# Prison versus Western Australia: Which worked best, the Australian penal colony or the English convict prison system?

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This year marks the 150th anniversary of the landing of the last convict ship docked in Western Australia, and the end of transportation to Australia. Aside from local commemorations and events in Fremantle and Perth, there has also been an academic re-appraisal of the global transportation system.[[1]](#footnote-1) The system of transporting convicts from Britain to Australia was only one part of a world-wide system operated by Imperial forces, as Anderson (2016) has shown; and convict transportation to the eastern colonies (VDL and NSW) has received a large amount of scholarly attention (Hughes 1987; O’Toole 2006; Maxwell-Stewart and Godfrey 2018). However, the transportation of nearly ten thousand convicts to Western Australia has received less attention (Gertzel 1949; Anderson 1964; Calvert 1894; Crowley 1960). One could argue that the British or ‘home’ convict system has received the least attention of all the convict systems in operation in the nineteenth-century (McConville 1981; Johnston 2015).

Using digital data (www.digitalpanopticon.org) it has now become possible to compare the effectiveness of the convict systems that, between 1850 and 1868, operated in tandem with each other - a natural experiment when men convicted of similar crimes could either serve their sentence of penal servitude in Britain or in Australia. For researchers, this offers the prospect of addressing a key question posed over two-hundred years ago by the philosopher and penal reformer Jeremy Bentham, when he authored a lengthy letter entitled ‘PANOPTICON versus NEW SOUTH WALES: OR, THE PANOPTICON PENITENTIARY SYSTEM, AND THE PENAL COLONIZATION SYSTEM, COMPARED.[[2]](#footnote-2) To his mind, his design for the Panopticon prison (which was in fact never built) offered a better and more rational solution to the problem of criminality than ‘off-shoring’ Britain’s convicts in the Antipodes. We now have the data to answer the underlying tenet of Bentham’s question: Which was best - at least in terms of re-offending and rehabilitation – prison or transportation?

**The establishment of a new penal colony in the West**

When New South Wales (NSW) and Van Diemen’s Land (VDL, later renamed Tasmania) began to grow from penal colony to civil society and develop into successful communities, agitation to end transportation increased. In 1840 the transport ships were diverted from NSW to VDL until 1856 when transportation ended there too. (Kingston 1988:161-2; Statham 1981; Calvert 1894: 17). In the first decades of its creation, the Swan River settlement, which had never been intended to be a penal colony, was far less successful than the eastern colonies. Indeed, by the late 1840s it was struggling (Statham 1981; Gill 2016). When transportation to the eastern colonies became less and less tenable, the colonists of Western Australia (renamed from Swan River in 1832) petitioned for convicts to be sent to them in order to build the settlement into a viable colony. Anthony Trollope later acerbically remarked that convictism continued in Australia because ‘the ‘taste for slavery had not yet lost its relish’ (1873: 501). However, Western Australia’s need for labour also suited the British government who were only too pleased to have the prospect of another destination for their convicts (male convicts, as the Western Australian colony never received female convicts, as the eastern colonies had); and so the new penal colony was established in May 1849.

The 1853 Penal Servitude act effectively removed the distinction between serving in Australia and home. Until 1868, in theory and in law, any man convicted of an indictable offence could expect to either set sail for the southern hemisphere, or to spend years in confinement behind British prison walls – a unique moment in the penal landscape when no man in the dock would know where they would serve out their sentence. For example, in January 1865, two young men walked into the Old Bailey. Thomas Osborne, aged twenty-eight, was convicted of burglary. He and a co-defendant had stolen some cloth and ribbons from a draper’s shop in Great Dover-Street, Newington. Osborne pleaded guilty and was sentenced to seven years’ penal servitude which would subsequently be served in an English convict prison. Later that day, George Grant, also aged twenty-eight, pleaded guilty to the burglary of a dwelling-house at St. Pancras.  He was sentenced to ten years' penal servitude, transported on the *Belgravia,* and arrived in Fremantle in July 1866 (as convict no.8055).

George was one of the almost ten-thousand convicts sent to Western Australia over an eighteen-year period. Unlike George, however, most of these men were not newly-sentenced prisoners; the bulk of those who were sent to Fremantle and Perth had already been held for several years in hulks (mast-less ships) moored in the Thames. The ‘backlog’ in transported convicts had been caused by the ending of large-scale transportation to VDL in 1853. This shift also had considerable impact on sentencing patterns. In 1853, nearly two-thousand (1,864) men were sentenced to transportation and five hundred to penal servitude ‘at home’ (and over eleven-hundred men were transported to Western Australia that year), but the following year only 325 men were sentenced to transportation, and over two-thousand consigned to the British convict estate. Between 1857, when the option of transportation had virtually been removed (it remained only for those sentenced to penal servitude in place or places beyond the seas) and 1867, a mere hundred men were sent to serve their time overseas.[[3]](#footnote-3)

During the same period, over twenty-six thousand men were sentenced to spend their time on penal servitude on home soil.[[4]](#footnote-4) Overall then, a relatively-small number of people were sentenced to transportation after VDL had closed for business. This reduction was compounded by the 1853 Penal Servitude Act which stipulated that shorter terms of ‘penal servitude’ were to be served in Britain, further reducing the number of men who were actually transported. Fewer than three-hundred men were transported from England and Wales between 1854 and 1856; just 224 in 1859 (Shaw 1966: 355). The British government then suspended the regulation that had stipulated that convicts serve half their time on hulks or inside prisons before sailing south, and there was an increase in convict traffic from 1861 to 1868 when the last convict ship docked in Fremantle. When Thomas Osborne and George Grant started their respective sentences, one in Fremantle, the other in London’s Millbank Prison, they began to feel their way around very different regimes.

