

Bushrangers, the Exercise of Mercy and the 'Last Penalty of the Law' in New South Wales and Tasmania 1824-1856

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Abstract

The death penalty in the 19th century in both colonial Australia and Great Britain was widely seen as necessary for punishment and deterrence. However, the prerogative of mercy served a vital role during this period in mitigating the effects of capital punishment. This article examines the exercise of the death penalty and the prerogative of mercy in colonial Australia during the period from 1824 to the grant of responsible government in 1856 with respect to bushrangers. Bushrangers despite their often celebrated and even sympathetic status in 'popular culture' were perceived (in official and 'respectable' circles at least) as more than mere colonial criminals and as posing a particular threat to the often tenuous stability and even existence of early colonial society. However, even offenders 'beyond the pale' such as bushrangers were not exempted from the benefit of mercy. It is argued that the prerogative was taken seriously in colonial Australia by the public, the press and notably the authorities to even the worst of capital offenders such as bushrangers. Different conceptions were expressed during the time, ranging from ideas of mercy as based on desert and equity, as something that was predictable and consistent, to ideas of mercy as an undeserved gift. These debates about the prerogative of mercy articulated different conceptions of law and order, community and justice in an embryonic, self-governing society.

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I INTRODUCTION

We trust these awful and ignominious results of disobedience to law and humanity will act as a powerful caution; for blood must expiate blood! and the welfare of society imperatively requires, that all whose crimes are so confirmed, and systematic, as not to be redeemed by lenity, shall be pursued in vengeance and extirpated with death.¹

These comments were offered by the *Hobart Town Gazette* in 1824 as to the fate accorded to Alexander Pearce, the notorious escaped convict and cannibal for murder;² John Butler for sheep stealing;³ and the escaped convicts and bushrangers John Thompson, Patrick Connolly, James Tierney and George Lacey for highway robbery and burglary and robbery of a dwelling at night.⁴ All were publicly hanged and Pearce's body was additionally ordered for dissection.⁵ The editor's hope was that the grisly fates of Pearce and the other prisoners would act as both a suitable punishment and deterrent.

The death penalty played a pivotal role in both the British and Australian criminal justice systems in the 19th century, reflecting a widespread (though far from universal)⁶ belief of the period, of the death penalty as necessary as both a means of punishment and deterrent to restrain and deter other potential evil doers. The exercise of the death penalty in England in the 18th and 19th centuries has long been a subject of both

¹ 'Executions', *Hobart Town Gazette* (Hobart), 24 July 1824, 2.

² See *R v Pearce* [1824] TASSupC 11 (*Hobart Town Gazette* (Hobart), 25 June 1824, 2). Not only had Pearce murdered and consumed a fellow convict called Cox when escaping from Macquarie Harbour, but on an earlier escape he had also killed and eaten several of his companions. See 'Alexander Pearce', *Hobart Town Gazette* (Hobart), 6 August 1824, 3.

³ This crime was regarded with particular gravity in the first half of the 1800s. See Alex Castles, *An Australian Legal History* (Law Book Co Ltd, 1982) 261; Richard Davis, *The Tasmanian Gallows: A Study of Capital Punishment* (Cat & Fiddle Press, 1974) 25-27. This offence carried the death penalty in Tasmania until 1836 and such offenders were regularly hanged. See further *Ibid*, 25-27.

⁴ See *R v Thompson and Others* [1824] TASSupC 15 (*Hobart Town Gazette* (Hobart), 25 June 1824, 3). See below n 95.

⁵ This was an additional punishment for deterrent purposes in cases of murder, under statutory discretion: *An Act for Better Preventing the Horrid Crime of Murder* (1752) Geo II c 37, s 2. Under (1752) 25 Geo II c 37, s 5 (*An Act for Better Preventing the Horrid Crime of Murder*), the judge was empowered to order that the body of the murderer be hanged in chains. If he did not order that, then the Act required that the body was to be anatomised, that is, dissected by surgeons, before burial. The intention in providing for anatomising was, reflecting the religious views of the period, to add to the deterrent effect of capital punishment, see Helen MacDonald, 'A Dissection in Reverse: Mary McLauchlan, Hobart Town, 1830' (2004) 13 *Feminist History Journal* 12, 13-16. 'Dissection was the most feared of all sentences' (David Towler and Trevor Porter, *The Hempen Collar: Executions in South Australia 1834-1964* (Wednesday Press, 1990, 13)

⁶ See, eg, Editorial, *Colonial Times* (Hobart), 19 June 1838, 7; 'Punishment of Death – Priest', *Launceston Examiner* (Launceston), 25 October 1845, 2. See further below n 34 and n 160.

academic scrutiny and popular interest.⁷ Yet the exercise of the death penalty has always been tempered in practice, by the elusive quality of mercy or ‘act of grace.’⁸ The prerogative of mercy is an ancient power vested in the British monarch to pardon, either unconditionally or conditionally, offenders. Study has been undertaken of the role of the prerogative of mercy⁹ in England during this period,¹⁰ and has been interpreted as vital to tempering the harsh effects of the *Bloody Code* that rendered, in theory at least, over 300 offences as punishable by death upon conviction.¹¹ In contrast, both the exercise of the death penalty and the role and application of the prerogative of mercy in early colonial Australia has been the topic of only limited scrutiny.¹² This is despite the fact that early colonial Australia, unlike England, represents an opportunity to consider ‘the actual rather than the theoretical operation of the *Bloody Code*.’¹³ This article is intended to help redress this gap in the understanding of this important aspect of the colonial legal system.

⁷ See, eg, VAC Gattrell, *The Hanging Tree: Execution and the English People* (Oxford University Press, 1994); Alan Brooke and David Brandon, *Tyburn: London's Fatal Tree* (Stroud, 2004). See generally John Beattie, *Crime and the Courts in England, 1660-1800* (Oxford University Press, 1986).

⁸ *Reckley v Minister of Immigration and Public Safety (No 2)* [1996] 1 AC 527, 540 (Lord Goff).

⁹ The prerogative was of great importance in capital cases. See further Carolyn Strange (ed), *Qualities of Mercy: Justice, Punishment and Discretion* (UBC Press, 1996); 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] *Australian and New Zealand Law and History Society e-Journal* 1, Part 3.

¹⁰ See, eg, Douglas Hay, ‘Property, Authority and the Criminal Law’ in Douglas Hay et al, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Allen Lane, 1975) 17 at 22-23, 23, n 1 and 43-49; Peter King, *Crime, Justice and Discretion in England 1740-1820* (Oxford University Press, 2000) 297-333; John Langbein, ‘Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources’ (1983) 50 *University of Chicago Law Review* 1-36. Mercy could also be exercised by jurors. See, eg, Thomas Green, *Verdict according to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* (University of Chicago Press, 1985); Trisha Olson, ‘Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial’ (2000) 50 *Syracuse Law Review* 109-196.

¹¹ There were over 220 statutes and a total of more than 350 offences in England that carried the death penalty in 1800, see J Ellard, ‘Law and Order and the Perils of Achieving It’ in Duncan Chappell and Paul Wilson, *Issues in Australian Crime and Criminal Justice* (Lexis Nexis Butterworths, 2005) 268. A useful list of these capital statutes can be found in Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (Stevens, 1948) App 1.

¹² See, eg, Tim Castle, ‘Watching Them Hang: Capital Punishment and Public Support in Colonial New South Wales’ (2008) 6 *History Australia* 43:1; Tim Castle, *The End of the Line: Capital Punishment and Mercy in Colonial New South Wales 1826-1836* (Honours Thesis, University of New England, 2006); Gregory Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900* (Federation Press, 2002); Plater and Milne, above n 9, 1-43.

¹³ Bruce Kercher, *Outsiders: Tales from the Supreme Court, 1824-1836* (Australian Scholarly Publishing, 2006) 5. In some years more offenders were hanged in Tasmania or New South Wales than in Great Britain.

The focus of this article is on the application of the death penalty and the prerogative of mercy to bushrangers in colonial Australia convicted of a capital crime. Bushrangers occupy a prominent place in the Australian national identity through their celebrated, if at times uncertain, portrayal in popular culture and literature. As Seal notes, 'The slightly enigmatic, slightly saturnine and ever ambivalent bushranger is the undisputed, if not universally admired, national symbol of Australia.'¹⁴ There has been considerable study, often of a colourful nature,¹⁵ of bushrangers, both generally¹⁶ and specifically of such leading figures as Ben Hall,¹⁷ Francis Gardiner,¹⁸ Andrew Scott alias Captain Moonlite,¹⁹ Frederick Ward alias Captain Thunderbolt²⁰ and lastly, but not least, Ned Kelly.²¹ In contrast the exercise in colonial Australia of the death penalty and the prerogative of mercy specifically to bushrangers, have been largely overlooked.²² This article examines the strength of the prerogative of mercy to bushrangers in colonial Australia in the period from 1824 to 1856 convicted of a capital offence and considers what factors influenced the colonial authorities in deciding who was reprieved and who faced the

¹⁴ Graham Seal, *Outlaw Heroes in Myth and History* (Anthem Press, 2011) 100.

¹⁵ See, eg, Jack Bradshaw, *The True Story of the Australian Bushrangers* (WJ Anderson and Co, 1924).

¹⁶ See, eg, James Bonwick, *The Bushrangers: Illustrating the Early days of Van Diemen's Land* (George Robertson, 1856); George Boxall, *The Story of the Australian Bushrangers* (Swan Sonnenschein & Co, 1899); Evan McHugh, *Bushrangers: Australia's Greatest Self Made Heroes* (Penguin Australia, 2011); Jennifer McKinnon, *Convict Bushrangers in New South Wales, 1824-34* (LaTrobe University, 1979); Allan Nixon, *100 Australian Bushrangers, 1789-1910* (Rigby Publishers, 1981); Charles White, *History of Australian Bushranging* (Rigby Limited, 1975).

¹⁷ See, eg, Frank Clune, *Ben Hall: The Bushranger* (Angus & Robertson, 1961); Nick Bleszynski, *You'll Never Take Me Alive – Life and Times of Bushranger Ben Hall* (Random House, 2008).

¹⁸ See, eg, Alec Morrison, *Frank Gardiner: Bushranger to Businessman (1830 to 1904)* (Wiley Publishing Australia, 2003)

¹⁹ See, eg, Samantha Asimus, *Captain Moonlite: Victim or Villain?* (Ginninderra Press, 2012) George Calderwood, *Captain Moonlite: Bushranger* (Rigby Ltd, 1971)

²⁰ See, eg, Carol Baxter, *Captain Thunderbolt and his Lady: the True Stories of Bushrangers Frederick Ward and Mary Anne Bugg* (Allen & Unwin, 2011).

²¹ The attention lavished on Ned Kelly and his gang is astonishing. 'Academics have devoted more time to the Kellys than to any other group of Australian historical figures' (Nixon, above n 16, 98). From the many works on Ned Kelly see, eg, Peter Carey, *True History of the Kelly Gang* (Knopf Doubleday Publishing Group, 2011); John Molony, *Ned Kelly* (Melbourne University Press, 2001); Ian Jones, *Ned Kelly: A Short Life* (Lothian Books, 1995); James Kenneally, *The Complete Inner History of the Kelly Gang and their Pursuers* (Reviews Ltd, 1929); Ian MacFarlane, *The Kelly Gang Unmasked* (Oxford University Press, 2013); Peter Fitzsimmons, *Ned Kelly: the Story of Australia's Most Notorious Legend* (Random House of Australia, 2013). The authors do not wish to enter into the long running historical debates as to the status of Kelly. As Jacobs notes, 'Many people thought – and still think – that they [the Kelly gang] were more sinned against than sinning' (Philip Jacobs, *Famous Australian Trials* (Robertson & Mullens Ltd, 1942) 78). The authors, like Jacobs, consider that it is best to 'let others decide whether this is true' (Ibid).

²² Though see Castle (2006), above n 12; Plater and Milne, above n 9.

gallows. This analysis highlights that the meaning and quality of mercy was the subject of debate and controversy during this time. These questions will be considered by looking at a number of bushranging cases in Tasmania and New South Wales from 1824 to 1856. Such cases, though perhaps seemingly historically insignificant in themselves, are important in revealing the wider society in which they took place.²³ They 'enable the modern reader to understand the moral universe of colonial society in which capital punishment was supported as a necessary part of maintaining secular social order as well as conforming to contemporary beliefs about divine justice.'²⁴

The reasoning of the colonial authorities in these cases demonstrates how they perceived and performed their role in the exercise of the death penalty for bushrangers and what considerations they had regard to and, whether in dealing with such offenders, there remained any place for the grant of mercy. The legal context of the period is also significant, commencing with the establishment in 1824 of the Supreme Courts of Tasmania and New South Wales; through the height of the transportation system in the 1820s and 1830s, the increasing development of the rule of law,²⁵ increasing free migration from the 1830s, the end of transportation to New South Wales in 1840 and then Tasmania in 1853,²⁶ the Gold Rushes and the grant of representative and then responsible government to the Australian colonies by 1856.²⁷

²³ See, eg, MacDonald, above n 5, 13; Simon Adams, *The Unforgiving Rope: Murder and Hanging on Australia's Western Frontier* (UWA Publishing, 2009) xix.

²⁴ Tim Castle, 'Constructing Death: Newspaper Reports of Executions in colonial NSW 1826-1837' (2007) 9 *Journal of Australian Colonial History* 67.

²⁵ It has been argued that aspects of the rule of law are evident in colonial society from as early as 1788 with the famous case of the convicts, Henry and Susannah Kable, who after arriving in the colony in 1788, successfully sued the captain who transported them to Botany Bay for the loss of property. See David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991).

²⁶ Though transportation was abolished to Tasmania in 1852, its effects lingered there for many years. See James Boyce, *Van Diemen's Land* (Black Inc, 2008) 236-243; Davis, above n 3, 58; Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868* (Collins Harvill, 1987) 323, 589-594.

²⁷ Australia underwent a fundamental transformation during the course of the middle part of the 19th century and evolved far beyond its origins as a simple penal colony. Though a detailed consideration of these changes and the reasons for them is beyond the scope of this article, by 1856, the transition from a frontier penal colony beset with peril to a stable self-governing free society was largely complete. See, eg, Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987). Alan Shaw, *The Story of Australia* (Faber & Faber, 1960) 104; Neal, above n 25. The Gold Rushes of the 1850s had a further profound effect on Australian society that was not confined to Victoria. See Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851-1861* (Melbourne University Press, 1963) 369-381.

'Cruelty, principle and mercy are inescapable and recurring elements in the story of the criminal law in colonial New South Wales'.²⁸ These often conflicting themes are especially evident in the exercise of the death penalty to bushrangers in colonial Australia in the period from 1824 to 1856. On the one hand the perceived need for punishment and deterrence are strongly manifest in the exercise of the death penalty, reflecting in part, the fear factor so prevalent in early colonial society.²⁹ This was especially manifest with regard to bushrangers who were viewed, in official circles at least,³⁰ as more than mere outlaws or criminals and as posing a real threat to the tenuous stability and on occasion even existence of early colonial society which necessitated the vigorous application of the criminal law. The 'last dreadful sentence of the law'³¹ was integral to the process of asserting and enforcing the authority of the government. 'In dealing with bushrangers, the Government was not just putting down cutthroats. It was proving that it was in fact the Government.'³²

On the other hand this article argues that deterrence and punishment, important as they were, were not the sole or even paramount considerations in the exercise of the death penalty to bushrangers. Rather, the colonial authorities, even with offenders such as bushrangers who were 'beyond the pale', took seriously the exercise of mercy in the context of an embryonic self-governing society in transformation from its penal roots.³³ The prerogative of mercy was imperfect and its exercise was often inconsistent. But the implementation of the death penalty was not a mere formality. Rather in the absence of a formal Court of Criminal Appeal until the end of the 19th century, mercy served a vital role in tempering the effects of capital punishment. The exercise of the prerogative was a serious and considered process where, as far as possible, even to bushrangers who had committed the most reprehensible crimes, 'mercy seasons justice'.

²⁸ Woods, above n 12, 6.

²⁹ See, eg, Editorial, *Sydney Herald* (Sydney), 15 September 1834, 2. See further below the discussion in Part 2.

³⁰ There is a strong trait in Australia to viewing bushrangers in uncertain but romantic terms. 'The bushranger is an essentially ambivalent character whose crimes, - often violent - are cast in folklore as justified defiance of oppression.' Graham Seal, *Great Australian Stories: Legends, Yarns and Tall Tales* (Allen & Unwin, 2009) x. See further the discussion below in Part 3.

³¹ *The Courier*, 16 September 1845, 3.

³² Alan Atkinson, *The Europeans in Australia, a History: Volume 2, Democracy* (Oxford University Press, 2004) 69.

³³ See, eg, John Braithwaite, 'Crime in a Convict Republic' (2001) 63 *Modern Law Review* 11; RB Madgwick, *Immigration Into Eastern Australia, 1788-1851* (Sydney University Press, 1969) ch 3; AGL Shaw, *Convicts and the Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire* (Faber, 1966) ch 10 and 11; Castles, above n 3, Ch 8 and 9; Woods, above n 12, Ch 1.

This article demonstrates that during this time the prerogative of mercy was conceptualised in different ways. One theme was whether or not a bushranger *deserved* the death penalty or mercy. Different factors contributed to these considerations, including recognition of the harsh conditions that may have propelled a convict to become a bushranger, the types of crimes and violence an offender may have committed, and how their offences compared to others who had committed similar crimes locally or in Britain. This approach has the effect of recasting mercy as equity, a notion that has been emphasised by legal historical scholars. For example, Langbein has argued that the pardon power in the 18th century England was utilised as an equitable adjustment for an overly harsh criminal code.³⁴ This conceptualisation of mercy as equity and desert was a way of ensuring consistency and certainty of punishment across different offenders. This article demonstrates that this notion of mercy as equity was particularly emphasised by members of the judiciary. This approach by the judiciary was consistent with the concern to reinstate law and order:

The very mercy of the law cries out
Most audible, even from his proper tongue,
'An Angelo for Claudio, death for death!'
Haste still pays haste, and leisure answers leisure;
Like doth quit like, and measure still for measure.³⁵

Here, mercy was reduced to equity and a proceduralist conception of law and justice focused upon certainty and consistency. Mercy was to be understood in legalistic terms according to a doctrine of precedent – was mercy exercised in other similar cases? In a fledgling society where law and order was under threat, mercy was to be reduced to a specific conception of order.

However, other themes of mercy were also present during this time, including amongst the members of the judiciary. In particular, there was the idea of mercy as an undeserved gift of reconciliation upon a wrongdoer. This drew from religious conceptions of grace, which was not owed or deserved, but was evoked from the Deity's boundless love and suffering for a wrongdoer.³⁶ Mercy offered a possibility of not only

³⁴ John Langbein, 'Albion's Fatal Flaws' (1983) 98 *Past and Present* 96, 102-106.

³⁵ William Shakespeare, *Measure for Measure*, Act V, Scene 1.

