

other contributors, Barnett contends that the crisis facing the criminal justice system calls for nothing less than a complete break with the policies of the recent past and the adoption of a fundamentally new approach to criminal justice—restitution.



## Chapter 12

### The Transportation of Criminals: A Brief Political-Economic History

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#### ANGLO-SAXON ROOTS

The excellence of Anglo-Saxon law concepts and their applicability today is best illustrated by the old system of *frithborh* or frankpledge. Basically, Anglo-Saxon common law was the law applied among neighbors. In the frankpledge system, groups of neighbors, usually ten or twelve, formed a unit that pledged surety for the good behavior of each, including the payment of judicially assigned damages should one of the members of the unit commit an injury to someone within or without the unit. Such units originally must have been based on kinship, for in early forms husbands and wives, having different kindred, had different pledge units. As the protective functions of kinship disappeared with mobility, the protective function was assumed by neighborhood groups that, by the proximity of their members, were able to reduce the cost of protection.

The *frithborh* or frankpledge system was a voluntary, personal association of families in the same neighborhood. In densely populated areas there would be a number of associations. These associations have been described as guilds or *tithings* which agreed, on a periodic basis, to be responsible for the offenses committed by its members against members of other voluntary associations. Every person either had sureties and pledge associates or one would not be able to function beyond one's own land, as no one would deal with one who had no bond or who could not get anyone to pledge their surety with him.

Any dispute or trial or an injury by a pledgeman against a fellow pledgeman, or against one in another surety association, required adjudication in the presence of the neighbors who were members of the voluntary associations, since they were the judges of the law and the facts.<sup>1</sup> Among the punishments for felony crimes were exile or banishment from the jurisdiction and outlawry or declaration of wolf-head, providing for execution on sight if a felon returned to the jurisdiction.

This healthy system tended to reduce or prevent the introduction into any society of anyone who did not have credentials transferred from a previous peaceful participation in a surety association. No one could enter the neighborhood who did not have membership in the local voluntary associations or who did not belong to some recognized equivalent association, such as the association of merchants, with its judicial systems. Thus, social relations were maintained only with people who shared surety protection.

Although suffering serious deformation by the introduction of law systems from the Continent, the benefits of Anglo-Saxon common law concepts continued for most Englishmen, as the continental laws mainly were applied to and benefited the Norman lords and clergy. For example, the rule that an injury could be the subject of inquiry, trial, judgment, and disposition only in the neighborhood in which it occurred—the concept of venue and the jury of twelve judges of law and fact from the neighborhood—continued to be observed.<sup>2</sup>

The maintenance of the jury system and of the nonlegalist lay judicial system of the justices of the peace may have been one of the most important social phenomena in English history, but it has received very little attention compared to the government's activities. The vast majority of the English benefited from the continuation of the concept of the surety system—the view of frankpledge and jury systems. The folk-peace was preserved, and the peace breaker was expelled from the association's neighborhood.

1. Thomas P. Taswell-Langmead, *English Constitutional History*, 2nd ed. (London: Stevens and Haynes, 1881), pp. 35–36, 130, 159; J. Laurence Loughlin, "The Anglo-Saxon Legal Procedure," in *Essays in Anglo-Saxon Law* (Boston: Little, Brown, 1876), pp. 270–99; W.S. Holdsworth, *A History of English Law*, 3rd ed. (Boston: Little, Brown, 1923), 2:43–47.

2. Taswell-Langmead, pp. 35–36; William Blackstone, *Commentaries on the Law of England. Of Public Wrongs* (Boston: Beacon Press, 1962), pp. 298–303; William Stubbs, *The Constitutional History of England*, 5th ed. (Oxford: Clarendon Press, 1926), 1:93–96; Lysander Spooner, *An essay on the trial by jury* (Boston: John P. Jewett, 1852).

## TUDOR LEGISLATION AND TRANSPORTATION

The drastic changes imposed on English society beginning with the Tudor reigns began to undermine the local systems of crime control, but much of the system persisted into the nineteenth century. Large numbers of agrarian people were dispossessed by the state, and moved about the country. Justices of the peace were required to control this population, but they were reluctant to permit them to settle in the districts because the state made the districts responsible permanently for their upkeep if the migrants did not find employment. The absence of government economic regulation in the rural parts of England encouraged the growth of industry in these areas during the sixteenth and seventeenth centuries, and this in turn contributed to the absorption of at least part of the population that had been dispossessed by the state. On the other hand, the eventual settlement of many of the dispossessed people in London gave rise to a metropolitan area based on government activity—the negation of production—rather than an urban productive area, as described by Jane Jacobs.<sup>3</sup>

The expanded, unproductive population of London produced the metropolitan problem of crime explosion. The courts' options for most felonies were execution or sentencing to prison. The latter had a primary drawback: prisons meant extended costs to the taxpayers to maintain the prison, while after release the criminal returned to society, probably improved only in his criminality by the prison system. The return of felons to society was abhorrent to people who were accustomed to the Anglo-Saxon common law concepts of exclusion of felons by exile or outlawry; there was a preference, where government interfered with those practices, to apply the threat of execution. Transportation of criminals—that is, exiling them to remote prison colonies—served as a substitute for execution, especially for criminals who had already suffered punishment. Transportation of felons was viewed as a more serious punishment than being held in prison and eventually released to society, although it also reduced the cost to taxpayers.

The origins of the system of transportation of felons lies in the Elizabethan era. The act of 39 Eliz. c. 4 (1597) provided that where rogues, vagabonds, and sturdy beggars "shall be dangerous to the inferior sort of people," and shall be incorrigible, justice might ordain that they "be banished out of this Realm, and all other the

3. Jane Jacobs, *The Economy of Cities* (New York: Vintage Books, 1970); id., *The Death and Life of Great American Cities* (New York: Vintage Books, 1961).

Dominions thereof," and "be conveyed into such Parts beyond the Seas as shall be at any Time hereafter for that Purpose assigned by the Privy Council unto her Majesty."<sup>4</sup> Transportation to the Virginia Colony began soon after.