**The Western Australian system**

Western Australian convicts passed through a number of progressive stages journeying towards release, each with a larger measure of autonomy and liberty (Kerr 1984; Braithwaite 2001). Following a period in Fremantle Depot and serving on the work gangs that were constructing parts of the colony, convicts were licensed with a ticket-of-leave as a form of conditional early release. Even when in receipt of their ticket – which they were required to carry around with them for inspection by police constables - convicts were conﬁned to a geographical area, were required to make regular reports to the local resident magistrate, had restrictions on their drinking of alcohol, could not apply for civil service posts, or serve on juries (although they were permitted to prosecute cases and act as witnesses in court). They were subject to curfew at 10pm, which Vivienne (1902: 39) says was still in operation in the 1890s, when very few ticket-of-leave men would still be wandering around the streets of Perth and Fremantle, and they remained under the supervision of the police (in a similar way to the British convicts who were subject to habitual offender legislation passed in the 1860s and 70s). However, ticket-of-leave holders were eligible to earn money on assignment with local employers.

Assigning had been considered a failure in the eastern Australian colonies and was discontinued in the 1830s (Sean Winter 2013). Nevertheless, the scheme was popular in the west, as a way of supplying labour to geographical areas where free labour would not venture (usually geographically dispersed settlements in Western Australia). Because they had already served time in British prisons or prison hulks, approximately a quarter of the convicts had already been issued with tickets-of-leave on entry to Western Australia, and so they were able to take employment assignments from the start of their life in the colony (Crowley 1960: 33; Kercher 1995: 41). By December 1852, over half of the transported men were working for private employers (Shaw 1966: 355). However, when the government removed the stipulation that convicts had to spend half their sentence in Britain prisons before being transported, new arrivals were forced to spend more time on road gangs and government work before being eligible for tickets-of-leave (Kercher 2003, 548). When the period under ’ticket’ had been successfully completed, convicts were issued with Certificates of Freedom. The Ticket-of-Leave was only an intermediary stage towards freedom or emancipation. Convicts who either had their tickets revoked (for committing new offences or breaching some regulations), were required to spend additional time in the Convict Establishment before being issued with a ticket again. Their perambulations up and down the progressive stages varied, of course, on ‘offences’ being detected, and the willingness of the authorities to take action (bribery and corruption must have been a factor). So, it could take many goes around the conditional-leave merry-go-round before convicts finally left the system. As ‘expirees’ they were then considered to be free, although men sentenced to transportation for life were not allowed to return back to their motherland.

**The British Convict System**

In anticipation of transportation ending, British convict prisons had been increasing their capacity from the 1840s. Existing penitentiaries had extensions added to create more beds, and new public works establishments were constructed (Brodie, Croom and Davies 2002:122-125; Johnston 2015: 106-113). Three years before VDL refused new convicts, the 1853 Penal Servitude Act replaced sentences of ten to fourteen years transportation to six to eight years penal servitude in the UK; seven to ten years transportation was replaced with between four to six years penal servitude; and only those sentenced to over fourteen years transportation could still expect to be transported. In 1857 the calibration changed once-again, longer periods of penal servitude were imposed on people who would previously have been transported. The tide had turned. These changes were reflected in the growth of the British convict population, which had averaged around six thousand between 1856 and 1868, but with the end of transportation, rose to nearly ten-thousand, before falling back in the late 1880s and 1890s (see Fig 1).

**Fig 1: Number of convicts in England and Wales, 1856-1914[[5]](#footnote-5)**

As with their Western Australian counterparts, British convicts found themselves entering into a system structured with progressive-stages. Penal servitude in the UK involved just three stages during the 1850s and 60s, the first of which was designed to isolate convicts from their environment so that they could focus on their moral redemption. They were left in complete silence for a number of months with only a meagre diet and the spiritual guidance provided by the Prison Chaplains to sustain them. When taking exercise, or in chapel, prisoners wore masks so that they could not see or talk to other inmates. In the public works stage, British convicts then laboured on dock-building schemes, fortifying the coastline defences, quarrying stone, or by aiding the running of the prison in the laundry, kitchens, or prison farms. The work was hard, the conditions dangerous, and accidents frequent (McConville 1981: 381-431; Johnston *et al* 2013). The last stage was when the convict was issued with a Ticket-of-Leave and given conditional license (after 1857 when the scheme was introduced). As previously noted, ticket-holders in Western Australia were restricted to the places they could go, the times they could wander the streets, the type of behaviour that was permitted (not too drunk, not too resistive to authority, not too louche) but they were allowed to own property, to earn wages, to marry, in the same way as were British convicts released on license (Shaw 1966: 355).

In the UK, from 1864, prisoners released from prison had rigorous reporting conditions, and from 1869 any prisoner subject to habitual offender legislation could be stopped at any point by a police constable and asked to prove that they were not living a dishonest life. Those deemed to be deviating from the path of honesty could be imprisoned for up to twelve months by a magistrate. However, in tandem with official measure, informal sanctions applied. Employers were often told by police officers that their new employee had a record; word spread around the neighbourhood, and so on. Not only was life made uncomfortable for released prisoners, but capacity for gaining employment and securing social opportunities was degraded (Godfrey *et al* 2010).

Both Australian and British convicts could progress through the stages with good behaviour, or they could fall back to a former stage if they resisted the system. In that sense, both were progressive systems, but as Marshall notes, the Australian system ‘was frequently circumvented in the pursuit of productivity goals. Although Fremantle’s labour hierarchy was officially conceptualised as a promotional pathway for the well-behaved and a descent mechanism for incorrigibles, in practice the degree of punishment a convict suffered depended more upon the skills he possessed than the level of reform he had achieved’. (Marshall2018). The Western Australian system was a supply-and-demand labour system which sent skilled workers to the market as soon as was practically possible. The stock-in-trade of the British system were those people for whom the market had no need or use. The Australian system was driven by labour-need, but the British system was focused on controlling surplus labour – not extracting labour from convict bodies but removing ‘unproductive’ labour from the market (Melossi 1981).

