ARTICLES
Freedom of Association in the Australian Constitution and the Crime of Consorting
ANTHONY GRAY

Legislative Implementation of the Law of the Sea Convention in Australia
WARWICK GULLETT

(R)evolution of State Immunity Following Jurisdictional Immunities of the State (Germany v Italy) – Winds of Change or Hot Air?
JARRAD HARVEY

Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights
KUAN CHUNG ONG

A Critique of Australian Environmental Law Reform for Strategic Environmental Assessment
SIMON MARSDEN

Bushrangers, the Exercise of Mercy and the Last Penalty of the Law in New South Wales and Tasmania 1824-1856
DAVID PLATER & PENNY CROFTS

CASE NOTES
Defining an Artificial Price Under s 1041A of the Corporations Act: Director of Public Prosecutions (Cth) v JM (2013) 298 ALR 615
PETER DOMINICK SCOTT

Tasmania v QRS [2013] TASSC 7
ALEXANDER FOSTER

BOOK REVIEWS
The Future of the Patent System
ALEXANDER E MOORES

Law and Religion: God, the State and the Common Law
AARON MOSS

Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth
LUKE OGDEN

Cost and Fee Allocation in Civil Procedure: A Comparative Study
PETER DOMINICK SCOTT
University of Tasmania Law Review

Volume 32 Number 2 2013

Articles

Freedom of Association in the Australian Constitution and the Crime of Consorting

Anthony Gray 149

Legislative Implementation of the Law of the Sea Convention in Australia

Warwick Gullett 184

(R)evolution of State Immunity Following Jurisdictional Immunities of the State (Germany v Italy) – Winds of Change or Hot Air?

Jarrad Harvey 208

Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights

Kuan Chung Ong 248

A Critique of Australian Environmental Law Reform for Strategic Environmental Assessment

Simon Marsden 277

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

David Plater & Penny Crofts 295
Case Notes
Defining an ‘Artificial Price’ Under s 1041A of the Corporations Act: Director of Public Prosecutions (Cth) v JM (2013) 298 ALR 615

PETER DOMINICK SCOTT 344

Tasmania v QRS [2013] TASSC 7

ALEXANDER FOSTER 354

Book Reviews
The Future of the Patent System

ALEXANDER E MOORES 359

Law and Religion: God, the State and the Common Law

AARCN MOSS 362

Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth

LUKE OGDEN 366

Cost and Fee Allocation in Civil Procedure:
A Comparative Study

PETER DOMINICK SCOTT 370

Guide for contributors to the UTLR

Inviting Contributors
We welcome scholarly and research articles of any length (preferably 5-10,000 words) on legal topics. We are an international journal, but also publish articles on topics with an Australian or Tasmanian focus. Articles and papers should be accompanied by a brief (150-200 word) abstract for publication on our website and 6-8 keywords for indexing purposes. Contributions may be submitted in the form of email attachments to: Law.Review@utas.edu.au, preferably in Microsoft Word format. Authors submitting papers for consideration must send to the editors a completed and signed original of the University of Tasmania Law Review Submission and Publication Agreement by mail, or a scanned copy of the signed original by email, retaining a copy for their files. Copies of the agreement may be downloaded from the UTLR website: <www.utas.edu.au/law/centres/university-of-tasmania-law-review>. All articles and papers must be submitted in English. All papers published as scholarly or research articles will be refereed by two referees pursuant to a ‘double-blind’ refereeing policy. The UTLR is published in conformity with the Australian Guide to Legal Citation 3rd ed., which can be viewed on the internet at: <http://mult.law.unimelb.edu.au/go/aglc>. Articles should be submitted in accordance with this referencing style.

Information for Subscribers
Cost of the Review is $A44.00 + GST per issue for subscribers resident in Australia and $A55.00 for subscribers resident overseas (delivered economy airmail for overseas subscribers). Two issues are published each year. Readers can also purchase a ‘one-off’ copy of a particular issue. You may either send a cheque with your subscription notice, or we will invoice you when you receive your first issue.

Intending Subscribers should write, or send a fax or email message to:

Publications Assistant
Law School, University of Tasmania, Private Bag 89
Hobart, Tasmania, Australia, 7001.
Phone: (+61 3) 6226 7552; Fax: (+ 61 3) 6226 7623.
Email: Law.Publications@utas.edu.au

North and South American readers should obtain subscriptions direct from the sole North and South American agent:

William S Hein & Co Inc
Hein Building, 1285 Main Street
Buffalo New York, USA, 14209.
All subscribers can obtain back issues from Hein.

EDITORS: Madeleine Figg
Peter Dominick Scott

EDITORIAL BOARD: Aaron Moss
Alexander Foster
Alexander E Moores
Cathryn Neo
Claire Jago
Rebecca Byrnes
Rohan Nanthakumar

FACULTY ADVISOR: Peter Lawrence

ISSN 0082-2108
Printed 2014
Bushrangers, the Exercise of Mercy and the ‘Last Penalty of the Law’ in New South Wales and Tasmania 1824-1856

DAVID PLATER & PENNY CROFTS *

Abstract

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

* David Plater BA/LLB, LLM, PhD (University of Tasmania), Lecturer, School of Law, University of South Australia; Honorary Research Fellow, Faculty of Law, University of Tasmania; Senior Legal Officer, State Attorney-General’s Department, Adelaide.

This article is an extension of Chapter 3 of his PhD, ‘The Changing Role of the Modern Prosecutor: has the notion of the “Minister of Justice” outlived its usefulness?’, submitted in April 2011 to the University of Tasmania, <http://epubs.utas.edu.au/13743/2/David_Plater_whole.pdf>.

Penny Crofts BEc/LLB, LLM, MPhil (Griffith University); Senior Lecturer, Faculty of Law, University of Technology Sydney.

The authors are grateful for the erudite comments of Sue Miller, School of Law, University of South Australia, on this article. Any views expressed in this article are those of the authors alone.

© Law School, University of Tasmania 2014
Bushrangers, the Exercise of Mercy and the ‘Last Penalty of the Law’

England, in the 18th and 19th centuries has long been a subject of both academic scrutiny and popular interest. Yet the exercise of the death penalty has always been tempered in practice, by the elusive quality of mercy or ‘act of grace’. The prerogative of mercy is an ancient power vested in the British monarch to pardon, either unconditionally or conditionally, offenders. Study has been undertaken of the role of the prerogative of mercy in England during this period, and has been interpreted as vital to tempering the harsh effects of the Bloody Code that rendered, in theory at least, over 500 offences as punishable by death upon conviction. In contrast, both the exercise of the death penalty and the role and application of the prerogative of mercy in early colonial Australia has been the topic of only limited scrutiny. This is despite the fact that early colonial Australia, unlike England, represents an opportunity to consider ‘the actual rather than the theoretical operation of


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

3 The prerogative of mercy was of great importance in capital cases. See further Carolyn Strange (ed), Qualities of Mercy: Justice, Punishment and Discretion (UCB Press, 1996); David Pater and Sue Milne, ‘The quality of mercy is not strained’: the Norfolk Island missionaries and the exercise of the death penalty in colonial Australia 1824-1860 [2002] Australian and New Zealand Law and History Society n-Journal 1, Part 3.


5 There were over 230 statutes and a total of more than 350 offenses in England that carried the death penalty in 1590, see J Ellard, ‘Law and Order and the Perils of Achieving It’ in Duncan Chappell and Paul Wilson, Issues in Australian Crime and Criminal Justice (Lexis Nexis Butterworths, 2005) 268. A useful list of these capital statutes can be found in Less Radiovacina, A History of English Criminal Law and Its Administration from 1500 (Stevens, 1948) App 1.


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

2 See R v Pearce [1824] TASSupC 11 (Hobart Town Gazette (Hobart), 25 June 1824, 2).

3 Not only had Pearce murdered and consumed a fellow convict called Cox when escaping from Macquarie Harbours, but on an earlier escape he had also killed and eaten several of his companions. See ‘Alexander Pearce’, Hobart Town Gazette (Hobart), 6 August 1824, 6.

4 This crime was regarded with particular gravity in the first half of the 1840s. See Alex Castles, An Australian Legal History (Law Book Co Ltd, 1980) 262; Richard Davis, The Tasmanian Gallows: A Study of Capital Punishment (Cat & Fiddle Press, 1974) 25-27.

5 This offence carried the death penalty in Tasmania until 1836 and such offenders were usually hanged. See further ibid, 25-27.

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

7 This was an additional punishment for deterrent purposes in cases of murder, under statutory discretion: An Act for Better Preventing the Horrid Crime of Murder (1752) Geo II c 37, s 2. Under (1752) 25 Geo II c 37, s 5 (An Act for Better Preventing the Horrid Crime of Murder), the judge was empowered to order that the body of the murderer be hanged in chains. If he did not order that, then the Act required that the body was to be anatomised, that is, dissected by surgeons, before burial. The intention in providing for anatomising was, reflecting the religious views of the period, to add to the deterrent effect of capital punishment, see Helen Macdonald, ‘A Dissection in Revenge: Mary McLauchlan, Hobart Town, 1830’ (2004) 3 Feminist History Journal 12, 13-16. Dissection was the most feared of all sentences! David Towle and Trevor Potter, The Honan Collar: Executions in South Australia 1834-1964 (Wednesday Press, 1990, 13)

8 See, eg, Editorial, Colonial Times (Hobart), 19 June 1838, 7; ‘Punishment of Death – Privy’, Launceston Examiner (Launceston), 25 October 1845, 2. See further below n 34 and n 160.
the *Bloody Code*. This article is intended to help redress this gap in the understanding of this important aspect of the colonial legal system.

The focus of this article is on the application of the death penalty and the prerogative of mercy to bushrangers in colonial Australia convicted of a capital crime. Bushrangers occupy a prominent place in the Australian national identity through their celebrated, if at times uncertain, portrayal in popular culture and literature. As Seal notes, “The slightly enigmatic, slightly saturnine and ever ambivalent bushranger is the undisputed, if not universally admired, national symbol of Australia.” There has been considerable study, often of a colourful nature, of bushrangers, both generally and specifically of such leading figures as Ben Hall, Francis Gardner, Andrew Scott alias Captain Moonlite, Frederick Ward alias Captain Thunderbolt and, lastly, but not least, Ned Kelly. In contrast the exercise in colonial Australia of the death penalty and the prerogative

13 Bruce Kerclach, *Outlaws: Tales from the Supreme Court, 1824-1835* (Australian Scholarly Publishing, 2006). 5. In some years more offenders were hanged in Tasmania or New South Wales than in Great Britain.


19 See, eg, Samantha Atkinson, *Captain Moonlite: Villain or Villain*? (Gerrardon Press, 2010) (George Calderwood, Captain Moonlite: Bushranger (Rigby Ltd, 1971).

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

21 The attention lavished on Ned Kelly and his gang is astonishing. ‘Academics have devoted more time to the Kellys than to any other group of Australian historical figures’ (Nixon, above n 16, 98). From the many works on Ned Kelly see, eg, Peter Carey, *True History of the Kelly Gang* (Knopf Doubleday Publishing Group, 2011); John Mulvaney, *Ned Kelly* (Melbourne University Press, 2001); Ian Jones, *Ned Kelly: A Short Life* (Lothian Books, 1993); James Kenneally, *The Complete Inner History of the Kelly Gang and their Pursuers* (Reviews Ltd, 1929); Ian MacFarlane, *The Kelly Gang Unmasked* (Oxford University Press, 2013); Peter Fitzsimmons, *Ned Kelly: The Story of Australia’s Most Notorious Legend* (Random House of Australia, 2013). The authors do not wish to enter into the long running historical debates as to the status of Kelly. As Jacob notes, ‘Many people thought – and still think – that they [the Kelly gang] were more liked than respected’ (Philip Jacob, *Famous Australian Trials* (Robertson & Mullens Ltd, 1942) 78).