During the seventeenth century, the broadest application of the policy of transportation occurred during the twenty years of Civil War, and the wars with Scotland and Ireland in the mid-seventeenth century. Most of the transportees were Celtic. Scot prisoners of war were transported to the West Indies and to mines in West Africa by Cromwell. Prisoners of the rebellions of 1715 and 1745 who survived the holocaust of English conquest were transported to America. Irish prisoners of war, including women and children, were subjected to transportation as slaves or servants, especially to sugar plantations in the West Indies, where they formed such an incorrigible part of the work force that they were replaced during the latter seventeenth century by more productive African agricultural workers. These slaves were more loyal to English rule than the Irish slaves.<sup>5</sup>

## POLITICAL TRANSPORTATION

### Basis of Hostility to Criminal Transportation

These origins raise an important issue about transportation. Its history is not a simple one of the transportation of ordinary felons. It is complex because of the intermix of political prisoners, from the Scottish and Irish "rebels" sent to the North American colonies and to the West Indies in the seventeenth and eighteenth centuries, to the Irish and English political prisoners sent to Australia in the later eighteenth and nineteenth centuries.

This association of transportation with political "crimes" dramatically confused the subject, as much of the opposition to transportation of political "criminals" was based on the fact that large numbers of people did not view these individuals as criminals, and viewed transportation—with its hardships, sickness, and chance of death—too severe a punishment for noncriminal offenses. For the same reasons, the government thought that transportation was too good. G.A. Wood wrote in 1927 that "the greatest English criminals remained in England," by which he did not mean those executed, but

4. Leon Radzinowicz, *History of English Criminal Law*, (London: Stevens, 1948) 1:109; John Watson, "The Prison System," in *Penal Reform in England*, 2nd ed., eds. L. Radzinowicz and J.W.C. Turner (London: Macmillan, 1946), pp. 164–78.

5. Leonard P. Liggio, "English Origins of Early American Racism," *Radical History Review* (Spring 1976).

"those who plundered their country in habitual political robbery."<sup>6</sup> Similarly, the French use of transportation in the eighteenth century to colonies such as Louisiana was followed by the shipment of political opponents, starting with orthodox clergy and Jacobin radicals in the 1790s, a practice that continued through the nineteenth century.

One of the most outstanding examples of the confusion of transportation of criminals and political "criminals" is Russia's use of Siberia. In 1648 the Russian government introduced exile to Siberia as a punishment, and during the seventeenth century, exile was substituted for the death penalty or other major punishments. Traditionally, the villagers themselves administered justice in Russian villages and they generally exercised their right to include permanent exile as part of the punishment. The government sought to institutionalize this practice by providing that those exiled from their own village were assumed not to be welcomed in another village, thus being required to go to Siberia as settlers. These *Kolodniks* (exiles) formed a large population; between 1823 and 1887 the number of exiles who went to Siberia was 772,979. The tsarist government used large numbers of felons in mines in Siberia; survivors would settle in Siberia at the end of their terms. Less serious criminals were exiled to agricultural settlements.

The most well publicized, however, were the political prisoners, and the use of transportation for political prisoners caused the entire concept to gain a negative reputation. In America this result was due mainly to the role of George Kennan. His book on *Siberia and the Exile System* (1891), and his Society of Friends of Russian Freedom (which included William Lloyd Garrison, Hamilton Holt, Lyman Abbott, Jane Addams, Lillian Wald, Oswald Garrison Villard, Jacob Schiff, and Rabbi Stephen S. Wise) tended to give Americans a bad impression of exile and the transportation system because it was associated with political prisoners. Americans were distressed at any punishment of active Russian disciples of Smith, Buckle, Mill, and Spencer.<sup>7</sup>

### The English Transportation System

Transportation of convicts became more regularized in the eighteenth century. The Mutiny Act of 1702 (1 Anne, St. 2, c. 16) pro-

6. Russel Ward, *The Australian Legend* (Melbourne: Oxford University Press, 1958), p. 19; E.J. Hobsbawm and George Rudé, *Captain Swing* (New York: Pantheon Books, 1968), pp. 265–80.

7. George Kennan, *Siberia and the Exile System*, 2 vols. (New York: The Century Co., 1891), 1:78, 80–81, 183–84; Christopher Lasch, *The American Liberals and the Russian Revolution* (New York: Columbia University Press, 1962), pp. 8–9.

vided for conscription into the military instead of transportation. The most important act was that of 1719 (6 Geo. 1, c. 23, s. 9), "An Act for the further preventing Robbery, Burglary, and other Felonies, and for the more effectual transportation of Felons."<sup>8</sup> The American Revolution brought a crisis in English criminal justice, especially in London, as it interrupted the transportation of felons. A solution was found in the late 1780s when transportation to Botany Bay in New South Wales in Australia, and later to Van Diemen's Land (Tasmania) and other parts of Australia, was initiated. This continued until 1867.

Transportation of criminals from London occurred in the context of a unique criminal justice system in England. Outside of London, criminal justice remained in the hands of the neighbors. In a period of severe economic changes precipitated by political intervention, significant problems arose in the agricultural sector. Government intervention uprooted 200,000 yeomen of farmer families during the eighteenth century with severe social consequences. English society was able to handle this social upheaval better than other societies due to the informal and neighborhood-based justice system. English neighborhood justice was founded on the belief that it was preferable to allow some crimes to go unpunished rather than to accept the existence of a police force, since English society had an intense aversion to an army and a police constabulary, as well as to state prosecution of crime. Crime was prosecuted by the victim, who determined the severity of the punishment. This criminal justice system was consistent with the general political philosophy of "salutary neglect" of eighteenth century Whigs, such as Robert Walpole, Henry Pelham, the Duke of Newcastle, and their principal legal advisor for almost half a century, Philip Yorke, Lord Chancellor Hardwicke.<sup>9</sup>

The system of transportation received favorable comment from Enlightenment philosophers such as Voltaire, who said:

... it generally happens that the criminals sent to Siberia in time become honest people. The same is observed in the English colonies. We are astonished at the change, and yet nothing can be more natural. The condemned are forced to continual labour for a livelihood. The opportunities of vice are wanting. They marry and multiply. Oblige men to work, and you certainly make them honest.<sup>10</sup>

8. Radzinowicz, 2:60.

9. Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree*, eds. D. Hay et. al. (New York: Pantheon, 1975), pp. 17-63, especially pp. 40, 56-60; E.P. Thompson, *Whigs and Hunters* (New York: Pantheon, 1975).

