

**‘The quality of mercy is not strained’: the Norfolk Island mutineers and the exercise of
the death penalty in colonial Australia 1824-1860**

David Plater and Sue Milne
School of Law, University of South Australia

The exercise of the death penalty in England in the 19th century has long been a subject of academic scrutiny and popular interest. Scholars have also studied the role and importance of the prerogative of mercy in the context of the capital sanction. The exercise of both the death penalty and the prerogative of mercy, in comparison, in colonial Australia have been often overlooked. This article, which is part of a wider ongoing study, considers the rationale and operation of the prerogative of mercy in colonial Australia during the period 1824 to 1860. The focus is on those convicted of a capital offence in the Australian colonies, particularly convicts already serving a sentence for previous offences, and who, indeed, might also be a previous recipient of a pardon. The article considers the question of secondary punishment and the grant of mercy in respect of three notable incidences of mutiny and piracy at Norfolk Island in 1827, 1834 and 1842. This article argues that whilst there was manifest a strong theme of punishment and deterrence in the exercise of the death penalty, these were not the sole or even paramount considerations. Rather it is argued that the colonial authorities, even in relation to those offenders who were “beyond the pale” such as the Norfolk Island mutineers, took seriously the exercise of mercy in the context of emerging self-government. The implementation of the death penalty was not randomly administered, but was considered within the operation of the rule of law, where, as far as possible, even in respect of offenders of the “deepest dye”, “mercy seasons justice”.

AS WILLIAM Shakespeare wrote:

The quality of mercy is not strained.
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:
It blesseth him that gives and him that takes.
Tis mightiest in the mightiest; it becomes
The throned monarch better than his crown.
His scepter shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings.
But mercy is above this sceptered sway;
It is enthroned in the hearts of kings;
It is an attribute of God himself;
And earthly power doth then show like God's
When mercy seasons justice.¹

¹ William Shakespeare, *The Merchant of Venice*, Act IV, Scene 1.

The death penalty, a topic of both popular and academic interest, played a pivotal role in the British and Australian criminal justice systems until well into the 20th century. Yet the exercise of the death penalty has always been tempered in practice, by the elusive quality of mercy or “act of grace.”² The exercise of mercy is a theme that remains valid in the administration of criminal justice today,³ especially in those jurisdictions which retain the death penalty.⁴ The importance of mercy in alleviating the ultimate sanction of the criminal law is especially evident in both England and the Australian colonies in the early 19th century, where the prerogative⁵ of mercy found practical expression when any other rights of appeal had been exhausted.⁶ As Lord Diplock noted, “Mercy is not the subject of legal rights. It begins where legal rights ends”⁷

The exercise of the death penalty in England in the 18th and 19th centuries has long been a subject of both academic scrutiny and popular interest.⁸ Further, perhaps less exhaustive, study has been undertaken of the role of the prerogative of mercy in England during this

² *Reckley v Minister of Immigration and Public Safety (No 2)* [1996] 1 AC 527, 540 (Lord Goff).

³ See, for example, ATH Smith, “The Prerogative of Mercy, the Power of Pardon and Criminal Justice,” *Public Law* [1983]: 398-439; Richard Fox, “When Justice Sheds a Tear: The Place of Mercy in Sentencing,” *Monash University Law Review* 25 (1995): 1-28; Eric Muller, “The Virtue of Mercy in Criminal Sentencing,” *Seton Hall Law Review* 24 (1993): 288, 330-338.

⁴ See, for example, Janice Brown, “The Quality of Mercy,” *University of California Los Angeles Law Review* (1992-1993): 327-338; Stephen Garvey, “As the Gentle Rain Falls: Mercy in Capital Cases,” *Cornell Law Review* 81 (1995-1996): 989-1048; Carolyn Strange, ed., *Qualities of Mercy: Justice, Punishment and Discretion* (Vancouver, BC: University of British Columbia Press, 1996).

⁵ The prerogative powers are commonly understood to be embodied in those common law rights vested in the Crown. “..the King hath no prerogative, but that which the law of the land allows him” : *The Case of Proclamations* (1610) 12 Co Rep 74, 76; 77 ER 1352, 1354. The administration of mercy is a residual judicial discretion held by the Crown, with the remainder of judicial powers devolved to the courts.

⁶ A fledgling and limited appellate system developed with the passing of the *New South Wales Act 1823* (UK) in 1824, however in practice, appeals were not common, possibly due to the lack of any comprehensive right of appeal until the early 1900s.

⁷ *De Freitas v Benny* [1980] AC 239, 247.

⁸ See, for example, VAC Gattrell, *The Hanging Tree: Execution and the English People* (Oxford: Oxford University Press, 1994); Alan Brooke and David Brandon, *Tyburn: London's Fatal Tree* (London: Stroud, 2004). See generally John Beattie, *Crime and the Courts in England, 1660-1800* (Oxford: Oxford University Press, 1986); Strange, *Qualities of Mercy*.

period,⁹ in tempering the harsh effects of the Bloody Code that rendered, in theory at least, over 300 offences as punishable by death upon conviction.¹⁰ As one scholar succinctly draws the connection between the capital sanction and mercy, “[e]xecution is a simple punishment, quick, effective, economical, but not merciful.”¹¹ In contrast, both the exercise of the death penalty and the role and application of the prerogative of mercy in respect of early colonial Australia has been the topic of only limited scrutiny.¹² This is despite the fact that early colonial Australia, unlike England, represents an opportunity to consider “the actual rather than the theoretical operation of the Bloody Code”.¹³ This article, which is part of a wider ongoing study into the exercise of the death penalty in colonial Australia from 1824 to 1860,¹⁴ is intended to help redress this apparent gap in the understanding of this important aspect of the early colonial legal system. It seeks to examine the strength of the prerogative of mercy in respect of a class of offenders who may truly be regarded as the “worst of the worst”. These are offenders who, having already been transported from England as convicts for previous offences, were subsequently convicted of at least one further offence, of a capital

⁹ See, for example, Douglas Hay, “Property, Authority and the Criminal Law,” in *Albion’s Fatal Tree: Crime and Society in Eighteenth Century England*, ed. Douglas Hay et al, (London: Allen Lane, 1975), 17 at 22-23, 23, n 1 and 43-49; Peter King, *Crime, Justice and Discretion in England 1740-1820* (Oxford: Oxford University Press, 2000), 297-333; John Langbein, “Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources,” *University of Chicago Law Review* 50 (1983): 1–36.

¹⁰ There were over 220 statutes and a total of more than 350 offences in England that carried the death penalty in 1800, see J Ellard, “Law and Order and the Perils of Achieving It” in *Issues in Australian Crime and Criminal Justice*, ed. Duncan Chappell and Paul Wilson (Sydney: Lexis Nexis Butterworths, 2005), 268. A useful list of these capital statutes can be found in Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (London: Stevens, 1948) Vol 1, App 1.

¹¹ AGL Shaw, *Convicts and the Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire* (London: Faber, 1966), 21.

¹² Tim Castles, “Watching Them Hang: Capital Punishment and Public Support in Colonial New South Wales 1826-1836,” *History Australia* 5:21 (2008): 43.1-43.15; Tim Castles, *The End of the Line: Capital Punishment and Mercy in Colonial New South Wales 1826-1836* (Honours Thesis, University of New England, 2006); Gregory Woods, *A History of Criminal Law in New South Wales : The Colonial Period, 1788-1900* (Sydney: Federation Press, 2002).

¹³ Bruce Kercher, *Outsiders: Tales from the Supreme Court, 1824-1836* (Melbourne: Australian Scholarly Publishing, 2006), 5. It is significant, as Castles notes (Castles, “Watching Them Hang,” 43.2 that in 1830, more persons (50) were hanged in NSW than were hanged in all of England and Wales that year (46). Tasmania in the 1820s also had years of a similar high rate of capital punishment.

¹⁴ This wider study seeks to investigate the exercise of the death penalty and the operation of the prerogative of mercy, with respect to certain representative classes of offenders in early colonial society. The current study focuses on secondary punishment with respect to convicts and piracy, another study will focus on bushrangers who are essentially secondary offenders. Other representative classes to be studied will be females and indigenous accused.

nature, in the Australian colonies. These “callous desperados, who, from previous escapes, through judicial lenity, seemed encouraged to perpetrate further misdeeds, and have an ignominious end, rather than ‘turn from their wickedness, and, live,’”¹⁵ might have also been previous recipients of the mercy prerogative.

In considering the place of secondary punishment in the Australian colonies and the operation of mercy, this article focuses upon three notable incidences of mutiny and piracy at Norfolk Island in 1827, 1834 and 1842. As a leading secondary place of punishment, Norfolk Island was always intended to be “an extreme punishment short of death.”¹⁶ The choice of these three mutinies as the focus of study is deliberate. These cases literally represent offending at its extreme by offenders who on any view can be seen as “criminals of the deepest dye”,¹⁷ who had often already received the benefit of mercy. The reasoning of the colonial authorities in these cases vividly illuminates how they perceived and performed their role with respect to the exercise of the death penalty, and whether in dealing with such offenders there still remained any place for the grant of mercy.

Punishment and deterrence were themes strongly manifest in the exercise of the death penalty, reflecting in part, the fear factor so prevalent in early colonial society. This article however, will argue that deterrence and punishment, important as they were, were not the sole or even paramount considerations in respect of the administration of the death penalty. Rather, it is argued that the colonial authorities, even in relation to those offenders who were “beyond the pale” such as the Norfolk Island mutineers, took seriously the exercise of mercy

¹⁵As the Attorney-General described several bushrangers who escaped from Port Macquarie, in *R v Thompson and Others* [1824] TASSupC 15 (*Hobart Town Gazette*, 25 June 1824, 2).

¹⁶ John Hirst, *Convict Society and Its Enemies: A History of Early New South Wales* (Sydney: Allen & Unwin, 1983), 93. See also Barry Godfrey and David Cox “The ‘Last Fleet’: Crime, Reformation, and Punishment in Western Australia after 1868,” *Australian and New Zealand Journal of Criminology* 41 (2008): 236-258.

¹⁷ “Convict Discipline,” *Sydney Monitor*, 11 March 1835, 2.

in the context of an embryonic self-governing society, in transformation from its penal roots.¹⁸ The implementation of the death penalty was not randomly administered, but rather was a considered process within the operation of the rule of law, where, as far as possible, even in respect of offenders such as the Norfolk Island mutineers, “mercy seasons justice”.

The Rationale of the Death Penalty and the Prerogative of Mercy

The paramount rationales for the death penalty in this period were the twin themes of deterrence and punishment.¹⁹ This is illustrated by the horrific case in Tasmania of Alexander Pearce in 1824. Pearce was convicted of the murder of a fellow convict called Cox whom he had killed and then roasted and consumed during an ill-fated effort to escape from the penal settlement at Macquarie Harbour.²⁰ It transpired that Pearce had killed and consumed five other prisoners on an earlier similarly ill fated escape attempt.²¹ Pearce was publicly hanged²² and dissected.²³ An editor expressed the hope that the grisly fate of Pearce and others hanged that day would serve both as an appropriate punishment and deterrent. “We trust these awful and ignominious results of disobedience to law and humanity will act as a powerful caution;

¹⁸ See, for example, RB Madgwick, *Immigration Into Eastern Australia, 1788-1851* (Sydney: Sydney University Press, 1969), ch 3; Shaw, *Convicts and the Colonies*, ch 10 and 11; Alex C Castles, *An Australian Legal History* (Sydney: Law Book, 1982), ch 8 and 9; Woods, *A History of Criminal Law in New South Wales*, ch 1. See further, John Braithwaite, “Crime in a Convict Republic,” *Modern Law Review* 63 (2001): 11-50, who contrasts the transformation of the criminal classes in the Australian colonies through procedural justice and reintegration initiatives, in comparison to the American experience where procedural injustices and slavery hindered such developments .

¹⁹ See generally, 4 *Blackstone’s Commentaries* 1-19. As Blackstone states, “the end of punishment is to deter men from offending”.

²⁰ *Hobart Town Gazette*, 25 June 1824. Macquarie Island, like Norfolk Island, was a place of secondary punishment that enjoyed a grim reputation. See further, Hamish Maxwell-Stewart, *Closing Hell’s Gates: the Death of a Convict Station* (Sydney: Allen and Unwin, 2008).

²¹ “Executions”, *Hobart Town Gazette*, 24 July 1824, 2.

²² *Ibid.* His last words are said to have been, “Men’s flesh is delicious. It tastes far better than pork or fish.”

²³ Under (1752) 25 Geo II c 37, s 5 (*An Act for Better Preventing the Horrid Crime of Murder*), the judge was empowered to order that the body of the murderer be hanged in chains. If he did not order that, then the Act required that the body was to be anatomised, that is, dissected by surgeons, before burial. The intention in providing for anatomising was, reflecting the religious views of the period, to add to the deterrent effect of capital punishment. In England, this even led to riots against the surgeons who performed the procedure. See Peter Linebaugh, “The Tyburn Riot against the Surgeons”, in Hay, *Albion’s Fatal Tree*, 65-117.

for blood must expiate blood and the welfare of society imperatively requires, that all whose crimes are so confirmed, and systematic, as not to be redeemed by lenity, shall be pursued in vengeance and extirpated with death.”²⁴

As a public spectacle,²⁵ hanging was accompanied by religious overtones of redemption and salvation, usually through the penitence often, but not always,²⁶ displayed at the gallows by those to be executed.²⁷ A public hanging was also believed to be a demonstration of equality before the law, for the gallows was deemed to show, in theory at least, no discrimination on account of class or status.²⁸ Although hanging was usually an effective means of execution,²⁹ deterrence, penitence and equality were not frequently proved. A tension also existed between the re-emergence of restorative justice concerns³⁰ in the late 18th and early 19th

²⁴ “Executions”, *Hobart Town Gazette*, 24 July 1824, 2.

²⁵ Public hangings were abolished in 1868 in England, and in 1855 in New South Wales and Tasmania, shortly after the establishment of responsible government. See further John McGuire, “Judicial Violence and the ‘Civilizing Process’: Race and the Transition from Public to Private Executions in Colonial Australia,” *Australian Historical Studies* 29 (1998): 187-209.

²⁶ The press reports of public executions of the period frequently dwelt on the approach of those condemned to their fate, with many showing penitence, and a few, defiance to the last. An example of the latter is that of Peter Chapman, who on ascending the scaffold, laughed and nodded at the females in the watching crowd, kicked off his shoes and ‘did everything he thought could prove his contempt of death.’ *The Times* (London), 27 February 1800.

