

**‘INNOCENT VICTIM OF CIRCUMSTANCE’  
OR ‘A VERY DEVIL INCARNATE’?  
THE TRIAL AND EXECUTION OF  
ELIZABETH WOOLCOCK IN SOUTH  
AUSTRALIA IN 1873**

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This article considers the trial and execution of Elizabeth Woolcock in 1873 for the alleged murder of her husband by poison. In examining the evidence adduced against her, notably the inconclusive scientific evidence, it is argued that Elizabeth was not the callous murderer presented by the prosecution but an ‘innocent victim of circumstance’ who was convicted and condemned to death, as much upon speculation and stereotype, as upon the tenuous strength of the prosecution case. Both Elizabeth’s trial and her eventual fate can be viewed in a wider context and illustrate the often polarised perception and treatment of female capital offenders during this period. Elizabeth’s already heinous crime in murdering her husband, further aggravated through her use of poison, and her purported liaison with another man, combined to brand her as ‘a devil incarnate’ and served to forfeit any claims to mercy on her behalf. Despite the real doubts as to her guilt and the strong mitigating factors that existed in her favour, Elizabeth Woolcock was destined to be the only woman in South Australia to ever suffer ‘the ultimate penalty of the law’.

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## I INTRODUCTION

In conclusion, the learned counsel put it strongly to the jury whether they could believe that the prisoner, against whose previous good character nothing had been adduced, had deliberately and in cold blood sat day and night by the side of the man she had sworn to love and obey, and gloated over him wasting away under the influence of deadly drugs administered by her hand. If they were of that opinion, they must regard her as a very devil incarnate – a being without the slightest humanity or natural feeling. He confidently asked them, however, on the evidence which they had heard, to say that she was not so revolting a character; and in full assurance of their justice, the prisoner submitted herself to them, to their justice, and to their God.<sup>1</sup>

These were the dramatic terms in which defence counsel, Dr Kauffmann, concluded his closing address to the jury in 1873, at the trial before the Supreme Court in Adelaide of Elisabeth Woolcock for the alleged murder through mercury poisoning of her husband in order to take up with another man. Kauffmann sought to portray Elizabeth<sup>2</sup> as the model devoted wife and had posed the rhetorical question of whether she could be capable of the heinous crime attributed to her by the prosecution. However, in the space of 25 minutes the jury accepted Elizabeth's guilt. Convicted and condemned to death, and refused mercy by the Governor and Executive Council, Elizabeth was hanged at the Adelaide Gaol on 30 December 1873, holding the dubious distinction of being the only woman in South Australia to receive the 'extreme sentence of the law'.<sup>3</sup>

The trial and execution of Elizabeth Woolcock provides an opportunity to examine the exercise of the death penalty and the prerogative of mercy in 19<sup>th</sup> century Australia, with respect to female

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<sup>1</sup> *South Australian Register*, 5 December 1873, 3. See also *South Australian Chronicle and Weekly Mail*, 6 December 1873, 10.

<sup>2</sup> This article employs the term 'Elizabeth' in preference to such terms as 'Woolcock', 'Mrs Woolcock' or 'Elizabeth Woolcock'. No undue familiarity or lack of objectivity is intended by this.

<sup>3</sup> 'Execution of Elizabeth Woolcock', *Walleroo Times and Mining Journal*, 3 January 1874, 3.

capital offenders. Both Elizabeth's trial and the refusal to extend mercy to her illustrate a recurrent theme of the polarised but often arbitrary perception and treatment of female capital offenders during this period. Uniquely, the circumstances surrounding Elizabeth Woolcock's unfortunate background; the death of her husband; the resulting Inquest and her trial for his alleged murder; the nature and strength of the prosecution case against her, especially the inconclusive and flawed nature of the scientific evidence; her conviction and sentence of death; the reaction to both her conviction and sentence of death and the reasoning and process which ultimately led the Executive Council to refuse mercy, are outlined herein.

## II THE DEATH PENALTY AND FEMALE OFFENDERS

Elizabeth Woolcock carried a triple burden. Firstly, she was accused of the murder of her husband, an act which until 1828 constituted the distinct aggravated crime of petit treason.<sup>4</sup> Petit treason, one of over 300 capital offences constituting the *Bloody Code*,<sup>5</sup> involved the murder of a social superior such as the murder of a man by his wife, and was an offence singled out for particular condemnation as a betrayal of the natural order. Elizabeth's crime was further aggravated by the suggestion of adultery or sexual 'immorality' on her part and lastly, the deceased had met his end through poisoning.

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<sup>4</sup> Created by the *Treason Act 1351*, 25 Edw 3, St 5, c 2. See further, Ruth Campbell, 'Sentence of Death by Burning Women' (1984) 5 *Journal of Legal History* 44; Shelley Gavigan, 'Petit Treason in Eighteenth Century England: Women's Inequality Before the Law' (1989) 3 *Canadian Journal of Women and Law* 335.

<sup>5</sup> See John Ellard, 'Law and Order and the Perils of Achieving It' in Duncan Chappell and Paul Wilson, *Issues in Australian Crime and Criminal Justice* (Lexis Nexis Butterworths, 2005) 268. There were over 220 statutes and a total of more than 350 offences in England that carried the death penalty in 1800. However as Radzinowicz notes, this can only be at best an approximation and does not account for the numerous capital offences which might be created by a single statute. A list of these capital statutes can be found in Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750: The Movement for Reform* (Stevens, 1948) Vol 1, App 1.

That a wife could deliberately poison her husband to death was a notion that especially horrified 19<sup>th</sup> century society,<sup>6</sup> with even Elizabeth's defence lawyer labelling a person who would do this as 'a very devil incarnate – a being without the slightest humanity or natural feeling'.<sup>7</sup>

The capital offences statute book was received into the Australian colonies upon settlement,<sup>8</sup> however the 1820s and 1830s witnessed legislative reform in both England and the colonies, to ameliorate the harshness of the *Bloody Code*.<sup>9</sup> The courts too, had some discretion when passing sentence for a capital offence, to enter a sentence of 'death recorded' for all but the most serious offences of murder and treason, where the judge deemed the convicted a 'fit and proper' person for the exercise of judicial mercy.<sup>10</sup> The effect of a sentence of 'death recorded' was the same as if judgment of death had been ordered, and the offender reprieved with a lesser, but usually still severe, penal sentence. Absent full rights of appeal however,<sup>11</sup> those

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<sup>6</sup> See, eg, Renda Helfield, 'Female Poisoners of the Nineteenth Century: a Study of Gender Bias in the Application of the Law' (1990) 20 *Osgoode Hall Law Journal* 53; Wendy Kukulies-Smith and Susan Priest, 'No Hope of Mercy for the Borgia of Botany Bay, Louisa May Collins, the Last Woman executed in NSW, 1889' (2010) 10 *Canberra Law Review* 144, 157; George Robb, 'Circe in Crinoline: Domestic Poisoning in Victorian England' (1997) 22 *Journal of Family History* 176-190. See further below Part X A 'Petit Treason'. It should be noted that most acts of poisoning in the 19th century, despite the perception to the contrary, were in fact committed by men. See, eg, Katherine Watson, *English Poisoners and their Victims* (Hambledon Continuum, 2007) xiii.

<sup>7</sup> *South Australian Register*, 5 December 1873, 3.

<sup>8</sup> In order to address early confusion as to the date of reception, the laws and statutes of England were said to be received so far as was applicable, into New South Wales and Van Dieman's Land on 25 July 1828: *Australian Courts Act 1828* 9 Geo 4, c 83; and for the remaining colonies, upon their foundation, thus South Australia received the laws of England on 28 December 1836: *Acts Interpretation Act 1915* (SA) s 48.

<sup>9</sup> Both by the local Legislative Councils (eg *Imperial Acts Adoption Act 1833* (NSW)(4 Wm 4 No.4) but also, most notably, through the enactment of the *Peel's Acts* (these were 7 and 8 Geo IV c 27, 28, 29, 30, 31) in England.

<sup>10</sup> *Judgment of Death Act 1823* (4 Geo IV, c 48) s 2.

<sup>11</sup> A fledgling and limited appellate system developed with the passing of the *New South Wales Act 1823* (4 Geo IV, c 96 (Imp)) but the right of appeal to the Governor was abolished in 1828 by the *Australian Courts Act 1826* (Imp). However in practice, appeals were not common, possibly due to the lack of any

convicted with sentence of ‘death passed’ had only one avenue in which to appeal their sentence, and that was through an appeal for mercy to the Executive. The prerogative of mercy, or pardon, therefore came to play a vital role in both England<sup>12</sup> and colonial Australia<sup>13</sup> in mitigating the effects of capital punishment (though its inconsistent exercise was a topic of regular complaint).<sup>14</sup> As one commentator observed:

The execution of the death penalty is under any circumstance a dire alternative, and if there is the slightest reasonable pretext for averting it, those in whose hands rest the prerogative of mercy are only too willing to lean to the side of mercy.<sup>15</sup>

The prerogative of mercy, or pardon, is a residual judicial discretion retained by the Crown to ‘dispense with or modify punishments which common law or statute would require to be undergone’.<sup>16</sup> The pardon was one of a number of unalienated prerogative powers bestowed by the Sovereign upon the respective Governors of the Australian colonies.<sup>17</sup> As Bennett notes,

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comprehensive right of appeal until the early 1900s with the passing of the *Criminal Appeal Act 1907* (UK).

<sup>12</sup> During the period 1800-1834, 29,808 defendants were sentenced to death in Britain, of these 27,132 (91 percent) were reprieved.

<sup>13</sup> See David Plater and Sue Milne, “‘The Quality of Mercy is not Strained’: the Norfolk Island Mutineers and the Exercise of the Death Penalty in Colonial Australia 1824-1860’ [2012] *ANZLH E-Journal*, Refereed Paper no 1, <[http://www.anzhsejournal.auckland.ac.nz/pdfs\\_2012/Plater-Milne-Piracy-and-mercy.pdf](http://www.anzhsejournal.auckland.ac.nz/pdfs_2012/Plater-Milne-Piracy-and-mercy.pdf)>. The number of capital offenders spared from the gallows in the colonies is significant. Castle notes that of the 1296 sentences of death passed in New South Wales during the period from 1826 to 1836, only 362 were actually carried into effect. See Tim Castle, ‘Watching Them Hang: Capital Punishment and Public Support in Colonial New South Wales’ (2008) 6 *History Australia* 43.1, 43.2, 43.6-43.7.

<sup>14</sup> See, eg, Richard Davis, *The Tasmanian Gallows: A Study of Capital Punishment* (Cat & Fiddle Press, 1974), 38; ‘State of Crime’, *Colonial Times*, 6 February 1838, 5; ‘Punishment of Criminals’, *South Australian Register*, 19 March 1864, 2 (‘One law for the rich and another for the poor’); ‘The Injustice of Reprieves’, *The Times*, 31 August 1867.

<sup>15</sup> ‘The Case of Louisa Collins’, *South Australian Register*, 9 January 1889, 4.

<sup>16</sup> William Anson, *The Law and Custom of the Constitution* (Oxford University Press, 4<sup>th</sup> ed, 1935) 29.

<sup>17</sup> See, eg, the address of the Secretary of State for the Colonies to the House of Lords, where he stated that, ‘The Governor, like the Home Secretary, is

The Crown prerogatives were then among the strongest ties binding the British Empire and, for most of the 19<sup>th</sup> century, successive Imperial Governments would not loosen them. For greater caution, exercise of the prerogative of mercy was delegated to the Governor not only by Instructions, but also, more solemnly, by his commission.<sup>18</sup>

The Instructions regulated the administration of the pardon, and typically required that all capital convictions be considered by the Governor in Council, in order to consider the exercise of mercy.<sup>19</sup> The judge presiding over a capital case would provide a report to the Governor and would later be summoned to attend the meeting of the Executive Council, in order to present his report and retire after providing any necessary explanations. The Governor would then ascertain the views of his Council and announce his decision. Although oversight of this process was not a matter for the courts (by way of judicial review), on occasion, the Secretary of State for the Colonies was required to intervene.<sup>20</sup>

As a prerogative power residing with the Governor, the rationale for the application of the pardon was not legally circumscribed.<sup>21</sup> Research into court records, judges' notebooks, and minutes of Executive Council meetings, and, not least, social and legal

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personally selected by the Sovereign as the depository of this prerogative [of mercy], which was not alienated from the Crown by any general delegation, but only confided as a matter of high trust to those individuals whom the Crown commissions for that purpose'. See United Kingdom, House of Lords, *Parliamentary Debates*, 16 April 1875 (Earl of Belmore).

<sup>18</sup> John M Bennett, 'The Royal Prerogative of Mercy – Putting in the Boots' (2007) 81 *Australian Law Journal* 35, 36.

<sup>19</sup> See, eg, the Commission and Instructions of Sir Thomas Brisbane, Governor of New South Wales, in *Historical Records of Australia* (Library Committee, Commonwealth Parliament, 1917) Series I, Vol X, 590.

<sup>20</sup> See, eg, Bennett, above n 18, 35; ACV Melbourne, *Early Constitutional Development in Australia* (University of Queensland Press, 1963).

<sup>21</sup> William Shakespeare accurately identified the role of mercy when he wrote that, 'mercy seasons justice', *The Merchant of Venice*, Act IV, Scene 1. A modern statement of the extra-legal role of mercy is found in the judgment of Lord Diplock in *De Freitas v Benny* [1976] AC 239, 247 (PC). 'Mercy is not the subject of legal rights. It begins where legal rights end'. See also *Eastman v Attorney-General (ACT)* (2007) 210 FLR 440.

comment in the newspapers of the period, does however provide an insight into the factors considered with respect to appeals for clemency. Although a power residing with the Executive, the application of the pardon was publicly scrutinised, and therefore administered with meticulous care,<sup>22</sup> with the Governor increasingly expected after the grant of responsible government to the Australian colonies in the 1850s to follow the advice of the Executive Council in any decision for clemency.<sup>23</sup> The discretionary nature of the power also meant that it was far from inevitable that the death sentence would be carried out for even, paradoxically, the most brutal murderer.<sup>24</sup> Although there was a particular reluctance, whether out of a sense of chivalry or otherwise, to hang a female offender, they were not immune from the death penalty, with the colonial authorities unwilling to grant mercy to those of the ‘gentler sex’ who were perceived to have betrayed their feminine role.<sup>25</sup> As one columnist remarked:

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<sup>22</sup> See John Hirst, *Convict Society and Its Enemies: A History of Early New South Wales* (Allen & Unwin, 1983) 114.

<sup>23</sup> See Alpheus Todd, *Parliamentary Government in the British Colonies* (Longman, Green and Co, 1894) 344-359. This convention had developed a few years after the *New South Wales Act 1823* (Imp), and became more entrenched with the development of responsible government after 1856. A detailed account of the operation of the prerogative of mercy in the period after responsible government is beyond this article. See, eg, ACV Melbourne, *Early Constitutional Development in Australia* (University of Queensland Press, 1963) pt 2, ch 1.

<sup>24</sup> See, eg, ‘The Reprieve of Gleeson’, *Bathurst Free Press*, 2 November 1850, 4 (controversial reprieve for an especially vicious murder); ‘Capital Punishment: Byford and Vidall’, *The Australian*, 4 February 1845, 3 (contentious reprieve for notorious former convict for a premeditated murder); *Bell’s Life in Sydney and Sporting Reviewer*, 5 June 1858, 2 (controversial reprieve of a man called Wilkes, ‘a monster in human form’ convicted of the murder of his wife and two young children. See also ‘Editorial’, *Sydney Morning Herald*, 2 June 1858, 4; ‘Reprieve of the Convict Wilkes’, *Sydney Morning Herald*, 2 June 1858, 5; ‘An Observer’, Letter to the Editor: ‘The Convict Wilkes’, *Sydney Morning Herald*, 3 June 1858, 8).

<sup>25</sup> The prevailing idealised English Victorian ‘notions of women’s essential passivity, goodness, virtue and empathy...“the angel of the house”...dutiful and devoted wifeness and self sacrificing and loving motherhood...flourished in colonial Australia’: Kay Saunders, *Deadly Australian Women* (Harper Collins, 2013) 2. See also, eg, Miriam Dixson, *The Real Matilda: Women and Identity in Australia 1788 to Present* (UNSW Press, 4<sup>th</sup> ed, 1999). See further below Part X.

Happily the instances are rare in which persons of the gentler sex render themselves liable to extreme penalty, but when such a case is found it would be yielding to a false sentiment and be doing a cruel wrong to the sex to refrain from inflicting the severest punishment. In affection, in tenderness, in longsuffering, the woman stands preeminent above the man. When she abjures these high qualities, and makes the confidence reposed in her because of them the cloak for murder after a mean and treacherous sort, she forfeits all claim to special consideration because of her sex. Her fall is greater than that of a man under like circumstance. She is untrue to her highest instincts and is unworthy of the exceptional clemency...<sup>26</sup>

### III THE BACKGROUND: ‘STALKED AT EVERY STAGE BY PERSONAL TRAGEDIES AND HARDSHIPS’

Elizabeth on any view came from an unfortunate background<sup>27</sup> with her early life, ‘a miserable one’.<sup>28</sup> Born in South Australia in 1848, her family moved to the Victorian goldfields in 1852, where her younger sister died shortly afterwards. Elizabeth’s mother was unimpressed with life in the ‘horrid, sin stained, colony [of Victoria] of scoundrels and villains’,<sup>29</sup> and when Elizabeth was aged only five, abandoned the family and returned to South Australia with another man. Elizabeth experienced a further series of traumatic events, witnessing the violent suppression of the Eureka Stockade in 1854, and the death of a close family friend killed by Government troops.<sup>30</sup> The following year, after being left alone in their tent on the goldfields by her father, Elizabeth was suffocated and raped and ‘left for dead’<sup>31</sup> when aged only six years.<sup>32</sup> The sheer brutality of the

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<sup>26</sup> ‘The Case of Louisa Collins’, *South Australian Register*, 9 January 1889, 4.

<sup>27</sup> For a full account see Allan Peters, *No Monument of Stone* (Allan Peters, 1992) ch 1-5; Samela Harris, ‘Haunted – Laying a Ghost to Rest’, *The Advertiser*, 13 February 2009.

<sup>28</sup> ‘Our Adelaide Letter’, ‘Our Own Correspondent’, *Border Watch*, 7 January 1874, 3.

<sup>29</sup> Peters, above n 27, 15; Allan Peters, *Dead Woman Walking: Was an Innocent Woman Hanged?* (Bas Publishing, 2008) 23.

<sup>30</sup> Peters, above n 27, 20-27; Peters, *Dead Woman Walking*, above n 29, 33-45.

<sup>31</sup> Alan Peters quoted by Harris, above n 27.

attack is plain from even the brief extract of the trial in *The Argus*.<sup>33</sup> Elizabeth was left with apparent psychological trauma and unable to bear children. The perpetrator was convicted and sentenced to death, but later reprieved.<sup>34</sup> Prescribed opium by her doctors after the rape, Elizabeth became addicted from a young age. Her father died three years later when Elizabeth was aged nine. Left to fend for herself, Elizabeth found service in Melbourne with a pharmacist's family, still dependant on opium, and returned to Ballarat at 15 with a supply of opium procured from her employer<sup>35</sup> to work in a guest house.<sup>36</sup>

In 1865, Elizabeth returned to South Australia after discovering that her mother had remarried a man called Williams and re-settled there. Elizabeth first worked as a maid in the close knit Cornish mining community of Moonta and in 1866 became live-in housekeeper for Thomas Woolcock, a widowed miner from Cornwall with a young son. Salacious local gossip and Elizabeth's stepfather's disapproval of Woolcock, resulted in Elizabeth hurriedly marrying Woolcock.<sup>37</sup> On the face of it nothing was amiss, as one

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<sup>32</sup> See Peters, above n 27, 28-35; Peters, *Dead Woman Walking*, above n 29, 47-59.

<sup>33</sup> *R v Shawshaw* (*The Argus*, 24 October 1855, 6). The attacker was described as a native of India but was later referred to as a 'black American', see 'The Yelta Case', *South Australian Register*, 10 September 1873, 3, or an 'American black': 'The Convict Mrs Woolcock', *South Australian Register*, 11 December 1873, 4. The editor of *The Argus* described 'the details of this case are totally unfit for publication': *The Argus*, 24 October 1855, 6. The Chief Judge in sentence pronounced it 'was one of the most atrocious cases he had ever listened to': at 6.

<sup>34</sup> The Chief Justice made it clear that though rape no longer carried the death penalty in England and it was not uncommon for offenders to be reprieved in Australia, 'the peculiar atrocity' of the present crime rendered it unlikely that the Executive Council would interfere. See *The Argus*, 24 October 1855, 6. The Executive Council subsequently reprieved Shawshaw and commuted his sentence to life imprisonment.

