The Capital Case of Sarah McGregor and Mary Maloney in New South Wales in 1834: ‘Justice is due even to them’

David Plater and Sue Milne

Abstract

[This paper looks at the rationale and operation of the death penalty and the prerogative of mercy in respect of female offenders convicted of a capital offence in Australia during the early colonial period from 1824 to 1860, through a consideration of the case of Sarah McGregor and Mary Maloney in 1834. McGregor and Maloney were assigned convict servants, convicted and condemned to death for the murder of their master, a Captain Waldron, a crime that was truly ‘beyond the pale’ in early colonial society. Yet after a spirited campaign, both women were reprieved. Although punishment and deterrence were themes strongly manifest in the exercise of the death penalty, this paper argues these were not the sole or even paramount considerations. The colonial authorities, even in relation to the apparent worst of offenders such as McGregor and Maloney, took seriously the exercise of mercy and, as far as possible, allowed mercy to season justice. Yet despite this humanity, female capital offenders were seen in stark and polarised terms, ‘All that’s good and virtuous, or that they are depraved and abandoned in the extreme?’ Female offenders perceived to fall into the former category could expect sympathy and the likelihood of reprieve, while those perceived to fall into the latter category had little hope of mercy, and could expect to receive the ‘ultimate penalty of the law’. The case of Maloney and McGregor illustrates the arbitrariness of this polarised stigma attached to female offenders. Yet despite the nature and gravity of their crime, ‘justice was due even to them.’ Maloney and McGregor underwent a remarkable transformation from apparent ‘criminals of the deepest dye’ to figures deserving of compassion and ultimately of the grant of mercy.]

Part 1: Introduction

‘Such barbarity was never seen in any land except New South Wales.’

1 BA/LLB, LLM, PhD, Lecturer, School of Law, University of South Australia; Honourary Research Fellow, Faculty of Law, University of Tasmania and Senior Legal Officer, Attorney-General’s Department, Adelaide.

BA, LLB, Lecturer, School of Law, University of South Australia. Any views expressed in this paper are expressed in a purely personal capacity and do not represent the views of any agency or department. This paper is part of the authors’ ongoing study into the exercise of the death penalty and prerogative of mercy for female offenders in colonial Australia.

2 Sydney Monitor, 25 February 1834, 3.
This was the observation offered by the editor of the *Sydney Monitor* in 1834 to highlight the gravity of the crime committed by Mary Maloney and Sarah McGregor who had been convicted by a jury after just 15 minutes of deliberation. The assessment offered by the *Sydney Monitor* is unsurprising in the context of colonial society of the period. Not only had Maloney and McGregor been found guilty of the crime of murder, they were assigned convict servants and their victim, a Captain Waldron, had been their master. Indeed, to further aggravate their crime, the two defendants were said to have murdered Waldron in the presence of his wife and some of his 12 children. If the crime of murder was not enough, the notion of convict servants such as McGregor and Maloney murdering their master, a respected 'gentleman' and Magistrate, was a particularly reprehensible crime which would have resonated in early colonial society. As one commentator observed in 1834, 'In no Country is life so insecure as in this – the Convict Servants being, in numerous instances, the first to destroy it. Let us look back and witness the scenes of atrocious murders that have been perpetrated under such circumstances.'

This form of murder, 'petit treason', was an aggravated and heinous form of murder that involved the killing of one's social superior such as employer or husband, though not wife. It is unsurprising that Justice Burton, in passing the sentence of death upon both Maloney and McGregor and ordering that their bodies be delivered to the colonial surgeon for dissection, declared that 'no hope' of mercy could be extended to either defendant.

However, it is notable that despite the nature and gravity of their crime, there was considerable sympathy for McGregor and Maloney in the Colony. Even the jury which had pronounced on their guilt, recommended the two defendants to mercy. The *Sydney Gazette* questioned, in the immediate aftermath of the trial, how McGregor and Maloney could have possibly committed the crime of which they stood convicted, 'the circumstance of the accused, being young women of prepossessing appearance, one of them of such mildness of countenance, as to render a conclusion of their disposition to commit so horrid a crime quite irreconcilable.' There was a spirited campaign on their behalf involving the judges, the jury, public opinion and

---


4 See further below nn 53-58.

5 This was an additional punishment for deterrent purposes in cases of murder, under statutory discretion: *An Act for Better Preventing the Horrid Crime of Murder* (1752) Geo II c 37, s 2. The intention in providing for anatomising was, reflecting the religious views of the period, to add to the deterrent effect of capital punishment. In England, this even led to riots against the surgeons who performed the procedure. See Peter Linebaugh, 'The Tyburn Riot against the Surgeons', in Douglas Hay, 'Property, Authority and the Criminal Law', in Douglas Hay et al, *Albion's Fatal Tree: Crime and Society in eighteenth-century England* (Pantheon Books, 1977) 65-117.

6 *Sydney Herald*, 24 February 1834, 1S.

7 See further below Part 7; n 293.

8 *Sydney Gazette*, 25 February 1834, 3
the press. The Executive Council extended the prerogative of mercy to both women and they were reprieved.

The exercise of the death penalty in England in the 19th century has long been a topic of both popular interest and academic study. Further, perhaps less exhaustive, study has been undertaken of the role of the prerogative of mercy in England during this period, in tempering the harsh effects of the Bloody Code that rendered, in theory at least, over 300 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 respect of 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 the Bloody Code. The focus of this paper is upon the operation of the death penalty with respect to female offenders. Though there has been considerable study in both England and Australia as to the significance and application of


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


13 Bruce Kercher, Outsiders: Tales from the Supreme Court, 1824-1836 (Australian Scholarly Publishing, 2006) 5. It is significant that, as Castles notes (Castles, above n 12, 43:2), in 1830, more persons (50) were hanged in NSW than were hanged in all of England and Wales that year (46). Tasmania in the 1820s also had years of a similar high rate of capital punishment. See for a full breakdown of the rates of execution in Australia during this period, see AGI Shaw, Convicts and the Colonies: a Study of Penal Transportation From Great Britain and Ireland to Australia and Other Parts of the British Empire (Faber, 1966).


15 See, for example, Joy Damousi, Draped and Disorderly: Female Convicts, Sexuality and Gender in Colonial Australia (Cambridge University Press, 1996); Kay Daniels, Convict Women (Allen & Unwin, 1998); Philip Tardif, Notorious Strumpets and Dangerous Girls: Convict Women in Van Diemen’s Land 1803-1829 (Angus & Robertson, 1990); Anne Summers, Damned Whores and God’s Police (Penguin, 2nd
gender in relation to female offenders in general terms, the exercise of the death penalty and the prerogative of mercy for female offenders has not been the topic of such exhaustive study in England, and especially Australia. This paper, which is part of a wider ongoing study into the application of the prerogative of mercy in colonial Australia, is intended to help redress this apparent gap in the understanding of this important aspect of the early colonial legal system.

This paper considers the operation of both the exercise of the death penalty and the prerogative of mercy in respect of female capital offenders during the early colonial period from 1824 to 1860, through a focus on the case of Sarah McGregor and Mary Maloney. It considers the trial of McGregor and Maloney, the reaction in the Colony to both the jury's finding of guilt and the sentence of death and the reasoning which led the Governor to ultimately reprieve both defendants from the gallows. This case, though perhaps seemingly historically insignificant in itself, is important in respect of the wider society in which it took place. The legal context of the period is also significant, commencing with the establishment of the Supreme Courts of Tasmania and New South Wales; and ending with the cessation of transportation to New South Wales and then Tasmania, the establishment of responsible government in the colonies, and the last days of the Gold Rush. It is suggested that the case illuminates

---


17 Though see Shaw, above n 13; Ruth Teale (ed), Colonial Eve: Sources on Women in Australidelia, 1788-1914 (Oxford University Press, 1978).

18 This wider study seeks to investigate the exercise of the death penalty and the operation of the prerogative of mercy with respect to certain representative classes of capital offenders in colonial society. This paper, which is part of an ongoing study, focuses on female capital offenders through a consideration of the case of Sarah McGregor and Mary Maloney. A previous article looked at secondary punishment and the operation of the death penalty with respect to convicts and piracy and mutiny (see David Plater and Sue Milne, ‘The Quality of Mercy is not Strained’: the Norfolk Island Mutineers and the Exercise of the Death Penalty in colonial Australia 1824-1860’ awaiting publication in the Australian and New Zealand Law and History Society E Journal). Another study will focus on female offenders in more detail looking at the theme of infanticide. Other representative classes to be studied as part of the wider study will include bushrangers and Indigenous accused.


20 Transportation was abolished to New South Wales in 1840.

21 Transportation was abolished to Tasmania in 1852 though the effects of transportation were to linger there for many years, see James Boyce, Van Diemen’s Land (Black Inc, 2008) 236-243; Richard Davis, The Tasmanian Gallows: A Study of Capital Punishment (Cat & Fiddle Press, 1974) 58; Robert Hughes, The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868 (Collins Harvill, 1987) 323, 589-594.

22 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 paper, it is notable that by 1860, the
the administration of the death penalty and the prerogative of mercy in respect of female offenders during this period, and the particular regard the authorities had with respect to such offenders, in consideration of the grant of mercy.

This paper argues that, whilst the themes of punishment and deterrence were plainly manifest in the general exercise of the death penalty, reflecting the fear factor so present in early colonial society, these were not the sole or even paramount considerations. Rather it is argued that the colonial authorities, even to those offenders who represented 'criminals of the deepest dye', took seriously the exercise of mercy in the context of an embryonic self-governing society, in transformation from its penal roots. The implementation of the death penalty was not arbitrary, but instead a considered though imperfect process within the operation of the rule of law, where as far as possible, even for offenders such as McGregor and Maloney, 'mercy seasons justice'. The rule of law was not mere rhetoric in this case. As one observer noted, 'Justice was due even to them'.

However, it is suggested that for the small number of female offenders condemned to death in early colonial Australia, particular considerations applied beyond those that ordinarily applied for male offenders. Female offenders of the period were

---

23 See, for example, Editorial, Sydney Herald, 15 September 1834, 2; Letter to Editor, ‘Nostalgus Buthurstiensis’, Sydney Gazette, 6 March 1834, 2-3.


25 See, for example, RB Madgwick, Immigration Into Eastern Australia, 1788-1851 (Sydney University Press, 1969) Ch 3; Shaw, above n 13, Ch 10 and 11; Alex Castles, An Australian Legal History (Law Book, 1982) Ch 8 and 9; Woods, above n 12, Ch 1. See further John Braithwaite, ‘Crime in a Convict Republic’ (2001) 63 Modern Law Review 11, who contrasts the transformation of the criminal classes in the Australian colonies through procedural justice and reintegration initiatives, in comparison to the American experience where procedural injustices and slavery hindered such developments .

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

27 Sydney Gazette, 27 February 1834, 2.

28 Despite the many female convicts transported to Australia during the operation of the transportation system from 1788 to 1868, the number of female offenders convicted of a capital crime and/or were actually hanged was comparatively minuscule when viewed against the number of male offenders who were convicted of a capital offence and/or went to the gallows. Castles notes that of the 1296 sentences of death passed in NSW during the period of his study from 1826 to 1836, only 19 related to female offenders. Of the 362 actually carried into effect, only a single woman, Bridget Fairless, was hanged. See Castles, above n 12, 43.2, 43.6-43.7. Of the 535 odd death sentences carried out in Tasmania in the 19th century, only four (Mary McLauchlan, Eliza Benwell, Ann Sullivan and Margaret Coghlin) were females.
typically seen (and arguably still are)\textsuperscript{29} in stark terms. As the \textit{Colonial Times} opined in 1834 as to the low incidence of female offending in the colonies:

It is sometimes said, that there is no medium with respect the female character, that either they are all that's good and virtuous, or that they are depraved and abandoned in the extreme; how then is it that in a place like this, where the most profligate and wicked of the female sex are to be found how is it, we say, that the proportionate number of females suffering the severe penalty of the law, should be so comparatively small, when compared with the number of male malefactor?\textsuperscript{30}

It is suggested that, as declared by the \textit{Colonial Times}, female offenders in the colonies (and indeed elsewhere)\textsuperscript{31} were typically perceived in these polarised and stereotypical terms, ‘damn whores’ and ‘God’s Police’;\textsuperscript{32} or the ‘virtuous’ and the ‘vicious’. This categorisation had a profound and particular impact in respect of female offenders convicted of a capital offence in early colonial society. On the one hand female offenders, despite whatever crimes they may have committed, might, nevertheless, be regarded as reflecting all that is ‘good and virtuous’ in the female character and still deserving of sympathy and even compassion. On the other hand female offenders who could be regarded as having ‘abandoned’ or ‘betrayed’ their feminine character and being ‘depraved and abandoned in the extreme’ were seen as undeserving of mercy. While those female offenders who were perceived to fall into the former category had every expectation of a reprieve, those who were perceived to fall into the latter category had little hope of mercy and could expect to receive the ‘ultimate penalty of the law’.\textsuperscript{33} However, this process could prove arbitrary as the case of Maloney and McGregor illustrates. Despite the nature and gravity of their crime, it is striking that Maloney and McGregor underwent a remarkable transformation from their original depiction as vicious criminals of the worst order to virtuous figures deserving of sympathy and compassion and ultimately of the grant of mercy.

\textbf{Part 2: Female Criminality and the Death Penalty in early 19 Century England}

The increase in legislation attracting the death penalty, particularly through the 18th century, has been a subject of extensive academic scrutiny.\textsuperscript{34} Much of this legislation


\textsuperscript{30} \textit{Colonial Times}, 23 April 1830, 3. The later assertion is correct. See above n 28.

\textsuperscript{31} This perception of female offenders in this period was not confined to Australia.

\textsuperscript{32} See Summers, above n 15.

\textsuperscript{33} See \textit{R v Jeffs and Conway (Launceston Examiner), 12 July 1843, 3).}

\textsuperscript{34} See, for example, Douglas Hay, ‘Property, Authority and the Criminal Law’ in Hay et al, above n 5, 17-64; Gatrell, above n 9. With respect to specific crimes, the study of the ‘Black Act’, the \textit{Waltham Black Act of 1723}, which created 50 offences attracting the death penalty, shows legislation aimed principally at rural
has been criticised as reactive, of temporary import, not clearly constructed, and class oriented, aimed at protective measures for new forms of property and wealth.\textsuperscript{35} The laws were also thought to have a deterrent effect, serving as a crude form of law enforcement in the absence of a standing police force and a developed system of public prosecution.\textsuperscript{36} Historians however also view the burgeoning of the capital statute book, or \textit{Bloody Code}, as a reaction to the rapid changes taking place in the 18\textsuperscript{th} and 19\textsuperscript{th} centuries in England. At this time England witnessed a transition from a largely rural based social and economic society, to the development of large urban areas, where the wealthy and the poor cohabited alongside each other, and both trade and crime satisfied the demands for wealth.

Yet in fact, the number of capital convictions and executions did not increase in correlation to the number of capital offences available. The reasons are thought to include opportunities within the administration of prosecutions, developments in criminal procedure and the part played in this process by juries and local magistrates. ‘If the criminal code of England seemed savage and bloodthirsty, the actual practice of the courts was to show restraint and exercise mercy in the execution of the law.’\textsuperscript{37}

Despite the indiscriminate nature of the offences which attracted capital punishment, the offences applied equally to men and women, and even children.\textsuperscript{38} Yet in fact however, only very few women were executed.\textsuperscript{39} A study of the period 1660-1800 shows only a quarter of the women sentenced to death went to the gallows, compared to 43\% of men who were executed.\textsuperscript{40} These outcomes reflect, in
part, proportional female involvement in crime,\textsuperscript{41} but resonate from other factors impacting upon conviction, sentence and reprieve.\textsuperscript{42}

Existing research on female involvement in crime in 19th century England has been restricted by a lack of comprehensive statistics for the period.\textsuperscript{43} However, there are some distinguishing features with respect to female gender and crime which might be identified, even if there is some doubt as to the constancy of these features throughout history.\textsuperscript{44} King’s study finds that with respect to serious property offences, such as privately stealing and highway robbery,\textsuperscript{45} women were almost as likely to be prosecuted at trial, as men. With respect to convictions, women were more likely to be sentenced to imprisonment or transportation than their male counterparts, but there were similarities in the number of both sexes sentenced to death but reprieved, but overall women were less likely to be executed.\textsuperscript{46} In the Old Bailey circuits, the number of more serious offences committed by women was greater, and women were more likely to be reprieved.\textsuperscript{47} In actuality, female involvement in crime in urban areas was significantly higher than in rural areas, generally considered to be due to economic imperatives and opportunities,\textsuperscript{48} and more personal freedom, than that of rural women who were more likely to be constrained by family and community.\textsuperscript{49}

Murder, more particularly, infanticide, were the major felonies attracting frequent female participation, although women were still a small proportion of those convicted and sentenced, in comparison to men. The figures are also distorted in that the infanticide statistics might be recorded instead as a concealment of birth

\textsuperscript{41} Scholars agree that women usually represent a smaller number of indictable offences and violent crimes, although are involved in a higher proportion of petty property offences. See Morris, above n 14; Heidensohn, above n 14. Although it is not certain how significant the operation of the principle of feme covert kept women out of the courts. This principle was based on the doctrine that married women had no separate legal identity from their husband, and if they were involved in the commission of a felony with their husband, they could argue that they were acting under instruction to gain an acquittal, excepting the offences of murder and treason.

