern were the crimes committed by the convicts and the failure of the purchasers of convicts to keep convicts under control. The purchasers of convicts were required to provide a recognizance of thirty pounds for the good behavior of the convict for one year, and this was to be renewed yearly for the term of the convict’s servitude. Failure to do so carried a penalty of four thousand pounds of tobacco. Shipmasters were required to provide similar bonds as required by the Virginia Act.

The swift reaction by the Board of Trade and Privy Council, however, did not go unnoticed, and this Act was rejected by the Maryland proprietor, Lord Baltimore, who identified the potential problems the Act would meet if it came before the Privy Council. The Act would, he said

disable the Contractor with the Government of England for Transporting of Felons to his Majesties plantations from performing his said Contract and that the said Act does in great measure destroy the intent of the Acts of Parliament made for that purpose in England, and their Excellencies the Lords Justices in Council having last August disallowed an Act of the like nature in . . . Virginia, we . . . hereby declare the said Act to be null void and of no effect.⁷⁵

⁷¹ Mr. Forward to Mr. Popple. June 26 1723, Cecil Headlem, ed. *Calendar of State Papers Colonial, America and West Indies*, Volume 33: 1722-1723. (1934)

⁷² *Ibid.*

⁷³ *Acts of the Privy Council, Colonial*, vol. 3, 54-55

⁷⁴ *Maryland Archives*, vol 35, 352.

⁷⁵ *Ibid.*, 212.

He concluded his discussion of the difficulty of forbidding transportation by lamenting, “I could heartily wish they were sent to any other of his Majesty’s Plantations but while we purchase they will send them, and we bring the Evil upon ourselves”⁷⁶ For the next several decades, Virginia and Maryland ceased attempting to release themselves from the burden of transportation. It had become abundantly clear that there was a newfound commitment to transportation in England and that nothing would be allowed to interfere with the penal policy.

Of course, eventually something would interfere with North American transportation: the outbreak of war. The war both interrupted trade and broke the political relationship. It is telling that, even when trade relationships were re-established, and a potentially profitable trade in convicts was again theoretically possible, transportation to North America was not viable.⁷⁷ North American transportation permanently collapsed at the point at which the central government no longer commanded the political authority to make it work. In 1772, with the demise of the subsidy and the threat that the trade would no longer remain profitable, transportation persisted. When the central government was no longer able to dictate the use of the practice, however, it was discontinued.

Administration

The above sections have demonstrated the government’s commitment to transportation in two ways: first, the dedication of subsidies to the project; and second, the taking of a heavy hand with respect to colonial actions that might hamper the trade. The third area where we see the government involved in a penal project of new scope is in the administrative commitments undertaken. This level of oversight was unknown in previous uses of transportation or in other punishments.

The greater degree of control that the government could exercise over the conduct of merchants with whom a contract had been made was an important component of the legislation. This leverage was invoked by William Thomson, who argued in opposition to allowing convicts to arrange their own passage. The government contracting merchant, unlike an independent merchant, Thomson said, “is esteemed an Officer with a public trust, and if he should willfully misbehave does not only forfeit his bond but is liable to public censure.”⁷⁸

The new administrative control over the process of transportation was seen chiefly in the development of requirements to provide security for the felons they transported and to procure documentation that the convicts had been dispensed with in keeping with the existing regulations. Attempts to regulate transportation in this manner had cropped up in the seventeenth century, but there was not a decisive movement in this direction until the eighteenth century. The most obvious precursor to the contract envisioned by the 1718 and 1720 Acts can be found not in prior contracts for transporting felons, but in one for transporting “rebels” in the wake of the 1715 Jacobite rising. A Liverpool merchant, Sir Thomas Johnson, sent in a proposal to the Treasury offering to transport the men: “Forty shillings per head were to be allowed for the transport, and the rebels were to serve Sir Thomas Johnson, or his assigns, in any of his Majesty’s

⁷⁶ *Ibid.*, 213.

⁷⁷ For a discussion of failed attempts to ship convicts in the intervening years, see Reece, *Origins*.

⁷⁸ Thomson, quoted in Beattie, *Crime and the Courts*, 508.

plantations for seven years.”⁷⁹ These terms were familiar and can be seen also in contracts for transporting felons at this time. The more interesting feature of this contract is that, upon accepting it, the Treasury stipulated that Johnson would be paid only after producing a certificate of shipment from the mayor of Liverpool and the collector of customs. He was also required to subsequently produce certificates of arrival from the governors of the plantations where the rebels were sent.⁸⁰

The echoes of this arrangement are clearly seen in the 1718 Act which notes that contractors who accept convicts must:

give sufficient security to the satisfaction of such Court that he or they will Transport... effectually such offenders conveyed to him...and procure an Authentic Certificate from the Governor or the Chief Custom-house Officer of the Place (which Certificate they are hereby Required to give forthwith, without fee or reward, as soon as conveniently may be) of Landing such Offenders ... (death and Casualties of Sea excepted) and that none of the said offenders shall be suffered to Return from the said Place to any Part of Great Britain or Ireland by the willful Default of such person or Persons so Contracting.⁸¹

In 1720, another Act regulating transportation further expounded on the administrative details of local transportation, noting “all securities for Transportation hereafter to be taken... shall be by Bond, in the name of the respective Clerks of the Peace (who) shall from Time to Time prosecute such Bonds in their own Names to which purpose they... shall be paid all such Costs, Charges, and Expenses as they ... shall sustain or expend in such Suit.”⁸²

In practice, transportation’s new administrative requirements meant that convict shippers were responsible for a great deal more “paperwork” than we typically associate with eighteenth-century punishments. Some of this was generated directly by the government’s requirements, while some was generated by the way transportation was subject to trade regulations. The new administrative procedures also resulted in keeping more detailed records of the movement of convicts. Although it would be a stretch to call these “files” on offenders, Cornelia Vismann’s observation about law and history seems appropriate: “a new way of binding or of writing things down, a change in the way data are collected, affects the legal framework.”⁸³ This change in the way things were “written down” can perhaps be seen most clearly in the juxtaposition of two methods of keeping track of offenders. Until transportation was adopted, the “record” of a past offense was literally placed on the offenders body, usually through the branding on the thumb associated with clerical release. The presence of this branding would identify a recidivist, and sentencing determinations could be made accordingly. By contrast, in 1714, William Thomson, the author of the 1718 Transportation Act, acting in his capacity as the Recorder of London, instituted the practice of keeping a written record of all offenders that came before the City courts. The book was designed as a reference book,

⁷⁹ “January 2-March 30, 1716,” *Calendar of Treasury Papers*, Vol. 5: 1714-1719 (1883), 183-202.

⁸⁰ Treasury Money Book, cited in AE Smith, *Colonists in Bondage*, 197.

⁸¹ 4 Geo. 1, c. 11. (1718)

⁸² 6 Geo. I, c. 23 (1720)

⁸³ Cornelia Vismann, *Files: Law and Media Technology*, trans. Geoffrey Winthrop-Young (Stanford University Press, 2008), xiii.

almost certainly for purposes of tracking recidivists, and was likely a great help when it came to determining those who had been previously transported. It had alphabetical tabs on the right side, and tracked the date of the session, the offender's name, the category of offence, the verdict, and the punishment imposed.⁸⁴

This "record keeping" was of course associated with the courts, but convict merchants were responsible for much of the documentation under the new regulations. From the transportation merchant's point of view, after the contract for transportation was completed, the jailer would provide the first "paperwork." The jailer, in the course of conveying the convicts to the ship, was responsible for bringing an order of the court for the convicts, on which he would certify that the contractor had provided security for the convict.

A certificate from John Stewart, Duncan Campell's trading partner, provides what is likely a typical form, with multiple entries on one page:

List of convicts ordered to be transported from the Town and Port of Dover...and from the last Michelmas Sessions held for the county of Kent, viz.:

Town and Port of Dover

1. John Gibbs for 7 years

Michelmas Quarter Sessions,

1. Jonathan Bowler

2. Richard Ellis for 7 years

These are to certify that John Stewart of London, Merchant, hath contracted and given security for the effectual transportation of the above named felons and that the securities are in my custody. Witness my hand this 18th day of January; 1769.

Jerome Knapp. Clerk of the Assizes of the said County of Kent.

I do humbly certify that the within list of names of the convicts...have been shipped on board the Thornton of which ship I am master in order to their being effectually transported to some of His Majesty's colonies or plantations in America.

London. 20th January 1769 Christopher Reed.⁸⁵

This signed order of the court would be conveyed to the captain, and shipped to the colonies along with the convict.⁸⁶ These orders of the court, or as they were called by the shippers, "conviction papers," were of enormous significance. An example of why can be seen in a 1720 voyage where the convicts (according to a surviving ship's mate) mutinied and destroyed the conviction papers for the 41 convicts on board.⁸⁷ While we

⁸⁴ Beattie, *Policing and Punishment*, 431-432.

⁸⁵ Quoted in Oldham, *Convicts to the Colonies*, 18-19.

⁸⁶ Duncan Campbell to Isaac Strong, July 14 1772. Campbell corrects Strong's mistake, and informs him of the correct procedure, "I now return to you the order of the court, which is not complete until you have certified thereon that I have on consequence of their order contracted and given needful security for the transportation of the above convict, which you will please to do and return to me in course of post as it must accompany the convict abroad and you will please also fill up the usual bond for me to execute" Duncan Campbell Business Letterbook.

⁸⁷ Schmidt, "Convict Servant Labor," 81.

do not know what became of these particular convicts, the rationale for their action can be guessed: the conviction papers were used to distinguish a convict from any other type of indentured servant; and while convicts were subject to be sold into seven year sentences of transportation, servants without “paperwork” (indenture papers or conviction papers) were, by the “custom of the country” only liable for 4 to 5 years of service.

In addition to these orders of court, or “conviction papers,” the jailer would supply and fill out a bond for the contractor to sign.⁸⁸ A transportation bond between Stevenson, Randolph and Cheston and the city of Chester reveals standard terms: the firm agreed to transport all convicts within two months of the signing of the bond and that it would not aide convicts in returning to Britain before their sentences were expired. They also agreed to provide an authentic certificate of all convict arrivals from the American destination. Finally, the bond specified the penalty for failure to meet these terms, which was typically £40 per convict, although in some cases it was as high as £50 per convict.⁸⁹ According to William Thomson, these bonds were subject to scrutiny. Thomson claimed to “read over carefully the names in every bond that is given by the merchant for transportation, and see with my own eyes, that every thing is right.”⁹⁰

While it is unlikely that many were as thorough as Thomson claimed to be, there is some indication that the terms of the bonds were taken quite seriously. With few exceptions the merchants appear to have shipped even the unprofitable convicts as ordered. They also scheduled their voyages to leave within two months of signing the bond - though, of course minimizing the time they were in possession of convicts before sailing was also in their own financial interest. According to an account of the transported convict John Poulter, the promise not to aide convicts in returning to Britain was also taken seriously. Although Poulter boasted that there were easy ways for a convict to return to Britain, he also indicated that the merchants understood themselves to be sufficiently constrained by the dictates of documentation that they would not participate in the convicts’ direct return themselves:

“I never heard of any Convict that came back again in the same Ship they went over in; for the Merchant or Captain gives a Bond to the Sheriff of the County where such Convicts go from, to leave them in America, and they get a Receipt from the Custom there”⁹¹

When the convict ships arrived in the colonies they would be subject, among other things, to the regulations related to trade. Naval and customs officers, treating the convicts like any other shipped good, would check papers, including the orders of the court shipped with the convicts. There was some variation in procedure depending on where convicts landed, and at what point in the century they arrived. The naval officer would typically record information such as the ship’s name, tonnage, port of debarkation, cargo, number of passengers, where and when the ship was bonded, and the names of the captains. Convicts might be listed as “passengers” or “servants” or they might be listed with goods in the “other cargo” category as “convicts.” These entry books, by the

⁸⁸ Duncan Campbell to Isaac Strong, July 14, 1772, Duncan Campbell Business Letterbook.