<sup>35</sup> Harris, above n 27.

<sup>36</sup> Peters notes that Elizabeth enjoyed a secret life in Ballarat and supplied prostitutes with opium in order to rob their clients. See Peters, *Dead Woman Walking*, above n 29, 75-100.

<sup>37</sup> See 'Confession of Mrs Woolcock', *South Australian Register*, 2 January 1874, 3; 'City Correspondence', *Kapunda Herald*, 6 January 1874, 3. It seems

neighbour who knew the Woolcocks for seven years observed; ‘She at all times conducted herself with propriety, her behaviour not differing from that of an ordinary respectable woman’.<sup>38</sup>

Elizabeth was soon to regret her hasty action in marrying Woolcock, who proved to be ‘a heavy drinker, a bully and a wife beater’.<sup>39</sup> There were regular arguments over money. Woolcock even placed public advertisements in a local newspaper in 1869 to say he would not be liable for any debts contracted by his wife after that date.<sup>40</sup> Elizabeth left Woolcock on two occasions but returned after he promised to change his ways. Any change was short-lived. Elizabeth even tried to hang herself.<sup>41</sup> The family moved to Yelta, another Cornish mining village. Elizabeth’s drug addiction continued and her efforts at acquiring opiates became increasingly desperate and ultimately a matter of knowledge and rumour in the local community. Elizabeth’s life, as Peters observes, ‘had been nothing less than blighted – stalked at every stage by personal tragedies and hardships’.<sup>42</sup>

In 1873, a man called Pascoe lodged with the Woolcocks, but was turned out after an argument over, not Pascoe’s apparent friendship with Elizabeth but, of all things, a horse. The extent of Elizabeth’s familiarity with Pascoe was to later acquire significance at her trial. Woolcock was taken ill on 23 July 1873 at the mine at which he

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Elizabeth married Woolcock as much to spite her family as anything else. See further Peters, *Dead Woman Walking*, above n 29, 111-122.

<sup>38</sup> ‘The Moonta Murders’, *Border Watch*, 17 December 1873, 4. See also Hannah Blight, another neighbour, who testified that the Woolcock’s ‘lived happily together’: ‘The Yelta Poisoning Case’, *South Australian Register*, 8 September 1873, 8.

<sup>39</sup> Harris, above n 27. Even in the immediate aftermath of Elizabeth’s execution, one columnist acknowledged it was clear ‘she had long led a life devoid of comfort or enjoyment, and that hers was a thoroughly ill-assorted marriage’. See ‘Confession of Mrs Woolcock’, *South Australian Register*, 2 January 1874, 3.

<sup>40</sup> See *Walleroo Times and Mining Journal*, 24 July 1869, 1; *Walleroo Times and Mining Journal*, 4 August 1869, 1.

<sup>41</sup> See ‘Confession of Mrs Woolcock’, *South Australian Register*, 2 January 1874, 3.

<sup>42</sup> Alan Peters, quoted by Harris, above n 27.

worked. He was treated with various degrees of success by Drs Bull,<sup>43</sup> Dickie and Herbert, who diagnosed different complaints and prescribed Woolcock a bizarre (to modern eyes at least) range of medication that included rhubarb, cream of tartar, mercury and lead acetate. Woolcock's condition, after improving under Herbert's care, worsened and he died on 3 September 1873. Dickie initially considered nothing was amiss and that Woolcock had 'died from pure exhaustion, brought on by excessive purging and vomiting and want of proper nutriments'.<sup>44</sup> But Woolcock's death prompted suspicions in the close-knit local community that his wife had poisoned him.<sup>45</sup> Rumours of foul play implicating Elizabeth,<sup>46</sup> in particular the assiduous efforts of Woolcock's cousin, a Mrs Snell, who had accused Elizabeth of poisoning her husband, prompted Dickie to ask for an Inquest.<sup>47</sup>

An Inquest convened to enquire 'into all the peculiarities of the case',<sup>48</sup> lasted two days and was presided over by a local police sergeant called Bentley.<sup>49</sup> Dickie initially volunteered his view that Woolcock's death had arisen from natural causes.<sup>50</sup> Elizabeth and

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<sup>43</sup> Bull's role in the case is significant. See further below Part VII.

<sup>44</sup> See 'The Yelta Poisoning Case', *South Australian Register*, 8 September 1873, 6; 'Suspicious Death at Yelta', *South Australian Chronicle and Weekly Mail*, 13 September 1873, 6.

<sup>45</sup> *The Argus*, 13 September 1873, 5.

<sup>46</sup> See 'Suspicious Death at Yelta', above n 44, 6. Edward Bentley, the local police sergeant, noted: 'Everyone seems to have heard a rumour, but no-one seems to have any knowledge of its truth': at 6.

<sup>47</sup> Ironically, Dickie's main motivation was to exonerate Elizabeth for poisoning her husband as alleged by the rumours abounding in the district, notably from Woolcock's cousin, Mrs Snell. See 'Suspicious Death at Yelta', *South Australian Chronicle and Weekly Mail*, 13 September 1873, 6. If this was his intention, it soon backfired.

<sup>48</sup> *South Australian Register*, 9 September 1873, 5S. For a detailed account of the evidence given at the Inquest, see 'The Yelta Poisoning Case', above n 44, 6-7; 'Coroner's Inquest: Suspicious Death at Yelta', *South Australian Advertiser*, 8 September 1873, 3; See 'Suspicious Death at Yelta', *South Australian Chronicle and Weekly Mail*, 13 September 1873, 6.

<sup>49</sup> Bentley was subsequently awarded 10 pounds by the trial judge for his 'zeal and intelligence' in conducting the proceedings. See *South Australian Chronicle and Weekly Mail*, 6 December 1873, 10.

<sup>50</sup> 'Suspicious Death at Yelta', *South Australian Chronicle and Weekly Mail*, 13 September 1873, 6.

other witnesses testified<sup>51</sup> as to Elizabeth's acquisition of various drugs and 'poisons', the terms often used interchangeably. Elizabeth, who was legally unassisted, unwisely denied employing her stepson to obtain drugs on her behalf from a local chemist.<sup>52</sup> A post-mortem was ordered midway through the Inquest after the apparently damning inconsistency emerged between the boy's testimony and Elizabeth's denials, and found mercury poisoning to be the likely cause of Woolcock's death. The police described finding various 'poisons' in the Woolcocks' house, most notably a mercury based powder or 'precipitate' that had ostensibly been used by Elizabeth to treat her scalp for 'scurf'.<sup>53</sup> It was quite possible this had also been used to treat the family's dog for ringworm.<sup>54</sup> This item was to acquire much emphasis at the subsequent trial. The stepson testified that he had purchased this item.<sup>55</sup> The significance of Bull's testimony at the Inquest that the three 'podophyllin' pills he had prescribed Woolcock 'might' have each contained a grain of mercury seems to have been lost.<sup>56</sup> The Coroner's jury found that, 'Thomas Woolcock, came to his death through the effects of slow irritative poisoning, and that we are of the opinion the poison was given him by his wife, Elizabeth Woolcock'.<sup>57</sup> Elizabeth was committed for trial. When asked for any comment, she replied in a 'broken voice' that she had not committed the crime which held not benefit for her.<sup>58</sup>

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<sup>51</sup> As a suspect in the affair, Elizabeth, had she sought legal advice, would no doubt have been advised not to testify. The police only cautioned her as a suspect at this point. See 'The Yelta Poisoning Case', *South Australian Register*, 8 September 1873, 6.

<sup>52</sup> After the stepson had confirmed Elizabeth had used him to obtain drugs, the Inquest Jury ordered a post-mortem to be performed upon the deceased. See 'Suspicious Death at Yelta', above n 44, 6.

<sup>53</sup> See the account of the stepson; 'Coroner's Inquest: Suspicious Death at Yelta', *South Australian Advertiser*, 8 September 1873, 3. See also *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14 (Dr Herbert).

<sup>54</sup> See further Peters, *Dead Woman Walking*, above n 29, 285.

<sup>55</sup> 'Suspicious Death at Yelta', *South Australian Chronicle and Weekly Mail*, 13 September 1873, 6.

<sup>56</sup> *Ibid.* Bull insisted that Woolcock only consumed one pill.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.* See also 'The Yelta Poisoning Case', *South Australian Register*, 8 September 1873, 7.

#### IV THE TRIAL OF ELIZABETH WOOLCOCK: ‘THE MOST DELIBERATE INTENTION OF POISONING THAT HE HAD EVER KNOWN’

The trial in Adelaide before a crowded court was described as a ‘dainty morsel, devoured with avidity’,<sup>59</sup> presided over by Wearing J which occupied three days.<sup>60</sup> The prosecution was represented by the Crown Solicitor, Mr Andrews QC, however Elizabeth, owing to her penury,<sup>61</sup> was represented on a *pro bono* basis by a newly qualified lawyer, a Dr Kauffmann.<sup>62</sup> Given Kauffmann’s lack of resources, preparation and legal experience this was to prove an unequal contest. It must be said that Peters<sup>63</sup> and contemporary commentators<sup>64</sup> are perhaps too harsh in all their criticisms of Kaufmann’s subsequent performance.

The Crown Solicitor observed in his opening address on 2 December 1873 that he need hardly dwell on the gravity of the case.<sup>65</sup> Andrews declared that although the jury might wonder how a woman such as Elizabeth had acquired such an apparent intimate knowledge of poison and its effects, the prosecution case would, nevertheless, establish that Elizabeth had murdered her husband

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<sup>59</sup> Our Own Correspondent, ‘City Correspondence’, *Kapunda Herald*, 9 December 1873, 2.

<sup>60</sup> See *South Australian Register*, 3 December 1873, 3; 4 December 1873, 3; 5 December 1873, 2-3; *South Australian Chronicle and Weekly Mail*, 6 December 1873, 13-14, 10.

<sup>61</sup> Peters, above n 27, 107; Peters, *Dead Woman Walking*, above n 29, 177.

<sup>62</sup> Kaufmann had only been called as a barrister in London in December 1871 and gained admission in South Australia in June 1872. It is notable that Kaufmann never appears to have acted in any significant criminal cases, either before or after Elizabeth’s trial. He mainly practised in civil and mining cases. The authors are grateful for the assistance of Peter Moore on this point.

<sup>63</sup> Peters, *Dead Woman Walking*, above n 29, 257.

<sup>64</sup> See, eg, Our Own Correspondent, ‘City Correspondence’, *Kapunda Herald*, 9 December 1873, 2; ‘Justice’, *Southern Argus*, 12 December 1873, 3; *The Mirror*, 9 December 1873. Though the relevant edition of *The Mirror* is not available, the relevant remarks can be found in *R v Marrett and James* (*South Australian Advertiser*, 3 January 1874, 3; *South Australian Register*, 3 January 1874, 3).

<sup>65</sup> *South Australian Register*, 3 December 1873, 3.

through the slow and deliberate administration of mercury to him. It was, Andrews declared, ‘the most deliberate intention of poisoning that he had ever known’.<sup>66</sup>

Andrews presented a compelling prosecution case, asserting that Elizabeth alone had both the means and the motive to commit the crime. Andrews noted that Woolcock had fallen ill in ‘very peculiar circumstances’,<sup>67</sup> Elizabeth had often purchased different kinds of poison, she alone had made his meals and attended to Woolcock as he lay ill. Woolcock had come to his death through the administration of ‘very large quantities of mercury’,<sup>68</sup> with the mercury rich ‘precipitate’, supposedly used for treating Elizabeth’s scalp for a skin disorder, as the likely means of murder. Andrews contended that there was ample motive for Elizabeth’s alleged crime, for she had never been happily married, ‘even in the earliest days of married life’.<sup>69</sup> To further aggravate her apparent guilt, Elizabeth had prevailed upon her husband to allow Pascoe to lodge with them and ‘had conducted herself in a highly improper way’.<sup>70</sup> Pascoe and Woolcock had quarrelled and Pascoe had been turned out. It was, as Andrews argued, ‘hardly possible to conceive a worse position than that in which the prisoner stood’.<sup>71</sup> Nevertheless, he urged the jury to approach their task objectively for the ‘interests of justice and the public were to be carefully guarded’.<sup>72</sup>

The prosecution called a considerable number of witnesses at

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<sup>66</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 13.

<sup>67</sup> *South Australian Register*, above n 65, 3.

<sup>68</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 13. See also *South Australian Register*, above n 65, 3.

<sup>69</sup> *South Australian Register*, above n 65, 3.

<sup>70</sup> *Ibid.* The exact nature of the relationship between Pascoe and Elizabeth was never made entirely clear but it seems unlikely it was either of a sexual nature or as sinister or significant as the prosecution suggested. Elizabeth, even in her final ‘confession’ of guilt (see further below Part VI) insisted that there was ‘no foundation at all for the story about the young man called Pascoe, he was nothing to me’: ‘Confession of Mrs Woolcock’, *South Australian Register*, 2 January 1874, 3.

<sup>71</sup> *South Australian Register*, 3 December 1873, 3.

<sup>72</sup> *Ibid.*

trial. Drs. Bull, Dickie and Herbert testified about the nature and symptoms of Woolcock's illness and their diagnosis and treatment of him with various degrees of success.<sup>73</sup> Dickie and Herbert further testified about the suspicious circumstances of Woolcock's death in light of the results of their post-mortem, their belief that he had been poisoned through the gradual administration of mercury and their confidence that his death was not due to natural causes.<sup>74</sup> The Government chemist, a George Francis, and a Dr Gosse testified as to their examination of the organs of the deceased and their finding of 'a very excessive'<sup>75</sup> amount of mercury, concluding that its gradual administration had been the cause of death.<sup>76</sup> Both Francis and Gosse were adamant as to the reliability of their findings.<sup>77</sup> Various local chemists testified to Elizabeth's purchase and accumulation of a seemingly bewildering array of various chemicals and drugs, generically and loosely known as 'poisons', especially the mercury rich 'precipitate' that Elizabeth had remarked to her stepson was used to treat her hair for a skin disorder called 'scurf' (or possibly the family's dog for ringworm). Elizabeth's ten year old stepson, Thomas,<sup>78</sup> and others<sup>79</sup> testified to Elizabeth's clumsy efforts to obtain drugs (including her use of another woman's details) and the use of her stepson to purchase drugs on her behalf

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<sup>73</sup> It is significant that Woolcock's dire condition after been treated by Bull and Dickie showed signs of drastic improvement after Dr Herbert took over. Woolcock was unable to pay for Herbert's services and he took the decision to change doctors, a decision that turned out to be fateful. He reverted to Dickie. See 'Suspicious Death at Yelta', *South Australian Chronicle and Weekly Mail*, 13 September 1873, 6.

<sup>74</sup> See *South Australian Chronicle and Weekly Mail*, 6 December 1873, 13; *South Australian Register*, 3 December 1873, 3. Though Peters suggests that Woolcock's symptoms were not entirely consistent with mercury poisoning. See Peters, *Dead Woman Walking*, above n 29, 276-278.

<sup>75</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 13.

<sup>76</sup> *Ibid*; *South Australian Register*, 3 December 1873, 3.

<sup>77</sup> See *South Australian Chronicle and Weekly Mail*, 6 December 1873, 13; *South Australian Register*, 3 December 1873, 3. Francis claimed the tests he had undertaken were capable of detecting a quantity of mercury, as small as 1/100 of a grain of mercury. See *South Australian Register*, above n 77, 3. Whether these findings were as accurate as Francis and Gosse insisted is open to doubt.

<sup>78</sup> See *South Australian Chronicle and Weekly Mail*, 6 December 1873, 13; *South Australian Register*, 3 December 1873, 2.

<sup>79</sup> See *South Australian Register*, 3 December 1873, 3.

after a local chemist had refused to supply her with opium.<sup>80</sup> The stepson said he had obtained for Elizabeth the precipitate allegedly used to poison Woolcock on several occasions.<sup>81</sup> Evidence was led as to the recovery of various ‘poisons’ at the house, especially the ‘precipitate’ and something called ‘antimonial wine’.

Even the apparently coincidental death of the family’s dog a few weeks before Woolcock’s death did not escape scrutiny. It was asserted that ‘small’<sup>82</sup> amounts of mercury were found in the dog, ‘which it has been said she [Elizabeth] experimented upon before trying her deadly arts on her husband’.<sup>83</sup> This argument was posited by the prosecution even though Woolcock had accused Pascoe of poisoning the dog after his eviction and had even made a complaint to the police.<sup>84</sup>

The relationship between Elizabeth, her husband and Pascoe were important factors at trial. Though evidence of motive is strictly unnecessary in a criminal prosecution for murder,<sup>85</sup> evidence of motive in the case was, as Wearing J observed to the jury, of ‘extreme importance’.<sup>86</sup> As Lord Atkinson later observed, ‘Evidence of motive necessarily goes to prove the fact of homicide by the accused...inasmuch as it is more probable that men are killed by

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<sup>80</sup> Elizabeth was a drug addict and ironically it appears her desperate efforts, whether directly or through her stepson, to purchase drugs was for her own addiction rather than any nefarious design. See Harris, above n 27; Peters, above n 27, 84-85; Peters, *Dead Woman Walking*, above n 29, 126, 141-142, 279, 284, 289; see Katarina Urban, ‘Not Guilty Verdict – 131 Years Later’ (2004) 85 *Police Journal* 22-23, <<http://murderpedia.org/female.W/w/woolcock-elizabeth.htm>>. Nevertheless this prompted local rumours and was later used by the prosecution to damning effect at trial to suggest that she had been secretly obtaining various drugs to poison her husband.

<sup>81</sup> *Observer*, 6 December 1873, 6.

<sup>82</sup> *South Australian Register*, 4 December 1873, 3. See also *South Australian Chronicle and Weekly Mail*, 6 December 1873, 13.

<sup>83</sup> ‘Our Adelaide Letter’, ‘Our Own Correspondent’, *Border Watch*, 7 January 1874, 3.

<sup>84</sup> *South Australian Register*, 4 December 1873, 3.

<sup>85</sup> See, eg, *R v De Guchy* (2002) 211 CLR 85, [53] (Kirby J).

<sup>86</sup> *South Australian Register*, 5 December 1873, 3.

those who have some motive for killing them than by those who do not'.<sup>87</sup> Several witnesses testified that they had never observed any hostility between Elizabeth and her husband.<sup>88</sup> The stepson, Thomas, said Elizabeth and his father 'were on bad terms sometimes' but 'they never had any very serious disagreements'.<sup>89</sup> Pascoe testified he believed Elizabeth and her husband were on good terms and he had never heard Elizabeth speak unkindly of him.<sup>90</sup>

Other witnesses painted a very different picture and testified to Elizabeth's regular references to the unhappy state of her marriage, the limited sum that her husband advanced her to maintain their house and her claims of ill treatment and violence from Woolcock. Elizabeth had told a James Merrifield that she would rather poison herself than live on the paltry sum that Woolcock advanced her.<sup>91</sup> A David Buzzard testified that Elizabeth had volunteered she and Woolcock were unhappy,<sup>92</sup> and confided, '[m]y husband thought he could treat me as he pleased, but if he treats me badly again it will be the last time'.<sup>93</sup> Buzzard claimed this last sentence was spoken 'emphatically, as if she meant them'.<sup>94</sup> Jane and John Nicholls, neighbours, testified that Woolcock had resented Pascoe and Elizabeth had told them that her husband had slapped her after he

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<sup>87</sup> *R v Ball* [1911] AC 47, 68.

<sup>88</sup> See *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14 (Hannah Blight); (Richard Hartigan); (Sarah Nichols).

<sup>89</sup> *South Australian Register*, 5 December 1873, 2. Thomas also volunteered that his stepmother was 'always kind' to him: at 2.

<sup>90</sup> *Ibid.* Though another account notes Pascoe testified that Woolcock and Elizabeth never argued more than any normal married couple, 'a civil growl now and again': *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14. Given the local gossip and the prosecution's pointed reference to Pascoe's part, it is likely that Pascoe would be circumspect in his testimony on this point.

<sup>91</sup> *Observer*, 6 December 1873, 6.

<sup>92</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14; *South Australian Register*, 5 December 1873, 3. Buzzard told Elizabeth she had been in 'a great hurry' to get married and she replied that she had only married Woolcock to 'spite those who were opposed to the marriage': at 3.

<sup>93</sup> *South Australian Register*, 5 December 1873, 3.