³⁶ See Olson, above n 10, 109-196. There is a strong religious background to the prerogative of mercy. 'The notion of clemency lies at the heart of Judeo-Christian theology' (Daniel Kobil, 'The Quality of Mercy Strained: Wrestling the Pardoning Power from the King' (1990-1991) 69 *Texas Law Review* 569, 572). As Shakespeare famously wrote in *The Merchant of Venice*: Portia's eloquent plea for mercy suggests that mercy 'blesseth him that gives, and him that takes' because its source is not in 'temporal power', but rather in the 'hearts of Kings', deposited there like the gentle rain of heaven by 'God Himself' (see *Ibid*; William Shakespeare, *The Merchant of Venice*, Act IV, scene i).

penitence but also redemption. Mercy as an undeserved gift expressed more about the benefactor's power and goodness than the recipient. This idea of mercy as an undeserved gift emphasised that justice was not, and should not be, solely about commensurability, represented by the image of Lady Justice holding scales and the expression, an 'eye for an eye'.³⁷ Rather, there were other conceptions of justice that went beyond objective adequation. Moreover, debates about and exhortations for or against mercy were reminders that justice was and is not the only virtue. Here mercy was perceived as another value additional and vital to softening harsh justice. Debates reflected a concern to articulate and organise central concepts in fledgling society about law and order, justice and mercy.

II THE DEATH PENALTY AND EARLY COLONIAL SOCIETY: 'IN NO COUNTRY IS LIFE SO INSECURE AS IN THIS'

The death penalty played a vital role in the administration of criminal justice in both Britain³⁸ and colonial Australia³⁹ in the 19th century.⁴⁰ The dual purposes of the death penalty were expressed to be deterrence and punishment. The rationale of deterrence was that the exercise of the death penalty (especially if accompanied at the gallows by the expected declarations of remorse from the condemned prisoner and exhortations to those assembled to learn from his or, rarely her, fate)⁴¹ would act as a 'terrible lesson to evildoers'⁴² and deter any other like-minded individuals. As George Savile, the 1st Marquess of Halifax, is reported to have said, 'Men are not hanged for stealing horses, but that horses may not be stolen.'⁴³ The rationale of the gallows in terms of punishment was simple. As one author observed of the customary 19th century argument justifying capital punishment, "'An eye for an eye, and a tooth for a

³⁷ Wai Chee Dimock, *Residues of Justice: Literature, Law and Philosophy* (University of California Press, 1996).

³⁸ See, eg, Gatrell, above n 7, 29-32; Hay, above n 11, 17-63.

³⁹ *R v Moore* (*Sydney Morning Herald* (Sydney), 16 January 1844, 2).

⁴⁰ The operation of the prerogative of mercy did not necessarily apply unchanged in a colonial context. Many other aspects of English law, customs and practices similarly did not apply unchanged in the Australian colonies. See, eg, *R v Farrell and Others*, *Sydney Gazette* (Sydney), 30 July 1831; NSW Select Cases (Dowling 1828-1844) 136, 148. Roger Therry, *Reminiscences of Thirty Years Residence in New South Wales and Victoria* (Sydney University Press, 1974) 317; Bruce Kercher, 'Why the History of Australian Law is not English' (2004) 7 *Flinders Journal of Law* 177-204; Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995).

⁴¹ See Castles, above n 3, 62; Davis, above n 3, 18; McDonald, above n 5, 21. See, eg, Thomas Power, a convicted bushranger, who at the gallows urged the crowd, 'My good friends, take warning by my sad example, and don't go bushranging' ('Executions', *The Australian* (Sydney), 23 May 1827, 3).

⁴² 'Execution of Harrison, Woods and Carver', *Empire*, 8 August 1864, 3.

⁴³ See generally, 4 *Blackstone's Commentaries* 1-19. As Blackstone states, 'the end of punishment is to deter men from offending'.

tooth,” and of the command “who so sheddeth man’s blood, by man shall his blood be shed”.⁴⁴ In her analysis of justice, Dimock asserts that the idea of ‘an eye for an eye’ expresses a highly influential model, both then and now, of justice as commensurability, predicated on a premise about the ‘weighable equivalences of the world and about the solvability of conflict on that basis.’⁴⁵ It is based upon an assumption of objective adequation, of good for good, and evil for evil, as if one evil could equal another evil, or one life equal another life, in the way that one tooth equals another tooth. It has the virtue of simplicity and predictability, but Dimock argues that it derives its intelligibility and predictability as much from what it fails to register as from what it does register. The application of the death penalty to bushrangers who killed was an example of justice as commensurability. One life was taken for another.

The sheer number of both sentences of death and executions in New South Wales and Tasmania during the convict period from 1824 to the 1840s in New South Wales and 1850s in Tasmania is striking. In 1830, 27 offenders were sentenced to hang in a single day at the Supreme Court in Hobart.⁴⁶ Castle notes that in 1830, more persons (50) were hanged in New South Wales than were hanged in all of England and Wales that year (46).⁴⁷ A remarkable 56 people were hanged in Tasmania in 1826, most for crimes short of murder,⁴⁸ and another 47 were hanged the following year.⁴⁹ In 1830, 30 persons were hanged in Tasmania.⁵⁰ Six members of a gang of bushrangers were publicly hanged together in Sydney in 1841.⁵¹ Four offenders were publicly hanged on the same occasion as late as 1855 in Hobart, literally just before the grant of responsible government.⁵²

Both hangings and the often gruesome crimes that led to them were an all too often routine event in the Australian colonies:

Hangings were taken as a matter of course by the inhabitants of Van Diemen’s Land with many people making a pastime of watching the

⁴⁴ OTR, Letter to Editor, *South Australian*, 12 June 1839, 4. See also Editorial, *Hobart Town Courier* (Hobart), 25 April 1829, 2. For an analysis of theories of deterrence see Adrian von Hirsch, *Doing Justice: The Choice of Punishments* (Hill and Wang, 1976); Adrian von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005).

⁴⁵ Dimock, above n 37, 2.

⁴⁶ *Hobart Town Courier* (Hobart), 8 May 1830, 3.

⁴⁷ Castle (2008), above n 12, 43.2.

⁴⁸ See Davis, above n 3, 21.

⁴⁹ Boyce, above n 26, 169.

⁵⁰ Davis, above n 3, 13.

⁵¹ ‘Execution of the Six Bushrangers’, *Sydney Herald* (Sydney), 17 March 1841, 2.

⁵² See Lloyd Robson, *A History of Tasmania* (Oxford University Press, 1983) 521-522. See also Boyce, above n 26, 236-243. This was ironically on the same day that news reached London of the formal renaming of the Colony as ‘Tasmania’ as part of the effort to erase the convict ‘taint’ of ‘Van Diemen’s Land’

event...Multiple executions were the order of the day, with the victims being not only bushrangers, escaped convicts and the like but people from all walks of life, although mainly the 'lower orders' as they were called suffered. With so many crimes other than murder listed as capital offences, the hangman had a very busy time....Multiple shocking murders were committed almost daily; dreadful affairs which make it seem unbelievable that ordinary people could live among so much carnage.⁵³

The imposition of the death penalty for offences other than murder offended against principles of justice as commensurability, but was justified due to the strong fear factor that existed in colonial society. Early Australian officials and settlers regarded themselves alone at the other side of the world from 'home' surrounded by a host of potential perils, notably but not confined to bushrangers. There was a strong perception, as noted in both contemporary⁵⁴ and modern accounts,⁵⁵ that colonial society was beset with crime and criminals. As one author comments of the 'fear' factor in Tasmania in this period:

In a colony where transported felons often outnumbered free settlers, where law and order were fragile and relative concepts, and brutality the resort of prisoner and gaoler alike, 'demons' were in plentiful supply, augmented by a lurking fear of those shadows in the bush, the original inhabitants.⁵⁶

This 'fear factor' came not just from the large convict population⁵⁷ but also Aboriginal offenders⁵⁸ and especially bushrangers.⁵⁹ Such offenders were regarded as posing not just a challenge to the maintenance of

⁵³ Joan Goodrick, *Life in Van Dieman's Land*, (Rainbow Publishing, 1992) 68.

⁵⁴ See, eg, Bonwick, above n 16, 2; Editorial, *Sydney Herald* (Sydney), 10 March 1826, 2; 'Nostalgus Buthurstiensis', Letter to Editor, *Sydney Gazette* (Sydney), 6 March 1834, 2-3; Editorial, *Sydney Herald* (Sydney), 15 September 1834, 2; Editorial, *Launceston Examiner* (Launceston), 13 July 1843, 3; Theodore Bartley, Letter to Editor: 'Household Events', *Launceston Examiner* (Launceston), 11 August 1852, 5.

⁵⁵ See, eg, Boyce, above n 26, 167; Castle (2008), above n 12, 43.2-43.4; Kercher (1995), above n 40, 103-104; Michael Sturma, *Vice in a Vicious Society; Crime and Convicts in mid 19th Century New South Wales* (University of Queensland Press, 1983) 64, 94-95.

⁵⁶ Ros Haynes, 'Van Diemen's Land', *The Companion to Tasmanian History*, available at <http://www.utas.edu.au/library/companion_to_tasmanian_history/V/VDL.htm>.

⁵⁷ See, eg, *R v Benson and Others* [1825] NSWSupC 4 (*The Australian* (Sydney), 27 January 1825, 2; *Sydney Gazette* (Sydney), 27 January 1825, 2-3); *R v Tougher and Kelly* (*Sydney Gazette* (Sydney), 7 November 1839, 3; *Sydney Herald* (Sydney), 8 November 1839, 2); James Mudie, *The Felony of New South Wales* (Landsowne Press, 1964) 113 and 116.

⁵⁸ Indigenous offenders, especially in relation to crimes committed upon white victims, were often seen in these terms. See, eg, *The Australian* (Sydney), 16 September 1826, 2-3; 'Black Natives', *Colonial Times* (Hobart), 5 June 1829, 2; *R v Yerricha and Others* (*South Australian Gazette and Colonial Register*, 25 May 1839, 4); *R v Tallboy* [1840] NSWSupC 44 (*Sydney Herald* (Sydney), 12 August 1840, 1S (trial); 14 August 1840, 1S (sentence); *Australian Chronicle*, 13 August 1840, 2); *R v Merrido and Nengavil* [1841] NSWSupC 48 (*Sydney Gazette* (Sydney), 18 May 1841, 2; *Sydney Monitor* (Sydney), 17 May 1841, 2).

⁵⁹ See Boyce, above n 26, 71-83; Hughes, above n 26, 203-243; Woods, above n 12, 77-78; Castles, above n 3, 79-80.

colonial law and order but as a very real threat to the tenuous stability of early colonial society. In particular in a society so heavily composed of convicts⁶⁰ there was always fear of a breakdown of what was described by Deputy Advocate-General Wilde in 1821 as the ‘sense of Restraint and Coercion, which may be urged to keep the Prisoners of the Crown, so comparatively numerous here, in proper awe and subjugation.’⁶¹ ‘A large portion of the population of this Colony’ was there under compulsion, as the Chief Justice observed in an 1838 case.⁶² He continued, ‘Great difficulties often occur in the management of the convict population in the interior; but the most effectual method to deal with them is to let them feel the arm of the law is strong enough to coerce them.’⁶³ The task of controlling and confining such a large part of the population was ‘a Herculean task’.⁶⁴ The imposition of the harshest penalties of the law was regarded as an act of strength and assertion of power. The ever present spectre that always loomed large in colonial society was, as Hughes notes, ‘a *jacquerie*, the convicts’ revolt that had figured in the nightmares of Australian settlers and governors since the Irish rose at Toongabbie in 1804.’⁶⁵

In contrast, Hirst argues that life in colonial Australia was comparatively ‘normal’ and the fear factor in colonial society was exaggerated.⁶⁶ Hirst asserts that the crime rate of Sydney was no higher than in London or any British port⁶⁷ and the rulers and local colonists in Australia were remarkably untroubled by thoughts of a convict rebellion, whether by the

⁶⁰ In 1822, two years before the establishment of the Supreme Court of Tasmania in 1824, 58% of the island’s white population were convicts (Hughes, above n 26, 371). In 1824 when the Supreme Court of Tasmania was established about half of Tasmania’s white population were convicts. In 1835 there were 22,000 convicts and 17,000 ‘free’ inhabitants. See Bonwick, above n 16, 8. Even as late as 1847, 34% of Tasmania’s white population were convicts, see Castles, above n 3, 255. In New South Wales in 1820, 45% of the white population were convicts but even as late as 1840 29% of the population were convicts and another 30% were former convicts and only 13% were free emigrants, see Neal, above n 25, 200-201.

⁶¹ Quoted by Hughes, above n 26, 231.

⁶² *R v Davies* (*Sydney Herald* (Sydney), 17 May 1838, 2; *Sydney Gazette* (Sydney), 19 May 1838, 3).

⁶³ *Ibid.*

⁶⁴ ‘One of the People’, Letter to Editor, *Colonial Times* (Hobart), 2 October 1846, 3.

⁶⁵ Hughes, above n 26, 234. Hughes is referring to the Irish convict rebellion at Castle Hill in 1804. There was a particular fear of the Irish convicts. See *Ibid.*, 181-195; Tony Moore, *Death or Liberty: Rebels and Radicals Transported to Australia 1788-1868* (Murdoch Books Australia, 2010) 101-120. As Naidis notes, ‘Every Irish convict was thought to harbour treason, treachery and murder’ (Mark Naidis, ‘Review: The Women of Botany Bay: A Reinterpretation of the Role of Women in the Origins of Australian Society’ [1991] *American History Review* 588).

⁶⁶ John Hirst, *Convict Society and Its Enemies: A History of Early New South Wales* (Allen & Unwin, 1983) 134.

⁶⁷ *Ibid.*

Irish or otherwise.⁶⁸ Though it would be simplistic to categorise early colonial society as merely the brutal convict Gulag depicted by Hughes,⁶⁹ one cannot overlook the reality of life in early colonial Australia, especially the 'fear' factor that was so prevalent in early colonial society. Whether or not this fear was warranted is arguable, what is significant is the feeling of fear at that time, and that sentencing and the prerogative of mercy took place within a context of fear. As one commentator remarked in 1835, 'In no country is life so insecure as in this.'⁷⁰ For example, the figures for 1837-1838 reflected and reinforced this fear, showing that the amount of crime in New South Wales and Tasmania 'in proportion to the respective populations [England and Australia], the number of convictions for highway robbery (including bushranging) in New South Wales exceeds the total number of convictions for all offences in England.'⁷¹ As the *Sydney Herald* declared in 1834 in the aftermath of the execution of two escaped convicts and bushrangers for the murder of Dr. Wardell, a prominent colonial barrister, 'The case of these Convicts show in a striking point of view, the absolute necessity for an unrelaxing system of restraint on the convict population.'⁷²

The threat perceived to the stability of early colonial society by offenders such as convicts, Aborigines and especially bushrangers justified a robust approach by the colonial authorities and militated against the exercise of mercy in such capital cases. This is illustrated by the case of a former convict from Port Arthur called Peter Kenney charged in 1847 with a burglary committed with extreme violence at the Hobart home of a respected citizen called Francis who was wounded in 21 places by the burglar and left for dead. At Kenney's trial,⁷³ Montagu J observed to the jury that 'a case of greater brutality he never heard'⁷⁴ and declared, 'We are surrounded with thieves, burglars and other offenders of the deepest criminality.'⁷⁵ The judge in an unflattering description of Tasmania, considered that, 'A worse community with especial reference to the very large population of the convict population never existed on the face of the

⁶⁸ Ibid 135.

⁶⁹ See, eg, John Braithwaite, 'Crime in a Convict Republic' (2001) 64 *Modern Law Review* 11-50; Alan Atkinson, 'Four Patterns of Convict Protest' (1979) 37 *Labour History* 28-51; Paula Bryne, *Criminal Law and the Colonial Subject* (Cambridge University Press, 1993); Neal, above n 25.

⁷⁰ Editorial, *Sydney Herald* (Sydney), 15 September 1834, 2.

⁷¹ House of Commons Papers for 1837-1838, vol xxii, paper no 669, quoted in Marcus Clark (ed), *Sources of Australian History* (Oxford University Press, 1957), 213.

⁷² 'Executions', *Sydney Herald* (Sydney), 13 November 1834, 2. Jenkins went to the gallows justifying his murder of the 'tyrant' Wardell and urged the assembled crowd if they ever 'went bush' to murder any other 'tyrant' they came across as well as several others he saw in attendance at the execution (Ibid).

⁷³ See *R v Kenney* (*The Courier*, 6 March 1847, 2-3).

⁷⁴ 'Mr Justice Montagu's Opinion of the State of the Country', *Launceston Examiner* (Launceston), 10 March 1847, 3.

⁷⁵ *The Courier*, 6 March 1847, 3. See also Davis, above n 3, 40.

globe than in this island, at all events never in the history of modern times.⁷⁶ Montagu J declared that if the jury ‘should entertain no doubt of the prisoner’s guilt, [but] the Executive should spare his life, then I should say the sooner the Supreme Court is shut up the better.’⁷⁷ Kenney denied any involvement⁷⁸ but was unsurprisingly (given the nature of both the crime and the judge’s summing up) convicted. Montagu J in passing sentence of death with ‘no hopes of mercy.’⁷⁹ noted Kenney’s ‘very bad character’ and declared that he had not the ‘slightest doubt’ of Kenney’s guilt and ‘it was an offence so dangerous to the community that I feel I should be neglecting my duty if I did not pass upon you the sentence of the law, and which will be carried into execution.’⁸⁰

The necessity for the ‘ultimate penalty of the law’ expressed in *Kenney* equally applied to bushrangers. *The Australian* in 1825, for example, noted with alarm the bushrangers ‘spreading terror and desolation among the settlers, driving them from, or burning them out of their homes.’⁸¹ *The Australian* denounced the ‘misplaced leniency’ of the Executive Council in reprieving such offenders, often more than once, from the death penalty:

...a deep error is committed by the Executive – an incalculable mischief done to society – and a temptation held out to the perpetration of the most alarming crimes. A system of terror in a place like this Colony, is an economical system and the greater the dread of extreme punishment, the less occasion is there to put it to practice. A score of executions everyone must allow, would be more effectual in repressing the desire to escape into the bush than all the terrors of all the penal settlements in the Southern Seas.⁸²

In such a society as described by *The Australian* and Montagu J in *Kenney*,⁸³ the death penalty, played, or was at least perceived to play,⁸⁴ a

⁷⁶ *The Courier*, 6 March 1847, 3.

⁷⁷ *Ibid.* Montagu J is referring to the prerogative of mercy.

⁷⁸ Kenney called as an alibi a woman who was labelled a prostitute and appears to have done his cause more harm than good.

⁷⁹ *Colonial Times* (Hobart), 9 March 1847, 3.

⁸⁰ *The Courier*, 10 March 1847, 4. For a report of Kenney’s execution, see ‘Executions’, *The Courier*, 24 March 1847, 2-3.

⁸¹ *The Australian* (Sydney), 1 September 1825, 2-3.

⁸² *Ibid.* 2. See also *The Courier*, 28 June 1844, 2.

⁸³ See ‘Mr Justice Montagu’s Opinion of the State of the Country’, *Launceston Examiner* (Launceston), 10 March 1847, 3.