²⁷ See, for example, Thomas Power, a convicted bushranger, who at the gallows urged the crowd, “My good friends, take warning by my sad example, and don’t go bushranging.” (“Executions”, *The Australian*, 23 May 1827, 3). See also Patrick Minahan who was convicted at a trial marked by his defiance of the brutal murder of another convict at Port Arthur who nevertheless died suitably remorseful: “I acknowledge that my trial has been fair, just and impartial, and my sentence justly merited.” He advised against escaping from Port Arthur. His last words in a “firm voice” were “God bless you all.” See *Hobart Town Courier*, 18 June 1843, 3; *Cornwall Chronicle*, 22 June 1841, 2; *Colonial Times*, 22 June 1842, 2. Alex Castles relates that from the earliest years of the colony, the press played an active part in commenting upon the penitence of those to be executed, ‘the *Sydney Gazette* solemnly recorded the last moments of those taken to the scaffold. Its reporters were always alert to note feelings of repentance before the hangman finished his work.’ Alex C Castles, *An Australian Legal History* (Sydney: Law Book, 1982), 62.

²⁸ It must be remembered as Hay asserts (see Hay, *Albion’s Fatal Tree*, 33-34 and 39) that the prosecution of a “toff” served an important purpose in the British criminal justice system. It served to illustrate, if only in theory, that there was genuine equality before the law and “the impression made by the execution of a man of property or position was very deep.” If an ostensibly respectable defendant such as Lord Ferrers (an English aristocrat who, wearing his silver brocade wedding-suit, was famously hanged and dissected for the murder of his steward) or Knatchbull could be prosecuted and hanged in a ‘society radically divided between the rich and the poor, the powerful and the powerless’ then the rhetoric of the law was not hollow. For a colonial example, see “Supreme Court: Mr Farquarhson”, *Colonial Times*, 9 June 1826, 3.

²⁹ Execution by hanging was an efficient, if not usually an immediate death: See generally Radzinowicz, *A History of English Criminal Law and Its Administration From 1750*, Vol 1, ch 6; see also below n 236.

³⁰ See, for example, John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002); David Garland, *Punishment and Welfare: A History of Penal Strategies* (Aldershot,

centuries, and the practice of the removal of criminals by banishment and transportation, in an effort to avoid the capital sanction.³¹ Transportation eventually superseded initiatives developed from the late 16th century when banishment,³² as a more palatable substitute for the death sentence, became a means by which criminal offenders and vagrants might be removed and their labour utilised for the common good. Some scholars³³ have traced one line in the development of this thinking to Queen Elizabeth I's 1602 Commission to the Privy Council, where the judicial body was ordered to moderate the severity of the laws punishing felony with death, and to reprove those "lesser offenders adjudged by law to die" [to] be punished instead in a manner that will correct them "and yield a profitable service to the Commonwealth in parts abroad...".³⁴

No study of the death penalty would be complete without a study of the role of mercy. The prerogative of mercy, or pardon, derives from an ancient right of the Crown to pardon those convicted of a public offence. The pardon attaches to the person of the monarch in the feudal concept of the individual, personal nature of the role; rather than to that of the Crown as represented in the political, abstract sense as the body politic or Executive.³⁵ It is to this personal capacity, matters of public law and the prerogative of mercy are attached,³⁶ and a

Hampshire: Gower, 1985). One example of restorative justice being the development of the penitentiary system, however whether such reforms stem from humanitarian or authoritarian impulses is disputed. For a survey of the opposing views of historians, see, James J Willis, "Transportation Versus Imprisonment in Eighteenth- and Nineteenth-Century Britain: Penal Power, Liberty, and the State," *Law and Society Review* 39 (2005): 171-210.

³¹ See, for example, Shaw, *Convicts and the Colonies*, ch 6 "Controversy in England, 1810-1830."

³² Banishment, or exile (essentially a form of civil death), effectively ended with the settlement of America, and was dissimilar to transportation in that the latter usually entailed servitude for a period. See, WF Craies, "The Compulsion of Subjects to Leave the Realm," *Law Quarterly Review* 24 (1890): 388-409. The first Act to inflict transportation as a punishment is believed to be the *Vagabonds Act 1597*, 39 Eliz c 4.

³³ See, for example, Abbot Smith, "The Transportation of Convicts to the American Colonies in the Seventeenth Century," *American Historical Review* 39 (1934): 232; John Langbein, "The Historical Origins of the Sanction of Imprisonment for Serious Crime," *Journal of Legal Studies* 5 (1976): 35-60.

³⁴ See further, Langbein, "The Historical Origins of the Sanction of Imprisonment for Serious Crime," 35, 56.

³⁵ *Calvin's Case* (1608) 7 Co Rep 1a, 10a; 77 ER 377-388-389, shows us that the Crown may be represented as the body politic, or in the person of the Monarch. The Crown "... hath but one person and several capacities, and one politic capacity for the realm of England, and another for the realm of Scotland...".

³⁶ This allegiance is said to arise from Saxon times: 4 *Blackstone's Commentaries* 397.

subject's allegiance aligned. However, many offences could be, and were, prosecuted by private prosecutors,³⁷ even with respect to capital offences. Private prosecutions raised private rights, which normally could not be prejudiced by the pardon.³⁸

The pardon operated as an executive device to alleviate the severity of the capital sanction, usually through a reprieve³⁹ to a lesser penal sentence, or transportation, granted through an Act of Parliament, or by charter, under the great seal. The central importance of the mercy prerogative in the British criminal justice system, is illustrated by the fact that over 90% of offenders who received the death sentence in England in the early 1800s were eventually reprieved.⁴⁰ A full pardon served to fully acquit the accused,⁴¹ or convicted.⁴² More common however, was the operation of the conditional pardon where capital convictions might be subsequently commuted,⁴³ usually to a less severe penal sentence,⁴⁴ or transportation, as

³⁷ See, for example, Douglas Hay and Francis Snyder, "Using the Criminal law, 1750-1850: Policing, Private Prosecution and the State," in *Policing and Prosecution in Britain 1750-1850*, ed. Douglas Hay and Francis Snyder (Oxford: Clarendon Press, 1996); Peter King, *Crime, Justice and Discretion in England, 1794-1820* (Oxford: Oxford University Press, 2000); David J Bentley, *English Criminal Justice in the Nineteenth Century* (London: Hambledon, 1998). For a contrasting view, see, Bruce P Smith, "The Myth of Private Prosecution in England, 1750-1850," in *Modern Histories of Crime and Punishment*, ed. Markus D Dubber and Lindsay Farmer (Stanford, Calif.: Stanford University Press, 2007).

³⁸ "...where any legal right or benefit is vested in a subject, the King cannot affect it.": J Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (London: Butterworth, 1820), 90-91; See also, 4 *Blackstone's Commentaries* 399.

³⁹ This term is used in its widest sense, however as strictly denoted, the reprieve is only a delay of execution: see generally, 4 *Blackstone's Commentaries* 394; 1 *Hawkins PC* 368-370. It has been observed that 18th century England commonly viewed the respite for some offenders, as an initial step in the process for a pardon on condition of transportation: Simon Devereux, "Imposing the Royal Pardon: Execution, Transportation, and Convict Resistance in London, 1789," *Law and History Review* 25 (2007): 101-138, 132.

⁴⁰ Carolyn Conley, *The Hanging Tree: Execution and the English People*: Review, *Journal of Social History* 29 (1996): 726, 727. The figures in respect of Australia are less clear, with figures of 51 executions on average annually in New South Wales and Tasmania, extrapolated from the United Kingdom. *Report from the Select Committee on Transportation, 1838 (Molesworth Committee)*, in Castles, *An Australian Legal History*, 161. Tim Castles' detailed survey of capital cases (including sentences of death recorded) for NSW for the period 1826-1836 found 1296 sentences of death and 363 actual executions. See Castles, "Watching Them Hang," 43.2. See further the website of the Francis Ford Society at http://research.forbessociety.org.au/index.php?option=com_jake&jrun=people%2Fsearch%2F.

⁴¹ The pardon, if bestowed previously by an Act of Parliament or under the Great Seal, might be pleaded prior to conviction: 2 *Hawkins PC* 396-398.

⁴² A full pardon was considered to bestow upon the accused, "new capacity, credit and character": 4 *Blackstone's Commentaries* 402; *Bacon's Abridgment* 143; J Chitty, *Criminal Law* (2nd ed 1826) vol. 1 764 and 769.

⁴³ However, the notion of commutation of sentences as a prerogative right has been rejected by Maitland.

evidenced by Elizabeth 1's 1602 Commission. The conditional pardon therefore served as a partial pardon with respect to the sentence bestowed, requiring the fulfillment of a condition annexed to the pardon. This condition required the assent of the offender.⁴⁵

The rationale for the application of the pardon is a source of ongoing inquiry and central to this study. Historically, the pardon operated in the pursuit of the public good by tempering justice with mercy,⁴⁶ but was articulated in the judicial and executive arms of government, on not only justicial grounds, but upon wider and recurring legal, policy and social concerns.

As one scholar on the period notes, the grant of mercy 'made up the official road to rehabilitation,'⁴⁷ yet this is but one rationale amongst a complex mix of economic,⁴⁸ political and criminal law imperatives and penal reforms, which were gaining impetus in 19th century England, through the agitation of thinkers and politicians such as Bentham, Romilly and Peel.⁴⁹ These wider themes are often evident in the colonial period of Australia, as illustrated not only through the official sources of court judgments and executive government records, but through the social commentary of the day; the press reports⁵⁰ of trials, executive deliberations on the pardon, and executions.

'The king has no power to commute a sentence. When we hear of sentences being commuted, what really happens is that a conditional pardon is granted: a condemned murderer is pardoned on condition of his going into penal servitude. It is a nice question whether he might not insist on being hanged.' FW Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1965), 480.

⁴⁴ 2 *Hawkins PC* c 37, s 45.

⁴⁵ *Ibid.* Although there was a presumption that there was no objection to the offender submitting to a less severe punishment: Chitty, *Prerogatives of the Crown*, 97; see above n 43. See also, P Brett, "Conditional Pardons and the Commutation of Death Sentences," *Modern Law Review* 20 (1957): 131-147. Brett cites as further authority, the legal opinion of two law officers, Sir Alexander Cockburn and Sir Richard Bethell, found in W Forsyth, *Cases and Opinions on Constitutional Law* (London: Stevens & Haynes, 1869), 463; Chitty, *Prerogatives of the Crown*, 96. See also above n 35.

⁴⁶ "The coronation oath requires the King to temper justice with mercy." Chitty, *Prerogatives of the Crown*, 88-90.

⁴⁷ Shaw, *Convicts and the Colonies*, 82; see also, Braithwaite, "Crime in a Convict Republic" 11-50.

⁴⁸ See, for example, Shaw, *Convicts and the Colonies*, ch 11, "Deterrence and Economy, 1826-1837".

⁴⁹ The reformers of the period were heavily influenced by Beccaria's, *Of Crime and Punishments* (1764).

⁵⁰ There has been much written on the political affiliations of the early colonial Australian press, but this aspect of the press is beyond the scope of this article.

The Prerogative of Mercy in England and Australia

The conditional pardon was widely exercised in respect of sentences imposed during the period of early British colonisation of Australia. Of the 778 convicts who were transported to New South Wales in the First Fleet, 239 came under a conditional pardon, as a life sentence or for a term of either seven or 14 years.⁵¹ By the later period of this study, covering the second stage of colonisation from 1824 to 1860,⁵² transportation as a judicial punishment was less common, instead directed more through positive law, with changes to the statute book to replace sentence of death with transportation to the colonies.⁵³ A relevant Act, the *Transportation Act 1824* (UK),⁵⁴ codified the operation of the conditional pardon whereby a convict might agree to transportation in place of other punishment,⁵⁵ with transportation being the conditional pardon, and servitude the condition, also embodied in statute.⁵⁶ The question of consent to the commutation of a capital sentence became inextricably woven into

⁵¹ See John Cobley, *The Crimes of the First Fleet* (Sydney: Angus and Robertson, 1970) who provides a detailed inventory of the trial, crime and sentence, occupation and sources of information for each of the transported convicts.

⁵² Prior to 1824, the Governor of the colony had virtually absolute legislative and administrative power, responsible only to the Colonial Office in England (See, *First Charter of Justice 1788*). With the passing of the *New South Wales Act 1823* 4 Geo IV c 96 (Imp), the second stage of colonisation began, with inter alia, a Supreme Court, trial by jury, and an embryonic Legislative Council. With the *Constitution Act 1855* (Imp) responsible government was established in New South Wales, heralding the third stage of colonisation. An earlier 1842 Act (5 & 6 Vic c 76) had given both New South Wales and Tasmania a form of responsible government with elected representatives in the legislature.

⁵³ Although these legislative developments have been criticised as being ‘guided by no principle whatever’... ‘utterly destitute of any sort of uniformity’, with respect to the crimes which attracted a sentence of transportation: James Stephen, *History of the Criminal Law of England* (1998) v 1, 480. Transportation from England was theoretically abolished in 1857 with the passing of the *Penal Servitude Act 1857* (UK), however many were still transported subsequently to that.

⁵⁴ See, for example, *An Act for the Transportation of Offenders from Great Britain* (1824) 5 Geo IV c 84 (*Transportation Act 1824* (UK)). In 1829 Forbes CJ of the NSW Supreme Court *In Re Jane New* [1829] NSWSupC 11, 12 opined that the Transportation Acts had two specific purposes; the punishment of criminals and the supply of colonies with labour, echoing Elizabeth I’s 1602 Commission to the Privy Council.

⁵⁵ 1 *Co Inst* 47-48; 1 *Hawkins PC* ch 33; see also, for example, *Transportation Act 1824* (UK) s 2. For a survey on the question of transportation, see for example, A Atkinson, “The Free-Born Englishman Transported: Convict Rights as a Measure of Eighteenth Century Empire,” *Past & Present* 144 (1994): 88-115.

⁵⁶ *Transportation Act 1824* (UK) s 8.

the issue of consent with respect to transportation, due to the presumption that no subject could be sent out of the realm without their consent.⁵⁷

The economic imperatives which contextualise the role of the early convicts in colonial Australia cannot be overstated.⁵⁸ The Governors of the early colonies were faced with all the demands for sustainability and commercial prosperity which a growing population requires. Early convict labour played a significant role in meeting these demands,⁵⁹ and so property in the services of the assigned convict was of great import.⁶⁰ This assignment of a convict's labour lends a primacy to the role of convicts in early colonial society,⁶¹ which must be recognised in the context of the question of re-offending and the operation of the pardon.