<sup>94</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14. See also *South Australian Register*, 5 December 1873, 3.

had been taken ill,<sup>95</sup> and that if she was again slapped, she would not live with her husband again.<sup>96</sup> Jane Nicholls recalled Elizabeth several times complaining of ill treatment from her husband and that he ‘was very unkind to her and that they did not agree very well together’.<sup>97</sup> Jane Nicholls stated Elizabeth had explained to her that the reason that Woolcock had slapped her was finding her writing to Pascoe. This had been about two weeks prior to Woolcock’s final illness. A Henry Allen, a relative of Woolcock, was unimpressed by the ‘very rough manner’ shown by Elizabeth to her ill husband, ‘not the way I should like to be treated by a wife’.<sup>98</sup> Allen highlighted Elizabeth’s suspicious addition of a substance that looked like ‘sugar’ in the ‘antimonial wine’ she gave to Woolcock in his presence.<sup>99</sup> Elizabeth’s stepsister, Mary Slape, produced a letter dated 10 April 1873 written to her from Elizabeth in which Elizabeth declared:

I am going to leave here now; and I cannot stop here any longer. I have to put up with it as long as I can but Tom [Woolcock] has got so bad, that I cannot bear it any longer. He has been dreadful since I have been out here living. He won’t let me go nowhere, and he has made a dreadful row every day for this week, and tonight he called me everything that was bad...In fact I could not tell all he says, but if anyone is in the house, he is like raw milk, you would not think he could say anything wrong. But he is a perfect devil; and if stop here much longer I shall hang myself. I have been tempted to do it two or three times.<sup>100</sup>

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<sup>95</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.* See also *South Australian Register*, 5 December 1873, 3.

<sup>98</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14.

<sup>99</sup> The unspoken inference was that this was the mercury precipitate used by Elizabeth to poison her husband. Woolcock complained ‘it had a very nasty taste’: *South Australian Register*, 6 December 1873, 14; and Allen testified he had tasted the wine and found it ‘turbid’ with ‘a nasty faint taste’: *South Australian Register*, 5 December 1873, 3. However, Allen revealed in cross-examination that he was a teetotaller and was not a good judge of wine! See *South Australian Register*, 5 December 1873, 3; *South Australian Register*, 6 December 1873, 14. One must wonder if Elizabeth would have been so foolish or brazen to have poisoned Woolcock in the presence of one of his relatives.

<sup>100</sup> *South Australian Register*, 5 December 1873, 3; *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14.

The precise relationship between Pascoe and Elizabeth was never made clear at the trial. Certainly, whether it supported the prosecution's portrayal of Elizabeth as a 'scarlet woman' and afforded her motive for murdering her husband as alleged by the prosecution was never resolved. Pascoe, surprisingly, was never directly asked or challenged by either the prosecution or the defence at trial about the nature of his relationship with Elizabeth.<sup>101</sup> Yet Elizabeth had remarked to several witnesses about the friction between Pascoe and her husband and the fact that her husband had ordered Pascoe to leave the house. Woolcock had even accused Pascoe of poisoning the family dog. A police officer described finding 'Valentines' and a photograph of Pascoe in Elizabeth's possession at her house.<sup>102</sup> A James Merrifield described on several occasions seeing Elizabeth and Pascoe 'larking together – catching hold of each other'.<sup>103</sup> This damning testimony directly hinted at 'the rumoured illicit love affair that has ultimately led to murder'.<sup>104</sup> Witnesses also described Elizabeth delivering letters to Pascoe at his new address three or four times after he had left the Woolcocks' premises,<sup>105</sup> although these could have simply been readdressed mail.<sup>106</sup> Ellen Nicholls claimed that Elizabeth had told her, 'I can, if I like, be Tom Pascoe's future bride'.<sup>107</sup> A Charles Richards testified that Elizabeth told him Woolcock had turned Pascoe out and Elizabeth had added, 'But if he goes I shall not be long after him. I shall not be as big a fool as I was last time.'<sup>108</sup> I shall take all the

<sup>101</sup> See *South Australian Register*, 5 December 1873, 3; *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14. This would now be a significant omission by the prosecution and in breach of the rule in *Brown v Dunn* (1893) 6 R 67, that requires any imputation against a witness to be put to that witness in cross-examination.

<sup>102</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 13.

<sup>103</sup> *Ibid* 14. Another report noted the testimony as 'larking about and scuffling together': *South Australian Register*, 5 December 1873, 3. Though it is unclear what Merrifield exactly meant by this, it clearly hinted at some illicit romantic liaison.

<sup>104</sup> Peters, above n 27, 133.

<sup>105</sup> Elizabeth described these related to 'Lodge business': see Peters, above n 27; *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14.

<sup>106</sup> *Observer*, 6 December 1873, 6.

<sup>107</sup> *Ibid*. See also *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14.

<sup>108</sup> Richards explained Elizabeth was referring to an earlier occasion when she had left her husband.

money I can lay hold of".<sup>109</sup> A William Carpenter claimed he had seen Pascoe 'frequently' at the Woolcock's home at all times of the day when he was not a lodger,<sup>110</sup> however Pascoe stated he had regularly visited Woolcock during his illness.<sup>111</sup>

## V ADDRESSES TO THE JURY AND VERDICT

The defence called no witnesses and Elizabeth was unable at the time to testify on her own behalf. Though Kaufmann can be criticised for his conduct of other aspects of the defence case such as his failure to call witnesses as to either the facts of the case (notably the cause of death)<sup>112</sup> or Elizabeth's good character,<sup>113</sup> his closing address is compelling.<sup>114</sup> Kaufmann depicted Elizabeth as a model devoted wife and drew attention to the inconclusive and circumstantial nature of the prosecution's case. He asked the jury

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<sup>109</sup> See *South Australian Register*, 5 December 1873, 3. See also *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14.

<sup>110</sup> *South Australian Register*, 5 December 1873, 3. See also *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14.

<sup>111</sup> See *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14; *South Australian Register*, 5 December 1873, 3.

<sup>112</sup> See Our Own Correspondent, 'City Correspondence', *Kapunda Herald*, 9 December 1873, 2. It was an unfortunate omission (if perhaps understandable given Elizabeth's lack of funds) that Kaufmann failed to elicit conflicting expert testimony at trial as to the cause of Woolcock's death. It was noted in 1860 that in poisoning cases that involved conflicting expert testimony as to the cause of death, it was rare for juries to convict. See *South Australian Chronicle and Weekly Mail*, 14 January 1860, 1S. 'It is hardly possible to get two men to depose to the same facts. One man will swear that the deceased died with every symptom of having been poisoned, while another will positively affirm that the death might fairly be attributed to natural causes': at 1S.

<sup>113</sup> The ability of the defence to call witnesses as to the accused's good character and reputation was a significant benefit in 19th century criminal procedure. See David Bentley, *English Criminal Justice in the 19<sup>th</sup> Century* (Hambledon Press, 1998) 10. Such witnesses could have a powerful effect upon the outcome of the trial and, in particular, on the question of whether the death sentence would be carried out.

<sup>114</sup> These combined omissions were a major oversight and highlighted Kaufmann's lack of legal experience.

how did an 'ignorant woman' like Elizabeth 'acquire the extensive knowledge she apparently possessed to the effects of the various poisons and the mode of efficaciously administering them?'<sup>115</sup> He cautioned the jury not to be influenced by the repeated use of the term 'poison' by the witnesses as nearly all drugs widely used for medical purposes were referred to as 'poisons'<sup>116</sup> and there was nothing to connect Elizabeth with supplying these 'poisons' to Woolcock.<sup>117</sup> The jury should confine themselves to the evidence about just one poison, mercury. Kauffmann highlighted the confusion as to the precise cause of Woolcock's death<sup>118</sup> and noted Woolcock's poor health and that he had been suffering from consumption. 'It was clear', as Kaufmann observed, that Woolcock 'was so far diseased that anything out of the ordinary course would have had a great effect on him'.<sup>119</sup> Kaufmann urged the jury (with perspicuity the authors would describe) to remember that Woolcock had consumed the two mercury pills prescribed by Bull and even a small dose of mercury would have had a 'good deal of effect upon him'.<sup>120</sup>

The law which prevented an accused from testifying on his or her behalf at trial meant Elizabeth could not explain why she had purchased the drugs.<sup>121</sup> Kaufmann highlighted the apparent lack of any motive for the alleged crime,<sup>122</sup> and appealed to the jury's sense of justice.

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<sup>115</sup> *South Australian Register*, 5 December 1873, 3.

<sup>116</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 10; *Observer*, 6 December 1873, 6. This is a valid point as in this period, 'drugs' and 'poisons' were interchangeable terms, see Robb, above n 10, 182.

<sup>117</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 10; *Observer*, 6 December 1873, 6.

<sup>118</sup> *Observer*, 6 December 1873, 6.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *South Australian Register*, 5 December 1873, 3; *Observer*, 6 December 1873, 6. Elizabeth's efforts to secure opiates were probably attributable to meet her own addiction rather than any sinister plot to poison her husband. See Peters, *Dead Woman Walking*, above n 29, 141-142, 284; Harris, above n 27.

<sup>122</sup> *South Australian Register*, 5 December 1873, 3; *Observer*, 6 December 1873, 6.

...was [it] likely a woman would be so fiendish and cruel as to deliberately and slowly murder her husband, not by one dose of poison in a moment of anger, but by small and repeated doses given day after day while she watched him passing out of the world in the agonies of slow torment - she would not be a woman to do this, but a fiend incarnate, and he did not think on the evidence as men of the world they would believe her guilty of such an act.<sup>123</sup>

In his closing address, the prosecutor asserted Elizabeth was 'criminally clever at slow poisoning' but had 'overlooked the fact that deadly evidence of her crime would remain in the body' of her husband.<sup>124</sup> He asserted she had gathered an extraordinary collection of poisons and tried various poisons and obtained them in various ways to suit her ends.<sup>125</sup> Andrews claimed that Elizabeth had accumulated two ounces of the mercury precipitate, the alleged means of murder, and this was enough to have rendered 200 doses.<sup>126</sup> Andrews reiterated that there was ample evidence of motive,<sup>127</sup> and pronounced that there was 'something singularly forcible, too, in the prisoner having said she could be Pascoe's future bride if she wanted'.<sup>128</sup> Andrews branded as 'ridiculous' the suggestion that the precipitate purportedly used to murder Woolcock might have been intended as a treatment for scurf and claimed there was no evidence to support that supposition<sup>129</sup> (an assertion at odds with the trial evidence).<sup>130</sup> Andrews even claimed, again despite no evidence, that Elizabeth had induced her husband to replace Herbert with Dickie after Herbert had started to restore her husband's health.<sup>131</sup>

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<sup>123</sup> *Observer*, 6 December 1873, 6. See also *South Australian Register*, 5 December 1873, 3.

<sup>124</sup> *Observer*, 6 December 1873, 6. See also *South Australian Register*, 5 December 1873, 3.

<sup>125</sup> *Observer*, 6 December 1873, 6.

<sup>126</sup> *Ibid.* Andrews arrived at this by estimating four and a half grains of the precipitate per dose.

<sup>127</sup> *South Australian Register*, 5 December 1873, 3.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> See the evidence of Dr Herbert who testified that it was in fact used to treat both ringworm and scurf: *South Australian Chronicle and Weekly Mail*, 6 December 1873, 13. See also the evidence of Opie: at 14.

<sup>131</sup> *Observer*, 6 December 1873, 6

In his final instructions to the jury on 4 December 1873, Wearing J dwelt on the ‘unhappy circumstances’<sup>132</sup> of Elizabeth’s marriage but noted the evidence did not establish that Woolcock was a tyrant. He reminded the jury that they must give no thought or regard to the consequences of their verdict and ‘no light or sentimental consideration should be allowed to warp their judgment’.<sup>133</sup> After just 25 minutes of deliberation<sup>134</sup> the jury returned a verdict of guilty with a recommendation of mercy on account of Elizabeth’s youth.<sup>135</sup> Wearing J concurred with the jury’s verdict and assured the jury that their recommendation of mercy would be forwarded to the Executive Council. The judge gave no clue of his own views on the question of mercy. Wearing J, who was noted as ‘considerably affected’,<sup>136</sup> passed sentence of death to be carried out on 30 December 1873.<sup>137</sup>

## VI REACTION TO THE GUILTY VERDICT

Both the guilty verdict and sentence of death were subject to fierce debate in the Colony, attracting ‘more attention than that of any other crime-convicted prisoner in the colony for years past’.<sup>138</sup> ‘Great dissatisfaction’ was reported at the verdict.<sup>139</sup> It was argued that the trial had been prejudiced and prejudged by the pre-trial gossip and publicity,<sup>140</sup> and the evidence at trial failed to establish Elizabeth’s

<sup>132</sup> *South Australian Register*, 5 December 1873, 3.

<sup>133</sup> *Ibid.* See also *South Australian Chronicle and Weekly Mail*, 6 December 1873, 10; *Observer*, 6 December 1873, 6.

<sup>134</sup> Given subsequent events it appears that the jury were easily convinced of Elizabeth’s guilt and most of the time was devoted to whether a recommendation of mercy should be attached to their verdict. See the evidence of the jury foreman in a subsequent prosecution for criminal libel in *R v Marrett and James*: *South Australian Register*, 18 March 1874, 3; *South Australian Chronicle and Weekly Mail*, 21 March 1874, 14.

<sup>135</sup> *South Australian Register*, 5 December 1873, 3.

<sup>136</sup> *Ibid.*

<sup>137</sup> The original date for the execution would have been Christmas day and Wearing J granted an extra five days.

<sup>138</sup> *Yorke Peninsula Advertiser*, 12 December 1873, 2.

<sup>139</sup> ‘Justice’, *Southern Argus*, 12 December 1873, 3.

<sup>140</sup> Peters, above n 27, 150; Peters, *Dead Woman Walking*, above 29, 249-250. This argument has persisted to the present day. See, eg, David Corker and

guilt, being 'entirely circumstantial'.<sup>141</sup> The *Southern Argus* declared that 'had Elizabeth secured a more experienced lawyer than Kaufmann, 'probably the chances of an acquittal would have been much greater'.<sup>142</sup> One letter questioned the reliability of the scientific tests as to the presence of mercury in the deceased and that this cast strong doubt on the entire prosecution case.<sup>143</sup> A columnist at the *Kapunda Herald* attacked the jury's verdict as reducing trial by jury, 'into something very akin to a farce' and had made a mockery of the entire legal system.<sup>144</sup> The columnist declared:

I cannot see that the jury were justified in the verdict returned. There were no doubt grounds for suspicion, but I fail to see any adequate motive for the commission of the crime...The whole case rests upon the gossiping suspicion of a few Cornish women...I confess I cannot bring myself to believe that the woman actually committed the murder, notwithstanding what the Moonta gossips may say.<sup>145</sup>

Imputations were made by two publications<sup>146</sup> as to the propriety of the jury's verdict, suggesting that the jury had arrived at its verdict, not by weighing up the evidence, but by a process known as 'shaking the hat'.<sup>147</sup> This charge was repudiated by the jury<sup>148</sup> in a

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Michael Levi, 'Pre-trial Publicity and its Treatment in English Courts' [1996] *Criminal Law Review* 622; Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity: an Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of New South Wales, 2001).

<sup>141</sup> 'Justice', *Southern Argus*, 12 December 1873, 3.

<sup>142</sup> *Ibid.*

<sup>143</sup> Peters, *Dead Woman Walking*, above n 29, 254. See further below Part VII.

<sup>144</sup> Our Own Correspondent, 'City Correspondence', *Kapunda Herald*, 9 December 1873, 2.

<sup>145</sup> *Ibid.*

<sup>146</sup> See Our Own Correspondent, 'City Correspondence', *Kapunda Herald*, 9 December 1873, 2; *The Mirror*, 9 December 1873. The relevant edition of *The Mirror* is not available but a transcript of the relevant remarks (without the accompanying cartoon) can be found in the subsequent trial of the publisher and journalist for criminal libel. See *R v Marrett and James: South Australian Advertiser*, 3 January 1874, 3; *South Australian Register*, 3 January 1874, 3.

<sup>147</sup> See *Observer*, 13 December 1873, 6; 'Libelling a Jury', *South Australian Register*, 13 December 1873, 5. See also Mr Ward MHA's question to the Chief Secretary, House of Assembly, 10 December 1873, reported in *South*

letter to Wearing J.<sup>149</sup> The jury called on the authorities to bring a prosecution for criminal libel against the offending newspapers,<sup>150</sup> and proceedings were subsequently brought against the *Mirror*.<sup>151</sup>

Other commentators were adamant that the evidence adduced at trial fully supported the jury's verdict of guilty.<sup>152</sup> The *Northern Argus*, for example, noted that Elizabeth's trial and another recent murder case 'have awakened an unusual amount of interest in the public mind, the varied points of importance brought out in evidence being freely commented on, and the verdict in both cases acknowledged just'.<sup>153</sup>

## VII DID ELIZABETH COMMIT THE CRIME?

Though it is beyond the scope of this article (or indeed any article) to definitively resolve whether Elizabeth committed the murder for which she was convicted, the prosecution case, if superficially compelling, is less than overwhelming when subjected to close scrutiny.<sup>154</sup> Indeed, as Peters asserts, the case against Elizabeth

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*Australian Register*, 11 December 1873, 5; 'Libelling a Jury', *South Australian Register*, 13 December 1873, 5.

<sup>148</sup> 'Libelling a Jury' *South Australian Register*, 13 December 1873, 5. See the full letter sent by the jury to Wearing J, *South Australian Register*, 13 December 1873, 3.

<sup>149</sup> 'Libelling a Jury' *South Australian Register*, 13 December 1873, 5.

<sup>150</sup> See *Observer*, 13 December 1873, 6; Our Own Correspondent, 'Letter from Adelaide', *Border Watch*, 17 December 1873, 3.

<sup>151</sup> See *R v Marrett and James* (*South Australian Advertiser*, 3 January 1874, 3; *South Australian Register*, 3 January 1874, 3) (committal); *South Australian Chronicle and Weekly Mail*, 21 March 1874, 14 (trial). The case was resolved before the jury reached a verdict after the defendants withdrew any imputations against the jury in Elizabeth's trial.

<sup>152</sup> See, eg, *South Australian Advertiser*, 20 December 1873, 2; 'The Prisoners under Sentence of Death', *South Australian Chronicle and Weekly Mail*, 20 December 1873, 8; 'Editorial', *Wallaroo Times and Mining Journal*, 20 December 1873, 2.

<sup>153</sup> 'Editorial', *Northern Argus*, 26 December 1873, 2.

<sup>154</sup> See Urban, above n 80.

appears to be the product of little more than a combination of ‘unsubstantiated gossip, innuendo and misrepresentation’<sup>155</sup> and based on ‘flimsy circumstantial evidence’.<sup>156</sup> The criticisms offered by the defence counsel of the prosecution case in his closing address are entirely justified.

The evidence of Elizabeth’s purported motive, namely her purported ‘criminal commerce’<sup>157</sup> with Pascoe, was tenuous. As she claimed at the Inquest, it was doubtful that she would have killed her husband for no financial gain to take up with someone such as Pascoe. Even Woolcock’s relatives, Mr and Mrs Snape (the same woman who had first persuaded Dickie to request an inquest), accepted at the Inquest that Woolcock believed his wife treated him well during his illness and gave no indication he had any suspicion as to the nature of his illness or of foul play.<sup>158</sup> Elizabeth’s desperate efforts through herself and her stepson to obtain opiates, such a prominent theme at the trial, was probably attributable to meet her own addiction rather than as part of any plot to poison her husband. Elizabeth’s possession of the mercury precipitate allegedly used to kill Woolcock similarly does not necessarily support the sinister and misleading interpretation placed on it by the prosecution. Such powders were legitimately used in this period to treat both people for skin disorders<sup>159</sup> (Elizabeth was suffering from such a condition referred to as ‘scurf’)<sup>160</sup> and dogs for ringworm. Both Herbert<sup>161</sup> and

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<sup>155</sup> Peters, *Dead Woman Walking*, above n 29, 9.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Border Watch*, 7 January 1874, 3.

<sup>158</sup> ‘Suspicious Death at Yelta’, *South Australian Chronicle and Weekly Mail*, 13 September 1873, 6. Mrs Snape confirmed this at trial: *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14.

<sup>159</sup> White precipitate was a well known remedy for psoriasis. See Eugene Farber, ‘History of the Treatment of Psoriasis’ (1992) 27 *Journal of the American Academy of Dermatology* 640-645.

<sup>160</sup> See the evidence of Mrs Snape at trial, *South Australian Register*, 5 December 1873, 3.

