Death of a Spectacle

The Transition from Public to Private Executions in Colonial Australia

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A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy, Department of History, School of Humanities, Faculty of Arts, The University of Adelaide.

February 2016

No doubt the principle of private execution was new in England, but it was already in practice in Prussia, and in America: and it was a grave consideration whether this colony, which had originally been a penal settlement, should not take an initiatory step in this matter and show the whole world the progress which had been made in civilisation.

Dr Henry Grattan Douglass

Extract from a speech delivered to the New South Wales Legislative Council, 1 July 1853.

Source: The Sydney Morning Herald, 2 July 1853, p.4.

CONTENTS

ABSTRACT

This thesis examines the transition from public to private executions in colonial Australia. It asks why public executions were abolished in the colonies and how the practice of executions was affected by the passage of the legislation. New South Wales (then including modern-day Queensland), Victoria and Van Diemen's Land all proclaimed their Private Execution Acts in 1855, South Australia did the same in 1858 and Western Australia in 1871. The pace of reform in Australia was early in the context of the British Empire with the United Kingdom stalling for another decade before finally legislating in favour of private hangings in 1868.

The transition to private executions in Australia had a short-term trigger with longer-term trends underpinning a desire for change. In New South Wales, the first colony to initiate the reform, the cultural legacy of convictism and the wish to appear 'civilised' to the outside world played a decisive role. This sentiment was bolstered by a public execution spectacle that had, for a long time, been the subject of concern across all of the colonies. Colonial elites feared that the women, children and lower class spectators who attended public executions were being 'demoralised' by the violence. The publicity of hangings also enticed many criminals into displays of bravado in their final moments, a situation exacerbated by the popular expectation that they 'die game'. Finally, bungled executions were a common feature of the colonial period and the pain it caused upon the body of the condemned was a sight that frequently distracted from the intended 'lesson' of the gallows.

The decline of violent, public punishments in the nineteenth century has many comparisons internationally. This thesis engages with the conceptual literature on penal change—the work of Michel Foucault, Marxist scholarship, and the appropriation of Norbert Elias' 'Civilizing Process'—but ultimately takes an approach that places great emphasis on the unique historical contingences of Australian settlement. Above all, it takes seriously the wider beliefs and customs of colonial Australians to assess how these cultural factors impacted upon the changing way that executions were carried out.

DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint award of this degree.

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Parts of Chapter 3 have appeared in the following publication:

Steven Anderson, 'Punishment as Pacification: The Role of Indigenous Executions on the South Australian Frontier, 1836-1862', *Aboriginal History*, vol.39, 2015, pp.3-26.

Aspects of the thesis have been presented at the following conferences:

Steven Anderson, 'Pacifying Stage-Plays: Explaining the Prevalence of Indigenous Executions on the South Australian Frontier, 1836-1862', Australian Historical Association Annual Conference, The University of Queensland, Brisbane, July 2014.

Steven Anderson, 'Guardians of Due Process or Morbid Bystanders? Exploring Australia's Scaffold Crowd', Australian Historical Association Annual Conference, The University of Adelaide, Adelaide, July 2012.

Steven Anderson, 'Authorizing Death: The Paradox of Public Executions in Colonial Australia', Death Down Under, The University of Otago, Dunedin (New Zealand), June 2012.

Steven Anderson, Various Papers, The School of History and Politics Annual Postgraduate Conference, The University of Adelaide, Adelaide, 2011-2015.

ACKNOWLEDGEMENTS

If one were to catalogue the acknowledgements pages for all of Paul Sendziuk's previous PhD students I'm more than confident that there would be a unanimous endorsement of his exceptional abilities as a supervisor. As an undergraduate student in one of his classes, his generous feedback on an essay and subsequent encouragement that I submit it for a prize is one of the strongest links in a causal chain that led me to write the thesis that follows. Ever since I have been grateful for his insight, patience, constant encouragement and readiness to assist on short notice with this thesis and various side-projects along the way.

The supportive comments of my co-supervisor, Rob Foster, on the penultimate draft of this thesis were helpful in preparation for its final submission. Associate Professor Stefan Petrow from the University of Tasmania commented on an early version of Chapter 6 which helped guide its later revision. Proof reading is an arduous task and Gay Anderson provided a fresh set of eyes for errors in punctuation, syntax and spelling when it was most needed.

Financially this thesis would have been made much harder—if not impossible—to write without an Australian Postgraduate Award. To be able to present my work at various research forums I am similarly indebted to an AHA/CAL travel and writing bursary in 2012 and the yearly financial support of the Department of History at The University of Adelaide. Special thanks must go to the National Library of Australia for granting me a Norman McCann Summer Scholarship in 2013. The generous parameters of that residency allowed me the time, space and resources to utilise a comprehensive collection of colonial material at all hours of the day and night.

I could fill this page with the names of fellow post-grads whose good humour and friendly smiles made Adelaide a wonderful environment to conduct research. Special thanks must go to Guy Richardson, Mike Radzevicius, Chris Bridges, Mark Neuendorf, Jenny Kalionis, Elizabeth Connolly, Mel Cooper-Dobbin, Clare Parker, and Kelly Birch for their friendship and advice. To Sophie Daniels, who is training to be a Doctor of a

very different kind, I am thankful for the many years of kindness and support that you showed me.

To be born and raised as the youngest in a family full of school teachers, I am pleased to report that this student of exceptionally long standing has received nothing other than encouragement and support upon completing the final step of his education. Glenn Anderson, the best teacher of all and the memory of whom I cherish, was there to guide me at the beginning of this PhD but not at the end. The sustained effort that it took to finish this thesis is testament to the many lessons he taught his son about life, rather than death, in those final years we had together.

LIST OF FIGURES

Introduction

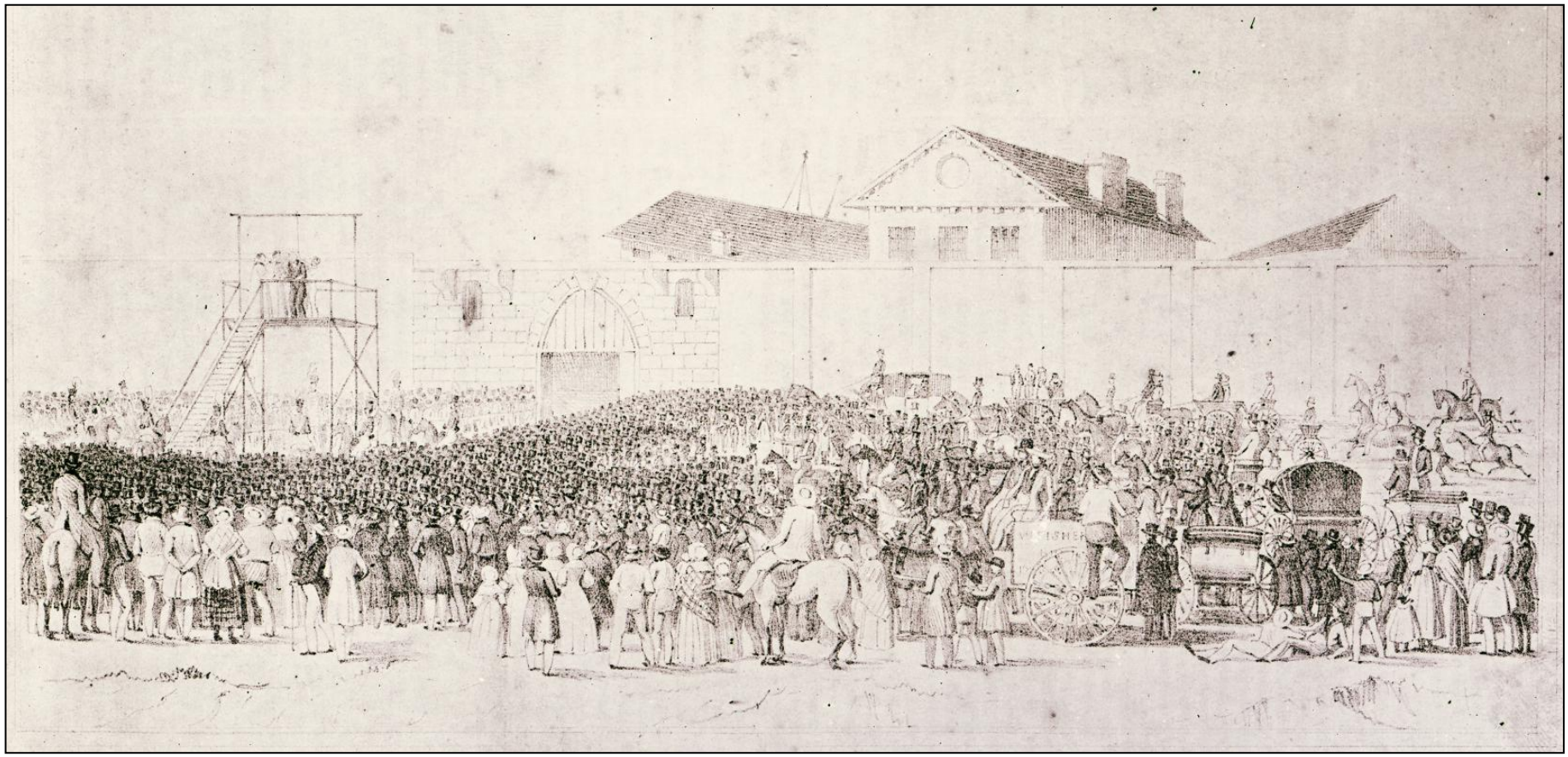

Figure 1.1. The execution of John Knatchbull outside Sydney's Darlinghurst Gaol on 13 February 1844.

Source: 'Woolloomooloo Gaol, Execution of John Knatchbull', State Records of New South Wales, Government Printing Office, Glass Negative 1 – 21799.

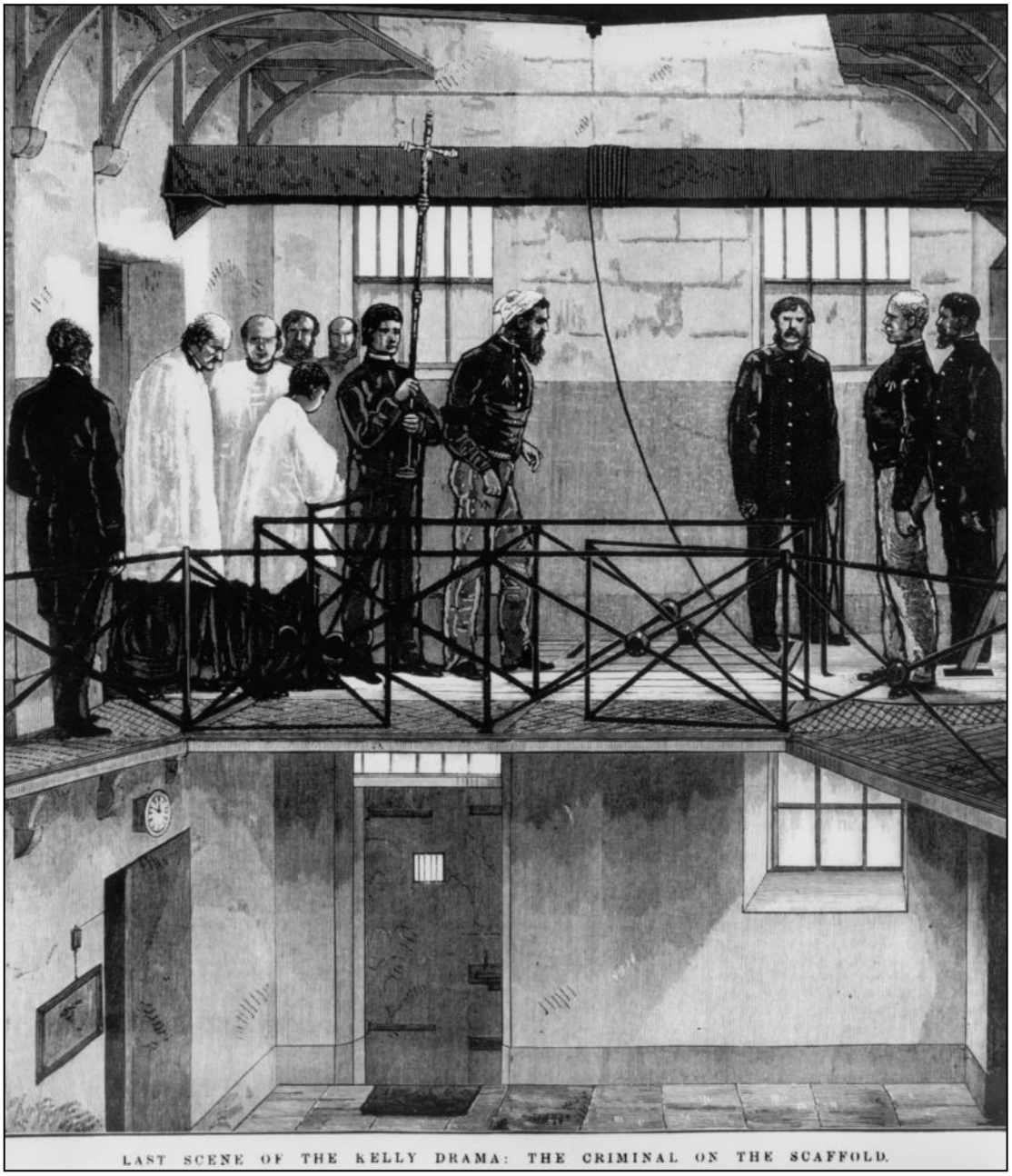

Figure 1.2. The execution of Ned Kelly inside Melbourne Gaol on 11 November 1880.

Source: Unknown Artist, 'Last Scene of the Kelly Drama: The Criminal on the Scaffold', print of a wood engraving published in *The Australasian Sketcher* on 20 November 1880, State Library of Victoria, Image A/S20/11/80/305.

Consider the execution of John Knatchbull in 1844 outside Sydney's Darlinghurst Gaol (Figure 1.1) compared with that of Ned Kelly in 1880 at the Old Melbourne Gaol (Figure 1.2). Both were notorious figures in Australian criminal history during their lifetime except that the former was sentenced to a public execution while the latter underwent a private execution. The sketch of Knatchbull, a convicted murderer of aristocratic birth, does well to capture the atmosphere of public executions.[1] To the far right, horses mounted with late spectators are in full stride, rushing to join the throng of an estimated 10,000 Sydneysiders present.[2] In the foreground male, female, and child spectators are all visible in a crowd that thickens the closer it comes to the towering image of the scaffold. Encircling the base of the structure are a dozen mounted military guard. Following the steps upward are two clergymen attending to Knatchbull as the executioner makes the final adjustments to the rope around his neck. The jutting architecture of Darlinghurst Gaol informs the background of the work but the drama is soon to be played out on the tongue of the entrance gate. One imagines that, as Knatchbull fell into the cavity below, the static image of the prison was secondary to the screams, gasps and jolts of fellow spectators gathered on each shoulder.

The image of Ned Kelly's hanging gives the opposing perspective of a private execution. The ten thousand itching, impatient spectators of Sydney at Knatchbull's feet are exchanged for the cold interior walls of Melbourne Gaol. In the absence of the distracting public, legal functionaries and religious advisors enclose him while the symbol of the cross is held steadily over his head. The white cap would soon be pulled over Kelly's face, hiding the grotesque contortions that always occur the moment the noose jabs at the neck. Though not depicted in the sketch, contemporary newspaper reports attest to the fact that there was a small crowd watching the hanging in the cellblock itself but not one was a curious onlooker. Each of the twenty-three spectators was present in a professional capacity—mostly journalists and government officials—

[1] For newspaper accounts of Knatchbull's execution, see *The Sydney Morning Herald*, 14 February 1844, pp.2-3; *The Australian*, 15 February 1844, p.3; *Morning Chronicle*, 14 February 1844, p.2. For secondary accounts of his crime, execution and aristocratic background, see Deborah Beck, *Hope in Hell: A History of Darlinghurst Gaol and the National Art School*, Sydney: Allen and Unwin, 2005, pp.16-17; Colin Roderick, *John Knatchbull: From Quarterdeck to Gallows*, Sydney: Angus & Robertson, 1963; 'Knatchbull, John (1782-1844)', *Australian Dictionary of Biography* 1967, http://adb.anu.edu.au/biography/knatchbull-john-2313, viewed 5 January 2015.

[2] *The Australian*, 15 February 1844, p.3.

who recorded their names and occupations as a matter of legal necessity.[3] To the newspapermen who would publish their accounts, the powerful architecture of the prison was all around them, inhabited by them, inescapable no matter where their eyes looked. From the perspective of Ned Kelly, looking outwards from the drop at Melbourne Gaol, the distractions had been removed; all that was staring back at him was the blank faces of officialdom and the dreary walls of the prison block.

Between the execution of John Knatchbull in 1844 and Ned Kelly in 1880 the Australian colonial parliaments passed what will be referred to hereafter as the 'Private Execution Acts' which fundamentally altered the character of the death penalty on the continent.[4] Without any central directive from Britain or official inter-colonial dialogue, the disgust at public executions was codified in law during the mid-nineteenth century. New South Wales (which then included the territory of modern-day Queensland), Van Diemen's Land and Victoria all proclaimed an end to public executions in 1855, South Australia in 1858, and Western Australia in 1871. The proclamation dates mask the fact that the first Private Execution Acts actually passed their third reading in the New South Wales Parliament in 1853 and the Victorian Parliament in 1854. The delay was due to the necessity of reserving the Bill for Queen Victoria's Royal Assent in England. The dubious honour of being the first person to be executed privately on the Australian continent is held by the convicted murderer William Ryan who was hanged on 28 February 1855 at Sydney's Darlinghurst Gaol.[5]

It comes as a surprise to learn how quickly the Australian colonies outlawed the spectacle of public executions in the context of the British Empire. England, the centre of the Empire, passed legislation to abolish public executions under the Prime Ministership of Benjamin Disraeli in 1868.[6] By that time, all of the Australian colonies

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[3] This count includes Andrew Shields M.D., the medical officer in attendance. For official confirmation of Kelly's death and the full list of spectators who attended the execution, see 'Witnesses to Kelly's Execution, 11 October 1880', Public Record Office Victoria, VPRS 4969/2/78.

[4] New South Wales, no.40 of 1853, *An Act to Regulate the Execution of Criminals*, 1855; Victoria, no.44 of 1854, *An Act to Regulate the Execution of Criminals*, 1855; Van Diemen's Land, no.2 of 1855, *An Act to Regulate the Execution of Criminals*, 1855; South Australia, no.23 of 1858, *Act to Regulate the Execution of Criminals*, 1858; Western Australia, no.15 of 1871, *An Act to Provide for Carrying Out of Capital Punishment Within Prisons*, 1871.

[5] *The Sydney Morning Herald*, 1 March 1855, p.5.

[6] United Kingdom, Chapter 24 of 1868, *Capital Punishment Amendment Act*, 1868.

(besides Western Australia) had been operating under a system of private executions for at least a decade. New Zealand was the next major British settler colony to abolish public executions in 1858 while Canada and the Cape of Good Hope waited until 1869 to copy the immediate example set by England.[7] It seems in reverse order that the Australian colonies, burdened with vast frontiers, the scourge of convictism and a resistant Indigenous population, would act before Britain's other substantial possessions to rid themselves of such an emphatic display of punishment. Yet, as shall be seen, the historical contingencies of the Australian situation proved enabling, as opposed to inhibiting, factors in the quest to be rid of such 'barbarous' and 'uncivilised' practices as public hangings.

This thesis examines the transition from public to private executions that occurred in the Australian colonies during the nineteenth century. It considers why public executions were abolished in the colonies and how the practice of executions was affected by the passage of the legislation. It offers a new explanation for why private executions were introduced in the Australian context and is the first study to present a continental wide study of the scaffold crowd, the dying criminal, and changing execution procedure for this transitionary period. More than just an empirical tour of Australia's penal past, the vast collection of primary documents amassed for the task has been integrated with a clear conceptual backdrop in mind. This thesis is the embodiment of a 'culturalist' approach to penal change; one that first identifies and then takes seriously the connection between punishment and the cultural developments of a given society. The changing forms of Australian executions in the colonial period are a reminder that the desired temperament of punishment always remains tethered to time, place, history, and culture.

Specialists in the field familiar with the conceptual literature on penal change (of which Michel Foucault's *Discipline and Punish* is the most famous example) will recognise aspects of the argument outlined below. These debts will be made explicit in due course but it is better to state my position outright, without complication, rather than obfuscate

[7] New Zealand, no.10 of 1858, *Act to Regulate the Execution of Criminals*, 1858; Canada, Chapter 29 of 1869, *An Act respecting Procedure in Criminal Cases, and other matters relating to Criminal Law*, 1869, section 106-124; Cape of Good Hope, no.3 of 1869, *For regulating the Execution of Capital Punishment*, 1869.

from the beginning. It is in this spirit that I present the four main arguments of this thesis:

1. Forms of punishment are a reflection of, and participate in, the cultural life of a given society.
2. Colonial executions were considered to be a communicative exercise—or 'lesson'—that attempted to convey to the criminal and onlooker the consequences of committing crime.
3. The abolition of public executions in colonial Australia was triggered in New South Wales by the cultural legacy of convictism and the desire to appear 'civilised' to the outside world.
4. Concerns over how the crowd, criminal, and execution procedure distracted from the central 'lesson' of the gallows were long term factors, shared by all Australian colonies, that influenced how executions were practised in the nineteenth century.

This thesis is divided into two Parts, three chapters each. Part 1 deals with the question of why public executions were abolished in colonial Australia on both the conceptual and practical planes. Part 2 deals with the changing practice of executions both before and after the Private Execution Acts were passed. A review of the relevant literature is carried out later in the Introduction. An outline of the primary sources used to construct this thesis is included after the Literature Review.

The demise of public, deliberately painful, bodily punishments in the nineteenth century is a trend reflected across the majority of western nations. The abolition of public executions, even in faraway Australia, should be rooted within that conceptual context and wider scholarly discussion. Chapter 1 justifies a 'culturalist' approach to the question of penal change over other candidates of conceptual analysis. The work of David Garland, Philip Smith and Louis P. Masur are chosen to exemplify the 'cultural turn' that has occurred in studies of punishment in recent decades. Their perspective is defended against other possibilities of understanding the transition, namely the work of Michel Foucault, Norbert Elias and Marxist scholars as well as more conventional approaches to the question of penal reform like that undertaken by Leon Radzinowicz.

John McGuire's earlier application of Elias' 'Civilizing Process' to understand the abolition of public executions in Australia is also critiqued in this opening chapter.

Chapter 2 focuses on the practical measures that were necessary to abolish public executions in colonial Australia. The contents of the various Private Execution Acts are examined as are the lengthy processes that New South Wales and Victoria went through to have the legislation approved by England. The parliamentary debates and the reaction of the colonial newspapers underline the long-term issues regarding public executions, especially surrounding the behaviour of the crowd and the attitude of the dying criminal. It is argued that the trigger for the transition to private executions was the cultural legacy of convictism and a desire for the older penal colonies to appear 'civilised' to the outside world.

Indigenous executions in South Australia and Western Australia were an exception to this trend to greater seclusion in hanging criminals. Chapter 3 demonstrates how these two jurisdictions reinstated the option to sentence an Indigenous offender to a public execution only a handful of years after they had abolished the practice *in toto*. It was based on the cultural construction of Indigenous intellect, temperament and habit by Europeans but also the practical idea that frontier executions would pacify Indigenous resistance to colonisation. Chapter 3 shows that, despite their partial reinstatement, the public execution of an Indigenous offender was a rare occurrence after the Amendments were passed. The experience of New South Wales, Tasmania, Victoria, and Queensland in regards to Indigenous executions is also touched upon to demonstrate how this was a legal narrative defined by its exceptionality rather than its regularity.

Chapter 4 gives a broad overview of the practice of executions in colonial Australia. From sentencing through to execution, the ideal versus the historical reality of execution procedure is covered in detail. What emerges in this discussion is just how culturally sensitive Australian colonists were towards the sight of unnecessary pain and suffering in criminals as the colonial period matured. The constant bungling of execution procedure, both major and minor, distracted from the intended 'lesson' of colonial executions that crime had consequences. In the name of 'decency' and 'humanity' the execution was transformed from an amateur undertaking to a standardised and professionalised procedure by the time of Federation.

Chapter 5 demonstrates how the condemned criminal had the capacity to shape the meaning of punishment in his or her final moments. A penitent criminal underlined the justice of the sentence but a misbehaving one left open the possibilities of other interpretations. When the criminal mounted the Australian scaffold there was the popular cultural expectation that they 'die game' or, in other words, with a degree of courage, pluckiness and bravado. It encouraged many criminals to misbehave and hide away any feelings of contrition or penitence for the crime that had been committed. The role of the executioner, clergymen, and sheriff was to shepherd criminals into thinking that penitence was the only option available to them. The introduction of private executions shielded culprits from the immediacy of these cultural expectations of the awaiting crowd.

Chapter 6 deals with the changing way that interested spectators engaged with the spectacle of hangings during the colonial period. There was the perception that women, children and others drawn from the lower class made up the majority of the crowd at public executions. This concerned middle and upper class colonists who were convinced that witnessing the gory spectacle of hangings only served to demoralise the onlooker and acclimatise them to violence. The presence of these three groups at the public scaffold was also in conflict with their idealised role in colonial society. When public executions were abolished colonial sheriffs were put in charge of determining who was able to view the private hanging. At these new executions an exceedingly small and select number of citizens were admitted into the gaol on the day of the hanging, complemented by the usual number of prison officials, journalists and medical men. The crowd in the era of public hangings was, like the sight of unnecessary suffering or the criminal who misbehaved, a distraction from the 'lesson' of the execution itself.

A Review of the Existing Literature

The history of executions in colonial Australia is yet to be given the full scholarly attention it deserves. The death penalty lacks a comprehensive study that has been to the benefit of the historical debate in places like England, Germany, the United States,

and Canada.[8] Mark Finnane's brief overview on the topic of executions in *Punishment in Australian Society* (1997) is a good starting point because the collection of journal articles, books and local histories that make up the existing literature are all limited by either scope, time-period or jurisdiction.[9] Still, the patchwork of serious academic scholarship that has emerged on the colonial gallows in recent decades is starting to reveal a more complete picture of the penalty. Below the review of the existing literature is split to conform to the themes presented in Part 1 and Part 2 of the thesis that follows. The literature on capital punishment in twentieth century Australia has been cited where it crosses over with the nineteenth century but otherwise it has been excluded. The more conceptually oriented literature on aspects of penal change is dealt with exclusively in Chapter 1. It is my intention for this thesis to contribute something new to the existing literature in both approach and content.

The Abolition of Public Executions in Australia and Abroad

John McGuire's 1998 publication in *Australian Historical Studies* on the abolition of public executions in Australia is a central reference point for this thesis.[10] McGuire situates the transition to private executions within Norbert Elias' idea of the 'Civilizing Process'.[11] Given the amount of stage setting that is required to first understand Elias' concept and then offer a critique of its application in Australia, his paper is more properly discussed in Chapter 1. What can be said at this point is that McGuire was right to place a priority on race relations and concepts like 'civilisation' in the transition from public to private executions. It is a well-researched paper that makes very good use of evidence from parliamentary debates and newspapers of the kind discussed in Chapter 2. Still, mustering the empirical evidence from the debates and linking key concepts like race and civilisation in such a way as to conform to Elias' 'Civilizing

[8] Stuart Banner, *The Death Penalty: An American History*, Cambridge, Mass.: Harvard University Press, 2002; Ken Leyton-Brown, *The Practice of Execution in Canada*, Vancouver: UBC Press, 2010; Richard J. Evans, *Rituals of Retribution: Capital Punishment in Germany, 1600-1987*, Oxford: Oxford University Press, 1996(a); V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770-1868*, Oxford: Oxford University Press, 1994.

[9] For Finnane's overview of executions in Australian history, see Mark Finnane, *Punishment in Australian Society*, Melbourne: Oxford University Press, 1997, pp.126-139.

[10] John McGuire, 'Judicial Violence and the "Civilizing Process": Race and the Transition from Public to Private Executions in Colonial Australia', *Australian Historical Studies*, vol.29, no.111, 1998, pp.187-209.

[11] Norbert Elias, *The Civilizing Process* [1939], second revised edition, E. Dunning, J. Goudsblom & S. Mennell (eds), E. Jephcott (trans), Oxford: Blackwell Publishing, 2000.

Process' is ill-advised. Chapter 1 is a plea to endorse a 'culturalist' approach to understanding penal change of the type that McGuire counsels against in his essay.[12] Part 1 of this thesis may deal with similar subject matter as McGuire but the conceptual approach taken to the question is very different, as are the conclusions.

Arthur L. Wintle wrote an Honours thesis at La Trobe University in 1973 that covers the abolition of public executions but only in the context of New South Wales.[13] Wintle never clearly separates out or prioritises the "complex interaction of ideas and events" which he identifies as causing the reform from the outset.[14] Humanitarian impulses, international influences, and opposition to public executions amongst the educated classes were all seen to Wintle as playing a key role. He makes excellent use of parliamentary debates and newspaper sources in the context of New South Wales. Wintle also provides a helpful background on the debate around capital punishment as a whole that occurred during the 1840s in Sydney.

Other than McGuire and Wintle, very few scholars have directly addressed the abolition of public executions in Australia at length. Scholars like Richard Davis, Mark Finnane, Jo Lennan and George Williams, Michael Sturma, Helen MacDonald, John Pratt, and Russell Ward all reference the abolition of public executions in Australia to some degree but never in a sustained manner.[15] Of those just cited, even fewer offer explanations for why the reform occurred. Davis briefly remarked how the introduction of private executions in Tasmania was a "necessary stage" in the rejection of capital

[12] McGuire, 1998, p.209.

[13] Arthur L. Wintle, 'The Abolition of Public Executions in New South Wales', unpublished B.A. (Hons) thesis, La Trobe University, 1973.

[14] *Ibid.*, p.1.

[15] Richard Davis, *The Tasmanian Gallows: A Study of Capital Punishment*, Hobart: Cat and Fiddle Press, 1974, pp.41-42; Mark Finnane and John McGuire, 'The Uses of Punishment and Exile: Aborigines in Colonial Australia', *Punishment and Society*, vol.3, no.2, 2001, p.282; Jo Lennan and George Williams, 'The Death Penalty in Australian Law', *Sydney Law Review*, vol.34, 2012, pp.665-666; Helen MacDonald, 'Public Executions', *The Companion to Tasmanian History* 2006, http://www.utas.edu.au/library/companion_to_tasmanian_history/P/Public%20executions.htm, viewed 14 June 2011; John Pratt, *Punishment and Civilization: Penal Tolerance and Intolerance in Modern Society*, London: SAGE Publications, 2002, p.33, fn.1; Michael Sturma, 'Death and Ritual on the Gallows: Public Executions in the Australian Penal Colonies', *Omega*, vol.17, no.1, 1987, pp.89-100; Russell Ward, *The Australian Legend*, Melbourne: Oxford University Press, 1958, pp.139-140.

punishment completely.[16] In a brief entry in the *Companion of Tasmanian History* MacDonald mentions how the perception of public executions as "barbarous spectacles" contributed to their abolition in the Australian colonies.[17] Sturma's passing comments on the introduction of private executions links the reform to the "privatization" of death and dying more generally in Australia, a trend that continued into the twentieth century.[18]

In the wider context of the British Empire (outside of England itself) there is limited secondary literature on the topic of the abolition of public executions. John Pratt briefly mentions that opposition to the New Zealand Bill was made on the basis of there being a large Maori population who were thought to still require the public example of capital punishment.[19] Ken Leyton-Brown provides the most extensive look at the introduction of private executions in Canada. He documents the practical issues confronted when implementing private executions in Canadian prisons, the adjustment needed for the execution crowd, and the new means through which news of the hanging was communicated to the world beyond the prison.[20] Carolyn Strange has also commented on how the introduction of private executions in Canada made a "highly dramatic act" into a "strictly scripted technocratic procedure" that hid the reality of hangings behind journalistic accounts.[21] The Cape Colony, another British settler society sometimes compared to the Australian colonies, is still yet to receive scholarly treatment on the transition from public to private executions.

The abolition of public executions in England has been addressed directly by a number of scholars with Randall McGowen, Vic Gatrell, David Cooper and John Pratt among the more prominent. Cooper's book-length study on the topic focuses on the intellectual lineage of the reform, the machinations of parliament and the influence of

[16] Davis, 1974, pp.41-42.

[17] MacDonald, 2006.

[18] Sturma, 1987, p.98.

[19] John Pratt, *Punishment in a Perfect Society: The New Zealand Penal System, 1840-1939*, Wellington: Victoria University Press, 1992, p.90.

[20] Brown, 2010, pp.104-118.

[21] Carolyn Strange, 'The Undercurrents of Penal Culture: Punishment of the Body in Mid-Twentieth Century Canada', *Law and History Review*, vol.19, issue 2, 2001, p.356.

humanitarianism but these explanatory preoccupations are discussed better within the context of Chapter 1.[22] In Pratt's work, also discussed further in the following chapter, public hangings are characterised as a carnival day that was incongruous with the development of civilised norms that prized more sanitised forms of death.[23] Gatrell writes about executions in *The Hanging Tree* (1994) with a focus on the emotional and psychological response of English people to the violence they witnessed. Squeamishness is the watchword in his discussion concerning the abolition of public executions as elites recoiled at the sight of hanging and the public execution crowd.[24] In McGowen's 1994 article on the end of public executions in England he explores the contested place of violence in civilised society and how disorienting it was for refined individuals to encounter the gallows spectacle and eager crowd.[25] The "anonymous and bureaucratic" nature of private executions assuaged the anxieties of 'civilised' people by containing the uncomfortable, or even potentially dangerous, emotions provoked by hangings within the seclusion of the prison.[26] As with much of McGowen's work on the reform of the English capital code, special care is taken to unpack the concepts used in the debate as well as exploring the attitudes and mental outlook of the two opposing sides – particularly that of sympathy in the case of the reformers.[27]

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[22] David D. Cooper, *The Lesson of the Scaffold: The Public Execution Controversy in Victorian England*, London: Allen Lane, 1974.

[23] Pratt, 2002, pp.15-34. For another work that contextualises public execution within English traditions of the carnival, see Thomas W. Laqueur, 'Crowds, Carnival and the State in English Executions', in A.L. Beier, D. Cannadine and J.M. Rosenheim, *The First Modern Society: Essays in English History in Honour of Lawrence Stone*, Cambridge: Cambridge University Press, 1989, pp.305-355.

[24] Gatrell, 1994, pp.589-612. For recent work on the crowd at English executions, see R.S. Shoemaker, 'Streets of Shame? The Crowd and Public Punishments in London, 1700-1820', in S. Devereaux and P. Griffiths (eds), *Penal Practice and Culture, 1500-1900: Punishing the English*, New York: Palgrave Macmillan, 2004, pp.232-257; Matthew Trevor White, 'Ordering the Mob: London's Public Punishments, c.1783-1868', unpublished PhD thesis, The University of Hertfordshire, 2009; Matthew White, 'Rogues of the Meaner Sort? Old Bailey Executions and the Crowd in the Early Nineteenth Century', *The London Journal*, vol.33, issue 2, 2008, pp.135-153.

[25] Randall McGowen, 'Civilizing Punishment: The End of the Public Execution in England', *Journal of British Studies*, vol.33, no.3, 1994, pp.257-282.

[26] *Ibid.*, pp.280-281.

[27] Randall McGowen, 'A Powerful Sympathy: Terror, the Prison, and Humanitarian Reform in Early Nineteenth-Century Britain', *Journal of British Studies*, vol.25, no.3, 1986, pp.312-334; Randall McGowen, 'Cruel Inflictions and the Claims of Humanity in Early Nineteenth-Century England', in K.D. Watson (ed.), *Assaulting the Past: Violence and Civilization in History Context*, Newcastle: Cambridge Scholars Publishing, 2007, pp.38-57; Randall McGowen, 'History, Culture and the Death Penalty: The British Debates, 1840-70', *Historical Reflections*, vol.29, no.2, 2003, pp.229-249; Randall McGowen, 'Punishing Violence, Sentencing Crime', in N. Armstrong and L. Tennenhouse (eds), *The Violence of Representation: Literature and the History of Violence*, London: Routledge, 1989, pp.140-156; Randall

Europe was another site of declining bodily punishments and the birth of prison regimes in the nineteenth century as Michel Foucault, Pieter Spierenburg, and Richard Evans have all observed.[28] The large Germanic states like Prussia, Württtemberg, Upper Hesse, Hamburg, Brunswick, Saxony, Baden, Bavaria and Rhenish Flesse all abolished public executions between 1851 and 1863.[29] Evans cited the threat of public disorder at the foot of the gallows and a desire to further legitimise capital punishment by bringing it under tighter state control as reasons for the transition in Germany.[30] A precise picture of public execution abolition dates for all European jurisdictions has yet to emerge in the secondary literature, though it appears that public punishments mostly disappeared in Western Europe by the late nineteenth century.[31] The last public guillotining in France took place on one early Parisian morning in 1939, making it exceptionally late to adopt the reform in the context of Western Europe.[32] The conceptual approach taken by Foucault and Spierenburg to explain declining public punishments in Europe is discussed in Chapter 1.

The United States was as early as it was late to adopt private executions. Prominent jurisdictions in the northeast were the first to experiment with the practice beginning with Connecticut in 1830 while Massachusetts, New Hampshire, New Jersey, New York and Pennsylvania followed very soon after.[33] The rest of the country was slower to adopt private executions, especially in the south. America's last public execution

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McGowen, 'The Body and Punishment in Eighteenth-Century England', *The Journal of Modern History*, vol.59, no.4, 1987, pp.651-679.

[28] Evans, 1996a; Michel Foucault, *Discipline and Punish: The Birth of the Prison* [1975], Alan Sheridan (trans), second vintage books edition, New York: Vintage Books, 1995; Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression; From a Preindustrial Metropolis to the European Experience*, Cambridge: Cambridge University Press, 1984.

[29] The small Germanic state of Saxe-Altenburg was the first territory to abolish public executions in 1841. See Richard J. Evans, 'Justice Seen, Justice Done? Abolishing Public Executions in 19th-Century Germany', *History Today*, vol.46, issue 4, 1996(b), http://www.historytoday.com/richard-evans/justice-seen-justice-done-abolishing-public-executions-19th-century-germany, viewed 1 March 2015; Evans, 1996a, pp.305-321.

[30] Evans, 1996a, pp.898 and 903.

[31] Spierenburg put the broad timeframe of 1770 to 1870 on the abolition of public, bodily punishments in Europe (including but not exclusively referring to capital punishment). See Spierenburg, 1984, p.198.

[32] John D. Bessler, *Death in the Dark: Midnight Executions in America*, Boston: Northeastern University Press, 1997, p.96.

[33] *Ibid.*, pp.40-80.

took place in 1936 in Kentucky, over a century after the practice was first outlawed in the northeast.[34] John Bessler, historian of private executions in America, gives three reasons for the transition: middle and upper class opposition to public hangings, a fear of social disorder at the base of the gallows, and the widespread support for private executions among those wishing to retain the death penalty.[35] Stuart Banner is another who suggests that public executions became troublesome in America because the crowd often sided with the criminal and that, with the growing non-attendance of the upper class, a once proud civic event was starting to degrade.[36] Much of Bessler and Banner's emphasis on class in relation to public executions can be traced back to the work of Louis P. Masur's work in antebellum America who I discuss in the following chapter.[37]

The Practice of Executions in Colonial Australia

Much of this thesis concerns the practice of executions in colonial Australia, just as much as focusing on private executions as a strictly legislative reform. Thematically a lot of ground is covered; the unique treatment given to Indigenous offenders, criminal behaviour on the scaffold, crowd behaviour and the standardisation of execution procedure to name only a handful. To confidently present the changing reality of executions in colonial Australia many secondary sources required consultation.

For basic information on the executions that took place in colonial Australia there was a mixture of local and scholarly histories that proved helpful. In research led by Ken Macnab, Tim Castle, and Amanda Kaladelfos, the 'NSW Capital Convictions Database, 1788-1954' has revealed a complete statistical account of the capital convictions in the history of New South Wales for the first time.[38] Trevor Porter made a useful directory

[34] Kentucky was "shamed" into abolishing public executions two years later in 1938. See *ibid.*, p.67.

[35] *Ibid.*, pp.67-72.

[36] Banner, 2002, pp.144-168. For studies focusing exclusively on the execution crowd in America, see Annulla Linders, 'The Execution Spectacle and State Legitimacy: The Changing Nature of the American Execution Audience, 1833-1937', *Law and Society Review*, vol.36, no.2, 2002, pp.607-656; Jürgen Martschukat, 'A Horrifying Experience?: Public Executions and the Emotional Spectator in the New Republic', in J.C.E. Gienow-Hecht (ed.), *Emotions in American History: An International Assessment*, New York: Berghahn Books, 2010, pp.181-200.

[37] Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865*, Oxford: Oxford University Press, 1989.

[38] Ken Macnab, Tim Castle and Amanda Kaladelfos, 'NSW Capital Convictions Database, 1788-1954', *Frances Forbes Society for Australian Legal History* 2013, http://research.forbessociety.org.au/, viewed 13 August 2015.

of all the executions to take place in the history of Victoria and earlier undertook the same task for South Australia in *The Hempen Collar* (1990), a work he co-authored with David Towler.[39] Brian Purdue's *Legal Executions in Western Australia* (1993) offers the historian basic information about the date, name, crime, gender and ethnicity of those executed in Western Australia.[40] Ross Barber, Hugh Mac Master, and Christopher Dawson are three historians who have detailed the number of those executed in Queensland.[41] Australia-wide a table constructed by Mukherjee, Walker, and Jacobsen in 1986 has been used as a starting point for execution numbers across the continent.[42]

There have been many historians who have focused on a particular grouping of executions. In Victoria, Judy E. Barry, Michael Cannon, Ian MacFarlane and Kevin Morgan are examples of local historians focusing on a cluster of executions determined by either location, time period or the gender of the executed criminal.[43] Christopher Dawson's collection of local histories on the topic of capital punishment in Queensland

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[39] Trevor J. Porter, *Executions in the Colony and State of Victoria 1842-1967*, Adelaide: The Wednesday Press, 1999; David J. Towler and Trevor J. Porter, *The Hempen Collar: Executions in South Australia, 1838 – 1964, A Collection of Eyewitness Accounts*, Adelaide: The Wednesday Press, 1990. For a later publication that addresses specific South Australian cases in further detail, see Trevor Porter, *Seven Lengths of Rope*, Adelaide: The Wednesday Press, 1995. For the first, but somewhat inaccurate, attempt to unearth the numbers of those executed in South Australia, see A.R.G. Griffiths, 'Capital Punishment in South Australia 1836-1964', *Australian & New Zealand Journal of Criminology*, vol.3, no.4, 1970, pp.214-222.

[40] Brain Purdue, *Legal Executions in Western Australia*, Perth: Foundation Press, 1993.

[41] Ross Barber, 'Capital Punishment in Queensland', unpublished B.A. (Hons) thesis, The University of Queensland, 1967, pp.193-197; Christopher Dawson, *The Prisoners of Toowong Cemetery: Life, Death and the Old Petrie Terrace Gaol*, Brisbane: Inside History, 2006, p.66; Hugh Mac Master, *Mostly Murder*, North Rockhampton: Hugh Mac Master, 1999, pp.145-172. For other works by Barber regarding capital punishment in Queensland not mentioned below, see Ross Barber and P.R. Wilson, 'Deterrent Aspect of Capital Punishment and its Effect on Conviction Rates: The Queensland Experience', *Australian and New Zealand Journal of Criminology*, vol.2, 1968, pp.100-108; Ross Barber, 'The Labor Party and the Abolition of Capital Punishment in Queensland, 1899-1922', *Queensland Heritage*, vol.1, no.9, 1968, pp.3-10.

[42] 'Table 103: Persons Executed by Offence by Jurisdiction', in S.K. Mukherjee, J.R. Walker and E.N. Jacobsen (eds), *Crime and Punishment in the Colonies: A Statistical Profile*, Historical Statistics Monograph no.6, Sydney: History Project Inc., 1986, pp.150-151. For the list of government and parliamentary sources used to construct this table, see p.156.

[43] Judy E. Barry, *Executions at the Old Ararat Gaol*, Ararat: Judy E. Barry, 1990; Michael Cannon, *The Woman as Murderer: Five Who Paid with Their Lives*, Mornington: Today's Australia Publishing Company, 1994; Ian MacFarlane, *1842: The Public Executions at Melbourne*, Melbourne: Victorian Government Printing Office, 1984; Kevin Morgan, *The Particulars of Executions 1894-1967: The Hidden Truth About Capital Punishment at the Old Melbourne Gaol and Pentridge Prison*, Melbourne: The Old Melbourne Gaol, 2004.

are similarly demarcated by the location of the execution, the site of burial or the period in which the criminal was hanged.[44] Simon Adams' *The Unforgiving Rope* (2009) is a more recent book examining a selection of capital cases in Western Australia.[45] The eleven case studies Adams chose to focus on highlight a particular aspect of colonial life and identity such as the existence of the convict stain, Irish nationalism, Indigenous experiences with British law, and the social standing of ethnic minorities. *Hanged* (2007) by Jim Main and *Noose* (2014) by Xavier Duff are recent popular histories on specific cases of executed criminals in Australia.[46] The rationale behind the selection of cases appears to be nothing other than the entertainment value of the criminal's backstory and eventual hanging.

Individual case studies have stood out for their importance among the many executions that took place in the colonial era. The life and death of John Knatchbull was the subject of a book length study by Colin Roderick while his trial formed the centrepiece of another study into the colonial legal defence of "moral insanity" by Jan Wilson.[47] It goes without saying that the execution of Ned Kelly has also received a great deal of attention in larger accounts of his bushranging career.[48] Some individual rape cases have demanded attention by scholars. The Mount Rennie case in 1886 has had two historians, Juliet Peers and David Walker, document different aspects of the same

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[44] Christopher Dawson, *Swinging in the Sixties: Hanging Around Colonial Queensland*, Brisbane: Inside History, 2011; Christopher Dawson, *That Gingerbread Structure: The Trials and Tribulations of the Queen Street Gaol*, Brisbane: Inside History, 2010; Christopher Dawson, *A Pit of Shame: The Executed Prisoners of Boggo Road*, second edition, Brisbane: Inside History, 2010; Christopher Dawson, *The Hanging at the Brisbane Windmill*, Brisbane: Inside History, 2009; Christopher Dawson, *The Dead Outside the Fence: Burying Executed Prisoners in Brisbane, 1830-1913*, *Queensland History Journal*, vol.20, no.8, 2008, pp.351-369; Christopher Dawson, *Dirty Dozen: Hanging and the Moreton Bay Convicts*, Brisbane: Inside History, 2007; Dawson, 2006.

[45] Simon Adams, *The Unforgiving Rope: Murder and Hanging on Australia's Western Frontier*, Perth: UWA Publishing, 2009.

[46] Xavier Duff, *Noose: True Stories of Australians who Died at the Gallows*, Melbourne: The Five Mile Press, 2014; Jim Main, *Hanged: Executions in Australia*, Melbourne: Bas Publishing, 2007.

[47] Roderick, 1963; Jan Wilson, 'An Irresistible Impulse of Mind: Crime and the Legal Defense of Moral Insanity in Nineteenth Century Australia', *Australian Journal of Law and Society*, vol.11, 1995, pp.137-168.