The pardon was also available to remit⁶² absolutely or conditionally, the whole or part of the term of transportation. This general power of the Governor was later restrained such that the Governor's pardon was only operative upon the approval of the Crown.⁶³ Conversely, there arose the question of the right of the Governor to increase the sentence imposed upon convicts in the courts. Hirst sets this within the context of the developing rule of law in an

⁵⁷The common law presumption was that the 'Crown cannot compel a subject to leave the realm' 1 Co Inst 47-48; 1 *Hawkins PC* ch 33. In 1679 the *Habeas Corpus Act* 31 Car 2, c 2, s 14 (1679) legalised banishment in the form of transportation: 'That if any person or persons lawfully convicted of any felony, shall in open court pray to be transported beyond the seas, and the court shall think fit to leave him or them in prison for that purpose, such person or persons may be transported into any parts beyond the seas...'. See also, WF Craies, "The Compulsion of Subjects to Leave the Realm," *Law Quarterly Review* 24 (1890): 388; Paul Halliday, *Habeas Corpus; From England to Empire* (Cambridge, Mass: Harvard University Press, 2010).

⁵⁸ Convicts represented nearly 40% of the NSW population by 1800, however, by the early period of the 19th century population growth and free migration helped to decrease the proportion of the convict population to 30% by the 1828 NSW census: see further, Madgwick, *Immigration Into Eastern Australia, 1788-1851*, 65. See also below n 100.

⁵⁹ Not least demonstrated, for example, by the early development of the ticket of leave scheme, whereby convicts were granted the opportunity to profit from their own labour.

⁶⁰The property in the convict's labour remained with the assignee during the period of transportation (originating from the *Piracy Act 1717* (UK) 4 Geo I, c 11; see also, *Transportation Act 1824* (UK) 5 Geo IV c 84). A property right which could only be removed from the assignee through remission of the term by pardon. *Transportation Act 1824* (UK) 5 Geo IV, c 84, s 9.

⁶¹ So much so that Forbes CJ felt compelled to articulate the law respecting convict assignment, in a letter to Governor Darling, *Historical Records of Australia*, Series 1, Vol 13, 608-612; *Convict Assignment Opinion* [1827] NSWSupC 62.

⁶² *Transportation Act 1790* (UK) 30 Geo III, c 4.

⁶³ *New South Wales Act 1823* (Imp) 4 Geo IV, c 96, s 35.

emerging society, where a liberal judiciary rejected the view of the colony as a penal settlement where sentences could be varied by arbitrary executive action.⁶⁴ As Hirst notes, the early convicts were regarded as servants with all the familiar laws and customs attendant upon the relationship between master and servant.⁶⁵ Colonel Breton, commander of a regiment in New South Wales, testified to the Molesworth Committee (not known for downplaying the harshness of the convict system) in 1838 that “a convict assigned to a good master is quite as well off as any servant in England, and better off than a soldier.”⁶⁶ The Colonel noted that two men in his regiment had even deserted in order to be transported.

The convicts who received transportation sentences did not constitute a homogenous group. They were convicted and received capital sentences, commuted to transportation, under the English statute book in which over 300 offences attracted capital punishment.⁶⁷ The so-called *Bloody Code* imposed capital punishment for serious offences such as treason, murder, manslaughter, sexual offences and the burning of dwelling houses; in addition to theft of all kinds, not necessarily with violence, and fraud.⁶⁸ Many of the new capital offence statutes introduced during the late eighteenth century were concerned with the defence of property, but the laws were also a response to rapid developments in trade and commerce brought

⁶⁴ Hirst, *Convict Society and Its Enemies*. See also John Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Sydney: Allen & Unwin, 1988). An exchange between Forbes CJ of the New South Wales Supreme Court, and Governor Darling, which occurred around the time of the trials of convicts who seized a ship transporting them to the penal colony of Norfolk Island, is illustrative of this tension. See, CH Currey, *Sir Francis Forbes: the First Chief Justice of the Supreme Court of New South Wales* (Sydney: Angus and Robertson, 1968) ch 18, “The Sudds-Thomson Affair and Its Repercussion”.

⁶⁵ Hirst, *Convict Society and Its Enemies: A History of Early New South Wales*, 104-133; Shaw, *Convicts and the Colonies*, ch 10. See also the account of the transported convicts, Henry and Susannah Kable, who after arriving in the colony in 1788, successfully sued the captain who transported them to Botany Bay for the loss of property. See further, David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Sydney: Cambridge University Press, 1991).

⁶⁶ United Kingdom. *Report from the Select Committee on Transportation*, 1838, xiv. (‘Molesworth Committee’).

⁶⁷ See above n 12.

⁶⁸ The development of promissory notes and an increase in negotiable instruments realised the potential for fraud, and were also included in the list of capital offences.

about by the industrial revolution. Most of the new offences were to protect this economic prosperity and the concomitant growth in wealth

The Australian colonies received this statute book upon settlement,⁶⁹ and early uncertainty as to the continuing effect of English law⁷⁰ was confirmed with the passing of the *Australian Courts Act 1828* (UK).⁷¹ With respect to property offences, hanging could be the consequence of something as seemingly trivial as stealing hares, cutting down trees, or setting fire to a stack of wheat or corn. Samuel Rooney, a youth, was convicted in 1834 of setting fire to a stack of wheat. Judgment of death was recorded against him. The trial judge commented, “By destroying this wheat he had deprived two poor men, in all probability of their whole support until another harvest; at all events he had scattered to the winds a very considerable proportion of their property.”⁷² The *Judgment of Death Act 1823* (UK)⁷³ enabled courts to enter a judgment of death recorded, in matters which carried a mandatory sentence of death (except murder and treason), where the court was of the opinion that the convicted should be recommended for mercy. Rooney’s sentence of “death recorded” came with a recommendation for mercy from the judge for the commutation of the capital sentence to one more suitable to his age, “of which frequent whippings should form a part”.⁷⁴

Relations between Britain and its colonies were regulated by the common law and constitutional conventions. The Executive branch of government had the remit to govern the

⁶⁹ *New South Wales Act 1787* (Imp) 27 Geo 3 c 2 (1787).

⁷⁰ See, for example, *Applicability of Criminal Laws Opinion* (1828) reproduced in TD Castle, Bruce Kercher, eds, *Dowling’s Select Cases 1828-1844 : Decisions of the Supreme Court of New South Wales* (Sydney: Francis Forbes Society for Australian Legal History, 2005) 181-193.

⁷¹ *Australian Courts Act 1828* (Imp) 9 Geo IV, c 83, s 24. This Act provide that all law in force in England on 25 July 1828 was to apply to the colony, “so far as the same can be applied within the said colonies...”.

⁷² See *R v Rooney* (*Sydney Gazette*, 27 February 1834, 2). See also *Sydney Gazette*, 4 February 1834, 2.

⁷³ *An Act for Enabling Courts to Abstain From Pronouncing Sentence of Death in Certain Capital Felonies* (1823) 4 Geo 4 c 48 (*Judgment of Death Act 1823*). The Act also gave the sentencing judge the power to stay the execution where there was “reasonable cause”.

⁷⁴ *Sydney Gazette*, 27 February 1834, 2.

colonies, and in respect of Crown prerogatives, the prerogative of mercy was devolved to the Governor of a colony, as the Executive head of government. Although the right to pardon was vested by statute solely in the King,⁷⁵ this right was thought to be delegable to Governors,⁷⁶ and was done so, except for the power to pardon murder and treason, which were considered non-delegable.⁷⁷ In these instances, if the trial judge or the Governor recommended a pardon for a murder conviction, the Secretary of State would be asked to support the recommendation.⁷⁸

The Executive Council assisted the Governor in the execution of his duties⁷⁹ and included the Governor, Lieutenant-Governor, Chief Justice, Archdeacon and Colonial Secretary. Later other official figures might be involved such as the Colonial Treasurer and the Chief Military Officer. Capital cases where sentence of death was recorded or death passed were presented to the Executive Council very soon after sentence was made, for time was short, as by statute, the execution was to take place “on the day next but one after sentence passed”,⁸⁰ unless that day fell on a Sunday when the execution would be then moved to the Monday. The Chief Justice or judge presiding would present the capital cases together with notes of evidence to

⁷⁵ 27 Hen 8 c 24, par 1 ‘That no person...shall have power to pardon or remit any treasons or felonies whatsoever...but that the King shall have the whole and sole power and authority thereof united and knit to the Imperial Crown of this Realm...’.

⁷⁶ From the *Transportation Act 1790* (UK) 30 Geo 3, c 47, the Governor, by Commission, might remit the whole or any part of the term for which the offender was transported. See, for example, Governor Phillip’s Second Commission, *Historical Records of Australia*, 1, 1 2.

⁷⁷ Although this restriction was not uniformly applied; see, for example, *R v Dwyer, Kinnear, Madden and Blewitt* [1825] NSWSupC 11 (*Sydney Gazette*, 7 April 1825, 3), where despite representations as to the restrictions of the operation of the pardon in respect of murder convictions, the court held that the pardon was delegable to the Governor.

⁷⁸ See, for example, *R v Webb and Webb* [1825] NSWSupC 36 (‘Execution’, *The Australian*, 25 August 1825, 3). This power eventually became exercisable on the advice of local ministers of the representative governments which developed. See further Bruce McPherson, *The Reception of English Law Abroad* (Brisbane: Supreme Court of Queensland Library, 2007).

⁷⁹ Originally, a Council was established with s 25 of the *New South Wales Act 1823*, to advise the Governor. The first Members of this Council consisted of the Lieutenant-Governor, Chief Justice, Colonial Secretary, Principal Surgeon and Surveyor-General. From 1825, four of these officials were to be members of the Executive Council, with the Legislative Council increasing in number from representation from non-officials, such as wealthy landowners like John Macarthur.

⁸⁰ *An Act for Better Preventing the Horrid Crime of Murder* (1752) Geo 2 c 37.

the Executive Council for deliberation.⁸¹ As a general rule, the Council would affirm the decision of the judge when recommendations for mercy were made, generally in the form of a “death recorded” conviction, but would carefully consider and re-examine the evidence when required. It was uncommon for a conviction of “death passed” to be commuted by the Council, but they might do so, for example, where matters of evidence presented difficulty.⁸² Although this was not a common occurrence it is illustrative of the careful consideration taken by the Executive with respect to the administration of the death penalty. Petitions to the Executive Council from legal counsel, members of the jury, the public, religious leaders and penal officers, might also be received.⁸³ The influence of such petitions often went to questions concerning mitigating circumstances and the conduct and character of the accused.⁸⁴ Similarly, previous convictions were commonly matters which affected the decision of the Executive Council as to the commutation of sentence.⁸⁵

The secondary places of punishment such as Moreton Bay, Port Arthur, Norfolk Island and Macquarie Harbour served a crucial role in the operation of the convict system. The lot of those convicts who behaved themselves in the colonies, as scholars such as Hirst argue, was not as grim or harsh as is often supposed. Convicts were not without legal rights despite their

⁸¹ It appears from late 1829 in New South Wales, a convention developed that the judges would formally retire from the meeting to allow the Executive Council to decide on these matters in their absence See NSW EC Minute no 22 of 18 June 1829. This practice developed later in Tasmania.

⁸² See, for example, William Puckridge and Edward Holmes, who were convicted in 1829 of murder. The Executive Council examined the evidence presented by the Chief Justice and upon finding provocation, commuted the sentence of death passed to transportation to the penal settlement of Moreton Bay for seven years. NSW EC Minute no 28, 18 March 1827, 134-142.

⁸³ See further the discussion in Part 6 below.

⁸⁴ See, for example, William Cusack who in 1826 was convicted of burglary with sentence of death passed. After looking at the Chief Justice’s notes of trial, the Executive Council after due deliberation found ‘it did not appear that he was a fit object for mercy... and that the law should take its course.’ NSW EC Minute no 14 29 June 1826. See further the discussion in Part 6 below.

⁸⁵ See, for example, John Boyd and Henry Drummond who were convicted in 1826 of stealing sheep and pigs belonging to the King at the Moreton Bay penal settlement, with sentence of death passed. Upon consideration of the case, the Executive Council deferred their decision until provided with information on what crimes the prisoners had originally been sent to the penal colony. The Executive Council subsequently commuted the sentence to transportation and hard labour in chains for the period of their lives, on Norfolk Island. See NSW Executive Council Minute, no.14, 29 June 1826 and NSW EC Minute, 5 July 1826, 50. See further the discussion in Part 6 below.

status⁸⁶ and they enjoyed a diet and conditions of employment and future opportunities upon expiry of their sentences that arguably surpassed what they would have enjoyed in Britain as free persons. However, for those convicts who committed further crimes in the colonies, the secondary places of punishment were to serve as a direct alternative to the death penalty, in terms of both punishment and deterrence, to the death penalty.⁸⁷ In *R v Gough and Others*,⁸⁸ the Chief Justice dismissed the complaints of three prisoners convicted of the murder of a guard at Norfolk Island that they had been driven by the harsh regime of their confinement.

With respect to the charge of harshness against the Government, there is nothing to substantiate it. Extreme severity cannot be urged, when the Court knows, that it is only for the deepest crimes, which twice, and thrice, and even four times convicted culprits are ever sent there; the object in sending such is to correct crime, and to make an example; and it is a happy thing that a place has at length been found, where this object *can* be effected. Can you imagine that you are sent there to indulge in the luxuries of life? The conduct of the Authorities is far from deserving your reproach; it appears salutary and good, that a check should be put to crimes such as yours.⁸⁹

The forbidding nature of such secondary places of punishment is borne out by the regular declarations of convicts who would rather die than be sent to such establishments.⁹⁰ “Many

⁸⁶ Hirst, *Convict Society and Its Enemies*.

⁸⁷ ‘The most brutal excesses of the system as it operated in New South Wales occurred when punishments were inflicted for the breach of convict discipline or the commission of further offences. The lash, the treadmill and the chain gang were the chief punishments for minor infractions. More serious cases were dealt with by continuing to send convicts to places of secondary punishment.’ Castles, *An Australian Legal History*, 158.

⁸⁸ *R v Gough, Muir and Watson* [1827] NSWSupC 57 (*The Monitor*, 24 September 1827, 2; *Sydney Gazette*, 24 September 1827, 2-3). See also the sentencing remarks in relation to those convicted of involvement in the bloody mutiny on Norfolk Island in 1834. Burton J noted that some of the mutineers had previously had the benefit of the Crown’s mercy and “it was the consequence of repeated convictions, and a continued career of crime that the law of human society deemed it expedient that you should be sent hither.” *R v Douglass and Others* (*Sydney Gazette*, 27 September 1834, 2S).