⁸⁹ K. Morgan, “Organization,” 210.

⁹⁰ Thomson, quoted in Ekirch, *Bound for America*, 71.

⁹¹ John Poulter, *The Discoveries of John Poulter, alias Baxter; who was apprehended for robbing Dr. Hancock, of Salisbury, ...* (Sherbourne: R. Goadby, 1753), 28.

convention of trade, not for reasons to do with convicts specifically, were submitted quarterly to the Treasury in London.⁹² Although these formed a part of the regulation of the convict trade, they are not unique to the transportation of convicts as opposed to other goods. In this sense, they are perhaps better understood as a way in which the government was able to extend its regulatory capacity by using the existing mechanisms of commerce.

Some forms of information collected were more specific to the convict trade, and seemed more narrowly tailored to the purposes of colonial governance. In Maryland, at least in the ports of Annapolis, a specific form to certify felons developed by the middle of the eighteenth century. For each convict a record was made containing age, sex, “quality” (meaning skills or trade), “complexion,” “stature,” and “origin” – which was variously interpreted as the name of a jail, a town or a county.⁹³ Officers in Virginia did not collect similarly thorough information, though they did record convicts’ names, sex, and sometimes the names of those who had died at sea.⁹⁴ The purpose of these books is ambiguous. They may have been intended to provide information for authorities on either side – or possibly both sides – of the Atlantic.

The processes of obtaining “an authentic certificate” that convicts had landed in the colonies can be understood, like the bonds discussed above, as a more direct form of administrative oversight. It, however, was also dependent on harnessing colonial trade mechanisms. The methods of certification varied, and further study would be needed to chart the various conventions. A few examples of procedures can, however, be noted. Merchants who shipped small numbers of convicts appear to have received individual “delivery certificates” or “landing certificates” for each convict, while merchants who routinely shipped convicts would collect one landing certificate listing all convicts. In some cases, the “landing certificate” would be collected not on the arrival of the ship, but months later when the ship departed from the same port.⁹⁵ It is possible that this was a mere convenience to the captains; it is also possible that for a time the colonial authorities were responding to the suggestion that the convict should only be certified when sold into the hands of a responsible party, and not when he merely was placed on shore. On other instances, the landing or delivery certificate was issued upon arrival. Sometimes the customs officers would inspect the convicts for disease, especially when fears of jail fever were prevalent. Other times the officers would note that the “said persons being called [ostensibly from names on the conviction papers] did Severally answer to their names.”⁹⁶ These landing certificates were then placed in the care of the captain of the ship, and returned to Britain.

While the orders of court that the jailer and ship master signed certifying that the convicts had left Britain were used to verify that the contractor was entitled to the subsidy, the landing certificates were submitted as evidence that the terms of the contractor’s bond had been honored. These two streams of documentation, and the trade mechanisms each relied on, formed an important component of the increased administrative requirements of an effective form of convict transportation.

⁹² Schmidt, “Convict Servant Labor,” 72-85.

⁹³ *Ibid.*, 79.

⁹⁴ *Ibid.*, 80.

⁹⁵ *Ibid.*, 84-85.

⁹⁶ *Ibid.*, 84.

The emphasis of the above has been on the ways transportation issued in new forms of regulation, but the evidence of an increased administrative capacity for punishment can also be plainly seen when transportation to North America ended. Shortly after trade was interrupted in 1775, Duncan Campbell stopped being a merchant who dealt in convicts, and took on a new role in the penal system as the overseer of the Thames prison hulks. Campbell received a fixed sum in exchange for housing, clothing, feeding and overseeing the work of the convicts, who were drawn from London jails as well as various county jails.⁹⁷ The hulks were the same ships Campbell had used for shipping convicts, and many responsibilities were familiar to Campbell, who had been used to providing for convicts – though not managing their labor – on his ships en route to Virginia.

Despite these similarities from Campbell's point of view, the hulks contain very little of the private character that has been associated with transportation. Even the prospective profits from the convict's labor were to be deducted from the pay Campbell received from the government.⁹⁸ The punishment of the hulks had an even more national character than the punishment of transportation, as seen in the fact that the central government was now paying for the punishment of prisoners from outside London and the Home Counties. Campbell's role of supervising and providing for the long term subsistence of convicts from all over England in exchange for a fixed sum seems a far cry from a system of transportation that some have called wholly private in character. The change we actually witness, however, was somewhat less dramatic than a shift from a "private" punishment to a "public" one. While the balance between the central government and private actors certainly shifted with the move to the prison hulks, the foundations for these changes had been in place for the better part of a century.

The subsidies paid to contractors had paved the way for the subsequent commitment of government resources to the project of punishment. The willingness to exert control over the colonies' regulation of convict importation gave way to a willingness to more directly "rule" the much closer outpost of a ship anchored in the Thames. And finally, the paperwork and written records of North American transportation gave way to more extensive record keeping and oversight– seen for instance in tracking death rates in the hulks, keeping a register of offenders confined there, and what their offenses were, and compiling data about the conditions of their confinement.

The three areas discussed above: dedication of public funds, nullification of colonial resistance, and increased administrative and regulatory control can be understood as three ways in which the central government committed itself in a new way to the project of punishment. Although Chapter Three focused on the private aspects of transportation, and Chapter Four has thus far focused on the public aspects of the punishment, I have argued throughout that transportation represented an interesting blending of commercial enterprise and state action. My contention is that the relationship between transportation and the expansion of serious punishments can be explained more fully if we look to the relationship between state action and commercial enterprise that

⁹⁷ Oldham, *Convicts to the Colonies*, chap. 2.

⁹⁸ *Ibid.*

manifested in transportation. Although traditional accounts of “net widening” associate the phenomenon with the totalizing power of large bureaucratic states as manifested in the penal institutions of the 19th century, my account suggests that the dramatic growth in penal capacity occurred in the 18th century, and that power was effectively mobilized through the increased commitments of private merchants and public officials.

Although this type of blending has not been explored extensively in the context of crime and punishment, the theme is a familiar one in studies of eighteenth-century state formation and the founding of a British overseas empire. One way that this relationship between commercial enterprise and state action can be understood is that a weak national government, lacking bureaucracy and armed forces, and the financial means to acquire these things, delegated responsibilities to subordinate bodies. A more compelling view is posed by Micheal Braddick, an historian of early modern England. Braddick complicates the story, arguing that even as an empire was being built through delegation to commercial bodies, an increasing amount of administrative activity was taken on more directly by the national government in the seventeenth century.⁹⁹

Seventeenth- and early eighteenth-century colonial activity existed in a space that combined state and private elements in many areas, and relied both on private action and on the increasing financial and administrative capacity of the national government. There are thus many parallels to the public/private pairing we see in transportation. A classic example of this phenomenon is the evolution of the military.¹⁰⁰ In the modern context, the military, like the penal system, often contracts with private agencies to provide services. Also like the penal system, military forces in the seventeenth and eighteenth centuries relied on a mix of public resources and private capacity. But in the seventeenth and eighteenth centuries the evolution was not from a public military of standing armies to a partly privatized one.¹⁰¹ Nor is it the case that the state simply delegated military responsibility to private actors. Rather, standing armies and government-owned navies developed through the state stimulating private investment in military capacity as a way to supplement the emerging effort to supply its growing mercantile empire with the military protection it required. This public stimulation of private investment in military, and particularly naval, capacity was accomplished in the first instance through greater, not lesser government action, usually in the form of subsidies. In the sixteenth century, the royal government began paying a bounty to those who built ships greater than 100 tons. In exchange for accepting this government largesse, the ship owners then owed the Crown service during wartime.¹⁰²

This system of subsidizing the private development of a navy that could be called into public service lasted into the eighteenth century, when it was supplanted as a means of satisfying the state’s military needs by greater government investment in state-owned

⁹⁹ Micheal Braddick, *State Formation in Early Modern England, c. 1550-1700* (Cambridge University Press, 2000).

¹⁰⁰ Nicholas Parrillo, “The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century,” *Yale Journal of Law and the Humanities* 19 (2007): 1-96.

¹⁰¹ *Ibid.*

¹⁰² Micheal Braddick, “The English Government, War, Trade, and Settlement,” in *The Origins of Empire*, ed. Nicholas Canny, vol. 1, *The Oxford History of the British Empire* (Oxford University Press, 1998), 1625-1688.

naval resources.¹⁰³ This investment was made possible in part by the state's growing ability to effectively collect taxes and customs duties.¹⁰⁴ But, as is the case with punishment, it was also made possible by the foundations that were put in place in the previous century as the government took increasing role in managing, directing, and harnessing the capacity of private actors and mechanisms of trade.

The institution of privateering reveals additional aspects of the public-private partnership. Privateering was a form of "government by license," in which the state authorized armed merchant ships to seize as prizes ships flying the flag of a power with whom the royal government was at war.¹⁰⁵ Beyond licensing the use of private ships to prey on enemy vessels, the government also allowed privateers to profit from their captures. The result of this mix of government license and financial incentives was the expansion of the naval resources serving Crown interests during wartime. Like Braddick, Parrillo emphasizes that the story of the "privatization" of governmental functions (in this case military functions) is historically misleading. Instead, the state initially developed its capacity to undertake warfare by drawing in the private sphere, and only later fully "publicized" those services that had previously been provided through some form of public-private partnership.

The growth of the military provides just one example of a phenomenon that can be seen in various contexts. The government created financial incentives for, granted legal license to, and regulated the action of, private actors undertaking actions on behalf of the government. Private actors settled and administered new colonies, fought wars, established trading outposts, conducted diplomacy with foreign sovereigns, and regulated trade relationships within towns and cities. They undertook these tasks, not because the British state was "privatizing" its operations, but rather because through the combination of harnessing private capacities and increasing governmental regulation and administration, the state could expand its reach. Like the punishment of transportation, and like the "privatization" of punishment discussed by Feeley in the modern context, the effect of this synergy was always ultimately greater, not lesser, government capacity.

Conclusion

Although transportation has been characterized as a "private" and a "local" punishment, I have argued that it is more correctly understood as a project that is also "public" and "national." While Chapter Three primarily focused on merchants, Chapter Four has primarily been concerned with the ways the central government took an increasing role in the administration of punishment during North America transportation in the eighteenth century. Transportation, a punishment that dramatically expanded the state's capacity to punish, was, I argue, made possible by unprecedented forms of government support paired with new forms of reliance on private actors.

¹⁰³ Ibid.

¹⁰⁴ Parrillo, "De-Privitization," 290-91.

¹⁰⁵ Ibid.

Chapter Five: Penalty and Labor

In this chapter, I turn to an exploration of transportation in the context of penalty and labor discipline. In shifting the focus away from the administration of transportation, and toward the penal and labor purposes of punishment, a different aspect of the process of “net widening” is implicated. In addition to needing effective infrastructure to flourish, transportation also had to be consistent with dominant understandings of the appropriate uses of the coercive power of the state. The evolution of punishments is always shaped, to some extent, by what is viewed as a credible, meaningful, just, and legitimate use of force within a specific historical context.¹ Authority is undermined, rather than reinforced, when punishment can not be understood as oriented toward an acceptable end, and scrutiny of the legitimacy of punishment is heightened during periods of penal change.² Punishments are both constrained by and constitutive of ideas about the acceptability of the exercise of coercive power.³ As John Beattie has put it, changes in penal practices “evolve within a larger social and cultural context that in imperceptible ways alters the limits of what is acceptable in society and what is not.”⁴

Transportation, in many ways, appears to be an unlikely candidate for an accepted expansion of the state’s coercive power. It was a punishment that combined elements of the unpopular punishments of banishment and forced labor, that bore similarities to the reviled practices of galley servitude and naval impressment, and that required localities to comply with an expensive national penal policy. Yet, unlike press gangs, frequent public executions, and prison reforms, transportation seems to have been regarded as an essentially acceptable form of coercive power. Although there were many aspects of transportation that received criticism, there was very little resistance to the punishment. It was not attended with riots or other acts of group resistance, and there were no counties that refused to comply with the new transportation policy. In order to understand transportation’s ability to “widen the net” so dramatically in the eighteenth century, we must consider why eighteenth-century transportation appeared to contemporaries to be a legitimate use of coercive force. This chapter addresses this puzzle by considering transportation in the context of shifting ideas about the purposes of punishment, and changing conceptions of liberty and labor.