Both systems maintained the rhetoric that they encouraged and facilitated rehabilitation, no matter how hard that view came to be challenged in the later nineteenth-century. Their priority was to supervise offenders and to watch for signs of re-offending, rather than to equip inmates with the skills and training to lead honest and useful lives on release. The systems were also intended to produce a regime that would deter potential offenders from committing crimes, and to further convince existing inmates that they would not want to return to custody (McConville 1998). When transportation was still the main punishment imposed by the courts, the problem of recidivism was moot for the British government. Despite common tropes about leopards never changing their spots, and old offenders being habitual thieves and drunks, conceptions of the recidivist offender were undeveloped in Britain until the 1850s. When convicts on tickets-of-leave were released to wander British cities rather than the streets of Sydney and Hobart, concern grew about the ability of prisons to bring about the reform of their inmates. By the time transportation was coming to an end there had been a number of ticket-of-leave scares; reoffending was considered to be an acute and almost intractable problem (Sindall 1987, 1990; Bartrip 1981; Stevenson 1983).

**Measuring recidivism**

From the mid nineteenth century, the British government became assiduous in collecting criminal justice process data, and increasingly used them as a tool of government (Shoemaker and Ward 2017). Statistics were recruited to inform penal policy and drove many of the reforms to the criminal justice system that proliferated in the later nineteenth century. However, the statistics that showed an increasing prison population being stoked up by repeat-prisoners were unsettling. Due in part to the fact that prisoners were being kept in the UK rather than sent to Australia, the annually collected figures showed that the majority of people being committed to prison had already spent time ‘inside’ before, and, by 1885, the proportion of recidivists had overtaken the proportion of first-timers (Godfrey *et al*, 2010).

**Fig 2: Numbers of prisoners with previous committals to prison, 1856-1914**

Prompted by the alarming statistics, public and media conceptions imagined recidivists as predatory repeat-burglars, incorrigible garrotters and inherently violent offenders - men who persisted with lives of serious violence. However, the published statistics were not sophisticated enough to reveal whether this was true or not – were recidivists being repeatedly imprisoned for committing serious, or non-serious offences. The majority of people who were captured in contemporary recidivist statistics (see Fig 2) may have been low-level habitual offenders who experienced repeated short-terms of imprisonment. These kinds of habitual offenders did not become the target for law and order campaigners until the 1890s. Excessive use of alcohol, public drunkenness, and ‘roughness’ was not only very prevalent amongst ex-prisoners and convicts but was also fairly-endemic in society. In the later nineteenth century, when moral entrepreneurs and the Temperance Movement targeted male working-class violence and female drinking (Archer 2011, Braithwaite 1989, Davies 1999; Morrison 2009; Stafford 2018; Wiener 1990), concepts of rehabilitation may have embraced sobriety as a measure of ‘going straight’. By then, public drunkenness was seen as a moral failing rather than part of normal working-class life and leisure as it had been in the 1850s and 1860s. In the mid-century, drinking and masculinity were so closely bound together that it would have been a utopian fantasy to aim for abstinence amongst the working-classes (or, indeed, amongst ex-offenders). Just under forty-five thousand people were convicted of being drunk and disorderly in England and Wales in 1857. That figure doubled over the following decade, and by the First World War it had reached over 180,000 convictions.[[6]](#footnote-6) At the same time, there were nearly ten thousand convictions for drunk and disorderliness in Western Australia (which had a population of around 184,000).[[7]](#footnote-7) Drunkenness, fighting, and low-level public order incidents were ‘common-or-garden offences committed by men across the British Empire’ (Godfrey and Cox 2008: 243).Rather than measuring the number of everyday-offending convictions, if the Victorians had really wanted to investigate whether prison worked, and for whom (and if we wish to re-pose that question in regard to imprisonment and transportation today), a better measure would be the prevalence of repeated serious offending. Today, we have the data available to do what the Victorians could not. We now have sufficient information to examine the problem of recidivism for a large group of male convicts and ex-convicts. This is an assessment, not just of the individual fortunes of those men, but of the two systems themselves. Indeed, for each of the two systems (convict estate in the UK, or convict transportation to WA) we could set two *efficiency tests*.

First, the more successful system should have *lower reconviction rates for serious offences*. This can be evidenced in a number of ways. Simple reconviction rates can be gathered, and additionally for Western Australia, we can also measure the reconviction rate of both expirees and the conviction rates of free settlers in their new land. If transportation curbed reoffending, then expirees and free settlers should have similar reconviction rates. Second, we can measure *speed to reconviction* (the time elapsed between capacity to offend and reconviction). These rates should be slower for the most effective regime.

**Constructing a Sample for Analysis**

For the analysis of British convicts’ reconviction rates, the primary sources were the caption documents held in the National Archives (PCOM 3 and PCOM 4), but also now digitised. The bundle of documents that followed each individual convict around the system whilst they were under sentence recorded antecedent offending history, behaviour inside the prison, and also any offences committed whilst on conditional license. The Digital Panopticon contains details of 3000 male license-holders (who were at some point in their lives convicted at the Old Bailey) which can be used to chart reconviction rates.