\textsuperscript{42} For example, with respect to property offences which attracted lesser penalties, there was a tendency that proportionally, fewer women would be prosecuted than men, often due to failure of victim to attend trial, cases not made out, jury ‘not guilty’ verdicts, or partial verdicts. See generally, King, above n 10, Ch 8; Emsley, above n 16, Ch 4.

\textsuperscript{43} See, for example, Beattie, above n 9; King, above n 14; King, above n 10.

\textsuperscript{44} See Ibid. Zedner too, notes that women’s participation in crime in 19\textsuperscript{th} century England indicates relatively high crimes in comparison to female crime rates today. See Zedner, above n 14, 317.

\textsuperscript{45} However, female highway robbers were indeed rare. See Beattie, above n 14, 90.

\textsuperscript{46} In this study the author records in the four years sampled, 27\% of males (32 men); compared to 4.8\% women (one woman) went to the gallows. See King, above n 14, 172.

\textsuperscript{47} For example, at the Old Bailey, 2/5 males were sentenced to death compared to 1/5 of females; with seven women reaching the gallows in the ten year sample, compared to 317 males. See Ibid, 175.

\textsuperscript{48} Identified in the literature by one scholar, as ‘financially motivated crimes’. See Zedner, above n 14, 319.

\textsuperscript{49} See King, above n 10, 198.
crime. Prior to 1803, statute law on concealment of birth\textsuperscript{50} presumed that a woman who had concealed the death of her child, had murdered the child. The law, a response to controlling immorality and bastardy, was often ineffective in that juries were reluctant to convict without strong evidence.\textsuperscript{51} Legislative reform shifted the onus of proof of the murder of the infant onto the prosecution, akin to other homicide offences. Where the murder charge failed, the jury could return a non-capital verdict of 'concealment of birth.' The females so accused are often perceived as economic victims, being from the poorer working classes, usually servants, who were driven to desperate measures out of economic need.

...a domestic servant was especially threatened by pregnancy, for apart from the ruinous blow it gave her character, it meant dismissal; if she had no family to turn to, an unmarried servant had little hope of keeping both her child and her job.\textsuperscript{52}

Petit treason\textsuperscript{53} was considered an aggravated form of murder. The crime involved the murder of a person to whom the offender owed some duty of subjection such as a wife killing her husband (but not vice versa) or a servant killing his or her master. Petit treason was considered even worse than murder as it was said to involve the betrayal of trust of a superior by a subordinate.\textsuperscript{54} It was to remain a distinct offence in England until 1828. The crime considered ‘an extreme affront to patriarchy’\textsuperscript{55} and when perpetrated by a woman, for example by the poisoning of a husband,\textsuperscript{56} would usually attract the severest penalty without reprieve. This was a crime truly ‘beyond the pale’ in both British\textsuperscript{57} and colonial\textsuperscript{58} society.

\begin{flushright}
\textsuperscript{50} 21 Jas I c 27 (1623).  \\
\textsuperscript{51} Beattie reports of his 18\textsuperscript{th} century study on females and crime that ‘Judges and juries went out of their war...to find evidence that would justify acquittal...the important question in court seems always to have been not whether she had concealed the birth, but whether she had intended to conceal it, and any evidence of preparation [for a live birth] on the part of the mother was seized on to justify acquittal...’ (Beattie, above n 14, 84-85). See also below n 212. See further the discussion below in Part 5.  \\
\textsuperscript{52} Beattie, above n 14, 84.  \\
\textsuperscript{53} Created by the \textit{Treason Act} 1351.  \\
\textsuperscript{54} The rationale for such a crime was that society rested on a framework in which each person had his or her appointed place and such murders were seen as threatening this framework of society.  \\
\textsuperscript{55} King, above n 10, 193.  \\
\textsuperscript{56} Poisoning by women once carried the taint of a deliberate crime of stealth, considered the modus operandi of female offenders, and thus a crime reviled. See, for example, Otto Pollack, \textit{The Criminality of Women} (University of Pennsylvania Press, 1950) Ch 3. However Beattie’s study found female murderers were no more prone to stealth and deception in perpetrating the crime, than were men. See Beattie, above n 14, 83.  \\
\textsuperscript{57} See, for example, the zealous prosecutions in \textit{R v Patch} in 1806 (see the record of the trial in Joseph Gurney and William Gurney, \textit{The Trial of Richard Patch for the Wifeful Murder of Issac Blight} (M Gurney, 1806) (murder of the accused’s social ‘superior’) and the famous trial of a Swiss servant on 1840 for the murder of his eminent aristocratic employer, Lord Russell, see James Atlay, \textit{Famous Trials of the Century} (Grant Richards, 1899) 44-63; W Townsend, ‘The Trial of Francois Benjamin Courvoisier for the Murder of Lord William Russell’ in \textit{Modern State Trials} (Longman, Brown, Green and Longman; 1850) 244-312.  \\
\textsuperscript{58} See Editorial, \textit{Sydney Herald}, 15 September 1834, 2.
\end{flushright}
Beattie’s study of female crime in 18th century England concluded that crime was influenced by socioeconomic determinants. Factors such as physical location, opportunity and economic and social pressures were important variables and this resonates with the turbulent social and economic times. Zedner states that these imperatives for crime were similarly appropriate in understanding 19th century crime. ‘Women’s offences, like those of men, were determined largely by the habitat, opportunities, and difficulties of life especially in the growing urban slums inhabited by the very poorest sections of the population.’ There was also a misfit between societal norms and economic realities. The ‘norms of mercantile life were at odds with those of a rural Christian society...’ This accords with feminist perspectives on the perception of the feminine role of women, the emergence of the bourgeoisie, and the modern concept of the family. Summers identifies this perspective as embodying the ‘God’s Police’ stereotype of women. It is a prescriptive stereotype where women, as wives and mothers were entrusted with the moral guardianship of society, and particularly in colonial Australia, were considered instrumental in the maintenance of basic authority relations. King acknowledges a connection between a reluctance to execute and the emergence of middle-class ideals of womanhood.

Paternalism, protectionism, practicality and prejudice, not to mention growing perceptions of the differences between public and private spheres, may all have had a role to play. However, what seems clear is that somewhere within the complex contradictions of patriarchy, the interaction of various forces meant that female offenders accused of crimes in the major courts of late eighteenth and early nineteenth century England frequently succeeded in obtaining much more lenient treatment than their male counterparts.

Modern feminist perspective on females and crime argue that female defendants are usually not considered ‘normal’, ‘conventional’, or ‘respectable’ women, and enjoy lifestyles which violated conventional notions of women’s proper roles. Subsequently, therefore, they were more likely to receive harsher treatment in the criminal justice system, as their crimes were viewed as acts of deviance from the ‘norm’ of femininity. This reflects too, a polarity in the perception of women in

59 Beattie, above n 14, 80. Beattie also found that patterns and level of women’s crime often derived from their place in the family, and their relationship to the wider community.
60 Zedner, above n 14, 318.
62 It is acknowledged that there are significant and distinctive schools of thought within the feminist discipline, which in its widest sense concerns the subordination of women in society. Lorraine Gelsthorpe and Allison Morris, ‘Feminism and Criminology in Britain’ (1988) 28 British Journal of Criminology 93.
63 Summers, above n 15, 212.
64 Ibid, 67. Summers believes that particularly with respect to Australia, this stereotype is tied to the ideal of the family. See Ibid, 197-198.
65 King, above n 14, 195.
66 See Heidensohn, above n 14.
67 Zedner, above n 14, 308.
society, whereby if the ‘God’s Police’ stereotype is not met, then the pejorative and punishing ‘damned whore’s’ stereotype, is applied. As Summers notes, ‘The point of the dual stereotypes is their rigidity, if you don’t conform to one you are automatically cast into the other.’ The sexualisation of this stereotype is most evident in research on females and crime in colonial Australia and is explored later in the paper. However, King’s research finds this framework not evidenced in his findings, for example, many females convicted of urban crimes were prostitutes but were not subsequently treated any harsher by the courts.

...Zedner’s conclusion for the Victorian years that ‘the seriousness of female crimes was measured primarily in terms of women’s failure to live up to the requirements of the feminine idea’ is difficult to apply to earlier periods. Neither sexual propriety nor non-violent behaviour were absolute preconditions for achieving better trial outcomes for women who appeared before the courts between 1780 and 1830.

Female criminals of the time were not considered as much as a threat to lives, property and order as were men. Yet Zedner shows research which consistently argues and evidences that the predominant approach to female criminality up until the mid-19th century, was moralistic, and measured in terms of failure to live up to the requirements of the feminine ideal.

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

Part 3: Females and Criminality in early Colonial Society

Social and economic status were major determinants with respect to females and crime in early colonial Australia. Similarly, social status is predominantly the variable by which females in early colonial Australia are categorised, with the major proportion of females arriving as convicts, later emancipated or married to

68 Summers, above n 15, 200.
69 Zedner, above n 14, 307-362, especially 320.
70 King, above n 14, 190-191.
71 Beattie, above n 9, 240, 439.
72 Zedner, above n 14, 307.
74 See generally, Teale, above n 17.
75 Robson notes that many received sentences of 7 years transportation and did not generally return to England after emancipation.
convict men. In counterpoint to the transportation of female convicts, the Bigge Report recommended that the population of the colonies be increased by free settlers and a series of schemes to attract passage to Australia were employed from the 1820s. The assisted passage schemes were not without their problems and did not always attract the quality of free settler as first envisaged. Many of the females who arrived by assisted passage were paupers, and of ill-health; the colony’s lingering ‘convict stigma’, and the perils of the long voyage, failing to attract viable candidates to migrate. From the 1820's however, women also began to arrive through unassisted migration. These women were usually the wives and daughters of men who came as speculators; or the ‘gentle women,’ the wives and daughters of officials and respected members of society.

The female convicts, most originally convicted for larceny-related offences, were overwhelmingly of working class origin, usually servants, originating mainly from the urban regions of England and Ireland, with a small proportion from Scotland. The 1812 British Select Committee on Transportation found with respect to those females convicted of transportable offences, that it was ‘customary to send, without any exception, all [females] whose state of health will admit of it, and whose age does not exceed 45 years,’ in contrast to the finding that with respect to male convicts, usually only the most serious male offenders were transported. Generally the female convicts were young and single. Robson notes a mean age of 27 years, just slightly older than the male convicts, with a third on record as married, which might include admissions of having cohabited with a man.

The sexual characterisation of the female convicts is striking, with ‘almost all contemporaries regard[ing] them as particularly “abandoned”’. An influential report on transportation, the Molesworth Report, concluded that the women transported were ‘with scarcely an exception, drunken and abandoned prostitutes.’ The report further surmised that even should the convict women be inclined to be well conducted, ‘the disproportion of the sexes in the penal colonies is so great, that they are exposed to irresistible temptations.’ This stereotype of female convicts as intemperate whores must be contextualised to be understood. Robson found that many of the females transported were recorded as being ‘on the town’, a synonym for prostitution. Although prostitution was common within the transported convict females, this was more a matter of circumstance than choice. The convict voyage itself often resulted in forced prostitution for the women convicts, as a question of survival.

---

77 Shaw, above n 13, 164.
78 Report from the Select Committee on Transportation, 1812, (Parliamentary Papers, House of Commons, 1812) vol 2, 581-582. This depiction of the convict women began with the First Fleet, as Lt Ralph Clark described, ‘the damned whores the moment they[fell] got below fell a fighting amongst one another and Capt Meridith order the Sergt. Not to part them but to let them fight it out…’ Lt Ralph Clark, First Fleet, quoted in Summers, above n 15, 313.
The arrival of the female convicts in the Australian colonies did not improve the image the transportation system had of them. Female convicts were either assigned to officials and settlers upon arrival, or were accommodated in the female factories, the first one established in Parramatta in 1801, were they were employed in domestic work. With respect to assignment, this meant servitude and, as often was found, sexual servitude. The Molesworth Report, which was considered to be politically motivated to end transportation, condemns the women so assigned, as ‘the tendency of assignment is to render them more profligate.’ But, as Summers notes, inadequate accommodation for women directed them into assignment and perhaps further sexual service; or cohabitation. The only other avenue was for the women to align themselves with a man.

The women’s punishment comprised transportation plus enforced whoredom. For at least the first twenty years they had no means of escaping this fate. The best a woman could do was form an attachment with one man and live with him as his wife and in this way protect herself from the unwelcome attentions of any other man who fancied her.

But the term ‘prostitute’ was also used loosely to include those women who cohabited outside of marriage. Female convicts were however less likely to marry, despite being outnumbered for many years at approximately six males to every one female, and were, until the latter mid 19th century, the largest cohort of females in the early colonies, with 11,083 female convicts arriving in New South Wales up to 1853, and 12,595 in Van Dieman’s Land, most arriving in the last 10 years of this period. Sturma argues that the convict women were predominantly of the English working class, and within the ‘working-class culture, the behaviour of female convicts in Australia appears less aberrant than is commonly supposed.’

---


80 There were legal avenues through the magistrates system, for redress against violent masters or sexual predation. However, this was not always a valid option due to problems of evidence and the social standing, or ‘respectability’, of the master.

81 Summers, above n 15, 316.

82 It should be noted that many early marriages were civil marriages so there is a lack of complete information on the status of many convicts. This type of union met with official disapproval, who ‘characterized such bonding on the women’s part as ‘prostitution’, even when practised ‘openly with one man’ only. Nor were such unions limited to the impoverished or working classes, with it not unknown for the children of such unions to obtain respectability. See Marian Aveling, ‘She Only Married to be Free; Or Cleopatra Vindicated’ in Norma Grieve and Patricia Grimshaw (eds), Australian Women: Feminist Perspectives (Oxford University Press, 1981) Ch 11.

83 Prior to the early 1820’s, New South Wales received all the female convicts, and when transportation to New South Wales ceased in 1840, Van Dieman’s Land received all female convicts. Robson further notes that based on their record of prior convictions, Van Dieman’s Land appears to have received the worst female offenders. See Robson, above n 76, 130.

England, there were cogent reasons for the prevalence of cohabitation over marriage in the working classes, including the imposition of marriage licence fees, the problem of bigamy for those who had left a spouse in England and employment reasons. This served as grist to the mill of the image of convict women as ‘abandoned prostitutes’. The convict women suffered from the upper class perspective projected upon them. Miriam Dixson casts the convict women as ‘victims of victims’: outcasts, projecting an image of the ugly, aggressive and unfeminine. Yet other feminists, such as Alford, reject this victim stigma.

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

The largest group of females accommodated in the female factories were those who had committed further crimes, and one concern was that these women would corrupt the younger women. Assigned female convicts who fell pregnant on assignment would also be vulnerable to being returned to the Female Factories, if there was no support from the father of the child, and the infant would remain at the Factory for their first two years of life, and then subsequently be removed to an orphanage. This both institutionalised and criminalised, illegitimate births. The assigned convict female was therefore at a proportionately greater risk of giving birth to illegitimate children. Kippen and Gunn’s study of illegitimate births in 19th century Tasmania finds a correlation between assigned service and rates of illegitimacy. They conclude that the pregnancy cannot solely be attributed to issues of sexual exploitation within the privacy of the home, but just as equally can be attributed to the high rate of bachelordom among males; the confidence and opportunity this might have given to convict women to anticipate marriage and commence courting, being of a group ‘single and of an age, who were the most likely

85 Particularly in the pastoral sector, married labourers were often not encouraged, as local conditions and the often itinerant nature of the work, meant female ‘encumbrances’ were not suited.

86 See Sturma, above n 84.

87 Though for an alternate viewpoint see, Portia Robinson, The Hatch and Brood of Time, a Study of the First Generation of Native-Born White Australians (1985). Carmichael states, with respect to the convict women, ‘that many exercised circumscribed control over their sexual and reproductive destinies’ (Carmichael, above n 79, 283).

88 Dixson, above n 15, Ch 4.


91 However, the ‘illegitimacy rate falls dramatically at the time when the system of assigning female convicts into domestic service ends, due to the termination of transportation and the expiry of the sentences of those who already were in the colony’ (Ibid, 396).
to engage in courtship behaviour.' Yet the consequences of an illegitimate birth were similar to that in England, so the motivation for infanticide and concealment of birth crimes was present.