<sup>161</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 13. Herbert noted the ‘lower classes’ used white precipitate to kill vermin on the head. See *Observer*, 6 December 1873, 5.

a chemist called Opie<sup>162</sup> confirmed this at the trial. Just how Elizabeth acquired such an intimate knowledge of the properties and effects of mercury was never made clear on the prosecution case. The evidence of the dog's death seems of marginal relevance and an unnecessary distraction.<sup>163</sup>

It was never even clearly established at the trial that the cause of Woolcock's death was actually mercury poisoning.<sup>164</sup> It could have been due to natural causes as Dickie had originally considered and testified at the Inquest.<sup>165</sup> Herbert, whilst claiming at the Inquest that mercury poisoning was the likely cause of death, accepted that the condition of the deceased's body at the post-mortem might have arisen from a natural disease.<sup>166</sup> Woolcock had been suffering, as the post-mortem confirmed, from both dysentery and consumption.<sup>167</sup>

The reliability of the findings in Woolcock's organs of the excessive amounts of mercury purportedly found by Francis and Gosse is open to question.<sup>168</sup> One letter to a newspaper highlighted Francis's assertion at trial that the tests he had undertaken were capable of detecting a quantity of mercury as small as 1/100 of a grain of mercury and no other poison had been found. This was significant in light of the fact that Dickie, by his own admission, had prescribed Woolcock lead acetate and if Francis's tests were as reliable as he claimed, he should have also found traces of lead

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<sup>162</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14; *Observer*, 6 December 1873, 6.

<sup>163</sup> It might be speculated that the dog's death was due to innocent factors such as accidentally absorbing a lethal dose of white precipitate through the skin while being treated for ringworm: Frederick Irving and Daniel Butler 'Ammoniated Mercury Toxicity in Cattle' (1975) 16 *Canadian Veterinary Journal* 260.

<sup>164</sup> *Ibid.*

<sup>165</sup> See 'Suspicious Death at Yelta', *South Australian Chronicle and Weekly Mail*, 13 September 1873, 6.

<sup>166</sup> *Ibid.*

<sup>167</sup> The results of the post-mortem are broadly consistent with both conditions.

<sup>168</sup> Peters, *Dead Woman Walking*, above n 29, 275-276. It is significant that Woolcock's organs had been left exposed to the open air for 24 hours prior to testing giving rise to a risk of contamination. See Urban, above n 80.

acetate.<sup>169</sup> The authors of the letter argued this omission cast doubt on the entire prosecution case:

If the finding of one poisonous, metallic substance in the deceased's organs was sufficient to help gain a conviction for murder, then surely the inability of the analyst to find another substance which was known to have been present, must cast serious doubt upon the acceptability of the entire process.<sup>170</sup>

William Ey, a chemist who had followed the trial with keen professional interest wrote to the authorities challenging the soundness of the verdict in light of what he claimed was the flawed nature of the medical evidence.<sup>171</sup> The authorities were sufficiently perturbed to commission a report from a Dr Edward Way, the prison doctor, to review the evidence in Elizabeth's case to assist them in deciding whether to grant a reprieve.<sup>172</sup> Though both Ey's letter and Way's report have been lost, Peters notes that Samuel Way, the future Chief Justice (then a leading Adelaide lawyer), referred to his brother's report in two private letters. In the first letter dated 1 January 1874, Samuel Way notes that his brother 'reported that though the evidence of the administration of poison was unreliable and the medical evidence mistaken on some points, there could be no doubt that the deceased had died from mercurial poisoning. So it was decided that the sentence should be carried out'.<sup>173</sup> In the second letter, also dated 1 January 1874, Samuel Way again noted the 'mistaken' nature of the medical evidence and that whilst Woolcock had expired from mercury poisoning, no poison had been administered for about three weeks prior to his death.<sup>174</sup>

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<sup>169</sup> Peters, above n 27, 191; Peters, *Dead Woman Walking*, above n 29, 275-276.

<sup>170</sup> Quoted by Peters, above n 27, 191; Peters, *Dead Woman Walking*, above n 29, 275-276.

<sup>171</sup> Peters, *Dead Woman Walking*, above n 29, 256.

<sup>172</sup> *Wallaroo Times and Mining Journal*, 17 December 1873, 2. Both Ey's letter and Dr Way's report were presented to the Executive Council when they deliberated on the question of extending mercy to Elizabeth.

<sup>173</sup> Peters, *Dead Woman Walking*, above n 29, 256-257.

<sup>174</sup> *Ibid* 257. Samuel Way also referred to the 'incompetent man' who had forced himself into the case. This appears a reference to Kaufmann.

Francis and Gosse describe using an iodide test to determine the presence and quantity of mercury in both the viscera of Woolcock and the dog. This was the standard test for detecting mercury in this period and would have given an indication to the presence and a reasonable (but far from precise) estimation of the quantity of mercury in the deceased. However, the limit of accuracy for the iodide test for mercury is closer to  $1/6^{\text{th}}$  of a grain of mercury not the  $1/100^{\text{th}}$  claimed by Francis.<sup>175</sup> The test for mercury in biological substances is unreliable even by reasonably modern standards, with laboratories both over and under-estimating mercury (and other heavy metal) concentrations in a controlled comparative test.<sup>176</sup> The reason for Francis and Gosse returning a negative finding for lead acetate is unknown but may be due to the fact that they were looking only for what they expected to find, namely the presence of mercury. Iodide of lead will be observed as a yellow precipitate while iodide of mercury is a red precipitate. Both a red and yellow precipitate were isolated in these tests, however both were attributed to mercury.<sup>177</sup> A finding of lead should have been made by Francis and Gosse.<sup>178</sup>

Even if Woolcock's cause of death was in fact mercury poisoning as was asserted by Francis and Gosse, it cannot be established that Elizabeth had ever administered the poison to Woolcock, let alone with any intention to kill or harm him. It is in this context that the roles of Dickie and especially Bull assume significance.<sup>179</sup> The most plausible alternative explanation for Woolcock's death lies with the nature of the 'care' that he received from Bull and, to a lesser extent, from Dickie. Bull accepted at the trial that he had prescribed

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<sup>175</sup> Robert Reimers, W Dickinson Burrows and Peter Krenkel, 'Total Mercury Analysis: Review and Critique' (1973) 45 *Water Pollution Control Federation Journal* 814-828.

<sup>176</sup> Robert Lauwerys et al., 'Intercomparison Program of Lead, Mercury and Cadmium Analysis in Blood, Urine, and Aqueous Solutions' (1975) 21 *Clinical Chemistry* 551-557.

<sup>177</sup> *Observer*, 6 December 1873, 5.

<sup>178</sup> Fred Bowman, 'Potassic Iodide as a Blowpipe Reagent' (1890) 7(4) *Proceedings of the Nova Scotian Institute of Science* 363.

<sup>179</sup> Mercury was not used at Woolcock's work. See *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14 (Richard Hartigan).

Woolcock two podophyllin pills that each contained 1/3 grain of mercury and he could not be sure that Woolcock had not taken these pills.<sup>180</sup> Yet Bull had acknowledged at the Inquest that there ‘might’ have been a grain of mercury in the three pills he had prescribed for Woolcock as treatment.<sup>181</sup> Bull insisted at the Inquest that Woolcock only consumed one of these pills<sup>182</sup> and at the trial he denied ever removing any medicine he had prescribed for Woolcock from the house.<sup>183</sup> However, Bull’s testimony is less than reliable on these points.

The issue of Bull prescribing mercury is pertinent. There are three forms of inorganic mercury: so called ‘white precipitate’ also known as mercuric amidochloride; ‘calomel’ otherwise known as mercurous chloride and ‘corrosive sublimate’ or mercuric chloride. For continuity these shall be referred to by the names given in the trial (shown in quotation marks). White precipitate, a common antiseptic of the period,<sup>184</sup> was the alleged poison used by Elizabeth to murder Woolcock. Calomel is a component of the podophyllin pills prescribed by Bull on 25 July 1873.

Examination of the material safety data sheets (MSDS) gives the relative toxicity for each of these compounds.<sup>185</sup> Calomel has an

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<sup>180</sup> *South Australian Chronicle and Daily Mail*, 6 December 1873, 13.

<sup>181</sup> ‘The Yelta Poisoning Case’, *South Australian Register*, 8 September 1873, 6.

<sup>182</sup> *Ibid*; ‘Suspicious Death at Yelta’, *South Australian Chronicle and Weekly Mail*, 13 September 1873, 6.

<sup>183</sup> *South Australian Register*, 5 December 1873, 2; *South Australian Chronicle and Weekly Mail*, 6 December 1873, 13.

<sup>184</sup> Werner Aberer, Georg Gerstner and Hubert Pehamberger, ‘Ammoniated Mercury Ointment: Outdated but still in Use’ (1990) 23 *Contact Dermatitis* 68.

<sup>185</sup> A Material Safety Data Sheet provides workers and emergency personnel with procedures for handling or working with that substance in a safe manner, and includes information such as physical data (melting point, boiling point, etc.), toxicity, health effects, first aid, reactivity, storage, disposal, protective equipment, and spill-handling procedures. United Nations, *Globally Harmonized System of Classification and Labelling of Chemicals (GHS)*, <[http://www.unece.org/trans/danger/publi/ghs/ghs\\_rev04/04files\\_e.html](http://www.unece.org/trans/danger/publi/ghs/ghs_rev04/04files_e.html)>.

LD<sub>50</sub><sup>186</sup> of 166 mg/kg,<sup>187</sup> white precipitate is twice as toxic with an LD<sub>50</sub> of 86 mg/kg<sup>188</sup> while corrosive sublimate is highly toxic with an LD<sub>50</sub> of only 1mg/kg<sup>189</sup> (making corrosive sublimate 166 times more lethal than calomel).<sup>190</sup> Neither white precipitate nor calomel is easily absorbed by the body when taken orally,<sup>191</sup> however corrosive sublimate is easily absorbed in the alimentary canal.<sup>192</sup> All three forms of mercury are solids at room temperature and highly toxic when particles of the powder are inhaled.<sup>193</sup> The symptoms of mercury poisoning are similar for white precipitate, calomel and corrosive sublimate, varying only in severity. The symptoms of acute poisoning are: irritation of the throat and stomach, bloody vomiting, diarrhoea, urine suppression and salivation. Post mortem examination would show corrosion along the entire alimentary canal and severe damage to the kidneys.<sup>194</sup> Chronic poisoning is associated with loss of teeth, neurological symptoms and hand tremors as well

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<sup>186</sup> In toxicology, the median lethal dose, LD<sub>50</sub> (abbreviation for 'lethal dose, 50%') of a toxin, radiation, or pathogen is the dose required to kill half the members of a tested population after a specified test duration. LD<sub>50</sub> figures are frequently used as a general indicator of a substance's acute toxicity.

<sup>187</sup> Science Lab, 'Material Safety Data Sheet: Mercurous chloride MSDS' (created 10 September 2005, updated 21 May 2013), <<http://www.sciencelab.com/msds.php?msdsId=9924623>>.

<sup>188</sup> Science Lab, 'Material Safety Data Sheet: Ammoniated mercury MSDS' (created 10 September 2005, updated 21 May 2013), <<http://www.sciencelab.com/msds.php?msdsId=9922909>>.

<sup>189</sup> Science Lab, 'Material Safety Data Sheet: Mercuric Chloride MSDS' (created 10 September 2005, updated 21 May 2013), <<http://www.sciencelab.com/msds.php?msdsId=9924616>>.

<sup>190</sup> See, eg, Leonard Goldwater, 'The Toxicology of Inorganic Mercury' (1957) 65 *Annals of the New York Academy of Sciences* 498; Thomas Clarkson, 'The Toxicology of Mercury' (1997) 34 *Critical Reviews in Clinical Laboratory Sciences* 369.

<sup>191</sup> See, eg, Bruna Azevedo et al., 'Toxic effects of mercury on the cardiovascular and central nervous systems' (2012) *Journal of Biomedicine and Biotechnology* ID 949048, 11; Clarkson, above n 190, 369.

<sup>192</sup> See, eg, Azevedo et al., above n 191; Harold Shoemaker, 'The Pharmacology of Mercury and its Compounds' (1957) 65 *Annals of the New York Academy of Sciences* 504.

<sup>193</sup> See Science Lab, above nn 187-189.

<sup>194</sup> See Goldwater, above n 190, 498; Watson, above n 6, 9-11.

as weight loss, weakness and salivation.<sup>195</sup> Woolcock's symptoms of gastric irritation, sore throat, salivation, vomiting and diarrhoea with post mortem findings of an 'intensely congested' left kidney, a 'partially congested' right kidney and an ulcerated alimentary canal are consistent with severe acute mercury poisoning.

Herbert's evidence at trial is significant. Herbert, who appears to have been the most competent of the three doctors to attend Woolcock, testified that as soon as he examined Woolcock he saw he was suffering from the ill effects of mercury poisoning and demanded to know who had been giving him mercury.<sup>196</sup> Herbert noted Elizabeth had told him that nothing had been taken beyond what Bull and Dickie had prescribed.<sup>197</sup> Herbert noted Woolcock's condition had improved during the 13 days he had treated him until Woolcock had informed him he could no longer afford Herbert's services and would be returning to Dickie.<sup>198</sup> Herbert informed Woolcock that it was 'useless' for him to return to Dickie and once dismissed he would not again enter the house.<sup>199</sup>

It is highly significant that, as Kaufmann suggested in his closing address, Woolcock was already in a very weakened state and the administration of mercury, even the small amounts that Bull claimed he had prescribed, could have been enough to have caused his death. Dickie noted at the Inquest that Woolcock's 'very weak' state made him 'very susceptible to mercury'.<sup>200</sup> Gosse similarly accepted at the trial that 'a man of weak constitution and suffering from disease of the kidneys would be very susceptible to mercury'.<sup>201</sup>

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<sup>195</sup> Jack Wands, Sharon Weiss, John Yardley and Willis Maddrey, 'Chronic Inorganic Mercury Poisoning due to Laxative Abuse' (1974) 57 *American Journal of Medicine* 92.

<sup>196</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 13.

<sup>197</sup> *Ibid.* Herbert told Elizabeth he was not concerned with what the other doctors had prescribed.

<sup>198</sup> *Ibid.* Robert Northey also confirmed that Woolcock improved under Herbert's treatment: at 14.

<sup>199</sup> *Ibid.* 13.

<sup>200</sup> 'Suspicious Death at Yelta', *South Australian Chronicle and Weekly Mail*, 13 September 1873, 6.

<sup>201</sup> *South Australian Register*, 3 December 1873, 3.

There is no way to conclusively prove how (if at all) Woolcock came to ingest the fatal dose of mercury (assuming this was the cause of death). However, it is possible to theorise a plausible alternative to the prosecution case. We know that in the initial Inquest into the death, Bull reported prescribing three podophyllin pills containing at least 1/3 grain (approximately 22 mg) of calomel each, and that Woolcock consumed (at least) one of these pills. At the time, calomel was still a legitimate medical treatment for a variety of illnesses. In fact, the Southern Medical Records (circa 1874) states ‘When at a loss what to do, or what to administer, order small doses of calomel...’<sup>202</sup> The toxicity of calomel is now known and it would be gross malpractice for a medical practitioner to prescribe mercury today.<sup>203</sup> What would not have been known to Bull is the propensity of calomel to readily oxidise to the corrosive sublimate form (with elemental mercury as a by-product). This occurs when the calomel is stored in such a way that it is exposed to UV light. This oxidation can also occur *in vivo*.<sup>204</sup> Thus the seemingly innocuous calomel may have been a dose of highly lethal corrosive sublimate. Even if Woolcock did only consume the one podophyllin pill of the three prescribed, this could have been a 22 mg dose of corrosive sublimate, which has potential to be a lethal dose for an adult.<sup>205</sup>

It should be noted that the white precipitate allegedly used by Elizabeth to poison Woolcock is also toxic, and there is no way to know if in fact this was the lethal agent. There are numerous reported cases of accidental mercury poisoning from white precipitate, but this is usually through skin absorption, as white

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<sup>202</sup> John Haller, ‘With a Spoonful of Sugar: the Art of Prescription Writing in the late 19<sup>th</sup> and early 20<sup>th</sup> Century’ (1984) 26 *Pharmacy in History* 171.

<sup>203</sup> Interestingly, and as an aside, a number of poisoning cases due to calomel are still reported each year due to it being an ingredient in beauty creams for skin whitening and in unregulated herbal medicines. See Sharon Davis, ‘Unregulated Potions still cause Mercury Poisoning’ (2000) 173 *Western Journal of Medicine* 19.

<sup>204</sup> See Kato Tennakone, ‘Photocatalytic Properties of Mercury I Chloride and Photogeneration of Oxygen from Water’ (1987) 15 *Solar Energy Materials* 59; EPA Report, ‘Summary Review of Health Effects Associated with Mercuric Chloride: Health Issue Assessment’ EPA/600/R-92/199, 22 July 2004.

<sup>205</sup> EPA Report, above n 204; Goldwater, above n 190, 498.

precipitate has been a common ingredient of antiseptic creams and skin lightening creams.<sup>206</sup> In addition, white precipitate is not soluble in water which makes poisoning via the oral route less likely.<sup>207</sup>

A contributing factor to Woolcock's eventual death may have been the treatment prescribed by Dickie. In the day or two before Woolcock's death Dickie prescribed medication containing a dose of three grains (195 mg) of lead acetate. With six doses in a lot and two lots taken this indicates Woolcock consumed approximately 2400 mg of lead acetate. Lead consumption is another acknowledged cause of renal failure and absorption is enhanced by lack of food intake and poor condition (from which we know Woolcock was suffering). A primary target organ of both mercury and lead is the kidneys and death from either poison is usually by renal failure.<sup>208</sup> Interestingly (and perhaps fatally), lead and mercury have an additive effect when taken together. Animal studies have shown that lead acetate and inorganic mercury act synergistically, substantially lowering the dose that is required to induce death.<sup>209</sup> It is quite plausible that the lead acetate would have compounded the existing ill effects of the mercury prescribed by Bull and, as Peters observes, 'have greatly worsened the condition and helped speed the ailing man on his journey to the grave'.<sup>210</sup>

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<sup>206</sup> Carl Becker et al., 'Nephrotic Syndrome After Contact with Mercury: a Report of Five Cases, Three After the Use of Ammoniated Mercury Ointment' (1962) 110 *Archives of Internal Medicine* 178-186; Donald Silverberg, John McCall, and James Hunt, 'Nephrotic Syndrome with use of Ammoniated Mercury' (1967) 120 *Archives of Internal Medicine* 581; E Young, 'Ammoniated Mercury Poisoning' (1960) 72 *British Journal of Dermatology* 449-455; Florian Kern et al., 'Ammoniated Mercury Ointment as a cause of Peripheral Neuropathy' (2009) 183 *Dermatology* 280-282.

<sup>207</sup> See Science Lab, above n 187.

<sup>208</sup> Elizabeth Brodtkin, 'Lead and Mercury Exposures: Interpretation and Action' (2007) 176 *Canadian Medical Association Journal* 59; Robert Goyer, 'Lead Toxicity: Current Concerns' (1993) 100 *Environmental Health Perspectives* 177; Goldwater, above n 190, 498.

<sup>209</sup> Hana Pohl and Joan Colman, 'Interaction profile for Chlorpyrifos, Lead, Mercury and Methylmercury', US Department of Health and Human Services, Public Health Service Agency for Toxic Substances and Disease Registry, August 2006, <<http://www.atsdr.cdc.gov/interactionprofiles/IP-11/ip11.pdf>>.

<sup>210</sup> Peters, *Dead Woman Walking*, above n 29, 287.

Ellen Nicholls at trial recalled noting Woolcock's condition about a month before he died that he was 'a man not long for this world' and he had been taking something he should not have taken.<sup>211</sup> Nicholls described Elizabeth volunteering that Bull's medicine had 'very nearly killed' her husband and that she had been unable to get it analysed as Bull had gone to Adelaide to the 'Lunatic Asylum'<sup>212</sup> and had taken the medicine away.<sup>213</sup> Dr Dickie at the Inquest volunteered that Woolcock had informed him 'that the medicine he had been taking had always made him sick and his teeth sore'.<sup>214</sup> Elizabeth had remarked to Dickie that she had tasted the medicine and it had also left her teeth sore.<sup>215</sup> Dr Dickie had asked to see this medicine but was informed by Woolcock that Bull had taken it away again. Dickie declared he 'was much surprised at this, as it is most unusual to take away medicines'.<sup>216</sup> Even Woolcock had volunteered to a friend called Robert Northey that he was 'very bad; and I am dissatisfied with Dr Bull's medicine, and shall not have him anymore'.<sup>217</sup> Woolcock observed that Bull's medicine 'was as bad as poison and he would have no more of Dr Bull's treatment',<sup>218</sup> and added, perhaps prophetically, 'I fear he has killed me'.<sup>219</sup>

Peters refers to Bull's 'very unusual and chequered career'.<sup>220</sup> He was even committed to a psychiatric institution,<sup>221</sup> and indeed Elizabeth had referred to Bull going to the 'Lunatic Asylum' after he

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<sup>211</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14.