The preamble to the 1718 Transportation Act contains an unlikely trio of aspirations for the new transportation policy. The first purpose that the Act articulates is that transportation will increase the terror of the criminal law, where past punishments have “not proved effectual to deter wicked and evil-disposed persons.”⁵ Transportation’s purpose is then described as being rooted in an expansion of mercy, and as the appropriate penal response for those “to whom Royal Mercy hath been extended.”⁶ Finally, the Act’s preamble contains the aspiration that transportation will provide a source of colonial labor. Transportation will, it is hoped, provide a solution to the problem that “in many of his Majesty’s Colonies and Plantations in America there is a

¹ Patricia Ewick, “Power, Justice, and Punishment,” in *Justice and Power in Sociolegal Studies*, ed. B. Garth and Austin Sarat (Northwestern University Press, 1998), 36.

² Susan Dwyer Amussen, “Punishment, Discipline, and Power: The Social Meanings of Violence in Early Modern England,” *The Journal of British Studies* 34, no. 1 (January 1, 1995): 5-9.

³ David Garland, *Punishment and Modern Society: A Study in Social Theory*, 1st ed. (University Of Chicago Press, 1990), 19.

⁴ Beattie, *Crime and the Courts*, 470.

⁵ 4 Geo. 1, c. 11. (1718)

⁶ *Ibid.*

great want of servants who, by their labour and industry, might be the means of improving and making the said Colonies and Plantations more useful to this nation.”⁷ The transportation policy set forth in the 1718 Act was thus portrayed ambitiously as having the potential to simultaneously increase deterrence, enact mercy, and augment the colonial labor force.

These three goals set the stage for an inquiry into transportation’s ability to be viewed as a legitimate form of punishment. I first consider the purposes of transportation against the backdrop of shifting eighteenth-century penal goals. I then turn to a discussion of legitimacy in the context of labor practices and associated conceptions of liberty.

I. Transportation and the Shifting Goals of Punishment

a. From Scaffold to Penitentiary

While scholars have often identified and explored the purposes of corporal and carceral punishments in the eighteenth century, there has been very little discussion of the penal purposes of North American transportation.⁸ In order to explore this facet of transportation more fully, I begin by situating transportation against the backdrop of the two overlapping penal regimes it spanned. Transportation was the most frequently used punishment in the middle half of the eighteenth century, a period that witnessed the dramatic expansion of the number of capital sanctions and a continued reliance on corporal and capital punishments. It was also, however, a period of increasing interest in punishments of confinement and labor.

The majority of writing on the subject of eighteenth- and nineteenth-century penal evolution has been organized around two broad areas of inquiry: the decline of the use of public corporal punishments and the subsequent rise to prominence of punishments of confinement. As Paul Griffiths notes, “*the question*” about penal change – in the sense of being both the most important and the most frequently asked – is “how did society get from the grisly gallows to ... ‘well ordered’ prisons?”⁹ Accounts of the decline of a penal regime that centered on corporal punishments look at both alterations to the “Bloody Code,” as well as the movement away from primary reliance on punishments such as public whipping and the pillory. Studies of the rise of a carceral regime focus on both the initial ascendance of punishments of confinements such as those in Bridewell, the increased interest in reforming and expanding local prisons, the emergence of the penitentiary concept in England, and the initial actualization of these ideas in the American context.¹⁰ As the forms of punishment shifted “from scaffold to penitentiary,” the purposes of punishment also changed. Spectacular, ritualistic and public displays of physical punishment were designed to act on the crowd and were strongly associated with the goal of general deterrence. Punishments of confinement at labor, by contrast, were increasingly associated with the purpose of individual reformation.

North American transportation, however, falls outside this neat typology. Some authors take for granted that transportation should be understood as part of the older regime of physical punishments, while others characterize it as new method of social

⁷ Ibid.

⁸ But see Beattie, *Crime and the Courts*; Devereaux, “In Place of Death.”

⁹ Paul Griffiths, “Introduction: Punishing the English,” in *Penal Practice and Culture, 1500–1900: Punishing the English*, ed. Paul Griffiths and Simon Devereaux (Palgrave MacMillan, 2004), 1.

¹⁰ For a review of this literature, see Bruce Smith, “English Criminal Justice Administration, 1650-1850: A Historiographic Essay,” *Law and History Review* 25, no. 3 (October 1, 2007): 593-634 and Innes and Styles, “Crime Wave.”

control.¹¹ The question that animates the initial portion of this inquiry is thus, was transportation viewed as legitimate because it was a familiar expression of long accepted penal goals and practices, or because it was anticipating and responding to changing conceptions of the appropriate means and ends of punishment?

Ultimately, I argue that the answer is both and neither. North American transportation possessed what Simon Devereaux has called an “interpretive flexibility” that allowed it to be understood as consistent with multiple conceptions of penalty.¹² Devereaux, writing about the “universal appeal” of Australian transportation, situates his inquiry against the backdrop of local variations in understandings of the appropriate aims of punishment, rather than the shift from “scaffold and penitentiary.” The essential argument is, however, similar. The ambiguity of transportation’s penal intention gave transportation the unique ability to be understood as consistent with an array of penal goals. Devereaux notes,

Then as now, the authority of the state to punish was critically dependant on its apparent ability at once to satisfy the most optimistic and most pessimistic visions of human potential. By simultaneously holding forth the terror of exile and the promise of redemption, transportation to Australia fulfilled this role for several decades.¹³

North American transportation’s ability to “widen the net” of penal sanctions was enabled by a similar quality. Some thought transportation would deter, others hoped it would lead to reform, and others still thought it would “merely incapacitate.” A central object here is to parse the extent to which transportation possessed its own independent logic of punishment as well as encompassing characteristics of older (deterrent) and newer (reformative) penal regimes. I begin by considering the aspiration that transportation should incapacitate, and then turn to deterrence and reform.

b. Transportation’s Penal Purposes

The lack of discussion of the penal purposes of transportation in the extant literature may be attributed, in part, to the lack of contemporary writing directly concerned with advocating transportation or explicating its purposes. Although transportation was the most popular, in the sense of most frequently used, punishment in the middle half of the eighteenth century, almost all writing about North American transportation took the form of criticisms. Some of the fullest discussions of the goals of transportation are thus found in the arguments of critics who opposed this penal form and advocated instead for punishments of imprisonment. Given their polemical purposes, we should not take at face value their conclusions concerning the “failings” of transportation. Nonetheless, their discussion of transportation’s failures is instructive. In order to be

¹¹ Works that characterize transportation as an older form of punishment include William Branch Johnson, *The English Prison Hulks* (Phillimore, 1970); Radzinowicz, *History of English Criminal Law*; Willis, “Transportation Versus Imprisonment.” Works that characterize transportation as new form of social control include, Rusche and Kirchheimer, *Social Structure*; Beattie, *Crime and the Courts*.

¹² Devereaux, “In Place of Death,” 72.

¹³ *Ibid.*

effective, their critiques needed to identify (allegedly) unrealized goals which their audience would recognize as well.¹⁴

a. Incapacitation

To the limited extent that the penal goals of North American transportation have been considered in the extant literature, there has been a tendency to dismiss transportation as having no purpose, other than that of incapacitating offenders.¹⁵ Since the penal purposes revealed in the shift “from scaffold to penitentiary” are primarily discussed in terms of the transition from deterrence to reform, a punishment that only incapacitates appears less relevant. I argue in this section that, although there was a strong suggestion that transportation should incapacitate (and was failing to do so), this was not the only penal purpose of transportation, nor was the aspiration of “mere” incapacitation unambiguously endorsed.

The most obvious thing that transportation did was to rid the mainland of a particular offender, and for many this has seemed to be its primary purpose. Roger Ekirch says of transportation, “its most compelling advantage, in the eyes of policymakers, lay in expelling from British shores significant quantities of threatening offenders.”¹⁶ He later emphasizes, “transportation’s chief value lay in keeping threatening malefactors safely exiled abroad.”¹⁷ John Beattie concurs. While noting the possibility that transportation was meant to reform, he describes transportation’s primary appeal as an “alternative substantial punishment that would prevent the offender from simply returning to society.”¹⁸ George Fisher makes the case most forcefully, stating that transportation’s goal was neither deterrence nor rehabilitation but “merely... what we today call incapacitation.”¹⁹

There is also contemporary support for the idea that the incapacitation of the convicted individual was the primary goal of transportation. Simply characterized by one eighteenth-century author, transportation was used because it was “the wish of the government to have them out off (sic) the country.”²⁰ William Thomson similarly opined, “the intent of the law... being to prevent their doing further mischiefs which they generally do if in their power by being at large.”²¹ Keeping “bad” individuals from committing further crimes was all that some asked of transportation, noting “those who merit transportation ... are bad subjects, and, if allowed scope, might essentially injure society.”²² “Draining the Nation of its offensive Rubbish” was the way another

¹⁴ This is particularly important to make explicit, because criticisms of transportations’ failures are sometimes taken as evidence that transportation was not directed at a particular goal. For instance, the fact that transportation persisted even though many contemporaries identified transportation as a poor deterrent, has led other authors to assume that transportation was not intended as a deterrent.

¹⁵ Even Devereaux, though exploring transportation’s other purposes, states that incapacitation was transportation’s “essential appeal.” Devereaux, “In Place of Death,” 59 .

¹⁶ Ekirch, *Bound for America*, 19.

¹⁷ *Ibid.*, 225

¹⁸ Beattie, *Crime and the Courts*, 518.

¹⁹ George Fisher, “Birth of the Prison Retold,” *Yale Law Journal* 104, no. 6 (1995): 1235-1324.

²⁰ Quoted in Ekirch, *Bound for America*, 97.

²¹ Report of Thomson, April 6, 1737, quoted in Ekirch, *Bound for America*, 19.

²² Candidus, *London Magazine* 1776, 424.

characterized the punishment of transportation.²³ Blackstone described transportation, less dramatically, as being a means to “deprive the party injuring of the power to do future mischief.”²⁴

The idea that transportation was meant to incapacitate is also revealed in contemporary comments criticizing transportation for not doing a better job of “ridding the mainland” of an offender. The pervasive claim that transportation was not keeping criminals from committing further crimes underscores the assumption that the punishment was meant to incapacitate. The most prominent anxieties surrounding transportation and incapacitation were focused on the belief that criminals were returning from America and resuming their past “occupation.” Although it is impossible to know with precision how frequently this occurred, the belief that it was a constant problem was certainly prevalent.²⁵ Almost as soon as the Transportation Act of 1718 was put into place, London Magistrates were complaining that “[t]here are great Numbers of...Street Robbers who are Felons convict returned from Transportation.”²⁶ Already in 1725, Mandeville was asserting that “[g]reat Numbers have been come back (from transportation) before half their time was expired.”²⁷ Proposals were made early in the eighteenth century for new locations where convicts might be sent, and a central fixation was the choice of a location that would make it difficult for convicts to return. These new, locations, it was hoped, “would rid without Slaughter, or Probability of Return, the Country of the Vermin of Society.”²⁸ By the middle of the century, the idea that convicts could easily return from transportation was such a truism that a proposal to adopt hard labor in the dockyards as a punishment singled out this concern as the principal weakness of transportation. “The Punishment of Transportation,” the Act insisted, “hath frequently been evaded, by the Offenders returning ... before the Expiration of the Terms for which they have been transported.”²⁹

A particularly well known account of returning convicts came from *The Discoveries of John Poulter, alias Baxter*, a popular criminal biography. Poulter, himself a returned transportee who was eventually executed, provides an exposition of how convicts return from transportation:

The general Way is this:

Just before they go on board a Ship, their Friend or Accomplices purchase their Freedom from the Merchant or Captain that belongs to the said ship, for about ten Pounds Sterling; some gives more and some less: Then the Friend of the Convict or Convicts, gets a Note from the Merchant, or Captain, that the Person is free to go unmolested when the Ship arrives between the Capes of Virginia where they

²³ George Ollyffe, *An Essay Humbly Offered for an Act of Parliament to Prevent Capital Crimes...* (London: J. Downing, 1731), 11-12.