The authors, like Jacobs, consider that it is best to ‘let others decide whether this is true’ (ibid).

of mercy specifically to bushrangers, have been largely overlooked. This article examines the strength of the prerogative of mercy to bushrangers in colonial Australia in the period from 1824 to 1856 convicted of a capital offence and considers what factors influenced the colonial authorities in deciding who was reprieved and who faced the gallows. This analysis highlights that the meaning and quality of mercy was the subject of debate and controversy during this time. These questions will be considered by looking at a number of bushranging cases in Tasmania and New South Wales from 1824 to 1856. Such cases, though perhaps seemingly historically insignificant in themselves, are important in revealing the wider society in which they took place. They ‘enable the modern reader to understand the moral universe of colonial society in which capital punishment was as a necessary part of maintaining secular social order as well as conforming to contemporary beliefs about divine justice.’

The reasoning of the colonial authorities in these cases demonstrates how they perceived and performed their role in the exercise of the death penalty for bushrangers and what considerations they had in mind, whether in dealing with such offenders, there remained any place for the grant of mercy. The legal context of the period is also significant, commencing with the establishment in 1824 of the Supreme Courts of Tasmania and New South Wales; through the height of the transportation system in the 1820s and 1830s, the increasing development of the rule of law, increasing free migration from the 1830s, the end of transportation to New South Wales in 1840 and then Tasmania in 1853, the Gold Rushes and the grant of representative and then responsible government to the Australian colonies by 1856.

22 Though see Castle (2006), above n 12; Pitzer and Milns, above n 9.


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

26 Though transportation was abolished to Tasmania in 1852, its effects lingered there for many years. See James Boyle, *Van Diemen’s Land* (Black Inc, 2008) 236-245; Davis, above n 3, 58; Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868* (Collins Harvill, 1987) 323, 589-594.

27 Australia underwent a fundamental transformation during the course of the middle part of the 19th century and evolved far beyond its origins as a simple penal colony. Though a detailed consideration of these changes and the reasons for them is beyond the scope of this article, by 1856, the transition from a frontier penal colony beset with peril to a stable self-governing free society was largely complete. See, eg, Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987); Alan Shaw, *The Story of Australia
‘Cruelty, principle and mercy are inescapable and recurring elements in the story of the criminal law in colonial New South Wales.’ These often conflicting themes are especially evident in the exercise of the death penalty to bushrangers in colonial Australia in the period from 1824 to 1856. On the one hand the perceived need for punishment and deterrence are strongly manifest in the exercise of the death penalty, reflecting in part, the fear factor so prevalent in early colonial society. This was especially manifest with regard to bushrangers who were viewed, in official circles at least, as more than mere outlaws or criminals and as posing a real threat to the tenuous stability and on occasion even existence of early colonial society which necessitated the vigorous application of the criminal law. The ‘last dreadful sentence of the law’ was integral to the process of asserting and enforcing the authority of the government. ‘In dealing with bushrangers, the Government was not just putting down cutthroats. It was proving that it was in fact the Government.’

On the other hand this article argues that deterrence and punishment, important as they were, were not the sole or even paramount considerations in the exercise of the death penalty to bushrangers. Rather, the colonial authorities, even with offenders such as bushrangers who were ‘beyond the pale’, took seriously the exercise of mercy in the context of an embryonic self-governing society in transformation from its penal roots. The prerogative of mercy was imperfect and its exercise was often inconsistent. But the implementation of the death penalty was not a mere formality. Rather in the absence of a formal Court of Criminal

Appeal until the end of the 19th century, mercy served a vital role in tempering the effects of capital punishment. The exercise of the prerogative was a serious and considered process where, as far as possible, even to bushrangers who had committed the most reprehensible crimes, ‘mercy seasons justice’.

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

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

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

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

(Faber & Faber, 1960) 104; Neal, above n 25. The Gold Rushes of the 1850s had a further profound effect on Australian society that was not confined to Victoria. See Geoffrey Serle, The Golden Age: A History of the Colony of Victoria, 1851-1881 (Melbourne University Press, 1963) 369-381.

Woods, above n 12, 6

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

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

The Courier, 16 September 1845, 3.


See, eg, John Braithwaite, ‘Crime in a Consumer Republic’ (2001) 63 Modern Law Review 11; RB Madgwick, Immigration Into Eastern Australia, 1788-1851 (Sydney University Press, 1969) ch 3; AGL Shaw, Convicts and the Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire (Faber, 1946) ch 10 and 11; Caulfield, above n 3, Ch 8 and 9; Woods, above n 12, Ch 1.


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

See Oison, above n 10, 106-196. There is a strong religious background to the prerogative of mercy. ‘The notion of clemency lies at the heart of Judeo-Christian
penitence but also redemption. Mercy as an undeserved gift expressed more about the benefactor’s power and goodness than the recipient. This idea of mercy as an undeserved gift emphasised that justice was not, and should not be, solely about commensurability, represented by the image of Lady Justice holding scales and the expression, an ‘eye for an eye’. Rather, there were other conceptions of justice that went beyond objective adequation. Moreover, debates about and exhortations for or against mercy were reminders that justice was and is not the only virtue. Here mercy was perceived as another value additional and vital to softening harsh justice. Debates reflected a concern to articulate and organise central concepts in fledgling society about law and order, justice and mercy.

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

The death penalty played a vital role in the administration of criminal justice in both Britain and colonial Australia in the 19th century. The dual purposes of the death penalty were expressed to be deterrence and punishment. The rationale of deterrence was that the exercise of the death penalty (especially if accompanied at the gallows by the expected declarations of remorse from the condemned prisoner and exhortations to those assembled to learn from his or, rarely her, fate) would act as a ‘terrible lesson to evildoers’ and deter any other like-minded individuals. As George Savile, the 1st Marquess of Halifax, is reported to theology’ (Daniel Kell, ‘The Quality of Mercy Strained: Wrestling the Pardoning Power from the King’ (1990-1991) 69 Texas Law Review 549, 572). As Shakespeare famously wrote in The Merchant of Venice: Portia’s eloquent plea for mercy suggests that mercy ‘blesseth him that gives, and him that takes’ because its source is not in ‘temporal power’, but rather in the ‘hearts of Kings’, deposited there like the gentle rain of heaven by ‘God Himself!’ (see ibid; William Shakespeare, The Merchant of Venice, Act IV, scene 1).


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

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


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

‘Execution of Harrison, Woods and Carver’, Empire, 8 August 1864, 3.

Bushrangers, the Exercise of Mercy and the ‘Last Penalty of the Law’ have said, ‘Men are not hanged for stealing horses, but that horses may not be stolen’. The rationale of the gallows in terms of punishment was simple. As one author observed of the customary 19th century argument justifying capital punishment, ‘An eye for an eye, and a tooth for a tooth,’ and of the command ‘who so shedeth man’s blood, by man shall his blood be shed’. In her analysis of justice, Dimock asserts that the idea of ‘an eye for an eye’ expresses a highly influential model, both then and now, of justice as commensurability, predicated on a premise about the ‘weighable equivalences of the world and about the solvability of conflict on that basis’. It is based upon an assumption of objective adequation, of good for good, and evil for evil, as if one evil could equal another evil, or one life equal another life, in the way that one tooth equals another tooth. It has the virtue of simplicity and predictability, but Dimock argues that it derives its intelligibility and predictability as much from what it fails to register as from what it does register. The application of the death penalty to bushrangers who killed was an example of justice as commensurability. One life was taken for another.

The sheer number of both sentences of death and executions in New South Wales and Tasmania during the convict period from 1824 to the 1840s in New South Wales and 1850s in Tasmania is striking. In 1830, 27 offenders were sentenced to hang in a single day at the Supreme Court in Hobart. Castle notes that in 1839, more persons (50) were hanged in New South Wales than were hanged in all of England and Wales that year (46). A remarkable 56 people were hanged in Tasmania in 1826, most for crimes short of murder, ‘and another 47 were hanged the following year.’ In 1830, 30 persons were hanged in Tasmania. Six members of a gang of bushrangers were publicly hanged together in Sydney in 1841. Four offenders were publicly hanged on the same occasion as late as 1855 in Hobart, literally just before the grant of responsible government.

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


42 Dimock, above n 37, 2.

43 Hobart Town Courier (Hobart), 8 May 1839, 3.

44 Castle (2008), above n 12, 43.2.

45 See Davis, above n 3, 21.

46 See Boyd, above n 26, 169.

47 Davis, above n 3, 13.

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

49 See Lloyd Robson, A History of Tasmania (Oxford University Press, 1983) 521-522. See also Boyd, above n 26, 216-249. This was ironically on the same day that news reached
Both hangings and the often gruesome crimes that led to them were an all too often routine event in the Australian colonies:

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

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

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

This ‘fear factor’ came not just from the large convict population but also Aboriginal offenders and especially bushrangers. Such offenders were regarded as posing not just a challenge to the maintenance of colonial law and order but as a very real threat to the tenuous stability of early colonial society. 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 submission.’

‘A large portion of the population of this Colony’ was there under compulsion, as the Chief Justice observed in an 1838 case. He continued, ‘Great difficulties often occur in the management of the convict population in the interior; but the most effectual method to deal with them is to let them feel the arm of the law is strong enough to coerce them...’ The task of controlling and confining such a large part of the population was ‘a Herculean task’. The imposition of the harshest penalties of the law was regarded as an act of strength and assertion of power. The ever-present spectre that always loomed large in colonial society was, as Hughes notes, ‘a jaquette, the convicts’ revolt that had figured in the nightmares of Australian settlers and governors since the Irish rose at Toongabbie in 1804.  

London of the formal renaming of the Colony as ‘Tasmania’ as part of the effort to erase the convict ‘taint’ of ‘Van Diemen’s Land’

38 See, eg, Bonwick, above n 16, 2; Editorial, *Sydney Herald* (Sydney), 10 March 1826, 2; *Nostalgia Bushmurrierties*, Letter to Editor, *Sydney Gazette* (Sydney), 4 March 1834, 2; Editorial, *Sydney Herald* (Sydney), 15 September 1834, 2; Editorial, *Launceston Examiner* (Launceston), 15 July 1843, 3; Theodore Stanley, Letter to Editor: ‘Household Events’, *Launceston Examiner* (Launceston), 11 August 1852, 5.  
41 See, eg, R v Bonson and Others ([1825] NSWSlipC 4 (The Australia (Sydney), 27 January 1825, 2; *Sydney Gazette* (Sydney), 27 January 1825, 2-3; R v Troughton and Kelly (Sydney Gazette (Sydney), 7 November 1839, 3; *Sydney Herald* (Sydney), 8 November 1839, 2); James Midle, The Felonry of New South Wales (Lawsonson Press, 1904) 113 and 116.  
In contrast, Hirst argues that life in colonial Australia was comparatively ‘normal’ and the fear factor in colonial society was exaggerated. Hirst asserts that the crime rate of Sydney was no higher than in London or any British port and the rulers and local colonists in Australia were remarkably untroubled by thoughts of a convict rebellion, whether by the Irish or otherwise. Though it would be simplistic to categorise early colonial society as merely the brutal convict Gulag depicted by Hughes, one cannot overlook the reality of life in early colonial Australia, especially the ‘fear’ factor that was so prevalent in early colonial society. Whether or not this fear was warranted is arguable, what is significant is the feeling of fear at that time, and that sentencing and the prerogative of mercy took place within a context of fear. As one commentator remarked in 1835, ‘In no country is life so insecure as in this’. For example, the figures for 1837-1839 reflected and reinforced this fear, showing that the amount of crime in New South Wales and Tasmania in proportion to the respective populations [England and Australia] the number of convictions for highway robbery (including bushranging) in New South Wales exceeds the total number of convictions for all offences in England. As the Sydney Herald declared in 1834 in the aftermath of the execution of two escaped convicts and bushrangers for the murder of Dr. Wardell, a prominent colonial barrister, ‘The case of these Convicts show in a striking point of view, the absolute necessity for an unrelaxing system of restraint on the convict population.’

