'All that's Good and Virtuous or Depraved and Abandoned in the Extreme'? Capital Punishment and Mercy for Female Offenders in Colonial Australia, 1824 to 1865

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Abstract

The exercise of the death penalty and the operation of the prerogative of mercy in 19th century Britain have long been a subject of academic scrutiny and popular interest. In comparison, the exercise of the death penalty and the prerogative of mercy in colonial Australia have been largely overlooked, as has too, the exercise of the death penalty in respect of female offenders in Britain, and more especially, Australia. This article examines the exercise of the death penalty for the women convicted of a capital offence in the Australia colonies (with particular focus on New South Wales and Tasmania) in the period from 1824 to 1865. This article examines the context of the prerogative of mercy and the perception and treatment of female offenders during this period in Britain and colonial Australia. In considering the rationale and operation of the prerogative of mercy for female capital offenders, it is argued that whilst punishment and deterrence were recurrent themes in the exercise of the death penalty in colonial Australia, these were neither the sole nor even paramount considerations. Instead, the colonial authorities, even to those offenders who were 'beyond the pale', regarded the exercise of the prerogative of mercy as fundamental to the administration of criminal justice. However particular considerations applied to female offenders. They were usually viewed in polarised terms that accorded with the wider perception of female offenders in this period, 'either they are all that's good and virtuous, or that they are depraved and abandoned in the extreme'.1 Female offenders who were perceived to fall into the former category could expect sympathy and the likelihood of reprieve, whilst those who were perceived, sometimes arbitrarily, to fall into the latter category

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[1] *Colonial Times* (Hobart), 23 April 1830, 3.

could entertain little hope of sympathy and mercy and could expect to receive the 'extreme penalty of the law'.

I INTRODUCTION

> It is sometimes said that there is no medium with respect to the female character, that either they are all that's good and virtuous, or that they are depraved and abandoned in the extreme; how then is it that in a place like this, where the most profligate and wicked of the female sex are to be found; how is it that the proportionate number of females suffering the severe penalty of the law should be so small when compared with the number of male malefactor?[2]

This observation was offered by the editor of the *Colonial Times* in 1831 in discussing the grim fate of Mary McLauchlan, who despite sympathy and calls for a reprieve, was refused mercy and publicly hanged in Tasmania with her body ordered for dissection[3] after her conviction for the murder of her illegitimate newborn son. These comments in two crucial respects demonstrate the exercise of the death penalty and the prerogative of mercy in colonial Australia in respect of female capital offenders during the period of British colonisation leading up to the grant of responsible government.

First, it suggests that, despite the considerable number of female convicts transported to Australia from 1788 to 1868,[4] the number of female offenders subsequently convicted of a capital crime in the colonies, and therefore destined to suffer the 'awful sentence of the law',[5] was low when compared to the number of male offenders who were hanged. Literally hundreds of male offenders convicted of a capital crime were

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[2] *Colonial Times* (Hobart), 23 April 1830, 3.

[3] Dissection was an additional punishment for deterrent purposes in cases of murder, under statutory discretion. Under the *Murder Act* (1752) 25 Geo II c 37, s 5 (*An Act for Better Preventing the Horrid Crime of Murder*), the trial 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 anatomisation was, reflecting the religious views of the period, to add to the deterrent effect of capital punishment. Dissection 'was the most feared of all sentences' (David Towles and Trevor Porter, *The Hempen Collar: Executions in South Australia 1834-1964* (Wednesday Press, 1990) 13). See also Helen MacDonald, 'A Dissection in Reverse: Mary McLauchlan, Hobart Town, 1830' (2004) 13 *Feminist History Journal* 12, 13-16; Peter Linebaugh, 'The Tyburn Riot against the Surgeons', in Douglas Hay et al, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Pantheon Books, 1977) 65–117.

[4] During the transportation period from 1788 to 1868, of the approximately 163,000 convicts sent to Australia, 24,960 were women. Of the 54 female capital offenders discussed in this article, all but 15 (of these 15, the status of 5 women is unknown) were convicts or ex-convicts. See further Appendix I.

[5] 'Execution', *Sydney Gazette* (Sydney), 27 January 1825, 3.

refused mercy and hanged during the particular period of this study from 1824 to 1865. In contrast, only a limited number of female offenders were convicted of a capital crime (this study has found 54), and of these only a handful (this study has found 12) were eventually hanged.[6]

Secondly, it demonstrates that female offenders were typically perceived in polarised stereotypes of good and evil.[7] Those female offenders perceived to have betrayed their feminine character, who had acted at odds to the expectations of their gender, would be condemned as 'depraved and abandoned in the extreme', and likely to be found undeserving of any hope of mercy. Conversely other women, despite whatever crimes they may have committed, might still be regarded as reflecting all that is 'good and virtuous' in the female character and deserving of compassion and mercy. Feminists have argued that this is reflective of a polarity in the perception of women in society.[8] If the 'good and virtuous' stereotype is not met, then the pejorative and punishing 'depraved and abandoned',[9] is applied. As Summers observes, '[t]he point of the dual stereotypes is their rigidity, if you don't conform to one you are automatically cast into the other'.[10] Although this categorisation could prove arbitrary, it is reflective of the distinctive approach of the authorities and the wider society, to the limited number of female offenders condemned to death in colonial Australia in the period

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[6] Castles notes that of the 1296 sentences of death passed in NSW during the period of his study from 1826 to 1836, only 19 related to female offenders. Of the 362 actually carried into effect, only a single woman, Bridget Fairless, was hanged. See Tim Castles, 'Watching Them Hang: Capital Punishment and Public Support in Colonial New South Wales' (2008) 6 *History Australia* 43.1, 43.2, 43.6-43.7. See further the NSW Capital Convictions database maintained by the Francis Forbes Society at
< http://research.forbessociety.org.au/search>. Of the 530 approximate death sentences carried out in Tasmania in the period 1824-1865, only four (Mary McLauchlan, Eliza Benwell, Ann Sullivan and Margaret Coghlan) were females. See further Appendix I for a list of all 54 females sentenced to death in the period 1824-1865 considered in this article. Owing to the lack of comprehensive records for other jurisdictions similar to the NSW Capital Convictions database maintained by the Francis Forbes Society, there may be other female capital convictions between 1824 and 1865 not identified by this study.

[7] The assignment of women into dual categories of good and evil is not unique to this context, being a basic tenet of the Judeo-Christian tradition. See Anne Summers, *Damned Whore's and God's Police* (Penguin, 2nd rev ed, 2002) 197.

[8] See Lucia Zedner, 'Women, Crime and Penal Responses: a Historical Account' (1991) 14 *Crime and Justice a Review of Research* 307; Alison Morris, *Crime and Criminal Justice* (Oxford University Press, 1987); Frances Heidensohn, *Women and Crime* (Macmillan, 1985). It is accepted that there are distinctive schools of thought within the feminist discipline, which in its widest sense concerns the subordination of women in society. However a detailed study of this discipline is beyond the scope of this article. See further Lorraine Gelsthorpe and Allison Morris, 'Feminism and Criminology in Britain' (1988) 28 *British Journal of Criminology* 93.

[9] Summers refers to this as a 'damned whores or God's police' stereotype. See Summers, above n 7.

[10] Ibid 200.

1824-1865 where, arguably, particular considerations prevailed beyond those that ordinarily applied for male offenders.

The death penalty played a central role in the British and Australian criminal justice systems until well into the 20th century.[11] It was both a dreaded punishment and a deterrent, serving as a crude form of law enforcement in the absence of a standing police force and a public prosecution service.[12] Yet the exercise of the death penalty has always been tempered in practice by the administration of the prerogative of mercy; an ancient power vested in the British monarch to pardon, either unconditionally or conditionally, offenders.[13] Punishment and mercy are considered two sides of the same coin,[14] with the prerogative of mercy pivotal in both Britain[15] and the Australian colonies[16] in ameliorating the operation of the *Bloody Code* which rendered,[17] in theory at least, over 300 offences in the first part of the 19th century as punishable by death

[11] See, eg, John Beattie, *Crime and the Courts in England, 1660-1800* (Oxford University Press, 1986); Alan Brooke and David Brandon, *Tyburn: London's Fatal Tree* (Stroud, 2004); VAC Gatrell, *The Hanging Tree: Execution and the English People* (Oxford University Press, 1994); Carolyn Strange (ed), *Qualities of Mercy: Justice, Punishment and Discretion* (UBC Press, 1996).

[12] Randall McGowan, *Rethinking Crime: Changing Attitudes Towards Law-Breakers in Eighteenth and Nineteenth Century England* (PhD Thesis, University of Illinois at Urbana-Champaign, 1979) ch 3.

[13] Hawkins, *Pleas of the Crown*, bk ii, c 37, s 45; J Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (Butterworth, 1820) c 7, s 2; FW Maitland, *The Constitutional History of England* (Cambridge University Press, 1965) 476.

[14] It has been argued that there is a specific connection between mercy, or the pardon, and the administration of the criminal law, akin to that of the role of equity in the civil law. In *State v Alexander* (1877) 76 NC 231, 234, it was stated that, 'the pardoning power answers about the same purpose in the administration of criminal matters that equity does in the administration of civil matters. Equity supplies that wherein the law by reason of its universality is deficient; and pardons supply that wherein the criminal law by reason of its universality is deficiency' (cited in Carla Johnson, 'Entitled to Clemency: Mercy in the Criminal Law' (1991) 10 *Law and Philosophy* 109).

[15] In the period 1800-1834, there were 29,808 death sentences passed in Britain. A total of 27,132 (91%) of these offenders were reprieved. In the period 1835-1864, there were 3014 death sentences passed in Britain with a total of 2651 of these offenders (90.5%) reprieved.

[16] See, eg, Castles, above n 6, 43:1; Tim Castles, *The End of the Line: Capital Punishment and Mercy in Colonial New South Wales 1826-1836* (Honours Thesis, University of New England, 2006); Gregory Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900* (Federation Press, 2002) 5–6.

[17] See, eg, Douglas Hay, 'Property, Authority and the Criminal Law' in Hay, above n 3, 17, 22–23, 23, 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. It is acknowledged that other factors also served to ameliorate the operation of the *Bloody Code*, including developments in the administration of prosecutions and in the laws of criminal procedure, which effectively required more rigorous evidence and proof of crimes before conviction.

upon conviction[18] (though this number was drastically reduced after the reforms of the 1820s and 1830s).[19]

This article looks to the wider context of 'mercy' and the perception of female offenders, in an examination of the exercise of the death penalty and the role and application of the prerogative of mercy in early colonial Australia.[20] Though there has been considerable study as to the significance and application of gender to female offenders in general terms,[21] the exercise of the death penalty and the prerogative of mercy for female capital offenders has not been the topic of such exhaustive study in England,[22] and especially Australia.[23]

This article, in particular, considers the proposition raised by the *Colonial Times* in 1831 that female offenders were typically perceived in stark terms between the 'virtuous' and the 'depraved'. In considering the comparatively limited number of capital cases involving female offenders during the period 1824-1865, with particular focus on the theme of 'petit treason', the authors question whether such polarised perceptions were significant in determining who was reprieved and who was not. These cases, seemingly historically insignificant in themselves are, nevertheless, important in understanding the development of the colonial legal system's engagement with the most difficult of legal challenges - the capital

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[18] See John Ellard, 'Law and Order and the Perils of Achieving It' in Duncan Chappell and Paul Wilson, *Issues in Australian Crime and Criminal Justice* (Lexis Nexis Butterworths, 2005) 268. There were over 220 statutes and a total of more than 350 offences in England that carried the death penalty in 1800. A list of these capital statutes can be found in Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750: The Movement for Reform* (Stevens, 1948) Vol 1, App 1.

[19] 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, serious assaults and rape still attracted the death penalty. See further, Woods, above n 16, 112–136.

[20] See Castles, above n 6; Castles, *The End of the Line*, above n 14; Woods, above n 16.

[21] For England, see, eg, John Beattie, 'The Criminality of Women in Eighteenth Century England' (1975) 8 *Journal of Social History* 80; Beattie, above n 11; King, above n 17; Peter King, *Crime and Law in England, 1750-1840: Remaking Justice From the Margins* (Cambridge University Press, 2006); Zedner, above n 8. For colonial Australia, see, eg, Joy Damousi, *Depraved and Disorderly: Female Convicts, Sexuality and Gender in Colonial Australia* (Cambridge University Press, 1996); Kay Daniels, *Convict Women* (Allen & Unwin, 1998); Philip Tardif, *Notorious Strumpets and Dangerous Girls: Convict Women in Van Diemen's Land 1803-1829* (Angus & Robertson, 1990); Summers above n 7; Miriam Dixson, *The Real Matilda: Women and Identity in Australia 1788 to Present* (University of New South Wales Press, 4th ed, 1999).

[22] Though see King, above n 17, 18; King, *Crime and Law in England*, above n 21; Clive Emsley, *Crime and Society in England, 1750-1900* (Pearson, 4th ed, 2010); Lucia Zedner, 1988, *The Criminality of Women and Its Control in England, 1850-1914* (PhD dissertation, University of Oxford). For an overview of the feminist literature touching upon the topic, see Zedner, above n 8.

[23] Though see 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).

offender.[24] Research into the official records of these cases, including case reports, official correspondence, Executive Council Minutes and Judges' notebooks; together with contemporary opinion found in the press reports of the period, provide an insight into the early administration of criminal justice. It also 'enable[s] 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'.[25]

As an embryonic, self-governing society in transformation from its penal roots,[26] the wider context of the period is also significant. It commenced with the establishment of the Supreme Courts of Tasmania and New South Wales in 1824, through the height of the transportation system, increasing 'free' migration and the cessation of transportation to New South Wales in 1840 and then Tasmania in 1852.[27] The period also witnessed the Gold Rushes of the 1850s, the establishment of responsible government in the colonies in the 1850s,[28] and the passage of the *Colonial Laws Validity Act 1865* (Imp) which confirmed the grant of self-government to the colonies.[29]

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[24] See Simon Adams, *The Unforgiving Rope: Murder and Hanging on Australia's Western Frontier* (UWA Publishing, 2009) xix; MacDonald, above n 3, 13.

[25] Tim Castles, 'Constructing Death: Newspaper Reports of Executions in colonial NSW 1826-1837' (2007) 9 *Journal of Australian Colonial History* 51, 67.

[26] See, eg, Alex Castles, *An Australian Legal History* (Law Book, 1982) ch 8 and 9; Robert Madgwick, *Immigration into Eastern Australia, 1788-1851* (Sydney University Press, 1969) ch 3; Shaw, above n 23, chs 8 and 9; Woods, above n 16, ch 1; John Braithwaite, 'Crime in a Convict Republic' (2001) 63 *Modern Law Review* 11.

[27] The effects of transportation were to linger in Tasmania for many years after its abolition in 1852. See James Boyce, *Van Diemen's Land* (Black Inc, 2008) 236-243; Richard Davis, *The Tasmanian Gallows: A Study of Capital Punishment* (Cat & Fiddle Press, 1974) 58; Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868* (Collins Harvill, 1987) 323, 589–594.

[28] 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. A detailed consideration of these changes and the reasons for them is beyond the scope of this article. However, it is notable that by the end of the Gold Rushes and the *Colonial Laws Validity Act 1865*, the transition from a frontier penal colony 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; David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991).

[29] This Act is significant in that the British Parliament made clear that the colonies were to develop the rule of law in the context of their particular colonial society. The doctrine of repugnancy, for example, where colonial laws were rendered invalid if judged to be inconsistent with the laws of England was to be interpreted very narrowly. See, eg, *Phillips v Eyre* (1870) LR 6 QB 1.

II FEMALES AND THE CRIMINAL LAW

In 19th century Britain, the perception of women's essential nature was considered one that, 'regardless of their status or class, they were inherently incapable of murder or premeditated violence'.[30] As Saunders asserts:

> ...with the ascension of young Queen Victoria to the throne, these notions of women's essential passivity, goodness, virtue and empathy assumed far more power and scope. By 1854 these beliefs were enshrined in the term, 'the angel in the house', taken from a poem by Coventry Patmore. The picture was of dutiful devoted wifehood and self-sacrificing, loving motherhood located within the security of marriage, where gender roles were rigidly delineated… This construction of the ideal bourgeois family was an immense distance from the lives of countless poor women, who struggled to exist.[31]

As a consequence, the predominant approach to female criminality until the mid-19th century was moralistic, and measured in terms of a failure to live up to the requirements of this feminine ideal.[32]

> The female criminal, the prostitute, and the female drunk were held up as the very negation of the feminine ideal, a warning to other women to conform.… Descriptions of crime frequently referred to the female offender's past sexual conduct, marital status, abilities as a wife and mother, lack of regret, or apparent 'shamelessness'. In sum, discussion of crime by women went far beyond the offense committed to build up a damning portrait of the character of the offender.[33]

Although research on female involvement in crime in 19th century England and Australia is hampered by a lack of comprehensive statistics for the period,[34] women usually represented a smaller number of indictable offences and violent crimes,[35] but were involved in a higher proportion of petty property offences.[36] Murder, more particularly, petit

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[30] Kay Saunders, *Deadly Australian Women* (ABC Books/Harper Collins, 2013) 2.
[31] Ibid.
[32] Zedner, above n 8.
[33] Ibid 320–321.
[34] See, eg, Shaw, above n 23; LL Robson, *The Convict Settlers of Australia an Enquiry into the Origin and Character of the Convicts Transported to New South Wales and Van Dieman's Land 1787-1852* (Melbourne University Press, 1965); Michael Sturma, *Vice in a Vicious Society: Crime and Convicts in Mid-Nineteenth Century New South Wales* (University of Queensland Press, 1983); Beattie, above n 11; King, above n 17.
[35] It is not certain how far the principle of *femme covert* might have kept women out of the courts. This principle was based on the doctrine that married women possessed no separate legal identity from their husband, and if they were involved in the commission of a felony with their husband, could argue that they were acting under his instruction to gain an acquittal, except in cases of murder and treason. See further below n 341.
[36] Sturma, *Vice in a Vicious Society*, above n 34; Heidensohn, above n 8. However an examination of female involvement in crime in the modern era is rendered far more

treason and infanticide, were the major felonies which attracted female participation, although women were still a small proportion of those convicted and sentenced, in comparison to men.

As an aggravated form of murder, the offence of petit treason was repealed in 1828 but its influence continued to be felt throughout the 19th century.[37] The crime involved the murder of a person to whom the offender owed some duty of subjection, such as a wife killing her husband (but not vice versa) or a servant killing his or her master, and constituted the betrayal of trust of a superior by a subordinate.[38] The rationale for such a 'profoundly brutal and inquisitious'[39] crime was that society rested on a framework in which each person had his or her appointed place and such murders were seen as threatening this status quo.[40] The crime was considered 'an extreme affront to patriarchy'[41] and when perpetrated by a woman, for example by the poisoning of a husband,[42] would usually attract the severest penalty without reprieve.[43]

In contrast to the aggravated nature of petit treason, infanticide was an offence often mitigated by the personal circumstances of the female offender, who was frequently perceived to have committed the offence of murdering an infant out of desperate economic need and/or social stigma. Females accused of the offence were frequently from the poorer working classes, usually servants, and as Beattie observes:

> …a domestic servant was especially threatened by pregnancy, for apart from the ruinous blow it gave her character, it meant dismissal; if she had

complex, including as it does, inter alia: the feminist backlash and the role of the media (eg. Susan Faludi, *Backlash: The Undeclared War Against American Women* (Anchor Books, 1991); racial issues; and the criminalising of victimisation. See, Medea Chesney-Lind, 'Patriarchy, Crime and Justice: Feminist Criminology in an Era of Backlash' [2006] *Feminist Criminology* 6.

[37] Created by the *Treason Act of 1351* (UK) but later repealed by the *Offences Against the Person Act 1828* (UK), 9 Geo 4, c 31.

[38] Until 1790 the punishment for a woman convicted of petit treason was to be burnt at the stake. See Shelley Gavigan, 'Petit Treason in Eighteenth Century England: Women's Inequality before the Law' (1989) 3 *Canadian Journal of Women and the Law* 335, 365.

[39] Ibid 338.

[40] See, eg, Ibid 341–349; Deidre Palk, *Gender, Crime and Judicial Discretion* (Boydell and Brewer, 2006) 33.

[41] King, above n 17, 193.

[42] Poisoning by women once carried the taint of a deliberate crime of stealth, considered the *modus operandi* of female offenders, and thus a crime reviled. See, eg, Otto Pollack, *The Criminality of Women* (University of Pennsylvania Press, 1950) ch 3. However another study finds that female murderers were no more prone to stealth and deception in perpetrating the crime, than were men. See Beattie, 'The Criminality of Women' above n 21, 83.

[43] Gavigan notes that although pardons were widely employed in the 18th century and even those convicted of murder or treason might be reprieved, no woman in her study convicted of petit treason was reprieved. See Gavigan, above n 38, 362–363.

