

"A PRISON SHIP LIES WAITING IN THE BAY": PENAL COLONIALISM IN THE SOUTH PACIFIC

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This article is offered as a contribution to this festschrift in honour of Professor Tony Smith, my colleague at Victoria University of Wellington. The main purpose of the article is to provide a Pacific orientation to the history of English criminal law and criminal and penal administration, as part of a collection of articles written as a tribute to Professor Smith's expertise and prominence in criminal law. The article draws on the historiography of English criminal law, a historiography with which Professor Smith is very familiar (and, indeed, knows some of its contributors personally). The article links this historiography to the wider historiography of the Pacific. Although the main focus is on Great Britain and the British system of convict transportation in the 18th and 19th centuries, the article also considers its French equivalent. France, too, shipped convicts to the Pacific, and just as the architectural legacy of the transportation era is obvious in Australia and Norfolk Island, it is also obvious in New Caledonia. The main approach has been to focus on "penal colonialism" as a specific variety of colonialism in its own right, and as an important dimension of British and French colonialism in the Pacific region during the colonial era. While New Zealand was not a penal colony as such, New Zealand had some connections of its own with British penal colonialism in the southwestern Pacific: New Zealand sent some convicts to the Australian penal colonies in New South Wales in Van Diemen's Land and also possessed a small-scale internal transportation of its own.

I INTRODUCTION: THE CONCEPT OF PENAL COLONIALISM

The words "South Pacific" may conjure up stereotypical images of coconut palms waving in the cooling trade winds blowing from the east, or perhaps of the great oceanic Polynesian sailing vessels of the past, the *waka*, or their modern replica vessels such as the Polynesian Voyaging Society's

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Hōkūle'a, ploughing a vast ocean as "wine-dark" as Homer's Mediterranean.¹ But, running counter to these images, the islands of the southern Pacific Ocean offer vistas of an altogether much grimmer kind: the remains of the crank room at Kingston, Norfolk Island, its stone walls enclosing the broken and rusting workings of a treadmill; a stone-built jetty and the foundations of a prison building at the same place laid out in accordance with Jeremy Bentham's plan for a panopticon, built by convict labour; a masonry guard tower and wall in downtown Nouméa, Foucauldian surveillance incarnate; or a row of solitary confinement cells, identical to those in the movie *Papillon* ("Prisoner, show yourself!") located within a ruined fortress at a picturesque spot by a turquoise lagoon on the western coast of Grande Terre.²

All over Grande Terre, the mainland of New Caledonia, can be found orange-red bricks made from the red mineralised soils of the island, and stamped AP (for "Administration Pénale"). The impressive remains of the convict era in Van Diemen's Land (now, of course, Tasmania) have generated a level of "dark tourism" sufficient to attract the interest of specialists in archaeological and historic preservation.³ Or, one can drive from Nouméa to Prony on the southwest coast of Grande Terre to see a sign informing the visitor to that remote spot that the road was originally built by convict labour. Alternatively, one can visit a well-restored prison building, now containing an excellent museum, in the fine Georgian precinct on the eastern side of Sydney's grand Macquarie Street. No one familiar with Norfolk Island, today an Australian possession, can forget the imposing remains of the island's vast penal colony, one of the densest clusterings of Georgian architecture to be found anywhere in the Pacific.

The architectural legacy of the South Pacific's carceral past is everywhere, from Tasmania to Norfolk Island, to nearly every part of the Grande Terre of New Caledonia, and even to the islands of the South American coast, the peaks of the Andes as a distant background. There are other cultural legacies of this pivotal phase of Pacific legal history. Musicologically, to counter the missionary hymns and traditional Polynesian dance music of Rarotonga and Samoa, there are such gloomy folk ballads as "The Fatal Shore", "To Plough Van Diemen's Land", and many others. There are other kinds of literary monuments, including Marcus Clarke's novel *For the Term of His Natural Life*, a novelisation of the transportation era and one of the earliest great works of Australian literature.⁴ The

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- 1 See Jeff Evans *Reawakened: Traditional Navigators of Te Moana-nui-a-Kiwa* (Massey University Press, Auckland, 2021).
 - 2 New Caledonia is divided into two main cultural and geographic regions: the principal island, a large Gondwana fragment, Grande Terre; and the Loyalty archipelago to the east, comprising three principal islands, Lifou, Maré, and Ouvéa. Politically, modern New Caledonia is divided into three provinces: the North and South Provinces of Grande Terre, and the Loyalty Islands.
 - 3 Eleanor Conlin Casella and Katherine Fennelly "Ghosts of Sorrow, Sin and Crime: Dark Tourism and Convict Heritage in Van Diemen's Land, Australia" (2016) 20 Int J Histor Archaeol 506.
 - 4 Marcus Clarke *For the Term of His Natural Life* (1874).

convict era continues to run as a *leitmotiv* in Australian literature. An example is Patrick White's *A Fringe of Leaves*, set in the 1840s.⁵ The plot revolves around Mrs Ellen Roxburgh, the survivor of a shipwreck, who is taken prisoner by a group of Aboriginal people and who then makes a terrifying journey through the Australian wilderness aided by a convict, Jack Chance, to the Moreton Bay penal colony. Both Chance and Mrs Roxburgh become disillusioned with "civilisation" when they return to it, and Chance goes back to the wilderness and the Aboriginal people. In French, there is Achille Ballière's *La grande évasion*, not a novel but a lengthy autobiographical work describing the author's adventurous life as a Communard, his deportation to the penal colony in New Caledonia in 1872 and his daring escape, a veritable *Papillon* narrative of the South Seas. This work has recently been republished as a fully edited edition in Nouméa.⁶ The escape of Ballière and his friends is memorialised not only in literature but also in art: it is the subject of a famous painting by Édouard Manet now in the Musée d'Orsay.⁷ The escapees eventually made their way to Australia.

Literary memorials to the Pacific's penal past of another kind are, as noted, to be found in English and Irish folk songs, including the tuneful ballad "The Fields of Athenry" sung by large crowds of Irish supporters at soccer and rugby internationals, or by Celtic fans at Rangers v Celtic clashes in Glasgow:⁸

By a lonely prison wall/I heard a young girl calling/"Michael, they are taking you are away"/

For you stole Trevelyan's corn/So the young might see the morn/

Now a prison ship lies waiting in the Bay/Low lie the fields of Athenry ...

While Ireland's unofficial football anthem might be a modern composition and not an authentic folk song (in fact it was written in 1979 by Pete St John), the vision this great ballad expresses is certainly rooted in Irish folk memory. There is no doubt in the song where the prison ship is going: young Michael responds that, against the Famine and the Crown, he rebelled and they cut him down, leaving poor Mary to live in hope and pray "for her love in Botany Bay". Many of those who were transported to the Pacific penal colonies were indeed Irish; some of them, as it happens, Irishwomen, who rather than being left to mourn at home were forced to join their Michaels on the transports to New South Wales and Van Diemen's Land.⁹ During the Famine years of the 1840s, many Irish convicts certainly

5 Patrick White *A Fringe of Leaves* (Jonathan Cape, London, 1976).

6 Achille Ballière *La grande évasion* (Michel Soulard and Alain Brianchon (eds), Humanis, Nouméa, 2018).

7 Édouard Manet *L'évasion de Rochefort (Rochefort's Escape)* (oil on canvas, 1880–1881).

8 My favourite, and certainly the rawest, version is that by the Boston–Irish band (and one very loyal to the Democratic Party in Massachusetts), Dropkick Murphys.

9 John Williams "Irish Female Convicts and Tasmania" (1983) 44 *Labour History* 1.

were transported for property offences, many for theft of livestock,¹⁰ so the scenario evoked in "The Fields of Athenry" is anything but far-fetched.

Carceralism in the Pacific was on so vast a scale that it has even affected the genetic and cultural make-up of the peoples of the Southwest Pacific, seen in the Irish descent of so many Australians¹¹ and by the Pacific's oldest Muslim community in New Caledonia, descendants of North African rebels, convicted and transported by France from the Mediterranean to the South Seas. The "convicts" were certainly those who had been convicted by the courts, but were not always criminals, at least not to modern eyes; they could indeed easily be Irish men and women who had rebelled against Famine and Crown, or against the French republic in Morocco and Algeria, or who could be political prisoners who had fallen into the hands of the French state after the defeat of the Paris Commune in 1871. And gendered history is important in this context too; to varying degrees and at different times, many of those transported from Britain, Ireland and France were women, whose lives before and after arriving at the Pacific penal colonies are the subject of a rich and expansive historiography. Their experiences were often very different to those of their male counterparts, both positively and negatively. (As it happens, it is a myth that women could be transported for prostitution: prostitution was not a crime at the time when Britain was transporting its convicts to the Pacific, but there were some prostitutes who were transported for stealing the possessions of their customers.)

New Zealand and Pacific history is bedevilled by a number of mythologies. One results from the Captain Cook scholarly industry, which continues to generate ever more biographies (not just of Cook but of practically everyone of importance who was on board the *Endeavour* and the *Resolution*) as well as continued lavish exhibitions and sumptuous catalogues.¹² No reasonable person can object to

10 Nicholas Woodward "Transportation Convictions during the Great Irish Famine" (2006) 27 *Journal of Interdisciplinary History* 59. The author shows that crime certainly did increase during the Famine, and there was also a large increase in female transportation sentences in Ireland during the terrible years of the "Great Hunger" (*an Gorta Mór*); moreover, there was a marked relative increase in transportation sentences in Ireland's poorest western regions (such as Mayo and Donegal), areas hit most severely by the Famine.

11 The doyen of the history of Irish migration to Australia and New Zealand, free and unfree, is Patrick O'Farrell. See Patrick J O'Farrell "The Irish in Australia and New Zealand" in WE Vaughan (ed) *A New History of Ireland, Volume V: Ireland Under the Union: I, 1801–1870* (Oxford University Press, Oxford, 2009) 661; Patrick O'Farrell *The Irish in Australia* (New South Wales University Press, Sydney, 1986); and Patrick O'Farrell *Vanished Kingdoms: Irish in Australia and New Zealand* (New South Wales University Press, Sydney, 1990). In *The Irish in Australia*, at 22–53, O'Farrell describes at length Irish penal transportation to Australia. Far more Irish people went to Australia as free immigrants, of course, than as convicts, but in the history of Irish migration Australia was less significant as a destination than North America and Britain itself, simply because it was so far away and expensive to get to.

12 Some recent glossy (and expensive) tomes include Brigitta Hauser-Schäublin and Gundolf Krüger (eds) *James Cook: Gaben und Schätze aus der Südsee/Gifts and Treasures from the South Seas* (Prestel-Verlag, Munich, 1998); Laurence Simmons *Tuhituhi: William Hodges, Cook's Painter in the South Pacific* (Otago University Press, Dunedin, 2011); Nicholas Thomas and others (eds) *Artefacts of Encounter: Cook's voyages, colonial collecting and museum histories* (Otago University Press, Dunedin, 2016); William Frame and Laura Walker

superbly printed and bound books illustrating the works of art collected in the course of Cook's voyages, but there is something of a historiographical problem all the same. The continued outpouring of these works serves to create an impression that the British presence in the Pacific was the outcome of a benign Enlightenment project, driven forward by scientific curiosity, the Royal Society, and exemplified by landscape paintings, collections of ethnographic curiosities and works of art, and by gentlemanly scholars and collectors like Sir Joseph Banks. In France, there is an equally large cultural industry devoted to Cook's French contemporary navigators of the 18th century: Bougainville, Lapérouse, similarly diffusing a general impression that European penetration of the Pacific was a project of the Enlightenment and scientific exploration. (Curiously, the great Spanish explorers of the Pacific, such as Mendaña, Queirós and Malaspina, have generated nothing like the same kind of publishing turnover as Cook and Cook's French contemporaries, even though Malaspina was as much a product of the Enlightenment as Banks and Bougainville.)

There is also a risk that what was essentially an episode in European cultural and intellectual history becomes transmuted into a major turning point in Pacific history. In fact, most Pacific peoples were never seen by Cook and, as far as the Polynesian and other indigenous peoples who encountered the *Endeavour* and the *Resolution* were concerned, Cook's voyages were a fleeting moment in a long history. Not everyone, moreover, is enthralled by Bougainville, Cook and Banks. The Cook industry, significantly, has sunk fewer deep roots in Australia, Cook being less iconic than he seems to be in Aotearoa, Australia's penal history being obviously foundational¹³ across the Tasman. Moreover, indigenous academics from Tonga, Hawai'i, Australia and Aotearoa have had every reason to become impatient with the attention trained on Cook and Bougainville and sometimes have expressed their impatience with much verve.

One can surely have nothing but admiration for major works of scholarship such as JC Beaglehole's editions of the journals of Cook and Banks and for his massive scholarly biography of Cook, or for Anne Salmond's contextualising of Cook's voyages in Polynesian histories and cultures. Nevertheless, perhaps it is time to devote more attention to the harsher realities of the British and French Pacifics. In reality, the British presence in the 18th-century Pacific was driven by something

James Cook: The Voyages (Bateman, Auckland, 2018); Nicolas Thomas (ed) *The Voyages of Captain James Cook* (Quarto, Minneapolis, 2016); and James Taylor *Picturing the Pacific: Joseph Banks and the Shipyard Artists of Cook and Flinders* (Adlard Coles, London, 2018). Enough already! Of course, there is nothing wrong with such books, which properly belong to the genre of art history rather than to Pacific history. (Even so, if there must be more art books about the Pacific, it would be nice to see a similarly lavish tome dealing with South Pacific prison architecture – certainly, albeit grimly, photogenic and of great architectural importance in its way – in New Caledonia, Norfolk Island, Tasmania and New South Wales.)