[48] Ian Jones, *Ned Kelly: A Short Life*, Sydney: Hachette Australia, 2008; Graham Seal, *Tell 'Em I Died Game: The Legend of Ned Kelly*, second edition, Sydney: Hyland House Publishing, 2002. For a comparison of Ned Kelly and Ronald Ryan who was executed in 1967, see Mike Richards, 'Ronald Ryan and Ned Kelly', *The Sydney Papers*, vol.14, no.2, 2002, pp.30-40.

event.[49] The rape of a woman named Jenny Green in 1888 was the subject of a masterly microhistory by David Philips in the context of Victoria.[50] Among other things, these separate historical case studies reveal a disparaging attitude toward female victims of sexual violence in the colonial era. Most recently, Amanda Kaladelfos has investigated the debate over three rapists capitally convicted in New South Wales in 1879 using them as a window into the highly gendered politics of the day and abolitionist rhetoric within the colony.[51]

It is important to note what basis capital punishment had in Australian legal history. Unfortunately Alex Castles only briefly touches upon the Australian capital code in his history of Australian law while capital punishment is mentioned even less in Bruce Kercher's survey.[52] The history of the death penalty, in a strictly legal sense, is given thorough treatment by Jo Lennan and George Williams in a paper recently submitted to the *Sydney Law Review*.[53] It tracks the existence of the penalty on Australia's statute books from colonial times to its twentieth century abolition. The decline in capital crimes is well documented and a brief summation of the legislation surrounding the abolition of public executions is also made.[54] If Australia was ahead of England in terms of privatising the spectacle of executions, Lennen and William's study documents how it sometimes lagged in terms of the reduction of the capital code. New South Wales and Queensland were especially reluctant to follow the English example, set in 1841, that removed rape as a capital offence. Amanda Kaladelfos and Ross Barber have

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[49] Juliet Peers, 'The Tribe of Mary Jane Hicks: Imaging Women Through the Mount Rennie Rape Case 1886', *Australian Cultural History*, no. 12, 1993, pp.127-144; David Walker, 'Youth on Trial: The Mt Rennie Case', *Labour History*, issue 50, 1986, pp.28-41.

[50] Philips' piece is printed verbatim in two different publications. See David Philips, 'Sex, Race, Violence and the Criminal Law in Colonial Victoria: Anatomy of a Rape Case in 1888', *Labour History*, issue 52, 1987, pp.30-39; David Philips, 'Sex, Race, Violence and the Criminal Law in Colonial Victoria: Anatomy of a Rape Case in 1888', in D. Philips and S. Davies (eds), *A Nation of Rogues?: Crime, Law and Punishment in Colonial Australia*, Melbourne: Melbourne University Press, 1994, pp.97-122.

[51] Amanda Kaladelfos, 'The "Condemned Criminals": Sexual Violence, Race, and Manliness in Colonial Australia', *Women's History Review*, vol.21, no.5, 2012, pp.697-714.

[52] Alex Castles, *An Australian Legal History*, Sydney: The Law Book Company Limited, 1982, pp. 62-63, 244-245, and 261-263. Kercher ably covers the British capital code but is more sparse in detail when it comes to the Australian experience. See Bruce Kercher, *An Unruly Child: A History of Law in Australia*, Sydney: Allen and Unwin, 1995, pp.xiii-xv.

[53] Lennan and Williams, 2012.

[54] For their summation of the legislation that introduced private executions into Australia, see *ibid.*, pp.665-666.

both shown that the persistence of rape as a capital offence in these two jurisdictions centred on anxieties regarding the vulnerability of women in the colonies and perceived patterns of Indigenous offending.[55]

So long as the death penalty has been meted out in Australia there were conflicting views about its existence on the statute books. James Gregory has tracked colonial opposition to capital punishment in Australia and New Zealand as part of a broader study on British and Imperial opposition to the penalty during the reign of Queen Victoria.[56] It is a descriptive account of the abolitionist movement but one that does well to demonstrate how other citizens of the British world—Irish, Indian, Canadian and African—shared the same concerns of English reformers back 'home'.[57] There are also some minor studies on the abolition of capital punishment in twentieth century Australia that are useful to complete the account of Gregory which ends in the nineteenth century.[58] The century-long gap between introducing private executions and abolishing capital punishment in Australia should demonstrate that these were related but entirely separate reforms under the consideration of colonial lawmakers.

Since the 1990s an ensemble of scholars has tried to make sense of the application of mercy at the Australian gallows. It has been most comprehensively studied in Victoria by Kathy Laster and R. Douglas where common variables, such as the identity of the

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[55] Ross Barber, 'Rape as a Capital Offence in Nineteenth Century Queensland', *Australian Journal of Politics and History*, vol.21, issue 1, 1975, pp.31-41; Amanda Kaladelfos, 'The Politics of Punishment: Rape and the Death Penalty in Colonial Australia, 1841-1901', *History Australia*, vol.9, no.1, 2012, pp.155-175.

[56] For the section dealing with Australia and New Zealand specifically, see James Gregory, *Victorians Against the Gallows: Capital Punishment and the Abolitionist Movement in Nineteenth Century Britain*, London: I.B. Tauris, 2012, pp.40-46. For further references to Australian colonists who wanted to abolish capital punishment in the nineteenth century, see Kaladelfos, 2012; Carolyn Strange, 'Discretionary Justice: Political Culture and the Death Penalty in New South Wales and Ontario, 1890-1920', in C. Strange (ed.), *Qualities of Mercy: Justice, Punishment, and Discretion*, Vancouver: UBC Press, 1996, pp.130-165; Wintle, 1973.

[57] Gregory, 2012, pp.36-52.

[58] Neil Mattingley, 'The Abolition of Capital Punishment in Western Australia, 1960-1984', unpublished B.A. (Hons) thesis, Murdoch University, 1990; Louise Jane Watson, 'The move towards the abolition of capital punishment in South Australia was a slow one. Was a strong political force, committed to the abolition of capital punishment in SA, rather than a public push or widespread interest, the impetus behind the legislative change?', unpublished B.A. (Hons) thesis, Adelaide University, 2001. For an example of twentieth century abolitionist writing in Australia, see Barry Jones (ed.), *The Penalty is Death: Capital Punishment in the Twentieth Century, Retentionist and Abolitionist Arguments with Special Reference to Australia*, Melbourne: Sun Books, 1968.

offender and the specific details of the case, are separately examined for their relative bearing on the final decision to execute.[59] Their analysis revealed a high level of arbitrary decision-making in the Victorian situation and a less than clear definition of roles for those involved. This finding was replicated by H.C. Tait in Queensland who found the application of mercy "paradoxical and inconsistent" and in conflict with a stated desire for the capital code to be more consistent, measured and rule based.[60] In a comparative study of New South Wales and Tasmania, David Plater and Penny Crofts show how the prerogative of mercy worked for bushrangers during the years 1824 to 1856.[61] When considering their plight, the authors could not help but notice how the Executive Council plied their role almost like a modern Court of Criminal Appeal would nowadays. Internationally, Carolyn Strange conducted a comparative analysis between New South Wales and Ontario in Canada for the period 1890 to 1920. She found that New South Wales displayed a high commutation rate by comparison which was put down to differences in their political cultures.[62] Additional works by Strange and Laster underline the important role that gender played in the decision to execute.[63]

Statistical spikes in execution numbers have been written about in the context of New South Wales and Van Diemen's Land. Tim Castle has twice examined the spike in executions—between 363 and 377 in number—that occurred under the rule of Governors Ralph Darling (1825-1831) and Richard Bourke (1831-1837) in New South

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[59] Kathy Laster and R. Douglas, 'A Matter of Life and Death: The Victorian Executive and the Decision to Execute 1842-1967', *The Australian and New Zealand Journal of Criminology*, vol.24, no.2, 1991, pp.144-160.

[60] H.C. Tait, 'Convictism to Codification: The Prerogative of Mercy in Colonial Queensland', *Australian Bar Review*, vol.38, no.3, 2014, pp.319-331, quote on p.319; H.C. Tait, 'Law's Objects: Execution and Reprieve in Queensland, 1859-1900', unpublished B.A. (Hons) thesis, University of Queensland, 2013.

[61] David Plater and Jenny Crofts, 'Bushrangers, the Exercise of Mercy and the "Last Penalty of the Law" in New South Wales and Tasmania 1824-1856', *University of Tasmania Law Review*, vol.32, no.2, 2013, pp.295-343.

[62] In Sydney, for instance, the "snap of the lash and the clang of convict chains" still "rang in the ears" of many legislators inclined to mercy and abolition of the penalty. See Strange, 1996, p.133.

[63] Kathy Laster, 'Arbitrary Chivalry: Women and Capital Punishment in Victoria, 1842-1967', in D. Philips and S. Davies (eds), *A Nation of Rogues?: Crime, Law and Punishment in Colonial Australia*, Melbourne: Melbourne University Press, 1994, pp.166-186; Carolyn Strange, 'Masculinities, Intimate Femicide and the Death Penalty in Australia, 1890-1920', *British Journal of Criminology*, vol.43, 2003, pp.310-339. For more references to gender and the gallows in Victoria by Laster, see Kathy Laster, 'Capital Punishment', *eMelbourne – The Encyclopedia of Melbourne* 2008, http://www.emelbourne.net.au/biogs/EM00290b.htm, viewed 1 August 2015; Kathy Laster and Kerry Alexander, 'Chivalry or Death: Women on the Gallows in Victoria, 1856-1975', *Criminology Australia*, vol.4, no.2, 1992, pp.6-10.

Wales.[64] Castle puts public support for executions in this period at the feet of "colonial anxieties" around high crime rates and instances of violence as well as the particular threat posed by convict men to the "social order in a frontier society".[65] The focal point for Richard Davis' slim volume, *The Tasmanian Gallows* (1974), was the heavy number of executions under the governorship of George Arthur (1824-1836), during which time almost half of Tasmania's "540-odd" executions took place.[66] Davis suggests that the growth in humanitarian feeling in England was not fully adopted in Van Diemen's Land because of the island's convict heritage. As a result executions were, according to Davis, carried out without a second thought. The sheer frequency of executions in both New South Wales and Van Diemen's Land during the 1820s and 1830s demonstrates how the image of the gallows was inseparable from the memory of the convict era.

The hanging of Indigenous offenders has been a topic well researched in the Australian colonies. Libby Connors in the context of Queensland has noticed how the aim of many early Indigenous hangings was to inspire 'awe' and 'terror' in onlookers of the same background.[67] Carmel Harris had also noticed that terror was the express aim of executions, in so far as it applied to Indigenous and Islander rapists in that colony.[68] This colonial idea that hangings were an indispensable legal terror to local Indigenous populations holds true for South Australia and Western Australia as well. In an article

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[64] Tim Castle, 'Watching Them Hang: Capital Punishment and Public Support in Colonial New South Wales, 1826-1836', *History Australia*, vol.5, no.2, 2008, pp.43.1-43.15; Tim Castle, 'Constructing Death: Newspaper Reports of Executions in Colonial New South Wales, 1826-1837', *Journal of Australian Colonial History*, vol.9, 2007, pp.51-68.

[65] Castle, 2008, p.42.11.

[66] Davis, 1974, p.13.

[67] Libby Connors, 'The Theatre of Justice: Race Relations and Capital Punishment at Moreton Bay 1841-59', in R. Fisher (ed.), *Brisbane: The Aboriginal Presence 1824-1860*, Brisbane: Brisbane History Group, 1992, pp.48-57. For other studies by Connors on Indigenous executions in Queensland, see Libby Connors, 'A Hanging, a Hostage Drama and Several Homicides: Why Sovereignty in 1859 is Problematic', *Queensland History Journal*, vol.20, no.12, 2009, pp.716-727; Libby Connors, 'Sentencing on a Colonial Frontier: Judge Therry's Decisions at Moreton Bay', *Legal History*, vol.12, 2008, pp.81-97; Libby Connors, 'Traditional Law and Indigenous Resistance at Moreton Bay 1842-1855, Part II', *Australian and New Zealand Law and History E-Journal* 2006, http://www.anzlhsejournal.auckland.ac.nz/papers/papers-2006.html, viewed 12 February 2015; Libby Connors, 'Traditional Law and Indigenous Resistance at Moreton Bay 1842-1855', *Australian and New Zealand Law and History E-Journal* 2005, http://www.anzlhsejournal.auckland.ac.nz/papers/papers-2005.html, viewed 16 February 2015.

[68] Carmel Harris, 'The Terror of the Law as Applied to Black Rapists in Colonial Queensland', *Hecate*, vol.8, no.2, 1982, pp.22-48.

published in 2015 in *Aboriginal History*, I sought to demonstrate that public executions of Indigenous offenders on the South Australian frontier was thought to pacify resistance to the colonial project.[69] In that sense it was a study that focused more on the political and strategic implications of Indigenous hangings and devoted less time to the justification for frontier hangings that was situated in nineteenth century European cultural constructions of Aboriginality. This is a concept explored at greater length in Chapter 3, as is the Western Australian experience of Indigenous executions that was similarly excluded from the scope of that paper.

Mark Finnane and John McGuire have tracked how different aspects of traditional European punishments were altered for the unique circumstances of Indigenous offending in Queensland and Western Australia.[70] In the article they briefly cover the selective reintroduction of public executions for Indigenous offenders in Western Australia, explaining the benefit it had for colonial administrations.[71] For the Indigenous onlooker it was a didactic lesson in British law that was thought to exert a "moral influence" over the so-called "untutored savage".[72] To the European settler, to see an Indigenous offender hanged was an assurance that something was being done to curb the "Aboriginal menace".[73] As two very capable historians of Australian penal regimes they are acutely aware that European perspectives on frontier hangings are easily attainable but to discover how Indigenous audiences actually perceived these foreign spectacles is a much more challenging exercise.[74] Their ideas on Indigenous executions are situated in a larger discussion regarding the role of punishment in the dispossession of Indigenous peoples alongside more traditionally thought of mechanisms like missions and reserves.

The way colonial law operated in the arbitration of capital cases was far from colour-blind and never removed from the clash of interests existing on the frontier. Susanne

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[69] Steven Anderson, 'Punishment as Pacification: The Role of Indigenous Executions on the South Australian Frontier, 1836-1862', *Aboriginal History*, vol.39, 2015, pp.3-26.

[70] Finnane and McGuire, 2001.

[71] For their specific discussion on capital punishment, see *ibid.*, pp.281-283.

[72] *Ibid.*, pp.281-282.

[73] *Ibid.*, p.282.

[74] *Ibid.*, pp.281-282.

Davies is one who looked at early Indigenous murder cases in Port Phillip and found that Indigenous unfamiliarity with European law, overbearing standards of evidence and testimony, language difficulties and the pressures of active colonisation all put a strain on British law's prized standards of equality before the law and justice for all.[75] Alan Pope's comprehensive book on Indigenous offending in early South Australian history also found that the criminal law tended to privilege European interests over that of the local Indigenous population.[76] The way that Europeans escaped serious punishment for violence directed towards Indigenous people on the frontier has already been well documented by scholars like Rob Foster in the South Australian context.[77] Recent work on *inter se* crime (i.e. where both the victim and perpetrator were Indigenous) neatly rounds out a scholarly debate that has more readily focused on European-Indigenous criminal interactions.[78]

Of great importance to this thesis is the aesthetics of colonial executions and their stated purpose beyond that of simply controlling crime. Michael Sturma and Andrew Lattas have both explored the ritualistic and semiotic aspects of Sydney's early public executions. Sturma's examination of hangings for the year 1838 suggested that executions aimed to inspire awe in the spectator and reinforce the relationship between church and state.[79] Reading further into this iconography of the Sydney scaffold, Lattas declares that public executions were the very personification of class structure in New South Wales from 1788 to 1830, an analytical framework that I interrogate closely in

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[75] Susanne Davies, 'Aborigines, Murder and the Criminal Law in Early Port Phillip, 1841-1851', *Historical Studies*, vol.22, no.88, 1987, pp.313-335.

[76] Alan Pope, *One Law for All?: Aboriginal People and the Criminal Law in Early South Australia*, Canberra: Aboriginal Studies Press, 2011.

[77] Robert Foster, '"Don't Mention the War": Frontier Violence and the Language of Concealment', *History Australia*, vol.6, no.3, 2009, pp.68.1-68.15.

[78] Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law: White Sovereignty after Empire*, Basingstoke: Palgrave MacMillan, 2012; Alan Pope, 2011, pp.70-87; Mark Finnane, 'Settler Justice and Aboriginal Homicide in Late Colonial Australia', *Australian Historical Studies*, vol.42, no.2, 2011, pp.244-259; Mark Finnane and Jonathon Richards, 'Aboriginal Violence and State Responses: Histories, Policies and Legacies in Queensland, 1860-1940', *Australian and New Zealand Journal of Criminology*, vol.43, 2010, pp.238-261.

[79] Michael Sturma, 'Public Executions and the Ritual of Death, 1838', *Push from the Bush*, no.15, 1983, pp.3-11.

Chapter 1 of this thesis.[80] In the *Journal of Australian Colonial History* Paul Sendziuk and I wrote about how the South Australian gallows were used to reinforce that colony's convict free foundation myth.[81] The article examined the discourse surrounding seven hangings of former or escaped convicts that occurred in the formative years of settlement.[82] It demonstrates how the gallows was harnessed to reassure free immigrants that adequate steps were being taken to control the convict threat from across the border and stay true to its founding ideals.[83]

In regards to the gallows communicating a specific message to the onlooker, it was not always a straightforward process. Kathy Laster made the crucial insight, expanded upon here in Chapter 5, that the condemned criminal's behaviour on the Australian scaffold could either legitimise or scandalise the use of capital punishment.[84] Her evidence base was a collection of last words spoken by Victorian criminals and is used to great effect. The success of the execution ritual, and all it might embody, hinged not just on the unpredictability of the criminal but the hangings' smooth, painless implementation. Unfortunately for colonial authorities, Australian hangmen were persons of questionable character and little technical expertise. It led to many mistakes in execution procedure being made which gave a barbarous gloss to the implementation of capital punishment in the colonies. The background, social standing and procedural failures of colonial hangmen have been documented by Ray and Richard Beckett, Steve Harris, and Christopher Dawson.[85]

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[80] Andrew Lattas, 'The Aesthetics of Terror and the Personification of Power: Public Executions and the Cultural Construction of Class Relations in Colonial New South Wales, 1788-1830', *Social Analysis*, no.19, 1986, pp.3-21.

[81] Steven Anderson and Paul Sendziuk, 'Hang the Convicts: Capital Punishment and the Reaffirmation of South Australia's Foundation Principles', *Journal of Australian Colonial History*, vol.16, 2014, pp.83-111.

[82] For a further discussion of this, see Steven Anderson, 'More Than Just Punishment: The Role of Indigenous and Convict Hangings in the First Twenty-Five Years of South Australian Settlement, 1836-1861', unpublished B.A. (Hons) thesis, The University of Adelaide, 2010.

[83] Paul Sendziuk has written more broadly on the presence of convicts in early South Australian history. See Paul Sendziuk, 'No Convicts Here: Reconsidering South Australia's Foundation Myth', in R. Foster and P. Sendziuk (eds), *Turning Points: Chapters in South Australian History*, Adelaide: Wakefield Press, 2012, pp.33-47.

[84] Kathy Laster, 'Famous Last Words: Criminals on the Scaffold, Victoria, Australia, 1842-1967', *International Journal of the Sociology of Law*, vol.22, 1994, pp.1-18.

[85] Ray Beckett and Richard Beckett, *Hangman: The Life and Times of Alexander Green, Public Executioner to the Colony of New South Wales*, Melbourne: Thomas Nelson Australia, 1980; Christopher

Originality of the Thesis

From an examination of the existing secondary literature on executions in colonial Australia it is clear that this thesis offers an original contribution to the scholarly debate. Part 1 deals with 'why' public executions were abolished in Australia, a topic touched upon directly by authors like McGuire and Wintle. However, the 'culturalist' approach taken to the question at hand contrasts with these previous studies. I disagree with McGuire that the Civilizing Process is an appropriate conceptual apparatus to apply to the abolition of public executions in Australia. The transition occurred because there are clear cultural limits placed on choices of punishment in all eras that are unique to time, place and historical circumstance. The legacy of convictism, settler constructions of Aboriginality, the changing relationships of colonists to the sight of physical pain, fears over the perceived effect of violence on vulnerable groups, and the expectation that the criminal 'die game' – these are a unique mix of cultural forces that intersect with the Australian colonial gallows at crucial moments of change.

Part 2, which examines 'how' the practice of executions were affected by the passage of the Private Execution Acts, similarly fills a clear gap in the historical literature. The standardisation of execution procedure has never been fully addressed in Australia and the role and actions of spectators to both public and private executions also lack a dedicated study. Mention of these two aspects of Australian executions has hitherto only been made incidentally or in passing. More has been written about the behaviour of the criminal in colonial Australia but the central importance of 'dying game' has not featured prominently in these analyses. Understanding the constraints put on the criminal's behaviour in their final moments is a window into the role of other individuals on the day of execution—especially the clergyman and sheriff—to whom I give more attention than they have hitherto received in the Australian context. Another point of difference for this study is that it has a continental-wide focus that is uncharacteristic of the existing literature.

Dawson, *No Ordinary Run of Men: The Queensland Executioners*, Brisbane: Inside History, 2010; Steve Harris, *Solomon's Noose: The True Story of Her Majesty's Hangman of Hobart*, Melbourne: Melbourne Books, 2015.

A Note on Primary Sources

This thesis concerns the changing way that executions were presented and carried out in Australia. Such a topic is beholden to particular primary documents that captured the complexities and nuances of the scene on the scaffold; from how the image of the gallows was curated to documenting the interaction of the main protagonists. To acquire such insights, newspapers are still the most valuable and widely available source for the colonial era. The execution of a criminal was a major event in the colony and it was exceptionally rare for the hanging itself to go unreported in the press. Across period and jurisdiction these reports provide a steady commentary at times when other primary sources are either unavailable or silent on such details. In total, seventy-three Australian newspaper titles are consulted in this study. Though there was a focus on collecting articles from the 1850s, the search spanned the entire colonial period so that the way in which executions were continually changing could be properly documented long term.

Other ways of constructing the scene at the colonial gallows come via published diaries, memoirs and travel writings from the nineteenth century. These are useful avenues for exploring foreign opinions on the Australian gallows as well as the reflections of long-time local residents on particular executions of note. The views of the elite literary class on executions are also found in these published sources as Chapter 6 demonstrates. Published abolitionist pamphlets were less helpful than first thought since all but one of the collection that survives in the nation's archives were published after private executions had been introduced.[86]

Visual depictions of Australian executions are far from plentiful. Colonial governments, by and large, patronised works that would flatter the colonies to an overseas audience rather than offer up shameful scenes like hangings.[87] Thus, the only criminals that were depicted in artistic works tended to be those of elevated notoriety. Still, many visual

[86] In the holdings of the National Library of Australia the only abolitionist essay to be written prior to 1853 is Nathaniel Lipscomb Kentish, *Essay on Capital Punishment* [short title], Hobart Town: S. A. Tegg, 1842. Though these sources turned out to be less helpful for understanding the transition to private executions across the colonies, I have included references to later abolitionist pamphlets in the bibliography so that other scholars may benefit from this preliminary research.

[87] Personal correspondence with Louise Anemaat, head of the Pictures Collection at the Mitchell Library, State Library of New South Wales, September 2012.

works—sketches, watercolours and articles from illustrated newspapers—were employed where possible for analytical purposes, most notably in Chapter 4.

Penal reforms may have their genesis in the wider culture but it is still in parliament that they are considered and codified into practical form. Parliamentary sources—legislation, debates and gazettes—have been widely utilised to identify specific concerns regarding public executions. Often in relation to a particular event or breach of prison standards, all colonial parliaments held Select Committees, Royal Commissions or Boards of Inquiry into the matter at hand.[88] These rarely addressed execution procedure directly in their contents and proved less useful than first hoped. With some searching other types of Parliamentary Papers were found to hold government correspondence that could be tied into the mid-century debate around execution procedure.

Other government records were used when further detail on notable individual cases was needed. These types of government or court related documents lead to a better understanding of the trial but are often limited in describing the criminal's experience of the punishment itself. Some statistical information can be gleaned from government and parliamentary sources, like local gaol registers or other various statistical returns, and were consulted where useful. A set of circulars sent out from the Colonial Office in 1880 attempted to standardise the practice of executions among the Australian colonies and are of particular interest to the themes discussed in Chapter 4.

Conclusion

The abolition of public executions in Australia demonstrates how the cultural beliefs and customs of colonists came to be reflected in the practical realities of administering punishment. In much the same way, a close examination of the execution ceremony itself can reveal a great deal about colonial society more generally. David Garland, for example, has called punishment a "complex cultural artefact" that can be read for clues

[88] These investigations into penal procedure and gaol operation are too numerous to cite here. Mark Finnane has made excellent use of these sources in his work *Punishment in Australian Society* (1997) and his bibliography is a useful starting point.

about the society it exists within.[89] Thus, by closely analysing key aspects of the execution ceremony along with the move to greater privacy, the cultural forces at work in the colonial period can also be understood more clearly. In terms of the history of capital punishment in Australia, it is hoped that this thesis provides a useful account of changing forms of nineteenth century punishment that historians may be able to expand upon in future.

[89] David Garland, *Punishment and Modern Society: A Study in Social Theory*, Oxford: Clarendon Press, 1990, p.198.

PART 1

The Abolition of Public Executions in Colonial Australia

CHAPTER 1

Conceptual Frameworks of Penal Change

> Among the questions in which we have anticipated reforms in the old country, is that of public executions, years ago abolished throughout Australia. It is strange how suddenly systems that have existed for ages, and have been almost universally cherished, as founded on right and essential to the well-being of society, drop into complete disrepute, all the arguments so seriously and vehemently advanced in their favour being abandoned as scarcely worth a serious thought.
>
> *The South Australian Weekly Chronicle*, 29 June 1867

The transition from public to private executions is the story of Australian punishment in miniature. As historians like Mark Finnane have already documented, the Australian colonies moved away from public, deliberately painful, bodily punishment towards private, sanitised and institutionalised forms of punishment over the nineteenth century.[1] It is a narrative that has many international analogues since most western nations follow a similar trajectory in their own histories, though on different timelines. The introduction of private executions is a centrepiece for this historical transformation to private, non-bodily punishments in Australia. However, when it is contextualised over the long-term and with similarities occurring internationally, there is clearly a need for a theory of causation to underline the empirical data.

This thesis is a case study into a specific form of punishment once used but now abandoned in Australia. Writing with the benefit of hindsight, studies of this nature always posit a central underlying question: Why does punishment change over time? If an explanation for penal change goes beyond placing it at the feet of a reforming individual or a belief in the 'growth in humanity' as in the work of Leon Radzinowicz or David Cooper, much of the secondary literature traditionally hangs off those thinkers who examined society with a wide lens. Michel Foucault, Karl Marx and Norbert Elias are just a few of the figures co-opted into a field termed the 'sociology of punishment'

[1] Mark Finnane, *Punishment in Australian Society*, Melbourne: Oxford University Press, 1997.

that, broadly defined, tries to examine the relationship of punishment to society and its social role beyond that of mere crime control.[2] This chapter seeks to navigate between these traditionally dominant candidates for a suitable explanatory framework of penal change that is applicable to the Australian situation. In the end a 'culturalist' perspective—an approach that has been formalised in recent decades—will be argued as the most useful. Three scholars who pioneered the 'cultural turn' in the understanding of punishment—David Garland, Philip Smith and Louis P. Masur—will all be highlighted below to give a sense of what form this approach can take and how it can be justified in light of other candidates of analysis.

Anyone familiar with the literature on penal change will immediately recognise that David Garland's *Punishment and Modern Society* (1990) serves as a key guidebook for this chapter.[3] Many scholars working in the field owe much to the work he did to consolidate, appraise and expand upon the work of key figures in western intellectual history and how they relate to questions of punishment. More recently, *The SAGE Handbook of Punishment and Society* (2013) has attempted, in a textbook format, to formalise the conceptual relationship between punishment and its social contexts that has emerged in recent decades.[4] A critical examination of these competing visions of penal change is necessary to not only 'show my workings' but explain why the empirical content of this thesis was arranged and interpreted in a particular manner.

Traditional Approaches to the Question of Penal 'Progress'

It is with great hesitation that I attach a label like a 'traditional' approach to the question of penal change. A brief overview on the public execution abolition literature in Australia and internationally (see Introduction) is enough to demonstrate how diversely scholars have tackled the same question. The abolition of public executions is a simple historical fact but any explanation may go in countless interpretive directions. Still, it is important to identify what a conventional approach to penal change might look like because many of the scholars whom I discuss below, Marxists and Foucault in

[2] David Garland, *Punishment and Modern Society: A Study in Social Theory*, Oxford: Clarendon Press, 1990, p.10.

[3] *Ibid.*

[4] Jonathan Simon and Richard Sparks (eds), *The SAGE Handbook of Punishment and Society*, London: SAGE Publications, 2013.

particular, were clearly arguing against such a position in their writings. Below the work of Leon Radzinowicz and David Cooper are chosen to represent the 'traditional' approach; the first in respect to explaining change in the penal code generally and the second as an approach applied specifically to the abolition of public executions. The term 'traditional' in the sense that I use it here should be linked most closely to studies of penal change that were written prior to the critical revaluation of punishment that occurred primarily during the 1960s that continues to the present day.

There is scarcely a better place to start than with the monumental work of Leon Radzinowicz and his hulking five volume *History of the English Criminal Law and its Administration from 1750* written between 1948 and 1986.[5] As one of the most widely-respected scholars of British legal history, Vic Gatrell would not stand alone in describing Radzinowicz as "the greatest historian of English criminal law".[6] In the foreword to the first volume the reader is informed that 1,250 reports of commissions and committees of inquiry, 3,000 accounts and papers, 800 annual reports of government departments and 1,100 volumes of parliamentary debates are utilised in his *History*.[7] For Radzinowicz this type of Parliamentary evidence, especially taken from the Blue Books, was unmatched for its "originality, thoroughness and practical importance".[8]

Radzinowicz's start date of 1750 was a period in the English penal code that was famously sanguine; gibbetting, whipping, burning at the stake, and disembowelling were just some of the punishments that could accompany death at the gallows. Mercy and severity were arbitrarily applied and some of the crimes that could warrant death were comparatively petty to modern eyes. Yet 1750 was also a time when an informed Enlightenment rejection of bloody penal codes in Europe was beginning to be articulated. By Volume 5 of the *History*, ending at the outbreak of the First World War

[5] Leon Radzinowicz, *A History of the English Criminal Law and its Administration from 1750*, Vols.1-4, London: Stevens and Sons Limited, 1948-1968; Leon Radzinowicz and Roger Hood, *A History of the English Criminal Law and its Administration from 1750*, vol.5, London: Stevens and Sons Limited, 1986.

[6] V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770-1868*, Oxford: Oxford University Press, 1994, p.11.

[7] Leon Radzinowicz, *A History of the English Criminal Law and its Administration from 1750*, Vol.1, London: Stevens and Sons Limited, 1948, p.v.

[8] Leon Radzinowicz and P.H. Winfield, 'Some Sources of Modern English Criminal Legislation', *The Cambridge Law Journal*, vol.8, issue 2, 1943, p.187.

in 1914, English punishments had dramatically softened in their temper but crime had experienced a significant downward trend. This was labelled "The English Miracle" at one point in the final volume and an outcome that was the envy of many in Europe.[9] To summarise a study of near Proustian length is always going to be unfair but the demise of the capital code, the role of individual reformers, the professionalization of the police force, and the development of a uniquely British way of punishing are just some of the dominant themes tabled in this work.

Radzinowicz's depiction of Britain's transforming penal code shares many traits with that of a nineteenth century Whig history. There is a belief in moral progress, a steady conviction that reason will conquer the passions, a trust that reformers are driven only by humanist impulses and an unswerving confidence that Britain's nineteenth century penal reforms arrived at a noble terminus. In the widely quoted opening lines of his preface to Volume 1 Radzinowicz confirms his outlook: "Lord Macaulay's generalisation that the history of England is the history of progress is as true of the criminal law of this country as of the other social institutions of which it is a part."[10] The chronological gap between the publication of Volume 4 in 1968 and the final volume in 1986 might have allowed Radzinowicz time to revaluate his approach in light of the vast amount of critical literature that appeared between these years. Instead, as Jennifer Davis put it in her review of Volume 5, "Four volumes and thirty-five years later, this optimistic view of the law's development is maintained."[11] For historians who are looking for a more nuanced explanation of penal change in nineteenth century Britain beyond the "genius of her national character" the reviewer recommended that the reader look elsewhere.[12]

What makes this a traditional approach to understanding the development of punishment is where Radzinowicz places the agency for change. In critical works examined in later sections the very structure of society—economic, power, or social in nature—are the engine of the transformation. By contrast, in Radzinowicz's *History*

[9] Radzinowicz and Hood, Vol.5, 1986, pp.113-129, quote on p.113.

[10] Radzinowicz, vol.1, 1948, p.ix.

[11] Jennifer Davis, 'Book Review: *A History of the English Criminal Law and its Administration from 1750, Volume 5*', *The Cambridge Law Journal*, vol.45, no.3, 1986, p.521.

[12] *Ibid.*, p.523.

prominent individuals or groups of privileged actors, are the unhindered agents of change. The various Parliamentary Inquiries, Reports and Committees that drive reform forward are similarly viewed in relation to prominent individuals. It is a work that also strikes the tone of an intellectual history. In the first volume alone, the writings, thought and practical efforts of Jeremy Bentham, William Eden, Samuel Romilly, Henry Fielding and Robert Peel are all given lengthy appraisals as are the works of continental Enlightenment thinkers like Cesare Beccaria and Montesquieu. Volume 5 returns to these intellectual influences when trying to understand the development of the 'British Way' in punishment and criminology. These intellectuals, their ideas and actions, interact with one another in what can sometimes appear to be an hermetically-sealed echo chamber. As one cultural historian points out, Radzinowicz deals with penal policy as if it were a "self-contained and self-explicable sphere" understandable only by reference to itself.[13]

An unwillingness to countenance influences too far beyond the parliamentary sphere was foreshadowed in a 1943 paper Radzinowicz published in *The Cambridge Law Journal* that outlined his impending study. On the countless factors that help create particular legislation Radzinowicz writes: "Of course this parliamentary activity does not arise spontaneously but is in its turn the product of powerful and diverse forces which operate within society and which are set in motion by the conflict of interests and aspirations that eventually force themselves upon the attention of one or other of the two Houses."[14] "But", Radzinowicz continues, "we are not concerned here with the explanation of this complex process of law-making".[15] It is a statement that suggests, even in the embryonic stage of organising his study, that influences over penal policy generated outside of the halls of power were not going to play a prominent role in his analysis. Generally speaking, these wider social forces are lumped under the category of 'public opinion' and given less weight and only fleeting attention compared with the action of politicians and intellectuals.

[13] Martin J. Wiener, 'The March of Penal Progress?', *Journal of British Studies*, vol.26, no.1, 1987, p.85. Jennifer Davis in her review of Volume 5 also stated that Radzinowicz presents the criminal law as if it were a "more or less self-contained institution with a separate history" rather than acknowledging its relationship to economics and various socio-cultural factors. See Davis, 1986, pp.522-523.

[14] Radzinowicz and Winfield, 1943, pp.183-184.

[15] *Ibid.*

It was in this soil that David Cooper in *The Lesson of the Scaffold* (1974) cultivated his study on the abolition of public executions in England.[16] The book shares a great deal with the approach of Radzinowicz. It emphasises the humanitarian impulse of reformers, highlights the writings and ideas of key intellectuals, and sees the inner workings of Parliament—Committees, Royal Commissions and formal debates—as being decisive in the quest for reform. Cooper's approach is foreshadowed in an early chapter explaining the demise of England's well known 'bloody code'. Cesare Beccaria and Jeremy Bentham are held up as beacons of humanitarianism and reason by the author. Their scholarly ideas regarding punishment were then bestowed upon "zealous disciples" in the British Parliament, namely Samuel Romilly, Henry Brougham, James Mackintosh, Robert Peel and William Ewart who went about drastically reducing the capital code in the early nineteenth century.[17]

Much the same can be said for Cooper's approach when it came to understanding the introduction of private executions. He emphasises the role of individual actors, intellectual scholarship, parliamentary process and humanitarian impulses. To be fair, Cooper does allow for pamphleteers, reform societies and literary figures to play a role in at least laying the groundwork for the public acceptance of private executions in England. However, these factors are largely seen as peripheral to the inner workings of parliament. Among the MPs whom he listed as "individual champions" of private execution law reform are Thomas Fowell Buxton, George Grote, Henry Rich, Monckton Milnes (the then Bishop of Oxford) and John Hibbert.[18] The abolition of public executions was, according to Cooper, only possible among this diverse set of MPs because they were united by the inhumanity of the practice:

> Much of the atmosphere conducive to change had been anticipated and prepared by the reform work of diverse groups of Bethamites, Evangelicals, religious dissenters, Whig philanthropists and Tory humanists. The matrix that held such groups together was a common

[16] David D. Cooper, *The Lesson of the Scaffold: The Public Execution Controversy in Victorian England*, London: Allen Lane, 1974.

[17] *Ibid.*, pp.27-53, quote on p.31.

[18] *Ibid.*, p.177. Interestingly, the well-known capital punishment abolitionist MPs in Britain, William Ewart, John Bright and Charles Gilpin are not counted among their number because these men actually obstructed the introduction of private executions believing it might cripple their cause.

> dislike of cruelty that was transformed into a social creed for every form of humanity. They cooperated in different shifting alliances: on factory-reform, prison-reform, free trade, religious liberty and education for the underprivileged. Humanitarianism often cut across party and religious lines.[19]

The first attempt to formally abolish public executions was undertaken by Henry Rich in 1841 whose proposal was met by "mocking laughter" and suffered a "stunning, crushing defeat" in British Parliament.[20] Many more failed bills can be counted between this first attempt in 1841 and the eventual triumph of private executions in 1868.[21] Cooper places great emphasis on the careful evidence gathered by the 1856 Select Committee in the House of Lords and the 1866 Royal Commission into Capital Punishment in laying the groundwork for the reform.[22] Both recommended the introduction of private executions but it was the latter, with its heavy focus on international evidence, that was directly responsible for the 1868 Act. According to Cooper, the success of the 1866 Royal Commission owed much to previous intellectual advancements and nineteenth century humanitarianism. In the closing passages of his book he writes:

> Like the capital-punishment-abolition movement, the abolition of public executions was a linear descendant of a long line of criminal reforms in the administration of justice initiated by Sir Samuel Romilly, Beccaria and Bentham. It was part of that even older humanitarian movement which grew to abhor iniquities in justice and brutality in punishment.[23]

Radzinowicz shared the belief in a growing humanitarian impulse flowering in the nineteenth century that caused the transition to private executions. His opinion expressed in Volume 4 of his *History* was that public executions were abolished

[19] *Ibid.*, p.38.

[20] *Ibid.*, pp.103-105.

[21] *Ibid.*, pp.98-122.

[22] *Ibid.*, pp.122-147.

[23] *Ibid.*, p.176.

because of "the improvement of morals and manners [and] the growth of humanity".[24] As for the aggravated penalties that accompanied death in earlier ages—torture, dissection, hanging in chains, drawing and quartering—these too were abandoned because a "growing sense of humanity had made them increasingly repugnant".[25] Accompanying these explanations is, like in the work of Cooper, a full complement of Bills, Inquiries and Committees that resulted in the 1868 *Capital Punishment Amendment Act*.

The willingness of Radzinowicz and Cooper to mix free individual agency with Enlightenment jurisprudence and humanitarianism is an approach troublesome to later writers on punishment, especially Foucault and the Marxists. Explaining penal change using a concept like 'the growth of humanity' was deemed simplistic and unhelpful. Moreover, both currents of thought cast doubt on the supposed freedoms granted by Enlightenment thought and the progress of modernity. Foucault and Marxist scholars tend to dwell on the irony and duplicity of individual social action in the nineteenth century, especially when it came to the outward motivation of reformers. In the eyes of such scholars, a keen interest in the role of individual actors needs to be supplemented with a wider critical backdrop or social structure explaining their hidden intentions. By way of reply, Radzinowicz labelled Foucault's study "original and exciting but highly speculative and generalised".[26] And, though he does briefly sum up the Marxist viewpoint on crime and punishment in Volume 5, Radzinowicz believes it is more applicable on the Continent than in nineteenth century Britain.[27] More recently, historians of the English criminal law like Vic Gatrell and Randall McGowen have, in their own ways, continued to advocate for a critical revaluation of the humanitarian values of early nineteenth century reformers engaged in the debate over punishment.[28]

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[24] For Radzinowicz's account of the abolition of public executions in England, see Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, vol.4, London: Stevens and Sons, 1968, pp.343-353, quote on p.352.

[25] *Ibid.*, p.344.

[26] Radzinowicz and Hood, vol.5, 1986, p.39, fn.15.

[27] *Ibid.*, pp.40-48.

[28] Gatrell, 1994; Randall McGowen, 'A Powerful Sympathy: Terror, the Prison, and Humanitarian Reform in Early Nineteenth-Century Britain', *Journal of British Studies*, vol.25, no.3, 1986, pp.312-334; Randall McGowen, 'Civilizing Punishment: The End of the Public Execution in England', *Journal of British Studies*, vol.33, no.3, 1994, pp.257-282.

Michael Ignatieff's study *A Just Measure of Pain* (1978) aptly demonstrates another criticism of the approach taken by Radzinowicz and Cooper.[29] Namely, that the will of leading intellectual lights and key reformers was only ever selectively fulfilled. Ignatieff points out how John Howard, often seen as the father of the modern penitentiary movement in England, would have disapproved of a supposed 'model prison' like London's Pentonville Prison that was built in 1842. "Had Howard lived to see his offspring," writes Ignatieff, "he might well have denied paternity".[30] Clearly, the ideals of reformers were filtered through something else before becoming practical realities. In Ignatieff's view economic crises and long-term social dislocation in the period 1750 through to 1850 were chief among the culprits shaping a rapidly changing English penal policy. Such an observation could easily be furthered to incorporate the supposed importance of intellectual ideals and Enlightenment jurisprudence in the debate over capital punishment. Though a preoccupation of many triumphant accounts of nineteenth century penal 'progress', the ideals of influential figures like Bentham and Beccaria were only adopted selectively and usually in a compromised form.

Finally, Martin Wiener demonstrates the pitfalls of explaining penal reform in parliament without first registering the broader changes taking place in society. In the nineteenth century the British penal system did not suddenly appear more "mindless and pointlessly cruel" because it had been tailored in that direction.[31] Instead, he argues, "the political and cultural conditions" that had originally shaped these arcane penal practices had been removed leaving those very same punishments "stranded like a beached whale" in more modern times.[32] Without constantly linking alterations of the penal code to corresponding changes occurring in wider society and culture, Wiener characterised Radzinowicz's study as a "wonderfully thorough account [that] nonetheless lacks depth".[33] It was these types of criticisms of Radzinowicz's work, and others following his example like Cooper, that led Phillip Thurmond Smith to remark

[29] Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850*, New York: Pantheon Books, 1978.

[30] John Howard would have especially disapproved of the generous use of solitary confinement and lack of transparency among staff, see *ibid.*, p.209.

[31] Wiener, 1987, p.92.

[32] *Ibid.*

[33] *Ibid.*, p.93.

that: "By the 1960s historical revisionists had mounted their assault, and the Whigs had to take cover."[34]

Michel Foucault and the Power Perspective

The French thinker Michel Foucault has proved to be the most dominant theoretical touchstone for studies of punishment since the publication of his book *Discipline and Punish: The Birth of the Prison* in 1975 (translated into English in 1977). Philip Smith in 2008 likened the effect of Foucault on criminology to the dominance of IKEA in the furniture industry; instead of "thinking outside the box" penal scholars of the last thirty years have simply bolted together his ready-made concepts for a "simple, visually attractive and workable enough explanation in any field where formal social control is at hand".[35] Yet with an original, self-contained, polemical argument that taps into an Orwellian paranoia about the hidden and insidious nature of modern state power, it is not hard to see why Foucauldian thinking became ascendant.

To understand the intricacies of Foucault's argument, one must first unpick his idea that punishment in every age is about the accumulation of power, regardless of the public utterances of jurists, benevolent reformers and lawmakers. This obsession of modern institutions to accumulate power shares much with Friedrich Nietzsche's concept of the 'Will to Power', a philosopher that had a profound influence on Foucault.[36] Underneath the facade of outward justifications and stated motives, what could be relied upon to make sense of human behaviour was this "timeless origin" central to understanding all behaviour.[37] Nietzsche's influence can also be sensed in the presentation of an implicit 'genealogical' account of the modern penal system; the technique of chasing down the

[34] Phillip Thurmond Smith, 'Book Review: *A History of the English Criminal Law and its Administration from 1750, Volume 5*', *The American Historical Review*, vol.92, no.3, 1987, p.660.

[35] Philip Smith, *Punishment and Culture*, Chicago: University of Chicago Press, 2008, p.4.

[36] A quote from the *Antichrist* might help communicate what Nietzsche meant by this concept. It is something he formulated in opposition to the Christian moral outlook he had earlier rejected: "What is good? Everything that heightens the feeling of power in man, the will to power, power itself. What is bad? Everything that is born of weakness. What is happiness? The feeling that power is *growing*, that resistance is overcome … What is more harmful than any vice? Active pity for all the failures and all the weak: Christianity." Friedrich Nietzsche, *The Portable Nietzsche*, W. Kaufmann (trans), New York: Penguin Books, 1976, p.570.

[37] Richard Rorty, *Contingency, Irony, Solidarity*, Cambridge: Cambridge University Press, 1989, pp.61-62.

historical origins of accepted practices in order to problematize their present usage.[38] It is a study that not only subverts the orthodox historical accounts of a growing humanitarian impulse in punishment but encourages people to look twice at the supposed freedoms granted in liberal democratic societies as a whole. With the help of modern technologies, the punishing authority manifested its power to such an extent that was inconceivable (albeit desirable) to pre-modern societies.

In the realm of punishment, Foucault saw the authorities infected with an obsessive ambition to control contained populations and discipline wider society. For Foucault, the punishing authority possesses a certain dynamism, or a self-organising principle, centred on the accumulation of power that is reminiscent of the way that Marx begrudgingly admires the ability of capitalism to endlessly re-posture itself in search of profit. Thus conceived, the hidden rationale of penal evolution is a restless authority seeking to maximise its control over society: "[N]ot to punish less but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; to insert the power to punish more deeply into the social body".[39]

For Foucault the reason for the evolution of punishment through time was simple – the punishing authority found better ways to punish which rendered public and violent penalties directed at the body obsolete. In the *Ancien Régime* punishment was a spectacle – the body wore the penalty, it was public, the extent of the punishment was unlimited and arbitrarily applied to the offender who was seen as a personal enemy of the sovereign. Foucault is quick to observe that the nature of the punishing authority's power was both temporal and explicit, an "irregular terrorism" enacted top down by the King onto his subjects.[40] Public executions were a deeply political ritual whose aim was to restore the momentarily injured sovereign in a spectacular manner that deliberately broadcasted the asymmetric power relations that underpin society. It was an explicit show of power but one that was volatile, unpredictable and irregular.

[38] Nietzsche most famously applied this technique of analysis to Christian morality in *On the Genealogy of Morals* (1887), see Friedrich Nietzsche, *On the Genealogy of Morals, and Ecco Homo*, W. Kaufmann and R. J. Holingdale (trans), W. Kaufmann (ed.), New York: Vintage Books, 1989.

[39] Michel Foucault, *Discipline and Punish: The Birth of the Prison* [1975], Alan Sheridan (trans), second vintage books edition, New York: Vintage Books, 1995, p.82.

[40] Garland, 1990, p.142.

All this changed in the late eighteenth and early nineteenth century when the state learnt to punish more effectively by hijacking the technologies of modernity and adopting the omnipresent tools of discipline and surveillance. In Foucault's eyes, the most pure expression of the modern state's punitive methods found architectural expression in Jeremy Bentham's panopticon prison design. The design places an opaque guard tower in the centre of a circular multi-storey cellblock; like a spider in the middle of a vast web. The omnipotent yet unseen gaze of the central guards made it likely that inmates would self-discipline since they could never tell whether their cell was being observed or not. In the panopticon most of the disciplinary mechanisms of the state were fully perceptible; individuals were spaced apart, categorised, ranked, organised by timetable, subject to intermittent surveillance and in a position where certain bodily movements could be made routine. More generally, Foucault observes that the criminal justice system in the modern world became more Weberian in tone; penalties were measured and standardised, their application professionalised and bureaucratised while the whole tenor of dispensing justice became dispassionate and unemotional.[41]

Crucial to Foucault's argument was that the surveillance and a subtle disciplining of the criminal population was never contained to the prison setting. Outside of the prison, the very same panoptic mechanisms were employed in the school, workshop, monastery, hospital and the army to help spread the normalising force of state control throughout civil society.[42] The ultimate aim was to create an obedient and self-disciplining civil population. The transition to a disciplinary society was marked by the creation of expert knowledge over the individual both inside and outside the prison. Only then, once the subjected body was more fully understood, could it be successfully controlled and manipulated.[43] Thus, by abandoning spectacular forms of physical punishment that

[41] Foucault never acknowledged Max Weber in his text but his influence is certainly perceptible in his findings. See *ibid.*, pp.177-192; Smith, 2008, p.4.