The threat perceived to the stability of early colonial society by offenders such as convicts, Aborigines and especially bushrangers justified a robust approach by the colonial authorities and militated against the exercise of mercy in such capital cases. This is illustrated by the case of a former convict from Port Arthur called Peter Kenney charged in 1847 with a burglary committed with extreme violence at the Hobart home of a respected citizen called Francis who was wounded in 21 places by the

[47] Ibid, 135.
[51] ‘Executions’, Sydney Herald (Sydney), 13 November 1834, 2. Jenkins went to the gallows justifying his murder of the ‘tyrant’ Wardell and urged the assembled crowd if they ever “went bush” to murder any other “tyrant” they came across as well as several others he saw in attendance at the execution (Ibid).

----

Bushrangers, the Exercise of Mercy and the ‘Last Penalty of the Law’

burglar and left for dead. At Kenney’s trial, Montague J observed to the jury that ‘a case of greater brutality he never heard’ and declared, ‘We are surrounded with thieves, burglars and other offenders of the deepest criminality’. The judge in an unflattering description of Tasmania, considered that, ‘A worse community with especial reference to the very large population of the convict population never existed on the face of the globe than in this island, at all events never in the history of modern times.’ Montague J declared that if the jury ‘should entertain no doubt of the prisoner’s guilt, [but] the Executive should spare his life, then I should say the sooner the Supreme Court is shut up the better.’ Kenney denied any involvement but was unsurprisingly (given the nature of both the crime and the judge’s summing up) convicted. Montague J in passing sentence of death with ‘no hopes of mercy’, noted Kenney’s ‘very bad character’ and declared that he had not the ‘ slightest doubt’ of Kenney’s guilt and ‘it was an offence so dangerous to the community that I feel I should be neglecting my duty if I did not pass upon you the sentence of the law, and which will be carried into execution.’

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

...a deep error is committed by the Executive — an incalculable mischief done to society — and a temptation held out to the perpetration of the most alarming crimes. A system of terror in a place like this Colony, is an economical system and the greater the dread of extreme punishment, the less occasion is there to put it in practice. A score of executions every year 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.”

[52] See R v Kenney (The Courier, 6 March 1847, 2-3).
[54] The Courier, 6 March 1847, 3. See also Davis, above n 3, 40.
[56] Ibid. Montague J is referring to the prerogative of mercy.
[57] Kenney called as an a/bi a woman who was labelled a prostitute and appears to have done his cause more harm than good.
[58] Colonial Times (Hobart), 9 March 1847, 3.
[60] The Australian (Sydney), 1 September 1825, 2-3.
[61] Ibid 2. See also The Courier, 28 June 1844, 2.
In such a society as described by *The Australian* and Montagu J in *Kennedy,* the death penalty, played, or was at least perceived to play, a crucial role in terms of both punishment and deterrence. Though a range of defendants in Australia might find themselves at risk of infliction of the death penalty (especially under the *Bloody Code* that was in existence until the early 1830s), this was most evident for defendants who were alleged to have committed crimes that were regarded as representing a particular threat to not just law and order but also the seemingly tenuous stability and even existence of colonial society. Though convicts, Aborigines and sexual offenders could be, and were, regarded in these stark terms, it is bushrangers, as *The Australian* suggested in 1825, who appear to have been viewed in early colonial society as posing the greatest threat and therefore to be most deserving of the death penalty.

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

---

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

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

83 See *Castle* (2008), above n 12, 435-436.

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

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

86 See, eg, *R v Tougher & Kelly* (*Sydney Gazette* (Sydney), 7 November 1839, 3; *Sydney Herald* (Sydney), 8 November 1839, 3) (assault with intent to 'ravish' a 'Natives') and the sentencing comments of Dowling CJ in *R v Sounders, R v Heene and R v Monson* [1841] *NSWAppC 14* (*Sydney Herald* (Sydney), 16 February 1841, 2). See also Davis, above n 5, 29-32; Hughes, above n 26, 244-248. The rationale that sexual offenders should be the subject of stern prosecution and even execution was that it was in a society where women were so heavily outnumbered by men (Castsles notes that in Tasmania in 1824 males outnumbered females by a factor of three to one and by 1842 this was still two to one, Casteles, above n 3, 261) the colony's women were endangered and had to be protected from the threat that any sexual offender posed to them, see Davis, above n 5, 29-32; Castles, above n 3, 261-62.

87 See *Davis* (2008), above n 5, 28.

88 [1832] *TASSupC 32* (*Tasmanian, 7 December 1832*).
Here, mercy was seen as a weakness, 'wantonly abused'.9 This was a message not only to the jury, but also to the Executive and Governor. There was a concern to reinstate law and certainty. On occasion, such as in Kennedy and Oxley, notions of punishment and deterrence took precedence over any other consideration. Though such reasoning might extend to any one of a number of seemingly non-serious capital offences such as the theft of livestock,43 its application is particularly evident to those offenders who were perceived to threaten the tenuous stability of early colonial society such as rebellious or intractable convicts,44 Aboriginal offenders,45 and, especially, bushrangers46 (though even with these offenders the prerogative of mercy still played a vital role and it was far from inevitable that such offenders would be executed).47

43 See the prosecutor's similar indignation as to the prisoners' perceived abuse of mercy in R v Shea and Others [1841] NSWSC 7 (Sydney Herald (Sydney), 25 February 1841, 2-3; Australian Chronicle, 25 February 1841, 2-3; The Australian (Sydney), 25 February 1841, 2; Sydney Gazette (Sydney), 27 February 1841, 2).
44 The Blood 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 12, 112-136.
45 See, eg, R v Butler and Others [1824] TASCS 4 (Hobart Town Gazette (Hobart), 2 July 1824, 2-3). See above n 3.
46 See, eg, R v Benson and Others [1825] NSWSC 4 (The Australian (Sydney), 27 January 1825, 2; Sydney Gazette (Sydney), 27 January 1825, 2-3; R v Gough, Moore and Watson (Sydney Gazette (Sydney), 24 September 1827, 2-3; Sydney Monitor (Sydney), 24 September 1827, 2; 'Execution', Australian, 26 September 1827, 3) (the fitting fate of three convicts, especially Gough who had long proved an especially difficult prisoner, for the murder of a guard at Norfolk Island). See also the swift fate accorded to ten convicts in 1830 condemned to death and refined money for their involvement in a convict rebellion with apparent Irish political overtones near Bathurst. See R v Webster and Others; R v Endhurst and Others (Sydney Gazette (Sydney), 11 November 1830, 3) see also Chris Clark, The Encyclopedia of Australia's Battles (Allen & Unwin, 2010) 8.
47 See, eg, The Australian (Sydney), 16 September 1826, 2-3; R v Talboys [1840] NSWSC 44 (Sydney Herald (Sydney), 12 August 1840, 1S (trial); 1S August 1840, 1S (sentence); R v Terrick and Others (South Australian Gazette and Colonial Register, 25 May 1839, 4; see also 'Trial and Conviction of the Natives', South Australian Gazette, 25 May 1839, 2); 'The South Australian Protectorate', South Australian Register, 15 August 1849, 2.
48 See, eg, the sentencing comments in R v Holmes and Others [1828] NSWSC 106 (The Australian (Sydney), 16 December 1828, 3; Sydney Gazette (Sydney), 15 December 1828, 3); R v Whelan and Payne (Sydney Gazette (Sydney), 8 January 1829, 3; Sydney Monitor (Sydney), 12 January 1829, 5-6); R v Whelan (Sydney Herald (Sydney), 26 February 1840, 3); R v Crumden (Cornwall Chronicle (Launceston), 3 April 1844, 2). This theme was repeated as late as 1867; see the Chief Justice's strong sentencing comments in R v Thomas and John Clark (Sydney Morning Herald (Sydney), 29 May 1867, 3).
49 See further the discussion below in Parts 4 and 5.

110 ibid 205.
111 Ward, above n 102, 180, referring to Humphry McQueen, A New Britannia: an Argument Concerning the Social Origin of Australian Radicalism and Revolutionary Sentiment (Ringwood, 1970) 136-139. See also, eg, 'The Bushrangers', Empire, 25 December 1856, 2; John West, The History of Tasmania (Hensley Howling, 1856) 137-138.
112 See the answer is 'mixed'. For every chivalrous and romantically inclined such as Daniel Priest (see below Part 4), or William Westwood alias Jacky Jacky (see below Part 5) there was a realistic view such as Thomas Jeffries, the four runaway convicts who in 1839 during a brutal armed burglary successively raped an elderly mother of 15 children (see R v Jackson (Sydney Herald (Sydney), 7 February 1840, 2; see also R v Summer and Others (The Australian (Sydney), 25 May 1839, 2); J Lynch who killed nine people in New South Wales in the early 1840s including a young girl with an axe and strangled a dog with his bare hands (see McQueen, above n 103, 137). This mixed reality of bushrangers is supported by contemporary authors. See, eg, Bonwick, above n 16, 13. See further Jill Brown, Bushrangers: Heroes, Villains or Villains? (Kangaroo Press, 2003); Edgar Penny, Bushrangers—Heroes or Villains? The Truth about Australia's Wild Colonial Boys (Travers Enterprises, 1988).
viewed by the colonial authorities, as a ‘formidable threat’. Even Hirst acknowledges that ‘the threat to the colony’s peace came not from large-scale rebellion but from thieves runaways and bushrangers who had no thought of rebellion but whose activities if allowed to go unchecked would have led to crippling disorder and perhaps have created the circumstances in which rebellion was more likely.’

The threat posed by bushrangers during the period from 1824 to 1856 (and indeed later) was very real. The ‘awful brutality’ and ‘murderous exploits’ of the bushrangers posed a major and recurring threat to law and order throughout not only the early colonial period but well into the second half of the 1800s. Bushrangers were regarded as more than mere outlaws and on more than one occasion represented a real menace to the entire social order in colonial society. In Tasmania they became a real ‘social force’. One columnist in 1826 spoke of the ‘detestable and lawless banditti, whose outrages are now of a character threatening the most serious consequences’. Indeed, until 1826, the bushrangers’ long ‘predatory career’ in Tasmania had threatened the ‘most serious consequences’ to ‘the best interests of this infant Colony’. The settlers and officials were sure the convict population was ready to rise and join the bushrangers, consigning Van Diemen’s Land to anarchy. It has been argued that the fears held as to the extent of the threat posed by bushrangers to Tasmania ‘is not a 19th century hyperbole’. As one Tasmanian columnist in 1843 declared:

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

Bushrangers, the Exercise of Mercy and the ‘Last Penalty of the Law’

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

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

But the activities of the bushrangers in New South Wales, as in Tasmania, extended beyond their challenge to law and order or threat to the livelihoods of certain sectors of society. Even when the worst of the bushrangers had been suppressed in Tasmania, in New South Wales the bandits continued to pillage and present their threats to the law, tempting convicts and awakening the fears of their masters that chains were made to be broken. Similar fears remained in Tasmania.

Indeed, with the influx of many convicts from Norfolk Island to Tasmania, such fears were still being expressed in Tasmania as late as the 1850s.

Bushrangers proved a major and recurring threat to the maintenance of colonial law, whether on the level of individual law-breaking or to more general threats to order, until well into the second half of the 19th century in both Tasmania and New South Wales. Bryne notes that although...
The death penalty was perceived as necessary to counter the acute threat (even if objectively not entirely justified) presented by bushrangers. This reasoning can be seen in the salutary fates of many convicts turned bushrangers in both Tasmania and New South Wales during this period, who were refused mercy and hanged for their crimes. Such bushrangers who met the 'extreme sentence of the law' included such obvious candidates as Thomas Jeffries, 'that monster in human shape' whose catalogue of crimes included the murder of a police officer and the kidnap and rape of a mother and the murder of her five month old son by hushing his head against a tree. John Lynch, 'that most dreadful of years on the Bench (see ibid); see also 'Execution', Launceston Examiner (Launceston), 25 April 1846, 16; 'The Execution', Cornwall Chronicle (Launceston), 29 April 1846, 377.