⁸⁹ *Ibid.* The *Sydney Gazette* reported the Chief Justice’s observations as follows: “With respect to the general harsh treatment of which you complain on Norfolk Island, what are men sent there for? It is within the knowledge of the Court that they are never sent except for crimes of the deepest dye; and is it then to be supposed that they are sent there to be indulged, to be fed with the fruits of the earth and that they are not to work in chains? No, the object in sending men there is not only as a punishment for their past crimes, but to serve as a terror to others; and so far from it being a reproach, as you have stated it, it is a wise project of the Government in instituting that settlement for the punishment of the twice and thrice convicted felon, as a place of terror to evil doers, and in order to repress the mass of crime with which the Colony unhappily abounds.” (*Sydney Gazette*, 24 September 1827, 2-3).

⁹⁰ See, in the context of Norfolk Island, Brian Fletcher, *Ralph Darling: A Governor Maligned* (Melbourne: Oxford University Press, 1984), 104-105; Hirst, *The Strange Birth of Colonial Democracy: New South Wales*

deluded creatures declare [it] worse than life itself.”⁹¹ Though the harshness of life for the average convict should not be exaggerated, this should not obscure the nature or purpose of secondary places of punishment which served an important purpose in colonial society.⁹²

The Nature of Early Colonial Society: ‘In no country is life so insecure as in this’

There was a strong perception that the “respectable” classes in early colonial society regarded themselves alone at the other side of the world from “home” beset by a host of potential perils. As Goodrick notes, “With so many crimes other than murder listed as capital offences, the hangman had a very busy time....Multiple shocking murders were committed almost daily; dreadful affairs which make it seem unbelievable that ordinary people could live among so much carnage.”⁹³ It is clear that early colonial society felt itself under a very real threat, whether from bushrangers or others. As Kercher explains:

Bushranging was a violent challenge to the official view of colonial Australia. The countryside was utterly alien to those who had been born in Europe. In the frontier years especially, there were only occasional paddocks surrounded by the endless ancient bush, with its venomous snakes and spiders, and hidden Aboriginal spears. The bush was much more violent than Britain or Ireland. Familiar and safe, the old countries had only occasional patches of forest among closely settled fields and towns, and no terrifying snakes or spears. When convicts turned themselves into the

1848-1884, 93; Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868*, (London: Harvill Press, 1996), 266.

⁹¹ *R v Perrot and Jones* (*The Colonist*, 6 February 1839, 2 (Willis J)).

⁹² Whether such places satisfied that purpose is another issue. See, for example, the following view offered by one colonial editor in 1834: “...nothing has yet come under our notice to induce us to alter our opinion of the utter inefficiency of a settlement managed like that at Norfolk Island, to attain the only legitimate end of human punishment. The government of this Colony may transport wretches there - it may doom them to a moral hell (for the settlement is nothing else); but so long as they continue so to do, so long will the scenes of horror which are the results of its constitution, and the multiplication of which has marked its progress in crime, continue to be enacted over and over again.” (*Sydney Gazette*, 27 September 1834, 2).

⁹³ Joan Goodrick, *Life in Old Van Dieman’s Land* (Adelaide: Rigby, 1977), 68. See also Michael Sturma, *Vice in a Vicious Society; Crime and Convicts in Mid 19th Century New South Wales* (Brisbane: University of Queensland Press, 1983), 64, 94-95.

first bushrangers, they added to the dangers of the bush and challenged the official policies of close surveillance and discipline, and reform through hard work.⁹⁴

This observation illustrates the sense of vulnerability that the early officials and settlers in Australia felt. The acute sense of isolation is significant in explaining why certain offenders were regarded as posing not just a challenge to the maintenance of colonial law and order but as a very real threat to the existence of colonial society. Bushrangers could, and often were, seen in these stark terms,⁹⁵ as were indigenous accused,⁹⁶ and convicts.⁹⁷ In a society so heavily composed of convicts⁹⁸ there was always fear of a breakdown of, what was described by Deputy Advocate-General Wilde in 1821 as, the “sense of Restraint and Coercion, which may be urged to keep the Prisoners of the Crown, so comparatively numerous here, in proper awe and subjugation.”⁹⁹ There was a sense that the ‘respectable’ classes were beset with criminals and crime. As Montagu J in 1847 during the trial for burglary with violence of a former convict from Port Arthur declared, “We are surrounded with thieves, burglars and

⁹⁴ Kercher, *An Unruly Child: A History of Law in Australia* (St Leonards, NSW: Allen & Unwin, 1995), 103-104.

⁹⁵ See, for example, the robust sentencing comments in *R v Holmes and Others* [1828] NSWSupC 106 (*The Australian*, 16 December 1828, 3); *R v Thomas and John Clark* (*Sydney Morning Herald*, 29 May 1867, 3). Bushrangers were to prove a major and recurring threat to the maintenance of colonial law and order until well into the second half of the nineteenth century in both Tasmania and New South Wales. See James Boyce, *Van Diemen’s Land* (Melbourne: Black Inc, 2008), 71-83; Hughes, *The Fatal Shore*, 203-243; Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900*, 203-206; Henry Parkes, *Fifty Years in the Making of Australian History* (London: Longmans, 1892), 180-186.

⁹⁶ Indigenous offenders on occasion, especially in relation to crimes committed upon white victims, were also seen in these stark terms. See, for example, *R v Merrido & Nengavil* [1841] NSWSupC 48 (*Sydney Gazette*, 18 May 1841, 2; *Sydney Monitor*, 17 May 1841, 2); *R v Tallboy* [1840] NSWSupC 44 (*Sydney Herald*, 12 August 1840; 1S (trial); 14 August 1840, 1S (sentence); Alexander Harris, *Settlers and Convicts* (reprint) (Melbourne: Melbourne University Press, 1964) (Original, 1847), 206-226, especially 212. The treatment of Indigenous offenders, especially in relation to the exercise of the death penalty is a complex and emerging area of study (see, for example, Alan Pope *One Law for All?: Aboriginal People and Criminal Law in early South Australia*. (Canberra: Aboriginal Studies Press, 2011); Mark Finnane and Jonathan Richards, “Aboriginal Violence and State Response: Histories, Policies, Legacies in Queensland 1860-1940,” *Australia and New Zealand Journal of Criminology* 42 (2010): 238–262 and beyond the scope of the present article. It is hoped to be the focus of future study as part of the authors’ ongoing project.

⁹⁷ See, for example, James Mudie, *The Felony of New South Wales* (Melbourne: Lansdowne Press, new ed, 1964), 113 and 116.

⁹⁸ In 1824 when the Supreme Court of Tasmania was established about half of Tasmania’s white population were convicts. Even as late as 1847 34% of the island’s white population were convicts, see Richard Davis, *The Tasmanian Gallows: A Study of Capital Punishment* (Hobart: Cat & Fiddle Press, 1974), 255. In NSW in 1820 45% of the white population were convicts but even as late as 1840 29% of the population were convicts, see Neal, *The Rule of Law in a Penal Colony*, 200.

⁹⁹ See Hughes, *The Fatal Shore*, 231.

other offenders of the deepest criminality.”¹⁰⁰ His Honour, in a far from flattering description of Tasmania, considered that, “A worse community with especial reference to the very large population of the convict population never existed on the face of the globe than in this island, at all events never in the history of modern times.”¹⁰¹ “Prison discipline”, as noted by Burton J in 1835, “was a theme harped upon from one side of the Colony to the other.”¹⁰² “A large portion of the population of this Colony” was there under compulsion as was noted in *R v Davies*¹⁰³ by the Chief Justice who emphasised the need for convicts to be treated with “rigour”.¹⁰⁴ He remarked, “Great difficulties often occur in the management of the convict population in the interior; but the most effectual method to deal with them is to let them feel the arm of the law is strong enough to coerce them.”¹⁰⁵

In particular it was of the utmost importance in a society composed so heavily of convicts or former convicts to deter the commission by them of further offences in Australia.¹⁰⁶ In *R v Oxley*¹⁰⁷ in 1832, for example, the accused was a convict who had been charged with escape from a prison hulk. At first glance this might not seem to have been the most serious crime in the colonies. However, the consequences in a strict penal colony of escaping convicts, particularly if they committed further crimes, especially of bushranging, were obvious.¹⁰⁸ As the Attorney-General explained in his robust address to the jury imploring them to make an example of the accused:¹⁰⁹

¹⁰⁰ *R v Kenney* (*The Courier*, 6 March 1847, 3). See also Davis, *The Tasmanian Gallows*, 40.

¹⁰¹ *The Courier*, 6 March 1847.

¹⁰² *Ibid* 1S.

¹⁰³ *Sydney Gazette*, 19 May 1838.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid*.

¹⁰⁶ See, for example, *R v Reid and Lancaster* (*Launceston Examiner*, 8 April 1843, 6).

¹⁰⁷ [1832] TASSupC 32 (*Tasmanian*, 7 December 1832).

¹⁰⁸ Most early bushrangers were escaped convicts. It is unsurprising that by 1830 it was a capital offence in Australia to escape from a penal settlement, see Davis, *The Tasmanian Gallows*, 28.

¹⁰⁹ Such zeal, at odds with the English notion of the prosecutorial role as the restrained “minister of justice”, was often demonstrated in other colonial cases where prosecution counsel sought to make an “example” of accused who were seen as a threat to society. See, for example, *R v Burgess* [1824] TASSupC 28 (*Hobart Town Gazette*,

... for so sure as he is found guilty of the charge exhibited against him, (as I expect he will) so sure he goes from here to the gallows. It is high time that an effective check should be put to the desperate and lawless proceedings of persons of the prisoner's description in a penal Colony like this, surrounded as we are by the most abandoned characters. What safety can be there for lives or property? When I reflect on the situation which I hold, it is astonishing how my life or my house is safe among them – men whom it appears spend their time in planning schemes of escape and plunder, and who evade the watchfulness of the most vigilant guards. I wish that every convict in the Colony would hear me, when I say that the mercy which has been so often and so wantonly abused, will not be extended in the future: and as I see there is a Reporter here from the Public Press, I do request that he will put this case, with what I say, before the public, and especially before the prison population.¹¹⁰

Nor was the threat of the commission of further crimes by convicts the sole issue that troubled colonial society. The ever present spectre that loomed large in colonial society was, as Hughes notes, “a *jacquerie*, the convicts’ revolt that had figured in the nightmares of Australian settlers and governors since the Irish rose at Toongabbie in 1804.”¹¹¹ These fears are manifest in the fate of the three convicts in *Gough* convicted of the murder of a guard at Norfolk Island who were all refused mercy and hanged and dissected. Gough’s fate was intended to serve as a particular example given that he “had earned for himself a name in the

10 December 1824, 2-3) (the prosecutor described “the magnitude and ruinous frequency of burglarious pillage in the Colony”); *R v Shea and Others* [1841] NSWSupC 7 (*Sydney Herald*, 25 February 1841, 2) (robust prosecution of a gang of bushrangers and emphasis on their abuse of the “indulgences” previously accorded to them and the need for a stern example to be made of them); *R v Broadhead and Others* (*Colonial Times*, 2 September 1825, 1S) (the “vital importance” of putting an end to the crime of robbery at night of a dwelling which was “one of the most dangerous tendency in a Colony” where most of the settlers were in the “most isolated and defenceless condition”); *R v Vout & Steele* (*Sydney Herald*, 9 September 1841, 2-3) (the Attorney-General expressed his regret that the death penalty was not available as a sentencing option during a very robust prosecution of two convicts who had committed a brutal armed home invasion and robbery of a Reverend and his wife); *R v Brennan* (*Sydney Morning Herald*, 22 October 1842, 2-3) (robust prosecution of a convict who had killed another convict at Norfolk Island ‘as one of the most atrocious cold blooded murders that ever a jury had to consider’); *R v Burdett & Ors* (*Sydney Morning Herald*, 17 July 1844, 3) (a highly emotive prosecution of three men accused of committing an armed burglary of a house on a Sunday “in the heart of the City of Sydney” and murdering the householder as he was reading his prayers and was just about to attend Church).

¹¹⁰ *Tasmanian*, 7 December 1832.

¹¹¹ Hughes, *The Fatal Shore*, 234. Hughes is referring to the Irish convict rebellion at Castle Hill in 1804. There was a particular fear of the Irish convicts, see *Ibid*, 181-195; Tony Moore, *Death or Liberty: Rebels and Radicals Transported to Australia 1788-1868* (Sydney: Murdoch Books Australia, 2010), 101-120. “Every Irish convict was thought to harbour treason, treachery and murder” (Mark Naidis, “Review: The Women of Botany Bay: A Reinterpretation of the Role of Women in the Origins of Australian Society,” *American History Review* [1991]: 588). Hirst disagrees and asserts that the rulers and local colonists in Australia did not live in fear and were remarkably untroubled by thoughts of a convict rebellion, whether by the Irish or otherwise, see Hirst, *Convict Society and Its Enemies*, 135.

record of outrage and crime”.¹¹² Similarly the swift fate accorded to ten convicts in 1830 who were condemned to death and refused mercy for their involvement in a convict rebellion with apparent Irish political overtones near Bathurst is significant.¹¹³

The similarly swift arm of justice befell the four defendants in *R v Benson and Others*¹¹⁴ in 1826. In this case the accused were not only convicts but they had murdered their master at home. One of the four, Eliza Campbell, has the dubious honour of being the first woman judicially hanged in Australia.¹¹⁵ She and her three accomplices were charged with not only murder but with the peculiar offence of the period of “petit treason”, a crime considered an aggravated form of murder. The crime involved the murder of a person to whom the offender owed some duty of subjection such as a wife killing her husband (but not vice versa) or a servant killing his or her master. Petit treason was considered even worse than normal murder as it was said to involve the betrayal of trust of a superior by a subordinate.¹¹⁶ This was truly a case of offending “beyond the pale” in both English¹¹⁷ and colonial society.¹¹⁸ At trial the Solicitor-General in seeking a guilty verdict sought divine guidance “for it was not only an offence with which they were charged of the utmost magnitude in the eye of human

¹¹² “Executions,” *The Australian*, 26 September 1827, 3. It was reported that Gough’s skull is said to present a fine subject for the observation of the Phrenologist”. See *Ibid.* Gough was black.

¹¹³ See *R v Webster and Others*; *R v Entwistle and Others* (*Sydney Gazette*, 11 November 1830, 3). See further Chris Clark, *The Encyclopaedia of Australia’s Battles* (Sydney: Allen & Unwin, 2010), 8.

¹¹⁴ [1825] NSWSupC 4 (*The Australian*, 27 January 1825, 2; *Sydney Gazette*, 27 January 1825, 2-3).