> no family to turn to, an unmarried servant had little hope of keeping both her child and her job.[44]

There was wide, though not universal,[45] sympathy and compassion for mothers accused of the murder of their newborn children in the 19th century, especially if the father was seen to have 'corrupted' the mother.[46] As one columnist observed in 1860, such offenders 'are for the most part mothers, whose personal troubles and difficulties almost always influence the minds of juries and lead to verdicts of not guilty'.[47]

By the early 1800s there was widespread acknowledgment of the extreme mental and other pressures that desperate mothers of newborn children might be subject to,[48] and that the killing of their children could be the tragic result of these pressures. The killing of a newborn child by the mother in such a case was 'understandable as a hysterical post-parturient attempt to hide the evidence of her shame from her family'.[49] Juries and judges in England[50] (and also colonial Australia)[51] proved extremely reluctant to convict women of murdering their newborn children, and the non-capital alternative offence (after 1803)[52] of concealing the birth of the child was likely to be found instead.[53] In the rare instance where the

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[44] Beattie, 'The Criminality of Women' above n 21, 84. See further, Gregory Durston, 'Eighteenth Century Infanticide: a Metropolitan Perspective' (2004) 13 *Griffith Law Review* 160.

[45] See, eg, *R v Scott* (*Sydney Morning Herald* (Sydney), 2 June 1857, 4–5) where at the trial of a woman for the alleged murder of her illegitimate newborn child there was emphasis on the 'lamentable depravity' of the crime and urging of the jury to 'take care that their verdict should not be such as would convince mothers of illegitimate children that their offspring were not like chattel property, to be disposed of and made away with as the parent thought proper'. See also the Chief Justice's remarks in *R v Mary Lamb* [1841] NSWSupC 102 (*Sydney Herald* (Sydney), 22 October 1841, 2; *The Australian* (Sydney), 23 October 1841, 2).

[46] See, eg, W Langer, 'Infanticide a Historical Survey' (1974) 1 *History of Childhood Quarterly* 353, 360; Constance Backhouse, 'Desperate Women and Compassionate Courts: Infanticide in 19th Century Canada' (1984) 34 *University of Toronto Law Journal* 447, 477; Carolyn Strange, 'Discretionary Justice: Political Culture and the Death Penalty in New South Wales and Ontario, 1890-1920' in Strange, above n 11, 130, 152.

[47] *South Australian Weekly Chronicle* (Adelaide), 14 January 1860, 1S.

[48] See, eg, Backhouse, above n 46, 448, 462–463; New South Wales Law Reform Commission, *Partial Defences to Murder, Provocation and Infanticide (Report No 83)* (NSWLRC, 1997) [3.3]–[3.4].

[49] Davis, above n 27, 20.

[50] See, eg, Beattie, 'The Criminality of Women' above n 21, 84-85; Backhouse, above n 46, 448; Mary Emmerichs, 'Trials of Women for Homicide in 19th Century England' (1993) 5 *Women and Criminal Justice* 99, 99–109; Lionel Rose, *Massacre of the Innocents: Infanticide in Britain 1800-1939* (Routledge & Keagan Paul Ltd, 1986) 74–76.

[51] See below nn 307–308.

[52] Prior to 1803 the crime of 'concealment of birth', was also a statutory capital offence (21 Jas I c 27 (1623)), and presumed that a woman who had concealed the death of her child, had murdered the child.

[53] See, eg, Martin Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England* (Cambridge University Press, 1990) 81.

prisoner was convicted of the capital crime, the general practice of the authorities was to extend mercy.[54] Such offenders, as one columnist noted in 1860, 'now almost invariably escape the extreme penalty of the law'.[55]

III FEMALES IN COLONIAL AUSTRALIA 1824-1865

Social and economic status was a significant factor with respect to female engagement in the administration of criminal justice, with the convict class overrepresented in the criminal records, at least in the early years of the colony.[56] This is largely a reflection of the convict status of the major proportion of females at the time,[57] most of whom had originally been convicted for larceny-related offences. These females were overwhelmingly of working class origin, usually servants originating mainly from the urban regions of England and Ireland, and a small proportion from Scotland.[58]

However it is the sexual characterisation of the female convicts which is most striking, with 'almost all contemporaries regard[ing] them as particularly "abandoned"'.[59] An influential report on transportation, the *Molesworth Report*, concluded that the women transported were 'with scarcely an exception, drunken and abandoned prostitutes'.[60] The report

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[54] See, eg, NSWLRC, above n 48, [3.3]–[3.4]. However, this was not always the case. A number of women were executed in Britain in the first half of the 19th century for the murder of their newborn children.

[55] *South Australian Weekly Chronicle* (Adelaide), 14 January 1860, 1S.

[56] Sturma, in his study of crime in New South Wales up to about 1850, notes that 'Overall New South Wales' conviction rate seems to justify an emphasis on the relation between crime and convictism...' (Sturma, *Vice in a Vicious Society*, above n 34, 66). However, Sturma argues that the criminal statistics are 'a questionable measure of actual criminal activity' (Ibid 64), and notes that by 1851, ex-convicts accounted for 50% of persons tried for a criminal offence, a decrease from 70% only a decade earlier. Robson notes that on average, convict women in Van Dieman's Land committed between three and four punishable offences each, with the most serious offences being assault and robbery. The usual offences were absence without leave, drunkenness and misconduct; the latter offence, frequently comprising sexual misconduct. In NSW, with respect to female offending, Robson notes that 'nothing is known from documentary sources that can be used systematically and satisfactorily' (Robson, above n 34, 138).

[57] See generally, Ruth Teale (ed), *Colonial Eve: Sources on Women in Australia, 1788-1914* (Oxford University Press, 1978); Robson, above n 34, who notes that many of the female convicts received sentences of seven years transportation and did not generally return to England after emancipation.

[58] Robson, above n 34, chs 4 and 6. Robson also notes that 65% of the women transported had previous convictions; compared to 61% of the male convicts. See Ibid 149–152.

[59] Shaw, above n 21, 164.

[60] *Report from the Select Committee on Transportation* (Parliamentary Papers, House of Commons, 1837-38) v 22 (660) p ix. This depiction of the convict women began with the First Fleet, as Ralph Clark described, 'the damned whores the moment the[y] got below fell a fighting amongst one another and Capt Meridith order the Sergt. not to part them but to let them fight it out…' (Lt Ralph Clark, First Fleet, quoted by Summers, above n 7, 313).

further surmised that even should the convict women be inclined to be well conducted, 'the disproportion of the sexes in the penal colonies is so great, that they are exposed to irresistible temptations'.[61] William Breton remarked in 1833 in similar terms of the 'melancholy fact, but not the less true, that the greater proportion [of female convicts] are utterly irreclaimable, being the most worthless and abandoned of human beings'.[62] This stereotype of female convicts as intemperate whores must be treated with a degree of caution, for undoubtedly they did not constitute a homogenous group.[63] Furthermore, the convict women were predominantly of the English working class, and within that culture 'the behaviour of female convicts in Australia appears less aberrant than is commonly supposed'.[64]

Upon arrival in the Australian colonies, female convicts were either assigned to officials and settlers,[65] or were accommodated in the Female Factories, the first one established in Parramatta in 1801, where they were employed in domestic work. The Female Factories were simultaneously a prison for those who offended in the colony,[66] a barracks for female convicts, a factory, and a marriage bureau.[67] For female convicts, assignment generally meant servitude in the form of housework, and on

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Robson also notes that many of the females transported (probably one in five) were recorded as being 'on the town', a synonym for prostitution. See Robson, above n 34, 78. Although this interpretation of the records might be questioned, see, eg, Deborah Oxley, 'Female Convicts' in Stephen Nicholas (ed), *Convict Workers: Reinterpreting Australia's Past* (Cambridge University Press, 1988) 85–97.

[61] *Report from the Select Committee on Transportation* (Parliamentary Papers, House of Commons, 1837-38) v 22 (660) p ix.

[62] William Breton, *Excursions in New South Wales, Van Dieman's Land and Western Australia 1830, 1831, 1832 and 1833* (Richard Bentley, 1833) quoted by Damousi, above n 21, 55.

[63] Oxley found that the female convicts were representative of a wide range of skills from jewellers, lacemakers and milliners, many of them literate, through to barmaids and cleaners. See Oxley, above n 60, ch 6.

[64] Michael Sturma, 'Eye of the Beholder: the Stereotype of Women Convicts, 1788-1852' (1978) 34 *Labour History* 3.

[65] See Michael Carmichael, 'From Floating Brothels to Suburban Semirespectability: Two Centuries of Non-Marital Pregnancy in Australia' (1996) 21 *Journal of Family History* 281, for an overview of the major views on the rationale for selection of an assigned servant. In 1835, the number of assigned convicts in NSW was 20,207, with only 6,475 such convicts in Van Dieman's Land. See *Report from the Select Committee on Transportation* (Parliamentary Papers, House of Commons, 1837-38) vol 22, 669, reproduced in CMH Clark (ed), *Select Documents in Australian History, 1788-1850*) (Angus & Robertson, 1959) 129.

[66] These women comprised the largest group accommodated in the female factories, and there were fears of their corruptive influence on the younger women. See Katrina Alford, *Production or Reproduction: An Economic History of Women in Australia, 1788-1850* (Oxford University Press, 1984) ch 4.

[67] Annette Salt, *These Outcast Women: the Parramatta Female Factory 1821-1848* (Hale & Iremonger, 1984).

occasion, sexual servitude.[68] The *Molesworth Report*, which was considered to be politically motivated to end transportation, condemned the women so assigned, as 'the tendency of assignment is to render them more profligate'.[69] But this criticism failed to recognise the limited avenues open to women.[70]

> That prostitution, concubinage and the production of large numbers of illegitimate children was to be the lot of many of the convict women stands less as an indictment of the women themselves than of the British and colonial authorities for failing to provide reasonable economic options for the women.[71]

The assigned female convict who fell pregnant on assignment,[72] as with Mary McLauchlan, would usually be returned to the Female Factories if there was no support from the father of the child.

In order to redress the continuing gender imbalance in the early colony,[73] a series of schemes to attract passage to Australia were employed from the 1820s. Unfortunately the assisted passage schemes lacked the proper infrastructure to support the unaccompanied female immigrants.[74] Many of the females were paupers,[75] and of ill health. The Colony's lingering 'convict stigma', and the perils of the long voyage, failed to attract 'desirable' candidates to migrate. From this time women also began to arrive through unassisted migration. These women were usually the wives

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[68] There were however legal avenues through the Magistrates' system for redress against either violent masters or sexual predation.

[69] 'Results of the Parliamentary Inquiry on Transportation' (1838) 11 *The Spectator* 799, 800.

[70] Summers, above n 7, 316.

[71] Alford, above n 66, 87; Ibid 80: In fact, as Alford notes, convict and ex-convict women had few employment options, and those options were little valued.

[72] Kippen and Gunn's study of illegitimate births in 19th century Tasmania finds a correlation between assigned service and rates of illegitimacy. However, the 'illegitimacy rate falls dramatically at the time when the system of assigning female convicts into domestic service ends, due to the termination of transportation and the expiry of the sentences of those who already were in the colony' (Rebecca Kippen and Peter Gunn, 'Convict Bastards, Common-Law Unions, and Shotgun Weddings: Premarital Conceptions and Ex-Nuptial Births in Nineteenth-Century Tasmania' (2011) 36 *Journal of Family History* 387, 396).

[73] Female convicts were outnumbered for many years at approximately six males to every one female, and were, until the latter mid-19th century, the largest cohort of females in the early colonies, with 11,083 female convicts arriving in New South Wales up to 1853, and 12,595 in Van Dieman's Land, most arriving in the last ten years of this period.

[74] As testified by the work of such pioneering women as Caroline Chisholm. See, eg, the biographies of pioneering Australian women in Heather Radi, *200 Australian Women: a Redress Anthology* (Women's Redress Press, 1988).

[75] 'For the first five years boatload after boatload were sent out by Female penitentiaries, workhouses, poor law administrators in overcrowded parishes and various other 'charitable' institutions…' (Teale, above n 57, 39).

and daughters of men who came as speculators; or the 'gentlewomen', the wives and daughters of officials and respected members of society.

In contrast to the generally unflattering portrayal of the female convict, the women who arrived by unassisted migration and the daughters of settlers and officials were considered the epitome of womanhood, 'always "fair", "gentle", "kind", "cultivated" and "intelligent", and as wives, utterly devoted.'[76] Free women, as a scarce commodity were in the ascendancy when it came to marriage, despite the lower ratio between the sexes,[77] and this observation included the currency lasses who, '[b]etter adapted to colonial conditions than the first generation of settlers, she made an admirable wife and pioneer,'[78] These free women also remained relatively untainted by the 'abandoned' tag so freely attached to the convict women.

In colonial Australia the convict origins of many of the early inhabitants, and the growing numbers of free settlers[79] created a dichotomy between the social realities of the era and emerging middle class expectations of social norms. Female criminals of the period might not have been considered as much as a threat to lives, property and order as men[80] but were instead, as the 'most profligate and wicked,' perceived to be a threat to the moral stability of society. This is consistent with feminist perspectives on the perception of the feminine role of women, the emergence of the middle class, and the modern idea of the family which developed in the 19th century. Summers identifies this perspective as embodying the 'God's Police' stereotype of women.[81] It is a prescriptive stereotype where women, as wives and mothers were entrusted with the moral guardianship of society.[82] The female convict class were considered the very antithesis of this ideal.

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[76] Ibid 64.

[77] In 1841 in NSW there were 1.5 free men to 1 free woman, see ibid, 74. In Tasmania in 1824 males outnumbered females by three to one and by 1847 this was still two to one, see Castles, above n 26, 261.

[78] Teale, above n 57, 58.

[79] From 1824 the convict origins of the colonies changed. In 1821 in NSW the total 'white' population was recorded as nearly 30,000, 12,000 (of which just under 900 were women) of them convicts, comprising 41% of the population. By 1841 just under 131,000, of which approximately 27,000 were convicts (24,000 men; 3,133 women), comprised 20% of the population, and in 1846, convicts comprised just under 6% of the total population of nearly 190,000. In Van Dieman's Land up until the mid-1800's the convict population did not decline to the same extent, with a 'white' population of 12,600 in 1824, of which 5,938 (47% of the population) were convicts (411 women) to a population of 74,741 in 1848, of which 28,459 were convicts (38% of the population). See CMH Clark (ed), *Select Documents in Australian History, 1788-1850* (Angus & Robertson, 1959) 405-408.

[80] Beattie, above n 11, 240, 439; King, above n 17, 192.

[81] Summers, above n 7, 212.

[82] Yet these women too could be perceived to have lost their 'femininity', if a lady 'breaks the rule' and associates with the convict classes. 'When no less a person than Lady Jane

The contrast between the portrayal of convict and free women was stark and divisive. As a strong class-based construct, its narrative became a natural part of the administration of the law and emerged in the discourse on the female offender and the application of the prerogative of mercy. The female offender also attracted characterisation in sexual terms, which added not only a salacious aspect to the reporting of female crime, but often created a polarisation in the public perception of the offender.[83] The prevailing 19th century idealised conception of the devoted and virtuous wife and self-sacrificing and loving mother inherently incapable of murder or premeditated violence, even though it was at odds with reality, flourished in colonial Australia as in Britain.[84]

IV The Exercise of the Death Penalty in Early Colonial Society

The death penalty played a pivotal role in the maintenance of social order and the administration of criminal justice in both Britain[85] and colonial Australia[86] in the 19th century.[87] The gallows represented the 'ultimate penalty of the law'[88] and was thought to both punish and act as a deterrent.[89] The rationale of the gallows in terms of punishment was simple. '"Blood for Blood" is the law of nature, reason and justice, as well as the law of God and it should be strictly enforced' and any efforts to abolish the death penalty 'condemns the law of the Creator as well as those of the country.'[90] As a deterrent, the death penalty was thought

Franklin, the wife of the Governor of Van Dieman's Land, interested herself in the condition of convict women, she was maligned as "a man in petticoats"' (Teale, above n 57, 64).

[83] See, eg, Martin Wiener, 'Convicted Murderers and the Victorian Press: Condemnation vs Sympathy' (2007) 12 *Crimes and Misdemeanors* 110, who examines the increasing importance of the public's role in deciding which murderers to hang and which to be spared, due to the intervention of the Press in reporting on the administration of the pardon.

[84] See Saunders, above n 30, 2.

[85] See, eg, Hay, above n 3; Ellard, above n 18, 268-269; Hughes, above n 27, 31–35.

[86] See, eg, Castles, above n 6, 43.2–43.6; *The Courier* (Hobart), 28 June 1844, 2.

[87] Though the operation of the death penalty (and the prerogative of mercy), as with many other aspects of English law, customs and practices; did not apply unchanged in a colonial context. See, eg, *R v Farrell and Others*, *Sydney Gazette* (Sydney), 30 July 1831; NSW Select Cases (Dowling 1828-1844) 136, 148; Bruce Kercher, 'Why the History of Australian Law is not English' (2004) 7 *Flinders Journal of Law Reform* 177–204; Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995).

[88] *R v Jeffs and Conway* (*Launceston Examiner* (Launceston), 12 July 1843, 3).

[89] This was especially if accompanied at the gallows by the expected expressions of remorse from the condemned prisoner and exhortations to those assembled to learn from his or, rarely her, fate. See MacDonald, above n 3, 21; Castles, above n 26, 62; Davis, above n 27, 18.

[90] 'Executions and Last Dying Speeches', *The Australian* (Sydney), 8 February 1844, 3. See also OTR, *South Australian* (Adelaide), 12 June 1839, 4; *R v Moore* (*Sydney Morning*

essential in preventing other like-minded individuals from being tempted to follow the same criminal path as the condemned prisoner.[91]

Early colonial life was considered one under threat, whether from bushrangers,[92] the large convict population[93] or Aboriginal offenders.[94] There was a strong perception, as noted in both contemporary[95] and modern accounts,[96] that officialdom and the 'respectable' classes regarded themselves alone at the other side of the world from 'home' surrounded by a host of potential perils and criminals.[97] As one colonial

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Herald (Sydney), 16 January 1844, 2); Allan Ramsay, 'The Expediency of Capital Punishment', *Maitland Mercury*, 25 December 1847, 2.

[91] 'Execution of Harrison, Woods and Carver', *Bell's Life in Sydney and Sporting Chronicle* (Sydney), 13 August 1864. 4. See also 'Execution', *Hobart Town Courier* (Hobart), 22 June 1838, 3. See generally, 4 *Blackstone's Commentaries* 1–19. As Blackstone states, 'the end of punishment is to deter men from offending'.

[92] See, eg, *R v Thompson and Others* [1824] TASSupC 15 (*Hobart Town Gazette* (Hobart), 25 June 1824, 2); *R v Shea and Others* [1841] NSWSupC 7 (*Sydney Herald* (Sydney), 25 February 1841, 2; *The Australian* (Sydney), 25 February 1841, 2; *Sydney Gazette* (Sydney), 27 February 1841, 2). See also Boyce, above n 27, 71–83; Hughes, above n 27, 203–243; Woods, above n 16, 77–78; Castles, above n 26, 79–80.

[93] See, eg, *R v Oxley* [1832] TASSupC 32 (*Tasmanian* (Hobart), 7 December 1832); *R v Tougher and Kelly* (*Sydney Gazette* (Sydney), 7 November 1839, 3; *Sydney Herald* (Sydney), 8 November 1839, 3); James Mudie, *The Felonry of New South Wales* (Lansdowne Press, 1964) 113, 116. In 1822, 58% of Tasmania's white population were convicts (Hughes, above n 27, 371). Even as late as 1847, 34% of Tasmania's white population were convicts (Castles, above n 26, 255). In NSW 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 (Neal, above n 28, 200–201). In particular, in a society so heavily composed of convicts, 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.' See Hughes, above n 27, 231.

[94] Indigenous offenders, especially in relation to crimes committed upon white victims, were often seen in these terms. See, eg, *R v Yerricha and Others* (*South Australian Gazette and Colonial Register* (Adelaide), 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* (Sydney), 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).

[95] See, eg, James Bonwick, *The Bushrangers: Illustrating the Early days of Van Diemen's Land* (George Robertson, 1856) 2; Editorial, *Sydney Herald* (Sydney), 10 March 1826, 2; Nostalgus Buthurstiensis, *Sydney Gazette* (Sydney), 6 March 1834, 2–3; Editorial, *Sydney Herald* (Sydney), 15 September 1834, 2; 'Results of the Parliamentary Inquiry on Transportation' (1838) 11 *The Spectator* 799–800; Editorial, *Launceston Examiner* (Launceston), 13 July 1843, 3; Theodore Bartley, 'Household Events', *Launceston Examiner* (Launceston), 11 August 1852, 5.

[96] See, eg, Boyce, above n 27, 167; Castles, above n 6, 43.2–43.4; Joan Goodrick, *Life in Old Van Dieman's Land* (Rigby, 1977) 68; Sturma, *Vice in a Vicious Society*, above n 34, 64, 94–95.