<sup>212</sup> *Ibid.*

<sup>213</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14. See also *South Australian Register*, 5 December 1873, 3. Mrs Nicholls even told Woolcock and Elizabeth had it been her husband, she would have had analysed the 'medicine' Bull has prescribed and even had him opened before he was carried out of the house. Clearly Nicholls had no faith in Bull's medical expertise.

<sup>214</sup> 'The Yelta Poisoning Case', *South Australian Register*, 8 September 1873, 6.

<sup>215</sup> 'Suspicious Death at Yelta', *South Australian Chronicle and Weekly Mail*, 13 September 1873, 6.

<sup>216</sup> 'The Yelta Poisoning Case', *South Australian Register*, 8 September 1873, 6.

<sup>217</sup> *South Australian Register*, 5 December 1873, 3. See also *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14.

<sup>218</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14.

<sup>219</sup> *South Australian Register*, 5 December 1873, 3.

<sup>220</sup> Peters, *Dead Woman Walking*, above n 29, 291.

<sup>221</sup> *Ibid* 289.

had treated Woolcock.<sup>222</sup> It subsequently emerged after Elizabeth's trial and execution that Bull was a chronic drug addict and he died of a fatal drug overdose in May 1874. The *Medical and Surgical Review* observed that those acquainted with Bull's 'increasing peculiarities and recent domestic troubles'<sup>223</sup> would be unsurprised. It was noted that Bull had resorted to opium to alleviate 'an extremely painful disease' 'and consequently contracted a custom detrimental alike to his professional and social success'.<sup>224</sup> Bull's nephew expanded upon this point at the Inquest into his uncle's death and testified that Bull for many years had 'been in the habit'<sup>225</sup> of consuming a cocktail of drugs such as atropine, sulphuric ether, chloroform and opium.<sup>226</sup> Dickie confirmed Bull's misuse of drugs and unstable state of mind. The Coroner's jury unsurprisingly found that Bull 'came to his death through taking an overdose of narcotic poison while he was in an unsound state of mind'.<sup>227</sup>

It appears likely that when Bull had treated Woolcock in 1873 he was in a 'drug befuddled state',<sup>228</sup> and frankly, could have mixed<sup>229</sup> and prescribed virtually anything. Given the likelihood of Bull having diagnosed, whether wittingly or unwittingly, mercury to Woolcock, it is quite possible that there lies the answer to Woolcock's death. The unfortunate and potentially lethal combination of mercury prescribed by Bull and the lead acetate prescribed by Dickie to Woolcock, especially in his already weakened state, provides a plausible, if not likely, explanation for Woolcock's death.

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<sup>222</sup> *South Australian Chronicle and Weekly Mail*, 6 December 1873, 14.

<sup>223</sup> *Medical and Surgical Review*, 1 June 1874, quoted by Peters, *Dead Woman Walking*, above n 29, 296.

<sup>224</sup> *Medical and Surgical Review*, 1 June 1874, quoted by Peters, *Dead Woman Walking*, above n 29, 296.

<sup>225</sup> 'The Late Dr Bull JP', *South Australian Register*, 15 May 1874, 7.

<sup>226</sup> 'Suicide of Dr Bull', *South Australian Chronicle and Weekly Mail*, 16 May 1874, 6.

<sup>227</sup> *Ibid*; 'The Late Dr Bull JP', *South Australian Register*, 15 May 1874, 7; 'Suicide of Dr Bull', *South Australian Advertiser*, 14 May 1874, 3.

<sup>228</sup> Harris, above n 27.

<sup>229</sup> Bull, unlike most medical practitioners of the period, did not use an apothecary but mixed his own patient's medications. See Peters, *Dead Woman Walking*, above 29, 287.

The lack of 'hard' evidence to incriminate Elizabeth is telling. Combining the nature and effects of the 'medication' prescribed by Bull and Dickie with the many other features of concern in the case such as: the less than precise medical and scientific evidence as to the precise cause of Woolcock's death, the tenuous evidence of motive, the never resolved issue of just how someone such as Elizabeth could have acquired such an intimate knowledge of the effects of mercury poisoning, her apparent legitimate possession of the mercury precipitate supposedly used to poison Woolcock, the 'red herring' of the dog's death, the likely real reason why she had acquired drugs (whether herself or by her stepson) and her understandable if ill-advised lack of frankness at the Inquest, it is likely that any reasonable jury with knowledge of all the facts of the case would have entertained a reasonable, if not strong, doubt as to Elizabeth's guilt.<sup>230</sup> The authors agree with Peters' conclusion, though not necessarily all his reasoning,<sup>231</sup> that it appears Elizabeth was 'an innocent victim of circumstance'.

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<sup>230</sup> A reconstruction of Elizabeth's trial in 2004 unsurprisingly resulted in a verdict of not guilty: *Ibid* 301. There are ongoing efforts to secure Elizabeth a posthumous pardon. See Hon Ann Bressington MLC, Legislative Council, *Parliamentary Debates*, South Australia, 10 December 2010, 1426. Though this might appear an example of shutting the historical stable door after the horse has bolted, there are recent examples of such cases. See, eg, Colin Ross who was hanged in Melbourne in 1922 for the sexually motivated murder of a 12 year old girl but was posthumously pardoned by the Victorian Governor in 2008 after a judicial enquiry confirmed Ross has been the victim of a miscarriage of justice. See John Silvester, 'Ross Cleared of Murder nearly 90 Years Ago', *The Age*, 27 May 2008. In South Australia, a new law came into effect in May 2013 to allow a second and subsequent appeal against conviction, where fresh and compelling evidence comes to light post-conviction which should, in the interests of justice, be considered on appeal. The legislation provides an alternative to the prerogative of mercy, and there are no time constraints in which to make an application. See *Statutes Amendment (Appeals) Act 2013 (SA)*.

<sup>231</sup> Peter's suggestion, for example, that Woolcock may have committed suicide is fanciful: see Peters, *Dead Woman Walking*, above n 29, 286 is fanciful.

## VIII CONSIDERATION OF MERCY: ‘SHE HAS BEEN HUNG BY THE NECK TILL DEAD’,<sup>232</sup>

It was not only the verdict of guilty that was the topic of debate, but the exercise of the death sentence in Elizabeth’s case was contentious.<sup>233</sup> The refusal to commute the death sentence was considered surprising,<sup>234</sup> and there were calls for mercy. The *Yorke Peninsula Advertiser*, for example, passionately argued:

Every humane instinct shudderingly protests against the savage and barbarous rendering of the sentence “blood for blood”! On these days it is simply the law revenging itself. Our cry is for a reprieve, and adequate expiatory punishment such as instant death by rope does not give. We urge again, then that there should be no more hanging and that expiation of crimes should rather be in acts of repentant reform, and labours done for outraged society.<sup>235</sup>

However the prevailing opinion of the Press opposed the grant of mercy given the gravity of Elizabeth’s alleged crime (especially the use of poison and the fact the victim was her husband) and the perceived need for punishment and deterrence<sup>236</sup> (considered the twin rationales for the death penalty). A columnist in the *Border Watch* stated that having been found guilty of ‘one of the most diabolical crimes ever committed in this or any other country’, the Executive Council had had no option but to proceed with Elizabeth’s execution.<sup>237</sup> The *Advertiser* accepted that there was a difference of

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<sup>232</sup> ‘Our Adelaide Letter’, ‘Our Own Correspondent’, *Border Watch*, 3 January 1874, 3.

<sup>233</sup> It is perhaps surprising that the case did not feature in Parliamentary debates in the Colony, except as to the imputation the jury had drawn lots to arrive at its verdict.

<sup>234</sup> *Kapunda Herald*, 23 December 1873, 3.

<sup>235</sup> *Yorke Peninsula Advertiser*, 12 December 1873, 2.

<sup>236</sup> As William Blackstone states, ‘the end of punishment is to deter men from offending’. 4 *Blackstone’s Commentaries* 1-19. See, eg, ‘Editorial’, *Walleroo Times and Mining Journal*, 20 December 1873, 2; ‘Editorial’, *Northern Argus*, 26 December 1873, 2.

<sup>237</sup> ‘Our Own Correspondent’, ‘Our Adelaide Letter’, *Border Watch*, 10 December 1873, 3. See also ‘Psuedo-Philanthropy’, *Bunyip*, 12 December 1873, 3.

opinion amongst its readers on the question of mercy,<sup>238</sup> but also supported the Executive Council's decision:

Two foul murders<sup>239</sup> were undoubtedly committed; the jury who heard the whole of the evidence and saw the demeanour of the witnesses, came to the conclusion that the prisoners were guilty, and as a matter of course they were sentenced to death. Now it is certain that this sentence will be carried out. We believe the jury could have come no other conclusion with the evidence before them, and ... no reason was shown for commuting the penalty...<sup>240</sup>

The *Advertiser* also dismissed the notion that Elizabeth's youth supported the jury's recommendation for mercy.<sup>241</sup> Consideration of her gender was similarly rejected, and the debate focussed on the role of the jury to find a verdict solely according to the evidence adduced at trial.<sup>242</sup> Any attempt in the absence of good reason to recommend mercy amounted to an impermissible effort 'to shift the responsibility which properly belongs to them, to the Executive Council'.<sup>243</sup> This debate on the role of the jury appears to have served to distract considerations as to the merit of the present case for mercy.

The Executive Council considered Elizabeth's case on Friday 19 December 1873.<sup>244</sup> Made available for their deliberations were the

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<sup>238</sup> *South Australian Advertiser*, 20 December 1873, 2. See the similar acknowledgement of public disagreement in 'The Prisoners under Sentence of Death', *South Australian Chronicle and Weekly Mail*, 20 December 1873, 8; 'Editorial', *Wallaroo Times and Mining Journal*, 20 December 1873, 2.

<sup>239</sup> The Executive Council also refused mercy to man called Ridgway convicted of the murder of a friend where the jury had also recommended mercy. See further, below n 249.

<sup>240</sup> *South Australian Advertiser*, 20 December 1873, 2. See also the remarkably similar views in 'The Prisoners under Sentence of Death', *South Australian Chronicle and Weekly Mail*, 20 December 1873, 8.

<sup>241</sup> 'Recommended to Mercy', *South Australian Advertiser*, 31 January 1874, 6.

<sup>242</sup> Ibid. See also 'Pseudo Philanthropy', *Bunyip* (Gawler), 12 December 1873, 3.

<sup>243</sup> 'Recommended to Mercy', *South Australian Advertiser*, 31 January 1874, 6. See also 'The Condemned Criminals', *Kapunda Herald*, 23 December 1873, 2; 'Editorial', *Northern Argus*, 26 December 1873, 2.

<sup>244</sup> The Council for this session consisted of the Governor, Chief Secretary, Attorney-General, Treasurer, Commissioner for Crown Lands and the

Judge's trial notes, and the letter of William Ey and report of Dr Way as to the disputed medical evidence, the latter papers read 'in alternate paragraphs'.<sup>245</sup> Wearing J was introduced and invited to present his report of the case to the Executive Council and when asked by the Governor if there were 'any circumstances connected with this case which would render commutation desirable', replied that it was 'his painful duty to say that he believed that there were no such circumstances and that he had not the slightest doubt of the guilt of the prisoner'.<sup>246</sup> It is significant that the judge did not support the jury's recommendation for mercy. Wearing J, as was the practice, then withdrew from the Council's deliberations, and the Governor proceeded to seek the opinion of each of the Council members as to the exercise of mercy, beginning with the most junior member, a Mr Bright. With the exception of the Treasurer, dissenting, all were 'of the opinion that the clemency of the Crown should not be exercised in this case'.<sup>247</sup> The Governor, Sir Anthony Musgrave,<sup>248</sup> made sure to note before the Council moved onto the next item on its agenda that 'Elizabeth Woolcock be left for execution in the usual course of the Law'.<sup>249</sup>

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Commissioner for Public Works. South Australia. *Executive Council Minutes*, 9 December 1873, 556.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid 557.

<sup>247</sup> South Australia, *Executive Council Minutes*, 19 December 1873, 557.

<sup>248</sup> He was appointed Governor of South Australia in March 1873, for a term of four years. In 1883 he was appointed Governor of Queensland (where he later died in office) where he later became a key figure in a constitutional dispute concerning responsible government and the administration of the pardon. See Bennett, above n 18, 35.

<sup>249</sup> South Australia, *Executive Council Minutes*, 19 December 1873, 557. The case of William Ridgway, convicted and sentenced to death for the callous murder of his friend, was also considered at this meeting of the Executive Council. Ridgway was refused mercy, despite the recommendations of the Attorney-General, Treasurer and Commissioner for Crown Lands recommending Crown leniency after consideration of the evidence of guilt: at 558. Peters speculates that the reason for this decision is that if Elizabeth aged 25 had been spared on account of her 'youth' as recommended by the jury, the Executive Council would have faced the unpalatable prospect of similarly having to reprieve in the interests of consistency Ridgway who was aged only 19. See Peters, *Dead Woman Walking*, above n 29, 258.

Elizabeth was noted after her conviction as ‘truly penitent’<sup>250</sup> and resigned to her fate.<sup>251</sup> She went to the gallows on 30 December 1873 ‘apparently not insensible to her terrible condition’ but in a ‘calm and collected manner’.<sup>252</sup> There was emphasis on her ‘great penitence’.<sup>253</sup> At her death she released through the Rev. Bickford a lengthy but incoherent handwritten ‘confession’<sup>254</sup> dated 16 December 1873, acknowledging her guilt for poisoning her husband and declaring her remorse for her crime and confidence in achieving divine salvation. Elizabeth described a long course of ill treatment and violence from Woolcock, her suicide attempts, and that ‘quite out of her mind’ in ‘an evil hour’ she had ‘yielded to the temptation’.<sup>255</sup> Woolcock had come home ill from work one day and after they had again quarrelled, ‘Satan tempted me and I gave him what I ought not’.<sup>256</sup> Yet even in this last declaration, Elizabeth denied poisoning the dog and any untoward affection for Pascoe.

This confession does not undermine the strong doubts previously expressed about the prosecution case. The veracity of such ‘gallows’ confessions in the 19<sup>th</sup> century are dubious. Final expressions of guilt and penance served an important purpose in the exercise of the death penalty, triangulated with the rationales of punishment and deterrence.<sup>257</sup> ‘It was the chaplain’s duty to offer eternal salvation in

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<sup>250</sup> ‘The Recent Murder Cases’, *South Australian Register*, 15 December 1873, 4.

<sup>251</sup> ‘Execution of Elizabeth Woolcock’, *South Australian Register*, 31 December 1878, 5.

<sup>252</sup> ‘Execution of Elizabeth Woolcock’, *South Australian Advertiser*, 31 December 1878, 2. See also ‘Execution of Elizabeth Woolcock’, *South Australian Register*, 31 December 1878, 5; ‘Execution of Elizabeth Woolcock’, *South Australian Chronicle and Weekly Mail*, 3 January 1874, 11.

<sup>253</sup> ‘Our Adelaide Letter’, ‘Our Own Correspondent’, *Border Watch*, 3 January 1874, 3.

<sup>254</sup> See ‘Confession of Elizabeth Woolcock’, *South Australian Register*, 2 January 1874, 5; ‘Confessions of a Murderess’, *The Argus*, 8 January 1874, 6. Elizabeth’s ‘confession’ is reproduced in full.

<sup>255</sup> ‘Confessions of a Murderess’, *The Argus*, 8 January 1874, 6.

<sup>256</sup> *Ibid.*

<sup>257</sup> See Davis, above n 14, 17-18; Alex Castles, *An Australian Legal History* (Law Book, 1982) 62. See, eg, the last confession of Margaret Coghlan who blamed alcohol for her crime and urged others to learn from her fate. See further, below n 308. It was not unknown for clergyman to put vigorous pressure on condemned prisoners to confess their guilt. In 1849, the Rev. Chapman was

return for final good behaviour', as Davis notes, and such confessions 'may have owed more than literary style to the fertile imagination of the chaplain'.<sup>258</sup> One can only speculate whether Elizabeth's last 'confession' was prompted by a desire to achieve divine salvation or as a genuine and final wish on her part to provide a reliable account of her 'crime. Elizabeth, as Peters notes, was 'more interested in impressing the Rev. Bickford with her earnest desire to repent than in setting the record straight'.<sup>259</sup>

Elizabeth's execution, despite the debate about the verdict and sentence, appears to have attracted widespread approval.<sup>260</sup> Her final 'confession' was seen to vindicate both the jury's verdict and the refusal to extend mercy. One columnist, for example, observed:

The jury will doubtless feel a great sense of relief, as the result of the fact that the woman has left a written confession of her guilt, although she has sought to somewhat palliate the fiendish enormity of the act by stating that she had not been well used, and by the facile device of blaming the devil as the source of her inspiration when, for seven weeks, she watched her husband slowly but surely dying because of terribly scathing potions which her hands were stealthily but steadily supplying to corrode and lacerate the most delicate fibers of his enfeebled frame.<sup>261</sup>

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dismissed from the prison service in England for holding the bare arm of Mary Wright (who had been sentenced to death for poisoning her husband by arsenic) to a candle and causing burns in a vain effort to encourage her to admit her crime.

<sup>258</sup> Davis, above n 14, 17-18. The reliability of such last declarations is dubious. See, eg, the notorious escaped convict and bushranger called Buchanan Wilson who, before 'being launched into eternity' in 1851 for bushranging 'addressed the crowd and desired them to take warning by his fate, and to avoid Sabbath-breaking, which had been the foundation of all his crimes': 'Execution', *Launceston Examiner*, 10 May 1851, 6.

<sup>259</sup> Peters, above n 29, 272. See also 'Recommended to Mercy', *South Australian Advertiser*, 31 January 1874, 6.

<sup>260</sup> See, eg, 'City Correspondence', *Kapunda Herald*, 6 January 1874, 3; 'Our Adelaide Letter', 'Our Own Correspondent', *Border Watch*, 7 January 1874, 3; 'Recommended to Mercy', *South Australian Chronicle and Weekly Mail*, 10 January 1874, 11-12; 'Recommended to Mercy', *South Australian Advertiser*, 31 January 1874, 6.

<sup>261</sup> 'Our Adelaide Letter', 'Our Own Correspondent', *Border Watch*, 3 January 1874, 3.

*The Advertiser* similarly expressed its support at Elizabeth's fate and doubted her confession revealed any genuine remorse.<sup>262</sup> 'What is called her "confession," which looks more like a vindication... True penitence is hearty sorrow for the sin itself, and not for the penal consequences of the sin'.<sup>263</sup> The *South Australian Register* refrained from direct comment on whether 'the extreme penalty of the law' should have been exercised on 'the unhappy woman'.<sup>264</sup> The editor dwelt on Elizabeth's background and 'morbid and unhealthy state of mind', and used her situation to criticise, not the verdict or the death sentence, but rather the standards of education in the Colony and the lack of proper moral teaching!<sup>265</sup>

## IX WHY WAS MERCY REFUSED? OTHER WOMEN 'BEYOND THE PALE' WHO WERE REPRIEVED

It is significant that the Executive Council chose to refuse mercy to Elizabeth despite the jury's recommendation, the doubts as to the strength of the prosecution case expressed even at the time, and Elizabeth's well known mitigating personal circumstances. There had been no executions in South Australia since December 1862. All the other women convicted in South Australia in the 1800s of a capital offence were reprieved.<sup>266</sup> Other women convicted of murder in colonial Australia during the same period as Elizabeth were reprieved.

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<sup>262</sup> 'Recommended to Mercy', *South Australian Advertiser*, 31 January 1874, 6. See also 'Recommended to Mercy', *South Australian Chronicle and Weekly Mail*, 10 January 1874, 11-12.

<sup>263</sup> 'Recommended to Mercy', *South Australian Advertiser*, 31 January 1874, 6

<sup>264</sup> 'Confession of Mrs Woolcock', *South Australian Register*, 2 January 1874, 3.

<sup>265</sup> Ibid.

<sup>266</sup> Elizabeth Davey, Mary Davey (aged 14) and Sarah Green avoided the death penalty for robbery in 1842: see below n 292. Mary Partington in 1870 and Johanna Sullivan in 1879 were reprieved for the murders of their illegitimate new born children: see below n 269. Elizabeth Magree was reprieved in 1882 for the murder of a man who had allegedly tried to rape her: see below the discussion in this Part.