See, eg, R v Holmes and Others [1828] NSW Suc 106 (The Australian Sydney, 16 December 1828, 3; Sydney Gazette (Sydney), 15 December 1828, 3; see also 'Execution', The Australian Sydney, 23 December 1828, 3) (three escaped convicts executed for using the servants as 'human shields' and robbing the dwelling of a settler and putting the occupants in bodily fear); R v Smyth and Smith [1832] NSW Suc C 55 (Sydney Monitor (Sydney), 11 August 1832, 4) (both offenders were hanged for robbery, Troy remarking that he would rather die than spend the rest of his life in chains in Norfolk Island; see 'Execution', Sydney Herald (Sydney), 20 August 1832, 3-4); R v Crawford Sydney Herald (Sydney), 8 November 1832, 2) (mercy refused for a robbery of the 'greatest atrocity' (ibid) of a man out with his aged mother; see 'Execution', Sydney Gazette (Sydney), 8 November 1832, 2); R v Beard and Richardson [1832] NSW Suc 73 (Sydney Gazette (Sydney), 3 August 1833, 2-3) (the conduct of two escaped convicts 'had been of the most lawless and aggregrated nature; it had been one continued round of plunder and robbery, until they had become the terror of the settlers in the district where they had carried on their depredations' (ibid), and both were executed for highway robbery (see 'Execution', The Australian Sydney, 9 August 1835, 2); R v Mulligan and Harrop [1834] NSW Suc 87 (Sydney Monitor (Sydney), 14 August 1835, 2) (both convicted of highway robbery and hanged; see 'Execution', The Australian Sydney, 12 September 1834, 2); R v Murphy and Doyle (Sydney Herald (Sydney), 7 August 1834, 2; Sydney Gazette (Sydney), 5 August 1834, 3 (trial); Sydney Monitor (Sydney), 8 August 1834, 2) (trials of a further two escapees (ibid) of 'a highway robbery...under circumstances of great atrocity' (ibid) and executed; see also 'Execution', The Australian Sydney, 12 September 1834, 2), R v Zola and Cuffe (The Australian Sydney), 16 February 1838, 2; Sydney Gazette (Sydney), 17 February 1838, 2 (trial); Sydney Gazette (Sydney), 27 February 1838, 2; Sydney Herald (Sydney), 26 February 1838, 2 (sentence) (armed robbery by two escaped convicts of a dwelling with considerable violence' (ibid), who were hanged at the scene of their crimes; see 'Execution', Sydney Gazette (Sydney), 20 March 1838, 2); R v Whitton The Australian Sydney, 25 February 1840, 2; Sydney Herald (Sydney), 26 February 1840, 2; Sydney Gazette (Sydney), 8 February 1841, 2; Australian Chronicle, 25 February 1841, 2-3; Australian Monitor, 25 February 1841, 2-3; The Australian Sydney, 25 February 1841, 2; Sydney Gazette (Sydney), 27 February 1841, 2) (six escaped convicts and prolific bushrangers were hanged, the Chief Justice declaring that it was not to be tolerated to allow such crimes to be committed in the colony and that they were hanged at the scene of their crimes and left for the disposal, in part, of the inhabitants with impunity, and setting the laws of God and man at defiance' (Sydney Herald (Sydney), 25 February 1841, 3; see also 'Execution', Monitor, 17 March 1841, 2; 'Execution', Australian Chronicle, 18 March 1841, 2).
murderers', whose many crimes showed a "thirst for human blood...unparalleled in the annals of history", and all but one of a gang of five runaway convicts who during a brutal armed robbery in 1839 of a homestead at night, successively raped an elderly mother of 15 children, a Mrs Hamlin (a case noted by the Chief Justice as 'a mere tragic or outrageous scene he [the judge] had never heard described, even in this country of crime').

However, other less obvious culprits were also spared the death penalty. James Bowtell, an escaped convict, 'as much fool as knave,' who acted without any great violence in robbing a gentleman's servant out in a cart, was refused mercy. Matthew Mahide was hanged in 1848 for the 'black faced' robbery of a house at night despite the jury's recommendation of mercy on account of the lack of violence, public sympathy and opposition to the sentence of death being carried out.

Bushrangers, the Exercise of Mercy and the 'Last Penalty of the Law'

been noted at his hanging that he 'ought in the opinion of ninety nine out of every hundred of the spectators to have been respited.' The rationale of the death penalty towards bushrangers was summarised by the Hobart Town Courier at the execution in Tasmania in 1838 of three prolific bushrangers, 'the daring and desperate marauders', called Banks, Afterell and Regan. The Hobart Town Courier declared its approval of their grim fate and 'hoped that others in the same class in life, will pause to reflect upon the inevitable, fatal, and disgraceful termination of a bushranger's career.' The Launceston Advertiser similarly expressed its trust that 'the example of the untimely end of these men will have its due effect on the prison population.'

IV THE PREROGATIVE OF MERCY AND BUSHRANGERS

The need for punishment and deterrence, significant as they were in the exercise of the death penalty towards bushrangers in this period, should not obscure the importance of the prerogative of mercy. Mercy played a vital role in the first half of the 19th century in Britain in mitigating the effects of capital punishment. Similarly, the judicious exercise of the prerogative of mercy by the Governor and the Executive Council in the

133 'Berima', Sydney Herald (Sydney), 2 May 1842, 2.
134 'The Berima and Mt Victoria Murderers', Sydney Gazette (Sydney), 1 May 1842, 2. Lynch murdered at least nine people in New South Wales in the early 1840s including a young girl with an axe and strangled a dog with his bare hands. See ibid, 'Berima', Sydney Herald (Sydney), 2 May 1842, 2.
135 See R v Summer and Others (Sydney Herald (Sydney), 3 May 1839, 2; Sydney Gazette (Sydney), 4 May 1839, 3; The Colonial Times (Sydney), 4 May 1839, 3 (trial); Sydney Monitor (Sydney), 20 May 1839, 2; The Australian (Sydney), 21 May 1839, 2; Sydney Herald (Sydney), 20 May 1839, 2 (sentence). See also A Settler, 'Bushrangers', Sydney Herald (Sydney), 1 February 1839, 2; 'Execution', The Colonial Times, 19 June 1839, 2; 'Execution', Sydney Gazette (Sydney), 22 June 1839, 2.
136 Sydney Herald (Sydney), 20 May 1839, 2.
137 Colonial Times (Hobart), 14 March 1843, 3.
138 Executive Council Minutes, Tasmania, 4 September 1847. See further R v Bowtell (Colonial Times (Hobart), 25 April 1843, 2; The Courier (Hobart), 28 April 1843, 2). Montagu J declared at trial that 'if ever there was a case that called for the execution of the law, this was that case' (Colonial Times (Hobart), 25 April 1843, 2) and there was no hope of mercy as 'there were so many men out in the bush, and armed, that in the present emergency of the colony his case became a very bad one' (The Courier (Hobart), 28 April 1843, 2). However, the public mood at Bowtell's fate is apparent from an observer at his execution who noted that 'it was evident that the unhappy man received a greater share of sympathy, from the less atrocious nature of his guilt, than is usually manifested on such occasions' ('Execution', The Courier (Hobart), 26 May 1843, 3). See also 'Kavringh', The Courier, 22 September 1843, 2; Colonial Times (Hobart), 31 October 1843, 3; A Settler, Letter to Editor, The Courier (Hobart), 29 October 1843, 3; Davis, above n 1, 38.
139 Executive Council Minutes, Tasmania, 24 October 1848. The Council was unwilling to exercise mercy on account of the perceived gravity of Mahide's crime. See further R v Mahide (Launceston Examiner (Launceston), 7 October 1848, 5; Cornwall Chronicle (Launceston), 7 October 1848, 73-75); 'Approaching Execution', Cornwall Chronicle (Launceston), 4 November 1848, 139; 'The Recommendation of a Jury', Cornwall Chronicle (Launceston), 4 November 1848, 4; 140 'The Execution', Cornwall Chronicle (Launceston), 8 November 1848, 148. It was noted, 'A scene of iniquity, a murder against oppression even, was the prevailing sentiment around the gallows' (ibid).
141 'The Bushrangers', Colonial Times (Hobart), 15 May 1838, 7. The crimes of the gang included the murder of a publican during an armed robbery at his hotel.
142 'Execution', Hobart Town Courier (Hobart), 22 June 1838, 3.
143 Launceston Advertiser (Launceston), 28 June 1838, 3. Though Banks was, unusually in this period as a bushranger, not a convict, Banks was the first native-born youth, of English parents, that had 'suffered an ignominious death by the halter' (see 'Execution', Hobart Town Courier (Hobart), 22 June 1838, 3).
144 In the period 1800 to 1834, there were 29,968 death sentences in England and 523 were hung for murder and 2135 for other crimes and 27,132 (over 90%) were reprieved. In the period 1835 to 1864 there were 3014 death sentences and 336 were hanged for murder and 27 for other crimes and 2631 (over 90%) were reprieved. In the period 1826 to 1833 of the 11,403, death sentences imposed in England, only 514 (4.54%) were carried out. Of the 217 offenders sentenced to death for forgery in the seven years leading up to 1830 only 24 or about 9% were hanged. See Colonial Times (Hobart), 8 January 1830, 2.
145 A detailed overview of the practical operation of the prerogative of mercy in colonial Australia from 1824 to 1856 is beyond the scope of this article. In brief, the power was exercised in colonial Australia during the period from 1824 until responsible government in the 1850s on behalf of the British monarch by the Governor in all but cases of treason and murder (where only the monarch could make the ultimate decision though the Governor’s recommendations in practice were usually followed). The Governor acted on the advice of the colony’s Executive Council which comprised various colonial officials (though in the case of Marcus Currongh in 1843 (see below the discussion in Part 5), the Governor was not bound to accept the views of the Executive Council). The Governor and Executive Council also paid close regard to any view of Chief Justice or trial judge, whether they were a member of the Court or not. See further Piatto and Miles, above n 9, 10-17. The courts too, had some discretion when passing sentence for a capital offence, to
The University of Tasmania Law Review

Vol 32 No 2 2013

Australian colonies spared many, if not the majority, of capital offenders, from the death penalty.185 Mercy was considered seriously, even for offenders viewed as ‘beyond the pale’ in colonial society. It was far from inevitable that the death penalty would be visited upon such offenders, even in a society seemingly beset by crime and criminals. As Hirst notes, ‘great care was taken in the choice of those to be saved.’186

The most intractable convicts and mutineers, or an Aboriginal defendant convicted of the murder187 of a white victim might be deemed

enter a sentence of ‘death recorded’ for all but the most serious offences of murder and treason, where the judge deemed the convicted a ‘fit and proper’ person for the exercise of judicial mercy. See Judgment of Death Act 1833 (4 Geo IV, c 4) s 2. The effect of a sentence of ‘death recorded’ was the same as if judgment of death had been ordered, and the offender reprieved with a lesser, but usually still severe, penal sentence.188

The number of capital offenders in the colonies reprieved from the gallows is significant. Castle notes that of the 1396 sentences of death passed in New South Wales during the period of his study from 1826 to 1836, only 362 were carried into effect. See Castle (2003), above in n 12, 43, 64-63.

Hirst, above n 66, 114. It must be said that the usual alternative to the gallows of transportation, often for life, to a secondary place of punishment such as Norfolk Island, Port Arthur or Macquarie Harbour, was for many convicts an unsatisfactory alternative. As a leading secondary place of punishment, Norfolk Island was always intended to be an ‘extreme punishment short of death’ (ibid, 93). The grim nature of such secondary places of punishment was borne out by the regular complaints by convicts, published in periodical and religious matter preparatory to an early release and this is borne out by a review of the cases tried in the period 1788-1855. See B Bridges, ‘The Aborigines and the Law: New South Wales 1788-1855’ (1970) 4 Teaching History 40, 52. Strange notes that ‘in most cases, where Aboriginal men were convicted of capital crimes against whites, they rioted or murdered the magistrates or soldiers and white rescuers’ (Carolyn Strange, ‘Discriminatory Justice: Political Culture and the Death Penalty in New South Wales and Ontario, 1800-1920’ in Strange, above n 5, 139, 138).