10. James Heath, *Eighteenth Century Penal Theory* (Oxford: Oxford University Press, 1963), p. 146.

Although there were frequent writings about the system of transported convicts in Australia, such as James Murdie's *The Felony of New South Wales* (London, 1837), thorough examination of the transported felons and the colony that they and their descendants established has awaited the attention of modern scholars. Of the more than 160,000 persons transported to Australia as felons, most of them—over 130,000—arrived after 1815. Eighty percent were transported for felony crimes, and a large majority were transported after a previous conviction. Two-thirds were tried in England and were Protestant; one-third were tried in Ireland and were Catholic. A few were Scots. The basis of national differences among the felons was summarized by the saying: "A man is banished from Scotland for a great crime, from England for a small one, and from Ireland, morally speaking, for no crime at all."<sup>11</sup>

Large numbers of Irish convicts were sentenced for the political "crime" of opposition to English rule. The Irish convicts tended to be older than the English, included more married men, had had less trouble with the police, were unskilled workers, and had not moved from their counties of birth, compared to the English convicts. Of women convicts, 43 percent were English, 47 percent Irish, and 9 percent Scots. (Half of the assisted, free immigrants to New South Wales before 1851 were Irish.)

In a letter from the Convict Department in 1850 it was noted that, on the basis of 60,000 convicts still residing in the colony, only 370 were under any kind of punishment. The conduct of the convicts in Australia bears out the view of Voltaire. Governor Macquarie, after nine years in office, wrote in 1819:

You already know that nine-tenths of the population of this colony are or have been Convicts, or the Children of Convicts. You have Yet perhaps to learn that these are the people who have Quietly submitted to the Law and Regulations of the Colony, altho' informed by the Free Settlers and some of the Officers of Government, who have built Houses and Ships, who have made wonderful Efforts, Considering the Disadvantages under which they have Acted, in Agricultural, in Maritime Speculations, and in Manufacturers; these are the Men who, placed in the balance as Character, both

11. L.L. Robson, *The convict settlers of Australia, An enquiry into the Origin and Character of the convicts transported to New South Wales and Van Diemen's Land, 1787-1852* (Melbourne: Melbourne University Press, 1965), pp. 9-10, 74-85, 89-91; Ward, pp. 43-65; Harry Elmer Barnes, *Transportation as a Method of Punishment* (Montclair, New Jersey: Patterson Smith, 1972), pp. 68-92; Harry Elmer Barnes and Hegley K. Teeters, *New Horizons in Criminology* (Englewood Cliffs, New Jersey: Prentice-Hall, 1959), pp. 294-305; Harry Elmer Barnes, *The Repression of Crime: Studies in Historical Penology* (New York: Doran, 1926), pp. 86-87; Leon Radzinowicz, *Ideology and Crime* (New York: Columbia University Press, 1966), p. 61.

Moral and political (at least since their Arrival here) in the opposite scale to those Free Settlers.<sup>12</sup>

Charles Darwin, who visited New South Wales in 1836, observed:

The worst feature in the whole case [the transportation system] is, that although there exists what may be called a legal reform, and comparatively little is committed which the law can touch, yet that any moral reform should take place appears to be quite out of the question. . . . On the whole, as a place of punishment, the object is scarcely gained; as a real system of reform it has failed, as perhaps would every other plan; but as a means of making men outwardly honest—of converting vagabonds most useless in one hemisphere into active citizens of another, and thus giving birth to a new and splendid country—a grand centre of civilisation—it has succeeded to a degree perhaps unparalleled in history.<sup>13</sup>

The emancipated convicts strongly resented the practice of the granting of large estates, mainly to military officers and government officials holding positions in Australia, but also to important immigrants. This system of land grants would become a serious issue in the debate over the penal colony system. Australian-born youth had attitudes that many visitors like Darwin would find unsatisfactory. Australian-born youth scorned entry into government service, preferring any private employment, and labor shortages created very good employment opportunities for youth. Boys of seven and eight became oxen drivers, or craftsmen's aides; teenagers were given responsible assignments. The editor, E.S. Hall, wrote in 1828:

The fact is, Sir, the young men of this Colony have feelings just the reverse of those of the Lower Orders in England and Ireland. The circumstances of the parents of most of them having come to the country in bondage, so far from making them humble, causes them to be the proudest people in the world. They are high-minded even to arrogance. The circumstance of being free is felt by them with a strength bordering on a fierce enthusiasm. Nothing can induce them to enter the army, nor take place in the police.<sup>14</sup>

12. Ward, p. 30.

13. Ibid., p. 31.

14. Ibid., pp. 63, 73; Eris O'Brien, *The Foundation of Australia (1786–1800), A Study in English criminal practice and penal Colonisation in the eighteenth century* (London: Sheed & Ward, 1937), pp. 121–91; 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: Faber and Faber, 1966), pp. 143, 155, 217, 273, 359; R.M. Hartwell, *Economic development of Van Dieman's Land, 1820–1850* (Melbourne: Melbourne University Press, 1954); James Griffin, ed., *Essays in Economic History of Australia, 1788–1939* (Brisbane: Jacaranda Press, 1967).