⁸⁴ Whether the death penalty actually serves these purposes is highly debatable, as was even often argued during the period in both unofficial (see, eg, Editorial, *Colonial Times* (Hobart), 19 June 1838, 7; Editorial, *Launceston Advertiser* (Launceston), 18 February 1841, 3; ‘An Inhabitant’, Letter to Editor, ‘Priest and Gillan’, *Launceston Examiner* (Launceston), 25 October 1845, 7; ‘The Condemned Criminals’, *Hobart Mercury* (Hobart), 22 June 1855, 2) and even official quarters (see further below n 160).

crucial role in terms of both punishment and deterrence.⁸⁵ Though a range of defendants in Australia might find themselves at risk of infliction of the death penalty (especially under the *Bloody Code* that was in existence until the early 1830s), this was most evident for defendants who were alleged to have committed crimes that were regarded as representing a particular threat to not just law and order but also the seemingly tenuous stability and even existence of colonial society. Though convicts,⁸⁶ Aborigines⁸⁷ and sexual offenders⁸⁸ could be, and were, regarded in these stark terms, it is bushrangers, as *The Australian* suggested in 1825, who appear to have been viewed in early colonial society as posing the greatest threat and therefore to be most deserving of the death penalty.

Most early bushrangers were escaped convicts. By 1830 it was a capital offence to escape from a penal settlement.⁸⁹ In a society composed so heavily of convicts or former convicts it was regarded as imperative to deter them from the commission of further crimes (especially of resorting to bushranging). The importance of the death penalty in helping to control the large convict population in this context is clear. This theme was emphasised by the Attorney-General in *R v Oxley*⁹⁰ during the trial of a convict who had escaped from a prison hulk. Though this might not appear to have represented the most serious crime in the colonial criminal calendar, the consequences in a strict penal colony of escaping convicts, particularly if they committed further crimes, especially of bushranging, were obvious. The Attorney-General in *Oxley* (displaying a marked lack of prosecutorial restraint)⁹¹ implored the jury to take heed of the fact that

⁸⁵ See Castle (2008), above n 12, 43.5-43.6.

⁸⁶ See, eg, Editorial, *Colonial Times* (Hobart), 2 October 1829, 2. See below n 96.

⁸⁷ See, eg, 'Black Natives', *Colonial Times* (Hobart), 5 June 1829, 4. See below n 97.

⁸⁸ See, eg, *R v Tougher & Kelly* (*Sydney Gazette* (Sydney), 7 November 1839, 3); *Sydney Herald* (Sydney), 8 November 1839, 2) (assault with intent to 'ravish' a female) and the sentencing comments of Dowling CJ in *R v Saunders*, *R v Hiefe* and *R v Manson* [1841] NSWSupC 14 (*Sydney Herald* (Sydney), 16 February 1841, 2). See also Davis, above n 3, 29-32; Hughes, above n 26, 244-281. The rationale that sexual offenders should be the subject of stern prosecution and even execution was that in a society where women were so heavily outnumbered by men (Castles notes that in Tasmania in 1824 males outnumbered females by a factor of three to one and by 1847 this was still two to one, Castles, above n 3, 261) the colony's women were endangered and had to be protected from the threat that any sexual offender posed to them, see Davis, above n 3, 29-32; Castles, above n 3, 261-62.

⁸⁹ See Davis, above n 3, 28.

⁹⁰ [1832] TASSupC 32 (*Tasmanian*, 7 December 1832).

⁹¹ Such prosecutorial zeal, at odds with the prosecutor's purported role as the restrained 'minister of justice', was not unusual in this period in confronting such defendants who were seen as a 'threat' to colonial society. See David Plater and Sangeetha Royan, 'The Development and Application in Nineteenth Century Australia of the Prosecutor's Role as a Minister of Justice: Rhetoric or Reality?' (2012) 31 *University of Tasmania Law Review* 78. This zeal was often found in the prosecution of bushrangers. See, eg, *R v Evans* [1824] TASSupC 21 (*Hobart Town Gazette* (Hobart), 12 November 1824, 3); *R v Whitton* (*The Australian* (Sydney), 25 February 1840, 2; *Sydney Herald* (Sydney), 26 February 1840, 2; *Sydney Gazette* (Sydney), 27 February 1840, 2); *R v Shea and Others* [1841] NSWSupC 7 (*Sydney Herald* (Sydney), 25 February 1841, 2-3; *Australasian Chronicle*, 25 February

they were beset with crime and criminals and to make an example of the defendants in the hope and expectation that mercy would not again be extended to him:

Gentlemen of the Jury, the case which I have now to bring before you, is one of those wherein I regret to state that the clemency of the Government is abused under a vague supposition, that because mercy has been extended to its utmost limit, it is still to continue so. The few examples which have been made of persons, of the prisoner's description have had so effect; they trust all to a chance lottery; but, I now tell that unfortunate man, that he need expect no mercy being extended to him, for so sure as he is found guilty of the charge exhibited against him, (as I expect he will) so sure he goes from here to the gallows. It is high time that an effective check should be put to the desperate and lawless proceedings of persons of the prisoner's description in a penal Colony like this, surrounded as we are by the most abandoned characters. What safety can there be for lives or property? When I reflect on the situation which I hold, it is astonishing how my life or my house is safe among them - men whom it appears spend their time in planning schemes of escape and plunder, and who evade the watchfulness of the most vigilant guards. I wish that every convict in the Colony could hear me, when I say that the mercy which has been so often and so wantonly abused, will not be extended in future; and as I see there is a Reporter here from the Public Press, I do request that he will put this case, with what I say, before the public, and especially before the prison population.⁹²

Here, mercy was seen as a weakness, 'wantonly abused'.⁹³ This was a message not only to the jury, but also to the Executive and Governor. There was a concern to reinstate law and certainty. On occasion, such as in *Kenney* and *Oxley*, notions of punishment and deterrence took precedence over any other consideration. Though such reasoning might extend to any one of a number⁹⁴ of seemingly non-serious capital

1841, 2-3; *The Australian* (Sydney), 25 February 1841, 2; *Sydney Gazette* (Sydney), 27 February 1841, 2); *R v Reid and Others* (*Colonial Times* (Hobart), 2 April 1844, 3); *R v Dalton and Kelly* (*Cornwall Chronicle* (Launceston), 9 April 1853, 2; *Launceston Examiner* (Launceston), 9 April 1853, 4-5).

⁹² *Tasmanian*, 7 December 1832. See also the case of James Porter in 1830 when the Colonial Secretary argued against mercy for an escaped previously reprieved convict from Macquarie Harbour as it 'was of the utmost importance' to prevent such escapes and highlighting it would be 'impossible to maintain [the system] unless severe examples were made of those who escaped'. See Executive Council Minutes, Tasmania, 6 May 1830. The majority of the Council disagreed and the sentence was commuted to transportation for life. See *Ibid.*

⁹³ See the prosecutor's similar indignation as to the prisoners' perceived abuse of mercy in *R v Shea and Others* [1841] NSWSupC 7 (*Sydney Herald* (Sydney), 25 February 1841, 2-3; *Australasian Chronicle*, 25 February 1841, 2-3; *The Australian* (Sydney), 25 February 1841, 2; *Sydney Gazette* (Sydney), 27 February 1841, 2).

⁹⁴ The *Bloody Code* applied in the colonies until the 1830s when the number of offences attracting the death penalty was drastically reduced but crimes such as highway robbery,

offences such as the theft of livestock,⁹⁵ its application is particularly evident to those offenders who were perceived to threaten the tenuous stability of early colonial society such as rebellious or intractable convicts,⁹⁶ Aboriginal offenders,⁹⁷ and, especially, bushrangers⁹⁸ (though even with these offenders the prerogative of mercy still played a vital role and it was far from inevitable that such offenders would be executed).⁹⁹

III BUSHRANGERS IN COLONIAL SOCIETY: MORE THAN MERE OUTLAWS

Bushrangers occupy a leading but ambivalent place in Australian culture and literature. On the one hand they have been often portrayed to the present day in romanticised terms as either political rebels, 'heroic symbols of resistance to constituted authority',¹⁰⁰ or as adventurers and folk heroes.¹⁰¹ Waker observes that bushrangers were so strongly

serious assaults and rape still attracted the death penalty. See further Woods, above n 12, 112-136.

⁹⁵ See, eg, *R v Butler and Others* [1824] TASSupC 4 (*Hobart Town Gazette* (Hobart), 2 July 1824, 2-3). See above n 3.

⁹⁶ See, eg, *R v Benson and Others* [1825] NSWSupC 4 (*The Australian* (Sydney), 27 January 1825, 2; *Sydney Gazette* (Sydney), 27 January 1825, 2-3; *R v Gough, Moore and Watson* (*Sydney Gazette* (Sydney), 24 September 1827, 2-3; *Sydney Monitor* (Sydney), 24 September 1827, 2; 'Execution', *Australian*, 26 September 1827, 3) (the fitting fate of three convicts, especially Gough who had long proved an especially difficult prisoner, for the murder of a guard at Norfolk Island). See also the swift fate accorded to ten convicts in 1830 condemned to death and refused mercy for their involvement in a convict rebellion with apparent Irish political overtones near Bathurst. See *R v Webster and Others*; *R v Entwistle and Others* (*Sydney Gazette* (Sydney), 11 November 1830, 3); see also Chris Clark, *The Encyclopaedia of Australia's Battles* (Allen & Unwin, 2010) 8.

⁹⁷ See, eg, *The Australian* (Sydney), 16 September 1826, 2-3; *R v Tallboy* [1840] NSWSupC 44 (*Sydney Herald* (Sydney), 12 August 1840, 1S (trial); 1S August 1840, 1S (sentence)); *R v Yerricha and Others* (*South Australian Gazette and Colonial Register*, 25 May 1839, 4; see also 'Trial and Conviction of the Natives', *South Australian Gazette*, 25 May 1839, 2); 'The South Australian Protectorate', *South Australian Register*, 15 August 1849, 2.

⁹⁸ See, eg, the sentencing comments in *R v Holmes and Others* [1828] NSWSupC 106 (*The Australian* (Sydney), 16 December 1828, 3; *Sydney Gazette* (Sydney), 15 December 1828, 3); *R v Whelan and Payne* (*Sydney Gazette* (Sydney), 8 January 1829, 3; *Sydney Monitor* (Sydney), 12 January 1829, 5-6); *R v Whitton* (*Sydney Herald* (Sydney), 26 February 1840, 2); *R v Crumden* (*Cornwall Chronicle* (Launceston), 3 April 1844, 2). This theme was repeated as late as 1867; see the Chief Justice's strong sentencing comments in *R v Thomas and John Clark* (*Sydney Morning Herald* (Sydney), 29 May 1867, 3).

⁹⁹ See further the discussion below in Parts 4 and 5.

¹⁰⁰ Russell Ward, *The Australian Legend* (2nd ed) (Oxford University Press, 1966) 146.

¹⁰¹ See, eg, Graham Seal, *The Outlaw Legend: a Cultural Tradition in Britain, America and Australia* (Cambridge University Press, 2011) 119-142; Keith Dunstan, *Saint Ned: the Story of the Near Sanctification of Ned Kelly* (Methuen of Australia, 1980); Hughes, above n 26, 237-243; Ward, above n 100, 145-146; Russell Ward, 'The Australian Legend Revisited' (1978-1979) 18 *Historical Studies* 171, 179-180. For a critical review of the

supported by 19th century public sympathy, as to amount to ‘a leading national institution’.¹⁰² On the other hand bushrangers are also viewed as no more than glorified gangsters and common criminals. As one author notes, ‘Bushrangers in fact were brutal thugs who informed on each other and lacked any chivalrous or redeeming features. As such they were thoroughly detested by ordinary people.’¹⁰³

It is unnecessary for the purposes of this article to resolve whether the bushrangers of the period are more aptly categorised as the folk heroes of popular culture or as no more than common criminals and thugs.¹⁰⁴ What is clear is the perception that was accorded to bushrangers in official and ‘respectable’ circles, whatever sympathy (misplaced or otherwise) that may have been accorded to them in other quarters.¹⁰⁵ Bushrangers were viewed by the colonial authorities, as a ‘formidable threat’.¹⁰⁶ Even Hirst acknowledges that ‘the threat to the colony’s peace came not from large-scale rebellion but from thieves runaways and bushrangers who had no thought of rebellion but whose activities if allowed to go unchecked would have led to crippling disorder and perhaps have created the circumstances in which rebellion was more likely.’¹⁰⁷

The threat posed by bushrangers during the period from 1824 to 1856 (and indeed later) was very real. The ‘awful brutality’ and ‘murderous exploits’¹⁰⁸ of the bushrangers posed a major and recurring threat to law and order throughout not only the early colonial period but well into the

mythologizing of bushrangers, see R Walker, ‘Bushranging in Fact and Legend’ (1964) 11:42 *Historical Studies* 206-221.

¹⁰² *Ibid* 206.

¹⁰³ Ward, above n 102, 180, referring to Humphrey McQueen, *A New Britannia: an Argument concerning the social origins of Australian radicalism and nationalism* (Ringwood, 1970) 136-139. See also, eg, ‘The Bushrangers’, *Empire*, 25 December 1856, 2; John West, *The History of Tasmania* (Henry Dowling, 1856) 137-138.

¹⁰⁴ In truth the answer is mixed. For every chivalrous and restrained culprit such as Daniel Priest (see below Part 4), or William Westwood alias Jackey Jackey (see below Part 5) there was a sadistic thug such as Thomas Jeffries, the four runaway convicts who in 1839 during a brutal armed burglary successively raped an elderly mother of 15 children (see *R v Jackson* (*Sydney Herald* (Sydney), 7 February 1840, 2; see also *R v Sumner and Others* (*The Australian* (Sydney), 21 May 1839, 2)) or John Lynch who killed nine people in New South Wales in the early 1840s including a young girl with an axe and strangled a dog with his bare hands (see McQueen, above n 103, 137). This mixed reality of bushrangers is supported by contemporary authors. See, eg, Bonwick, above n 16, 13. See further Jill Brown, *Bushrangers: Heroes, Victims or Villains* (Kangaroo Press, 2003); Edgar Penzig, *Bushrangers – Heroes or Villains: the Truth about Australia’s Wild Colonial Boys* (Tranter Enterprises, 1988).

¹⁰⁵ See, eg, Bonwick, above n 16, 88-89; A L Haydon, *The Trooper Police of Australia: a Record of Mounted Police Work in the Commonwealth from the Earliest Days of Settlement to the Present Time* (Arthur Lincoln, 1911) vi.

¹⁰⁶ Paula Byrne, *Criminal Law and the Colonial Subject* (Cambridge University Press, 2003) 143.

¹⁰⁷ Hirst, above n 66, 137.

¹⁰⁸ ‘The Bushrangers’, *Empire*, 25 December 1856, 2.

second half of the 1800s.¹⁰⁹ Bushrangers were regarded as more than mere outlaws and on more than one occasion represented a real menace to the entire social order in colonial society.¹¹⁰ In Tasmania they became a real 'social force'.¹¹¹ One columnist in 1826 spoke of the 'detestable and lawless banditti, whose outrages are now of a character threatening the most serious consequences.'¹¹² Indeed, until 1826, the bushrangers' long 'predatory career'¹¹³ in Tasmania had threatened the 'most serious consequences'¹¹⁴ to 'the best interests of this infant Colony.'¹¹⁵ The settlers and officials 'were sure the convict population was ready to rise and join the bushrangers, consigning Van Dieman's Land to anarchy.'¹¹⁶ It has been argued that the fears held as to the extent of the threat posed by bushrangers to Tasmania 'is not 19th century hyperbole.'¹¹⁷ As one Tasmanian columnist in 1843 declared:

...when every door is barred and bolted at sunset – when every door knock sends women into fits, and this makes knockers the curse of domestic peace – when the most brave are frightened in the dark, and children dare not sleep alone – in the midst of such universal terror and timidity.¹¹⁸

Similarly, the activities of bushrangers in New South Wales were a source of recurring concern. Therry commented that bushrangers had been the 'terror'¹¹⁹ of New South Wales and in the 1830s it was 'positively perilous to venture from Sydney, in consequence of the daring of the bushrangers'.¹²⁰ A gang of escaped convicts and bushrangers in 1834 even murdered Dr. Wardell, a prominent colonial barrister.¹²¹ James Macarthur in 1840 complained that 'the bushrangers were now governing the Colony with a reign of terror.'¹²² Governor Bourke in justifying to the Colonial Secretary the introduction in New South Wales in 1830 of the contentious *Bushranging Act* explained:

¹⁰⁹ See, eg, Woods, above n 12, 203-206; Henry Parkes, *Fifty Years in the Making of Australian History* (Longmans, 1892) 180-186.

¹¹⁰ See Hughes, above n 26, 203-243; Editorial, *Colonial Times* (Hobart), 14 April 1826, 2; Woods, above n 12, 77-78; Castles, above n 3, 79-80.

¹¹¹ Hughes, above n 26, 234.

¹¹² 'The Bush-Ranger: Dreadful Outrages and Murder!', *Colonial Times* (Hobart), 10 March 1826, 2.

¹¹³ *Colonial Times*, 14 April 1826, 2.

¹¹⁴ 'The Bush-Ranger: Dreadful Outrages and Murder!', *Colonial Times* (Hobart), 10 March 1826, 2.

¹¹⁵ *Colonial Times* (Hobart), 14 April 1826, 2. See further Robson, above n 52, 78-105.

¹¹⁶ Hughes, above n 26, 228. See also Boyce, above n 26, 71-83.

¹¹⁷ *Ibid.*, 74.

¹¹⁸ *Launceston Examiner* (Launceston), 13 July 1843, 3.

¹¹⁹ Therry, above n 40, 43.

¹²⁰ *Ibid.*, 123.

¹²¹ See *R v Jenkins and Tattersdale* [1834] NSWupC 118 (*Sydney Herald* (Sydney), 10 November 1834, 2).

¹²² 'Legislative Council', *The Australian* (Sydney), 30 May 1840, 2.

...the roads were infested by bushrangers and it was unsafe to proceed even a short distance from Sydney without an escort or being well armed and in company. Burglaries had become common and I am informed that there was an absolute want of security for life and property within the best peopled parts of the Colony.¹²³

But the activities of the bushrangers in New South Wales, as in Tasmania, extended beyond their challenge to law and order or threat to the livelihoods of certain sectors of society.¹²⁴ Even when the worst of the bushrangers had been suppressed in Tasmania, in New South Wales ‘the bandits continued to pillage and present their threats to the law, reminding convicts and awakening the fears of their masters that chains were made to be broken.’¹²⁵ Similar fears remained in Tasmania.¹²⁶ Indeed, with the influx of many convicts from Norfolk Island to Tasmania, such fears were still expressed in Tasmania as late as the 1850s.¹²⁷

Bushrangers proved a major and recurring threat to the maintenance of colonial law, whether on the level of individual law-breaking or to more general threats to order, until well into the second half of the 19th century in both Tasmania and New South Wales.¹²⁸ Byrne notes that although ‘the reality might well have been that bushrangers were desperate, hungry runaway convicts but the IMAGE presented of them in court was quite different.’¹²⁹ It is the image or perception of bushrangers which framed and established the court’s reactions to the bushrangers (including their punishment).¹³⁰

The death penalty was perceived as necessary to counter the acute threat (even if objectively not entirely justified) presented by bushrangers. This reasoning can be seen in the salutary fates of many convicts turned bushrangers in both Tasmania¹³¹ and New South Wales¹³² during this

¹²³ Quoted by Byrne, above n 106, 142.