13 Shown by the success of the massive popular history of transportation by Robert Hughes: see Robert Hughes *The Fatal Shore* (Collins Harvill, London, 1987). Hughes wrote this book, however, because he was concerned that the convict era and the history of transportation was, if anything, neglected by Australians, or even regarded by Australians as an embarrassment: at xi–xv. See also Graeme Newman "Punishment and Social Practice: On Hughes's 'The Fatal Shore'" (1988) 13 *L. & Soc Inquiry* 337.

much more brutal and far more fundamental to the functioning of the British state than gentlemanly science, this being the need to establish new penal colonies when the newly independent United States made it clear that British felons could no longer be sent to North America. Before the invention of modern prisons, the British penal system was *absolutely* dependent on transportation as the principal punishment for felony imposed by the Chesapeake. Without transportation, the British (and Irish) criminal justice systems would have ground to a halt. Botany Bay, and all that came to mean, and the ruins of the treadmill in the "crank house" on Norfolk Island, as well as the prison ships lingering in the Irish folk memory, more accurately exemplify the British Pacific than the journals of Sir Joseph Banks. So too do the ruins of the solitary confinement blocks in New Caledonia exemplify the French Pacific more accurately than the journals of Bougainville and Diderot's famous *Supplément* on the latter. New Caledonia, as Louis-José Barbançon writes, was a place of *grande punition* (large-scale punishment, or penalty), which long retained the sound of chains ("*Longtemps la terre de Nouvelle-Calédonie a retenti du bruit des chaînes*").¹⁴

Another historiographical problem is that there has been something of a tendency on the part of historians to cite the Treaty of Waitangi in a historical context of debates about colonialism and empire in Britain while neglecting the brutal realities of the long-established British colonial presence on the opposite side of the Tasman for decades before the Treaty of Waitangi was even thought of. British colonialism in Aotearoa was an outgrowth of British colonialism in Australia, and events in New Zealand from 1835–1845 must be seen in an Australasian context. The Treaty of Waitangi was framed not so much within a context of British global colonialism but rather from within a specifically Southwest Pacific regional variant of the British world-system, the imperial presence in the Southwest Pacific at first being entirely dominated by penal colonialism and its administrative and material requirements. Arguably, much more can be learned about the real context of the Treaty of Waitangi by looking outwards from New South Wales and Van Diemen's Land to the archipelagos of South Polynesia than from a New Zealand direction looking outwards towards London, the Colonial Office, the House of Commons, and with occasional glances in the direction of Sydney and Hobart.

The interconnections between Britain's massive carceral establishment in Australia and New Zealand can be seen at every turn. One such connection was the botched effort to create a flax-making industry under Māori tuition at the penal outstation of Norfolk Island in 1793. This initiative derived entirely from Lieutenant-Governor Philip Gidley King, who pestered the Admiralty to have Māori brought to Norfolk to instruct the convicts in the arts of growing and processing flax.¹⁵ This early sustained contact between Māori and the British imperial authorities was driven entirely by the perceived needs of the Australian penal colonies. Sustained commercial contacts between Māori and

14 Louis-José Barbançon *L'archipel des forçats* (Presses Universitaires de Septentrion, Paris, 2003) at 15.

15 On Governor King and the attempts to set up a flax industry on Norfolk, see the brilliant account by Anne Salmund in her *Between Worlds: Early exchanges between Maori and Europeans 1773–1815* (Viking, Auckland, 1997) at 211–233.

the capitalist world-system originated not from Britain but rather from New South Wales. Even the Anglican missionisation of Aotearoa was driven forward by Samuel Marsden in New South Wales far more than it ever was by the Church Missionary Society in Britain.

By the time of the Treaty of Waitangi, Aotearoa was already tightly tied into an English-speaking Australasian world centred on the penal colonies of Australia. Whatever debates there were on the Treaty of Waitangi and its wording occurred entirely within that already complex and well-established context. New Zealand did not become a separate colony from New South Wales until 3 May 1841 when Captain William Hobson took an oath as Governor and Commander-in-Chief of New Zealand. The pivotal role played by Governor Gipps of New South Wales in the formal annexation of New Zealand is well understood by Australian historians, albeit that not all historians of the history of the Treaty of Waitangi based in New Zealand pay Gipps a lot of attention. Land tenure policies in early colonial New Zealand were driven forward to an astonishing degree to suit the needs, and placate the demands, of commercial interests in the Australian colonies. New Zealand's first land ordinance was, for all practical purposes, drafted and first applied by the government at Sydney. It is not going too far to speak of an *Australian* (or colonial pre-Australian) colonisation of Aotearoa rather than a "British" colonisation. At the very least, the debates and developments that did take place in London about New Zealand occurred in a setting where the long-standing Australian context was taken for granted.

The study of colonialism as a historical process has differentiated between different types of colonialism, including the merchant or commercial colonialism of Portugal and of the British and Dutch East India Companies in, for example, Bengal and Java (a colonialism which could often be less "commercial" than it was the brutal enforcement of monopolies by the likes of the Dutch East India Company (VOC)). There is also the mining- and metals-based and labour colonialism of the Spanish in Mexico,¹⁶ Central America and the Andes,¹⁷ often studied by historians within a context of Spanish imperialism and globalising capitalism.¹⁸

16 See Carlos Sempat Assadourian *Zacatecas: Conquista y transformación de la frontera en el siglo XVI: Minas de plata, guerra, y evangelización* (Colegio de México, México DF, 2008); John Tutino *Making a New World: Founding Capitalism in the Bajío and Spanish North America* (Duke University Press, Durham, 2011); John Tutino *The Mexican Heartland: How Communities Shaped Capitalism, a Nation, and World History, 1500–2000* (Princeton University Press, Princeton, 2017); and Rafael Dobardo and Gustavo A Marrero "The role of the Spanish state in the mining-led growth of Bourbon Mexico's economy" (2011) 64 *Economic History Review* 855.

17 See Karen Spalding *Huarochirí: An Andean Society Under Inca and Spanish Rule* (Stanford University Press, Stanford, 1984); and Sergio Serulnikov *Conflictos sociales e insurrección en el mundo colonial andino: El norte de Potosí en el siglo XVIII* (Fondo de Cultura Económica de Argentina, Buenos Aires, 2006).

18 See for example Stanley J Stein and Barbara H Stein *Silver, Trade and War: Spain and America in the Making of Early Modern Europe* (Johns Hopkins University Press, Baltimore, 2000).

Most familiarly to New Zealanders, there is the settler colonialism said to typify the United States, Canada, Australia and New Zealand, as well as the Río de la Plata countries of Uruguay and Argentina. "Settler colonialism", especially, has become a widely deployed term, even if it is anything but clear what settler colonialism actually is, or which colonies are "settler colonies" and which are not.¹⁹ The difficulties are seen most clearly with South Africa: what kind of colony was it? Recent studies of colonial South Africa have tended to increasingly site South Africa within the overall framework of settler colonialism, mainly by arguing that the apartheid system did not derive so much from racial attitudes within the Calvinist Afrikaner groups of the Great Trek era that poisoned the entire South African body politic, but rather from the expansion of South Africa's mining frontier and from South Africa's absorption into the British capitalist world system.²⁰ It was British capitalism that brought thousands of British settlers to the Cape Colony and Natal in the 19th century. To this author, it seems obvious that there is no reason to differentiate South Africa: it clearly falls within the cluster of British settler colonies: the United States, Canada, Australia, New Zealand – and South Africa.

But there was yet another variety of British and French colonialism, now increasingly recognised in the historiography as an important variety of colonialism in its own right, which it is not inaccurate to characterise as *penal* colonialism. Penal colonialism possessed its own distinctive infrastructures, legal arrangements, administrative organisation, politics and economies, and has generated its own historical and cultural legacies. That penal colonialism should be seen as a specific variety of colonialism in its own right is shown by some historical instances where various countries considered Britain's penal establishment in the southwestern Pacific and debated instituting similar projects of their own in order to benefit the mother country in the same way that Great Britain was thought to have succeeded in doing. France, somewhat envious of Britain's Pacific penal colonies, considered, and indeed carried out, a similar colonial experiment in New Caledonia. In the same way, there was a degree of interest in the United States in the possibility of expanding American frontiers of settlement by establishing penal colonies in the newly acquired territory of Alaska.²¹

It can hardly be emphasised enough that British and French penal colonialism in the Pacific was also imperial, as well as merely "colonial" – if there is a difference between the two. In both cases,

19 On the difficulties of defining settler colonies, see RP Boast "Adjudication of Indigenous-Settler Relations" in Markus D Dubber and Christopher Tomlins (eds) *The Oxford Handbook of Legal History* (Oxford University Press, Oxford, 2018) 1061. The usual exemplars of "settler colonies" are those principally settled by colonists from northern and/or southern Europe in the 19th century: Canada, the United States of America, Argentina, Uruguay, Australia and New Zealand. What then of, say, Brazil, Mexico, Chile, South Africa, Algeria and Taiwan? Some parts of Brazil, such as São Paulo state, Paraná and Rio Grande do Sul fit the model; other parts of Brazil, such as Pernambuco and Bahia (old Portuguese slavery-and-sugar colonies) do not. In South Africa, the "settlers" never became a majority (but should that matter?).

20 Timothy Keegan *Colonial South Africa and the Origins of the Racial Order* (University of Virginia Press, Charlottesville, 1996).

21 See Ted C Hinckley "Alaska as an American Botany Bay" (1973) 42 PHR 1.

some of those transported were not merely "ordinary" criminals but were in fact rebels against England and France. France sent convicted rebels from North Africa, from what is today Algeria principally, to New Caledonia, and at times Great Britain transported Irish rebels to New South Wales and Van Diemen's Land. Thus in both instances, the penal colonies did not operate merely within the frameworks of the French and British criminal justice systems but within structures of empire too. This reality can be obscured by the ambiguous constitutional relationships between Britain and Ireland on the one hand and France and Algeria on the other. France repeatedly claimed that Algeria was not a colony but was, rather, part of metropolitan France, a stance that created a legal and constitutional alchemy that transmuted nationalist rebels against France in Algeria to "ordinary" criminals within the legal framework of greater France. At the start of the 19th century Ireland lost her formal independence from Britain; the Irish Parliament was closed, and instead Ireland sent MPs to Westminster. The effect was much the same as in France: the Fenians, similarly, in reality Irish rebels against Britain, were by the same kind of legal chemistry transmuted into either ordinary felons or were transported under particular statutes enacted by the Westminster Parliament to suppress rebellions within the political entity that now styled itself the "United Kingdom" (something it was far from being). The timing of these two legal transformations, Ireland to the United Kingdom and Algeria to France, was not very far apart. Ireland's parliamentary independence was abolished on 31 December 1800, and France invaded Algiers in 1830.

The concept of penal colonialism recognises, above all, that there can be a colonialism based on the migration of the unfree. Those sent to Van Diemen's Land (Tasmania) or to Grande Terre (the New Caledonian mainland) as convicts had no choice about their destinations, but not only that, they were forced to stay where they had been sent and could seldom return; they were compulsory populators. Studies of migration typically analyse the "push-pull" factors that induce people to migrate, but convicts were, of course, merely and only pushed out – and forcibly. There was, by definition, no "pulling" except in the sense that the European powers needed dumping grounds for convicts that were there for the taking, accessible by sea, and sufficiently isolated and conveniently far away that the convict exiles could have no hope of returning. The push factor is easily recognised: the authority of the state. Thinking about "penal" colonialism also invites consideration of the extent to which a colony's original function as a penal colony might have resulted in a colonial administration that was different from the norm. That is, even with respect to free migrants, perhaps penal colonialism created colonies characterised by military administration, militarised law, harsher forms of class differentiation or tendencies towards authoritarian government generally.

Nor were the indigenous inhabitants of Van Diemen's Land or New Caledonia asked if they wanted to receive convicts in their midst: the effects on the Kanaks of New Caledonia and the Aboriginal peoples of Van Diemen's Land (Tasmania) were especially calamitous.²² The Kanak

22 See Nicholas Clements *The Black War: Fear, Sex and Resistance in Tasmania* (University of Queensland Press, St Lucia, 2014); Lyndall Ryan *Tasmanian Aborigines: A history since 1803* (Allen & Unwin, Sydney,

peoples and the Aboriginal peoples of Tasmania and mainland Australia were, no less than the convicts themselves, also all compulsory participants in the carceral colonialism of Great Britain and France. Adding to the complexity, underscoring the fact that penal colonialism was typically but one component of the global imperialisms of Great Britain and France, is the fact that many of the transported were indigenous people themselves, shipped to Australia and New Caledonia from Africa and from other parts of the Pacific.²³ Penal colonialism could mean that Khoisan people from the Cape Colony, Australian Aboriginal peoples and Māori might encounter one another in Van Diemen's Land or New South Wales, or that Berber rebels from North Africa might engage with Austronesian-speaking Kanak people in New Caledonia. British and French penal colonialism was global in its reach and in its effects.