²⁴ Blackstone, *Commentaries*, Book 4, 11.

²⁵ G Morgan and Rushton, *Criminal Transportation*, 116-25; G Morgan and Rushton, “Running Away.”; Ekirch, *Bound for America*, 202-3, 208-9.

²⁶ Westminster and Middlesex Justices to Townshend, quoted in Ekirch *Bound for America*, 193.

²⁷ Bernard Mandeville, *An Enquiry into the Causes of the Frequent Executions at Tyburn...* (London, 1725), 47.

²⁸ *Ibid.*

²⁹ “A Bill for the Better preventing Thefts and Robberies ...,” 1752, in Lambert, ed., *Sessional Papers*, vol. 9, 357-67

please. . . . [A]s there are Ships coming Home every Week, if they can pay their Passage they are refused in no Ship. Some men will work their Passage back again, and them that cannot free themselves, take an Opportunity of running away from their Master, and lay in the Woods by Day, and travel by Night for Philadelphia, New York, or Boston; in which Places no Questions are asked them.³⁰

Regardless of whether Poulter's account was an accurate representation of how convicts returned, the text is further indication of a preoccupation with the failure of transportation to achieve the goal of incapacitation. Poulter's narrative was not only written for a popular audience, it was also written in an effort to provide authorities with information that would secure him a pardon. His lengthy description of returning convicts was included because he was aware that the idea of convicts who returned was a particular source of concern – a question to which the authorities wanted an answer.

In addition to concern that criminals would return, criticisms also reveal a fear that transportation, far from incapacitating convicts, was creating more debased offenders and more powerful criminal networks. Arguments that prisons were “seminaries of vice” had certainly been advanced and would become more pronounced in the years to come. With transportation however, the fear was somewhat different. One version of the imagined effect transportation might have is that returned convicts, knowing that detection would mean death for them, would be driven more forcefully into a life of crime. In 1738, a newspaper correspondent complained, “Transportation does not answer the End proposed, the Convicts are continually returning, and are made more desperate than before.”³¹ Convicts, returned from transportation, and made even more violent by the need to avoid being identified by their victims at all costs, were often identified as being responsible for perceived increases in violent crimes.³² Lord Townshend, for instance, declared that an increase of robberies in 1728 was “greatly to be imputed to the unlawful return of Felons Convict, who have been transported to his Majesty's Plantations.”³³ In 1738 an author in the *London Post* similarly noted “[r]obberies are become very frequent, which it's reckoned to be in great Measure owing to the Numbers that get off yearly by Transportation.”³⁴ In these accounts, transportation was described as failing because it did the opposite of incapacitating - it contributed to waves of increased violent crime.

A second anxiety about transportation creating greater criminality had to do not simply with how individual convicts would themselves be made more violent, but how they would be used by criminal gangs. This concern stemmed from the fact that returned convicts were extremely “trustworthy” as members of criminal gangs because they could not give evidence against someone else without being identified and facing capital sanctions. The greatest populizer of this concern was Jonathan Wild, the notorious “thief-taker” who allegedly enlisted returned transportees as his Agents for this very reason.³⁵

³⁰ Poulter, *Discoveries*, 28.

³¹ Quoted in Ekirch, *Bound for America*, 212.

³² Beattie, *Crime and Courts*, 540.

³³ Townshend, quoted in Ekirch, *Bound for America*, 221.

³⁴ November 4, 1738, *London Evening Post*.

³⁵ Beattie, *Policing and Punishment*, chap. 5.

As these writings show, incapacitation was an important goal of transportation. But it was not the only goal, nor was it unambiguously endorsed as an aspiration. Even as contemporary authors suggested that the incapacitative purposes of transportation were important, there was a sense that “mere” incapacitation was not enough to recommend a punishment. Fielding, for instance, made derisive reference to the apparent goal of simply ridding England of offenders, calling it being “transported out of the way.”³⁶ The ascription of nothing more than incapacitation to transportation was itself a criticism that revealed that more was expected of punishments generally, and of transportation specifically.

Some of this criticism can be attributed to the colonial critiques of the practice. In the colonies, the view of transportation as primarily oriented toward incapacitation was dominant, and, not surprisingly, extremely unpopular. Benjamin Franklin’s writing about transportation famously criticized it on this ground. Transportation was, he said, the equivalent of England emptying their “jakes” (chamberpots) on the table.³⁷ In a latter account, he suggested repaying the favor of transportation by shipping rattlesnakes back to England.³⁸ The implication of both these accounts was that transportation’s true purpose was merely to “dump” its undesirables elsewhere. To be the “dumping ground” in the policy of incapacitation was, of course, very different from being the beneficiary of it, but the objections to this quality of transportation are seen on both sides of the Atlantic. Morgan and Rushton have persuasively argued that colonial sentiments regarding transportation were assimilated into understandings of the practice in England, and thus it is not surprising that the most frequent grounds for criticism of transportation in the colonies would be repeated in England.³⁹

b. Transportation and Deterrence

Deterrence is a penal goal that was featured prominently in discussions of the shifting purposes of punishment in the eighteenth and nineteenth centuries. Eighteenth-century deterrence is typically conceptualized as relying on a highly visible, public, “spectacle of suffering.”⁴⁰ Transportation, by contrast, can be understood as being an almost “invisible” punishment. Convicts were ferried, without ceremony, to waiting ships and disappeared across the Atlantic, usually permanently. If we consider the labor term to be a portion of the punishment – as undoubtedly most did – there is still virtually no first hand sight of the punishment among the community the convict is leaving. The fate of the convict in the colonies is a subject of imagination and speculation, but it operates almost entirely without spectacle or visual context. Some have interpreted transportation’s lack of display as meaning that transportation wasn’t meant to deter. I argue, however, that transportation was understood as enacting a new kind of deterrence, one that had more in common with the new prison ideology than with older understandings of crowd-based deterrents.

³⁶ Fielding, quoted in Beattie, “Pattern of Crime,” 9.

³⁷ Franklin quoted in Morgan and Rushton, “Print Culture,” 63.

³⁸ Ibid.

³⁹ Morgan and Rushton, “Print Culture.”; G Morgan and Rushton, *Criminal Transportation*, 54; K Morgan, “English and American Attitudes.”

⁴⁰ Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression : from a Preindustrial Metropolis to the European Experience* (Cambridge University Press, 1984).

Although the “invisibility” of transportation has not been discussed in the context of penal purposes, the “disappearing” of punishments more generally has been the subject of frequent discussion.⁴¹ One often-noted feature of the shift from “scaffold to penitentiary” is that, while corporal punishments tend to take place in full view of the community, carceral punishments do not rely on public display and happen more or less entirely out of public sight. The change in visibility of punishment was an important feature of the shift from public hangings to punishments of confinement, but this process is also revealed in numerous other ways that corporal punishments “disappeared” in the eighteenth and nineteenth centuries. Hangings themselves were moved behind prison walls, reliance on the pillory declined, and public whipping in the streets was often replaced with private whipping. The moving of punishments “indoors” and behind prison walls marks not only a change in the outward appearance of the punishment, but also suggests a change in the understanding of penal goals and conceptions of how they can be achieved.

Attempts to explain this “disappearing” of punishment have given rise to a rich body of literature, none of which makes more than passing reference to transportation. James Cockburn, for instance, identifies the shift from hangings at Tyburn (and the associated public procession) to hangings at Newgate with a “concern for public order rather than a change in penal philosophy.”⁴² Beattie, among others, similarly has drawn attention to the desire to decrease the disruption of commerce that was associated with hanging days and public whipping.⁴³ Pieter Spierenburg focuses on the role of emotion, arguing that as people became more sensitized they became less tolerant of gory displays of suffering.⁴⁴ In any of these explanatory theories transportation could be easily stand in as an example of a punishment that would not incur the problems of public punishments – it avoided problems for public order and interruption of commerce, and it spared increasingly sensitive and squeamish members of society from witnessing acts of gore.

The exclusion of transportation from these discussions makes more sense if we consider transportation, as many have, to be a passing curiosity that it does not exhibit deterrent ambitions. The notable absence of a ceremonial visual display of suffering has led authors to argue that deterrence could not have been the intent. Ekirch, for instance, says, “by punishing offenders abroad and removing them from public view, transportation could not have been chiefly intended as a deterrent.”⁴⁵ Certainly Ekirch’s conclusions are consistent with the perspectives of some contemporaries. As William Paley complained, even if transportation was a horrid ordeal for the transported convict, “his sufferings are removed from the view of his countrymen and do not serve as a

⁴¹ E.g., James Cockburn, “Punishment and Brutalization in the English Enlightenment,” *Law and History Review* 12, no. 1 (1994): 155-179; Thomas Laqueur, “Crowds, Carnival, and the State in English Executions, 1604-1868,” in *Modern Society: Essays in Honor of Lawrence Stone*, ed. Lee Beier, David Cannadine, and James Rosenheim (Cambridge University Press, 1989), 305-355; Spierenburg, *Spectacle of Suffering*.

⁴² Cockburn, “Punishment and Brutalization,” 173.

⁴³ Beattie, *Policing and Punishment*, 306-8, 473-4.

⁴⁴ Spierenburg, *Spectacle of Suffering*.

⁴⁵ Ekirch, *Bound for America*, 19; Fisher similarly notes, “Transportation, the primary penal weapon ... before the reform, could not claim much deterrent effect... (it) had little power to terrify. Fisher, “Birth of the Prison,” 1272.

warning and an admonition to others.”⁴⁶ Another concurred, saying that transportation did not deter because it lacked “example and shame,”⁴⁷ and another said of transportation that it “hides too many of the offenders from those who ought to learn to beware from their example.”⁴⁸ Later proponents of carceral punishments similarly criticized transportation for being “invisible.” Jeremy Bentham, leveling a criticism of Australian transportation that was equally applicable to North American transportation, notes “its radical and incurable defect” was that “it is hidden, abstracted from, the eyes of those upon whom it is desirable it should operate in the way of example.”⁴⁹

As the authors above convey, it is difficult to interpret the “invisible” punishment of transportation as being part and parcel of the general-deterrence oriented capital punishment regime that was intended to act primarily on the spectator. That transportation was meant to enact some type of deterrence, however, can be seen both from criticisms and from affirmative statements of purpose. From the first uses of the sanction, we are told that “a few of these examples (of transportation) will be more fearful to the thief and rogue than death itself.”⁵⁰ Similarly, it is hoped that “such a servitude shall be a greater terror to them than death itself.”⁵¹ The 1718 Act, of course, places deterrent ambitions at the forefront, stating that transportation is meant to “deter wicked and evil-disposed persons.”⁵² Complaints about the return of convicts from America, noted above, also contain the concern that returning convicts represent failed deterrence. The suggestion was that an easy return would cause the punishment to cease to be feared. The 1752 Dock Yards Bill, for instance, responds to the concern of returning transportees with the perceived need to “more effectually deter evil-disposed Persons.” Similarly, Mandeville, in complaining about the shortcomings of transportation affirmed the punishment’s intended deterrent purpose: “the mild usage our felons receive beyond the sea...has quite destroyed the end which transportation was designed for, the criminals have no dread against it.”⁵³

Deterrence retained an important place in the penal goals of transportation - albeit in a different form than is typically associated with early eighteenth-century punishments. Transportation ushered in a new way of conceptualizing deterrence, one that did not rely on physical sight and the crowd. This new type of deterrence can be understood in terms of two changes: first, the belief that the imagination of suffering could deter, and second, the idea that deterrence required increased certainty.