[97] Kercher, *An Unruly Child*, above n 87, 103–104.

commentator observed in 1834, 'In no country is life so insecure as in this.'[98]

Yet this insecurity should not be overstated. Even during the height of the transportation period, the Australia colonies were more than the brutal convict Gulags depicted by Hughes. Although the stability of early colonial society was tenuous, there existed a strong awareness of the operation of the rule of law and the entrenchment of certain rights for free settlers, convicts and emancipists alike.[99] There was legal redress for the wrongful treatment of convicts, and a pathway to emancipation (and eventually integration into society) through assignment and the ticket-of-leave system. This gave everyone a stake and recognition of place in the future of the colony.[100]

By grant from the Crown, the Governor could exercise the prerogative of mercy, or as it is more commonly known, in a reference to the actual instrument sought, the pardon.[101] A discretionary and relatively uncircumscribed power, the pardon enabled the Governor to 'dispense with or to modify punishments which common law or statute would require to be undergone'.[102] By Instructions, all capital cases attracting the death penalty were to be considered by the Governor-in-Council, in order to consider the exercise of mercy.[103] The judge presiding over a

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[98] *Sydney Herald* (Sydney), 15 September 1834, 2.

[99] See, eg, Neal, above n 28; Braithwaite, above n 26; W Nichol, 'Ideology and the Convict System in New South Wales, 1788-1820' (1986) 22 *Historical Studies* 13.

[100] Braithwaite, above n 26.

[101] Although a prerogative power, the operation of the pardon has frequently been regulated by statute, most notably by 27 Hen 8 c 24 (*Jurisdiction in Liberties Act 1535*), which reaffirmed the common law position that the power to pardon for treason and felonies solely resided with the monarch. Excepting treason and murder offences, which required the consent of the King to the recommendation for mercy, the power to pardon was considered delegable to the Governors of the British colonies: Ibid s 1.

[102] William Anson, *The Law and Custom of the Constitution* (Clarendon Press, 4th ed, 1935) 29.

[103] A detailed overview of the practical operation of the prerogative of mercy in colonial Australia from 1824 to 1865 is beyond the scope this article. In brief, the power was exercised 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 compromised various colonial officials though (as in the case of the notorious bushranger Laurence Kavangah in Tasmania in 1843) the Governor was not bound to accept the views of the Executive Council. The Governor and Executive Council also paid close regard to any views of the Chief Justice or trial judge, whether they were a member of the Council or not. The Governor was increasingly expected after responsible government in the 1850s to follow the advice of the elected Ministers on the Executive Council in any decision on clemency though the precise boundaries of the Governor's role in this context weren't resolved until at least the 1870s. See Alpheus Todd, *Parliamentary Government in the British Colonies* (Longman, Green and Co; 1894) 344–359.

capital case would provide a report to the Governor and would later be summoned to attend the meeting of the Executive Council in order to present his report.[104] With such cases, a pardon might be recommended by the jury,[105] or judge who had the discretion to recommend a reprieve from execution for all but murder or treason offences,[106] or be pleaded by the condemned prisoner.[107] The prerogative of mercy played a vital role in the administration of criminal justice and even the worst capital offender might be reprieved.[108]

Yet the threat posed by certain offenders often justified a robust approach by the colonial authorities and militated against the exercise of mercy in such capital cases.[109] On such occasions the rationale of punishment and deterrence took precedence over any other consideration.[110] As *The Australian* observed in denouncing the 'misplaced leniency' of the Executive Council in reprieving repeat offenders who had avoided the death penalty:

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[104] See, eg, the Commission and Instructions of Sir Thomas Brisbane, who succeeded Lachlan Macquarie as Governor of New South Wales in 1821, in *Historical Records of Australia* (Library Committee, Commonwealth Parliament, 1917) series I, vol X, 590.

[105] See, eg, *R v Brewer and Quinn* (*The Courier* (Hobart), 22 October 1853, 3; *Colonial Times* (Hobart), 26 October 1853, 3) where the jury not only recommended mercy with its verdict but wrote to the Governor reiterating its call. See Executive Council Minutes, Tasmania, 29 October 1853.

[106] Under the *Judgment of Death Act 1823* (4 Geo IV c 48) s 1, the trial judge had considerable discretion where an offender was convicted of a capital crime. If the judge thought that the circumstances made the offender a 'fit and proper subject' for the exercise of Royal mercy, then instead of sentencing the offender to death, he could order that judgment of death be recorded. The effect was the same as if judgment of death had been ordered, and the offender reprieved (s 2). This form of 'judicial mercy' was not available for murder or treason convictions. It was considered inevitable that the Executive Council would ratify such a grant of mercy and nobody was executed after a sentence of death recorded. See 'Hobart Town', *Launceston Advertiser* (Launceston),14 June 1844, 2.

[107] In England the offender could petition the King up until the moment of execution. Grounds for awarding mercy were typically that the offence was minor, the offender was of good character, or that the crime committed was not common enough in the local county to require an exemplary hanging. In colonial Australia, the defendant might petition the Governor but the usual practice was for others to petition the Governor and Executive Council on their behalf.

[108] See, eg, David Plater and Penny Crofts, 'Bushrangers, the Exercise of Mercy and 'the last Penalty of the Law' in New South Wales and Tasmania, 1824-1856' (2013) 32 *University of Tasmania Law Review* 295; See further below Part 7.

[109] See, eg, Editorial, *Colonial Times* (Hobart), 2 October 1829, 2; *R v Kenney* (*The Courier* (Hobart), 6 March 1847, 3). See also Davis, above n 27, 40.

[110] Whether the death penalty actually served these purposes is dubious, as was even officially acknowledged in the period. See, eg, the strong views expressed by the Senior Military Officer doubting the rationale of the death penalty as either punishment or deterrence. See Executive Council Minutes, Tasmania, 30 October 1837. See also the doubts expressed by the British Secretary of State as to whether hanging deterred bushranging. See Chief Justice's Letter Book, Archives Office of New South Wales, 4/6651, 37–38.

> ...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.[111]

V FEMALE OFFENDERS AND 'THE LAST DREADFUL SENTENCE OF THE LAW'

There was a general reluctance to apply the death penalty in the 19th century to female offenders,[112] although such offenders were not immune from its application. Indeed, in a patriarchal society, 'where women were accused of murdering men, the cases were seen in much blacker terms by the press and the Magistrates'.[113] If a female offender was perceived to have acted contrary to the expectations of her gender and betrayed her 'feminine' role, then it was more likely that mercy would be refused.[114] As one columnist declared in 1889 (in terms which are equally applicable to the earlier period):

> Happily the instances are rare in which persons of the gentler sex render themselves liable to the extreme penalty, but when such a case is found it would be yielding to a false sentiment and be doing a cruel wrong to the sex to refrain from inflicting the severest punishment. In affection, in tenderness, in long suffering, the woman stands preeminent above the man. When she abjures the high qualities, and makes the confidence reposed in her because of them the cloak for murder after a mean and treacherous sort, she forfeits all claim to special consideration because of her sex, Her fall is greater than that of a man under like circumstance. She is untrue to her higher instincts and is unworthy of the exceptional clemency.[115]

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[111] *The Australian* (Sydney), 1 September 1825, 2. See also *The Courier* (Hobart), 28 June 1844, 2.

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

[113] Paula Byrne, *Criminal Law and the Colonial Subject* (Cambridge University Press, 2003) 98. See also, eg, John Kelly, *Sydney Morning Herald* (Sydney), 31 December 1888, 9.

[114] See, eg, Kathy Callahan, 'Women Who Kill: an Analysis of Cases in late 18th and early 19th Century London' (2013) 46 *Journal of Social History* 1013, 1030–1032.

[115] 'The Case of Louisa Collins', *South Australian Register* (Adelaide), 9 January 1889, 4.

This reasoning is evident in the case of Bridget Fairless and her accomplice, a man named John Collins, convicted in New South Wales of highway robbery in 1826.[116] Both were convicts. To compound their guilt, Fairless and Collins had lured their victim and taken advantage of his good nature, 'thus the exercise of one of the best feelings of human nature was made subservient to their wicked purposes'.[117] At the trial it emerged that Fairless had encouraged the use of greater violence upon the victim as 'the old bugger had more money' than he had relinquished.[118] Given not only the gravity of her crime, but also a conduct in conflict with expectations of the feminine role, it is unsurprising that Fairless was refused mercy and hanged with her companion.[119]

Other capital cases of the period can be seen in the context of female offenders perceived to have 'betrayed' the expectations of their gender. Eliza Benwell, an assigned convict servant, was alleged to have assisted three male convicts;[120] Gomm, Lockwood and Taylor, in the brutal and what appears to have been, sexually motivated murder of Jane Saunders, the maid of the American Consul and his wife, in Tasmania in 1845.[121] Benwell was on intimate terms with Gomm. The three men were convicted of Jane's murder[122] and hanged.[123] Benwell denied her guilt and was separately tried,[124] but found guilty in circumstances acknowledged even at the time, as less than satisfactory.[125] Montagu J, in passing

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[116] See *R v Collins and Fairless* [1826] NSWSupC 41 (*The Australian* (Sydney), 21 June 1826, 3; *Sydney Gazette* (Sydney), 21 June 1826, 3; *Sydney Monitor* (Sydney), 23 June 1826, 8).

[117] 'Execution', *Sydney Gazette* (Sydney), 12 July 1826, 3.

[118] Ibid.

[119] Executive Council Minutes, NSW, 5 July 1826 (adjourned from Meeting No 15); see 'Execution', *The Australian* (Sydney), 12 July 1826, 2; *Sydney Monitor* (Sydney), 14 July 1826, 2.

[120] *The Observer* (Hobart), 16 September 1845, 3.

[121] The motivation and the precise circumstances of the murder were never entirely resolved, even after two trials. See 'Public Execution', *The Courier* (Hobart), 1 October 1845, 2.

[122] See *R v Gomm, Lockwood and Taylor* (*The Courier* (Hobart), 30 July 1845, 2, 4; *Cornwall Chronicle* (Launceston), 30 July 1845, 29–30; *The Observer* (Hobart), 29 July 1845, 2–3),

[123] See 'The Three Murderers', *Colonial Times* (Hobart), 16 September 1845, 3; 'Public Execution', *Colonial Times* (Hobart), 17 September 1845, 2; 'Execution – the Murderers of Jane Saunders', *Cornwall Chronicle* (Launceston), 24 September 1845, 185; 'Execution on Tuesday Morning', *The Observer* (Hobart), 19 September 1845, 3. See also Editorial, *Colonial Times* (Hobart), 12 September 1845, 2.

[124] See *R v Eliza Benwell* (*Colonial Times* (Hobart), 5 September 1845, 3; 9 September 1845, 3; 12 September 1845, 3; *The Observer* (Hobart), 9 September 1845, 2–3; 12 September 1845, 2–3; *The Observer* (Hobart), 16 September 1845, 3; *The Courier* (Hobart), 13 September 1845, 2–3).

[125] See 'The New Norfolk Murder', *Launceston Examiner* (Launceston), 17 September 1845, 3. See also *The Observer* (Hobart), 16 September 1845, 3; Davis, above n 27, 49; Geoffrey Abbott, *Amazing Stories of Female Executions* (Summersdale Publishers, 2006) 29. There was only one direct witness to the crime, a Pacific Islander who could not speak

sentence of death without the slightest hope of mercy,[126] described Benwell as 'a bad, abandoned, hardened woman'.[127]

Both Benwell's trial and sentence attracted largely unsympathetic comment in the Colony with unsubstantiated rumours as to her purported bad character.[128] The *Colonial Times* branded Eliza Benwell to be 'a licentious woman of the worst sort' who was even worse than her male accomplices.[129] Benwell, the *Colonial Times* subsequently declared, 'proves the accuracy of the adage that an abandoned woman is capable of any extent of crime'.[130] The Executive Council saw no reason 'to interfere with the course of the law in this case'[131] and Benwell was duly hanged,[132] maintaining her innocence to the end.[133]

The obstinate and unfeminine demeanour of Mary Sullivan, convicted in Tasmania in 1852 of the 'cold blooded and diabolical murder'[134] of a two year old child under her care,[135] was complicit in sending her to the gallows. Sullivan, aged only 16, had been in Tasmania for less than two months, having been transported from Ireland in 1851 for 14 years.[136] She was placed as an assigned convict servant at a hotel in Hobart to care for the young children of the landlord who was away in the Victorian Gold

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English. The jury at Benwell's trial initially found her not guilty on the basis that the three men had not committed murder. Montagu J refused to accept the verdict and instructed the jury that they could not go beyond the jury's original verdict at the trial of the three men and the only issue for their consideration was whether Benwell had aided and abetted the murder. The jury then proceeded to find Benwell guilty of murder. Benwell's execution has been understandably called 'a serious miscarriage of justice' (Ibid).

[126] *The Observer* (Hobart), 16 September 1845, 3; *The Courier* (Hobart), 16 September 1845, 3.

[127] *Colonial Times* (Hobart), 12 September 1845, 3.

[128] See 'Eliza Benwell', *Cornwall Chronicle* (Launceston), 24 September 1845, 185. Although the *Cornwall Chronicle* acknowledged that her police character in the Colony 'is not bad, (if we exclude profligacy and intemperance), until the night of the dreadful murder of Jane Saunders, as an aider and abetter in which, she is doomed to forfeit her wretched existence' (Ibid). The *Colonial Times* belatedly noted that Benwell actually 'was a very good character, compared with other females of the same class'. She had been transported to Tasmania for 14 years in 1835 for 'unlawfully pledging' and her infractions in the Colony were comparatively minor. See 'The Late Eliza Benwell', *Colonial Times* (Hobart), 10 October 1845, 3.

[129] *Colonial Times* (Hobart), 12 September 1845, 2.

[130] *Colonial Times* (Hobart), 19 September 1845, 2.

[131] Executive Council Minutes, Tasmania, 4 September 1847.

[132] See 'Execution of Eliza Benwell', *Colonial Times* (Hobart), 30 September 1845, 3; 'Public Execution', *The Courier* (Hobart), 1 October 1842, 2.

[133] See 'Eliza Benwell', *The Courier* (Hobart), 27 September 1845, 3. Benwell maintained that she had only stumbled upon the aftermath of the crime and had not been keeping lookout. She also exonerated Gomm and Taylor. See also 'Eliza Benwell', *Cornwall Chronicle* (Launceston), 24 September 1845, 185.

[134] 'Execution', *The Courier* (Hobart), 7 August 1852, 3.

[135] See *R v Sullivan* (*Colonial Times* (Hobart), 27 July 1852, 2).

[136] *Launceston Examiner* (Launceston), 10 July 1852, 6.

Fields. Sullivan had shown 'considerable impatience' to the youngest child, Adeline, and after only a week, Sullivan strangled Adeline to death, left her body in a sink in the backyard and absconded.[137] There was no apparent motive for the crime.[138] Sullivan was swiftly traced and arrested.

A major factor in discouraging any sympathy and ultimately the exercise of mercy for Sullivan, apart from the gravity of her crime, was what was seen as her 'silent sullen disposition'.[139] Sullivan was portrayed as a 'short stout rough-looking girl of forbidding appearance'[140] who was 'habitually unkind to the children'.[141] She appeared legally unrepresented at her trial before the Chief Justice,[142] called no witnesses and provided no defence. The jury, after a short consultation, found her guilty of murder, and even the sentence of death without any hope of mercy appeared to leave her unmoved. 'She has hitherto manifested an unrelenting obduracy and nothing seems calculated to bring her a sense of her enormous guilt'.[143]

Despite the callous nature of the crime, it is notable that the issue of mercy was seriously considered. From the outset there were suggestions that Sullivan may have been insane[144] and a petition was got up, representing her to be so[145] in order to spare her life.[146] However, a Medical Board after careful consideration found Sullivan to be in 'a sound state of mind'.[147] 'Sullivan exhibited no vacancy – no want of

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[137] 'Diabolical Murder of a Child', *The Courier* (Hobart), 10 July 1852, 2.

[138] Ibid. See also 'Murder', *Colonial Times* (Hobart), 9 July 1852, 2; 'Horrible Occurrence', *The Argus*, 19 July 1852, 4.

[139] *Colonial Times* (Hobart), 27 July 1852, 2.

[140] 'Adjourned Inquest on the Body of the Child Murdered by a Servant', *Colonial Times* (Hobart), 16 July 1852, 3.

[141] 'The Campbell Street Murder', *Colonial Times* (Hobart), 13 July 1852, 2.

[142] See *R v Sullivan* (*Colonial Times* (Hobart), 27 July 1852, 2); 'The Late Child Murder at Hobart', *Launceston Examiner* (Launceston), 28 July 1852, 6. Sullivan's lack of legal representation was not unusual in the period, even in such capital cases. In the 1840s, for example, in the Black Country in England only 25% of defendants were legally represented. In serious criminal cases this figure only rose to 49%. See David Taylor, *Crime, Policing and Punishment in England 1750-1914* (St Martin's Press, 1998), 114. The injustice of such a situation is obvious. See James Stephen, *A History of the Criminal Law of England (Vol 1)* (Macmillan and Co, 1883) 442.

[143] 'Execution', *Colonial Times* (Hobart), 3 August 1852, 3.

[144] 'Horrible Occurrence', *The Argus* (Melbourne), 19 July 1852, 4.

[145] The Executive Council minutes make no reference to the issue of insanity or any such petition but the Colonial Secretary's extensive records in relation to the case indicate how seriously Sullivan's state of mind was considered.

[146] 'Public Execution', *Colonial Times* (Hobart), 6 August 1852, 2.

[147] Ibid. Though the Colonial Secretary's extensive records of the case, including the report of the Medical Board dated 3 August 1852, indicate how seriously Sullivan's state of mind was investigated and considered, in 1852 psychiatric knowledge was still in its comparative infancy and the conclusion that Sullivan was of sound mind has been questioned by modern authors. See Davis, above n 27, 43; Abbott, above n 125, 204–205.

perception, but utter callousness'.[148] The Executive Council refused mercy,[149] and Sullivan went to the gallows before a 'vast crowd'.[150] Again there was emphasis on her apparent lack of remorse.