Historians of penal transportation typically site their narratives in one of two contexts: either that of the history of the British (and to some extent of the French) criminal justice systems, or as a foundational period in the history of Australia. Both contexts are obviously important, but nonetheless studying transportation of convicts as a variety of colonialism in the Pacific (or, for that matter, elsewhere) provides different kinds of perspectives on the histories of both colonialism and migration. It allows the histories of the French and British presence in the Pacific to be compared as related varieties of penal colonialism and might show that the histories of French and British colonialism in the Pacific were more similar than is sometimes supposed. On the whole, Anglophone historians of the French Pacific tend to treat the history of the French presence in the Pacific within the framework of Enlightenment scientific exploration and discovery, neglecting French Catholic missionisation, penal transportation and labour controls. The concept of penal colonialism, moreover, allows many of the insights of French philosopher-historians such as Michel Foucault to be applied to the Pacific, potentially opening some very interesting perspectives. (Why, for example, has nobody explored the architectural carceralism of New Caledonia, Norfolk Island and Van Diemen's Land?) There is also the impact on indigenous peoples. The colonial histories of Tasmania and New Caledonia have more in common than appears to be commonly recognised, in both cases being histories of colonial policies that were near-genocidal in their consequences for the indigenous.

It is now seen that penal colonisation typically does not operate in complete separation either from its parent society or from other forms of colonisation and settlement around it. New South Wales, Van Diemen's Land and New Caledonia were never *wholly* penal colonies; there were free settlers in these places as well, whose ranks the convicts could aspire to join in a variety of ways, or whom the

2012); and Rebe Taylor *Unearthed: The Aboriginal Tasmanians of Kangaroo Islands* (Wakefield Press, Adelaide, 2008).

23 Kristyn Harman *Aboriginal Convicts: Australian, Khoisan and Māori Exiles* (University of New South Wales Press, Sydney, 2012). For different perspectives on the colonial history of Tasmania, see Alison Alexander *Tasmania's Convicts: How Felons Built a Free Society* (Allen & Unwin, Sydney, 2010); and Sharon Morgan *Land Settlement in Early Tasmania: Creating an Antipodean England* (Cambridge University Press, Cambridge, 1992).

transported might know as employers and supervisors. Recent studies even of the Soviet Gulag, such as Alan Barenberg's remarkable study of the Soviet Arctic city of Vorkuta,²⁴ made notorious by Alexander Solzhenitsyn's *Gulag Archipelago* (*Архипелаг ГУЛАГ*), are now seeking to move away from Solzhenitsyn's conception of the Gulag as an "Archipelago"²⁵ to focus, rather, on how this vast system of penal colonisation was interconnected with the rest of Soviet society. Increased access to archival sources in Russia, at least until the revived Russian despotism of the Putin era, led to a "new wave of scholarship" that investigates how "the Gulag was more closely connected to Soviet society than was previously thought".²⁶ To see the Gulag in this way might also make its links to earlier Muscovite and Tsarist forms of penal and forced colonisation more clear.

Such interactions were no less important in the Pacific and show that penal colonialism was not merely "penal": the penal colonies were not just prisons, but were, rather, *colonies*, linked to their mother countries, economically and culturally. Vorkuta was not merely a prison but a Russian economic and cultural colony in the Arctic north of the Soviet Union, in a region previously inhabited mainly by indigenous tribal groups who, just as in Tasmania and New Caledonia, had to engage with European migrants, free and unfree, who were as culturally different from themselves as could be imagined. The Gulag and the French and British transportation systems have gone, but the incorporation of northern Siberia into the Russian cultural world, Van Diemen's Land into the Anglo world and New Caledonia into the French cultural zone have proved permanent.

II PARTICIPATING POWERS

By far the largest, best-known and most consequential carceral regime in the Pacific was that set up by Great Britain. Britain already possessed a long-established convict transportation system that had been operating on a large scale for several decades long before Captain James Cook explored the eastern coastline of the Australian continent in 1770. By that time the British were old hands at transporting their convicts overseas. Their first destination had been the British North American colonies.²⁷ This migration of the unfree to North America in the 18th century had some similarities to the much vaster slave trade, each forced migrations of the unfree across the Atlantic in the most brutal and squalid of conditions, albeit that the convicts sent to North America were not differentiated from the rest of colonial society by race. (Their labour was, however, in both cases bought and sold in North American ports.) The North American colonies were the destination of slaves, indentured

24 Alan Barenberg *Gulag Town, Company Town: Forced Labour and its Legacy in Vorkuta* (Yale University Press, New Haven, 2014). Vorkuta, as the title of this book suggests, was the site of a prison camp complex, but it was also a newly established Soviet industrial and mining city with a large civil population.

25 Aleksandr Isaevich Solzhenitsyn *The Gulag Archipelago, 1918–1956* (Harper & Row, New York, 1974) vols 1–3. "Gulag" is an acronym for "General Camp Administration" in Russian.

26 Barenberg, above n 24, at 6.

27 On the American phase of British transportation, see A Roger Ekirch *Bound for America: Transportation of British Convicts to the Colonies, 1718–1775* (Clarendon Press, Oxford, 1987).

servants – and convicts too.²⁸ While the slave trade is, quite rightly, a staple of modern historical writing, the same cannot be said of the North American phase of British penal transportation; apart from a few studies, it has largely dropped out of American historical memory (so much so, that I can recall an American student in the Legal History class at Victoria University telling me that her husband, an American historian, had indignantly denied that convicts were ever transported to the British North American colonies at all). It is estimated that about 50,000 convicts were transported to the American colonies before the outbreak of the Revolutionary War, far fewer than were later sent to the Australian penal colonies and a mere drop in the ocean of the millions of transatlantic migrants who have journeyed to the United States, and so it is not surprising that penal transportation does not loom large in the literature relating to migration to the United States. Transportation is marginal to American historiography, and central to Australian. To historians of British transportation, however, the American phase is important: it was the first major phase of British transportation, and it was in America that the basic workings and legal frameworks of transportation were first set in motion.

The second (Australian) phase of British transportation was far larger than the first, North American, phase. About 50,000 convicts were sent from Britain and Ireland to the North American colonies, and about 162,000 to the Australian penal colonies. The second phase was not only bigger; it was far more consequential. The American phase did not have any major impacts on the general course of American colonial history, but transportation to Australia was a pivotal process in the early colonial history of Australia and is one that reverberates very powerfully in Australia and especially in Australian historical consciousness to the present. It is because transportation to Australia was so massive and so foundational that it has generated, and continues to generate, such a large historiographical literature in Australia. It is possible for historians of colonial North America to overlook penal transportation entirely (many have), but quite impossible for historians of colonial Australia. New Zealand was never a penal colony, and indeed more free settlers, nearly 202,000, migrated to New Zealand in just one decade, the 1870s, than convicts were shipped overseas during the North American and Australian phases of transportation combined. On the other hand, the convicts who were sent compulsorily to North America were a drop in the ocean compared to the vast numbers of free migrants to British North America before the Revolution.

28 On the various forms of free and unfree migration to, and of labour in, colonial British North America, see Christopher Tomlins *Freedom Bound: Law, Labor and Civic Identity in Colonizing English America, 1580–1865* (Cambridge University Press, Cambridge, 2010). Tomlins argues, in an extended discussion, that the boundaries between "free" and "unfree" labour in colonial British North America were highly permeable. I can see no reason why the same could not be said of colonial Australia, which received not only convicts but also enslaved Pacific islanders, sent there by means of what is euphemistically referred to as the Pacific "labour trade" and where, in addition, Aboriginal people were forced into various systems of compulsory labour. (There was no "unfree" labour in colonial New Zealand, which lacked slavery, indentured labour, convicts, or even Master and Servant Acts; moreover, the Māori people could not be pushed around and were well armed.)

Apart from Great Britain (including its impoverished and misgoverned dependency of Ireland), the principal penal coloniser in the Pacific was France. The French counterpart to the Australian penal colonies was New Caledonia, which is discussed in detail later in this article. But France and Great Britain were not the only countries to send their unwanted to Pacific islands in the 19th century. Sakhalin Island was used as a penal colony by Russia, and while not in the South Pacific, might well qualify as a "Pacific" island at least. It was Russia's largest penal colony during the Tsarist period, and was visited by Chekhov, who described the grim conditions there in his book *The Island of Sakhalin*.²⁹ The island of San Cristóbal in the Galápagos archipelago was used by Ecuador as a penal colony on two separate occasions (1850–1860 and 1946–1959). Fifty kilometres out to sea in the Pacific from the coast of Colombia is Gorgona Island, used as a prison island by Colombia for high-security prisoners from the 1950s until 1984. (Its alarming name marked the fact that the island was densely overrun by poisonous snakes.) Except perhaps for Sakhalin, none of the carceral regimes at these other places qualifies under the rubric of penal colonies: they were simply prisons. The foci of this article are the Australian penal colonies, their Pacific offshoot on Norfolk Island and French transportation to New Caledonia.

III LEGAL FRAMEWORKS

In his study of French penal transportation to New Caledonia, Louis-José Barbançon has identified the essential foundations of a system of penal colonisation. These are: a judicial system in which the option of transportation is available to the courts, or an *arsenal juridique*; people to be transported overseas; a naval establishment adequate to transport them (which both Britain and France certainly had); the political will to implement a policy of transportation; and somewhere to which the transported convicts could be sent.³⁰ The legal framework that underpinned the later phase of British transportation to the Pacific was initially established to underpin penal transportation to British North America.³¹ The statutes underpinning transportation in the 18th century grew out of an established distinction in the British system of criminal punishment, that between pardoned convicted capital offenders – which meant, in practice, all pardoned felons, virtually all felonies being capital – and, on the other hand, first offenders on felony charges who had been able to plead benefit of clergy. The Transportation Act 1718 (GB) 4 Geo I c 11 was designed to offer a wider range of sentencing options to the English criminal courts, the Assizes and the Old Bailey, giving judges the option of doing something other with convicted felons than hanging or pardoning them.³² The Transportation Act 1718 was one of a number of pivotal statutes which reconstructed the English criminal justice system

29 Anton Chekhov *The Island of Sakhalin* (1893).

30 Barbançon, above n 14, at 15.

31 On the first (American) phase of British convict transportation, see Ekirch, above n 27.

32 On the legislation of 1718, see Bruce Kercher "Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700–1850" (2003) 21 LHR 527.

in the 18th and early 19th centuries, other examples being the Penitentiary Act 1779 (GB) 19 Geo III c 74, which was a first step towards imprisonment as a standard punishment, and the Prisoners' Counsel Act 1836 (UK) 6 & 7 Will IV c 114, which finally permitted persons accused of felony to be represented by counsel.³³ The Transportation Act was brought before the House of Commons in 1717 by William Thompson, member for Ipswich, Solicitor-General and the Recorder of London. As Recorder he had sat at the Old Bailey and "well knew the problem of mounting crime".³⁴ The 1718 legislation made sentencing law less harsh in some respects, and harsher in others. From 1718 onwards, pardoned capital offenders could be sentenced to transportation for a term of 14 years, while, on the other hand, first offenders convicted of capital offences (those who could plead benefit of clergy)³⁵ could be transported for seven years, as could those convicted of petty larceny. Previously, those convicted under clergyable offences had been able to get off scot-free – should one, that is, regard being burned on the thumb with a red-hot iron as getting off scot-free!³⁶ Persons convicted of petty larceny had normally been whipped. However painful or humiliating, that was probably a better option than seven years in the Chesapeake.

Transportation from Britain and Ireland did not in fact begin with the Transportation Act of 1718. Rather, this statute marks the commencement of the use of transportation overseas as a standard feature of the ordinary criminal justice system. Before that, it was used episodically only, principally during the process of suppressing rebellions, including rebellions in Ireland. During the Interregnum, for example, the Cromwellian authorities in Ireland arranged for captured Irish opponents of the regime to be transported to Virginia, Barbados and other islands in the Caribbean.³⁷ By the late 1660s there were about 8,000 Irish former transportees living in Barbados.³⁸

The criminal justice systems in 18th-century Britain and Ireland have generated a rich and diverse modern historiography. It was argued in a famous essay by Douglas Hay (a Canadian), published in 1975 as part of a pivotal collection of essays on English criminal justice history edited by EP Thompson and others, that the English criminal justice system was wholly dominated by the discretions that were available to prosecutors, magistrates, the judges and the Crown at all levels of

33 On the impacts of the Prisoners' Counsel Act 1836 (UK) 6 & 7 Will IV c 114 on the bar and on practice and procedure at the Old Bailey, see Allyson N May *The Bar and the Old Bailey, 1750–1850* (University of North Carolina Press, Chapel Hill, 2003).

34 Ekirch, above n 27, at 17.

35 The history of the plea of benefit of clergy is complex. By the early 18th century it meant in practice that persons convicted of a capital felony for the first time were spared the death penalty. Some felonies were, however, always non-clergyable (murder, for example).

36 Being burned on the thumb after plea of benefit of clergy was about the only form of criminal record-keeping that the 18th-century criminal justice system had.