It is of course, usually not possible to ascertain the exact rationale for the application or otherwise of the pardon. In part this is due to the private nature of the deliberations of the Executive Council in respect of capital convictions, with the record of such meetings usually providing scant detail. But it is most notably due to the relatively uncircumscribed nature of the power to pardon which, as essentially a residential judicial power residing with the Crown as a prerogative right, seeks to temper what the law requires to be done.<sup>267</sup> What we then must consider, are the matters which typically are addressed by the courts and the executive, when considering any recommendation for mercy. With respect to female defendants, gender-based considerations were frequently, although not always, pre-eminent in such deliberations, as can be evidenced by the records of the day, as provided in both official and press reports of particular cases.

Mercy was typically extended to those who were convicted,<sup>268</sup> whether in South Australia<sup>269</sup> or elsewhere,<sup>270</sup> of the murder of their

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<sup>267</sup> The modern day position also reflects a wide range of considerations which are important to a recommendation for mercy, however the application of a full pardon for serious offences is more circumscribed and lacks the ‘tempering’ effect of the harshness of the law. For example, in England, a full pardon is considered to be a constitutional safeguard against mistakes, but requires that the defendant is found to be both morally and technically innocent. See, eg, *R v Secretary of State for the Home Dept; ex parte Bentley* [1993] QB 349. In Australia, the pardon has more recently been associated with decisions in respect of policy concerning the administration of criminal justice. See, eg *Von Einem v Griffin* (1998) 72 SASR 110.

<sup>268</sup> A rare occurrence given juries were notoriously reluctant to return a guilty murder on the capital count. See, eg, Constance Backhouse, ‘Desperate Women and Compassionate Courts: Infanticide in 19<sup>th</sup> Century Canada’ 34 *University of Toronto Law Journal* 447, 448; Mary Emmerichs, ‘Trials of Women for Homicide in 19<sup>th</sup> Century England’ (1993) 5 *Women and Criminal Justice* 99-109; Lionel Rose, *Massacre of the Innocents: Infanticide in Britain 1800-1939* (Routledge & Kegan Paul Ltd, 1986) 74-76.

<sup>269</sup> See Mary Partington: *R v Partington*, *South Australian Register*, 8 December 1870, 3; 9 December 1870, 3 (sentence of death commuted to 10 years imprisonment; see ‘The Case of Mary Partington’, *South Australian Register*, 13 December 1870, 4; Johanna Sullivan: see *R v Sullivan*, *South Australian Register*, 20 August 1879, 4 (case attracted ‘great sympathy’ (*Border Watch*, 27 August 1879, 2) and many calls for mercy (see, eg, Mercy, Letter to Editor, ‘The Girl Sullivan’, *South Australian Register* 21 August 1879, 6; see, cf,

infant children, reflecting a wider sympathy, with such defendants generally regarded in the period ‘as much sinned against as sinning’.<sup>271</sup> Even a mother convicted of murdering her older child was generally viewed with sympathy and was likely to be reprieved.<sup>272</sup>

‘Honour’ killings by a ‘virtuous’ female defendant ‘who in the

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Society, ‘The Case of Johanna Sullivan’, Letter to Editor, *South Australian Register*, 25 August 1879, 6) and her sentence was commuted to 14 years imprisonment: *South Australian Chronicle and Weekly Mail*, 6 September 1879, 7.

<sup>270</sup> See, eg, Rosanna Nicholls (sentence of death for the murder of her three month old son commuted to seven years imprisonment): *R v Nicholls (Ovens and Murray Advertiser*, 9 April 1857; ‘Rosanna Nicholls’, *The Argus*, 2 May 1857, 4; Isabella ‘O’Brien’ (sentence of death commuted to life imprisonment): see *R v O’Brien, Empire*, 6 April 1872, 3; ‘The Condemned Woman’, *Sydney Morning Herald*, 27 April 1872, 7; *South Australian Register*, 22 May 1872, 5; Annie Thompson (sentence of death commuted to life imprisonment): see *Sydney Morning Herald*, 8 June 1880, 6; Rosanna Plummer (reprieved and granted a rare free pardon on account of evidence of her mental disorder): see *R v Plummer, Sydney Morning Herald*, 28 July 1884, 8; *The Argus*, 12 August 1884, 4.

<sup>271</sup> ‘Isabella O’Brien’, *Darling Downs Gazette*, 22 May 1872, 3.

<sup>272</sup> See, eg, Maria Laye, a French woman, convicted of the murder of her three year old son by bludgeoning him to death, whose unhappy personal circumstances (she had been abandoned in Sydney by her new husband) and apparent mental instability attracted much sympathy and whose sentence was commuted to 10 years imprisonment; see ‘Editorial’, *Sydney Morning Herald*, 18 May 1882, 4; *Queensland Times*, 25 May 1882, 9. See also Mary Ann Ellington, a 17 year old prostitute who was convicted in Tasmania in 1876 and sentenced to death for the murder of her illegitimate three year daughter, Catherine: see *R v Ellington, Cornwall Chronicle*, 20 October 1876, 2-3; *The Mercury*, 23 October 1876, 3; *Launceston Examiner*, 21 October 1876, 5. The case appeared at first glance to be ‘a cruel case of child murder’: *The Mercury*, 2 September 1876, 1S, and attracted strong moral judgement: see ‘Editorial’, *Launceston Examiner*, 12 August 1876, 2. However, her plight attracted much sympathy: see *Mercury*, 30 October 1876, 1S; *Cornwall Chronicle*, 20 October 1876, 2; ‘Sentence of Death Commuted’, *Cornwall Chronicle*, 27 October 1876, 2. Mary had been abandoned by both her parents and the child’s father. The Executive Council took into account the various mitigating factors and jury’s recommendation of mercy and commuted her sentence to imprisonment for life. See Executive Council Minutes, Tasmania, 25 October 1876; ‘Sentence of Death Commuted’, *Cornwall Chronicle*, 27 October 1876, 2; ‘Legal’, *Launceston Examiner*, 28 October 1876, 4.

desperation of her sorrow, or in the face of a dishonored life, sheds the blood of her betrayer'<sup>273</sup> also attracted sympathy and appealed to 19<sup>th</sup> century society's perception of the female role.<sup>274</sup> Though such cases in Australia did not lead to outright acquittals (unlike in the United States),<sup>275</sup> such offenders still attracted strong sympathy and the likelihood of mercy.<sup>276</sup> Milbra Nott, for example, was convicted and reluctantly sentenced to death by Innes J in New South Wales in 1883 for the murder of her fiancé, a miner called Mitchell.<sup>277</sup> Milbra, a 'very good looking'<sup>278</sup> 18 year orphan, murdered Mitchell after he refused to carry out his promise to marry her, shortly before the wedding. It was asserted that Mitchell cynically seduced Milbra by promising to marry her, and Milbra had been driven to kill him after imploring him to keep his promise of marriage to save her honour

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<sup>273</sup> 'Two Women: On Trial for Their Lives for Murder in California', *Los Angeles Times*, 28 January 1887, 10.

<sup>274</sup> See, eg, Carolyn Ramsay, 'Domestic Violence and State Intervention in the American West and Australia, 1860-1930' (2011) 86 *Indiana Law Journal* 185, 246, 249-252; Carolyn Ramsey, 'Intimate Homicide: Gender and Crime Control, 1880-1920' (2006) 77 *University of Colorado Law Review* 101, 118-125.

<sup>275</sup> See Ramsay, above n 274, 249-250; *Evening News*, 12 April 1883, 3.

<sup>276</sup> See, eg, Cecile Anderson, sentenced to death in 1894 for the murder of a man called Fraser in Melbourne. Cecile, a 50 year old widow, had become romantically involved with Fraser, and had loaned him a large sum of money. Fraser had promised to marry her but two months prior to the murder he had married someone else. Fraser was denounced as a 'scoundrel' who had stolen both Cecile's heart and money. See *R v Anderson, The Argus*, 17 August 1894, 7; 'The Burke Street Tragedy: Unexpected Development', *Brisbane Courier*, 22 June 1894, 5. Cecile's situation attracted considerable public sympathy, even from the deceased's brother. See 'The Condemned Mrs Anderson', *Gippsland Times*, 20 August 1894, 3; 'Burke Street Murder', *Daily News*, 20 August 1894, 3; 'The Condemned Woman Anderson', *Daily News*, 25 August 1884, 6. Cecile was reprieved to wide approval: see 'Death Sentence Commuted', *Brisbane Courier*, 28 August 1894, 5. It was also reported that she could expect to be released in ten years: see 'The Condemned Woman Anderson', *Singleton Argus*, 29 August 1894, 4. Mary Silk who was reprieved in Victoria in 1883 after brutally murdering her husband who had been sexually abusing their intellectually disabled 14 year old daughter can be seen as an example of an 'honour' killing. See further, below n 340.

<sup>277</sup> See *Evening News*, 12 April 1883, 3; 'A Girl Sentenced to Death', *Sydney Morning Herald*, 12 April 1883, 8; 'The Trial of Milbra Nott', *Queanbeyan Age*, 17 April 1883, 2.

<sup>278</sup> 'A Girl Sentenced to Death', *Sydney Morning Herald*, 12 April 1883, 8.

and reputation.<sup>279</sup> Milbra's plight engendered universal sympathy and it was expected she would be reprieved<sup>280</sup> (both the jury and the judge joined this call). One columnist declared, 'What man of honor doesn't secretly applaud Milbra Nott for wiping out her seducer? Who sympathises with the dead ruffian? Not I, faith'.<sup>281</sup> Even the decision to commute her sentence to five years imprisonment was criticised,<sup>282</sup> with one member of Parliament, a Mr Buchanan, asserting that a six month sentence 'would have answered all the purposes of justice'.<sup>283</sup>

The case of Elizabeth Magree in South Australia in 1882 can also be seen as an example of an 'honour killing'. Mrs Magree was convicted and sentenced to death with her husband for the murder of a man called Renderup,<sup>284</sup> a crime described by the Crown Solicitor as 'one of the most cold blooded murders that had been perpetrated in South Australia'.<sup>285</sup> However, Mrs Magree, pregnant at the time, attracted sympathy and calls for mercy.<sup>286</sup> The deceased was branded a 'fiend' and a 'wild beast' when under the influence of drink and was known for his brutality and 'demon of lust' towards women.<sup>287</sup> It was asserted the crime was really manslaughter<sup>288</sup> as Mrs Magree

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<sup>279</sup> See, eg, *Evening News*, 12 April 1883, 3; 'Justifiable Homicide', *Queensland Figaro*, 28 April 1883, 3; Corinda, 'The Case of Milbra Nott', *Clarence and Richmond Examiner*, 19 May 1883, 3. Mitchell's brother denied the damning imputations against his brother. See 'Milbra Nott's Case', *Queanbeyan Age*, 4 May 1883, 1.

<sup>280</sup> 'Sydney', *South Australian Register*, 19 April 1883, 5.

<sup>281</sup> 'Justifiable Homicide', *Queensland Figaro*, 28 April 1883, 3.

<sup>282</sup> See, eg, Corinda, 'The Case of Milbra Nott', *Clarence and Richmond Examiner*, 19 May 1883, 3;

<sup>283</sup> Mr Buchanan, NSW Legislative Assembly, 27 April 1883, reported in *Evening News*, 28 April 1883, 5.

<sup>284</sup> See *R v Magree and Magree*, *South Australian Register*, 19 December 1882, 1S.; 20 December 1882, 6; 21 December 1882, 1S.

<sup>285</sup> *South Australian Register*, 20 December 1882, 6.

<sup>286</sup> See, eg, *South Australian Advertiser*, 21 December 1882, 4; 'The Hamley Bridge Murder', *South Australian Weekly Chronicle*, 23 December 1882, 4; Humanitarian, 'Capital Punishment', Letter to Editor, *South Australian Advertiser*, 17 January 1883, 5.

<sup>287</sup> *South Australian Advertiser*, 21 December 1882, 4;

<sup>288</sup> P Glynn, 'Capital Punishment', Letter to Editor, *South Australian Weekly Chronicle*, 27 January 1883, 13.

and her husband had acted under ‘tremendous provocation’ after the deceased had made ‘immoral proposals’ and had allegedly been trying to rape her when the murder was committed.<sup>289</sup> Mrs Magree and her husband were, to no surprise, reprieved and their sentences commuted to life imprisonment.<sup>290</sup>

Mercy was not confined to perhaps obvious cases as that of Milbra Nott and Elizabeth Magree. Other female murderers<sup>291</sup> and capital offenders<sup>292</sup> were also regarded as worthy of mercy. Margaret

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<sup>289</sup> *South Australian Advertiser*, 21 December 1882, 4.

<sup>290</sup> See *South Australian Weekly Chronicle and Daily Mail*, 6 January 1883, 10; ‘The Prisoners Burns and Magree’, *South Australian Register*, 6 January 1883, 5.

<sup>291</sup> See, eg, Margaret O’Donohue, whose sentence of death was commuted to 21 years imprisonment for the murder of a fellow prostitute with an axe during a drunken row in a Melbourne brothel: see *Illustrated Australian News*, 10 October 1872, 203; *Illustrated Australian News*, 7 November 1872, 214. See also Catherine Lee, convicted and sentenced to death in Tasmania in 1872 for the murder in ‘circumstances of peculiar atrocity’: *The Mercury*, 5 November 1872, 3S, of an infirm woman suffering from an incurable disease called Julia Thompson, see *R v Lee*, *The Mercury*, 23 October 1872, 2; *Cornwall Chronicle*, 21 October 1872, 2. The Chief Justice in passing sentence of death dwelt on the aggravating features of the crime: at 2. Lee was a ‘hardened old offender’: *Cornwall Chronicle*, 11 November 1872, 2, with ‘a constitution broken and shattered through continued debauchery’, ‘The Condemned’, *Launceston Examiner*, 9 November 1872, 2. Notwithstanding the nature of both the offence and the offender, mercy was extended by the Executive Council in light of ‘certain mitigating circumstances’ and doubts as to the issue of causation and Lee’s sentence was commuted to life imprisonment. See Tasmania, Executive Council Minutes, 4 November 1872; *Cornwall Chronicle*, 11 November 1872, 2.

<sup>292</sup> See, eg, Elizabeth Davey, Mary Davey (aged 14) and Sarah Green were sentenced to death recorded in South Australia in 1842 for robbery as after their offence, the law had changed to no longer punish robbery with the death penalty. See *R v Davey*, *Davey and Green*, *South Australian*, 12 July 1842, 3. See also Maria Thompson who was sentenced to death recorded in Tasmania in 1858 for attempting to murder a child and his mother by poison in a cake after it had failed to reach its intended recipient, a man whom Thompson had a grievance with: see *R v Thompson*, *The Courier*, 30 July 1858, 3; *Hobart Town Daily Mercury*, 30 July 1858, and whose sentence was commuted to life imprisonment, see Tasmania, Executive Council Minutes, 6 August 1858. The *Judgment of Death Act 1823* (UK) enabled courts to enter a judgment of death recorded, in matters which carried a mandatory sentence of death (except

Spillane, despite the ‘most foul and savage’<sup>293</sup> murder she had committed, was reprieved.<sup>294</sup> So too, a notorious ‘baby farmer’<sup>295</sup> such as Sarah Makin, convicted in 1893 with her husband, John, of the murder of an ‘unknown infant’ (and strongly suspected of up to 14 other similar crimes),<sup>296</sup> was reprieved.<sup>297</sup> Despite the gravity of Sarah Makin’s crimes, the law ‘threw a paternalistic cloak around her in the belief that as John’s wife, she had acted under his direction’.<sup>298</sup>

These cases beg the obvious question. Why if female offenders such as Margaret Spillane and Sarah Makin were reprieved, was mercy refused and sentence of death carried out in Elizabeth’s case given the jury’s recommendation of mercy, the prevailing reluctance to apply the death penalty to female capital offenders and the mitigating factors that existed, and were acknowledged, at the time?

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murder and treason), where the court was of the opinion that the convicted should be recommended for mercy.

<sup>293</sup> ‘Editorial’, *Brisbane Courier*, 28 July 1882, 2.

<sup>294</sup> *Ibid.* Spillane had beaten to death ‘a helpless unresisting man’: at 2.

<sup>295</sup> Baby farming was a widespread and controversial practice in the second half of the 19<sup>th</sup> century in both England and colonial Australia. See, eg, Dorothy Haller, ‘Bastardry and Baby Farming in Victorian England’ (1989-1990) 21 *Loyola University Student Historical Journal* 5; Annie Cossins, *The Baby Farmers* (Allen & Unwin, 2013) 61-67; Judith Flanders, *The Invention of Murder* (Harper Press, 2011) 217-223.

<sup>296</sup> See, the sentencing remarks, *Sydney Morning Herald*, 31 March 1893, 7; ‘The Crimes of the Makins’, *South Australian Register*, 10 March 1893, 3; ‘The Makin Murders’, *South Australian Register*, 1 April 1893, 4.

<sup>297</sup> See ‘The Baby Framing Case’, *Sydney Morning Herald*, 17 April 1893, 7; Heather Radi, ‘Makin, Sarah Jane (1845–1918)’, Australian Dictionary of Biography, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/makin-sarah-jane-13271/text23651>>. The decision to reprieve Sarah Makin was controversial. See, eg, ‘Editorial’, *The Advertiser*, 15 August 1893, 4; ‘Editorial’, *The West Australian*, 18 January 1894, 4.

<sup>298</sup> Cossins, above n 295, 12. See also ‘The Crimes of the Makins’, *South Australian Register*, 10 March 1893, 3; ‘The Makin Murders’, *South Australian Register*, 1 April 1893, 4. The doctrine of *femme covert* was based on the principle that married women had no separate legal identity from their husband, and if they were involved in the commission of a felony with their husband, could argue that they were acting under instruction to gain an acquittal.

## X WHY MERCY WAS REFUSED TO ELIZABETH WOOLCOCK: THE TRIPLE HANDICAP

No considerations of mercy were to apply to Elizabeth Woolcock who was presented as the antithesis of the 19<sup>th</sup> century ideal of the virtuous and devoted wife. Elizabeth had an impossible triple handicap to overcome. Not only had she allegedly murdered her husband, but to compound her crime her purported motivation was an unsubstantiated romantic involvement with another man, and she had methodically used poison to bring about her husband's demise. It is unsurprising that in 1877, a wax exhibition of notorious murderers portrayed Elizabeth, 'as the "big claimant"...the murderer of her husband by poison...with an evil low brow and altogether the worst countenance, except those of the Maoris in the whole collection'.<sup>299</sup>

### A *Petit Treason*

The murder of a husband by his wife was regarded in the 19<sup>th</sup> century as a form of 'petit treason', if not a distinct crime at least an aggravated form of murder,<sup>300</sup> which involved the murder of a person to whom the offender owed some duty of subjection. The crime, when perpetrated by a woman, for example by the poisoning of a husband,<sup>301</sup> was considered 'an extreme affront to patriarchy'<sup>302</sup> and

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<sup>299</sup> 'The Exhibition of Waxworks', *Cornwall Chronicle*, 5 March 1877, 2.

<sup>300</sup> The offence of petit treason was repealed by the *Offences Against the Person Act 1828*, 9 Geo 4, c 31, but its influence continued to be felt throughout the 19<sup>th</sup> century.

<sup>301</sup> Poisoning by women was a crime reviled: see, eg, Otto Pollack, *The Criminality of Women* (University of Pennsylvania Press, 1950) ch 3. However an 18<sup>th</sup> century study found that female murderers were no more prone to stealth and deception in perpetrating the crime, than were men: see John Beattie, 'The Criminality of Women in Eighteenth Century England' (1975) 8 *Journal of Social History* 80.

<sup>302</sup> Peter King, *Crime, Justice and Discretion in England 1740-1820* (Oxford University Press, 2000) 193.

would usually attract the severest penalty without reprieve.<sup>303</sup> Margaret Coghlan was convicted in Tasmania in 1862, and sentenced to death and dissection,<sup>304</sup> for the murder of her husband in the course of a violent drunken row.<sup>305</sup> Despite apparent mitigating factors,<sup>306</sup> she was refused mercy by the Executive Council,<sup>307</sup> and was hanged, suitably repentant.<sup>308</sup> As Davis explains, ‘though there had been a number of men hanged for killing their wives and mistresses [in Tasmania], Margaret Coghlan was unique in being executed for this reversal of the natural order which the horrified Victorians regarded as petty treason’.<sup>309</sup>

This theme emerges in respect of other women convicted in the Australian colonies of the murder of their employers<sup>310</sup> or

<sup>303</sup> In England, the reluctance to execute women convicted of this offence, fluctuated over the 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> centuries. See John Beattie, *Crime and the Courts in England, 1660-1800* (Oxford University Press, 1986) 514, 532-3.