> It is too clear she was conscious of the guilt of the deed she perpetrated – that she was of a sullen, morose disposition, and impatient of all control. Her head and features indicated a ferocious and passionate disposition, with strong determination marked in the lower part of the jaw...[her] passions though young were very strongly marked in her countenance.[151]

Greed; cruel and licentious behaviour; and a callous and obdurate demeanour proved against Fairless, Benwell and Sullivan respectively and precluded any grant of mercy. Yet mercy might even prove unattainable in the tragic case of a woman convicted of the murder of her illegitimate infant child.[152] Mary McLauchlan was an assigned convict servant at the home of Charles Nairne, a prominent married settler in Tasmania. Whilst in his service, Mary became pregnant and Nairne was believed to be the father.[153] After becoming pregnant,[154] Mary was sent, for undisclosed infractions,[155] to the Cascades House of Correction, a secondary place of punishment for female convicts. Mary's newborn child was strangled soon after his birth and the body placed in a water closet. Mary was charged and convicted in 1831 of the 'wilful murder of

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[148] 'Execution', *The Courier* (Hobart), 7 August 1852, 3.
[149] Executive Council Minutes, Tasmania, 27 July 1852.
[150] See above n 146. See also 'Public Execution', *Colonial Times* (Hobart), 6 August 1852, 2.
[151] See above n 146. A different view as offered by another observer, 'The unhappy female having previously confessed her crime, vacated her cell for the scaffold with much firmness, and spent her last moments in prayer' ('Public Execution', *Colonial Times* (Hobart), 6 August 1852, 2).
[152] See, eg, MacDonald, above n 3, 19, Gatrell, above n 11, 366. A detailed study of the complex issues involving the treatment of women accused of infanticide in the 19th century is beyond the scope of this article.
[153] See 'First Woman Executed', *Tasmanian & Austral-Asiatic Review*, 23 April 1831; MacDonald, above n 3, 17–18; Nicola Goc, *Women, Infanticide and the Press, 1822-1922: New Narratives in England and Australia* (Ashgate Publishing Ltd, 2013) ch 4. See also the Colonial Secretary's pointed remark at the Executive Council that there were 'some grounds for suspicion that she might have been incited to commit the crime [in] its commission by the father of the child, who was widely supposed to be a person of better education and higher rank in society than herself' (Executive Council Minutes, Tasmania, 16 April 1830).
[154] It is unknown whether the child was the product of seduction, rape or a willing sexual encounter. See MacDonald, above n 3, 17.
[155] There is a strong suspicion that Margaret was sent to the House of Correction not for any valid infraction but to rid her embarrassing presence from Nairne's estate after she fell pregnant. See Ibid 18.

a male bastard child',[156] the first woman in Tasmania to be convicted of murder, and sentenced to hang.[157]

The exercise of the death penalty in the case of Mary McLauchlan proved contentious. Governor Arthur and the majority of the Executive Council rejected appeals for mercy from the jury,[158] public opinion[159] and even spirited opposition from within the Council.[160] Mary was hanged.[161] Just why the Governor refused to extend mercy when, even as he acknowledged, the practice in England in such cases was to extend mercy,[162] is a matter of speculation but the strong moral prejudice that existed in the colonies against assigned female convict servants may well be significant. As an assigned female convict servant, Mary belonged, as MacDonald notes, to a 'despised group'.[163] Contemporary authors also emphasised this point. The Rev John West asserted that such 'women [were] deprived of the graces of [their own] sex and more than invested with the vices of men'.[164] As Davis contends, 'Arthur's hatred of sexual immorality no doubt prevented him from granting a reprieve for a crime which [only] in 1934 was distinguished from murder'.[165]

The defendants in Fairless, Benwell, Sullivan and McLauchlan were refused mercy and condemned to death for crimes considered both unforgiveable and in conflict with the expectations of the female role in

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[156] *The Courier* (Hobart), 17 April 1830, 3.
[157] *Colonial Times* (Hobart), 16 April 1830, 3.
[158] Executive Council Minutes, Tasmania, 17 April 1830.
[159] See 'First Woman Executed', *Tasmanian & Austral-Asiatic Review* (Hobart), 23 April 1831. Contrast 'Execution', *Colonial Times* (Hobart), 23 April 1830, 3; *Hobart Town Courier* (Hobart), 24 April 1830, 2, which supported the refusal to extend mercy with 'First Woman Executed', *Tasmanian & Austral-Asiatic Review* (Hobart), 23 April 1831, which strongly attacked the decision to execute Mary.
[160] The Colonial Secretary argued in support of mercy at the first meeting of the Executive Council. The Governor granted a temporary respite to clarify if Mary had acted alone in killing her newborn child or if anyone else (referring to the unknown father) had put her up to it. See Executive Council Minutes, Tasmania, 16 April 1830. The Executive Council resolved at its second meeting the next day to not interfere with the sentence of death, despite an appeal for mercy from the Colonial Treasurer, in light of Mary's insistence to the Governor's agent, a Mr. Horne, that she alone was responsible for the crime. See Executive Council Minutes, Tasmania, 17 April 1830. However, as MacDonald has described, Horne's objective role in the affair is questionable given his connection in the small confines of 'respectable' colonial society to Mary's former married master, the likely father of the child, and his role as the committing Magistrate. See MacDonald, above n 3, 20-21.
[161] See 'Execution', *Colonial Times* (Hobart), 23 April 1830, 3; *Hobart Town Courier* (Hobart), 24 April 1830, 2. As a postscript, the assiduous Rev. Bedford talked Mary from denouncing the father of the illegitimate child at the gallows. See McDonald, above n 3, 21-22.
[162] See Executive Council Minutes, Tasmania, 16 April 1830. See also 'First Woman Executed', *Tasmanian & Austral-Asiatic Review* (Hobart), 23 April 1831.
[163] MacDonald, above n 3, 17.
[164] John West, *The History of Tasmania* (Angus and Robertson Publishers, 1852) 509.
[165] Davis, above n 27, 25.

the period. All therefore were perceived to fall within that class of women 'depraved and abandoned in the extreme...the most profligate and wicked of the female sex'.[166]

VI PETIT TREASON AND THE DEATH PENALTY TO FEMALE OFFENDERS 'BEYOND THE PALE'

Petit treason, which involved the murder of a person to whom the offender owed a duty of subordination, was viewed as a particularly malicious crime and a threat to colonial society,[167] as in Britain[168] where each person had his or her appointed place.

In 1826 Elizabeth Campbell and three male accomplices were charged in New South Wales with not only murder, but also petit treason. The accused, who were all convicts, had allegedly murdered their master, John Brackfield, then ransacked his home and stole his possessions. The crime was presented 'as one of the most bloody scenes ever recorded,'[169] with Campbell holding the dubious honour of being the first woman judicially hanged in Australia.[170] Not only was Campbell alleged to have played an active role in the murder but was said to have procured its commission through sleeping with, if not seducing, Brackfield and then opening the door to her male accomplices. At the trial[171] the Solicitor-General discarded prosecutorial restraint in appealing for divine inspiration and zealously urged the jury to return a guilty verdict.[172] However, it was Campbell's sexual 'immorality' that further aggravated her crime and attracted particular condemnation.

[166] *Colonial Times* (Hobart), 23 April 1830, 3.
[167] See Editorial, *Sydney Herald* (Sydney), 15 September 1834, 2.
[168] See, eg, the robust prosecution in *R v Patch* in 1806 (see the record of the trial in Joseph Gurney and William Gurney, *The Trial of Richard Patch for the Wilful Murder of Isaac Blight* (M Gurney, 1806) (murder of the accused's social 'superior').
[169] 'Execution', *Sydney Gazette* (Sydney), 27 January 1825, 3.
[170] A total of four women were hanged in New South Wales prior to 1824. Ann Davis, a convict, has the dubious distinction of been the first known woman hanged in Australia in 1789 for burglary following a trial (of sorts) before Collins, the Judge-Advocate (see *R v Davis* [1789] NSWSC 5). Elizabeth Jones was hanged for murder in 1799, Mary Grady was hanged for burglary in 1808 (see *R v Grady* (*Sydney Gazette* (Sydney), 19 June 1808, 2)) and Elizabeth Anderson and two male convict servants were hanged in 1816 for murdering her husband (see *R v Anderson* [1816] NSWSupC 5 (*Sydney Gazette* (Sydney), 22 June 1816, 2)).
[171] *R v Benson and Others* [1825] NSWSupC 4 (*The Australian* (Sydney), 27 January 1825, 2; *Sydney Gazette* (Sydney), 27 January 1825, 2–3).
[172] Ibid 2. Though the custom of prosecutorial restraint as a 'minister of justice' that had firmly developed in England by the 1820s, was ostensibly applied in colonial Australia, in practice the minister of justice role was unevenly applied (especially to 'threats to society') by colonial prosecutors until the 1850s. 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.

> But what said the woman, Eliza Campbell, upon the evening of the murder?... that she was going to sleep with her master – a married man – a tottering old man! That she so prostituted herself, at the instance of her deceased master, there cannot be a shadow of doubt, and whilst he was planning the adulterous intercourse, the object of his illicit amour was abetting the murderers in that deed which hurried him, in the plenitude of sin, into the presence of the GREAT ETERNAL![173]

One editor noted that Campbell, who was 'good looking', had lived with his family for 18 months as an assigned convict servant before she had been sent back to the Factory for her 'drunkenness' and 'prostitution'.[174] She was later assigned to Brackfield and had become his 'concubine', 'but her lewdness led her to prostitute herself to Brackfield's men'.[175] Campbell 'was *really* [editor's emphasis] the instigator of the vices which terminated in all of them together perishing on the scaffold'.[176] In this context, on being found guilty of murder, it is unsurprising that Campbell and her accomplices were refused mercy.[177] Interestingly, in light of the compassion that on occasion was extended in subsequent cases such as Maria Williams[178] and Anne Perry[179] sparing female defendants from the death penalty,[180] neither Forbes CJ nor the Governor made special mention of the sex of Eliza Campbell. She was later described as 'a woman of more than ordinary understanding but her associates and prompters in crime, were almost quite ignorant'.[181] All four defendants were swiftly hanged,[182] suitably repentant,[183] with Campbell not allowing her remorseful accomplices to exonerate her from any knowledge of the murder.[184]

The case of Lucretia Dunkley and Martin Beech in 1843 for the murder of Lucretia's husband, Henry Dunkley, further illustrates the application of

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[173] Editorial, *Sydney Gazette* (Sydney), 27 January 1825, 2. Even 20 years later Campbell's conduct was still the focus of such condemnation. See H, 'An Appeal', *Sydney Morning Herald* (Sydney), 20 September 1845, 5.
[174] *Sydney Monitor* (Sydney), 29 September 1826, 5.
[175] Ibid.
[176] Ibid. Though the editor also castigated Brackfield, an elderly married man, for his jealousy of Campbell and 'sin' in sleeping with a woman about 40 years younger than him and the harshness of the local Magistrates for their roles in the events leading up to the crime.
[177] See Forbes CJ to Governor Brisbane and reply, 22 January 1825, Chief Justice's Letter Book, Archives Office of New South Wales, 4/6651, 22-23; and see Mitchell Library document A 744 Letters from Governor Brisbane to Forbes CJ, 22 January 1825.
[178] See further below Part VIII.
[179] See further below Part IX.
[180] See Laster, above 112, 167-186; Streib, above 112.
[181] 'Execution', *Sydney Gazette* (Sydney), 27 January 1825, 3.
[182] Their bodies were also ordered for dissection. See *The Australian* (Sydney), 27 January 1825, 2. As to the significance of dissection, see above n 3.
[183] See above n 181. See also 'Execution', *The Australian* (Sydney), 27 January 1827, 2.
[184] Ibid. It was noted, 'However clear the testimony may be against criminals, nevertheless it is consolatory to listen to the public confession of dying penitents'.

the death penalty to a female offender in the context of 'petit treason', although this charge was not actually made.[185] Lucretia, originally transported to Australia as a convict for housebreaking, married a pardoned convict, Henry Dunkley, in 1834 and the couple ran a farm in New South Wales. Lucretia was alleged to have had an adulterous affair with an Irish convict labourer, Martin Beech, and the two conspired to kill Dunkley. Dunkley was brutally hacked to death with an axe whilst in bed,[186] and although attempts were made to hide the crime, neighbours alerted the police to Dunkley's mysterious disappearance.[187]

Lucretia and Beech faced trial in September 1843, some twelve months later, for the wilful murder of Henry Dunkley.[188] Beech was charged as the actual perpetrator, and Lucretia, being present at the commission of the crime, as co-conspirator.[189] Their trial before the Chief Justice Sir James Dowling, lasted two days.[190] Lucretia, described as a Welshwoman 'of strong masculine appearance, and every way qualified for the horrid work in which they have been engaged,'[191] displayed a lack of loyalty to the 30 year old Beech, [192] and insisted that he was the true culprit. The defendants' hardened demeanour and their undisguised 'criminal intimacy'[193] was the topic of much comment,[194] with the reporters struck by the 'compound of virulence, shrewdness, and levity'[195] which Lucretia displayed at the trial. She loudly abused the witnesses, claiming of one witness, 'that woman would hang Jesus Christ, let alone me'.[196] Similar, but not such acute observations were made of Beech, whose 'whole demeanour showed great indifference to the result'.[197]

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[185] *Australasian Chronicle* (Sydney), 9 September 1843, 3.
[186] See *Sydney Morning Herald* (Sydney), 4 October 1842, 3; *Australasian Chronicle* (Sydney), 4 October 1842, 2, for reports of the inquest into the murder.
[187] See, eg, *Sydney Morning Herald* (Sydney), 28 September 1842, 2; 'Henry Dunkley, of Gunning, having been missing for ten days, suspicions are afloat that all is not right. His wife cohabits with another man; and they, with the bullock-driver, were ransacking the house, and taking away property.'
[188] *Sydney Morning Herald* (Sydney), 8 September 1843, 2.
[189] See *Sydney Morning Herald* (Sydney), 15 March 1842, 2 and the direction to the jury by Dowling CJ, *Sydney Morning Herald* (Sydney), 9 September 1843, 2.
[190] The trial was heard over Tuesday 5 September 1943 to Wednesday 6 September 1943. See *R v Dunkley and Beech* (*Sydney Morning Herald* (Sydney), 8 September 1843, 2; 9 September 1843, 2).
[191] *Sydney Morning Herald* (Sydney), 5 October 1842, 3.
[192] Ibid.
[193] *Sydney Morning Herald* (Sydney), 9 September 1843, 2. 'She laughed outright upon allusions being made to the criminal intimacy existing between herself and her accomplice.'
[194] Ibid. See also 'Berrima Assizes', *Australasian Chronicle* (Sydney), 9 September 1843, 3.
[195] *Sydney Morning Herald* (Sydney), 9 September 1843, 2.
[196] Ibid.
[197] Ibid.

The evidence against the two accused was comprehensive and the jury took only five minutes to return a verdict of guilty on both prisoners.[198] The Chief Justice, in passing sentence of death without any prospect of reprieve,[199] described the defendants as 'monsters of human depravity'.[200] He painted Beech's actions in stark terms of 'Judas-like' treachery and adultery,[201] but reserved his strongest denunciation for Lucretia, stating that at the trial she had exhibited 'a tone and manner, accompanied by language, which… lead to the conviction that the Devil himself had, for a time, assumed the female form'.[202] The Chief Justice also referred to Lucretia's adultery.

> A wife – the drunken polluter of the rites of Hymen, the violator of every tie by which the sacred institution of marriage can unite in holy wedlock, yielding to brutal lust, and with her paramour consummating her guilty passion in the blood of her husband![203]

The Executive Council briefly acknowledged that the only consideration which would induce them to hesitate in confirming the death sentence was Lucretia's sex.[204] However, Lucretia's callous actions and demeanour did not engender any compassion,[205] and Lucretia and her lover were hanged, seemingly unrepentant.[206]

A year later Mary Thornton, aged 21, and her lover, a man called Vale, were convicted of the murder through strychnine poisoning of Mary's husband.[207] Mary was a convict and Vale was an employee of the deceased. It was, as the Attorney-General made clear in his robust opening address at the trial,[208] a damning combination: the murder of a

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198 Ibid; *Sydney Morning Herald* (Sydney), 8 September 1843, 2.
199 *Sydney Morning Herald* (Sydney), 15 September 1843, 3.
200 Ibid.
201 Ibid. The judge made further reference to Macbeth when he surmised that the 'ghost of your murdered victim, in ghastly shape, must day and night present itself to your guilty minds, and his gaping wounds demand that retribution which laws divine and human award'.
202 Ibid.
203 Ibid. One account also holds that the Chief Justice ordered that Lucretia's body be buried in a vertical position so she could not lie easy, even in death. See Gunning & District Historical Society, *Lucretia Dunkley*, <http://www.gunninghistory.org.au/index.php/historical-people/19-lucretia-dunkley>.
204 Executive Council Minute, NSW, no 20, 21 September 1843, 323.
205 Executive Council Minute, NSW, no 21, 29 September 1843, 332.
206 See *Sydney Morning Herald* (Sydney), 19 October 1843, 3; *Morning Chronicle* (Sydney), 21 October 1843, 1. One reporter noted, 'The prisoners, ever since their condemnation, had manifested the most appalling indifference to the great change which awaited them… Both prisoners exhibited the like apathy upon the scaffold, and died as they had lived, hardened and unrepentant.' See Ibid. Though for a contrary account see *Morning Chronicle* (Sydney), 25 October 1843, 2.
207 See 'The Murder at Mulberry Creek', *Maitland Mercury* (Maitland) 3 February 1844, 2; 'The Maitland Poison Case', *Sydney Morning Herald* (Sydney), 19 April 1844, 3.
208 *Sydney Morning Herald* (Sydney), 21 March 1844, 4.

husband and employer highlighting the theme of petit treason, the use of poison as the means of murder (a particular aggravating feature in the period)[209] and the presence of adultery (another aggravating feature). In the face of a 'vast body of evidence',[210] the Chief Justice in pronouncing sentence of death without hope of mercy this side of the grave, alluded to the case of Lucretia and Beech where he had also passed sentence of death 'upon a wife and her guilty paramour in a case as nearly as might be similar to this'.[211] Despite some misgivings owing to the circumstantial nature of the prosecution case,[212] mercy was refused and both Mrs Thornton and Vale were hanged.[213]

Adultery and youth are themes also evident in the murder of Robert Scott in Victoria in 1863. Elizabeth Scott, aged only 23, was convicted with two men called Cross and Gedge, of her husband's murder. Elizabeth and Gedge were said to be lovers. Elizabeth was painted by the prosecution and also by the colonial newspapers, as a 'scarlet woman', [214] 'who through her feminine wiles had led Gedge and Cross to their doom'.[215] Elizabeth's confidence that her sex 'would save her' proved misplaced.[216] All three defendants were hanged.[217] Elizabeth was reported as going to her death still declaring her innocence and as dying 'with a falsehood on

[209] See, eg, Renda Helfield, 'Female Poisoners of the Nineteenth Century: a Study of Gender Bias in the Application of the Law' (1990) 20 *Osgoode Hall Law Journal* 53; George Robb, 'Circe in Crinoline: Domestic Poisoning in Victorian England' (1997) 22 *Journal of Family History* 176-190; David Plater, Joanne Duncan and Sue Milne, ''Innocent Victim of Circumstance' or 'a Very Devil Incarnate'? The Trial and Execution of Elizabeth Woolcock in South Australia in 1873' (2013) 15 *Flinders Law Journal* 315, 370-373.

[210] *Maitland Mercury* (Maitland), 19 March 1844, 2.

[211] *Sydney Morning Herald* (Sydney), 21 March 1844, 4.

[212] 'Punishment by Death', *The Australian* (Sydney), 26 March 1844, 3.

[213] 'Execution of Vale and Mary Thornton at Newcastle', *Maitland Mercury* (Maitland), 20 April 1844, 2. Both Mary and Vale before their executions made detailed confessions, accepting their guilt and the justice of the sentences passed upon them. See Ibid; 'The Maitland Poisoning Case', *Sydney Morning Herald* (Sydney), 19 April 1844, 3.

[214] Paula Wilson, 'Elizabeth Scott', 29 October 2011, <http://www.openwriting.com/archives/2011/10/elizabeth_scott.php>. See also Carolyn Ramsay, 'Domestic Violence and State Intervention in the American West and Australia, 1860-1930 (2011) 86 *Indiana Law Journal* 185, 248, especially n 390; *The Star*, 12 November 1863, 2. A different picture of Elizabeth Scott is conveyed by Hanson who highlights Elizabeth's unfortunate background and her abusive marriage. See Anne Hanson, *White Handkerchief; The Story of Elizabeth Scott, the first Woman hanged in Victoria* (Anne Hanson, 2010).

[215] Anne Hanson, 'Elizabeth Scott: The Female Monster' (2008) Beechworth – North East Victoria <http://www.beechworthonline.com.au/pages/elizabeth-scott/>.

[216] *The Argus* (Melbourne), 9 November 1863, 4. See also 'Condemned Prisoners', *The Star*, 7 November 1863, 2S.

[217] See *The Argus* (Melbourne), 12 November 1863, 4; *The Star* (Ballarat), 12 November 1863, 2; 'Execution', *Cornwall Chronicle* (Launceston), 18 November 1863, 3.

her lips'.[218] One columnist expressed the hope that the fate of Elizabeth and her duped accomplices 'may long remain in the memory of the rising generation of the Colony as a warning against the abandonment of principle and the encouragement of sinful desires'.[219]

Eliza Campbell, Lucretia Dunkley, Mary Thornton and Elizabeth Scott were all obvious candidates in the period for the gallows. All had committed murder in aggravating circumstances amounting to petit treason. In *Campbell*, being party to her master's murder by other convict servants after seducing him; in *Dunkley*, murdering her husband in league with her convict lover and then gloating about her crime and adultery at trial; in *Thornton* by murdering her husband with her 'paramour' through the use of poison and in *Scott* in murdering her husband with her lover.

The application of the death penalty in cases of 'petit treason' was not confined to such obviously 'abandoned' and 'depraved' women as these.[220] Mary Ann Brownlow was convicted in 1855[221] of the apparent deliberate[222] murder of her 'wastrel husband'.[223] The Chief Justice, Sir Alfred Stephen, made no secret of his views and described Mary's crime in his far from balanced summing up to the jury as 'one of the most foul and brutal murders ever brought before him'.[224] Yet there was strong

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[218] *The Star* (Ballarat), 12 November 1863, 2. Cross and Gedge admitted their roles in the murder. Gedge claimed that he had been 'entirely' influenced by Elizabeth to commit the crime.

[219] 'Execution', *Cornwall Chronicle* (Launceston), 18 November 1863, 3.

[220] See also the 1855 case in Western Australia of Bridget Hurford and her male accomplice, Dodd, for the financially motivated murder of Bridget's husband. The prosecutor had noted of Bridget, 'whose sex and whose relationship to the murdered man rendered her crime still more appalling' (see *R v Hurford and Dodd* (*Inquirer and Commercial News* (Perth), 10 October 1855, 2–3; see also *Perth Gazette* (Perth), 5 October 1855, 2). The 'verdict of the jury was universally regarded as just' (Ibid). Bridget and Dodd were refused mercy and hanged. See 'The Executions', *Inquirer and Commercial News* (Perth), 17 October 1855, 2; 'Public Executions', *Perth Gazette* (Perth), 19 October 1855, 3.

[221] See *R v Brownlow* (*Empire* (Sydney), 14 September 1855, 5; *Sydney Morning Herald* (Sydney), 14 September 1855, 2; *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 15 September 1855, 3; *Maitland Mercury* (Maitland), 19 September 1855, 2S).

[222] See Editorial, *Sydney Morning Herald* (Sydney), 18 October 1855, 4. The jury's foreman on returning a verdict of guilty of murder, in answer to a question put by the Chief Justice, explained, 'We are of opinion that no evidence has been laid before us to justify us in finding that any blows were struck during the altercation between the prisoner and deceased, and we are further of opinion that when the prisoner stabbed her husband she intended to take away life' (*Sydney Morning Herald* (Sydney), 14 September 1855, 2; see also *Empire* (Sydney), 14 September 1855, 5).