37 SJ Connolly *Divided Kingdom: Ireland 1630–1800* (Oxford University Press, Oxford, 2008) at 104.

38 At 105.

the system.³⁹ There was no police force, with the exception of village constables, volunteers who operated at strictly local levels. The same system operated in Ireland, a somewhat more violent country than England and also one with large areas, especially in western Ireland, that by English standards were very isolated, thinly settled and ungovernable. (One problem with understanding the operation of the system in Ireland is that, compared to England, few records have survived⁴⁰ and there are no printed source materials such as the Old Bailey Sessions Papers (OBSP) that historians such as JK Langbein have drawn from.)⁴¹ By means of these discretions, the harshness of the criminal code was ameliorated in practice, but that was not their true social function. To Hay, in fact, the whole system operated as a way of displaying and exercising power.

Hay, however, did not focus on transportation. More recent work, especially that by JM Beattie, while not departing from Hay's emphasis on discretionary power, has shown that, in the course of the 18th century, the whole system became absolutely dependent on transportation as a sentencing option,⁴² there being no sentence of imprisonment available to the courts and no secure prisons to send convicts to in any event. Transportation was initially appealing because it was cheap. In its first, American phase, transportation was left to private enterprise and convicts were transported across the Atlantic by private merchant vessels chartered by the government; "Parliament enacted laws to prevent [convicts] early return home but took no steps to regulate their treatment either at sea or in

39 Douglas Hay "Property, Authority and the Criminal Law" in Douglas Hay and others (eds) *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Allen Lane, London, 1975) 17. Hay's article was criticised by John H Langbein: John H Langbein "Albion's Fatal Flaws" (1983) 98 *Past & Present* 96. Hay's contribution to *Albion's Fatal Tree* and Langbein's critique set off a lengthy historiographical debate, unusual in that major contributions were found both in law journals and historical reviews. Important review articles include Peter Linebaugh "(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein" (1985) 60 *NYU L Rev* 212; Joanna Innes and John Styles "The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England" (1986) 25 *Journal of British Studies* 380; and Bruce P Smith "English Criminal Justice Administration, 1650–1850: A Historiographic Essay" (2007) 25 *LHR* 593. Interest in the operation of the criminal justice system in the 18th century has also crossed the Irish Sea, as the system in Ireland largely duplicated that in England, with the same institutions: justices of the peace, assizes, grand juries (particularly important in Ireland), county gaols, quarter sessions and so forth. See Neal Garnham "Local Elite Creation in Early Hanoverian Ireland: The Case of the County Grand Jury" (1999) 42 *Historical Journal* 623.

40 Connolly, above n 37, at 321. The only Irish counties where reasonably full records of indictments have survived are Armagh and Tyrone. During the 18th century, the far west – Clare, Kerry and Mayo especially – were more or less outside the gaze of the Irish government completely, and even south Armagh seems to have been a world to itself. Significantly, the lowly office of constable was one of the few positions within the Irish administration that were open to Catholics during the period of the Penal Laws (1697–1788). The regime had to take whoever was willing to serve.

41 On this source, see John H Langbein *The Origins of Adversary Criminal Trial* (Oxford University Press, Oxford, 2003) at 10–66. See also John H Langbein "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources" (1983) 50 *U Chi L Rev* 1.

42 JM Beattie *Crime and the Courts in England 1660–1800* (Clarendon Press, Oxford, 1986).

the colonies".⁴³ Ekirch judges that "by virtue of transportation, Britain was able to avoid a massive corrections system and the creation of a coercive force to staff it".⁴⁴ The American phase of British convict transportation from 1718–1776 hardly ranked as penal colonialism at all, but the Australian phase from 1798 onwards was quite different. At the beginning there was no existing settler population in New South Wales interested in purchasing convict labour; the Australian penal colonies required a large military and civil administration as well as the construction of prison buildings, workshops and so forth. In contrast to British North America, the Australian penal colonies completely lacked an infrastructure of jetties, roads and bridges, which had to be built from scratch. The convicts, certainly, were made to provide most of the labour, but they still had to be supervised and guarded and the work had to be organised by architects, builders and masons. In these ways, the British state was much more active in the organisation of colonialism than it ever was in North America.

Between the enactment of the Transportation Act in 1718 and the outbreak of the American Revolutionary War in 1776, about 50,000 convicts were transported from Britain and Ireland to American colonies. The American colonies were not penal colonies as such; rather, private contractors took convicts to North America under contract from the Crown. In North America their labour was sold by the contractors to private settlers for the terms of their sentences. A Roger Ekirch, the principal historian of transportation to the American colonies, has concluded that those transported to North America were not petty thieves, nor were they "the members of a criminal underclass".⁴⁵ Rather, they were "reasonably serious malefactors".⁴⁶ Without transportation the system would collapse, and, proving Beattie's analysis beyond doubt, it did indeed collapse with the outbreak of the American Revolution. For some time before the penal crisis brought about by the American Revolution, transportation to the American colonies was already being widely criticised. One criticism, as JM Beattie notes, "sprang from the undoubted truth that it no longer held the terror it had a hundred or even fifty years earlier".⁴⁷ Ships were better, the American colonies were more settled and much less frightening, and there was so much transatlantic shipping that it was comparatively easy for escaped convicts to arrange a return voyage to the British Isles. Although returning home before the expiration of one's offence was a capital felony, there were fears that this made returned convicts especially desperate criminals and made crime even worse.⁴⁸ Perhaps had there been no American Revolution,

43 Ekirch, above n 27, at 3.

44 At 3.

45 At 3.

46 At 3.

47 Beattie, above n 42, at 541.

48 At 540. Beattie adds that returned convicts "were peculiarly attractive accomplices because, having been convicted of felony, they could not give evidence in court and so could be trusted like no other companion".

a different destination might have been found. In any event, the Americans refused to have any more of Britain's convicts, and with the emergence of the independent United States, Britain had to send its convicts somewhere else.

The government experimented with a version of transportation at home, by which those sentenced to transportation were transported no further than the river Thames and some other spots around the coast, where the prisoners were confined to the "hulks", decaying ships moored in the river to be used as prisons. This was provided for by a stop-gap Act of 1776, the Hulks Act 1776 (GB) 16 Geo III c 43. It is these "hulks" and the desperadoes confined to them that frighteningly loom over the Gargery family in the opening chapters of Dickens' *Great Expectations*,⁴⁹ leading to the classic encounter between young Pip and the returned convict Magwitch in a scene loaded with literary Gothic conventions: "the deserted churchyard, the chains hanging from the former gallows, the threatened cannibalism, the violence of the fighting convicts".⁵⁰ While it can be argued that the use of the hulks was a step towards the development of imprisonment as a standard criminal sanction, in fact the government's attention at the time was fixed simply on finding a new destination for the convicts, and nothing resembling a modern prison was to be built in England until 1918. Without the option of transportation to the Australian colonies being available, Britain might have moved to a penal system based on imprisonment much sooner. In that sense, transportation may have provided the *ancien régime* penal system with a new lease of life.

In 1786 the government decided the convicts should be sent to a new colony to be established in New South Wales, a surprising choice in that the British government knew next to nothing about Australia apart from Cook's remarks in his journals written over 15 years previously. So began what one historian has described as "probably the greatest penal experiment of all time".⁵¹ Australian historians have argued with one another about the government's choice of New South Wales for some years, some arguing that there must have been more to the decision than merely finding somewhere to send Britain's convicts, possibly to do with imperial strategies of various kinds, the China trade and other such imperial and global considerations. This "convicts versus empire" argument has been inconclusive, and really there is nothing to show that the government was motivated by anything except the penal crisis at home. No one has been able to demonstrate convincingly that the Australian continent had any strategic value to Great Britain in 1786.

49 Charles Dickens *Great Expectations* (Chapman & Hall, London, 1861).

50 Dorice William Elliott *Transported to Botany Bay: Class, National Identity, and the Literary Figure of the Australian Convict* (Ohio University Press, Athens (OH), 2019) at 41.

51 Colin Forster "French Penal Policy and the Origins of the French Presence in New Caledonia" (1991) 26 *Journal of Pacific History* 135 at 135.

IV *CONVICT WORKERS?: PENAL COLONIALISM AND SOCIETY IN THE AUSTRALIAN COLONIES*

It is not the purpose of this article to depict penal colonialism as simply coercive, but rather to come to terms with the complexities of penal colonialism, which was as varied and complex as any other form of colonialism. All colonialisms are difficult to understand, and the experiences of the colonised can range from outright resistance, to compliance and various forms of accommodation. Australia's convict era has been so intensively studied in all its aspects by so many prominent Australian historians for so long that all generalisations about this phase of Australian history are risky now. In my view the most fruitful way to understand penal colonialism is to see it as essentially a form of labour colonialism, colonial society being founded on a range of controls on labour, whether by tickets of leave issued to convicts or by Master and Servant Acts. Convict society in both the Australian penal colonies and in New Caledonia are clear illustrations of the "permeability" between free and unfree forms of labour that Tomlins has analysed with such clarity in early colonial America.⁵²

These emphases do not, however, detract from the central reality of penal colonialism: the transported had no choice about their initial journey. The keynote of penal colonialism is the absence of choice, not only by the colonised, who of course are never asked about whether they wish to be colonised, but by the *colonisers*. Even if the harsh realities of established colonial society in the Australian colonies were ameliorated by British legal and constitutional traditions in various ways, still the fact remains: the convicts were sent there without their consent, and they were not allowed, and were not able, to return. It is this central fact that distinguishes penal colonialism from other varieties.

Historical studies of migration tend to focus on the *choices* made by emigrants. What impelled so many Irish men and women to flee Ireland during and after the 1840s? Why did hundreds of thousands of impoverished Jewish people abandon the *shtetls* of Russia and Ukraine to migrate in huge numbers to the United States?⁵³ Or yet again, why did nearly 200,000 people from the British Isles – mostly farm labourers from southern England – choose to emigrate to New Zealand in the 1870s?⁵⁴ Or why

52 Tomlins, above n 28.

53 Irving Howe *World of Our Fathers* (Simon and Schuster, New York, 1976). Howe's book graphically describes the political and economic plight of Russian and Ukrainian Jewry in the 19th century, the poverty they continued to encounter on the Lower East Side of New York and the vitality of their transplanted Yiddish literary culture in America.

54 See Tony Simpson *The Immigrants: The Great Migration from Britain to New Zealand, 1830–1890* (Godwit, Auckland, 1997); and Lyndon Fraser and Angela McCarthy (eds) *Far from 'Home': The English in New Zealand* (Otago University Press, Dunedin, 2012). There are many books on the early phases of British links with New Zealand in the early colonial period, but demographically and culturally it is the migration of the 1870s that really counts. This astonishing outflow to New Zealand is a classic example of "push" and "pull";

did peasants from Italy decide to uproot themselves and move to Argentina and Uruguay in the 19th century? Convicts, obviously, did not choose, as they were made to migrate. A standard ingredient of migration studies is missing in their case. Those who went to Australia as free migrants are obviously distinguishable from those who were made to go there. Free settlers could take their money, their possessions, and their families with them. Transported convicts normally had no money, could bring few possessions, and were permanently severed from their families. Free settlers could return, if they wanted to or could afford it, but convicts knew that if they somehow managed to return to England and Ireland before the expiration of their sentence, an impossibility practically in any case, they risked being hanged should anyone recognise them and report them to the authorities. To return before the expiration of one's sentence was a capital felony; after 14 or seven years in Van Diemen's Land or New South Wales, links with the home communities in Britain and Ireland had usually ceased to be meaningful.

One of the most extensive and richly documented treatments of transportation to Australia, simply as an aspect of migration history shorn of all mythologising and stereotyping of the convicts – whether as rebels against the establishment or as representatives of a criminal class – is the book *Convict Workers*, edited by Stephen Nicholas.⁵⁵ The authors emphasise, very correctly, that transportation to Australia was not of itself especially unusual:⁵⁶

The British and Irish convicts sent to Australia were part of a larger international and intercontinental flow of forced migration including Indian, French, Spanish and Russian convicts, and "bonded" Indian and Melanesian contract labour. After 1820 a quarter of a million convicts were shipped across the world's oceans to colonise Australia, New Caledonia, Singapore and French Guiana, and to meet labour demand in Gibraltar, Bermuda, Penang, Malacca and Mauritius.

Convict Workers was based on large-scale quantitative research carried out by a group of historians based mainly at the University of New South Wales. The research was specifically designed

the push was the difficult conditions faced by farmworkers in rural southern England in the 1870s; the pull was the Fox–Vogel–McLean government's brilliantly organised system of assisted passages from Britain to New Zealand. The most comprehensive analysis is Rollo Arnold *The Farthest Promised Land: English Villagers, New Zealand Immigrants of the 1870s* (Victoria University Press/Price Milburn, Wellington, 1981). Very few Pākehā families in modern New Zealand do not have some kind of link with the outflow from the British Isles to New Zealand of the 1870s. The rhythm of Irish migration to New Zealand was different: see Lyndon Fraser *To Tara via Holyhead: Irish Catholic Immigrants in Nineteenth-Century Christchurch* (Auckland University Press, Auckland, 1997); Lyndon Fraser (ed) *A Distant Shore: Irish Migration & New Zealand Settlement* (Otago University Press, Dunedin, 2000); and Brad Patterson (ed) *The Irish in New Zealand: Historical Contexts and Perspectives* (Stout Research Centre for New Zealand Studies, Victoria University of Wellington, 2002).