In contrast, the women who arrived by unassisted migration and the daughters of settlers and officials were considered the epitome of womanhood, ‘always “fair”, “gentle”, “kind”, “cultivated” and “intelligent”, and as wives, utterly devoted.’ Free women, as a relatively scarce commodity were in the ascendancy when it came to marriage, as they were in high demand. They also remained relatively untainted by the ‘whore’ tag predominantly attached to the convict women.

**Part 4: The Rationale and Operation of the Death Penalty in early colonial Australia and Female Offenders**

There was a strong perception that officialdom and the ‘respectable’ classes in early colonial society regarded themselves alone at the other side of the world from ‘home’ surrounded by a host of potential perils and beset with crime and criminals, including bushrangers, convicts and Aboriginal offenders. 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. The threat posed by these offenders justified a robust approach by the authorities and militated against the exercise of mercy in such capital cases. As Montagu J in 1847 during the

---

92 Ibid.

93 Although the sex imbalance was much lower amongst free immigrants, in 1841 for example, one and a half free men for every free woman. See Alford, above n 89, 74.

94 Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995) 103-104. See also Castles, above n 12, 43.2-43.4.

95 See, for example, the robust prosecutions in *R v Thompson and Others* [1824] TASSupC 15 (*Hobart Town Gazette*, 25 June 1824, 2); *R v Shea and Others* [1841] NSWSupC 7 (*Sydney Herald*, 25 February 1841, 2; *The Australian*, 25 February 1841, 2; *Sydney Gazette*, 27 February 1841, 2). See also Boyce, above n 21, 71-83; Hughes, above n 21, 203-243; Woods, above n 12, 77-78; Castles, above n 12, 79-80.

96 See, for example, *R v Oxley* [1832] TASSupC 32 (*Tasmanian*, 7 December 1832); James Mudie, *The Felony of New South Wales* (Landsowne Press, 1964) 113 and 116. In 1824 when the Supreme Court of Van Diemen’s Land was established, about half of the island’s white population were convicts. Even as late as 1847, 34% of Tasmania’s white population were convicts (see Davis, above n 21, 255). In NSW in 1820 45% of the white population were convicts but even as late as 1840, 29% of the white population were convicts (and another 30% were former convicts) and only 13% were free emigrants (see David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* Cambridge University Press, 1991) 200-201). There was always fear of a breakdown of, what was described by Deputy Advocate-General Wilde in 1821 as, the ‘sense of Restraint and Coercion, which may be urged to keep the Prisoners of the Crown, so comparatively numerous here, in proper awe and subjugation.’ See Hughes, above n 21, 231.

97 Indigenous offenders, especially in relation to crimes committed upon white victims, were often seen in these terms. See, for example, *R v Yerricha and Others* (*South Australian Gazette and Colonial Register*, 25 May 1839, 4); *R v Tallboy* [1840] NSWSupC 44 (*Sydney Herald*, 12 August 1840, 1S (trial); 14 August 1840, 1S (sentence); *Australian Chronicle*, 13 August 1840, 2); *R v Merrido and Nengavil* [1841] NSWSupC 48 (*Sydney Gazette*, 18 May 1841, 2; *Sydney Monitor*, 17 May 1841, 2).
trial for burglary with violence of a former convict from Port Arthur observed, 'We are surrounded with thieves, burglars and other offenders of the deepest criminality.'

His Honour, in a far from flattering description of Tasmania, considered that, 'A worse community with especial reference to the very large population of the convict population never existed on the face of the globe than in this island, at all events never in the history of modern times.' Montagu J declared that if the jury ‘should entertain no doubt of the prisoner’s guilt, [but] the Executive should spare his life, then I should say the sooner the Supreme Court is shut up the better.’ In such a society the death penalty, played, or was at least perceived to play, a major role in terms of both punishment and deterrence.

The application of the twin rationales of deterrence and punishment in the exercise of the death penalty are illustrated by the horrific Tasmanian case of Alexander Pearce in 1824. Pearce was convicted of the murder of a fellow convict called Cox whom he had killed and then roasted and consumed during an ill-fated effort to escape from the secondary penal settlement at Macquarie Harbour. It transpired that Pearce had killed and consumed five other prisoners on an earlier similarly ill-fated escape attempt. Pearce was publicly hanged and dissected. An editor

---

98 R v Kenney, The Courier, 6 March 1847, 3; Davis, above n 21, 40. See also, for example, Theodore Bartley, Letter to Editor: ‘Household Events’, Launceston Examiner, 11 August 1852, 5; Joan Goodrick, Life in Old Van Dieman’s Land (Rigby, 1977) 68; Michael Sturma, Vice in a Vicious Society; Crime and Convicts in mid 19th Century New South Wales (University of Queensland Press, 1983) 64, 94-95.

99 The Courier, 6 March 1847, 3.

100 Ibid. Montagu J is referring to the prerogative of mercy. This is an ancient power vested in the British monarch to pardon, either unconditionally or conditionally, offenders. The prerogative was of great importance in capital cases. A detailed overview of the practical administration of the prerogative of mercy in colonial Australia from 1824 to 1860 is beyond the scope this paper. However, in brief, the power was exercised in colonial Australia from 1824 until responsible government in the 1850s by the Governor, who acted on the advice of the Executive Council and also had regard to any view of Chief Justice or trial judge. See further Plater and Milne, above n 18, Part 3.

101 Whether the death penalty actually serves these purposes is highly debatable, as was even officially acknowledged in the period. See, for example, in the 1825 case of two highway robbers, Watson and Golding, Forbes CJ indicated that execution might be appropriate, since the crime had been so prevalent lately. Governor Brisbane disagreed and noted his ‘opinion that Executions do not deter the Commission of Crimes have weighed with me in extending Clemency towards these two Individuals’ (see Chief Justice’s Letter Book, Archives Office of New South Wales, 4/6651, 37-38; Sydney Gazette, 30 June 1825, 3).

102 See generally, 4 Blackstone’s Commentaries 1-19. As Blackstone states, ‘the end of punishment is to deter men from offending’. See also Castles, above n 12, 43.5-43.6.

103 Hobart Town Gazette, 25 June 1824; Macquarie Harbour, like other places of secondary punishment in the colonies such as Norfolk Island and later Port Arthur enjoyed a grim reputation. See further, Hamish Maxwell-Stewart, Closing Hell’s Gates: the Death of a Convict Station (Allen and Unwin, 2008).


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

106 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
expressed the hope that the grisly fate of Pearce and others hanged that day would serve both as a suitable punishment and deterrent.

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

On occasion, such as in *Pearce*, 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, one can particularly see its application in respect of those offenders who appeared to threaten the tenuous stability of early colonial society such as rebellious or intractable convicts, Aboriginal offenders, and, especially bushrangers of capital punishment. In England, this even led to riots against the surgeons who performed the procedure. See Peter Linebaugh, ‘The Tyburn Riot against the Surgeons’, in Hay, above n 5, 65-117


108 The *Bloody Code* applied in the colonies until the 1830s when the number of offences attracting the death penalty was drastically reduced but crimes such as highway robbery, serious assaults and rape still attracted the death penalty.

109 See, for example, *R v Butler and Others* [1824] TASSupC 4 (*Hobart Town Gazette*, 2 July 1824, 2-3); *R v Davis and Ors* (‘Execution’, *Colonial Times*, 22 September 1826, 3; see also ‘Remarks’, *Colonial Times*, 22 September 1826, 3); the sentencing comments in *R v Clayton and Ors* (*Hobart Town Gazette*, 23 June 1827, 4-5; see also ‘Execution’, *Colonial Times*, 6 July 1827, 4). See further Davis, above n 21, 25-27; Castles, above n 12, 261. This offence carried the death penalty in Tasmania until 1836 and it was not uncommon for offenders to be hanged for this crime. See further Davis, above n 21, 25-27.

110 See, for example, the case of *R v Coleman* (*Sydney Monitor*, 13 February 1833, 2; *Sydney Herald*, 11 February 1832, 2). Joseph Coleman was an assigned convict servant. He was charged in 1832 with striking his master with intent to murder. Coleman had been unrepentant about his crime. See further Davis, above n 21, 25-27.

111 See, for example, *R v Tallboy* [1840] NSWSupC 44 (*Sydney Herald*, 12 August 1840, 1S (trial); 1S August 1840, 1S (sentence)); *R v Yerricha and Others* (*South Australian Gazette and Colonial Register*, 25 May 1839, 4; see also ‘Trial and Conviction of the Natives’, *South Australian Gazette*, 25 May 1839, 2); ‘The South Australian Protectorate’, *South Australian Register*, 15 August 1849, 2; *R v Manyelta* (*South Australian Register*, 18 August 1860, 3; *South Australian Advertiser*, 18 August 1860, 3; see also ‘The Condemned Native’, *South Australian Advertiser*, 6 September 1860, 2).
(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).  

Though a sense of 'chivalry' might be shown to female capital offenders, even female offenders were not immune from the application of the death penalty. An illustration of this reasoning is provided by the case of Bridget Fairless in 1826. Fairless and her accomplice, a man called Collins, had robbed an unsuspecting traveller. Both stood trial and were 'convicted of a highway robbery, aggravated by circumstances of a particularly aggravated character.' To compound their guilt, Fairless and Collins, had lured the victim and taken advantage of his good nature, 'thus the exercise of one of the best feelings of human nature was made subservient to their wicked purposes.' Not only had both played an active role in the crime, but at the trial it emerged that Fairless had encouraged the use of even greater violence upon the victim by Collins as 'the old bugger had more money' than he had relinquished and they had both 'considerably ill treated him.' Both were sentenced to death. No hope of mercy was held out and the Executive Council declined to interfere.

Both Fairless (who was noted as 'decently and modestly attired') and Collins went to the gallows with 'great firmness' and suitable penitence. One observer noted that 'a deep silence, now and then broken by the lamentations of some females who stood on the hill overlooking the place of execution, who were perhaps acquaintances or relatives to the criminals, prevailed whilst [Fairless] knelt and with

---

113 See further the discussion below in Part 5.


115 See ‘The Police’, Sydney Gazette, 7 June 1826, 3, for a detailed account of the facts of the case.

116 See The Monitor, 16 June 1826, 5;

117 ‘Execution’, Sydney Gazette, 12 July 1826, 3.

118 Ibid.

119 Ibid.

120 The Australian, 21 June 1826, 3; Sydney Gazette, 21 June 1826, 3; The Monitor, 23 June 1826, 8.

121 Ibid. Though one reporter noted that ‘strong feeling of disgust was excited in the minds of the multitude assembled to witness the awful spectacle, by the indecent conduct of a number of persons of both sexes, whose boisterous and unseasonable mirth, blasphemous language, and turbulent disposition, was in the highest degree scandalous and disgraceful.’ See Sydney Monitor, 14 July 1826, 2.

122 Ibid. See also ‘Execution’, The Australian, 12 July 1826, 2.
the assiduous clergyman put up their fervent petitions for the Almighty's saving mercy.’

Collins’ last declaration was that Fairless was innocent and had played no part in the affair. It is unsurprising that Fairless was hanged, given not only the gravity with which such crimes were perceived in colonial society but, in particular, the nature of Fairless’s involvement in it.

Similar considerations can be seen in the fate of Mary Sullivan in 1852 in Tasmania. Sullivan was aged only 16. She had been sentenced in Ireland in April 1851 to transportation for 14 years. She had been in the Colony for less than two months. She was placed as an assigned convict servant at a public house in Hobart to care for the young children of the landlord who was away in Victoria in the Gold Rushes, especially the youngest child aged only two. Sullivan after only a week absconded after stealing some items and strangling the youngest child to death and leaving her body in a sink in the backyard. The crime was branded ‘a cold blooded and diabolical murder’ with no apparent motive. As one columnist volunteered, ‘What the object was which she had in view in murdering the poor child – whether it arose from impatience of being obliged to attend to it, or with the view of fixing the guilt on her fellow servant, (which we have heard alleged as a motive), has not, that we are aware of, as yet transpired.’

Sullivan was swiftly traced, arrested and charged with the child’s murder. She made a poor impression at both the Inquest and the trial. As one reporter commented, ‘The prisoner is a short stout rough-looking girl of forbidding appearance, and sullen disposition.’

Sullivan called no witnesses and said nothing in her defence. Again there was

123 Ibid.

124 Launceston Examiner, 10 July 1852, 6.

125 Ibid. See also ‘Murder’, Colonial Times, 9 July 1852, 2; ‘Horrible Occurrence’, The Argus, 19 July 1852, 4.


127 Ibid.

128 See R v Sullivan (Colonial Times, 27 July 1852, 2).

129 This was not unusual in the period, even in capital cases. In the 1840s, for example, in the Black Country in England only 25% of defendants were legally represented. In serious criminal cases this figure only rose to 49%, see David Taylor, Crime, Policing and Punishment in England 1750-1914 (St Martin’s Press, 1998), 114. As late as 1879 a defendant in England charged with murder might still appear unrepresented, see R v Sherwood (The Times, 5 May 1879). A similar situation also arose in Australia, see, for example, R v Gomm, Lockwood and Taylor (The Courier, 30 July 1845, 2, 4; The Observer, 29 July 1845, 2-3), R v Flanders (Mercury, 5 June 1862, 2-3); R v Griffiths (Hobart Mercury, 25 October 1865, 3; 26 October 1865, 2-3). All these defendants were hanged. It was not uncommon, even into the 20th century, to find defendants, even those accused of serious crimes, appearing legally unrepresented. As late as 1910 the Court of Appeal in R v Gillingham (1910) 5 Cr App R 187 deemed it necessary to remind judges to ensure defendants charged with rape should be represented by counsel. The injustice of such a situation is obvious, see James Stephen, A History of the Criminal Law of England (Vol 1) (Macmillan and Co, 1883) 442.
pointed reference by a witness to her ‘silent sullen disposition’. The jury unsurprisingly after a short consultation found her guilty of the child’s murder. The Chief Justice emphasised the ‘enormity of her crime’ and advised Sullivan to repent and to prepare for another world. She was sentenced to death ‘without hope of mercy’. Sullivan appears to have been unmoved. ‘She has hitherto manifested an unrelenting obduracy and nothing seems calculated to bring her a sense of her enormous guilt.’

Still even in a case as heinous as this involving an apparently unrepentant murderer, the issue of mercy did not go unnoticed. From the outset there were suggestions that Sullivan may have been insane. The ‘extraordinary’ circumstances of the murder, as The Courier noted, the total absence of any apparent motive, her ‘indifference’ when taken into custody and her ‘stoicism’ during the trial and the sentence, all appeared inconsistent with sanity. The Colonial Times reported that with a view of saving her life, a petition was got up, representing Sullivan to be insane. This had (unsurprisingly in such circumstances) led to the belief that upon enquiry her insanity would be established and her life would be spared. However, the Medical Board appointed to enquire into the Sullivan’s condition after an investigation described as ‘patient’ and ‘most careful’ of all the circumstances declared her to be in ‘a sound state of mind’. ‘Sullivan exhibited no vacancy – no want of perception, but utter callousness.’

The Executive Council considered the case but after reading the Chief Justice’s report of the trial, refused to intervene and resolved they were ‘unable to discover any reason which might justify them advising His Excellency to extend mercy to this prisoner.’ Sullivan went to the gallows before a ‘vast crowd’.

---

130 Colonial Times, 27 July 1852, 2.
131 Ibid.
133 ‘Execution’, Colonial Times, 3 August 1852, 3.
136 The minutes of the Executive Council make no reference to the issue of insanity or any such petition.
137 ‘Public Execution’, Colonial Times, 6 August 1852, 2. This appears plausible, especially to a modern observer. See further below n 147.
139 ‘Execution’, The Courier, 7 August 1852, 3.
140 ‘Public Execution’, Colonial Times, 6 August 1852, 2. It appears that in the ship which had brought the Sullivan to the Colony, there was another female bearing the same name, who really had exhibited signs of mental aberration, and she had been taken for the criminal under sentence of death.
141 ‘Execution’, The Courier, 7 August 1852, 3.
142 Executive Council Minutes, Tasmania, 27 July 1852.
emphasis on her apparent lack of remorse and ‘total absence of all fear’. As one observer noted:

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

Sullivan, as with Fairless, had committed a heinous crime that was at odds with any expectation of the feminine character. The notion of a convict servant callously murdering an infant child under her care was clearly ‘beyond the pale’. But Sullivan had compounded her guilt by her ‘total indifference’, what was seen, quite possibly wrongly, as her obdurate and unrepentant nature.