[42] Foucault was not the first scholar to stress the transferability of punitive techniques with other social institutions, see Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* [1939], New Brunswick: Transaction Publishers, 2003, see for example, pp.85, 91 and 95.

[43] In David Garland's words: "The successful control of an object—whether it is an object in nature or a human object—requires a degree of understanding of its forces, its reactions, its strengths and weaknesses, its possibilities. Conversely, the more it is known, the more controllable it becomes. For Foucault the relationship between knowledge and power is thus an intimate and internal relationship in which each implies and increases the other." David Garland, 'Foucault's "Discipline and Punish" – An Exposition and Critique', *American Bar Foundation Research Journal*, vol.11, no.4, 1986, p.853.

could only regulate behaviour in "fits and starts", the techniques of discipline and surveillance could project state power much more thoroughly and evenly over the entire population.[44]

Consequently, in the new era of punishment, Foucault believes that the insidious disciplinary logic of the state retards the ability of the wider public to dispassionately critique the punitive mechanisms of the state: "everyone must see punishment not only as natural, but in his own interest; everyone must be able to read in it his own advantage".[45] Foucault takes a passage from Servan to further illustrate this point: "A stupid despot may constrain his slaves with iron chains; but a true politician binds them even more strongly by the chain of their own ideas."[46] The American philosopher Richard Rorty elaborated on this concept of Foucault saying that in the French scholar's eyes, "our imagination and will are so limited by the socialisation we have received that we are unable even to propose an alternative to the society we have now".[47] Thus, modern punishment was characterised by the targeting of the mind or 'soul' of the offender and wider population. Constrained and manipulated by the hidden normalising techniques of the state the soul became the new "prison of the body".[48]

David Garland challenges Foucault's argument in *Discipline and Punish* from a number of different perspectives. To begin with, the historical evidence that Foucault offers the reader often falls short of the types of claims he makes. For example, if the disciplining of the population was a "strategic calculation" of the authorities why does Foucault provide so little evidence to support that claim in the places that matter, such as the actual legislative process?[49] Moreover, why are prominent historical agents or decision-makers never identified for the benefit of the reader?[50] Another criticism centres on the ongoing practical failure of the modern penal regime in preventing crime and recidivism. Garland refuses to accept Foucault's explanation that to allow a degree of

[44] *Ibid.*, p.851.

[45] Foucault, 1995, p.109.

[46] Servan quoted in, *ibid.* pp.102-103.

[47] Rorty, 1989, p.64.

[48] Foucault, 1995, p.30.

[49] Garland, 1986, p.871.

[50] *Ibid.*, p.879.

delinquency in society is, in fact, a further strategy of "political domination" because it works to "divide the working classes against themselves".[51] Garland saw this attempt to explain away the malfunctioning prison as an underhand way for Foucault to reconceptualise "apparent failures" of his disciplinary regime as "successful moves" by applying it to a broader societal, rather than a strictly institutional, context.[52]

There is a broader point to be made about Foucault's vision of penal change. From his analysis, decisions regarding what form punishment should take appear to be carried out in sealed institutional contexts and fail to correspond with any outside opinions. Thus, many have critiqued Foucault using a cultural logic to emphasise that even the internal control mechanisms of institutions are still constrained by "changing forms of mentality, sensibility, and culture".[53] Garland demonstrates this by stating how wider social and cultural forces operating outside the prison prohibit radical forms of "behaviour modification" or even "old-fashioned blood sanctions" – ignoring any possibility that they may indeed prove more effective in a closed institutional context.[54] Additionally, for all of Foucault's focus on the rational accumulation of power and control it appears detached from any sort of social goal. Power is collected for the sake of power alone. One historian more accustomed to making class relationships the fulcrum of his analysis labelled it "bizarre" that there is power everywhere but apparently concentrated nowhere and, by extension, put to no greater purpose.[55]

In terms of applying Foucault's concepts to the Australian debate on public executions, I agree with Kathy Laster who writes that: "For a former penal colony like Australia, Foucault's analysis of the transformation of punishment into something technical and

[51] *Ibid.*, p.863.

[52] *Ibid.*, p.873.

[53] *Ibid.*, p.849; Smith, 2008, pp.1-34; Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression; From a Preindustrial Metropolis to the European Experience*, Cambridge: Cambridge University Press, 1984, p.x.

[54] Garland, 1986, p.874.

[55] Douglas Hay, 'Introduction to the Second Edition', in *Albion's Fatal Tree: Crime and Society in Eighteeth-Century England* [1975], revised edition, London: Verso, 2011, pp.xxxiii. For more on how Foucault's work has been perceived and utilised by historians over the years, see Randall McGowen, 'Power and Humanity, or Foucault Among the Historians', in C. Jones and R. Porter (eds), *Reassessing Foucault: Power, Medicine and the Body*, London: Routledge, 1994, pp.91-112.

administrative once the execution becomes secret, doesn't quite fit."[56] Australia was full of unruly Indigenous peoples and one-time convicts, not to mention it had large tracts of land lacking adequate policing. The very existence of a 'frontier', for example, illustrated that the reach of state influence had a self-imposed border, despite what maps officially marked out as the territory of the colonisers. Thus, to suggest that a disciplinary regime replaced the scaffold simply does not apply in the newly colonised Australian continent. Moreover, even though public executions were abolished in Australia, capital punishment did not disappear for more than a century afterwards. So long as it was conducted in private, the death penalty persisted well into the twentieth century, even in the face of a maturing bureaucracy capable of greater surveillance that ought to have made bodily punishments obsolete. It is these practical issues as well as some deeper theoretical ones, specifically the inability to take into account the wider cultural context of punishment, which means that Foucault's notions are unable to be successfully applied to the subject matter of this thesis.

The Role of Economics and Class: Marxist Approaches to Penal Change

Karl Marx himself did not have much to say about punishment but many historians have since drawn upon the nexus of class, labour, and changing modes of production to explain why punishment took on various forms across the centuries.[57] Georg Rusche and Otto Kirchheimer show how the economic base directly impacts upon choices of punishment over the long term. Moving from raw economic determinism to the nature of class rule in eighteenth century England, Douglas Hay, Peter Linebaugh, and E. P. Thompson demonstrate how criminal law and public punishment all work to perpetuate ruling class interests. In Australia, Andrew Lattas showed how the drama of Sydney's early gallows embodied class relations operating in wider colonial society. These scholars, when read together, point to a Marxist understanding of penal change that must be assessed for use in the Australian context.

Georg Rusche and Otto Kirchheimer's book, *Punishment and Social Structure* (1939), was the first American publication from the Institute for Social Research at Frankfurt

[56] Kathy Laster, 'Famous Last Words: Criminals on the Scaffold, Victoria, Australia, 1842-1967', *International Journal of the Sociology of Law*, vol.22, 1994, p.15.

[57] References to punishment by Marx in *Das Kapital* are explored in Dario Melossi, 'The Penal Question in *Capital*', *Crime and Social Justice*, vol.5, 1976, pp.26-33.

University after it was relocated to Columbia University. Reprinted by separate publishers in 1968 and 2003, the first reissue saved it from obscurity and helped it gain the reputation as "the certified *bona fide Marxist* view on punishment" leading into debates in the 1970s and beyond.[58] Foucault was clearly influenced by *Punishment and Social Structure* calling it a "great work" in one of his few appraisals of the secondary literature in the introduction of his own study.[59] The authors' basic thesis is that economic factors, in particular changing modes of production and fluctuations in the labour market, determine choices in punishment over the long-term.

Rusche and Kirchheimer begin by radically questioning the conventional thought of enlightenment thinkers—Beccaria, Voltaire and Bentham for example—that punishment is premised on preventing crime in the future. The authors set themselves the task of stripping penalties of their "ideological veils and juristic appearance" and investigate how they think systems of punishment have actually operated historically.[60] A key insight Rusche and Kirchheimer articulate is that certain types of punishment are only possible to inflict in different stages of economic development. In their words:

> [W]e see that the mere statement that specific forms of punishment correspond to a given stage of economic development is a truism. It is self-evident that enslavement as a form of punishment is impossible without a slave economy, that prison labor is impossible without manufacture or industry, that monetary fines for all classes of society are impossible without a money economy.[61]

To translate this insight into explicitly Marxist terms, modes of production determine the various forms punishment can take. More specifically than this, Rusche and Kirchheimer's work aims to demonstrate how fluctuations in the labour market, assume

[58] For more information on the influence of this work on the field of 'critical legal studies' or 'critical criminology' in recent decades, see Dario Melossi, 'Introduction to the Transaction Edition', in Rusche and Kirchheimer, 2003, pp.xxi-xxxvii, quote is from p.xxi.

[59] Foucault, 1995, p.24.

[60] Rusche and Kirchheimer, 2003, p.5.

[61] *Ibid.*, p.6.

the causal role over the longer term.[62] They demonstrated this correlation using a crude periodisation of European history starting with the late Middle Ages, passing through Mercantilism and emerging in the early years of the Industrial Revolution. It is a work that largely jettisons socio-cultural concerns since punitive choices are viewed as representatives of purely economic relationships.

Rusche and Kirchheimer posit that in the Middle Ages the lower classes were punished physically because pecuniary punishment could not be facilitated among the moneyless masses.[63] These were punishments that suited a mode of production where land was the primary means of exchange, not money. Foucault expanded upon this idea stating how when money and production were still developing in Europe, the body was "the only property accessible" to the authorities when punishing.[64] In the late Middle Ages land became consolidated in fewer hands, vagrancy was rife, and Rusche and Kirchheimer observe a corresponding intensification of the system of punishment. Bodily mutilation in new and invigorated forms reached crueller heights; a "primitive cruelty", the authors insist, "which can be understood only in terms of the social relationships prevailing in any given period".[65]

As Rusche and Kirchheimer arrive at the Mercantilist period of the sixteenth and eighteenth centuries labour markets were tight and rulers were keen to allocate economic resources for the benefit of enlarging state power. In such a period the authors insist that prison labour was made productive for the first time and that the conditions for convicts were relatively good. Think of new punishments developing in the sixteenth to eighteenth centuries in Europe like the profiteering Houses of Corrections in Holland and widespread galley servitude in nations with maritime interests. All these punishments forcibly redistributed labour to sectors of the economy where it was most needed for national objectives yet unattractive to free citizens. Ruche

[62] Two essays written by Georg Rusche in the 1930s foreshadow this very same causal relationship expanded upon in *Punishment and Social Structure*. See Georg Rusche, 'Labor Market and Penal Sanction' [1933], *Crime and Social Justice*, vol.10, 1978, pp.2-8 and Georg Rusche, 'Prison Revolts or Social Policy: Lessons from America' [1930], *Crime and Social Justice*, vol.13, 1980, pp.41-44.

[63] By contrast, large landowners during this period were more likely to pursue financial punishments amongst each other because wrongdoers of the upper-classes could more readily access money. See Rusche and Kirchheimer, 2003, p.9.

[64] Foucault, 1995, p.25.

[65] Rusche and Kirchheimer, 2003, p.23.

and Kirchheimer suggest the birth of convict transportation to Australia should also be understood in this manner.[66]

Moving to the early days of industrialisation in Europe, unemployment rose steeply as machines outcompeted human labour in the factories. In this economic climate Rusche and Kirchheimer argue that prison lives became less economically valuable to the state and conditions for prisoners dropped accordingly. In England for example, Sisyphean punishments such as the treadmill and rock breaking were introduced even though new industrial processes rendered this painfully slow form of prison labour obsolete. Idleness was unacceptable as prisoners were reprogrammed with the virtues and habit of wage labour while incarcerated. Prison would become the new terror of the working class, a sanction that became more palatable than blood punishments after the Enlightenment debates around punishment.[67] Moreover, prison conditions could never rise above the working conditions of the poorest labourer toiling in free society for fear of an incentive to crime being created.[68] It was yet another reason for the downward pressure on prison conditions in times of economic depression.

In Rusche and Kirchheimer's analysis punishment is related to the economy in a one-dimensional manner. Changes in punishment are the direct result of changes in the economic base but little is said about what punishment does to perpetuate the class system more broadly, a key concept in Marxist thinking. This is strange considering how the other major studies that characterised the Frankfurt School focused on how things operating outside the economy (especially in culture and art) worked to achieve this outcome.[69] Instead it was left to a group of historians at Warwick University under the tutelage of E. P. Thompson in the 1970s to examine what role punishment—in both its symbolism and application—played in the maintenance of class order. Historians

[66] For their extended discussion on transportation to Australia, see *ibid.*, pp.114-123.

[67] Garland, 1990, p.103.

[68] In nineteenth century Britain, this concept was labelled the principle of 'less eligibility'.

[69] Theodor Adorno's ruminations on the 'culture industry' are particularly instructive to the program of 'superstructural' analyses that the Frankfurt School aimed to conduct. See Theodor W. Adorno, *The Culture Industry: Selected Essays on Mass Culture*, London: Routledge, 1991.

like Peter Linebaugh, E.P. Thompson, and Douglas Hay were key figures exploring these ideas within the context of eighteenth century England.[70]

To this group of historians the criminal justice system was nothing more than the manifestation of raw class interest. Eighteenth century English definitions of crime, justice and mercy were all ideologically loaded and fixed to perpetuate the political dominance of the ruling class. E.P. Thompson demonstrated in *Whigs and Hunters* (1975) how unwaged forms of existence available to the poor were criminalised with the passage of the 'Black Act' in 1723. The Act introduced at least fifty new capital crimes to demonstrate how the direct threat of the hangman underwrote propertied interests.[71] In Hay's famous essay, published in *Albion's Fatal Tree* (1975), he too argued that the English criminal law was the "chief ideological instrument" of the ruling class.[72] The English justice system, especially the way that mercy was applied in criminal cases, helped maintain the "bonds of obedience" in society by "legitimizing the status quo" and "recreating the structure of authority which arose from property".[73] In Linebaugh's text, *The London Hanged* (2003), he ruminated on similar themes. In a reflection printed in a revised edition he tersely surmised that his was a work documenting "capital punishment and the punishment of capital".[74]

If propertied interests were reflected in the criminal law of the nation, it would follow that the very symbolism of punishment would project these meanings onto the perpetrator. For Hay this began with the drama of the courtroom which he thought underlined the majesty of the criminal law. Judges were paternalistic yet god-like in their rulings and sentencing remarks acted like "secular sermons" on the wrongs of infringing property rights that "burned deep in the popular consciousness".[75] The spectacle of the eighteenth century courtroom was a "reminder of the close relationship

[70] Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century*, London: Verso, 2003; Douglas Hay, 'Property, Authority and the Criminal Law', in *Albion's Fatal Tree: Crime and Society in Eighteeth-Century England* [1975], revised edition, London: Verso, 2011, pp.17-64; E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, London: Allen Lane, 1975.

[71] Thompson, 1975, pp.21-24.

[72] Hay, 2011, p.26. For a criticism of Hay's essay using empirical data, see John H. Langbein, 'Albion's Fatal Flaws', *Past and Present*, no. 98, 1983, pp.96-120.

[73] Hay, 2011, p.25.

[74] Linebaugh, 2003, p.445.

[75] Hay, 2011, pp.29-31.

between law, property and power".[76] When the time came for the guilty criminal to be escorted to the gallows, his/her execution was the "climactic emotional point of the criminal law – the moment of terror around which the system revolved".[77] Similarly, Linebaugh stated in *The London Hanged* that if hangings are to be considered theatre, executions teach a simple lesson: "Respect Private Property".[78] In a later section Linebaugh was even more direct when he wrote that the "periodic massacres at the gallows" were a "form of state power" that helped to maintain discipline in London.[79]

Andrew Lattas conducted an analysis into the iconography of early Australian executions that reflect the themes mentioned above.[80] He wrote about the aesthetics of executions in New South Wales from 1788 to 1830 and showed how the rituals of the gallows spoke to larger class relationships in society. He put forward the case that public hangings allowed the crowd to ponder "the very forms which power assumed" in colonial society.[81] The domination of the criminal's body, the Governor's representative on the scaffold, the clergymen buttressing the whole affair, these were all examples of how the "ceremonial punishment of the body" served as a "powerful idiom in a context where state-class power relations took on a personal form".[82] Foucault's insights are left to mingle more freely in Lattas' analysis than in the work of Hay and Linebaugh who both express reservations about using the French scholar's framework.[83] Nevertheless, Lattas' article is an exercise in how the Australian gallows can be read in relation to wider interest groups who possess both property and influence in society.

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[76] *Ibid.*, p.31. The courtroom being analogous to the stage play was a point also made by Linebaugh. See Linebaugh, 2003, p.4.

[77] Hay, 2011, p.28.

[78] Linebaugh, 2003, pp.xxii-xxiii.

[79] *Ibid.*, p.330.

[80] Andrew Lattas, 'The Aesthetics of Terror and the Personification of Power: Public Executions and the Cultural Construction of Class Relations in Colonial New South Wales, 1788-1830', *Social Analysis*, no.19, 1986, pp.3-21.

[81] *Ibid.*, p.3.

[82] *Ibid.*, pp.3-4.

[83] The opening chapter of *The London Hanged* about Jack Shepherd's deeds and lasting popularity among the poor was deliberately framed to challenge Foucault's idea that government is "all-powerful" and that the imagination of the poor was spellbound by the new institutions of the state. See Linebaugh, 2003, pp.7-41, quote from p.3. For Hay's reservations on using Foucault, see Hay, 2011, p.xxxiii.

In applying a Marxist logic to the introduction of private executions there are two points that are difficult to account for – the preference for privacy in punishment and the leading role of the ruling class in initiating that very privacy. If spectacles of public punishment functioned in a way to perpetuate class dominance in society as these scholars suggest, why then was privacy suddenly preferred by lawmakers? Private executions were far less didactic than their public counterparts and accessible only to legal functionaries and other professional groups. In fact, by introducing private executions the working classes were largely excluded from a practice that was supposedly targeted at them. Moreover, for these same reasons, it is strange how elites should strongly advocate for the introduction of private executions in Australia (see Chapter 6) and England. There is clearly more to choices in punishment than raw class interest and economic determinism. Lastly, though it is always tempting to relate cultural forces back to economic developments, many of the beliefs that influenced how executions were practised in the case of Australia—'dying game' or the memory of convictism for instance—appear to be somewhat removed from such origins.

Norbert Elias and the Civilizing Process

The German-born sociologist Norbert Elias' idea of the 'Civilizing Process' has had a substantial influence over recent debates around punishment, especially following the work of Foucault. Elias never addressed the issue of violent punishment directly in his study but scholars like Pieter Spierenburg and John Pratt have since updated his framework to address the question of penal change.[84] Elias is of particular importance to this study because he was employed by John McGuire in his journal article on the abolition of public executions in Australia. In this section a basic explanation of the Civilizing Process is presented to see how it relates to historical transformations in punishment. The shortcomings of this explanation when applied to the Australian experience will then be discussed in detail.

[84] There is a singular mention to the gallows in his original work, see Norbert Elias, *The Civilizing Process* [1939], second revised edition, E. Dunning, J. Goudsblom & S. Mennell (eds), E. Jephcott (trans), Oxford: Blackwell Publishing, 2000, p.175; John Pratt, *Punishment and Civilization: Penal Tolerance and Intolerance in Modern Society*, London: SAGE Publications, 2002; Spierenburg, 1984.

Elias published his text in Germany in 1939 but a complete English translation of *The Civilizing Process* did not appear until 1982.[85] The book is comprised of two volumes; the first titled *The History of Manners*, and the second *State Formation and Civilization. The Civilizing Process* sought to understand how a very particular set of physical behaviours and psychological disposition collectively termed 'civilised' was conceived and developed in the context of Western Europe. It is an ambitious work of comparative sociology focusing on France, Germany and England with an historical timeframe ranging from the rule of Charlemagne in the eighth century to the twentieth century. To quote one Elias scholar, his basic thesis posits "a connection between the long-term structural development of societies and long-term changes in people's social character or typical personality make-up".[86] A view, Elias himself insisted, that was founded on an "undogmatic, empirically-based sociological theory of social processes".[87]

The two-volume structure of the work hints at the importance Elias placed on state formation in his causal relationship. To transform from feudal society to absolute monarchy and emerge later as a modern nation-state is the result of many historical factors. One of the most important for Elias was the monetisation of the European economy. The widespread introduction of money as a means of exchange—as opposed to one based on the exchange of land or goods for various services—performed a number of tasks which strengthened the financial and territorial power of the central ruler. It broke a feudal cycle where conquering Kings exchanged land for military service and loyalty, leading to the virtual fracturing of his territory in peacetime. Latterly, a bourgeoning taxation revenue exclusive to the King financed mercenaries and bureaucrats to administer territory solely for pecuniary reward. According to Elias a series of "elimination contests" then took place in this new environment leading to larger territories being accumulated by a central ruler without the need to then redistribute the conquered territory.[88] The losing territory was either "destroyed" as a

[85] *The History of Manners* was translated first in 1969 while *State Formation and Civilization* followed in 1982.

[86] Stephen Mennell, 'Decivilising Processes: Theoretical Significance and Some Lines of Research', *International Sociology*, vol.5, no.2, 1990, pp.205-223, quote on p.207.

[87] Elias, 2000, p.452.

[88] *Ibid.*, p.263.

political unit or their rulers fell into social "dependence" on the conquering King.[89] It was not just land and money that was concentrated in the King's hands but also opportunities for control, influence and social advancement.[90]

The creation of larger and larger territorial blocks led to greater levels of interdependency among the ruling elites. Administering taxation or the justice system, for example, cannot be wielded by any one actor but had to be "secured" by institutional arrangements and held in place by a complex system of functional dependencies.[91] In the absolutist court society of the fifteenth to eighteenth centuries the degree of human interdependency and cooperation required to carry out the complex tasks of government was significant and growing. The King was dependent on specialists to manage an increasingly vast and complex set of administrative tasks that constrained him within a "web of functionaries".[92] Meanwhile the key tasks of government were handed to a selection of nobles, clergy and bourgeoisie as if it were the "social property" of the King.[93] To enjoy an entitled position in government was dependent upon his personal favour. It gave birth to a new "social constellation" where everyone was jockeying for the King's favour in a newly pacified social space.[94] Elias did not underestimate the impact of this increasing interdependency of the upper classes, calling it at one point the "motor of civilization".[95]

The interdependence of the upper class led to a fundamental shift in acceptable codes of conduct. Once the key functions of the state were distributed among the elites, attaining privilege through brute force as in a medieval warrior society was strictly prohibited. Elias suggests that the previous social structure of medieval society—its decentralised political structure, social distance and incalculable fear of physical harm—made it advantageous to behave in an aggressive way.[96] Fast-forward through the process of

[89] *Ibid.*, pp.263 and 305.

[90] *Ibid.*, p.269.

[91] *Ibid.*, p.273.

[92] *Ibid.*, p.271.

[93] *Ibid.*, p.303.

[94] *Ibid.*, p.317.

[95] *Ibid.*, p.129.

[96] As Elias put it there was a "permanent readiness to fight, weapon in hand" in medieval warrior society. See *ibid.*, p.166.

state formation to absolutist court society and all that was left for the previously belligerent upper classes to engage in was an "abundance of unwarlike administrative and clerical work".[97] New levels of cooperation among the elites to run a complex governmental administration demanded "a constraint on the affects, a self-discipline and self-control, a peculiarly courtly rationality" that gave the "common stamp" to Western civilisation.[98]

The ingenious way Elias proved that conduct among the upper classes had fundamentally altered in lockstep with the increasing centralisation of state power was to examine etiquette books from the thirteenth to the nineteenth century. At the tables of princely courts from the fifteenth century onwards, older forms of etiquette that had once characterised the Middle Ages was now unacceptable. Eating with hands, the use of knives at the table and the open expression of bodily functions (spitting, flatulence, snorting, nose blowing etc.) were all beginning to be regulated. The introduction of specialised eating utensils gave material proof of these changing habits. The appearance of the fork and handkerchief among the upper classes around the sixteenth century seem basic in comparison to the onslaught of implements that came later to accommodate the Hors d'oeuvre or dessert course at courtly dinners.[99] More evidence of progress in the realm of manners was how later etiquette books omitted pieces of advice that had before seemed necessary to recount. Urinating in staircases and spitting chewy food directly onto the floor are just two examples of behaviours explicitly sanctioned against in early etiquette books but not mentioned at all by later ones.

Such demonstrable changes in table manners did not coincide with great leaps forward in the understanding of hygiene, germs and pathogens which, at first blush, might provide a more logical explanation. Elias reassures the reader that changes in etiquette "does not come from rational understanding of the causes of illness" but from "changes in the way people live together, in the structure of society".[100] These changing structures of human relationships, the one of interdependencies and forced self-constraint discussed above, was forcing new codes of behaviour that were applicable to

[97] *Ibid.*, p.248.

[98] *Ibid.*, pp.190-191.

[99] *Ibid.*, pp.90 and 126.

[100] *Ibid.*, p.135.

a pacified social space. Manners and appropriate conduct distinguished the upper classes, made clear the hierarchy of society and gave expression to a "self-image, to what, in their own estimation, made them exceptional".[101] Moreover, this standard of conduct was fanning out to life beyond court society, especially to the lower classes who tended to mimic the behaviours of those higher up the social ladder.

From Elias' vantage, transformations in state formation do not only force a particular code of conduct upon people but also an accompanying change in mental outlook. For Elias, 'civilisation' can be described in psychological terms as "an advance in the threshold of repugnance and the frontier of shame".[102] Such events as the carving of the whole dead animal at the table were "removed behind the scenes of social life" not because it was impractical or unhygienic but it simply became repulsive to witness.[103] Habits like examining the contents of a freshly soiled handkerchief "as if pearls and rubies might have fallen out of your head" were abandoned because there was a growing sense of shame at offering such a spectacle to the onlooker.[104] Even the fork, Elias states at one point, "is nothing other than the embodiment of a specific standard of emotions and a specific level of revulsion".[105] Manners and physical conduct more generally, argues Elias, were a window into the inner life of human psychology.

When reading the work it is clear that Sigmund Freud's psychological theories were of great inspiration to Elias. Vic Gatrell for one called Elias' model a "grand fusion of Freudian psychoanalytical theory and the history of political processes".[106] Constant reference is made to the changing level of 'affect controls' or 'drive controls' that people possess at a given time in history. Elias thought that there were ever tightening psychological constraints put upon our hardwired propensity for violence, aggression and sex. Though these constraints were historically conditioned by changing social structures, Elias thought they appeared to each individual as something "highly

[101] *Ibid.*, p.54.

[102] *Ibid.*, p.86.

[103] *Ibid.*, p.103.

[104] *Ibid.*, p.123.

[105] *Ibid.*, p.107.

[106] Gatrell, 1994, p.17.

personal, something 'inside', implanted in them by nature".[107] Moreover, it is an "automatically functioning self-restraint" that also "functions when a person is alone".[108] Elias shares with the Freud of *Civilization and its Discontents* (1930) the view that 'civilisation' is a repressive concept in so far as it restricts basic drives.[109] However, he is distinct from a scholar like Foucault in believing that such a mechanism of self-control is built with an overall purpose in mind. The Civilizing Process, says Elias, "is set in motion blindly, and kept in motion by the autonomous dynamics of a web of relationships, by specific changes in the way people are bound to live together".[110]

Pieter Spierenburg was the first to realise the potential of applying Norbert Elias' work to the problem of penal evolution with the publication of *The Spectacle of Suffering* (1984).[111] The "nucleus" of his study was Amsterdam's sentencing records from the period 1650 to 1750 but the author extended his discussion to account for the development of punishment in Western Europe more generally.[112] With the publication of *Punishment and Civilization* (2002), John Pratt complemented Spierenburg's study by applying Elias to penal developments in the English-speaking world in the last two centuries. Both authors would agree that the Civilizing Process was the key reason that punishment was directed away from the body, towards the private sphere and sanitised within the prison setting.

Owing to Elias' silence on the topic of punishment, Spierenburg took care in his book to situate the development of the European criminal justice system by relating it to the development of centralised states. Spierenburg posits that the very existence of the justice system is contingent upon a complex administrative apparatus capable of meting out punishment on behalf of private citizens. At times of weak central rulers, such as the feudal period for example, individuals carried out punishment among themselves in

[107] Elias, 2000, p.109.

[108] *Ibid.*, p.117.

[109] Sigmund Freud, *Civilization and its Discontents* [1930], David McLintock (trans), Camberwell: Penguin Books, 2002.

[110] Elias, 2000, p.367.

[111] Spierenburg, 1984.

[112] *Ibid.*, p.xi.

the form of private vendettas, blood feuds or voluntary reconciliation.[113] Between the twelfth and fifteenth centuries criminal justice in the modern sense emerged because territorial princes became strong enough to expropriate the power to punish from private citizens.[114] However, in this transition from individual to state run justice, a highly unstable monopoly of violence was apparent.[115] Thus, this period displayed high levels of violent, public punishments because it served to "bolster up" the "precarious position" of elites and "seal the transfer of vengeance from private persons to the state".[116]

For Spierenburg the abolition of public executions is linked to changes in state formation in at least three ways. First, the development of the modern nation-state in the eighteenth century resulted in a stable monopoly on violence that made the spectacle of punishment less necessary. To quote Spierenburg directly: "Public executions were not only felt to be distasteful; they were no longer necessary … the authorities could afford to show a milder and more liberal face."[117] Second, tighter webs of social interdependence present in nation states resulted in a growth in empathy towards the dying criminal. This upshot in "mutual identification", as Spierenburg called it, made many onlookers uncomfortable with the violence of more arcane forms of punishment.[118] The last factor that played a role in the transition to private punishment is that of changing elite 'sensitivities' or 'mentalities' caused by changes in state formation. Spierenburg agrees with Elias that state formation created a class of "domesticated elites" who underwent a series of "psychic changes" that first found expression in manners and basic social interactions.[119] Spierenburg suggests that these "psychic controls" were widened later on to incorporate feelings of repugnance towards public punishment and the very sight of the scaffold in public spaces.[120] Thus, the

[113] *Ibid.*, pp.1-4.

[114] *Ibid.*, p.4.

[115] *Ibid.*, p.202.

[116] *Ibid.*

[117] *Ibid.*, p.205.

[118] 'Mutual identification' basically means humanism when stated in less abstract terms, see *ibid.*, p.185. For a passing discussion on the concept of mutual identification, see Mennell, 1990, pp.209-210.

[119] Spierenburg, 1984, p.204.

[120] *Ibid.*

gradual abolition of public punishments in Amsterdam was the "political conclusion" to a much longer-term change in the "sensibilities" of Dutch elites.[121]

John Pratt's examination of the abolition of public executions in England differed with that of Spierenburg in many ways, despite both sharing a common affiliation with Elias' framework. In the absence of any reference to the structural transformation of the British state, Pratt goes headfirst into an explanation of the transition to private executions being the result of "changing sensibilities to the carnival".[122] The transition to private executions tried to sanitise the suffering of the condemned by turning his or her death into a "bureaucratic accomplishment, not an opportunity for carnival".[123] Only by hoisting a black flag or the lengthy ringing of the prisons' church bell could the wider public know that an execution had taken place. This was death communicated in a "reduced and dignified" manner, unlike previously when executions were a reason for "celebration and disorder".[124] As a useful coda, Pratt mentions how twentieth century modes of execution like lethal injections, gassing and the electric chair were an extension of this type of bureaucratic mentality at work.[125]

It is in institutional contexts where Pratt excels in his deployment of the Civilizing Process. The prison system's centralised bureaucracy and countless functional interdependencies between staff provide a microcosm within wider society where Elias' ideas can take hold. The sanitisation of penal language, changing prisoner conditions and the key decision-making role that bureaucratic elites have in this context are all explicated in light of Elias' theorising. After reading countless annual prison reports across a variety of jurisdictions, Pratt also puts a twist on conventional interpretations of the Civilizing Process. He became convinced that "technological proficiency, bureaucratic rationalism and scientific expertize" can actually lead to barbarous or 'uncivilised' outcomes for the prisoners involved, despite gentle and benign appearances to the contrary.[126] In this sense, Pratt is responding to views that the

[121] *Ibid.*, p.183.

[122] Pratt, 2002, p.17.

[123] *Ibid.*, p.25.

[124] *Ibid.*, p.24.

[125] *Ibid.*, p.26.

[126] *Ibid.*, pp.1-3.

Civilizing Process is somehow teleologically preconceived as something guided by ideas of goodness and virtue which a casual reading of Elias' original work might sometimes project.[127]

John McGuire and the Civilizing Process in Australia: A Critique

In 1998 John McGuire published an article in *Australian Historical Studies* that addressed the abolition of public executions in Australia from the perspective of the Civilizing Process.[128] From the outset McGuire identifies Elias' opus as a "useful explanatory tool" when applied to the history of capital punishment.[129] Already successfully applied to punitive transitions in Western Europe, he argues that it was high time the Civilizing Process was taken to Europe's colonial margins to complete the account.[130] In applying the Civilizing Process to the Australian colonies, he suggested that the only "mitigating variable" in its otherwise smooth application across the continent's punitive apparatus was race.[131] He was, of course, referring to the extended half-life of public executions for Indigenous offenders in Western Australia and South Australia as well as some alterations made to the private execution ceremony for other non-European races in the specific case of Queensland (see Chapter 3 for a discussion of these issues). Moreover, McGuire was very aware of the conceptual literature on penal change when writing his paper and he expressed reservations about fully endorsing the 'culturalist' approach.[132]

I do not want to cast doubt over the factual accuracy or excellent breadth of secondary evidence covered in McGuire's paper but only to take issue with how these details were marshalled to conform to the contours of Elias' conceptual framework. A key concern

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[127] *Ibid.*, p.8.

[128] John McGuire, 'Judicial Violence and the "Civilizing Process": Race and the Transition from Public to Private Executions in Colonial Australia', *Australian Historical Studies*, vol.29, no.111, 1998, pp.187-209.

[129] *Ibid.*, p.190.

[130] *Ibid.*

[131] *Ibid.*

[132] In the concluding lines of his essay McGuire writes the following: "While it must be conceded to David Garland that historians and sociologists of punishment should embrace the innovations of cultural studies in 'a more multi-dimensional framework of inquiry', we must simultaneously guard against endorsing a culturalist approach that obscures the impact of political factions in the history of penal processes." *Ibid.*, p.209.

is that McGuire is silent on the process of state formation and its relationship to elite sensibilities in the context of colonial Australia. This is surprising given his citation of Spierenburg and a brief yet accurate summation of Elias' thesis at the beginning of his article acknowledging the link between structural transformations within the state and behavioural/psychological changes in individuals. Without this backdrop to the discussion, the noble rhetoric of civilisation in parliamentary debates and press reports directed at the ills of public executions during the 1850s float freely without an explanatory grounding that Elias would recognise as familiar. We are left wondering what particular aspects of Australian state formation contributed to these changing sensibilities towards the gallows and what it was about the 1850s that triggered this sudden desire for more 'civilised' forms of executions.

McGuire more successfully documents why non-European public executions lingered for longer in a vocabulary that would match Elias' position. In a key paragraph on Queensland's experience with public Indigenous hangings, McGuire emphasises the role they played in securing a "monopoly over the use of force in the protection of European persons and property".[133] He also, in a point that echoes Spierenburg in many ways, makes mention of how displays of violent punishment towards Indigenous peoples reminded European settlers that the power to punish resided in the hands of the state and not private citizens.[134] Staying in Queensland, McGuire then focuses on the execution of men from a Pacific Island background late in the nineteenth century when, even in a private execution setting, select members of his race were admitted by authorities into the gaol to watch the death. These racially defined 'semi-public' executions, McGuire writes, not only guaranteed the "submission" of this minority but were an "essential weapon in maintaining the compliance of 'untutored savages' with the conventions of civilization".[135]

This is a plausible explanation made within the umbrella of the Civilizing Process as to the key 'exception' in Australia's execution history; that is, why the publicity of non-

[133] *Ibid.*, pp.198-199.

[134] To quote McGuire: "It was an imperative of the process of internal pacification that both the colonised and the colonisers should be shown the appropriate penalty for severe crime and dissuaded from taking matters into their own hands." *Ibid.*, p.199.

[135] *Ibid.*, p.206.

European executions was sometimes amplified due to racial difference. To be clear, McGuire stated that he wanted to make the supposed "limitations" of the Civilizing Process the "predominating focus" of his study.[136] However, we are still left unaware as to how the 'rule', or general long-term thrust towards private punishment in Australia, might be championed within the conceptual framework provided by Elias. Below I identify a central problem that McGuire would have encountered, at least comparatively, if he had extended his study to incorporate a more general explanation for the introduction of the Private Execution Acts in Australia. The issue revolves around their early adoption in the international context, especially in comparison to somewhere like France.

The early timing of the transition to private executions in Australia is troubling when placed in the context of the Civilizing Process internationally. The passage of the private execution legislation through the New South Wales' legislature in 1853 outpaced two of the three nations that formed the central case studies in Elias' original work. England waited until 1868 to abolish the practice and France had its last public guillotining in 1939.[137] Only some of the smaller German states were either on pace or slightly ahead of New South Wales' position on executions.[138] Surely we cannot assume that an ex-penal colony on the other side of the world was more politically consolidated and therefore more psychically restrained than the French and English nations. Of the three territories studied by Elias it is curious that he identified Germany—the first of the three regions to abolish public executions—to have lagged behind both France and England in the area of "centralization and integration" of state power.[139] One can only imagine how far back the Australian colonies, with their vast tracts of unpoliced frontiers, would have been on such a measure. Yet, in both the

[136] *Ibid.*, pp.190-191.

[137] Pratt, 2002, p. 33, fn 1.

[138] To quote Richard Evans: "Apart from the small Thuringian state of Saxe-Altenburg, which abolished public executions in 1841, no German state took this crucial step [of abolishing public executions] until the 1850s: Prussia in 1851, Württemberg and Upper Hesse in 1853, Hamburg and Brunswick in 1854, Saxony in 1855, Baden in 1855, Bavaia in 1861, Rhenish Flesse in 1863." Richard J. Evans, 'Justice Seen, Justice Done? Abolishing Public Executions in 19th-Century Germany', *History Today*, vol.46, issue 4, 1996, http://www.historytoday.com/richard-evans/justice-seen-justice-done-abolishing-public-executions-19th-century-germany, viewed 1 March 2015. See also, Richard J. Evans, *Rituals of Retribution: Capital Punishment in Germany 1600-1987*, Oxford: Oxford University Press, 1996, pp.305-321.

[139] Elias, 2000, p.261.

German and Australian cases, they took the lead ushering in the private era of capital punishments.

The chronology of France is especially troubling in this context since Elias always saw the French nation as being the archetypal example of the Civilizing Process unfolding and a leader in standards of conduct on the continent. For example, Elias repeatedly describes France as the most influential court society in Europe, writing at one point: "From Paris the same codes of conduct, manners, taste and language spread, for varying periods, to all the other European courts."[140] These types of claims made by Elias are irreconcilable with France waiting until the very year he published *The Civilizing Process* to finally abolish the public guillotine. One might be accused of nit-picking if the chronological difference between the Australian colonies and France was narrower, but a gap of almost a century makes the charge all the more serious. The importance of introducing private executions should not be glossed over. As Pratt put it, the introduction of this new mode of execution was the "defining moment in the development of punishment in the civilized world".[141] Even Spierenburg stated in the concluding lines in *The Spectacle of Suffering* that France's extended delay in abolishing public executions required a "separate explanation".[142]

Some deeper theoretical concerns have been levelled at Elias over the years, especially in light of twentieth century historical developments. The barbarity of the holocaust challenged the idea that tighter forms of state formation (like Fascism) meant that civilised outcomes automatically followed.[143] The casualisation of manners and relaxation of sexual mores that occurred across the west in the 1960s seems to counter the notion that growing webs of social interdependence leads to ever higher forms of

[140] *Ibid.*, p.189.

[141] Pratt, 2002, p.15.

[142] Spierenburg never clarified if he meant for an explanation to take place inside or outside the tradition of the Civilizing Process. See Spierenburg, 1984, p.206.

[143] This idea led one reviewer of the work in 1986 to write that at the exact time Elias published his theory, "Hitler was refuting the argument on the grandest scale." Sir Edmund Leach quoted in Andrew Linklater and Stephen Mennell, 'Norbert Elias, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations* – An Overview and Assessment', *History and Theory*, vol.49, 2010, pp.384-411, quote on p.404. For a thought provoking rebuttal to such criticisms, see Eric Dunning and Stephen Mennell, 'Elias on Germany, Nazism and the Holocaust: On the Balance between "Civilizing" and "Decivilizing" Trends in the Social Development of Western Europe', *British Journal of Sociology*, vol.49, no.3, 1998, pp.339-357.

bodily regulation.[144] The idea that 'civilised' behaviour (self-restraint in particular) must have its genesis with the formation of a central state was already being questioned in sociological and anthropological circles by the 1980s.[145] These lines of criticism focus on issues within the causal logic of Elias' model rather than questioning the evidence base for his original claims. This latter line of attack appears as a major focus of a four-volume critique by the German anthropologist Hans Peter Duerr.[146] Others have criticised the validity of making assumptions about "unobservable" psychic restraints and emotional dispositions of historical actors considering these types of investigations are hard enough to accomplish in the modern laboratory.[147] Elias scholars have been able to offer counter-arguments within the framework of the Civilizing Process to these problems with varying degrees of success. Concepts like the 'Decivilizing Process' have been developed in the work of Stephen Mennell and Jonathan Fletcher to demonstrate how the Civilizing Process can go into reverse under certain circumstances.[148] Nevertheless, such counter-theorising guards against the possibility of ever being able to falsify Elias' thesis, a key test in scientific circles at least, of the validity of the original hypothesis.

Given my reservations in applying Elias' concept to the key question of this thesis, it is worth clarifying that references to the word 'civilisation' hereafter do not carry any broader notions of a sociological process that is unfolding in the colonies. It seems more natural to locate the colonial obsession over 'civilisation' as part of Australia's cultural baggage that was inherited from England and invigorated during the 1850s in

[144] This was an ongoing point of inquiry occurring largely in Dutch sociological circles during the 1970s and 1980s. It is recounted in Mennell, 1990, pp.211-213.

[145] Robert Van Krieken cites the work of the Dutch cultural anthropologist H.U.E. van Velzen to demonstrate how some tribal societies in Suriname, namely the Djuka, operate without any central authority to speak of and yet still display 'civilised' forms of behaviour in the same way that would Elias describe it. See Robert Van Krieken, 'Violence, Self-Discipline and Modernity: Beyond the "Civilizing Process"', *Sociological Review*, vol.37, no.2, 1989, pp.193-218.

[146] Duerr's critique titled *Der Mythos vom Zivilsationsprozess* published between 1988 and 1997 is yet to be translated into English so I am relying here on the comments of the two reviewers: Stephen Mennell and Johan Goudsblom, 'Civilizing Processes – Myth or Reality? A comment on Duerr's Critique of Elias', *Comparative Studies in Society and History*, vol.39, no.4, 1997, pp.729-733.

[147] Garland, 1990, p.229.

[148] Mennell, 1990, pp.205-223; Jonathan Fletcher, *Violence and Civilization: An Introduction to the Work of Norbert Elias*, Cambridge: Polity Press, 1997. For more on the 'decivilizing process' in relation to contemporary penal trends, see John Pratt, 'Elias, Punishment, and Decivilization', in J. Pratt, D. Brown, M. Brown, S. Hallsworth and W. Morrison (eds), *The New Punitiveness: Trends, Theories, Perspectives*, Devon: Willan Publishing, 2005, pp.256-271.

reaction to a recent experience with transportation. Still, McGuire was right to recognise the central role that lofty concepts like 'civilisation' played in the debate surrounding public executions in Australia. By allowing for these factors he is certainly closer to the mark than Foucault or Marxist interpretations of punishment that ignore the outward rhetoric of those who actually enacted the reform. However, to contextualise the transition to private executions within a thousand year sociological process is fraught with danger. It is more appropriate to locate the transition to private executions within Australia's colonial century by reference to the unique cultural impact of convictism and more immediate gripes with the crowd, criminal, and execution procedure.

Garland, Smith, and Masur: Punishment and Culture

Around the mid-1980s more scholars began to place a serious emphasis on the culture within which a punishment resides rather than the internal logic of penal institutions or individual reformers as reasons for change. In the words of one historian who worked under this paradigm: "Cultural norms have been employed in all ages to rationalize and justify certain punishments and to prohibit others."[149] 'Culture' is a notoriously difficult phenomenon to pin down; multi-layered, localised and ever changing, when defined as a causal factor it can lead to a variety of possible outcomes. However, through the work of David Garland and Philip Smith, the relationship that culture has to punishment has been formalised in a way that is attune to the symbolic element of penalties, its communicative purpose and the two-way (both passive and active) relationship it has within society. The work of Louis P. Masur in antebellum America is highlighted below because he was able to weave notions of a cultural understanding of punishment successfully into a concrete historical study that is instructive for this thesis.

David Garland: Punishment as a 'Cultural Artefact'

David Garland's primary focus in *Punishment and Modern Society* (1990) was to examine the work of Michel Foucault, the Marxists, Émile Durkheim, Max Weber and Norbert Elias in relation to questions of punishment. Unlike many of the thinkers

[149] Greg T. Smith, 'Civilized People Don't Want to See That Kind of Thing: The Decline of Public Physical Punishment in London, 1760-1840', in C. Strange (ed.), *Qualities of Mercy: Justice, Punishment, and Discretion*, Vancouver: University of British Columbia Press, 1996, pp.21-51, quote on p.23.

Garland dealt with in the book, he comes out the other end reluctant to reduce punishment to a single causal relationship or transposable rule that can be observed in all societies across time and place.[150] Taking care to redefine punishment as a 'social institution' he advocates a multi-dimensional approach to understanding its relationship to society. One would be charged with reductionism if other complex social institutions like the school, church or family was dealt with so single-mindedly, so it appears foolhardy to do the same with punishment.[151]

There are some technical elements that Garland introduced in *Punishment and Modern Society* in an attempt to formalise the relationship between punishment and culture. The key was to identify punishment as a collection of material signs and symbols. In Garland's hands everything related to punishment is "framed in languages, discourses, and sign systems which embody specific cultural meanings, distinctions, and sentiments, and which must be interpreted and understood if the social meaning and motivation of punishment are to become intelligible".[152] Even banal instrumental symbols of the prison environment such as staff and inmate clothing or architecture all convey something to an awaiting audience of convicted criminals, prison staff and the general public. Viewing punishment in this way, Garland is comfortable with its "polysemic possibilities"; that is, the ability of penal signs and symbols to communicate multiple meanings at once.[153] Christ's crucifixion and the Bastille are given as passing examples of penal symbols in history that have projected polysemic meanings.[154]

For Garland in *Punishment and Modern Society*, culture may conceptually be divided in two, comprising both mentalities (ways of thinking) and sensibilities (ways of feeling).[155] Culture to Garland is something that "refers to all those conceptions and values, categories and distinctions, frameworks of ideas and systems of belief which

[150] Garland stresses this point in a later work that deals with capital punishment directly. See David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition*, Oxford: Oxford University Press, 2010, p.72.

[151] Garland, 1990, p.282.

[152] *Ibid.*, p.198.

[153] *Ibid.*, p.273.