55 Stephen Nicholas (ed) *Convict Workers: Reinterpreting Australia's Past* (Cambridge University Press, Cambridge, 1988).

56 Stephen Nicholas and Peter R Shergold "Unshackling the Past" in Stephen Nicholas (ed) *Convict Workers: Reinterpreting Australia's Past* (Cambridge University Press, Cambridge, 1988) 3 at 7.

to investigate transportation as a variety of migration and nothing more. The amount of research that the contributors to *Convict Workers* conducted was very substantial, and the book is certainly impressively documented. The *Convict Workers* group decided to analyse the convicts sent to Australia simply as migrants, and from that perspective asked the questions that are typical of migration studies generally. Their first major conclusion was that the convicts did not belong to a "criminal class", if indeed there is such a thing. They were, simply, ordinary English and Irish working class men and women, who had for one reason or another got into trouble:⁵⁷

Our analysis of the character of the male convicts transported to New South Wales, and Deborah Oxley's assessment of their female counterparts, does not indicate that they were habitual or professional criminals. Most were first offenders found guilty of petty theft. Most had been employed as free workers in the British or Irish labour markets prior to their conviction. For many, their crimes were work related: they had stolen tools or material from their employers, or possessions from their masters.

I am no criminologist, but presumably most people convicted of crimes today are not "habitual or professional criminals" either, notwithstanding the efforts of (typically conservative) politicians to convince electorates that they are imperilled by those born to a life of crime.

Considered as migrants, the convicts had some marked advantages as such. For one thing, they were, contrary to some stereotypes, productive and physically fit. Moreover, they arrived in Australia in reasonably good shape.⁵⁸

Only healthy convicts were selected for embarkation on the long, four-month voyage to Australia. Low mortality on the transports meant that most convicts arrived fit and well. The convicts were productive workers, as measured indirectly by their height. ... Since the convicts were as physically robust as other members of the British working class, they were potentially as productive as workers in Great Britain.

The convicts also, so it is argued, brought "useful skills" with them to Australia:⁵⁹

The proportion of convicts in the skilled, semi-skilled and unskilled occupational categories was roughly the same as the percentages of each skill class for the English workforce in 1841. Our statistical tests confirmed that the convicts came from the same occupational population as the free workers in England.

The convicts were the English working classes transported, bringing a cross-section of useful skills.

All this seems very plausible. It is unsurprising that the convicts were a cross-section of the British and Irish working class and brought an array of working-class skills with them to the penal colonies. But the *Convict Workers* team move to more risky terrain when they suggest that the convicts were

57 At 7.

58 At 9.

59 At 9.

not merely a cross-section of the English and Irish working class, but they were *particularly* suitable settlers for Australia in that they were mostly male, young, and travelled without young children:⁶⁰

Unlike free settlers, the convict immigrants arrived without the young and the old, avoiding the burden of dependent service provisions, such as schools, trade training and old-age care, for two generations. Most convict workers were men. Free migration before 1850 was "folk migration", with most migrants to North America travelling as family units. Australia's inflow of overwhelmingly single male convicts created an exceptionally high labour participation rate in which over 65 per cent of the total population were members of the male workforce. The age-sex structure of the convicts provided a unique workforce upon which to build economic growth.

But that is unproven. Did Australia grow more quickly in its penal colony years than did free colonies such as New Zealand or Canada (or the United States, come to that)? This hypothesis works only if convict-era Australia can be shown to have had more rapid economic growth than other kinds of colonies. New Zealand, at least, certainly grew very fast, probably at about the same rate as the Australian colonies; and it may be that the free Australian colonies, Victoria and New South Wales, grew just as fast, or faster, than New South Wales and Van Diemen's Land.

It is also argued in *Convict Workers* that the immigration of the convicts was "effective", in the sense that the convicts stayed on in Australia and did not return:⁶¹

Today's immigration policy tries to ensure "migration effectiveness", displaying concern over migrants who, by returning to their homeland, reduce the level of net immigration. The lower the level of net immigration the greater the cost of maintaining Australia's immigrant workforce. Between 1982 and 1987 net immigration was only 67 per cent of immigrant arrivals; in contrast, over 95 per cent of the convicts never saw Britain or Ireland again.

The authors also argue that the organisation of convict labour in colonial New South Wales by means of the labour assignment system was also efficient and was not a "lottery" as some historians have thought.⁶²

There is no reason to doubt the accuracy of the observation that few convicts returned home, or that, measured by this standard, transportation was "efficient", but the key question that arises is the contrast between transportation to the Americas on the one hand and to the Australian penal colonies on the other. Transportation to the Americas was ineffective in the sense that is used here, because many of those transported to the Americas did indeed return. They returned because they could:

60 At 8.

61 At 8–9.

62 Stephen Nicholas "The Convict Labour Market" in Stephen Nicholas (ed) *Convict Workers: Reinterpreting Australia's Past* (Cambridge University Press, Cambridge, 1988) 111. This chapter is one of the most innovative and interesting parts of *Convict Workers* and the arguments made seem entirely convincing.

transatlantic shipping was plentiful and convicts with the right connections were able to get passages back to England and Ireland with relative ease. The fact that those transported to Australia seldom returned is explicable not so much because of transportation's "effectiveness" as a migratory system but as more a reflection of the sheer distance between Australia and England and the scarcity of maritime traffic – a matter of, to borrow the title of Professor Blainey's famous book, the tyranny of distance.⁶³ Measured by this standard, the decision by Pitt's government to end transportation to North America and replace it with transportation to Australia made good sense.

Convict Workers is a useful corrective, but only if it is widely believed that convicts were drawn from a separate criminal underclass, that they were unusually unhealthy and that, as habitual criminals, they were skilled at nothing except at committing crimes. Essentially, *Convict Workers* is a better-documented and more elaborate rejection of the "criminal class" stereotype, a rejection which other historians had made already. To show that the convicts *qua* migrants were in many ways very suitable migrants to populate a new colony is to miss much of the historical significance of transportation simply because transportation was *not* simply migration. Can transportation actually be seen as a form of migration which just happened to have the atypical aspect of compulsion? It is compulsion, surely, that shifts transportation outside the zone of "migration" altogether. It was "migration" in that large numbers of people were moved from their homes to an overseas colony, but transportation was also *punishment*. Punishment is known as one of the most difficult and complex of social phenomena to analyse and describe.⁶⁴ One might as well say that the prisoners who were moved to the Soviet Gulag were in many ways ideal migrants to settle and colonise the frozen wastes of northern Siberia. Or, one might carry out a statistical analysis of the slave trade and conclude that the slaves were indeed very suitable people to build up economies based on sugar cultivation in Brazil and the West Indies.

Convict Workers is certainly interesting but skips over the lived experience of the convicts themselves; no individual convict transported to Australia had a better experience simply because he or she happened to be young, working-class, skilled and reasonably fit. Also missing is the cultural significance of transportation to modern Australian identity and in Australian historiography, which is where *Convict Workers* is of course itself sited. *Convict Workers* shows, if nothing else, that Australians are perhaps more willing to embrace, or at least research, a wider range of perspectives on transportation than, for instance, romanticising the convicts as rebels against an oppressive society or, on the other, stigmatising them as habitual criminals or prostitutes. There is, simply, a diverse range of perspectives to take on transportation to Australia which was on a massive scale, was part of a system of criminal punishment (which was in itself in a state of dynamic evolution) and which was

63 Geoffrey Blainey *The Tyranny of Distance: How Distance Shaped Australia's History* (revised ed, Sun Books, Melbourne, 1983).

64 See David Garland *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press, Oxford, 1990).

migration and colonisation as well. Showing that the convicts had many suitable attributes as migrants is just one way to analyse a very complex historical phenomenon.

For these reasons it seems better to consider transportation not as a type of *migration* but rather as a type of *colonialism*. It was a colonialism which forced people to move to colonies, forced them to labour there, and kept them under surveillance. As a type of colonialism, it required naval power, convicts to send, appropriate legal provisions, somewhere to send the convicts to, and a coercive apparatus. These characteristics were not incidental to a kind of migration but were, rather, fundamental to a type of colonialism.

Another way to look at *Convict Workers* is to place it in a context of the study of the history of penalty that emerged after the publication of *Albion's Fatal Tree* in 1975.⁶⁵ Although Hay's essay in the *Albion's Fatal Tree* collection is the best-known contribution,⁶⁶ equally important were a number of essays that related to "social crime" or "social protest crime", including Cal Winslow's essay on Sussex smugglers,⁶⁷ John Rule's analysis of wrecking and coastal plunder,⁶⁸ and an additional chapter by Hay himself on poaching and the game laws.⁶⁹ The underlying argument in these essays was essentially the same: that concepts of crime and criminality are class-relative; what the authorities might see as criminal behaviour, and punish as such, might be perceived very differently by ordinary men and women. While all sectors of society would agree that murder and even housebreaking are criminal activities, the same is much less obvious in the case of poaching, the game laws or the long-established practices of coastal villagers in Cornwall who regarded wrecked ships as theirs for the taking. As well as the essays in *Albion's Fatal Tree* there were a number of books and articles by EP Thompson, including "The Moral Economy of the English Crowd in the Eighteenth Century", which also explored the relationship between penalty and class and the relationship between criminal law and customary rights.⁷⁰ Like Hay, Thompson also focused attention on poaching and the game laws, publishing his *Whigs and Hunters* in 1975.⁷¹ That the concept of "crime" in early modern Britain and Ireland was class- or culturally relative is relevant to penal colonisation in the sense that it serves to

65 Douglas Hay and others (eds) *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Allen Lane, London, 1975).

66 See Hay, above n 39.

67 Cal Winslow "Sussex Smugglers" in Douglas Hay and others (eds) *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Allen Lane, London, 1975) 119.

68 John G Rule "Wrecking and Coastal Plunder" in Douglas Hay and others (eds) *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Allen Lane, London, 1975) 167.

69 Douglas Hay "Poaching and the Game Laws on Cannock Chase" in Douglas Hay and others (eds) *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Allen Lane, London, 1975) 189.

70 EP Thompson "The Moral Economy of the English Crowd in the Eighteenth Century" (1971) 50 *Past & Present* 76.

71 EP Thompson *Whigs and Hunters: The Origin of the Black Act* (Pantheon Books, London, 1975).

undermine any suggestion that the transported convicts belonged to a criminal class. That the transported might have been sent to New South Wales for poaching or plundering wrecks makes it all the more likely that the convicts represented a cross-section of the English and Irish labouring classes. The *Convict Workers* team and the historians of "social crime" are working on parallel pathways. Early modern Britain was a disorderly place by modern standards, and protests and riots, both urban and rural, were commonplace. Following particular outbreaks, the authorities would crack down, resulting in selective hangings and the transportation of convicted rioters. No wonder that those convicted and transported in such circumstances were a cross-section of the working class.

It is probably wise to be wary of making too firm a distinction between "real" or "actual" crime and "social" crime. Many were transported for offences against the revenue laws. Smuggling mainly involved importing or delivering luxury goods while dodging the government's revenue officers, in England or in Ireland. Sometimes there were gun battles between smugglers and the King's officers, or efforts made by the revenue officers to demolish unlicensed whisky stills might have been rather actively resisted. Are those who breach the statutes relating to taxes and customs duties or who gallop off under the noses of the revenue officers "real" or "social" criminals? Maybe they are both (or neither). Certainly, their exploits are remembered in folk ballads such as *Darlin' Corey* (or *Cora* in older versions), ballads which were later transplanted to America:

Wake up, wake up darlin' Corey/Tell me what makes you sleep so sound/

The revenue officers are comin'/Gonna tear your still house down.

Then again, the exploits of Mexican drug criminals today are often celebrated in the popular *corrido* (ballad) genre known as *narcocorrido*, often on the air in Los Angeles as well as in Mexico (despite many efforts to ban it), but this does not make them social criminals (unless, perhaps, in a way it does).

If England and Scotland had rich heritages of rural and urban protest, that was far more so the case in Ireland, where many of the transported convicts came from. The English and Irish criminal justice systems in the 18th century operated in similar ways, and their management by justices of the peace and the judges on assize were more or less the same. In the 16th and 17th centuries Ireland had long been the scene of complex colonial warfare and religious upheaval, but in the 18th century organised agrarian protest movements had emerged as a new phenomenon, with the Houghers in western counties around 1711–1712, followed by the Whiteboy movement in Tipperary, Limerick, Waterford and Cork in 1769–1775.⁷² From these beginnings, agrarian protest, which could often be quite violent, became a recurring phenomenon in much of rural Ireland. Many of the protesters sought to prevent the expansion of stock rearing and to protect subsistence farming. The protesters often claimed to be followers of rural folk heroes, such as *Ever Right* and *Queen Sadhbh* (*Sive*), the latter

⁷² On the beginnings of Irish agrarian protest movements, see Connolly, above n 37, at 300–301. Many of the protesters targeted cattle and sheep, seen as a threat to the survival of the peasantry.

a supposed Gaelic goddess. This had counterparts in England, as with the Captain Swing rural protests of 1830, a "widespread rebellion across a broad swathe of south and east England".⁷³ In Ireland and Britain alike, "social criminals" might easily have been applying similar kinds of moral economies, but crimes of protest in rural Ireland had a dimension of their own. Irish rural society was antagonistic and embittered in special ways. As SJ Connolly (of Queen's University, Belfast) carefully puts it:⁷⁴

The protests of the Whiteboys and their successors may have had parallels elsewhere in early modern Great Britain and beyond. But the recurrence of disturbances in successive decades suggests a deficiency either in channels of communication or in levels of mutual comprehension between rulers and ruled, reflected in a ready resort to open protest over grievances that elsewhere might have been more often dealt with through either formal or informal representations to social superiors.