The case of Elizabeth Campbell and her three male accomplices in R v Benson, Campbell and Others in 1826 further illustrates the operation of the death penalty in the early colonial period with respect to capital offenders. Campbell is of additional significance in highlighting the application of the death penalty to a female offender for the specific crime of murdering her master, the very crime with which Maloney and McGregor were later charged. Campbell and her three male accomplices were convicts who had allegedly murdered their master, John Brackfield, at his home and had ransacked and robbed his possessions. Campbell has the dubious honour of being the first woman judicially hanged in Australia. She and her three accomplices were charged with not only Brackfield’s murder but also with the peculiar offence of the period of ‘petit treason’. Not only was Campbell alleged to have played an active role in the actual murder but, to even further aggravate her crime, she was said to have procured its commission through seducing and sleeping...

143 ‘Execution’, The Courier, 7 August 1852, 3. It was noted ‘a great proportion’ of the crowd to the ‘sad spectacle’ were females and children of tender years. See ‘Public Execution’, Colonial Times, 6 August 1852, 2.

144 ‘Execution’, The Courier, 7 August 1852, 3. Sullivan’s execution was a brutal and botched affair. The executioner, the prolific Solomon Blay, ‘chucked’ the rope. See Ibid.

145 Ibid. A different view as offered by another observer, ‘The unhappy female having previously confessed her crime, vacated her cell for the scaffold with much firmness, and spent her last moments in prayer.’ See ‘Public Execution’, Colonial Times, 6 August 1852, 2.

146 Davis, above n 21, 43.

147 However, one must question, as was suggested even in 1852, whether Sullivan was legally sane at the commission of her crime. As Davis notes, ‘Mary Sullivan might not be judged sane today, and her case seems only an extreme example of a phenomenon common amongst men and women without hope’ (Ibid). Davis compares such cases to 20th century soldiers suffering from shellshock (Ibid). Another modern author observes, ‘With hindsight and the present knowledge of what life was like for those transported thousands of miles away from their families, treated more like animals than human beings, with no prospect of ever returning to home, it can only be assumed that hers were the actions of someone totally without hope’ (see Geoffrey Abbott, Amazing Stories of Female Executions (Summersdale Publishers, 2006) 204-205).

148 [1825] NSWSupC 4 (The Australian, 27 January 1825, 2; Sydney Gazette, 27 January 1825, 2-3).

149 See above, nn 53-58.
with Brackfield. This damning fact attracted particular denunciation. As the *Sydney Gazette* opined in dramatic terms:

> It certainly must be pronounced a most horrid murder, though all crimes where life is taken may be thus designated, but still there appeared no incentive to murder this poor old man – so easily might he have been robbed without being slain! But what said the woman, Eliza Campbell, upon the evening of the murder?...that she was going to sleep with her master – a married man – a tottering old man! That she so prostituted herself, at the instance of her deceased master, there cannot be a shadow of doubt, and whilst he was planning the adulterous intercourse, the object of his illicit amour was abetting the murderers in that deed which hurried him, in the plenitude of sin, into the presence of the GREAT ETERNAL! “The adulteress (it is said) will hunt for the precious life.”

At the trial the Solicitor-General took a similar zealous view. He ‘elaborately delineated’ the prosecution case and sought divine inspiration in urging that the jury must return a guilty verdict ‘for it was not only an offence with which they were charged of the utmost magnitude in the eye of human jurisprudence, but it was also an act of such intense enormity, as to elicit the declaration of the Divine Law, which solemnly testifies ’whose sheddeth man’s blood shall his blood be shed." The Chief Justice, in his summing up, ‘expressed a strong opinion of the guilt of the prisoners.’ The jury after just ten minutes, perhaps unsurprisingly given the nature of the case, returned a verdict of guilty for all the defendants. The Chief Justice in passing the death sentence observed that it was not his intention to wound the feelings of the unfortunate prisoners, or to aggravate their sufferings by entering into the details of the evidence. Rather it was ‘his duty to tell them that no recommendation for mercy could with justice be forwarded to His Excellency on their behalf.’ They were ordered for execution the following Monday and their bodies were ordered to be delivered to the surgeons for dissection.

As usual, the trial, as it involved the capital offence of murder, was conducted on a Friday and the execution the following Monday. In determining the opportunity for clemency, Forbes CJ found that there was nothing in the case which could lead him to

151 See *The Australian*, 27 January 1825, 2; *Sydney Gazette*, 27 January 1825, 2-3. Such prosecutorial zeal, at odds with the prevailing notion in England by this time of the prosecutorial role as the restrained ‘minister of justice’, was often shown in Australia until the middle part of the 19th century in dealing with offenders such as bushrangers, intractable convicts and Indigenous offenders who were seen as posing a real ‘threat’ to early colonial society. See further David Plater and Sangeetha Royan, ‘The Development and Application in Nineteenth Century Australia of the Prosecutor’s Role as a Minister of Justice: Rhetoric or Reality?’, to be published in the forthcoming edition of the *University of Tasmania Law Review*.
152 *Sydney Gazette*, 27 January 1825, 2.
153 Ibid.
154 *The Australian*, 27 January 1825, 2.
155 Ibid.
156 Ibid.
recommend mercy to the Executive Council. Governor Brisbane agreed and said that he had no alternative but to carry out the sentence, after reviewing the notes of the trial supplied by Forbes CJ. Interestingly, in light of the 'chivalry' that on occasion was extended in colonial cases such as Maria Williams and Ann Edwards sparing female defendants from the death penalty, neither Forbes CJ nor the Governor made special mention of Campbell's sex. She was described as 'a woman of more than ordinary understanding but her associates and prompters in crime, were almost quite ignorant.' Though it is significant that even in a case such as this, the question of mercy was still seriously considered, the magnitude of the crime 'as one of the most bloody scenes ever recorded' and the need for punishment and deterrence outweighed any other considerations. All four defendants were swiftly hanged, and in accordance with the sentence, their bodies were delivered to the surgeons for dissection. It was reported at their execution that all four 'unhappy creatures gave every symptom of unfeigned penitence, and acknowledged the justice of that decree which necessarily severed them from Society by an ignominious death.' Campbell would not allow her remorseful accomplices to exonerate her from any knowledge of the murder and 'acknowledged she knew that they were going to murder her master.'

The grim fate of the female offenders in *Fairless, Sullivan* and *Campbell* illustrates the application of the death penalty to female offenders and the fact that their gender gave them no immunity from the gallows. In these cases it is clear that the nature of their crimes and the need for punishment, 'whose sheddeth man's blood shall his blood be shed,' and the need to deter any other like-minded individuals was such


158 For further discussion of both Williams and Edwards, see below Part 10.

159 See, for example, Castles, above n 12, 43.6; Laster, above n 114, 167-186.


161 See further the discussion below in Part 5.


164 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.

165 ‘Execution’, *Sydney Gazette*, 27 January 1825, 3. See also ‘Execution’, *The Australian*, 27 January 1827, 2. ‘They acknowledged the justice of their sentence; one of them sung two hymns, and the whole of them evinced the utmost penitence for their crime – they were then launched into eternity’ (Ibid).

166 ‘Execution’, *Sydney Gazette*, 27 January 1825, 3. It was noted, ‘However clear the testimony may be against criminals, nevertheless it is consolatory to listen to the public confession of dying penitents’ (Ibid). Such ‘last minute’ confessions and public expressions of penitence by the condemned prisoner and exhortations to the assembled crowd (hangings were in public until the 1850s) to learn from their example, served an important purpose in the rationale of the death penalty. See Davis, above n 21, 17-18.

167 *Sydney Gazette*, 27 January 1825, 2.
as to outweigh any countervailing considerations. All three offenders were perceived as falling within the category of those females ‘depraved and abandoned in the extreme’. However, it is notable that even in cases such as these the question of mercy was still countenanced. In *Sullivan* the issue of insanity was seriously raised and even in *Campbell* the Governor turned his mind to the issue of mercy. The gallows, even for the apparent worst of offenders in early colonial society, was not a foregone conclusion. Yet, with respect to female offenders, the reasoning for respite from the gallows is not always clear:

...apart from an occasional aside by an assize judge who, in leaving a condemned woman to hang, made reference to the fact that her crime was too great to allow the normal immunity of women from hanging to apply in her case, contemporaries rarely referred to this issue in public.\(^{168}\)

One of the ‘normal’ immunities from execution which applied to women was the plea of pregnancy, or to ‘plead their belly.’ The plea of pregnancy was available to women facing the gallows, and usually served as not just a temporary respite from capital execution, but a reprieve.\(^{169}\) The procedure involved the empanelling of a jury of matrons, usually 12 married women, who were charged with the duty to ascertain the veracity of the claim to pregnancy.\(^{170}\) The nature of the determination on pregnancy was fraught, with it not uncommon for the jury to be unable to make a decision on the matter.\(^{171}\)

Typically however, the pardon might involve consideration of such matters as prior convictions (female offenders usually being less likely to have prior convictions in comparison to men),\(^{172}\) character references and aggravated circumstances.\(^{173}\) This accords with the statutory basis for pardons granted to judges, which refers to worthiness of the subject as to whether they are ‘fit and proper subject’ to be recommended for mercy.\(^{174}\) Likewise, petitions for mercy would often focus upon special circumstances and personal characteristics.\(^{175}\) King notes that desirable

---

\(^{168}\) King, above n 14, 186 (internal references removed).

\(^{169}\) Beattie, above n 9, 430-431.

\(^{170}\) There were some highly publicised mistakes made by the jury of matrons. For example, at the trial of Bathsheba Spooner in 1778 in Massachusetts, the jury of matrons found in response to her plea of pregnancy that she was ‘not quick with child’. However, the post-mortem after her subsequent execution revealed her in fact to have been pregnant (1844) 2 *American Criminal Trials* 1. This unusual procedure was convened to deal with Sarah McGregor’s claim that she was pregnant. See below nn 266-268.

\(^{171}\) Anne Hurle was found guilty at the Old Bailey in 1804 of forgery, a capital offence. The jury of matrons were unable to come to a decision, so a physician was called who found her not pregnant. See further Thomas Forbes, ‘A Jury of Matrons’ (1988) *Medical History* 32.

\(^{172}\) Although, as one scholar notes, recidivism in female defendants increased in the later 19th century, see Emsley, above n 16, 98.

\(^{173}\) See further Radzinowicz, above n 11.

\(^{174}\) *Judgment of Death Act* 1823, s 2.

\(^{175}\) For example, King cites age, infirmity and poverty as relevant considerations. See King, above n 10, Ch 9, ‘Pardoning Policies: The Good Mind and the Bad’.
characteristics were those which conformed to ‘the practical needs and underlying assumptions of the propertied classes,’ for example, industriousness and honesty. This was a theme in the operation of the prerogative of mercy which is to be found in colonial Australia.\textsuperscript{176}

\textbf{Part 5: The Operation of the Prerogative of Mercy in colonial Australia}

The fate of the defendants in cases such as \textit{Pearce}, \textit{Campbell}, \textit{Sullivan} and \textit{Fairless} should not obscure the fundamental importance of the prerogative of mercy in the Australian colonies, as in England, in alleviating the drastic effects of capital punishment.\textsuperscript{177} The colonial authorities, even in relation to the worst offenders, took very seriously the exercise of the prerogative of mercy. The Governor and the Executive Council often strained to find grounds upon which to reprieve the condemned prisoner, and considered a wide range of factors including the circumstances of the offence\textsuperscript{178} (especially if there were doubts as to the safety of the verdict,\textsuperscript{179} as was ultimately to prove the case in \textit{Maloney and McGregor}), the conduct of the trial\textsuperscript{180} and the background and circumstances of the offender\textsuperscript{181} in its

\textsuperscript{176} See Plater and Milne above n 18.

\textsuperscript{177} It is striking over 90\% of capital sentences in England in this period ultimately resulted in the grant of mercy, see Carolyn Conley, \textit{The Hanging Tree: Execution and the English People: Review} (1996) 29 \textit{Journal of Social History} 726, 727. The figures in respect of Australia are less clear, with figures of 51 executions on average annually in New South Wales and Tasmania, extrapolated from the United Kingdom. \textit{Report from the Select Committee on Transportation, 1838 (Molesworth Committee)}, in Castles, above n 25, 161. Castles’ detailed survey of capital cases (including sentences of death recorded) for NSW for the period 1826-1836 found 1296 sentences of death and 363 actual executions. See Castles, above n 12, 43.2. See further the website of the Francis Ford Society at http://research.forbessociety.org.au/index.php?option=com_jake&jrun=people%2Fsearch%2F.

\textsuperscript{178} See, for example, \textit{R v Reid, Lancaster, Glove and Price (Launceston Examiner, 4 October 1843, 4} (absence of wanton cruelty); See also William Puckridge and Edward Holmes who were convicted in 1829 of murder. The Executive Council examined the evidence presented by the Chief Justice and upon finding provocation, commuted the sentence of death passed to transportation to the penal settlement of Moreton Bay for seven years. See \textit{Sydney Gazette}, 20 March 1827, 2; \textit{NSW Executive Council Minute}, no 28, 18 March 1827, 134-142.

\textsuperscript{179} See, for example, \textit{R v Tucker and Davies (Colonial Times, 7 May 1830, 3; Hobart Town Courier, 8 May 1830, 3), who were convicted of rape upon an Eliza Hickery but the Chief Justice forbore 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. He noted the victim was of ‘bad character’ and both accused were of good character. See Tasmania Executive Council Minutes, 6 May 1830. See also Thomas Hudson who was convicted at trial of burglary and sentence of death recorded was passed (\textit{Colonial Times, 7 May 1830, 3}). The Chief Justice expressed to the Executive Council his ‘strong doubt’ about Hudson’s guilt. Hudson was granted an unconditional pardon. See Tasmania Executive Council Minutes, 6 May 1830.

\textsuperscript{180} See, for example, John M’Cabe who was condemned to death in 1855 for murder and was advised by Williams J ‘not to entertain the slightest hope of mercy’ (‘Murder’, \textit{Sydney Morning Herald}, 24 October 1855, 5). The trial was described as a ‘mockery of justice’ (‘The Convict M’Cabe’, \textit{The Argus}, 23 October 1855, 4) owing to the deplorable and ‘very severely criticised’ (‘Victoria’, \textit{South Australian Register}, 27 October 1855, 3) conduct of the trial judge. See further Ibid; ‘The Convict M’Cabe’, \textit{The Argus}, 23 October 1855, 4; ‘The Convict M’Cabe’, \textit{The Argus}, 23 October 1855, 5; ‘The Convict M’Cabe’, \textit{The Argus}, 24 October 1855, 6; ‘Convict M’Cabe’, \textit{The Argus}, 24 October 1855, 7. The accused was reprieved, see Ibid.
consideration of whether mercy was appropriate. The Council was sensitive to calls for mercy, whether from the jury, employers, clergymen or, as was also to feature in Maloney and McGregor, public opinion and the attitude of the press.

Even those offenders who represented the worst criminals in early colonial society such as the most intractable convicts, prolific bushrangers and Indigenous

---

181 See, for example, John Boyd and Henry Drummond who were convicted in 1826 of theft of livestock with sentence of death passed but after consideration of the information on what crimes the prisoners had originally been sent to Australia, the Executive Council commuted their sentences on account of their previous good character. See NSW Executive Council Minute, no 14, 29 June 1826; NSW Executive Council Minute, 5 July 1826, 50. See also a bushranger and escaped convict called James Quinn (see R v Brewer and Quinn (The Courier, 22 October 1853, 3; Colonial Times, 26 October 1853, 3)) who was reprieved on account of his youth and unhappy upbringing. ‘He never remembered from a child being anything else but a prisoner. He has never enjoyed the privileges and opportunities of freedom.’ See Tasmania Executive Council Minutes, 29 October 1853.

182 See, for example, R v Brewer and Quinn (The Courier, 22 October 1853, 3; Colonial Times, 26 October 1853, 3) where the jury not only recommended mercy but wrote to the Governor (see Tasmania Executive Council Minutes, 29 October 1853); R v Adams and McLean (South Australian Register, 9 September 1873, 5S (the jury not only recommended mercy with their verdict on two sailors convicted of murdering their captain but all the jurors wrote to the Governor praying that the death penalty should be commuted, noting the mitigating factors in the case. The death sentence was commuted). It is significant that the jury in McGregor and Maloney not only recommended mercy with their verdict but wrote to the defence lawyer to reiterate the point. See further Part 7 below.

183 See, for example, R v Maher (Sydney Gazette, 12 November 1836, 3) where the trial judge in a capital case of a female convict who had been found guilty of cutting and maiming another female convict servant with intent to cause grievous bodily harm passed a sentence of death recorded and recommended a term of only six months imprisonment on account of the good character given by the prisoner’s master and mistress and provocation from the victim.