[223] Martha Rutledge, *Stephen, Sir Alfred, (1802-1894)* (1976) Australian Dictionary of Biography, National Centre of Biography, Australian National University <http://abd.anu/biopgraphy/stephen-sir-alfred-1291/text7645>. See also Fleur Snedden, *King of the Castle: a Biography of William Larnach* (David Bateman Ltd, 1997) 45–47.

[224] *Empire* (Sydney), 14 September 1855, 5.

public sympathy for her plight,[225] with many calls, including two petitions,[226] for mercy to be exercised on her behalf.[227] Mary Brownlow was seemingly an ideal candidate for the grant of mercy. She was only 23, 'a tall fine looking woman'[228] of 'comely countenance and figure'[229] and a 'respectable' background.[230] She had three young children, one of whom she had given birth to whilst on remand in prison after her arrest (she had committed the crime when pregnant).[231] Mary Brownlow had committed the crime in a state of 'pure frenzy'[232] during a drunken fit of jealously directed at her husband.[233] She had displayed suitable remorse, eliciting one columnist to argue 'no case within the annals of the gallows can furnish a more conclusive argument against the iniquity, impolicy and sinfulness of capital punishment'.[234] A member of the Legislative Council also argued that Mary's case, 'pre-eminently called for the exercise of that prerogative [of mercy]...and was on many grounds deserving of mercy'.[235]

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[225] See WPW, 'The Condemned Woman', *Empire* (Sydney), 27 September 1855, 5; 'Sentences of Death', *Empire* (Sydney), 28 September 1855, 5; 'The Condemned', *Empire* (Sydney), 10 October 1855, 2; 'Execution of Mary Ann Brownlow', *Empire* (Sydney), 15 October 1876, 5; 'Execution of Mary Ann Brownlow', *Maitland Mercury* (Maitland), 17 October 1855, 2; Editorial, *Sydney Morning Herald* (Sydney), 18 October 1855, 4; *Sydney Morning Herald* (Sydney), 24 October 1855, 4; 'Execution of Mary Ann Brownlow', *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 20 October 1855, 1.

[226] See 'The Condemned', *Sydney Morning Herald* (Sydney), 3 October 1855, 8.

[227] See, eg, 'Sentences of Death', *Empire* (Sydney), 28 September 1855, 5; 'The Condemned', *Sydney Morning Herald* (Sydney), 3 October 1855, 8; 'Mrs Brownlow', *Bell's Life in Sydney and Sporting Reviewer* (Sydney); 6 October 1855, 2; 'The Goulburn Homicides', *Empire* (Sydney), 17 October 1855, 4-5; 'Execution of Mary Ann Brownlow', *Maitland Mercury* (Maitland), 17 October 1855, 2; 'Execution of Mary Ann Brownlow', *Empire* (Sydney), 15 October 1876, 5. 'Execution of Mary Ann Brownlow', *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 20 October 1855, 1. Some of these calls were more incoherent than others; see H, 'An Appeal', *Sydney Morning Herald* (Sydney), 20 September 1855, 5; WPW, 'The Condemned Woman', *Empire* (Sydney), 27 September 1855, 5 (who argued that the weather of NSW led to more passion and excitability than in England!).

[228] *Empire* (Sydney), 14 September 1855, 5.

[229] Justitia, 'Mary Ann Brownlow', *Empire* (Sydney), 25 October 1855, 3.

[230] See 'Incident in the Goal', *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 1 September 1855, 3.

[231] See 'Sentences of Death', *Empire* (Sydney), 28 September 1855, 5; 'Execution of Mary Ann Brownlow', *Empire* (Sydney), 15 October 1855, 5.

[232] 'The Goulburn Homicides', *Empire* (Sydney), 17 October 1855, 4.

[233] Mary was jealous of Brownlow's 'fancy woman'. Brownlow's claim prior to his death that there was no basis for his wife's jealously was questioned. See WPW, 'The Condemned Woman', *Empire* (Sydney), 27 September 1855, 5.

[234] 'Execution of Mary Ann Brownlow', *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 20 October 1855, 1. Interestingly, the editorial in that journal for that day expressed a very different view.

[235] Mr. Martin, Legislative Council, 23 October 1855, reproduced *Sydney Morning Herald* (Sydney), 24 October 1855, 2.

The Chief Justice did not share these views and advised the Executive Council that a plea for clemency was not justified.[236] He even wrote to the press under the alias of 'Justitia',[237] asking what distinction Mary's sex and 'youth and beauty to do with contravening the primeval command, "whose sheddeth man's blood shall his blood be shed"'.[238] The Executive Council agreed, mercy was refused,[239] and Mary was hanged.[240] This decision, controversial as it may have been, received significant support.[241] The editor of the *Sydney Morning Herald* declared that sympathy for the sex of the assassin was unwarranted. 'It is perfectly admissible in poetry and romance to draw distinctions of the sort; but unless the guilt of murder be less when perpetrated by a woman's hand, the penalty is no less justly due'.[242] The fact that the victim of Mary Brownlow's crime was her husband compounded her guilt. As one writer declared: 'Murder, aggravated by the fact of the murderer being bound by all the ties, both human and divine, to succour, comfort and help him whom she had so brutally deprived of life. She [Mary] must die'.[243]

Neither mitigating circumstances nor the absence of the sexual 'depravity' or 'abandonment' seen in *Campbell*, *Dunkley*, *Thornton* or *Scott* would necessarily secure the reprieve of a female offender for the murder of her husband. Ellen Monks, a 40 year old Irish woman and former convict, and her 60 year old alcoholic husband, had six children. In the course of a heated row with her drunken husband, Ellen bludgeoned him to death with a hammer. She then dismembered the body

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[236] Ibid. See further *Sydney Morning Herald* (Sydney), 24 October 1855, 2.

[237] 'Justitia' was a name under which Stephen wrote to the press. See Rutledge above n 223.

[238] See Justitia, 'Mary Ann Brownlow', *Empire* (Sydney), 25 October 1855, 3.

[239] See 'The Condemned Murderers', *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 6 October 1855, 2.

[240] See 'Execution of Mary Ann Brownlow', *Empire* (Sydney), 15 October 1855, 5; 'Execution of Mary Ann Brownlow', *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 20 October 1855, 1; 'The Condemned Murderess', *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 13 October 1855, 2. It was reported that 'she died without a struggle, acknowledging the greatness of her crime, as well as the justness of her sentence' and 'her extremely delicate appearance deeply affected every one present [at her execution], and caused the tears to start irresistibly from the eyes of the hardiest.' See 'Execution of Mary Ann Brownlow', *Empire* (Sydney), 15 October 1855, 5.

[241] 'The Later Execution at Goulburn', *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 20 October 1855, 2. The author of the same journal's account of Mary's hanging on the very same day took a very different view of the events. See 'The Condemned Murderess', *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 13 October 1855, 2.

[242] Editorial, *Sydney Morning Herald* (Sydney), 18 October 1855, 4. See also Vindex, 'Execution of Women', *Sydney Morning Herald* (Sydney), 25 September 1855, 3; Justitia, 'Mary Ann Brownlow', *Empire* (Sydney), 25 October 1855, 3.

[243] Vindex, 'Execution of Women', *Sydney Morning Herald* (Sydney), 25 September 1855, 3.

and burnt the remains in an effort to conceal any evidence of her crime.[244] Her daughters were awakened by 'a very offensive smell' and on getting up saw what they took to be the knee of their father sticking out of the fire and their mother 'told them if they said anything about it she would burn them too'.[245] The police found Ellen 'composedly smoking her pipe, and so far from exhibiting any alarm, invited them to sit down and have a cup of tea'.[246]

Ellen appeared legally unrepresented before the Supreme Court and, unusually in a capital case in the 19th century,[247] insisted upon pleading guilty to the murder of her husband.[248] Sentence of death without the slightest hope of mercy was passed by Wise J, who noted that her 'victim was your husband, whom you had solemnly, in the face of your Creator, promised to love and cherish through life… notwithstanding that sometime in his life he did not give you the same peace and joy you hoped'.[249]

Despite the gruesome nature of her crime, there was still significant sympathy for Ellen.[250] One columnist noted 'that Monks had for some time past been drinking hard, and the whole circumstances connected with the family show a sad state of immorality'.[251] A petition for mercy on Ellen's behalf signed by the Speaker, members of the Legislative Assembly, Magistrates and others was submitted to the Governor. It was

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[244] Ibid. One report of the crime noted, 'It was even stated that she 'threw portions of the flesh of her husband to the dogs, but evidence of this is not at present before us' ('Shocking Murder near Binda – Confession of the Murderess', *Empire* (Sydney), 11 November 1860, 5).

[245] 'The Murder near Binda', *Empire* (Sydney), 15 November 1859, 5; See *Empire* (Sydney), 15 November 1859, 5; 'The Murder near Binda', *Sydney Morning Herald* (Sydney), 15 November 1859, 3. As a reporter noted at the Inquest, which proved not for the faint hearted, 'A small heap of charred bones, and a little lump of burned flesh, were placed on view of the jury, and were all that had been found of the deceased's remains' (Ibid).

[246] 'The Murder near Binda – Confession of the Murderess', *Sydney Morning Herald* (Sydney), 15 November 1859, 2.

[247] This has been the only case during the period seen by the authors where a defendant, whether male or female, pleaded guilty to murder (though on occasion the trial judge might insist that the accused plead not guilty). Ellen Monks soon after arrest had made a full confession to her crime. See 'Shocking Murder near Binda – Confession of the Murderess', *Empire*, 11 November 1859, 5; 'The Murder near Binda – Confession of the Murderess', *Sydney Morning Herald* (Sydney), 15 November 1859, 2. Ellen's full confession is reproduced by these sources.

[248] See *Empire* (Sydney), 31 March 1860, 3; *Bells Life in Sydney*, 31 March 1860, 3.

[249] *Empire* (Sydney), 31 March 1860, 3.

[250] 'Colonial News', *The Australian Home Companion and Band of Hope Journal*, 19 May 1860, 22.

[251] 'Shocking Murder near Binda – Confession of the Murderess', *Empire* (Sydney), 11 November 1859, 5; 'The Murder near Binda – Confession of the Murderess', *Sydney Morning Herald* (Sydney), 15 November 1859, 2.

argued the crime was mitigated by a lack of premeditation and that the nature of the disposal of the body formed no element in the crime itself.[252] The petitioners noted her age and previous good character, and referred to the recent practice in England to avoid the execution of female offenders.[253] It was noted that every British Secretary of State,

> … acting apparently from a sense of respect for the improved feeling of the nation, has uniformly advised the prerogative of mercy to be extended to condemned women and your petitioners respectfully and earnestly submit that neither the ends of justice nor the interest of morality can be promoted by sacrificing the life of the wretched convict, Ellen Monks.[254]

The petition and a report from the judge, Wise J, were put before the Executive Council, who ‘felt reluctantly compelled’ not to intervene.[255] Ellen was hanged,[256] showing ‘deep contrition and repentance for her crimes’.[257] The murder of her husband combined with the disposal of his remains in such a grisly manner was likely the reason for her fate. One columnist branded Ellen ‘a bloody-minded hag’, and declared that ‘the plea the gentlemen put forth on her behalf [in the petition] was that she was a woman – we are glad to think she no longer cumbers the earth’.[258]

Similar reasoning can be seen as late as 1862 in the fate of Margaret Coghlan, a former convict, who was convicted and hanged in Tasmania for the ‘most foul and brutal’[259] murder of her husband. Margaret and her husband were alcoholics of ‘dissipated habits’.[260] The evidence presented at the Inquest was damning[261] and the prosecution case rendered more certain when Margaret, who was legally unrepresented, unwisely insisted on making a full written confession in which she revealed that her husband’s death was the culmination of a prolonged drinking bout. A row had ensued between the couple and Margaret’s husband had snatched up a heavy iron bar and hurled it at her head. It had just missed her. Infuriated by drink and passion Margaret had caught up the bar, and literally smashed her husband's head in with it. But this was not all. ‘I saw

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[252] ‘Petition for Reprieve’, *Sydney Morning Herald* (Sydney), 5 May 1860, 7.
[253] Ibid. The petitioners omitted to highlight Ellen’s guilty plea and obvious remorse.
[254] Ibid.
[255] ‘Ellen Monks and William Goodson’, *Sydney Morning Herald* (Sydney), 9 May 1860, 7.
[256] ‘Goulburn’, *Sydney Morning Herald* (Sydney), 9 May 1860, 7; ‘Execution’, *Empire* (Sydney), 12 May 1860, 7; ‘Execution of the Condemned Criminals at Goulbourn’, *Bell’s Life in Sydney and Sporting Reviewer* (Sydney), 12 May 1860, 3. In a final ironic twist, Ellen’s body was deposited in the same coffin as ‘the burnt remains of her husband, for whose death she suffered’ (Ibid; ‘Execution of Frederick Clarke and Ellen Monks’, *Cornwall Chronicle* (Launceston), 30 May 1860, 3).
[257] ‘Execution’, *Empire* (Sydney), 12 May 1860, 7.
[258] ‘The Murderer Goodson’, *Moreton Bay Courier* (Brisbane), 2 June 1860, 3.
[259] ‘The Murder in Goulburn Street’, *The Mercury* (Hobart), 7 January 1862, 2.
[260] *The Mercury* (Hobart), 23 January 1862, 5.
[261] Ibid.

he was dying so hard, and felt so sorry, that I got the razor and cut his throat'.[262]

Margaret was represented at her trial by a newly admitted barrister who made his debut,[263] and her earlier confession at the Inquest served to undermine her counsel's plea of provocation in his closing address.[264] Margaret was convicted of murder. The Chief Justice, Sir Valentine Fleming, passed sentence of death without hope of reprieve and emphasised the enormity of Margaret's crime, 'particularly alluding to the victim of her barbarity being her own husband'.[265] Despite much sympathy for Margaret's plight and a petition calling for mercy,[266] her sentence was upheld by the Executive Council.[267] Moments before Margaret was led to her execution, her last confession was handed to the Press in which she blamed drink for her crime and admitted her guilt and 'acknowledge[d] fully the justice of her sentence'.[268] She urged that 'May all women in particular, take warning by my awful fate. Oh! Let all fear the hour of death!'[269]

Given the mitigating facts that Coghlan had hurled an iron bar at Margaret, abused her[270] and the mutual presence of alcohol, it may seem harsh to modern eyes that Margaret was not reprieved. However Davis provides some explanation for the Executive Council's refusal to extend mercy, similar to the reasoning shown in *Brownlow*, *Monks, Mitchell* and *Scott*. '[T]hough there had been a number of men hanged for killing their wives and mistresses [in Tasmania], Margaret Coghlan was unique in

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[262] Ibid.
[263] See *R v Coghlan* (*The Mercury* (Hobart), 29 January 1862, 2; *Cornwall Chronicle* (Launceston), 5 February 1862, 2).
[264] See *The Mercury* (Hobart), 29 January 1862, 2; *Cornwall Chronicle* (Launceston), 5 February 1862, 2. Margaret's prospects were also not assisted by the Chief Justice's notably unbalanced summing up to the jury.
[265] Ibid 3. See also *Empire* (Sydney), 7 February 1862, 6.
[266] See *Cornwall Chronicle* (Launceston), 8 February 1862, 5; 'The Condemned', *Launceston Examiner* (Launceston), 11 February 1862, 4; 'The Condemned', *Launceston Examiner* (Launceston), 18 February 1862, 4; 'Margaret Coghlan', *Hobart Town Advertiser* (Hobart), 19 February 1862; Saunders, above n 30, 246.
[267] Executive Council Minutes, Tasmania, 3 February 1862. The Executive Council considered the Chief Justice's report of the case, a petition for mercy from Coghlan and her confession at the Inquest. See also *The Mercury* (Hobart), 5 February 1862, 2.
[268] 'Execution of Margaret Coghlan', *The Mercury* (Hobart), 19 February 1862, 2; 'Execution of Margaret Coghlan', *Cornwall Chronicle* (Launceston), 22 February 1862, 3. Such last minute 'confessions' were common in 19th century capital cases. They were encouraged as serving a secondary purpose of the death penalty by showing suitable contrition and remorse.
[269] 'Execution of Margaret Coghlan', *The Mercury* (Hobart), 19 February 1862, 2.
[270] Coghlan had called his wife a 'bloody whore' before throwing the iron bar at her. See 'The Late Murder at Goulburn Street,' *Cornwall Chronicle* (Launceston), 11 January 1862, 5. See also Saunders, above n 30, 246.

being executed for this reversal of the natural order which the horrified Victorians regarded as petty treason'.[271]

The nature and magnitude of the crimes committed in cases such as *Fairless*, *Benwell*, *Sullivan* and especially in cases involving the theme of petit treason as in *Campbell, Brownlow*, *Thornton*, *Monks, Scott* and *Coghlan* were such as to preclude any hope of mercy. Their gender gave them no immunity from the gallows. In all these cases, the perceived character of the female offenders, the nature of their crimes, conflated with the need to both inflict suitable punishment and to deter others, were such as to outweigh any countervailing considerations.

Yet in such cases the question of mercy was still countenanced. In *Sullivan* the issue of insanity was seriously considered and even in *Benwell* comment was made on the unsatisfactory nature of the trial.[272] In *Brownlow*, *Monks* and *Coghlan* despite their convictions for 'the highest offence known to the law,'[273] there was sympathy for the defendants and the issue of mercy was seriously pursued. Even in cases as reprehensible as both *Campbell* and *Dunkley*, the Governor still turned his mind to the question of mercy, exemplifying that the application of the death penalty was far from inevitable.

VII The Prerogative of Mercy, 'Great Care was Taken in the Choice of those to be Saved'

The Governor and Executive Council considered the exercise of the prerogative of mercy in colonial Australia in the period from 1824 to 1865 as an essential part of the administration of criminal justice. As Hirst notes, 'great care was taken in the choice of those to be saved'.[274] This meant that even the most notorious bushrangers,[275] intractable

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[271] Davis, above n 27, 66. See also 'Margaret Coghlan', *Hobart Town Advertiser* (Hobart), 19 February 1862.
[272] See 'The New Norfolk Murder' *Launceston Examiner* (Lauceston), 17 September 1845, 3.
[273] *Bells Life in Sydney* (Sydney), 31 March 1860, 3.
[274] John Hirst, *Convict Society and Its Enemies: A History of Early New South Wales* (Allen & Unwin, 1983) 114.
[275] See, eg, *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 to make their peace with their maker 'as it was one of those cases in which the utmost penalty of the law must be carried into effect'. Wilson was later hanged in Tasmania having escaped yet again and committed further crimes as a bushranger (see Executive Council Minutes, Tasmania, 26 April 1851). See also the prolific bushrangers and escaped convicts Martin Cash and Lawrence Kavanagh who were controversially reprieved by the Tasmanian Governor in 1843. See Davis, above n 27, 38; 'The Bushrangers', *Launceston Examiner* (Launceston), 30 September 1843, 3–4; *The Courier* (Hobart), 29 September 1843, 3. See further Plater and Crofts, above n 108.

convicts[276] (including those guilty of piracy[277] and mutiny[278] who had already been convicted of further capital crimes in the colonies) or an Aboriginal defendant convicted of the robbery,[279] or even the murder,[280] of a white victim, might be deemed eligible for the grant of mercy. The most brutal murderers were not beyond hope of mercy.[281]

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[276] See, eg, *R v Butler and Others* (*Sydney Herald* (Sydney), 7 February 1833, 3) where three convicts who had committed further crimes in NSW and had then escaped from a chain gang and committed a highway robbery with 'considerable violence' were still reprieved and sent to Norfolk Island for life (see *Sydney* (Sydney) *Herald*, 21 March 1833, 3) despite the fact 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' (*Sydney Gazette* (Sydney), 28 February 1833, 2; see also *Sydney Herald* (Sydney), 25 February 1833, 2).

[277] See, eg, the convicts in 1827 who 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 'The Log Book of the Pirates', *The Australian*, 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; 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*, Refereed Paper no 1. <http://www.anzlhsejournal.auckland.ac.nz/pdfs_2012/Plater-Milne-Piracy-and-mercy.pdf>, 24–31. The majority of the participants, even the self-appointed Captain, were eventually reprieved. See Ibid; Executive Council Minutes, NSW, no 27, 5 March 1827, 129–130.

[278] See, eg, the fate of the convicts condemned to death for their roles in the 1834 and 1842 mutinies at Norfolk Island. Both mutinies were bloody affairs that left a number of both soldiers and convicts dead. The mutineers represented the worst criminals in colonial society and yet the majority of them were reprieved, despite the undoubted gravity of both their backgrounds and crimes. See Plater and Milne, above n 277, 31-39; *Sydney Gazette* (Sydney), 27 September 1834, 2S.