¹²⁴ See John Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Allen & Unwin, 1988) 217-241; Woods, above n 12, 203-206.

¹²⁵ Hughes, above n 26, 234.

¹²⁶ Boyce, above n 26, 77.

¹²⁷ See, eg, ‘Bushranging’, *Colonial Times* (Hobart), 18 January 1853, 2; ‘The Recent Murders’, *Colonial Times* (Hobart), 30 May 1855, 2.

¹²⁸ See Boyce, above n 26, 71-83; Hughes, above n 26, 203-243; Woods, above n 12, 203-206; Henry Parkes, *Fifty Years in the Making of Australian History* (Longmans, 1892) 180-186. Bushrangers were also active in the other Australian colonies, especially Victoria. Bushrangers, especially former convicts from Tasmania (the so called ‘Vandemonians’), plagued Victoria during the Gold Rushes of the 1850s (see Boxall, above n 16, Ch 12-14) and remained active in the Colony until 1880 with the Kelly Gang.

¹²⁹ Byrne, above n 106, 130. Byrne’s emphasis.

¹³⁰ *Ibid.* This perception also shapes to a certain extent the wider culture of bushranging itself. See *Ibid.*

¹³¹ See, eg, *R v Thompson and Others* [1824] TASSupC 15 (*Hobart Town Gazette* (Hobart), 25 June 1824, 3; ‘Executions’, *Hobart Town Gazette* (Hobart), 24 July 1824, 2)

(the assertion of four escaped convicts from Macquarie Harbour that their harsh conditions had prompted their escape and resort to bushranging was dismissed by the Chief Justice 'for if such conduct as yours is allowed, no man's property or person or life will be safe' (*Hobart Town Gazette* (Hobart), 25 June 1824, 3)); *R v Strong and Others* (*Colonial Times* (Hobart), 5 January 1827, 4; *Hobart Town Gazette* (Hobart), 6 January 1827, 4) (five bushrangers refused mercy and hanged in hope that their death would serve as a fitting example (see 'Executions', *Hobart Town Gazette* (Hobart), 13 January 1827, 4); *R v Ashton, Gibson and Moulds* (*Hobart Town Courier* (Hobart), 10 January 1829, 2) (the 'most aggravated case' (Ibid) of three escaped convicts who were refused mercy for robbing a house while the family were present; see also *Hobart Town Courier* (Hobart), 21 February 1829, 2); *R v Lawton and Others* (*Hobart Town Courier* (Hobart), 26 June 1830, 3) (four convicts who had escaped from the service of a Major McLeod on account of their poor treatment and had been sentenced to death for robbing the house of a Mr. Stewart, were refused mercy, not so much for that crime, but for also attacking and firing upon McLeod's house (there was no objection to taking into account this uncharged act in deciding their fate); see Executive Council Minutes, Tasmania, 24 and 26 June 1830); *R v Watson and Wallace* (*Cornwall Chronicle* (Launceston), 16 January 1841, 3; *Launceston Courier* (Launceston), 11 January 1841, 2) (sentence of death without any ground for merciful consideration upheld for the robbery of a house despite an absence of violence and appeals for mercy; see Editorial, *Launceston Courier* (Launceston), 28 January 1841, 3; 'Execution of Watson and Wallace', *Launceston Courier* (Launceston), 1 February 1841, 2); *R v Conway and Jeffs* (*Cornwall Chronicle* (Launceston), 8 July 1843, 2-3; *Launceston Examiner* (Launceston), 8 July 1843, 3-4 (trial); *Launceston Advertiser* (Launceston), 13 July 1843, 3; *Cornwall Chronicle* (Launceston), 15 July 1843, 2 (sentence)) (two bushrangers refused mercy for the murder of a police constable committed during a robbery despite appeals for mercy for Jeffs after the Executive Council resolved 'that under the existing circumstances in which the Colony is placed with respect to bushrangers, an example is absolutely required' (Executive Council Minutes, Tasmania, 17 July 1843); Henry Ford (see *R v Smart and Ford* (*Launceston Examiner* (Launceston), 8 April 1846, 6; *Cornwall Chronicle* (Launceston), 11 April 1846, 280-281(trial); *Cornwall Chronicle* (Launceston), 11 April 1846, 281; *Launceston Examiner* (Launceston), 11 April 1846, 6 (sentence) (sentence of death passed without hope of mercy and upheld despite reprieve of accomplice for armed robberies of houses in the middle of Launceston, 'outrages of so bad a character' as had not been seen by the Chief Justice during his 20 years on the Bench (see Ibid); see also 'Execution', *Launceston Examiner* (Launceston), 25 April 1846, 6; 'The Execution', *Cornwall Chronicle* (Launceston), 29 April 1846, 327).

¹³² See, eg, *R v Holmes and Others* [1828] NSWSupC 106 (*The Australian* (Sydney), 16 December 1828, 3; *Sydney Gazette* (Sydney), 15 December 1828, 3; see also 'Execution', *The Australian* (Sydney), 23 December 1828, 3) (three escaped convicts executed for using the servants as 'human shields' and robbing the dwelling of a settler and putting the occupants in bodily fear); *R v Troy and Smith* [1832] NSWSup C 55 (*Sydney Monitor* (Sydney), 11 August 1832, 4) (Both offenders were hanged for robbery, Troy remarking that he would rather die than spend the rest of his life in chains in Norfolk Island; see 'Execution', *Sydney Herald* (Sydney), 20 August 1832, 3-4); *R v Crawford* (*Sydney Herald* (Sydney), 8 November 1832, 2) (mercy refused for a robbery of the 'greatest atrocity' (Ibid) of a man out with his aged mother; see 'Execution', *Sydney Gazette* (Sydney), 8 November 1832, 2); *R v Beard and Richardson* [1833] NSWSupC 73 (*Sydney Gazette* (Sydney), 3 August 1833, 2-3) (the conduct of two escaped convicts 'had been of the most lawless and aggravated nature; it had been one continued round of plunder and robbery, until they had become the terror of the settlers in the district where they had carried on their depredations' (Ibid, 3) and both were executed for highway robbery (see 'Executions', *The Australian* (Sydney), 9 August 1833, 2); *R. v Mulligan and Harrup* [1834] NSWSupC 87 (*Sydney Gazette* (Sydney), 9 August 1834, 3; *Sydney Herald* (Sydney), 14 August 1834, 3) (both convicted of highway robbery and hanged; see 'Execution', *The Australian* (Sydney), 12 September 1834, 2)); *R v Murphy and Doyle* (*Sydney Herald* (Sydney), 7 August 1834,

period who were refused mercy and hanged for their crimes. Such bushrangers who met the ‘extreme sentence of the law’ included such obvious candidates as Thomas Jeffries, ‘that monster in human shape’,¹³³ whose catalogue of crimes included the murder of a police officer and the kidnap and rape of a mother and the murder of her five month old son by bashing his head against a tree,¹³⁴ John Lynch, ‘that most dreadful of murderers’,¹³⁵ whose many crimes showed a ‘thirst for human blood...unparalleled in the annals of history’,¹³⁶ and all but one of a gang of five runaway convicts who during a brutal armed robbery in 1839 of a homestead at night, successively raped an elderly mother of 15 children, a Mrs Hamlin¹³⁷ (a case noted by the Chief Justice as ‘a more tragic or outrageous scene he [the judge] had never heard described, even in this country of crime’).¹³⁸

2; *Sydney Gazette* (Sydney), 5 August 1834, 3 (trial); *Sydney Monitor* (Sydney), 30 August 1834, 2; *Sydney Gazette* (Sydney), 28 August 1834, 3 (sentence) (convicted of ‘a highway robbery...under circumstances of great atrocity’ (Ibid) and executed; see ‘Execution’, *The Australian* (Sydney), 12 September 1834, 2); *R v Toole and Cuffe* (*The Australian* (Sydney), 16 February 1838, 2; *Sydney Gazette* (Sydney), 17 February 1838, 2 (trial); *Sydney Gazette* (Sydney), 27 February 1838, 2; *Sydney Herald* (Sydney), 26 February 1838, 2 (sentence) (armed robbery by two escaped convicts of a dwelling with ‘considerable violence’ (Ibid), who were hanged at the scene of their crime see ‘Execution’, *Sydney Gazette* (Sydney), 20 March 1838, 2); *R v Whitton* (*The Australian* (Sydney), 25 February 1840, 2; *Sydney Herald* (Sydney), 26 February 1840, 2; *Sydney Gazette* (Sydney), 27 February 1840, 2) (Whitton’s ‘cold blooded atrocities have never been equalled in the annals of crime’ and he was executed at the scene of one of his many crimes (Amicus, Letter to Editor, *Sydney Herald* (Sydney), 7 February 1840, 1S); *R v Shea and Others* [1841] NSWSupC 7 (*Sydney Herald* (Sydney), 25 February 1841, 2-3; *Australasian Chronicle*, 25 February 1841, 2-3; *The Australian* (Sydney), 25 February 1841, 2; *Sydney Gazette* (Sydney), 27 February 1841, 2) (six escaped convicts and prolific bushrangers were hanged, the Chief Justice declaring that it were not to be tolerated to allow such men ‘to roam armed over the country, plundering the homes of the peaceful and well disposed portion of the inhabitants with impunity, and setting the laws of God and man at defiance’ (*Sydney Herald* (Sydney), 25 February 1841, 3; see also ‘Execution’, *Monitor*, 17 March 1841, 2. ‘Execution’, *Australian Chronicle*, 18 March 1841, 3).

¹³³ *Hobart Town Gazette* (Hobart), 7 January 1826, 2. See also *Colonial Times* (Hobart), 13 January 1826, 4.

¹³⁴ *R v Jeffries* [1826] TASSupC 4 (*Hobart Town Gazette* (Hobart), 29 April 1826, 2). See also Bonwick, above n 16, 90-92.

¹³⁵ ‘Berrima’, *Sydney Herald* (Sydney), 2 May 1842, 2.

¹³⁶ ‘The Berrima and Mt Victoria Murderers’, *Sydney Gazette* (Sydney), 3 May 1842, 2. Lynch murdered at least nine people in New South Wales in the early 1840s including a young girl with an axe and strangled a dog with his bare hands. See Ibid; ‘Berrima’, *Sydney Herald* (Sydney), 2 May 1842, 2.

¹³⁷ See *R v Sumner and Others* (*Sydney Herald* (Sydney), 3 May 1839, 2; *Sydney Gazette* (Sydney), 4 May 1839, 3; *The Colonist*, 4 May 1839, 3 (trial); *Sydney Monitor* (Sydney), 20 May 1839, 2; *The Australian* (Sydney), 21 May 1839, 2; *Sydney Herald* (Sydney), 20 May 1839, 2 (sentence). See also A Settler, ‘Bushrangers’, *Sydney Herald* (Sydney), 1 February 1839, 2; ‘Executions’, *The Colonist*, 19 June 1839, 2; ‘Execution’, *Sydney Gazette* (Sydney), 22 June 1839, 2.

¹³⁸ *Sydney Herald* (Sydney), 20 May 1839, 2.

However, other less obvious culprits were also not spared the death penalty. James Bowtell, an escaped convict, 'as much fool as knave',¹³⁹ who acted without any great violence in robbing a gentleman's servant out in a cart, was refused mercy.¹⁴⁰ Matthew Mahide was hanged in 1848 for the 'black faced' robbery of a house at night despite the jury's recommendation of mercy on account of the lack of violence, public sympathy and opposition to the sentence of death been carried out,¹⁴¹ it been noted at his hanging that he 'ought in the opinion of ninety nine out of every hundred of the spectators to have been respited.'¹⁴²

The rationale of the death penalty towards bushrangers was summarised by the *Hobart Town Courier* at the execution in Tasmania in 1838 of three prolific bushrangers, 'the daring and desperate marauders',¹⁴³ called Banks, Atterell and Regan. The *Hobart Town Courier* declared its approval of their grim fate and 'hoped that others in the same class in life, will pause to reflect upon the inevitable, fatal, and disgraceful termination of a bushranger's career.'¹⁴⁴ The *Launceston Advertiser* similarly expressed its trust that 'the example of the untimely end of these men will have its due effect on the prison population'.¹⁴⁵

IV THE PREROGATIVE OF MERCY AND BUSHRANGERS

¹³⁹ *Colonial Times* (Hobart), 14 March 1843, 3.

¹⁴⁰ Executive Council Minutes, Tasmania, 4 September 1847. See further *R v Bowtell* (*Colonial Times* (Hobart), 25 April 1843, 2; *The Courier* (Hobart), 28 April 1843, 2). Montagu J declared at trial that 'if ever there was a case that called for the execution of the law, this was that case' (*Colonial Times* (Hobart), 25 April 1843, 2) and there was no hope of mercy as 'there were so many men out in the bush, and armed, that in the present emergency of the colony his case became a very bad one' (*The Courier* (Hobart), 28 April 1843, 2). However, the public mood at Bowtell's fate is apparent from an observer at his execution who noted that 'it was evident that the unhappy man received a greater share of sympathy, from the less atrocious nature of his guilt, than is usually manifested on such occasions' ('Execution', *The Courier* (Hobart), 26 May 1843, 3). See also 'Kavenagh', *The Courier*, 22 September 1843, 2; *Colonial Times* (Hobart), 31 October 1843, 3; A Settler, Letter to Editor, *The Courier* (Hobart), 29 October 1843, 3; Davis, above n 3, 38.

¹⁴¹ Executive Council Minutes, Tasmania, 24 October 1848. The Council was unwilling to exercise mercy on account of the perceived gravity of Mahide's crime. See further *R v Mahide* (*Launceston Examiner* (Launceston), 7 October 1848, 5; *Cornwall Chronicle* (Launceston), 7 October 1848, 73-75); 'Approaching Execution', *Cornwall Chronicle* (Launceston), 4 November 1848, 139; 'The Recommendation of a Jury', *Cornwall Chronicle* (Launceston), 4 November 1838, 4.

¹⁴² 'The Execution', *Cornwall Chronicle* (Launceston), 8 November 1848, 148. It was noted, 'A sense of injustice, a murmur against oppression even, was the prevailing sentiment around the gallows' (*Ibid*).

¹⁴³ 'The Bushrangers', *Colonial Times* (Hobart), 15 May 1838, 7. The crimes of the gang included the murder of a publican during an armed robbery at his hotel.

¹⁴⁴ 'Execution', *Hobart Town Courier* (Hobart), 22 June 1838, 3.

¹⁴⁵ *Launceston Advertiser* (Launceston), 28 June 1838, 3. Though Banks was, unusually in this period as a bushranger, not a convict. Banks was the first native-born youth, of English parents, that had 'suffered an ignominious death by the halter' (see 'Execution', *Hobart Town Courier* (Hobart), 22 June 1838, 3).

The need for punishment and deterrence, significant as they were in the exercise of the death penalty towards bushrangers in this period, should not obscure the importance of the prerogative of mercy. Mercy played a vital role in the first half of the 19th century in Britain in mitigating the effects of capital punishment.¹⁴⁶ Similarly, the judicious exercise of the prerogative of mercy by the Governor and the Executive Council¹⁴⁷ in the Australian colonies spared many, if not the majority, of capital offenders, from the death penalty.¹⁴⁸ Mercy was considered seriously, even for offenders viewed as ‘beyond the pale’ in colonial society. It was far from inevitable that the death penalty would be visited upon such offenders, even in a society seemingly beset by crime and criminals. As Hirst notes, ‘great care was taken in the choice of those to be saved.’¹⁴⁹

¹⁴⁶ In the period 1800 to 1834, there were 29,808 death sentences in England and 523 were hanged for murder and 2153 for other crimes and 27, 132 (over 91%) were reprieved. In the period 1835 to 1864 there were 3014 death sentences and 336 were hanged for murder and 27 for other crimes and 2651 (over 90%) were reprieved. In the period 1826 to 1835 of the 11,305 death sentences imposed in England, only 514 (4.545) were carried out. Of the 217 offenders sentenced to death for forgery in the seven years leading up to 1830, only 24 or about 9% were hanged. See *Colonial Times* (Hobart), 8 January 1830, 2.

¹⁴⁷ A detailed overview of the practical operation of the prerogative of mercy in colonial Australia from 1824 to 1856 is beyond the scope of this article. In brief, the power was exercised in colonial Australia during the period from 1824 until responsible government in the 1850s on behalf of the British monarch by the Governor in all but cases of treason and murder (where only the monarch could make the ultimate decision though the Governor’s recommendations in practice were usually followed). The Governor acted on the advice of the colony’s Executive Council which comprised various colonial officials (though as in the case of Laurence Kavangah in 1843 (see below the discussion in Part 5), the Governor was not bound to accept the views of the Executive Council). The Governor and Executive Council also paid close regard to any view of Chief Justice or trial judge, whether they were a member of the Council or not. See further Plater and Milne, above n 9, 10-17. 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. See *Judgment of Death Act 1823* (4 Geo IV, c 48) s 2. 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.

¹⁴⁸ The number of capital offenders in the colonies reprieved from the gallows is significant. Castle notes that of the 1296 sentences of death passed in New South Wales during the period of his study from 1826 to 1836, only 362 were carried into effect. See Castle (2008), above n 12, 43.2, 43.6-43.7.

¹⁴⁹ Hirst, above n 66, 114. It must be said that the usual alternative to the gallows of transportation, often for life, to a secondary place of punishment such as Norfolk Island, Port Arthur or Macquarie Harbour, was for many convicts an unpalatable alternative. As a leading secondary place of punishment, Norfolk Island was always intended to be ‘an extreme punishment short of death’ (Ibid, 93). The grim nature of such secondary places of punishment is borne out by the regular declarations of convicts who would rather die than be sent to such establishments. See, eg, *R v Perrot and Jones* (*The Colonist*, 6 February 1839, 2). See further in the context of Norfolk Island, Brian Fletcher, *Ralph Darling: A Governor Maligned*, (Oxford University Press, 1984), 104-105; Hirst, above n 66, 93; Hughes, above n 26, 266. Such places were reserved for the worst convicts who had

The most intractable convicts and mutineers¹⁵⁰ or an Aboriginal defendant convicted of the murder¹⁵¹ of a white victim might be deemed eligible for the grant of mercy.¹⁵² Even the most brutal murderers¹⁵³ and those bushrangers 'who were steeped neck-deep in violence – of murder

committed further crimes in the colonies and had often been already reprieved from the gallows in Australia.