184 See, for example, ‘Petition for Mercy’, Cornwall Chronicle, 25 October 1845, 277. See also Davis, above n 21, 42–43.

185 See, for example, the petition presented to the Executive Council from the members of the jury and 42 respectable citizens in the case of Maria Williams (see Shaw to Darling, Petition, 6 July 1829, EC Appendix to the NSW Executive Council Minutes, Vol 2, 4/1439, SRNSW; see further Castles, above n 12, 43.7). See also Ann Edwards, who was also reprieved in the face of public sympathy having assaulted with intent to kill her abusive and drunken husband (see Homo, ‘Letter to Editor’, Colonial Times, 2 July 1833, 3; Editorial, Colonial Times, 2 July 1833, 2; Goodrick, above n 98, 71). For further discussion of both cases, see below Part 10.

186 Castles, above n 12, 43.11. The press calls for mercy, for example, in both Williams and Edwards are significant. See above n 185.

187 This is illustrated by the fate of the participants who were convicted of various capital crimes arising from the successive convict mutinies at Norfolk Island in 1834 and 1842. Both mutinies were bloody affairs that left a number of both soldiers and convicts dead. As a leading secondary place of punishment, Norfolk Island was always intended to be ‘an extreme punishment short of death’ (John Hirst, Convict Society and Its Enemies: A History of Early New South Wales (Allen & Unwin, 1983) 93). Many of the participants in both affairs were convicts who had committed further crimes in the colonies and had often been already reprieved from the gallows in Australia. Such offenders would naturally be thought to be destined for the gallows. However, the majority of them were ultimately reprieved despite their backgrounds and the undoubted gravity of their crimes. See further Plater and Milne, above n 18, Part 5.

188 See, for example, the notorious convicts and bushrangers, Martin Cash and Lawrence Kavanagh, who had escaped from Port Arthur. Cash was condemned to death for murder in relation to the death of a special constable during his arrest and Kavanagh was condemned to death for robbery under arms. Yet both were controversially reprieved by the Governor despite their backgrounds and the gravity of their crimes. See
offenders convicted of the murder of a white man,\textsuperscript{189} were not exempt from the grant of mercy. Even the crime of murder might attract mercy.\textsuperscript{190} Indeed, even ‘a monster in human form’ convicted of the most ‘monstrous, remorseless and deliberate’ murder of his wife and two young children such as Wilkes in 1858 might still be deemed eligible for mercy.\textsuperscript{191}

The fate of the 23 convicts condemned to death for their involvement in the mutiny and seizure of the brig \textit{Wellington} whilst en route to Norfolk Island after overpowering the ship’s crew\textsuperscript{192} demonstrates how seriously the colonial authorities

\textsuperscript{189} See, for example, \textit{R v Tallboy} [1840] NSWSupC 44 (\textit{Sydney Herald}, 12 August 1840; 1S (trial); 1S August 1840, 1S (sentence)) where, despite the robust comments of both prosecution counsel and the trial judge highlighting the threat posed to white society by conduct such as that attributed to Tallboy (he had murdered a white surveyor) and the need to deter similar conduct by other Aborigines, the sentence of death was reprieved (see \textit{Sydney Monitor}, 19 September 1840, 2; \textit{The Australian}, 26 November 1840, 2). See also the Governor’s order to reprieve and release an Aboriginal defendant called Make-I-Light who had been convicted of the murder of a white man where the trial judge had held out to the prisoner ‘no hope of mercy’ (see \textit{R v Make-I-Light} [1851] NSWSupC 29 (\textit{Moreton Bay Courier}, 15 November 1851) ‘in consequence of some doubt of the sufficiency of the evidence of identity’ (see ‘The Aboriginal Make-I-Light’, \textit{Moreton Bay Courier}, 22 May 1852, 3). The treatment of Indigenous offenders, especially in relation to the exercise of the death penalty and the prerogative of mercy is a complex and emerging area of study (see, for example, Alan Pope \textit{One Law for All?: Aboriginal People and Criminal Law in early South Australia}. (Aboriginal Studies Press, 2011); Mark Finnan and Jonathan Richards, ‘Aboriginal Violence and State Response: Histories, Policies, Legacies in Queensland 1860-1940’ (2010) 42 \textit{Australia and New Zealand Journal of Criminology} 238–262) and beyond the scope of the present paper. It is hoped to be the subject of future focus as part of the authors’ ongoing study.

\textsuperscript{190} See the reprieve granted to four escaped convicts condemned to death for the murder of a respected settler called McIntrye during an armed robbery, ‘if true, a tale of barbarity so savage, it has rarely fallen to our lot to record’ (‘Trial of Four Men for Mr McIntrye’s Murder’, \textit{The Australian}, 21 December 1832, 4), who were reprieved after strong doubts emerged as to the testimony of the principal prosecution witness, see report of Governor Bourke to the Colonial Secretary, \textit{Historical Records of Australia}, Series 1, Volume 17, 50-51.

\textsuperscript{191} \textit{Bell’s Life}, 5 June 1858, 2. See also Editorial, \textit{Sydney Morning Herald}, 2 June 1858, 4; ‘Reprieve of the Convict Wilkes’, \textit{Sydney Morning Herald}, 2 June 1858, 5; ‘An Observer’, Letter to the Editor: ‘The Convict Wilkes’, \textit{Sydney Morning Herald}, 3 June 1858, 8. The decision to spare Wilkes was controversial. It was asserted that if a man like Wilkes was reprieved, it was difficult to see who could ever be properly hanged in a future case. See \textit{Bell’s Life}, 5 June 1858, 2.

approached the prerogative of mercy. Despite their status as ‘escaped convicts and convicted pirates’, there was, nevertheless, considerable public sympathy for the defendants and calls for mercy on their behalf in the Colony’s press. The Executive Council minutes demonstrate the scrupulous care that was taken in deciding which prisoners should be reprieved, it being recorded that:

...the Council endeavoured with the utmost anxiety to ascertain which amongst the Prisoners seemed least deserving of clemency, either in consequence of their violent conduct whilst effecting their purposes, or from the vicious course of their previous lives.

The Council resolved that 17 of the condemned men should be reprieved and the sentence of death was only upheld for the remaining six. The Council even commuted the sentence of death for John Walton, the prisoner who had acted as the Captain of the pirates to transportation to Norfolk Island and hard labour in chains for the term of his natural life. Consideration of ‘the moderation and humanity which marked his conduct as captain of the brig’ and prior offences were primary factors influencing this decision. The remaining reprieved men were similarly sentenced to Norfolk Island, to work in chains for the rest of their lives. A further reprieve arrived for one of the condemned men, Douglas, as he was arriving at the place of execution. The remaining five prisoners were duly hanged, suitably remorseful.

The importance attached to the prerogative of mercy extended to female capital offenders despite the nature and perceived gravity of their crimes in early colonial society. Ann Smith, for example, was convicted of the capital offence of highway robbery in 1826. She received sentence of death recorded which would have

---

193 Ilde (2009), above n 192.
194 See, for example, ‘Further Particulars of the Piratical Seizure and Recapture of the Brig Wellington’, The Monitor, 17 February 1827, 5; Sydney Gazette, 3 March 1827, 2; The Monitor, 9 March 1827, 8; ‘Executions’, The Australian 10 March 1827, 3; The Australian, 13 March 1827, 2.
195 NSW Executive Council Minute, 5 March 1827, 128.
196 NSW Executive Council Minute, no 27, 5 March 1827, 129-130. The six men were: William Douglass, John Edwards alias Flash Jack, John Smith, Edward Colthurst and William Liddington (or Leddington).
197 Ibid.
198 Sydney Gazette, 8 March 1827, 2. See also, Darling to Hay, 7 March 1827, Historical Records of Australia, Series 1, vol 13, 146-147.
199 Execution’, Sydney Gazette, 13 March 1827, 3; ‘Execution’, The Australian, 13 March 1827, 3.
200 See Ibid.
201 R v Smith v Others [1826] NSWupC 61 (The Australian, 13 September 1826, 3; Sydney Gazette, 13 September 1826, 3).
202 Sydney Gazette, 23 September 1826 3. Death recorded meant a formal sentence of death, without an intention that the sentence would be carried out. Under (1823) 4 Geo IV c 48, s 1, except in cases of murder, the judge had considerable discretion where an offender was convicted of a felony punishable by death. If the trial judge thought that the circumstances made the offender fit for the exercise of Royal mercy, then instead of sentencing the offender to death, he could order that judgment of death be recorded. The effect was the same as if judgment of death had been ordered, and the offender reprieved (s. 2).
reprieved her from the gallows. Catherine Hyam in 1832 was convicted of highway robbery ‘in circumstances of aggravation’ along with her two male accomplices. However, the Executive Council took a different view. All three were reprieved; the two male robbers been transported for 14 years to Norfolk Island and Hyam been transported to Moreton Bay for seven years. Even the apparent worst of female capital offenders such as Ann Edwards and Maria Williams, as well as Maloney and McGregor, were ultimately deemed eligible for the grant of mercy.

Cases of the alleged murder of their newborn children by their mothers were typically, though by no means universally, regarded with sympathy, especially if the father was seen to have ‘corrupted’ the mother. Such cases were often prosecuted with conspicuous restraint, even compassion. By the early 1800s there was widespread acknowledgment of the extreme mental and other pressures that desperate mothers of newborn children in the early 1800s might be subject to and that the killing of their children could be the tragic result of these pressures. The killing of a newborn child by the mother in such a case, as Davis notes, is ‘understandable as an hysterical post-parturient attempt to hide the evidence of her shame from her family.’ Juries and judges in colonial Australia, as in England,

---

203 See also R v Price (Sydney Gazette, 21 August 1834, 2) (death recorded for stabbing with intent to inflict grievous bodily harm); R v Maher (Sydney Gazette, 12 November 1836, 3) (death recorded on female convict for cutting and maiming another female convict with intent to cause her grievous bodily harm).

204 Sydney Monitor, 8 September 1832, 2.

205 R v Hipple, Darbyshire and Hyam [1832] NSWSupC 57 (Sydney Gazette, 21 August 1832, 3; The Australian, 24 August 1832, 3; Sydney Herald, 23 August 18432, 3).

206 Ibid.

207 See further the discussion below in Part 10.

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


210 See, for example, R v Masters (Colonial Times, 12 May 1835, 6-7; Hobart Town Courier, 15 May 1835, 4); R v Buckley (Sydney Morning Herald, 9 December 1853, 4); R v Beckett (Mercury, 29 January 1859, 3).

211 Davis, above n 21, 20.

212 See, for example, Backhouse, above n 209, 448; R Ireland, ‘Perhaps My Mother Murdered Me: Child Death and Law in Victorian Carmarthenshire’ in Christopher Brooks and Michael Lobban (eds), Communities and Courts in Britain, 1150-1900 (Hambledon Press, 1997) 229, 230; Mary Emmerichs,
proved very reluctant to convict females of murdering their newborn children, seemingly recognising the extreme pressures such females could be under. Juries would often instead return a guilty verdict of the lesser non-capital offence of concealing the birth of the child. In the rare instance where the prisoner was convicted of the capital crime, the general practice was to extend mercy.

However, it is importance not to overstate the operation of the prerogative of mercy in Australia from 1824 to 1860. The process was limited and imperfect. It was not the same as a modern Court of Criminal Appeal. The Executive 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 inconsistent exercise of the prerogative of mercy was a source of comment and complaint in both England and the colonies. One prisoner might be executed and another reprieved for identical or even more aggravated crimes. Full pardons were rare.

---

213 See, for example, *R v Bridget Kenny* (Colonial Times, 18 October 1854); *R v Masters* [1835] TASSupC 9 (Colonial Times, 12 May 1835, 6-7) (acquitted ‘after the most painful investigation and tedious examination of three medical witnesses’).

214 See, for example, Backhouse, above n 209, 448. 462-463; New South Wales Law Reform Commission, *Partial Defences to Murder, Provocation and Infanticide* (Report No 83) (NSWLRC, 1997) [3.3]-[3.4].

215 See, for example, *R v Guthrie* [1838] NSWSupC 41 (Sydney Gazette, 3 May 1838, 2); *R v Lloyd* [1840] NSWSupC 18 (Sydney Gazette, 9 May 1840, 2); *R v Lamb* [1841] NSWSupC 102 (The Australian, 12 October 1841, 2; Sydney Herald, 22 October 1841, 2; The Australian, 23 October 1841, 2)

216 See, for example, ‘First Woman Executed’, *Tasmanian & Austral-Asiatic Review*, 23 April 1830; NSWLRc, above n 214, [3.4] (‘Mercy would almost be invariably exercised’). However, this was not always the case. Mary McLauchlan (see *R v McLauchlan* [1830] TASSupC 14 (Hobart Town Courier, 17 April 1830, 3) a married convict, was executed in Tasmania in 1830 for the murder of her illegitimate newborn son despite strong mitigating circumstances and appeals for mercy from the jury, the public and even members of the Executive Council (see Executive Council Minutes, Tasmania, 16 and 17 April 1830; Davis, above n 21, 20 and 25; ‘First Woman Executed’, *Tasmanian & Austral-Asiatic Review*, 23 April 1830; McDonald, above n 19. The operation of the death penalty and the prerogative of mercy to mothers convicted in relation to the death of their infant children is a complex area and it is hoped, with particular focus on the case of Mary McLauchlan, to be the subject of the authors’ next project as part of their wider ongoing study.

217 On 16 September 1826, for example, the Executive Council in Tasmania considered the remarkable number of 37 condemned prisoners in one sitting.

218 See, for example, ‘The Injustice of Reprieves’, *The Times*, 31 August 1867.

219 See Davis, above n 21, 38; ‘Hall, Kenney and Davis,’ *Cornwall Chronicle*, 5 August 1854, 4.

220 Contrast the fate of James Bowtell executed for robbery despite the comparative lack of aggravating features (see ‘Execution’, *Colonial Times*, 16 May 1843, 3) with the reprieve accorded to Cash and Kavanagh who on any view were worse offenders. See ‘The Bushrangers’, *Launceston Examiner*, 30 September 1843, 3-4; Davis, above n 21, 38.

221 See, for example, Daniel Tucker and Issac Davies, (see *Hobart Town Courier*, 8 May 1830, 3). Both were convicted of rape upon an Eliza Hickery but the Chief Justice at sentence forbore to comment upon their case in passing the death sentence. Both were granted an unconditional pardon after the Chief Justice volunteered to the Executive Council that he was ‘very doubtful’ of the guilt of the accused. He noted the
and offenders spared the death penalty were usually sentenced to long periods of transportation in one of the notorious secondary places of punishment in the colonies. Even those offenders where the conferral of mercy was prompted by doubts as to prisoner’s guilt in light of weaknesses in the prosecution case 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 Governor and the Executive Council were free to disregard public opinion and ignore appeals for mercy from the public, the jury and even members of the Executive Council. On

victim was of ‘bad character’ and both accused were of good character. See Tasmania Executive Council Minutes, 6 May 1830.

222 See, for example, John Hewitt and William Love. Both were convicted of robbery and sentenced to death. The trial judge noted to the Executive Council there was ‘a doubt as to the testimony of the prosecutor’ and the sentence was commuted to seven years transportation and a year of probation. See Tasmania Executive Council Minutes, 18 April 1853. See also the case of John M’Cabe, see above n 180. M’Cabe was convicted of murder at a trial that was justifiably described as ‘no fair trial’ and a ‘mockery of justice’ (‘The Convict M’Cabe’, The Argus, 23 October 1855, 4), yet his ‘reprieve’ was to work on the roads for 15 years, the first three in chains. See ‘Convict M’Cabe’, 24 October 1855, 7.

223 See, for example, Joseph Hawley, John Brickfield, and Richard Coglan who were convicted sentenced to death for the rape of the wife of a coachman. All three protested their innocence. All were literally at the last moment spared by the Executive Council and transported for life to Norfolk Island (see Sydney Herald, 23 September 1833, 2) ‘Circumstances have transpired which fix a suspicious character on the prosecutrix and cast doubt as to the truth of her unsupported evidence’ (Sydney Monitor, 21 September 1833, 2). See also Maria Williams who was reprieved but still transported for life. See further below Part 10.

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

225 See, for example, the refusals to grant reprieves to Daniel Stewart alias ‘Wingy’, Peter Haley alias ‘Black Peter’ and William Fearns sentenced to death for bushranging (see ‘The Condemned’, Hobart Mercury, 15 February 1859; ‘Execution of Five Men at Hobart Town’, Bell’s Life in Sydney, 26 February 1859, 3); the refusal of the Governor to interfere in respect of the execution of an Aborigine for the murder of a white man (see ‘The Condemned Native’, South Australian Advertiser, 6 September 1860, 2).

226 See, for example, the refusals to grant reprieves to Daniel Stewart alias ‘Wingy’, Peter Haley alias ‘Black Peter’ and William Fearns sentenced to death for bushranging despite appeals for mercy from the victim (see ‘Execution of Five Men at Hobart Town’, Bell’s Life in Sydney, 26 February 1859, 3).