See, eg, R v Ryan and Others [1832] NSWHCA 95 (Sydney Monitor, 19 December 1832, 1-2). A verdict was returned of no evidence in a murder case against McIntyre. See The Sydney Monitor, 30 October 1832, 1, for a report of the execution of a man named Smith who was hanged for murder.

See, eg, R v Hall [1830] NSWHCA 138 (Sydney Monitor, 26 November 1840, 2). See also the reprieve and release of an Aboriginal defendant called Make-I-Light who had been convicted of the murder of a white man and sentenced to death with ‘no hope of mercy’ (see R v Make-I-Light [1831] NSWHCA 29 (Newcastle Bay Courier, 15 November 1831, 2-3)) ‘in consequence of some doubt of the sufficiency of the evidence of identity’ (see ‘The Aboriginal Make-I-Light’, Newcastle Bay Courier, 22 May 1832, 3).

Even the most brutal murderers189 and those bushrangers ‘who were steeped neck-deep in violence – of murder and crime of the most atrocious dye’190 were not beyond hope of reprieve. Different conceptions of, and justifications for, mercy were offered in different cases. The arguments about the prerogative of mercy to bushrangers highlight the range of arguments and how seriously mercy was taken in colonial society.

Even where the offender was hanged, the issue of mercy was still seriously considered. The Chief Justice in sentencing in 1840 the bushrangers convicted of the brutal armed robbery of a homestead when Mrs Hamlin had been gang raped, assured the defendants that their protestations of innocence would be seriously investigated and if anything could be discovered in their favour, it would be taken advantage of.191 A respite was granted whilst their claims of an alibi for the crimes were investigated and found to be baseless before their sentences of death were carried out.192 One member of the gang called Jackson was spared from sharing the fate of his accomplices as, whilst he had taken part in the

1851, 2-3) ‘in consequence of some doubt of the sufficiency of the evidence of identity’ (see ‘The Aboriginal Make-I-Light’, Morpeth Bay Courier, 22 May 1832, 3).

185 It has been suggested that the exercise of mercy ‘took much of the sting out of major sentences in that a significant proportion of capital sentences imposed on natives were commuted to transportation which in effect often becomes a term for Cockatoo or Goat Island’ (ibid) (20 December 1806). This was recorded by a prison keeper (cited in Sydney Monitor, 19 November 1840, 2). See also the reprieve and release of an Aboriginal defendant called Make-I-Light who had been convicted of the murder of a white man and sentenced to death with ‘no hope of mercy’ (see R v Make-I-Light [1831] NSWHCA 29 (Newcastle Bay Courier, 15 November 1831, 2-3)) ‘in consequence of some doubt of the sufficiency of the evidence of identity’ (see ‘The Aboriginal Make-I-Light’, Newcastle Bay Courier, 22 May 1832, 3).

Bushrangers, the Exercise of Mercy and the ‘Last Penalty of the Law’
robery, he had refrained from joining in the rape and but for his intervention, both her life and the other occupants of the homestead "would have fallen a sacrifice to the brutality of the others." The three Tasmanian bushrangers; Banks, Attrell and Regan; despite the gravity of their crimes, attracted sympathy and calls for mercy. The Governor only upheld their execution after lengthy debate and division as to their fate within the Executive Council over two sessions (including a call from the Senior Military Officer for mercy who made no secret of his view that the death penalty served neither deterrence nor punishment). A fourth member of the gang, an escaped convict called Davies, was reprieved by the Governor after careful consideration as had been wrongfully detained at the convict chain gang at which he had escaped from prior to bushranging.

It was far from inevitable that even bushrangers convicted of capital crimes would receive the "last penalty of the law." This is illustrated as early as 1825 in New South Wales in the cases of Watson and Golding, two escaped convicts, who were convicted of separate highway robberies and sentenced to death. Forbes CJ hinted that execution might be appropriate, since this crime had been so frequent lately in the Colony.

157 R v Jackson (The Colonist, 8 February 1840, 2; see also Sydney Herald (Sydney), 7 February 1840, 2.
158 See Editorial, Colonial Times (Hobart), 19 June 1838, 7; Hobart Town Courier (Hobart), 29 June 1838, 24; "The Convict Eby! The Public Interest Requires that his Life be spared", Cornwall Chronicle (Launceston), 28 July 1838, 120. Regan's assertion that his harsh treatment as a convict had compelled him to escape and resort to bushranging received particular sympathy. See ibid. This link was widely acknowledged in contemporary accounts. See, eg, Lachlan Macquarie in an 1823 letter to the British Colonial Secretary quoted by Robert Travers, The Tasmanians: The Story of a Doomed Race (Cassell Australia, 1963) 105; Travers, above n 40, 43; "Nixon Discipline at Port Arthur", Cornwall Chronicle (Launceston), 26 April 1844, 2; "Bushranging", Cornwall Chronicle (Launceston), 26 January 1856, 3.
159 Executive Council Minutes, Tasmania, 15 June 1838 and 19 June 1838.
160 Executive Council Minutes, Tasmania, 15 June 1838. The Senior Military Officer made these views plain on other occasions. See, eg, Executive Council Minutes, Tasmania, 30 October 1837. Such official misgivings as to the rationality of the death penalty were not unique. In response to Governor Darling's report of the criminal proceedings and punishments for 1825 to 1827, the British Colonial Secretary told Darling that he did not believe that an increase in executions decreases crime. "It is for the gravest crimes and to those only that the punishment of death is applicable; and I would seriously impress upon you the responsibility incurred by any deprivation of human life, which is not demanded by a clear and paramount necessity." The clear implication was that the Governor had allowed too many criminals to be hanged for minor offences. See Historical Records of Australia, Series 1, Vol. 14, 497-498, and 27 on the Governor's initial report of the statistics. See also the editor's note at: <http://www.law.mq.edu.au/research/colonial_case_law/tas/war/case_index/1828/v_curtis_and_nurragh/).
161 Executive Council Minutes, Tasmania, 19 June 1838; Colonial Times (Hobart), 26 June 1838, 7.
162 "Execution", Cornwall Chronicle (Launceston), 4 November 1854.
163 R v Watson; R v Golding (Sydney Gazette (Sydney), 5 June 1825, 3.

Bushrangers, the Exercise of Mercy and the 'Last Penalty of the Law'

However, Governor Brisbane elected to spare both men from execution. He explained that he doubted the necessity or even the logic of the death penalty in such a case:

... that I am induced to show Mercy to both in Pursuance of the principle which had hitherto guided me in the Extension of Mercy in such Cases, as it does not appear by your Letter, or from your notes, that either of the Prisoners actual committed Violence with the Act of Robbery; and under the Impression that the sending of these Prisoners to Norfolk Island, will as effectually prevent their future Crimes or Injury to Society, as their actual Removal from the World. This Conviction combined with the opinion that Executions do not deter the Commission of Crimes have weighed with me in extending Clemency towards these two Individuals. Here, mercy was conceived partly as a question of desert, but also raised issues questions about the efficacy of the death penalty as deterrence. The mercy shown in Golding and Watson was not unusual. Other bushrangers were similarly reprieved in this period in both New South Wales and Tasmania.

164 Sydney Gazette (Sydney), 30 June 1825, 3.
165 Chief Justice's Letter Book, Archives Office of New South Wales, 466/651, 37-38. The failure of public hangings as a deterrent is shown by the fact that in Tasmania, as in England, during crimes were committed at the very foot of the gallows. See Davis, above n 2, 3.
166 See, eg, R v Byrne, Wright and Murphy [1825] NSWSCPC 28 (Sydney Gazette (Sydney), 30 June 1825, 3) who were convicted for maliciously shooting at the Chief Constable of Liverpool and reprieved and sent to Norfolk Island (see Mitchell Library document A 744 Letters from Governor Brisbane to Forbes CJ, 30 June 1825); R v Wood and Wilson (Sydney Herald (Sydney), 5 November 1822, 2) (two escaped convicts were reprieved for the robbery of a dwelling and sent to Norfolk Island for 14 years despite being advised by the judge "it was one of those cases in which the utmost penalty of the law must be carried into effect") (see ibid). Wilson was later hanged in Tasmania having again escaped and committed further crimes as a bushranger; see below n 270; R v Butler and Others (Sydney Herald (Sydney), 7 February 1833, 3) (three convicts who had committed further crimes in the Colony and then escaped from a chain gang and committed a highway robbery with 'considerable violence' were reprieved and sent to Norfolk Island for 14 years) (see Sydney Gazette (Sydney), 21 March 1833, 3); despite the Chief Justice's view that both these were "crime and not common spoiling" (see Sydney Gazette (Sydney), 28 February 1833, 2; Sydney Herald (Sydney), 25 February 1833, 2); R v Bosler (Sydney Gazette (Sydney), 10 February 1838, 3) (sentence of death recorded for highway robbery on basis of transportation for life to Norfolk Island, the first two to be so treated, except, despite the offender having committed the crime after his prompt escape from a chain gang where he had been sent after having been previously reprieved from the death penalty for an earlier highway robbery (see The Australian (Sydney), 27 February 1838, 2; Sydney Gazette (Sydney), 9 February 1838, 3), 25 February 1833, 2) (see ibid).
Even the apparent worst of escaped convicts and bushrangers might receive the benefit of mercy. Six convicts\(^{168}\) for example, escaped from a convict chain gang near Bathurst in 1834, seizing the sentry's musket in the process. The gang then proceeded to the house of David Ramsay and put a servant in bodily fear and 'robbed the place of everything' before proceeding to the nearby house of a Captain King RN and robbing him of 'everything movable'.\(^{169}\) The 'gang of villains' was reported to have committed 'numerous depredations' on other persons in the area, including a Captain Scarwell.\(^{170}\) The defendants were eventually arrested and charged with robbing Ramsay's house and putting his servant in bodily fear. All were convicted at trial.\(^{171}\)

The Chief Justice in passing sentence of death upon all but Johnson (who had escaped from custody the day before sentence) observed the defendants had all been found guilty of 'an atrocious robbery' and it was unnecessary for him to enter into the circumstances attending the

July 1829, 2); William Newman (replied for robbery of a house on account of the offender's good character adduced by his master and co-operation upon arrest; see Executive Council Minutes, 11 May 1830; William Stewart (replied for robbery of a house and a violent armed attack upon his former master's house (though this offence was not charged) whose service he and his accomplices had absconded from, or account of the former master's grudging acceptance that Stewart had planned a lesser role in the attack upon his house; see Launceston Examiner (Launceston), 21 June 1830, 5; Executive Council Minutes, Tasmania, 24 and 26 June 1830; R v Rares (Launceston Advertiser (Launceston), 16 June 1830, 3) (death sentence for robbery committed to transportation for life on account of offender's youth, suffering and 'forbearance' during the crime; see Ibid.; Executive Council Minutes, Tasmania, 22 June 1830); R v Yarrow, Hobley and Eastcote (Colonial Times (Hobart), 2 February 1841, 2) (three escaped convicts from Port Arthur sentenced to death 'without any hopes of a reprieve' (Ibid) were spared following calls for mercy; see Editorial, The Courier, 9 February 1841 2; Editorial, Launceston Advertiser (Launceston), 18 February 1841, 2); John Reilly (sentence commuted to transportation for life owing to lack of violence during robbery; see Executive Council Minutes, Tasmania, 21 December 1841, 1); Henry Smart, R v Smart and Powell (Launceston, 8 April 1846, 6; Cornwall Chronicle (Launceston), 11 April 1846, 280-281(trial); Cornwall Chronicle (Launceston), 11 April 1846, 281, Launceston Examiner (Launceston), 11 April 1846, 6 (sentence) (replied from sentence of death passed without hope of mercy for armed robberies of houses in the middle of Launceston, 'outrages of so bad a character' as not had been seen by the Chief Justice during his 20 years on the Bench (see Ibid); R v Brewer and Quinn (Colonial Times (Hobart), 22 October 1853, 3); Cornwall Chronicle (Launceston), 22 October 1853, 3 (sentence)) (two bushrangers despite Brewer's notoriety as an escaped convict and past offender were replied for armed robbery and were transported for 15 years to Norfolk Island following appeals for mercy from the jury and the trial judge on account of the lack of violence used in the crime and Quinn's youth and unfortunate background; see Executive Council Minutes, Tasmania, 29 October 1853).