1. Imagination

Since transportation had neither visual displays nor spectators, its deterrent capacity relied on the imagination of suffering, rather than the visual experience of it. Of course, some portion of the suffering of the offender had always been somewhat left to the imagination, even when the display was directly witnessed. On the scaffold the logic

⁴⁶ William Paley, *The Principles of Moral and Political Philosophy* (London, 1785), 543.

⁴⁷ Quoted in Ekirch, *Bound for America*, p. 223.

⁴⁸ Randall McGowen, “The problem of punishment in eighteenth-century England,” in *Penal Practice and Culture, 1500–1900: Punishing the English*, ed. Simon Devereaux and Paul Griffiths (Palgrave MacMillan, 2004), 223.

⁴⁹ *The Works of Jeremy Bentham*, ed. J. Bowring (New York: Russell & Russell, 1837), 431.

⁵⁰ Quoted in Herrup, “Punishing Pardon,” 122.

⁵¹ *Acts of Privy Council* (1619)

⁵² 4 Geo. 1, c. 11. (1718)

⁵³ Quoted in Coldham, *Emigrants in Chains*, 128-9.

of deterrence required the spectator to imagine the pain experienced by the punished, and to therefore act differently for fear of experiencing the imagined pain first-hand. For capital punishments to have their full deterrent effect, the spectator also had to imagine the real “punishment” of eternal damnation that was meant to await the offender in the afterlife.⁵⁴ There was, nonetheless, a tangible difference in the imagination of a physical pain that a spectator witnessed first-hand as a member of a crowd, and the individual’s imagination of the fate a convict might meet in a distant land.

Not only was the fact of the imagining different, the nature of what was being contemplated had changed. Pain, bodily destruction, and eternal suffering were no longer the intended subject. Rather, terror was meant to arise from being separated from one’s home, the dangerous sea voyage, the hardships of life in a foreign land, and the condition of forced labor. Certainly these images proved capable of terrifying some, in particular the fear of becoming “slaves” in America. For instance, transported convict Bampfylde Moore Carew said, “let the worst happen he thought Death preferable to Slavery.”⁵⁵ Similarly, as Daniel Defoe described Moll Flanders’ husband’s reaction to a sentence of transportation, “he had a kind of horror upon his mind at being sent over to the plantations, as Romans sent condemned slaves to work in the mines; that he thought the passage into another state, let it be what it would, much more tolerable at the gallows.”⁵⁶ William Eddis confirmed that Maryland convicts “groaned beneath a worse than Egyptian bondage” and that they were “strained to the utmost to perform their allotted labor; and from a prepossession in many cases too justly founded, they are supposed to be receiving only the just reward which is due to repeated offences.”⁵⁷ Descriptions of the imagined horrors took many forms, with the conditions of servitude and the loneliness of being separated from all friends and family making up the bulk of serious complaints.

Not all offenders feared transportation, however, and as Jeremy Bentham eloquently remarked of Australian transportation later in the century, punishments that relied on the imagination of suffering could be unpredictable.

[S]ays an author who had deeply considered the effects of imagination, ‘the mass of the people make no distinction between an interval of a thousand years and of a thousand miles.’ It has been already said, but cannot be too often repeated and enforced, that the utility and effect of example is not determined by the amount of suffering the delinquent is made to endure, but by the amount of apparent suffering he undergoes. It is that part of his suffering which strikes the eyes of beholders, and which fastens on their imagination, which leaves an impression strong enough to counteract the temptation to offend. . . . [Despite the hardships of transportation, it] is not the hundredth nor even the thousandth part of this mass of punishment that makes any impression. . . upon that class of people who are most likely to commit offences. . . .⁵⁸

⁵⁴ Randall McGowen, “The Body and Punishment in Eighteenth-Century England,” *The Journal of Modern History* 59, no. 4 (December 1987): 652-679; Laqueur, “Crowds.”

⁵⁵ *An Apology for the Life of Bampfylde-Moore Carew*, 24-25.

⁵⁶ Daniel Defoe, *The Fortunes and Misfortunes of the Famous Moll Flanders...*, ed. G.A. Starr (London, 1971), 264-5.

⁵⁷ William Eddis, *Letters From America*, ed. Aubrey Land (Cambridge, Mass: 1969, n.d.), 38.

⁵⁸ Jeremy Bentham, “Principles of Penal Law,” in *The Works of Jeremy Bentham*, ed. J. Bowring, vol. 1 (New York: Russell & Russell, 1837), 491.

Despite the many examples of offenders who claimed transportation was a terrible experience, and despite the efforts many took to avoid transportation, there were others who imagined that transportation was nothing to be feared. William Paley dismissed the idea that banishment caused suffering. Transportation was not likely to evoke terror because, he thought, “exile is in reality a slight punishment to those who have neither property, nor friends, nor reputation, nor regular means of subsistence at home.” It was, he said, a “defect in the laws, in not being provided with any other punishment than that of death sufficiently terrible to keep offenders in awe.”⁵⁹ Others shared this sentiment that transportation was a failure because it wasn’t sufficiently unpleasant – or in any event not sufficiently visibly unpleasant – to work as a deterrent. William Eden went so far as to describe it as “often beneficial to the criminal, and always injurious to the community.”⁶⁰ A judge in 1766 claimed that transportation had “almost ceased to be a punishment.”⁶¹ Mandeville similarly complained, “our subtle criminals have found means to render transportation ineffectual. Some have escaped on the voyage itself, others have never been put on board, several have reached the plantations but returned by the first ship. Those that are forced to stay do very little service themselves and spoil the other slaves.”⁶²

The imagination of the punishment of transportation was unpredictable. Some thought it would be a fate worse than death, while others imagined it as nothing to be feared. Morgan and Rushton illustrate this well in juxtaposing two responses to sentences of transportation. A man from the Maidstone assizes in 1766, sentenced to transportation “made strong instances to be rather hanged, promising to make great discoveries were he permitted to die.” By contrast, a woman sentenced to transportation in Westminster, upon receiving a sentence of transportation, said defiantly to the magistrate, “Thank ye, Sir –n, when I return I’ll make your Worship a present of a Parrot, and Mr. J—e W—t another hogshhead of tobacco.”⁶³

2. Certainty

The criticism that punishments could not be effective deterrents because they couldn’t be regularly used was prevalent, and transportation provided a partial remedy. Thomson, for instance, repeatedly emphasized the importance of ensuring the terror of the certainty of the punishment, warning the Crown in 1726 that frequently granting free pardons in place of transportation “may prove of very dangerous consequence.”⁶⁴ Thomson, in a similar attempt to ensure that transportation remained an effective deterrent, fought efforts to extend the special privilege of booking one’s own passage to America, arguing, it “would almost change the terror of the punishment if it were known that it could be easily obtained.”⁶⁵ What Thomson was contemplating as deterrent was not what happened to the transported convict, but simply the certainty that he would be transported. Booking one’s own passage may have allowed the offender to secure a more comfortable transatlantic voyage, but more importantly, from Thomson’s point of view,

⁵⁹ Paley, *The Principles of Moral and Political Philosophy*.

⁶⁰ William Eden, *Principles of Penal Law* (London, 1771), 33.

⁶¹ Beattie, *Crime and the Courts*, 547.

⁶² Mandeville, *An Enquiry into the Causes of the Frequent Executions at Tyburn...*, 46-48.

⁶³ Morgan and Rushton, “Print Culture,” 57.

⁶⁴ Report of Thomson, quoted in Ekirch, *Bound for America*, 37.

⁶⁵ Thomson, quoted in Ekirch, *Bound for America*, 72.

those who had been granted the privilege to book their own passage in the past had frequently “neglected to perform the condition.”

This move towards increased certainty was consistent with Beccaria’s argument that overly harsh laws, not consistently enforced, were ineffective in deterring crime. Criminals would be encouraged by the inconsistency of enforcement, he said, “for it is the nature of mankind to be terrified at the approach of the smallest inevitable evil, whilst hope, the best gift of Heaven, hath the power of dispelling the apprehension of a greater, especially if supported by examples of impunity.”⁶⁶ Beccaria concluded with his famous assessment that “[c]rimes are more effectually prevented by the certainty than the severity of punishment.”⁶⁷ Although these remarks were more frequently used to justify carceral punishments, the thinking behind them was applicable to transportation.

Transportation, though devoid of a “spectacle of suffering” could be understood as consistent with a type of deterrence that relied on the increased certainty of punishment. By the middle of the eighteenth century, with the rise of debate about punishments of confinement at hard labor, a new type of argument was being articulated that shared this understanding of deterrence through imagination of labor and the increased certainty of offenses.⁶⁸ The imagination of labor, the deprivation of liberty, and the certainty of punishment, were all advanced as means to deter.

In the words of one contributor to the London Magazine,

It is not the Intenseness of Pain that has the greatest Effect on the Mind... The Death of a Criminal is a terrible but momentary Spectacle, and theretofore a less efficacious Method of deterring others than the continued Example of a Man deprived of his Liberty.⁶⁹

Similarly, Beccaria wrote:

It is not the terrible yet momentary spectacle of the death of a wretch, but the long and painful example of a man deprived of liberty, who, having become a beast of burden, recompenses with his labors the society he has offended, which is the strongest curb against crime. That efficacious idea - efficacious because very often repeated to ourselves - 'I myself shall be reduced to so long and miserable a condition that if I commit a similar misdeed' is far more potent than the idea of death, which men envision always at an obscure distance.⁷⁰

Another commenter opined, “a certain term of laborious confinement... is all that... ought to require[d] by way of example.”⁷¹

Although often criticized as an ineffective deterrent, transportation was intended to deter, and was consistent with the emerging rhetoric of a new type of deterrence that relied on both the imagination and the certainty of suffering.

c. Transportation, Labor and Rehabilitation

⁶⁶ Cesare Beccaria, *On Crimes and Punishments* (New York: Bobbs-Merrill) (1963[1764]), 98.

⁶⁷ *Ibid.*

⁶⁸ Rebecca M. McLennan, *The Crisis of Imprisonment* (Cambridge University Press, 2008), 27.

⁶⁹ “Philanthropos,” *Thoughts on Capital Punishments* (London, 1725). London Magazine, June 36, 1767, 307.

⁷⁰ Beccaria, *On Crimes*, 46.

⁷¹ Gentleman's Magazine 46 (1776):254-5.

The presence of a term of labor in transportation suggests that it is a likely candidate to be understood as part of the trend toward punishments of reformatory labor. Punishments of confinement at labor came to be strongly associated with the reform of individual offenders in the second half of the eighteenth century, and had already been associated with the reform of vagrants and petty criminals sentenced to Bridewell.⁷² Thus we might also expect to find evidence that transportation was meant to rehabilitate, despite the fact that it pre-dated the time when confinement at labor became a norm. Certainly, as Devereaux has noted, when transportation to Australia was initially adopted rehabilitation was one component of the rhetoric supporting the practice. The Great Seal of New Wales is a telling example in itself, described in 1790 as depicting,

Convicts landed at Botany Bay - Their fetters taken off and received by industry sitting on a bale of goods with her attributes, the distaff, bee-hive, pick axe and spade, pointing to oxen ploughing - to rising habitations and a Church on a hill at a distance.⁷³

Not surprisingly, with Australian transportation we also see critics couching their objections to transportation in terms of its failure to reform criminals. Jeremy Bentham remarked dismally, “[s]uch has been the state of the convict population of this colony - past reformation none - future reformation still more hopeless.”⁷⁴ Other advocates of imprisonment agreed. “I am convinced from my Experience & so are all my Brethren, that solitary Imprisonment . . . would be the most effectual mode of Punishment, both to prevent Offences, & to reform Criminals. Our present System of Transportation, Confinement to the Hulks etc. I fear is totally inadequate to these Purposes.”⁷⁵ Of course it is not surprising to find that advocates of a particular model of reformatory punishment, to which transportation seemed antithetical, would find that transportation was failing in this respect. What is interesting, however, is their new emphasis that transportation, and any other punishment, should have reformation as its standard.