[154] *Ibid.*

[155] *Ibid.*, p.195.

human beings use to construe their world and render it orderly and meaningful".[156] Culture defined as such places clear limits on the form penalties can take. Decisions that change the fundamental character of punishment that may appear on the surface to be the result of economic efficiencies, bureaucratic prerogatives or the objectives of crime control are first predicated upon a normative judgement of what is acceptable or unacceptable within a given social context. Put another way, possible candidates of action are always culturally limited by things operating outside of the direct parameters of the penal sphere.[157]

Garland argues that punishment is imprinted by its socio-cultural context in a variety of ways, sometimes subtly and at other times less so. Basic categories of difference that impact upon how punishment is carried out—gender, social status, race and age etc.—are first generated from wider social norms operating outside the penal sphere before being adopted internally.[158] Social movements like religious revivals or humanitarianism as well as historically conditioned conceptions of the criminal have all influenced penal practice in a similar way.[159] More recently the 'science' of punishment—penology, criminology and psychology—could also be conceived of as working like another social movement, readily adopted by a penal bureaucracy whose staff increasingly defined themselves as professionals, technicians, specialists and experts.[160] Changes in penal practice are not developed in isolation but are congruent with these forces operating in society. "[P]enal forms," says Garland, "are fashioned out of the prevailing (or emergent) codes of thought and feeling; they are a practical embodiment of specific mentalities and sensibilities".[161]

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[156] *Ibid.* This is compatible with a similar definition of culture that appears at the beginning of a recent edited collection of essays regarding capital punishment and cultural settings internationally: Austin Sarat and Christian Boulanger (eds), *The Cultural Lives of Capital Punishment: Comparative Perspectives*, Stanford: Stanford University Press, 2005, p.16.

[157] For example, to the extent that corporal punishments are cheap, calculable and provide a deterrent, it may make sense to employ them on a purely penological rationale. However, modern sensibilities around suffering and violence will always interfere with reprising such punishments no matter their instrumental efficiency. See Garland, 1990, p.241.

[158] *Ibid.*, pp.199-203.

[159] *Ibid.*, pp.203-209.

[160] *Ibid.*, p.209.

[161] *Ibid.*, p.273.

Crucial to Garland's conception of the penalty is its role as an active cultural agent. Far from being a passive imprint of cultural norms as described in the previous paragraph, Garland argues that penalties have an active role within the culture as a way of organising meaning in society. Among other things it makes intelligible to the onlooker the nature of state authority, reinforces the proper role for an individual within society as well as presenting the relationship between the offender and the community in an idealised form.[162] In this sense, punishment is a "dramatic, performative representation of the way things officially are and ought to be".[163] It is a reflection of society, a "complex cultural artefact" of a specific time and place.[164]

Two book length studies written by Garland following *Punishment in Modern Society* are practical demonstrations of his attempt to show the connection between punishment and the changing society it exists within. The first of these is *The Culture of Control* (2001) that shows how crime control mechanisms in the United States and the United Kingdom in the last decades of the twentieth century were adaptive to social changes brought about by 'late modernity' such as new economic conditions, the advent of mass media and the realities of high crime rates. Crime control mechanisms adapted to these new social changes in a series of "patchwork repairs" rather than "well thought-out reconstruction" from the outset.[165] Garland stresses that new penal strategies of the 1970s and beyond were not "*determined* by the social field" but "strongly conditioned by that field and probably inconceivable without it".[166] The cultural component that impacted upon new methods of crime control do not float freely in Garland's work but also have their genesis in the broader social patterns of the latter half of the twentieth century.

In *Peculiar Institution* (2010) Garland focuses his attention on the history of American capital punishment in relation to other Western nations, documenting both historical

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[162] *Ibid.*, pp.265-273.

[163] *Ibid.*, p.265.

[164] *Ibid.*, p.198. For an essay that explores capital punishment in the United States by defining it as a 'cultural artifact' along the lines explicitly stated by Garland, see Judith Randle, 'The Cultural Lives of Capital Punishment in the United States', in Sarat and Boulanger, 2005, pp.92-111.

[165] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford: Oxford University Press, 2001, p.103.

[166] *Ibid.*, p.165.

similarities and local divergence from largely abolitionist narratives elsewhere. He situates it as a work of "law and society" that investigates "social context to better understand a legal institution, but also using a legal institution to better understand a society".[167] Garland puts the decline in use and more discreet modes of capital punishment across the west as being "shaped by the forces of state formation and rationalization, liberalization and democratization, 'civilization' and humanization".[168] The United States was not exempt from these social processes that the rest of the West underwent but stresses how differences in the political structure of America—the local and popular character of justice in particular—led to the retention of the death penalty in many states. In *Peculiar Institution* Garland never shuts off the interpretive possibilities of other social theorists – Foucault, Elias and Durkheim are all kept in mind during his analysis. For example, in his comprehensive discussion of the historical modes of capital punishment in Europe and America the requirements of state power are strongly referenced as reason for the evolving forms that executions took.[169] Both of his latter book-length studies refuse to shy away from the complexities of large social forces and form nuanced understandings of punishment beyond that of mere crime control. Moreover, the cultural aspects of punishment are always embedded within larger patterns of social change.

Philip Smith: The Symbols of Punishment in Motion

From Garland we learn that punishment can be reinterpreted as an important institution that is shaped by the complex socio-cultural setting it resides within. Punishment is both a passive recipient of cultural norms but also an active participant in helping create, manage and sustain meaning for individuals in society. In this way punishment is a 'cultural artefact' impregnated by circumstance and able to be dissected to discover more about the wider social setting. A relatively recent book by Philip Smith, *Punishment and Culture* (2008), despite its limitations, does well to build on some of Garland's ideas. Its strength is in conceptualising how the material signs and symbolism of punishment are altered by their continuing reaction with the wider culture.

[167] Garland, 2010, p.16.

[168] *Ibid.*, p.72.

[169] *Ibid.*, pp.70-100.

Similar to Garland, Smith takes punishment to be a communicative action; a kind of "speech act" where the penalty becomes a message, encoded by the authorities in material signs and symbols, which is then sent out and decoded by the onlooker.[170] These symbols of punishment transmit an "authoritative discourse", or intended meaning, in the hope that it will be 'read' properly by the majority – that is, in such a way that is consistent with the stated aims of the punishment.[171] The problem for authorities is that certain symbols of punishment can "take on new, unsavoury meanings and then fade into oblivion" due to their interaction with cultural beliefs, norms and memory.[172] As just one example, Smith describes how the prison chain gang working on the side of the road in the South of America came irksomely close to the "poisoned iconography of slavery", eventually leading to its reduced usage.[173] Garland in his review of *Punishment and Culture* observed how New York State abandoned hangings for the electric chair in the 1880s in order to clearly distinguish the legal execution of criminals with the illegitimate, unlawful and racially based practice of Southern lynching.[174] Smith terms such contamination of the intended symbolism of punishment—that prisoners are slave-like or hanging is akin to lynching—as a 'genre-shift', or 're-narration' of the penalty. Smith notices how, helpfully or otherwise, "our cultural systems loop back to their referents and constrain as they knot onto concrete technologies, practices, and institutions, binding them with layers of meaning".[175]

The idea that the material signs and symbolism of punishment always pass through the external filter of culture is at the heart of Smith's account. The subversion of the punitive message by the culturally informed onlooker is detrimental to the aims of punishment. The viability of certain penalties thus rests on a utilitarian judgement of whether the existing punishment generates net "cultural pollution" or not.[176] If it does, the punishment becomes vulnerable to alteration. Changes in punitive technique are

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[170] Smith, 2008, p.16.

[171] Smith borrows the term "authoritative discourse" from the Russian literary thinker Mikhail Bakhtin. See *ibid.*, p.134.

[172] *Ibid.*, p.26.

[173] *Ibid.*, pp.86-89 and 173.

[174] David Garland, 'A Culturalist Theory of Punishment?: Review of Philip Smith, *Punishment and Culture*', *Punishment & Society*, vol.11, no.2, 2009, pp.259-268, quote on p.264.

[175] Smith, 2008, p.172.

[176] *Ibid.*, p.171.

simply "repair work" by the authorities so that the troublesome punishment can match up with the existing conceptions of 'appropriate' punishment that exist within the "civil discourse".[177] Crucially, the authorities fashion the new symbols of punishment in such a way that competing, unruly and unhelpful interpretive possibilities are closed off, or at least find it difficult to establish themselves within the thoughts of the wider community. This need for the authorities to either correct interpretations of punishment or thwart their possible 're-narration' is what drives the evolution of punishment forward.

So why is punishment 'misread' by the onlooker? What makes one particular punishment sit better than another within the prevailing cultural setting? Someone like Garland would be willing to countenance the idea that culturally informed misreadings of punishment are spontaneous combustions; the random aligning of people, events, historical contingencies, geography or long-term patterns of social organisation. To Smith, however, there are clear bedrocks for cultural meaning and production that should never be transgressed. The work of Émile Durkheim and his followers is of special relevance in this regard. The sacred-profane divide, purity-pollution divide and ideas of the 'left sacred' all come in and out of his analysis to explain why punishment is read in counterproductive ways. As just one example of how this works in practice, Bentham's panopticon is reimagined by Smith as a purifying machine – not the site emblematic of social control as Foucault would posit. Regulating bodily functions, sanitising bad smells, keeping clean the inmates and their cells, these were Bentham's real aims for the panopticon as interpreted by Smith.[178] In other examples scholars like Robert Hertz, Roland Barthes, and Mary Douglas are all invoked to find explanations as to why the casual 'onlooker' to punishment creates errant meanings when reading the symbols of punishment. For Smith then, only those punishments which properly respect Durkheimian boundaries will sit well within the civil discourse and continue to be imposed in response to crime without challenge.[179]

[177] *Ibid.*, p.46.

[178] *Ibid.*, pp.99-107.

[179] *Ibid.*, p.171.

If more space were available, the work of Durkheim deserves a section all of its own given its recent resurgence in the literature.[180] Punishment, as traditionally conceived by Durkheim, was a means to patrol the moral borders of society, its *conscience collective* to borrow his terminology. Seen as a way to avenge the transgression of sacred morals it was an emotional highpoint of social life and a collective reminder of what behaviour is acceptable or unacceptable within the community. Importantly, Durkheim also realised that the temper of the penalty should never step outside the established moral boundaries of the group lest the punishment meted out provoke the very same outrage in the onlooker as did the original crime. However, caught in both the terminology and functionality of Durkheim's sociological world many of these ideas were never retrieved until much later by scholars like Smith and Garland.[181] Smith was especially aware that contemporary criminologists saw the French father of sociology as "one of the busts on the mantle of the formerly important".[182] Still, Smith argues that his ruminations on punishment lie latent in Durkheim's own analysis of society and that the French sociologist's final conclusions about the role of punishment and society are quite removed from his own.

Durkheim's idea of punishment as a communicative action that, in its practical design, must fit within the moral codes of society is useful in combating the idea that punishment is pitched at the accumulation of power (Foucault) or derivative of economic factors (Marx). Still, Durkheim's view of culture, as traditionally conceived, is a decidedly moral one in tone.[183] Smith in part attempted to expand Durkheim's narrow conception of culture to include wider variants as defined by some of his later followers. However, as an historian it is difficult to support something as timeless and ahistorical as the 'left sacred' or purity pollution divide. Such themes are especially

[180] *The Division of Labour in Society* (1893), an essay titled 'The Two Laws of Penal Evolution' (1901) and *Moral Education* (1925) are where Durkheim mentions punishment most extensively in his original work. For an edited collection of these writings as well as other insights on the law that lay scattered throughout his oeuvre, see Steven Lukes and Andrew Scull (eds), *Durkheim and the Law*, Oxford: Martin Robertson & Company, 1983. For a comprehensive overview of Durkheim's original conception of punishment as well as how it might be expanded upon, see Smith, 2008, pp.1-34; Garland, 1990, pp.23-46 and 47-82.

[181] More precisely, Garland argues that Durkheim's original conception of punishment failed to gain ascendancy because it was perceived to only relate to primitive society, formulated on poor historical evidence and heavily dependent upon his imperfect model of society. See Garland, 1990, p.26.

[182] Smith, 2008, p.13.

[183] Garland, 1990, p.195, fn. 4.

difficult to reconcile when, from the outset in *Punishment and Culture*, Smith underlines his enthusiasm for "local and embedded" cultural meanings that impact upon punishment in unique ways.[184]

Louis P. Masur: National Culture, Class Sensibilities and Historical Moments

The thesis that follows is not one written for sociology, nor is the connection between culture and punishment articulated using the technical language of sociologists. It is, strictly speaking, an historical study that is open to the findings of other disciplines. Louis P. Masur's *Rites of Execution* (1989) offers the possibility of understanding changing forms of executions through its relationship with society and culture. In the context of a purely historical study, Masur demonstrates how capital punishment, in both its design and the debate surrounding its very existence on the statute books, corresponded to the transformation of American culture in the antebellum period.[185] National culture, class sensibilities and historical moments all have a role to play in understanding this relationship. As a self-aware exercise in cultural history, Masur introduces his approach to understanding capital punishment this way:

> Ideas cannot be separated artificially from the so-called reality of society. Beliefs are themselves tangible and meaningful; thoughts are actions. Rituals, as cultural performances and dramatic representations, constitute a text that provides another window onto ideological assumptions, social relations, and collective fictions. Ideas and rituals, however, are neither conceived nor employed in a vacuum. They simultaneously create and exist in contexts, and these contexts are crucial to describing how cultural assumptions and practices change as and when they do.[186]

Published in 1989 Masur was never alert to the later theorising of Garland or Smith. He was, however, cogent in understanding how punishment interacts with culture by citing

[184] Smith, 2008, p.36.

[185] The 'antebellum period' in the history of the United States refers to the years between the American Revolution and the Civil War (1776-1865).

[186] Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865*, Oxford: Oxford University Press, 1989, p.7.

in a footnote, among others, Clifford Geertz as a good "starting point".[187] Geertz, an American anthropologist, was synonymous with 'symbolic anthropology' as well as practising what he called 'thick description'. Both components act to break down rituals to their constituent parts with an aim to describe not only the symbolic element but also the social context in which the particular action/totem/belief can make sense.[188] Geertz's famous description of a Balinese cockfight is illustrative of his attempt to "draw large conclusions from small, but very densely textured facts".[189]

Throughout the study Masur demonstrates how American culture, especially republicanism, religiosity and middle class sensibilities, interacted with the gallows. These elements were evident in the design of public executions that formed a coherent message that could be "viewed, heard and read" by the throng of onlookers.[190] In light of the American Revolution, public executions embodied a message of civic virtue. Weary of social disorder and wartime chaos, new republican values enacted on the scaffold emphasised that "individual passions must yield to the good of the community".[191] The religious element of executions, the gallows sermon, hymn singing and maybe even a confession from the criminal, focused on the eternity of life where the roles of the criminal and the spectator could easily be interchanged. Whether such messages were internalised by the audience is unclear but Masur insists that the rites of execution laid bare a collection of socio-cultural assumptions that "mattered dearly" to social elites.[192]

As the American middle class emerged so did their attitudes towards capital punishment. Masur argues that public executions started to become offensive to middle-class sensibilities of privacy, civility, individuality, control and restraint. Tied to such sentiments was a growing fear of 'the mob' as a centre for social deviance and a benevolent wish to morally transform the lower classes and protect women and children

[187] *Ibid.*, p.7, fn. 5.

[188] Clifford Geertz, *The Interpretation of Cultures*, New York: Basic Books, 1973.

[189] Clifford Geertz quoted in Philip Smith and Alexander Riley, *Cultural Theory: An Introduction*, second edition, Oxford: Blackwell Publishing, 2009, p.189; Geertz, 1973, pp.3-32 and 412-454.

[190] Masur, 1989, p.26.

[191] *Ibid.*, p.27.

[192] *Ibid.*

from viewing such displays of cruelty. Public executions were defined anew by middle class culture as a ritual "threatening, not preserving, social order".[193] As middling tastes turned on public executions the bourgeoisie stopped attending by the early nineteenth century, further demeaning its value as a civil and religious ceremony, and accelerating its demise.[194] In this new cultural climate the eventual transition to private executions, "served to reinforce the shared cultural values of the middle and upper levels of American society".[195]

It should be noted that *Rites of Execution* is mainly concerned with the movement against capital punishment in America rather than the transition to private executions specifically. This movement against capital punishment in America drew upon Enlightenment jurisprudence, environmental psychology and liberal theology. Masur writes how this antigallows sentiment was marked by the idea that "if severe and excessive punishments marked monarchies, mild and benevolent ones would have to characterize republics".[196] It, once again, tied movements for penal change to the broader socio-cultural frame of reference rather than those strictly operating within the penal sphere.

Masur does a number of things in his study that is useful to the approach taken in this thesis. First, contra Smith's later work, Masur fixes the bedrock of cultural forces on historical contingencies truly unique to time and place, instead of relying on a set of fixed binaries conceived by scholars in the sociological realm. Second, Masur views the development of middle class sensibilities and beliefs as a key ingredient in the push to private executions without explicitly chasing them to origins in state formation as Elias or Spierenburg would prefer. Instead, middle class culture sits organically within the contours of nineteenth century America. Lastly, his arguments are developed out of an evidence base common to all historians, archival material and the popular press for instance. Masur demonstrates that broad assumptions about cultural values and beliefs can be made through a close examination of the practice of executions and the rhetoric surrounding its use.

[193] *Ibid.*, p.100.

[194] *Ibid.*, p.96.

[195] *Ibid.*, p.110.

[196] *Ibid.*, p.61.

Conclusion

This thesis identifies and takes seriously the cultural factors that operated on the practice of executions in colonial Australia. It eschews the technical language of sociologists like Garland and Smith but it nonetheless takes many of their insights for granted. In each chapter hereafter there is a clear factor operating in the wider cultural sphere that has an impact on the colonist's interaction with the Australian gallows; the legacy of convictism and the desire to appear civilised (Chapter 2), European conceptions of Aboriginality (Chapter 3), a feeling of discomfort with the sight of pain (Chapter 4), the art of 'dying game' (Chapter 5), and the perceived effects of witnessing violence on innocent bystanders (Chapter 6). These cultural factors were unconnected with the day to day operation of punishment or the objectives of crime control. They were ideas and beliefs that first had currency in the cultural dialogue of the Australian colonies but looped back onto the practice of executions and affected how they were carried out. In this way, changing execution procedure was a reflection of aspects of Australian colonial culture and, by the very performance of executions, a means to codify and further such sentiments.

The chapters that follow share a broad understanding of 'culture' as forwarded by John Rickard in *Australia: A Cultural History* (1996) who saw the term as denoting the "evolving values, beliefs, rites and customs" of Australian society.[197] Thus, a cultural history does not necessarily need to focus on cultural products (paintings, literature and song for example) but such material should be consulted insofar as it can help better understand the beliefs and customs of nineteenth century colonists. The source of developing cultural beliefs in the Australian colonies that came to impact on the gallows should always be closely linked to the historical contingencies of settlement. There was a profoundly English tone to standards of conduct and mental outlook but these influences were constantly being filtered through the practical necessities of living

[197] John Rickard, *Australia: A Cultural History*, second edition, New York: Addison Wesley Longman Limited, 1996, p.xi.

life in a colony. Recently, Penny Russell in *Savage or Civilised?* (2010) has pursued a similar idea in her excellent work on changing manners in colonial Australia.[198]

All of the conceptual approaches outlined above have their different strengths and weaknesses, explanatory capacity and avenues of research that can lead down many different paths. Depending on historical contexts and the substance of available primary material, different approaches are applicable for different contexts. In the case of Australia in the mid-nineteenth century, paying close attention to cultural factors operating outside the penal sphere has been particularly fruitful for understanding changes to the practice of executions. I have referred to this as a 'culturalist' approach to penal change in an attempt to capture these sentiments and the approach itself in a shorthand way.[199] The idea that punishment is intimately connected with the society and culture it resides within is not a radical one. This is especially the case when such an insight is stripped of the technical vocabulary recently developed in sociological circles to better articulate and defend this core relationship. It is, however, an approach that ought to be justified by reference to other candidates of analysis like that of Foucault, Elias, the Marxist school, and more conventional accounts of penal 'progress'. Punishment in the West underwent a profound transformation during the nineteenth century and Australia was not exempt from the move away from public, violent and bodily penalties. It is only natural to situate the abolition of public executions within the existing conceptual literature on penal change in the hope that others working in different historical contexts may, in some small way, benefit from the example.

[198] Penny Russell, *Savage or Civilised?: Manners in Colonial Australia*, Sydney: The University of New South Wales Press, 2010.

[199] The term 'culturalist' as an approach to understanding penal change has been used in the secondary literature to varying degrees. The phrase was used explicitly in John McGuire's paper on colonial executions to denote the approach outlined by Garland. See McGuire, 1998, p.209.

CHAPTER 2

The Abolition of Public Executions in Colonial Australia

This chapter concerns the passage of the 'Private Execution Acts' through the Australian colonial parliaments during the period 1853 to 1871. Examining the wording of the Acts illustrates how this reform irrevocably changed the personality and character of capital punishment across the colonies. Passing such legislation comparatively early within the context of the British Empire tells the historian something about the desires and insecurities of colonial Australians. Ultimately, I argue that the trigger for introducing these Acts, especially in New South Wales, came from a culturally loaded desire to appear 'civilised' to the outside world and distance the Australian colonies from their often chequered beginnings. Anxiety over the behaviour of the crowd, the dying criminal and the gory execution procedure are also commonly referred to in the parliamentary debates and press comment on public executions. These threads of the debate are expanded upon fully in Part 2 but, in the meantime, the thoughts of lawmakers and journalists provide something of an introduction to the substance of their concerns.

The Private Execution Legislation

The history of the death penalty in Australia, in the Euro-centric sense studied here, began in 1788 when the English criminal law travelled to Australia along with the passengers of the First Fleet. The Charter of Justice for New South Wales issued in the Letters Patent of 2 April 1787 directed the establishment of a Court of Criminal Jurisdiction to deal with serious offences in the new colony "according to the laws of this [the British] realm".[1] The Criminal laws imported from Britain were notorious for the high number of crimes punishable by death which numbered at least 223 by 1810.[2] Yet the Australian colonies were never fully moored to the British example as the

[1] Letters Patent quoted in Jo Lennan and George Williams, 'The Death Penalty in Australian Law', *Sydney Law Review*, vol.34, 2012, pp.659-694, quote on p.663. This first court of criminal jurisdiction also had a statutory basis as pertained in the *Act Constituting a Court of Criminal Judicature in New South Wales 1787* (UK) according to Patrick Parkinson, *Tradition and Change in Australian Law*, fifth edition, Sydney: Thomson Reuters (Professional) Australia Limited, 2013, p.136.

[2] Lennan and Williams, 2012, p.663.

debates over public executions demonstrate. Acts to abolish the practice of public executions were passed separately among the colonies without any top down direction from Britain or any official dialogue between the colonies to act collectively. It was a case of discreet colonial jurisdictions acting independently to abolish the bloody spectacle of public executions one after the other.

To state the obvious, the passage of the Private Execution Acts through colonial parliaments was only something that could take place when it was legally possible for lawmakers to do so. The *New South Wales Act 1823*, *The Australian Courts Act 1828*, *Australian Constitutions Act 1842 (No.1)*, *Australian Constitutions Act 1850 (No.2)*, and later the *Colonial Laws Validity Act 1865* were laws passed by the British Parliament that mark a transformative period in colonial Australian legal history.[3] The individual Constitutions for each Australian colony were also approved by the Imperial Government in London between 1854 and 1855 for Van Diemen's Land, New South Wales, Victoria and South Australia whereas Western Australia waited until 1890 for the approval of its own Constitution.[4] By the mid-1850s all Australian colonies besides Western Australia emerged with a partially elected bicameral parliament with the power to initiate legislation, a Governor constrained by the advice of his Executive Council, and a court system closer to that found in England.[5] In short, so long as the colonies did not pass any legislation completely 'repugnant' to the laws of England, the autonomy of their statutes would be respected by London. Such reforms were, to quote one legal academic referring to New South Wales, enough to transform it from a "penal colony under military leadership to … a nascent civil society".[6]

For the Australian colonial governments of the 1850s enabled by this greater law-making autonomy, capital punishment as a penalty was still acceptable but the manner in which it was carried out was not. The 'Private Execution Acts' (these Acts were officially titled differently across the colonies) converted this sentiment into law. New South Wales, Victoria and Van Diemen's Land all proclaimed an Act to abolish public

[3] For the importance of these Acts to the legal history of colonial Australia, see Parkinson, 2013, pp.127-154.

[4] *Ibid.*, p.148.

[5] *Ibid.*, pp.127-154.

[6] *Ibid.*, p.150.

executions in 1855.[7] South Australia proclaimed an end to public executions in 1858 while Western Australia waited until 1871 to follow the example set by the colonies to the east.[8] In the case of modern-day Queensland private executions were adopted in 1855 since it was under the administrative jurisdiction of New South Wales until 1859.[9] Though the Act was proclaimed in New South Wales and Victoria in 1855, this hides the fact that the Bill actually passed its third reading much earlier. In the Parliament of New South Wales a successful third reading occurred in August 1853, while in November 1854 the Bill passed its third reading in the Victorian Parliament.[10] The lengthy delay in proclaiming the Bill was due to the fact that, in both cases, it was sent to England for Royal Assent.

Pre-empting England with this reform was a contentious point for the two earliest colonies, hence the need for Royal Assent. At the time the reform was deemed "so novel", to borrow the words of New South Wales Attorney-General John Plunkett, that it needed to be double-checked by the 'mother-parliament'.[11] Plunkett had "no hesitation" in suggesting that "the Governor-General [of New South Wales] ought not to give his assent to any such measure until it had been referred home for the decision of the Queen".[12] After being transmitted to England, *An Act to Regulate the Execution of Criminals* was officially proclaimed in New South Wales on 10 January 1855, a full seventeen months following its initial passage through Parliament.[13] By late November

[7] New South Wales, no.40 of 1853, *An Act to Regulate the Execution of Criminals*, 1855; Victoria, no.44 of 1854, *An Act to Regulate the Execution of Criminals*, 1855; Van Diemen's Land, no.2 of 1855, *An Act to Regulate the Execution of Criminals*, 1855.

[8] South Australia, no.23 of 1858, *Act to Regulate the Execution of Criminals*, 1858; Western Australia, no.15 of 1871, *An Act to Provide for Carrying Out of Capital Punishment Within Prisons*, 1871.

[9] Queensland affirmed its position in favour of private executions when law-makers included the measure in the first consolidation of the criminal code, see Queensland, no. 13 of 1865-1866, *Criminal Consolidation Act*, 1865-1866, sections 58-63.

[10] For a record of the Bill passing its third reading in the Parliament of New South Wales, see New South Wales, *Votes and Proceedings of the Legislative Council* (hereafter *VPLC*), vol.1, no.48 of 1853, 17 August 1853; *The Sydney Morning Herald*, 18 August 1853, p.2. For evidence that the Bill was read a third time and passed in Victoria, see *The Argus*, 15 November 1854, pp.4-5; *The Argus*, 24 November 1854, p.4.

[11] *The Sydney Morning Herald*, 21 July 1853, p.2.

[12] The Colonial Secretary of New South Wales, Edward Thomson, fully endorsed Plunkett's position, see *ibid*.

[13] For evidence of Royal Assent being granted in the case of New South Wales see footnote 'a' in New South Wales, no.40 of 1853, *An Act to Regulate the Execution of Criminals*, 1855.

1854, when the Bill had been successfully read a third time in Victoria, news had not yet arrived of New South Wales' success in gaining approval from England. Thus, Victoria also joined its northern neighbour in bypassing the Governor's approval and sent the Bill to England for Royal Assent.[14] On 10 October 1855, almost a year later, it was announced in the Victorian *Government Gazette* that Her Majesty's Assent had been granted.[15] Conversely, in Van Diemen's Land, South Australia and Western Australia, the resident Governors, not the Queen of England, gave their Assent to the various Bills concerning private executions – the precedent of New South Wales and Victoria having already been set.[16]

John Darvall, a former barrister-cum-parliamentarian, was the only person to seriously question the need for Sydney to reserve the Bill for Royal Assent:

> What had the Imperial Government to do with the question [of private executions]? Really, after all their struggles for self-government … it would come to this, that they could not have a gutter cleansed without asking permission from home.[17]

Darvall viewed the alteration of the execution procedure as a "purely local and municipal" issue that did not require an opinion from the 'Imperial Government'.[18] It was a concern that does have a legitimate legal basis since the precedent throughout the colonial era was to only reserve bills for Her Majesty in England that were of an Imperial concern, rather than that of a local character.[19]

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[14] *Portland Guardian and Normanby General Advertiser*, 7 December 1854.

[15] *Victorian Government Gazette*, 9 October, 1855, p.2561; Victoria, no.44 of 1854, *An Act to Regulate the Execution of Criminals*, 1855.

[16] Despite the fact that Victoria began the legislative process in September 1854, Van Diemen's Land actually beat Victoria by nine days in putting the reform into practice by avoiding the time required to send the Bill back and forth between England and Australia. Lieutenant-Governor of Van Diemen's Land, William Denison, proclaimed an end to public executions on 1 October 1855. For details, see *The Hobarton Mercury*, 10 August 1855, p.4; *Launceston Examiner*, 16 August, 1855.

[17] *The Sydney Morning Herald*, 21 July 1853, p.2.

[18] *Ibid.*

[19] This division of power between the centre and the periphery of the British Empire, although sometimes murky, is a good example of what has been viewed as an alternate precursor to the version of Australian Federalism that found full voice after 1901.The more conventional explanation is that Australia's version of Federalism was developed from the practical and constitutional experience of the United States, see

The pioneering legislation of New South Wales (see Appendix One) came with five specific clauses. As had always been the case, Section 1 of the Act still put the responsibility of running the execution in the hands of the Sheriff or someone to whom he expressly delegated this responsibility.[20] It also declares that the execution must occur "within the walls of the Prison of the Country City Town or District in which the conviction was had or within the enclosed yard of such Prison".[21] This is the crucial clause that gave hangings their newly 'private' character. From this point on the gallows across the colonies were mounted differently or covered up in ways that made the scene invisible to those outside the prison (see Chapter 4). Section 2 of the New South Wales Act outlines who could watch:

> The Sheriff Under Sherriff or Deputy as aforesaid shall be present at such execution together with the Gaoler and proper Officers of the Gaol including the Physician or Surgeon together with all Magistrates who shall think fit and such Constables Military Guard and adult Spectators as the said Sheriff Under Sheriff or Deputy as aforesaid may think fit.[22]

The legal and medical functionaries mentioned by name are the same that were needed to successfully carry out a public execution. The key part of this clause was that the Sheriff now had the power to admit any "adult Spectators", chosen from among the general public, to view the execution. In fact, all the colonies stipulated that the Sheriff had this specific power over admittance. The only variation was in Western Australia where the legislation specifically mentioned that "such relatives of the prisoner" were allowed to view the private hanging.[23]

Richard Lucy, 'The Division of Powers Between the British Empire and its Australian Self-Governing Colonies, 1855-1900, *Australian Journal of Law and Society*, vol.6, 1990, pp.83-96.

[20] The responsibility to run the execution is distinct from the power to commute and pardon criminals which always rested solely with the Governor, and later, the Governor in consultation with his Executive Council, see Lennan and Williams, 2012, p.663.

[21] New South Wales, no.40 of 1853, *An Act to Regulate the Execution of Criminals*, 1855, section 1.

[22] *Ibid.*, section 2.

[23] Western Australia, no.15 of 1871, *An Act to Provide for Carrying Out of Capital Punishment Within Prisons*, 1871, section 3.

The three remaining sections in the New South Wales Act were largely designed to organise procedural guidelines. The Sheriff is directed not to allow anyone to leave the place of execution until the medical officer signs a form declaring that the criminal's life had expired. Similarly, gaol officers and any public spectators must sign another form stating that they were witness to the death.[24] Any false testimony regarding witnesses and medical statements came with a maximum penalty of fifteen years transportation. Although penalties for false declarations were present in each of the other colonies, the punishment in New South Wales was the most severe for this kind of transgression. The Sheriff was directed to lodge these documents with the Supreme Court in Sydney for their safekeeping and news of the hanging was to be twice published in the *Government Gazette*.

The central point of departure between the different Acts passed by the colonies (see Appendix One) was how to guarantee procedural transparency and make people aware that an execution had occurred. Coronial Inquests following the execution were required by law in every colony except New South Wales and Van Diemen's Land. In these two remaining colonies the signing of declarations from witnesses to the execution and the medical officer certifying the success of the hanging was deemed suitable enough to satisfy the public mind. Only in Victoria was it possible, upon a clause originally suggested by the Attorney-General, for any person in the colony to be able to view the dead criminal's body within eight hours of the hanging – so long as they had permission from a Justice of the Peace.[25] In the interests of adequately publicising the judicial execution (and in the very rare case that the newspapers avoided comment on the issue), every colony except Western Australia stipulated that news of the death must be published in the colony's *Government Gazette*.

Western Australia's guarantee of transparency and due process deviated the most from that of other colonies. It was the only colony where the sheriff and witness declarations

[24] Tasmania has an extensive collection of these official statements signed by public witnesses and medical practitioners ranging from 1856 to 1946, see 'Copies of Declaration by Witnesses and Doctors of the Execution of Convicted Persons, 1 January 1856 to 31 December 1946', Tasmanian Archives, SC485/1/1.

[25] Victoria, no.44 of 1854, *An Act to Regulate the Execution of Criminals*, 1855, section 4.

as well as the Surgeon's medical certificate had to be displayed "on or near the principal entrance of the prison" where the execution took place for a minimum of twenty-four hours afterwards.[26] A duplicate of these documents were then sent to the Colonial Secretary's office for safekeeping. Western Australia was also the only colony to allow some room to manipulate the boundaries of the execution ceremony but only in so far as to accentuate the new qualities of the penalty. In the colony, the Colonial Secretary was given the power "from time to time" to "make such rules and regulations to be observed on the execution" that lends "greater solemnity" to the occasion.[27]

The first criminal in Australia to be hanged in accordance with the newly formed standards of a private execution was William Ryan on 28 February 1855 at Sydney's Darlinghurst Gaol.[28] Found guilty of disembowelling his wife in a drunken stupor, Ryan was led to the newly constructed gallows at the rear of the Gaol and composed himself by shaking hands with the clergymen as the moment of death neared. His final words spoken not long after 9am—"O! Lord have mercy upon my soul!"—echoed around the gaol yard with uncharacteristic clarity in the absence of the usually rowdy Sydney crowd.[29] As soon as the execution ended, the medical officer checked for a pulse, found Ryan dead, and signed the relevant form as stipulated by *An Act to Regulate the Execution of Criminals* which had been proclaimed a month prior. The small number of observers who attended also played their part, signing a witness statement confirming the death.[30] The execution became a simple fact twice printed in the *Government Gazette*, reported through the lens of newspapermen and only witnessed by a select few

[26] Western Australia, no.15 of 1871, *An Act to Provide for Carrying Out of Capital Punishment Within Prisons*, 1871, section 9.

[27] *Ibid.*

[28] John McGuire, 'Judicial Violence and the "Civilizing Process": Race and the Transition from Public to Private Executions in Colonial Australia', *Australian Historical Studies*, vol.29, no.111, 1998, pp.191-192; For primary accounts of Ryan's hanging, see *Empire*, 1 March 1855; *The Sydney Morning Herald*, 1 March 1855, p.5; *Bell's Life in Sydney and Sporting Reviewer*, 3 March 1855, p.2; *People's Advocate*, 3 March 1855.

[29] *People's Advocate*, 3 March 1855.

[30] The official documentation is reprinted in *The Maitland Mercury and Hunter River General Advertiser*, 10 March 1855, p.2.

members of the public. Ryan's death in 1855 was the archetypal example of a private execution ceremony that remained in place until Australia's very last hanging in 1967.[31]

The Parliamentary Debates

Dr Henry Grattan Douglass, a Member of the Legislative Council of New South Wales from 1851 to 1861, initiated the first Private Execution Act in Australia. He did so on the grounds that abolishing public executions would show the outside world, and especially Britain, how civilised the one-time penal colony of New South Wales was becoming. Parliamentary debates among the other colonies demonstrate a shared and profound dislike for the practice of public executions as well as a desire to keep up with the standard set by New South Wales. Opposition to the Bills revolved around concerns over maintaining due process and providing adequate transparency in the newly hidden world of private executions. New South Wales is separated from the remaining colonies in both this and the following section since it instigated the penal reform in Australia and requires closer attention.

The New South Wales Parliamentary Debates

Henry Grattan Douglass came to New South Wales from Ireland. A young surgeon, he was soon put in charge of the Parramatta General Hospital and appointed superintendent of the Female Factory.[32] He was also a key member of Sydney's Benevolent and Philosophical Societies at different times. Douglass was, briefly during the 1820s, appointed as a magistrate before being forced to resign after an accusation that he had behaved "improperly" during his time in charge of the Female Factory.[33] Douglass was uniquely positioned throughout his career to analyse criminal behaviour and punitive techniques from many different perspectives; as a medical practitioner, a magistrate presiding over cases, a one-time manager of female prisoners and finally as a lawmaker. He was a man who was, in his own words, "strongly opposed to capital

[31] The last person to be executed in Australia was Ronald Ryan on 3 February 1967. For details of his execution, see Mike Richards, *The Hanged Man: The Life and Death of Ronald Ryan*, Melbourne: Scribe publications, 2002, pp.369-396.

[32] K.B. Noad, 'Douglass, Henry Grattan (1790-1865)', *Australian Dictionary of Biography* 1966, http://adb.anu.edu.au/biography/douglass-henry-grattan-1987, viewed 20 August 2013; 'Dr Henry Grattan DOUGLASS (1790-1865)', *The Parliament of New South Wales* 2008, http://www.parliament.nsw.gov.au/prod/parlment/members.nsf/1fb6ebed995667c2ca256ea100825164/8a28df421cb43794ca256e69000968aa?OpenDocument, viewed 20 August 2013.

[33] *Ibid.*

punishments altogether" but was fully aware that his position was not shared by a majority of the New South Wales Parliament.[34] The abolition of public executions was something he pursued after a discussion during the Financial Estimates over a faulty set of gallows at Darlinghurst Gaol in Sydney.

Since it was last replaced in 1844, the wooden platform of the gallows at Darlinghurst Gaol had surrendered once more to the climate and rotted through.[35] Such a small matter of prison maintenance ought to have been dealt with quickly if not for the need to first discuss the matter on the floor of Parliament. Due process stipulated that the £500 needed to remove the old gallows and erect a new one needed to be included in the Government's Financial Estimates for that year. When the issue of gallows maintenance at Darlinghurst Gaol arose, it soon caught the ire of Douglass who was quick to retort that he would, "vote any sum to take it down, but not a farthing to set it up".[36] He then moved to reduce the amount of government money allocated to the reconstruction of the gallows by £200. The remaining £300 Douglass offered for the task was presumably only enough to take down the gallows but not enough to erect a new one.

Douglass' incidental defiance triggered a discussion on the floor of Parliament that revealed the other Members' disgust at the practice of public executions. The long serving Colonial Secretary of New South Wales, Edward Thomson, offered his view during the Financial Estimates that, "it was objectionable that the gallows should be constantly exposed; and on the subject of public executions ... the American practice of private execution was infinitely preferable on every ground".[37] Former solicitor George Nichols also advocated for private executions "under the eye of competent witnesses" rather than the rubbernecking general public. The Attorney-General John Plunkett agreed with the other Members that public executions had a "demoralising tendency" but suggested that the mood of the general public would be "against the extreme penalty

[34] *Empire*, 2 July 1853.

[35] Arthur L. Wintle, 'The Abolition of Public Executions in New South Wales', unpublished B.A. (Hons) thesis, La Trobe University, 1973, p.23; *People's Advocate*, 9 October 1852.

[36] *The Sydney Morning Herald*, 24 June 1853, p.2.

[37] *Ibid.*

of the law being carried out privately".[38] On Plunkett's advice, and after some further discussion on the topic of capital punishment more generally, Douglass removed his Amendment. He later said that after the Financial Estimates he continued to have conversations about public executions with many Members of Parliament (MPs) behind closed doors and found that the majority of lawmakers shared his desire for greater privacy.[39] It was a gap of only a few months before Douglass took leave to introduce a Bill with the intention of abolishing public executions in the colony.

Douglass formally introduced *An Act to Regulate the Execution of Criminals* in July 1853.[40] It was an action that he thought would indicate to the outside world, and especially to Britain, that New South Wales was now a civilised citizen of the nineteenth century and something more than just a former penal colony. According to the *Empire*'s account of proceedings, Douglass thought that the introduction of private executions "would be a step in advance for this colony to make, and it would set an example to the mother country, which they might worthily follow, although it emanated from a convict colony".[41] Douglass continued this theme later in his speech stating that "this would be a great advance in the civilisation of the criminal laws of the country".[42] *The Sydney Morning Herald*, another newspaper to offer an account of parliamentary debates in New South Wales, also noted Douglass' motive. *The Herald*'s version of his remarks picks up yet more of this vision for New South Wales to be defined by something other than convicts and punishment:

> No doubt the principle of private execution was new in England, but it was already in practice in Prussia, and also in America; and it was a grave consideration whether this colony, which had originally been a

[38] *Ibid.*

[39] *Empire*, 2 July 1853.

[40] The key dates of the Bill's passage through the Parliament are as follows: 1 July 1853 (Douglass took leave to introduce the Bill), 6 July (First Reading), 19 July (Second Reading), 9 and 10 August (Committee of the whole), 17 August (Third Reading). For confirmation, see New South Wales, *VPLC*, vol.1, no.26 of 1853, 1 July 1853; New South Wales, *VPLC*, vol.1, no.28 of 1853, 6 July 1853; New South Wales, *VPLC*, no.33 of 1853, 19 July 1853; New South Wales, *VPLC*, vol.1, no.43 of 1853, 9 August 1853; New South Wales, *VPLC*, vol.1, no.44 of 1853, 10 August 1853; New South Wales, *VPLC*, vol.1, no.48 of 1853, 17 August 1853.

[41] *Empire*, 2 July 1853.

[42] *Ibid.*

> penal settlement, should not take an initiatory step in this matter and show the whole world the progress which had been made in civilisation.[43]

The central concern with the legislation was to safeguard against any 'foul play'. Attorney-General John Plunkett put forth his opinion that he, "believed public executions were extremely demoralising; but at the same time he felt that the greatest caution must be exercised in making any change in the present practice, so as not to allow the slightest doubt as to the identity of the criminal."[44] In an earlier debate on the Bill, Plunkett also stated his opinion that public executions were still adhered to in England primarily because of an "innate hatred of concealment in British law".[45] That said, he agreed with Douglass that introducing private executions "was a measure quite in accordance with the great progress daily making in civilisation and enlightenment".[46]

The Solicitor-General, William Manning, agreed that care must be taken in drawing up the Bill as, in the new era of private executions, "the great point was to prevent the possibility of foul play".[47] James Martin, although not opposed on principle to the reform, thought that with hangings taking place in private it "would be exceedingly difficult to satisfy the public mind".[48] It was these types of concerns that demanded witness statements, medical certificates and other legal documentation be included in the final wording of the Act. Despite initial apprehensions, to hide away the violent spectacle inside the prison yard was a measure generally applauded by the legislators of New South Wales.

An Amendment proposed by George Nichols also tried to exclude women and children from being able to view a private execution. Nicholas stated in a motion that executions had a "demoralising and hardening influence" on all those who watched and that the

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[43] *The Sydney Morning Herald*, 2 July 1853.

[44] *The Sydney Morning Herald*, 21 July 1853, p.2.

[45] *Empire*, 2 July 1853.

[46] *The Sydney Morning Herald*, 2 July 1853, p.4.

[47] *The Sydney Morning Herald*, 21 July 1853, p.2.

[48] *Ibid.*

Governor of the gaol ought to exclude by law women and children from being admitted to private executions.[49] For Douglass their attendance had been a problem in the public era: "public execution of criminals was attended by a class of spectators whom they would least like to see present at such a spectacle—women and children—and they were always more impressed with pity for the criminal than with horror at the crime".[50] That said, the Amendment was narrowly defeated 19 to 18 on the grounds that when a woman was executed it might be desirable to have female witnesses.[51]

Before moving on to discuss the parliamentary debates in the other colonies, it is worth briefly noting the success of this Private Execution Bill in relation to later failures to abolish capital punishment as a whole. Various Bills hoping to abolish capital punishment reached their First Reading in the New South Wales Parliament on at least six occasions in the colonial era – 1859, 1861, 1870, 1872, 1895, and 1899.[52] These unsuccessful attempts meant that the punishment persisted well into the twentieth century, in the specific case of New South Wales the death penalty was abolished as late as 1985.[53] Thus, despite their similarities, the abolition of public executions and the abolition of capital punishment in Australia need to be treated as two separate reforms in the historical record. Juxtaposing the repeated failure to abolish capital punishment with the triumph of the Private Execution Bill in 1853 demonstrates that lawmakers carefully distinguished between these two issues. David Cooper makes a similar distinction in England. In Cooper's opinion, the English movement to abolish public executions had hitherto been treated "either as a footnote or as an appendage" to the history of capital punishment rather than a separate reform that deserved an "identity

[49] For the full wording of this proposed Amendment, see New South Wales, *VPLC*, vol.1, no.33 of 1853, 19 July 1853.

[50] *Empire*, 2 July 1853.

[51] Wintle, 1973, pp.61-62.

[52] For evidence of their First Reading, see *The Sydney Morning Herald*, 15 October 1869, p.4; New South Wales, *Votes and Proceedings of the Legislative Assembly* (hereafter *VPLA*), 15 January 1861, p.19; New South Wales, *VPLA*, 8 March 1870, p.98; *The Sydney Morning Herald*, 30 November 1872, p.5; New South Wales, *VPLA*, 22 October 1895, p.158; New South Wales, *VPLA*, 28 November 1899, p.235.

[53] Australian jurisdictions abolished capital punishment in the following order: Queensland (1922), Tasmania (1968), the Commonwealth (1973), Victoria (1975), South Australia (1976), Australian Capital Territory (1983), Western Australia (1984) and New South Wales (1985), see Sam Garkawe, 'The Reintroduction of the Death Penalty in Australia? – Political and Legal Considerations', *Criminal Law Journal*, vol.24, no.2, 2002, pp.101-108.

and history of its own".[54] To be precise, the introduction of private hangings in Australia was an agreement to amend the aesthetics of carrying out the death penalty rather than a challenge to the efficacy of capital punishment more generally.

The Parliamentary Debates in the Other Colonies

During the passage of the private execution legislation in New South Wales, *The Sydney Morning Herald*'s Melbourne correspondent was quick to offer his congratulations: "Your legislature is right in deciding that executions should be private instead of public ... It is very likely that some one of our new members will try his hand on a similar measure in our Council."[55] As it would turn out the transition to private executions in Victoria was initiated by the Lieutenant-Governor himself rather than an individual MP. On 26 September 1854 Lieutenant Governor Charles Hotham sent a brief communication from the Government Offices directing the Legislative Council to consider a draft of 'A Bill to Regulate the Execution of Criminals'.[56] The ability for the Colonial Governors to recommend legislation to the Parliament had been enshrined in the *Australian Constitutions Act 1850*.[57]

On the day following Hotham's communication William Stawell, the Attorney-General of Victoria, placed the Bill under the consideration of the Legislative Council. To Stawell such scenes were an "evil" that harmed both spectator and criminal:

> The ATTORNEY-GENERAL in moving the first reading of this bill, observed that much evil attended the present mode of executing criminals. It was injurious and demoralising both to the unfortunate culprit and to the spectators. The former had his thoughts distracted from the awful subject that ought to occupy them, by knowing that he

[54] David D. Cooper, *The Lesson of the Scaffold: The Public Execution Controversy in Victorian England*, London: Allen Lane, 1974, p.ix. It is also worth noting that, unlike in England, the push to abolish public executions in Australia was not complicated by its relationship to a broader movement desiring an end to capital punishment. For example, Henry Grattan Douglass was personally opposed to the death penalty but still championed private executions without expressing any fear that it would damage the feeling against capital punishment in New South Wales.

[55] *The Sydney Morning Herald*, 3 August 1853, p.2.

[56] Victoria, 'Execution of Criminals', *Victorian Parliamentary Papers*, B-no.7 of 1854.

[57] United Kingdom, Chapter 59 of 1850, *An Act for the Better Government of Her Majesty's Australian Colonies*, 1850, section 14.

