

THE UNIVERSITY OF NEWCASTLE

DEPARTMENT OF HISTORY

STUDENT RESEARCH PAPERS

IN

EARLY AUSTRALIAN HISTORY

1976

C O N T E N T S

RACE AGAINST TIME

by Christine Misko

CONVICT OFFENCES: SHAW/ROBSON?

by Gary Luxford

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P R E F A C E

Each year students in the History IIB Class are asked in First Term to research a paper on some aspect of the History of Australia before Federation that interests them, basing their work, wherever possible, on primary sources. Some of these papers reach high standards, and not infrequently make original contributions to the understanding of our history, especially to the local history of this region.

This collection of five of the papers presented this year has been assembled to make the fruits of some of this research available to others, and at the same time to show students the standard of work that can be achieved. These essays are not necessarily the best essays, but they are good ones and are technically well presented. They have been chosen, however, more to demonstrate the variety of issues that interest students: local as well as national; female as well as male; black as well and white.

They display a solid background and provide an insight into several themes developed during the First Term. In this way they constitute a useful supplement to the course and should prove interesting reading.

It is hoped that this project will continue from year to year both to encourage research and originality and to slowly build up a body of material to which later students can refer.

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CONVICT OFFENCES: SHAW/ROBSON?

by Gary Luxford

SYNOPSIS

This paper sets out to discover, exactly, what type of criminal offences were dominant amongst the convicts during the transportation period from 1820 to 1852, with specific emphasis upon the period after 1835. The initial stimulation to investigate this question was provided in the works of A.G.L. Shaw and L. Robson.

In an endeavour to arrive at some firm understanding of the topic, it was essential to outline the development and functioning of the British criminal law. Once this had been done, it was possible to survey relevant statistical data concerning the convicts.

The findings indicate that petty crimes remain the most numerous convict offence during the period from 1820 to 1852. All that then remained was to find some specific reasons indicating why such a trend did occur.

"This (the new criminal law) meant that proportionately fewer were even sentenced to transportation, and from this time onwards the crimes of those who were sentenced were increasingly serious even if by modern standards their punishment was very severe". (Shaw, 1966).

"The effect of these and subsequent changes in the criminal law on transportation was slight. All they meant was that men who previously ran the risk of being hanged were now certainly transported (they usually were anyway), and that men who were formerly likely to be transported might escape with a goal sentence. The important point to stress is that the types of offences for which men were sent to Australia altered scarcely at all. This could be summed up by saying that a man found guilty of stealing money in, say, 1790 might be hanged, though he would probably be transported for life, whereas the same offence in, say, 1840 would be punished by seven years transportation, or perhaps a period in prison". (Robson, 1970).

The above cited quotations succinctly express two varying arguments concerning the criminal offences of the convicts sent to Australia in the period from 1787 until 1852. Shaw (1) maintains that, after the onset of criminal law reform in the late 1820's and early 1830's, there is a change in the type of offences for which criminals were sentenced to transportation. He maintains that as a result of criminal law reform, 'the crimes of those who were sentenced were increasingly serious'.

Robson (2) favours an entirely different view. He maintains that, although there was a process of law reform in the middle of the transportation era, the types of offences for which men (and women) were transported to Australia altered scarcely at all. He believes that even after a reform of the criminal law, the proportion of petty offenders among the convicts remained quite high.

The aim of this paper is to survey the type of criminal offences leading to transportation. The specific objective will be to see whether the type of offences remained much the same before and after any reform in the British criminal law. Yet, before any consideration can be given to the question of convict offences, it is necessary to gain some understanding of the movement towards criminal law reform within Britain.

A good general outline of England's criminal law during the eighteenth century would describe the letter of the law as severe and sanguinary. However the manner and spirit of the law's administration was totally different. "Often the injured party, realizing a trivial damage became in law a capital felony, refused to prosecute or altered the assessed damage so as to make the offence a misdemeanour". (3)

The influence of such a divergence between the statute law and the functioning of that law is reflected in figures recording the incidence of executions. The ratio of executions to capital convictions in London and Middlesex (4) for the period from 1749 to 1758 was 2:3. Between 1790 and 1799 it was 1:3 and for the period 1800 to 1810 it had been reduced to 1:7.

The development of the law concerning simple grand larceny is a good indicator of this general trend in the eighteenth century. This particular law is also important because larceny crimes were such a significant proportion of convict offences. (5) As the law stood in the late eighteenth century, simple grand larceny was theft unaccompanied by any aggravating circumstances; the adjective 'grand' denoted simply that the value of the stolen goods exceeded twelve pence. If it was twelve pence or under, the offence was called a petty larceny and did not carry the death penalty. (6) Many other petty offences (most of which were crimes of larceny) were punishable with death but, as in the case of simple grand larceny, punishment was usually commuted to terms of imprisonment or transportation. Such a situation was ridiculous because a severe criminal law hardly ever observed in practice, offered no fears to the criminal elements in society, nor did it act as a deterrent to the increasing incidence of crime.