Put simply, Irish rural society was less cohesive and less stable than its British counterpart. It was also much poorer, and was a vast pyramid of tenancy, sub-tenancy and debt characterised by a complete mismatch between legal and cultural boundaries. How could Irish men and women transported for levelling fences, resisting evictions or digging up pasture (to prevent the expansion of stock raising) even be imagined to belong to a "criminal class"? It hardly seems necessary to labour the point that they could not have been. The reality is that the convicts transported to the Australian penal colonies were a mix: English, Irish, Welsh and Scottish; men and women; some quite young and some rather old; some ordinary offenders; some dangerous criminals; some who had protested against the loss of cultivated lands and the destruction of rural rights in Ireland; poor crofters in Scotland who had done the same; some who were people who had demonstrated against enclosure or dear foods in Britain or who had joined proscribed radical political movements; even some upper-class offenders who may have forged bills of exchange or (as happened in one instance) stolen books from a college library. The criminal justice system simply did not make clear distinctions between felons – except perhaps within the discretionary frameworks of sentencing practice which are very challenging to analyse.

V PENAL COLONIALISM AND THE RULE OF LAW IN THE AUSTRALIAN COLONIES

Some historians emphasise the complexities of the Australian penal colonies and have argued for the persistence of English legal norms and traditions of self-government within the overall penal-colonial framework. To put it crudely, some recent historiography has downplayed the *abnormality* of early colonial Australia to stress, rather, the ways that it was "normal" and typically British.⁷⁵ This

73 Rollo Arnold *New Zealand's Burning: The Settlers' World in the Mid 1880s* (Victoria University Press, Wellington, 1994) at 238.

74 Connolly, above n 37, at 303.

75 See for example John Hirst *Freedom on the Fatal Shore: Australia's First Colony* (Black Inc, Melbourne, 2008). This book is a consolidation of the same author's *Convict Society and its Enemies: A History of Early*

issue has loomed large in the recently published *Cambridge Legal History of Australia*.⁷⁶ To understand the lineaments of the debate on the "normality" (or lack thereof) of the Australian penal colonies, attention must focus on the fact that, to paraphrase George Orwell, some penal colonies were more equal than others. Discussion of the "Australian" penal colonies must not neglect differences between the colonies.

By any measure, it was New South Wales, the first of the Australian penal colonies, that stood out as highly militarised and authoritarian. Bruce Kercher believes that the legal system of New South Wales was both unusually autocratic and largely amateurish. The militarised and authoritarian tendencies are apparent in colonial New South Wales at many levels. According to Kercher:⁷⁷

The new colony's legal structure was autocratic, with the governor at its centre. There was no colonial council, legislature or court of original jurisdiction until 1824. In the meantime, the governors alone made local laws, called orders or proclamations. In the absence of an Executive Council the governors were also in complete control of colonial administration, and they controlled the courts.

That New South Wales was run by an authoritarian and coercive regime was noted by many historians long before Kercher's elegant summation of Australia's legal evolution from "colonial settlement" to "colony". Kercher breaks new ground, however, in stressing the unprofessional and amateurish aspects of the legal system as it operated in early New South Wales. An important characteristic of law in early New South Wales was, Kercher writes, its "amateurism", itself a characteristic of the judicial systems of the entire British Empire at the time:⁷⁸

The first judges had no legal training, and there were no official lawyers to advise the governors. This was common across the Empire in the early nineteenth century. Even the appeals committee of the Privy Council included some members without legal qualifications; so, there should be no surprise that Sydney saw the brief appearance of only one legally qualified judge before 1809.

It might be added that the administration of the legal system in Britain itself was one in which a large role was played by unqualified justices of the peace who controlled many aspects of the system from their own parlours, at quarter sessions, and on the grand and petty juries. New South Wales was "normal" in the sense that the colonial government and legal system was small-scale, staffed largely by amateurs, and the regime had to make do as best it could. Only slowly did New South Wales move

New South Wales (Allen & Unwin, Sydney, 1983) and *The Strange Birth of Colonial Democracy: New South Wales, 1848–1884* (Allen & Unwin, Sydney, 1988).

76 Peter Cane, Lisa Ford and Mark McMillan (eds) *The Cambridge Legal History of Australia* (Cambridge University Press, Cambridge, 2022).

77 Bruce Kercher "Colonial Settlement to Colony" in Peter Cane, Lisa Ford and Mark McMillan (eds) *The Cambridge Legal History of Australia* (Cambridge University Press, Cambridge, 2022) 87 at 87.

78 At 88.

from a "settlement" to a mature "colony" with a developed legal infrastructure, one sufficient to match "the more complex needs of the much larger towns across the Australian colonies".⁷⁹ Thus any discussion of the normality, or lack thereof, of New South Wales and Van Diemen's Land has to be sited in the context of the slow consolidation and maturation of the legal system.

Returning to the point that New South Wales was just one of the Australian colonies, it can also be said that many other Australian colonies were quite different; much more akin, in fact, to New Zealand. It is inaccurate to think of "convict" Australia and "free settler" New Zealand, as two major Australian settler colonies, Victoria and South Australia, never were penal colonies at any time. In many ways it is more compelling to bracket New South Wales, Tasmania, Queensland and Western Australia together on the one hand, and Victoria, South Australia and New Zealand on the other.

VI THE APOTHEOSIS OF A PACIFIC ISLAND PENAL COLONY: NORFOLK ISLAND

Robert Hughes devotes an entire chapter of his great history of transportation, *The Fatal Shore*, to Norfolk Island, and with good reason.⁸⁰ Norfolk was in many ways the apotheosis of penal colonisation: a place of isolation, incessant work, inter-prisoner violence and brutal discipline. It was also, however, a place of massive infrastructure: of stone-built jetties, a panopticon-style prison building, a crank house for the treadmill, a church for the convicts and houses and administrative buildings for the civil and administrative staff. It also represents the acme of penal colonisation: it was the Pacific Island penal colony *par excellence* in that, for much of its colonial history, Norfolk had no other function apart from disciplining convicts. That was all that happened there: there were no free settlers.

The assignment system of New South Wales and Van Diemen's Land did not operate on Norfolk given the absence of civil settlement; the convicts worked only for the government. The imposing Georgian buildings of the main settlement at Kingston and the stone- and brick-built bridges and culverts that dot the island were built entirely by convict labour. The labour was unremitting: "As soon as they landed at Kingston, the convicts went to work."⁸¹ The expropriation of convict labour by the state on Norfolk was complete.

Norfolk Island is the subject of an interesting novelesque study – a book that sits somewhere between a nonfiction novel or novelised historical criminology – by Norval Morris, which is concerned with the administration of Norfolk by Captain Alexander Maconochie.⁸² Maconochie's

79 At 107.

80 Hughes, above n 13, at 460–484.

81 At 462.

82 Norval Morris *Maconochie's Gentlemen: The Story of Norfolk Island and the Roots of Modern Prison Reform* (Oxford University Press, Oxford, 2002).

humane administration of Norfolk, which is described in some detail by Hughes in *The Fatal Shore*, remodelled Norfolk by using a "mark system" to manage the inmates in place of the old system of brutal floggings, the treadmill and so on. Morris obviously finds Maconochie a captivating person and sees him as a kind of archetype of the humane prison reformer. Morris introduces this rather unusual work as follows:⁸³

In my own life, I am much involved in prison issues. In this book I try to wrestle with some of these issues as they arose in Maconochie's island prison. Until his arrival, Norfolk Island had ranked in brutality and suffering with the French settlement on Devil's Island and the Russian settlement on the Sakhalin Islands (see Anton Chekhov's "A Journey to Sakhalin"). It was the most severe prison in the considerably severe range of then existing British prisons and gaols. The lash, the spreadeagle, the wooden gag, and the scavenger's daughter often accompanied prisoners to the dankest of cells.

But Morris explains there are some lights among these dark shades:⁸⁴

This is not an unremittingly grim prison story. His wife and six children accompanied Maconochie to Norfolk Island. Much of the story is about these "other prisoners".

In fact the houses of the civil and military administration on Norfolk are still there and are open to the public, as is a church on one of the floors of the main prison administration building. "Is this a true story?", Morris asks:⁸⁵

The events in it are true. Contemporary records and letters, official and private, testify to their occurrence. I adhered closely to the historical records, relying on John Vincent Barry's *Captain Maconochie of Norfolk Island* (Oxford University Press, 1958) as my primary biographical guide. The story is true if I can achieve psychological truth in deploying the personal, social, and moral lives of the characters.

Two general conclusions about Norfolk follow here. First, the British penal administration in the Pacific and Australia was on a sufficient scale and lasted long enough to generate a substantial history of its own, a history that includes efforts by at least some enlightened reformers who attempted to apply what seemed to be the enlightened penological thought of the early 19th century. (In our post-Foucauldian world, however, we may be more inclined to see discipline by means of marks according to a scale of good and bad behaviour as no less repressive than flogging and the treadmill.) Secondly, Norval Morris, as he tells us, has visited Norfolk and has certainly felt its remarkable spell, a spell created by the strange combination of massive Georgian prison architecture combined with the scenery and seascapes of a lonely Pacific island. The spell was evidently enough to generate a highly original work by one of the leading criminologists of modern times. The architectural legacy that

83 At x.

84 At xi.

85 At xi.

remains on Norfolk is extraordinary; no one interested in the history of British penalty should fail to visit it.⁸⁶

Norfolk has a surprisingly interesting post-convict history, one which is partly also connected with crime, but in a very different way.⁸⁷ After the penal establishment was closed, the British government offered Norfolk to the people of Pitcairn Island. The Pitcairners were the descendants of the mutineers of HMS *Bounty* and their Tahitian wives, who had formed an essentially Tahitian community on Pitcairn, one of the loneliest and most isolated spots in the Pacific.⁸⁸ John Adams, the sole survivor of the original mutineers and the leader of this strange and isolated Anglo-Tahitian group on Pitcairn, had petitioned the British government in 1825 asking if the Pitcairners might be moved somewhere else. In 1831 they were moved by the Royal Navy to Tahiti, but were not happy there and the French authorities took them back to Pitcairn. With the ending of transportation, the British government decided to offer Norfolk, with all of its abandoned penal buildings, to the Pitcairners. The Pitcairners, 194 people belonging to the Adams, Buffett, Christian, Evans, McCoy, Nobbs, Quintal and Young families, landed at Norfolk on 8 June 1856. Their descendants still live on the island today, retaining some aspects of their hybrid Anglo-Tahitian culture. The island had its own governor and until recently was constitutionally separate from Australia. Much to the displeasure of many of the people of Norfolk, the island lost its constitutional autonomy in 2015 when Canberra abolished the Norfolk Island Legislative Assembly. Some people in Norfolk, feeling themselves to be Pacific Islanders, would prefer to be part of New Zealand instead.⁸⁹

VII FREEDOM AND UNFREEDOM IN NEW CALEDONIA

It is well known that France has a long history of penal colonialism.⁹⁰ There is a large literature on "L'enfer vert" (the "Green Hell"), the French penal colony in Guiana,⁹¹ but France also had a significant penal colony in the Pacific in New Caledonia. The Australian penal colonies have

86 I have had two periods of exploration of Norfolk Island (in the company of my family) and have been able to explore the remains of the penal colony thoroughly and to photograph all of the buildings.

87 On the post-transportation history of Norfolk, see Raymond Nobbs *Norfolk Island and its Third Settlement: The First Hundred Years – The Pitcairn Era, 1856–1956 and the Melanesian Mission, 1866–1920* (Library of Australian History, Sydney, 2006).

88 See Robert Nicolson *The Pitcairners* (Pasifika Press, Auckland, 1997).

89 As I was told myself when I last visited Norfolk in 2016. On the political and constitutional relationship between Norfolk Island and Australia, see Maev O'Collins *An Uneasy Relationship: Norfolk Island and the Commonwealth of Australia* (Pandanus Books, Canberra, 2002).

90 On French penalty generally in the 19th century, see Patricia O'Brien *The Promise of Punishment: Prisons in Nineteenth-Century France* (Princeton University Press, Princeton, 1982). Chapter 8 of this book, "Exclusion as Punishment", deals with transportation to New Caledonia and French Guiana: at 258–296.