The digitised Western Australian Probation Registers, Character Books, and General Registers recorded the name and convict number of nearly ten-thousand transported convicts. By joining the information together, these records together provide information on each convict’s age, crime for which they were transported, details of previous convictions, ship they came to Western Australia in, marital status, number of children they had, where they were assigned to, literacy level, and 'character' prior to and during sentence.[[8]](#footnote-8) It is possible to ascertain the ‘offences’ they committed whilst subject to convict regulations (such as refusal to work, insubordination and possession of contraband) and because the General Register continued to be updated until the convict received their Certificate of Freedom, died, or was transferred to another institution (many convicts were housed in hospitals and asylum, especially as they became elderly and infirm in a colony that had no poor relief outside of institutionalisation), they continue into the 1870s and 1880s, when transportation had ceased.[[9]](#footnote-9)

Additionally, archival data relating to Fremantle Prison registers (1858-1868) and the Supreme Court of Western Australia (1861-1893) in the State Records Office have been collected and transcribed.[[10]](#footnote-10) These records contain details of ‘status’ (convict or free-settler), as well as their name and age. In the Supreme Court registers free-settlers were identified by their status, and the number given to each of the convicts was recorded in 92% of entries. In Fremantle Prison registers, 961 (40%) convicts did not give their number to the court; 699 (47%) did not give their ship name; and 115 (8%) would not reveal their age. However, only eight convicts did not reveal any information whatsoever. By linking the data together across the categories of ‘name’, ‘age’, ‘convict number’ and ‘ship name’, it was possible to identify 96% of the convicts (out of nearly 1,500 convicts and expirees, less than fifty remained unidentified).[[11]](#footnote-11) Because of the years they cover, analysis of these records has extended our knowledge of re-offending up to the 1890s, and also allowed a comparison between convicts transported to Western Australia and those who arrived as free men.[[12]](#footnote-12) In order to analyse whether the number of convicts entering the courts and prison was proportionate, population data was extracted from the Annual Reports of Western Australia (1842-1902).

In order to make a true comparison, certain data was excluded from the database. Many convicts were prosecuted for status offences – offences which only applied to people serving sentences (Finnane 1997: 20). For example, in 1870, nearly five-hundred (473) serving convicts were convicted of absconding from their masters or other breaches of ticket-of-leave regulations (1870 Western Australia Reports). Similarly, in the UK, convicts were regularly punished for breeching prison rules. The ESRC project ‘Costs of Imprisonment’ found that over half of all British convicts committed prison offences.[[13]](#footnote-13) All of these offences are recorded on the penal record, but there is no settled view on whether these offences should count as re-offending. It seems clear that someone who damages a part of their cell, sings during divine service, talks during exercise periods, and so on, is only kicking against restrictive prison rules. None of that sort of behaviour would warrant prosecution by the authorities if it had not involved prisoners. Other breaches of prison regulations such as assaulting fellow prisoners and prison warders, stealing food from cellmates, and so on, are the kind that would likely result in prosecution if they had happened outside of the prison walls. For example, on Wednesday, April 5, 1865, John Sullivan was charged with wounding James Rankin. Both men had been transported in the *Clara*, and Rankin told the warder at Fremantle Depot shortly they arrived that the other men from the Clara had a ‘down’ on him, and that he was afraid for his life. In court the warder recalled that he saw Rankin lying on the floor, his head covered in blood from a blow from an axe. Sullivan asked the warder to let him know when Rankin was dead, so he could say it was a warning to other inmates. When asked what he meant, he stated that Rankin had threatened to kill him when they both gained their ‘ticket’ because he informed on other prisoners on the voyage over on the Clara. 'I might as well be hung as killed by convicts,' Sullivan said, and taking a piece of tobacco from his cap, put it in his mouth, said, “The Lord forgive me for defending myself.” The Colonial Surgeon was called on to attend to Rankin’s wound, which was about three inches long, dividing the scalp and the skull. He thought it a hopeless case. It was certainly that for Sullivan, who was sentenced to death, and executed at Perth Prison.

Burglar George White serving eight years penal servitude in the 1860s during which time he was reported for various breeches of prison regulations: irreverent behaviour in the prison chapel, malingering and evading prison labour, having instruments for making tattoos (he had no tattoos when he entered prison, so he must have been planning some for himself or other prisoners), having tobacco in his possession, and many others. However, he was also punished for fighting, assaulting other prisoners and stealing bread and the property of fellow inmates. The first set of prison ‘offences’ were trivial, but any of the violent incidents George was involved with could have led to prison sentences if they had been dealt with in the courts rather than in a convict prison. The violent acts carried out by Sullivan and White would have been prosecuted wherever they took place. So, in order to make a better comparison, the database has excluded offences committed inside British convict prisons, as well as ‘status’ offences committed by Australian convicts on tickets-of-leave.

Offences against master and servant legislation were also excluded. This legislation remained more prevalent in Australia than the UK as the practice of using the law to prosecute breeches of employment contract became embedded during the convict period and continued long after it ended. Again, however, in order to make a closer comparison, these offences were stripped out of the database.

One more check was made to determine whether any other biases needed to be corrected in the data. Based on a small sample, Edgar (2012) suggested that men transported to Western Australia had been convicted of more serious crimes compared to those transported to the eastern Australian colonies; and it has long been a popular trope in Western Australia that the colony had been ‘duped’ into accepting weightier offenders whilst less-dangerous men remained behind in the British penal estate. Because the 1853 Penal Servitude Act allowed prisoners to serve shorter period of penal servitude in Britain, only more serious offenders were eligible to be transported to Western Australia. The impression was keenly felt, that the British government were expelling their most dangerous men to the other side of the world (something they had promised the Western Australian authorities that they would not do). Of course, sentencing was an idiosyncratic exercise in the nineteenth century courts, and, although there is a relationship, there is no direct link between severity of offence and length of sentence that was finally imposed on the convicted – there were a number of factors that might produce different length custodial sentences for apparently similar crimes (age and gender of the defendant, gender and status of the victim, number of previous convictions, socio-political or moral preoccupations of the sentencing Judge, and so on). Nevertheless, it is possible to test the assertion that Western Australia got more than its fair share of more-serious offenders, and thereby to test if we are comparing ‘like with like’ when we compare transported men with those serving their penal servitude in Britain.

Using a larger sample than that available to Edgar (2012), we can analysis the offence-profile of men sentenced at the Old Bailey between 1853 and 1868 to show that men who were sentenced to transportation, and those who were sentenced to penal servitude were fairly similar in terms of the offences they had committed. Theft and deception made up approximately three-quarters of the offence profile for both transported convicts (to Western Australia) and those who served out their time in Britain (see Fig 3).