¹¹⁵ The exercise of the death penalty in colonial Australia and the considerations involved in respect of female offenders is an important area worthy of further study but it is beyond the scope of this article. It is intended that this will be the focus of the next part of the authors’ ongoing project.

¹¹⁶ It was to remain a distinct offence in England until 1828. The rationale for such a crime was that society rested on a framework in which each person had his or her appointed place and such murders were seen as threatening this framework of society. The vigorous prosecution of such defendants who could be perceived as a ‘threat to society’ emerges from some of the English cases of ‘petit treason’ of the period showing prosecutorial zeal as in *Benson*, even from a renowned defence advocate such as William Garrow when prosecuting see, for example, *R v Patch* in 1806 (see the transcript of the trial in Joseph Gurney and William Gurney, *The Trial of Richard Patch for the Wilful Murder of Isaac Blight* (London: M Gurney, 1806), 9-10.

¹¹⁷ See, for example, the zealous prosecution in 1844 in the famous trial of a Swiss servant for murdering his eminent aristocratic employer, Lord Russell, see James Atlay, *Famous Trials of the Century* (Grant Richards, 1899) 44-63; William Townsend, “The Trial of Francois Benjamin Courvoisier for the Murder of Lord William Russell,” in *Modern State Trials* (London: Longman, Brown, Green and Longman; 1850), 244-312.

¹¹⁸ See Editorial, *Sydney Herald*, 15 September 1834, 2.

jurisprudence, but it was also an act of such intense enormity, as to elicit the declaration of the Divine Law, which solemnly testifies ‘whose sheddeth man’s blood shall his blood be shed’.”¹¹⁹

As usual, the trial, as it involved the capital offence of murder, was conducted on a Friday and the execution the following Monday. In determining the opportunity for clemency, Forbes CJ found that there was nothing in the case which could lead him to recommend mercy to the Executive Council. Governor Brisbane agreed and said that he had no alternative but to carry out the sentence, after reviewing the notes of the trial supplied by Forbes CJ.¹²⁰ Interestingly, in light of the “chivalry” that could on occasion be extended to female defendants sparing them from the death penalty,¹²¹ neither Forbes CJ or the Governor made special mention of the sex of Elizabeth Campbell.¹²² Presumably the gravity of the crime and the need for deterrence outweighed any other considerations. All four prisoners were hanged,¹²³ and their bodies were delivered to the surgeons for dissection.¹²⁴

One sees this strict approach to the exercise of mercy further demonstrated in a series of other cases involving the commission of serious crimes by convicts such as Alexander Pearce who had already committed further crimes in the colonies and been sent, often after their capital

¹¹⁹ Ibid.

¹²⁰ See Forbes CJ to Governor Brisbane and reply, 22 January 1825, Chief Justice’s Letter Book, Archives Office of New South Wales, 4/6651, 22-23; and see Mitchell Library document A 744 Letters from Governor Brisbane to Forbes CJ, 22 January 1825. It is significant that even in such a grave case as *Benson*, mercy was still considered.

¹²¹ See Kathy Laster, “Arbitrary Chivalry: Women and Capital Punishment in Victoria, 1842-1967” in David Phillips and Suzanne Davies, *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia* (Melbourne: Melbourne University Press, 1994), 167-186; Carolyn Strange, “Masculinities, Intimate Femicide and the Death Penalty in Australia, 1890-1920,” *British Journal of Criminology* 8 (2003): 310-339. See generally Victor Streib, “Death Penalty for Female Offenders,” *University of Cincinnati Law Review* 58 (1990): 845-880.

¹²² See above n 120.

¹²³ The prisoners were reported to have died suitably repentant. “They acknowledged the justice of their sentence.” See *The Australian*, 27 January 1825, 2.

¹²⁴ This was an additional punishment for deterrent purposes in cases of murder, under statutory discretion: *An Act for Better Preventing the Horrid Crime of Murder* (1752) Geo II c 37, s 2.

sentences had been commuted, to such secondary places of punishment as Sarah Island at Macquarie Harbour, Norfolk Island and Port Arthur. Unsurprisingly mercy was not extended in 1827 to ‘nine misguided and unhappy men’ who were convicted of the murder of a constable during a desperate escape from Sarah Island.¹²⁵ The Chief Justice in sentencing the men to death, exhorted them to make their peace with God, “seeing that they could entertain no hope of mercy at the hands of man.”¹²⁶ The crime was seen as one of the utmost depravity, calling for a strong need for deterrence: “It was one of those cold, deliberate and premeditated murders, which to the disgrace of humanity are from time to time committed at Macquarie Harbour...We are utterly unable to conceive the state of mind existing in men capable of so bloody, so horrible and so unprovoked a deed as this. All feeling of the heart must have been extinct.”¹²⁷

It was unsurprising that the Executive Council confirmed the death penalty without any apparent comment or note. All nine prisoners were duly hanged.¹²⁸ This strict approach can be seen elsewhere,¹²⁹ even as late as 1857.¹³⁰

¹²⁵ *R v Lacey and Others* [1827] TASSupC 14 (*Tasmanian*, 14 December 1827; *Hobart Town Courier*, 15 December 1827; ‘Execution’, *Hobart Town Gazette*, 22 December 1827, 4). The nine prisoners were James Lacey, William Jenkins, James Kirk, John McMillan, Samuel Measures, James Reed, John Ward and Thomas Williams. See further Maxwell-Stewart, above n 22.

¹²⁶ *Tasmanian*, 14 December 1827. The *Tasmanian* further noted (Ibid), “Upon the customary phrase of ‘And may the Lord have mercy on your souls;’ one of the Prisoners, believed to be Lacey, answered, ‘Amen.’”

¹²⁷ “Execution,” *Hobart Town Courier*, 22 December 1827, 4.

¹²⁸ See Ibid. It was noted that Lacey and his companions died suitably repentant after “been so sunk in the depth of wickedness as to have been perfectly aware, like many others, that the ignominious end which now overtook them must be the inevitable result” (Ibid). This illustrates the significant role of penitence, see above n 22-23.

¹²⁹ See, for example, the fate of the accused in *R v Langham* (*Colonial Times*, 26 July 1842, 3; see also “Attempt to Murder,” *The Courier*, 17 June 1842, 2; “Cutting and Stabbing,” *The Courier*, 24 June 1842, 2; “Execution,” *The Courier*, 12 August 1842, 3; “Execution,” *Colonial Times*, 16 August 1842, 3) and *R v Maxfield* (see *The Courier*, 23 and 26 July 1845, 2; see also “Execution,” *The Courier*, 13 August 1845, 3) who were both refused mercy for vicious attacks committed upon officials at Port Arthur.

¹³⁰ In March 1857 John Price, the Superintendent of Prisons in Victoria, visited Williamstown to investigate complaints about rations by convicts from the hulks employed there on public works. Price had gained notoriety for the brutality of his previous tenure as Governor of Norfolk Island. While he was listening to some grievances a party of convicts gathered around him. Missiles were thrown and one struck him heavily; as he turned away he was knocked down and severely battered about the head and body in a savage attack. Price was well known to the prisoners from his days at Norfolk Island. On the next afternoon he died from his injuries. At the inquest fifteen convicts were committed for trial. They were tried in four groups, and seven were eventually

Piracy

A: 1827 *Wellington Mutiny*

The sensational case of the Wellington mutiny event of December 1826 provides a vivid illustration of the deliberations of both judge and Executive Council on the exercise of the prerogative of mercy. As an island continent, escape by sea was a risky option for convicts, but one which many in their desperation would attempt, whether as stowaways, commandeering a vessel,¹³¹ or through piracy.¹³² As one historian has noted, “Convict piracy in Australia demands recognition as a major convict resistance practice...”.¹³³ Piracy was sea robbery, an act of theft of a ship or vessel on the high seas,¹³⁴ and since 1536 had attracted the same laws equated with treason, felonies and murder on land, with the offenders to suffer death and loss of lands, goods and chattels.¹³⁵ Piracy was originally convicted under the civil laws of Admiralty however a 1698 Act allowed conviction under the common law of the land.¹³⁶ With the passing of the *Piracy Act 1837* (UK),¹³⁷ convictions for piracy might be commuted to transportation for life, or for any term not less than a period of 15 years,

convicted and sentenced to death. All were refused mercy by the Executive Council. Three were hanged on 28, three on 29, and one on 30 April 1857. Accounts of the trials leave the impression that some of the executed men may well have been wrongly convicted. See John Barry, “Price, John Giles (1808–1857)”, *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/price-john-giles-2563/text3497> (7 March 2012).

¹³¹ Although it is believed most attempts to escape in this manner failed, see the notable case of the Bryants who fled Port Jackson in 1791, by escaping in the Governor’s own cutter, as described in Hughes, *The Fatal Shore*, 205-210.

¹³² Hughes, *The Fatal Shore*, 213-218.

¹³³ Ian Duffield, “‘Haul Away the Anchor Girls’: Charlotte Badger, Tall Stories and the Pirates of the ‘Bad Ship Venus,’” *Journal of Australian Colonial History* 7 (2005): 35-64.

¹³⁴ See, for example, Chief Justice Dowling’s description of the crime of piracy to the jury in *R v Jones & Others* (*Sydney Gazette*, 20 October 1842, 2; *Sydney Morning Herald*, 20 October 1842, 2-3; *Australasian Chronicle*, 20 October 1842, 2).

¹³⁵ *Offences at Sea Act 1536* (UK) 28 Hen VIII c 15. The right to benefit of clergy for acts of piracy was removed by the *Piracy Act 1717* (UK) 4 Geo I c 11. With respect to piracy, the jurisdiction of the New South Wales Supreme Court was also restated in the *Australian Courts Act 1828* (Imp) s 2.

¹³⁶ *Piracy Act 1698* (UK) 11 & 12 Will 3, c 7, s 1.

¹³⁷ *Piracy Act 1837* (UK) 1 Vict 1, c 88, ss 2 and 3.

however those acts of piracy attended by assault with intent to murder were to be considered capital felonies whereby those convicted were to suffer death.

In December 1826, 62 convicts were transported from Sydney on the brig *Wellington*, to the penal settlement of Norfolk Island. During the voyage the ship's guard were overpowered by some of the convict prisoners who took control of the ship, installing the ship's crew, guards and other convicts who wanted no part in the affair, in the ship's hold. There was no loss of life and the mutineers acted with conspicuous restraint. Events transpired such that the ship's crew were required to assist with sailing the ship. John Walton, one of the convicts, took command of the brig, and his command was marked by a particular humanity, paying 'to the passengers attention, and even respect; - to the military some better compliment, such as giving them the first share of provisions, and allowing them on deck to air themselves occasionally.'¹³⁸ The brig sailed to the North Island of New Zealand where the pirates surrendered after the intervention of the crew of a whaling ship.¹³⁹

The trials of 26 men involved in the mutiny were heard over several days in 1827.¹⁴⁰ At the trial of eleven of the defendants,¹⁴¹ Forbes CJ referred to the "ingenuously handled" objections of defence counsel to the charges laid.¹⁴² The defence had challenged the lawfulness of both the confinement and transportation of the convicts to the penal settlement of Norfolk Island, asserting that the convicts, in trying to escape, were merely doing so much

¹³⁸ *The Monitor*, 24 February 1827 5. Walton's log of the voyage subsequent to the convict revolt was subsequently used at trial, with an extract from the log published in *The Australian*, see "The Log Book of the Pirates", *The Australian*, 23 February 1827, 3.

¹³⁹ For a descriptive account of the *Wellington* incident see Eric Ihde, "Liberty or Life: the Convict Pirates of the Wellington," *Darkmatter Journal* 20 December 2009; Eric Ihde, "Pirates of the Pacific: The Convict Seizure of the *Wellington*," *Journal of the Australian Association for Maritime History* 30 (2008): 3-17.

¹⁴⁰ *R v Walton et al* [1827] NSWSupC 7; *R v Flanagan et al* [1827] NSWSupC 8.

¹⁴¹ John Walton, William Douglas, John Edwards, Charles Clay, alias Todhunter, John Smith, Richard Hicks, William Browne, James O'Neil, Edward Colthurst, Charles Daley, and William Ryan.

¹⁴² *R v Walton and Others* [1827] NSWSupC 7 (*The Australian*, 1 March 1827, 3-4).

as “was necessary to liberate themselves from the [unlawful] arrest they were under.”¹⁴³ These and other arguments¹⁴⁴ were rejected by Forbes CJ in both of the main trials.¹⁴⁵ Most of the alleged irregularities in procedure were not established¹⁴⁶ and as Forbes CJ opined, even should some irregularity in procedure have been found, it “cannot be supposed, that, because parties are irregularly sent to a penal settlement, they are justified in committing piratical acts, and going into the extremes of violence.”¹⁴⁷

The mutineers’ humane conduct was, nevertheless, a matter of some comment. The *Australian* argued that mercy should be extended to those of the prisoners who had shown mercy during the mutiny, and published extracts from the ship’s log to highlight the orderly

¹⁴³ Ibid. Convicts sentenced to transportation to a penal settlement within the colonies might be housed in Hulks until an Order from the Governor concerning the transportation details was received. It was proof of the existence of such orders that was being challenged. With respect to the *Wellington* mutiny, the convicts were challenging the authority of the keeper of the Hulk, upon which they were held prior to embarkation on board the *Wellington*, for keeping them prisoner. A further anomaly concerned the re-transfer of at least one of the convicts, who had been assigned to the penal settlement of Port Macquarie, and was then removed to the notoriously harsher penal settlement of Norfolk Island, in order to provide necessary skilled labour. Therefore, it was challenged, there was a lack of authority, or at the very least, irregularities in the observance of the proper procedure for the transfer of the convicts from the Hulks, and re-transfer without further conviction. In his disposition of the case, Forbes CJ stated that had the prisoners applied for habeas corpus prior to transfer from the Hulk to the *Wellington*, then the proper authorisation might have been thought irregular. But this would also have required consideration of, “whether it would be doing more justice to the public, to liberate the parties from custody, than to remand them back to prison with a more proper authority.” Governors had statutory authority to order the transfer of offenders to a contractor who would, for example, perform the transportation. As related by Forbes CJ in his disposition of the case, “The Governor communicates an Order to the Colonial Secretary, and the Secretary writes to the keeper of the hulk requiring him to tranship a certain number of men, whose names are specified in writing, on board a particular vessel for removal to some penal settlement.” *The Australian*, 1 March 1827, 3.

¹⁴⁴ Another briefly made defence concerned a challenge to the jurisdiction of the court which was, it was claimed, not properly constituted for a matter to be heard in the Admiralty jurisdiction.