227 Though the Executive Council gave any recommendation from the jury for mercy its ‘serious consideration’, it was not obliged to accept it, see ‘Recommended to Mercy’, South Australian Advertiser, 31 January 1874, 6. See, for example, the refusal of the Executive Council to endorse the jury’s recommendation for mercy in the case of Mahide convicted of the robbery of a house (see ‘The Convicts under Sentence of Death’, Cornwall Chronicle, 1 November 1848, 132; Cornwall Chronicle, 4 November 1848, 2; ‘The Condemned Criminals’, Launceston Examiner, 1 November 1848, 4) and the refusal of both the trial judge and the Executive Council in R v M’Manus (The Courier, 2 June 1853, 2; Cornwall Chronicle, 8 June 1853, 2) to heed the jury’s recommendation of mercy in the case of a brutal rape by a notorious convict who had on two previous occasions been the recipient of mercy (see ‘The Execution of M’Manus and M’Alist’, The Courier, 21 June 1853, 2).

228 See, for example, the insistence of Governor Arthur in allowing the execution of the married female convict in R v McLauchlan [1830] TASSupC 14 (Hobart Town Courier, 17 April 1830, 3) who had been found guilty of the murder of her illegitimate newborn son despite the strong mitigating circumstances and appeals for mercy from the jury, the public and even members of the Executive Council (see Executive Council Minutes, Tasmania, 16 and 17 April 1830; Tasmanian & Austral-Asiatic Review, 23 April 1830; Davis, above n 21, 20 and 25).
such occasions notions of retribution and deterrence overrode any other countervailing consideration.\textsuperscript{229}

Nevertheless, despite these limitations, the prerogative of mercy played a vital role in the administration of the death penalty during the period from 1824 to 1860.\textsuperscript{230} 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.’\textsuperscript{231} Until a comprehensive right of appeal and the modern Court of Criminal Appeal emerged at the start of the 20th century, the Executive Council was the nearest that existed to a colonial Court of Appeal in capital criminal cases. The case of Maloney and McGregor in 1834 illustrates the operation of the death penalty and the prerogative of mercy. It demonstrates that, despite the nature and gravity of their alleged crime and the polarised perception of female offenders in the colonies, the rule of law was not to prove mere rhetoric and ‘Justice was due even to them.’

\textbf{Part 6: McGregor and Maloney: the Trial}

McGregor and Maloney were assigned convict servants to a Captain Waldron who lived with his wife and nine of their 12 children at their estate at Spring Hill. Waldron had had occasion to remonstrate McGregor and Maloney over unperformed household chores. ‘An occurrence almost unheard of took place.’\textsuperscript{232} Waldron having reprimanded one of the two women was returned with ‘great abuse’ and the two women then proceeded to ‘beat the gentleman in such a manner that he is seriously laid up’,\textsuperscript{233} To add to the outrageous nature of their conduct, the two women were initially reported to have then stripped themselves naked, exposed themselves to Waldron’s wife and danced in the courtyard until the police arrived.\textsuperscript{234} Both females were branded as ‘vicious characters.’\textsuperscript{235} Waldron was left with no visible injuries but he appears to have never recovered from the violent attack and he died 14 days later leaving his wife and nine young children bereft and without their provider. McGregor and Maloney were charged with his murder and committed for trial.

The trial before the Supreme Court of New South Wales\textsuperscript{236} was reported to have attracted ‘lively’\textsuperscript{237} and ‘intense’\textsuperscript{238} interest. Both defendants, unlike other defendants

\textsuperscript{229} See, for example, \textit{R v Kenney} (\textit{The Courier}, 10 March 1847, 4); ‘Mr. Justice Montagu’s Opinion of the State of the Country’, \textit{Launceston Examiner}, 10 March 1847, 3.

\textsuperscript{230} For its application to even the ‘worst’ convicts during this period, see Plater and Milne, above n 18.

\textsuperscript{231} Hirst, above n 187, 114.


\textsuperscript{233} Ibid.

\textsuperscript{234} Ibid.

\textsuperscript{235} Ibid.

\textsuperscript{236} \textit{R v McGregor and Maloney} [1834] NSWSupC 13 (\textit{Sydney Gazette}, 25 February 1834, 2-3; \textit{Sydney Herald}, 24 February 1834, 1S; \textit{Sydney Monitor}, 25 February 1834, 2-3; \textit{The Australian}, 24 February 1834, 3)
of the period facing capital charges, were at least legally represented but otherwise it is hardly possible to conceive a worse position than that in which the two defendants stood. On any view Waldron was a ‘gentleman’ in the relatively closed confines of early colonial society, being a former Army officer, a Magistrate and a landowner. In relatively small and stratified Colony, such as New South Wales, as Hughes notes, ‘the question of class was all-pervasive and pathological’, McGregor and Maloney, in stark contrast, were not only convicts but as female assigned servants belonged, as MacDonald notes, to a ‘despised group’. Such females were regarded as, Elizabeth Fenton remarked, ‘an immoral physical force.’ Such a crime would have particularly horrified early colonial society. The notion of convicts murdering their master, as was apparent in the trial and execution of Elizabeth Campbell in 1826, was not only a truly reprehensible crime in early colonial society but only a few years prior to McGregor and Maloney’s trial would have constituted the distinct and aggravated crime of petit treason.

The testimony at the trial of Waldron’s wife had a powerful effect that discouraged even further any sympathy for the defendants. One reporter noted that the ‘impressive and distinct’ nature of Mrs Waldron’s testimony combined with her coming into court in a deep mourning dress with her infant in her arms ‘tended to increase that sympathetic feeling, which the melancholy detail seemed universally to excite.’ Mrs Waldron’s account, supported by her twelve year old son, was that both Maloney and McGregor had taken part in a vicious attack upon her husband. The two women had strongly reacted after Waldron had remonstrated with Maloney about some unperformed household chores. Mrs Waldron described that McGregor had rushed at her husband and had ‘struck him with great violence on the right side of the neck.’ He had fallen immediately on his left side and had landed with ‘great force’ on some rough stones, with which the yard was paved. Maloney had then joined in the attack and had ‘struck him repeatedly with his clenched fists, while he was lying on the ground.’ Mrs Waldron described both defendants had then ‘repeatedly struck him in the face and neck, with all the force they could

238 Sydney Herald, 24 February 1834, 1S.
239 See, for example, R v Sullivan (Colonial Times, 27 July 1852, 2). See further above n 129.
240 Hughes, above n 21, 323. See also Louisa Meredith, Notes and Sketches of New South Wales during a Residence in that Colony from 1839 to 1844 (John Murray, 1844) 52-53.
241 MacDonald, above n 19, 17.
242 See Henry Bart (ed), The Journal of Mrs Fenton. A Narrative of her life in India, the isle of France (Mauritius) and Tasmania during the Years 1826-1830 (Edward Arnold, 1901) 354. See also John West, The History of Tasmania (Angus and Robertson Publishers, 1852) 509.
244 Sydney Gazette, 25 February 1834, 2.
245 Ibid.
Waldron had been unable to extricate himself. His wife had repeatedly called out to the male convict servants about the place to come and help him, but none came to his aid. Mrs Waldron noted that two of their men had been unloading wood from a dray at the back of the house and ‘from the noise of the women, and the cries of my children who flocked around me, these men could not perhaps have heard the call of my husband, but they must have seen him lying on the ground.’ Yet they had failed ‘to save him from the fury of the women’.

Mrs Waldron described that after the attack on her husband both women used language ‘of the most disgraceful description, both were equally violent and outrageous’ and Maloney had even exposed herself to the family. The prisoners were in a most ungovernable rage, and made use of the most dreadful language, such as I had never before heard. Mrs Waldron insisted that none in the Colony were ‘more abstemious’ than her husband and he ‘was the best of husbands, fathers, and masters’. She denied defence claims that her husband possessed a fierce tamper and had often struck his servants.

On being called on for their defence, McGregor handed in a written statement, which was read to the jury. It was to the effect that ‘reports of a most injurious tendency, had been industriously [sic] circulated to their prejudice, respecting the injuries they had inflicted on their deceased master.’ McGregor urged the jury to dismiss this material from their minds, and ‘dispassionately to weigh their case, which they reposed with confidence in their honour and integrity.’

Burton J in his charge to the jury lamented the fact that a Dr. Grover who had attended the deceased during his illness, and who had testified at the Inquest, had been unable to attend the trial to confirm the cause of death. Burton J called a second medical witness, a Dr. Hosking, who happened to be in attendance at court to shed

---

246 Ibid.
247 Ibid.
248 Ibid.
249 *Sydney Herald*, 24 February 1834, 1S.
250 *Sydney Gazette*, 25 February 1834, 2.
251 Ibid.
252 See Ibid; *Sydney Herald*, 24 February 1834, 1S. Two of the male convict servants (who had refused to come to the assistance of the deceased) who were produced at trial for the prosecution, swore positively that Waldron had repeatedly called the two prisoners ‘damn bitches’ and had threatened them with violence. See Ibid; *Sydney Gazette*, 25 February 1834, 2.
253 Until the end of the 1800s, a defendant had no right to give evidence on his her behalf.
254 *Sydney Gazette*, 25 February 1834, 2.
255 Ibid.
light on this point, though without much success.\textsuperscript{256} This was to turn out to be a vital issue.\textsuperscript{257}

The jury after a retirement of about 15 minutes returned with a verdict of ‘Guilty of Murder’, but recommended the prisoners to mercy, on the ground, that ‘when they committed the offence, the fatal effects were not contemplated.’\textsuperscript{258} This odd verdict\textsuperscript{259} prompted Burton J to instruct the jury that if they thought that the death had ensued ‘from the unlawful and unprovoked violence of the prisoners towards their master, he was of opinion that the crime amounted to the legal definition of murder.’\textsuperscript{260} However, the judge advised the jury to reconsider their verdict and consider whether their recommendation of mercy coupled with his explanation could reduce the offence to the milder one of manslaughter.\textsuperscript{261} The jury persisted in their verdict of guilty of murder.

Burton J passed ‘the awful sentence of the law’\textsuperscript{262} on both defendants. He observed that they had been convicted on the ‘clearest evidence’ and he could hold out ‘no hope’ that their sentences would be set aside.\textsuperscript{263} They were ordered for execution for the following Monday and their bodies ordered to be delivered to the surgeons for dissection. Both women strongly reacted to the news of their impending demise. ‘On the sentence being pronounced, the prisoner Maloney loudly denied all intention to murder the deceased, and put it to the Judge and Jury, whether two unarmed females could have foreseen the awful consequences of their attack.’\textsuperscript{264} McGregor was described as dissolving in tears and pleaded pregnancy as a bar to her execution.\textsuperscript{265}

\begin{itemize}
\item \textsuperscript{256} \textit{Sydney Gazette}, 25 February 1834, 3; \textit{Sydney Monitor}, 25 February 1834, 3.
\item \textsuperscript{257} See further below the discussion in Part 8.
\item \textsuperscript{258} \textit{Sydney Gazette}, 25 February 1834, 3.
\item \textsuperscript{259} The modern crime of murder requires an intention to either kill the victim or to at least inflict grievous bodily harm.
\item \textsuperscript{260} Ibid.
\item \textsuperscript{261} The \textit{Australian}, 24 February 1834, 3, reported that after the jury’s initial verdict of guilty with a recommendation of mercy, the foreman told Burton J. that the reason was that the fatal result was not contemplated. The \textit{Australian} stated: ‘Judge Burton wished to put the Jury clear upon one point, if they considered the blows were given without provocation, and that they caused death it was murder as the law presumed the animus in the act; if they considered the blows had been given and were not more than any provocation that might have been received, then it would only amount to manslaughter; but if they were of opinion the blows had not been given, or if given, were not the cause of the death in that case they must acquit the prisoners.’ See Ibid.
\item \textsuperscript{262} \textit{The Australian}, 24 February 1834, 3.
\item \textsuperscript{263} \textit{Sydney Herald}, 24 February 1834, 1S.
\item \textsuperscript{264} \textit{Sydney Gazette}, 25 February 1834, 3.
\item \textsuperscript{265} Pregnancy acted a bar to execution. See above nn 169-171.
\end{itemize}
special 'jury of matrons' was unusually convened to determine the question. The jury of matrons found that McGregor was not pregnant.

**Part 7: Reaction to the Trial and the Sentence of Death**

Both the trial and the sentence of death passed upon Maloney and McGregor attracted much debate in the Colony. One columnist noted that 'a very considerable degree of interest has been excited by the case'. Another declared, 'Much opinion has been given, and speculation afloat, respecting the sentence passed on McGregor and Maloney for the murder of Captain Waldron.'

The reaction of the Colony's press to the verdict of guilt and the sentence of death passed upon both women is significant. The colonial newspapers, as Castles observes, 'provided a vital link between public opinion and the decisions made by the Executive Council about capital punishment and mercy.' The newspapers not only shed light about daily events in the colonies, 'they also reveal "much about what was being thought" about these events.' The press was to play a pivotal role in the outcome of the case and, in particular, to the transformation of Maloney and McGregor from the apparent worst of colonial criminals to feminine figures deserving of sympathy and ultimately mercy.

The *Sydney Monitor* expressed its initial horror at the facts of the case. 'Such barbarity was never seen in any land except New South Wales.' It noted that even the witnesses for the defence had admitted that the deceased 'was a kind hearted man' and the 'cruel behaviour' of the prisoners was unjustified by any apparent severity of the deceased 'given in the testimony of the unhappy bereft widow, left with nine children to provide for.' The failure of the male convict servants, 'the male monsters', to come to the aid of their stricken master further compounded the gravity of the situation.

However, despite the nature of their crime and the backgrounds of the parties, the plight of McGregor and Maloney attracted widespread almost immediate sympathy.

---

266 See further, above 265.

267 *The Australian*, 28 February 1834, 3. This was, *The Australian* claimed, the first time that a Jury of Matrons had been empanelled in the Colony, see Editorial Note, *The Australian*, 28 February 1834, 3.

268 See *The Australian*, 28 February 1834, 3; *Sydney Gazette*, 25 February 1834, 3; *Sydney Herald*, 27 February 1834, 2.

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

270 *Sydney Gazette*, 13 November 1834, 2.

271 Castles, above n 12, 43.5.


274 Ibid.

275 Ibid.
in the aftermath of the trial and many calls for mercy. *The Australian* referred to the
‘unhappy women’ awaiting their fate.276 It expressed its hope that, after taking into
account all the circumstances of the case, the Governor and Council would extend
mercy. The verdict of murder was wrong, and it was manslaughter at most.277 *The
Australian* argued that the conduct of the two women, bad as it may have been, was
not murder or petit treason:

We do not mean to palliate the offence of which they have in reality been guilty —
raising their hands to strike their master is in itself a crime deserving severe
punishment, and if they have been legally guilty of murder, they have, in the
present instance subjected themselves (if they had been so indicated) to the
dreadful penalty awarded for the offence of petty treason. But there is that in the
evidence which conclusively shows that their passions were momentarily excited
— that they must have received some provocation which, although it could never
justify them in striking their master, brings them within that merciful regulation of
our laws which allows for the frailty of human nature.278

The *Sydney Gazette* expressed a similar view. It expressed its ‘astonishment’ at the
guilty verdict and asserted ‘that there was not an atom of evidence to support such a
verdict and that the unfortunate woman must, of necessity, be pardoned.’279 It was
far from clear, the *Gazette* argued, on the evidence led at trial that the ‘most culpable
conduct of the two abandoned women’, ‘gross assault’ that it was, had actually in a
legal sense caused Waldron’s death.280 The *Gazette* declared that to execute the two
women in such circumstances would be ‘JUDICIAL MURDER’ [the editor’s
emphasis].281 It later noted that ‘many persons’ were of the ‘opinion, that the justice
of the case would have been fully met by a verdict of manslaughter.’282 It observed
that that while ‘the conduct of McGregor since her condemnation, has been penitent
and becoming...it is to be lamented that her wretched companion continues to
manifest the most disgusting levity.’283

The *Sydney Monitor* in just three days underwent a dramatic about face in its
position to the two women.284 It observed:

The tide of commiseration expressed towards the bereft widow of Captain
Waldron, and the little infant at her breast during the trial, began to ebb after the

276 *The Australian*, 24 February 1834, 3.
277 Ibid, 2.
278 Ibid.
279 Editorial, *Sydney Gazette*, 25 February 1834, 2. The modern law is that the act of the accused need not be
the sole or dominant cause of death, but must in a real or substantial sense have ‘caused’ the death of the
deceased, see *R v Smith* [1959] 2 QB 35; *R v Hallett* [1969] SASR 141, 150.
281 Ibid.
282 *Sydney Gazette*, 27 February 1834, 2.
283 Ibid.
284 ‘A Correspondent’, ‘Behaviour of Sarah McGregor and Mary Maloney after Conviction’, *Sydney
Monitor*, 28 February 1834, 2.
conviction and sentence of the two women, and after they were removed from the dock, it began to flow strongly in favour of the two murderesses, one eighteen years of age.  