Later, when gold was discovered in 1851, it is interesting to note that as part of the tradition of avoiding the police authority, and echoing Anglo-Saxon custom, anyone committing a crime in a goldfield was expelled from that field, and the sanction carried for the other goldfields.<sup>15</sup>

### Support and Opposition to Transportation

Many of the eighteenth century writers on crime and punishment who had experience with the transportation system, such as Sir James Fielding and Patrick Colqhohoun, strongly supported it. It was felt to be consistent with the general legal position based upon retribution. Adam Smith, in his *Lectures on Justice, Police, Revenue, and Arms*, favored retributive justice. Lord Kames, in his *History of the Criminal Law*, formulated a legal philosophy rooted in retributive justice. Lord Woodhouslee declared in 1807 that "the foundation of criminal law is retributive justice, that great principle which regulates the redressing of wrongs, and the avenging of injuries." Woodhouslee noted that the severity of criminal law was due to "our departing from the just principle of commensurating the vengeance of the law to the moral guilt of the offender; and from our resorting to the secondary end of punishment, the prevention of crimes, instead of the primary, which is the avenging of them."<sup>16</sup>

Opposition to transportation of felons received its greatest support from the Utilitarians, especially Jeremy Bentham. From the very beginning of the move to Botany Bay as an alternative to transportation to America, Bentham opposed transportation. He advocated the creation of a domestic prison system, the Panopticon, of which he proposed himself as warder. It would have the aim of reforming the criminal and returning him to society as a good citizen. Bentham's utilitarianism was the source of modern prison theory, as well as of criticism of transportation. Bentham and his disciples favored reformation of criminals as a major aim of punishment. They considered the prison—ordered according to their designs—the best method of reformation.

Bentham considered banishment a bad punishment because it had an unequal effect depending on the offender's age, sex, and family ties. The hard labor required to survive in a colony, Bentham be-

15. Ward, p. 111.

16. Adam Smith, *Lectures on Justice, Police, Revenue, and Arms* (Oxford: Clarendon Press, 1896), pp. 126, 142; Lord Kames, "History of the Criminal Law," *Historical Law Tracts* (1761), pp. 1–57; Lord Woodhouslee, *Memoirs of the Life and Writings of the Hon. Henry Home of Kames* (1807), in *History*, ed. Radzinowicz, 1:73, 79, 86; Heath, p. 281.

lieved, had no beneficial attributes in those circumstances. Finally, if the criminal was reformed, he was not readmitted to English society. Bentham objected that transportation lacked an exemplary quality; little impression is made on people at home as a deterrence to their committing crimes. The punishment does not confine and control the convict as an individual; it only removes him from society.

So Bentham viewed transportation as too harsh in that the convict was not protected against the high risk of death, against sickness, or against difficulty in acquiring food in the colonies. He saw it as too easy, because it did not confine and control. Bentham found that it violated certainty, since it could not be predicted which felons would survive and which would not:

Justice, of which the most sacred attributes are certainty and precision—which ought to weigh with the most scrupulous nicety the evils which it distributes—becomes, under the system in question, a sort of lottery, the pains of which fall into the hands of those that are least deserving of them. Translate this complication of chances, and see what the result will be: “I sentence you,” says the judge, “but to what I know not—perhaps to storm and shipwreck, perhaps to infectious disorders, perhaps to famine, perhaps to be massacred by savages, perhaps to be devoured by wild beasts. Away, take your chance, perish or prosper, suffer or enjoy; I rid myself of the sight of you; the ship that bears you away saves me from witnessing your sufferings; I shall give myself no more trouble about you.”<sup>17</sup>

Bentham viewed his Panopticon penitentiary as an example to those in the metropolis who might contemplate crime; thus it would be a deterrent. For purposes of deterrence, the actual punishment of the criminals would be less important than the appearance of punishment. The criminals would suffer the punishment of reformation. “By his constant superintendence, the governor would subject the inmates to a new discipline, by his teaching them profitable trades he would impart a new education to them, so that when set free they would be able to take up a useful occupation.”<sup>18</sup> Part of Bentham’s scheme also involved the belief that by their work, the convicts would be able to pay compensation to the party that was injured.

One of Bentham’s leading disciples, Sir Samuel Romilly, was the leading advocate in England of prison and criminal law “reform.” While Bentham attacked transportation, Romilly carried forth the

campaign in the House of Commons. Based on what he considered the arbitrariness of transportation, Romilly’s criticism included the objections that there was no provision for the return of former convicts, and that they were ill-suited to create a well-behaved colony. Concerning the colony of convicts and emancipated convicts in New South Wales, Romilly told Parliament:

It was, perhaps, the boldest and most unpromising project ever held out to any administration. The colony was to consist entirely of the outcasts of society and the refuse of mankind, of persons who had not ever been left to their own natural profligacy, but who had acquired a matured virility in vice by their education on board the hulks [prison ships in the Thames]. . . . Instead of selecting persons who were acquainted with agriculture and the employments of a country life, the directors of the undertaking chose only those who had been convicted in London and Middlesex, and who, as inhabitants of a large city, might be easily conceived to be the most unfit persons for a new colony.<sup>19</sup>

James Mill, likewise interested in the reformation of the criminal, commented on transportation and convict colonies in his famous essay on colonies for the supplement to the *Encyclopaedia Britannica*, which was reprinted in his *Essays* (1831). Mill’s healthy skepticism about the economic benefits of colonization as a government policy contributed to his distaste for the convict and emancipative colonies: “New South Wales of all places on the face of the earth, except, perhaps, a British prison, is the place where there is the least chance for the reformation of an offender, the greatest chance of his being improved and perfected in every species of wickedness.”<sup>20</sup>

#### CONVICT COLONIES AND THE DEBATE OVER ECONOMIC PRINCIPLES

Probably due to the domestic political situation, the classical economists tended not to examine the English social and economic situation, but rather used the overseas areas of Ireland, North America, and Australia as the focus of their empirical work. Donald Winch has noted: “The economic problems raised by colonies and colonization went straight to the root of classical inquiry: free trade, capital accumulation, population pressure, economic growth and the role of the state. Colonial topics furnished a proving ground and a battlefield

17. Coleman Phillipson, *Three Criminal Law Reformers, Beccaria, Bentham, Romilly* (New York: E.P. Dutton, 1923), pp. 210–13; Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Blackwell, 1948), pp. 281–311; Heath, pp. 225–26.