**Fig 3: Offence profile of men transported to Western Australia, and men who served their penal servitude sentence in the UK, 1853-68[[14]](#footnote-14)**

|  |  |  |
| --- | --- | --- |
|  | **Western Australia** | **England and Wales** |
| **Offence** | **Number** | **%** | **Number** | **%** |
|

|  |
| --- |
| Homicide |

 | 5 | 2 | 35 | 1 |
|

|  |
| --- |
| Sexual offences |

 | 4 | 2 | 63 | 2 |
|

|  |
| --- |
| Violent theft |

 | 28 | 10 | 339 | 12 |
|

|  |
| --- |
| Theft |

 | 141 | 51 | 1837 | 64 |
|

|  |
| --- |
| Breach of peace |

 | 20 | 7 | 131 | 5 |
|

|  |
| --- |
| Deception |

 | 58 | 21 | 390 | 13 |
|

|  |
| --- |
| Criminal damage |

 | 1 | 0 | 33 | 1 |
|

|  |
| --- |
| Royal offences |

 | 15 | 5 | 13 | 0 |
|

|  |
| --- |
| Miscellaneous |

 | 2 | 1 | 45 | 2 |
|

|  |
| --- |
| Total |

 | 274 | 99 | 2886 | 100 |

Having garnered robust data, it was possible to construct two substantial databases. The first contained details of all the men who had received a sentence of transportation and were transported to Western Australia between 1850 and 1868 (n=9434), and also all the men who had received a sentence of penal servitude at the Old Bailey between 1850 and 1868 who stayed ‘at home’ in English convict prisons (n=1938). The second database contained details of everyone sentenced at Western Australian Supreme Court between 1861 and 1893 (n=1684), and everyone imprisoned in Fremantle Prison between 1858 and 1868 (n=2052). By analysing these two databases it was possible to make a comparison between transported convicts and those serving their penal servitude in the UK in terms of rate and speed of reconviction; and it was also possible to make comparison between convicts transported to Western Australia and free-settlers. The following section describes the findings of the analysis.

**Findings: Reconviction rates**

Turning to the first of our efficiency tests, the more successful system should have *lower reconviction rates for serious offences*. Shaw (1966) and Edgar (2012) hold very optimistic opinions on the extent of rehabilitation amongst transported convicts. According to Battye (1924) and Shaw (1966) about one in every three ticket-of-leave holders were reconvicted, mostly for drunkenness. Only a fifth were reconvicted of serious offences. Godfrey and Cox (2008) found a similar picture. They examined the proportion of crime prosecuted in Perth Magistrates Court that had been committed by free and transported men in 1870 and in 1880. They found that ticket-of-leave men and those on conditional pardons committed 47% of offences prosecuted in 1870; and that 28% had been committed by expirees. Only a quarter of convictions in the magistrates’ courts concerned free-settlers. Convictions for drunken disorder, and breeches of convict regulations predominated (29% of crime prosecuted in magistrates’ courts’ in 1870). Most of the low-level offences were committed by a smaller number of habitual offenders (there were 1.6 offences per transported man, with some transported men racking up a considerable number of convictions for drunkenness and vagrancy after they arrived in the colony). Transportation hit many men so hard that all they were left with was a washed-up life, alcoholism, drifting through life and through the colony as vagrants and occasional inmates of the prison and the asylum (Godfrey and Cox 2008). Expirees were actually four times more likely to be vagrants than free settlers during the convict transportation period (Fremantle Prison Registers, 1858-68).

In the Supreme Court, 77% of convictions against transported men were for property offences, whilst 42% of cases against free men were property crimes. Only 15% of cases against convicts involved violence, as opposed to 50% of cases against free men. This is not surprising. Free-settlers were more likely to arrive in the colony with capital, and the means and skills to make money. They were less likely to commit acquisitive crimes. Desperately poor convicts with few prospects were much more likely to commit property offences. More surprising is the high proportion of violence committed by free men. However, when we consider that half of those convictions for violence were against ‘aboriginal natives’, rather than against free settlers, it becomes a little clearer. Indigenous men were disproportionately vulnerable to arrest and prosecution and were more likely to have offences against European victims dealt with in the Supreme Courts. No wonder indigenous people were more likely to be indicted for acts of violence – we should not forget, however, that indigenous communities also suffered considerable violence (collectively through the colonial experience, and as victims of individual acts of violence). For example, in February 1864, expiree Francis Badcock was indicted for the murder of the indigenous woman (named Emma) that he lived with. A witness recalled Badcock berating Emma for being drunk, pushing her to the ground and kicking her. The witness reminded Badcock to take care as he was still on a ticket-of-leave. Other witnesses reported that Badcock had then picked up a frying-pan and told Emma that she would never forget what was going to happen to her. The witnesses then fell asleep and saw no more, but in the morning, Emma was dead. A local doctor described the nature of the injuries: severe blows on the upper part of her chest, broken ribs, and also some blows on the head, ‘as from a frying-pan’. Found guilty of manslaughter, Badcock was sentenced to twelve years penal servitude (*Perth Gazette and West Australian Times*, April 7th, 1865).[[15]](#footnote-15)

Badcock had arrived in Western Australia on the *Nile* on New Year’s Day 1858. Analysis of the Supreme Court records shows that over thirty of his shipmates (over 10%) were still appearing in the Supreme Court years long after the *Nile* had docked.