¹⁵⁰ This is demonstrated by the fate of the participants who were convicted of various capital crimes arising from the successive convict mutinies at Norfolk Island in 1827, 1834 and 1842. The 1827 mutineers, whilst en route to Norfolk Island, seized control of a ship, the *Wellington*, and imprisoned the ship's company and their guards and sailed to New Zealand (though with notable restraint). See further 'The Log Book of the Pirates', *The Australian* (Sydney), 23 February 1827, 3; Eric Ihde, 'Pirates of the Pacific: The Convict Seizure of the *Wellington*' (2008) 30 *Journal of the Australian Association for Maritime History* 3-17; Plater and Milne, above n 9, Part 5. The 1834 and 1842 mutinies were bloody affairs that left a number of both soldiers and convicts dead. The mutineers represented the worst of offenders in colonial society and would have naturally been thought to be destined for the gallows. However, the majority of them were ultimately reprieved despite the undoubted gravity of both their backgrounds and crimes. See *Ibid.*

¹⁵¹ See, eg, *R v Tallboy* [1840] NSWSupC 44 (*Sydney Herald* (Sydney), 12 August 1840; 1S (trial); 1S August 1840, 1S (sentence)) where, despite the strong comments of both prosecution counsel and the trial judge highlighting the threat posed to white society by offenders conduct such as Tallboy (he had murdered a white surveyor) and the need to deter similar conduct by other Aborigines, sentence of death was reprieved (see *Sydney Monitor* (Sydney), 19 September 1840, 2; *The Australian* (Sydney), 26 November 1840, 2). See also the reprieve and release of an Aboriginal defendant called Make-I-Light who had been convicted of the murder of a white man and sentenced to death with 'no hope of mercy' (see *R v Make-I-Light* [1851] NSWSupC 29 (*Moreton Bay Courier*, 15 November 1851, 2-3)) 'in consequence of some doubt of the sufficiency of the evidence of identity' (see 'The Aboriginal Make-I-Light', *Moreton Bay Courier*, 22 May 1852, 3).

¹⁵² It has been suggested that the exercise of mercy 'took much of the sting out of major sentences in that a significant proportion of capital sentences imposed on natives were commuted to transportation which in effect often becomes a term for Cockatoo or Goat Islands (in Sydney Harbour) for instruction in secular and religious matter preparatory to an early release' and this is borne out by a review of the cases tried in the period 1788-1855. See B Bridges, 'The Aborigines and the Law: New South Wales 1788-1855' (1970) 4 *Teaching History* 40, 62. Strange notes that 'in most cases, where Aboriginal men were convicted of capital crimes against whites, they reaped the meagre tradeoffs of colonisation and white racism' (Carolyn Strange, 'Discretionary Justice: Political Culture and the Death Penalty in New South Wales and Ontario, 1890-1920' in Strange, above n 9, 130, 138). See further Alan Pope, *One Law for All?: Aboriginal People and Criminal Law in early South Australia* (Aboriginal Studies Press, 2011); Mark Finnane and Jonathan Richards, 'Aboriginal Violence and State Response: Histories, Policies, Legacies in Queensland 1860-1940' (2010) 42 *Australia and New Zealand Journal of Criminology* 238-262.

¹⁵³ See, eg, *R v Ryan and Others* [1832] NSWSupC 95 (*Sydney Monitor* (Sydney), 19 December 1832, 1-2). Four escaped convicts sentenced to death for the savage murder of a settler called McIntrye during an armed robbery (see 'Trial of Four Men for Mr McIntrye's Murder', *The Australian* (Sydney), 21 December 1832, 4), were reprieved after strong doubts emerged as to the veracity of testimony of the main prosecution witness. See report of Governor Bourke to the Colonial Secretary, *Historical Records of Australia*, Series 1, Volume 17, 50-51; 'The Late Mr John McIntrye', *Sydney Monitor* (Sydney), 9 January 1833, 2. See also, eg, 'Capital Punishment: Byford and Vidall', *The Australian* (Sydney), 4 February 1845, 3 (contentious reprieve for notorious former convict for a premeditated murder); 'The Reprieve of Gleeson', *Bathurst Free Press*, 2 November 1850, 4 (controversial reprieve for a brutal murder).

and crime of the most atrocious dye¹⁵⁴ were not beyond hope of reprieve. Different conceptions of, and justifications for, mercy were offered in different cases. The arguments about the prerogative of mercy to bushrangers highlight the range of arguments and how seriously mercy was taken in colonial society.

Even where the offender was hanged, the issue of mercy was still seriously considered. The Chief Justice in sentencing in 1840 the bushrangers convicted of the brutal armed robbery of a homestead when Mrs Hamlin had been gang raped, assured the defendants that their protestations of innocence would be seriously investigated and ‘if anything could be discovered in their favour, it would be taken advantage of.’¹⁵⁵ A respite was granted whilst their claims of an alibi for the crimes were investigated and found to be baseless before their sentences of death were carried out.¹⁵⁶ One member of the gang called Jackson was spared from sharing the fate of his accomplices as, whilst he had taken part in the robbery, he had refrained from joining in the rape and but for his intervention, both her life and the other occupants of the homestead ‘would have fallen a sacrifice to the brutality of the others.’¹⁵⁷ The three Tasmanian bushrangers; Banks, Atterell and Regan; despite the gravity of their crimes, attracted sympathy and calls for mercy.¹⁵⁸ The Governor only upheld their execution after lengthy debate and division as to their fate within the Executive Council over two sessions¹⁵⁹ (including a call from the Senior Military Officer for mercy who made no secret of his view that the death penalty served neither deterrence nor punishment).¹⁶⁰

¹⁵⁴ *Colonial Times* (Hobart), 28 October, 1845, 3. See further the case of Cash and Kavanagh in Part 5.

¹⁵⁵ *Sydney Monitor* (Sydney), 20 May 1839, 2. See also *The Australian* (Sydney), 21 May 1839, 2; *Sydney Herald* (Sydney), 20 May 1839, 2.

¹⁵⁶ ‘Respite’, *Sydney Gazette* (Sydney), 6 June 1839, 2; *Sydney Monitor* (Sydney), 7 June 1839, 2; ‘Executions’, *The Colonist*, 19 June 1839, 2.

¹⁵⁷ *R v Jackson* (*The Colonist*, 8 February 1840, 2; see also *Sydney Herald* (Sydney), 7 February 1840, 2).

¹⁵⁸ See Editorial, *Colonial Times* (Hobart), 19 June 1838, 7; *Hobart Town Courier* (Hobart), 29 June 1838, 2-4; ‘The Convict Ely! The Public Interest Requires that his Life be Spared’, *Cornwall Chronicle* (Launceston), 28 July 1838, 120. Regan’s assertion that his harsh treatment as a convict had compelled him to escape and resort to bushranging received particular sympathy. See *Ibid.* This link was widely acknowledged in contemporary accounts. See, eg, Lachlan Macquarie in an 1823 letter to the British Colonial Secretary quoted by Robert Travers, *The Tasmanians: The Story of a Doomed Race* (Cassell Australia, 1968) 105; Therry, above n 40, 43; ‘Prison Discipline at Port Arthur’, *Cornwall Chronicle* (Launceston), 26 April 1844, 2; ‘Bushranging’, *Cornwall Chronicle* (Launceston), 26 January 1856, 3.

¹⁵⁹ Executive Council Minutes, Tasmania, 15 June 1838 and 19 June 1838.

¹⁶⁰ Executive Council Minutes, Tasmania, 15 June 1838. The Senior Military Officer made these views plain on other occasions. See, eg, Executive Council Minutes, Tasmania, 30 October 1837. Such official misgivings as to the rationale of the death penalty were not unique. In response to Governor Darling’s report of the criminal prosecutions and punishments for 1825 to 1827, the British Colonial Secretary told Darling that he did not

A fourth member of the gang, an escaped convict called Davies, was reprieved by the Governor after careful consideration as had been wrongly detained at the convict chain gang at which he had escaped from prior to bushranging.¹⁶¹

It was far from inevitable that even bushrangers convicted of capital crimes would receive the 'last penalty of the law'.¹⁶² This is illustrated as early as 1825 in New South Wales in the cases of Watson and Golding, two escaped convicts, who were convicted of separate highway robberies and sentenced to death.¹⁶³ Forbes CJ hinted that execution might be appropriate, since this crime had been so frequent lately in the Colony. However, Governor Brisbane elected to spare both men from execution.¹⁶⁴ He explained that he doubted the necessity or even the logic of the death penalty in such a case:

... that I am induced to show Mercy to both in Pursuance of the principle which had hitherto guided me in the Extension of Mercy in such Cases, as it does not appear by your Letter, or from your notes, that either of the Prisoners actual committed violence with the Act of Robbery; and under the Impression that the sending of these Prisoners to Norfolk Island, will as effectively prevent their future Crimes or Injury to Society, as their actual Removal from the World. This Conviction combined with the opinion that Executions do not deter the Commission of Crimes have weighed with me in extending Clemency towards these two Individuals.¹⁶⁵

Here, mercy was conceived partly as a question of desert, but also raised issues questions about the efficacy of the death penalty as deterrence. The mercy shown in *Golding* and *Watson* was not unusual. Other bushrangers were similarly reprieved in this period in both New South Wales¹⁶⁶ and Tasmania.¹⁶⁷

believe that an increase in executions decreases crime. 'It is for the gravest crimes and to these only that the punishment of death is applicable; and I would seriously impress upon you the responsibility incurred by any deprivation of human life, which is not demanded by a clear and paramount necessity.' The clear implication was that the Governor had allowed too many criminals to be hanged for minor offences. See *Historical Records of Australia*, Series 1, Vol. 14, 497-498, and see 27 on the Governor's initial report of the statistics. See also the editor's note at: <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1828/r_v_curtis_and_murtagh/>.

¹⁶¹ Executive Council Minutes, Tasmania, 19 June 1838; *Colonial Times* (Hobart), 26 June 1838, 7.

¹⁶² 'Execution', *Cornwall Chronicle* (Launceston), 4 November 1854.

¹⁶³ *R v Watson; R v Golding* (*Sydney Gazette* (Sydney), 9 June 1825, 3).

¹⁶⁴ *Sydney Gazette* (Sydney), 30 June 1825, 3.

¹⁶⁵ Chief Justice's Letter Book, Archives Office of New South Wales, 4/6651, 37-38. The failure of public hanging as a deterrent is shown by the fact that in Tasmania, as in England, daring crimes were committed at the very foot of the gallows. See Davis, above n 3, 21.

¹⁶⁶ See, eg, *R v Byrne, Wright and Murphy* [1825] NSWSupC 28 (*Sydney Gazette* (Sydney), 30 June 1825, 3) who were convicted for maliciously shooting at the Chief Constable of Liverpool and reprieved and sent to Norfolk Island (see Mitchell Library

document A 744 Letters from Governor Brisbane to Forbes CJ, 30 June 1825); *R v Wood and Wilson* (*Sydney Herald* (Sydney), 5 November 1832, 2) (two escaped convicts were reprieved for the robbery of a dwelling and sent to Norfolk Island for 14 years despite being advised by the judge ‘it was one of those cases in which the utmost penalty of the law must be carried into effect’ (see *Ibid*). Wilson was later hanged in Tasmania having again escaped and committed further crimes as a bushranger; see below n 276); *R v Butler and Others* (*Sydney Herald* (Sydney), 7 February 1833, 3) (three convicts who had committed further crimes in the Colony and then escaped from a chain gang and committed a highway robbery with ‘considerable violence’ were reprieved and sent to Norfolk Island for life (see *Sydney Herald* (Sydney), 21 March 1833, 3) despite the Chief Justice’s view that their past punishments had not worked and the exhaustion of all forms of punishment other than hanging ‘had not had the effect of awakening them to the value of good and virtuous lives’ (see *Sydney Gazette* (Sydney), 28 February 1833, 2; *Sydney Herald* (Sydney), 25 February 1833, 2); *R v Bolster* (*Sydney Gazette* (Sydney), 10 February 1838, 3) (sentence of death recorded for highway robbery on basis of transportation for life to Norfolk Island, the first two to be spent in irons, despite the offender having committed the crime after his prompt escape from a chain gang where he had been sent after having been previously reprieved from the death penalty for an earlier highway robbery (see *The Australian* (Sydney), 27 February 1838, 2; *Sydney Gazette* (Sydney), 27 February 1838, 2).¹⁶⁷ See, eg, James Davis, John Hall, Robert M’Guire, John Collins and Williams Templemen (‘Criminal Court’, *Hobart Town Courier* (Hobart), 20 June 1829, 4; ‘Criminal Court’, *Colonial Times* (Hobart), 26 June 1829, 4) (offenders reprieved after death passed for robbery with emphasis on need for ‘severe examples’ and not to entertain ‘vain hopes of mercy’ (*Ibid*); two others hanged; see ‘Execution’, *Hobart Town Courier* (Hobart), 11 July 1829, 2); William Newman (reprieved for robbery of a house on account of the offender’s good character adduced by his master and co-operation upon arrest; see Executive Council Minutes, 11 May 1830); William Stewart (reprieved for robbery of a house and a violent armed attack upon his former master’s house (though this offence was not charged) whose service he and his accomplices had absconded from, on account of the former master’s grudging acceptance that Stewart had planned a lesser role in the attack upon his house; see *Launceston Examiner* (Launceston), 21 June 1830, 3; Executive Council Minutes, Tasmania, 24 and 26 June 1830); *R v Raess* (*Launceston Advertiser* (Launceston), 14 June 1830, 3) (death sentence for robbery commuted to transportation for life on account of offender’s youth, suffering and ‘forbearance’ during the crime; see *Ibid*; Executive Council Minutes, Tasmania, 22 June 1830); *R v Yarwood, Hoble and Eastcourt* (*Colonial Times* (Hobart), 2 February 1841, 2) (three escaped convicts from Port Arthur sentenced to death ‘without any hopes of a reprieve’ (*Ibid*) were spared following calls for mercy; see Editorial, *The Courier*, 9 February 1841 2; Editorial, *Launceston Advertiser* (Launceston), 18 February 1841, 2); John Reilly (sentence commuted to transportation for life owing to lack of violence during robbery; see Executive Council Minutes, Tasmania, 21 December 1841); Henry Smart (see *R v Smart and Ford* (*Launceston Examiner* (Launceston), 8 April 1846, 6; *Cornwall Chronicle* (Launceston), 11 April 1846, 280-281(trial); *Cornwall Chronicle* (Launceston), 11 April 1846, 281; *Launceston Examiner* (Launceston), 11 April 1846, 6 (sentence) (reprieved from sentence of death passed without hope of mercy for armed robberies of houses in the middle of Launceston, ‘outrages of so bad a character’ as had not been seen by the Chief Justice during his 20 years on the Bench (see *Ibid*)); *R v Brewer and Quinn* (*Colonial Times* (Hobart), 22 October 1853, 3; *The Courier*, 22 October 1853, 3 (trial); *Cornwall Chronicle* (Launceston), 26 October 1853, 3 (sentence)) (two bushrangers despite Brewer’s notoriety as an escaped convict and past offender were reprieved for armed robbery and were transported for 15 years to Norfolk Island following appeals for mercy from the jury and the trial judge on account of the lack of violence used in the crime and Quinn’s youth and unfortunate background; see Executive Council Minutes, Tasmania, 29 October 1853).

Even the apparent worst of escaped convicts and bushrangers might receive the benefit of mercy. Six convicts,¹⁶⁸ for example, escaped from a convict chain gang near Bathurst in 1834, seizing the sentry's musket in the process. The gang then proceeded to the house of David Ramsay and put a servant in bodily fear and 'robbed the place of everything' before proceeding to the nearby house of a Captain King RN and robbing him of 'everything moveable'.¹⁶⁹ The 'gang of villains' was reported to have committed 'numerous depredations' on other persons in the area, including a Captain Scarwell.¹⁷⁰ The defendants were eventually arrested and charged with robbing Ramsay's house and putting his servant in bodily fear. All were convicted at trial.¹⁷¹

The Chief Justice in passing sentence of death upon all but Johnson (who had escaped from custody the day before sentence) observed the defendants had all been found guilty of 'an atrocious robbery' and it was unnecessary for him to enter into the circumstances attending the crime.¹⁷² The Chief Justice saw no reason to disapprove of, or to interfere with, their verdict. The prisoners had all been transported from England for various crimes and had been further convicted in the Colony of crimes for which they had been under sentence of labour on the roads in irons. Instead, of bearing their punishment patiently, they had taken an opportunity, while the sentry was distracted and to deprive him of his arms, and abscond from lawful custody. With these same arms the defendants had proceeded on the very same day to a gentleman's house, which they had pillaged, and placed the inmates in fear of their lives. From this it appeared to the Chief Justice that all the mercy that has been extended, and all the punishments that had been visited upon the defendants had been disregarded. The Chief Justice advised he and his fellow judges could see 'no reason that would justify me in holding out to your view any, even the remotest hope of further mercy'.¹⁷³

Underlying the Chief Justice's statements was an older religious assumption that mercy offered an opportunity for penitence and redemption.¹⁷⁴ For the Chief Justice, the failure of the offenders to have demonstrated redemption despite earlier mercy precluded the possibility of any more mercy. Their failure demonstrated that they did not deserve

¹⁶⁸ Thomas Stacey, William Johnson, John Whelan, Peter Thomson, George Bramah, and John Ritchie.

¹⁶⁹ *Sydney Herald* (Sydney), 9 January 1834, 2.

¹⁷⁰ *Sydney Herald* (Sydney), 24 February 1834, 1S.

¹⁷¹ *R v Stacey and Others*, (*Sydney Gazette* (Sydney), 22 February 1834, 2).

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ The religious background to the prerogative of mercy and concepts of punishment and clemency are a regular theme. See Carla Johnson, 'Entitled to Clemency: Mercy in the Criminal Law' (1991) 10 *Law and Philosophy* 109, 113. See also above n 36.

mercy. The Chief Justice advised the prisoners ‘to seek for that mercy at a higher tribunal which I am not warranted to extend to you here.’¹⁷⁵

However, despite the Chief Justice’s strong views, the Executive Council took a different view and of the ‘unhappy men’, only Johnson, the apparent ringleader, was ‘left to undergo the extreme penalty of the law’.¹⁷⁶ The others, bar the absent Hancock, were reprieved. Hancock was branded ‘a most determined villain – the terror of the police’¹⁷⁷ and was recaptured after committing yet further crimes.¹⁷⁸ The Chief Justice in pronouncing sentence of death upon Hancock observed only Johnson had been executed and his accomplices had been spared. ‘His Excellency the Governor, doubtless from wise purposes has thought fit to commute the capital punishment of the others, but I can dispense no such clemency, to obtain which you must appeal to the Governor and Council.’¹⁷⁹ The Chief Justice observed to Hancock that ‘the offence of which you have been convicted, is one of an aggravated character, and it therefore remains only with me to pass upon you the sentence of the law.’¹⁸⁰ However, even Hancock was subsequently reprieved and his sentence commuted for transpiration for life to Norfolk Island.¹⁸¹

Similar mercy might be extended to escaped convicts and bushrangers in Tasmania despite the undoubted gravity of their crimes and the strong views of the trial judge.¹⁸² An example of the willingness to apply mercy in such a case is presented by Daniel Priest in 1845. Priest had been transported for life in 1835 from England. He escaped and became a prolific bushranger and eluded apprehension for several years and ‘had been for so long a period the terror of the whole colony’.¹⁸³ There were numerous offers of a pardon¹⁸⁴ and later a reward of 50 pounds for procuring his recapture.¹⁸⁵ Yet owing to his lack of wanton violence and the comparative mildness he displayed to his victims and chivalry to

¹⁷⁵ *Sydney Gazette* (Sydney), 27 February 1834, 2. See also *Sydney Herald* (Sydney), 27 February 1834, 2.

¹⁷⁶ *Sydney Gazette* (Sydney), 27 February 1834, 2.

¹⁷⁷ *Sydney Herald* (Sydney), 24 February 1834, 2S.

¹⁷⁸ See *R v Hancock* (*Sydney Gazette* (Sydney), 3 June 1834, 3).

¹⁷⁹ *Sydney Gazette* (Sydney), 5 June 1834, 2.

