I would like to thank the Trustees of the Admiral Arthur Phillip Memorial Trust for having invited me to give today's address. It's a real honour to be here.

When I began thinking about this address, I was struck by the coincidences and contrasts between the life of Arthur Phillip and that of the philosopher and reformer Jeremy Bentham, whose works and correspondence I help to edit at University College London. The two are brought into historical proximity by the penal colony of New South Wales—one as its founder, the other as its first major critic. There is also a degree of geographical proximity between Phillip and Bentham, though their subsequent lives were very different. Phillip was born in modest circumstances in the Bread Street Ward here in Cheapside in 1738. In 1748— and barely a fifteen-minute walk away—Bentham was born to a comfortable middle-class family at Red Lion Street, Houndsditch. Phillip was admitted to the charity school for the sons of poor seamen at the Royal Naval Hospital at Greenwich and experienced a challenging apprenticeship aboard a whaler. The precocious Bentham, meanwhile, was enrolled aged seven at the exclusive Westminster School, then had gone to Queen's College Oxford, aged just twelve.

Phillip went on to have a remarkable seafaring career, from serving on whaling and merchant vessels, rising through the ranks of the Royal Navy, secondment to the Portuguese, working in the secret and colonial services, and ultimately reaching the rank of Admiral of the Blue. Bentham was set up for a career in law by his father, who thought his brilliant son might one day become Lord Chancellor; instead, Bentham concluded that the English law made no sense and instead spent his life seeking to radically reform the British legal, ecclesiastical, and political establishments according to the principle of utility—that is, an action is correct if it increases happiness—which he applied as a critical standard. At his death in 1832 Bentham was an internationally-renowned thinker. As far as I am aware, the two never actually met, though their respective networks crossed—Phillip knew William

Petty, then Earl of Shelburne and later Marquess of Lansdowne, with whom Bentham was close, for instance.

In short, here were two east London boys, one a practical man who not only safely steered the First Fleet through its arduous voyage, but who was the founding Governor of New South Wales and paved the way for its future success, while the other was theoretically-minded and became the colony's most influential critic in three works of 1802–3, namely two 'Letters to Lord Pelham' and 'A Plea for the Constitution'. These are better known by the adversarial title under which they were first published in 1812, *Panopticon versus New South Wales*.[1]

Bentham had been an opponent of criminal transportation long before Phillip was commissioned to lead the First Fleet, having argued in 1778 that transportation—in the North American context—was archaic, inequitable, unexemplary, expensive, and ineffective, and corroded rather than reformed the transportee. He concluded that the only effective way to punish and reform criminals was imprisonment combined with hard labour and surveillance. The end of transportation to the American colonies, and the passage of the Penitentiary Act of 1779, did suggest that transportation's day might be done. However, though the British government may have wished to build a penitentiary, the expense—particularly during almost continuous war with France until 1815—meant that it was not until 1816 when Millbank penitentiary opened. Instead, the government persisted with transportation, only needing somewhere new to send convicts.

Bentham was in Russia when the decision was made to establish a penal colony at Botany Bay. On 31 August 1786 Richard Clark, Bentham's friend and a former Lord Mayor

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[1] See *Panopticon versus New South Wales and other writings on Australia*, ed. T. Causer and P. Schofield, London, 2022.

of London, wrote with news of the decision to 'send off seven hundred convicts to New Wales, under convoy of a man-of-war, where a fort is to be built, and a colony established, and that a man has been found who will take upon him the command of this rabble'.[2] That man was, of course, Arthur Phillip, and while he began the great task of preparing for the voyage, Bentham seems to have been prompted into seriously preparing an alternative to transportation, namely his infamous panopticon penitentiary. From the Greek for 'all-seeing', Bentham conceived of the panopticon prison as a circular or polygonal building with a tower at the centre, from which an inspector could look into any cell at any time—but the prisoners could never see the inspector. Bentham expected this unseen surveillance would lead prisoners to internalise honesty and good behaviour, and then maintain it when released. The panopticon would have been run by contract management, with Bentham the contractor and sharing with the prisoners the profits of their labour.

Phillip was still Governor of New South Wales when, in January 1791, Bentham offered the panopticon to the British government, claimed that he had in part been motivated to do so by 'bad tidings' from New South Wales. He referred to reports in the London press during December 1790 and January 1791 describing the colony in dire terms: the First Fleet's flagship, HMS *Sirius*, had been wrecked at Norfolk Island in March 1790, while the settlement itself was in danger of starvation. (News of the appalling level of death and illness on the voyage of the Second Fleet had not yet reached London.)