18. Phillipson, pp. 212–13.

19. Ibid., p. 316.

20. Crawford D.W. Goodwin, *The Image of Australia* (Durham, North Carolina: Duke University Press, 1974), p. 12.

for differences of opinion on wider matters of economic analysis and policy.”<sup>21</sup> Adam Smith had described how monopoly and imperialism diverted capital, distorted investment, and hindered the rate of economic growth. Bentham in *Emancipate Your Colonies* (1792) had noted the double injustice of imperialism: the subjects of the imperialist state suffered expense and corruption, and the people of the colony were worse governed than under self-government. Among the expenses of colonialism, Bentham noted the general retardation of economic development, and added that “it is the *quality of capital*, not *extent of market*, that determines the quantity of trade.”

From the beginning of the nineteenth century, economics began to be influenced by the writings of Thomas Malthus (an influence that eventually served as a source of inspiration for Keynesian economists as well). Malthus’ underconsumptionist views particularly influenced the Benthamites. In reply to Malthus’ belief that a free market could possibly give rise to a general overaccumulation or overproduction, David Ricardo stated that “all that is produced will be at its fair relative price and will be freely exchanged.” This was a formulation of the fundamental economic doctrine derived from Smith by J.B. Say and known as “Say’s Law of Markets.” Smith held, and J.B. Say stated, that in a free market there are unlimited investment opportunities and that overaccumulation of capital occurs only as a result of government intervention which, in turn, occurs at the behest of special interest groups.

The abandonment of classical economic doctrine in England can be dated from 1830, when a new generation of economists took a different direction. The convict colonies in Australia played a major role in this development. Nassau Senior provided an important continuity in classical economics by his application of Say’s contributions and by his interest in utility theory. But the major influences were the “theorists of 1830,” especially Edward Gibbon Wakefield and Robert Torrens. For Karl Marx, likewise, 1830 appeared as the termination of classical economics, except as continued by Cobden and Bright; the influence of the theorists of 1830 on Marx was to have immense importance.

The conflict between the anti-imperialist Cobdenite Manchester School and the Benthamite London School of colonial reformers (the theorists of 1830) was irreconcilable. The “liberty” and “liberalism” of the Manchester School was “most mischievous” to Bentham even as late as the 1830s, because “liberty” interfered with

security and the government’s police functions. For Bentham and his disciples, laissez-faire theory was a mere instrument, while the conservatism of enlightened despotism remained their ideal.

Shortly before his death, Bentham passed the mantle to Edward Gibbon Wakefield and subscribed to the view of Wakefield and the other theorists of 1830 that colonies were the greatest utility, as they would increase the market for England. This return to the language of mercantilism was crucial for nineteenth century economic theory, and was rooted for Wakefield in his abandonment of Say’s Law.

Like the mercantilist colonial theorists, Wakefield viewed the economy as glutted with productive facilities; there were insufficient opportunities for the further investment of capital and labor. Wakefield sought to destroy the Ricardian theoretical foundation of capital accumulation in the private sphere and to substitute in its place a “justification for monopoly accumulation through state power.” Winch noted: “Wakefield was denying the assumptions of Say’s Law by arguing that the demand of ‘field of employment’ for capital was not coextensive with its supply; that capital accumulation could take place in the absence of profitable investment opportunities and bring about the simultaneous existence of redundant capital and labour.”<sup>22</sup>

Wakefield was aware that the controls and institutions of colonialism that had been applied in the seventeenth century had been paralyzed and defeated by the American settlers in the eighteenth century. Wakefield’s analysis sought to remedy the failures of control in earlier colonial institutions. Wakefield’s interest was to establish “civilized communities” in the colonial societies as an outlet for the overproduction in the mother country. Winch continued: “He wanted colonies to be attractive to all classes of society, to be ‘extensions of an old society, . . . with the several parts in the *same relative situation as they occupied before.*’” Security or stability required a status society in order to attract the men who were or should be the governors over their fellow men. The colonies should not be a place where men could escape to freedom from government, status, and domination; rather colonies should involve a re-creation of the parent government, with status and domination for the benefit of the surplus governing class from the old country.

Smith had described a simple combination that provided a market for production, including manufactured goods. Wakefield described another situation—“complex combination” or “concentration”—arising from the relationship of political institutions to property

21. Donald Winch, *Classical Political Economy and Colonies* (Cambridge, Massachusetts: Harvard University Press, 1965), p. 2.

22. Ibid., p. 79.



and to the market. The attempts of the mercantilists to duplicate this development of "concentration" in the colonies through land grants or commercial privileges had been unsuccessful, especially in America.

Against the classical economists, from Smith to Marx, who considered America as a rather successful free market experiment, Wakefield viewed American history as a constant struggle by the governing class to overcome the freedom resulting from the primary defect in earlier colonial institutions—private property in land. Private property in land, Wakefield indicated, leads to the creation of real wealth and a comfortable existence, but it is the negation of the "complex combinations" upon which a status society is based. Wakefield realized that the export of capital and labor to the colonies did not fundamentally re-create the conditions of the old society, because the land was not monopolized as under feudalism and the people were not debarred from the free acquisition of land, or homesteading.