¹⁸⁰ *Ibid.*

¹⁸¹ See *Sydney Herald* (Sydney), 31 July 1834, 3; *Sydney Gazette* (Sydney), 31 July 1834, 2.

¹⁸² As bushranging was largely absent from New South Wales for much of the 1840s until it enjoyed an unwanted resurgence with the Gold Rushes, Tasmania appears to have had the lion share of bushranging compared with other Colonies in the 1840s.

¹⁸³ *Cornwall Chronicle* (Launceston), 11 October 1845, 235. See also ‘Surrender of Priest’, *Launceston Examiner* (Launceston), 24 September 1845, 3; Chris Loring, *Compelled to Tiers* (Regal Press, 1996).

¹⁸⁴ See, eg, *Colonial Times* (Hobart), 25 April 1843, 4; *Cornwall Chronicle* (Launceston), 19 August 1843, 4.

¹⁸⁵ See, eg, *The Courier*, 22 May 1845, 2.

women,¹⁸⁶ Priest was branded 'The Friendly Bushranger'¹⁸⁷ (which would seem to be misnomer if there ever was one).

Priest was eventually captured in 1845 after surrendering to the police after injuring his foot. His case attracted the 'most intense interest'.¹⁸⁸ Priest pleaded guilty to a capital charge of robbing the estate of a Mr. Lucas¹⁸⁹ (he was ultimately only charged with this offence).¹⁹⁰ Mr. Lucas and his family had been detained at gunpoint during the robbery. Priest adhered to his plea of guilty even after the Chief Justice reminded him that it was a capital offence. Priest asserted that he hadn't used violence or attempted to take life but he admitted committing robbery under arms.¹⁹¹

Despite Priest's guilty plea and candour, the Chief Justice was unmoved. He noted that Priest must have known that in the Colony the crime he had committed was a capital offence. The Chief Justice in passing sentence of death left no doubt of his view that Priest should entertain no hope of mercy. The case represented:

... a shocking outrage not to be tolerated in any civilised country. I am aware of the merciful leniency with which the Government has have acted, in sparing the lives of men convicted of similar and more aggravated offences.¹⁹² But I do not think and cannot hold out to you the slightest hope of such result in your case. You have acquired a notoriety throughout the Colony, scarcely equalled, and although I have made no enquiry into other cases of robbery alleged against you, I cannot but look upon you as a man who has for years carrying on a lawless system of plunder, to the great terror of the colonists. If you have not actually resorted to personal violence, you have carried arms and uttered threats by which people have through fear, suffered their property to be taken from before their very eyes. I cannot conceive, whatever disposition the government of the present day may have to extend mercy to persons of your description, not having attempted life or used actual violence as in

¹⁸⁶ See, eg, 'Further Particulars of Priest', *The Courier*, 27 September 1845, 2; 'Priest should not be Executed', *Cornwall Chronicle* (Launceston), 22 October 1845, 263; *Colonial Times* (Hobart), 28 October 1845, 3.

¹⁸⁷ Robert Minchin, 'Bushranging', *The Companion to Tasmanian History*, available at http://www.utas.edu.au/library/companion_to_tasmanian_history/B/Bushranging.htm. See further Robert Minchin, *Bolters for the Bush: Bushranging in Old Van Dieman's Land* (RF Minchin, 2010).

¹⁸⁸ *Cornwall Chronicle* (Launceston), 11 October 1845, 235.

¹⁸⁹ See *R v Priest* (*Cornwall Chronicle* (Launceston), 11 October 1845, 235-236; *Launceston Examiner* (Launceston), 11 October 1845, 6; *Launceston Advertiser* (Launceston), 16 October 1845, 2).

¹⁹⁰ Given the offence was capital, the prosecution would often not proceed with all the offences as it was seen as unnecessary and a waste of limited public funds.

¹⁹¹ *Cornwall Chronicle* (Launceston), 11 October 1845, 2. See also *Launceston Examiner* (Launceston), 11 October 1845, 6.

¹⁹² This was a far from subtle reference to the reprieve of Cash and Kavanagh in 1843. See further below Part 5.

the case of which you stand convicted, I cannot conceive that they will extend mercy to a person, who, like you, is known to have been a general terror – to have outraged all laws – for years eluded all attempts at apprehension, and lived only by that system of lawless robbery to which this Colony is particularly exposed. It is my duty to warn you solemnly; I feel your life will not be spared – and I sincerely hope you will from this moment make up your mind that the sentence I am about to pass will be carried into execution.¹⁹³

Despite the strong views of the Chief Justice there was almost universal sympathy amongst both the public and press for Priest. The *Launceston Examiner* declared its deep regret if in the case of ‘this unhappy man’, the Governor ‘should deviate from those maxims he asserted in a case in which far more malice was displayed, and a much more cruel disposition indicated.’¹⁹⁴ The *Launceston Examiner* noted Priest’s many crimes could not fairly be held against him as, however, many crimes he had committed, he had pleaded guilty only to one.¹⁹⁵ The fact he was an escaped convict and had eluded pursuit and recapture for so long could hardly count against him. ‘Self-preservation is the dictate of nature, and can constitute no new feature of criminality.’¹⁹⁶ The *Examiner* thought ‘that the execution of the sentence is to be deprecated on every ground’ and respectfully urged on the Governor the following reasons for a commutation of the ‘fearful sentence’:¹⁹⁷

First, there was nothing in the state of the Colony which demands sanguinary punishments. There are crimes many; but fewer than most men would expect among thousands of prisoners. With few exceptions the injury to society is the loss of property, and, certainly, apprehensions of personal violence. But the convicts at large have generally avoided whatever might jeopardise their lives in the event of discovery: a feeling which has been deemed the best security against atrocious and useless crimes. Instances have frequently occurred where the criminal, knowing that detection would forfeit his life, has endeavoured to secure himself by murder. The dead cannot give evidence... Such is the apology of wanton cruelty. It therefore appears most impolitic to punish with extreme severity those who, from whatever cause, have carefully avoided acts which might compromise their own lives when brought to justice. Priest having surrendered himself voluntarily, by that act mitigates, rather than

¹⁹³ *Launceston Examiner* (Launceston), 11 October 1845, 6. See also *Cornwall Chronicle* (Launceston), 15 October 1845, 245; *Launceston Advertiser* (Launceston), 16 October 1845, 3. Priest was reported as unmoved at this address.

¹⁹⁴ ‘Punishment of Death - Priest’, *Launceston Examiner* (Launceston), 25 October 1845, 2.

¹⁹⁵ This was one of the reasons given by the Governor in 1843 for controversially sparing Lawrence Kavanagh. See ‘Midland Agricultural Association’, *The Courier*, 13 October 1843, 2-3. See further below Part 5.

¹⁹⁶ ‘Punishment of Death - Priest’, *Launceston Examiner* (Launceston), 25 October 1845, 2.

¹⁹⁷ *Ibid.*

aggravates, his case... Had he been sure of death, his course might have been different, and probably desperate. The extreme sentence of the law has been commuted in numberless instances while Priest was at large: and however just it might be to make examples by a more rigorous course, it seems to us that the moral efficacy of such visitations depend on their concurrence with popular feeling – which will never allow that Priest, when compared with others, deserves to die.¹⁹⁸

The *Launceston Examiner* saw little benefit in capital punishment in all but the most extreme case and was unimpressed with the customary argument that the circumstances of the Colony justified, if not compelled, the application of the death penalty to an offender such as Priest:

We question the propriety, and utility of increasing the punishment of death on account of local circumstances: already the frequency of executions has rendered them a mockery and a sport to all but the victims. In a town of equal size in England, the ignominious death of a fellow-creature would occasion the deepest gloom and sorrow; to us it is nothing but pastime – an excitement in which at best, perhaps, pain and satisfaction are blended together. The blood of murderers, however numerous, may be due to Divine legislation: but let not the government aggravate the dangers of the colony, and multiply the occasions by which humane sensibilities are blunted, beyond such as are absolutely demanded by indisputable necessity.¹⁹⁹

A similar view was expressed by the *Cornwall Chronicle* which noted its concern at reports that the Executive Council has decided to allow the law to take its course on Priest. The editor acknowledged that the strict justice of the sentence could not be impugned as Priest had 'most indisputably incurred the penalty of death' through his long and lawless career.²⁰⁰ But it noted that much public sympathy was felt for Priest. Priest was 'a determined, bold man' and might, had he felt so minded, have committed great violence on the persons and properties of the settlers that he had robbed.²⁰¹ But Priest had neither used violence himself, nor permitted his associates to use it. He had not committed murder and had never used a firearm, even to intimidate. He had acted in his many robberies with a courtesy and mildness, especially to women, that was very unusual with persons engaged in the lawless career of bushrangers. In this light, the *Cornwall Chronicle* argued, Priest was a suitable candidate for mercy:

If the conduct of this man be viewed as it should be viewed, and estimated as it merits, the representative of Majesty who is armed with its prerogative, should be solicited to exercise it; firmly and solemnly do we

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ 'Priest should not be Executed', *Cornwall Chronicle* (Launceston), 22 October 1845, 263. See also *Colonial Times* (Hobart), 28 October 1845, 3.

²⁰¹ 'Priest should not be Executed', *Cornwall Chronicle* (Launceston), 22 October 1845, 263.

believe that the case of the misguided man is worthy of the Lieutenant Governor's consideration and that His Excellency, if applied to, would gladly avail himself of the opportunity of practising that godlike attribute - Mercy! the ignominious death of Priest - will effect little as an example... that crime of the same character to that he was convicted on by his voluntary admission - has not been punished in the persons of scores of offenders - proved to have been guilty - even since Sir Eardley Wilmot has been Governor of this colony ; but we would not urge pardon for Priest, on the ground of other prisoners, ten times more guilty having been pardoned; Priest confessed his guilt, and the whole population must admit the justice of his sentence; still we would implore most earnestly that the poor creature's life be spared; he never insulted a woman; he never wantonly harmed a man! For mercy's sake, we entreat Sir Eardley Wilmot to spare the unhappy criminal Priest; in all the fervency of language we are capable of using.²⁰²

Much of the arguments made by the *Cornwall Chronicle* were in terms of justice as desert. It was argued that he had not used violence, and his actions were compared to other offenders who had used more violence but had been pardoned. However, the concluding arguments extended to the notion of mercy as an undeserved gift. It did not matter that there those 'ten times more guilty having been pardoned', rather the Governor should extend mercy to Priest.

This sympathy was shared amongst the public.²⁰³ Various petitions asking for mercy were submitted to the Governor.²⁰⁴ The *Cornwall Chronicle* reported that 'the public feeling on the occasion is very strong.'²⁰⁵ The editor observed that there had been no similar instance of such a petition, receiving in Launceston, the large number of 600 signatures within the just four hours and that number could easily have been doubled, had it not been necessary to transmit the petition by Monday's post to the Governor.²⁰⁶ The petition argued that Priest's case was 'almost without parallel for mildness and kindness towards persons with whom he came into collision in pursuit of his lawless career.'²⁰⁷ The petition attached a statement from one of Priest's many victims, an Edward Bryant, testifying to this effect. The petition expressed the hope that the Governor would 'see fit to exercise your prerogative, and extend mercy to Daniel Priest, who has extended mercy to others, and by sparing his life, afford

²⁰² 'Priest should not be Executed', *Cornwall Chronicle* (Launceston), 22 October 1845, 263. See also similar support from *Colonial Times* (Hobart), 28 October 1845, 3.

²⁰³ See, eg, 'An Inhabitant', 'Priest and Gillan', *Launceston Examiner* (Launceston), 25 October 1845, 7.

²⁰⁴ *Launceston Examiner* (Launceston), 22 October 1845, 4.

²⁰⁵ 'The Convicts under Sentence of Death', *Cornwall Chronicle* (Launceston), 29 October 1845, 286.

²⁰⁶ *Ibid* 286-287.

²⁰⁷ *Cornwall Chronicle* (Launceston), 25 October 1845, 277.

him an opportunity, by future good conduct, of making some atonement to society for his past transgressions.²⁰⁸

Further petitions imploring mercy to the Governor on Priest's behalf were submitted by several clergymen²⁰⁹ and a prominent official called Theodore Bartley.²¹⁰ The *Launceston Examiner* had 'no doubt' that the Governor would 'comply with the request so generally urged' and commute the sentence to transportation for life.²¹¹ The Executive Council decided in the face of such pressure to grant mercy. The Under Sheriff, a Mr. Sams, wrote 'that his Excellency the Lieutenant-Governor has been pleased to accede to the prayer of the memorial, on the condition of transportation for life.'²¹² Priest's sentence was commuted to life imprisonment, the first ten to be spent on Norfolk Island.²¹³ News of the reprieve was greeted with approval. The *Launceston Examiner* declared that it was 'happy to announce' that Priest had been spared.²¹⁴ The *Cornwall Chronicle* expressed 'much satisfaction' on behalf of the inhabitants of Launceston in applauding the Governor's 'prompt and humane' decision to accede to the public call and extend mercy to the 'unhappy criminal'.²¹⁵

V KAVANAGH AND CASH: 'I WISH TO GIVE THIS COLONY THE BLESSINGS OF BRITISH JUSTICE AND THE BRITISH CONSTITUTION'

An ever more striking example of the application of mercy to even the worst of bushrangers is presented by the case of Martin Cash and Laurence Kavanagh in 1843. Cash was a colourful convict.²¹⁶ He had been transported for seven years from Ireland for purportedly firing at and injuring in the buttocks a man who was embracing Cash's mistress. After committing further crimes in Australia, he was sent to Tasmania and he escaped three times and ended up at Port Arthur. Kavanagh was a hardened offender and escaper who had previously been reprieved from

²⁰⁸ Ibid.

²⁰⁹ The Revs. Hastle (Presbyterian), Butler (Roman Catholic), West and Price (Independent) and other clergymen were noted as the signatories.

²¹⁰ 'Priest', *Launceston Examiner* (Launceston), 29 October 1845, 3.

²¹¹ Ibid.

²¹² 'The Memorial in Favour of Priest', *Launceston Examiner* (Launceston), 1 November 1845, 4.

²¹³ 'Daniel Priest', *Launceston Examiner* (Launceston), 1 November 1845, 4.

²¹⁴ 'Priest', *Launceston Examiner* (Launceston), 29 October 1845, 4. See also 'A few Words to Bushrangers', *Cornwall Chronicle* (Launceston), 5 November 1845, 203.

²¹⁵ 'Daniel Priest's Life is Spared', *Cornwall Chronicle* (Launceston), 29 October, 1845, 287.

²¹⁶ See Martin Cash, *The Bushranger of Van Diemen's Land in 1843-1844: A Personal Narrative of his Exploits in the Bush and his Experiences at Port Arthur and Norfolk Island* (J Walch, 1911); Frank Clune, *Martin Cash: the last of the Tasmanian Bushrangers* (Angus & Robertson, 1955).

the gallows more than once. He had only been transported to life to Tasmania in 1842 for shooting at the Colonial Secretary and a Captain Hunter when an escaped convict outside Sydney. On that occasion the Attorney-General at Kavanagh's trial had expressed his profound regret that that 'atrocious' offence no longer carried the death penalty in New South Wales.²¹⁷

Cash and Kavanagh and a man called Jones escaped from Port Arthur and became prolific bushrangers. Their 'long career of lawless rapine'²¹⁸ resulted in 20 odd robberies. Cash and Kavanagh became known as the Gentlemen Bushrangers with some, though not complete,²¹⁹ justification, because they did not use unnecessary or excessive violence.²²⁰ Both were eventually captured. Cash was tried for the murder of a special constable who had been fatally shot during his arrest in a confusing mêlée in Hobart.²²¹ Kavanagh was tried for one of the many armed robberies that he had committed, the highway robbery under arms of a coach.²²² Both defendants were convicted.

In his initial comments to Cash, Montagu J assured him that he would reflect on Cash's pleaded defence to the murder,²²³ but in 'a brief and very felling manner' advised Cash that he could hold out to him no hope of mercy in this world...but to believe that the extreme sentence of the law would be speedily carried into effect.²²⁴ Cash insisted he had always been against the taking of human life and would never take life deliberately. He asserted that he had saved five lives in the bush and had prevented many murders and had never used violence against either man

²¹⁷ See *R v Cavenagh and Others* (*Sydney Herald* (Sydney), 13 April 1842, 2).

²¹⁸ Humanus, Letter to the Editor, *The Courier*, 29 September 1843, 3.

²¹⁹ One robbery of the dwelling of a Captain Horton could hardly be categorised as a restrained crime.

²²⁰ Lloyd Robson and Russel Ward, 'Cash, Martin (1808–1877)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/cash-martin-1885/text2217>>.

²²¹ *R v Cash* (*The Courier*, 8 September 1843, 2-3; *Colonial Times* (Hobart), 12 September 1843, 2-3; *Hobart Town Advertiser*, 8 and 12 September 1843).

²²² *R v Kavanagh* (*The Courier*, 8 September 1843, 3; *Colonial Times* (Hobart), 12 September 1843, 3; *The Courier*, 15 September 1843, 2-3). This decision which was normal was based on the premise it was unnecessary to increase the public cost by prosecuting on further capital charges. See 'Kavenagh', *Launceston Examiner* (Launceston), 21 October 1843, 3. However, the omission to charge Kavanagh with the violent robbery of Captain Horton attracted much criticism. See A Settler, Letter to Editor, *The Courier*, 20 October 1843, 3; 'Kavenagh', *Launceston Examiner* (Launceston), 21 October 183, 3-4; 'A Little Political Ominum Gatherum', *Launceston Advertiser* (Launceston), 2 November 1843, 2.

²²³ This was a technical legal argument that although Cash was a bushranger, he was not guilty of the constable's murder as the deceased did not know Cash's precise status at the time of the fatal fracas.

²²⁴ *Colonial Times* (Hobart), 12 September 1843, 3. See also *The Courier*, 8 September 1843, 3.

or woman²²⁵ (this claim has some justification). The judge replied that from all that he had read and heard of Cash this was true; 'but still, I cannot hold out any hope to you.'²²⁶

In sentencing both prisoners to death, Montagu J disabused them of any hope of mercy given the nature and extent of their crimes. Montagu J referred at length to the other robberies that they had committed. 'Both had set the Government and its officers at defiance for many months and had committed almost every offence, except murder, and were hunted about the country like wild beasts.'²²⁷ Montagu J branded Kavanagh as a 'plausible, subtle and an artful man...but he was at the same time one of the most abandoned and worst of characters.'²²⁸ The judge dwelt on Kavanagh's nine years at Norfolk Island, 'where the very worst of characters were congregated – picked out from this Colony and from all parts of the globe.'²²⁹ Kavanagh, the judge noted, had only been transported to life to Tasmania in 1842 for shooting at the Colonial Secretary when an escaped convict. The judge noted that neither defendant had previously committed either murder or rape, but this was no ground for allowing them 'to go at large again amongst a community you have so greatly outraged, but in the hope that there may be in your hearts such feelings as may induce you to submit – not to me – but on your knees, to that Almighty Power which can alone extend to you mercy and forgiveness; from the Government of this Colony you must expect no mercy.'²³⁰ Indeed, Montagu J declared, if Cash and Kavanagh were relieved, it was difficult to see what offence might still attract capital punishment:

I have sat in this Court for many years, and have seen many offenders placed in the awful situation in which you stand, but even in this Colony I do not remember any one case where men stood at the bar stained with so great an aggregate of crime...The question in the case of both of you is simply this – whether the law for capital offences is to be entirely abrogated, for such would be the effect of extending mercy to you.²³¹

It is arguable that members of the judiciary made such harsh judgments with no expectation of mercy in order to excite penitence and redemption in an offender, recognising that the Executive may then exercise mercy. However, evidence presented below is against this – judges were more concerned with reinstating the law, in particular the law as certainty and

²²⁵ *Colonial Times* (Hobart), 12 September 1843, 3.