The hardships in New South Wales during 1790 and 1791 certainly posed Phillip a considerable challenge of his leadership—one to which he rose by skilfully and even-handedly guided the colony through a desperate period, including having taken the

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[2] Richard Clark to Bentham, 31 August 1786, *The Correspondence of Jeremy Bentham*, vol. iii, ed. I.R. Christie, London, 1971, p. 488.

remarkably egalitarian measure in April 1790 of placing all hands, from himself down to the lowliest convict, onto the same subsistence ration (much to the chagrin of officers of the marine detachment). Bentham, entirely unaware of Phillip's endeavours, took these newspaper reports, as well as the colony's latest financial accounts, as confirmation of his view that New South Wales was a 'truly curious scene of imbecility, improvidence, and extravagance'. He was, though, at pains to make clear that he did not blame Phillip and his officers, but the ministry, for the colony's travails.[3] Bentham, generally opposed to colonies and colony-holding, suggested that New South Wales had already failed on two grounds: demographically, since so few women were transported; and as a punishment, since if expirees were returned home it would be expensive, but if they were not they would in effect endure 'false banishment for life'. Bentham's solution was straightforward: adopt the panopticon and send a fleet to Port Jackson to 're-import the whole colony at once'.[4]

Bentham more-or-less left New South Wales there until early 1802, by which time Phillip had secured the colony's future, returned to England, remarried, and been promoted to Rear Admiral. Bentham, meanwhile, had spent the preceding decade fruitlessly trying to persuade the government to build a panopticon prison. This is neither the time nor the place to recount that story, but suffice to say that despite the construction of a panopticon having been authorised by the Penitentiary Act of 1794 and the Appropriation Act of 1799, and £40,000 of public money spent on acquiring land on which to build it, no progress had been made. This owed mainly to the state of the wartime economy and government policy, as well as the opposition of wealthy landowners who did want a prison near their estates. Bentham

[3] Bentham to Charles Bunbury, 6 May 1793, *The Correspondence of Jeremy Bentham*, vol. iv, ed. A.T. Milne, London, 1981, pp. 277–80

[4] Panopticon Postscript, Part II' in *The Works of Jeremy Bentham, Published Under the Superintendence of his Executor, John Bowring*, 11 vols., Edinburgh 1838–43, iv., p. 170.

had come to the view that there had been a secret conspiracy—led by the Duke of Portland, the Home Secretary, and his successor Lord Pelham—to abandon the panopticon against the will of Parliament.

Deflated and miserable, Bentham began work on a history of his experience dealing with government, during which he made six 'discoveries' about New South Wales. First, detaining transportees in New South Wales after their sentences expired added a '*perpetual illegal*' punishment to their 'expired *legal* punishment', in violation of the Habeas Corpus Act. Second, sentences of transportees had been illegally altered by the colonial authorities, without that power have been granted by Parliament. Third, some sentenced to seven years' transportation had already served upwards of five years on hulks in England but were still transported, and illegally detained when their sentences expired. Fourth, paperwork detailing convict sentences had not arrived, forcing those legally free to remain in servitude. Fifth, the governors of New South Wales, from Phillip onwards, exercised 'an absolute and illegal power of legislation', countenanced by ministers. Finally, all colonial office-holders, from the governor down, were 'exposed to ruin' if convicts knew of these things and brought proceedings.[5] For a while Bentham believed that these findings, expanded upon in his writings on New South Wales, which he called 'the true Bastile', might not only rescue the panopticon but prompt the 'evacuation of that scene of wickedness and wretchedness'.[6]

Perhaps Bentham's most damaging allegation was that there was no legal nor constitutional authority for the establishment of New South Wales, since ministers had been afraid to go to Parliament for the necessary powers for fear that questions would be asked as to why the panopticon had not been implemented. As he stated in 'A Plea for the

[5] Bentham to Charles Abbot, 3 September 1802, *The Correspondence of Jeremy Bentham*, vol. vi, ed. J.R. Dinwiddy, Oxford, 1984, pp. 102–4

[6] Bentham to Samuel Bentham, *c.* 21 August 1802, *The Correspondence of Jeremy Bentham*, vol. vi, pp. 88–90.

Constitution', when the First Fleet left England 'It left the seat and source of regular government. A Governor [i.e. Phillip] went out with it: and with him went not out the smallest particle of legislative power, derived from the only source of legislative power … from *Parliament*'.[7] Though the New South Wales Courts Act of 1787 did establish criminal and civil courts, there was no legal power for Phillip and his successors to issue local ordinances, nor to punish individuals for their violation. Bentham's friend, the lawyer and future Solicitor General, Samuel Romilly, thought Bentham's interpretation was probably correct, but that pursuing the point would be a dead-end since Parliament would simply legislate to retrospectively legalise the colony.

In his two 'Letters to Lord Pelham' Bentham contended with New South Wales on grounds of penal policy, arranging it around 'five ends of penal justice', characteristics that any good system of punishment must embody: deterring example; reformation of the criminal; incapacitation of the criminal; compensation to the victim and society; and cost-effectiveness. Transportation to New South Wales was not exemplary since it removed offenders 'as far as possible out of view' of the population on whom the deterring example was intended to operate. While the panopticon would subject prisoners to systematic supervision without which they could not be reformed, convicts in New South Wales, especially agricultural labourers, worked 'out of the habitual reach of every *inspecting* eye'. Transporting criminals provided no compensation or restitution to injured parties, and he condemned the expense of the 'colonial-transportation' system, predicting that the colony would fail since it produced nothing of value.[8]

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[7] 'A Plea for the Constitution' in *Panopticon versus New South Wales*, ed. Causer and Schofield, p. 326.