**Fig 4: Percentage of convicts, by year of transportation, who were convicted in the Supreme Court between 1861 and 1900[[16]](#footnote-16)**

|  |  |  |  |
| --- | --- | --- | --- |
| **Year** | **Number of convicts transported**  | **Convicted in Supreme Court between 1861 and 1900** | **% of convicts transported this year who were convicted in Supreme Court between 1861 and 1900** |
| 1850 | 175 | 7 | 4 |
| 1851 | 802 | 31 | 4 |
| 1852 | 491 | 23 | 5 |
| 1853 | 1107 | 50 | 5 |
| 1854 | 596 | 45 | 8 |
| 1855 | 520 | 33 | 6 |
| 1856 | 498 | 48 | 10 |
| 1857 | 266 | 22 | 8 |
| 1858 | 827 | 96 | 12 |
| 1859 | 224 | 42 | 19 |
| 1860 | 0 | 0 | 0 |
| 1861 | 293 | 36 | 12 |
| 1862 | 893 | 113 | 13 |
| 1863 | 847 | 92 | 11 |
| 1864 | 559 | 56 | 10 |
| 1865 | 557 | 64 | 11 |
| 1866 | 579 | 71 | 12 |
| 1867 | 253 | 32 | 13 |
| 1868 | 279 | 11 | 4 |

For convictions in the Supreme Court, we would expect the figures from 1861 onwards to be higher than the rest, since the analysis was conducted on data from records which start in 1861 (see Fig 4). However, it still remains the case that more than one in ten of all of the transported men was reconvicted in the Supreme Court after arrival, 75% of cases heard by Perth magistrates in 1854 were against transported men, and many expirees were still being prosecuted in the 1880s (Godfrey and Cox 2008). This was twelve years after transportation to Western Australia had ended, and, in fact, 4% of convictions in 1880 were against men transported between 1850 and 1855 – more than thirty years after they had landed in the colony. Data from the Supreme Court indicates that the re-offending rate amongst transported convicts was very high; and this is confirmed by analysis of Fremantle prison data.

Because the Supreme Court data begins in 1861, this Figure contains information on convicts who arrived from 1861 onwards; similarly, the figures for Fremantle Prison relate to the reconviction of convicts who had received their tickets of leave after 1858.

Shaw suggests that the Western Australian consignment of convicts were too well-behaved to fill Perth Gaol (built in 1856), however, by the 1860s it is apparent they were entering Fremantle Prison (opened in 1855) in large numbers. In fact, just under three-quarters (74%) of Fremantle Prison’s inmates between 1858 and 1868 were transported men. William Smith (convict number 13) was one of seven men who had arrived on the first convict ship, *Scindian*, who were still offending in the 1860s. Two, Fred Ward and William Johnson were imprisoned four times each between 1858 and 1868.

The Digital Panopticon contains the antecedent history of each person appearing at the Old Bailey between 1850 and 1868, where it exists. The male prison licenses in the Panopticon record details of previous convictions leading up to the point at which each person received a penal servitude sentence. Using these records, we can determine how many people offended during their license period (48%); and we can also look to some work that has already been completed in this area. Johnston *et al*, analysing re-offending in men and women released on license between 1856 and 1887 found that eighty per cent of the 600 ex-convicts in their sample were reconvicted at some point in their lives (some were highly convicted).[[17]](#footnote-17)

The last comparison we can make is to compare the reconviction rates of transported convicts with conviction rates amongst free settlers. Because we do not know the date when each free-settler arrived, it is not possible to assess speed to conviction data. The only way to compare the propensity of both free and transported men to commit offences is to examine the proportion of each group both in society, and in the criminal justice system.

**Fig 5: Estimation of expiree pop in Perth**

In 1854, just over half of the population of the colony were convicts (54%) and just under half (46%) were free settlers or children of free settlers (Driesen 1986a, 1986b). By the 1860s and 1870s, the older convicts, those who had been transported in the 1850s, were thinning. By the 1880s and 1890s many of this cohort of convicts were dying out, and the convict population was generally diluted due to the massive waves of immigration that followed the finding of gold in the west. However, it is not possible to gain a very accurate assessment of the convict population as annual figures were not kept. For the creation of Figure 5, the estimated convict and expiree population has been calculated by the cumulative addition of numbers of transported men from 1850 to 1868, then reduced by an estimated annual attrition rate (through death or migration to other colonies or emigrating abroad) of ten per cent. Given that the colony was a dangerous place, it is entirely possible that the attrition rate was much higher, and therefore it would be reasonable to assume that the convict population in Figure 5 is, if anything, an over-estimate.

If the picture in Figure 6 is accurate, convicts and expirees were significantly over-represented (by nearly 100%) in the Fremantle Prison registers and Supreme Court records. Over 80% of people sent to Fremantle prison between 1858 and 1868, and 60% of men appearing in the Supreme Court, had arrived by way of a convict transport ship.

It seems clear that, with regard to the first efficiency test – reconviction rates – both the Western Australian and the British convict systems failed quite dramatically. This can be compared against contemporary recidivism rates in Western Australia (38% of released prisoners reoffended, 2014/15 figures[[18]](#footnote-18)) and in the UK (59% of prisoners on short-term sentences reoffended[[19]](#footnote-19)).

**Fig 6: Proportion of convicts and expirees in Western Australia, in the Supreme Court 1861-1868, and in Fremantle Prison, 1850-1893**

**Findings: Speed to Reconviction**

For the second efficiency test, the measure was *speed to reconviction* (the time elapsed between capacity to offend and reconviction), bearing in mind that these rates should be slower for the most effective system. It has been possible to compare the speed to reconviction for four groups. The first (A) were UK habitual offenders, whose offending record was recorded as part of the habitual offender legislation to which they were subjected. The second (B) are sample of convicts who were released on licensed, then had their licenses revoked due to a reconviction. The third (C) are the convicts who appeared in the Western Australia Supreme; and the last (D) are men who served time in Fremantle Prison. As the run of data from the Supreme Court records starts in 1861, anyone who arrived in the colony before then was discounted for this analysis; and, because Fremantle Prison data runs from 1858, anyone who arrived before 1858 was also discounted. The results are interesting (see Fig 7).