<sup>304</sup> 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 defendant 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: see, eg, Helen MacDonald, ‘A Dissection in Reverse: Mary McLauchlan, Hobart Town, 1830’ (2004) 13 *Feminist History Journal* 12, 13-16.

<sup>305</sup> See *R v Coghlan*, *The Mercury*, 29 January 1862, 2; *Cornwall Chronicle*, 5 February 1862, 2.

<sup>306</sup> The murder had occurred after the deceased had sworn at his wife and thrown an iron bar at her before she had killed him: see ‘Murder in Goulburn Street; The Murderess’s Confession’, *The Mercury*, 9 January 1862, 3.

<sup>307</sup> See Executive Council Minutes, Tasmania, 3 February 1862.

<sup>308</sup> Margaret made a last confession to her ‘horrible crime’ and blamed the evils of alcohol and implored others to learn from her ‘awful fate’: see ‘Execution of Margaret Coghlan’, *The Mercury*, 19 February 1862, 2; ‘Execution of Margaret Coghlan’, *Cornwall Chronicle*, 22 February 1862, 3; Davis, above n 14, 66.

<sup>309</sup> Ibid.

<sup>310</sup> See, eg, *R v Campbell* [1825] NSWSupC 4 (*Sydney Gazette*, 27 January 1825, 2-3). Eliza Campbell, a female convict servant, was refused mercy and hanged for petit treason and murder as to the death of her married master amidst condemnation for her betrayal and ‘immorality’ and ‘adultery’ in sleeping with him and then unlocking the door to allow her male convict accomplices to murder and rob him. See ‘Editorial’, *Sydney Gazette*, 27 January 1825, 2; ‘Execution’, *Sydney Gazette*, 27 January 1827, 3. For the significance of sexual immorality, see also Part X, C.

husbands<sup>311</sup> who shared a similar fate. Ellen Monks murdered her alcoholic husband in New South Wales in 1860 and dismembered his remains.<sup>312</sup> At trial she accepted her guilt.<sup>313</sup> Wise J passed sentence of death and noted Monks had ‘pleaded guilty to the highest offence known to the law...[your] victim was your husband’.<sup>314</sup> Despite mitigating factors (notably alcohol and domestic discord) and calls for mercy,<sup>315</sup> the Executive Council refused to intervene and Monks was hanged.<sup>316</sup>

Even a woman with powerful mitigating factors such as Mary Brownlow, convicted in New South Wales in 1855<sup>317</sup> of the apparent deliberate<sup>318</sup> murder of her ‘wastrel husband’<sup>319</sup> was not immune

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<sup>311</sup> See the conviction and execution in Western Australia in 1855 of Bridget Hurford and her male accomplice: see ‘The Executions’, *Inquirer and Commercial News*, 17 October 1855, 2; ‘Public Executions’, *Perth Gazette*, 19 October 1845, 3, for the financially motivated murder of Bridget’s estranged husband. ‘The verdict of the jury was universally reckoned as just’: *Perth Gazette*, 5 October 1855, 2. The Advocate-General had emphasised of Bridget’s crime, ‘whose sex and whose relationship to the murdered man rendered her crime still more appalling’: *Inquirer and Commercial News*, 10 October 1855, 2.

<sup>312</sup> See ‘The Murder near Binda’, *Empire*, 15 November 1859, 5; ‘The Murder near Binda – Confession of the Murderess’, *Sydney Morning Herald*, 15 November 1859, 2.

<sup>313</sup> *R v Monks*, *Empire*, 31 March 1860, 3.

<sup>314</sup> *Ibid.*

<sup>315</sup> See, eg, ‘Colonial News’, *The Australian Home Companion and Band of Hope Journal*, 19 May 1860, 22; ‘Petition for Reprieve’, *Sydney Morning Herald*, 5 May 1860, 7.

<sup>316</sup> See ‘Ellen Monks and William Goodson’, *Sydney Morning Herald*, 9 May 1860, 7.

<sup>317</sup> See *R v Brownlow*, *Empire*, 14 September 1855, 5; *Sydney Morning Herald*, 14 September 1855, 2; *Bell’s Life in Sydney and Sporting Reviewer*, 15 September 1855, 3; *Maitland Mercury*, 19 September 1855, 2S.

<sup>318</sup> See ‘Editorial’, *Sydney Morning Herald*, 18 October 1855, 4. The jury’s foreman on returning a verdict of guilty of murder, in answer to a question put by the trial judge, explained, ‘We are of opinion that no evidence has been laid before us to justify us in finding that any blows were struck during the altercation between the prisoner and deceased, and we are further of opinion that when the prisoner stabbed her husband she intended to take away life’: *Sydney Morning Herald*, 14 September 1855, 2; *Empire*, 14 September 1855, 5.

from the death penalty.<sup>320</sup> Mary's 'respectable'<sup>321</sup> background, her 'comely countenance and figure',<sup>322</sup> the fact she had three young children,<sup>323</sup> strong public sympathy<sup>324</sup> (including two petitions),<sup>325</sup> suitable penitence and remorse,<sup>326</sup> and the fact that her crime had been committed in a state of 'pure frenzy'<sup>327</sup> during a drunken fit of jealousy directed at her husband<sup>328</sup> led to many calls for mercy to be exercised on her behalf.<sup>329</sup>

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<sup>319</sup> Martha Rutledge, 'Stephen, Sir Alfred, (1802-1894)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, <<http://abd.anu/biography/stephen-sir-alfred-1291/text7645>>.

<sup>320</sup> One member of the Legislative Assembly argued that never had any case been more suitable as Mary's for the grant of mercy. See Mr Martin, Legislative Council, 23 October 1855, reproduced *Sydney Morning Herald*, 24 October 1855, 2.

<sup>321</sup> See 'Incident in the Goal', *Bell's Life in Sydney and Sporting Reviewer*, 1 September 1855, 3.

<sup>322</sup> 'Justitia', Letter to the Editor, 'Mary Ann Brownlow', *Empire*, 25 October 1855, 3.

<sup>323</sup> See 'Sentences of Death', *Empire*, 28 September 1855, 5; 'Execution of Mary Ann Brownlow', *Empire*, 15 October 1855, 5.

<sup>324</sup> See WPW, Letter to Editor, 'The Condemned Woman', *Empire*, 27 September 1855, 5; 'Sentences of Death', *Empire*, 28 September 1855, 5; 'The Condemned', *Empire*, 10 October 1855, 2; 'Execution of Mary Ann Brownlow', *Empire*, 15 October 1876, 5; 'Execution of Mary Ann Brownlow', *Maitland Mercury*, 17 October 1855, 2; Editorial, *Sydney Morning Herald*, 18 October 1855, 4; *Sydney Morning Herald*, 24 October 1855, 4; 'Execution of Mary Ann Brownlow', *Bell's Life in Sydney and Sporting Reviewer*, 20 October 1855, 1.

<sup>325</sup> See 'The Condemned', *Sydney Morning Herald*, 3 October 1855, 8.

<sup>326</sup> 'Execution of Mary Ann Brownlow', *Bell's Life in Sydney and Sporting Reviewer*, 20 October 1855, 1. Interestingly, the editorial in that journal for the very same day expressed a very different view.

<sup>327</sup> 'The Goulburn Homicides', *Empire*, 17 October 1855, 4.

<sup>328</sup> Mary was jealous of Brownlow's 'fancy woman' but Brownlow had insisted prior to his death there was no basis for his wife's jealousy. This claim was questioned; see WPW, Letter to Editor, 'The Condemned Woman', *Empire*, 27 September 1855, 5.

<sup>329</sup> See, eg, 'Sentences of Death', *Empire*, 28 September 1855, 5; 'The Condemned', *Sydney Morning Herald*, 3 October 1855, 8; 'Mrs Brownlow', *Bell's Life in Sydney and Sporting Reviewer*, 6 October 1855, 2; 'The Goulburn Homicides', *Empire*, 17 October 1855, 4-5; 'Execution of Mary Ann Brownlow', *Maitland Mercury*, 17 October 1855, 2; 'Execution of Mary Ann Brownlow', *Empire*, 15 October 1876, 5. 'Execution of Mary Ann Brownlow', *Bell's Life in Sydney and Sporting Reviewer*, 20 October 1855, 1. Some of these calls were more incoherent than others; see H, Letter to Editor, 'An

However, these calls went unheeded. The Chief Justice, Sir Alfred Stephen, described Mary's crime in his far from balanced summing up to the jury as 'one of the most foul and brutal murders ever brought before him'.<sup>330</sup> The Chief Justice advised the Executive Council that mercy was entirely unjustified<sup>331</sup> and even wrote to the press under the alias of 'Justitia',<sup>332</sup> asking 'what have youth and beauty to do with contravening the primeval command, 'whose sheddeth man's blood shall his blood be shed'.<sup>333</sup> The Executive Council agreed and mercy was refused.<sup>334</sup> Mary was hanged,<sup>335</sup> displaying 'sincere repentance'.<sup>336</sup> This decision, controversial as it may have been, received much support.<sup>337</sup> The editor of the *Sydney Morning Herald* dismissed the argument that Mary should have been spared as she was a woman. 'It is perfectly admissible in poetry and romance to draw distinctions of the sort; but unless the guilt of murder be less when perpetrated by a woman's hand, the penalty is

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Appeal', *Sydney Morning Herald*, 20 September 1855, 5; WPW, Letter to Editor, 'The Condemned Woman', *Empire*, 27 September 1855, 5 (who argued that the weather of NSW led to more passion and excitability than in England!).

<sup>330</sup> *Empire*, 14 September 1855, 5.

<sup>331</sup> *Ibid.* See also *Sydney Morning Herald*, 24 October 1855, 2.

<sup>332</sup> 'Justitia' was a name under which Stephen wrote to the press. See Rutledge, above n 319.

<sup>333</sup> See 'Justitia', Letter to the Editor, 'Mary Ann Brownlow', *Empire*, 25 October 1855, 3.

<sup>334</sup> See 'The Condemned Murderers', *Bell's Life in Sydney and Sporting Reviewer*, 6 October 1855, 2.

<sup>335</sup> See 'Execution of Mary Ann Brownlow', *Empire*, 15 October 1876, 5; 'Execution of Mary Ann Brownlow', *Bell's Life in Sydney and Sporting Reviewer*, 20 October 1855, 1.

<sup>336</sup> 'The Condemned Murderess', *Bell's Life in Sydney and Sporting Reviewer*, 13 October 1855, 2. It was reported that 'she died without a struggle, acknowledging the greatness of her crime, as well as the justness of her sentence' and 'her extremely delicate appearance deeply affected every one present [at her execution], and caused the tears to start irresistibly from the eyes of the hardiest': see 'Execution of Mary Ann Brownlow', *Empire*, 15 October 1876, 5.

<sup>337</sup> See, eg, 'The Later Execution at Goulburn', *Bell's Life in Sydney and Sporting Reviewer*, 20 October 1855, 2. The author of the same journal's account of Mary's hanging on the very same day took a very different view of the events. See 'The Condemned Murderess', *Bell's Life in Sydney and Sporting Reviewer*, 13 October 1855, 2.

no less justly due'.<sup>338</sup> The fact that the victim of Mary Brownlow's crime was her husband compounded her guilt.<sup>339</sup>

However, it was not inevitable that a woman convicted of the murder of either her husband<sup>340</sup> or employer<sup>341</sup> in this period would be refused mercy. Ann Hayes, for example, was convicted of the 'most barbarous murder'<sup>342</sup> of her husband in Victoria in 1860,<sup>343</sup> after stabbing him in the course of a drunken row. Both were former convicts from Tasmania.<sup>344</sup> Barry J in passing sentence of death, observed Hayes' crime was 'the most disgraceful of its class – the murder of a husband by a wife'.<sup>345</sup> The jury's recommendation of

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<sup>338</sup> 'Editorial', *Sydney Morning Herald*, 18 October 1855, 4. See also Vindex, Letter to Editor, 'Execution of Women', *Sydney Morning Herald*, 25 September 1855, 3; 'Justitia', Letter to the Editor, 'Mary Ann Brownlow', *Empire*, 25 October 1855, 3. Generally, the offences which attracted capital punishment applied equally to men, women, and even children.

<sup>339</sup> Vindex, Letter to Editor, 'Execution of Women', *Sydney Morning Herald*, 25 September 1855, 3. See also 'Editorial', *Sydney Morning Herald*, 18 October 1855, 4.

<sup>340</sup> See, eg, Mary Ann Perry in 1860 (see further Part X, C below); Elizabeth Hyde in 1882 (see further below Part X, B) and Mary Silk in Victoria in 1884. Mrs Silk's case is significant. She was convicted and sentenced to death for the 'especially violent' murder of her husband by repeatedly striking him with an axe (including 'finishing him off' when he was injured on the ground); *R v Silk*, *The Argus*, 18 February 1884, 10. Though prosecution counsel had branded it as 'a most heartless case of murder': at 10, Mrs Silk was reprieved, and her sentence commuted to 20 years imprisonment after the jury had recommended mercy on account of Silk's 'flagrant misconduct' with the couple's intellectually disabled 14 year old daughter. See Ramsay, above n 274, 245.

<sup>341</sup> See, eg, *R v McGregor and Maloney* [1834] NSWupC 13 (*Sydney Gazette*, 25 February 1834, 2-3). Two female convict servants sentenced to death for the murder of their master in the presence of his wife and children attracted, despite the nature of their crime, considerable sympathy: see, eg, 'A Correspondent', 'Behaviour of Sarah McGregor and Mary Maloney after Conviction', *Sydney Monitor*, 28 February 1834, 2, and were reprieved to approval given their characters and after doubts had emerged on the issue of causation: see, eg, *Sydney Herald*, 27 February 1834, 3.

<sup>342</sup> 'Horrible Murder in Napoleon Gully', *The Argus*, 2 February 1860,

<sup>343</sup> See *R v Hayes*, *Bendigo Advertiser*, 1 March 1860, 5.

<sup>344</sup> *The Argus*, 1 March 1860, 5. Mrs Hayes also had 11 children.

<sup>345</sup> *Ibid.*

mercy on account of her 'advanced age',<sup>346</sup> public sympathy,<sup>347</sup> and a petition for mercy noting the lack of premeditation for the crime which had been committed during a drunken quarrel,<sup>348</sup> were accepted by the Governor. Hayes' sentence was commuted to 15 years imprisonment, the first three in irons.<sup>349</sup>

## B *Poison*

The use of poison as a means of murder attracted particular condemnation.<sup>350</sup> As one editor remarked in 1889, '[i]n the English speaking communities no crime arouses such general and distinct execration as that of poisoning. Your poisoner has no friends'.<sup>351</sup> The use of poison by a woman to kill her husband or employer carried particular odium.<sup>352</sup> Poisoning by women carried the taint of a deliberate crime of stealth, considered the *modus operandi* of female offenders, and thus a crime to be especially reviled.<sup>353</sup> As defence

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<sup>346</sup> Ibid.

<sup>347</sup> 'The Case of the Convict Ann Hayes', *Bendigo Advertiser*, 6 March 1860, 2.

<sup>348</sup> Ibid. See also *Empire*, 12 March 1860, 3; Ramsay, above n 274, 249.

<sup>349</sup> 'The Convict Ann Hayes', *Bendigo Advertiser*, 13 March 1860, 3. There was comment as to the 'very bad grace' that accompanied the reprieve. The order to be placed in irons for the first three years was unheard of for a female prisoner and the Governor of the prison was reported to have been so 'astonished' at the order, that he had checked its veracity: at 3.

<sup>350</sup> See, eg, Flanders, above n 295, 182-183, 231-234, 245-246; Watson, above n 6, 123-148.

<sup>351</sup> 'Louisa Collins', *Brisbane Courier*, 17 August 1889, 4.

<sup>352</sup> See, eg, 'The Case of Louisa Collins', *South Australian Register*, 9 January 1894, 4; *Northern Miner*, 31 March 1890, 5.

<sup>353</sup> See Robb, above n 10, 177-178. See, eg, Martha Needle who was convicted and hanged for the attempted murder of her fiancé's brother but it was strongly believed that she killed her husband, their three children and her fiancé's other brother with arsenic: see 'Martha Needle's Career', *The Advertiser*, 23 October 1894, 5 (on a modern view Needle was quite possibly insane. The use of mercury as the instrument of death was especially horrific. The toxic properties of mercury were known as early as Roman times and were well known in the 19<sup>th</sup> century. The term 'mad as a hatter' refers to the hat makers of the period whose frequent insanity was caused by the use of mercury nitrate solutions which were used to the cleaning of felt hats and the processing of beaver pelts which were in fashion at that time for hat-making. See Gerasimos Pavlogeogatos and Vasilis Kikilias, 'The Importance of Mercury

counsel declared in England in 1843 at the trial of Sarah Dazley, for the murder of her husband through the administration of arsenic:

The charge made against the prisoner was one of the most horrible that it was possible for a human being to be charged with... Murder was the highest offence, with the exception of treason, but this was the murder of one to whom she had avowed obedience and affection; one with whom she was having a happy and peaceable life, murder by poison administered in the helplessness of sickness and disease at the very moment he is leaning on her bosom for comfort and support.<sup>354</sup>

‘Poisoning was considered a particularly evil crime as it is totally premeditated and thus it was extremely rare for a poisoner to be reprieved’.<sup>355</sup> In 1889, Louisa Collins was the last woman to be judicially hanged in New South Wales for the murder of her second husband by arsenic poisoning. Her first husband, a man called Andrews, had also died in what were seen as suspiciously similar circumstances. Mrs Collins’ case aroused considerable debate throughout Australia and many calls for mercy.<sup>356</sup> Collins had faced an unprecedented four trials.<sup>357</sup> The first two trials for the murder of her second husband resulted in hung juries.<sup>358</sup> A third trial, this time

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Determination and Speciation to the Health of the General Population’ (2003) 4 *The International Journal* 107.

<sup>354</sup> *Bedfordshire Mercury and Huntingdon Express*, 29 July 1843. The accused was convicted and Alderson B passed sentence of death, emphasising that ‘no earthly tribunal’ could now save Dazley. She maintained her innocence. Sarah’s perceived promiscuous lifestyle and the highly suspicious deaths of her previous husband and infant child had attracted comment and the case prompted intense local gossip.

<sup>355</sup> Capital Punishment UK, ‘Sarah Dazley: a Victorian Murder’, <<http://www.capitalpunishmentuk.org/dazley.html>>.

<sup>356</sup> Kukulies-Smith and Priest, above n 6, 155-156.

<sup>357</sup> One MP challenged the Minister of Justice to give a parallel case in the colony’s history. See *Sydney Morning Herald*, 20 December 1888, 5, quoting NSW Legislative Assembly, 19 December 1888.

<sup>358</sup> See *R v Collins (No 1)*, *Sydney Morning Herald*, 7 August 1888, 9; 8 August 1888, 4; 9 August 1888, 3; 10 August 1888, 7; *R v Collins (No 2)*, *Sydney Morning Herald*, 6 November 1888, 11; 7 November 1888, 6; 8 November 1885, 5-6; 9 November 1888, 4-5.

for the murder of her first husband,<sup>359</sup> saw again the jury unable to reach a verdict. An ‘extraordinary’<sup>360</sup> fourth trial finally found Louisa guilty of the murder of her second husband.<sup>361</sup> The perceived betrayal by Louisa Collins, as with Elizabeth Woolcock, of the female role was ultimately to preclude any prospect of mercy.<sup>362</sup> As one columnist remarked,

This case is a clear one, and one of the most revolting ever perpetrated in Australia. Why should those seeking her reprieve plead sex? I think they should not, for when a woman sinks to such a state of iniquity that she will poison her husband, I say that woman has lost all the noble, gentle characteristics that, are natural to her sex.<sup>363</sup>

But the use of poison by a wife to murder her husband did not always preclude the grant of mercy.<sup>364</sup> Elizabeth Hyde was convicted at a retrial and sentenced to death for the murder of her husband in Queensland in 1890 through poisoning him with strychnine concealed in a scone.<sup>365</sup> The case bore more than passing similarity to that of Elizabeth Woolcock. Elizabeth Hyde was surrounded ‘by persons who looked with suspicion upon her’;<sup>366</sup> the prosecution’s

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<sup>359</sup> *R v Collins (No 3)*, *Sydney Morning Herald*, 20 November 1888, 3; 21 November 1888, 13; 22 November 1888, 6.

<sup>360</sup> *Portland Guardian*, 7 December 1888, 3.

<sup>361</sup> Kukulies-Smith and Priest, above n 6, 144, 152-154.

<sup>362</sup> *Ibid* 157. Not only had Louisa systematically poisoned at least one husband, but to compound her crime she had had an affair with her second husband when he had been a boarder at the house Louisa had shared with her first husband, who had died shortly afterwards. It is unsurprising that Louisa was branded ‘the Borgia of Botany Bay’: at 151.