> was to die in the presence of a multitude, and the latter were too often attracted to witness the dying struggles of a fellow creature by mere morbid curiosity.[58]

Stawell then noted that executions should take place within the prison walls and listed the type of functionaries that should be compelled to attend the event. According to *The Argus*, the first reading was met "without either opposition or discussion" in the House.[59]

In the committee stage the parliamentarian John Myles suggested that some people known personally to the condemned ought to be allowed into private executions to "sympathise with the criminal and pray for him".[60] It was a considerate gesture but one that was eventually defeated by the other Members who thought that it was still possible to convey consolation without the need to be physically present at the death. Victoria was a colony where the feeling against capital punishment ran high and many MPs spoke freely about the possibility of abolishing the penalty altogether. However, the Colonial Secretary, John Leslie, stated that this was "by no means a country in which the experiment of abolishing capital punishment could be tried" and the sole object of the measure before parliament was simply to "prevent the publicity of ... a 'necessary evil'".[61] The Attorney-General reiterated the Colonial Secretary's point, stating that the only question that need engage the house was simply "Shall we dispense with the public exhibition of criminals in their very last struggles?"[62]

In July 1855, *A Bill to Regulate the Execution of Criminals* was introduced in the Parliament of Van Diemen's Land.[63] Van Diemen's Land felt itself a step behind the

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[58] *The Argus*, 28 September 1854, p.4.

[59] *Ibid.* The only opposition occurred at a later reading when the Speaker of the House, James Frederick Palmer, expressed his anxiety that Victoria was not the place to trial private executions because people were so excitable that if they were denied the spectacle of death they might "flock to the gaol in such numbers as to take possession of the gaol". For details, see *The Argus*, 3 November 1854, p.4.

[60] *The Argus*, 3 November 1854, p.4.

[61] *The Argus*, 19 October 1854, p.4.

[62] *The Argus*, 26 October 1854, p.4.

[63] *The Courier*, 19 July 1855.

other colonies in initiating this reform. The Solicitor-General remarked that "The bill had been found sufficient in New South Wales, and he thought it would be found sufficient here."[64] Like in New South Wales, Members raised concerns over the appropriate safeguards which could prevent any possible corruption. The Colonial Secretary of Van Diemen's Land, William Champ, was someone well placed to judge such concerns being the former Commandant of Port Arthur but soon erased them believing that "There was a vast difference between a 'private' execution and a 'secret' one."[65]

Three years passed before South Australia decided to adopt legislation mimicking the reforms of the colonies to the east.[66] On 21 September 1858 the Chief Secretary, William Younghusband, rose to give the first reading of the Bill in the Legislative Council to abolish public executions. He thought that public executions had a tendency to "demoralise" those who attended, and questioned the power of the gallows to deter saying that it "had no beneficial result as an example".[67] To strengthen his support for the Bill, Younghusband was quick to tell the Parliament in the first reading that (with ignorance in respect to Western Australia's predicament) "A similar law was in force in all the other Australian colonies."[68] The Commissioner of Public Works, Arthur Blyth, raised a similar point saying that South Australia needed to become "assimilated" with the other colonies who had already "adopted the plan of private execution".[69]

Public executions were maligned for encouraging misbehaviour on the part of the criminal and corrupting the innocent. William Townsend remarked that at public executions "the man who was to die went up to the scaffold with courage he was a hero,

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[64] *The Courier*, 1 August 1855, pp.2-3.

[65] *Ibid.*

[66] It should be noted that South Australia is the first colony where an official Hansard exists for the debate over private executions. Previous to that colonial newspapers had dutifully copied down the speeches of Members and reprinted them for public consumption with varying degrees of detail and length.

[67] *South Australian Parliamentary Debates* (hereafter *SAPD*), 21 September 1858, p.173.

[68] *Ibid.*

[69] *SAPD*, 7 October 1858, p.331.

his likeness was taken, and his form was embodied in waxwork for the public gaze."[70] William Burford remarked how "the love of notoriety and the pride of dying game would be done away with" which would finally lead criminals to receive punishment in the "proper spirit".[71] As for the crowd at public executions in South Australia, Arthur Blyth stated that, "They were attended by a greater proportion of the female portion of the community than of the male, and even children and infants were taken to view them."[72]

Interestingly, South Australia was the only parliament to suggest that prisoners, like members of the general public, ought to be shielded from the spectacle of executions. If the prevailing logic was that the general public were 'demoralised' by the hanging of a criminal, it should follow that lawmakers would be keen to hide the spectacle from those that might be susceptible to further debasement. Thus, the proposed solution of William Burford, a man well-known in Adelaide for his strong religious convictions, was to establish a separate gaol, "specially set apart for the execution of criminals, in order not to run the risk of contaminating other prisoners".[73] However, the Treasurer, Boyle Finniss, opposed the construction of a so-called "public slaughterhouse" because it was not only costly but "indecorous and improper to have a building of this kind".[74] After some further cajoling over how news of private executions might be distributed, the legislation eventually passed the second and third reading with little trouble.[75]

The central opposition encountered in the South Australian debate of 1858 centred on reservations about introducing private executions for Indigenous offenders. For some MPs, the execution of an Indigenous offender ought to remain public and occur at the scene of the crime, as was the current practice in South Australia. This aspect of the

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[70] *Ibid.*

[71] *Ibid.*, p.332.

[72] *Ibid.*, p.331.

[73] *Ibid.*, p.333.

[74] *Ibid.*

[75] William Townsend suggested an Amendment compelling at least two South Australian newspapers publish news of a private hanging. It was dismissed on the grounds that an execution would be newsworthy enough for newspapers to write about, without having to be compelled to do so by law. For details, see *ibid.*, pp.333-334.

South Australian parliamentary debate, and the eventual triumph of this position in 1861, is discussed at length in Chapter 3.

It was not until January 1871 that the Parliament of Western Australia passed a Bill to abolish public executions. This was almost two decades after the New South Wales' legislature had mooted the possible introduction of a new and more discreet mode of capital punishment in its parliamentary chambers. Unfortunately the primary documents surrounding the passage of the private execution legislation are reticent in providing an explanation for the delay. After being read a first time at the Western Australian Legislative Council on 7 December 1870, the second reading took place on 19 December 1870. But instead of a lengthy discussion on the Bill that usually takes place upon the second reading (as was the case in the other Australian colonies), Hansard simply states: "The bill was read a second time, and passed through Committee, without discussion."[76] *The Perth Gazette and Western Australian Times*' version reads almost identically but adds that it was "passed without amendment".[77] As for the third reading of the Bill, it took place on 28 December 1870 and was assented to five days later on 2 January 1871.[78] The complete lack of newspaper comment surrounding the Act suggests support for the measure rather than division. As evidence for such a view, there were some calls in the newspapers before 1871 urging the authorities to abolish public executions and align themselves with the example found in the other colonies.[79]

The Reaction of the Colonial Newspapers

The response of the colonial newspapers to the Private Execution Acts as they were under the consideration of the colonial parliaments was overwhelmingly supportive. Public executions were seen as demoralising spectacles that benefited neither spectator nor criminal. Like in the Parliamentary debates, banishing public executions was seen as advancing the cause of civilisation in the colonies. To the newspapers, capital

[76] *Western Australian Parliamentary Debates*, 19 December 1870, p.54.

[77] *The Perth Gazette and Western Australian Times*, 28 December 1870, p.4.

[78] *The Inquirer and Commercial News*, 4 January 1871, p.3; Western Australia, no.15 of 1871, *An Act to Provide for Carrying Out of Capital Punishment Within Prisons*, 1871.

[79] See, for example, *The Perth Gazette and Western Australian Times*, 15 October 1869; *The Inquirer and Commercial News*, 17 July 1867.

punishment as a whole was acceptable to the majority but the 'barbarous' manner in which it was being carried out needed fundamental reform.

Newspaper Comment in New South Wales

While the legislation was under the consideration of the New South Wales Parliament, *The Sydney Morning Herald* offered its cautious support, stating that the current mode of execution was beyond repair. As a whole, public executions needlessly excited "morbid passions" and often struck the tone of "cold-blooded revenge", rather than that of a solemn punishment.[80] The newspaper came down exceptionally hard on the "criminal rabble" who insisted on attending with an attitude not appropriate to the occasion: "Brutalising, public executions certainly are; and, in as far as example is concerned, it may be doubted whether the terror they are intended to inflict is equal in force to the disgust or the pity they generate."[81] For *The Sydney Morning Herald*, the death penalty was still very much necessary to deter crime but the current mode of execution was simply not hitting the right notes.[82] The newspaper also cautioned against the growing secrecy of the punishment ensuring that it must still "meet the just and stern requirements of public justice".[83] In its public comment, the newspaper was at pains to protect the transparency of the punishment in this new era of private executions.

The *Freeman's Journal*, another Sydney publication supporting the Bill before Parliament, was surprised that no one in the colony had thought of this reform earlier: "It appears somewhat strange in an age of such maudlin sentimentalism and spurious humanity as the present, that no philanthropist or statesman has taken up the question before now."[84] It also thought the crowd who came to watch were a blight on the age: "We do sincerely hope that public executions will be abolished, and the shameful spectacle taken away, of women and children, prentice boys and older fools running

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[80] *The Sydney Morning Herald*, 12 July 1853, p.2.

[81] *Ibid.*

[82] *The Sydney Morning Herald* was very much in favour of retaining capital punishment. It was even called the "gibbet-loving *Herald*" by a rival publication only a few years earlier, see *Bell's Life in Sydney and Sporting Reviewer*, 23 September 1848.

[83] *The Sydney Morning Herald*, 12 July 1853, p.2.

[84] *Freeman's Journal*, 23 July 1853, pp.7-8.

with all speed from their respective occupations to witness the last convulsive movements of a fellow mortal, as if it were a matter of public rejoicing or some exhilarating scene of innocent amusement."[85] As for *The Sydney Morning Herald*'s concern over the transparency of private executions and the capacity for corruption, the *Freeman's Journal* was unfazed by the possibility. With characteristic acerbity it advised its rival publication to "discard all such old womanish apprehensions" and "frightful nursery maids' tales".[86]

Regional newspapers appeared to be in agreement with those of the city on the issue of public executions. *The Maitland Mercury*, for example, thought it was time that women and children were shielded from proceedings and saw very little "beneficial purpose" that public executions could serve.[87] The *Bathurst Free Press and Mining Journal* was very much disgusted at the spectacle and those who attended saying that, "A raree show, a horse race, bull bait, or man fight will not excite half the curiosity in the vulgar and unfeeling which is stirred up by the spectacle of a dying wretch struggling out his last breath at the rope's end."[88] As for moving before England in this reform, the paper offered some words of encouragement to any nervous MPs:

> Whilst but too happy to borrow all that is excellent or praiseworthy in the institutions of the mother country, we protest against the folly of copying her errors. And it will be highly credible to the enlightenment and public feeling of New South Wales, if the first step be taken by her legislature towards the reform of an abomination which has long been a scandal to civilisation.[89]

Newspaper Comment in the Other Colonies

Upon hearing the news of the Victorian Parliament's success in gaining Royal approval for the introduction of private executions, *The Argus* published a strongly worded piece

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[85] *Ibid.*

[86] *Ibid.*

[87] *The Maitland Mercury and Hunter River General Advertiser*, 30 July 1853, p.2.

[88] *Bathurst Free Press and Mining Journal*, 9 July 1853, p.2.

[89] *Ibid.*

entitled 'The Private Gallows'. It offered unconditional support for the reform as well as outlining the benefits privacy might bring to the overall decorum of the spectacle. First of all, the "crowds of scum" who ritually assembled at the base of the scaffold would henceforth be a relic of Victoria's barbarous past.[90] Thankfully, in the absence of a crowd, it thought the criminal would feel no obligation to act like a hero or a martyr as had been the case in the era of public hangings:

> The heroism of the gallows will be destroyed; and the convict, instead of being elevated by the sympathy of the spectators to the dignity of the martyr, or by his own morbid self-esteem to that defiant position which has been supposed to be attained by those who 'die game,' will part from the world under the eye of the few authorised to witness his departure better fitted to meet that Presence into which he is to be so suddenly thrust.[91]

The Argus labelled public executions "horrid", "degrading" and "demoralising" while looking forward to a future where capital punishment was stripped of its festive tone.[92] Given the subdued nature of the private gallows, the newspaper hoped that "depravity will no longer have excuse for holding holiday on occasions when the circumstances ought to suggest fasting and humiliation rather than a festival".[93] The article was also careful to put the Act on a grander plane, seeing it as evidence of enlightened progress occurring in the colony of Victoria and one step before the abolition of capital punishment as a whole: "We are now about to put in practice a law which, though a startling innovation upon English precedent, may fairly be considered a sign and proof of an advancing civilisation, destined, we trust, in time, wholly to supersede death punishments."[94]

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[90] *The Argus*, 19 October 1855, p.4.

[91] *Ibid.*

[92] *Ibid.*

[93] *Ibid.*

[94] *Ibid.*

The newspapers of Van Diemen's Land were similarly supportive of the push toward private executions. An impatient *Hobarton Mercury* thought that the reform was overdue:

> It is quite time that the disgusting exhibitions, which have so long pampered the morbid curiosity of the ignorant and the vicious, should come to an end ... Every essayist now-a-days has something to say on such subjects, until we are wearied to death of the theme, and our only wonder is how people have tolerated public executions so long. They ought to have gone out with bear-baiting, thirty years ago.[95]

The *Colonial Times* viewed the disappearance of public death from Hobart's streets as much needed: "Nothing can be more opposed to the philosophy of punitive discipline; or so injurious, in the main, to the interests of society."[96] *The Courier* also praised the move stating that it was, "in consonance with that spirit of improvement of the law which has so creditably distinguished England of late years".[97] As news of the legislation travelled north to Launceston, *The Cornwall Chronicle* was similarly relieved by the thought of a calm, contemplative criminal on the drop: "instead of being diverted from the solemnity of their eternal preparation by the presence of ancient comrades of their own stamp, who come to see whether they die craven, or game ... will find in the presence of a few staid men, only an additional incentive ... to a reverential, penitent, and submissive demeanour."[98]

The South Australian press rejoiced at the prospect of introducing private executions into the colony. The *South Australian Register* was quick to offer its best wishes for the success of the Bill thinking it conducive to cultivating an improvement in "public morals".[99] For the newspaper, public executions were linked to the old tyrannical regimes of Europe, not the quickly civilising colony on Australia's southern shores:

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[95] *The Hobarton Mercury*, 25 July 1855, p.2.

[96] *Colonial Times*, 24 July 1855, p.2.

[97] *The Courier*, 3 August 1855, p.2.

[98] *The Cornwall Chronicle*, 28 July 1855, p.4.

[99] *South Australian Register*, 2 October 1858, p.2.

> The advancement of society in Europe generally has tended to eradicate the odious practices which subjected the criminal to torture as a precedent of death. We believe that breaking on the wheel, the rack, and other medieval inventions for prolonging the sufferings of those doomed to death are now banished from those States which belong to the great European family; if they linger at all, it is among those nations who yet groan under the worst tyrannies. In our native land these practices never took root, and disappeared with the light and freedom which accompanied the Reformation.[100]

An added bonus for the *Register* was that volatile interactions between crowd and criminal could be tempered: "There will be no inducement to cultivate a spirit of bravado – no encouragement to 'die game;' there will be the consciousness that those who witness the scene, are either the cold, official functionaries of the law, or those whose emotions vibrate between abhorrence of the criminal and pity for the man."[101]

Unusually, *The South Australian Advertiser* took a similar stance to its counterpart in both tone and content. It believed that the "virtuous recoil with disgust" at public hangings whereas only the "profligate and abandoned attend an execution as they would a race, a fair, or a play".[102] In the *Advertiser*'s opinion public hangings were:

> [A] rallying point for the outcasts of society … a fruitful harvest-field for pickpockets, ruffians, and harlots; it is a region of fearful moral contagion to the idle and the curious, who follow apathetically in the course of the stream, or are led by morbid inquisitiveness to see a man die; it is, in fact, precisely the place where the better qualities of human nature run great risk of defilement, and where vice discovers the most fruitful and congenial field of action.[103]

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[100] *Ibid.*

[101] *Ibid.*

[102] *The South Australian Advertiser*, 8 October 1858, p.2.

[103] *Ibid.*

Furthermore, it also believed that the imagery of violent death emanating from the scaffold was one that created more criminals than it deterred. The newspaper thought that public hangings were a "seed-time" from which many "crime-harvests" would soon follow.[104] It continued: "The lesson which the hangman teaches is not of an ameliorating, not of a refining, not of a reformatory, not even of a terrifying character."[105] Instead, the paper viewed the public scaffold as "purely a lesson in crime, a lesson in demoralisation, a lesson in the downward series, terminating in the abysses of shame, crime, and ruin".[106] Like the *Register* though, it too saw this legislation as proof of the advancing civilisation of the age: "We think that the friends of humanity will rejoice in this triumph of reason and civilisation over the degrading relics of a barbarous age."[107] *The Advertiser* continued that public hangings are "one of the last lingering vestiges of a barbarous *regime*, and, thank God, it is about to disappear".[108]

The Cultural Legacy of Convictism and the Timing of the Transition

The proclamation of the Private Execution Acts through Australian colonial parliaments beginning in 1855 was early in the context of the British Empire. It anticipated the United Kingdom itself while comparable settler colonies like New Zealand, Canada and the Cape of Good Hope were similarly delayed. New Zealand was the first to follow the example of New South Wales by abolishing public executions in 1858.[109] Lawmakers were convinced of the "demoralising tendency" of public executions and were prompted to act on the issue by a Memorial from the Auckland Provincial Council suggesting that reform was needed.[110] Canada and the Cape of Good Hope waited until 1869 to abolish public executions, both within a year of Britain passing the reform in

[104] *Ibid.*

[105] *Ibid.*

[106] *Ibid.*

[107] *Ibid.*

[108] *Ibid.*, emphasis original.

[109] New Zealand, no.10 of 1858, *Act to Regulate the Execution of Criminals*, 1858.

[110] *Hawke's Bay Herald*, 5 June 1858, p.6.

1868.[111] In the Canadian Parliament a Bill advocating private executions was first suggested by an MP named Alexander Morris as early as December 1867 but it took until 1869 for it to be included in a much larger Act pertaining to procedure in criminal cases.[112] The central motivation for Morris appeared to be that Britain and some substantial jurisdictions in Europe and America had already introduced private executions, though the Australian colonies were not mentioned among his examples.[113] Uncovering the motivations of lawmakers in the Cape of Good Hope becomes difficult upon learning how scarce official records are for the 1869 parliamentary debates owing to an economic depression.[114]

Whatever the individual justification of each far-flung parliament, the fact that the Australian colonies were the pacesetter in the British Empire in regards to private executions requires further investigation. A cursory knowledge of colonial history is enough to know that the key difference between the Australian colonies and the other substantial British settlements is their long association with convicts. Indeed, Australia's convict past explains why Henry Grattan Douglass originally felt the need to prove to the world that New South Wales was fast becoming civilised through the introduction of private executions. The comparatively early introduction of private executions in the Australian colonies ought to be understood by reference to this broader narrative. Moreover, private executions were an affirmation of a 'civilised' sense of self, a reminder of their worldly advancement against the backdrop of a penal past and the challenges of frontier society.[115]

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[111] Canada, Chapter 29 of 1869, *An Act respecting Procedure in Criminal Cases, and other matters relating to Criminal Law*, 1869, sections 106-124; Cape of Good Hope, no.3 of 1869, *For regulating the Execution of Capital Punishment*, 1869.

[112] *Canadian Parliamentary Debates*, House of Commons, 13 December 1867, p.271; *Canadian Parliamentary Debates*, House of Commons, vol.2, 28 April 1869, p.95.

[113] *Canadian Parliamentary Debates*, House of Commons, vol.2, 28 April 1869, p.95.

[114] Peter Ralph Coates, 'Cape Colonial Parliamentary Publications, 1854-1910, with Special Reference to Documents in the Dutch language', unpublished Information Science M.A. Thesis, University of South Africa, 2009, p.93.

[115] A similar idea to this—that private executions were a performative affirmation of civilised identity—is pursued by Jürgen Martschukat in the context of Hamburg, Germany, a jurisdiction that introduced private executions in 1854. For his perceptive essay, see Jürgen Martschukat, 'Nineteenth-Century Executions as Performances of Law, Death, and Civilization', in Austin Sarat and Christian Boulanger (eds), *The Cultural Lives of Capital Punishment: Comparative Perspectives*, Stanford: Stanford University Press, 2005, pp.49-68.

Australia Imagined (2005) is a primary source compendium examining how the British periodical press constructed Australia during the colonial era and provides written evidence for the colonies' image problem abroad. In the introductory essay Judith Johnston and Monica Anderson acknowledge that before the discovery of gold, the "general tone" of the British press toward Australia was "one of disparagement, due solely to the transportation of convicts".[116] It is hard to disagree with such an assessment upon further examination of the printed extracts they provide. Sydney Smith's work published in the *Edinburgh Review* of 1819 viewed New South Wales as a "sink of wickedness" and a place where convicts go to "become infinitely more depraved".[117] Smith then compared New South Wales to a sunken marsh that "may be drained and cultivated" but, in the meantime, "no man who has his choice, would select it … for his dwelling-place".[118] In a separate extract from 1849 written by William Smith O'Brian, a prominent Irish nationalist turned transportee himself, Britain is squarely blamed for creating in Australia a "school of sin", "nurseries of depravity" and a collection of colonies "drowned with the flood of her own wickedness".[119] Another example comes from the London publication *Leisure Hour* which conducted a five part overview of the Australian colonies in 1852. Despite being generally hopeful for their future, it began by remarking how: "Persons of mature age can well remember the time when Australia, the 'great south land', was invested with no pleasing associations, and would have been regarded as the last spot on the surface of the globe to be voluntarily selected as a home."[120]

Insecurities over the standing of the Australian colonies in the civilised world were perceptible on the continent itself. As the authors of *Australia Imagined* rightly point out, the disparaging views of the British press were being "overheard" by the colonists

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[116] Judith Johnston and Monica Anderson, *Australia Imagined: Views from the British Periodical Press: 1800-1900*, Perth: University of Western Australia Press, 2005, p.3.

[117] Sydney Smith, 'Botany Bay', *Edinburgh Review*, vol.32, 1819, pp.28-48, as reprinted in *ibid.*, p.36.

[118] *Ibid.*, p.37.

[119] William Smith O'Brian, 'Transportation as it now is', *Edinburgh Review*, vol.90, 1849, pp.1-39 as reprinted in *ibid.*, p.28.

[120] 'Australia. I – Its General Features and Resources', *Leisure Hour*, vol.1, 1852, pp.497-501 as reprinted in *ibid.*, pp.43-44.

themselves, since many of these periodicals were circulated, purchased and read in Australia very soon after publication.[121] Commenting on Australia's lack of renown abroad, *The Courier* of Hobart printed an article in 1851 entitled 'The Reputation of the Colony'.[122] It regretted how the British public would never consider "penal colonies as fields of national glory" and thought that the reputation of both New South Wales and Van Diemen's Land had been "very much injured by the uses to which they have devoted them".[123] It continued by stating that: "Every judge, in pronouncing the sentence of the law, makes a point to allude to this country in no very flattering terms."[124] When the London correspondent for *Bell's Life in Sydney and Sporting Reviewer* in 1849 said to, "Thank your kind stars that you are living far away from civilised life", the newspaper did not take kindly to the intended compliment. Such an accusation was labelled a "slur" and the newspaper complained as to "Why should it be that this vast country be marked out by them as a blot upon the map of the world, and its sons held up as but one degree removed from the dusky savages whom civilisation has displaced?"[125] A senior figure in the early Australian Catholic Church, William Ullathorne (see Chapter 5 for more on Ullathorne), was another keenly aware of Australia's reputation abroad. If the standing of the colonies was not quickly remedied, he thought that the "nation of crime" would soon become "a by-word to all the peoples of the earth".[126]

With a need to transform the image of Australia abroad and insecurities perceptible among the colonists themselves, a natural correlation emerges between the introduction of private executions and the legacy of convictism. For the three colonies that proclaimed an end to public executions in 1855—New South Wales, Victoria and Van Diemen's Land—all had recent experiences with convicts to varying degrees. New South Wales ceased transportation in 1840 (ignoring a brief resumption in 1848), Van

[121] *Ibid.*, p.2.

[122] *The Courier*, 22 February 1851, p.2.

[123] *Ibid.*

[124] *Ibid.*

[125] *Bell's Life in Sydney and Sporting Reviewer*, 18 August 1849.

[126] William Ullathorne quoted in James Boyce, *Van Diemen's Land*, Melbourne: Black Inc., 2008, pp.236-237.

Diemen's Land accomplished the same in 1853 whereas the experience with convicts in the Port Phillip District (later Victoria) was miniscule by comparison and over by 1849.[127] Between 1850 and 1868 Western Australia accepted almost 10,000 British convicts before it too abolished public executions only three years later in 1871.[128] South Australia was unique in that the adoption of Edward Gibbon Wakefield's plan for 'Systematic Colonisation' circumvented the need for convict labour, although the convict free status of the colony (and its gallows) has recently been challenged in the historiography by Paul Sendziuk and me.[129]

Executions were not the only physical punishment profoundly affected by the memory of the convict era. In comparison with other British settler societies and the United Kingdom itself, Australia was comparatively reluctant to use the whip after the 1850s. For example, the two oldest penal colonies in Tasmania and New South Wales had all but finished with the punishment by 1900.[130] Mark Finnane in *Punishment in Australian Society* (1997) briefly explores the connection between this relatively early demise in usage by reference to the convict past:

> To what extent was the memory of the convict era a factor in the demise of flogging after the 1850s? To argue that it was a significant factor would be consistent with what we know of the larger history of changes in modern Western penality. In the last resort, those changes have to be explained not in terms of changing economic modes or the preferences of the judiciary, but in terms of an altered cultural

[127] Of the approximately 160,000 convicts that were shipped to the Australian continent between 1788 and 1868 the vast majority were sent to New South Wales and Van Diemen's Land for punishment, Victoria only accepted around 1,750 'Pentonvillians' between 1843 and 1849 from Van Diemen's Land, see Marian Quartly, 'Convicts', in G. Davison, J. Hirst and S. Macintyre (eds), *The Oxford Companion to Australian History*, revised edition, Melbourne: Oxford University Press, 2001, pp.156-157; Helen Doyle, 'Pentonvillians', in Davison, Hirst and Macintyre, 2001, p.504.

[128] Quartly, 'Convicts', in Davison, Hirst and Macintyre, 2001, pp.156-157.

[129] Steven Anderson and Paul Sendziuk, 'Hang the Convicts: Capital Punishment and the Reaffirmation of South Australia's Foundation Principles', *Journal of Australian Colonial History*, vol.16, 2014, pp.83-111; Paul Sendziuk, 'No Convicts Here: Reconsidering South Australia's Foundation Myth', in R. Foster and P. Sendziuk (eds), *Turning Points: Chapters in South Australian History*, Adelaide: Wakefield Press, 2012, pp.33-47.

[130] Mark Finnane, *Punishment in Australian Society*, Melbourne: Oxford University Press, 1997, pp.124-125.

> connotation attached to punishments of the body … The relatively early demise of whipping in Australia may demonstrate a particular cultural context's peculiar power to change decisively the possibilities of punishment.[131]

For Finnane, it was not simply the mere fact of convictism that provoked the decline of whipping in Australia, but also the way the period was remembered and sustained by Marcus Clarke's widely read book *For the Term of His Natural Life* (1874).[132] The image of the 'lash' was used by Clarke in his fiction to highlight the "brutality and brutalising effects of the convict system".[133] The book was not just a "reflection of opinion" but it became an "agent of political and cultural formation" during the late nineteenth century.[134] Whether it was an execution or a whipping, the use of bodily punishments in the colonies were clearly influenced by the cultural legacy of the convict era.[135]

The timing of the Private Execution Acts in Australia is a reminder that punishment is intimately connected to the society it resides within. David Garland wrote that "designing penal policy" is an exercise in "defining ourselves and our society in ways which may be quite central to our cultural and political identity".[136] If Australian colonists like Henry Grattan Douglass were insecure in their civilised standing in the world because of a penal past, the introduction of private executions went some way to assuaging that concern. It was, to repeat his words one last time, an opportunity to "show the whole world the progress which had been made in civilisation".[137] Part 2 will demonstrate that the desire to abolish public executions was underpinned by persistent

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[131] *Ibid.*, p.125.

[132] Marcus Clarke, *For the Term of His Natural Life* [1870-1872], Adelaide: Rigby Limited, 1977.

[133] Finnane, 1997, p.109.

[134] *Ibid.*, pp.109-110.

[135] In an interesting aside Finnane notes that, in contrast to the other Australian jurisdictions, the two largely convict free colonies of Victoria and South Australia still had whipping as a sentencing option well into the mid-twentieth century. See *ibid.*, p.125.

[136] David Garland, *Punishment and Modern Society: A Study in Social Theory*, Oxford: Clarendon Press, 1990, p.276.

[137] *The Sydney Morning Herald*, 2 July 1853, p.4.

concerns over the crowd, criminal, and execution procedure across all the colonies. These factors are just as important in understanding the push for reform. However, the wish to transform the tarnished image of New South Wales abroad was a unique trigger that drove Douglass to introduce the very first Private Execution Act. It was a motivation not replicable in the United Kingdom or any of its other substantial settler colonies and was responsible for Australia's comparatively early adoption of private executions in the context of the British Empire.

Conclusion

Between the years following the successful passage of the Private Execution Acts through the Australian colonies and Britain passing a similar law, there was more than enough time for self-congratulation. In an article entitled 'The Model Colony' there were three things that *The Argus* thought Britain could learn from Victoria: the secret ballot, the extension of male voting rights and, not least of all, the practice of private executions. To repeat its chosen metaphor: "While she stands shivering on the bank we have plunged boldly into the stream".[138] It was through the success of these three measures that colonists had given "substance, progress, and character to the land of our adoption" and hoped that it would be possible to "suggest new strides upon the path of freedom to countries older, larger, and infinitely more powerful than our own".[139] When reporting on one of Hobart's first private executions in 1856, *The Courier* thought it should "rejoice" that the colony was "in advance of the mother-country".[140] In 1867 a Western Australian newspaper, lamenting that its own colony was still yet to adopt the practice, was philosophical in supporting the foresight of its colonial neighbours in moving before Britain on private executions:

> In the Mother Country the old system is doomed … Australia can take credit for having already, in practice, solved questions, that for generations had formed subjects of discussion among the thinkers and writers in England, and which have been the battle-ground of many debates in the British Parliament. And not among the least of the

[138] *The Argus*, 1 July 1856, p.4.

[139] *Ibid.*

[140] *The Courier*, 17 April 1856, p.2.

> questions in which the sister colonies have anticipated reforms in the old country, are these public executions.[141]

These types of sentiments, combined with Henry Grattan Douglass' initial motivation for introducing the first Private Execution Act in New South Wales, demonstrate that this was something more than just another penal reform. To first recognise and then abolish something as stereotypically 'barbarous' and 'savage' as public executions before the 'Mother Parliament' was significant given the foundation history of New South Wales and Van Diemen's Land in particular. There appears a deep, underlying desire to publicise to Britain that the Australian colonies were civilised and refined, so much so that their actions should be an example for others to copy. The need to transform the image of the Australian colonies from a collection of penal societies to a collection of civil societies was a unique situation that was not present in Britain or any of its other substantial possessions. Their early adoption affirmed the nervous colonist's 'civilised' sense of self in light of a colonial culture that was often fearful of a scornful imperial gaze.

[141] *The Inquirer and Commercial News*, 17 July 1867.

CHAPTER 3

The Reintroduction of Public Executions for Indigenous Offenders in South Australia and Western Australia

This thesis asks how and why the extroverted spectacle of public executions in colonial Australia transitioned to being a more private and discreet practice from the 1850s onwards. The narrative is correct albeit for one exception – the reintroduction of public executions for Indigenous offenders in South Australia and Western Australia. Like the other colonial legislatures to the east, these two settlements abolished public executions in 1858 and 1871 respectively – Western Australia being the later of the two. However, only a few years after their abolition, South Australia and Western Australia reprised the practice of public executions but only for Indigenous offenders. For European criminals, the basic tenet of a private execution within the walls of the prison held true for as long as capital punishment remained on the statute books. In complete contrast are the colonies of New South Wales, Victoria and Tasmania which never contemplated the formal reintroduction of public executions once they were abolished. Queensland sits somewhere in the middle since it occasionally allowed for a controlled number of spectators, drawn from minority ethnic groups, to attend the private execution of a fellow countryman. The early settlers of South Australia and Western Australia valued Indigenous executions for the role they played on the frontier. The 'terror' of a public execution, preferably enacted at the scene of the crime, was perceived to pacify Indigenous resistance to colonisation.[1] In the vast untamed frontiers of these two colonies, public executions broadcasted a decipherable symbol of British law and power to an Indigenous audience who did not share the coloniser's culture or language. Their perceived efficacy was based on a disparaging cultural construction of Indigenous intellect, habit and temperament.

[1] For more information on this in the South Australian context, see Steven Anderson, 'Punishment as Pacification: The Role of Indigenous Executions on the South Australian Frontier, 1836-1862', *Aboriginal History*, vol.39, 2015, pp.3-26.

The Value of Indigenous Executions to South Australia and Western Australia

In the formative years of South Australian settlement it was very clear what purpose Indigenous executions were to perform in the colony. In 1840 twenty-six Europeans were killed in the Coorong after their brig, the *Maria*, ran aground in the area. The survivors had fallen foul of the local Milmenrura clan, a group of the Ngarrindjeri people, who were engaged by the Europeans to guide them back to Adelaide.[2] The 'Maria Massacre', as it became known, was the single largest murder of Europeans by Indigenous people in Australian colonial history.[3] The colony's Police Commissioner, Major Thomas O'Halloran, was dispatched by the Governor to "apprehend, and bring to summary justice, the ringleaders in the murder, or any of the murderers (in all not to exceed three)".[4] The speech he gave at the subsequent double hanging at the scene of the massacre articulates the rationale of Indigenous executions in the colony of South Australia thereafter:

> Black men, this is the white's punishment for murder, the next time white men are killed in this country more punishment will be given. Let none of you take these bodies down, they must hang till they fall in pieces. We are now friends, and will remain so, unless more white people are killed, when the Governor will send me, and plenty more policemen, and punish much more severely. All are forgiven except those who actually killed the wrecked people, who, if caught, will also be hung. You may go now, but remember this day, and tell what you have seen to your old men, women, and children.[5]

From the earliest days of the colony, it was clear that the role of frontier hangings was to pacify the Indigenous threat to the colonial project. It was a need most pressing for settlers residing on the colony's westernmost frontier. For example, thirteen of the

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[2] Robert Foster, Rick Hosking and Amanda Nettelbeck, *Fatal Collisions: The South Australian Frontier and the Violence of Memory*, Adelaide: Wakefield Press, 2001, p.13.

[3] *Ibid.*

[4] *The South Australian Register,* 19 September 1840, p.4.

[5] Thomas O'Halloran as quoted in Alexander Tolmer, *Reminiscences of an Adventurous and Chequered Career at Home and at the Antipodes, Volume 1* [1882], facsimile edition, London: Gilbert and Rivington Ltd, 1972, p.190.

twenty-three Aborigines to be executed in the history of South Australia were for crimes committed on the Eyre Peninsula.[6] At these executions the hangman was instrumental in calming settler anxieties. Such sentiments were articulated at the colony's last ever Indigenous hangings in 1861 and 1862 on the west coast of the Eyre Peninsula. For *The South Australian Register*, it was the "expressed belief" of those living near the troubled district that, "the effect of these executions will be good, and that no other means would have been so effectual in preventing the reoccurrence of such outrages".[7]

Western Australians were also convinced that Indigenous executions had benefits to settler safety. One newspaper correspondent who claimed to be "well acquainted with the habits of the aborigines", praised the efficacy of the gallows:

> I conscientiously believe … that for every life that is taken by sentence of the law, a dozen is preserved by the terror instilled by the execution of such sentence. When Kanyan was hung [for the murder of another Indigenous man in 1850], I know, from personal experience, that thereby four murders were prevented in the districts of Northam and Toodyay. In the settled districts I believe murder to be nearly at an end, in consequence of the late executions; I mean among aborigines inhabiting the settled districts. Among the bushmen it still exists, and naturally will continue, until the terror of the law shall reach them.[8]

The *Perth Gazette* agreed with the *Inquirer*'s correspondent on this subject. The following year it wrote that capital punishment had an "awe-inspiring effect".[9] Through the example of the gallows, "the aborigines are beginning to feel that life is worth clinging to, and that they will be less given to their death dealing propensities, at least

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[6] Consult the table of Indigenous offenders charged with the murder of Europeans in Alan Pope, *One Law for All?: Aboriginal People and the Criminal Law in Early South Australia*, Canberra: Aboriginal Studies Press, 2011, pp.175-178.

[7] *The South Australian Register*, 19 September 1861, p.2.

[8] *Inquirer*, 16 April 1851, p.2.

[9] *The Perth Gazette and Independent Journal of Politics and News*, 11 April 1851.

where the influence of our laws is known and experienced".[10] In 1862 it was said that the example of executions would have, "such an effect upon the natives as will in future deter them from again committing acts of hostility upon the settlers".[11] Reporting on another Indigenous hanging in 1865 the *Perth Gazette* stated its opinion that: "we are, in reality, dealing with people who are but children in reasoning power, moved and swayed by a savage impulse as entirely now as on the day when they first came into contact with the white man thirty-six years ago".[12]

Western Australia occasionally displayed Indigenous bodies on the frontier after an execution to enhance the deterrent effect. At the colony's first legal execution in July 1840, Doodjep and Bunaboy (sometimes written as Barrabong) were hanged at York for the murder of a mother and child.[13] As a lasting warning the bodies were left hanging long afterwards for the local Indigenous population to contemplate the consequences of crime. That said, a disturbing letter to the Editor of the *Inquirer* appeared two months later detailing the mutilation of the deceased bodies by local Europeans.[14] At the aforementioned execution of Kanyan in 1850 the authorities transported his dead body to St. Aubyn's where it was "hung in chains".[15] The gibbetting of an Indigenous criminal happened on at least one other occasion. When Yandal and Goologol were hanged in Perth for two separate *inter se* murders in 1855 their bodies were then transported to York. Displayed in a "conspicuous part of the district", it was hoped that the example might quell recent Indigenous-settler violence.[16] In the aftermath of South Australia's 'Maria Massacre' the two dead bodies remained

[10] *Ibid.*

[11] *The Inquirer and Commercial News*, 17 January 1866, p.2.

[12] *The Perth Gazette and West Australian Times*, 21 July 1865, pp.2-3.

[13] The earlier 1833 execution by firing squad of the Indigenous male, Midgegooroo, is not tallied in Brian Purdue's final count of Western Australian executions for the reason that he was shot at the behest of the Lieutenant Governor and his Executive Council and was not given the courtesy of a proper judicial trial. Purdue's conviction is that Midgegooroo's execution was illegal and instead considers Doodjep and Bunaboy the first people to be legally executed in Western Australia, a convention that has been followed here. See Brian Purdue, *Legal Executions in Western Australia*, Perth: Foundation Press, 1993, pp.iv-vi.

[14] "The ears of one of these unhappy natives have been cut off, and are now preserved in the house of a small farmer in the district. Others have gone out, *and fired at the bodies* – stretching out their legs by the insertion of sticks between them, and committing other disgusting acts of brutality…"; *Inquirer*, 23 September 1840, p.31 emphasis original.

[15] *Inquirer*, 17 April 1850, p.3.

[16] *The Perth Gazette and Independent Journal of Politics and News*, 20 July 1855, p.2.

displayed indefinitely on the sands of the Coorong where they were hanged but that was the only time such a practice took place in the colony.[17] The gibbetting of Indigenous criminals in Western Australia occurred long after New South Wales and Tasmania had abolished the practice of 'hanging in chains' by 1837 (see Chapter 4). It was, for the record, never once practised on European offenders in South Australia or Western Australia.

The display of Indigenous bodies after death is the logical extension of the idea that the 'terror' of public executions could pacify resistance to colonisation on the frontier. For a people who did not share British culture and language the easily decipherable symbolism of the gallows was seen as a useful aid to the isolated colonist. The practice of hanging Aborigines at the scene of the crime and forcing the offender's people to watch the execution was designed to teach the traditional owners of the land that British law was now omnipotent. In a frontier unable to be properly policed, the ability to scare compliance into Indigenous people by planting the image of the scaffold in their mind was something to be welcomed rather than banished in the eyes of many.

The Selective Reintroduction of Public Executions

In both colonies the original decision to abolish public executions for Aborigines as well as Europeans came under direct criticism – though most detectably in South Australia. At the second reading in Adelaide of the 1858 Act abolishing public executions, Thomas Strangeways anticipated the consequences of the proposed legislation:

> The Act would entirely prevent the execution of the aborigines in the usual manner. If any of the white population committed a crime, it was perhaps desirable they should be executed under the provisions of that Act, but it had hitherto been considered necessary in the case of an aborigine that he should be executed in the place where the crime was committed, in order that the associations connected with the crime should be connected with the punishment. If that Bill were passed,

[17] Tolmer, 1972, p.190.

> however, the supposed sentence of death on aborigines would be practically abolished.[18]

Consequently, Strangeways suggested a special clause be inserted into the 1858 legislation that would allow the Governor, upon his written consent, to propose a place of execution other than the Adelaide Gaol for Indigenous offenders. The success of Strangeway's clause would have, in effect, facilitated the continuation of public executions for offenders of Indigenous background. Two other Members supported the clause but it was eventually voted down by a majority of the House who thought that, "such scenes did no credit to our civilisation in the eyes of savages".[19]

The will of Parliament to banish public executions for Indigenous offenders was strongly tested over the next three years, beginning at the execution of Manyella in 1860. At trial the twenty-year-old Indigenous male was found guilty of wilfully murdering John Jones, a hutkeeper, near Mount Joy on 13 May 1860.[20] Having been sentenced to death two years after the introduction of private executions, the law dictated that Manyella be executed in private or, in the wording of the legislation, "within the walls of the Gaol".[21] However, in conflict with the original intention of the 1858 Act, Manyella was taken on a long journey back to a police station at Streaky Bay, the closest to the scene of the murder, and hanged in the public gaze. The restrictions of the 1858 legislation were overcome by proclaiming the existing Police Station at Cherriroo, Streaky Bay, a Public Gaol.[22] After making this decision public in the *Government Gazette*, John Morphett was quick to raise the issue in the Legislative Council stating that the colony's newest gaol was nothing more than a hut.[23] This new 'prison' did not have high walls like those enclosing Adelaide Gaol so the execution was performed in full view of the town, but technically still 'within the walls of the Gaol', which avoided any accusations that the hanging was illegal.

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[18] *South Australian Parliamentary Debates* (hereafter *SAPD*), 7 October 1858, p.331.

[19] William Younghusband quoted in *ibid.*, p.332.

[20] *Adelaide Observer*, 18 August 1860, p.4.

[21] South Australia, no.23 of 1858, *Act to Regulate the Execution of Criminals*, 1858.

[22] *South Australian Government Gazette*, 20 September 1860.

[23] *SAPD*, 25 September 1860, p.920.

Manyella's execution was a creative solution to a problem that highlighted how this new legislation found itself in complete opposition to the presumed needs and desires of those settling South Australia's outlying districts. While explaining the Government's actions in the Legislative Council, the Chief Secretary began by stating that the government had been requested by the settlers in the district to "make an example of the murderers in the vicinity of this crime, so that his tribe might receive a salutary lesson".[24] He continued by positing that, given the previous success with public executions on the Eyre Peninsula, "he trusted they would need no more executions at Streaky Bay".[25]

Even more pronounced than in the case of Manyella was the outrage directed at South Australia's first truly private Indigenous execution. It was conducted in June 1861 at the Adelaide Gaol following the murder of Mary Ann Rainberd and her two children by four Indigenous males. "We have been cheated," stated an incensed *The Northern Star*, "The fellows should be hanged up here [in Kapunda, the town where the murders took place], or they should have been placed at the rifle target for the volunteers to shoot at, so they would have a lingering death."[26] Employing a more restrained prose *The Advertiser* questioned the logic of private Indigenous executions:

> What effect will this private execution have upon the aboriginal natives? What practical result will follow it? Where is the salutary lesson of terror that it was intended to teach other would-be murderers? The mere destruction of four murderers was surely not *all* that was contemplated by the jury who convicted them; we will venture to say it was not the *principal* idea.[27]

The private execution of the 'Rainberd Murderers' was clearly a waste in the eyes of the early settler. In the seclusion of the prison yard, the gallows was shorn of its

[24] *Ibid.*

[25] *Ibid.*

[26] *The Northern Star* quoted in Peter Liddy, *The Rainberd Murders: 1861*, Adelaide: Peacock Publications, 1993, pp.82-83.

[27] *The Advertiser*, 8 June 1861, p.2 [original emphasis].

additional functions that had proved so useful in dealing with disobedient Aborigines and stabilising a vast frontier. When carried out hidden from the public gaze, capital punishment was reduced to a strictly punitive function and it was obvious that the colonist did not warm to the transition.

In 1861 the disharmony between the laws of South Australia and the will of the people was corrected when an amendment to the 1858 Act was passed along racial lines.[28] The amendment stipulated that a sentence of death passed over "any aboriginal native" could be "publicly carried into execution at the place at which the crime … was committed, or as near to such place as conveniently may be".[29] The Indigenous offender's body was also to be buried at the place of execution or close by that site. It signalled the partial reinstatement of public executions in South Australia but only for Indigenous offenders. The existing system of private executions for non-Indigenous offenders was not altered by the 1861 Amendment.

Justification for South Australia's Amendment came from two sources; the past efficacy of Indigenous hangings and the cultural and linguistic differences of the Indigenous population. From the 'example' provided at the Coorong in 1840 to subsequent Indigenous executions on the Eyre Peninsula, MPs expressed their belief that the gallows had proven itself a valuable friend of the isolated settler. John Bagot was one MP who expressed his fear of future Indigenous violence if denied access to the pacifying qualities of public hangings. Referencing the recent Rainberd murders he thought that, "If some steps were not taken to check such horrible crimes upon women and children, the remote districts would be again given up to savage tribes."[30] There was even the suggestion by Edward Grundy that Indigenous bodies be left hanging from the gallows indefinitely following the execution. Given that "mildness and kindness" had failed to civilise Indigenous people, the government must resort to a "system of terror" to persuade such "unsophisticated creatures" from future

[28] South Australia, no.1 of 1861, *Act to amend an Act, no.23 of 22nd Victoria, intituled 'An Act to Regulate the Execution of Criminals'*, 1861.

[29] *Ibid.*, section 1.

[30] *SAPD*, 28 May 1861, p.111.

delinquency.[31] The return of gibbetting alongside public executions was deemed a step too far and his suggestion was subsequently voted down.

In 1871 Western Australia introduced private executions for all criminals, regardless of race, but by 1875 they had passed an Amendment altering their original conviction. Like South Australia before it, the Western Australian legislation stipulated that the "Execution of aboriginal natives [was able] to take place as if the said Act [of 1871] had not been passed".[32] When introducing the Amendment to Parliament the Attorney General, Robert John Walcott, clearly explained the aim of reinstating public executions for Indigenous offenders: "The object of this measure was to strike terror into the heart of other natives who might be collected together to witness the executions of a malefactor of their own tribe." [33] Walcott insisted that the Bill was not conceived in a "vindictive spirit" but as a means to deter the Aborigines from committing "outrages" amongst themselves and against the settlers.[34] A number of Members speaking at the second reading of the Amendment also expressed their support, commenting on the previous capacity of the gallows in preventing Aboriginal crime.[35] The amendment was passed by a majority of Members and assented to in December 1875.[36]

The very idea that the 'terror' of public executions could deter Indigenous offenders from crime had a strong basis in colonial culture. There is a long documented history of viewing Indigenous people through the lens of the 'savage' that can be traced back as far as William Dampier in the late seventeenth century.[37] The idea of the 'savage' was

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[31] *Ibid.*, p.112.