**Fig 7: Speed to reconviction in the UK and Western Australia[[20]](#footnote-20)**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Months** | 1. **British Habitual Offenders**
 | 1. **Convicts in British Prisons**
 | 1. **Convicts in WA Supreme Court**
 | 1. **Convicts in Fremantle Prison**
 |
|  | **No** | **%** | **No** | **%** | **No** | **%** | **No** | **%** |
| **1 to 12** | 105 | 48 | 99 | 39 | 28 | 4 | 25 | 4 |
| **13-24** | 31 | 14 | 66 | 26 | 17 | 2 | 81 | 12 |
| **24-60** | 41 | 19 | 52 | 21 | 124 | 15 | 347 | 53 |
| **Over 60** | 43 | 19 | 34 | 13 | 654 | 79 | 201 | 31 |
| **TOTAL** | 220 | 100 | 251 | 100 | 823 | 100 | 654 | 100 |

In the UK, of those who reoffended after release from custody, approximately half of British ex-convicts subject to habitual offender legislation (under the 1869 Habitual Offenders Act and 1871 Prevention of Crimes Act) were reconvicted within a year of release from prison. Habitual offender legislation was at least as onerous a form of surveillance as that which existed in Australia (Godfrey *et al* 2010). They were subject to this particular kind of legislation which combined long sentences with an extended period of police surveillance after release, because they had already committed two or more indictable offences. It is not necessarily surprising that they quickly re-offended. Their life-chances were slim, they were subject to close scrutiny by the police, and they already had significant antecedent histories. Most convicts were not subject to conditions imposed by being placed under habitual offender legislation, but the speed to reconviction was still high for this group. Nearly four in ten (39%) ex-convicts also reoffended within a year of release; over six in ten were reconvicted within two years (64%). Ignoring the numbers or proportion of released British convicts, those who did re-offend, got down to criminal work very quickly. Indeed, British convicts were over ten times as likely as Western Australian convicts to be reconvicted in the first twelve months of their release from incarceration (see Fig 7).[[21]](#footnote-21) The records show that during their first twelve months of release only 4% of Australian convicts were convicted of serious offences at the Supreme Court (many would have been convicted of minor offences, see Godfrey and Cox 2008), and only 4% were imprisoned in Fremantle prison.

The Western Australian system performed much stronger in the second efficiency test – speed to reconviction – although one could also argue that the system seemed not to be able to curb offending over the long term. There was a long tail of offending.

**The general and the specific**

What has been presented so far is a quantitative analysis of archival records. There is, of course, much variation of experience contained within the aggregated data. The life-histories of two brothers, Mark and Luke Jeffreys, are probably the best example of this.

Mark Jeffrey led an extraordinary life, one he described himself in his autobiography (Jeffrey 1893; see Godfrey 2014). Mark was born in 1825 in Newmarket but ran away from home with his brother aged fifteen to escape their violent father. Working as a knife-seller and amateur boxer in fairs around the Fens. Mark, like his father, enjoyed drinking alcohol, but that did not prevent him becoming a relatively successful prize-fighter and friend of champion pugilist Bendigo Thompson. Perhaps because of his physical prowess, Mark became a central member of a group of London-based burglars. His night-time activities ceased when he and his brother, Luke, were convicted of burglary and sentenced to fifteen years’ transportation. He was initially imprisoned in Millbank Prison, but this did not keep him out of trouble, especially when he ran into the man who had testified against him at the Cambridgeshire Assizes. It seems unlikely that the torrent of threats and insults that Mark hurled at the man caused his heart attack, but as Mark had already had one attempt at assaulting the man (during the trial), the authorities were not in a forgiving mood. Mark was charged with manslaughter, but the jury found him not guilty and he was acquitted, and so he returned to Millbank to await transportation to VDL. However, whilst on board the hulk he contracted cholera which made him unfit to be transported (Jeffrey 1893: 41-42). Whilst his brother sailed to Australia, Mark remained behind on the *Warrior* hulk permanently moored at Woolwich.

Described as a ‘giant’, Mark constantly complained that he was denied sufficient food on the *Warrior*, and he had several fracases with the cooks, other inmates, and warders, in his various attempts to gain more rations. He complained that he had ‘lost four pounds in a fortnight, and three pounds before that, besides a stone and a half in Milbank’. Taking out his frustrations on the *Warrior*’s second-mate, he hit him on the head with a piece of wood. On the way to Newgate Prison where he was held awaiting trial at the Old Bailey, he assaulted two more warders. He was sentenced to another fifteen years transportation and this time he would not avoid a sea-voyage. In 1849, the *Eliza* deposited him on Norfolk Island, a brutal penal colony reserved for those who had previous convictions. He had mixed experiences on Norfolk Island, working as a gardener and (briefly) as a police constable, but when that isolated and distant penal colony, fifteen-hundred miles from the Australian coast, was closed, he was transferred to Port Arthur, another notorious penal colony reserved for those who had previous convictions (Maxwell-Stewart 2008). The ticket-of-leave he earned in VDL in the early 1850s was revoked on several occasions (for assaulting a police-magistrate, drunkenness, and so on) and in 1866 he was sent to Port Arthur again, this time as an ‘invalid’ due to his walking difficulties. Following release, long after transportation to VDL had ended, he found himself in and out of Hobart Gaol (for assault mainly).

He was, in that respect, fairly typical of the men who were out of the government’s clutches as far as the convict system was concerned, but who were also periodically subject to bouts of incarceration in local prisons. The period that Mark would be in custody was lengthened significantly when he was convicted of the manslaughter of a man who had insulted him in a public house in 1871. Sentenced to life imprisonment, Mark returned to Port Arthur for a third time.