91 For a general history of French Guiana, see Serge Mam Lam Fouck *Histoire générale de la Guyane française* (Ibis Rouge Editions, Matoury (French Guiana), 2002).

generated a large literature, in part because of the sheer scale of penal colonialism in Australia, but also because the convict era long has been – and remains – basic to Australian history and Australian self-awareness. The penal era is the subject not only of specialist studies, but is also written about at length in all general histories of Australia, works written by historians as diverse as Manning Clark, Robert Hughes (as we have seen) and Geoffrey Blainey. By contrast, the equivalent French penal colonial system in New Caledonia was on a smaller scale and was not foundational to anything. New Caledonian independence being a highly uncertain prospect even now, neither the Caledonian–French population nor the Kanak peoples have any reason to lay claim to the penal phase of New Caledonian history as foundational or even in any way resonant. Another problem is that the historiographical literature on French penal colonialism in the Pacific is written almost entirely in French, and for that reason has not much impacted on the historical awareness of readers in the Anglo-Pacific countries. Nor has French penal colonialism impacted the general historiography of penalty, general histories of which quite often consider Botany Bay and British penal transportation but which seldom consider French transportation. Nor, to my knowledge, have any comparative studies of French and British systems of penal transportation made an appearance. However, if penal colonialism is treated as a phase not of Australian or New Caledonian history, but rather as a phase of *Pacific* history, the whole picture changes and, as I hope to show, new perspectives are opened up.

New Caledonia has a long history of indigenous settlement.⁹² It was first settled by Austronesian navigators in the early first millennium BC. These earliest settlers belonged to exactly the same early phase of Austronesian-speaking settlers who settled in Vanuatu, Tonga, Fiji and coastal New Guinea at the same time, a settlement wave usually regarded by archaeologists as associated with the distinctive Lapita ceramics, named after a find-site on the Grande Terre of New Caledonia, and who descended from a still earlier wave of Austronesian-speaking Neolithic navigators who migrated from Taiwan to Luzon and from there to islands in Southeast Asia and Near Oceania. New Caledonia, referred to by archaeologists as the Southern Lapita province, is rich in archaeological sites,⁹³ including the remains of impressive agricultural terraces used for cultivating taro. The people who first colonised New Caledonia about 2,000 years ago are the ancestors of today's Kanak peoples, who have a rich traditional culture and who speak an array of complex Austronesian languages. The Kanak peoples, therefore, are distant cousins of the Māori, Fijians and (for that matter) all Polynesians and many of the peoples of island Southeast Asia. Recent scholarship has repudiated any suggestion that the Kanak peoples were ever small groups of "hunter gatherers"; rather they were (and are) horticulturalist Austronesians, essentially the same in all key respects as the "Melanesian" peoples of Vanuatu, the Bismarck Archipelago and coastal New Guinea. The Kanak peoples had richly

92 On the prehistory of New Caledonia, see Christophe Sand "*Le temps d'avant": La préhistoire de la Nouvelle-Calédonie* (L'Harmattan, Paris, 1995).

93 On the Lapita ceramic horizon in New Caledonia, see Christophe Sand *Lapita calédonien: Archéologie d'un premier peuplement insulaire océanien* (Société des Océanistes, Paris, 2010).

developed systems of customary law, systems which remain an important component of modern private law in New Caledonia (referred to by commentators as *droit civil coutumier Kanak*, ie Kanak customary civil law).⁹⁴

On 24 September 1853, *contre-amiral* Febvrier-Despointes took possession of New Caledonia in the name of Napoleon III in the presence of a group of officers and missionaries. In the months that followed, a number of Kanak chiefs formally submitted to the new French regime. New Caledonia was annexed first and foremost as a penal colony, *une colonie pénitentiaire*. Some historians have suggested that the French government might also have hoped that, just as fabulous discoveries of gold had occurred in Britain's Australian colonies, the same might be the case in New Caledonia.⁹⁵ (New Caledonia is rich in metals, as it happens; not gold, however, but nickel, which is so valuable today it might just as well be gold.) Since annexation New Caledonia has had a complex history which by now has generated a rich and elaborate historiography,⁹⁶ nearly entirely in French.

French penal colonialism in the Pacific coincided almost exactly with the time when its British counterpart was coming to an end. British transportation to eastern Australia ended in 1852, the year when France first began transporting felons overseas, at first to French Guiana. British transportation to the last of the Australian penal colonies, the Swan River Colony (Western Australia) ended in 1868; a year earlier the French government had announced that New Caledonia would be its only penal colony for hard-labour convicts.

The French decision to send convicts to the Pacific was not prompted by a penal crisis within the metropolitan criminal justice system, as had been the case in Britain, but rather within the context of a "sustained debate" in France "concerning the causes of crime and the appropriate punishment", that being "one of the major social issues in the Western world".⁹⁷ Perhaps just as important, or even more important, was French envy and admiration for Britain's establishment of its massive system of penal colonisation in Australia. According to Colin Forster:⁹⁸

It was fitting that this penal site [New Caledonia] should be an island in the southwest Pacific adjacent to Australia. So much of the French penal debate, so much of the French planning for colonial development by convicts, had turned on the Australian experience. For such a long period had the British penal achievement in Australia been the object of the admiration and envy of French transportationists.

94 Antoine Leca *Introduction au droit civil coutumier kanak* (Presses Universitaires d'Aix-Marseille, Marseille, 2016); and Antoine Leca *Précis de droit civil coutumier kanak* (4th ed, Presses Universitaires de la Nouvelle-Calédonie, Nouméa, 2019).

95 Georges Delbos *L'Église catholique en Nouvelle-Calédonie: Un siècle et demi d'histoire* (Desclée, Paris, 1993) at 95.

96 Frédéric Angleviel *Historiographie de la Nouvelle-Calédonie* (Publibook, Paris, 2003).

97 Forster, above n 51, at 135.

98 At 150.

Transportation to New Caledonia was the fulfilment of the long-standing desire to expel convicts and create a colony, as had been done at Botany Bay.

French penal transportation to New Caledonia lasted from 1864–1897, but the penitentiary there was not finally closed until 1931. About 22,000 French men and women were sent there. Some 75 separate naval convict fleets were sent there in the 1864–1897 period.⁹⁹ The establishment of the penal colony had severe impacts on the indigenous Kanak peoples. According to Christophe Sand, New Caledonia's most prominent contemporary archaeologist:¹⁰⁰

Wanting to create a free and convict settlement colony on the model of Australia, the French needed to gain control of the fertile lands of the river-plains and thus pushed the Kanak tribes into the valley depths or toward the poorly fertile seashores ... In this harsh and violent starting point of the colonial era, in a period of severe indigenous population decline due to the introduction of European diseases, the Christian missionaries were among the few to take interest in the local cultures and traditions ...

Discipline in New Caledonia was certainly harsh. New Caledonia was far away, and the French public knew little about what went on there. In the 1880s a French journalist, Simon Mayer, went there and published a number of articles in the French journal *Le Petit National* describing what he had seen. He described a place of brutal discipline and suffering:¹⁰¹

If a guard finds your work unsatisfactory, you receive blows from the whip. In going to work, if you march too quickly or too slowly, you receive blows from the whip. If you reply or attempt to deny any of their observations, this is considered an insult to a superior, and thus you receive blows from the whip. If you change your clothing in any way, you receive blows from the whip, because all objects are presumed to be stolen. For eating a morsel of sugar-cane, you receive blows from the whip. For taking a piece of fruit along your daily route to work you receive blows from the whip. For no apparent reason, other than the enjoyment of the guards you receive blows from the whip ... The director of the camp cannot ignore these facts, the whole world knows that blood flows over the muscles of the workers; their torturous cries are frightening and can be heard by everyone. Ten blows, twenty blows, twenty-five blows ... with each blow the man screams. I know. I have heard it.

French policies were not unvarying, and following Mayer's articles there was some amelioration of the disciplinary system in New Caledonia, but on the other hand there were critics of the system who regarded it as too benign, just as there are those today who imagine that prisoners lead a life of leisure

99 Barbançon, above n 14, at 17.

100 Christophe Sand "Archaeology of a Piece of Gondwanaland: The Past of New Caledonia" in Ethan E Cochrane and Terry L Hunt (eds) *The Oxford Handbook of Prehistoric Oceania* (Oxford University Press, New York, 2018) 185 at 187 (citations omitted).

101 Simon Mayer "Souvenir d'un déporté: étapes d'un forçat politique" *Le Petit National* (France, 4 November 1879), quoted and translated by Stephen A Toth "Colonisation or Incarceration? The Changing Role of the French Penal Colony in Fin-de-Siècle New Caledonia" (1999) 34 *Journal of Pacific History* 59 at 64–65.

and comfort in jail. On the whole, the starting point of penal administration in both New Caledonia and Guiana was that the convicts had been treated mercifully when they might have been executed at home and had no right to complain. At least, life in colonial New Caledonia bore no relation to the country's image as a place for water-skiing, paragliding and so forth presented in the tourist brochures of today, albeit that the physical remains of the penal area are scattered all over Nouméa, and here and there in the countryside. Prisoners being flogged for eating bits of sugar cane is as valid a representation of the French colonial presence in the Pacific as is that of Bougainville strolling around Tahiti.

French convicts toiling on the roads and in the fields of New Caledonia were not the only category of the unfree in New Caledonia. In some ways New Caledonia was a mirror of early colonial North America, where there were a number of categories of unfree workers: slaves, indentured servants and convicts. In New Caledonia, the indigenous Kanak population was subject to a specifically French form of labour coercion, *l'indigénat*, or indigenous labour code, by which the indigenous population was forced to work for both the colonial regime, and/or the French settlers (*colons*). The *indigénat* was by no means unique to New Caledonia; it was an institution found everywhere in the French plantation colonies, most notably in Africa and in *Indochine*. The operation of the *indigénat* in New Caledonia has been studied in depth by Isabelle Merle and Adrian Muckle.¹⁰² Essentially the essence of the *indigénat* was that it was an exceptional system applicable only to the "indigenous" (*les indigènes*), whose status was different from citizens (*citoyens*), whose civil status was governed by the Civil Code (*Code Civil*), by definition the fundamental private law for citizens.

One of the problems with assessing the impacts of penal colonialism on the Kanak peoples of New Caledonia has been the persistence of quite inaccurate stereotypes of Kanak culture and society. It has long been assumed that the Kanak peoples lived in small groups of "hunter gatherers" and that overall population levels were quite low. Recent research by Sand and others has now dislodged these perceptions, allowing the sheer scale of population decline and cultural dislocation caused by French colonialism in New Caledonia to at last be accurately understood. Sand makes the scale of pre-European settlement and landscape development on New Caledonia very clear:¹⁰³

Settlement pattern studies point to intensive occupation of Grande Terre's landscapes (on coastlines, on valley floors, or deep inland), the building of thousands of permanent hamlets (some with over fifty house mounds in one site), the extension of fragile and often steep wet-land terracing over tens of thousands of

102 Isabelle Merle and Adrian Muckle *L'indigénat: Genèses dans l'empire français, Pratiques en Nouvelle-Calédonie* (CNRS Éditions, Paris, 2019). The *indigénat* was abolished in the French colonial empire from 1945–1946 (on the process of abolition and the lingering after-effects of the *indigénat* era in New Caledonia, see Merle and Muckle at 369–373).

103 Sand, above n 100, at 197 (citation omitted).

hectares, with even larger surfaces being devoted to long dry-land mounds ... and appears to characterize dense communities, not semi-nomadic family groups moving from one region to the other.

The evidence points to massive demographic collapse over the course of the 19th century, beginning with the first contacts with isolated sailing vessels from Britain and France and then with the sandalwood trade. This was all before the convict era, but pressures on the struggling indigenous peoples of New Caledonia continued after 1864: "This process continued during the whole second half of the nineteenth century ... amid colonial land spoliations, endemic war cycles, regrouping of clans, and creation of indigenous reservations".¹⁰⁴

Those transported as convicts to New Caledonia did not come just from France; many were from North Africa. Some of those transported from France's colonies in Morocco, Tunisia and Algeria became involved in the cultivation of dates in New Caledonia, the subject of an interesting monograph by Mélica Ouennoughi.¹⁰⁵ As in the British Pacific penal colonies, transportation to New Caledonia left an architectural legacy in the form of penitentiary blocks, convict churches, walls, watchtowers and the like, readily seen by all visitors to Nouméa; other remains of the convict era can be seen on other parts of Grande Terre and on the Île des Pins. A literature on the historical archaeology of the penal colony period in New Caledonia is beginning to emerge.¹⁰⁶

Two groups of convicted persons transported to New Caledonia have attracted the particular attention of French historians: rebels from *la Grande Kabylie* (a section of the Atlas Mountains in northern Algeria) and the Communards, participants in the great revolutionary upheaval of the Paris Commune (*Commune de Paris*) of 1871.¹⁰⁷ The interest taken by historians in these particular groups is unsurprising. Kabylia, occupied by Berber tribes, was a centre of fierce resistance to the French colonisation of Algeria. The trauma of the modern Algerian war of 1954–1962 has led both French and Algerian historians to focus on Arab and Berber resistance to the 19th-century French invasion of Algeria, and naturally transportation of Algerian rebels to the Pacific has attracted much sympathetic interest. The Paris Commune is an especially well-known event in French history, seen by many historians as an emblematic working-class rebellion, arguably both a successor to the French Revolution and a precursor to the revolutionary upheavals of the 20th century. The Communards and the Algerian rebels obviously stand out as political transportees, their transportation relating to the repressive policies of the French state rather than deterring crime. The complex political history of

104 At 197 (citation omitted).

105 Mélica Ouennoughi *Les déportés maghrébins en Nouvelle-Calédonie et la culture du palmier dattier (1864 à nos jours)* (L'Harmattan, Paris, 2005).