[279] See, eg, *R v Jemmy and Others* (*Sydney Monitor* (Sydney), 14 February 1835, 2) where Burton J passed sentence of death recorded on five Aborigines convicted of violent robberies of white homesteads, noting 'he had heard of many atrocities committed on the natives by the whites, and the natives till lately had submitted; their wives and children he was sorry to say, had been ill used by the settlers, and their little property also taken away'.

[280] See, eg, *R v Tallboy* [1840] NSWSupC 44 (*Sydney Herald* (Sydney), 12 August 1840; 1S (trial); 1S August 1840, 1S (sentence)) where, despite the robust comments of both prosecution counsel and the trial judge highlighting the threat posed to white society by conduct such as that of Tallboy (he had murdered a white surveyor) and the need to deter similar conduct by other Aborigines, the sentence of death was reprieved (see *Sydney Monitor* (Sydney), 19 September 1840, 2; *The Australian* (Sydney), 26 November 1840, 2). 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.

[281] See, eg, 'The Reprieve of Gleeson', *Bathurst Free Press* (Bathurst), 2 November 1850, 4 (controversial reprieve for a brutal convicted murderer); 'Capital Punishment: Byford and Vidall', *The Australian* (Sydney), 4 February 1845, 3 (contentious reprieve of a notorious former convict for a premeditated murder).

Historians have identified the concept of discretion as a defining feature of the 19th century criminal justice system.[282] The rationale for the operation of discretionary justice might be considered, in part, as a means of ameliorating the harshness of the *Bloody Code*, but was also a pragmatic development arising from decentralised governance and the recognition that '[lo]cal influence could make itself felt in the determination of punishment at various stages in the criminal process'.[283] In colonial Australia, this discretionary influence operated in a more formalised process. Judicial mercy might be available if the judge deemed the convicted 'fit and proper'[284] for a sentence of 'death recorded', although this determination was unavailable for murder or treason. Reference to prior convictions (female offenders usually being less likely to have prior convictions in comparison to men)[285] and character references were obvious sources for enquiry.

Similarly, the Executive Council looked beyond the legality or 'justice' of the conviction, to examine a wide range of factors considered significant to the determination of the suitability of the defendant as a recipient for mercy,[286] which included both the particular circumstances of the offence[287] and the offender[288] and even the conduct of the trial.[289] As an

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[282] See, eg, Simon Devereaux, 'In Place of Death: Transportation, Penal Practices, and the English State, 1770-1830' in Strange, above n 11, 52–76.

[283] Ibid 70. In England, the number of capital convictions and executions did not increase in correlation to the number of capital offences available. The reasons are thought to include developments in criminal procedure and the part played by local juries and magistrates. 'If the criminal code of England seemed savage and bloodthirsty, the actual practice of the courts was to show restraint and exercise mercy in the execution of the law' (McGowan, above n 12, 78).

[284] *Judgment of Death Act 1823* s 1 (4 Geo IV c 48). See, eg, *R v Smith, Kelly and Kaine* [1826] NSWSupC 61.

[285] Although, it has been noted that recidivism in female defendants increased in the later 19th century in England. See Emsley, above n 22, 98.

[286] See Plater and Milne, above n 277, 39–43.

[287] See, eg, Thomas Hudson, who was granted an unconditional pardon for burglary after the Chief Justice informed the Executive Council of the 'strong doubt he entertained of his guilt' (Executive Council Minutes, Tasmania, 10 May 1830). See also John Hewitt and William Love who were convicted of robbery and sentenced to death. The trial judge noted to the Executive Council there was 'a doubt as to the testimony of the prosecutor' and the sentence was commuted to seven years transportation and a year of probation) (see Executive Council Minutes, Tasmania, 18 April 1853) and James Neill who was reprieved for murder in 1860 on account of a doubt about the presence of blood on his clothes, an important part of the prosecution case (see *Empire* (Sydney), 21 April 1860, 2) and was commuted to 15 years hard labour on the roads.

[288] See, eg, a bushranger and escaped convict called James Quinn (see *R v Brewer and Quinn* (*The Courier* (Hobart), 22 October 1853, 3; *Colonial Times* (Hobart), 26 October 1853, 3)) who was reprieved following representations from the jury 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.

[289] 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*

individuated form of justice, the rationale for mercy sought to distinguish those who deserved punishment from those who did not. Thus, petitions for mercy might focus upon special circumstances and personal characteristics of the accused, with desirable characteristics being, for example, exemplified as those conforming to 'the practical needs and underlying assumptions of the propertied classes', such as industriousness and honesty.[290]

In the absence of any formal Appeal Court to challenge the conviction 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. Yet the elusive nature of the prerogative of mercy is evident when we consider that 'criminals of the deepest dye'[292] were also reprieved. Indeed, when even a man called Wilkes, convicted in 1858 of the most 'monstrous, remorseless and deliberate'[293] murder of his wife and two young children was contentiously reprieved,[294] the question was raised that if such an offender could be reprieved, it was difficult to see who could ever be properly hanged in the future.[295] It is difficult to conceive that the administration of the pardon in this instance was a pure 'act of grace', [296] rooted in compassion. Yet if its rationale was mercy as a form of individualised justice, then arguably too, it was misplaced.

The mitigatory effect of the prerogative of mercy in the Australian colonies should not be overstated. Its operation was imperfect and it fell

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Morning Herald (Sydney), 24 October 1855, 5). The trial was described as a 'mockery of justice' ('The Convict M'Cabe', *The Argus* (Melbourne), 23 October 1855, 4) owing to the deplorable and 'very severely criticised' ('Victoria', *South Australian Register* (Adelaide), 27 October 1855, 3) conduct of the trial judge. See further Ibid; 'The Convict M'Cabe', *The Argus* (Melbourne), 23 October 1855, 4; The Convict M'Cabe', *The Argus* (Melbourne), 23 October 1855, 5; 'The Convict M'Cabe', *The Argus* (Melbourne), 24 October 1855, 6; 'Convict M'Cabe', *The Argus* (Melbourne), 24 October 1855, 7. However, M'Cabe's 'reprieve' was to work on the roads for 15 years, the first three in chains. See 'Convict M'Cabe', *The Argus* (Melbourne), 24 October 1855, 7.

[290] King, above 17, ch 9. King also cites age, infirmity and poverty as relevant considerations.

[291] Although a Court of Appeal could be convened under the *New South Wales Act 1823* (Imp) appeals were limited to questions of law, not on wrongful determinations on fact. For a brief summary, see, eg, Woods, above n 16, 253–255. A full right of appeal did not emerge until the end of the 19th century.

[292] 'Convict Discipline', *Sydney Monitor* (Sydney), 11 March 1835, 2.

[293] *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 5 June 1858, 2.

[294] Ibid. See also Editorial, *Sydney Morning Herald* (Sydney), 2 June 1858, 4; 'Reprieve of the Convict Wilkes', *Sydney Morning Herald* (Sydney), 2 June 1858, 5; An Observer, 'The Convict Wilkes', *Sydney Morning Herald* (Sydney), 3 June 1858, 8.

[295] See *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 5 June 1858, 2.

[296] *Reckley v Minister of Immigration and Public Safety (No 2)* [1996] 1 AC 527, 540 (Lord Goff). The cultural jurisprudence of the mercy standard is beyond the scope of this article, but an excellent introduction to this topic can be found in Austin Sarat and Hussain Nasser (eds), *Forgiveness, Mercy, and Clemency* (Stanford University Press, 2007).

far short of a modern Court of Criminal Appeal. The inconsistent exercise of the prerogative of mercy was a regular source of complaint in both England[297] and the colonies.[298] One prisoner might be executed and another reprieved for identical or even more aggravated crimes.[299] On occasion the perceived need for retribution and deterrence overrode any call for mercy (whether from the press,[300] the public,[301] the jury[302] or even within the Executive Council[303]) and any other countervailing consideration.[304] Whatever the practical flaws in the exercise of the prerogative of mercy, it should not obscure the fact that its exercise was an essential part of the rule of law in Australia from at least 1824, if not from the beginning of British colonisation.

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[297] See, eg, 'The Injustice of Reprieves', *The Times* (London), 31 August 1867.

[298] See, eg, 'Hall, Kenney and Davis,' *Cornwall Chronicle* (Launceston), 5 August 1854, 4; 'The Goulburn Homicides', *Empire* (Sydney), 17 October 1855, 4–5; 'Executions', *Maitland Mercury* (Maitland), 10 December 1861, 3; 'The Condemned', *Launceston Examiner* (Launceston), 11 February 1862, 4; *South Australian Register* (Adelaide),19 March 1864, 2 ('one law for the rich and another for the poor').

[299] Contrast the fate of James Bowtell executed for robbery despite the lack of aggravating features (see 'Execution', *Colonial Times* (Hobart), 16 May 1843, 3) with the reprieve accorded to Martin Cash and Lawrence Kavanagh who on any view were far worse offenders. See Davis, above n 27, 38.

[300] 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 protestations of innocence, strong doubts as to the character and credibility of Smith and press calls for mercy. 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, 'James Smith', *Launceston Examiner* (Launceston), 19 October 1854, 3; *Colonial Times* (Hobart), 7 November 1854, 3. See also Davis, above n 27, 56; Executive Council Minutes, Tasmania, 24 October 1854.

[301] See, eg, the execution of Mary Ann Brownlow in 1855 for the murder of her husband despite strong public sympathy and calls for mercy (see 'The Goulbourn Homicides' *Empire* (Sydney), 17 October 1855, 4–5) and the executions of three convicts for their involvement in the revolt at Castle Forbes owned by the unpopular 'Major' Mudie, despite strong public feeling in favour of the condemned men (see 'Execution', *The Australian* (Sydney), 23 December 1833, 2). Equally the Executive Council might ignore press and public opinion and reprieve a condemned offender as in the case of Wilkes in 1858. See above nn 293–295.

[302] 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* (Adelaide), 31 January 1874, 6). See, eg, Matthew Mahide who was executed in 1848 for robbing a house owing to the perceived gravity of the crime despite the jury's appeal for mercy. See Executive Council Minutes, Tasmania, 24 October 1848. See also 'Approaching Execution', *Cornwall Chronicle* (Launceston), 4 November 1848, 139; 'The Recommendation of a Jury', *Cornwall Chronicle* (Launceston), 4 November 1838, 139; 'The Execution', *Cornwall Chronicle* (Launceston), 8 November 1848, 148.

[303] As happened in the case of Mary McLaunchlan. See also the strong objections to the death penalty expressed by the Senior Military Officer, Executive Council Minutes, Tasmania, 30 October 1837, 15 and 19 June 1838.

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

VIII FEMALE CAPITAL OFFENDERS AND THE PREROGATIVE OF MERCY

Female capital offenders were not exempt from the exercise of mercy and indeed there was a general reluctance, whether out of a sense of 'chivalry' or some other factor, to execute such offenders in this period.[305] An obvious example, as in Britain,[306] of the reluctance to apply the full force of the criminal law was where mothers were accused of the murder of their newborn children. Juries and judges in colonial Australia proved reluctant to convict on the capital count,[307] and were more likely to return a guilty verdict on the non-capital alternative offence of concealing the birth of the child.[308] In the rare instance where the prisoner was convicted of the capital crime, the general (with the notable exception of Mary McLauchlan in 1830) practice in the colonies was to extend mercy.[309] By way of illustration, Bridget Mitchell was convicted in New South Wales in 1846 of the murder of her newborn male child.[310] The trial judge passed sentence of death recorded[311] (which would have reprieved her from the gallows), with the sentence later commuted to just three years imprisonment.[312]

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[305] See, eg; Kathy Laster, 'Arbitrary Chivalry, Women and Capital Punishment in Victoria, Australia, 1842-1967' (1996) 6 *Women and Criminal Justice* 67, 67-68; Streib, above n 112.

[306] See the discussion above in Part 2.

[307] See, eg, *South Australian Weekly Chronicle* (Adelaide), 14 January 1860, 1S; *R v Sarah Masters* [1835] TASSupC 9 (*Colonial Times* (Hobart), 12 May 1835, 6–7; *Hobart Town Courier* (Hobart), 15 May 1835, 4); *R v Eliza Henry* (*The Australian* (Sydney), 21 May 1839, 2); *R v Elizabeth Pattison* [1841] NSWSupC 73 (*Sydney Herald* (Sydney), 14 July 1841, 2; *Sydney Gazette* (Sydney), 15 July 1841, 2); *R v Ann Buckley* (*Sydney Morning Herald* (Sydney), 9 December 1853, 4); *R v Mary Connell* (*South Australian Register* (Adelaide), 23 August 1854, 2); *R v Bridget Kenny* (*Colonial Times* (Hobart), 18 October 1854, 3); *R v Margaret Beckett* (*Hobart Mercury* (Hobart), 29 January 1859, 3).

[308] See, eg, *R v Jane Guthrie* [1838] NSWSupC 41 (*Sydney Gazette* (Sydney), 3 May 1838, 2); *R v Jane Appleby* (*The Australian* (Sydney), 5 February 1839, 2); *R v Ann Lloyd* [1840] NSWSupC 18 (*Sydney Gazette* (Sydney), 9 May 1840, 2); *R v Ann Lyach* (*Sydney Herald* (Sydney), 13 May 1840, 1S); *R v Isabella McKenzie* (*Sydney Gazette* (Sydney), 15 July 1841, 2); *R v Mary Lamb* [1841] NSWSupC 102 (*The Australian* (Sydney), 12 October 1841, 2 and 23 October 1841, 2; *Sydney Herald* (Sydney), 22 October 1841, 2); *R v Jemima Newton* (*Sydney Morning Herald* (Sydney), 9 December 1853, 4); *R v Bridget Kenny* (*Colonial Times* (Hobart), 18 October 1854, 3); *R v Mary Thompson* (*The Mercury* (Hobart), 30 January 1863, 2).

[309] See, eg, 'First Woman Executed', *Tasmanian & Austral-Asiatic Review* (Hobart), 23 April 1830; NSWLRC, above n 48, [3.4] ('Mercy would almost be invariably exercised').

[310] See *R v Bridget Mitchell* (*Sydney Morning Herald* (Sydney), 17 March 1846, 3; *Sydney Morning Herald* (Sydney), 11 September 1846, 4).

[311] See *Sydney Morning Herald* (Sydney), 12 September 1846, 2; *Sydney Chronicle* (Sydney), 16 September 1846, 1.

[312] See 'Criminals Condemned to Death since 1840', *Sydney Morning Herald* (Sydney), 3 May 1860, 5.

This reluctance to apply the full rigour of the criminal law extended to women convicted of the murder of their young children. Rosanna Nicholls, for example, was convicted and sentenced to death for the murder in 1857 on the Victorian goldfields of her three month old son who had died of neglect and starvation. The evidence at both the Inquest and the trial focused on Nicholls’ ‘dissolute way of life’,[313] and she was branded an ‘unnatural’ woman.[314] However, her case attracted public sympathy and following the intervention of the trial judge, Williams J, with the Executive Council to the effect that her crime was really one of manslaughter, Nicholls’ sentence was commuted to seven years imprisonment.[315]

However other less obvious classes of female offenders in the period such as those guilty of burglary and/or capital thefts[316] or convict servants

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[313] See Anne Hanson, *Rosanna Nicholls – the first person to be sentenced to death at the Beechworth Circuit Court* (2008) Beechworth – Victoria Australia < http://www.beechworth.com.au/Beechworth-History/Beechworth-Stories/Rosanna-Nicholls.html#_ftn5>.

[314] See *R v Nicholls* (*Ovens and Murray Advertiser* (Beechworth), 9 April 1857). Her ‘depravity’ was her habitual intoxication and lack of care for her infant son. Rosanna was the first woman sentenced to death in Victoria.

[315] See Hanson, above n 313. See also ‘Rosanna Nicholls’, *The Argus* (Melbourne), 2 May 1857, 4.

[316] See *R v Martha Dunn* (*Sydney Gazette* (Sydney), 8 July 1824, 2) (theft of goods valued under 40 shillings from a dwelling); *R v Catherine Lawry alias Gulliver* (*Sydney Gazette* (Sydney), 6 February 1827, 3, 14 February 1827, 3 (sentence of death recorded, commuted to transportation for seven years to Moreton Bay, for assisting her husband and another man to burgle and steal from a store at night; see Executive Council Minutes, NSW, Meeting No 25, 17 February 1827); *R v Jane New* (*Sydney Gazette* (Sydney), 8 January 1829, 2; *The Australian* (Sydney), 9 January 1829, 3; *Sydney Gazette* (Sydney), 24 February 1829, 2; *Sydney Gazette* (Sydney), 26 February 1829, 2) (sentence of death recorded for theft of cloth in a dwelling belonging to a Madame Rems; the sentence was subsequently commuted to 14 years transportation to Tasmania in legally contentious circumstances, see further Carol Baxter, *An Irresistible Temptation: the True Story of Jane New and a Colonial Scandal* (Allen & Unwin, 2007)); *R v Margaret Summers* (*Sydney Gazette* (Sydney), 14 August 1830, 3) (sentence of death recorded, commuted to transportation for 14 years to Moreton Bay, for theft of cash from dwelling)*; R v Hannah Lousley* (*Sydney Herald* (Sydney), 8 November 1832, 2 and 3) (sentence of death recorded, commuted to transportation for seven years to Moreton Bay, for theft of cash over five pounds from a dwelling); *R v Ann Housley* (*Sydney Herald* (Sydney), 7 February 1833, 3; 25 February 1833, 2) (sentence of death recorded, commuted to transportation for seven years to Moreton Bay, for burglary and theft of two items of clothing (the co-accused, Martha Dunn was, acquitted)); *R v Rebecca Johnston* (*Sydney Gazette* (Sydney), 3 June 1833, 2; *Sydney Monitor* (Sydney), 5 June 1833, 2) (sentence of death recorded (see *Sydney Herald* (Sydney), 1 July 1833, 3), commuted to transportation to Moreton Bay for 14 years, for the burglary of a dwelling and theft of a large sum of money; see Executive Council Minutes, NSW, Meeting No 16, 10 July 1833); *R v Mary Ann Burrows* (*Sydney Herald* (Sydney), 29 August 1833, 2) (transportation for life for theft of silver valued at 7 pounds from a dwelling); *R v Mary O’Connor or Hyland* ((*Sydney Monitor* (Sydney), 6 November 1837, 2; *The Australian* (Sydney), 7 November 1835, 2 (sentence ‘humanely’ commuted to confinement in the Factory for 12 months for forgery).

stealing from their master[317] (despite the breach of trust involved) were also likely to attract sympathy and the grant of mercy. Margaret Curry, an assigned convict servant, received sentence of death recorded in 1829 for the theft of cash valued at over five pounds from her master's dwelling.[318] Such a breach of trust was usually regarded in the period in an aggravated light, but the Chief Justice recommended mercy, in light of an assertion at Curry's trial that her master 'had on several occasions attempted to take improper liberties with her'.[319] Without assuming the truth of this imputation, the Chief Justice considered it grounds to warrant a mitigation of sentence,

> because when a female prisoner is assigned by the Government to a person bearing the outward appearance of respectability, and that person acts towards her as the prosecutor in this case is stated to have done, he places himself in some respect in her power, and induces her to commit depredations on his property under the supposition that the offence will be passed over.[320]

Sympathy for a female capital offender in a similar 'aggravated case of servants robbing their master'[321] might also result in a commutation of sentence. Maria Williams, an assigned convict servant, and Thomas Shaw, a former convict and fellow servant, were charged with stealing a large amount of gold and cash from William's master and mistress.[322] The defendants were both convicted and sentenced to death.[323] However a petition for mercy on Williams' behalf was presented to the Executive Council from both the members of the jury[324] and 42 respectable

[317] See *R v Mary Ann Gallagher* (*Sydney Gazette* (Sydney), 14 September 1830, 3; *The Australian* (Sydney), 17 September 1830, 3) (sentence of death recorded, commuted to transportation to Moreton Bay for seven years, for theft of cash from her master's dwelling by a convict servant); *R v Mary Matthews* (*Sydney Monitor* (Sydney), 3 February 1837, 3; *Sydney Herald* (Sydney), 6 February 1837, 2; *The Australian* (Sydney), 7 February 1837, 2) (sentence of death recorded with recommendation of 14 years transportation for burglary by a female assigned convict servant and her male accomplice of their master's premises; both caught red handed).

[318] *Sydney Gazette* (Sydney), 1 December 1829, 2. Her sentence was commuted to transportation for seven years.

[319] Ibid.

[320] Ibid.

[321] Castles, above n 6, 43.7, quoting Executive Council Minutes, NSW, 13 June 1829, Appendix, Vol 2, 4/1439, SRNSW.

[322] Williams tried to bribe the arresting officer into letting her go in return for half the loot. See *Sydney Monitor* (Sydney), 13 June 1829, 2; 15 June 1829, 6.

[323] *Sydney Gazette* (Sydney), 9 June 1829, 2; *The Australian* (Sydney), 9 June 1829, 3. The sentence is only reported in passing.