The *Sydney Monitor* dwelt in some detail upon what it saw as their becoming and suitably remorseful conduct and demeanour, both at their trial and subsequent. The *Sydney Monitor* depicted Maloney and McGregor in sympathetic terms and explained how they were not the callous offenders that they may have been thought of. Rather they were virtuous females deserving of kindness and compassion. Reference was made to their backgrounds and essential decency and good character. The writer highlighted Maloney's 'courage', 'firmness', 'superior mind' and how at the Factory she was the 'terror of evil doing.' She was 'something that might have been splendid.' The writer concluded, 'Mary Maloney was not a common woman.' Sarah McGregor was described as the daughter of a gardener employed by a Lord in England who had been brought up by her parents 'morally and religiously.' She had been aged only 13 or 14 when transported to the colonies and was still only 18 years old. She had preserved her 'chastity' until she had been seduced near Bathurst in New South Wales by a military officer. Sarah was noted as 'of a soft feminine mind, easily affected by kindness.' The writer concluded:

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

The transformation of McGregor and Maloney, especially as depicted in the *Sydney Monitor*, is little short of remarkable. In the space of just three brief days they were transformed from vicious criminals undeserving of sympathy to virtuous and good females, perhaps led astray, deserving of compassion and the grant of mercy.

The jury also reaffirmed their earlier recommendation for mercy on behalf of both women. Mr. Rowe, defence counsel, wrote to Burton J attaching a petition for mercy he had received from the jury specifically referring to the absent medical witness, Dr Grover. Rowe noted to the judge that he felt that he 'should not be discharging a duty were I not to observe that I am credibly informed the whole of his Deposition

---

285 Ibid.
286 Ibid.
287 Ibid.
288 Ibid.
289 Ibid.
290 Ibid.
291 Ibid.
292 Ibid.
went to show that the Death of Capt Waldron was occasioned by, – not the act of the Prisoners in his case but - the bursting of a blood vessel in the head subsequently.\textsuperscript{294}

**Part 8: Intervention of the Judges**

The trial judge, Burton J, evidently shared, in private at least, the unease expressed in the Colony's press about the verdict and sentence in the case. He reserved the case for the consideration of all three judges of the Supreme Court; himself, Forbes CJ and Dowling J. The judges considered the case on 24 February 1834.\textsuperscript{295} This was, in the absence of any formal right of appeal at this time, a somewhat unusual course of action.\textsuperscript{296}

The judges had before them an affidavit from the surgeon, Dr. Grover, who had been subpoenaed to attend the trial, but had been prevented from reaching Sydney in time to attend the trial, by an accident to his horse. The surgeon stated that in his opinion the deceased 'had probably died from apoplexy, he having a predisposition to that disorder, and that in his opinion there were no marks of violence externally sufficient to have caused death.'\textsuperscript{297} It was noted that the women had been convicted of the murder by 'casting and throwing the deceased upon the ground, and with both their hands striking him on the head and shoulders, thereby giving unto him divers mortal wounds, bruises and contusions in and upon the right side of the head & shoulder, of which he languished from the 11\textsuperscript{th} until the 20\textsuperscript{th} January and died.'\textsuperscript{298} It was further noted there was evidence that the women had thrown the deceased down on the ground, and that while down they had both struck him with 'repeated blows'. Waldron afterwards arose, and being ill, went to bed, apparently affected with paralysis and subsequently died on 20 January 1834. There were no external markings of violence on his head and shoulder as had been alleged in the indictment – no wounds, bruises, or contusions sufficient to have caused death. No surgeon had been examined at the trial to show that the violence used by the women was sufficient to have caused death, and the case had been left to the jury to presume that the death arose from the actions of the two women. The jury had found the prisoners

---


\textsuperscript{296} A fledgling and limited appellate system developed with the passing of the *New South Wales Act 1823* (UK) in 1824. However, in practice, appeals were not common, possibly due to the lack of any comprehensive right of appeal until the early 1900s. This was not remedied until a comprehensive right of appeal was introduced in England by the *Criminal Appeal Act 1907* and similar measures were adopted in Australia.

\textsuperscript{297} Burton, *Notes of Criminal Cases*, State Records of New South Wales, 2/2413, vol 10, 145, 167. It was observed Waldron had been buried without an Inquest and his widow would not allow the surgeon to open his head. See Ibid, 168.

\textsuperscript{298} Ibid, 163.
guilty of murder but they were recommended to mercy on the ground that probably they did not contemplate the fatal consequences of their attack.

The three judges unanimously resolved that whether McGregor and Maloney had contemplated the fatal consequences of their act made no difference as to the legality of their conviction. ‘It was no less murder, though the consequences of their illegal act might not have been anticipated.’299 Forbes CJ considered that the case had been properly left to the jury, and was of opinion that there was no need to prove that Waldron was, as alleged, wounded, bruised and confused on the head. However, he thought that the conviction was not satisfactory ‘for want of sufficient evidence of the surgeon that the death was really occasioned by the acts of the Prisoners; for as he died of apoplexy, non constant, but it might be a natural disorder.’300 Dowling J was of the opinion that the prisoners ought to have been acquitted as there was no evidence ‘to show clearly that the death was occasioned by their acts.’301 He noted, first, that the particular allegation that the women had inflicted ‘divers mortal wounds, bruises and contusions in and upon the left side of the head and shoulder of the deceased,’ was a material allegation, requiring proof, because it went to show that by reason of such wounds, bruises and contusions the death had ensued. Dowling J noted, secondly, there ought to be clear and distinct proof that the proximate cause of Waldron’s death was the violent acts of the women as there were no actual wounds, bruises and contusions as alleged on the indictment.302 Burton J also doubted the propriety of the conviction.303

The court agreed that Burton J should state the opinions of the judges upon the case, when he came to report it in the Executive Council. It was understood that McGregor and Maloney would be recommended to the Crown for a pardon. The intervention of the judges, even in the absence of a formal Court of Criminal Appeal, was significant.

The Executive Council considered the case on 25 February 1834. The session was attended by the Crown law officers and all three judges of the Supreme Court.304 The Executive Council accepted the views of the judges and the medical evidence of Dr Grover that suggested the cause of Waldron’s death was an epileptic seizure, rather than the blows that the deceased had received from the two women.305 The Council resolved that McGregor and Maloney should be respited until the King’s pleasure was made known.306 Maloney was forwarded to Newcastle Gaol and McGregor sent

299 Ibid, 165.
300 Ibid, 166.
301 Ibid.
303 Ibid, 167.
304 See Sydney Herald, 27 February 1834, 2; Sydney Gazette, 27 February 1834, 2.
305 Castles, above n 12, 43.7. See also NSW Executive Council Minutes, 25 February 1834, Meeting No 6, 4/1518, SRNSW.
306 See Ibid. Only the King had the power to grant mercy in cases in cases of murder and treason.
to Windsor where both women would be detained until they the decision in their case was obtained from England. It was subsequently recommended that they should be imprisoned with hard labour for three years.

**Part 9: Reaction to Reprieve**

The Executive Council’s decision to spare the two women was widely applauded. *The Australian* expressed its approval. The *Sydney Herald* observed that although Mrs Waldron’s testimony at trial had been ‘very strong’ and the jury’s verdict ‘very proper’, the decision to reprieve the two women ‘after mature deliberation’ was the right one given the impossibility in showing what had been the intention of the defendants in carrying out the attack. “The law has wisely ordained that, in all cases of this description, if any doubt arise, it shall be given in favour of the prisoner.”

The *Sydney Herald* in a subsequent edition explained that, having regard to the medical evidence, especially that of Dr. Grover who had missed the trial, it was impossible to establish that the prisoners had legally caused Waldron’s death and ‘if this gentleman’s deposition had been taken on the trial, things would have probably worn a different face.’

A similar view was expressed by the *Sydney Gazette*. The decision to reprieve McGregor and Maloney until the King’s pleasure was known, whilst not unexpected, was still welcome. The editor made clear that both women ‘richly deserved’ a ‘severe punishment’, ‘but whatever feelings of indignation their atrocious conduct may excite, justice is due even to them – let them undergo the full penalty of their guilt, but no more.’ The *Gazette* declared, ‘Human life must not be sacrificed, unless the sacrifice is legally incurred.’ The *Gazette* noted that the accounts of both Dr. Grover and Dr. Hosking made it clear that the causation of death had not been established. ‘The deceased was a passionate man, and easily excited.’

---

307 *Sydney Gazette*, 1 May 1834, 2.

308 Governor Bourke to Stanley, 26 February 1834, *Historical Records of Australia*, Series 1, Vol 17, 379. See also *Sydney Gazette*, 15 January 1835, 2.

309 *The Australian*, 28 February 1834, 3.

310 *Sydney Herald*, 27 February 1834, 3.

311 Ibid.

312 *Sydney Herald*, 3 March 1834, 2.

313 *Sydney Gazette*, 27 February 1834, 2. This, the *Gazette* reminded its readers, was all that the Executive Council could do in the case; as the Governors of all British colonies were restrained from pardoning persons found guilty either of treason or murder. That decision was reserved to the King.

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

315 Ibid. See also *Sydney Gazette*, 13 November 1834, 2.
A writer to the *Sydney Gazette* felt compelled by the dictates of his conscience to also offer his view of ‘the appalling evils of this anomalous proceedings.’ The writer remarked he had been present at the trial, 'not as an idle lounger, but as an attentive observer.' The writer left no doubt about his sentiments:

No words can express my surprise, that in the present age, and in a country governed by English laws, such a verdict should have been recorded, and such a sentence should have been pronounced, as that which consigned the two young women, Mary Maloney and Sarah McGregor to death and anatomicization, on the following Monday. At the bare idea of its being carried into execution, humanity shudders, and nature revolts...I cannot, however, defer to offer to you, Sir, my cordial thanks for your manly and appropriate appeal in behalf of justice and humanity; an appeal that will ever be remembered, as equally creditable to your feelings and your talents.

*Maloney and McGregor* is telling in illustrating both the exercise of the death penalty and the prerogative of mercy in early colonial society. It shows that, notwithstanding the dire situation in which the two women had found themselves as convicts condemned to death for the murder of their master, the concept of mercy was taken seriously. The judges, the jury, the press and public opinion were all mobilised on behalf of Maloney and McGregor. In the process the two women underwent a transformation from vicious criminals of the worst order to virtuous females deserving of sympathy. Confirmation of their formal reprieve from London was greeted with approval, the *Sydney Gazette* noting that it was ‘glad’ at the news.

**Part 10: Isolated Aberration or Part of Wider Trend?**

The sympathy and consideration shown to Maloney and McGregor was not always manifest in the consideration of mercy to female offenders convicted of a capital crime during the colonial period from 1824 to 1860. The death penalty was applied, as has been seen, to female offenders such as Fairless, Sullivan and especially Campbell who were perceived to have committed the most heinous crimes in colonial society and at odds with expectations of the female character.

Similar reasoning can be seen in the case of Eliza Benwell in 1845. Benwell was a female convict. She was alleged at an inn outside Hobart by ‘looking on and keeping watch’ to have aided and abetted three male convicts; Gomm, Lockwood and Taylor, in the sexually motivated murder of Jane Saunders, the maid of the American Consul and his wife. Benwell was on intimate terms with Gomm. Jane was suffocated...

---

317 Ibid.
318 Ibid, 2.
319 *Sydney Gazette*, 15 January 1835, 2.
320 *The Observer*, 16 September 1845, 3.
to death and the case attracted great interest in the Colony.\textsuperscript{321} The three men were convicted of Jane’s murder.\textsuperscript{322} Mercy was refused and all three were hanged.\textsuperscript{323} Benwell denied her guilt and was separately tried.\textsuperscript{324} She was found guilty (though in circumstances that were less than satisfactory).\textsuperscript{325} Montagu J described Benwell as ‘a bad, abandoned, hardened woman’ and in ‘a very feeling and impressive address’ passed ‘the awful sentence of death’ upon her and ordered her body to be dissected and anatomised.\textsuperscript{326} He implored Benwell to prepare for her death and make her peace with God.\textsuperscript{327} ‘His Honour held out no hope – not the slightest – that her life would be spared.’\textsuperscript{328}

The \textit{Colonial Times} expressed a similar lack of sympathy for the ‘miserable creature’.\textsuperscript{329} ‘Eliza Benwell’, it declared, ‘was a licentious woman of the worst sort there appears no doubt....There can be no doubt that in a country, composed of base materials as is this, the most severe examples are actually necessary to the ordinary safety of female life.\textsuperscript{330} The editor asserted that Benwell, in lending her support to a crime such as her male accomplices had committed, was even worse than them and ‘proves the accuracy of the adage that an abandoned woman is capable of any extent of crime.’\textsuperscript{331} Benwell, the editor declared, had betrayed her feminine role:

...she acknowledged, that she had seen the cruel – the brutal – the ferocious conduct to which the poor victim had been subjected by all three [men], and if she had possessed one single attribute of woman, her heart would have softened by witnessing the atrocious spectacle, and she would have given the alarm, so as to

\begin{itemize}
\item \textsuperscript{321} See note of editor at conclusion of trial in \textit{R v Benwell, Colonial Times}, 12 September 1845, 3.
\item \textsuperscript{322} See \textit{R v Gomm, Lockwood and Taylor (The Courier}, 30 July 1845, 2, 4; \textit{The Observer}, 29 July 1845, 2-3).
\item \textsuperscript{324} See \textit{R v Eliza Benwell (Colonial Times}, 5 September 1845, 3; 9 September 1845, 3; 12 September 1845, 3; \textit{The Observer}, 9 September 1845, 2-3; 12 September 1845, 2-3; 16 September 1845, 3; \textit{The Courier}, 13 September 1845, 2-3.)
\item \textsuperscript{325} See \textit{The Observer}, 16 September 1845, 3; Davis, above n 21, 49. There was only one direct witness to the crime, a Pacific Islander who could not speak English. The jury at Benwell’s trial initially found her not guilty on the basis that the three men had not committed murder. Montagu J refused to accept the verdict and instructed the jury that they could not go beyond the original verdict in the trial of the three men and the only issue for their consideration was whether Benwell had aided and abetted the murder. The jury then proceeded to find Benwell guilty of murder. Benwell’s execution has been called ‘a serious miscarriage of justice’ (Ibid). See also Abbott, above n 147, 29.
\item \textsuperscript{326} \textit{The Observer}, 16 September 1845, 3. See also \textit{The Courier}, 16 September 1845, 3.
\item \textsuperscript{327} \textit{Colonial Times}, 12 September 1845, 3.
\item \textsuperscript{328} \textit{The Observer}, 16 September 1845, 3.
\item \textsuperscript{329} \textit{Colonial Times}, 19 September 1845, 2.
\item \textsuperscript{330} \textit{Colonial Times}, 12 September 1845, 2.
\item \textsuperscript{331} \textit{Colonial Times}, 19 September 1845, 2.
\end{itemize}
effect, if possible, the poor girl's recovery from incipient suffocation. It is to be feared that on the contrary she gloated in it – that she gratified herself in the horrible idea that any impediment to her own baseness was removed.\(^{332}\)

Montagu J, questionably in view of the events at the trial, advised the Executive Council that he entertained 'no doubt of the guilt of Benwell,'\(^{333}\) The Council refused to intervene, noting it 'cannot discover any grounds upon which they could be justified in recommending an interference with the sentence passed upon her.'\(^{334}\) Benwell was duly hanged,\(^{335}\) maintaining her innocence to the end.\(^{336}\)

The fate of Lucretia Dunkley in 1842 for the murder of her husband, Henry, provides another example of offending beyond the pale in the context of 'petit treason' (although this charge was not actually made). Lucretia was a former convict. In 1834 she married a pardoned convict, Henry Dunkley, and the couple ran a farm at Gunning, near Goulburn. Lucretia had seemingly indulged in an adulterous affair with an Irish convict labourer, Martin Beech, who held a ticket-of-leave. The two of them were alleged to have brutally hacked Dunkley to death with an axe whilst he was in bed.\(^{337}\) Attempts had been made to hide the crime, but neighbours alerted the police to Dunkley's mysterious disappearance.\(^{338}\) When confronted with his body, Lucretia broke down and blamed Beech for the murder, maintaining that she had only helped dispose of the body.

Both were charged with Dunkley's murder; Beech, as the actual perpetrator, and Lucretia, being present at the commission of the crime, as co-conspirator.\(^{339}\) The prosecution case was strong and the jury took only five minutes to return a verdict of guilty on both accused.\(^{340}\) Neither defendant would have advanced their cause through their demeanour at trial. The press described their demeanour as exhibiting

---

\(^{332}\) Ibid.