Known by the authorities to be a troubled and troublesome inmate, Mark was sent to work as the gravedigger on Port Arthur’s ‘Island of the Dead’ (where convicts were interred). This arrangement seemed satisfactory to all concerned. Mark was supplied with provisions and could bake his own bread – he was no longer plagued by hunger – but he began to suffer badly from nightmares and visions of demons and devils. His physical and mental state deteriorated as he got older, and he was removed to Launceston Invalid Station in the north of VDL where he stayed until he died and was buried, aged sixty-eight, in 1903. Thankfully Mark avoided being buried in the grave he had dug for himself on the Island of the Dead (the grave remained open and unfilled for years after his death).

Whilst Mark had been living in VDL, his brother Luke, meanwhile had been living three-thousand-miles away in Western Australia. He had been transported on the *Scindian*, the first transport ship to arrive in Fremantle. Luke received his ticket-of-leave in 1851, and only received one conviction (for drunkenness in 1852) until he received his Certificate of Freedom in 1861. Working as a sawyer, the criminal courts next saw Luke acting as a witness in a murder case (*Western Australian* April 1877). He had challenged a man he suspected of murdering his own wife, and who then attacked Luke with a stick. Possibly sharing his brother’s pugilistic skills, Luke downed the man with a single punch. It was his turn to be downed a few years later, when an accident with his horse left him with head injuries (*Western Australian* November 1882). Whether his injuries caused long-term damage or whether he was suffering from the same kinds of mental-illness that inflicted his brother in later life is unknown, but five months later, in April 1883, Luke put a gun in his mouth and pulled the trigger. The woman he had lived with for ten years as his ‘wife’ stated that he had been drinking more than usual in the previous few months and seemed downhearted at times (*Western Australian* 28th March 1883).

If Mark had been well enough at the time the brothers might have both been transported to Australia. They may still have got into trouble (with Mark having far more re-convictions than Luke), or they may have offered each other support and help to make successful new lives in Australia. Both men, of course, could have been retained by their motherland. If they had both been imprisoned in a British convict prison, they would (as we have seen) still be likely to re-offend on release.

**Which system ‘won’?**

Contemporary and modern conceptions of the aims and successes of punishment may differ, although the desire to inhibit reoffending was the main concern of penal theorists and remains so today. Researchers working on processes of persistence and desistence identify education, relationship-formation, gaining employment, and the support of family and peers in turning released prisoners away from crime (Farrall 2002; Laub and Sampson 2006). Historical data tends, in the main, to support modern theories (Cox *et al* 2014; Godfrey *et al* 2007, 2010, 2017; Rogers 2015). Australian historians have shown that it is possible to analyse Australian convict records to show how similar processes of reformation took place in VDL. (Frost and Maxwell-Stewart 2001; Maxwell-Stewart and Hood 2001; Hasluck 1959; Dunstan 2000; Hyland 2003, Erickson 1983). However, despite the notable successes of some convicts to reform, the majority of Western Australian and UK convicts and expirees continued to appear in the courts for both petty and serious offences.

It would be simplistic to make too close a comparison between the historical and the modern. Western Australian probation was different from modern probationary schemes; and processes of desistence are historically contingent. It would also be a mistake to label one system the winner in some sort of historical “Convict Ashes” in a context when both systems failed. In the final assessment, we would have to say that both the Australian and the British convict systems were shoddy attempts to deal with a complex problem that still consumes policy-makers today. Neither achieved their aim of significantly curbing re-offending, and many people who went through ‘the system’ (in the UK and in Australia) were subsequently reconvicted, many for serious offences. We should conclude that far from measuring both systems for their efficiency in promoting desistence we should instead note their remarkable efficiency in manufacturing recidivism.

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2. http://oll.libertyfund.org/titles/bentham-the-works-of-jeremy-bentham-vol-4 [↑](#footnote-ref-2)
3. Judicial Statistics 1857-1867 [↑](#footnote-ref-3)
4. Just over four-hundred (420) were sentenced to death during this period. Another124,104 were sent to prison for less than two years; nearly three-thousand youths were sent to reformatory schools; and all of these were dwarfed by the 156,000 who received fines rather than custodial sentences, *Annual Judicial Statistics, 1857-1867*. [↑](#footnote-ref-4)
5. Judicial Statistics, 1856-1914. [↑](#footnote-ref-5)
6. *Judicial Statistics 1857-1867.* [↑](#footnote-ref-6)
7. *Western Australia, Report, 1860* [↑](#footnote-ref-7)
8. see https://www.digitalpanopticon.org/WA\_Character\_Books\_and\_General\_Registers\_1850-1868 [↑](#footnote-ref-8)
9. Western Australia retained its status as a penal colony until 1886 (Gibbs 2006). [↑](#footnote-ref-9)
10. This lengthy and laborious task was completed by Dr Jane Richardson. [↑](#footnote-ref-10)
11. Erickson and O’Mara (1994) was also useful. [↑](#footnote-ref-11)
12. 179 indigenous men were also prosecuted in Supreme Court records; 127 (72%) indigenous defendants were convicted, thirty-eight of those were executed, and ninety were confined in Rottnest Island (rather than Fremantle Prison). [↑](#footnote-ref-12)
13. *https://www.researchcatalogue.esrc.ac.uk/grants/RES-062-23-3102/read* [↑](#footnote-ref-13)
14. Old Bailey Online, 1853-1868. [↑](#footnote-ref-14)
15. Badcock received his Certificate of Freedom in 1877 and lived out his life as a shepherd. [↑](#footnote-ref-15)
16. Note that Fig 4 does not indicate that they were reconvicted in the year they arrived. [↑](#footnote-ref-16)
17. https://www.researchcatalogue.esrc.ac.uk/grants/RES-062-23-3102/read [↑](#footnote-ref-17)
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20. Figures for Habitual Offenders taken from sample of MEPO 6 and PCOM 2, both held in The National Archives, London. [↑](#footnote-ref-20)
21. Some may have been reconvicted after expiration of their the license period (usually between 12-24 months) and would not show in reconviction figures, see https://www.researchcatalogue.esrc.ac.uk/grants/RES-062-23-3102/read. [↑](#footnote-ref-21)