Sir Robert Peel, as Home Secretary, saw the need for law reform. During the decade after 1820, he set about bringing the letter of the law into alignment with the manner and spirit of its administration. (7)

In 1823 (8) it was enacted that a court could abstain from passing the death sentence on persons convicted of any crime except murder. This meant that judges were empowered to merely record the death sentence and to impose transportation directly. The inevitable result was an increase in the number of commuted death sentences.

Another most important bill passed in 1827 (9) abolished the distinction between petty and grand larceny. This statute greatly reduced the number of capital felonies and made the punishment of transportation a more certain sentence. (10)

The process of criminal law reform continued into the 1830's, so that by 1839 the number of capital statutes had been reduced to fourteen. (11) Not more than thirty years previously the number had been something like two hundred and fifty.

The administering of the British criminal law led to the transportation of 148,000 convicts to N.S.W. and V.D.L. between 1787 and 1852. (12) Of these, 123,000 were male and 25,000 were female. From one half to two thirds of the convicts had formerly been punished, while 80% were transported for larceny of various kinds. (13)

Shaw, like Robson, acknowledges the high incidence of theft amongs the convict offences. However, they disagree on the proportion of petty offenders amongst the total number of transportees during the post law reform era.

Shaw claims that after 1835 the British government provided for imprisonment as a 'clear alternative to transportation', yet something like 54% of all convicts transported to N.S.W. and V.D.L. came out between 1830 and 1849. (14) Shaw accounts for this by suggesting that a significantly greater number of those sentenced to transportation after 1835 (15) were actually conveyed to the penal settlements (see Table One). He also asserts that the proportion of petty offenders amongst these convicts is significantly less than the proportion before the new criminal legislation. The validity of such a contention can best be ascertained by observing relevant statistical data concerning the convicts.

During period number one (1787-1819) the incidence of 'serious' offences (16) is 6% of the total number of convicts transported in that period. In the second period (1820-1852) the proportion of 'serious' offences had increased, but only insignificantly, to 7%. (17)

The incidence of simple larceny as a proportion of the total number of felons transported the first period is 33%. During the latter period the proportion actually rose to 38%. Contrary to Shaw's argument petty crime still constituted a significant proportion of convict offences. Similarly the petty crimes under the heading of 'Offences Against Property' (18) had increased from 63% of the total in the first period, to 84% of the total number of offences in the second period. (19)

Even if one claims that Shaw was referring specifically to the period after 1835, the evidence still supports Robson's contention. From 1830 to 1852 the proportion of serious offences was 7% and for offences against property 85% (including 37% for simple larceny) of the total number of convicts transported. (20)

All the above figures indicate that the proportion of serious offences remained a minor portion of convict numbers. Thus Shaw's appraisal is proven to be fallacious. All that remains is to find a reason or reasons indicating why such large numbers of petty criminals came to Australia between 1820 and 1852.

An answer could be found by observing the proportion of very young offenders amongst the convicts. Between 1835 and 1839, 66% of all persons convicted in Britain were under 25 years of age, while 50% were under 21 years of age. (21) This means that 20% of the population were committing 55% of the crimes. (22) Also, at least 55% of all convicts transported for simple larceny came from the 15 to 24 years age group. (23)

A proportional increase in the number of petty offenders among transportees after 1820 could have resulted partly from an increase in the numbers being sent from the under 25 age group. (24) However, the lack of a set of tables indicating the offence, the age of the offender, and the year of departure, makes this hypothesis difficult to verify.

Another explanation could be found in the influences of an efficient police force, a reformed criminal law and a new form of prosecution. Between 1814 and 1829 the ratio of convictions to charges (see Table Two) in London and Middlesex was 63% and for the period 1830 to 1839 it was 72%. In the remainder of England the ratios for the corresponding periods were 68% and 72% respectively. (25)

It is not unreasonable to suppose that as the number of convictions increased so did the proportion of convicted petty offenders. (26) Thus, the greater number of convictions led to more petty offenders being sentenced to transportation. This situation was compounded by the fact that between 1830 and 1852 greater numbers of prisoners were being conveyed to Australia

because of the changing situation on board the hulks and the operation of the new criminal law.

The administration of the new criminal law gained a greater level of honesty and efficiency with the advent of stipendiary magistrates and public prosecutors. These magistrates enforced the law in a manner which added a greater certainty to the form punishment would take. Previously, many criminals had been acquitted because the operating law and its administration were antiquated. Greater numbers now began to be prosecuted under a more efficient criminal code. Similarly, many more minor offenders (especially during the 1830's) were transported under criminal laws which made a specific provision for such a punishment.

However, the contribution of the new criminal law to the number of petty offenders transported after 1830 was dependent upon the changing situation on board the hulks.