¹⁴⁵ *R v Flanagan and Others* [1827] NSWSupC 8 concerns those claimants where irregularities with the transfer were made out. John Magennis was one of three men acquitted of the original charges, due to irregularities in transfer of the convicts. For Magennis, who had been transferred from Port Macquarie to Norfolk island, it was held that the Act of Council enabling the Governor to withdraw a convict sent to a penal settlement and employ them in Crown service or assign their labour to settlers, was, as with all penal statutes, to be read strictly, such that it did not allow the Governor to re-transfer the convict to harsher penal conditions. For the other two men, Hugh Carline was acquitted as he was sent to Norfolk Island in error; however with respect to Abraham Davis who was sentenced in England to transportation to Norfolk Island, and came by way of Van Diemen’s Land, Forbes CJ found no irregularity with his transportation, however the jury acquitted Davis in addition to Magennis and Carline.

¹⁴⁶ See *R v Walton and Others* [1827] NSWSupC 7 (*The Australian*, 1 March 1827, 3). This question of convict assignment was of great significance in the colonies and was addressed by Forbes CJ in an opinion to Governor Darling: see *Convict Assignment Opinion* [1827] NSWSupC 62 (*Historical Records of Australia*, Series 1, Vol 13, 608-612).

¹⁴⁷ *R v Walton and Others* [1827] NSWSupC 7 (*The Australian*, 1 March 1827, 4).

administration of justice by the ship's crew through the enactment "of regulations to prevent irregularities and dissension" amongst the ship's crew, which "composed a council of seven persons to 'judge and punish misdemeanours.'"¹⁴⁸

All accounts relative to the pirates concur in representations of their extreme moderation, and of anxiety to avoid committing violence on their quondam gaolers. This conduct – this really meritorious conduct is that, we presume, which has gained for the prisoners much of that sympathy which exists in the public mind for them. ...we cannot help giving them credit for their humanity. This, probably, will be taken into consideration when their doom is sealed. If men in their situation and covered with the crime of which they have been convicted, can hope for mercy, it is because they have shewn mercy to others.¹⁴⁹

In his comments on sentence at the trial that resulted in eleven convictions,¹⁵⁰ Forbes CJ alluded to the past convictions of all eleven defendants by the same court, of "crimes for which it is possible, had you been tried elsewhere, your lives would have been forfeited."¹⁵¹

The defendants' perceived abuse of the mercy previously accorded to them was emphasised by the Chief Justice:

But, it is also known to me, that there is a great degree of humanity presiding in the administration of justice in this Colony. Some of your cases are of a deeply aggravated character. You added to the original sins you have committed, after having, through the merciful consideration of the Governor had your lives preserved, by a mitigation of the severities of your sentences. ...In every point of view, your case is of a very aggravated character, for you have abused that clemency, which a merciful and forbearing hand extended to you. The sentence therefore of this Court is, "*that you, and each of you, be severally hanged by the neck, until your bodies be dead.*"¹⁵²

¹⁴⁸ "The Log Book of the Pirates," *The Australian*, 23 February 1827, 3.

¹⁴⁹ *The Australian*, 23 February 1827, 3.

¹⁵⁰ *The Australian*, 21 February 1827; *Sydney Gazette*, 8 March 1827, 2 (Forbes CJ). See also, *Sydney Gazette*, 27 February 1827, 3.

¹⁵¹ *Ibid.*

¹⁵² *R v Walton and Others* [1827] NSWSupC 7 (*The Australian*, 1 March 1827).

Twelve other defendants who had been earlier found guilty of involvement in the *Wellington* mutiny (though three others had been acquitted)¹⁵³ were also sentenced by Forbes CJ to death on the same occasion as their erstwhile Captain, Walton, and his ten co-accused.¹⁵⁴

The fate of the 23 condemned prisoners was introduced to the Executive Council on 2 March 1827.¹⁵⁵ The case was then adjourned until 5 March 1827, where it was significantly recorded that, "...the Council endeavoured with the utmost anxiety to ascertain which amongst the Prisoners seemed least deserving of clemency, either in consequence of their violent conduct whilst effecting their purposes, or from the vicious course of their previous lives."¹⁵⁶

This presents a clear exposition of the general importance of mercy in even a case as serious as the *Wellington* mutiny and the initial determinative matters considered with respect to the operation of mercy in such cases, namely the conduct of the accused and their prior convictions. The Executive Council then continued to further delineate secondary matters considered with respect to eligibility for respite of the capital sentence, with "abuse of the mercy previously extended to them", being "forcibly adverted to".¹⁵⁷ The importance of setting an "example" where the prisoner had previously received the benefit of mercy is significant. As the editor of the *Sydney Gazette* asserted: "...we never beheld mercy so stretched before as has been exemplified in the case of the pirates, that life should be forfeited, not by way of atonement, but by way of example to all surviving desperate characters who seem to defy the utmost extent of human ingenuity in attempting their

¹⁵³ *R v Flanagan and Others* [1827] NSWSupC 8 (*Sydney Gazette*, 24 February 1827, 3).

¹⁵⁴ *The Australian*, 1 March 1827.

¹⁵⁵ NSW EC Minute, 2 March 1827, 126, 127.

¹⁵⁶ NSW EC Minute, 5 March 1827 128.

¹⁵⁷ *Ibid* 129.

reclamation..... We earnestly hope that this awful but necessary example will at length induce the devotees of crime to ‘cease to do evil, and learn to do well.’¹⁵⁸

The Council resolved that 17 of the condemned men should be reprieved and the sentence of death was only to be upheld for the remaining six.¹⁵⁹ The Council even commuted the sentence of death for John Walton, the prisoner who had acted as the Captain of the pirates, to transportation to Norfolk Island and hard labour in chains for the term of his natural life; a sentence that was not considered especially merciful. Again, consideration of “the moderation and humanity which marked his conduct as captain of the brig” and prior offences were primary factors influencing their decision.¹⁶⁰ The remaining reprieved men were similarly sentenced to Norfolk Island, to work in chains for the rest of their lives.¹⁶¹

The fate of the twenty three condemned prisoners occasioned much local comment. There was public sympathy for the defendants despite their status as “escaped convicts and convicted pirates”.¹⁶² The *Australian* reported the public’s view that it was wrong to hang the defendants for having spared men’s lives and asked “is this the way to reward humanity?”¹⁶³ This was reflective of a wider debate in the colony’s press. The conservative *Sydney Gazette* initially branded the mutineers “desperate ruffians”¹⁶⁴ and insisted that only the ultimate penalty of the law was appropriate for at least some of the defendants: “...we are well satisfied His Excellency needs no other moving principle than that which pervades his compassionate breast, to spare life where mercy can be divinely blended with justice. But

¹⁵⁸ *Sydney Gazette*, 8 March 1827, 2.

¹⁵⁹ NSW EC Minute no.27, 5 March 1827, 129-130. The six men were: William Douglass, John Edwards alias Flash Jack, John Smith, Edward Colthurst and William Liddington (or Leddington).

¹⁶⁰ *Ibid.*

¹⁶¹ *Sydney Gazette*, 8 March 1827, 2. See also, Darling to Hay, 7 March 1827, *Historical Records of Australia*, Series 1, vol 13, 146-147.

¹⁶² Ihde, “‘Liberty or Life’ the Convict Pirates of the Wellington.”

¹⁶³ “Executions,” *The Australian* 10 March 1827, 3.

¹⁶⁴ “Piratical Seizure of the Brig *Wellington*,” *Sydney Gazette*, 16 February 1827, 2.

there are some doubly, aye, and trebly, convicted criminals, with whom it would be necessary, in our humble judgment, to let the law take its course, since, it would appear, with such characters, all hope of reformation is forever extinct; and men must, indeed, be irretrievably lost, when Norfolk Island is considered unfit to be cursed with their presence.”¹⁶⁵

The Monitor took a different view. It disagreed with the label of “desperate ruffians”¹⁶⁶ and expressed the hope that “the Government will treat the ex captain and his crew with the mercy – their humanity and magnanimity when in command loudly call for at the hands of their sovereign...”¹⁶⁷ *The Australian* similarly called for mercy.¹⁶⁸ Even the editor of the *Sydney Gazette* qualified his earlier opinion and declared that “we shall never become advocates for depriving fellow creatures of life, except for murder and cases of cruelty” and questioned the suggestion in *The Australian* that it is was permissible to spare the life of Walton, the “ringleader” and “the chief of the pirates”, but to take the lives of his associates.¹⁶⁹ The *Gazette* argued it would make more sense to extend mercy to all of the condemned men and, although the Governor’s task was not easy, such a course of action was not of the question in the present case.¹⁷⁰

¹⁶⁵ *Sydney Gazette*, 6 March 1827, 2.

¹⁶⁶ “Further Particulars of the Piratical Seizure and Recapture of the Brig *Wellington*,” *The Monitor*, 17 February 1827, 5.

¹⁶⁷ *Ibid.* See also *The Monitor*, 9 March 1827, 8.

¹⁶⁸ See *The Australian*, 13 March 1827, 2;

¹⁶⁹ *Sydney Gazette*, 3 March 1827, 2.

¹⁷⁰ *Ibid.*

The six unlucky men were ordered for execution “to be made a public example of”.¹⁷¹ However, a reprieve arrived for Douglas as he was arriving at the place of execution.¹⁷² The remaining five were duly hanged, suitably remorseful.¹⁷³ The editor of the *Australian* argued that this should be enough and “by the execution of those five men the ends of justice cannot but be fully satisfied” and reiterated his view “that mercy may be allowed to resume her seat uncontrolled, and that the transportation of the remaining sixty [mutineers] to Norfolk Island or elsewhere, may be considered quite sufficient without the extra labour of working in double or single irons.”¹⁷⁴

B: 1834 Norfolk Island Mutiny

In 1834 there was a further mutiny at Norfolk Island. In contrast to the restrained nature of the *Wellington* mutiny, the 1834 mutiny was a violent affair that left one soldier, one guard and six convicts dead. The *Sydney Gazette* remarked on the “great ferocity” of the mutiny and the fact that the authorities had encountered “great difficulty” in its suppression.¹⁷⁵ The accused were charged with a capital offence.¹⁷⁶ At the first trial,¹⁷⁷ the Solicitor-General

¹⁷¹ *The Monitor*, 9 March 1827, 8.

¹⁷² “Execution,” *Sydney Gazette*, 13 March 1827, 3; “Execution,” *The Australian*, 13 March 1827, 3.

¹⁷³ See *Ibid.* It was reported of Edwards in particular; “...the man’s manner...was solemn, unaffected and impressive – his articulation ... could scarcely fail of making a deep and salutary impression on those who heard him” (*Ibid.*).

¹⁷⁴ *Ibid.*

¹⁷⁵ *Sydney Gazette*, 11 September 1834, 2.

¹⁷⁶ Burton J described the applicable law in his sentencing remarks (*Sydney Gazette*, 27 September 1834, 2S) as follows: “The law requires even upon the first conviction (and none of you stand in that situation), that you should suffer death. A local law places me under a more painful situation than the general law of England. By an act of the Governor in Council, wherein it is enacted that ‘it is expedient that robbers and housebreakers should be tried and punished, as may be consistent with the ends of justice, it is enacted that all persons who shall be fully committed for the crime of robbery, or of entering and plundering any dwelling house with arms and violence, shall be brought to trial as soon as possible, and being lawfully convicted of any such crime, and sentenced to suffer death, shall be executed according to law, on the day next but two after sentence passed, unless the same shall happen to be Sunday, and in that case on Monday following; and such sentence shall be

referred to the “diabolical conspiracy” that ‘had been concerted for the purpose of subverting the Government of the Island – depriving the military of their arms – putting to death all opposers – violating the females, and escaping from the Island.’¹⁷⁸ After a series of trials before Burton J and a military jury, 30 prisoners were convicted.¹⁷⁹ All were sentenced to death but in his sentencing remarks Burton J granted respites to 22 of the prisoners¹⁸⁰ until the Governor’s pleasure was known, but making it plain that they should not entertain any hope that mercy would necessarily be extended. He ordered the immediate execution of the remaining eight defendants. He explained that the law would take its course with respect to those prisoners who had taken a leading part in the revolt or had previously received the Crown’s mercy. Burton J elaborated his reasoning as to those who should be respited:

The principle upon which I have acted in arriving at a determination of this point, is, that is to all who were principals in the conspiracy, taking the most active and prominent parts, the law must take its course; and how am I to ascertain this, but by looking at the parts the different individuals sustained, and the parts they performed, as they appear to upon the evidence before me? To that I can look and see if it supports the conviction, and into the book of the law. I must judge upon fallible human testimony, which they who give it, must take upon their conscience, I cannot look into your souls.... Doubtless some may be objects of the clemency of the Crown. At all events, those who were principals and the seducers of others; those to whom mercy has been extended before, and who now have so much abused it, I shall not recommend as objects for mercy. But there may be some who were themselves not the seducers, but the seduced, upon whom the prerogative of mercy may be exercised. I have endeavoured to do justice in mercy; I have taken upon myself the responsibility of respiting as many as to whom I cannot lay my finger upon evidence, which positively identifies such as principals, and leaders in the conspiracy.¹⁸¹

passed immediately after conviction of such offender, unless the Court or Judge shall see reasonable cause for postponing the same.”

¹⁷⁷ *R v Douglass and Others* (*Sydney Gazette*, 13 September 1834, 1S).

¹⁷⁸ *Sydney Gazette*, 13 September 1834, 1S.

¹⁷⁹ For a detailed account of the nine trials, see *Sydney Gazette*, 13 September 1834, 1S; *Sydney Gazette*, 20 September 1834, 1S; *Sydney Gazette*, 27 September 1834, 1S. A number of convicts were acquitted of involvement showing that guilt was not a foregone conclusion.

¹⁸⁰ The prisoners not ordered for immediate execution were Duggan, Knowles, Brady, Geeson, Ryan, Toms, Barratt, Beaver, Bennett, Chaffey, Murphy, Quinn, McCullough, William Groves, John Groves, Reilly, Doran, Eaton, Hall, Freshwater and Pritchard.

¹⁸¹ *Sydney Gazette*, 27 September 1834, 2S.