²²⁶ *Ibid.*

²²⁷ See *Hobart Town Advertiser* (Hobart), 19 September 1843; *Colonial Times* (Hobart), 19 September 1843, 2-3.

²²⁸ *Ibid.*, 3.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ 'The Bushrangers', *Launceston Examiner* (Launceston), 30 September 1843, 3.

consistency. Mercy, as an undeserved gift, was too uncertain and inconsistent and conflicted with a judicial notions of law and order.

The Executive Council agreed without debate or dissent that the sentence of death should proceed for Cash.²³² For Kavanagh it was to prove very different. The Senior Military Officer argued that no distinction should be drawn with Cash and as Kavanagh had absconded and whilst illegally at large had committed a crime which the law of the Colony visited with the death penalty, he could not see how such an offender could be reprieved.²³³ The Colonial Secretary noted that whilst Kavanagh's crime did not attract the death penalty in England, in Tasmania the crime was of a 'very different character'.²³⁴ This was because the crime in Tasmania, the Colonial Secretary argued, was of a 'deeper dye because from the circumstances in which we are placed, it is here much more dangerous to the peace and well being of the community'.²³⁵ Kavanagh's escape from Port Arthur and crime 'endangered life and property to an extent which could never follow from [the] same cause in England'.²³⁶ The Colonial Secretary reasoned that 'the public security therefore it appears to me requires as far as the offence of which Kavanagh has been convicted' to be enforced stricter in Tasmania than in England.²³⁷ The other Council Members concurred with the Senior Officer and the Colonial Secretary. However, the new Governor, Sir Eardley Wilmott saw things differently.²³⁸ Wilmott signified his misgivings at proceeding with the death sentence and Kavanagh's case was adjourned for further consideration.

Despite the view of the Executive Council, Wilmott on 21 October 1843 defied his Council and took the lone decision to extend mercy to Kavanagh. The Governor gave two reasons to the Executive Council for his decision. First, because of the nature of the crime of which Kavanagh had been convicted. Under ordinary circumstances in England, the Governor noted, this crime did not carry the death penalty but rather transportation for a number of years, or at least life. Secondly, to execute Kavanagh for other 'outrages' for which he had never been arraigned, tried, heard in his defence or convicted by a jury the Governor reasoned

²³² Executive Council Minutes, Tasmania, 16 September 1843.

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ It is significant to note that Wilmott, though not known for his intellectual or legal accomplishments, was a former barrister and Member of Parliament and had espoused and worked for criminal law and prison reforms. See Michael Roe, 'Eardley-Wilmott, Sir John Eardley (1783-1847)' *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, available at: <<http://abd.anu.edu.au/biography/eardley-wilmott-sir-john-eardley-2015/text2471>>.

was unjust and wrong. '[It] would be the exercise of a dangerous and unconstitutional power, and a like contempt to the first principle of Justice and the Law of Great Britain and Society.'²³⁹ Kavanagh's sentence was again (given his previous reprieves) commuted to transportation for life (this time to Norfolk Island).

The Attorney-General subsequently advised that no further charges would be preferred against Kavanagh.²⁴⁰ Both of the Governor's arguments were consistent with a notion of mercy as equity. The question of whether an offender deserved mercy revolved around comparisons with English punishments and what he had been convicted for. What punishment would an English offender have received? These were legalistic arguments as to mercy and an attempt by the Governor to assert and enact a rule of law as existed in Britain. Here, mercy was not seen as an expression of weakness but of the type of legal system the Governor believed the Colony could and should have. The Governor's reasoning in *Kavanagh*, as the *Colonial Times* observed, would 'cause a great revolution in the administration of justice in the Colony.'²⁴¹ As in Britain, 'His Excellency conceives the offender shall be tried and convicted of every offence of him committed, or that Judge has no right to refer to any alleged misconduct of a convicted felon.'²⁴²

Cash also was the recipient of unexpected good fortune. Despite the emphatic comments of Montagu J at his sentence and the Executive Council's decision confirming the death sentence, Montagu J decided to respite Cash's sentence 'until Her Majesty's pleasure could be known, acting under the advice of her law officers and the fifteen judges of the land.'²⁴³ Montagu J explained that after Cash's sentence he had anxiously reflected on the case and had doubts whether the crime of which Cash had been convicted strictly amounted to murder. The judge had therefore exercised his power to respite Cash's sentence until the legal soundness of his conviction had been examined in London. Cash was ultimately to be spared following legal advice from London and his sentence was commuted to transportation for life to Norfolk Island.²⁴⁴

Both Kavanagh and Cash's escape from the death penalty proved contentious.²⁴⁵ One editor noted that the grounds for their respite

²³⁹ Executive Council Minutes, Tasmania, 21 October 1843.

²⁴⁰ *Cornwall Chronicle* (Launceston), 1 November 1843, 3;

²⁴¹ *Colonial Times* (Hobart), 31 October 1843, 3.

²⁴² *Ibid.*

²⁴³ *Launceston Advertiser* (Launceston), 26 October 1843, 3. See also *Hobart Town Advertiser*, 24 October 1843.

²⁴⁴ Executive Council Minutes, Tasmania, 29 November 1844.

²⁴⁵ See, eg, A Settler, Letter to Editor, *The Courier*, 29 September 1843, 3; A Settler, Letter to Editor, *The Courier*, 13 October 1843, 3; 'Kavanagh', *Launceston Examiner* (Launceston), 21 October 1843, 3.

prompted from ‘almost everyone we meet...the most anxious inquiries’,²⁴⁶ This was the third or fourth time that Kavanagh had been reprieved and he ‘appears to possess a sort of charmed life.’²⁴⁷

Wilmott’s decision to spare Kavanagh (legally sound by modern standards as it was), and proved particularly controversial.²⁴⁸ *The Courier*, whilst expressing its qualified support for the Governor’s leniency, observed it would be failing in its duty to the people and Government ‘if we did not give expression to the general public feeling of surprise, not unmingled with openly expressed dissatisfaction, at a result with few, if any, seem to have entertained.’²⁴⁹ *The Courier* observed that Kavanagh’s character was such that ‘it is our firm belief that the life of Kavanagh, thus spared for a time, will yet terminate in the ignominious manner from which he has just escaped.’²⁵⁰ One writer (also expressing support for the reprieve) acknowledged that he had heard ‘great dissatisfaction’ at Kavanagh’s reprieve and Cash’s respite and that people were ‘solely occupied with the dismal reflection’ that the prisoners had escaped the gallows and ‘the dread of the consequences likely to arise from the operation of such an example [of leniency] upon the minds of the prisoner population, and the insecurity created to life and property throughout the island.’²⁵¹ Montagu J made no secret of his unease at Kavanagh’s reprieve.²⁵² In a case in Launceston of four bushrangers convicted of the armed robbery of a hut a few days after Kavanagh’s reprieve,²⁵³ Montagu J noted that although under the existing state of the law the prisoners were liable to suffer death, he would merely pass sentences of death recorded as in light of Kavanagh’s recent reprieve, it

²⁴⁶ ‘Cash and Kavanagh’, *Colonial Times* (Hobart), 26 September 1843, 3.

²⁴⁷ *Ibid.*

²⁴⁸ See, eg, *The Courier* (Hobart), 29 September 1843, 2, A Settler, Letter to Editor, *The Courier*, 29 September 1843, 3; ‘Kavenagh’, *Launceston Examiner* (Launceston), 21 October 1843, 3.

²⁴⁹ ‘Kavenagh’, *The Courier*, 22 September 1843, 2.

²⁵⁰ *Ibid.* This was to prove prophetic. Kavanagh was implicated in the same bloody convict revolt at Norfolk Island in 1846 as Jacky Jacky during which four guards were killed. Kavanagh was said to have led the revolt. He and 11 others were convicted of murder for their part in the revolt and all were hanged at Norfolk Island. Cash, in stark contrast, was to become a reformed character. He spent ten years at Norfolk Island and was a model prisoner and was later released and became a curator at the Hobart Botanical Gardens and even a police constable! He died in alcoholic respectability and is notable as one of the very few bushrangers to die naturally of old age in his own bed.

²⁵¹ Humanus, Letter to the Editor, *The Courier*, 29 September 1843, 3.

²⁵² *R v Reid and Others* (*Launceston Examiner* (Launceston), 4 October 1843, 5). Montagu J noted he had no desire to investigate why Kavanagh had been spared; ‘they were doubtless such as did honour to our nature, although many dissentient opinions might exist respecting the expediency of such a precedent’ (*Ibid.*). Montagu J made his displeasure at Kavanagh’s reprieve plain at later cases. See ‘The Sessions’, *Launceston Examiner* (Launceston), 13 April 1844, 2; ‘Progress of Crime’, *Launceston Advertiser* (Launceston), 25 April 1844, 2.

²⁵³ See *R v Reid and Others* (*Launceston Examiner* (Launceston), 4 October 1843, 4-5).

was impossible to suppose that death would be visited for their crimes which he considered did not surpass those of Cash and Kavanagh.²⁵⁴ This decision proved controversial.²⁵⁵ This provides a stark example of judicial desire for a legalistic emphasis upon certainty and consistency. Judges were concerned to reinstate law and order. Mercy was to be reduced to legal understandings – in this case – mercy was reduced to precedent. How had other offenders convicted of similar offences been punished?

Such was the controversy aroused by the fate of Cash and Kavanagh that the Governor felt compelled to defend himself at a public speech at an Agricultural Show to outline his reasons for reprieving Kavanagh.²⁵⁶ The Governor expressed his wish to dispel any erroneous impression made by the press reports of the case of both prisoners. First, in respect of Cash 'a gross misconception prevails'.²⁵⁷ The Governor expressed his astonishment at Cash's respite and made clear this was entirely the act of Montagu J and the Governor 'was in no way whatever concerned in it'.²⁵⁸ However, Wilmott was unapologetic for reprieving Kavanagh just ten minutes before the time appointed for his execution:

In my administration of this Government, I claim the right of exercising the privileges of the British Constitution – justice to the accused and protection to the injured. Laws built on that principle must afford general satisfaction, and, by their exercise, the good will be encouraged and the bad discouraged. When, therefore, I had to consider the case of the miserable man alluded to – when I found he had been convicted of an offence which, however great it might be against society, yet, taken by itself, would not, in a general way, be visited by death, being a highway robbery, unattended by any violence whatever, I could not, according to what I considered, and always shall consider, the acknowledged principles of justice and the laws of Great Britain, punish him for other supposed or real offences for which he had never been arraigned, tried, heard in his defence, and convicted by a jury. It is a dangerous and unconstitutional power to be placed in the hands of any man, to try a man for one offence, and to punish him for others; and, while I have the responsibility of this on myself, I never will do so. This unhappy man was not convicted of murder; he was not convicted of entering a dwelling house and putting its inmates in fear of their lives; he was not convicted of violating the sanctity of a man's domestic hearth, and committing outrages against his person or that of his family. Had he been so convicted nothing could have saved him from condign punishment; and, therefore, because he had fallen

²⁵⁴ Ibid, 5.

²⁵⁵ See 'Midland Agricultural Association', *The Courier*, 13 October 1843, 2-3.

²⁵⁶ Ibid. See also 'Midland Agricultural Association', *Colonial Times* (Hobart), 17 October 1843, 3; *Sydney Morning Herald* (Sydney), 28 October 1843, 4.

²⁵⁷ 'Midland Agricultural Association', *The Courier*, 13 October 1843, 2.

²⁵⁸ Ibid. The Governor during his speech also made clear his astonishment at Montagu J's recent decision in the Launceston case to merely pass sentence of death recorded and for such 'outrageous' crimes of robbing a house, he would have had no hesitation in confirming the death sentence. See Ibid.

into the grasp of retributive justice for one offence, I could not visit him with the last measure of punishment for others, however guilty I might think him, yet still not legally proved against him...I wish to give this Colony the blessings of British justice and the British constitution; I care not for the anonymous attacks (and I have received several) of concealed accusers, nor the more honourable, because more open, assaults of avowed opponents. I shall always fearlessly defend those principles – which I have conscientiously adopted, knowing well, that there is nothing so powerful as sincerity, and nothing really permanent but truth. I feel I am outstepping the usual line of my situation in making any remarks at all on these subjects; but the extraordinary misconception alluded to might, unexplained, involve this colony in the most fearful and dreadful consequences, and I feel justified in making this address to you.²⁵⁹

The Governor was praised for his arguments about law and justice.²⁶⁰ The *Launceston Advertiser*, for example, noted that Kavanagh had only been sentenced for a single robbery and the Attorney-General had chosen, perhaps wrongly not to indict him for the most serious violence robbery of Captain Horton and it was wrong as an issue of basic principle to punish offenders for crimes that they had not been convicted of.²⁶¹

In the aftermath of *Cash and Kavanagh* it became increasingly commonplace for bushrangers in Tasmania to be reprieved on the basis that no wanton violence had been used in the commission of their crimes, whether by a sentence of death recorded²⁶² or by the Executive Council²⁶³

²⁵⁹ ‘Midland Agricultural Association’, *The Courier*, 13 October 1843, 2-3; See also ‘Midland Agricultural Association’, *Colonial Times* (Hobart), 17 October 1843, 3; *Sydney Morning Herald* (Sydney), 28 October 1843, 4. The ‘candid and honourable’ tone of the Governor’s explanation was reported to have attracted ‘a high degree of satisfaction’ in the interior, even from those who disagreed with his decision (*The Courier* (Hobart), 20 October 1843, 2).

²⁶⁰ See, eg, ‘Kavenagh’, *Launceston Examiner* (Launceston), 21 October 1843, 3; *Colonial Times* (Hobart), 31 October 1843, 3. It is ironic that Wilmott proved ‘desperately unpopular’ in Tasmania and he was prematurely removed as Governor in 1846 as a result of upsetting both the local colonial elite and the Colonial Office about the convict probation system, financial and budgetary difficulties, his administrative neglect and incompetence, religious issues and persistent, though never confirmed, reports of immorality in his private life, extending to sexual affairs with female convicts. See Roe above n 238.

²⁶¹ ‘A Little Political Ominum Gatherum’, *Launceston Advertiser* (Launceston), 2 November 1843, 2.

²⁶² See, eg, *R v Skinner, Sullivan and Moore* (*Launceston Examiner* (Launceston), 10 April 1844, 6) (no ‘violent outrage’); *R v Roberts and Price* (*Cornwall Chronicle* (Launceston), 10 April 1844, 2; *Launceston Examiner* (Launceston), 10 April 1844, 6; *Launceston Advertiser* (Launceston), 11 April 1844, 4) (Montagu J had ‘no doubt’ the prisoners’ lives would be spared but noting it would have been different had the crime been committed at night time or with particular violence (*Ibid*));

²⁶³ See, eg, *R v Liddle, Jones and Dalton* (*Cornwall Chronicle* (Launceston), 3 April 1844, 2 (trial); *Cornwall Chronicle* (Launceston), 10 April 1844, 2; *Launceston Examiner* (Launceston), 10 April 1844, 6 (sentence)) (sentence of death passed without hope of mercy for armed robbery in light of increasing crime and bushranging in the Colony but

(though the notion of an 'unnecessarily' or 'excessively' violent robbery was criticised as arbitrary and difficult to define in practice).²⁶⁴ It was argued that it was unfair and inconsistent to execute bushrangers for all but crimes accompanied by the most excessive or wanton violence after offenders as prolific as Cash and Kavanagh had been reprieved (though mercy was by no means inevitable in such cases).²⁶⁵ This reflects the dominance of the judicial conception of the legal conception of mercy, reducing mercy to certainty, consistency through a kind of doctrine of precedent.

A gang of escaped convicts in 1844 who robbed the houses of a Captain Cheyne and a Mr. Davidson (and escaped shots with the police in the process) were convicted at the Oatlands Supreme Court of the capital offence of robbery with violence. Though the case against the gang was 'perfectly clear', Montagu J controversially sentenced the culprits to only death recorded.²⁶⁶ The judge's reasoning was that as other prisoners under similar circumstances had been reprieved by the Executive (a clear reference to *Cash and Kavanagh*) 'and His Honour conceived that justice in its administration should be sure and equal.'²⁶⁷ In other words it was a 'habitually futile' exercise to pass a sentence of death that the court knew in practice would be commuted.²⁶⁸

Even the most prolific of offenders might benefit from this approach. William Westwood otherwise known as Jacky Jacky was a habitual escaped convict and prolific bushranger but he was known as the 'Gentleman Bushranger' for the restraint and politeness of his many crimes.²⁶⁹ Westwood was convicted in Tasmania in 1845 after escaping from Port Arthur of robbery under arms but Montagu J considered that 'the ends of justice' did not require Westwood to pay the ultimate price.²⁷⁰ The judge merely passed a sentence of death recorded. Montagu

Montagu J noted the offenders had not acted with unnecessary cruelty and they were reprieved even though Jones had insisted he would rather hang than return to Port Arthur). See also *R v Driscoll and Flannigan* (*Colonial Times* (Hobart), 21 January 1856, 3; *Hobart Mercury* (Hobart), 23 January 1856, 3) (sentence of death passed for robbery under arms but the judge assured the jury that their strong recommendation of mercy in light of the offenders' restraint and lack of violence would be forwarded to the proper quarter and the Governor commuted the sentence for both to imprisonment at Port Arthur for five years, a lenient punishment for the period (see *Cornwall Chronicle* (Launceston), 23 February 1856, 3; Executive Council Minutes, Tasmania, 7 February 1856).

²⁶⁴ See, eg, 'Kavenagh', *Launceston Examiner* (Launceston), 21 October 1843, 3-4; Davies, above n 3, 39.

²⁶⁵ See, eg, the controversial fates of George Whiley in 1854 and Matthew Mahide in 1848.

²⁶⁶ *The Courier*, 28 June 1844, 2.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ See Boxall; above n 16, Ch VI; Martha Rutledge, 'Westwood, William (1820-1846)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/westwood-william-13246/text6635>>.

²⁷⁰ *R v Westwood* (*Colonial Times* (Hobart), 5 September 1845, 3).

J noted that Westwood ‘had conducted himself with great forbearance’²⁷¹ during his crime and furthermore (in another reference to *Cash and Kavangah*) other far worst offenders than he had been reprieved. The reporter observed that Westwood ‘comported himself with indifference, without bravado, he evinced neither surprise nor emotion of any kind’ at Montagu J’s address.²⁷² The Executive Council considered the case and after reading the judge’s report, agreed to ‘extend mercy’²⁷³ Westwood was ordered to be transported ‘beyond the seas for life.’²⁷⁴

VI CONCLUSION: MERCY, THE ‘BRIGHTEST GEM THAT CAN ADORN THE ADMINISTRATION OF ANY RULER’

The scrupulous care taken to the fate of bushrangers in cases such as *Priest, Kavanagh and Cash* (where mercy was granted) and even cases such as the rapists of Mrs Hamlin and *Banks* (where mercy was ultimately not granted) is telling and illustrates the seriousness with which the question of mercy was approached in colonial Australia in the period 1824 to 1856.