Feudalism, the expropriation of land through government monopoly, was basic to the "concentration" of capital and labor that Wakefield desired, and his objective was to introduce the effects of feudalism into the new colonies in Australia. Feudalism, he realized, was not merely the monopolization of land but, equally important, the resulting expropriation of the owners created an artificially abundant labor supply. "To achieve combination it was essential to prevent dispersal of the labor force into individual land ownership." Wakefield advocated strong government intervention to prevent the natural tendency toward private ownership of land from undermining complex combinations: "It is in the power, and seems to be within the province of legislation, to interfere with the operation of political economy; in so far, that is, as to prevent or correct the hurtful effects on the production of natural wealth, which arises from a minute sub-division of landed property."<sup>23</sup>

America represented the opposite of Wakefield's theory. Wakefield hated the cheapness of land and the expense of labor that characterized America. Although early nineteenth century American land policy was not formally based on homesteading, Wakefield felt that the low price of land sold by the government had nearly the same effect. Wakefield considered the introduction of black slave labor in

America a crucial event. Since it was not possible to introduce slavery in Australia and New Zealand, either of blacks or of whites ("if for every acre of land that may be appropriated here, there should be a conviction for felony in England, our prosperity would rest on a solid basis"), Wakefield insisted that the government should appropriate all the land and sell it above the market price. The government could then use that income to encourage the immigration of an artificially created labor force that could not easily afford the price of the government-controlled land.

Wakefield's many writings about the Australian convict colonies and their relevance to economic theory had a strong influence on John Stuart Mill, and through Mill on other economists, whether they claimed to be in the classical tradition or in the socialist tradition. Winch notes:

Mill always treated Wakefield's theoretical ideas with great respect, giving them prominence in his *Principles of Political Economy* (1848). He devoted a chapter to the concept of "combination" because he believed that it was "one of these great practical discoveries, which, once made, appear so obvious that the merit of making them seems less than it is."

Mill's approval of Wakefield's stress on the importance of creating circumstances favourable to the development of markets in new countries led him to abandon the laissez-faire principle in the case of colonization.<sup>24</sup>

Mill was not consistent with reference to Wakefield's "combination" concept; at least Mill became critical of Wakefield's belief in the political necessity of large-scale estates. Mill seemed to have lost a sense of the importance of Say's Law, because he completely overlooked Wakefield's and Torrens' stagnation position. Winch notes:

Mill acceded to the policy implications of Wakefield's theory while attempting to retain a thin veneer of consistency with his account of the fall of profit in Ricardian terms, and his defence [*sic*] of Say's Law. In going so far towards Wakefield's point of view Mill "completely undermines the relevance of his theoretical analysis of the impossibility of general glut."<sup>25</sup>

Mill's failure to perceive the loss of a sense of importance of Say's Law in analyzing Wakefield's theory had an important influence on

23. Ibid., pp. 94, 99, 145; Gertrude Himmelfarb, "The Haunted House of Jeremy Bentham," in *Ideas in History*, eds. Richard Herr and Harold T. Parker (Durham, North Carolina: Duke University Press, 1965), pp. 231-36; A.P. Thornton, *The Imperial Idea and its Enemies* (London: Macmillan and Co., 1959), pp. 8-11; Richard Koebner and Helmut Dana Schmidt, *Imperialism* (Cambridge: Cambridge University Press, 1964), pp. 27-28.

24. Winch, pp. 135-37.

25. Ibid., p. 139; A.W. Coats, "The Classical Economists and the Labourer," in *The Classical Economists and Economic Policy*, ed. A.W. Coats (London: Methuen, 1971), pp. 144-78; Marian Bowley, *Nassau Senior and Classical Economics* (New York: Octagon Books, 1967); Lionel Robbins, *Robert Torrens and the Evolution of Classical Economics* (London: Macmillan, 1958), pp. 247-48.



Marx. Colonel Robert Torrens and Edward Gibbon Wakefield, the so-called theorists of 1830 and founders of the Ricardian socialist tradition, were prominent supporters of government-assisted colonization as a potential outlet for capital goods produced in England. Wakefield wished to limit the opportunity and the extent of property ownership—without reference to the quality of the land and its potential use—by imposing a high purchase price on land. The proceeds from these sales would subsidize immigration to maintain artificially low wage rates.

Wakefield's frequently expressed proposal that the government prevent transported or immigrant labor from owning land for extended periods in order to create artificially a laboring class was strongly criticized by other long-term observers of the Australian economy, such as William Howitt. In 1852 Howitt blasted the Wakefieldian policies the government had adopted:

Here you have immediately a proof of that ingenuity by which men contrive to defeat the intentions of Providence. Providence has given vast new lands, on which the overflowing population may settle; but selfish and purblind governments immediately lay hold on that which was meant to be a free Gift of God, and dole it out in such modicums that the pressing necessities of arriving immigrants compel them to bid up it auction against each other, till the land of these new countries lying with millions of miles of unoccupied soil becomes far dearer than at the dearest of that which they have left.

The fatal Wakefieldian system of only selling colonial lands at a high price, and only where government pleases, has totally quashed that intermixture of tillage, that diffusion of cheerful villages up the country, which would have converted it from a desert to a place of happy and civilized life. The theory of preventing the too rapid spread of population in new lands, has here prevented it from spreading altogether.<sup>26</sup>

The English statesman Charles Dilke was greatly impressed by the homesteading and immigration policy in America after the Civil War; he was horrified on visiting Australia by the large land monopolies created by the government. American frontier expansion had a great positive impact on Dilke, and he felt that American liberalism was grounded on the Lockean principles of property rights and homesteading.