[8] 'Letter to Lord Pelham' in *Panopticon versus New South Wales*, ed. Causer and Schofield, pp. 71–164.

Bentham of course never visited the penal colony he so condemned. He relied primarily upon *An Account of the English Colony in New South Wales* by its first Judge-Advocate, David Collins, a generally positive account up to 1801, but which Bentham mined for examples of recidivism, violence, drunkenness, and immorality. Bentham was a proponent of evidence-based decision making, and so it is surprising to see him make artful, to say the least, use of evidence in prosecuting the colony. Take for instance a passage in 'Second Letter to Lord Pelham' where Bentham tries to make a point about colonial morality, noting reports by Phillip printed in 1789 in *The Voyage of Governor Phillip to Botany Bay*, that 14 marriages were solemnized in February 1788, and that from 26 January 1788 to 12 February 1790 87 children were born in the colony. In a remarkably literal reading, Bentham suggests, impossibly, that all 87 children were born to the 14 couples,[9] or in other words each couple had six children in little over two years, in an attempt to portray colonial society as profligate.

That is perhaps an extreme example and I do not want to leave you with the impression that Bentham's discussion of the colony Phillip founded is worthless. Despite his finessing of the evidence and his limited knowledge of the practicalities faced by Phillip and his successors, Bentham's critique of transportation to New South Wales is sophisticated and powerful. It even had a practical effect. His argument that it was illegal to transport convicts in the Royal Navy vessels HMS *Glatton* and HMS *Calcutta* in 1802–3, since the active transportation legislation required it to be done by private contractor as it had to North America, almost certainly concerned Spencer Perceval, the Attorney General, enough to introduce a bill that became the Transportation Act of 1802 which, very specifically allowed convicts to be transported in Navy ships. Bentham's arguments were also subsequently very

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[9] 'Second Letter to Lord Pelham' in *Panopticon versus New South Wales*, ed. Causer and Schofield, p. 184.

influential upon those campaigning during the 1830s and 40s to abolish transportation, perhaps most famously upon the radical MP Sir William Molesworth, chair and author of the report of the Select Committee on Transportation of 1837–8.

But the fact remains that as history Bentham's work on New South Wales is partial, overly-negative, and failed to take account of the circumstances faced by its first governor. Indigenous peoples, for instance, were only ever treated in the abstract by Bentham as a threat to the colony's security, whereas Phillip juggled diplomatic and military relations with the Eora. Bentham insisted that the only way to prevent crime and reform criminals was to replace corporal and capital punishment with imprisonment and surveillance, finding it inconceivable that reform could be effected meaningfully in the 'desert' of New South Wales[10]—'The prisoners under the inspection of each other!', Bentham exclaimed, 'A pretty check that would be in New South Wales!'[11] This remark is, I think, indicative of Bentham's ignorance of practicalities in New South Wales, and in convict Australia more generally. The convict system simply would not have functioned without employing convicts as overseers, constables, and other petty officials—Phillip had, for example, put William Bryant in charge of the colony's fishing enterprise, at least until February 1789 when Bryant was flogged for selling government fish on the sly.[12]

As my colleagues Matthew Allen and David Roberts of the University of New England argue in a forthcoming book of essays on Bentham and Australia, Bentham misunderstood what 'reformation' meant in New South Wales. For Bentham, reform was practical, that is desisting from further offending, and was caused by altering an individual's

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[10] 'Letter to Lord Pelham' in *Panopticon versus New South Wales*, ed. Causer and Schofield, p. 94.

[11] 'Second Letter to Lord Pelham' in *Panopticon versus New South Wales*, ed. Causer and Schofield, 227.

[12] See *Memorandoms by James Martin: an astonishing escape from early New South Wales*, ed. T. Causer, London, 2017, p. 11.

sensibilities through inspection and evidenced by becoming a compliant worker. In New South Wales, Allen and Roberts point out, reformation was in large part achieved through the 'independence permitted to ex-convicts in early New South Wales that allowed them to reintegrate into society, or at least integrate into a new one'.[13] This is not to say transportation was a benign punishment—but neither was penitentiary imprisonment, and those who underwent the latter punishment may have returned afterwards to the narrow streets and narrow opportunities of London, Manchester, or Glasgow. Those transported to New South Wales, thanks to that relative independence afforded to them, may have found opportunities otherwise unthinkable back in Britain—and which were unthinkable to Bentham—and it was this potential for a new start in a new society that would have been impossible without Governor Arthur Phillip.

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[13] Matthew Allen and David Andrew Roberts, '"Inspection, the only effective instrument of reformative management": Bentham, surveillance, and convict recidivism in early New South Wales' in *Bentham and Australia: Convicts, Utility, and Empire*, London, 2022 (forthcoming).