[324] *The Australian* (Sydney), 10 July 1929, 2.

citizens.[325] Doubts were expressed as to the evidence.[326] *The Australian* argued that both Williams and Shaw should be reprieved:

> We really think mercy would not be lost upon these condemned wretches. The crime was perpetrated without any of those adjuncts which frequently mark the depredations of burglars, and ruffians on the highway. To execute a female for commission of or abetting a murder is right. But where no fatal or outrageous consequences have, or could have ensued, the sterner, features of justice may be relaxed with good effect. Mercy may well he extended, considering all circumstances, towards this deluded and unfortunate woman.[327]

In the face of such pressure the Executive Council reconsidered its initial position not to interfere with the death sentence.[328] Both prisoners were reprieved; Williams’ sentence commuted to transportation for life to Norfolk Island[329] and Shaw’s sentence commuted to 14 years transportation to Norfolk Island.

The grant of mercy also extended to females convicted of offences of violence.[330] In 1832 Catherine Hyam was convicted of the capital offence

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[325] See Shaw to Darling, Petition, 6 July 1829, EC Appendix to the Executive Council Minutes, NSW, Vol 2, 4/1439, SRNSW). See further Castles, above n 6, 43.7.

[326] Ibid.

[327] *The Australian* (Sydney), 8 July 1829, 2. See also *Sydney Gazette* (Sydney), 9 July 1829, 2

[328] *The Australian* (Sydney), 10 July 1929, 2. See Shaw to Darling, Petition, 6 July 1829, EC Appendix to the Executive Council Minutes, NSW, Vol 2, 4/1439, SRNSW; Executive Council Minutes, NSW, Meeting No 28, 9 July 1829. See further Castles, above n 6, 43.7.

[329] Ibid. Though given the grimness of the secondary places of punishment, especially Norfolk Island (see Brian Fletcher, Ralph Darling: a Governor Maligned, (Oxford University Press, 1984), 104–105; Hughes, above n 27, 266; Hirst, above n 274, 93), Williams’ reprieve may have been a mixed blessing.

[330] See *R v Ann Smith v Others* [1826] NSWSupC 61 (*The Australian* (Sydney), 13 September 1826, 3; *Sydney Gazette* (Sydney), 13 September 1826, 3) (sentence of death recorded (see *Sydney Gazette* (Sydney), 23 September 1826 3), commuted to confinement in a penitentiary for seven years, for highway robbery after robbing a man Smith had met in a hotel and asking him to ‘treat her’ and inviting him home; see Executive Council Minutes, NSW, 23 September 1826 (following adjournment from Meeting No 19, 21 September 1826)); *R v Phoebe Price* (*Sydney Gazette* (Sydney), 19 July 1834, 2; 21 August 1834, 2) (sentence of death recorded, commuted to transportation for three years to Moreton Bay, for stabbing a female neighbour with intent to cause grievous bodily harm during a drunken row); *R v Ann Maher* (*Sydney Monitor* (Sydney), 11 November 1836, 3; *Sydney Gazette*, 12 November 1836, 3; *Sydney Herald* (Sydney), 14 November 1836, 3) (sentence of death recorded for cutting and maiming a fellow convict servant recommended as six months in the factory as a result of good character references from Maher’s master and mistress and provocation from the victim); *R v Eliza Davey, Mary Davey* (aged 14) *and Sarah Green* (*Southern Australian* (Adelaide), 12 July 1842, 3) (sentence of death recorded for assault and robbery as the crime was no longer capital); *R v Euphemia Griffiths* (*Observer* (Hobart), 30 January 1846, 3; *Courier* (Hobart), 28 January 1846, 3; *Colonial Times* (Hobart), 30 January 1846, 3) (sentence of death recorded, commuted to transportation for life, for stabbing a woman with intent to inflict grievous bodily harm; the blow would have been fatal but for being defected by a bone; see

of highway robbery 'in circumstances of aggravation'[331] along with her two male accomplices.[332] Although sentence of death without any hope of mercy was passed on all three defendants,[333] the Executive Council took a different view and all three defendants were reprieved; the two male robbers transported for 14 years to Norfolk Island, and Hyam transported to Moreton Bay for seven years.[334]

Sarah Webb was convicted in 1826 together with her husband, William Webb, with robbing a dwelling at night and putting the female occupant in fear.[335] Both Sarah and her husband were convicts. Sarah, dressed in men's clothing, had brandished a musket at the victim whilst her husband had removed a large amount of clothing from the premises. Webb insisted that his wife 'acted entirely under his control and begged the Government

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Executive Council Minutes, Tasmania, 3 February 1846); *R v Eliza Gibbs* (*Launceston Examiner*, 9 July 1851, 6; *Cornwall Chronicle* (Launceston), 12 July 1851, 434-435; (sentence of death recorded, commuted to 15 years transportation, for robbing with her husband the victim after luring him to their home, hitting him with a bottle, and 'kicking and beating him most unmercifully' (Ibid); see also Executive Council Minutes, Tasmania, 17 July 1851; below n 341); *R v Mary Carroll, Margaret Cleary and Bridget Long* (*Cornwall Chronicle* (Launceston), 5 April 1851, 211; *Launceston Examiner* (Launceston), 5 April 1851, 6) (sentence of death recorded, commuted to two years imprisonment and varying periods of solitary confinement, for arson at the Launceston Gaol by three recalcitrant female convicts, see Ibid; Executive Council Minutes, Tasmania, 16 April 1851); *R v Sophia Brien* (*Cornwall Chronicle* (Launceston), 4 October 1851, 631; *Launceston Examiner* (Launceston), 4 October 1851, 10) (sentence of death recorded for firing a gun at her sister with intent to inflict grievous bodily harm in light of various mitigating factors commuted to 12 months imprisonment; see Executive Council Minutes, 18 October 1851); *R v Louisa Ferres* (*Colonial Times* (Hobart), 23 April 1852, 4; *Courier* (Hobart), 24 April 1852, 3; *Cornwall Chronicle* (Launceston), 28 April 1852, 267-268) (sentence of death for wounding with intent to inflict grievous bodily harm by a convict on her employer's assistant who had allegedly seduced and abandoned her (see further below n 391), commuted to transportation for life accompanied by imprisonment for five years at the Cascade Female House of Corrections (see 'Hobart', *Cornwall Chronicle* (Launceston), 1 May 1852, 277); *R v Maria Thompson* (*Courier* (Hobart), 30 July 1858, 3; *Hobart Town Daily Mercury* (Hobart), 30 July 1858, 2) (sentence of death recorded, commuted to transportation for life, for administering poison with intent to kill concealed in a cake of a man Thompson had a grievance with; the cake was consumed by a mother and her child; see Executive Council Minutes, Tasmania, 6 August 1858 and 20 December 1858); *R v Sophia Nelson* (*Courier* (Hobart), 3 December 1858, 3; 4 December 1858, 3; *Hobart Town Daily Mercury* (Hobart), 4 December 1858, 3) (sentence of death recorded, commuted to seven years imprisonment, for assaulting and robbing with her male accomplice a female victim; see Executive Council Minutes, Tasmania, 11 December 1858).

[331] *Sydney Monitor* (Sydney), 8 September 1832, 2.

[332] *R v Hipple, Darbyshire and Hyam* [1832] NSWSupC 57 (*Sydney Gazette* (Sydney), 21 August 1832, 3; *The Australian* (Sydney), 24 August 1832, 3; *Sydney Herald* (Sydney), 23 August 1832, 3).

[333] Ibid.

[334] *Sydney Herald* (Sydney), 6 September 1832, 3; *Sydney Gazette* (Sydney), 6 September 1832, 3.

[335] *R v Webb and Webb* (*Sydney Gazette* (Sydney), 15 July 1826, 2; *The Australian* (Sydney), 15 July 1826, 3; *The Monitor* (Sydney), 28 July 1826, 6).

on that account to extend mercy to her'.[336] Sentence of death was passed and Sarah's 'convulsed'[337] reaction was notable.[338] However both Sarah and William were reprieved by the Executive Council. William was sent to Norfolk Island for life and his wife was ordered to be transported for life to Tasmania.[339] Though William may have been fortunate to escape the gallows, Sarah's reprieve was unsurprising. The law in the 19th century threw a 'paternalistic cloak'[340] in such circumstances around a wife in the belief that she had committed the crime under her husband's control.[341] As Mr Bumble was informed in Charles Dickens' *Oliver Twist*, 'the law supposes that your wife acts under your direction'.[342]

Even the apparent worst offences of violence by women might be viewed with sympathy. Three female convicts; Mary Sheriff, Eliza Owens and Elizabeth Elemore, were found guilty in 1843 of stabbing the assistant colonial surgeon, Dr Maddox, with intent to inflict grievous bodily harm during a riot at the Launceston Female Factory.[343] The crime was branded as 'shocking' by the prosecutor and not the result of any 'sudden ebullition but cool deliberation'.[344] However, the jury's strong recommendation of mercy on account of the prisoners 'irritated state of their minds at and before the occurrence'[345] was accepted. The Chief Justice was at pains to assure the distraught women that, despite the enormity of their crime, their lives would be spared.[346] This was confirmed by the Executive Council. The prisoners were ordered to be

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336 *Sydney Gazette* (Sydney), 15 July 1826, 2.
337 *The Australian* (Sydney), 15 July 1826, 3.
338 *Sydney Gazette* (Sydney), above n 336.
339 *The Australian* (Sydney), above n 337. Sarah could not be sent to Norfolk Island as that would have conflicted with the policy at the time that there should be no women on the island. See *Historical Records of Australia*, Series 1, Vol 12, 517–518. The rationale for this was the deterrent effect of Norfolk Island as a secondary place of punishment.
340 Annie Cossins, *The Baby Farmers* (Allen & Unwin, 2013) 12.
341 See Palk, above n 40, 28–32; above n 33. See also the Chief Justice's doubt in 1851 of the guilt of Eliza Gibbs of the robbery of which she had been convicted as the crime had been committed in the presence of her husband and he was probably the 'main mover'. The Chief Justice recommended that Eliza's sentence of death be commuted to transportation for 15 years. See Executive Council Minutes, Tasmania, 17 July 1851. This was explained in a minute from the Colonial Secretary dated 17 July 1851 to be confinement in the Launceston Factory for one year.
342 To which Mr Bumble memorably and aptly replied, 'If the law supposes that...the law is an ass – an idiot.' It was only at the end of the 19th century that it was accepted that no presumption existed that a wife who committed a crime in her husband's presence did so under his compulsion. See Palk, above n 40, 29.
343 See *R v Sheriff, Owens and Elemore* (*Launceston Advertiser* (Launceston), 12 January 1843, 2; *Launceston Examiner* (Launceston), 11 January 1843, 4–5; *Cornwall Chronicle* (Launceston), 14 January 1843, 2; *Launceston Courier* (Launceston), 16 January 1843, 3).
344 Ibid.
345 Ibid.
346 *Cornwall Chronicle* (Launceston), 14 January 1843, 2. See also *Launceston Courier* (Launceston), 16 January 1843, 3.

separated and placed in solitary confinement, Sherriff and Elemore for three years and Owens for 18 months.[347]

Ann Burnsides was also the recipient of judicial mercy in 1834, despite the gravity of her crime. Burnsides and a man called Noble Foster, both convicts, were accused of the highway robbery of a John Clifford.[348] Clifford had visited the Factory in Parramatta to marry a convict residing there but was instead preyed upon by Burnsides who offered to live with him. She lured him to where Foster was waiting in ambush, where Foster brandished a pistol at Clifford and threatened to 'blow his brains out' unless he handed over his money. Interestingly, Burton J stated he wished to consult his two fellow judges before passing sentence but 'feared that the peculiar circumstances under which they had committed the crime were such as to render it necessary to visit them with the extreme punishment of the law'.[349] Burton J emphasised the 'aggravated nature' of the crime,[350] but subsequently pronounced sentence of death recorded on Burnsides and Foster, intimating that this would be commuted for both of them to transportation for life.[351] Given the gravity of the crime, notably Burnsides' role, and the judge's earlier comments, the reason for Burton J's apparent change of heart is unclear.[352]

Despite the prominence of the death penalty in the Australian colonies in the period 1824-1865 as a means of both punishment and deterrence, the prerogative of mercy was extended to both male and female offenders. Female offenders guilty of aggravated crimes of dishonesty or violence might be reprieved, and even the most heinous crimes in the colonial criminal calendar, notably the murder of an employer or husband in circumstances amounting to petit treason, might receive the benefit of mercy.

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[347] *Launceston Examiner* (Launceston), 15 February 1843, 3. See Executive Council Minutes, Tasmania, 12 February 1843.

[348] *R v Burnsides* (*Sydney Gazette* (Sydney), 10 May 1834, 2; *Sydney Monitor* (Sydney), 10 May 1834, 2).

[349] *Sydney Gazette* (Sydney), 10 May 1834, 2.

[350] *Sydney Monitor* (Sydney), 10 May 1834, 2.

[351] *Sydney Gazette* (Sydney), 20 May 1834, 2; *Sydney Herald* (Sydney), 22 May 1834, 3. Foster was transported to life with hard labour at Norfolk Island, Burnsides was transported for life to Tasmania.

[352] One can only speculate whether the victim's gullibility contributed to this decision. Though Foster had raised an alibi at trial for the crime and even called his overseers to testify to this effect, it emerged at the overseer's trial and conviction for perjury (see *R v Wylie* (*Sydney Monitor* (Sydney), 21 May 1834, 2)) that Foster clearly had left the barracks on the day of the robbery.

IX PETIT TREASON AND THE PREROGATIVE OF MERCY: 'JUSTICE WAS DUE EVEN TO THEM'

The strength of the prerogative of mercy in colonial society to female capital offenders is especially evident in a number of cases in the period from 1824 to 1865 involving 'petit treason'. Yet these cases also reveal the sometimes arbitrary nature of the portrayal of such female offenders.[353] Female offenders guilty of the murder of an employer or husband might still be found deserving of mercy, particularly if distinguished from such 'abandoned' or 'depraved' female offenders as Eliza Campbell, Lucretia Dunkley, or Mary Thornton.

The case of Ann Margaret Edwards (nee Wright) in Tasmania in 1833 demonstrates these propositions. Ann Edwards was charged with the capital offence of cutting her husband, George Edwards, with intent to kill him. Ann was a convict with an extraordinary background for any woman, let alone one of only 25 years of age.[354] It transpired that Ann had been seduced by a ship's officer and had fled Tasmania with him on the ship, *Phoenix*, making it as far as Bombay only to be abandoned and set ashore in India. After a series of harrowing events, including more sexual misadventures, Ann ended up back in the hands of the British authorities and was returned to Tasmania to complete her sentence. She was already married to Edwards, who was later described as 'not the most moral or prudent of husbands'[355]

Ann attacked Edwards during a violent row in 1833, leaving him alive but with a large wound to his head. He had spent their household money on alcohol rather than food, but both Ann and her husband testified they had no memory of the attack.[356] Ann, who was legally unrepresented, was convicted and sentenced to death without hope of reprieve for her crime.[357] The Chief Justice described the crime as the culmination of a 'long indulgence in a course of habitual wickedness',[358] and 'that her untimely fate would prove a warning to other young women, who were pursuing a similar evil course of life'.[359]

The case was viewed differently in the Colony.[360] Even fully acknowledging her guilt, the *Colonial Times* observed there were extenuating circumstances. There had been no malice or premeditation;

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[353] Strange above n 11, 142.
[354] See *The Courier* (Hobart), 5 July 1833, 2, which contains a full account of her misadventures.
[355] Ibid.
[356] Ibid.
[357] See *R v Edwards* [1833] TASSupC 2 (*Tasmanian* (Hobart), 28 June 1833).
[358] *Tasmanian* (Hobart), 28 June 1833.
[359] Ibid.
[360] Editorial, *Colonial Times* (Hobart), 2 July 1833, 2.

Ann had been sorely provoked[361] but had immediately confessed her wrongdoing and the victim was still very much alive. Justice could be satisfied without the loss of life.[362] The Executive Council, over the objections of the Chief Justice, agreed. Ann was reprieved to widespread approval and her sentence commuted to 14 years transportation.[363]

The sometimes precarious application of the prerogative of mercy to even the worst female offenders accused of murder in the context of petit treason is evident in the case of Sarah McGregor and Ann Maloney in New South Wales in 1834. Both defendants were female convict servants charged with the murder of their master, Captain Waldron, in the presence of his wife and some of his 12 children. The women had attacked Waldron and 'repeatedly struck him in the face and neck, with all the force they could command'.[364] Waldron died some days after the attack. Both defendants were convicted of his murder and sentenced by Burton J to death without hope of mercy and their bodies ordered for dissection.[365]

McGregor and Maloney stood in a tenuous position. Waldron left an 'unhappy bereft widow, left with nine children [still] to provide for'.[366] His status as a 'gentleman,' former Army officer, Magistrate and a landowner only compounded their crime, within a relatively small and stratified colony such as New South Wales, where 'the question of class was all-pervasive and pathological'.[367] McGregor and Maloney, in contrast, were not only convicts but as female assigned servants were regarded as Elizabeth Fenton remarked, 'an immoral physical force'.[368]

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[361] Ibid. See also Goodrick, above n 96, 71.

[362] See Editorial, *Colonial Times* (Hobart), 2 July 1833, 2; Homo, *Colonial Times* (Hobart), 2 July 1833, 3.

[363] Executive Council Minutes, Tasmania, 26 June 1833. See also *The Courier* (Hobart), 5 July 1833, 2; Goodrick, above n 96, 71.

[364] *Sydney Gazette* (Sydney), 25 February 1834, 2.

[365] See *R v McGregor and Maloney* [1834] NSWSupC 13 (*Sydney Gazette* (Sydney), 25 February 1834, 2–3; *Sydney Herald* (Sydney), 24 February 1834, 1S; *Sydney Monitor* (Sydney), 25 February 1834, 2–3; *The Australian* (Sydney), 24 February 1834, 3; *Sydney Herald* (Sydney), 24 February 1834, 1S).

[366] *Sydney Monitor* (Sydney), 25 February 1834, 3. It was noted at trial that the 'impressive and distinct' nature of Mrs Waldron's testimony combined with her coming into court in a deep mourning dress with her infant in her arms 'tended to increase that sympathetic feeling, which the melancholy detail seemed universally to excite' (*Sydney Gazette* (Sydney), 25 February 1834, 2; see also *Sydney Monitor* (Sydney), 25 February 1834, 2–3).

[367] Hughes, above n 27, 323.

[368] See Henry Bart (ed), *The Journal of Mrs Fenton: a Narrative of her life in India, the isle of France (Mauritius) and Tasmania during the Years 1826-1830* (Edward Arnold, 1901) 354. See also West, above n 164, 509; McDonald, above n 2, 17; 'Results of the Parliamentary Inquiry on Transportation' (1838) 11 *The Spectator* 799–800.

Although their crime strictly amounted to 'petit treason', the two defendants nevertheless attracted a spirited campaign on their behalf that included: the jury,[369] the judiciary,[370] the colonial press[371] and public opinion.[372] It was argued that the evidence in the case, especially as to the vital issue of the cause of death,[373] did not establish the crime of murder and subsequently their conviction and sentence of death for Waldron's murder was inappropriate. It was asserted that it would be 'JUDICIAL MURDER' to execute them.[374] The *Sydney Monitor*, in particular, in the space of just three days underwent a dramatic about face in its attitude to McGregor and Maloney.[375]

> The tide of commiseration expressed towards the bereft widow of Captain Waldron, and the little infant at her breast during the trial, began to ebb after the conviction and sentence of the two women, and after they were removed from the dock, it began to flow strongly in favour of the two murderesses, one eighteen years of age.[376]

Further reference was made to their backgrounds, essential decency and good character. The writer highlighted Maloney's 'courage', 'firmness', 'superior mind' and how at the Factory she was the 'terror of evil doing'.[377] She was 'something that might have been splendid'.[378] The

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[369] The jury recommended mercy with its verdict and wrote to defence counsel, Mr. Rowe, repeating this view. See Burton, *Notes of Criminal Cases*, State Records of New South Wales, 2/2413, vol 10, 145. Attached to the judge's trial notes is the letter from Mr. Rowe. See also the entry at the AustLII website, available at: <http://www.austlii.edu.au/au/cases/nsw//NSWSupC/1834/13.html>.

[370] See *Sydney Herald* (Sydney), 27 February 1834, 2; *Sydney Gazette* (Sydney), 27 February 1834, 2.

[371] See *The Australian* (Sydney), 24 February 1834, 3; Editorial, *Sydney Gazette* (Sydney), 25 February 1834, 2; *Sydney Gazette* (Sydney), 27 February 1834, 2; *Sydney Herald* (Sydney), 27 February 1834, 3; A Correspondent, 'Behaviour of Sarah McGregor and Mary Maloney after Conviction', *Sydney Monitor* (Sydney), 28 February 1834, 2; *The Australian* (Sydney), 28 February 1834, 3. *Sydney Herald* (Sydney), 3 March 1834, 2.