[32] Western Australia, no.1 of 1875, *An Act to amend 'The Capital Punishment Amendment Act, 1871'*, 1875, the quote is taken from the sidebar.

[33] *The Inquirer and Commercial News*, 15 December 1875.

[34] *Ibid.*

[35] *Ibid.*

[36] Western Australia, no.1 of 1875, *An Act to amend 'The Capital Punishment Amendment Act, 1871'*, 1875.

[37] Dampier's comment about Indigenous people on the west coast of the continent as being "the miserablest [*sic.*] People in the World" is well known. For the full quote, see William Dampier quoted in Glyndwr Williams, 'Reactions on Cook's Voyage', in I. Donaldson & T. Donaldson (eds), *Seeing the First Australians*, Sydney: Allen & Unwin, 1985, p.37. For historical accounts of how early Australian settlers read Indigenous bodies and habits through various conceptual apparatus brought with them from Europe, see Kay Anderson, *Race and the Crisis of Humanism*, London: Routledge, 2007; Shino Konishi, *The Aboriginal Male in the Enlightenment World*, London: Pickering & Chatto Publishers, 2012; Penny

not the only category of analysis that colonists carried with them from Europe, particularly when concepts like that of the 'noble savage' are also taken into account. If Dampier was the archetype for one school of thought, then another early figure in Australian exploration history, Captain James Cook, embodies the other. On first impression he wrote that Australian Aborigines were "far more happier than we Europeans", live in the "Tranquillity" of nature and "set no Value" upon the materialism of European life.[38] However, when Indigenous peoples appeared to fall prey to the "vices of civilisation"—drink, dice and venereal disease—rather than excel in the areas of bodily propriety, habit, dress and biblical instruction, an increasingly disparaging account of Indigenous peoples became dominant among settlers as the colonial era matured.[39]

Such cultural stereotyping led to further assumptions about effective ways of carrying out punishment on the Indigenous population. In Moreton Bay, Libby Connors also noticed how the "theatre of justice" was used to express the "power and terror" of British law to Indigenous peoples.[40] Moreover, in the Queensland Parliamentary debates on maintaining rape as a capital crime, Ross Barber quotes many MPs who believed death to be one of the few punishments that actually deterred Indigenous wrongdoers.[41] As an analogue to the retention of public executions, Western Australia also banished the punishment of whipping in 1883 and reintroduced it in 1892 but only for Indigenous criminals. The Attorney-General of Western Australia justified the amendment by likening 'black fellows' (as well as those of other non-European

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Russell, *Savage or Civilised?: Manners in Colonial Australia*, Sydney: The University of New South Wales Press, 2010, pp.19-52.

[38] For the full quote, see Captain James Cook quoted in Williams, 1985, p.35.

[39] Russell McGregor, 'The Doomed Race: A Scientific Axiom of the Late Nineteenth Century', *Australian Journal of Politics and History*, vol.39, issue 1, 1993, pp.14-22, quote on p.17.

[40] Libby Connors, 'The Theatre of Justice: Race Relations and Capital Punishment at Moreton Bay 1841-59', in R. Fisher (ed.), *Brisbane: The Aboriginal Presence 1824-1860*, Brisbane: Brisbane History Group, 1992, pp.48-57, quote on p.50.

[41] For example, one MP named Gore concluded in 1860 that Indigenous people "could not be deterred by any other punishment than that of death". For more on these debates and the fear of Aboriginal offending on the frontier as reason for the retention of rape as a capital offence in Queensland, see Ross Barber, 'Rape as a Capital Offence in Nineteenth Century Queensland', *Australian Journal of Politics and History*, vol.21, issue 1, 1975, pp.31-33.

backgrounds) to naughty children: "Give them a little stick when they really deserve it, and it does them a power of good."[42]

European conceptions of the Indigenous intellect, temperament and habit filtered through the lens of the 'savage' fits neatly with parliamentary debates that approvingly reference how public executions inspired 'awe' and 'terror' in Indigenous people. There was a practical need to pacify Indigenous resistance on the frontier but beliefs over the efficacy of Indigenous executions were firmly rooted in nineteenth century cultural constructions of Aboriginality. Colonial culture ordered and categorised Indigenous people in such a way that rendered violent, public and bodily punishments commensurate with their assumed 'savagery'. The selective reinstating of public executions in Western Australia and South Australia is just another example of how culture—operating completely separate from the penal sphere—had direct implications for choices in punishment.

Indigenous Executions after the 1861 and 1875 Amendments

The long held view in South Australia and Western Australia that the 'terror' of public hangings could pacify Indigenous resistance on the frontier made their selective reintroduction particularly attractive to lawmakers. Yet, the question must be asked, how widespread were these spectacles of frontier intimidation in the years following the passage of the Amendment? Moreover, when did Indigenous executions on the frontier finally disappear from the penal landscape altogether? This section examines how public executions on the frontier after 1861 and 1875 were infrequent. It reinforces the notion that these were exceptional scenes for the Australian colonist of the late nineteenth century.

For all the effort spent partially restoring public executions for Indigenous criminals in South Australia, the colony had very few Indigenous hangings after the 1861 Amendment. On the Eyre Peninsula in late 1861, two Indigenous men were publically hanged at Fowler's Bay and another two at Venus Bay, on both occasions for the

[42] The Attorney-General of Western Australia quoted in Mark Finnane and John McGuire, 'The Uses of Punishment and Exile: Aborigines in Colonial Australia', *Punishment and Society*, vol.3, no.2, 2001, p.284.

murder of a European settler.[43] In September 1862, the hangman returned to Venus Bay to execute Meengulta who speared a hutkeeper after a dispute over rations.[44] Meengulta was the last Indigenous person to hang in the history of South Australia.[45] This means that only on five occasions were Indigenous offenders executed in the post-amendment era and all within two years of it being passed. Thus, despite the rhetoric of the colonists and the push for legislative changes, a public execution in South Australia was never seen again after 1862.

Curiously, Western Australia hanged many more Indigenous offenders after 1875 but the sites of these executions were, more often than not, the colony's gaols rather than the frontier. After the Amendment's assent in December 1875 until the last Indigenous execution in Western Australia in May 1900, a total of eighteen Indigenous people were executed.[46] Only on one occasion—at the triple execution of Terribie, Corrondine and Tchawada in February 1892—was the hanging held at the scene of the crime. It was reported that around seventy "able-bodied natives" saw the execution at Mount Dockrell, near Halls Creek in the north of Western Australia.[47] The correspondent thought that the triple execution successfully communicated "the penalty they risk in attempting the lives of white men".[48] Otherwise, Indigenous executions after the 1875 Amendment were performed in Rottnest Island (5), Roebourne (5), Derby (3) and Perth (2) – all in that particular location's gaol precinct.[49]

Despite the decision of the authorities to execute Indigenous criminals within the prison setting rather than at the scene of the crime, the executions were still viewed by a great

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[43] *The South Australian Register*, 16 August 1861, p.3; *The South Australian Register*, 19 September 1861, p.2.

[44] Pope, 2011, p.103. This execution was missed by the otherwise accurate *Hempen Collar*. See David Towler & Trevor Porter (eds), *The Hempen Collar: Executions in South Australia: 1836-1964*, Adelaide: The Wednesday Press, 1990.

[45] A.R.G. Griffiths states that in 1906 an Indigenous person was executed in South Australia but, on closer inspection, the hanged man was in fact a Muslim immigrant by the name of Natalla Habbibulla. See A.R.G. Griffiths, 'Capital Punishment in South Australia 1836-1964', *Australian & New Zealand Journal of Criminology*, vol.3, no.4, 1970, p.218; *Adelaide Times*, 17 November 1906.

[46] Purdue, 1993.

[47] *Western Mail*, 26 March 1892, p.26; *The Inquirer and Commercial News*, 26 March 1892, p.6.

[48] *Ibid.*

[49] Purdue, 1993.

number of Indigenous inmates detained in these locations. At the dedicated prison for Aborigines established on Rottnest Island off the coast of Perth, there are accounts in 1879 and 1883 of every resident prisoner being forced to watch the hangings.[50] On another occasion at Roebourne Gaol in 1893, the "native prisoners" and "town natives" witnessed the execution of Cooperabiddy.[51] As suggested by the wording of the 1875 Amendment, public executions at the scene of the crime were an option of the Governor, not an obligation. Perhaps it was an option less readily taken up after a prison system was established in Western Australia that was already heavily populated with Indigenous peoples. Displaying the consequences of crime in front of a target audience of Indigenous wrongdoers may have been just as effective as a public hanging in front of their own people in the eyes of the authorities.

In Western Australia the 1875 Amendment was wholly repealed in 1952, after surviving two substantial consolidations of the Criminal Code in that jurisdiction in 1902 and 1913.[52] In South Australia the right of the Governor to hang an Indigenous offender at the scene of the crime was not officially revoked until 1971.[53] It survived both the 1876 and 1935 Criminal Law Consolidation Acts, the latter being (notwithstanding ongoing revisions) the primary legislative vehicle in South Australian criminal law that codifies crimes and penalties to this very day.[54] Nevertheless, the amendment was a dormant feature of South Australian and Western Australian Criminal Law following the last Indigenous executions many years earlier and it remains unlikely that a subsequent Governor would have exercised the option, especially in the twentieth century.

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[50] *The Western Australian Times*, 22 June 1883, p.3; *The Inquirer and Commercial News*, 20 June 1883, p.3; *The Inquirer and Commercial News*, 23 July 1879, p.3; *The Western Australian Times*, 18 July 1879, p.2.

[51] *The Inquirer and Commercial News*, 31 March 1893, p.28; *The West Australian*, 22 March 1893, p.2.

[52] For the incorporation of the 1875 Amendment into the 1902 and 1913 Western Australian Criminal Codes, see Western Australia, no.14 of 1902, *The Criminal Code of Western Australia*, 1902, section 663; Western Australia, no.28 of 1913, *Criminal Code Act Compilation Act*, 1913, section 678. For its eventual repeal in 1952, see Western Australia, no.27 of 1952, *Criminal Code Amendment Act*, 1952.

[53] South Australia, no.96 of 1971, *Criminal Law Consolidation Amendment Act*, 1971, section 4.

[54] South Australia, no.38 of 1876, *Criminal Law Consolidation Act*, 1876, section 14; South Australia, no.2252 of 1935, *Criminal Law Consolidation Act*, 1935, section 307.

Indigenous Executions and the Colonies to the East

The move to reintroduce public executions for Indigenous criminals was isolated to Western Australia and South Australia with the remaining colonies to the east never formally contemplating their reprisal. Victoria and Queensland are fitting comparisons but neither colony hanged Indigenous persons at the scene of the crime after public executions were officially abolished. To refuse to engage in a system of Indigenous executions at the scene of the crime was strange for these colonies that established themselves at a similar time to Western Australia and South Australia. They too experienced similar levels of Indigenous-settler violence and felt the need to protect European interests on the frontier. Moreover, disparaging cultural constructions of Aboriginality were just as prevalent in Victoria and Queensland as they were elsewhere.

The difference in Victoria lies with the leadership of Charles La Trobe, Superintendent of the Port Phillip District (1839-1851) and later Lieutenant-Governor of Victoria (1851-1854). Victoria never once hanged an Indigenous offender at the scene of the crime. An explanation came in 1842 with the execution of an Indigenous male named 'Roger' who was found guilty of the murder of a settler at Mount Rouse. The presiding judge, John Walpole Willis, wrote in a letter to La Trobe stating that there were "no mitigating circumstances" in the case of 'Roger' and believed that, "if the sentence is to be carried out the example would have a better effect if the execution took place at Mt Rouse rather than at Melbourne".[55] La Trobe's preferred site for Indigenous executions had always been the colony's capital.[56] La Trobe explained his position to Judge Willis this way:

> I think it exceedingly doubtful whether, from what we know of their temper, it would be productive of the good effect intended upon the natives in that part of the country. It would possibly not only disgust them with the spot which has been chosen for their future location, but

[55] Judge Willis quoted in Ian MacFarlane, *1842: The Public Executions at Melbourne*, Melbourne: Public Records Office of Victoria, 1984, p.53.

[56] Two Indigenous men had been executed in Melbourne earlier in 1842 despite their murders being committed in Port Fairy. See Edmund Finn (pseudonym 'Garryowen'), *The Chronicles of Early Melbourne 1835 to 1852: Historical, Anecdotal and Personal* [1888], centennial edition, Melbourne: Heritage Publications, 1976, p.295.

> might arouse feelings which it is of the greatest importance to avoid exciting…[57]

La Trobe was the key figure that determined the location of executions from the earliest days of the colony until he gave up his position of Lieutenant-Governor in May 1854. Given the colony's Private Execution Act was proclaimed the following year, there was hardly any time to establish a new convention for Indigenous executions outside of his administration. Thus, La Trobe's personal conviction that public executions at the scene of the crime would encourage rather than pacify Indigenous violence is central to understanding why Victoria diverged from South Australia and Western Australia in this regard.[58]

Since it was not a separate colony until 1859, Queensland ceased to hold public executions after 1855 when the Private Execution Act was proclaimed in New South Wales. The colony was certainly not exempt from its share of late nineteenth century violence which put pressure on the merits of fully private executions. In 1865, for example, one MP stated during a debate on Queensland's first consolidation of the Criminal Law since becoming a colony: "for the aborigines, I believe, hanging is the only thing that brings home to them the terrors of the law".[59] When an Indigenous criminal named Dugald was sentenced to death for rape in 1872 it was suggested that his execution take place where Brisbane's Indigenous inhabitants collect their blankets rather than in the private confines of the prison.[60] As John McGuire has already demonstrated, Queensland occasionally allowed for a controlled number of spectators of the same ethnic group to attend Indigenous, Pacific Islander and Asian hangings well into the 1890s.[61] John McGuire labelled these hangings "semipublic" to get across the

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[57] Charles La Trobe quoted in MacFarlane, 1984, p.54.

[58] La Trobe's logic was not unheard of in Western Australia with one Member, William Marmion, basing his opposition to the 1875 Amendment on this line of reasoning. Noting the "revengeful nature of the Aborigines", Marmion thought public hangings might inflame tensions and encourage reprisal attacks on Europeans. See *The Inquirer and Commercial News*, 15 December 1875.

[59] *Queensland Parliamentary Debates*, 2 August 1865, p.396.

[60] A more palatable compromise was reached whereby Indigenous prisoners on St Helena were transferred to Brisbane Gaol to watch the hanging. For the circumstances of Dugald's execution, see John McGuire, 'Judicial Violence and the "Civilizing Process": Race and the Transition from Public to Private Executions in Colonial Australia', *Australian Historical Studies*, vol.29, no.111, 1998, pp.203-204.

[61] *Ibid.*, pp.203-208.

sense that Queensland's private executions were sometimes modulated owing to the race of the offender.[62]

Australia's two oldest colonies, New South Wales and Van Diemen's Land, never contemplated the reintroduction of public executions of Indigenous offenders once abolished. The reason for this difference is complex but can be put down to two important factors. First, by the 1850s the frontiers of New South Wales and Van Diemen's Land were more established and stable in comparison with that of South Australia and Western Australia. The two older colonies had already overcome the most acute Indigenous resistance in the decades preceding the abolition of public executions and thus did not have a convincing reason to reintroduce them.[63] Second, as mid-century humanitarianism swept through the Colonial Office in London, the later settling colonies of South Australia and Western Australia were obliged to deal with Indigenous resistance through the judiciary, or with at least some semblance of due process. It was an obligation much weaker in the earliest days of colonising the Australian continent where widespread settler reprisals and military skirmishes were often conveniently overlooked.[64] Public executions on the frontier presented Western Australia and South Australia with an opportunity to legally 'terrify' the Indigenous population who resisted colonisation. Once again, a predicament that was far less pressing for the established colonies of Tasmania and New South Wales by the 1850s.

Conclusion

At first glance, the evidence presented above suggests something contrary to the nineteenth century narrative that executions were on the path to greater privacy. However, the selective reintroduction of public executions was confined to two colonies and offenders of a particular ethnic background within those jurisdictions. Moreover, a very limited number of Indigenous offenders were actually executed in perfect

[62] *Ibid.*, p.187.

[63] Tasmania's 'Black War' that transpired under the Governorship of George Arthur is one major example of European settlers dealing with Indigenous resistance through violent and often unsanctioned means. See Robert Hughes, *The Fatal Shore: A History of Transportation of Convicts to Australia, 1787-1868*, London: Vintage Books, 1986, pp.414-424; Nicholas Clements, *The Black War: Fear, Sex and Resistance in Tasmania*, Brisbane: University of Queensland Press, 2014.

[64] In Castles' overview of Australian legal history he states that as a "general rule" those colonists who wronged Indigenous peoples in the first fifty years of European settlement were never prosecuted. See Alex C. Castles, *An Australian Legal History*, Sydney: The Law Book Company Limited, 1982, p.521.

accordance with the Amendments after their successful passage through both Parliaments. The desire to reprise public executions for South Australia in 1861 and Western Australia in 1875 was based on the practical need to pacify Indigenous resistance on the frontier. Still, the idea that the very 'terror' of public hangings could achieve the task it was assigned was deeply connected with disparaging cultural constructions of Aboriginality. New South Wales, Tasmania and Victoria sit in complete opposition to this legal narrative whereas Queensland flirted with a modulated execution ceremony for non-Europeans up until the 1890s, albeit still within the prison setting.

PART 2

The Practice of Executions in Colonial Australia

CHAPTER 4

The Execution

The practice of executions in colonial Australia aimed to communicate a simple message to both the criminal and the onlooker – crime has consequences. In the words of Samuel Frederick Milford, Judge of the Supreme Court of New South Wales: "The object of capital punishment is to alarm and deter persons predisposed to crime from committing it."[1] Underlined by the symbolism of death, this punitive message was an easy one to decipher then as it is now. More convoluted and hidden, however, was how this 'lesson' of the Australian gallows was constantly being derailed by failures in execution procedure. The frequent bungling of colonial executions caused unnecessary pain, suffering and disfigurement upon the body of the criminal that reflected badly on the justice of the sentence as a whole. Beneath cries of 'barbarism' and 'savagery', the lesson of deterrence was lost when an execution was not performed correctly. This chapter deals with the changing way that Australian executions were carried out in practice during the colonial period and attempts by the Colonial Office in London after 1880 to better regulate their procedure. As with all chapters in Part 2, it focuses on one particular aspect of Australian hangings with a timeframe and scope that incorporates the whole of the colonial era, rather than just the 1850s and the debate over public executions. It gives a broad but informative sweep of the practice of executions in the Australian colonies, the problems encountered and the solutions given.

Execution Procedure and its Regulation

In late 1880 a curious circular, not for general publication, arrived in the Australian colonies from London courtesy of John Wodehouse, 1st Earl of Kimberley, the then Secretary of State for the Colonies.[2] On the cover letter to the Circular was written the following:

[1] United Kingdom, 'Report of the Capital Punishment Commission: Together with the Minutes of Evidence and Appendix', London: Printed by George E. Eyre and William Spottiswoode, 1866, p.588.

[2] Personal research has confirmed that both Queensland State Archives (QSA) and the State Records of South Australia (SRSA) hold a complete and identical set of these documents regarding capital punishment that were sent out from the Colonial Office in London during the year 1880. From this starting point it is assumed that all Australian colonies received a copy of these documents, as was the usual procedure with all 'circulars' sent by the Colonial Office. In this chapter the Queensland set are

> The attention both of my predecessor and myself has been called to cases where, through mismanagement or an adherence to barbarous usages, the execution of criminals has been attended with revolting circumstances, the recurrence of which it is necessary, in the interest both of humanity and decency, to prevent by every possible means.[3]

Enclosed was a 'Memorandum' on the subject of proper execution method using the long drop, a document that was developed in close consultation with the Public Executioner in England.[4] It aimed to standardise execution procedure and thereby prevent the constant bungling of hangings that seemed, from London at least, to be the scourge of most colonial jurisdictions. From the time of sentencing to the preparation of the dead body for medical inspection, the Memorandum was comprehensive in its attempt to regulate proper execution method in the colonies. Diagrams of up-to-date equipment and techniques were also included for the benefit of practitioners. Only a few months later a very large, colour printed, technical drawing of the gallows at London's Newgate Gaol was sent out as an accompaniment to the Memorandum.[5] By the 1890s a standardised 'Table of Drops' began appearing in colonial jurisdictions that used a specifically developed formula to calculate the appropriate drop length for each individual criminal.[6] These documents suggest that the kind of guesswork and

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cited as they provide better clarity in terms of which individual document within the circular is being referred too. For the complete series in the context of Queensland, see 'Circulars on Capital Punishment, 27 June 1880 to 28 December 1880', Queensland State Archives (hereafter QSA), Series ID 12690. For the individual items within this series, see 'Circular from the Secretary of State for the Colonies, regarding a memorandum on the practice of executing criminals, 27 June 1880', QSA, Series ID 12690, Item ID 1839167; 'Memorandum upon the Execution of Prisoners by Hanging with a long Drop, June 1880', QSA, Series ID 12690, Item ID 1139511; 'Circular from the Secretary of State for the Colonies, with attached plan and section of the gallows at Newgate Gaol, 28 December 1880', QSA, Series ID 12690, Item ID 1839168. For the identical set of circulars sent to South Australia, see 'Dispatches received from the Secretary of State, London, later Governor General, 27 June and 28 December, 1880', State Records of South Australia (hereafter SRSA), GRG 2/1/40.

[3] 'Circular from the Secretary of State for the Colonies, regarding a memorandum on the practice of executing criminals, 27 June 1880', QSA, Series ID 12690, Item ID 1839167.

[4] 'Memorandum upon the Execution of Prisoners by Hanging with a long Drop, June 1880', QSA, Series ID 12690, Item ID 1139511.

[5] 'Circular from the Secretary of State for the Colonies, with attached plan and section of the gallows at Newgate Gaol, 28 December 1880', QSA, Series ID 12690, Item ID 1839168.

[6] The 'Table of Drops' is reprinted in the following secondary sources, see below for further comments: Kevin Morgan, *The Particulars of Executions 1894-1967: The Hidden Truth about Capital Punishment at the Old Melbourne Gaol and Pentridge Prison*, Melbourne: The Old Melbourne Gaol, 2004, pp.12-13;

amateurism that characterised Australian execution procedure for the majority of the colonial period was increasingly replaced by more professional and standardised methods by the time of Federation.

As this section concerns the procedure of hangings in colonial Australia, the 1880 Memorandum (full title: "Memorandum upon the Execution of Prisoners by Hanging with a long Drop") is used below in an uncommon way. In italics the original document is quoted in full, but in a piecemeal fashion, broken up so that there is a focus on each individual point in turn. The subject heading is displayed in square brackets above the italicised quote, though it appears in the sidebar of the original document (for a copy of this Memorandum see Figure 4.1 – note that all relevant figures appear together at the end of this Chapter starting on page 158). Juxtaposed to this ideal execution procedure, as conceived by the Colonial Office in 1880, is the historical reality of executions in the Australian colonies up until that point. Only by contrasting the ideal with the reality of executions will the truly bungling nature of colonial hangings be fully communicated. Moreover, it is a useful opportunity to provide, for the historical record, a detailed look at execution procedure in the Australian colonies from sentencing through to burial.

[Interval between sentence and execution.]

The law or custom of each particular colony may to some extent define the interval between sentence and execution. In the United Kingdom the execution takes place on the first Monday after the intervention of three Sundays from the day on which sentence is passed.

The first point made in the 1880 Memorandum is for there to be a regular and predictable interval between the sentence of death and the execution of the criminal. In the earliest days of each colony executions seemed to be carried out in haste, with little chance of appeal on behalf of the condemned. For example, Australia's first ever execution of Thomas Barrett on 27 February 1788 was carried out just before sunset on the very same day of his sentencing.[7] Later in the colonial period an interval of a little

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Ross Ward, *The Office of the Sheriff: A Millennium of Tradition*, Sydney: Department of Courts Administration, 1992, p.57.

[7] Watkin Tench, *A Narrative of the Expedition to Botany Bay, With an Account of New South Wales, its Productions, Inhabitants, &c. To which is subjoined, A list of the Civil and Military Establishments at*

over a week was common but anything more than a month appears rare. The six-day turn around between the sentencing and execution at South Australia's first hanging was cause for apprehension as there was legitimate concern that an executioner might not be found in time.[8] As for the day that the execution ought to be held, there does not appear to be a fixed rule. Guilty persons sentenced at the same criminal sessions were very likely to have the same date of execution but no day of the week was given preference over another or used consistently.

> *[Convict to be informed of date of execution.]*
>
> *As soon as the date is fixed, the sheriff or governor of the prison should inform the prisoner of the fact.*

Informing the condemned of the execution date gave them the opportunity to come to terms with their impending fate and prepare accordingly. An example of this intimate exchange is relayed in the personal diary of John Buckley Castieau who was at one time the Governor at Beechworth and Melbourne Gaols. After the arrival of a letter from the Chief Secretary's Office that fixed the date and time for the execution of James Cusack, one of the prisoners under his supervision during his time at Melbourne Gaol, Castieau immediately went to the prisoner's cell to convey the news.[9] Tying back to the question of the interval between sentencing and execution, Cusack provides a useful case study. Sentenced to death on 16 August 1870, he was informed of his execution date by Castieau on 22 August and hanged on 30 August – an interval of exactly two weeks between sentencing and execution.[10]

Port Jackson [1789], Sydney: Sydney University Library, 1998, p.36. Barrett's execution was hastened by the fact that in the earliest days of the colony there was no means to appeal a criminal sentence. For more on this point, see 'Officer', *An authentic and interresting [sic] narrative of the late expedition to Botany Bay* [short title], London: W. Bailey, 1789, pp.20-22.

[8] For a thorough account of Michael Magee's execution, including the widely discussed anxiety about finding an executioner in time, see T. Horton James, *Six Months in South Australia: with some account of Port Philip and Portland Bay, in Australia Felix: with advice to emigrants: to which is added a monthly calendar of gardening and agriculture, adapted to the climate and seasons* [1838], Adelaide: Public Library of South Australia, 1962, pp.54-61.

[9] John Buckley Castieau, *The Difficulties of My Position: The Diaries of Prison Governor John Buckley Castieau, 1855-1884*, M. Finnane (ed.), Canberra: National Library of Australia, 2004, p.87.

[10] For details of Cusack's sentencing, notification of execution date by Castieau and hanging at Melbourne Gaol see, in order, *The Argus*, 17 August 1870, p.6; Castieau, 2004, pp.87-89.

[Hour of execution.]

Executions in the United Kingdom take place usually at the hour of eight a.m.

Besides exemplary cases like that of Thomas Barrett (described above) who was executed near sunset, Australian executions were always conducted early in the morning. 8am was the most common time but anywhere from 7am till 11am has been mentioned as the hour of execution. For instance, Cusack's execution occurred at 10am, identical to the time set for the two other men executed at Melbourne Gaol that year.[11]

[The executioner.]

The executioner should be a trustworthy and intelligent person, and on the first occasion of his employment care should be taken to ascertain that he knows fully and accurately what he has to do, and in what order he is to do the several acts which constituted his duty. He should, when practicable, be lodged in the prison or under close supervision, from the Saturday preceding the Monday of execution, so as to obviate the chance of his being tampered with by the friends of the prisoner.

The fact that the Memorandum had to state explicitly that the hangman ought to be a dependable individual and competent at the task at hand says something about their previous quality. Ray and Richard Beckett, Christopher Dawson and Steven Harris have all written about Australia's colonial hangmen at length.[12] Their work reveals, among other things, their poor character, rampant alcoholism and bungled handiwork. For the majority of the colonial period hangmen were chosen from among the prisoners

[11] For details of the execution of the two other men at Melbourne Gaol in 1870, see *The Argus*, 5 August 1870, p.6; *The Age*, 14 November 1870, p.2.

[12] Ray Beckett and Richard Beckett, *Hangman: The Life and Times of Alexander Green, Public Executioner to the Colony of New South Wales*, Melbourne: Thomas Nelson Australia, 1980; Christopher Dawson, *No Ordinary Run of Men: The Queensland Executioners*, Brisbane: Inside History, 2010(a); Steve Harris, *Solomon's Noose: The True Story of Her Majesty's Hangman of Hobart*, Melbourne: Melbourne Books, 2015.

themselves. Sometimes they performed the undesirable task in exchange for a reduction of their sentence or a relatively large pecuniary reward.[13]

The position of executioner in colonial Australia was an ignoble one, laden with superstition and social stigma. It was a fact that led many short-term executioners to don disguises at the gallows. Hangmen with fake beards, goggles, masks, costume dress and faces smeared with various emulsions were occasionally seen on the colonial scaffold.[14] When Henry Flude's identity as the hangman of Queensland was revealed he left Brisbane and his successful grocery store behind such was the shame attached to the job.[15] Long-term executioners like Alexander Green in New South Wales and Soloman Blay in Tasmania cared less about protecting their identity, as their vocation and status was already well known in each colony. Other executioners even tried to distance themselves from the act of killing itself. Robert Howard, or 'Nosey Bob' as he was known, was the public executioner of New South Wales but delegated to an assistant the task of putting the rope around the neck of the victim and activating the drop.[16] "It's not a fact that I ever hung a man – never, sir, never", he told *The Bulletin* in 1880.[17]

A willingness to do the job was the only prerequisite of the colonial hangman; aptitude for the task was a secondary concern. Moreover, the non-existence of formal training left any shortcomings in technique uncorrected. Knowledge of proper execution method was, for the most part, hard won through the experience of trial and error. By 1876 the Sheriff of New South Wales, Charles Cowper, was tired of the lack of professionalism among executioners. In writing a letter to the Department of Justice he demanded a

[13] For example James Freeman, the man who hanged Thomas Barrett, had also been sentenced to death that very same day. However, Freeman was reprieved by Governor Arthur Phillip on the proviso that he act as the colony's hangman for the remaining period of his sentence. See Dawson, 2010a, p.7; Ward, 1992, p.33. As of 1819 the salary of the executioner in Hobart Town was £25 per annum, only £5 less than that of the turnkey at the Gaol. See 'Return of all Civil Officers and Persons receiving Salaries from the Police Fund of Van Diemen's Land', in *Historical Records of Australia*, series 3, vol.3, Sydney: The Library Committee of the Commonwealth Parliament, 1921, p.538.

[14] Dawson, 2010a, p.50.

[15] *Ibid.*, p.41.

[16]'Robert "Nosey Bob" Howard (1832-1906)', *Waverley Council* 2009, http://www.waverley.nsw.gov.au/__data/assets/pdf_file/0020/8732/Hangman_Waverleys_First.pdf, viewed 11 November 2014.

[17] *The Bulletin*, 31 January 1880, p.5.

raise in their salary and an end to employing criminals for the job.[18] He was, to quote from the letter, "daily beset" by the nuisance of previous executioners under his service.[19] Their addiction to drink, lack of respectable attire and need for a personal handler when attending a regional execution was particularly irritating to the Sheriff.

Sheriff Cowper would have been pleased to hear that in colonies like Queensland the professionalisation of the executioner was not far off. Withholding the name and address of the hangman from the public record combined with the new secrecy of private executions led to a better class of person being appointed to the post of hangman in that colony.[20] In 1886 twenty-six people applied for a publicly advertised vacancy to become the new executioner of Queensland. The successful applicant had no criminal record and even sported a reference from the former Mayor of Brisbane.[21] In 1900 when the same position became available, over one hundred people applied for the job, which demonstrated just how much things had changed over the intervening century.[22]

> *[The apparatus to be tested.]*
>
> *Early on the morning of execution, the executioner should try the apparatus and rope to ascertain that all is in good working order. The drop, &c. should then be locked up until the return of the executioner with the convict, the key being kept by the chief warder.*

Testing the apparatus prior to the actual hanging was a rare event, or at least it does not show up strongly in the historical record. That said, Edmund Finn in *The Chronicles of Early Melbourne* (1888) tells one story of how the executioner of Daniel Jepps and two other bushrangers in 1842 (see Chapter 5 for more on this hanging) did indeed put in some prior practice. Earlier in the year the same hangman had horribly blundered an execution in such a way where "the two poor wretches got jambed [*sic*.], and twisted

[18] The letter written by Sheriff Charles Cowper to the Under Secretary of the Department of Justice, dated 1 June 1876, is reprinted in Ward, 1992, pp.46-55.

[19] *Ibid.*

[20] Dawson, 2010a, p.39.

[21] The new executioner's name was William Ware, a man sporting a laboring background but also some secretarial experience. See *Ibid.*, p.42.

[22] *Ibid.*, p.45.

and writhed convulsively in a manner that horrified even the most hardened".[23] Being Victoria's first ever execution the untested and hastily constructed scaffold, "only a degree removed from the proverbial 'bucket'", was mostly to blame. [24] Finn testifies that the executioner "was so universally censured" by his first effort that he was "fearful of losing the 'appointment'".[25] So as to avoid the same mistakes and in the hope of "making his post a permanency" the hangman "procured the straw effigy of a human figure, and upon this model [of the scaffold] was in the habit of taking frequent private rehearsals".[26] Practice, as the saying goes, makes perfect. Jepps and the two other bushrangers died "without a struggle" when the drop was activated for the second time in Victoria's history.[27]

[The gallows.]

> *No description is here given of the gallows and drop, as it is assumed that in most cases the colonial authorities understand how they should be constructed. If they have any doubt about the matter, working drawings will be supplied by the Secretary of State on application.*

At the earliest executions in each colony, particularly the very first, the gallows were primitive constructions. The five executions that occurred in 1788 in Sydney appeared to have been conducted on a tree with the help of a ladder that was quickly pulled away.[28] At South Australia's first execution in 1838 the culprit was hanged using an overhanging tree branch and a cart that was slowly removed from under him by a horse (see Figure 4.2). Performed and prepared by an amateur hangman of no experience it was, unsurprisingly, horribly botched.[29] The first execution in Moreton Bay was at the

[23] The execution was of two Aborigines named 'Bob' and 'Jack' on 20 January 1842. See Edmund Finn (pseudonym 'Garryowen'), *The Chronicles of Early Melbourne 1835 to 1852: Historical, Anecdotal and Personal* [1888], centennial edition, Melbourne: Heritage Publications, 1976, pp.394-396, quote on p.396.

[24] *Ibid.*, p.396.

[25] *Ibid.*, p.398.

[26] *Ibid.*

[27] *Ibid.*

[28] For primary accounts of the five convicts executed in 1788, see John Cobley, *Sydney Cove 1788*, London: Camelot Press Ltd., 1962, pp.87-88, 134, 169 and 259-260.

[29] The name of the executed man was Michael Magee. For first-hand written accounts of how the execution was set up, see James, 1962, pp.59-60; John Fogg Taylor, 'Letter from John Fogg Taylor of

convict barracks but the second in 1841 occurred atop a windmill in the heart of the settlement that had been refitted for the occasion.[30] These early executions were very likely to be botched since there was little technical expertise on hand to direct the build and, more to the point, an all too hasty turnaround time between sentence and execution.

After these initial hangings each colony soon developed the appropriate infrastructure to deal with the execution of criminals. In Queensland, a trusty set of portable gallows—10 feet long, 6 feet wide and 10 feet high—could hang up to three criminals at a time and were in use for many years at the Petrie Terrace Gaol.[31] These were later replaced by a cellblock gallows at Boggo Road Gaol. A similar set of portable gallows was erected out the front of Adelaide Gaol and then within the gaol yard after the introduction of private executions. A permanent drop was constructed in the 'A' wing of the Adelaide Gaol in the 1890s before a 'hanging tower' was constructed in the 1950s.[32] The same portable gallows that were used at the George Street Gaol in Sydney for many years were transferred to the yard at Darlinghurst Gaol after it opened in the early 1840s. During the year 1844 a new permanent drop was commissioned at Darlinghurst whereby the prisoner mounted the scaffold from a ladder inside the prison walls but emerged above the drop outside its walls. In full view of the crowd, the criminal fell into the space below the entranceway on the given signal.[33]

When the Private Execution Acts were passed, many hasty alterations were made to these longstanding structures across the colonies. In November 1855 the colony of Victoria had its first private execution, a triple hanging at Melbourne Gaol, where such an alteration was made. "The machine of death remains in the place it formerly occupied," wrote *The Argus*, "but having been roofed in, the condemned are enclosed

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Tundemunga, near Adelaide, 1840, to "John" in Wigan, Lancashire, England, dated September 1840', State Library of South Australia, D 7310, p.21.

[30] Christopher Dawson, *The Hanging at the Brisbane Windmill*, Brisbane: Inside History, 2009.

[31] Christopher Dawson, *A Pit of Shame: The Executed Prisoners of Boggo Road*, second edition, Brisbane: Inside History, 2010(b), p.12.

[32] David J. Towler and Trevor J. Porter, *The Hempen Collar: Executions in South Australia, 1838–1964, A Collection of Eyewitness Accounts*, Adelaide: The Wednesday Press, 1990, pp.148-149.

[33] Arthur L. Wintle, 'The Abolition of Public Executions in New South Wales', unpublished B.A. (Hons) thesis, La Trobe University, 1973, p.23.

from public view."[34] At the first private execution in Queensland in 1857 a thick black cloth was wrapped around the top half of the scaffold to prevent people from seeing the platform from over the low lying walls.[35] At Western Australia's first private execution in Perth Gaol in 1871, the gallows remained in the same location inside the gaol yard but it was simply erected at a lesser height so that it could no longer be seen over the walls.[36] A similar tact was taken inside the prison yard of the Murray Street Gaol in Hobart. The long wooden legs of the scaffold were all but removed, a large hole dug to the depth of seven feet and the trap placed above it.[37] The once proud gallows, soaring over the prison walls, now became invisible to the world outside the prison through a variety of hasty alterations made in accordance with the spirit of the Private Execution Acts.

[The trap or drop.]

> *It should, however, be observed that the public executioner (with whose assistance this Memorandum has been compiled) attaches much importance to having a trap in two pieces dividing in the middle when the bolt is withdrawn, as by this arrangement the man falls quite straight down and his neck is more surely broken; whereas a single trap with hinges at the side or back gives the convict a direction in his fall, which diminishes the jerk at the end, and is therefore less effective in breaking his neck. The public executioner considers it very important that the lever for letting down the trap-doors of the drop should be so placed that the executioner can get at it without losing sight of the convict, who otherwise might shift his position.*

The specific design aspects of the construction of the trap door are best explained by reprinting the technical drawing of the Newgate Gallows sent to the Australian colonies

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[34] James Condon, John Dixon and Alfred Henry Jackson were the names of the men executed. See *The Argus*, 23 November 1855, p.5.

[35] The man executed was named William Teagle. See Dawson, 2010a, p.26.

[36] *The Inquirer and Commercial News*, 19 April 1871. In the years prior to the legislation being passed the scaffold at Perth Gaol was erected at such a height from within the prison yard that executions were clearly visible from nearby houses, a subject of complaint for one newspaper. See *The Inquirer and Commercial News*, 17 October 1855.

[37] Richard Davis, *The Tasmanian Gallows: A Study of Capital Punishment*, Hobart: Cat and Fiddle Press, 1974, p.59.

in December 1880 (see Figure 4.3). This document was not included in the original Memorandum from the Colonial Office dated June 1880. As noted by the Secretary of State for the Colonies, copies were arranged and dispatched only after "numerous applications" were received from the colonies regarding the "Working drawings of a Gallows and Drop".[38] The technical drawing clearly details the trap being made from two pieces that part in the middle as suggested by the Memorandum. When the stop pin was removed the floor very quickly gave way. A sudden drop and a clean death should result, providing the drop length was calculated properly and the knot fixed in the appropriate position.

Given there was no central directive on the question of gallows construction until after this document was sent out in 1880 the design of the apparatus varied in the Australian colonies. Still, descriptions of drops designed later in the nineteenth century give the impression of a much more efficient and reliable apparatus that was far superior to earlier incarnations. In 1896 one Melbourne writer wrote of "springs, bolts, and [a] pulley" when describing the gallows at Melbourne Gaol.[39] Even an "India-rubber tube" was strategically placed below the drop with the aim of "deadening any noisy slam".[40] The Boggo Road gallows constructed in the early 1880s was similarly complex and had a pulley system that could gently lower the criminal's body to the ground after the execution was complete.[41] Some of these late colonial constructions reference aspects of the Newgate drop in their design but to state with confidence that these apparatus could trace their lineage directly to this drawing sent out in 1880 is difficult to determine.

> *[The rope.]*
>
> *The rope should be strong, and should be well tested with weights much greater than those of any man who is likely to be hanged on it, and with a somewhat longer drop than the normal one of eight*

[38] 'Circular from the Secretary of State for the Colonies, with attached plan and section of the gallows at Newgate Gaol, 28 December 1880', QSA, Series ID 12690, Item ID 1839168.

[39] Waldemar Bannow, *The Colony of Victoria, Socially and Materially*, Melbourne: McCarron, Bird & Co, 1896, p.43.

[40] Bannow, 1896, p.43.

[41] Dawson, 2010b, p.12.

feet. The object of thus testing the rope is not only to prevent the possibility of those shocking accidents which sometimes occur at executions, but to take from the rope any kink or elasticity which it would have when new.

The ropes supplied for executions in this country by the authorities of Her Majesty's Gaol of Newgate have a smooth metal eye surrounded by two strands of rope – an arrangement which has many advantages.

All ropes should be kept dry and in good order, and in tropical climates they should not be used if they have long in store without being severely tested afresh. Supplies of ropes with metal eyes can be obtained from Newgate through the Crown Agents.

Some executioners took pride in the rope and knot they were capable of producing. In New South Wales, Robert Elliot reportedly spent many hours "manipulating the rope with grease to make it soft and pliable" before every execution.[42] Grease, or a similar lubricant, was always applied to the rope to make the knot slide over itself more easily. If appropriate care was not taken with the rope it could stretch or even snap in two at the crucial moment. For example, when a punitive party travelled to the Coorong from Adelaide in 1840 to hang the perpetrators of the Maria Massacre (see Chapter 3) the rope was not hung with weights prior to the summary execution. The result was that it stretched well beyond its resting length. The sand had to be cleared away from under the feet of the two condemned men before a second attempt on their lives could be made.[43]

Unwanted stretching was one thing but a clean snap of the rope could be just as harrowing and certainly more painful. It even engendered the possibility of the condemned being extended mercy because of the trauma involved. In 1803 Joseph

[42] Dawson, 2010a, p.27.

[43] A watercolour painted by E.C. Frome at the scene of the hanging in 1840 clearly demonstrates the hole dug below the feet of the two men to accommodate for the rope that had unexpectedly stretched. The work is reprinted in Robert Foster, Rick Hosking and Amanda Nettelbeck, *Fatal Collisions: The South Australian Frontier and the Violence of Memory*, Adelaide: Wakefield Press, 2001, p.14. For a written primary account of the two attempts to execute these men, see Alexander Tolmer, *Reminiscences of an Adventurous and Chequered Career at Home and at the Antipodes, Volume 1* [1882], facsimile edition, London: Gilbert and Rivington Ltd, 1972, p.189.

Samuels mounted the Sydney gallows three times over. On the first attempt the rope broke in a "singular manner", on the second attempt "the cord unrove at the fastening" and on the third attempt the "cord again snapped in twain".[44] Each time Samuels slammed to the ground from the height of the platform. When the rope failed a third time the Provost Marshal rode to the Governor and "feelingly represented these extraordinary circumstances" to him.[45] The Governor, in response, granted Samuels a reprieve from the penalty of death. On another occasion in 1826 William Curtin received a commutation of his death sentence after a problem with the rope caused him to fall to the ground from a "considerable height" and receive heavy injuries.[46] Mercy was not always forthcoming, however, as William Johnson found out in 1828.[47] He too fell to the earth after the rope snapped so the Sheriff took leave from the execution scene to inquire into the possibility of Johnson being granted mercy. It was a "trying moment", according to the *Australian,* where the criminal sat on his coffin for almost an hour "painfully vibrating between hope of mercy, and doubt, and fear".[48] Unfortunately for Johnson, the Sheriff returned and announced that "the law shall take its course".[49]

The suggestion in the Memorandum to employ a "smooth metal eye", as opposed to persisting with the traditional 'hangman's knot', was not taken up until after this document was circulated. Adelaide Gaol was quick to adopt this new technique as it was consistently noted in the newspaper reports of executions during the 1880s and 1890s.[50] The older knot was performed to varying degrees of success in the colonies. One journalist who witnessed the hanging of the perpetrators of the Mount Rennie rape case at Darlinghurst Gaol in 1887 stated how the 'hangman's knot' approached the

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[44] G. Paterson, *The History of New South Wales from its First Discovery to the Present Time* [short title], Newcastle-upon-Tyne: Mackenzie and Dent, 1811, p.385.

[45] *Ibid.*

[46] 'Executive Council Minute no.6, 17 February 1826', in *Historical Records of Australia*, series 1, vol.12, Sydney: The Library Committee of the Commonwealth Parliament, 1919, p.245.

[47] *Australian*, 25 March 1828.

[48] *Ibid.*

[49] *Ibid.*

[50] At the execution of William Brown in 1894 one journalist remarked on a new rope the hangman was using, fixed by a "copper eyelet" and a "leather washer" that were placed tight against the criminal's neck. See *South Australian Register*, 25 August 1894. For the execution of William Burns in 1883 a "thimble neatly spliced at one end of the rope" is mentioned as was a "closely-fitting leather washer" to prevent the knot from expanding once fastened to the neck. See *South Australian Register*, 19 January 1883.

"size of an ordinary quart bottle, if not larger".[51] Not only did the rope reek of freshly applied tar that "permeated the whole building", it was also "stout" enough to tie a "steamer up to a wharf".[52] The correspondent called these arrangements "barbarous in the extreme" because he thought it caused prolonged strangulation rather than the immediate dislocation of the neck. A poorly tied knot was also a point of concern. At one of the executions presided over by Alexander Green in 1853 a faulty knot he had tied around the neck of one criminal caused him to fall to the ground from a reported height of twenty feet. Paralysed but still living the criminal was, limp limbed, carried up to the drop once more to be hanged a second time.[53]

The rope used for hangings was an object of fascination to many colonists. Robert Elliot, the aforementioned hangman who took great pride in preparing his rope for executions, appeared before a Magistrate for drunkenness in 1857. It was revealed in court that he became unsociably drunk after being given free "nobblers" by publicans around Sydney for exhibiting to excited patrons the two lengths of rope he had used at a recent double execution.[54] After the death of Solomon Blay, the long-term Tasmanian executioner, one newspaper claimed that two-hundred pieces of rope were found among his personal effects. Housed in a box they were said to be labelled and ticketed with the details of each of his executions.[55] Sometimes the rope was profitably sold off as a relic of the hanging. The rope used to hang a man named Thomas Griffin in Queensland was later cut up and sold at one shilling each. "The genuineness of this rope was doubted," wrote one settler in his published recollections, "but the buyers were satisfied."[56] The existence of such stories and an unwanted fascination with the rope led, in Queensland at least, for it to be burnt by prison authorities immediately following executions conducted after the 1860s.[57]

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[51] *The Riverine Grazier*, 11 January 1887, p.4.

[52] *Ibid.*

[53] *Bathurst Free Press*, 16 April 1853.

[54] *Empire*, 16 May 1857.

[55] Harris, 2015, p.314.

[56] W.R.O. Hill, *Forty-Five Years' Experiences in North Queensland, 1861 to 1905, with a Few Incidents in England, 1844 to 1861*, Brisbane: H. Pole & Col., Printers 1907, p.180.

[57] Dawson, 2010a, p.6.

[The length of drop.]

Death by hanging with a long drop ought to result from dislocation of the neck, or nervous shock. A man of 10 stone and under requires a drop of 8 feet, a heavier man requires a slightly lesser drop in proportion to his weight over 10 stone. If the man's neck and shoulders are very hard and muscular he should have an extra foot or so beyond the normal drop of his weight.