Dilke's very positive impressions about America contrast with earlier nineteenth century English views of Americans. In the 1820s

26. William Howitt, *Land, Labor and Gold* (Boston: Ticknor and Fields, 1885), 1:17, cited in Goodwin, pp. 83, 86.

there were great expectations that Australia would rectify the great mistake in America, where homesteading or Lockean land policies in the colonial period created the conditions and the expectations that led to the American Revolution and the Lockean social system that succeeded the Revolution. This expectation was noted for Van Diemen's Land, "where it is hoped, a better race from the same parent stock is about to spring up, than that of the 'back woodsmen' of North America."<sup>27</sup>

Wakefield argued that the fatal weakness of the convict colonies in Australia was the possibility that emancipatees could gain land easily. A ruling class of feudal landholders and policies negating the Lockean principle of homesteading, he noted, would create a large reserve of wage labor that he considered a necessity for a well-functioning economy. The artificially created labor force would encourage capital investment and create a market for the "overproduction" he believed existed in the English economy. As a student of Wakefield's writings, Karl Marx commented, in the first volume of *Capital*, on Australia's "shameless lavishing of uncultivated colonial land on aristocrats and capitalists" as an illuminating illustration of the artificial creation in new countries of the conditions for exploitation of labor.<sup>28</sup> Wakefield's analysis of the Australian economy shaped Marx's perception of the Australian colonies and profoundly influenced his economic theories. With reference to the Australian colonies, Marx noted:

There the capitalist regime everywhere comes into collision with the resistance of the producer, who, as owner of his own conditions of labor, employs that labor to enrich himself, instead of the capitalist. The contradiction of these two diametrically opposed economic systems, manifests itself here practically in a struggle between them. Where the capitalist has at his back the power of the mother-country, he tries to clear out of his way by force, the modes of production and appropriation, based on the independent labor of the producer. The same interest which compels the sycophant of capital, the political economist, in the mother-country, to proclaim the theoretical identity of the capitalist mode of production with its contrary, that same interest compels him in the colonies to make a clean breast of it, and to proclaim aloud the antagonism of the two modes of production. To this end he proves how the development of the social productive power of labor, cooperation, division of labor, use of machinery on a large scale, etc., are impossible without the expropriation of the laborers, and the corresponding transformation of their means of pro-

27. Goodwin, pp. 7, 84.

28. *Ibid.*, p. 84.

duction into capital. In the interest of the so-called national wealth, he seeks for artificial means to ensure the poverty of the people. Here his apologetic armour crumbles off, bit by bit, like rotten touchwood. It is the great merit of E.G. Wakefield to have discovered, not anything new about the colonies (Wakefield's few glimpses on the subject of Modern Colonisation [sic] are fully anticipated by Mirabeau Pere, the physiocrat, and even much earlier by English economists [the mercantilists]), but to have discovered in the colonies the truth as to the conditions of capitalist production in the mother-country. As the system of protection at its origin attempted to manufacture capitalists artificially in the mother-country, so Wakefield's colonisation [sic] theory, which England tried to enforce by Acts of Parliament, attempted to effect the manufacture of wage-workers in the colonies. This he calls "systematic colonisation [sic]."<sup>29</sup>

Wakefield's analysis of "capitalism's" need for the destruction of the Lockean right of private property by government was the basis of the concluding chapter (XXIII) of the first volume of *Capital*. Marx considered Wakefield's analysis the "purest" theory of capitalism:

The only thing that interests us is the secret discovered in the new world by the political economy of the old world, and proclaimed on the house-tops: that the capitalist mode of production and accumulation, and therefore capitalist private property, have for their fundamental condition the annihilation of self-earned private property; in other words, the expropriation of the laborer.<sup>30</sup>

H.O. Pappé has noted the fundamental role that Wakefield's comments on the Australian convict colonies played in the formulation of Marx's economic theory: "For Marx, his views on colonization were considerably more than a contribution to contemporary controversy; they were to be the crowning confirmation of his economic theory." Bernard Semmel has suggested that the Benthamite pursuit of a new bureaucratic collectivism caused Wakefield to deny Say's Law and to create a "general theory" of imperialism. Marx in turn believed that Wakefield's analysis proved that classical economic theory as well as the existing economy based on government intervention were founded upon exploitation of the laborers and the expropriation of their private property. "One point emerges clearly: much of what has been regarded as characteristically Marxist doctrine was already common Radical belief when Marx came to England in 1849."<sup>31</sup>

29. Karl Marx, *Capital* (New York: Modern Library, 1936), pp. 1:838-39.

30. Ibid., 1:848.

31. H.O. Pappé, "Wakefield and Marx," *Economic History Review*, 2nd ser., 4 (1951):89. Bernard Semmel, "The Philosophical Radicals and Colonialism," *Journal of Economic History* 21 (1961):515.

It would be beyond the scope of this essay to discuss why the above view of the Australian convict colonies gained dominance; certainly it would be part of a general discussion of the motivation and impact of utilitarianism. However, there were economists who were critical of this analysis of the Australian convict colonies. The Scottish economist Sydney Smith noted in 1803 that he feared that the government's policy in Botany Bay was not based on sound economic principles. He opposed the government's attempt to create a subservient and cheap labor force in order to encourage capital investment:

The high prices of labour which the Governor was so desirous of abating, bid fair, not only to increase the agricultural prosperity, but to effect the moral reformation of the colony . . . the avaricious love of gain, which is so feelingly deplored, appears to us a principle which, in able hands, might be guided to the most salutary purposes. The object is to encourage the love of labour, which is best encouraged by the love of money.<sup>32</sup>

In 1819 Smith criticized the government's interventionism, represented by its control over prices in the Australian convict colonies, its enforced dispersal of population, and its expenditure on public works (upon which Herbert Spencer later commented). By 1828 Sidney Smith was impressed by the development of healthy habits among the children of the convicts: "Instead of treading in the steps of their progenitors, [they] almost invariably render themselves conspicuous by a course of life directly opposite; and are, in a more than ordinary degree, temperate and honest."<sup>33</sup>

Lord Henry George Grey, as colonial secretary, presented a strong critique of the Wakefieldian advocacy of government intervention in colonization:

There is not (and never has been) any real redundancy of labour in this country; consequently it would be most mistaken policy to seek relief from any temporary difficulties we may experience, by artificially promoting emigration at the public expense, instead of by removing any obstacles to the natural extension of the field of employment at home. It must be borne in mind that active and industrious labourers, by being sent to Australia, cease to become contributors to the wealth and revenue of the mother-country.

To establish the practice of giving relief to those who cannot find work

32. Goodwin, pp. 22-25. Spencer used the example of government intervention in the transportation of Australia to criticize public works, *ibid.*, pp. 55-56. Also see, Herbert Spencer, "Government Colonization," *Social Statics* (New York: Appleton, 1878), pp. 390-405.