<sup>363</sup> Junior Junius, Letter to the Editor, ‘The Case of Louisa Collins’, *Sydney Morning Herald*, 24 December 1884, 5.

<sup>364</sup> Mary Ann Burton and her stepdaughter, Sarah Keep, were convicted after two trials of the murder of Sarah’s husband by poisoning him with strychnine. The rationale to reprieve Keep and Burton was the chivalrous view that it was wrong to carry out the death penalty upon women, and that there were lingering doubts as to the guilt of the two women: see ‘The Maitland Poisoning Case’, *Maitland Mercury*, 28 May 1885, 4.

<sup>365</sup> See *R v Hyde*, *The Queenslander*, 8 March 1890, 459-460; *Brisbane Courier*, 27 February 1860, 2; 28 February 1890, 2. The first jury had been unable to reach a unanimous verdict.

<sup>366</sup> *Ibid*.

case was circumstantial, and the married life of the Hyde's 'a miserable one'.<sup>367</sup> The jury recommended mercy on account of Elizabeth's two young children,<sup>368</sup> but the *Brisbane Courier* was unimpressed with calls for mercy<sup>369</sup> on the basis of her sex.<sup>370</sup>

Women can commit murder as well as men; ...If any murderer deserves death, it is the poisoner; and we altogether fail to see, especially in these days of woman's asserted equality with man, that any distinction can in this respect be made between the sexes. It is certain that the law makes no distinction, and that the Executive could make none.<sup>371</sup>

However, unlike with Elizabeth Woolcock, the Executive Council accepted the jury's recommendation of mercy and Mrs Hyde's sentence was commuted to life imprisonment.<sup>372</sup>

### C *Adultery or Sexual Immorality*

The suggestion of adultery or sexual immorality, though more apparent than real in Elizabeth's case, was a further aggravating feature that would have prejudiced her chances of either acquittal or mercy.<sup>373</sup> As Wiener notes, in relation to the English case of Priscilla

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<sup>367</sup> *Brisbane Courier*, 27 February 1860, 2.

<sup>368</sup> The judge was reported as noting the jury's recommendation for mercy would be forwarded to the authorities but 'her removal from this world might perhaps be better for' her two young children: see *Brisbane Courier*, 28 February 1890, 2. This remark was later clarified as 'The jury have strongly recommended you to mercy, not on account of your own conduct, but for the sake of your two young children, whom your removal from the world would leave parentless': *Brisbane Courier*, 1 March 1890, 4.

<sup>369</sup> See 'Ipswich', *Brisbane Courier*, 20 March 1890, 5.

<sup>370</sup> 'Editorial', *Brisbane Courier*, 21 March 1890, 4.

<sup>371</sup> *Ibid.* See the mixed response by the *Northern Miner*, 31 March 1890, 5; passionately denouncing Mrs Hyde's 'betrayal' of her husband but opposing the death penalty.

<sup>372</sup> *Brisbane Courier*, 20 March 1890, 4. Apart from Mrs Hyde's two young children, there were possible lingering doubts as to the safety of her conviction: see 'Editorial', *Brisbane Courier*, 21 March 1890, 4.

<sup>373</sup> See, eg, Flanders, above n 295, 237-238; Ramsay, above n 274, 248; Robb, above n 10, 183-185. See, eg, the significance of sexual 'immorality' in the tragic case of Emma Williams, a young married woman who left her husband

Biggadike, convicted and hanged in 1868 for fatally poisoning her husband, '[s]he was charged with being assisted by her lover – a double crime in the public mind, if not in law'.<sup>374</sup>

This theme can be seen in a number of colonial cases of the 19<sup>th</sup> century.<sup>375</sup> Eliza Benwell, an assigned convict servant, was convicted of assisting her paramour and his two companions, all convicts, in the sexually motivated murder of the maid of the United States' consul in Tasmania in 1845.<sup>376</sup> Benwell was branded as 'a licentious woman of the worst sort',<sup>377</sup> who was even worse than her male accomplices in having betrayed her feminine role. Benwell 'proves the accuracy of the adage that an abandoned woman is capable of any extent of crime'.<sup>378</sup> The Executive Council refused mercy and

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to live with a man called Matthews and drowned her two year old son in Victoria in 1895 as he was a 'nuisance' and to stop Matthews 'grumbling' about him. She was a prostitute and had been unable to find anybody to take the child. See *R v Williams*, *The Argus*, 25 September 1895, 5; see also 'The Port Melbourne Murder, a Shocking Crime: 'Full Confession'', *The Argus*, 15 August 1895, 5; 'The Child Murder Case: The Mother Confesses', *Bairnsdale Advertiser*, 15 August 1895, 2. The trial judge, Hodges J, was notably unsympathetic in his summing up to the jury and dwelt on what he saw as Emma's dissolute character. See *R v Williams*, *The Argus*, 25 September 1895, 5. Mercy was refused and Emma was executed: see 'Execution of Emma Williams', *The Argus*, 5 November 1895, 6.

<sup>374</sup> Martin Weiner, 'Convicted Murderers and the Victorian Press: Condemnation versus Sympathy' (2007) 12 *Crimes and Misdemeanours* 110, 115.

<sup>375</sup> See, eg, the case of Eliza Campbell in 1825, 'Editorial', *Sydney Gazette*, 27 January 1825, 2. See related commentary, above n 310.

<sup>376</sup> The circumstances of her conviction were less than satisfactory. See 'The New Norfolk Murder' *Launceston Examiner*, 17 September 1845, 3; *The Observer*, 16 September 1845, 3; Davis, above n 14, 49; Geoffrey Abbott, *Amazing Stories of Female Executions* (Summersdale Publishers, 2006) 29. There was only one direct witness to the crime, a Pacific Islander who could not speak English. The jury at Benwell's trial initially pronounced her not guilty on the basis that the three men had not committed murder. Monatgu J refused to accept the verdict and instructed the jury that they could not go beyond the jury's original verdict at the trial of the three men and the only issue for their consideration was whether Benwell had aided and abetted the murder. The jury then proceeded to find Benwell guilty of murder. Benwell's execution has been called 'a serious miscarriage of justice': at 29.

<sup>377</sup> *Colonial Times*, 12 September 1845, 2.

<sup>378</sup> *Ibid.*

Benwell was duly hanged,<sup>379</sup> maintaining her innocence to the end.<sup>380</sup> Lucretia Dunkley was convicted and sentenced to death for the murder of her husband, in collaboration with her lover, Martin Beech, a convict servant, in New South Wales in 1843.<sup>381</sup> The Chief Justice, Sir James Dowling, described the defendants as ‘monsters of human depravity’,<sup>382</sup> and was especially struck by Lucretia’s hardened demeanour at trial, stating that it excited doubt of her ‘kindred with the human species, and lead to the conviction that the Devil himself had, for a time, assumed the female form.’<sup>383</sup> But it was Lucretia’s adultery which attracted His Honour’s particular condemnation,

A wife – the drunken polluter of the rites of Hymen, the violator of every tie by which the sacred institution of marriage can unite in holy wedlock, yielding to brutal lust, and with her paramour consummating her guilty passion in the blood of her husband!’<sup>384</sup>

Mercy was refused and both were hanged.<sup>385</sup> It was reported both ‘manifested the most appalling indifference’ to their fate and both ‘died as they had lived, hardened and unrepentant’.<sup>386</sup>

Elizabeth Scott was characterised by the press as ‘a scarlet woman luring young and innocent men to their doom’.<sup>387</sup> Elizabeth

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<sup>379</sup> See Tasmania Executive Council Minutes, 20 September 1845; ‘Execution of Eliza Benwell’, *Colonial Times*, 30 September 1845, 3; ‘Public Execution’, *The Courier*, 1 October 1842, 2.

<sup>380</sup> See ‘Eliza Benwell’, *The Courier*, 27 September 1845, 3; ‘Eliza Benwell’, *Cornwall Chronicle*, 24 September 1845, 185.

<sup>381</sup> *Australasian Chronicle*, 9 September 1843, 3.

<sup>382</sup> *Sydney Morning Herald*, 15 September 1843, 3.

<sup>383</sup> *Ibid.*

<sup>384</sup> *Ibid.*

<sup>385</sup> ‘Execution’, *Morning Chronicle*, 21 October 1843, 1.

<sup>386</sup> *Ibid.* A contrary view was offered by the chaplain. See John Kavanagh, Letter to Editor, *Morning Chronicle*, 25 October 1843, 2.

<sup>387</sup> Paula Wilson, ‘Elizabeth Scott’, 29 October 2011, <[http://www.openwriting.com/archives/2011/10/elizabeth\\_scott.php](http://www.openwriting.com/archives/2011/10/elizabeth_scott.php)>. See also Ramsay, above n 274, 248. For a more rounded view, see Anne Hanson, *White Handkerchief: The Story of Elizabeth Scott, the first Woman hanged in Victoria* (Anne Hanson, 2010).

and two men called Cross and Gedge, were convicted of the murder of her husband in Victoria in 1863, and sentenced to death.<sup>388</sup> Elizabeth was 22 with Gedge thought to be her lover. Elizabeth Scott's confidence that the authorities would not hang a woman proved misplaced.<sup>389</sup> Similarly, Ellen Thompson in 1887 was the only woman ever hanged in Queensland, convicted of the murder of her husband with her younger 'paramour', a man called Harrison who had deserted from the Royal Marines. The case prompted considerable debate and there were calls both for<sup>390</sup> and against<sup>391</sup> the grant of mercy. However, Ellen's 'immorality' counted strongly against her,<sup>392</sup> condemned to death, as Saunders notes, as much for her adultery as the murder of her husband.<sup>393</sup>

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<sup>388</sup> See *R v Cross, Gedge and Williams*, *The Argus*, 24 October 1863, 5; 28 October 1863, 6.

<sup>389</sup> *The Argus*, 9 November 1863, 4. See also 'Condemned Prisoners', *The Star*, 7 November 1863, 2S.

<sup>390</sup> See, eg, J Knight, Letter to Editor, 'The Condemned Woman', *Brisbane Courier*, 6 June 1887, 5; J Knight, Letter to the Editor, 'Mrs Thompson', 8 June 1887, 6; 'For a Woman's Sake', *Queensland Figaro and Punch*, 11 June 1887, 2-3; 'Our Gallows Jubilee', *Queensland Figaro and Punch*, 18 June 1887, 3.

<sup>391</sup> See, eg, *Warwick Examiner and Times*, 15 June 1887, 2; *Brisbane Courier*, 6 June 1887, 5; 'Hanging a Woman', *Northern Star*, 11 June 1887, 4.

<sup>392</sup> After the two had been hanged, a Professor Blumenthal conducted a 'phrenological examination' of the skulls of both Harrison and Ellen. Harrison's skull revealed 'combativeness was exceedingly large, destructiveness large, amativeness rather small but tending to sensuality, as shown by the noticeably heavy lips'. For Ellen, Blumenthal's examination 'showed that in the woman combativeness and destruction were both large, the domestic affections were very full, the animal of selfish propensities were full, the moral propensities were small, and sexual love amativeness exceedingly large': see 'Two Lives for a Life', *Brisbane Courier*, 14 June 1887, 3. Armed with these results, the *Brisbane Courier* felt able to offer the following informed comment on the case: 'Judging from this, it would seem that the woman was the moving spirit in the plot, and that her passion for Harrison inspired her. She was active, cunning and masterful, capable of doing kindly acts and attachment to her children. Harrison, on the contrary, cared for nothing but for himself, and wanted old Thompson's money far more than he did old Thompson's wife': at 3. It is striking that Blumenthal's 'examination' conveniently happened to accord with both the prosecution's theory of the case and the wider polarised perception of Ellen.

<sup>393</sup> Saunders, above n 25, ch 12.

Ellen's situation was not assisted by her stubborn and perceived unfeminine refusal to accept her guilt, let alone show suitable remorse.<sup>394</sup> Branded a 'perfect virago',<sup>395</sup> she appealed for mercy, denying any role in the murder, making three demands of the Governor and complaining, with good reason, of the conduct of Copper J, the trial judge.<sup>396</sup> Ellen went to the gallows declaring she was dying as an 'injured angel',<sup>397</sup> and denounced the Executive Council for their murder of an innocent woman.<sup>398</sup>

Yet the apparent worst female offender could receive mercy. Mary Anne Perry was convicted and sentenced to death without hope of mercy<sup>399</sup> in New South Wales in 1859 for 'one of the most atrocious crimes of murder'<sup>400</sup> of her husband.<sup>401</sup> Despite the gruesome nature of the crime and suggestions of sexual impropriety<sup>402</sup> she still attracted sympathy.<sup>403</sup> Perry maintained her

<sup>394</sup> See, eg, 'The Mossman Murders', *Queensland Figaro and Punch*, 21 May 1887, 6S; *Queensland Times*, 4 June 1867, 7; 'Our Brisbane Letter', *Cairns Post*, 22 June 1887, 4.

<sup>395</sup> *Morning Bulletin*, 13 June 1887, 4.

<sup>396</sup> See 'Petitions for Mercy', *Brisbane Courier*, 14 June 1887, 3. 'When I am dying on the gallows it will be the taking of my life that will be the murder. Our lives, I know, were completely sworn away through false swearing'.

<sup>397</sup> 'Brisbane', *Maitland Mercury*, 14 June 1887, 5. Other reports qualified this by noting that Elizabeth had 'admitted that, from a legal point of view, she might be guilty of the charge of murder, but morally was innocent as an unborn babe': see 'Double Execution in Brisbane', *Sydney Morning Herald*, 14 June 1887, 4; *Cairns Post*, 22 June 1887, 4.

<sup>398</sup> 'Double Execution at Brisbane', *The Mercury*, 20 June 1887, 2. See also 'Double Execution in Brisbane', *Sydney Morning Herald*, 14 June 1887, 6.

<sup>399</sup> See *Sydney Morning Herald*, 6 April 1859, 3; 7 April 1859, 3.

<sup>400</sup> 'Dreadful Murder', *Bathurst Free Press*, 16 February 1859, 3. Perry had been tied up and his skull 'split asunder' by an axe and it had taken some weeks for his body to be discovered. See 'Notes of the Week', *Sydney Morning Herald*, 21 February 1859, 2. It was recorded that when Perry's remains were found, 'the soft, flesh had entirely disappeared; thousands of, insects swarmed the bed, and the stench was intolerable. The deceased's bones were perfect, but when touched they fell to pieces....On the whole, the spectacle presented was most horrible': *Maitland Mercury*, 15 February 1859, 3.

<sup>401</sup> See *R v Perry*, *Sydney Morning Herald*, 6 April 1859, 3; 7 April 1859, 2-3; *Bell's Life in Sydney and Sporting Reviewer*, 9 April 1859, 2.

<sup>402</sup> Mary Perry was said 'to have been on terms of criminal intimacy' with a man called Crane, who was himself suspected of involvement in the crime: see

innocence,<sup>404</sup> and was reprieved, and sentenced instead to 15 years imprisonment.<sup>405</sup> There appears to have been two considerations behind this decision. First, ‘the provocation and brutal usage to which she had been subjected’ from her husband<sup>406</sup> (both were chronic alcoholics).<sup>407</sup> Secondly, and more significantly, doubts as to the strength of the prosecution case and the suggestion that others had been involved in the commission of the crime.<sup>408</sup>

## XI CONCLUSION

It has been seen that whilst the themes of petit treason or the murder of her husband by a woman, sexual ‘immorality’ or ‘depravity’ and the use of poison counted against a female offender’s prospects of reprieve, the question of mercy was seriously contemplated. Even female offenders convicted of murders that featured one, or even

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‘Notes of the Week’, *Sydney Morning Herald*, 21 February 1859, 2. The evidence against Crane was acknowledged at the time as ‘vague and inconclusive’; at 2; and his case was not taken to trial by the Attorney-General: see ‘The Late Murder at Burwood’, *Sydney Morning Herald*, 14 March 1859, 4. However, the issue of Crane’s purported liaison with Mary resurfaced at her trial and the defence case was that Crane may have been the killer. See *Sydney Morning Herald*, 7 April 1859, 2-3. Crane denied any affair with Mary or role in the murder. His role in the case was never entirely resolved. See also ‘Reprieve of Mary Ann Perry’, *Bell’s Life in Sydney and Sporting Reviewer*, 23 April 1859, 3.

<sup>403</sup> See, eg, ‘Burwood Murder and Its Moral’, *Sydney Herald*, 1859, 8 April 1859, 4.

<sup>404</sup> See P Agnew, ‘Letter to Editor’, ‘Mrs Perry’, *Sydney Morning Herald*, 25 April 1859, 5. Agnew was the Government Chaplain.

<sup>405</sup> See ‘Notes of the Week’, *Sydney Morning Herald*, 25 April 1859, 8.

<sup>406</sup> See ‘Reprieve of Mary Ann Perry’, *Bell’s Life in Sydney and Sporting Reviewer*, 23 April 1859, 3.

<sup>407</sup> ‘Burwood Murder and Its Moral’, *Sydney Herald*, 1859, 8 April 1859, 4.

<sup>408</sup> ‘Reprieve of Mary Ann Perry’, *Bell’s Life in Sydney and Sporting Reviewer*, 23 April 1859, 3. The *Sydney Morning Herald* speculated that the ‘the probable cause of this commutation is, that the proof of her having been the actual murderess is not deemed sufficiently conclusive, although there was quite enough evidence of her complicity – as a participant in the crime, either active or passive – to warrant the finding of the jury’: *Sydney Morning Herald*, 13 May 1859, 3.

more (as in the cases of Elizabeth Hyde or Mary Anne Perry), of these themes were not necessarily exempt from the benefit of mercy. The prerogative of mercy served a fundamental purpose in the colonial criminal justice system in mitigating the effects of capital punishment. As a discretionary power residing in the Executive, there are no common law principles which enliven the application of the pardon. Instead, the pardon seeks to 'dispense with or modify punishments which the common law or statute would require to be undergone',<sup>409</sup> in an act of forgiveness.

Female offenders as a class were not immune from application of the death penalty, but there was a particular reluctance to hang female offenders. This reluctance was most evident if the female offender was perceived paternalistically, as a 'pitiful creature worthy of mercy'.<sup>410</sup> However if she was seen to have abjured her 'high qualities, 'in affection, in tenderness, in long suffering', she was regarded as 'untrue to her highest instincts and is unworthy of the exceptional clemency...'<sup>411</sup>

Elizabeth Woolcock's misfortune is that was she perceived to have abjured her 'high qualities' with an insurmountable triple handicap to overcome. It is argued that, whilst it is impossible to resolve her guilt or innocence, the likelihood is that Elizabeth was not the 'criminally clever' murderer presented by the prosecution case. Rather it appears she was a victim of circumstance, convicted and condemned to death, as much upon speculation and stereotype, as upon the tenuous strength of the prosecution case. The evidence presented against Elizabeth was, as has been argued in this article (and was even noted at the time), fatally flawed, notably as to the questionable medical and scientific evidence and the dubious role of Dr Bull.

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<sup>409</sup> William Anson, *The Law and Custom of the Constitution* (Clarendon Press, 4<sup>th</sup> ed, 1935) 29.

<sup>410</sup> Carolyn Strange, 'Discretionary Justice: Political Culture and the Death Penalty in New South Wales and Ontario, 1890-1920' in Carolyn Strange (ed), *Qualities of Mercy: Justice, Punishment and Discretion* (UBC Press, 1996), 142.

<sup>411</sup> 'The Case of Louisa Collins', above n 26.

Both Elizabeth's trial and her eventual fate can be viewed in a wider context with her case illustrating the polarised perception and treatment of female capital offenders during this period. Female offenders were typically, and often arbitrarily, viewed in polarised terms, as endowed with the 'high qualities' of a 'womanly spirit' and therefore deserving of mercy, or in having abandoned their feminine spirit, as disgraceful, licentious and abandoned. In poisoning her husband, Elizabeth was perceived to fall into the second category, and could entertain little hope of sympathy. '[F]or when a woman sinks to such a state of iniquity that she will poison her husband, I say that woman has lost all the noble, gentle characteristics that, are natural to her sex'.<sup>412</sup> Her crime was further aggravated by her purported immorality as a married woman in her alleged liaison with Pascoe. These factors in combination, lead her to forfeit any right to mercy. Despite the real doubts as to her guilt and the strong mitigating factors that existed in her favour, Elizabeth Woolcock was destined to be the only woman in South Australia to ever suffer 'the extreme penalty of the law'.<sup>413</sup>

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<sup>412</sup> Junius, above n 363.

<sup>413</sup> 'Confession of Mrs Woolcock', *South Australian Register*, 2 January 1874, 3.