Reformation of the individual convict, does not, however, appear to have been as central to the goals of eighteenth-century North American transportation.⁷⁶ A few remarks late in the period of American transportation mention the goal of “reformation.” For instance, in a rare example of transportation presented in a positive light, a London magistrate in 1773 declared that it was the “most humane and effectual punishment we have” because it “immediately removes the evil, separates the individual from his abandoned connections, and gives him a fresh opportunity of being a useful member of society thereby answering the great ends of punishment, viz., example, humanity, and reformation.”⁷⁷ In 1776 a contributor to the *Gentleman’s Magazine* similarly noted, “this manner of punishing common crimes seems to have a manifest aptitude to reclaim the criminal himself.”⁷⁸ This sentiment was rare, and it appeared late in the period of

⁷² Innes, “Prisons for the Poor.”

⁷³ Quoted in Devereaux, “In Place of Death,” 60.

⁷⁴ Bentham, *Works*, 495.

⁷⁵ Justice Bayley, quoted in Fisher, “Birth of the Prison,” 1270.

⁷⁶ The labor features of transportation will be explored in more detail in the following section, but for present purposes, I will discuss labor insofar as it reveals ideas about the purposes of transportation.

⁷⁷ Quoted in Devereaux, “In Place of Death.”

⁷⁸ *Ibid.*

transportation's use, but its presence indicates that some, at least, were contemplating transportation as rehabilitative.

Very little of the rhetoric surrounding the practice of North American transportation directly suggests the aspiration – failed or otherwise - that transportation might reform criminals. That reform may have been understood as a goal of punishment, however, can be seen in newspaper accounts that told the story of transported convicts who returned to England to apologize and repay their accusers. Morgan and Rushton note that this type of narrative appeared occasionally, near the end of the colonial period, and was unlikely to have been seen as believable. One such account that emphasizes reform reads:

The following is another singular Instance of Honesty, similar to that we lately mentioned. In 1760, the Shop of Mr James Shaw, of Darlington, was broke into in the Night and robb'd of Goods etc to the amount of £200. The Offender, one William WALKER, was apprehended, and for that and other Things proved against him, was transported from this City. Having made a considerable Fortune in America he wrote to his Relations in England desiring them to enquire for the said Jas Shaw, and another Person whom he had defrauded at Yarm, to obtain an Estimate of the Loss, and to make full Repara[tion] for the Injuries they had sustained by him. Walker is a young Fellow of good Family, but had been seduced by an infamous Woman, who had drawn him into these bad Practices.⁷⁹

This story suggests a type of reform was understood as being possible during transportation, and, like other accounts that emphasized the possibility of rehabilitation, it appeared in the late eighteenth century when this penal goal was more frequently discussed. For contemporary readers, however, this story may have evoked less of an image of the possible reformatory capacity of transportation, than it did the image of possible economic opportunity in the colonies. The story of making one's fortune in America was a familiar one, and this would have been a typical expression.

In addition to the presence of these types of stories about transported convicts, the labor component of transportation could be interpreted as promising a certain version of "reform." As I will discuss in different terms below, one appeal of transportation was that it could "reform" criminals, as well as supervise them, by placing them in appropriate labor relationships. Such was the thinking, it seems, of an assize judge who argued in favor of a free pardon rather than transportation for a convict named Joseph Hall. A weaver had agreed to employ Hall as an apprentice, and this, the judge assured the king in his report, was "a more Effectual means to Reform him than Transportation."⁸⁰ Using similar logic to recommend the opposite outcome, in 1735 William Thomson argued against giving a free pardon to a thief who had a reputation that "would inhibit others from offering employment." To make matters worse, Thomson argued, "After being Convicted of Theft in this manner... he cannot expect to be employed again so as to maintain his family in an honest way."⁸¹ Although unemployment was used as an argument against granting pardons in other contexts, the logic here was more direct. For

⁷⁹ Morgan and Rushton, "Print Culture," 59.

⁸⁰ Report of Eyre, quoted in Ekirch, *Bound for America*, 42.

⁸¹ Report of Thomson, quoted in Ekirch, *Bound for America*, 42.

those who had the option of “reform” through servitude outside the penal system, transportation was not required. For the unemployable thief, however, transportation was the appropriate sanction – not because he had been a thief, but because he needed supervision and employment to ensure he would not be a thief in the future. This relationship between labor and criminality will be discussed at length in the section below, where I argue that a close association with indentured servitude was an important factor in making transportation appear more consistent with liberty. I mention it here as well because it seems to suggest a particular type of reform that was associated with transportation.

The above discussion of the purposes of transportation suggests that the punishment was understood as having multiple purposes. Some considered transportation more severe than death, others considered it so lenient that it was an inducement to commit crime. Many thought transportation failed to incapacitate, some thought it ought to do more than merely incapacitate, and assumed it should reform. Transportation’s capacity to be understood in terms of multiple conceptions of penalty provided a means for legitimating the punishment in a time of changing penal ambitions. Devereaux has said of Australian transportation, “the failure to define transportation’s specific penal purposes sustained a loosely centralized state structure.”⁸² North American transportation’s ambiguous penal goals similarly can be understood as a means for enabling the punishment to seem consistent with multiple conceptions of penalty in a time when penal forms and purposes were transitioning.

Although I have been emphasizing transportation’s essential ambiguity with respect to penal goals, I below want to emphasize a slightly different relationship between transportation, labor, liberty and legitimacy.

II. Labor, Liberty and Reform

Thomas Robe, writing in 1726 to advocate the adoption of punishments of imprisonment at hard labor, noted a peculiar inconsistency about punishment, labor and liberty. Robe anticipated that some would object to his proposals for domestic penal labor out of a fear that “ill Consequences may happen (from Inflicting any kind of Slavery on free born Subjects) which in time may affect our Liberties.”⁸³ He did not understand, however, why penal labor in the colonies under the policy of transportation was not criticized on the same grounds. “Why,” he asked, “should We fear any worse consequences from Confining Felons to hard Labour at home, in respect to our Liberties, then we find at present from Transporting them abroad, to our Plantations?”⁸⁴ The puzzle that Robe identified has not generated much subsequent debate. It suggests, however, an important question about transportation’s success: why was transportation, a punishment that created and sold property rights in the labor of convicts, widely accepted, while penal servitude in England was rejected as a form of slavery?

⁸² Devereaux, “In Place of Death,” 53.

⁸³ Thomas Robe, *A method whereby criminals liable to transportation may be render’d not only useful, but honest members of the publick*. (London, 1726), 8.

⁸⁴ *Ibid.*, 8-9.

Scholars who have studied eighteenth-century proposals for imprisonment at hard labor have noted, as Robe suggested, that one reason prison-based reforms failed was the presence of widespread resistance to a form of punishment that seemed to threaten the traditional liberties of the “freeborn Englishman.”⁸⁵ Early proponents of disciplining convicts in penitentiaries, and other forms of confinement at hard labor faced the critique that these programs constituted slavery, and thus violated the principles of liberty enshrined in the English Constitution.⁸⁶ Although this objection has been frequently identified, there has been little discussion of why North American transportation did not face similar critiques.

There are, however, a few discussions of transportation, labor and liberty that can illuminate the issue. James Willis, discussing the decision to renew convict transportation to New South Wales, has considered the question of libertarian sentiments.⁸⁷ Willis’ examination of liberty and transportation is less developed than is his account of liberty and the penitentiary, but he does note that transportation did not invite concern because it constituted a “largely invisible and limited approach to penal administration,” and minimal “involvement in the domestic management of British felons, since it removed them to a distant colony where many would eventually be assigned to private citizens.”⁸⁸

Alan Atkinson, exploring the ways that convict rights reveal changing conceptions of empire, has also raised the question of why traditional concerns about liberty played out in unusual ways in the setting of convict transportation. Atkinson notes that North American transportation only entailed temporary exile, and that a term of labor was not technically required. Any who had the means to purchase their indenture from the merchant might arrive “in the colonies as (in some ill-defined sense) pardoned Englishmen and women, free of penal restraint.”⁸⁹ This was important, in Atkinson’s framing, because there was a specific prohibition against “transportation under any form of bondage.”⁹⁰ Atkinson later notes that convicts sentenced to transportation after 1718 were imagined as having been pardoned from death sentences, and thus were assumed to be voluntarily choosing banishment over death, rather than being forced into exile. Despite the fact that the 1718 Act assumed convicts would labor, and despite the knowledge that after 1718 most convicts were directly sentenced rather than pardoned, there remained, “a deeply engrained collective wishful thinking to the effect that the new system was in line with the ancient virtues of the constitution.”⁹¹

Willis’ arguments that transportation was seen as consistent with liberty because the punishment was largely “invisible,” and the role of the state was limited, and Atkinson’s arguments that voluntariness was assumed, and labor was not required,

⁸⁵ E.g. Hirsch, A.J. *The Rise of the Penitentiary: Prisons and Punishment in Early America*. (Yale University Press, 1992); Willis, “Transportation versus Imprisonment,” 198.

⁸⁶ Starting in the late sixteenth century, the idea of the English as being particularly and unusually “free” became a more prominent theme, and has been associated with the rise of the English national identity. Christopher Leslie Brown, *Moral Capital: Foundations of British Abolitionism* (UNC Press, 2006), 46.

⁸⁷ The practices of, as well as the debates over, penal transportation differed significantly in the North American and later Australian contexts. Nonetheless, the scholarship on the Australian case offers some helpful insights concerning the relationships among transportation, labor and liberty.

⁸⁸ Willis, “Cultural Limits,” 420.

⁸⁹ Atkinson, “Free-Born Englishman,” 93.

⁹⁰ *Ibid.*

⁹¹ Atkinson, “Free-Born Englishman,” 20.

suggest important factors in the acceptance of North American transportation. I will elaborate on these accounts below in proposing an alternative explanation.

My central argument is that transportation was legitimized by its close relationship with indentured servitude and thus was embraced because of, not in spite of, the associated feature of coerced labor. Allusions to slavery notwithstanding, transportation, I argue, was seen as more legitimate because convicts were bound into terms of servitude. In making this argument I focus on two understandings of labor that legitimized transportation's use. First, I argue that the labor performed in transportation implied an important extension of supervision, and that the private nature of this control was consistent with eighteenth-century understandings of liberty. Second, I argue that transportation was legitimated because it mimicked the "correct state" of non-penal bound labor relationships.

The legitimating effect of the resonance between a form of labor and its penal counterpart has been elaborated in other contexts, although it has not been explored with respect to convict transportation. Michael Ignatieff said of penitentiary and industrial labor relationships, "the institution took place within the structure of other institutions so interrelated in function, so similar in design, discipline, and language of command that together the sheer massiveness of their presence in the Victorian landscape inhibited further challenge to their logic."⁹² To challenge the penitentiary's logic, he argued, would require challenging "the interlocked structure of a whole encircling industrial order."⁹³ This is not to say that the structure of labor relationships dictated the adoption of a certain form of punishment; rather, it suggests that discourses and logics of labor and punishment form an interdependent ideological framework. Indentured servitude was widely accepted as a legitimate labor practice, and by association it legitimated the use of transportation.