The correct drop length, calculated with reference to the weight of the prisoner, would result in a quick dislocation of the neck and an immediate death. A decade after this Memorandum appeared giving general estimates of appropriate drop length a much more precise 'Table of Drops' began appearing in the colonies. The table itself is dated April 1892 and has two columns "weight of the prisoner in his clothes" and "length of drop" (see Figure 4.4). The hangman and sheriff could easily refer to these corresponding columns on the day of execution. In rare circumstances, where an abnormally heavy or light prisoner was in their care, they could even calculate the drop length themselves since the specific formula underpinning these standard drop lengths was also included.[58]

A hand-written transcription of the Table of Drops appears in an exercise book used by successive Victorian sheriffs to document the executions from 1894 onwards.[59] The heading to the transcription states that the Table was an enclosure to a "confidential circular" which suggests that it was not just sent to Victoria given the nature of such documents.[60] That said, more research is required to understand just how widely this document was circulated among the Australian colonies. An identical, though typed, version of the Table does appear in the Appendices to Ross Ward's work, *The Office of the Sheriff* (1992), but poor referencing obscures both the origin and jurisdiction of his version of the document.[61] A search of the dispatches received from London for both 1892 and 1905 (the two years mentioned in the Victorian transcription) in the State

[58] The formula to calculate drop length was 840 foot-pounds divided by the total weight of the criminal in his clothes, the answer being the appropriate drop length in feet.

[59] Morgan, 2004, pp.12-13.

[60] *Ibid.*

[61] Ward, 1992, p.57.

Records of South Australia did not reveal a Table of Drops where one might expect to find a circular of this nature.[62]

According to the Table of Drops anywhere from four to eight feet was acceptable but anything beyond these parameters could be disastrous. Set the drop too short and extended strangulation would result, too long and decapitation was a very real risk. John Hatton, Queensland's longest serving executioner who plied his trade from 1862 to 1885, was in the habit of setting the drop length far too long.[63] When Patrick Collins was hanged in 1872, Hatton set an enormous drop length of 12 feet. A "fearful gash" was thereby made to Collins' neck that nearly took off his head; "blood spurted forth violently, deluging the clothes he wore, and pouring down over his trousers on to the ground underneath his feet".[64] Solomon Blay in Tasmania was at the opposite end of the spectrum hanging every criminal regardless of weight with a drop of 1.5 metres, or just under 5 feet.[65] Light-framed criminals would therefore be choked over many minutes rather than a clean break of the neck being made. The insufficient drop length that Blay persisted with in Tasmania was even raised repeatedly by one MP at the 1884 Select Committee into Gaol Discipline.[66] Though dislocation of the neck was the intention, it was no sure thing in the colonial era. Such informative guides as the Table of Drops and the 1880 Memorandum provided welcome instruction to tenured hangmen who did not appear to be quick learners.

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[62] I searched for the Table of Drops in the equivalent set of records where the 1880 Circulars on Capital Punishment were found for South Australia – that is, in the dispatches received from the Secretary of State in London (held by the State Records of South Australia). For the records consulted in this unsuccessful search for a Table of Drops in South Australia, like the one that appears in Victoria, see 'Despatches received from the Secretary of State, London, later Governor General, 1892', SRSA, GRG2/1/52; 'Despatches received from the Secretary of State, London, later Governor General, 1905', SRSA, GRG2/1/70.

[63] For more on John Hatton the executioner, see Dawson, 2010a, pp.32-36.

[64] *The Maitland Mercury*, 11 June 1872, p.4.

[65] George Brown, David Button, Elizabeth Mercer, Peter Mercer and Brian Rieusset, *The Penitentiary Chapel Historic Site*, Tasmania: National Trust of Australia, 2007, p.42.

[66] Henry Rooke asked both the Superintendents of Hobart and Launceston Gaol about the length of the drop and whether they thought it was sufficiently long. See Tasmania, 'Gaol Discipline: Report from the Select Committee, with Minutes of Proceedings and Evidence', *Tasmanian Parliamentary Papers*, no.177 of 1884, pp.8 and 11.

[Pinioning.]

The governor of the prison, the surgeon, two or three principal warders, and the executioner should proceed to the condemned cell a few minutes before the execution, and the convict should be pinioned and his neck bared by the executioner. In this country a set of straps is used, which appears effective and can be quickly adjusted.

The chief object to be attained in pinioning the convict is to prevent his getting his hands up to his throat. Rapidity of adjustment is also an important object. The accompanying diagrams show a front and back view of the convict when pinioned, and also the pinioning apparatus itself; which will be supplied on application to the Secretary of State.

Executioners who were either forgetful or untrained in the necessities of pinioning paid the price for their negligence. At the hanging of Charles Streitman at Adelaide Gaol for example, the executioner forgot to strap the prisoner's legs together beforehand. Owing to the drop length being a mere 3 feet, Streitman managed to raise his legs to the platform above but they were soon kicked back into the drop. "His chest heaved and fell at long intervals in the attempt to breathe", wrote one observer, "It was not until twenty-two or twenty-three dragging minutes had passed that all signs of life had ceased."[67] At Darlinghurst Gaol in 1863 Henry Manns' untied arms, "repeatedly rose and fell, and finally, with one of his hands, the unfortunate man gripped the rope as if to tear the pressure from his head, a loud guttural noise the meanwhile proceeding from his throat and lungs, while blood gushed from his nostrils, and stained the cap with which his face was covered."[68] The whole scene lasted over 10 minutes according to the reporter.[69] Pinioning the limbs of the criminal ought to be one of the easiest things to control on the day of execution. The imprecision of drop lengths, uncertainties over the type of rope and placement of the knot, were much harder to get right. Still, many executioners either completely forgot to do so, or remembered but failed to do it properly.

[67] *South Australian Register*, 9 August 1877.

[68] *The Sydney Morning Herald*, 27 March 1863.

[69] *Ibid.*

[The procession to the scaffold.]

When the convict is pinioned, and his neck bared, he should be at once conducted to the scaffold, the governor and surgeon preceding with the chief warder, two warders at the convict's side, and the executioner following with such force of warders as may be deemed requisite.

In the earliest days of each colony, when the place of confinement and the execution site could be spread out across town, there was something of a procession for the public to witness. In early Port Phillip there were three separate processions of the "death cart" (as Edmund Finn called it) in 1842 – at the execution of 'Bob' and 'Jack' in January, Daniel Jepps, Charles Ellis and Martin Fogarty in June, and finally, of 'Roger' in September.[70] A watercolour, painted by W. F. E. Liardet, depicts the very first procession starting off.[71] A bullock team pulls the cart conveying the two Indigenous criminals away from waiting officials, there are military guards in tow while a crowd is visible walking adjacently to the cart (see Figure 4.5). The procession travelled down Collins Street, William Street, Lonsdale Street and Swanston Street to the site chosen for the execution.[72] On the second occasion the route taken to Swanston Street was only very slightly altered but, this time, the cart had been loaded with three coffins which the condemned bushrangers were required to sit atop.[73] On both occasions crowds lined portions of the streets to see it pass by. Less is known about particulars of the procession of an Indigenous male nicknamed 'Roger' in September, though Edmund Finn briefly notes that one did indeed take place.[74]

In Adelaide and Launceston a similar horse and cart procession is recorded at one time or another but only very early on in the history of each settlement.[75] In none of the

[70] For information about the three separate processions of the criminal to the site of execution, see Finn, 1976, pp.394-395, 397 and 399, quote on p.394.

[71] W.F.E. Liardet, 'The First Execution', watercolor, pencil, pen and ink, 8.7 x 16.4 cm, 1875, State Library of Victoria, H28250/14.

[72] Finn, 1976, p.395.

[73] *Ibid.*, p.397.

[74] *Ibid.*, p.399.

[75] For Adelaide, this occurred at the execution of Michael Magee in 1838 according to the account of T. Horton James, while in Launceston a man named Jefferies in 1826 was carted to the gallows among a

colonies did it come close to the scale, formality or carnival atmosphere that was detectable at London's 'Tyburn Processional'. Rather it was a practical necessity to convey condemned criminals from the place of confinement to the site of execution. Thus, almost always, these extended processions ceased immediately following the main gaol being built since it became the site of subsequent executions thereafter. For instance, Port Phillip's processions stopped after the Melbourne Gaol opened in 1845. Subsequently the 'procession' to the scaffold consisted of nothing more than collecting the criminal from his/her cell to wherever the gallows had been erected on the gaol precinct.

[The chaplain.]

> *Where the convict professes the Christian religion, and the services of a chaplain of a suitable denomination are available, the chaplain should attend in the condemned cell, and his place in the procession is behind the governor and in front of the convict. In the discharge of his duties he will be guided by the rules and usages of the church to which he belongs.*

Religion was an important part of the execution ritual, clergymen time and again helped guide the condemned criminal both at the execution itself and in the days leading up to it. The overwhelming majority of criminals received some variety of Christian comfort in their final moments. There are repeated references across the colonies to Roman Catholics, sometimes but not always, being dressed in pure white with a large black cross being emblazoned across their chest, back or cap.[76] Rosaries and crucifixes were also a common sight on the scaffold among Catholics. Most criminals mounted the scaffold empty-handed, though objects like flowers or the bible did sometimes appear across the denominational divide. There is much more to say about the influence of

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hostile crowd. See James, 1962, pp.54-61; Geoffrey Chapman Ingleton, *True Patriots All, or News from Early Australia*, Sydney: Angus and Robertson, 1952, p.107.

[76] One time Vicar General of Sydney, William Ullathorne, who attended to many condemned criminals in colonial New South Wales wrote that: "The Catholics had a practice of sewing large black crosses on their white caps and shirts." Most of the criminals under his care appeared on the scaffold with this attire. See, for example, the convicts executed in the aftermath of the 'mutiny' on Norfolk Island in 1834: William Ullathorne, *The Autobiography of Archbishop Ullathorne with Selections From His Letters*, London: Burns & Oates Ltd, 1891, p.103.

clergymen over condemned criminals at colonial executions but that is better discussed in the context of Chapter 5.

The narrow definition of Christian attention suggested in the Memorandum was sometimes exchanged for spiritual advisors of religious minorities. At the execution of Edward Davies, a bushranger of Jewish heritage, he was assisted by a reader at the Sydney Synagogue throughout proceedings and later buried in the Jewish portion of the Devonshire Street cemetery.[77] At the execution of an Afghan Muslim named Goulam Mahomet in Western Australia his spiritual advisor passed the Quran over his chest, traced the words of a holy prayer on his forehead and told him to recite that same prayer as the drop fell. After his execution he was buried with "Mohammedan rites" outside the walls of Fremantle Prison by twenty of his fellow countrymen.[78] Some sheriffs also respected the wishes of Indigenous criminals in death. Wera Meldera who was executed at Adelaide Gaol in 1845 wanted no white man to touch him in death or at the burial – a request that was "strictly complied with" according to the *South Australian Register*.[79] After his hanging a collection of local Aborigines "received him in their arms, placed him in the coffin, and buried him in the gaol yard by the side of the other murderers".[80] Only very rarely was spiritual advice outright refused as in the case of Arthur Buck, an atheist executed at Melbourne Gaol in 1895. He "respectfully received" the prison Chaplin but was most unusual in his request for the "usual prayers and devotional exercises" not to be carried out in his final moments.[81]

[The execution.]

On reaching the gallows the duty of the executioner is as follows: –

1. *Place the convict <u>exactly</u> under the part of the beam to which the rope is attached.*
2. *Strap the convict's legs tightly (diagram annexed, marked C).*
3. *Put on the white linen cap (diagram annexed, marked D).*

[77] G.F.J. Bergman, 'Davis, Edward (1816-1841)', *Australian Dictionary of Biography* 1966, http://adb.anu.edu.au/biography/davis-edward-1964, viewed 15 March 2015.

[78] Albert Frederick Calvert, *My Fourth Tour in Western Australia*, London: W. Heinemann, 1897, p.157.

[79] *South Australian Register*, 29 March 1845.

[80] *Ibid.*

[81] *The Argus*, 2 July 1895, p.7.

4. *Put on the rope round the neck quite tight, the knot of metal eye being just in front of the angle of the jaw-bone on the left side, so as to run up behind the left ear when the man falls and receives the jerk. Care should be taken to adjust the rope as in the diagram annexed, marked E, the part to which the metal eye belongs being [sic.] in the front of the throat. If the rope is adjusted the other way there will be less certainty of breaking the man's neck. The noose should be kept tight, as adjusted, by means of a stiff leather washer on the rope. The long front of the white cap should be free from the rope, hanging down in front.*
5. *Go <u>quickly</u> to the lever and let down the trap-doors.*

Once the preparation was made and the knot accurately adjusted under the neck, the procedure was fairly straightforward. Rather than talk through these elements it is much easier to see how these bullet points were paired with the illustrations that were included in the 1880 Memorandum (see Figure 4.1). The equipment and technique drawn in these diagrams was seen by the executioner in England as being most appropriate for the job at hand. Buckled leather straps replaced plain lengths of rope for ease of adjustment and quick use. A newly fashioned hood replaced the rather non-descript calico bag that was usually placed over the heads of dying criminals. It kept the back and sides of the neck clear for the precise positioning of the rope while the plunging flap extending down near the chest of the culprit made it an even more remote possibility that the contortions of the face would be visible to the onlookers. To be sure that this execution equipment was used in the proper fashion additional diagrams were included. Clarification on how to fix the leather pinioning straps onto the upper body of the criminal was also demonstrated for the benefit of practical application. The new method employed by the English hangman of a metal washer instead of the 'hangman's knot' is drawn very clearly. So too is the positioning of the washer in relation to the criminal's neck.

For a visual example of an execution conducted in the months prior to the circulation of the 1880 Memorandum, and therefore in the absence of these new techniques, see Figure 4.6. It depicts the hanging of Andrew George Scott (known as 'Captain

Moonlite) and Thomas Rogan at Darlinghurst Gaol in January 1880. The 'hangman's knot' was still in use as are the rather non-descript calico bags placed over the criminal's faces, their hands appear to be pinioned but the legs left free. 'Nosey Bob', the executioner of New South Wales, confidently stands cross-armed to the left of a reliable platform that was purpose built for such an occasion. Even without explicit guidance from England like that contained in the 1880 Memorandum, by the final decades of the nineteenth century the basics of hangings were being performed well when a competent executioner was on hand. Visually, at least, the Australian gallows were similar to elsewhere and the suggestions of the Memorandum appear to be sometimes small, obvious or incidental. However, critical mistakes were frequently made in regards to technique. As documented above, even very minor oversights could produce a variety of very painful outcomes for the criminal involved. Fortunately for Scott and Rogan, 'Nosey Bob' performed his task admirably on this occasion with a skill and judgment derived from years of first-hand experience. As far as Australian colonial executions are concerned, both men died as well as could be hoped.

> *[The taking down of the body.]*
>
> *The convict should hang one hour, and before he is taken down the surgeon should, as a matter of form, satisfy himself that he is dead.*
>
> *The best way of taking the body down is not to cut the rope, but to take the rope off the hook, and lift the body down; the rope should be removed from the neck, and also the straps from the body, when it is on the ground.*
>
> *In laying out the body for the inquest, or other similar proceeding, the head should be raised three inches by putting a small piece of wood under it.*

These instructions on how to deal with the criminal's body in death are the final procedural guidelines included in the 1880 Memorandum. Historically criminals were always left hanging for at least one hour following their execution to ensure that, without a shadow of doubt, death had run its course. In the era of private executions sometimes this length of time was shortened. Either because the presence of a surgeon could now quickly confirm the death, or because the execution was so horribly botched that it was quite clear that the criminal was deceased. For example, at an execution in

Brisbane in 1901, the criminal was only left hanging for a mere 10 minutes after death – a motionless body, expired pulse and a blood-soaked cap caused by the fall was more than enough confirmation for those present.[82] The Private Execution Acts did not specify a period of time for the body to be left hanging and it was, therefore, a proviso that was open to interpretation.

The display of the body for any more than an hour would only occur in the rare decision that it should be 'hung in chains'. This practice was certainly not the norm at colonial executions and it is most prevalent only in the very early annals of New South Wales and Tasmanian history. The dead criminal's body could be left hanging for months, standing as a lasting warning for visitors to the district. Frances Morgan, for instance, was hung in chains on a "small island" in the middle of Sydney Harbour.[83] According to one early chronicler, the "clothes shaking in the wind, and the creaking of his irons" reminded local Aborigines of the supernatural and therefore presented a "much greater terror to the natives, than to the white people, many of whom were more inclined to make jest of it".[84] "Hunter's Island" was the place to gibbet dead criminals in Hobart until the year 1816 when the Lieutenant-Governor of Van Diemen's Land, Thomas Davey, ordered these "Objects of Disgust" to be moved elsewhere.[85] Following the lead of the British Parliament that abolished the practice of hanging in chains in 1834, the very same Act was adopted by New South Wales and Van Diemen's Land in 1837.[86]

Dissection was another indignity that could be imposed upon the early Australian criminal before burial. When John Fenlow was executed in early Sydney his body was, pursuant to his sentence, turned over to a surgeon for dissection. David Collins, the first Judge Advocate of the infant colony, described what happened when Fenlow's post-

[82] Dawson, 2010b, p.58.

[83] Paterson, 1811, p.254.

[84] *Ibid.*

[85] A "Point of Land near Queensborough" was, according to the words of Lieutenant-Governor Davey's order, to be the new site of executions. See *The Hobart Town Gazette and Southern Reporter*, 8 June 1816, p.1.

[86] For the original British Act, see United Kingdom, Chapter 26 of 1834, *An Act to abolish the practice of hanging the Bodies of Criminals in Chains*, 1834. For confirmation of the adoption of the British Act by New South Wales and Van Diemen's Land, see New South Wales, no.2 of 1837, *Imperial Acts Adoption Act*, 1837; Van Diemen's Land, no.1 of 1837, *An Act for extending to this Colony sundry Statutes passed for the amendment of the Criminal Law*, 1837.

dissection body was able to be inspected by the general public: "[T]hey had no sooner signified that a body was ready for inspection, than the hospital was filled with people, men, women, and children, to the number of several hundreds".[87] Collins says these spectators consisted of the "lower class" and lamented how none "appeared moved with pity for his fate, or in the least degree admonished by the sad spectacle before their eyes".[88] Dissection was commonly recorded at very early executions, though the degree of publicity given to Fenlow's executed body in 1796 stands out as a rare occurrence.[89] Dissection was abolished in the two oldest Australian colonies of New South Wales and Van Diemen's Land in 1837 by the very same 1834 British Act that had outlawed hanging in chains.[90]

The taking down of the body was something only occasionally documented by witnesses to the execution as it was presumably viewed as ephemeral to the central drama of the event. At the private execution of Thomas Williams and Charles Montgomery one unnamed journalist writing in *The Bird O' Freedom* did, however, give an extended personal account of what it was like to stay behind and witness this part of the scene.[91] It was stated that the executioner's assistant held the body while 'Nosey Bob', the hangman, cut through the noose using a sharp knife, lowering the bodies gently into a pre-positioned basket. What was most "repulsive" to the journalist was when he spotted the executioner, "coolly wiping the grease of the rope from his hands with a towel" before moving onto the second body.[92] Once dissection was outlawed, the inspection of the body following death by medical practitioners was a much more passive exercise. The bodies of Williams and Montgomery were carried

[87] David Collins, *An Account of the English Colony in New South Wales, from its First Settlement in January 1788, to August 1801: with remarks on the dispositions, customs, manners &c. of the native inhabitants of that country*, second edition, London: T. Cadell and W. Davies, 1804, p.330 [above, and hereafter, the arcane use of the 'f' has been replaced with 's' where appropriate for passages quoted from Collins' work]. This account is repeated verbatim in Paterson, 1811, p.245.

[88] Collins, 1804, p.330.

[89] For example, Henry Muggleton was executed in 1830 at Sydney Gaol and was then sent off for dissection but no note was made of the public being admitted to the hospital afterwards. See *Sydney Gazette*, 1 June 1830.

[90] For more on the general history of dissection, especially in the context of Van Diemen's Land, see Helen MacDonald, *Human Remains: Dissection and its Histories*, Melbourne: Melbourne University Press, 2005.

[91] *The Bird O' Freedom*, 2 June 1894, p.5.

[92] *Ibid.*

away individually in the large basket to the gaol morgue. The doctor then assessed each body for the exact cause of death and noted it down – suffocation for Williams and the dislocation of the neck in the case of Montgomery.[93]

The place of burial for executed prisoners was something that varied colony to colony and was not always well documented. Graves are usually connected to the main colonial prison or a nearby cemetery but sometimes the burial site of criminals is unknown. South Australia provides a useful case study. The majority of executed criminals were interred between the inner and outer walls of the Old Adelaide Gaol and are, to this day, identifiable with a very modest grave marker that carries nothing more than the criminal's initials and date of death.[94] However, the resting places of the only three non-Indigenous men to be hanged outside Adelaide are still unknown.[95] Moreover, the burial places of those Indigenous offenders publically executed on the frontier are largely undocumented.

This section has contrasted the ideal with the reality of execution procedure in colonial history. Botched executions were the scourge of the colonial gallows so much so that an attempt was made by the Colonial Office to standardise execution procedure across all jurisdictions. Not only was knowledge of proper execution technique shared with the colonies via the 1880 Memorandum but equipment ("ropes with metal eyes" and the "pinioning apparatus") was available to Australian practitioners upon request. The technical drawings of the gallows at Newgate Prison sent out later in the year sought to prevent mistakes in the design stage. The Table of Drops also hoped to correct the unfortunate frequency with which criminals were hanged with either too short or long a fall. Bungled executions took away from the intended lesson of the Australian gallows. As a result, hangings were a civic event all too often interpreted as 'barbarous' and 'macabre' rather than a solemn display of state justice vividly demonstrating the consequences of crime. By circulating the same detailed instructions on how to execute

[93] *Ibid.*

[94] Towler and Porter, 1990, p.65.

[95] All three—Carl Jung, William Page and William Nugent—were hanged at the Old Mount Gambier Gaol. See Kate Hill, 'Friday Rewind: The Hangman of Old Mount Gambier Gaol', *ABC South East SA* 2015, http://www.abc.net.au/local/photos/2015/08/21/4297622.htm, viewed 16 November 2015.

criminals to Australian colonial administrations it was hoped mistakes could be prevented and decency restored to the gallows.

The Sight of Pain and the 'Lesson' of the Gallows

From sentencing through to burial, Australian executions could be bungled in a myriad of ways. Not only were there serious procedural failures at executions, they appear to be a frequent occurrence. What was neglected in the retelling of Australian execution procedure above was the extent to which botched hangings impacted upon the 'lesson' of capital punishment and the feelings it instilled in the onlooker. When Joseph Mutter was decapitated in Brisbane by an unusually hard and thin rope, unwisely left exposed to the effects of overnight frost, the press were flabbergasted. "[H]orrible", "disgraceful", "disgusting", "sickening" and "atrociously revolting" are a select list of adjectives extracted from just one short paragraph that appeared in *The Brisbane Courier* describing the event.[96] Instead of concentrating on the gravity of the murder Mutter had committed and the warning hangings sent to potential wrongdoers, the Queensland press were busily mounting a case for an official inquiry into the matter. Mutter may be an extraordinary example but the fact remains that even in minor cases of mismanagement a botched hanging took away from the intended lesson of punishment of the consequences of crime.

Instead of demonstrating, one by one, how 'botched' executions negatively impacted upon the lesson of the scaffold and the feelings it generated in those who watched, one primary document has again been selected to help centre the discussion. It is a Report penned in 1858 by Claud Farie, then Sheriff of Victoria, regarding a cluster of executions that took place in Melbourne Gaol in November of that year. Such was the sensation caused by these hangings in *The Argus* and *The Herald* that the Sheriff thought it reflected unfairly on the "officers whose duty it is to conduct such operations".[97] The Report was originally prepared for the Colonial Secretary but appeared in the *Victorian Parliamentary Papers* after it was tabled in both Houses

[96] *The Brisbane Courier*, 10 June 1879, p.2.

[97] Victoria, 'Execution of Criminals, Report of the Sheriff, Relative to Recent Executions at Her Majesty's Gaol, Melbourne', *Victorian Parliamentary Papers*, no.32 of 1858, pp.865-870, quote on p.867.

according to "His Excellency's Command".[98] The correspondence included in the 1858 Report is worth quoting at length since it goes to the heart of how hangings, and the physical pain it caused, were easily misread by the public – even if the procedure went exactly according to plan.

In November 1858 four men were executed at Melbourne Gaol on two separate days. On 6 November Samuel Gibbs and George Thompson were executed while on 29 November Edward Hitchcock and Christian Von See (sometimes spelt Sie) were hanged. In the first of these double executions, Thompson died instantly but Gibbs' rope snapped after the bolt was pulled and he fell to the ground in a "most unfortunate and terrible accident" according to the Sheriff.[99] The broken ends of Gibbs' rope were hastily tied together and the criminal was hanged a second time. The Sheriff was eager to stress repeatedly that, in his own opinion, Gibbs was not "sensible to any suffering" between the first and second attempts on his life, despite comments to the contrary in the newspapers.[100] He also registered his confusion at the failure of the rope. He attributed the break to a "flaw or defect" in the manufacture of the hemp, unseen to the naked eye, as the rope was always "carefully examined" before an execution "to see if any defect could be found".[101] Rather predictably the press were disparaging toward Gibbs' hanging, *The Herald* more so than *The Argus* it must be said.[102]

Outrage at the bungled treatment of Gibbs was to be expected but public and press indignation at the executions of Von See and Hitchcock manifested in a very peculiar manner. When these two men were executed, the Sheriff noted in his Report that, "nothing unusual occurred," and that they were not "sensible or conscious of any pain or suffering, mental or bodily, after they were cast off".[103] Still, three days later, in a Letter to the Editor of *The Herald*, 'S.E.F.' wrote that Hitchcock died in "terrible

[98] *Ibid.*, p.867.

[99] *Ibid.*

[100] *Ibid.*

[101] *Ibid.*, p.868.

[102] For an initial report on the execution of Gibbs and Thompson, see *The Argus*, 8 November 1858, p.5.

[103] Victoria, 'Execution of Criminals, Report of the Sheriff, Relative to Recent Executions at Her Majesty's Gaol, Melbourne', *Victorian Parliamentary Papers*, no.32 of 1858, p.868.

agony" because of the length of time the body appeared to suffer. The letter, reprinted in his Report in full, reads as follows:

THE EXECUTION OF HITCHCOCK

To the Editor of the Herald.

SIR,

Your contemporary, *The Christian Times*, in noticing the execution of the criminal, Edward Hitchcock, which took place on Tuesday last, states that the unhappy man died in great agony, 'suffering some four or five minutes.'

Now, Sir, what is the meaning of a wretched man being subjected to the extremest [*sic.*] agony for this great space of time? It must have been caused by shameful neglect on the part of the authorities. If the savage and barbarous punishment of death must be inflicted on our fellow creatures, for the sake of humanity let every means be taken to render their agonies as brief as possible. It is a disgrace to our boasted civilization that such a piece of barbarity as I have mentioned should have to be recorded. Would that the death punishment were done away with. It is opposed to every good feeling of our breasts. You will greatly oblige by inserting this.

I am, yours obediently,

S.E.F.

Collingwood, 29 November, 1858.[104]

The Sheriff was clearly incensed by the accusation that Edward Hitchcock underwent extended suffering during his execution. It was the popular response to this hanging in particular that animated the Sheriff to write the Report and seek out expert testimony for the Colonial Secretary to read. Sheriff Farie saw nothing unusual or remotely cruel in the hanging of Hitchcock, nor the length of time his body was in spasm. It was, in his opinion, an execution carried out to the letter. As proof of his point, the Sheriff asked for the opinion of the two medical men present at the death. The response came in the

[104] *Ibid.*, p.869.

form of a certificate. Penned three days after the execution took place, it reads as follows:

> Melbourne, 2nd December, 1858.
>
> We, whose names are hereunto subscribed, having been present at the execution of Edward Hitchcock, at the main Gaol of Melbourne on the 29 November, do certify that the execution was performed in the usual manner, that there was no neglect on the part of the officials who assisted at it, and that in our opinion the deceased did not suffer pain after the drop fell. The spasmodic convulsions usually accompanying such modes of death lasted longer than usual.
>
> (Signed)
> W. McCREA, M.D.
> EDWARD BARKER, Surgeon.[105]

In addition to a certificate from the two medical men actually present at the death, the Sheriff went to the length of seeking advice on the general topic of bodily spasms that occur in humans after hanging. James F. Rudall, a Melbourne based Fellow of the Royal College of Surgeons, was the expert engaged by Sheriff Farie. Rudall was someone who had previously attended executions at the Melbourne Gaol, though not in the specific case of Hitchcock. It, once again, confirmed the Sheriff's opinion that there was nothing medically abnormal about Hitchcock's death or his 'suffering':

> Russell-Street, December 8th, 1858.
>
> SIR,
>
> I readily accede to your wish that I should furnish you with a statement of my opinion respecting the executions which I have lately witnessed at Melbourne prison. The recent animadversions in the daily journals on the mode of carrying out the last sentence of the law, shew that there is much error in the public mind respecting it.
>
> 1st. It is quite certain that very soon (probably in less than a minute) after the air passages are completely obstructed in the human

[105] *Ibid.*

subject, all volition and consciousness cease; in this state although life still remains the individual is perfectly unsusceptible of sensations, whether painful or other wise. *Life* then may be present and yet *consciousness* completely absent. In support of this opinion we have the recorded statements of several persons who have been resuscitated after accidental and suicidal hanging.

2nd. Muscular movements do not imply the presence of consciousness, nor indeed even of life. It would be easy to enter into a physiological explanation of these muscular movements, but it would be superfluous in a communication of this kind. I will, in reference to them, just observe that the contractions affect those muscles which are not under control of the will of the living being, as well as those which are subject to its direction.

Persons unacquainted with the elements of physiology imagine that the muscular movements (which may occur more or less frequently for four or five minutes) are expressive of pain, or of attempts on the part of the individual to extricate himself from his situation, and therefore shew that he possesses consciousness and volition. The error of this is distinctly stated above.

The only cases in which death supervenes immediately upon the suspension of a criminal are those very rare ones, in which either from violence used by the execution, or from great length of the drop, dislocation or fracture of one of the cervical vertebra occurs, when death is instantaneous from injury to the spinal cord. It is my belief that in the executions which I have witnessed in Melbourne death has occurred as quickly as it usually does in executions by hanging.

I am, Sir,

Your Obedient Servant,

JAMES F. RUDALL, F. R. C. S.[106]

The sight of lengthy bodily spasms was completely normal to the medical expert of the mid-nineteenth century and not indicative of pain or suffering. Rudall notes that after

[106] *Ibid.*, pp.869-870, emphasis original.

the airways are obstructed the "individual is perfectly unsusceptible of sensations, whether painful or other wise". Moreover, the spasmodic muscular movements that occur after the drop is activated "do not imply the presence of consciousness, nor indeed even of life". Rudall believed that laymen (i.e. "Persons unacquainted with the elements of physiology") were mistaken to view such actions as being "expressive of pain" or that the criminal was momentarily in the possession of "consciousness and volition". The muscular contortions of hanged bodies—extended hand clutching, chest heaving, guttural noises and full body jolts for example—appear the same to all who viewed them on a purely visual level. However, what Rudall was describing are two entirely separate interpretations of these very same bodily actions – that of the medical/scientific expert versus that of an ordinary citizen. The medical opinion of someone like Rudall was informed by extensive university training, practical medical experience and ongoing professional memberships. However, for the vast majority of those who saw the criminal's bodily spasms, their beliefs and opinions on the subject were much more likely to be swayed by broader cultural forces. Hopes of civilisation and progress for the Australian colonies did not fit with a mode of punishment that appeared as though it was causing extended pain and suffering upon one of its citizens, even if he or she were a criminal.

A completely normal response to hanging for the medical practitioner was confirmation of an overtly cruel and inhumane punishment in need of alteration for many ordinary colonists. Even just reading about Hitchcock's lengthy bodily spasms was enough for 'S.E.F.' to be energised in his or her opposition to capital punishment as a whole. It was sure-proof that executions were "savage and barbarous", "a disgrace to our boasted civilization" and "opposed to every good feeling in our breasts".[107] To make such claims in reference to Gibbs plummeting to the cement floor after his rope had snapped earlier that month would have been a more natural tact. Instead the letter from 'S.E.F' presents a more recent aversion to executions based on the mere sight of bodily pain and its purposeful infliction. This developing nineteenth century response to human suffering was something that the Sheriff of Victoria went to great lengths to correct using the testimony of medical experts. So much so that Sheriff Farie felt the need to write a report to the Colonial Secretary defending the good conduct of his officials at

[107] *Ibid.*, p.869.

the hanging of Hitchcock who had, in his own professional opinion, performed their role perfectly.

The 1890s saw a flourishing in new suggestions of execution methods in Australia, more painless and less visibly confronting than that of hanging. 'HUMANITY', in a Letter to the Editor of *The Brisbane Courier*, suggested that drowning the criminal in an iron tank would avoid any disfiguration of the body, be both "certain" and "painless", while also being "devoid of all risks from bungling or miscalculation" that currently existed with death by hanging.[108] In a letter sent to the same newspaper the previous year, 'D.H.F.' suggested "asphyxiation with carbonic acid gas" in an airtight shaft would be "rapid, painless, and unaccompanied by disgusting concomitants".[109] The peculiarly American form of death by electrocution that was emerging late in the nineteenth century was rejected by the *South Australian Register* for there being an even greater risk of bungling it than with hanging.[110] *The Sydney Morning Herald*, also commenting on developments in New York, thought that not enough was known about electricity to guard against its misuse at executions.[111] The guillotine, a very effective killing machine, was far too French to be given a fair hearing in the Australian colonies. Still, the evaluation of new techniques of execution in the press on the basis of how much unnecessary pain and suffering was inflicted on the criminal, demonstrates a degree of dissatisfaction with hanging on this very point.

Colonial authorities stuck firmly to the punitive methods bestowed on them by England and a legal heritage that privileged hanging over other forms of execution. The response of Australian colonial authorities was therefore not to adopt a new method of execution altogether but to bury the practice of hanging further away from public view. By the early 1890s newspaper reports of executions at Melbourne Gaol begin to reference the existence of a "curtain" below the drop.[112] It was activated by a warder from above the

[108] *The Brisbane Courier*, 18 July 1893, p.7.

[109] *The Brisbane Courier*, 27 April 1892, p.7.

[110] *South Australian Register*, 26 October 1891, p.4.

[111] *The Sydney Morning Herald*, 21 December 1895, p.4.

[112] For example, at three separate executions at Melbourne Gaol in 1891—that of John Phelan, Fatta Chand and William Colston—the use of a curtain below the drop is mentioned in newspaper reports. See *Mercury and Weekly Courier* 19 March 1891, p.3; *Mount Alexander Mail*, 25 August 1891, p.3; *The Maffra Spectator*, 30 April 1891, p.3. As early as 1883 a similar arrangement is mentioned at Adelaide

moment after the trap door opened. It completely hid the full body contortions undertaken by the criminal in death; the kind that Sheriff Farie had to explain as natural and painless in his 1858 Report. The curtain hiding the body was something of an upgrade on the calico hood that had—for as long as executions were conducted in Australia—prevented the contortion of the eyes and mouth from being seen by the onlooker.

Once the curtain was installed at Melbourne Gaol the rope leading into the newly hidden space below the drop was the only way for journalists to make a judgement on the extent of the criminal's suffering. Whether it twitched violently or swayed slowly back and forth spoke to much of what was going on behind the curtain. The curtain prevented anyone but medical men and experienced gaol officials from viewing the bodily spasms typical at executions but alarming to journalists and their readers. Hiding the drop at private executions appeared to be a lasting practice in Victoria. At Australia's very last execution, that of Ronald Ryan at Pentridge Prison in 1967, there was a large tarpaulin draped below the drop to prevent anyone from viewing the scene. When a journalist from the *Truth* stooped to the ground in an attempt to see under it a nearby prison guard chastised him—"None of that!"—he was reported as saying.[113]

An aversion to physical suffering was a culturally informed belief, tied to notions of civilisation and progress, that was a long term factor shaping the practice of executions in colonial Australia. It can easily be read into the demise of dissection and gibbeting in the colonies and it is detectable in the debates over public executions that occurred during the 1850s. Yet it would be an error to think that a developing distaste at the sight of physical suffering was something that suddenly ceased at the abolition of public executions. Even in the privacy of the prison the practice of executions was altered in response to the personal beliefs, views and aversions of those who would watch and read about the death. The tightening of execution procedure in the colonies helped limit the possibilities for misconstruing the scene as something other than a criminal

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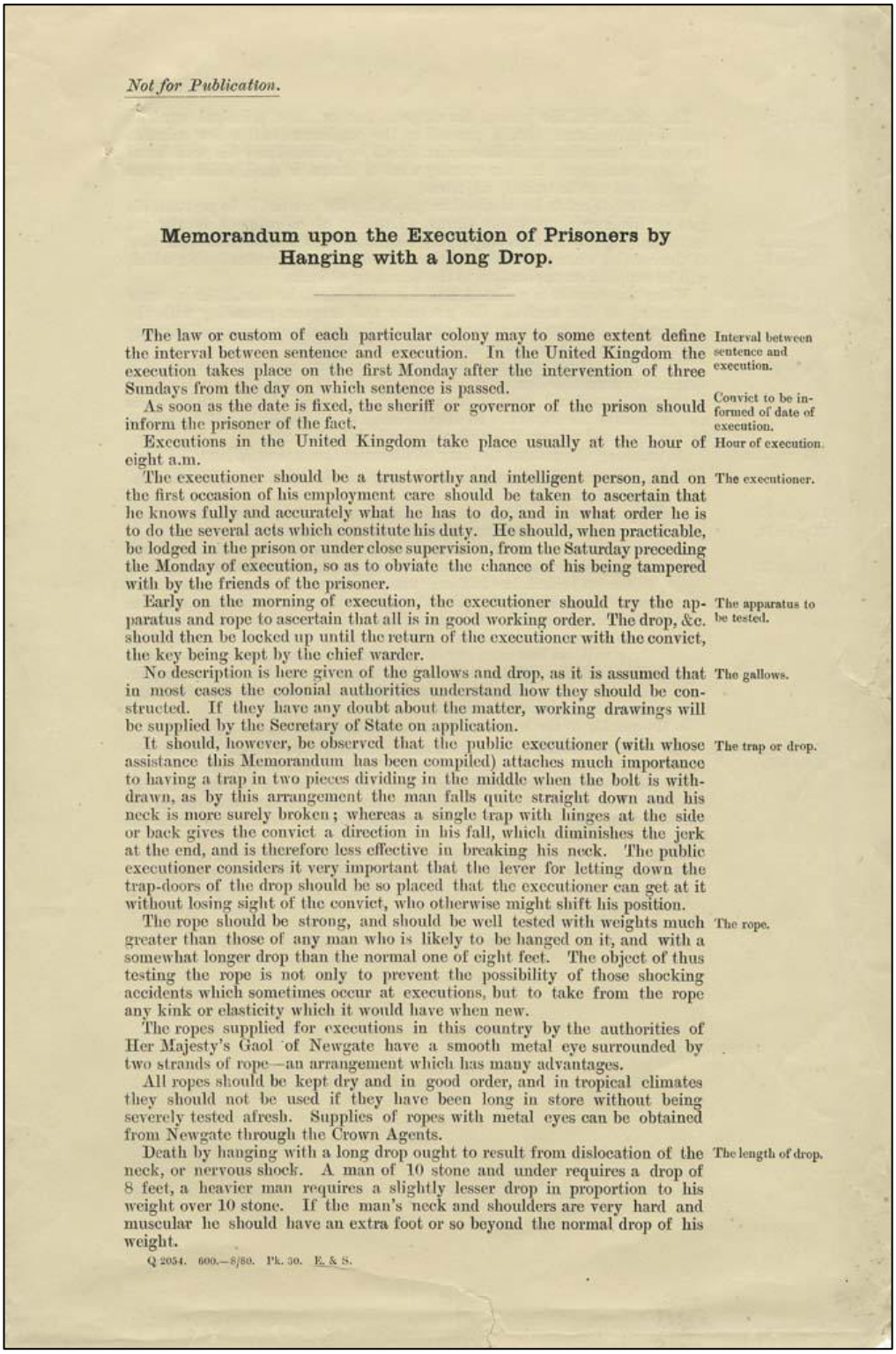
Gaol for the execution of William Burns. According to the *South Australian Register*, "the lower part of the scaffold was draped with a black cloth so that after the drop [is activated] … only the head of the man could be seen". For more details, see *South Australian Register*, 19 January 1883.

[113] Mike Richards, *The Hanged Man: The Life and Death of Ronald Ryan*, Melbourne: Scribe, 2002, pp.369-396, quote on p.388.

receiving his or her just desserts. No longer would the message of colonial executions be undercut by the method used to carry them out.

Conclusion

Australian executions were practised in order to communicate to both the criminal and the onlooker the consequences of crime. The ‘lesson’ of the gallows and the ‘example’ of the criminal was a turn of phrase used often throughout the colonial era. However, if this was indeed a didactic exercise, mistakes were frequently made in its implementation. Faulty equipment, amateur hangmen and a lack of technical guidance until late in the nineteenth century made it an even chance whether a solemn display of state justice would morph into a gory spectacle. The constant sight of unnecessary pain and suffering inflicted on the dying criminal at the gallows threatened to derail the stated purpose of colonial executions. At serious procedural failures, from prolonged strangulation to decapitation, outrage was an understandable response. Yet, as the 1858 Report of Sheriff Claud Farie demonstrates, an aversion to the practice of hanging emerged in much more subtle ways as the colonial era developed. A growing distaste at the sight of unnecessary pain and suffering caused by the hanging was a long-term cultural factor underpinning the changing way that executions were practised in the Australian colonies.



Not for Publication.

Memorandum upon the Execution of Prisoners by Hanging with a long Drop.

The law or custom of each particular colony may to some extent define the interval between sentence and execution. In the United Kingdom the execution takes place on the first Monday after the intervention of three Sundays from the day on which sentence is passed. — Interval between sentence and execution.

As soon as the date is fixed, the sheriff or governor of the prison should inform the prisoner of the fact. — Convict to be informed of date of execution.

Executions in the United Kingdom take place usually at the hour of eight a.m. — Hour of execution.

The executioner should be a trustworthy and intelligent person, and on the first occasion of his employment care should be taken to ascertain that he knows fully and accurately what he has to do, and in what order he is to do the several acts which constitute his duty. He should, when practicable, be lodged in the prison or under close supervision, from the Saturday preceding the Monday of execution, so as to obviate the chance of his being tampered with by the friends of the prisoner. — The executioner.

Early on the morning of execution, the executioner should try the apparatus and rope to ascertain that all is in good working order. The drop, &c. should then be locked up until the return of the executioner with the convict, the key being kept by the chief warder. — The apparatus to be tested.

No description is here given of the gallows and drop, as it is assumed that in most cases the colonial authorities understand how they should be constructed. If they have any doubt about the matter, working drawings will be supplied by the Secretary of State on application. — The gallows.

It should, however, be observed that the public executioner (with whose assistance this Memorandum has been compiled) attaches much importance to having a trap in two pieces dividing in the middle when the bolt is withdrawn, as by this arrangement the man falls quite straight down and his neck is more surely broken; whereas a single trap with hinges at the side or back gives the convict a direction in his fall, which diminishes the jerk at the end, and is therefore less effective in breaking his neck. The public executioner considers it very important that the lever for letting down the trap-doors of the drop should be so placed that the executioner can get at it without losing sight of the convict, who otherwise might shift his position. — The trap or drop.

The rope should be strong, and should be well tested with weights much greater than those of any man who is likely to be hanged on it, and with a somewhat longer drop than the normal one of eight feet. The object of thus testing the rope is not only to prevent the possibility of those shocking accidents which sometimes occur at executions, but to take from the rope any kink or elasticity which it would have when new. — The rope.

The ropes supplied for executions in this country by the authorities of Her Majesty's Gaol of Newgate have a smooth metal eye surrounded by two strands of rope—an arrangement which has many advantages.

All ropes should be kept dry and in good order, and in tropical climates they should not be used if they have been long in store without being severely tested afresh. Supplies of ropes with metal eyes can be obtained from Newgate through the Crown Agents.

Death by hanging with a long drop ought to result from dislocation of the neck, or nervous shock. A man of 10 stone and under requires a drop of 8 feet, a heavier man requires a slightly lesser drop in proportion to his weight over 10 stone. If the man's neck and shoulders are very hard and muscular he should have an extra foot or so beyond the normal drop of his weight. — The length of drop.

Q 2054. 600.—8/80. Pk. 30. E. & S.

Figure 4.1. The 1880 Memorandum on execution procedure sent to the Australian colonies from the Secretary of State for the Colonies in London (continued on the next two pages).

Source: 'Memorandum upon the Execution of Prisoners by Hanging with a long Drop, June 1880', Queensland State Archives, Series ID 12690, Item ID 1139511.

Pinioning.

The governor of the prison, the surgeon, two or three principal warders, and the executioner should proceed to the condemned cell a few minutes before the execution, and the convict should be pinioned and his neck bared by the executioner. In this country a set of straps is used, which appears effective and can be quickly adjusted.

The chief object to be attained in pinioning the convict is to prevent his getting his hands up to his throat. Rapidity of adjustment is also an important object. The accompanying diagrams show a front and back view of the convict when pinioned, and also the pinioning apparatus itself; which will be supplied on application to the Secretary of State.

Diagram A.
Diagram B.

The procession to the scaffold.

When the convict is pinioned, and his neck bared, he should be at once conducted to the scaffold, the governor and surgeon preceding with the chief warder, two warders at the convict's side, and the executioner following with such force of warders as may be deemed requisite.

The chaplain.

Where the convict professes the Christian religion, and the services of a chaplain of a suitable denomination are available, the chaplain should attend in the condemned cell, and his place in the procession is behind the governor and in front of the convict. In the discharge of his duties he will be guided by the rules and usages of the church to which he belongs.

The execution.

On reaching the gallows the duty of the executioner is as follows:—

1. Place the convict *exactly* under the part of the beam to which the rope is attached.

Diagram C.

2. Strap the convict's legs tightly (diagram annexed, marked C).

Diagram D.

3. Put on the white linen cap (diagram annexed, marked D).

Diagram E.

4. Put on the rope round the neck quite tight, the knot or metal eye being just in front of the angle of the jaw-bone on the left side, so as to run up behind the left ear when the man falls and receives the jerk. Care should be taken to adjust the rope as in the diagram annexed, marked E, the part to which the metal eye belongs being in the front of the throat. If the rope is adjusted the other way there will be less certainty of breaking the man's neck. The noose should be kept tight, as adjusted, by means of a stiff leather washer on the rope. The long front of the white cap should be free from the rope, hanging down in front.
5. Go *quickly* to the lever and let down the trap-doors.

The taking down of the body.

The convict should hang one hour, and before he is taken down the surgeon should, as a matter of form, satisfy himself that he is dead.

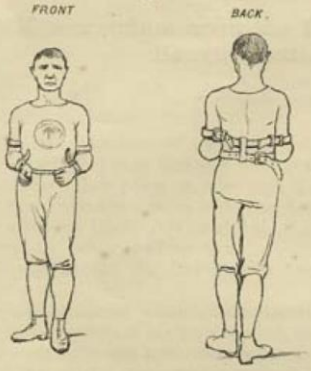
The best way of taking the body down is not to cut the rope, but to take the rope off the hook, and lift the body down; the rope should be removed from the neck, and also the straps from the body, when it is on the ground.

In laying out the body for the inquest, or other similar proceeding, the head should be raised three inches by putting a small piece of wood under it.

Downing Street,
June 1880.

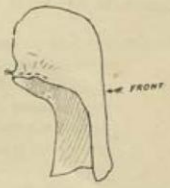
DIAGRAMS.

A

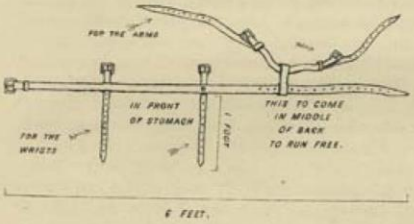


C

D



B



E

DANCKERFIELD, LTD., 72, SECOND ST. COVENT GARDEN.

Figure 4.2: A sketch made in 1838 by John M. Skipper of the apparatus used to hang Michael Magee in Adelaide, the first criminal executed in the colony of South Australia.