\(^{333}\) Tasmania Executive Council Minutes, 20 September 1845.

\(^{334}\) Ibid.

\(^{335}\) See ‘Execution of Eliza Benwell’, Colonial Times, 30 September 1845, 3; ‘Public Execution’, The Courier, 1 October 1842, 2.

\(^{336}\) See ‘Eliza Benwell’, The Courier, 27 September 1845, 3. Benwell maintained that she had only stumbled upon the aftermath of the crime and had not been keeping lookout. She also exonerated Gomm and Taylor.

\(^{337}\) See the reports of the inquest into the murder, Sydney Morning Herald, 4 October 1842, 3; Australasian Chronicle, 4 October 1842, 2.

\(^{338}\) See, for example, Sydney Morning Herald, 28 September 1842, 2; ‘Henry Dunkley, of Gunning, having been missing for ten days, suspicions are afloat that all is not right. His wife cohabits with another man; and they, with the bullock-driver, were ransacking the house, and taking away property.’

\(^{339}\) See direction to the jury by Sir James Dowling, Sydney Morning Herald, 9 September 1843, 2.

\(^{340}\) Sydney Morning Herald, 8 September 1843, 2; Sydney Morning Herald, 9 September 1843, 2.
'a most fearful degree of hardihood.' Lucretia's 'most hardened, depraved and extraordinary' attitude was singled out for particular censure.

...the female indulging in the most violent invectives against the principal witness; and even when the instrument of destruction was produced in evidence, together with the bloody garments of their victim, and the bed saturated with gore, she laughed outright upon allusions being made to the criminal intimacy existing between herself and her accomplice.

The Chief Justice in passing sentence of death upon the two defendants made it clear that there was not 'the least hope of mercy'. He emphasised the 'speedy and ignominious death' which awaited them, and emphasised the perception of the enormity of Lucretia's crime by making reference to the humane spirit of the present age which no longer provided that 'the treason of a murderous wife was expiated by burning alive.' The Chief Justice described the defendants as 'monsters of human depravity'. He was especially struck by Lucretia's demeanour at trial, stating that she had exhibited:

a tone and manner, accompanied by language, which might well excite doubt of your kindred with the human species, and lead to the conviction that the Devil himself had, for a time, assumed the female form.

The Chief Justice particularly condemned Lucretia's adultery:

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

Beech actions were similarly painted in terms of 'Judas-like' treachery and adultery:

A servant – dipping his hand in the same dish with his master, drinking of the same cup, with Judas treachery stealing upon the sanctity of the marriage bed, and then extinguishing with Macbethian blood-thirstiness the life of that master, and

---

341 Editorial, Sydney Morning Herald, 9 September 1843, 2.
342 Ibid.
343 Ibid.
344 Sydney Morning Herald, 15 September 1843, 3.
345 Ibid.
346 Ibid.
347 Ibid.
348 Ibid.
349 The judge made further reference to Macbeth when he surmised that the 'ghost of your murdered victim, in ghastly shape, must day and night present itself to your guilty minds, and his gaping wounds demand that retribution which laws divine and human award.' Ibid.
looking to inherit his adulterous wife and his worldly goods as the reward of your murderous treason.\textsuperscript{350}

It is unsurprising in a case of this nature that both defendants were refused mercy and hanged. If any case typified the worst offenders in colonial society, this was it. Lucretia was perceived as a woman ‘depraved and abandoned in the extreme.’

However, the reasoning manifest in cases such as Benwell and especially Dunkley was far from universal in its application to female capital offenders. The sympathy shown to Maloney and McGregor was by no means unusual with respect to female capital offenders in the colonies. The fates of Ann Edwards and Marie Williams suggest that, as with Maloney and McGregor, the prerogative of mercy might well be applied to even the worst of female offenders in early colonial society.

Maria Williams, in 1829, was an assigned convict servant to a Mr. Moore. She was charged with a Thomas Shaw, a former convict and fellow servant, with breaking open a cashbox and stealing a considerable amount of gold and cash from her master and mistress while they were out for the evening and Williams had been left in charge of the house. Williams and Shaw absconded after the crime but were both swiftly traced by the authorities to a public house. Most of the stolen items were recovered from Williams.\textsuperscript{351} She denied any wrongdoing and optimistically claimed at trial that she had brought the gold from England when transported as a convict. Shaw denied any knowledge of the crime. The jury after a few minutes unsurprisingly found both defendants guilty.\textsuperscript{352} The Chief Justice passed sentence of death,\textsuperscript{353} observing this was an ‘aggravated case of servants robbing their master.’\textsuperscript{354} The Executive Council initially refused to interfere and determined that ‘the sentence of the law should take its course’.\textsuperscript{355}

Despite the nature of the crime and the breach of trust, Williams seems to have been regarded in a sympathetic light. It was noted that the ‘unfortunate woman’ appeared ‘perfectly resigned to her miserable situation’ and had experienced ‘every kind attention from the Governor of the gaol’.\textsuperscript{356} A petition for mercy on Williams’ behalf

\begin{flushright}
\textsuperscript{350} Ibid.
\textsuperscript{351} Williams tried to bribe the arresting officer into letting her go in return for half the loot. See Sydney Monitor, 13 June 1829, 2; 15 June 1829, 6.
\textsuperscript{352} R v Shaw and Williams (Sydney Monitor, 13 June 1829, 2; 15 June 1829, 6).
\textsuperscript{353} Sydney Gazette, 9 June 1829, 2; The Australian, 9 June 1829, 3. The sentence is only reported in passing.
\textsuperscript{354} Castles, above n 12, 43.7, quoting NSW Executive Council Minutes, 13 June 1829, Appendix, Vol 2, 4/1439, SRNSW.
\textsuperscript{355} Castles, above n 12, 43.7, quoting NSW Executive Council Minutes, 1 July 1829, Meeting No 27, 4/1516, SRNSW.
\textsuperscript{356} Sydney Gazette, 13 June 1829, 2.
\end{flushright}
was presented to the Executive Council from both the members of the jury and 42 respectable citizens. Doubts were expressed as to the evidence. The press supported the calls for mercy. The *Sydney Gazette* acknowledged 'that the difficulty of guarding property from the depredation of domestic servants, doubtless renders it necessary that a very great degree of severity should be exercised in the execution of the law in cases like that of this unhappy woman.' However, the *Gazette* noted that 'public sympathy is very much excited in favour of the unfortunate woman who is ordered for execution' and asserted that in the present case 'one cannot help regretting that public justice should require a female victim'. *The Australian* agreed. It noted that amongst the 'miserable culprits in the condemned cells under the torturing anticipation of approaching execution' were Williams and her male accomplice. The editor, despite the nature of their crime, called for mercy:

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

The Executive Council reconsidered its position and the *Sydney Monitor* was 'happy to say' that Williams had been respited. The sentence of death was commuted to transportation for life to Norfolk Island.

The case of Ann Margaret Edwards (nee Wright) in 1833 also shows the application of the prerogative of mercy to even the perceived worst of female offenders. Ann was charged with the capital offence of cutting her husband, George Edwards, with intent to kill him. Ann was a convict with an extraordinary background for any woman, let alone one of only about 25; ‘the curious particulars of this individual’s life, who,
though yet young, has run through a most eventful and miserable career.\textsuperscript{366} It transpired Ann had been seduced by a ship’s officer and had fled Tasmania with him on the ship, \textit{Phoenix}, making it as far as Bombay only to be abandoned and set ashore in India. Ann, after a series of harrowing events, including more sexual misadventures, ended up back in the hands of the British authorities and was returned to Tasmania to complete her sentence.\textsuperscript{367} She had already, it seems, married Edwards. He was later described as ‘not the most moral or prudent of husbands’\textsuperscript{368}

Ann attacked Edwards during a violent row in 1833. He testified at trial that he had been drinking and ‘was so drunk as to be insensible of what passed [and] had no recollection of receiving any blow.’\textsuperscript{369} Ann immediately confessed after the attack to a neighbour that she and a man called Cobb\textsuperscript{370} had killed her husband. She had attacked her drunken comatose husband with a spade. Edwards was left with a large wound to his head but he survived. Ann, who was legally unrepresented,\textsuperscript{371} said in her defence at trial that she recalled nothing about the incident. She was convicted. The Chief Justice at sentence proved unsympathetic:

> His Honour after a most feeling address, proceeded to pass the awful sentence of death. He held out no hopes of mercy whatsoever to the wretched young woman, who had, he said, been most probably led to the commission of this dreadful crime by a long indulgence in a course of habitual wickedness. He hoped that her untimely fate would prove a warning to other young women, who were pursuing a similar evil course of life. His Honour was considerably affected, and the unfortunate prisoner filled the Court with her screams and lamentations.\textsuperscript{372}

The sentence of death, as the \textit{Colonial Times} noted, ‘excited very considerable interest.’\textsuperscript{373} Goodrick observes that the fact that Ann was to be executed the day after her trial ‘created much public sympathy’ and Edwards was ‘a dissolute man’ who had given his wife ‘much provocation and was still very much alive.’\textsuperscript{374}

Ann’s plight, as one editor noted, aroused ‘a sympathy in the public, which rebounds to the credit of our community. There is something so awful melancholy in the fate of the unfortunate woman, that we are not at all surprised at the feeling, which has

\begin{itemize}
\item \textsuperscript{366} \textit{The Courier}, 5 July 1833, 2.
\item \textsuperscript{367} See \textit{Ibid} for a brief account of her misadventures.
\item \textsuperscript{368} Ibid.
\item \textsuperscript{369} Ibid.
\item \textsuperscript{370} There is no further indication as to his presence or role.
\item \textsuperscript{371} See further above n 129.
\item \textsuperscript{372} \textit{Tasmanian}, 28 June 1833.
\item \textsuperscript{373} \textit{Colonial Times}, 2 July 1833, 2.
\item \textsuperscript{374} Goodrick, above n 98, 71.
\end{itemize}
been excited in her favour.' Even fully acknowledging her guilt, the editor considered there were still extenuating circumstances which should prevail in favour of mercy. There was no malice or premeditation. She had received 'a very aggravated provocation' and had committed the attack in a 'momentary fit of passion, provoked by the intemperate habits of her husband.' Ann had confessed her wrongdoing to the first person that she had encountered after the attack. The errant husband was still very much alive 'and this, with other things, should prevail in the unfortunate wife's favour.'

A letter to the Colonial Times made similar representations. The writer noted a petition asking for mercy, 'most respectfully and numerously signed,' had been submitted to the Governor. There was no doubt of Ann's guilt but there were various mitigating factors. The husband had been so insensible through drink that he had slept through the attack and knew nothing about it until raised the next day from his drunken stupor. Anne had been especially provoked. It transpired that Ann had given him some money to buy some 'things' from town but instead, contrary to his promise, Edwards had spent the money on drink and he had arrived home in 'a state of beastly intoxication'. The writer asserted that there had been no premeditation and the attack had been committed in a 'temporary excitement, amounting almost to absolute frenzy.' It was important to set an example to offenders in a convict society such as Tasmania but there were also wider factors to consider. Justice could be satisfied, the writer urged, without the loss of life. 'In this case, the sense and ardent desire of the community is that mercy should be shown, and that the extreme penalty of the law should not be enforced.'

The Executive Council considered Ann's case on 26 June 1833. The Chief Justice, reiterating the theme that he had expressed at trial, 'could not perceive of any circumstance of mercy'. He noted Ann's intention had been to kill her husband and he advised that the law should take its course. The Senior Military Officer disagreed. He hoped that her life might still be spared and the fact that the victim was still alive should be allowed in mitigation of her sentence whatever her intention may have been. The Council unanimously concurred and Ann was reprieved and her sentence commuted to 14 years transportation. This decision was greeted with approval.

375 Editorial, Colonial Times, 2 July 1833, 2.
376 Ibid. See also Goodrick, above n 98, 71.
377 Editorial, Colonial Times, 2 July 1833, 2.
379 Ibid.
380 Ibid.
381 Ibid.
382 Tasmania Executive Council Minutes, 26 July 1833.
383 Ibid. After 13 years Ann was pardoned. However, years later she received another seven years for stealing a frying pan and tub. She was still in gaol in 1859, 34 years after her first conviction. See Tardif, above n 15.
As The Courier remarked: 'There is something so revolting to humanity under any circumstances in the spectacle of a public execution, but especially when a female is the object, that we take sincere pleasure in announcing that His Excellency has been pleased to remit the sentence of the condemned criminal, Mary Ann Edwards.'

In stark contrast to the fate of female offenders such as Lucretia Dunkley and Campbell, the prerogative of mercy was applied to even female offenders of the worst category such as Williams and Edwards where the trial judges had stated that no hope of mercy could be held out. Whilst offenders such as Dunkley and Campbell were perceived as vicious criminals undeserving of mercy, Williams and Edwards fell into an altogether different class. As with Maloney and McGregor, they were perceived, not as vicious criminals, but rather as good if fallen women deserving of sympathy and the grant of mercy.

**Part 11: Conclusion**

The twofold themes of punishment and deterrence were strongly apparent in the exercise of the death penalty in early colonial society reflecting the fears evident in an insecure ‘frontier’ society seemingly beset with crime and criminals. Female offenders were not immune from the application of the death penalty. In cases such as *Fairless, Sullivan* and *Benwell*, the crimes of the female offenders were of such a nature and gravity as to preclude any grant of mercy, whatever sympathy may have existed in *Fairless* or concerns as to the mental state of the defendant in *Sullivan* or the safety of the conviction in *Benwell*. In simple terms their alleged crimes were ‘beyond the pale’. In cases such as *Campbell* and *Dunkley* further considerations applied. Not only had the defendants committed the crime of murder but had done so in particularly aggravating circumstances amounting to petit treason. In *Campbell*, being party to her master’s murder after allegedly seducing him and in *Dunkley* murdering her husband in league with her convict lover and then gloating about her crime and adultery at trial. If any female offender could be viewed as ‘depraved and abandoned in the extreme’ it was offenders such as these. It is scarcely any wonder mercy was refused in all these cases.

However, it is striking that McGregor and Maloney did not meet a similar fate. Both were lowly convict servants who were convicted and sentenced to death for the murder of their master, Captain Waldron, a crime that, has been discussed in this paper, amounted to ‘petit treason’ and on any view represented the gravest of offending in early colonial society. Yet after a spirited campaign on their behalf that included the jury, the judiciary, the colonial press and public opinion, both women were ultimately reprieved. It was accepted that, despite the nature and magnitude of
their alleged crime, the evidence in the case did not establish the crime of murder and the penalty of death was inappropriate.

This case serves to demonstrate the application of both the death penalty and the prerogative of mercy to female capital offenders in early colonial society and confirms that both were taken seriously by the authorities. The Governor and the Executive Council, despite the perceived importance of the death penalty as a means of punishment and deterrence in early colonial society, did not simply pay lip service to their vital role in determining which capital offenders should or should not receive the ‘awful sentence of the law.’\footnote{‘Execution’, \textit{Sydney Gazette}, 27 January 1825, 3.} The case serves to demonstrate the application of the rule of law in early colonial society, even to the apparent worst of offenders such as McGregor and Maloney. The process was, as been discussed, imperfect and inconsistent. However, as far as possible in accordance with the standards of the day, it was a case of where ‘mercy seasons justice’.

\textit{Maloney and McGregor} further demonstrates that the exercise of the death penalty for female capital offenders was subject to particular complicating considerations. Female capital offenders, reflecting wider trends in the portrayal of female offenders and the administration of criminal justice, were typically seen in polarised terms, either ‘all that's good and virtuous’ or ‘depraved and abandoned in the extreme.’ Those female offenders who were perceived to fall into the former category such as Williams and Edwards could expect sympathy and the likelihood of reprieve. However those offenders such as Benwell, Sullivan, Fairless, Campbell and Dunkley who were perceived to fall into the latter category had little hope of mercy and could expect to receive the ‘last dreadful sentence of the law’\footnote{\textit{The Courier}, 16 September 1845, 3.}. However, this process could prove arbitrary as the case of Maloney and McGregor illustrates. Despite the nature and gravity of their crime, it is striking that Maloney and McGregor underwent a remarkable transformation in the space of just a few days from apparent ‘criminals of the deepest dye’ to ‘pitiful creatures worthy of mercy.’\footnote{Strange, above n 209, 142.} Ultimately, ‘Justice was due even to them’. 

\begin{footnotesize}
\begin{enumerate}
\item [386] ‘Execution’, \textit{Sydney Gazette}, 27 January 1825, 3.
\item [387] \textit{The Courier}, 16 September 1845, 3.
\item [388] Strange, above n 209, 142.
\end{enumerate}
\end{footnotesize}