"At 1833...the men of the worst character, and those previously convicted for serious offences being sent first...However, after 1833 the position changed and by 1835 it had been ordered that all the men on the hulks be transported". (27) Thus, prior to 1835 a sentence of transportation did not necessarily mean that the felon would progress any further than the hulks. For instance, of the numbers sentenced to transportation in England just prior to 1819 about 30% were actually sent away. From about 1824 until 1846 the figure fluctuates between 60 and 75% (see Table One). In Ireland the number remained at about 70% until 1844. (28)

A lack of available work for hulk inmates and a shortage of prisons (especially in Ireland) necessitated sending away a greater number of convicts in the latter period. Thus, since petty offenders constituted between 70 and 90% of convicted felons, and since such a significant proportion of these offences were punished with transportation, then it must follow that any increase in the number of actual transportations will contain a significant number of petty offenders.

The statistical evidence must lead one to conclude that a great majority of the convicts throughout the period of transportation were nothing more than petty criminals. Undoubtedly, more serious felons were conveyed to the penal settlements of eastern Australia once the death sentence was reserved solely for murderers but they remained a decided minority, before, during and after the reforms in the British criminal law.

FOOTNOTES

- (1) A.G.L. Shaw, Convicts and the Colonies, London, 1966, p.148.
- (2) L. Robson, The Convict Settlers of Australia, Carlton, 1970, p.8
- (3) E. O'Brien, The Foundation of Australia, Sydney, 1950, p.58.
- () see also Robson, op.cit., p.33.
- (4) L. Radzinowicz, A History of English Criminal Law, London, 1948, Vol.1, p.151.
see also pp1819 (585) VIII Appendices 1 and 2, pp126-139.
- (5) Between 1810 and 1825 larceny charges comprised 90% of all crimes in England. pp1827 (534) pp66-70. Cited in O'Brien, op.cit., p.10.
- (6) Radzinowicz, op.cit., Vol.1, pp632-633
- (7) see Holdsworth, W., A History of English Law, London, 1965, Vol.XIII, pp397-401
O'Brien, op.cit., pp48-53.
Radzinowicz, op.cit., Vol.1, pp578-585.
- (8) 4 Geo 4, C48 (1823).
- (9) 7 and 8 Geo 4, C28 (1827).
- (10) The punishment for simple larceny was transportation for seven years or imprisonment for not more than two years.

- (11) Radzinowicz, op.cit., Vol.1, pp733-734.
- (12) The grand total (which includes the period to 1868), is 163,021. Robson, op.cit., p.4.
- (13) Ibid, p.9.
- (14) Ibid, Tables 4a and 4k.
- (15) The observance of any proportional changes in the incidence of convict offences can only be made more comprehensible by dividing the transportation period into two sections. The first, from 1787 to 1819, representing the period before criminal law reform and the second representing roughly the era of reform from 1820 to 1852.
- (16) These 'serious' crimes must be assumed to include such offences as murder, assault, robbery with violence, rape and wilful destruction.
- (17) Robson, op.cit., Tables 6a and 8a.
- (18) Without wilful destruction and robbery with violence.
- (19) Robson, op.cit., Tables 6a and 8a.
- (20) Ibid.
- (21) Shaw, op.cit., p.160.
- (22) Ibid.
- (23) Robson, op.cit., Tables 6f and 8e.
- (24) Ibid. 54% of all offences against property were committed by the 25 and under age group.
- (25) J.Hart, "Reform of the Borough Police, 1835-1856". English Historical Review, 1955, Vol.70, pp413-415.
- (26) Between 1810 and 1825 larceny charges rose by 300% and comprised 90% of all crimes in England. pp1827 (534) pp66-70. Cited in O'Brien, op.cit., p.10.
- (27) Robson, op.cit., p.37.
- (28) See pp1851 (572), XLVI.

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TABLE ONE

	A	B
1811 - 1817	31	30
1818 - 1824	34	60
1825 - 1831	34	70
1832 - 1834	35	75
1835 - 1837	27	66
1838 - 1840	22	66
1841 - 1843	19	75
1844 - 1846	17	66
1847 - 1848	14	40

Column A: % of all those convicted at assizes and sessions who were sentenced to transportation or respited for it.

Column B: % sentenced who were actually transported.

Source: A.G.L.Shaw, Convicts and the Colonies, Carlton, 1970, p.150.

TABLE TWO

	A		B	
	London & Middlesex	Rest of England & Wales	London & Middlesex	Rest of England & Wales
1811 - 1820	195	78	not ascertained	
1814 - 1820	209	89	131	58
1821 - 1829	226	105	145	74
1830 - 1835	231	131	163	93
1836 - 1839	198	145	146	105
1830 - 1839	218	136	156	98
1840 - 1849	208	162	157	118

Column A: the number of persons charged with criminal offences per 100,000 of population.

Column B: the number of persons convicted of criminal offences per 100,000 of population.

Source: J. Hart, "Reform of the Borough Police, 1835-1856", English Historical Review, 1955, Vol.70, p.413.