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

Sydney Gazette (Sydney), 9 January 1834, 2.

Sydney Herald (Sydney), 24 February 1834, 18.

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

Bushrangers, the Exercise of Mercy and the ‘Last Penalty of the Law’

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

Underlying the Chief Justice’s statements was an older religious assumption that mercy offered an opportunity for penitence and redemption.\(^{174}\) For the Chief Justice, the failure of the offenders to have demonstrated redemption despite earlier mercy precluded the possibility of any more mercy. Their failure demonstrated that they did not deserve mercy. The Chief Justice advised the prisoners ‘to seek for that mercy at a higher tribunal which I am not warranted to extend to you here.’\(^{175}\)

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

168 Ibid.
169 Ibid.
170 Ibid.
171 Ibid.
172 Ibid.
173 Ibid.
175 Sydney Gazette (Sydney), 27 February 1834, 2. See also Sydney Herald (Sydney), 27 February 1834, 2.
176 Sydney Gazette (Sydney), 27 February 1834, 2.
177 Sydney Herald (Sydney), 24 February 1834, 28.
178 See R v Hancock (Sydney Gazette (Sydney), 3 June 1834, 3).
179 Sydney Gazette (Sydney), 5 June 1834, 2.
remains only with me to pass upon you the sentence of the law.180 However, even Hancock was subsequently reprieved and his sentence commuted for transportation for life to Norfolk Island.181

Similar mercy might be extended to escaped convicts and bushrangers in Tasmania despite the undoubted gravity of their crimes and the strong views of the trial judge.182 An example of the willingness to apply mercy in such a case is presented by Daniel Priest in 1845. Priest had been transported for life in 1835 from England. He escaped and became a prolific bushranger and eluded apprehension for several years and 'had been for so long a period the terror of the whole colony'.183 There were numerous offers of a pardon184 and later a reward of 50 pounds for procuring his recapture.185 Yet owing to his lack of wanton violence and the comparative mildness he displayed to his victims and chivalry to women,186 Priest was branded ‘The Friendly Bushranger’187 (which would seem to be misnomer if there ever was one).

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

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

... a shocking outrage not to be tolerated in any civilised country. I am aware of the merciful leniency with which the Government has have acted, in sparing the lives of men convicted of similar and more aggravated offences.192 But I do not think and cannot hold out to you the slightest hope of such result in your case. You have acquired a notoriety throughout the Colony, scarcely equalled, and although I have made no enquiry into other cases of robbery alleged against you, I cannot but look upon you as a man who has for years carrying on a lawless system of plunder, to the great terror of the colonists. If you have not actually resorted to personal violence, you have carried arms and uttered threats by which people have through fear, suffered their property to be taken from before their very eyes. I cannot conceive, whatever disposition the government of the present day may have to extend mercy to persons of your description, not having attempted life or used actual violence as in the case of which you stand convicted, I cannot conceive that they will extend mercy to a person, who, like you, is known to have been a general terror – to have outraged all laws – for years eluded all attempts at apprehension, and lived only by that system of lawless robbery to which this Colony is particularly exposed. It is my duty to warn you solemnly; I feel your life will not be spared – and I sincerely hope you will from this moment make up your mind that the sentence I am about to pass will be carried into execution.193

Despite the strong views of the Chief Justice there was almost universal sympathy amongst both the public and press for Priest. The Launceston Examiner declared its deep regret if in the case of ‘this unhappy man’, the Governor ‘should deviate from those maxims he asserted in a case in which far more malice was displayed, and a much more cruel disposition indicated’.194 The Launceston Examiner noted Priest’s many crimes could not fairly be held against him as, however, many crimes he had committed were

180 Ibid.
181 See Sydney Herald (Sydney), 31 July 1834, 3; Sydney Gazette (Sydney), 31 July 1834, 2.
182 As bushranging was largely absent from New South Wales for much of the 1840s until it enjoyed an unwarranted resurgence with the Gold Rushes, Tasmania appears to have had the lion share of bushranging compared with other Colonies in the 1840s.
183 Cornwall Chronicle (Launceston), 11 October 1845, 233. See also ‘Surrender of Priest’, Launceston Examiner (Launceston), 24 September 1845, 3; Chris Loring, Compelled to Tiers (Regal Press, 1996).
184 See, eg, Colonial Times (Hobart), 25 April 1843, 4; Cornwall Chronicle (Launceston), 19 August 1843, 4.
185 See, eg, The Courier, 22 May 1845, 2.
186 See, eg, ‘Further Particulars of Priest’, The Courier, 27 September 1845, 2; ‘Priest should not be Executed’, Cornwall Chronicle (Launceston), 22 October 1845, 263; Colonial Times (Hobart), 28 October 1845, 3.
188 Cornwall Chronicle (Launceston), 11 October 1845, 233.
189 See R v Priest (Cornwall Chronicle (Launceston), 11 October 1845, 235-236; Launceston Examiner (Launceston), 11 October 1845, 6; Launceston Advertiser (Launceston), 16 October 1845, 2.
190 Given the offence was capital, the prosecution would often not proceed with all the offences as it was seen as unnecessary and a waste of limited public funds.
191 Cornwall Chronicle (Launceston), 11 October 1845, 2. See also Launceston Examiner (Launceston), 13 October 1845, 6.
192 This was a far from subtle reference to the reprieve of Cash and Kavanaugh in 1843. See further below Part 5.
193 Launceston Examiner (Launceston), 11 October 1845, 6. See also Cornwall Chronicle (Launceston), 15 October 1845, 245; Launceston Advertiser (Launceston), 16 October 1845, 2. Priest was reported as unmoved at this address.
committed, he had pleaded guilty only to one.\textsuperscript{195} The fact he was an escaped convict and had eluded pursuit and recapture for so long could hardly count against him. ‘Self-preservation is the dictate of nature, and can constitute no new feature of criminality.’\textsuperscript{196} The Examiner thought ‘that the execution of the sentence is to be deprecated on every ground’ and respectfully urged on the Governor the following reasons for a commutation of the ‘fearful sentence’:\textsuperscript{197}

First, there was nothing in the state of the Colony which demands sanguinary punishments. There are crimes many; but fewer can most men expect among thousands of prisoners. With few exceptions the injury to society is the loss of property, and, certainly, apprehensions of personal violence. But the convicts at large have generally avoided whatever might jeopardise their lives in the event of discovery: a feeling which has been deemed the best security against atrocious and useless crimes. Instances have frequently occurred where the criminal, knowing that detection would forfeit his life, has endeavoured to secure himself by murder. The dead cannot give evidence. Such is the apology of wanton cruelty. It therefore appears most impolitic to punish with extreme severity those who, from whatever cause, have carefully avoided acts which might compromise their own lives when brought to justice. Priest having surrendered himself voluntarily, by that act mitigates, rather than aggravates, his case... Had he been sure of death, his course might have been different, and probably desperate. The extreme sentence of the law has been commuted in innumerable instances while Priest was at large: and however just it might be to make examples by a more rigorous course, it seems to us that the moral efficacy of such visitations depend on their concurrence with popular feeling – which will never allow that Priest, when compared with others, deserves to die.\textsuperscript{198}

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

We question the propriety, and utility of increasing the punishment of death on account of local circumstances: already the frequency of executions has rendered them a mockery and a sport to all but the victims. In a town of equal size in England, the ignominious death of a fellow-creature would occasion the deepest grief and sorrow; to us it is nothing but pastime – an excitement in which at best, perhaps, pain and satisfaction are blended together. The blood of murderers, however

\textsuperscript{195} This was one of the reasons given by the Governor in 1843 for controversially sparing Lawrence Kavanagh. See ‘Midland Agricultural Association’, The Courier, 13 October 1843, 2-3. See further below Part 5.
\textsuperscript{196} ‘Punishment of Death – Priest’, Launceston Examiner (Launceston), 25 October 1845, 2.
\textsuperscript{197} Ibid.
\textsuperscript{198} Ibid.

Bushrangers, the Exercise of Mercy and the ‘Last Penalty of the Law’

nongeous, may be due to Divine legislation: but let not the government aggravate the dangers of the colony, and multiply the occasions by which humane sensibilities are blunted, beyond such as are absolutely demanded by indisputable necessity.\textsuperscript{199}

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

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

Much of the arguments made by the Cornwall Chronicle were in terms of justice as desert. It was argued that he had not used violence, and his actions were compared to other offenders who had used more violence

\textsuperscript{199} Ibid.
\textsuperscript{200} ‘Priest should not be Executed’, Cornwall Chronicle (Launceston), 22 October 1845, 263. See also Colonial Times (Hobart), 28 October 1845, 3.
\textsuperscript{201} ‘Priest should not be Executed’, Cornwall Chronicle (Launceston), 22 October 1845, 263.
\textsuperscript{202} ‘Priest should not be Executed’, Cornwall Chronicle (Launceston), 22 October 1845, 263. See also similar support from Colonial Times (Hobart), 28 October 1845, 3.
but had been pardoned. However, the concluding arguments extended to the notion of mercy as an undeserved gift. It did not matter that there those 'ten times more guilty having been pardoned', rather the Governor should extend mercy to Priest.

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

Further petitions imploring mercy to the Governor on Priest's behalf were submitted by several clergymen and a prominent official called Theodore Bartley. The *Launceston Examiner* had 'no doubt' that the Governor would 'comply with the request so generally urged' and commute the sentence to transportation for life. The Executive Council decided in the face of such pressure to grant mercy. The Uner Sheriff, a Mr. Sams, wrote 'that his Excellency the Lieutenant-Governor has been pleased to accede to the prayer of the memorial, on the condition of transportation for life.' Priest's sentence was commuted to life imprisonment, the first ten to be spent on Norfolk Island.

---

204 *Launceston Examiner* (Launceston), 22 October 1845, 4.
205 'The Convicts under Sentence of Death', *Cornwall Chronicle* (Launceston), 29 October 1845, 286.
206 Ibid 286-287.
207 *Cornwall Chronicle* (Launceston), 25 October 1845, 277.
208 Ibid.
209 The Revs. Hastie (Presbyterian), Butler (Roman Catholic), West and Price (Independent) and other clergymen were noted as the signatories.
210 'Priest', *Launceston Examiner* (Launceston), 29 October 1845, 3.
211 Ibid.
212 'The Memorial in Favour of Priest', *Launceston Examiner* (Launceston), 1 November 1845, 4.
213 'Daniel Priest', *Launceston Examiner* (Launceston), 1 November 1845, 4.
214 'Priest', *Launceston Examiner* (Launceston), 29 October 1845, 4. See also 'A Few Words to Bushrangers', *Cornwall Chronicle* (Launceston), 5 November 1845, 203.
215 'Daniel Priest's Life is Spared', *Cornwall Chronicle* (Launceston), 29 October, 1845, 287.
216 See Martin Cash, *The Bushrager of Van Diemen's Land in 1843-1844: A Personal Narrative of his Exploits in the Bush and his Experiences at Port Arthur and Norfolk Island* (J. Wraight, 1911); Frank Clinic, Martin Cash: the last of the Tasmanian Bushrangers (Angus & Robertson, 1955).
217 See R. & Cavenagh and Others (Sydney Herald (Sydney), 13 April 1842, 2).
219 One robbery of the dwelling of a Captain Horton could hardly be categorized as a restrained crime.