Burton J noted that Douglass, Drummond, Bell, Butler, and Glennie appeared to him upon the evidence to have taken a leading part in the conspiracy and therefore with respect to them the law must take its course. Snell was similarly ordered for immediate execution, the condemned man noting “he had been a very bad man and had many crimes to answer for.”¹⁸² Anderson, Burke and Buchanan Wilson were refused any respite of their sentence.¹⁸³ John Groves noted that he had been before condemned to death but had been spared on the day fixed for his execution and his sentence commuted to transportation to Norfolk Island for life. Groves declared he was prepared for death. “He said that he deeply regretted that he had not then been executed, and as death was far preferable to an existence on that island, he trusted that if sentence of death were again passed upon him, it would not again be commuted.”¹⁸⁴ Despite his explicit wishes, Groves was respited.

Thirteen prisoners¹⁸⁵ were eventually hanged. They died “remarkably penitent”.¹⁸⁶ It is notable that despite the gravity of their crimes there was again much sympathy for the condemned prisoners in the colonial press. The *Australian* asserted that Norfolk Island’s regime was too harsh and simply didn’t work.¹⁸⁷ “What good can be expected to flow,” the editor asked, “from the condensation of so much vice and misery.”¹⁸⁸ Even the normally conservative *Sydney Gazette* expressed a similar view. It condemned “a system the

¹⁸² Ibid.

¹⁸³ Wilson was later reprieved by the Executive Council but subsequently committed a further capital offence and was not reprieved on this occasion, see below n 220.

¹⁸⁴ *Sydney Gazette*, 27 September 1834, 2S.

¹⁸⁵ Robert Douglas, Henry Drummond, James Bell, Joseph Buller, Robert Glennie, Walter Burke, Joseph Snell, Michael Andrews, William Groves, Henry Knowles, Thomas Freshwater, Robert Ryan, and William McCulloch

¹⁸⁶ ‘Ship News’, *Sydney Herald*, 16 October 1834, 3. Indeed, the Rev Ullathorne later testified to a British Select Committee that the 13 condemned men took the news of their impending executions with rejoicing. ‘It is a remarkable fact that as I mentioned the names of those men who were to die, they one after the other, as their names were pronounced, dropped on their knees and thanked God that they were to be delivered from that horrible place, whilst the other remained standing mute; it was the most horrible scene I ever witnessed. Those who were condemned to death appeared to be rejoiced.’ Quoted by Sir William Molesworth, HC Deb 05 May 1840 vol 53 cc1236-307.

¹⁸⁷ “Norfolk Island,” *The Australian*, 22 August 1834, 3. The editor noted that convicts often expressed the preference to be hanged rather than sent to Norfolk Island. This is well established. See above n 90 and 91.

¹⁸⁸ “Norfolk Island,” *The Australian*, 22 August 1834, 3.

continuation of which no crimes can justify” and asserted that to send convicts to Norfolk Island showed “every folly and vice were combined in any system of government.”¹⁸⁹ The *Gazette* asked “what else could be expected of men undergoing a species of punishment, the tendency of which is to brutalise them more, the longer they endure it”¹⁹⁰ and greeted the news of the execution of the thirteen condemned men with dismay:

Thus have thirteen more human lives been sacrificed to the Moloch Vengeance, which dooms men to scenes of horror like that of Norfolk Island...are there not modes of punishment to be adopted which will not lead to the commission of still greater crimes than those for which they have been doomed to banishment? If men are thought worthy to live, why reduce them to a state to avoid which they court death, and in order to ensure the last dread punishment which man can indict, commit new and still more fearful crimes? This is the natural consequence of the unnatural system pursued at Norfolk Island – a system which, so long as it is persevered in, will tend only to multiply crime, and to provide occupation for the executioner.¹⁹¹

C: 1842 Governor Phillip Mutiny

In 1842 there was a convict mutiny on the brig, *Governor Phillip*, whilst it was anchored at Norfolk Island. Unlike the earlier affair on the *Wellington* in 1827, this proved a bloody affair. One soldier and five convicts were killed before the mutiny was suppressed and a soldier called Whitehead was badly injured. Nevertheless, one of the convicts, James Woolf, saved the life of a drowning soldier during the fracas. Six of the surviving convicts; Woolf (alias Mordecai), Whelan, Jones, Beaver, Sears, and Lewis; were put on trial for the capital counts of assaulting Whitehead with intent to murder and piracy.¹⁹² The Attorney General in

¹⁸⁹ *Sydney Gazette*, 23 August 1834, 2. See also *Sydney Gazette*, 27 September 1834, 2.

¹⁹⁰ *Sydney Gazette*, 11 September 1834, 2.

¹⁹¹ “Norfolk Island,” *Sydney Gazette*, 16 October 1834, 2.

¹⁹² The assault on Whitehead was a central element of the prosecution case, for piracy with assault with intent to murder attracted a capital conviction, which was evidently not open to commutation to transportation, with possibly imprisonment, as were other offences of piracy: *Piracy Act 1837* (UK) 1 Vict 1, c 88 s 2.

a robust opening address,¹⁹³ reminded the jury, “that however their feelings might incline to mercy, that they must also give their pity to this brave man, cut off in his prime of manhood, being only twenty-four years of age, while defending the laws of his country.”¹⁹⁴ The Attorney noted that five of the mutineers, “had already paid the forfeit of their lives’ and this was a lesson that piracy would not prevail, but also “that the arm of the law would be too strong for them to resist, and that sooner or later justice would overtake them.”¹⁹⁵ The Attorney acknowledged that there were some mitigating factors in Woolf’s case which might entitle him to a recommendation of mercy.¹⁹⁶ Defence counsel exhorted the jury to look only to the evidence presented before them, and not to opinion as expressed in the press, or to the “situation in life” of the defendants.¹⁹⁷ It was also argued that the affair had arisen “from the culpable, [and] the criminal negligence of the soldiers, the sentries who were placed in guard over this boat’s crew.”¹⁹⁸

In summing up, Dowling CJ impressed upon the jury the “happy illustration” they had before them of “the purity, the impartiality, and the mercy of English law”.¹⁹⁹ For they had before them, “six men transported from England for their crimes, and yet were to have as full, as fair, as impartial a trial, as any person however high his station or pure his previous conduct might have been.” This acknowledgement of the furtherance of justice was emphasised also by the assignment of counsel to defend them, with “that zeal which always characterises the British bar, the learned gentlemen [the defence counsel] had displayed as much ingenuity and earnestness in defending the prisoners, without fee or reward, as if they were defending a

¹⁹³ See *R v Jones and Others* (*The Australian*, 21 October 1842, 2; see also *Sydney Gazette*, 20 October 1842, 2; *Sydney Morning Herald*, 20 October 1842, 2-3; *Australasian Chronicle*, 20 October 1842, 2).

¹⁹⁴ *The Australian*, 21 October 1842, 2.

¹⁹⁵ *Australasian Chronicle*, 20 October 1842, 2; *The Australian*, 21 October 1842, 2.

¹⁹⁶ *Sydney Morning Herald*, 20 October 1842, 2.

¹⁹⁷ *Ibid.*

¹⁹⁸ *The Australian*, 21 October 1842, 2.

¹⁹⁹ “The Norfolk Island Piracy,” *Sydney Morning Herald*, 21 October 1842, 2.

man of the highest station.’²⁰⁰ The jury after a retirement of only five minutes found all the prisoners guilty but recommended mercy to Woolf.

Jones, Whelan, Sears and Lewis at sentence protested “in the most solemn manner their innocence of any murderous intention in the assault on the brig” and denounced the convicts’ “inhuman” treatment after the mutiny’s suppression.²⁰¹ They also stated that they were aware they had nothing to look forward to but death, and that they were satisfied from the evidence which was laid before the jury that it could not have come to any other verdict, but claimed that most of the evidence given was false. Some of the prisoners further confessed to “a long career of crime, and said they had done many things deserving death, but they denied on the present occasion having been guilty of the crime held against them.”²⁰²

Dowling CJ in addressing the prisoners thought that the verdict of the jury was just, and alluded to the fact that most of the “prisoners appear to have led a long career of crime, as their recorded histories both at home and in the colony,”²⁰³ and the laws of the country, “required that when guilt became aggravated beyond a certain pitch, that the authors of it should be removed from the society they had disgraced and degraded. They were already under restraint for former crimes, but appeared ready to rush into fresh acts of violence...”²⁰⁴

Dowling CJ at sentence intimated that to Woolf alone could he hold out any hope of mercy on account of having saved the life of the soldier during the mutiny. The Executive Council subsequently considered the question of mercy and received a petition on behalf of Whelan and another on behalf of the six prisoners collectively. The Chief Justice responded that “a

²⁰⁰ Ibid.

²⁰¹ *Sydney Morning Herald*, 20 October 1842, 2; *The Australian*, 21 October 1842, 2.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

favourable distinction might be made with regard to the case of Whelan,²⁰⁵ who did not belong to the boat's crew but was reluctantly attached to her the evening before the incident took place, and whose conduct during the mutiny exhibited no violence. The Reverend Naylor also addressed the Council and stated his belief that the attempt to seize the brig was not premeditated.

Despite representations on the fate of the men generally, the Executive Council upheld the sentence of death for Jones, Beaver, Sears and Lewis. It reprieved Woolf and Whelan, with the sentence of death commuted to one of transportation for life.²⁰⁶ A subsequent petition from a Joseph Robinson, a local social reformer, prayed for the extension of mercy on behalf of the remaining four men, arguing that the general lack of discipline and precaution on board the brig, tempted the commission of the crime. This "neglect of the soldiers forming the guard over the prisoners", was supported by representations from Thomas Simpson, then master of the vessel *Hope*, employed to take provisions and convicts to Norfolk Island, who claimed that during the voyage which occasioned the mutiny, "the military guard had performed their duty most negligently...[and] that the carelessness of the guard was a main incitement to their commission of an unpremeditated crime."²⁰⁷

This attempt to transfer some onus of guilt onto the other party involved (which had also featured in the defence case at trial) was rejected by the Executive Council who considered that the charge of neglect brought against the soldiers was not shown by the trial evidence, "nor could such neglect, even if proved, be pleaded in justification of the crime of which the prisoners had been convicted."²⁰⁸ Another petition from a Mr Murray, a local barrister,

²⁰⁵ NSW EC Minute no 24, 2 November 1842, 113.

²⁰⁶ NSW EC Minute no 24, 2 November 1842, 115.

²⁰⁷ NSW EC Minute no 25, 5 November 1842, 122.

²⁰⁸ NSW EC Minute no 25, 5 November 1842, 123.

requesting a reprieve of the men until an anticipated Parliamentary Inquiry into the case, and the Norfolk Island system generally, stated that under English law such a crime would not be visited with the punishment of death. The Council responded that they “could not of course be biased in the exercise of their own judgement as to the course which might have been adopted towards these unhappy men, had they been tried and found guilty in England...”²⁰⁹ They concluded that in extending mercy to Woolf and Whelan that they had gone as far as justice would allow.²¹⁰ “Independently of higher consideration, the Council felt that it would be highly unbecoming in them to treat a crime committed at a penal settlement by doubly and trebly convicted felons with a lenity, which Parliament, by the enactment referred to by the Attorney General, had so recently declared to be inexpedient in ordinary cases.”²¹¹

The four condemned men went to the gallows suitably repentant. “Both at their trial and since their condemnation the unhappy men have conducted themselves in the most becoming manner.”²¹² The *Australian* further remarked, “We heard several of those employed about the gaol remark that they had never witnessed men come to the scaffold so firm, yet in so resigned and devotional a state of mind.”²¹³

The scrupulous care taken by the Governor and the Executive Council to the fate of the *Wellington* and *Governor Phillip* mutineers of 1827 and 1842 and by Burton J in respect of the 1834 mutineers, is telling. It is clear that the authorities, even in relation to the worst of offenders, took seriously the prerogative of mercy. As Hirst notes, “great care was taken in

²⁰⁹ Ibid. See also below n 233.

²¹⁰ NSW EC Minute no 25, 5 November 1842, 124.

²¹¹ NSW EC Minute no 25, 5 November 1842, 125.

²¹² “Executions,” *Australasian Chronicle*, 10 November 1842, 2.

²¹³ “Execution,” *The Australian*, 9 November 1842, 2. With respect to the penitence shown by the prisoners, see also “Execution of Sears, Lewis, Jones and Beaver,” *Sydney Morning Herald*, 9 November 1842, 2; “Executions,” *Australasian Chronicle*, 10 November 1842, 2.

the choice of those to be saved.’²¹⁴ The mercy shown to the Norfolk Island mutineers was by no means unusual in respect of such capital offenders.²¹⁵ Even the most notorious escaped convicts and prolific bushrangers such as Martin Cash and Lawrence Kavanagh²¹⁶ might still be deemed eligible for mercy.²¹⁷

Conclusion

It is apparent from our initial research, particularly as shown by the fate of those convicted of involvement in the Norfolk Island mutinies of 1827, 1834 and 1842, that the authorities in early colonial Australia, even in relation to offenders who could be seen as ‘beyond the pale’, took very seriously the exercise of the prerogative of mercy. It was far from a foregone conclusion that the ultimate penalty of the law would be inflicted on such offenders, even in a society seemingly beset by crime and criminals. The prerogative of mercy was not administered in a cursory or perfunctory manner. The Governor and the Executive Council did not function as a mere “rubber stamp” in the implementation of the death sentence.

²¹⁴ Hirst, *Convict Society and Its Enemies*, 114.

²¹⁵ See, for example, James Edwards, John Bateman and James Gowers, who were convicted in 1844 of cutting and stabbing with intent to murder a William Findlay, who was an Assistant Superintendent of a convict chain gang in the Tasman Peninsula. All three prisoners brutally attacked Findlay with weapons (see *R v Edwards, Bateman and Gowers* (*Colonial Times*, 16 April 1844, 2-3) Montagu J, in passing the death sentence, observed that he could give none of them “the slightest hope his life would be spared” (Ibid, 3). The Executive Council considered the case and took a different view. They resolved “[the case] is not of such a nature as to require imperatively that any of them should be executed”. Mercy was extended and all three were ordered to be transported to Norfolk Island for life (see Executive Council Minutes, Tasmania, 16 September 1844). See also *R v Johnson and Others* (*Sydney Gazette*, 27 February 1834, 2) when six escaped convicts from a chain gang were convicted of armed robbery using the musket seized from their sentry. Despite the strong views of the Chief Justice, the Executive Council resolved to spare all the accused bar Johnson who was hanged (see “Execution,” *Sydney Gazette*, 27 February 1834, 2). Even one of the gang, Hancock, who had escaped from jail awaiting sentence was spared (see *Sydney Gazette*, 5 June 1834, 2; *Sydney Gazette*, 31 July 1834, 2).