106 See Christophe Sand, Jacques Bolé and André Ouetcho "Historical Archaeology in Island Melanesia: First Research on the Convict Settlements of New Caledonia" (2005) 27 *New Zealand Journal of Archaeology* 145.

107 See Germaine Malhé *Déportation en Nouvelle-Calédonie des Communards et des révoltés de la Grande Kabylie (1872–1876)* (L'Harmattan, Paris, 1994).

19th-century France, with its divisions between republicans, Bonapartists and royalists has also become interlinked with the history of French penal transportation, clearly so in the case of the Communards. In an ironic twist, the rebels of Algeria were subjected to the same labour controls of the *indigénat* as were the Kanak peoples of New Caledonia, the *indigénat* a key factor in provoking anti-colonial rebellions in both places.

There is no exact equivalent of political transportation in the history of the Australian penal colonies, unless one counts the Irish transportees, many of whom were likely to be highly disenchanted with British rule but who were transported as ordinary felons for the most part. The principal exceptions to this pattern were the transportation of some Irish rebels to Australia following the Irish insurrection of 1798,¹⁰⁸ the Young Ireland rebellion of 1848 and the Fenian rebellion of 1867. And even those Irish men and women who were transported as ordinary felons were different culturally from most convicts. As Patrick O'Farrell has put it, "the Irish, as ever, stood apart: even in felony they tend to be a distinctive group".¹⁰⁹

A section of the Irish [transportees], small but significant in its prominence, were men of integrity, guilty of political or social protest, not common criminals. The Irish were mostly Catholics, whereas the English and Scots were Protestants. Most of the Irish were peasants (though about a third possessed skills of some kind), while most of the English came from towns. Though the literacy rate of Irish males was not markedly different from that of English males (about 60 percent could read and between 40 and 50 percent could also write), many of the Irish did not speak English among themselves, but Gaelic.

Some of the leaders of the 1848 rebellion in Ireland, sometimes known as the "Famine Rebellion", convicted of a new offence of treason-felony,¹¹⁰ ended up in the Australian penal colonies. The best-known of these transportees were William Smith O'Brien, Thomas Francis Meagher and John Mitchel. All three went on to lead spectacularly interesting lives,¹¹¹ especially Meagher, who escaped from Van Diemen's Land to the United States and became a Union general in the American Civil War and Governor of Montana. Another group of Fenians was transported to Fremantle, arriving in 1868.

Louis-José Barbançon has wondered, when analysing penal colonisation, which of the two comes uppermost, colonisation or punishment?¹¹² Arguably, there is no distinction: the essence of penal colonisation is that it was both at once. That can certainly be plausibly argued was the case in the Australian penal colonies. In the case of New Caledonia, penalty and colonisation were likewise

108 Connolly, above n 37, at 483.

109 O'Farrell *The Irish in Australia*, above n 11, at 25.

110 Treason Felony Act 1848 (UK) 11 & 12 Vict c 12.

111 See Thomas Keneally *The Great Shame: A Story of the Irish in the Old World and the New* (Random House, Sydney, 1998).

112 Barbançon, above n 14, at 15.

closely linked. By the end of the 19th century New Caledonia had benefited from the financial outlays of the penal administration, both direct and indirect. The system had left roads and infrastructure, and the economy of the colony had benefited from supply contracts and from convict labour in agriculture and mining. The whole economic development of New Caledonia had been intimately linked with the penal transportation system, which had also brought to the colony the ancestors of the bulk of its the European population.¹¹³ But it is hard to see that penal colonisation brought any benefits to the battered and much reduced indigenous populations of the archipelago. New Caledonia exemplifies the benefits and detriments of economic development by means of penalty, as do New South Wales and Van Diemen's Land.

VIII PENAL TRANSPORTATION FROM AND WITHIN NEW ZEALAND

New Zealand did send convicted felons, some of whom were Māori, to the Australian penal colonies, and in that sense participated in the system of convict transportation to the Pacific. But that is decidedly not the only way in which the New Zealand colonial state was a participant in the wider process of penal colonisation. The New Zealand colony had an island penal colony of its own, this being the Chatham Islands, some 840 km to the east of the South Island, and populated by a separate – separate from Māori, that is – eastern Polynesian culture, the Moriori. As will be seen, some Māori opponents of the government were transported to the Chathams in the 1880s. Moreover, by some kind of ingrained reflex about the nature of criminal punishment, other Māori leaders who had defied the colonial state in Taranaki were transported (there is no other word for it) to Otago, where they were forced to labour for the government; and in an uncanny re-enactment of the hulks at Deptford in the 18th century, Māori prisoners of war after the government's invasion of the Waikato were confined on hulks in Auckland Harbour. In these ways British penal styles had an afterlife in Aotearoa just as Britain was at last moving to incarcerating its felons in massive panopticon-like prisons.

Transportation of felons from New Zealand to the Australian penal colonies was first studied by Robert Burnett in an occasional paper in criminology at Victoria University of Wellington published in 1978.¹¹⁴ Transportation of Māori "rebels" from the Wellington region was discussed by Ian Wards in 1968 and by the present author in evidence prepared for the Waitangi Tribunal's Port Nicholson inquiry.¹¹⁵ Now, at last, the subject of penal transportation from Aotearoa to the Australian colonies

113 At 403.

114 Robert Burnett *Penal Transportation: An Episode in New Zealand History* (Victoria University of Wellington, Occasional Paper in Criminology No 9, 1978).

115 Ian Wards *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand 1832–1852* (Department of Internal Affairs, Wellington, 1968) at 293–300.

has been explored in a valuable monograph by Dr Kristyn Harman of the University of Tasmania.¹¹⁶ New Zealand was established as a colony that was meant to be wholly distinct from the penal colonies across the Tasman, but that did not prove to be quite possible:¹¹⁷

Idealised as a new sort of colony to be populated by gentlefolk and free labour, New Zealand's early image of itself could only be realised through the brutal suppression of challenges to that idea. The complex realities of colonial life threatened that idyllic dream, and the threats were excised. Idle, dishonest or violent men were unwelcome, feared, and censured. Some were imprisoned locally, and those considered to be the worst offenders were handed down exemplary punishments – several were hanged and others were exiled to demonstrate the empire's strength and reach.

Dr Harman's book is concerned with transportation from New Zealand to the Australian colonies and does not traverse penal transportation overseas but within New Zealand, this including the transportation of Māori "rebels" to the Chatham Islands as well as transportation of the government's Māori opponents in Taranaki to the South Island, or the confinement of Māori prisoners of war on prison hulks moored near Auckland.

Transportation of Māori deemed to be rebels was most systematically employed by the Hawke's Bay provincial government from 1865–1866. After conflict between some Māori groups on the one side, and government forces and the Crown's Māori allies on the other, broke out at Waerenga-a-Hika near Gisborne in 1865, a number of captured Māori people, one of whom was Te Kooti Arikirangi Te Tūruki (usually referred to in New Zealand historiography simply as Te Kooti), were transported to the Chatham Islands. There was further fighting in Hawke's Bay the following year, with battles at Ōmarunui and Pētane on 12 October 1866. At these engagements, armed supporters of the Pai Mārire religious movement were suppressed by government forces with the assistance of Māori allies. Pai Mārire was deeply divisive amongst the Māori people, and the chiefly leaders of the Māori communities of Hawke's Bay had no liking for it. Neither battle was a major encounter, and the "rebels", if that is what they were, were easily defeated. The government's principal decision-maker on the spot in Hawke's Bay at the time was Donald McLean, the superintendent of Hawke's Bay province and the Hawke's Bay agent for the general (ie national) government. McLean wielded an impressive amount of power in the province, and had invested much effort in building up a pro-government party among the Māori chiefs of the region.

Most of the "Hauhaus", as they were styled – religious radicals and opponents of the government – were captured by the government forces and their Māori allies. Those captured at Ōmarunui and Pētane were treated as military prisoners and were transported to the Chatham Islands (known as Wharekauri in Māori and as Rēkohu in the Moriori language of the indigenous inhabitants) – a remote

116 Kristyn Harman *Cleansing the Colony: Transporting convicts from New Zealand to Van Diemen's Land* (Otago University Press, Dunedin, 2017).

117 At 181.

archipelago about 900 km east of the North Island. On 25 October 1866 the first detachment of Hawke's Bay prisoners, 52 prisoners of war and eight women, were taken to the Chathams on board the government steamer *St Kilda*. The transportees cannot accurately be described as "convicts", as none of them had been convicted of anything. They were guarded on the outward journey by 10 Māori and 10 Pākehā non-commissioned officers and soldiers. On 23 October 1866 the *Hawke's Bay Herald* reported on their departure to the remote and wind-swept Chathams:¹¹⁸

The *St. Kilda* ... "is expected to get away this afternoon, with the prisoners taken at Omarunui and elsewhere. They will be accompanied by a guard, who will remain on the island, and be a protection to the inhabitants, who, otherwise, would be panic-stricken at this formidable addition to the number of prisoners ...".

The transportees lived in a row of ponga houses at the settlement of Waitangi, under the supervision of the resident magistrate, William Thomas, and were monitored by an armed guard of about 26 men, half of whom were Māori themselves. The transportees constructed a redoubt at Waitangi, a three-celled prison, grew their own vegetables and upgraded tracks and roads.¹¹⁹ But in July 1868, after the transportees from the East Coast had been on Wharekauri (the Chathams) for nearly two years, led by Te Kooti, they carried out a daring escape. Te Kooti and his whakarau (exiles) seized the *Rifleman*, a schooner chartered by the government to bring supplies to the Chathams, and sailed to the North Island with 298 exiles on board: 163 men, 64 women and 71 children. On reaching the North Island coast at Whareongaonga, south of Gisborne, everyone disembarked without hindrance. Soon after, Te Kooti and his force attacked Gisborne before making an epic journey to the North Island interior. In both its *Mohaka ki Ahuriri* and *Turanga* reports, the Waitangi Tribunal found that as there was no legal justification for the detention of the exiles on the Chathams without trial, both the Gisborne and the Napier prisoners had every right to escape.¹²⁰

IX SUMMARY AND CONCLUSIONS

The principal proposition of this article is a simple one: that in the case of the Pacific, the history of crime and punishment and the history of colonisation, especially French and British colonisation, intersect. To historians of the criminal justice systems of France and the British Isles, Australia and New Caledonia are simply convict destinations: the main story is that of the emergence of

118 "Summary Disposal of Hauhau Rebels in Hawke's Bay" *The New Zealand Herald* (Auckland, 27 October 1866) at 4, reprinting *Hawke's Bay Herald* (Hawke's Bay, 23 October 1866).

119 Michael King *Mori: A People Rediscovered* (Viking, Auckland, 1989) at 105–106.

120 Waitangi Tribunal *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) at 192–193. In fact, the Tribunal further found that the exiles "were removed not because their continued presence in Turanga posed a threat to the security of the colony but because the Crown wanted to push through the confiscation of Turanga land so as to solve the 'Native question' in the district once and for all": at 193. On the life and times of Te Kooti, see Judith Binney *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Bridget Williams Books, Wellington, 1995).

transportation as a sentencing option in the courts of the mother country. To historians of the Pacific, on the other hand, transportation has tended to be seen as of minor interest when compared with the voyages of discovery by French and British maritime explorers, the arrival of Protestant and Catholic missionaries and the partition of the Pacific amongst the European colonial powers. But in between the era of exploration and that of formal colonisation there was a separate phase altogether, one of no less significance: that of penal colonisation.

This phase of Pacific history was dominated by the two most important colonising powers to operate in the Pacific, France and Great Britain, both of which possessed the necessary legal frameworks, political will and global naval reach to establish penal colonies in the southwest Pacific. The French and British systems, while close together in time, differed widely in scale, the British system being much larger. But they were also similar in many respects, both requiring an administrative and military infrastructure, and both creating an architectural legacy of prison buildings, administrative buildings, and roads, bridges and churches built by coerced convict labour. There was definitely a certain penal colonial style, distinctive to itself, which New Caledonia, Norfolk Island, Tasmania and New South Wales all share. In both cases the legacy of the penal-colonial era has long outlived the cessation of penal transportation from Britain and France; and in both cases the descendants of the transportees remain demographically and culturally significant. In both the British and French instances, penal colonisation could have quite severe and long-lasting impacts on indigenous peoples, particularly on the Kanak peoples of New Caledonia and on the Aboriginal Australian peoples of New South Wales and Tasmania.

In the case of New Zealand history, the obsessive focus of historians on Cook's voyages, Christian missions and the Treaty of Waitangi has meant that the true significance of Britain's massive penal establishment in the southwestern Pacific can be overlooked. Discussions of the Treaty of Waitangi and its contexts tends to focus on "the Crown", in a detached kind of way, and on the missionaries as intermediaries, at the cost of a full understanding of British colonisation in New Zealand as simply an outgrowth, even a necessary consequence, of an existing British presence in the southwestern Pacific founded on penalty and confinement.

Finally, the concept of penal colonisation has historiographical value in that it can link the history of the Pacific to the history of crime and penalty in Great Britain, Ireland and France. All of these have rich historiographies of their own, and perhaps more can be done to link these historiographies together to the benefit of all, Pacific and New Zealand historical writing especially.