1. Liberty and Private Regulation

Transportation, Willis suggests, perhaps was not seen as affirmatively consistent with liberty, so much as it was ignored because it was "invisible." Domestic penal labor would be constantly visible, while the labor component of transportation was not in the public view and thus could be easily forgotten or dismissed. As Willis says of early Australian transportation, it did not provoke concerns about liberty because it "remov[ed] convicts and their suffering overseas."⁹⁴ This argument was also made in the American context. As a contemporary noted, those who "disdain that Englishmen should be Slaves on English Land" would "rather choose America for the theatre of our Shame."⁹⁵ Historians have similarly suggested that the lack of libertarian concerns about transportation can be understood primarily as hypocrisy or cultural denial. Ekirch says of transportation's popularity, "Out of sight, out of mind. Liberty would not be sacrificed for the sake of social peace, not, at least, in England. For a country threatened by mounting crime but dedicated to protecting popular freedoms, no other punishment could promise so much."⁹⁶

⁹² Ignatieff, *Just Measure*, 219.

⁹³ *Ibid.*, 215.

⁹⁴ Willis, "Cultural Limits," 420.

⁹⁵ *Hanging not Punishment Enough*, 16-17.

⁹⁶ Ekirch, *Bound for America*, 21. This sentiment is echoed in Kercher, "Perish or Prosper."

Although “invisibility” may explain much, there was also great cultural awareness of transportation and its associated term of servitude. As Morgan and Rushton have documented, in England there was enormous interest in the lives of transported criminals.⁹⁷ The growing Atlantic print culture encouraged a heightened awareness of the conditions transported convicts faced in the colonies. Novels, plays, newspaper accounts, and ever-popular criminal biographies frequently featured depictions of transportation and penal labor in the colonies.⁹⁸ Although these accounts were unlikely to be accurate, they indicate a level of interest and awareness. Morgan and Rushton term this the “criminal Atlantic,” “made up of many reports of individual criminals” and a two-way flow of information about convicts, crime and conditions in the colonies.⁹⁹ While the lack of seeing convicts laboring first-hand may explain much, the knowledge that even the well-publicized idea of transportation and labor did not seem to provoke concerns about liberty suggests that there is more to be explained.

Although Willis suggests that transportation was made to seem more legitimate by the lack of visible labor, I argue that the assumption that most transported convicts would work affirmatively legitimated the punishment. Transportation, after all, was not simply banishment. We can imagine, for instance, that had the government simply contracted with a merchant to deposit convicts elsewhere, rather than selling them into labor, this may have seemed like a less acceptable option. As discussed above, one form of criticism against transportation that gained particular traction was that it disposed of people like an “excrementitious mass.”¹⁰⁰ Transportation, characterized this way, seemed unacceptable, even to those who were the beneficiaries of the policy. The suggestion was that if transportation truly just was a means of dumping convicts, it was not a legitimate use of state power. It mattered, on some level, what became of convicts after they were exiled.

In 1766, an Act that extended to Scotland the provisions of the 1718 Transportation Act suggested one function served by the labor component of transportation. While Scotland had transported convicts to the colonies before 1766, contractors had not yet been formally granted property rights to convicts’ labor. Thus, according to Parliament, merchants had not been selling convicts into servitude. The preamble to the 1766 Act is concerned with the particular problems that this has created: the Colonies and Plantations to which such Offenders are transported are exposed to many Dangers and Inconveniences, by having such Offenders set loose amongst them, without any Person or Persons having a Property or Interest in their Service, whereby they may be restrained from committing new Crimes and Offences in the said Colonies and Plantations.¹⁰¹

The problem is conceptualized as a lack of supervision, and the solution is the sale of the convict’s labor. By granting contractors an alienable property interest in the

⁹⁷ Morgan and Rushton, “Print Culture,” 4; G Morgan and Rushton, *Criminal Transportation*, chap. 4.

⁹⁸ *Ibid.*

⁹⁹ In part because of transportation and the movement of convicts back and forth across the Atlantic, “a system of exchange of news and reports on an international scale was created for the first time”

Morgan and Rushton, *Criminal Transportation*, 50.

¹⁰⁰ Bentham, quoted in Willis, “Cultural Limits,” 419.

¹⁰¹ 6 Geo. 3, c. 32. (1766)

convict's labor, the Act assumes the colonies will be shielded from the "Dangers and Inconveniences" of unattached convicts. In this description, the primary (and somewhat ironic) concern expressed is for the colonists, but, more importantly for present purposes, assumptions about a certain type of labor relationship are also revealed. The Act suggests that the relationship of servitude is also a relationship of criminal regulation. Once in the colonies, the convict should have a master who profits from his labor, and also "restrains" him from committing new crimes. While it has often been suggested that selling convicts into labor was appealing simply because it defrayed the cost of their transatlantic passage and incentivized merchants, this Act suggests that the sale of labor served an additional role. By creating a master-servant relationship, the sale also created an extended framework of control. Convicts were not meant to be merely deposited; they were meant to be supervised and controlled by masters who had an "Interest in their Service."¹⁰²

It is important that this expansion of control is realized through a private relationship. As Willis notes, the limited role of the state was important in making transportation appear consistent with liberty. For defenders of liberty in the eighteenth century, perceived changes in the exercise and scale of state power were defining objects of concern. The growth of the Executive, associated with new fiscal resources and enlarged military capacities, was held to threaten the independence of Parliament and the balance of the Constitution. Measures that weakened the authority of traditional common law institutions, such as trial by jury, raised the fear of the more general loss of English liberties. Discretionary powers and arbitrary proceedings, of the kind associated with French Absolutism, deserved vigilant repudiation.¹⁰³

Although Transportation introduced profound changes in the kingdom's penal regime, it did so without the creation of new state structures or practices. Its operation depended upon the established practices of criminal procedure and conviction; and its implementation relied on the efforts of private as well as state agents. The scale of transportation was new, but as a penal form it conformed to the existing structures of labor and authority as adapted to the particular situation of indentured servitude in the colonies. Transportation both relied on the private relationship of master and servant, and expanded it to encompass the regulation of criminals, not just the poor. Transportation thereby made possible a dramatic expansion of control, without the growth of the types of state power that were regarded with particular suspicion. Labor under transportation, which expanded the means of controlling, supervising, and disciplining convicts, took the form of long-accepted private relationships, and could be carried out through the traditional common law process.

2. The Solution to Idleness, the Solution to Crime

Daniel Defoe revealed much about the curious relationship between indentured servitude, poverty and transportation when he opined that it would be "a much wiser Course" for England's poor to simply go to the colonies as indentured servants rather "than turn Thieves, and worse, and then be sent over by Force."¹⁰⁴ If we are thinking of

¹⁰² Ibid.

¹⁰³ David Lieberman, "The Mixed Constitution and the Common Law," in *The Cambridge History of Eighteenth-Century Political Thought*, ed. Mark Goldie and Robert Wokler (Cambridge University Press, 2006), 317-46; H. T. Dickinson, *Liberty and property: political ideology in eighteenth-century Britain* (Holmes and Meier Publishers, 1977); Brewer, *Sinews of Power*.

¹⁰⁴ Daniel Defoe, *A Tour Thro' the Whole Island of Great Britain...*, 1724, 213.

transportation in terms of punishment, it is somewhat surprising to see the suggestion that the poor should do by choice what was for others a felony punishment. For Defoe, however, the difference was not meaningful. Idleness, Defoe assumed, was the first step to criminality, and those who committed crimes were those who had not learned to support themselves through labor discipline.

Labor in general was a status condition in eighteenth-century English law. The poor were meant to be under some structure of labor authority through which they could be supervised and disciplined. The proper condition was violated when the poor were “idle” or “unattached.” With the rising demand for labor in the colonies, colonial indentured servitude became a primary means of creating appropriate relationships of labor and supervision for the poor. Given the understanding of a close relationship between idleness and criminality, transportation held out promise because it seemed to restore the correct situation by binding the convict to an employer.

Spierenberg makes an analogous point in connection with the early modern workhouse. The workhouse (unlike the penitentiary) was organized on the model of the early-modern household as a site of production as well as shelter and consumption. The workhouse master was referred to as “father” in some locations, and resembled a master supervising and disciplining apprentices. In this way, the new urban workhouse mimicked traditional labor arrangements.¹⁰⁵ Transportation, in much the same fashion, mimicked the labor relationships of voluntary colonial servitude. Its appearance of being traditional helped it appear natural, unthreatening, legitimate, and harmonious with English liberty. The more transportation looked like indentured servitude, as opposed to mere banishment, the more familiar it seemed. Given the understanding that idleness led to criminality, and the understanding that labor relationships provided supervision and discipline, it is not surprising to find that voluntary indentured servitude and transportation were often conflated.

As early as the end of the sixteenth century, the colonies were described by Richard Hakluyt (the elder) as places where both the idle and criminals should labor. Colonial labor, Hakluyt thought, could stop the cycle by which “idle persons” unable to find work will “fall to pilfering and thieving”¹⁰⁶ Hakluyt was not articulating a penal goal per se. His focus was on how labor might place into useful employment an emerging population of potential criminals. Whether or not they had committed a crime was less important than the fact that they were not bound by labor. Hakluyt thus recommended “petty thieves might be condemned for certain years in the western parts,” and also suggested that the children “of the wandering beggars of England that grow up idly and hurtful and burdensome to this realm may there be unladen better bred up.”¹⁰⁷

Two decades later, a similar logic of transportation as an answer to both criminality and idleness can be seen in the decision to transport poor children from London. In 1618, the Virginia Company petitioned the Common Council of London, noting the many “vagrant boys and girls that lie and beg in the streets,” and requesting permission to transport one hundred of them to Virginia “to be employed in some industrious courses.”¹⁰⁸ The subsequent bill declared that one hundred children should be

¹⁰⁵ Spierenburg, “Body and the State.”

¹⁰⁶ Hakluyt, *Western Planting*, 37.

¹⁰⁷ *Ibid.*

¹⁰⁸ R. Johnson, “Vagrant Children,” 138.

“taken up and transported to Virginia, there to be educated and brought up at the charge of the Company.”¹⁰⁹ Each child would receive “freedom dues” of fifty acres of land, and the City was to pay the estimated £5 cost of the passage. To ensure that that the parties fulfilled their obligations, indenture agreements were drawn up.

This transaction was, in some ways, much like any indenture relationship, freedom dues were paid, and an indenture was signed. It lacked, however, even the illusion of voluntariness. The constables were instructed to apprehend any vagrant children they found, and to commit them to Bridewell where they would be held until the ship was ready. A second order, issued shortly thereafter, offered parents “overcharged and burdened with poor children...age ten and up” the opportunity to send their children to Virginia. Although this suggested parental consent, in a subsequent order, parents who did not wish to have the Virginia Company “ease them of their charge” were told that they would no longer be able to receive poor relief.¹¹⁰ Through these means a group of ninety-nine children was collected, detained in Bridewell, then sent to Virginia to labor.

The issue of voluntariness, however, proved to be an important one. A second group of children was collected in the same manner, but when detained at Bridewell they declared “their unwillingness” to be transported. The Virginia Company, requesting authority to transport the children against their will, described the “revolt:”

The City of London have by act of their Common Council, appointed one hundred children out of their superfluous multitude to be transported to Virginia; there to be bound apprentices for certain years, and afterward with very beneficial conditions for the children. ... Now it falleth out that among those children, sundry being ill disposed, and fitter for any remote place than for this City, declare their unwillingness to go to Virginia, of whom the City is especially desirous to be disburdened, and in Virginia under severe masters they may be brought to goodness.¹¹¹

The very willfulness of the children’s desire to not be transported is presented as further evidence that they are in need of the masters they will acquire in Virginia. In response to this request, the Privy Council issued an order authorizing the transportation of the children. The language of the order, like the Virginia Company’s request, emphasizes the benefits of the labor relationship.