²¹⁶ Kavanagh is particularly worthy of mention. The trial judge in *R v Cash and Kavanagh* (*Colonial Times*, 19 September 1843, 2) had branded him as a “plausible, subtle and an artful man...but he was at the same time one of the most abandoned and worst of characters” including nine years spent at Norfolk Island, “where the very worst of characters were congregated – picked out from this Colony and from all parts of the globe.” The trial judge had noted that Kavanagh had only been transported to life to Tasmania in 1842 for shooting at the Colonial Secretary and a Captain Hunter when an escaped convict outside Sydney. On that occasion the Attorney-General at trial had expressed his profound regret that that “atrocious” offence no longer carried the death penalty in NSW (see *R v Cavenagh & Ors* (*Sydney Herald*, 13 April 1842, 2)).

²¹⁷ See Davis, *The Tasmanian Gallows*, 38.

Rather, as evidenced by the Norfolk Island mutineers and other similar offenders who were reprieved, it is clear that the Governor and the Executive Council took seriously the question of who to extend mercy to and indeed, strained to find grounds upon which to reprieve the condemned prisoner.

A wide range of factors, as one observes demonstrated in the Norfolk Island mutineers, could be significant in influencing the deliberations of the Executive Council. The previous good character of the condemned prisoner;²¹⁸ the crime for which he or unusually she had been originally transported to the colonies;²¹⁹ whether the prisoner had previously received the benefit of a grant of mercy;²²⁰ any mitigating features surrounding the commission of the offence such as provocation,²²¹ absence of wanton violence or cruelty;²²² co-operation with the authorities;²²³ testimonials from employers;²²⁴ appeals from the victim of the offence²²⁵ or members of the jury;²²⁶ the position of the press;²²⁷ public opinion,²²⁸ typically in the form of

²¹⁸ See, for example, John Boyd and Henry Drummond who were convicted in 1826 of theft with sentence of death passed but after consideration of the information on what crimes the prisoners had originally been sent to Australia, the Executive Council commuted their sentences. See further above n 87. Conversely the previous bad character of the prisoner was a material factor in allowing the law to take its course. See, for example, Buchanan Wilson (the same Buchanan Wilson who had been reprieved for his role in the 1834 Norfolk Island revolt, see above n 185) who was convicted of robbery and was noted as a “very desperate character”. On this occasion the Executive Council resolved it could not advise the Governor to interfere with Wilson’s sentence (see Executive Council Minutes, Tasmania, 26 April 1851; *R v Wilson (Colonial Times, 22 April 1851, 2)*).

²¹⁹ See above n 220. However, this was not always possible as the information on original conviction might only be available from England, hence delays were an issue.

²²⁰ See, for example, the reasoning of Burton J in the 1834 Norfolk Island mutiny trials (see above the discussion in Part 5(3)); the execution of a notorious convict in *R v M’Manus* (see *The Courier*, 2 June 1853, 2; “The Romance of Atrocity,” *The Courier*, 2 June 1853, 2; *Cornwall Chronicle*, 8 June 1853, 2) for a brutal rape who had on two previous occasions been the recipient of mercy (see “The Execution of M’Manus and M’Alister,” *The Courier*, 21 June 1853, 2).

²²¹ See, for example, the case of William Puckridge and Edward Holmes. See further above n 84.

²²² See, for example, *R v Matthew Reid, Thomas Lancaster, James Glove and John Price (Launceston Examiner, 4 October 1843, 4)*; *R v Westwood alias Jackey Jackey (Colonial Times, 5 September 1845, 3)* (confirmed by Executive Council on 20 September 1845).

²²³ Such co-operation would often take the form of the accused giving evidence against his erstwhile criminal associates. The notion of “honour amongst thieves” has always been more in the breach than in the observance.

²²⁴ See, for example, Daniel McLeod, who alone of a gang of five bushrangers in Tasmania was reprieved, on account of the support of a Mr Jellicoe, his former master, who had written to the judge asking for mercy and giving him a good character.

²²⁵ See, for example, Daniel Pearce, the so called “friendly bushranger,” see “Petition for Mercy,” *Cornwall Chronicle*, 25 October 1845, 277; “Daniel Priest’s Life is Spared,” *Cornwall Chronicle*, 29 October 1845, 287.

²²⁶ See, for example, *R v Brewer and Quinn (The Courier, 22 October 1853, 3)* where the jury not only recommended mercy but wrote to the Governor (see Executive Council Minutes, Tasmania, 29 October 1853).

public petitions,²²⁹ appeals from clergymen,²³⁰ doubts as to the strength of the prosecution's case,²³¹ especially if conveyed by the trial judge,²³² could all help persuade the Executive Council to accord mercy. Sometimes even the "hand of fate"²³³ might intervene in a prisoner's favour.²³⁴ In the absence of any formal Appeal Court to challenge the conviction or sentence in capital (or indeed any) criminal cases,²³⁵ the Executive Council was perhaps the nearest that there was to a colonial Court of Criminal Appeal in this period.

However, it is important not to overstate the mitigatory effect of the Executive Council. The Council's operation was limited, imperfect and inconsistent. The Council, in its earlier years at least, may have such a volume of cases to consider that it could not have given each

²²⁷ Castles, "Watching Them Hang," 43.11.

²²⁸ See, for example, Maria Williams, who was reprieved when "public sympathy is very much excited in favour of the unfortunate woman who is ordered for execution" (*Sydney Gazette*, 9 July 1829, 2); see also *The Australian*, 8 July 1829, 2; 10 July 1829, 3; *Sydney Monitor*, 11 July 1829, 1; Castles, "Watching Them Hang," 43.7); Ann Edwards, who was also reprieved in the face of public sympathy having assaulted with intent to kill her abusive and drunken husband (see Homo, "Letter to Editor," *Colonial Times*, 2 July 1833, 3; Editorial, *Colonial Times*, 2 July 1833, 2; Goodrick, *Life in Old Van Dieman's Land*, 69-71.

²²⁹ See, for example, the petition presented to the Executive Council from the members of the jury and 42 respectable citizens in the case of Maria Williams (see Shaw to Darling, Petition, 6 July 1829, EC Appendix to the Executive Council Minutes, Vol 2, 4/1439, SRNSW). See further Castles, "Watching Them Hang," 43.7.

²³⁰ See, for example, "Petition for Mercy," *Cornwall Chronicle*, 25 October 1845, 277. See also Davis, *The Tasmanian Gallows*, 42-43.

²³¹ See, for example, an Aboriginal defendant called Make-I-Light who was convicted of the murder of a white man. The judge "from that spot could hold out to the prisoner no hope of mercy." See *R v Make-I-Light* [1851] NSWSupC 29 (*Moreton Bay Courier*, 15 November 1851, 2-3). The prisoner was later reprieved and released on the order of the Governor on the advice of the Executive Council "in consequence of some doubt of the sufficiency of the evidence of identity" (see "The Aboriginal Make-I-Light," *Moreton Bay Courier*, 22 May 1852, 3).

²³² See, for example, Daniel Tucker and Issac Davies (*R v Tucker and Davies* (*Colonial Times*, 7 May 1830; *Hobart Town Courier*, 8 May 1830, 3)). Both were convicted of rape upon an Eliza Hickery but the Chief Justice at sentence forbore to comment upon their case in passing the death sentence. Both were granted an unconditional pardon after the Chief Justice volunteered to the Executive Council that he was 'very doubtful' of the guilt of the accused. He noted the victim was of "bad character" and both accused were of good character. See Tasmania EC Minutes, 6 May 1830.

²³³ Hirst, *Convict Society and Its Enemies*, 114.

²³⁴ See, for example, William Curten who was reprieved for murder when at his hanging the rope broke and granted a conditional pardon, see "Failed Execution," *The Australian*, 26 January 1826; Bathurst to Darling, 2 November 1826, *Historical Records of Australia*, Series 1, Vol. 12, 673

²³⁵ Although a limited Court of Appeal could be convened under the *New South Wales Act 1823* (Imp) appeals were limited to questions of law, not on wrongful determinations on fact. For a brief summary, see, for example, Woods, *A History of Criminal Law in New South Wales*, 253-255.

condemned prisoner detailed consideration.²³⁶ One prisoner might be executed and another reprieved for identical or even more aggravated crimes.²³⁷ The Executive Council might insist, citing the local conditions in the colonies as being very different from those existing in England, in carrying out the death sentence notwithstanding the fact that the offence for which the accused had been convicted no longer carried the death penalty in England.²³⁸ Full pardons were very rare²³⁹ and offenders spared the gallows were usually sentenced to long periods of transportation in one of the notorious secondary places of punishment in the colonies. Even those offenders where the conferral of mercy was prompted by doubts as to prisoner's guilt in light of weaknesses in the prosecution case, were not granted a full pardon but were usually ordered to be transported,²⁴⁰ often for life.²⁴¹ The Governor and the Executive Council were at liberty to disregard public opinion²⁴² and ignore appeals for mercy from the public,²⁴³ the victim, the jury²⁴⁴ and even members of the Executive Council.²⁴⁵ On

²³⁶ On 16 September 1826 the Executive Council in Tasmania considered the remarkable number of 37 condemned prisoners in one sitting.

²³⁷ Contrast the fate of James Bowtell executed for robbery despite the comparative lack of aggravating features (see "Execution", *Colonial Times*, 16 May 1843, 3) with the reprieve accorded to Cash and Kavanagh who on any view were worse offenders. See Davis, *The Tasmanian Gallows*, 38.

²³⁸ See, for example, Issac Tidburrow who was convicted in June 1844 in Tasmania of the rape of a girl under seven named Mary Gangell. He was a former convict. He was sentenced to be hanged. The Executive Council upheld the death sentence despite the Colonial Treasurer noting that as the similar law in England was no longer a capital offence, mercy could be extended. The Colonial Secretary disagreed. There was reason to fear the prevalence of the offence and the circumstances of the Colony, unlike England, justified the retention of the old capital law. "The state of society is very different here." The other members of the Council concurred with the Colonial Secretary. See Tasmania EC Minutes, 19 June 1844. Tidburrow was hanged on 2 July 1844. See also above n 171 and n 204 in relation to the 1834 and 1842 Norfolk Island mutineers.

²³⁹ See, for example, Daniel Tucker and Issac Davies, see above n 234.

²⁴⁰ See, for example, John Hewitt and William Love. Both were convicted of robbery and sentenced to death. The trial judge noted to the Executive Council there was 'a doubt as to the testimony of the prosecutor' and the sentence was commuted to seven years transportation and a year of probation. See Tasmania EC Minutes, 18 April 1853.

²⁴¹ See, for example, Joseph Hawley, John Brickfield, and Richard Cogan who were convicts sentenced to death for the rape of the wife of a coachman. All three protested their innocence. All were literally at the last moment spared by the Executive Council and transported for life to Norfolk Island (see *Sydney Herald*, 23 September 1833, 2) "Circumstances have transpired which fix a suspicious character on the prosecutrix and cast doubt as to the truth of her unsupported evidence" (*Sydney Monitor*, 21 September 1833, 2).

²⁴² See, for example, the execution of Mahide for the robbery of a house despite much public opposition (see "Approaching Execution", *Cornwall Chronicle*, 4 November 1848, 139) and the public sympathy for the three men executed for their involvement in the convict revolt at Castle Forbes (see "Execution," *The Australian*, 23 December 1833, 2).

²⁴³ See, for example, the refusals to grant reprieves to Daniel Stewart alias "Wingy", Peter Haley alias "Black Peter" and William Fearn sent to death for bushranging (see "The Condemned," *Hobart Mercury*, 15 February 1859; "Execution of Five Men at Hobart Town," *Bell's Life in Sydney*, 26 February 1859, 3); the

such occasions notions of retribution and deterrence overrode any other countervailing consideration.²⁴⁶

However, the exercise of the death penalty was not a random lottery. The Executive Council was plainly not oblivious to the need in the context of early colonial society to ensure that suitable offenders did receive the extreme penalty of the law and that the prevailing notions of punishment and deterrence (whatever misgivings that members may have entertained in the rationale of capital punishment as an effective deterrent)²⁴⁷ were applied. However, balanced against the need for retribution and deterrence was the crucial prerogative of mercy. As Shakespeare observed, in the passage quoted at the start of this article, “The quality of mercy is not strained,” and in relation to the exercise of the death penalty in early colonial Australia even in relation to the worst of offenders such as the Norfolk Island mutineers it was indeed a case of “When mercy seasons justice.”

refusal of the Governor to interfere in respect of the execution of an Aborigine for the murder of a white man (see “The Condemned Native,” *South Australian Advertiser*, 6 September 1860, 2).

²⁴⁴ See, for example, the refusal of the Executive Council to endorse the jury’s recommendation for mercy in the case of Mahide convicted of the robbery of a house (see “The Convicts under Sentence of Death,” *Cornwall Chronicle*, 1 November 1848, 132; *Cornwall Chronicle*, 4 November 1848, 2; “The Condemned Criminals,” *Launceston Examiner*, 1 November 1848, 4); the refusal of both the trial judge and the Executive Council in *R v M’Manus* (*The Courier*, 2 June 1853, 2; *Cornwall Chronicle*, 8 June 1853, 2) to heed the jury’s recommendation of mercy in the case of a brutal rape by a notorious convict who had on two previous occasions been the recipient of mercy (see “The Execution of M’Manus and M’Alister,” *The Courier*, 21 June 1853, 2).

²⁴⁵ See, for example, the execution of John Somers for rape of a child despite the Chief Justice’s opposition (see *Colonial Times*, 28 December 1831, 2); the insistence of Governor Arthur in allowing the execution of the female convict in *R v McLauchlan* [1830] TASSupC 14 (*Hobart Town Courier*, 17 April 1830, 3) who had been found guilty of the murder of her illegitimate newborn son despite the clear mitigating circumstances and the strong appeals for mercy from the jury, the public and even members of the Executive Council (see Executive Council Minutes, Tasmania, 16 and 17 April 1830; *Tasmanian & Austral-Asiatic Review*, 23 April 1830; Davis, *The Tasmanian Gallows*, 20 and 25).

²⁴⁶ See, for example, *R v Kenney*, (*The Courier*, 10 March 1847, 4); Mr. Justice Montagu’s Opinion of the State of the Country’, *Launceston Examiner*, 10 March 1847, 3.

²⁴⁷ See, for example, in the 1825 case of two highway robbers, Watson and Golding, Forbes CJ indicated that execution might be appropriate, since the crime had been so prevalent lately. Governor Brisbane disagreed and noted his “opinion that Executions do not deter the Commission of Crimes have weighed with me in extending Clemency towards these two Individuals” (see Chief Justice’s Letter Book, Archives Office of New South Wales, 4/6651, 37-38; *Sydney Gazette*, 30 June 1825, 3).