A wide range of factors could be significant in influencing the deliberations of the Governor and the Executive Council. The Council looked beyond ‘mercy’ and at the ‘justice’ of the particular offence and/or offender. They had regard to both the circumstances of the offence (such as the absence of violence or cruelty or chivalry to women (as in *Priest*);²⁷⁵ and the offender (such as the previous good character of the condemned prisoner;²⁷⁶ his or her personal circumstances,²⁷⁷ whether the

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Executive Council Minutes, Tasmania, 20 September 1845.

²⁷⁴ Westwood later took a leading role in the convict revolt at Norfolk Island in 1846 that left four warders dead. Westwood was said to have personally killed two of them. Twelve prisoners, including Westwood, were convicted and hanged. See Boxall, above n 16, Ch XI; Rutledge, above n 269.

²⁷⁵ See, eg, *R v Reid, Lancaster, Glove and Price* (*Launceston Examiner* (Launceston), 4 October 1843, 4); John Reilly (Executive Council Minutes, Tasmania, 21 December 1848).

²⁷⁶ See, eg, John Boyd and Henry Drummond who were convicted in 1826 of theft of livestock with sentence of death passed but after consideration of the crimes the prisoners had originally been sent to Australia, the Executive Council commuted their sentences on account of their previous good character. See Executive Council Minute, NSW, no 14, 29 June 1826; Executive Council Minute, NSW, 5 July 1826, 50. Conversely the previous bad character of the prisoner was a material factor in allowing the law to take its course. See, eg, Buchanan Wilson (who had been reprieved in 1832 for a highway robbery (see above n 166) and again in 1834 for his role in the Norfolk Island revolt) who was convicted of robbery after escaping (see *R v Wilson* (*Colonial Times* (Hobart), 22 April 1851, 2)) and was noted as a ‘very desperate character’. On this occasion the Executive Council resolved that it could not advise the Governor to yet again grant mercy. See Executive Council Minutes, Tasmania, 26 April 1851;

prisoner had previously received the benefit of a grant of mercy,²⁷⁸ and co-operation with the authorities).²⁷⁹ The Council, as in *Priest*, had regard to appeals from the victim of the offence²⁸⁰ or the position of the press,²⁸¹ public opinion (typically in the form of public petitions as in *Priest*),²⁸² and appeals from clergymen (as in *Priest*);²⁸³ Testimonials from employers²⁸⁴ and from members of the jury²⁸⁵ could also prove decisive. The Executive Council was prepared to have regard to major flaws in the fairness of the trial²⁸⁶ and doubts as to the strength of the prosecution's case²⁸⁷ (especially if conveyed by the trial judge).²⁸⁸ Even the 'hand of

²⁷⁷ See, eg, a bushranger and escaped convict, James Quinn (see *R v Brewer and Quinn* (*Colonial Times* (Hobart), 22 October 1853, 3; *The Courier* (Hobart), 22 October 1853, 3 (trial); *Cornwall Chronicle* (Launceston), 26 October 1853, 3) who was reprieved on account of his youth and unhappy upbringing. 'He never remembered from a child being anything else but a prisoner. He has never enjoyed the privileges and opportunities of freedom.' See Executive Council Minutes, Tasmania, 29 October 1853.

²⁷⁸ See, eg, the reasoning of Burton J in the 1834 Norfolk Island mutiny trials (see *Sydney Gazette* (Sydney), 27 September 1834, 2S).

²⁷⁹ See, eg, William Newman who reprieved for robbery of a house on account of his assistance upon arrest in recovering the stolen property and mainly contributing to establishing the case against his accomplices; see Executive Council Minutes, Tasmania, 11 May 1830. In the 18th and 19th centuries, a pardon was frequently used to induce accomplices to give evidence against the principal offenders, see *R v Blackburn* (1853) 6 Cox CC 333, 335. 'Honour amongst thieves' has always been more a custom honoured more in the breach than in the observance.

²⁸⁰ See 'Petition for Mercy', *Cornwall Chronicle* (Launceston), 25 October 1845, 277.

²⁸¹ See further Castle (2008), above n 12, 43.11.

²⁸² *Colonial Times* (Hobart), 31 October 1845, 3; 'Priest', *Launceston Examiner* (Launceston), 29 October 1845, 4.

²⁸³ See, eg, 'Petition for Mercy', *Cornwall Chronicle* (Launceston), 25 October 1845, 277 (see also Davis, above n 3, 42-43); 'The Reprieve to the Convict Shepherd', *Maitland Mercury* (Hobart), 11 April 1855, 2S.

²⁸⁴ See, eg, *R v McLeod* (*Colonial Times* (Hobart), 14 May 1830, 2; *Hobart Town Courier* (Hobart), 8 May 1830, 3) sentence of death on a member of a gang of bushrangers for robbing a house was commuted to transportation for life owing to the representations made to both the trial judge and the Executive Council by his former master as to his good character. See *Ibid*; Executive Council Minutes, Tasmania, 6 May 1830.

²⁸⁵ See, eg, *R v Brewer and Quinn* (*Colonial Times* (Hobart), 22 October 1853, 3; *The Courier*, 22 October 1853, 3 (trial); *Cornwall Chronicle* (Launceston), 26 October 1853, 3 (sentence)) where the jury not only recommended mercy with its verdict but wrote to the Governor (see Executive Council Minutes, Tasmania, 29 October 1853). See also John Reily where the jury wrote to the trial judge successfully asking for mercy (see Executive Council Minutes, Tasmania, 21 December 1848).

²⁸⁶ See, eg, John M'Cabe who was condemned to death in 1855 for murder and was advised by Williams J 'not to entertain the slightest hope of mercy' ('Murder', *Sydney Morning Herald* (Sydney), 24 October 1855, 5). The proceedings were described as a 'mockery of justice' ('The Convict M'Cabe', *The Argus*, 23 October 1855, 4) owing to the deplorable and 'very severely criticised' ('Victoria', *South Australian Register*, 27 October 1855, 3) conduct of the trial judge. See further *Ibid*; 'The Convict M'Cabe', *The Argus*, 23 October 1855, 4; 'The Convict M'Cabe', *The Argus*, 23 October 1855, 5; 'The Convict M'Cabe', *The Argus*, 24 October 1855, 6; 'Convict M'Cabe', *The Argus*, 24 October 1855, 7. The accused was reprieved, see *Ibid*.

²⁸⁷ See, eg, the reprieve granted to the four convicts condemned to death for the brutal murder of a free settler called McIntyre after strong doubts emerged as to the veracity of

fate²⁸⁹ might intervene in a prisoner's favour.²⁹⁰ In the absence of any formal Appeal Court to challenge the conviction or sentence in capital (or indeed any) criminal cases,²⁹¹ the Executive Council was perhaps the nearest that there was to a colonial Court of Criminal Appeal in this period.

However, it is important not to overstate the mitigatory effect of the Executive Council. Its operation was limited and it was not the same as a modern Court of Criminal Appeal. The Council, in its earlier years at least, may have had such a volume of cases to consider that it could not have given each condemned prisoner detailed consideration.²⁹² The exercise of mercy was often controversial, whether in favour²⁹³ or not²⁹⁴ of the condemned prisoner.²⁹⁵ The prerogative of mercy was criticised as a 'game of chance in which those who suffered were merely unlucky'²⁹⁶ and its inconsistent exercise was a regular source complaint in both

the testimony of the principal prosecution witness (see *Sydney Gazette* (Sydney), 20 December 1832, 2; 8 January 1833, 2; 'The Late Mr John McIntrye', *Sydney Monitor* (Sydney), 9 January 1833, 2; 'The Murder of Mr McIntrye', 10 January 1833, 2). See also the reprieve of three convicts called Champley, Shelvey and Yates for burglary owing to 'a fair and reasonable doubt as to the propriety of the conviction' (see 'The Campbelltown Convicts', *Sydney Gazette* (Sydney), 20 April 1830, 2).

²⁸⁸ See, eg, *R v Tucker and Davies* (*Colonial Times* (Hobart), 7 May 1830, 3; *Hobart Town Courier* (Hobart), 8 May 1830, 3), who were convicted of rape upon an Eliza Hickery but the Chief Justice declined to comment upon their case in passing the death sentence. Both were granted an unconditional pardon after the Chief Justice volunteered that he was 'very doubtful' of the guilt of the accused as the victim was of 'bad character' and both defendants were of good character. See Executive Council, Tasmania, Minutes, 6 May 1830.

²⁸⁹ Hirst (1983), above n 66, 114.

²⁹⁰ See, eg, William Curten who was reprieved for murder when at his hanging the rope broke, see 'Failed Execution', *The Australian* (Sydney), 26 January 1826; Bathurst to Darling, 2 November 1826, *Historical Records of Australia*, Series 1, Vol. 12, 673

²⁹¹ Although a limited Court of Appeal could be convened under the *New South Wales Act 1823* (Imp) appeals were limited to questions of law, not on wrongful determinations on fact. See Woods, above n 12, 253-255. A full right of appeal did not emerge until the end of the 19th century.

²⁹² On 16 September 1826 the Executive Council in Tasmania considered the remarkable number of 37 condemned prisoners in one sitting.

²⁹³ See, eg, 'Capital Punishment: Byford and Vidall', *The Australian* (Sydney), 4 February 1845, 3; 'The Reprieve of Gleeson', *Bathurst Free Press*, 2 November 1850, 4.

²⁹⁴ See, eg, the 1854 execution of George Whiley. See Davis, above n 3, 56; Executive Council Minutes, Tasmania, 24 October 1854. See further 'A Dangerous Man', *Launceston Examiner* (Launceston), 12 October 1854, 2; *Colonial Times* (Hobart), 14 October 1854, 2; 'Execution', *Cornwall Chronicle* (Launceston), 4 November 1854, 4; 'Execution', *Colonial Times* (Hobart), 7 November 1854, 3.

²⁹⁵ The exercise of mercy continued to prove highly contentious after 1856 in a number of high profile cases in NSW featuring convicted bushrangers (see Woods, above n 12, 199-200), especially in the case of Frank Gardiner (see Bede Nairn, 'The Governor, the Bushranger and the Premier' (2000) 86 *Journal of Royal Australian Historical Society* 114).

²⁹⁶ 'State of Crime; *Colonial Times* (Hobart), 6 February 1838, 5.

England²⁹⁷ and the Australian colonies.²⁹⁸ One prisoner such as James Bowtell might be executed and others such as Cash and Kavanagh reprieved for identical or even more aggravated crimes.²⁹⁹

The Executive Council might insist, citing the local conditions in the colonies as being very different from those in England, in carrying out the death sentence notwithstanding the fact that the offence for which the accused had been convicted no longer carried the death penalty in England.³⁰⁰ The Governor and the Executive Council on occasion ignored the very real doubts that must have existed as to the strength of the prosecution case and insisted on proceeding with the death penalty.³⁰¹ They were further at liberty (as in *Mahide*) to disregard public opinion³⁰² and ignore appeals for mercy from the victim,³⁰³ the jury³⁰⁴ and even (as seen in *Banks*) from within the Executive Council. On such occasions

²⁹⁷ See, eg, 'The Injustice of Reprieves', *The Times*, 31 August 1867.

²⁹⁸ See, eg, Editorial, *Launceston Advertiser* (Launceston), 18 February 1841, 3; 'Kavenagh', *The Courier*, 22 September 1843, 2; 'Kavenagh', *Launceston Examiner* (Launceston), 21 October 1843, 3; 'Hall, Kenney and Davis,' *Cornwall Chronicle* (Launceston), 5 August 1854, 4; 'The Goulburn Homicides', *Empire*, 17 October 1855, 4-5; 'Punishment of Criminals', *South Australian Register*, 19 March 1864, 2 ('one law for the rich and another for the poor').

²⁹⁹ See 'Kavenagh', *The Courier*, 22 September 1843, 2; Davis, above n 3, 38.

³⁰⁰ See, eg, Issac Tidburrow who was convicted and sentenced to death in 1844 in Tasmania for the rape of a young girl. He was a former convict. The Executive Council upheld the sentence despite the Colonial Treasurer arguing that as the similar law in England was no longer a capital offence, mercy could be extended. The Colonial Secretary disagreed. There was reason to fear the prevalence of the offence and the circumstances of the Colony, unlike England, justified the retention of the old capital law. 'The state of society is very different here.' The majority concurred with the Colonial Secretary. See Executive Council Minutes, Tasmania, 19 June 1844. Tidburrow was hanged.

³⁰¹ See, eg, the case of George Whiley who was executed in November 1854 in Launceston for assaulting and robbing a man called Smith despite Whiley's steadfast protestations of innocence and the strong doubts as to the character and credibility of Smith. See 'A Dangerous Man', *Launceston Examiner* (Launceston), 12 October 1854, 2; 'A Question for Consideration of the Executive', *Hobart Mercury* (Hobart), 18 October 1854, 2; A Lover of Justice, Letter to Editor, 'James Smith', *Launceston Examiner* (Launceston), 19 October 1854, 3; *Colonial Times* (Hobart), 7 November 1854, 3;

³⁰² See, eg, the executions of three convicts for their involvement in the revolt at Castle Forbes owned by the controversial 'Major' Mudie, despite public feeling in favour of the condemned men (see 'Execution', *The Australian* (Sydney), 23 December 1833, 2).

³⁰³ See, eg, Thomas Gault who were refused mercy and hanged in 1858 for robbery under aggravation of a house despite appeals for mercy from his two victims (and nine members of the jury to the Governor). His accomplice was reprieved. See Executive Council Minutes, Tasmania, 11 and 20 December 1858.

³⁰⁴ Though the Executive Council gave any recommendation from the jury for mercy its 'serious consideration', it was not obliged to accept it ('Recommended to Mercy', *South Australian Advertiser*, 31 January 1874, 6). See, eg, the Executive Council's refusal to grant mercy to Matthew Mahide convicted of the robbery of a house. See Executive Council Minutes, Tasmania, 24 October 1848.

notions of retribution and deterrence overrode any other countervailing consideration.³⁰⁵

Full pardons were comparatively rare,³⁰⁶ and offenders spared the death penalty were usually sentenced to long periods of transportation to secondary places of punishment. Even those offenders where the conferral of mercy was prompted by doubts as to prisoner's guilt in light of weaknesses in the prosecution case or glaring flaws in the fairness of the trial, were not granted a full pardon but were usually ordered to be transported,³⁰⁷ often for life.³⁰⁸

The colonial authorities were all too aware in the period from 1824 to 1856 of the need in a frontier society seemingly beset by crime and criminals to ensure that the death sentence was applied to capital offenders, especially bushrangers, deserving of the 'awful sentence of the law'.³⁰⁹ It was important that prevailing notions of punishment and deterrence were applied, whatever misgivings that members of the Executive Council,³¹⁰ the Governor (as in *Golding and Watson*) or even the British Colonial Secretary³¹¹ may have entertained in private in the

³⁰⁵ See, eg, *R v Kenney* (*The Courier*, 10 March 1847, 4); 'Mr. Justice Montagu's Opinion of the State of the Country', *Launceston Examiner* (Launceston), 10 March 1847, 3.

³⁰⁶ See, eg, Daniel Tucker and Issac Davies, (see *Colonial Times* (Hobart), 7 May 1830, 3; *Hobart Town Courier* (Hobart), 8 May 1830, 3). Both were convicted of rape upon an Eliza Hickery but the Chief Justice at sentence forbore to comment upon their case in passing the death sentence. Both were granted an unconditional pardon after the Chief Justice volunteered to the Executive Council that he was 'very doubtful' of the guilt of the accused. He noted the victim was of 'bad character' and both accused were of good character. See Executive Council Minutes, Tasmania, 6 May 1830.

³⁰⁷ See, eg, the case of three convicts called Champley, Shelvey and Yates who were reprieved owing to 'a fair and reasonable doubt as to the propriety of the conviction' for burglary but were still ordered transported to Norfolk island for 15 years (see 'The Campbelltown Convicts', *Sydney Gazette* (Sydney), 20 April 1830, 2); John M'Cabe, who was convicted in 1855 of murder after a trial that was justifiably described as 'no fair trial' and a 'mockery of justice' ('The Convict M'Cabe', *The Argus*, 23 October 1855, 4). However, his 'reprieve' was to work on the roads for 15 years, the first three in chains. See 'Convict M'Cabe', *The Argus*, 24 October 1855, 7. See also John Hewitt and William Love who were convicted of robbery and sentenced to death. The trial judge noted to the Executive Council that there was 'a doubt as to the testimony of the prosecutor' and their sentence was commuted to seven years transportation and a year of probation. See Executive Council Minutes, Tasmania, 18 April 1853.

³⁰⁸ See, eg, Joseph Hawley, John Brickfield, and Richard Coglan who were convicts sentenced to death for the rape of the wife of a coachman. All three protested their innocence. All were literally at the last moment spared and transported for life to Norfolk Island (see *Sydney Herald* (Sydney), 23 September 1833, 2) 'Circumstances have transpired which fix a suspicious character on the prosecutrix and cast doubt as to the truth of her unsupported evidence' (*Sydney Monitor* (Sydney), 21 September 1833, 2).

³⁰⁹ 'Execution', *Sydney Gazette* (Sydney), 27 January 1825, 3.

³¹⁰ See above n 160. See also the frank acknowledgement of the Colonial Secretary in 1846 as to the failure of the death penalty as a deterrent in the case of John Brear and George Preddy. See Executive Council Minutes, Tasmania, 31 July 1846.

³¹¹ See above n 160.

rationale of capital punishment as an effective or appropriate punishment or deterrent. However, balanced against the need for retribution and deterrence was the prerogative of mercy.

The Governor and Executive Council took seriously its crucial role in dispensing mercy in capital cases. Debates about the exercise of mercy expressed different conceptions of law, order and justice in a fledgling society that cast itself as under threat of anarchy. Even the worst capital offenders, including bushrangers 'steeped neck deep in violence – of murder and crime of the most atrocious dye,'³¹² might still receive the benefit of mercy. The prerogative of mercy was not mere rhetoric. As the *Launceston Advertiser* declared in 1841 in favour of the grant of mercy to three escaped convicts and bushrangers from Port Arthur sentenced to death 'without hope of a reprieve'³¹³ for robbing a house after been thwarted by the bravery of the owner; 'The frequent display of mercy is the brightest gem that can adorn the administration of any ruler, but few will dispute, whilst on the other hand there is no blot more foul, no stigma more odious than that having pursued one continued course of stern severity.'³¹⁴

³¹² 'Priest should not be Executed', *Cornwall Chronicle* (Launceston), 22 October 1845, 263.

³¹³ *R v Yarwood, Hobley and Eastcourt* (*Colonial Times* (Hobart), 2 February 1841, 2).

³¹⁴ Editorial, *Launceston Advertiser* (Launceston), 18 February 1841, 3. See also Editorial, *The Courier*, 9 February 1841, 2; Editorial, *Launceston Advertiser* (Launceston), 18 February 1841, 2. The three were reprieved.