[372] See, eg, Amicus Justitle, *Sydney Gazette* (Sydney), 6 March 1834, 2–3.

[373] The deceased had a pre-existing medical condition and it appears that his demise was due to this condition rather than to the attack of the two women. A medical witness who could have testified to this effect had been unable to attend the trial. See further Editorial, *Sydney Gazette* (Sydney), 25 February 1834, 2; *Sydney Gazette* (Sydney), 27 February 1834, 2; *Sydney Herald* (Sydney), 3 March 1834, 2; Dowling, *Proceedings of the Supreme Court*, Vol 83, State Records of New South Wales, 2/3266; Burton, *Notes of Criminal Cases*, State Records of New South Wales, 2/2413, vol 10, 145. Dowling and Burton's minutes are reproduced by Kercher and are available at: <http://www.austlii.edu.au/au/cases/nsw//NSWSupC/1834/13.html>.

[374] *Sydney Gazette* (Sydney), 27 February 1834, 2 (emphasis added).

[375] A Correspondent, 'Behaviour of Sarah McGregor and Mary Maloney after Conviction', *Sydney Monitor* (Sydney), 28 February 1834, 2. Only three days earlier the same newspaper had denounced the crime, declaring 'Such barbarity was never seen in any land except New South Wales' (*Sydney Monitor* (Sydney), 25 February 1834, 3).

[376] A Correspondent, 'Behaviour of Sarah McGregor and Mary Maloney after Conviction', *Sydney Monitor* (Sydney), 28 February 1834, 2.

[377] Ibid.

writer concluded, 'Mary Maloney was not a common woman'.[379] Sarah McGregor was described in even more praiseworthy terms. The daughter of a gardener employed by a Lord in England, she had been brought up by her parents 'morally and religiously'.[380] Of only 14 years of age when transported to the colonies, she was still only 18 years old, and had preserved her 'chastity' until she had been seduced by a military officer.[381] She was noted as 'of a soft feminine mind, easily affected by kindness'.[382]

> Sarah McGregor is what English women in respectable and virtuous life generally are, feminine and amiable. But she is also far gone, and her youth and good looks and the company she will be condemned to keep in the Factory in the next 12 months, will most likely destroy her altogether.[383]

The Executive Council considered the case on 25 February 1834, attended by the Crown law officers and all three judges of the Supreme Court.[384] The Executive Council accepted the views of the judges[385] and the medical evidence that suggested the cause of Waldron's death was an epileptic seizure, rather than the blows that the deceased had received from the two women.[386] The death sentence for both women was commuted to imprisonment with hard labour for three years, after a formal reprieve from London was received confirming the Governor's order to respite the sentence.[387]

Maloney and McGregor demonstrate the careful consideration of the prerogative of mercy in colonial society. Gender, social status, and character of the accused all played roles in the operation of the pardon,

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[378] Ibid.
[379] Ibid.
[380] Ibid.
[381] McGregor had earlier pleaded pregnancy when convicted and sentenced to death. A special jury of matrons was convened to determine the veracity of her claim, the first such empanelled jury in the Colony (see *The Australian* (Sydney), 28 February 1834, 3). The jury of matrons found that McGregor was not pregnant (see Ibid; *Sydney Gazette* (Sydney), 25 February 1834, 3; *Sydney Herald* (Sydney), 27 February 1834, 2).
[382] A Correspondent, 'Behaviour of Sarah McGregor and Mary Maloney after Conviction', *Sydney Monitor* (Sydney), 28 February 1834, 2.
[383] Ibid.
[384] See *Sydney Herald* (Sydney), 27 February 1834, 2; *Sydney Gazette* (Sydney), 27 February 1834, 2.
[385] See Dowling, *Proceedings of the Supreme Court*, Vol 83, State Records of New South Wales, 2/3266; Burton, *Notes of Criminal Cases*, State Records of New South Wales, 2/2413, vol 10, 145. Dowling and Burton's minutes are reproduced by Kercher. See further: <http://www.austlii.edu.au/au/cases/nsw//NSWSupC/1834/13.html>.
[386] Castles, above n 6, 43.7. See also Executive Council Minutes, NSW, 25 February 1834, Meeting No 6, 4/1518, SRNSW.
[387] Governor Bourke to Stanley, 26 February 1834, *Historical Records of Australia*, Series 1, Vol 17, 379. See also *Sydney Gazette* (Sydney), 15 January 1835, 2.

yet the final verdict upon which the accused were deemed worthy of mercy proved almost arbitrary and unpredictable. The ultimate determinants for the application of the pardon were public opinion and sensitivity to the proper administration of the rule of law, seen in this context as real doubt as to the cause of death.

Cases such as *Edwards* and *Maloney and McGregor* were not unique cases in the period.[388] Christina Boddy was accused of the murder of her husband in New South Wales in 1853.[389] She had cut her husband's throat with a razor whilst he was sleeping. Her defence of provocation based on alcohol and jealously was rejected by the jury who found her guilty without even leaving to consider their verdict. However, Christina, who had promptly confessed her crime and expressed remorse, was a strong candidate for sympathy. Christina had suspected her husband of infidelity after finding him sleeping with two Aboriginal women. So called 'honour' killings by 'virtuous' female defendants 'who in the desperation of her sorrow or in the face of a dishonoured life sheds the blood of her betrayer'[390] were likely to attract sympathy and appealed to 19th century perceptions of the female role,[391] even if not technically a mitigating factor for the crime.[392] In addition Christina's child had drowned some months prior to the crime and witnesses at the trial testified to her grief

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388 Indeed, the application of mercy in this context is also evident in the period before 1824. Mary Lyons was sentenced to death in 1822 for the murder of a man she had been 'criminally living' for five years (in modern terms her de facto husband). See *R v Lyons* (*Sydney Gazette* (Sydney), 22 March 1822, 3). She had bludgeoned him to death with a hammer. However, her sentence was commuted to transportation for seven years after 'some favourable circumstances' were presented to the Governor. See the entry for Mary Lyons at the NSW Capital Offences Database. There was disagreement as to the cause of death. See *Sydney Gazette* (Sydney), 22 March 1822, 3.

389 See *R v Boddy* (*Bathurst Free Press* (Bathurst), 12 March 1853, 2; *Sydney Morning Herald* (Sydney), 10 March 1853, 2S). See also 'The Murder on the Castlereagh River', *Maitland Mercury* (Maitland), 22 January 1853, 4.

390 'Two Women: On Trial for their Lives for Murder in California', *Los Angeles Times* (Los Angeles), 28 January 1887, 10.

391 See Plater, Duncan and Milne, above n 209, 359–360; Carolyn Ramsay, 'Intimate Homicide: Gender and Crime Control, 1880-1930' (2006) 77 *University of Colorado Law Review* 1010, 118-125; Ramsay, 'Domestic Violence', above n 214, 246, 249–252. The case of Louisa Ferres in Tasmania in 1852 illustrates this theme. The victim of Louisa's frenzied attack was alleged at her trial to have seduced and abandoned her. The 'original wickedness of the deed has been lost in sight of in the contemplation of the ideal picture of a deceiver and betrayer upon whom this woman wrecked her vengeance' ('Louisa Ferres', *Courier* (Hobart), 1 May 1852, 2). Louisa's sentence was commuted. The victim strongly rebutted the imputations upon his character and asserted that he had always acted to Louisa with the strictest proprietary. See Ibid; John Turnbull, Letter to Editor, *Colonial Times* (Hobart), 27 April 1852, 3 and 30 April 1852, 3, John Turnbull, Letter to the Editor, *Courier* (Hobart), 1 May 1852, 1S.

392 *Bathurst Free Press* (Bathurst), 12 March 1853, 2. As the Chief Justice declared at Mrs Boddy's trial, 'Let it once go forth that mere suspicion justified the shedding of human blood, what unbridled licence, what fiendish passions would be let loose on society – what countless beings would be hurried into eternity' (Ibid).

and 'eccentric'[393] manner ever since. The Chief Justice, although required to administer the death sentence on the guilty verdict on the capital count, indicated that it was most unlikely to be carried into effect, with probably instead a commutation to imprisonment for ten years with hard labour.[394]

Less obvious candidates for sympathy and a reprieve following a conviction for the murder of a husband were also found. Ann Hayes, a 'large muscular woman' aged between 50 and 60 [395] was convicted of the 'most barbarous murder'[396] of her husband in Victoria in 1860.[397] She had fatally stabbed him during a drunken row. Both were former convicts. Barry J passed sentence of death, observing Mrs Hayes 'was guilty of a crime, the most disgraceful of its class – the murder of a husband by a wife',[398] despite the jury's recommendation of mercy. However the case attracted public sympathy.[399] One columnist noted that the immediate cause of the crime was the usual, 'drink – drink – drink'.[400] A 'numerously signed'[401] petition was presented to the Governor asking for mercy,[402] noting the absence of any premeditation for the crime and that it had been committed during a drunken quarrel.[403] These representations were accepted by the Executive Council and the sentence was commuted to 15 years imprisonment, the first three in irons.[404]

Similarly, the case of Mary Anne Perry in New South Wales convicted of the 'appalling'[405] murder of her husband in 1859 illustrates the strength of the prerogative of mercy despite the gruesome nature of the crime,[406] and

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[393] *Sydney Morning Herald* (Sydney), 10 March 1853, 2S.
[394] *Sydney Morning Herald* (Sydney), 12 March 1853, 2
[395] See *R v Hayes* (*Bendigo Advertiser* (Bendigo), 1 March 1860, 5).
[396] 'Horrible Murder in Napoleon Gully', *The Argus* (Melbourne), 2 February 1860, 3.
[397] See *R v Hayes* (*Bendigo Advertiser* (Bendigo), 1 March 1860, 5).
[398] *Bendigo Advertiser* (Bendigo), 1 March 1860, 5.
[399] See 'The Case of the Convict Ann Hayes', *Bendigo Advertiser*, 6 March 1860, 2.
[400] *The Star* (Ballarat), 3 March 1860, 2.
[401] *Empire* (Sydney), 12 March 1860, 3.
[402] 'The Case of Ann Hayes', *Bendigo Advertiser* (Bendigo), 12 March 1860, 3.
[403] Ibid. See also *Empire* (Sydney), 12 March 1860, 3; Ramsay, 'Domestic Violence', above n 214; 249, n 395; 'The Case of the Convict Ann Hayes', *Bendigo Advertiser* (Bendigo), 6 March 1860, 2.
[404] See 'The Convict Ann Hayes', *Bendigo Advertiser* (Bendigo), 13 March 1860, 3. There was comment as to the 'very bad grace' that accompanied the reprieve. The order to be placed in irons for the first three years was unheard of for a female prisoner and the Governor of the prison was reportedly so 'astonished' at the order, that he had checked its veracity. See Ibid.
[405] 'Appalling Murder at Longbottom', *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 12 May 1859, 3.
[406] Perry's skull had been crushed with an axe and when his remains were found some days after the murder, 'the soft flesh had entirely disappeared; thousands of, insects swarmed the bed, and the stench was intolerable. The deceased's bones were perfect, but when touched they fell to pieces.... On the whole, the spectacle presented was most horrible' (*Maitland Mercury* (Maitland), 15 February 1859, 3).

the additional aggravation of suggestions of sexual impropriety[407] (usually a highly damning factor against the woman concerned).[408] The doubt as to the strength of the prosecution case and sympathy for the defendant[409] served to mitigate against the death sentence. Mary Perry maintained her innocence,[410] and was reprieved, with sentence of death commuted to 15 years imprisonment.[411] There appears to have been two considerations behind this decision. First, 'the provocation and brutal usage to which she had been subjected during a long period of years' from her husband.[412] Secondly, and perhaps more significantly, the lingering doubts as to the strength of the prosecution case and the suggestion that others had been involved in the commission of the crime.[413] Mrs Perry's reprieve is telling. If a woman could be reprieved for the murder of her husband committed in circumstances even as gruesome as this with the suggestion of sexual 'immorality', the prerogative of mercy was exercised in a manner which aligns to both rationales for the operation of mercy: as a 'act of grace' or in recognition of individual merit.

X CONCLUSION: 'JUSTICE WAS DUE EVEN TO THEM'

The response to female capital offenders in the 19th century is complex and cannot be accounted for by simple notions of chivalry towards the weaker sex, or with accusations of moral decline. In the context of punishment and deterrence, female offenders were not immune from the death penalty. In cases such as *Fairless*, *Benwell*, *Sullivan* and even *McLauchlan* the characters and/or crimes of the female offenders were viewed (whether rightly or wrongly to modern eyes) as such to preclude any hope of mercy, whatever mitigating factors may have existed. In cases such as *Brownlow*, *Monks*, *Coghlan*, *Campbell*, *Dunkley*, *Thornton*

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[407] Mary Perry was said 'to have been on terms of criminal intimacy' with a man called Crane, who had been suspected of involvement in the murder. See 'Notes of the Week', *Sydney Morning Herald* (Sydney), 21 February 1859, 2. The evidence against Crane proved 'vague and inconclusive' (Ibid) and the Attorney-General chose not to take his case to trial (see 'The Late Murder at Burwood', *Sydney Morning Herald* (Sydney), 14 March 1859, 4). Crane testified as a prosecution witness at Mary's trial. However, Crane's purported liaison with Mary resurfaced at the trial and the defence case was that Crane may well have been the killer (see *Sydney Morning Herald* (Sydney), 7 April 1859, 2–3). Crane denied any affair with Mary or involvement in the murder and his role in the case was never resolved. See 'Reprieve of Mary Ann Perry', *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 23 April 1859, 3.

[408] See, eg, Robb, above n 209, 180–185; Ramsay, 'Domestic Violence' above n 214, 248–249; Wiener, above n 83, 117; Plater, Duncan and Milne, above n 209, 373–378.

[409] See 'Notes of the Week', *Sydney Morning Herald* (Sydney), 25 April 1859, 8.

[410] See P Agnew, 'Mrs Perry', *Sydney Morning Herald* (Sydney), 25 April 1859, 5.

[411] See 'Notes of the Week', *Sydney Morning Herald* (Sydney), 25 April 1859, 8.

[412] See 'Reprieve of Mary Ann Perry', *Bell's Life in Sydney and Sporting Reviewer* (Sydney), 23 April 1859, 3.

[413] Ibid. See also *Bathurst Free Press and Mining Journa*l (Bathurst), 4 May 1859, 3.

and *Scott* further considerations applied. Not only had these female defendants committed the crime of murder, but they had done so in aggravated circumstances amounting to petit treason. The already heinous crimes of the female offenders in *Campbell*, *Dunkley, Thornton* and *Scott* were further compounded by their perceived sexual 'immorality'. However, the strength of the theme of petit treason in 19th century society was such that, even in cases such as *Coghlan*, *Brownlow* and *Monks* it outweighed the obvious mitigating circumstances that existed and precluded the grant of mercy.

Yet even in these cases where mercy was refused and the female offender was hanged, the question of mercy was still countenanced. The importance of the prerogative of mercy is further supported by cases such as *Curry*; *Nicholls*; *Williams*; *Hyam*; *Webb*; *Sheriff, Owens and Elemore* and *Burnsides* where female capital offenders were reprieved. Indeed, even those female offenders convicted of the worst crimes involving petit treason as in *Edwards*, *Maloney and McGregor*, *Boddy*, *Hyde* and *Perry* were ultimately spared. These cases demonstrate that, as with male offenders, it was far from inevitable that even the worst offender would be hanged. Of the 54 female offenders discussed in this article, all but 12 were reprieved, demonstrating that '[t]his awful and momentous question',[414] that is the exercise of mercy to capital offenders, was considered a pivotal aspect of the administration of criminal justice by the colonial authorities, with mitigating factors and character assessment prominent in the deliberations of both the judiciary and the executive, on the suitability of the offender for judicial mercy or an executive pardon.

However further complicating considerations existed in respect of the female capital offender. In reflecting wider trends in the portrayal of the female criminal, the female capital offender was typically viewed in polarised terms, as the 'vicious' or the 'virtuous'. Those perceived to fall into the former category as in *Fairless*, *Benwell*, *Sullivan*, *Monks*, *Coghlan*, *Campbell*, *Thornton*, *Dunkley*, and even *Brownlow* and *McLauchlan*, had little hope of mercy and could expect to receive the 'last dreadful sentence of the law'.[415] However, those female offenders who were perceived to fall into the latter category as in *Curry*; *Bridget Mitchell*; *Nicholls*; *Williams*; *Webb*; *Sheriff, Owens and Elemore; Edwards*; *McGregor and Maloney; Boddy* and even *Hayes* and *Perry* could expect sympathy and the likelihood of reprieve as 'pitiful creatures worthy of mercy'.[416] This categorisation could prove arbitrary as cases such as *Brownlow*, *Edwards*, *Maloney and McGregor*, *Hayes*, and *Perry* illustrate. Nevertheless, the prerogative of mercy, imperfect and

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[414] Executive Council Minutes, Tasmania, 30 October 1837.
[415] *The Courier* (Hobart), 16 September 1845, 3.
[416] Strange above n 11, 142.

inconsistent as its exercise may have been, was duly administered as an individuated form of justice, where even for the worst female capital offenders in early colonial society, ‘Justice was due even to them’.[417]

XI Appendix I: Female Capital Offenders, 1824 – 1865 (Table)

Year	**Name**	**Executed/ Reprieved**	**Convict Status**	**Crime**
1824	Martha Dunn	R	Convict	Theft from Dwelling
1825	Campbell, Eliza	E	Convict	Petit Treason and Murder
1826	Bridget Fairless	E	Convict	Highway Robbery
1826	Ann Smith	R	Convict	Highway Robbery
1826	Sarah Webb	R	Convict	Robbery of Dwelling
1827	Catherine Lawry/Lowry	R	Convict	Assisting Burglary
1829	Jane New	R	Convict	Theft from Dwelling
1829	Maria Williams	R	Convict	Theft from Employer
1829	Margaret Curry	R	Convict	Theft from Employer
1830	Margaret Summers	R	Convict	Theft from Dwelling
1830	Mary Ann Gallagher	R	Convict	Theft from Employer
1830	Mary McLauchlan	E	Convict	Murder of newborn child

[417] *Sydney Gazette* (Sydney), 27 February 1834, 2.

1832	Catherine Hyam	R	Convict	Highway Robbery
1832	Hannah Lousely	R	Convict	Theft from Dwelling
1833	Ann Housley	R	Convict	Burglary and Theft
1833	Rebecca Johnson	R	Convict	Burglary/Theft of Dwelling
1833	Ann Edwards	R	Convict	Cutting w/i to Kill
1833	Mary Ann Burrows	R	Convict	Theft from Dwelling
1834	Sarah McGregor	R	Convict	Murder of Master
1834	Ann Mahoney	R	Convict	Murder of Master
1834	Ann Burnsides	R	Convict	Highway Robbery
1834	Phoebe Price	R	Ex-Convict	Stabbing w/i GBH
1836	Ann Maher	R	Convict	Cutting and Maiming
1837	Mary O'Connor/Hyland	R	Ex-Convict	Forgery
1837	Mary Matthews	R	Convict	Burglary of Employer
1842	Eliza Davey	R	Unknown	Assault and Robbery
1842	Sarah Davey (age 14)	R	Non-Convict	Assault and Robbery
1842	Sarah Green	R	Unknown	Assault and Robbery
1843	Mary Sheriff	R	Convict	Stabbing w/i GBH
1843	Eliza Owens	R	Convict	Stabbing w/i

				GBH
1843	Elizabeth Elemore	R	Convict	Stabbing w/i GBH
1843	Lucretia Dunkley	E	Ex-Convict	Murder of Husband
1844	Mary Thornton	E	Convict	Murder of Husband
1845	Eliza Benwell	E	Convict	Murder
1846	Euphemia Griffiths	R	Non-Convict	Stabbing wi/i GBH
1847	Bridget Mitchell	R	Non-Convict	Murder of Infant
1851	Eliza Gibbs	R	Unknown	Robbery and Assault
1851	Sophia Brien	R	Unknown	Firing w/i GBH
1852	Louisa Ferrers	R	Convict	Wounding w/i GBH
1852	Mary Sullivan	E	Convict	Murder of Master's child
1853	Margaret Cleary, Bridget Long & Mary Carroll	R	Convicts	Arson in jail in Tasmania
1853	Christina Boddy	R	Non-Convict	Murder of Husband
1855	Mary Ann Brownlow	E	Non-Convict	Murder of Husband
1855	Bridget Hurford	E	Non-Convict	Murder of Husband
1857	Rosanna Nicholls	R	Non-Convict	Murder of Child
1858	Maria Thompson	R	Non-Convict	Poison w/i Kill
1858	Sophia Kennedy	R	Unknown	Robbery and Assault

1859	Mary Ann Perry	R	Non-Convict	Murder of Husband
1860	Ellen Monks	E	Ex-Convict	Murder of Husband
1860	Ann Hayes	R	Ex-Convict	Murder of Husband
1862	Margaret Coghlan	E	Ex-Convict	Murder of Husband
1863	Elizabeth Scott	E	Non-Convict	Murder of Husband