Bushrangers, the Exercise of Mercy and the 'Last Penalty of the Law'

reprieve was greeted with approval. The *Launceston Examiner* declared that it was 'happy to announce' that Priest had been spared. The *Cornwall Chronicle* expressed 'much satisfaction' on behalf of the inhabitants of Launceston in applauding the Governor's 'prompt and humane' decision to accede to the public call and extend mercy to the 'unhappy criminal'.

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

An ever more striking example of the application of mercy to even the worst of bushrangers is presented by the case of Martin Cash and Laurence Kavanagh in 1843. Cash was a colourful convict. He had been transported for seven years from Ireland for purportedly firing at and injuring in the buttocks a man who was embracing Cash's mistress. After committing further crimes in Australia, he was sent to Tasmania and he escaped three times and ended up at Port Arthur. Kavanagh was a hardened offender and escaper who had previously been reprieved from the gallows more than once. He had only been transported to life to Tasmania in 1842 for shooting at the Colonial Secretary and a Captain Hunter when an escaped convict outside Sydney. On that occasion the Attorney-General at Kavanagh's trial had expressed his profound regret that that 'atrocious' offence no longer carried the death penalty in New South Wales.

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

In his initial comments to Cash, Montagu J assured him that he would reflect on Cash’s pleaded defence to the murder, but in ‘a brief and very feeling manner’ advised Cash that he could hold out to him no hope of mercy in this world...but to believe that the extreme sentence of the law would be speedily carried into effect. Cash insisted he had always been against the taking of human life and would never take life deliberately. He asserted that he had saved five lives in the bush and had prevented many murders and had never used violence against either man or woman (this claim has some justification). The judge replied that from all that he had read and heard of Cash this was true; but still, I cannot hold out any hope to you.

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

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

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

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

Despite the view of the Executive Council, Wilmott on 21 October 1843 defied his Council and took the lone decision to extend mercy to Kavanagh. The Governor gave two reasons to the Executive Council for his decision. First, because of the nature of the crime of which Kavanagh had been convicted. Under ordinary circumstances in England, the Governor noted, this crime did not carry the death penalty but rather transportation for a number of years, or at least life. Secondly, to execute Kavanagh for other ‘outrages’ for which he had never been arraigned, tried, heard in his defence or convicted by a jury the Governor reasoned was unjust and wrong. ‘[It] would be the exercise of a dangerous and unconstitutional power, and a like contempt to the first principle of Justice and the Law of Great Britain and Society.’ Kavanagh’s sentence was again (given his previous reprieves) committed to transportation for life (this time to Norfolk Island).

The Attorney-General subsequently advised that no further charges would be preferred against Kavanagh. Both of the Governor’s arguments were consistent with a notion of mercy as equity. The question of whether an offender deserved mercy revolved around comparisons with English punishments and what he had been convicted for. What punishment would an English offender have received? These were legalistic arguments as to mercy and an attempt by the Governor to assert and enact a rule of law as existed in Britain. Here, mercy was not seen as an expression of weakness but of the type of legal system the Governor believed the Colony could and should have. The Governor’s reasoning in

Kavanagh, as the Colonial Times observed, would ‘cause a great revolution in the administration of justice in the Colony’. As in Britain, ‘His Excellency conceives the offender shall be tried and convicted of every offence of him committed, or that Judge has no right to refer to any alleged misconduct of a convicted felon.’

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

Both Kavanagh and Cash’s escape from the death penalty proved contentious. One editor noted that the grounds for their respite prompted from ‘almost everyone we meet...the most anxious inquiries’. This was the third or fourth time that Kavanagh had been reprieved and he ‘appears to possess a sort of charmed life’.

Wilmott’s decision to spare Kavanagh (legally sound by modern standards as it was), and proved particularly controversial. The Courier, whilst expressing its qualified support for the Governor’s leniency, observed it would be falling in its duty to the people and Government ‘if we did not give expression to the general public feeling of surprise, not unmixed with openly expressed dissatisfaction, at a result with few, if any, seem to have entertained.’ The Courier observed that Kavanagh’s character was such that ‘it is our firm belief that the life of Kavanagh, thus spared for a time, will yet terminate in the

241 Colonial Times (Hobart), 31 October 1843, 3.
242 Ibid.
243 Launceston Advertiser (Launceston), 26 October 1843, 3. See also Hobart Town Advertiser, 24 October 1843.
244 Executive Council Minutes, Tasmania, 29 November 1844.
246 Cash and Kavanagh’, Colonial Times (Hobart), 26 September 1843, 3.
247 Ibid.
249 Kavanagh, The Courier, 22 September 1843, 2.
ignominious manner from which he has just escaped."210 One writer (also expressing support for the reprieve) acknowledged that he had heard 'great dissatisfaction' at Kavanaugh's reprieve and Cash's respite and that people were 'solely occupied with the dismal reflection' that the prisoners had escaped the gallows and 'the dread of the consequences likely to arise from the operation of such an example [of leniency] upon the minds of the prisoner population, and the insecurity created to life and property throughout the island.'211 Montagu J made no secret of his unease at Kavanaugh's reprieve.212 In a case in Launceston of four bushrangers convicted of the armed robbery of a hut a few days after Kavanaugh's reprieve,213 Montagu J noted that although under the existing state of the law the prisoners were liable to suffer death, he would merely pass sentences of death recorded as in light of Kavanaugh's recent reprieve, it was impossible to suppose that death would be visited for their crimes which he considered did not surpass those of Cash and Kavanaugh.214 This decision proved controversial.215 This provides a stark example of judicial desire for a legalistic emphasis upon certainty and consisency. Judges were concerned to reinstate law and order. Mercy was to be reduced to legal understandings – in this case – mercy was reduced to precedent. How had other offenders convicted of similar offences been punished?

Such was the controversy aroused by the fate of Cash and Kavanaugh that the Governor felt compelled to defend himself at a public speech at an Agricultural Show to outline his reasons for reprieve Kavanaugh.216 The Governor expressed his wish to dispel any erroneous impression made by the press reports of the case of both prisoners. First, in respect of Cash 'a

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

211 Humaneas, Letter to the Editor, The Courier, 29 September 1843, 3.

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

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

214 Ibid, 5.

215 See 'Midland Agricultural Association', The Courier, 13 October 1843, 2-3; See also 'Midland Agricultural Association', Colonial Times (Hobart), 17 October 1843, 3; Sydney Morning Herald (Sydney), 28 October 1843, 4.

216 'Midland Agricultural Association', The Courier, 13 October 1843, 2; See also 'Midland Agricultural Association', Colonial Times (Hobart), 17 October 1843, 3; Sydney Morning Herald (Sydney), 28 October 1843, 4. The 'candid and honourable' tone of the Governor's explanation was reported to have attracted 'a high degree of satisfaction' in the
The Governor was praised for his arguments about law and justice. The Launceston Advertiser, for example, noted that Kavanagh had only been sentenced for a single robbery and the Attorney-General had chosen, perhaps wrongly not to indict him for the most serious violence robbery of Captain Horton and it was wrong as an issue of basic principle to punish offenders for crimes that they had not been convicted of.

In the aftermath of Cash and Kavanagh it became increasingly commonplace for bushrangers in Tasmania to be reprieved on the basis that no warrant violence had been used in the commission of their crimes, whether by a sentence of death recorded or by the Executive Council (though the notion of an 'unnecessarily' or 'excessively' violent robbery was criticised as arbitrary and difficult to define in practice). It was argued that it was unfair and inconsistent to execute bushrangers for all but crimes accompanied by the most excessive or warrant violence after offenders as prolific as Cash and Kavanagh had been reprieved (though interior, even from those who disagreed with his decision (The Courier (Hobart), 20 October 1843, 2).

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

'A Little Political Omnium Gatherum', Launceston Advertiser (Launceston), 2 November 1843, 2.

See, eg, R v Skinner, Sullivan and Moore (Launceston Examiner (Launceston), 10 April 1844, 6 (no 'violent outrage'); R v Roberts and Price (Cornwall Chronicle (Launceston), 10 April 1844, 2; Launceston Examiner (Launceston), 10 April 1844, 1, 4; Launceston Advertiser (Launceston), 11 April 1844, 4 (Montagu J had 'no doubt' the prisoners' lives would be spared but noting it would have been different had the crime been committed at night time or with particular violence (ibid));

See, eg, R v Liddic, Jones and Dalton (Cornwall Chronicle (Launceston), 3 April 1844, 2 (ibid); Cornwall Chronicle (Launceston), 10 April 1844, 2; Launceston Examiner (Launceston), 10 April 1844, 6 (sentenced) (sentence of death passed without hope of mercy for armed robbery in flight of increasing crime and bushranging in the Colony but Montagu J noted the offenders had not acted with unnecessary cruelty and they were reprieved even though Jones had insisted he would rather hang than return to Port Arthur).

See also R v Driscoll and Flannigan (Colonial Times (Hobart), 21 January 1856, 3; Hobart Mercury (Hobart), 23 January 1856, 3) (sentence of death passed for robbery under arms but the judge assurred the jury that their strong recommendation of mercy in light of the offenders' restraint and lack of violence would be forwarded to the proper quarter and the Governor commuted the sentence for both to imprisonment at Port Arthur for five years, a lenient punishment for the period (see Cornwall Chronicle (Launceston), 23 February 1856, 3; Executive Council Minutes, Tasmania, 7 February 1856).

See, eg, 'Kavanagh', Launceston Examiner (Launceston), 21 October 1843, 3-4: Davies, above n 3, 39.

mercy was by no means inevitable in such cases). This reflects the dominance of the judicial conception of the legal concept of mercy, reducing mercy to certainty, consistency through a kind of doctrine of precedent.

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

Even the most prolific of offenders might benefit from this approach. William Westwood otherwise known as Jacky Jacky was a habitual escaped convict and prolific bushranger but he was known as the 'Gentleman Bushranger' for the restraint and politeness of his many crimes. Westwood was convicted in Tasmania in 1845 after escaping from Port Arthur of robbery under arms but Montagu J considered that the 'ends of justice' did not require Westwood to pay the ultimate price. The judge merely passed a sentence of death recorded. Montagu J noted that Westwood 'had conducted himself with great forbearance during his crime and furthermore (in another reference to Cash and Kavanagh) other far worse offenders than he had been reprieved. The reporter observed that Westwood 'came by the court with indifference, without bravado, he cived neither surprise nor emotion of any kind' at Montagu J's address. The Executive Council considered the case and after reading the judge's report, agreed to 'extend mercy'. Westwood was ordered to be transported 'beyond the seas for life.'