We are informed that the City of London by Act of Common Council have appointed one hundred children out of the multitudes that swarm in that place to be sent to Virginia, there to be bound apprentice with very beneficial conditions for them afterwards ... Whereas the City deserves thanks and commendation for redeeming poor souls from misery and ruin and putting them in a condition of use and Service to the State...and that, among their number divers are unwilling to be carried thither, and that the City wants authority to deliver, and the Virginia Company to receive and carry out, these persons against their will; we authorize and require the City to take charge of that service to transport to Virginia all and

¹⁰⁹ Ibid.

¹¹⁰ Ibid., 140.

¹¹¹ Susan Kingsbury, ed., *The Records of the Virginia Company of London* (Washington D.C., 1906), vol. I, 270.

every the aforesaid child. And if any children disobey or are obstinate we authorize the imprisonment, punishment and disposal of them upon any disorder by them or any of them committed.

Underscoring the close relationship between the idle poor and criminals, this order was authored only three months after the Privy Council authorized the transportation of convicted felons to “be usefully employed for the great benefit and service of the commonwealth and to that end [to] be constrained to toil in such heavy and painful works.”¹¹² While the tone was slightly more punitive in describing the felons’ labor and the children’s labor, the prescription for each had more in common than different. The “multitudes” of children “that swarm” the City of London were not just any children; they were poor children who, like felons, needed to be restored to the correct state of supervision through colonial labor. Whether they were felons already, or were merely poor children who might become criminals, the solution was the same.

The same logic applied to vagrants, minor offenders, and children sentenced to transportation by Bridewell court in the early seventeenth century.¹¹³ Bridewell, in addition to being a place of confinement and labor, also operated an internal court that dealt with problems such as vagrancy, idleness, street walking, and disorderly behavior.¹¹⁴ In sentences for transportation given in Bridewell court, consent was at least nominally required. Of course there were many ways to obtain consent, and further punishment could be threatened. Paul Griffiths describes a streetwalker of whom it was said, “If she not be transported of her own desire she must be punished.”¹¹⁵ Labor at Bridewell was seen as a particularly fitting threat, as was apparent with Richard Newman, told to “work [in Bridewell] for as long as it took him to agree to ‘go to sea.’”¹¹⁶ That these individuals needed to be punished was not the point. More importantly, they needed to be placed in an appropriate labor relationship. John Wilton, for instance, was told at Bridewell court “to get a service soon or get on board a ship for Virginia.”¹¹⁷ Whether transportation was intended to be a punitive threat to Wilton, or simply a work arrangement that was commensurate to domestic labor, was, fittingly, ambiguous.

These relationships between transportation and indentured servitude; labor and supervision; idleness and criminality; and coercion and consent are neither a curious relic of the early seventeenth century nor a particular creature of Bridewell. A full century later the 1718 Transportation Act, after a long discussion of transportation as a punishment for felony, contains a paragraph dealing with “voluntary” contracting for labor with children that echoes these same themes.

Whereas there are many Idle Persons, who are under the Age of One and twenty Years, lurking about in divers Parts of London, and elsewhere, who want Employment, and may be tempted to become thieves, if not provided for: And

¹¹² *Acts of the Privy Council of James I*, vol. 5 (London, 1930), 53.

¹¹³ Griffiths, *Lost Londons*, 284.

¹¹⁴ *Ibid.*, Innes, “Prisons for the Poor.”

¹¹⁵ Griffiths, *Lost Londons*, 287.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

whereas they may then be inclined to be Transported, and to enter into Services in some of his Majesties Colonies and Plantations in America: But as they have no Power to Contract for Themselves, and therefore it is not safe for Merchants to Transport then, or take them into such Services; Be It Enacted... That where any Person of the Age of Fifteen Years, or more, and under the Age of Twenty one, shall be willing to be Transported, and to Enter into any Service in any or his Majesty's Colonies of Plantations in America, It shall and may be Lawful for any Merchant, or other, to Contract with any such Person for any such Service, not exceeding the Term of Eight Years; provided such Person so Binding him or herself do come before the Lord Mayor of London, or some other Justice of the Peace of the City.¹¹⁸

The passage seems out of place in a discussion of felony punishments and, perhaps for this reason, has been ignored in previous studies of transportation. The fact that a provision to make it easier for children to become indentured servants is placed, without comment, in an act otherwise concerned with punishing felons by transportation, again emphasizes the close relationship in understandings of poverty, criminality, punishment and servitude. Concern about “spirits” stealing children and selling them into slavery had become popular in the previous century, and thus the children in 1718 were not quite as vulnerable to outright coercion as those transported from London a century before.¹¹⁹ Although in the seventeenth century the children did not have to consent to be transported, but pardoned felons did, by 1718 the relationship was inverted. The 1718 Act removed the requirement that those convicted of felony had to consent to be transported, but the echoes of this requirement are retained in the discussion of children and safeguards that their servitude be voluntary.

It is likely, as Atkinson suggested, that for some lingering notions of voluntary banishment and conditional pardon were an important factor in why the direct sentence of transportation was not regarded as infringing on liberty. But perhaps a more important deeply engrained frame of reference was that of indentured servitude and the freedom to bind oneself to labor. Transportation and indentured servitude had become so similar in form and function as to be almost indistinguishable. It thus seems important, though for different reasons than those suggested by Atkinson, that labor was not an absolute requirement. Had it been applied to the wealthy, as well as the poor, the imagination of idleness and criminality would have been threatened. The wealthy criminal was not in need of correction through labor discipline, and fittingly he could purchase an exemption from it. For those convicts who were poor, penal servitude was not optional, but nor was it seen as problematic. Among the poor, bound labor was a “choice” for those who had not yet become criminals, and a “consequence” for those who had. In either case, the correct labor relationship could be restored through colonial labor.

When Defoe suggested that England's poor should pre-empt the process and become indentured servants by choice before they were “sent over by Force” as thieves, he was describing this very logic.¹²⁰ In a peculiar twist on Defoe's suggestion, Elizabeth

¹¹⁸ 4 Geo. 1, c. 11. (1718)

¹¹⁹ AE Smith, *Colonists in Bondage*, chap. 1.

¹²⁰ Defoe, *Tour*, 251.

Martin, after her husband was slated to be transported, stole a silver spoon in an effort to get herself transported. As told by a servant, giving evidence at the Old Bailey,

the prisoner called at our lodge one day last week, either on the Wednesday or Thursday evening; she said to me, I beg your pardon, I want to ask you a question; I said, I'll resolve you if I can; she called for a pint of wine, then she asked me how she could be transported, she wanted to be transported; I laughed at her, thinking she came to make game; after I had drank a glass with her she called me aside, and said, I'll tell you the reason of it; I have a husband that is to be transported from Maidstone, and I want to know how I can go along with him... she said she insisted upon going if she knew how, and wanted to know how she could; I believe somebody, out of a joke said, if you step over to the goldsmith's shop, you may soon know the way to be transported.¹²¹

Martin's attempt to "choose" transportation through crime was undoubtedly uncommon, but it underscores the extent to which transportation and indentured servitude had merged in popular imagination. Voluntary indentured servitude and the punishment of transportation had, at least for some, become indistinguishable. By mimicking the labor relationships of voluntary colonial servitude, transportation appeared to be consistent with eighteenth-century understandings of English liberty. It was, by association with accepted logics of labor, so natural and familiar as to seem fundamentally legitimate.

Conclusion

The aspirations of the 1718 Act - that transportation might at once encompass mercy, deterrence, and a source of much-needed colonial labor - were just one manifestation of the punishment's ability to be understood as consistent with multiple, and often contradictory, conceptions of penalty and labor discipline. Transportation was depicted as a failure by almost every measure: it didn't incapacitate, it didn't deter, it didn't rehabilitate, and its labor term was both too harsh and too lenient. Far from delegitimizing the punishment however, transportation continued to be the most frequently used punishment throughout the majority of the eighteenth century. Transportation's fundamental ambiguity allowed it to be seen as consistent with multiple conceptions of penalty in a time when penal purposes more generally were transitioning from those associated with the scaffold to those associated with the penitentiary.

Transportation's close relationship with indentured servitude similarly served a legitimating function. Transportation, unlike imprisonment at hard labor, was not seen as violating traditional English liberties because it "widened the net" without creating new state structures and practices. Transportation drew on the accepted logic of governing the poor through labor, and thus took place "within the structure of other institutions so interrelated in function, so similar in design, discipline" that it seemed both natural and unthreatening.

¹²¹ Sept. 1766, OBSP online, reference number t17660903-69. <<http://www.oldbaileyonline.org>>

Conclusion

This dissertation seeks to fill some important gaps in the existing literature on convict transportation, and has a particular interest in how transportation “widened the net” of penal sanctions in the eighteenth century.

Chapter One supplied an historical overview of convict transportation, and conceptualized three important phases in the development of North American convict transportation. From the late sixteenth to the mid-seventeenth century, transportation developed in the dual contexts of responses to poverty and crime; from the mid-seventeenth to the early eighteenth century, transportation was more distinctly situated in the penal context, and was primarily associated with pardons; after 1718, transportation became more administratively developed, and began to be used on a large scale as a direct sentence for criminals. The forms and functions of transportation associated with these different uses of the punishment contributed to the varied, and often contradictory, interpretations of the practice and its purposes.

Chapter Two used quantitative data to demonstrate that, well before the rise of a national prison system, transportation dramatically expanded the number of offenders subject to serious punishment. Unlike the more typical accounts of “net widening” in the context of carceral punishments, my account of “net widening” does not focus on the byproducts of reform movements. “Net widening” in the context of transportation has expansion as its explicit goal. And although most accounts of penal “net widening” focus on the development of “new institutions of social control,” transportation sheds light on a form of expansion that is comprised of “old institutions of social control”: penal exile and indentured servitude. Rather than being an unintended consequence of new, carceral, reform-based social control mechanisms, eighteenth century “net-widening” is an explicit attempt to use familiar forms of punishment in new and more expansive ways.

In Chapters Three and Four the emphasis was on explaining how this expansion of penal capacity was realized. Chapter Three considered the role of the private, profit-seeking merchants who shipped convicts to the colonies. Although I argue that transportation was not as “private,” nor as financially lucrative as others have assumed it to be, the profit-seeking merchants who shipped convicts to the colonies played an important role in shaping the punishment. Through delegation of some penal functions to merchants, the state was able to increase its capacity to punish.

Chapter Four shifted the focus to the central government, and the financial and political commitment to the creation of a large-scale national punishment. The government realized this goal by awarding merchant subsidies, nullifying colonial legal opposition to transportation, and increasing regulation and administrative control of the convict shipping process. Transportation predated the penitentiary as a “decisive national response” to penal concerns, and set the stage for the coming years of increased central government control of punishments. The most important aspect of transportation’s ability to widen the net of penal sanctions, however, is seen in the combination of the private mechanisms and increased public governmental commitment. I argue that it was this pairing of delegation to commercial actors and increasing involvement of the national government in the financial, political and regulatory aspects of the administration of punishment that made possible the expansion of eighteenth-century penal capacity.

In Chapter Five I explored the perceived legitimacy of transportation. In order for the “net” to widen, transportation had to be understood as an acceptable use of coercive power. This legitimacy had two inter-related dimensions. First, transportation was seen as

consistent with multiple conceptions of penalty in a time of transitioning penal regimes, and second, transportation was legitimized by its close relationship with a dominant, and accepted, labor form.

North American transportation is often dismissed in accounts of penal evolution. Its partially private character and its goal of ridding England of offenders have invited the characterization that transportation was a temporary, misguided expedient. This dissertation has challenged that view by emphasizing the importance of understanding transportation in the context of changing patterns of punishment, the developing penal capacity of the state, and dominant forms of labor relationships.

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