33. Goodwin, p. 25.

at home, by sending them to the Colonies where wages are higher than they are here, would therefore be to reverse the position of the good and bad labourers under the wholesome operation of the natural laws of society, and actually to give an advantage over the best labourers to the indiffererent ones, on account of their inferiority, by considering their inability to compete with the others in the labour-market at home, a reason for giving them the means of carrying their labour to a higher market in the colonies. . . . It is clear, that the more the population and wealth of the British Islands increase the lighter will become to their inhabitants the burden of our national debt, and of the taxes to which it compells [sic] us to submit.<sup>34</sup>

Grey's wisdom, however, did not overcome the arguments of the utilitarians in favor of government assistance to immigrants in order to create markets abroad for English goods. The policy of assisted immigration, along with the increase in immigration caused by the discovery of gold in 1851, created a population in the Australian colonies that was divided over the social implications of transportation of criminals. Due to the strength of their connections in England rather than their numbers, and the support of those advocating government assistance of immigration, the utilitarians pressured the English government into ending the system of transportation of convicts and replacing it with a system of penitentiaries for the reformation of prisoners. This was one outgrowth of the movement for the establishment of government police departments and of other continental intrusions into English criminal law.

The criminal law theorist of the late nineteenth century, Sir James Fitzjames Stephen, had opposed the attempts to control crime by endangering the essential liberties of the individual. The growth of a criminal justice bureaucracy to administer the reformation of criminals and infringe on the rights of the citizen was a result of the Benthamite mind set. Stephen was critical of the prison system established to replace transportation, "which provided so effective a method for protecting society at home against criminals by weeding them out and sending them to the colonies."<sup>35</sup> Instead, a great cost was placed on the backs of the law-abiding citizens of England. In contrast to Bentham's deterrence view, he emphasized that punishment must satisfy the "common feeling of hatred" against the criminal:

34. *Ibid.*, pp. 16-17.

35. Leon Radzinowicz, *Sir James Fitzjames Stephen, 1829-1894, and his contribution to the development of criminal law*, Selden Society Lecture (London: Bernard Quaritch, 1957), p. 29; Sir James Fitzjames Stephen, *A history of the criminal law of England* (London: Macmillan, 1883), 1:480-83.

The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.

It is highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it.<sup>36</sup>

If the "direct prevention of crime" was not the proper object of criminal sanctions, Stephen held that reformation had not any position in the criminal law, properly understood. Stephen felt that since inflicting pain was unpleasant to the humane and educated, they had sought to escape the question by looking to education, or reformation, as the solution. Stephen found that the prisons established in place of transportation were founded upon the false concepts of education or reformation. Furthermore, in contrast to expulsion from society, they entailed great expense to citizens. Stephen had an understanding of criminal law rooted in the view that the criminal had by his act excluded himself from society and that his continued presence in the society was an invasion. "There is as much moral cowardice in shrinking from the execution of a murderer as in hesitating to blow out the brains of a foreign invader."<sup>37</sup> The abolition of transportation, which had served as a substitute for executions, made the subject of capital punishment a cause of great controversy.

Given the general recognition that the system of prisons is a form of punishment that has not achieved the goals of citizens, while costing them fantastic sums in taxes to maintain, alternative forms of dealing with criminals are very much in order. At the same time, the operation of the criminal justice system by the government, based upon Benthamite or utilitarian intrusions into the common law customs, has been shown to be totally ineffective. A system of transportation of criminals and their permanent exclusion from established societies would be an effective solution to the necessities of punishment and of finding a modern approach to the criminal justice system left over from the nineteenth century.

The historical examples of transportation provide a strong positive support for that system. That system's excellent record has stood despite the criticisms of the Benthamites and the Ricardian

36. Radzinowicz, *Stephen*, p. 30.

37. *Ibid.*, p. 35. For a recent study of Stephen's criminal law writings, see James Alfred Colaiaco, "Sir James Fitzjames Stephen: the Great Dissenter" (Ph.D. dissertation, Columbia University, 1976), pp. 173-225.

socialists who perceived that the transportation system had not been designed for the purpose of deterrence or reformation or who viewed such a system as an impediment to the government colonization schemes they advocated. Moreover, the record of convict transportation systems has survived despite the public antipathy generated by the subsequent use of such systems to punish political opponents of the government. The system of transportation of criminals deserves a central place in discussions of alternatives to the existing system, which appears to be in an advanced state of collapse.



## Chapter 13

### The Role of the Victim in America

*William F. McDonald*

Before the American Revolution, criminals were required to pay back their victims. All defendants convicted of larceny, for example, were required to pay treble damages. If they could not pay, they were given to their victims in servitude for a length of time equal to the amount owed. If the victim preferred, he could sell the defendant. In 1769, a Massachusetts court sentenced defendant Powell to be sold for four years; in 1772, defendant Polydone to be sold for six months; and in 1773, defendant Smith to be sold for fourteen years. Victims who chose to sell their criminals rather than take them as servants were allowed one month in which to find a buyer. After that they had to pay for the criminal's maintenance in jail or the criminal would be released.<sup>1</sup>

The conception of crime in colonial America was very different than it is today. While criminal prosecutions were brought in the name of the state, they were in effect private prosecutions in which the state usually did not play an active role and did not have a vested interest. Crime was conceived of primarily as an injury to the individual victim, not an attack against society.<sup>2</sup> Today, the situation is reversed. Crime is regarded as an offense against the state. The damage to the individual victim is incidental and its redress is no longer regarded as a function of the criminal justice process. The victim is told that if he wants to recover his losses he should hire a lawyer and

1. William F. McDonald, "Towards a Bicentennial Revolution in Criminal Justice," *American Criminal Law Review* 13 (1976):649-73.

2. W. Nelson, "Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective," in *Criminal Justice in America*, ed. Richard Quinney (Boston: Little, Brown and Co., 1974).