---

256 See eg, the controversial fate of George Whaley in 1834 and Matthew Mahide in 1848.
257 The Courier, 28 June 1844, 2.
258 Ibid.
259 Ibid.
261 R v Westwood (Colonial Times (Hobart), 5 September 1845, 3).
262 Ibid.
263 Ibid.
264 Executive Council Minutes, Tasmania, 20 September 1845.
265 Westwood later took a leading role in the convict revolt at Norfolk Island in 1846 that left four warders dead. Westwood was said to have personally killed two of them. Twelve
VI CONCLUSION: MERCY, THE ‘BRIGHTEST GEM THAT CAN ADORN THE ADMINISTRATION OF ANY RULER’

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

A wide range of factors could be significant in influencing the deliberations of the Governor and the Executive Council. The Council looked beyond ‘mercy’ and at the ‘justice’ of the particular offence and/or offender. They had regard to both the circumstances of the offence (such as the absence of violence or cruelty or chivalry to women (as in Priest), and the offender (such as the previous good character of the condemned prisoner), his or her personal circumstances whether the prisoner had previously received the benefit of a grant of mercy, and co-operation with the authorities. The Council, as in Priest, had regard to appeals from the victim of the offence or the position of the press; public opinion (typically in the form of public petitions as in Priest) and appeals from clergymen (as in Priest). Testimonies from employers and from members of the jury could also prove decisive. The Executive Council was prepared to have regard to major flaws in the fairness of the trial and doubts as to the strength of the prosecution’s case (especially if conveyed by the trial judge). Even the ‘hand of fate’ might intervene in a prisoner’s favour. In the absence of any

261 See Further Castle (2008), above n 12, 43-11.
262 Colonial Times (Hobart), 31 October 1845, 3; ‘Priest’, Launceston Examiner (Launceston), 29 October 1845, 4.
263 See, eg, ‘Petition for Mercy’, Cornwall Chronicle (Launceston), 25 October 1845, 277 (see also Davis, above n 3, 42-43); ‘The Receipt to the Convict Shepherd’, Midlands Mercury (Hobart), 11 April 1855, 25.
264 See, eg, R v McLeod (Colonial Times (Hobart), 14 May 1830, 2; Hobart Town Courter (Hobart), 9 May 1830, 3) sentence of death on a member of a gang of bushrangers for robbing a house was commuted to transportation for life owing to the representations made to both the trial judge and the Executive Council by his former master as to his good character. See ibid, Executive Council Minutes, Tasmania, 6 May 1830.
265 See, eg, R v Brewer and Quinn (Colonial Times (Hobart), 22 October 1853, 3; The Courier, 22 October 1853, 3 (trial); Cornwall Chronicle (Launceston), 26 October 1853, 3 (sentenced) where the jury not only recommended mercy with its verdict but wrote to the Governor (see Executive Council Minutes, Tasmania, 29 October 1852). See also John Reilly where the jury wrote to the trial judge successfully asking for mercy (see Executive Council Minutes, Tasmania, 21 December 1848).
266 See, eg, John McCubie who was condemned to death in 1855 for murder and was advised by Williams J ‘not to entertain the slightest hope of mercy’ (‘Murder’, Sydney Morning Herald (Sydney), 24 October 1855, 5). The proceedings were described as a ‘scandal of justice’ (“The Convict McCubie”, The Argus, 23 October 1855, 4) owing to the depression and ‘very severely criticised’ (“Victorian, South Australian Register, 27 October 1855, 3) conduct of the trial judge. See further ibid; ‘The Convict McCubie’, The Argus, 23 October 1855, 4; ‘The Convict McCubie’, The Argus, 23 October 1855, 5; ‘The Convict McCubie’, The Argus, 24 October 1855, 4; ‘Convict McCubie’, The Argus, 24 October 1855, 7, The accused was reprieved, see ibid.
267 See, eg, the reprieve granted to the four convicts condemned to death for the brutal murder of a free settler called McIntyre after strong doubts emerged as to the veracity of the testimony of the principal prosecution witnesses (see Sydney Gazette (Sydney), 20 December 1832, 2; 8 January 1833, 2; ‘The Late Mr John McIntyre’, Sydney Monitor (Sydney), 9 January 1833, 2; ‘The Murder of Mr McIntyre’, 10 January 1833, 2). See also the reprieve of three convicts called Champney, Shelvey and Yares for burglary owing to ‘a fair and reasonable doubt as to the propriety of the conviction’ (see ‘The Campbelltown Convicts’, Sydney Gazette (Sydney), 20 April 1830, 2).
268 See, eg, R v Tucker and Davies (Colonial Times (Hobart), 7 May 1830, 3; Hobart Town Courter (Hobart), 8 May 1830, 3), who were convicted of rape upon an Eliza Hickery but the Chief Justice declined to comment upon their case in passing the death sentence. Both were granted an unconditional pardon after the Chief Justice volunteered that he was ‘very doubtful’ of the guilt of the accused as the victim was of ‘bad character’ and both defendants were of good character. See Executive Council, Tasmania, Minutes, 6 May 1830.
formal Appeal Court to challenge the conviction or sentence in capital (or indeed any) criminal cases, the Executive Council was perhaps the nearest that there was to a colonial Court of Criminal Appeal in this period.

However, it is important to note the mitigatory effect of the Executive Council. Its operation was limited and it was not the same as a modern Court of Criminal Appeal. The Council, in its earlier years at least, may have had such a volume of cases to consider that it could not have given each condemned prisoner detailed consideration. The exercise of mercy was often controversial, whether in favour or not of the condemned prisoner. The prerogative of mercy was criticised as a ‘game of chance in which those who suffered were merely unlucky’ and its inconsistent exercise was a regular source complaint in both England and the Australian colonies. One prisoner such as James Bowtell might be executed and others such as Cash and Kavanagh reprieved for identical or even more aggravated crimes.

The Council might insist, citing the local conditions in the colonies as being very different from those in England, in carrying out the

See, eg, William Carton who was reprieved for murder when his hanging the rope broke, see ‘Failed Execution’, The Australian (Sydney), 26 January 1826; Bathurst to Dunwich, 2 November 1826, Historical Records of Australia, Series 1, Vol. 12, 473; Although a limited Court of Appeal could be convened under the New South Wales Act 1823 (Imp) appeals were limited to questions of law, not on wrongful determinations on fact. See Woods, above n 12, 253-255. A full right of appeal did not emerge until the end of the 19th century.

On 16 September 1847 the Council in Tasmania considered the remarkable number of 27 condemned prisoners in one sitting.


See, eg, the 1854 execution of George Whiley. See Davis, above n 3, 56; Executive Council Minutes, Tasmania, 24 October 1854, 2; ‘Executive’, Launceston Examiner (Launceston), 12 October 1854; 2; ‘Executive’, Colonial Times (Hobart), 14 October 1854, 2; ‘Executive’, Cornwall Chronicle (Launceston), 4 November 1854, 4; ‘Executive’, colonial Times (Hobart), 7 November 1854, 3.

The exercise of mercy continued to prove highly contentious after 1855 in a number of high profile cases in NSW featuring convicted bushrangers (see Woods, above n 12, 199-200), especially in the case of Frank Gardner (see Bette Nairn, ‘The Governor, the Bushranger and the Press’ (2000) 96 Journal of Royal Australian Historical Society 114).

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

See, eg, ‘The Injustice of Reprieve’, The Times, 31 August 1867.

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

See ‘Kavanagh’, The Courier, 22 September 1843, 3; Davis, above n 3, 18.

Bushrangers, the Exercise of Mercy and the ‘Last Penalty of the Law’

decision notwithstanding the fact that the offence for which the accused had been convicted no longer carried the death penalty in England. The Governor and the Executive Council on occasion ignored the very real doubts that must have existed as to the strength of the prosecution case and insisted on proceeding with the death penalty. They were further at liberty (as in Mahidor) to disregard public opinion and ignore appeals for mercy from the victim, the jury and even (as seen in Banks) from within the Executive Council. On such occasions notions of retribution and deterrence overrode any other countervailing consideration.

Full pardons were comparatively rare, and offenders spared the death penalty were usually sentenced to long periods of transportation to secondary places of punishment. Even those offenders where the conferral of mercy was prompted by doubts as to prisoner’s guilt in light

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

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

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

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

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

See, eg, R v Kennedy (The Courier, 10 March 1847, 4); Mr Justice Montagu’s opinion of the State of the Country’, Launceston Examiner (Launceston), 16 March 1847, 3.

See, eg, Daniel Tucker and Isaac Davies, (see Colonial Times (Hobart), 7 May 1830, 3; Hobart Town Courier (Hobart), 8 May 1830, 3). Both were convicted of rape upon an Eliza Hickory but the Chief Justice at sentence forbore to comment upon their case in passing the death sentence. Both were granted an unconditional pardon after the Chief Justice volunteered to the Executive Council that he was ‘very doubtful’ of the guilt of the accused. He noted the victim was of ‘bad character’ and both accused were of good character. See Executive Council Minutes, Tasmania, 6 May 1830.
of weaknesses in the prosecution case or glaring flaws in the fairness of
the trial, were not granted a full pardon but were usually ordered to be
transported, often for life.

The colonial authorities were all too aware in the period from 1824 to
1856 of the need in a frontier society seemingly beset by crime and
criminals to ensure that the death sentence was applied to capital
offenders, especially bushrangers, deserving of the ‘awful sentence of the
law’. It was important that prevailing notions of punishment and
deterrence were applied, whatever misgivings that members of the
Executive Council, the Governor (as in Golding and Wamor) or even the
British Colonial Secretary may have entertained in private in the
rationale of capital punishment as an effective or appropriate punishment
or deterrent. However, balanced against the need for retribution and
deterrence was the prerogative of mercy.

The Governor and Executive Council took seriously its crucial role in
dispensing mercy in capital cases. Debates about the exercise of mercy
expressed different conceptions of law, order and justice in a fledgling
society that cast itself as under threat of anarchy. Even the worst capital
offenders, including bushrangers ‘steeped neck deep in violence – of
murder and crime of the most atrocious dye,’ might still receive the
benefit of mercy. The prerogative of mercy was not mere rhetoric. As the
Lancashire Advertiser declared in 1841 in favour of the grant of mercy to

---

397 See, eg, the case of three convicts called Chalmers, Shidley and Yates who were
reprieved owing to ‘a fair and reasonable doubt as to the proprietor of the convicts’ for
burglary but were still ordered transported to Norfolk Island for 15 years (see 'The
Campbelltown Convict', Sydney Gazette (Sydney), 20 April 1836, 2); John McCabe, who
was convicted in 1855 of murder after a trial that was justifiably described as ‘no fair trial’
and a ‘mockery of justice’ ('The Convict McCabe', The Argus, 23 October 1855, 4).
However, his reprieve was to work on the roads for 15 years, the first three in chains. See
'Convict McCabe', The Argus, 24 October 1855, 7. See also John Hewitt and William Love
who were convicted of robbery and sentenced to death. The trial judge noted to the
Executive Council that there was 'a doubt as to the testimony of the prosecute' and their
sentence was commuted to seven years transportation and a year of probation. See
Executive Council Minutes, Tasmania, 18 April 1853.
398 See, eg, Joseph Hawley, John Bridgfield, and Richard Coglan who were convicts
sentenced to death for the rape of the wife of a coachman. All three protested their
innocence. All were literally at the last moment spared and transported for life to Norfolk
Island (see Sydney Herald (Sydney), 23 September 1833, 2) ‘Circumstances have
transpired which fix a suspicious character on the prosecutrix and cast doubt as to the
truth of her unsustained evidence' (Sydney Monitor (Sydney), 21 September 1833, 2).
399 'Execution', Sydney Gazette (Sydney), 27 January 1835, 3.
400 See above n 160. See also the frank acknowledgement of the Colonial Secretary in 1846
as to the failure of the death penalty as a deterrent in the case of John Bear and George
Pardy. See Executive Council Minutes, Tasmania, 31 July 1846.
401 See above n 160.
402 'Priest should not be Executed', Cornwall Chronicle (Launceston), 22 October 1845,
263.

---

393 R v Yarrow, Hobley and Eastcoote (Colonial Times (Hobart), 2 February 1841, 2).
394 Editorial, Launceston Advertiser (Launceston), 18 February 1841, 3. See also Editorial,
The Courier, 9 February 1841, 2; Editorial, Launceston Advertiser (Launceston), 18
February 1841, 2. The three were reprieved.
University of Tasmania Law Review

Title Details

Title
University of Tasmania Law Review

ISSN
0082-2108

Publisher
University of Tasmania * Faculty of Law

Country
Australia

Status
Active

Start Year
1958

Frequency
Semi-annually

Language of Text
Text in: English

Refereed
Yes

Abstracted / Indexed
Yes

Serial Type
Journal

Content Type
Academic / Scholarly

Format
Print

Website

Description
Includes articles on all aspects of law throughout the world, not just in Tasmania and Australia.