Source: John M. Skipper, 'A Sketch of South Australia's First Execution by John M. Skipper, 1838', pencil on paper, 13 x 18 cm, 1838, State Library of South Australia Pictorial Collection, B 7797.

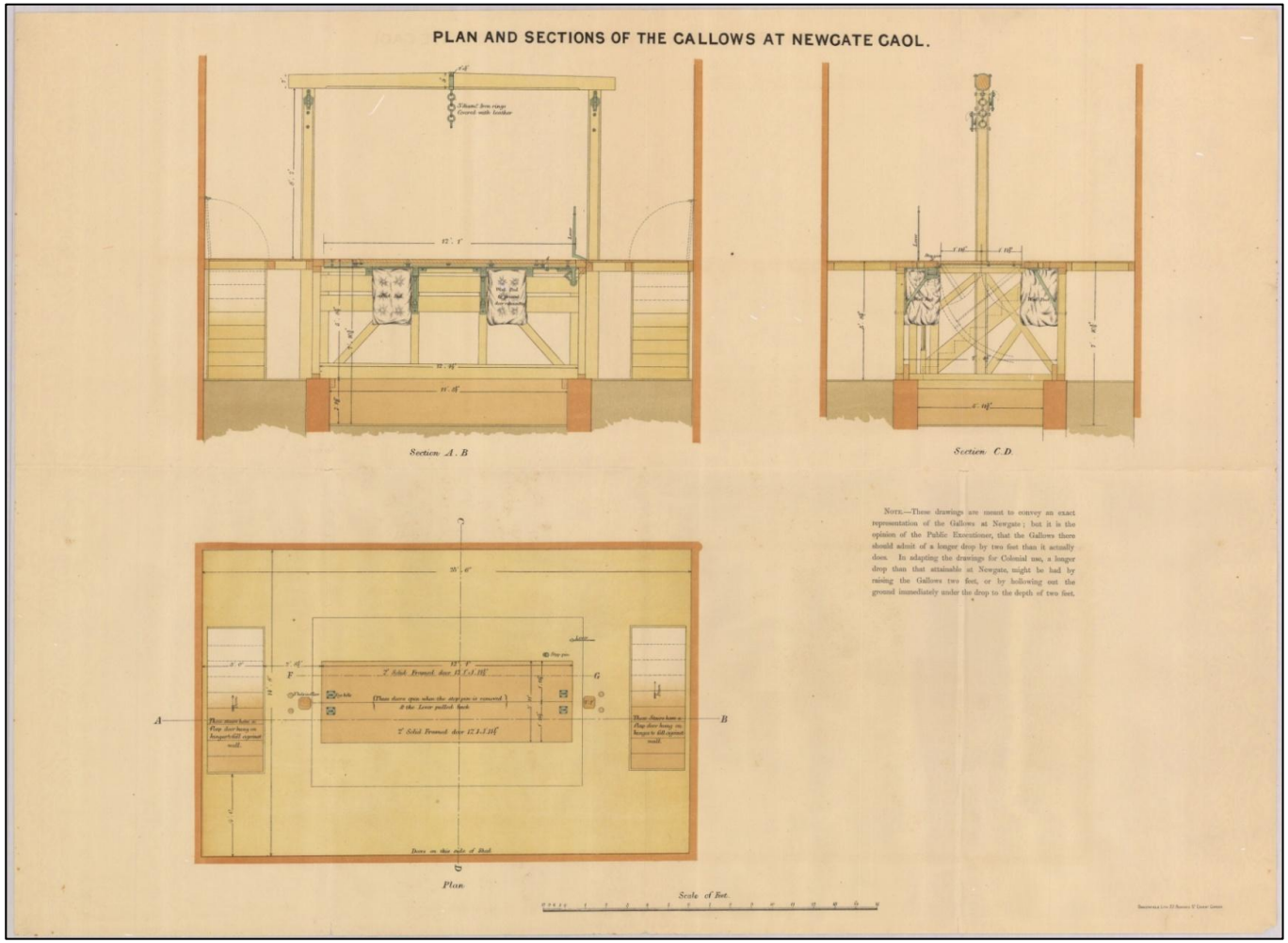
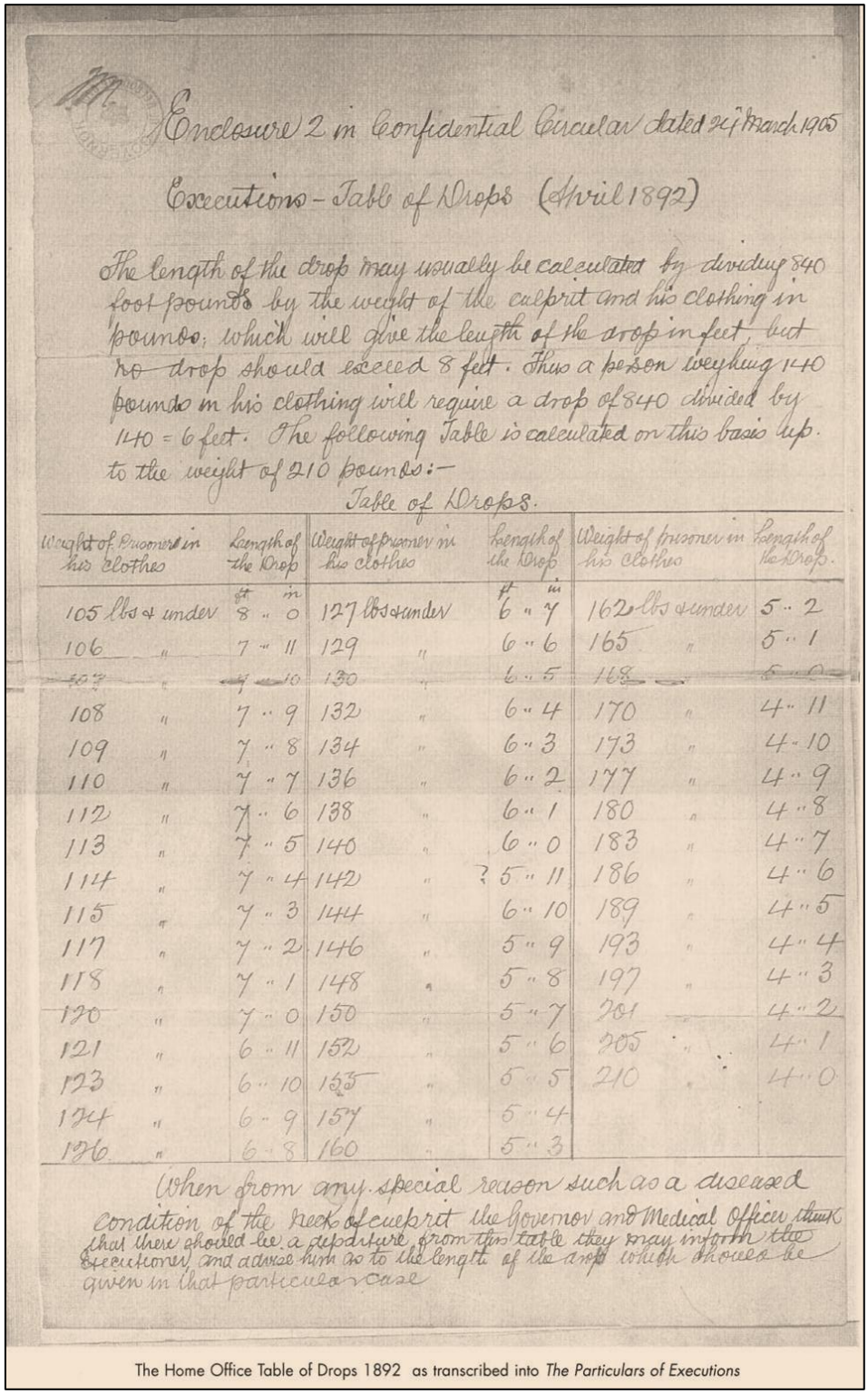


Figure 4.3. Technical drawing sent to the Australian colonies of the gallows at Newgate Gaol in London.

Source: 'Circular from the Secretary of State for the Colonies, with attached plan and section of the gallows at Newgate Gaol, 28 December 1880', Queensland State Archives, Series ID 12690, Item ID 1839168.



Enclosure 2 in Confidential Circular dated 24th March 1905

Executions - Table of Drops (April 1892)

The length of the drop may usually be calculated by dividing 840 foot pounds by the weight of the culprit and his clothing in pounds; which will give the length of the drop in feet, but no drop should exceed 8 feet. Thus a person weighing 140 pounds in his clothing will require a drop of 840 divided by 140 = 6 feet. The following Table is calculated on this basis up to the weight of 210 pounds:-

Table of Drops.

Weight of Prisoner in his clothes	Length of the Drop	Weight of prisoner in his clothes	Length of the Drop	Weight of prisoner in his clothes	Length of the Drop.
	ft in		ft in		
105 lbs & under	8 " 0	127 lbs & under	6 " 7	162 lbs & under	5 " 2
106 "	7 " 11	129 "	6 " 6	165 "	5 " 1
107 "	7 " 10	130 "	6 " 5	168 "	5 " 0
108 "	7 " 9	132 "	6 " 4	170 "	4 " 11
109 "	7 " 8	134 "	6 " 3	173 "	4 " 10
110 "	7 " 7	136 "	6 " 2	177 "	4 " 9
112 "	7 " 6	138 "	6 " 1	180 "	4 " 8
113 "	7 " 5	140 "	6 " 0	183 "	4 " 7
114 "	7 " 4	142 "	5 " 11	186 "	4 " 6
115 "	7 " 3	144 "	6 " 10	189 "	4 " 5
117 "	7 " 2	146 "	5 " 9	193 "	4 " 4
118 "	7 " 1	148 "	5 " 8	197 "	4 " 3
120 "	7 " 0	150 "	5 " 7	201 "	4 " 2
121 "	6 " 11	152 "	5 " 6	205 "	4 " 1
123 "	6 " 10	153 "	5 " 5	210 "	4 " 0
124 "	6 " 9	157 "	5 " 4		
126 "	6 " 8	160 "	5 " 3		

When from any special reason such as a diseased condition of the neck of culprit the Governor and Medical Officer think that there should be a departure from this table they may inform the Executioner and advise him as to the length of the drop which should be given in that particular case

The Home Office Table of Drops 1892 as transcribed into *The Particulars of Executions*

Figure 4.4. The 'Table of Drops' transcribed by hand into an exercise book used by successive Victorian Sheriffs from 1894 onwards to document the particulars of executions in that jurisdiction.

Source: Kevin Morgan, *The Particulars of Executions 1894-1967: The Hidden Truth about Capital Punishment at the Old Melbourne Gaol and Pentridge Prison*, Melbourne: The Old Melbourne Gaol 2004, pp.12-13.

Figure 4.5. A bullock team transporting Tunnerminnerwait and Maulboyheenner (otherwise known as ‘Bob’ and ‘Jack’) to the site of their execution in Melbourne, January 1842.

Source: W.F.E. Liardet, ‘The First Execution’, watercolor, pencil, pen and ink, 8.7 x 16.4 cm, 1875, State Library of Victoria, H28250/14.

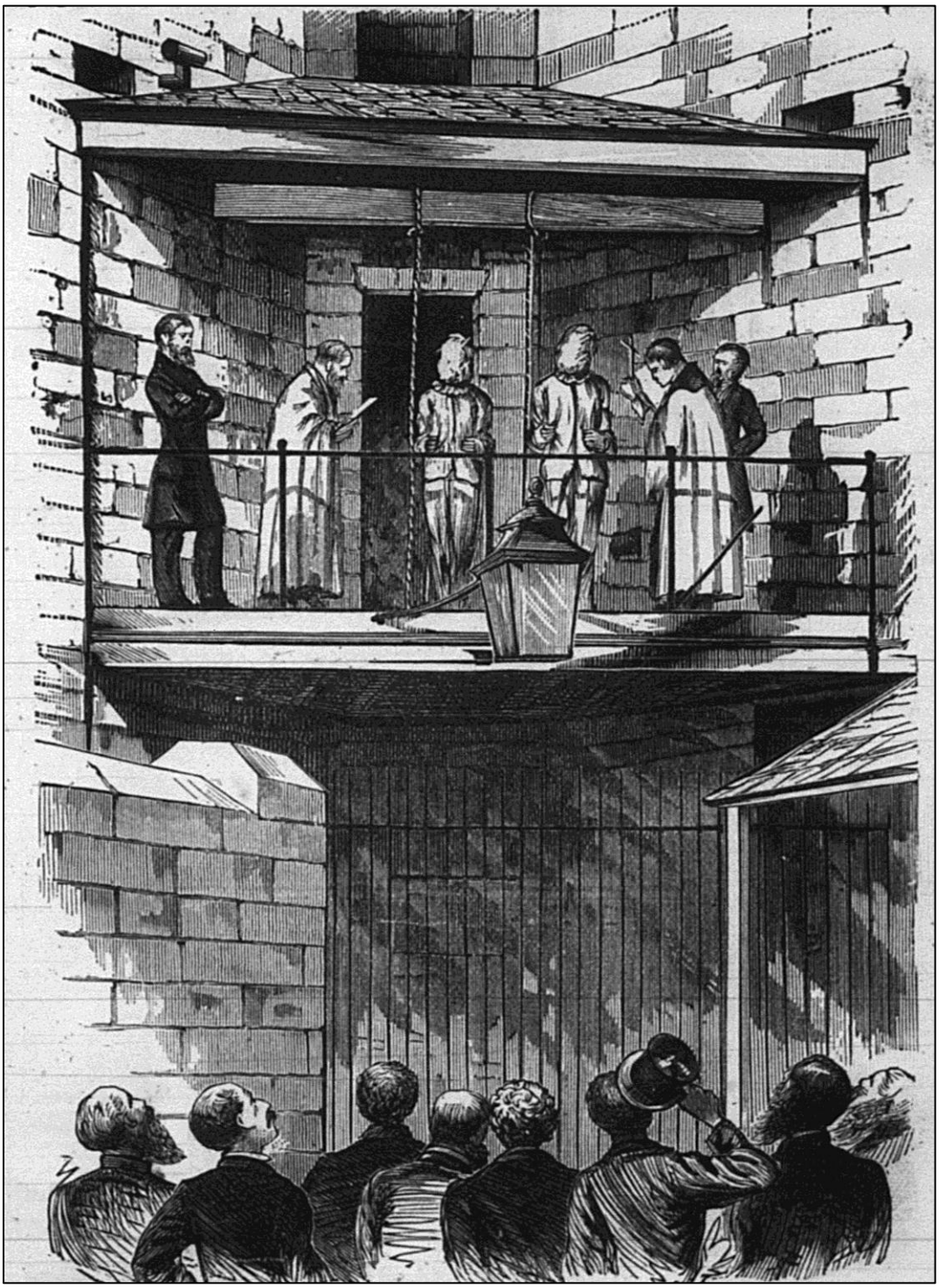


Figure 4.6. An artist working for *The Bulletin* depicts the execution of Andrew George Scott and Thomas Rogan on 20 January 1880 at Darlinghurst Gaol.

Source: *The Bulletin*, 31 January 1880, p.5.

CHAPTER 5
The Criminal

This chapter concerns the behaviour of colonial criminals in their dying moments. It starts with the premise that the criminal's behaviour, words and demeanour went some way in shaping how their punishment was 'read' by the onlooker. Those running the execution desired a penitent criminal above all else, one who gave the outward appearance of agreement with the justice of their sentence. Many factors worked against this outcome on the day of execution including the temperament of the condemned and their unique circumstances. Crucially, there was the widespread cultural expectation in the Australian colonies that the criminal 'die game' – that is, with a degree of premeditated pluckiness and bravado. This cultural belief, appropriated from England, encouraged many criminals to misbehave in their final moments and show little remorse for their crimes. Fully aware of the criminal's propensity to misbehave, those charged with running the execution employed various mechanisms to guide the criminal away from 'gameness' and toward penitence. Since the very publicity of the execution exacerbated the propensity for the criminal to misbehave, the introduction of private executions was yet another way of achieving this desired outcome. By limiting forms of resistance it was hoped that the 'lesson' of the Australian gallows would remain shaped by the hands of the state, rather than that of the criminal. In the end, however, the broader cultural context in which the execution took place could often be the determining factor in how it was perceived and remembered by the public.

Desirable versus Undesirable Behaviour at the Gallows: Two Case Studies

Capital punishment was at the apex of the hierarchy of punishments on offer in colonial society: a solemn climax to the criminal law whereby the state reserved the right to terminate the life of a citizen. A mixture of deterrence for future wrongdoers and retribution for past crimes was the primary message that any execution hoped to communicate. The role of the criminal on the scaffold was to conform with an execution ceremony framed in these terms. Any verbal or physical conduct ought to respect the tenets of the punishment and not seek to undermine or challenge its

legitimacy. Penitence was, for those who ran the execution, the desired attribute for any criminal about to die. To this end, the execution of Daniel Jepps in Melbourne and John Jenkins in Sydney provide fitting case studies to explore what desirable and undesirable behaviour looked like in the context of the colonies.

In June 1842 three bushrangers—Daniel Jepps (sometimes spelt Gepps), Charles Ellis and Martin Fogarty—were hanged in Melbourne for attempted murder. Their execution, and the demeanour of Jepps in particular, stands out as an ideal display of penitence on the Australian scaffold. It is recounted in detail by Edmund Finn in his *Chronicles of Early Melbourne* (1888).[1] At the foot of the gallows near modern day Swanston Street "not less than seven thousand persons" were present according to Finn.[2] Upon arriving at the scaffold, Jepps and Ellis immediately began to kneel in prayer while Fogarty engaged in a private devotion with his own spiritual advisor. After Jepps had finished praying he delivered his gallows speech to the crowd below while being supported by the arm of a clergyman. It was a penitent and dignified address but one that also served as a deterrent to potential wrongdoers on a key issue that worried the government:

> 'Fellow Christians! You see before you three young men in the prime of life and strength about to suffer on the scaffold for the crime of bushranging. I trust you will all take warning by our untimely fate, and avoid those crimes which have brought us to this end. Good people, I most humbly beg your prayers to the Almighty on our behalf. I die in the faith of our salvation through the blood of our Divine Redeemer.'[3]

One historian described Jepps attempts to "persuade the spectators at his execution of the correctness of his punishment" as the desired outcome for a state that got "lucky" on this occasion.[4] Jepps' eloquence may be attributed to the fact that he was originally a native of Boston with "highly respectable connexions" who received a "liberal

[1] Edmund Finn (pseudonym 'Garryowen'), *The Chronicles of Early Melbourne 1835 to 1852: Historical, Anecdotal and Personal* [1888], centennial edition, Melbourne: Heritage Publications, 1976.

[2] *Ibid.*, p.397.

[3] *Ibid.* A shorter version of this speech appears in the *Port Phillip Herald*, 1 July 1842, p.2 and is quoted in Kathy Laster, 'Famous Last Words: Criminals on the Scaffold, Victoria, Australia, 1842-1967', *International Journal of the Sociology of Law*, vol.22, 1994, p.3.

[4] *Ibid.*, p.10.

education" before commencing a career on whaling vessels in the South Sea.[5] Finn goes on to describe how gentlemanly the three convicted bushrangers acted among themselves as the hangman made the final adjustments:

> When the three wretches were standing together under the gallows, they shook hands one with the other, and Fogarty, looking at Jepps, exclaimed 'Farewell! We shall soon meet in eternity.' The executioner then shook hands twice with each of them, adjusted the ropes, and drew the caps down over their faces; and whilst operating upon Jepps, the latter said to him, 'May God bless you and your poor soul.'[6]

Jepps and his companions were a model of penitence at the Australian gallows, a disposition most desirable to those running the execution. They were easy to manage and did not physically or verbally resist their fate. Contrition was evident in Jepps' speech to the crowd and their dignified behaviour was appropriate to the solemnity of the event. Nothing other than the punishment itself would be the focus on the occasion of their death.

If there was ever a counterpoint to the 'ideal' criminal behaviour of Jepps and company on the Melbourne scaffold then it must come in the form of John Jenkins who was executed in Sydney a few years earlier in 1834. In reference to Jenkins' character one newspaper wrote that: "Even in a criminal population, expatriated from England, we do not believe that there exists at this moment an equal to the atrocious murderer in question, either in daring villainy, or perfect insensibility ... at that terrible and trying moment, when eternity yawns around them."[7] Russel Ward in *The Australian Legend* (1958) even included Jenkins' execution as one of many examples of the recalcitrant bushranger spirit that informs the pedigree of his archetypal Australian.[8]

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[5] Finn, 1976, p.398.

[6] *Ibid.*, p.398.

[7] *The Sydney Gazette and New South Wales Advertiser*, 11 November 1834, p.2.

[8] Russel Ward, *The Australian Legend*, Melbourne: Oxford University Press, 1958, pp.138-139.

Jenkins defiance towards authority was evident even at the trial stage.[9] In the New South Wales Supreme Court the bushranger was found to have shot dead Dr. Robert Wardell after a dispute between the pair regarding a makeshift camp Jenkins had established on his property with two others. The co-accused, Thomas Tattersdale, was also sentenced to death for his role in handing Jenkins the gun. The youngest of the three bushrangers, Emanuel Brace, escaped the gallows in exchange for becoming the prosecution's chief witness. The victim, Dr. Wardell, was a Cambridge educated barrister and proprietor of Sydney's colonial newspaper the *Australian* so his trial attracted large press interest and a packed courtroom.[10] When the jury found both Jenkins and Tattersdale guilty the Judge performed the customary duty of asking the accused if there was any reason why the sentence of death should not be passed over them. Jenkins contemptuous response was recounted by *The Sydney Monitor*:

> [H]e considered that he had not had a fair trial in the first place ... he could have conducted his own case with a better chance of justice; and to show the manner in which the feeling was against him – the Jury were not out a second, when they brought him in guilty; but he did not care a b——dy d——n for either Judge or Jury, or the whole b——dy Court, whom he would shoot with the greatest pleasure if he had his gun here; he became very violent and struck the dock with his hand quite infuriated.[11]

After his verbal outburst, Jenkins rushed towards his accomplice in the dock with "ferocity unparalleled" and committed an act that had "never presented itself in any Court of Justice for the last fifty years":[12]

> Jenkins immediately commenced a violent attack on Tattersdale, and struck him two tremendous blows on the face, which knocked him

[9] For reports on the trial, see *The Sydney Gazette and New South Wales Advertiser*, 8 November 1834, p.2; *Australian*, 11 November 1834, pp.2-3; *The Sydney Monitor*, 8 November 1834, p.2; *The Sydney Herald*, 10 November 1834, pp.2-3.

[10] C.H. Currey, 'Wardell, Robert (1793-1834)', *Australian Dictionary of Biography* 1967, http://adb.anu.edu.au/biography/wardell-robert-2773, viewed 3 October 2013.

[11] *The Sydney Herald*, 10 November 1834, pp.2-3.

[12] *Ibid.*

> down in the dock, and his conduct altogether was of such a desperately audacious character, that we never expect to see exhibited again in any Court of Justice; in fact, it defies description. The Judge sat in mute astonishment – the Court was in a most extraordinary state of uproar, and it took a dozen constables to secure and handcuff him. He was eventually taken down the street, venting the most horrid impressions against Judge, Jury, and everything in the shape of humanity.[13]

As the day of punishment approached, Jenkins was seemingly immune to the customary elements of Christian reflection and devotion offered to him while in custody:

> In the cells his utter destitution of moral feeling continued to predominate, and he received all the pious exhortations of his Christian instructor, with an apathy never before exhibited on such an occasion. Yesterday, as his mortal career drew nigh, those who had seen the influence of solitude and remorse upon men equally fearless and depraved in the beginning as Jenkins, expected that his demeanour would alter, and that he would manifest, even at the eleventh hour, some compunction. But, alas![14]

Jenkins entered the gallows-yard with a "fierce determined eye", bending his knee only "mechanically" in prayer and in such a way that lacked a "sincere appeal to the mercy of God".[15] After climbing the ladder and mounting the platform, Jenkins raced over to the drop and playfully plucked the hangman's rope like a violinist.[16] As his public execution took place in the gallows-yard of the George-Street Gaol, his dying speech was attended by a great number of prisoners in addition to members of the free public. For an administration tired of being menaced by bushrangers, what Jenkins said next was not the type of gallows' speech anyone could wish for:

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[13] *Australian*, 11 November 1834, pp.2-3.

[14] *The Sydney Gazette and New South Wales Advertiser*, 11 November 1834, p.2.

[15] *Ibid.*

[16] *The Sydney Herald*, 13 November 1834, p.2.

> Jenkins addressed the felons in the yard to the following effect, 'Well, good bye my lads, I have not time to say much to you; I acknowledge I shot the Doctor, but it was not for gain, it was for the sake of my *fellow prisoners* because he was a tyrant, and I have one thing to recommend you as a friend, if any of you take the bush, *shoot every tyrant* you come across, and there are several now in the yard who ought to be served so...'[17]

The Sydney Gazette and New South Wales Advertiser was so disgusted at this instruction of violence directed at his fellow prisoners under sentence that it felt it had a "duty to suppress" the details of Jenkins' speech, choosing not to print its contents.[18] Writing a decade after the event Alexander Marjoribanks, a visiting Scotsman to New South Wales, believed that Jenkins' speech had even prompted an order from the Governor himself that no prisoner at the Gaol should ever again be "called out" to the yard to witness an execution.[19]

On face value, the inflammatory manner in which Jenkins opened his gallows monologue was counteracted by the seemingly helpful way that he confessed to his numerous other crimes in the second half of his speech. Specifically, Jenkins confessed to two robberies and a separate stabbing of a man. He did so, in his words, to prevent the possible wrongful conviction of innocent persons: "I have done several robberies, and for fear that any innocent man should suffer on my account, I have made a confession to the gaoler and given such marks and tokens as will prove it was I that committed the acts."[20] However, at least one of these confessed crimes, concerning a robbery of a man named Mills at Kissing Point, was plainly fabricated by Jenkins. In the week following the criminal's death on the scaffold the Chief Clerk of the Sydney Police Office, Cornelius Delohery, had to front the Supreme Court and tell the Judge that this robbery, supposedly made by Jenkins, was in fact committed two days after he was in police custody.[21] According to Delohery, "it was evident that Jenkins'

[17] *Ibid.*, emphasis original.

[18] *The Sydney Gazette and New South Wales Advertiser*, 11 November 1834, p.2.

[19] Alexander Marjoribanks, *Travels in New South Wales*, London: Smith, Elder, and Co., 1847, p.222.

[20] *The Sydney Herald*, 13 November 1834, p.2.

[21] *The Sydney Herald*, 20 November 1834, pp.2-3.

declaration was false, and made with a view to defeat justice".[22] More precisely, it was to cover for a person named Abraham Mahon whom Jenkins most likely met in gaol and was later found guilty of the robbery.[23] The revelation consequently threw the other two confessions of guilt in doubt and made his gallows speech all the more pernicious upon reflection.

From the trial stage through to the execution and even in death, Jenkins was intent on testing the symbols of punishment and obstructing the earnest pursuit of justice in the colony. Inciting other prisoners to violence and subverting the confession was just another way to achieve this same aim. In one final show of malice Jenkins refused to shake the hand offered to him by Tattersdale in the pair's final moments, reportedly turning away from his accomplice in distain as the rope was tightened around his neck.[24] Jenkins died as such on 10 November 1834, roundly considered by the journalists who came to watch as "one of the most depraved of the human species" and something of a villain who had "disgraced humanity".[25]

If Jepps and Jenkins were made points of reference on a crude spectrum of 'good' and 'bad' criminal behaviour at the Australian gallows, the vast majority of remaining colonial executions would fit somewhere in between these two archetypal examples. I will spare the reader a tedious listing of traits unique to particular criminals in their final moments and proceed to explaining a root cause of much misbehaviour at colonial hangings. It came in the form of a cultural expectation placed upon the dying criminal that can account for a vast array of stray elbows, hurled abuse and misplaced bravery performed on the gallows stage.

The Art of 'Dying Game'

In consultation with Francis Grose's well-known, *1811 Dictionary of the Vulgar Tongue*, a working definition of 'dying game' can be ascertained. Published in London and initially having a wide circulation within the lower orders of society, under the

[22] *Ibid.*

[23] For details of Abraham Mahon's case, see *The Sydney Monitor*, 19 November 1834, p.2.

[24] *The Sydney Herald*, 13 November 1834, p.2.

[25] *Ibid.*; *The Sydney Gazette and New South Wales Advertiser*, 11 November 1834, p.2.

entry for ‘game’ is written the following: “To die game; to suffer at the gallows without shewing any signs of fear or repentance.”[26] Various editions of John Camden Hotten’s equally well-circulated English publication, *A Dictionary of Modern Slang, Cant, and Vulgar Words* (1859), offers a similar definition. The usage examples for ‘game’ in the 1859 edition were: “are you GAME? Have you courage enough?”[27] While the 1874 edition included a new entry for ‘gameness’ that was said to denote, “pluck, endurance, courage generally”.[28]

The practice of ‘dying game’ was inherited from English folkloric culture but flourished in its southern colonial outpost during the nineteenth century.[29] This cultural expectation was present in all Australian colonies and affected every criminal in the executioner’s care. The pressure placed on the dying to behave in an unhelpful way also heightened the crowd’s sense of excitement on the day of execution. A ‘game’ criminal, as we shall see, was perceived by many writers to threaten the ‘lesson’ of capital punishment and make a hero out of the criminal.

The degree to which the crowd anticipated and expected the condemned to ‘die game’ should not be underestimated or considered peripheral to the larger narrative of the occasion. The manner in which the criminal took his or her death was central to the execution as public attraction. “Such an event,” wrote the *Bathurst Free Press* in 1853, “becomes a holiday occasion to the depraved, and whether the shedder of human blood has died or is likely to ‘die game,’ is a subject of brutal speculation”.[30] To prove its point the newspaper then recounted one story where a “Vandemonian pugilist” walked for fifty miles to attend a local execution to see if the criminal named Whilmore—

[26] Francis Grose, *1811 Dictionary of the Vulgar Tongue. A Dictionary of Buckish Slang, University Wit, and Pickpocket Eloquence* [1811], Adelaide: Bibliophile Books, 1981.

[27] John Camden Hotton, *A Dictionary of Modern Slang, Cant, and Vulgar Words*, London: Antiquarian Bookseller, Piccadilly, 1859, p.43.

[28] John Camden Hotton, *The Slang Dictionary, Etymological, Historical and Anecdotal: A New Edition, Revised and Corrected, with Many Additions*, London: Chatto and Windus Publishers, 1874, p.172.

[29] For more on ‘dying game’ in the English context, see Andrea McKenzie, ‘Martyrs in Low Life? Dying “Game” in Augustan England’, *Journal of British Studies*, vol.42, no.2, 2003, pp.167-205; Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850*, New York: Pantheon Books, 1978, pp.21-24.

[30] *Bathurst Free Press*, 9 July 1853, p.2.

whom the traveller labelled a "plucked un"[31]—would "show the white feather" or not.[32] The newspaper then lamented that such "beastly phraseology" was all too common among spectators at the foot of the gallows.[33] At an execution the year before, Sydney's *Empire* wrote how the "cursing and the hustling, and the language circulating among the crowd" was fully devoted to "the speculation as to whether he will die 'game' or like a 'brick'".[34] Clearly, to see whether the criminal would 'die game' was a great unknown that drew many spectators towards the foot of the public scaffold for all the wrong reasons.

Perth's *The Inquirer and Commercial News*, among many other colonial publications, tells how the attitude of the crowd could quickly shift from agreement with the justness of the punishment to all-out admiration for the courage of the criminal if performed correctly. It was a common gestalt switch that damaged the intended ends of the punishment irrevocably:

> The mind of the lower classes, and they are the majority, it has been found, is only too apt to sympathise with the so-called victim of the law, and particularly if a man shows physical pluck and dies what is styled game. This sympathy changes to a certain admiration, which makes a lasting and dangerous impression on the minds of those whose animal propensities outweigh their mental ones.[35]

The Argus in Melbourne concurred in thinking that the "sight of a hardened ruffian closing his career by 'dying game' upon the scaffold, is not a spectacle calculated to have a warning effect upon people of the same stamp in the crowd".[36] *The Courier* of Hobart shared a similar dislike of 'gameness' viewing it as destructive to the mind-set of the criminal and dangerous in the way public perceptions were so easily altered:

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[31] 'Plucked un' was a common phrase for a "stout or brave fellow" who "dares face anything" according to John Camden Hotton's dictionary. See Hotton, 1874, p.256.

[32] *Bathurst Free Press*, 9 July 1853, p.2.

[33] *Ibid.*

[34] *Empire*, 27 September 1852, p.3.

[35] *The Inquirer and Commercial News*, 8 April 1874, p.2.

[36] *The Argus*, 25 April, 1853.

> He [the criminal] is supported, in the contemplation of a violent death, by the same feeling which animated the warriors of old in the day of battle. He knows that in his last moments he will be hailed as the hero of the scene, and that if he dies 'game,' he will depart amidst the plaudits of a thousand spectators.[37]

Fervent opponents of capital punishment also pounced on the fact that 'gameness' was rife at the Australian gallows. Alfred J. Taylor, for example, wrote an abolitionist pamphlet in 1877 that touched on the scourge of 'dying game' in a tone that echoed the concern of many colonial newspapers. It was used as strong evidence for Taylor's belief that the death penalty was not a deterrent:

> It cannot be denied that to the criminal mass the murderer who dies what is called 'game' is as much a hero as the man who dies with the flag of victory waving over his head is to his fellow soldiers, or the martyr who burns at the stake for his religion is to his disciples.[38]

Earlier Taylor states that: "There should exist in all cases the general impression that the infliction of a certain penalty is just."[39] Otherwise, he argued, a series of negative consequences would result: "[S]ympathy for the criminal often amounts to forgetfulness of his crime, public feeling revolts against the sentence under which he suffers, and the blood-dyed villain gets to believe that he is regarded as a martyr rather than as a justly punished offender".[40] The art of 'dying game' was clearly a threat to the very meaning of the punishment that required a penitent criminal to successfully communicate the grave consequences of committing crime. A criminal's last words, their demeanour and

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[37] *The Courier*, 3 August 1855, p.2.

[38] Alfred Joseph Taylor, *Capital Punishment: Reasons why the death penalty should be abolished; with suggestions for an efficient substitute*, Hobart Town: Davies Bros. Printers 'Mercury' Steam Press Office, 1877, p.20.

[39] *Ibid.*, p.5.

[40] *Ibid.* David McLaren was an earlier writer who shared Taylor's view that crowd speculation over the 'gameness' of the criminal was a central reason for capital punishment to be abolished altogether. See David McLaren, *Lecture on the abolition of capital punishments delivered by David McLaren to the Literary and Scientific Association and Mechanic's Institute, at Adelaide, December 18, 1840*, Hobart Town: S.A. Tegg, 1842, p.55.

appearance, were all closely examined by the crowd who decided what to make of the death.

Though the concept of 'gameness' had far reaching consequences, it appears to be applied only in the case of male executions. Female criminals escaped the cultural expectation that they too must 'die game', or, in any other manner that could be expressed in a comparatively coherent manner. Certainly, special care was taken by journalists to document the emotional state, appearance and family ties of female criminals on the scaffold. Moreover, the comparatively rare hanging of a female criminal was read into predictable nineteenth century narratives of fallen womanhood and broken morals. Yet, an anticipation or knowledge of these worn narratives did not seem to alter the behaviour of women in their final moments in anywhere near the same way. By contrast, courage and bravado in the face of death can easily be tied to expressions of colonial masculinity. Even executioners defined the gallows as a manly space and strongly disliked having to hang female criminals, lest it impinge on their own sense of masculinity.[41]

The concept of 'dying game' encouraged criminal misbehaviour on the scaffold and challenged the ideal of a penitent criminal meeting their punishment full of remorse and regret. Perhaps not as obvious to pick as physical violence or the unhelpful oratory of some criminals in their last moments, the cultural expectation that men 'die game' was equally pernicious to the stated aims of capital punishment. It encouraged male criminals to puff the chest, swallow any feelings of trepidation and to take the punishment with a premeditated 'pluckiness'. The crowd flocked to the gallows for all the wrong reasons, not to partake in a civic display of justice, but to see whether or not the criminal squirmed with cowardice in the light of eternity or bucked up and took the punishment properly. Performed correctly, the criminal even had the chance to appear heroic and admirable in his very last moments on earth.

[41] The most spectacular example of this came in 1894 when Melbourne's *The Argus* reported that, in the days leading up to the execution of Frances Knorr, 'Jones the Hangman' had committed suicide over a fear that "the persecutions of his neighbours … would be still more hostile if he hanged a woman". See *The Argus*, 8 January 1894, p.5 quoted in Kathy Laster and Kerry Alexander, 'Chivalry or Death: Women on the Gallows in Victoria, 1856-1975', *Criminology Australia*, vol.4, no.2, 1992, p.7.

From Gameness to Penitence

Upon contrasting the simplistic model of 'desirable' and 'undesirable' criminal behaviour provided above, as represented with the archetypal examples of Jepps in Melbourne and Jenkins in Sydney, a not so subtle dualism emerges. One type of criminal behaviour at the gallows, like that of Jepps, evokes an agreement with the fundamental tenets of the punishment as the just, commendable and right action to take under the circumstances. The other category of criminal behaviour, exemplified by Jenkins, can distract from the central lesson of capital punishment and direct the onlooker's attention elsewhere. Not helping the cause was the cultural expectation that Australian criminals 'die game', a possibility that gave them hope of being considered a hero for behaving in an unhelpful manner. With all this in mind, it was very much in the interest of the authorities to do all in their power to mass-produce replicas of Jepps on the scaffold, not copies of Jenkins; to induce penitence, not gameness. This section is dedicated to exploring how those running the execution worked to bring this hope to reality.

It is important to realise that the time-tested ritual of the execution ceremony, passed down from England to Australia in a colonial exchange, was, in and of itself, configured to induce complicity from the criminal. Kathy Laster in her study of the last words of Victorian criminals hints at this possibility when she wrote that:

> Executions are always ceremonial dramas. In all its forms, the formal execution was designed to be a morality play carefully staged and regulated. Extraordinary efforts were mounted by the State in order to ensure that an execution went according to plan. Those facing the gallows were placated, humoured and mollified. They were persuaded, and sometimes bullied, into some sort of acknowledgement of the justness of their fate: if they could not repent, then at least they could confess; if there was no confession forthcoming then at least they could comply with the rituals of the execution.[42]

[42] Laster, 1994, p.5.

Michael Sturma also hinted at this idea in his close study of Sydney's public executions for the year 1838 when he wrote: "Ritual provided order and regularity in what was an extraordinary event".[43] When the criminal engaged with the overt symbolism and ritualistic elements of the execution ceremony it conveyed the look of outward complicity and agreement with the punishment. There was limited room for the criminal to express his or her personal opinion of the fairness of the sentence, except in the form of last words. A number of different elements worked together on the day of execution to mollify the criminal and achieve this appearance of a fair and just sentence being dispensed. As will be demonstrated below, various men of religion, the sheriff and the executioner were all engaged in this central task. Moreover, the introduction of private executions prevented the troublesome interaction between criminal and crowd that so often led to misbehaviour.

Religious Advisors

The role the church performed at the gallows was a key factor in helping guide the criminal towards a penitent death that was conducive to the aims of the sheriff. Any diligent clergyman sought a criminal brimful of forgiveness and remorse, prepared for the coming judgment of God. It was a disposition very distant from that of the 'game' and mischievous criminal defiant to the very end. In the heightened symbolic world of executions, the church took on a large portion of responsibility for initiating its ritualistic elements. The outward signs of penitence on the part of the criminal were invaluable in buttressing the overall 'look' of the punishment as just and commendable. The desire for a penitent criminal was an unintentional collision of interests between church and state but one that should not go unnoticed.

The idea that the diligence of the clergy fitted neatly with the needs of the state is exemplified twice in the autobiography of William Ullathorne, a devout Catholic who was at one time the Vicar-General of Sydney.[44] On the first occasion Ullathorne travelled with an Anglican Priest to comfort two convicts (one Catholic, the other Anglican) who had recently beaten an overseer to death. By recalling a conversation he

[43] Michael Sturma, 'Public Executions and the Ritual of Death, 1838', *The Push from the Bush*, no. 15, 1983, pp.8-9.

[44] T.L. Suttor, 'Ullathorne, William Bernard (1806-1889)', *Australian Dictionary of Biography* 1967, http://adb.anu.edu.au/biography/ullathorne-william-bernard-2750, viewed 6 May 2015.

had with the Anglican Priest prior to the hanging, Ullathorne reveals a great deal about his own methods of preparing the criminal for death:

> The Anglican clergyman again wished to see me. He asked what I should do on the way and on the scaffold? I told him that my poor man was well instructed, that on the way I should repeat a litany which he would answer, and I should occasionally address words to him suited to his state. 'Very good, Sir; and what will you do on the scaffold?' 'The man,' I replied, 'is well taught to offer his life to God for his sins, which he will do with me in the words I have taught him. And when the executioner is quite ready for the drop he will give me a sign, and I shall descend the ladder and pray for his soul.'[45]

Upon arriving at the gallows the convict under Ullathorne's care wanted to make a final speech and meet with some friendly faces gathered below. However, this did not align with Ullathorne's plan and he successfully persuaded him out of the interaction:

> The young man was bent on speaking to his comrades below, but I would not let him: for such speeches at the dying moment are commonly exhibitions of vanity. He obeyed me, I pressed his hand, and he was cast off.[46]

On another occasion Ullathorne travelled to Norfolk Island to comfort thirteen convicts who were executed for the 'mutiny' of 1834.[47] According to his autobiography, Ullathorne gave them spiritual guidance and comfort at every available hour in the week leading up to the hangings. On the night prior to their execution the mutineers were granted a rare "indulgence" to fuel their religious fervour: "My Men asked as a special favour … to be allowed some tobacco, as with that they could watch and pray

[45] William Ullathorne, *The Autobiography of Archbishop Ullathorne with Selections From His Letters*, London: Burns & Oates Ltd, 1891, p.92.

[46] *Ibid.*, p.93.

[47] For more information on the 'mutiny' of 1834, see Manning Clark, *A History of Australia*, vol.2, Melbourne: Melbourne University Press, 1968, p.215; Frank Clune, *The Norfolk Island Story*, Sydney: Angus & Robertson, 1967, p.145; William Molesworth, *Report from the Select Committee of the House of Commons on Transportation: together with a letter from the Archbishop of Dublin on the same subject: and notes*, London: Henry Hooper, 1838, pp.xv-xvi.

all night."[48] On the day of execution, the condemned convicts displayed their obedience to Ullathorne's instructions in a passage that is worth quoting at length:

> When the irons were struck off and the death warrant read, they knelt down to receive it as the will of God; and next, by a spontaneous act, they humbly kissed the feet of him who brought them peace. After the executioner had pinioned their arms they thanked the jailers for all their kindness, and ascended the ladders with light steps, being almost excitedly cheerful. I had a method of preparing men for their last moments, by associating all that I wished them to think and feel with the prayer, 'Into Thy hands I commend my spirit; Lord Jesus, receive my soul.' I advised them when on the scaffold to think of nothing else and to say nothing else … As soon as they were on the scaffold, to my surprise, they all repeated the prayer I had taught them, aloud in a kind of chorus together, until the ropes stopped their voices forever. This made a great impression on all present, and was much talked of afterwards.[49]

Travelling across both colony and denomination, Reverend William Bedford was another who was no stranger to properly preparing the guilty for an impending death. Before migrating to Van Diemen's Land in 1823, Bedford was made an Ordinary at London's Newgate Prison that turned out to be an ideal preparation for the sombre task he took on in his new home. After a decade in the colony Bedford was already a veteran of the gallows, comforting many fellow Anglicans awaiting their fate. Speaking at an early meeting of the Hobart Temperance Society in 1832 he told them that he had already attended to the dying needs of condemned criminals at "no less than 3 and 400 executions".[50] In the next breath he stated that "19/20ths" of those criminals who were hanged owed their fate to alcohol and the effects of drunkenness.[51]

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[48] Ullathorne, 1891, p.103.

[49] *Ibid.*

[50] *The Hobart Town Courier*, 28 April 1832, p.4. This fact is repeated in John West, *The History of Tasmania* [1852], A.G.L. Shaw (ed.), Sydney: Angus and Robertson, 1971, p.663, fn.247.

[51] *The Hobart Town Courier*, 28 April 1832, p.4.

Bedford made a habit of speaking to the crowd on behalf of the criminal in his or her last moments. These addresses were often structured with a general confession of the crime bookended by statements of remorse and requests for divine forgiveness.[52] To say that these final remarks were further coloured with gushes of moral feeling comes as little surprise given his statements made to the Temperance Society. For example, at the execution of Thomas Jerries in 1826 Bedford took care to highlight the elements of the parable that were contained in his path to the gallows:

> 'The unhappy man, Jeffries, now before you, on the verge of eternity, desires me to state, that he attributes all the crimes which he has committed, and which have brought him to his present awful state, to the abhorrent vice of drunkenness. He acknowledges the whole of the crimes with which he has been charged, and he implores of you all to take warning by him, and to avoid the commission of the sin of drunkenness, which infallibly leads on to all other crimes.'[53]

Years later in 1845, a criminal named Gardiner requested that Bedford state to the crowd gathered that: "Sabbath-breaking and disobedience to parents had been the first steps of an evil course of life which was thus about to be terminated by a premature and shameful death."[54] Bedford's orations framed how the crime and execution ought to be perceived by those gathered at the foot of the scaffold and overlaid the whole ceremony with a deep spiritual significance. As for the criminals in Bedford's care, this practice removed a major opportunity for displays of 'game' indifference and manly bravado in the face of death.

Bedford, like Ullathorne, ensured that the criminal was prepared for his or her fate well before the actual day of execution. When two particularly obstinate criminals presented themselves to Bedford in 1832 he organised for prison officers to take turns reading scripture to the men during the hours when he, or another religious advisor, were

[52] For examples of Bedford making speeches at the gallows on behalf of the criminals under his care, see *Hobart Town Gazette and Van Diemen's Land Advertiser*, 25 February 1825, p.2; *Colonial Times and Tasmanian Advertiser*, 2 September 1825, p.4; *Hobart Town Gazette*, 25 August 1827, p.6.

[53] *Colonial Times and Tasmanian Advertiser*, 5 May 1826, p.3.

[54] *The Courier*, 26 June 1845, p.2.

absent.[55] Bedford prepared another man named Charles Routley in a similar manner. Routley was given a "sense of the awful situation in which he was placed" by the repeated exertions and prayers of the experienced Bedford in the week leading up to his hanging.[56] It was something of a triumph according to *The Hobart Town Courier* because, before Bedford's intervention, the criminal was "one of the most horrid and most blood-thirsty monsters that have yet disgraced the annals of humanity".[57] On the scaffold Routley confessed to all his crimes, prayed for the King and Governor of the colony by name and, in his own words, offered the crowd a first-hand account of the slippery slope he took to the gallows:

> He implored all those who heard him to set its due price on the gospel, and not undervalue its glad tidings as he had done, and he besought them, if they would avoid his awful end, immediately to forsake all wicked and dissipated courses of life, for he said the beginnings of crime though at first small, and often committed without discovery, gradually led to offences more and more deep, until at last robberies and murders like his would be committed.[58]

Being chief comforter to Anglican criminals during the reign of Lieutenant-Governor George Arthur (1824-1836) meant that Bedford was a dependable hand on the scaffold during a period of Tasmanian history in which the frequency of hangings was unparalleled. In fact, Richard Davis states that almost half of the "540-odd" executions to take place in Tasmania occurred during this period.[59] Bedford's "sincerity and devotion" to the numerous prisoners under the sentence of death even drew personal praise from Governor Arthur himself.[60]

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[55] *The Hobart Town Courier*, 8 June 1832, p.4.

[56] *The Hobart Town Courier*, 18 September 1830, p.3.

[57] *Ibid.*

[58] *Ibid.*

[59] Richard Davis, *The Tasmanian Gallows: A Study of Capital Punishment*, Hobart: Cat and Fiddle Press, 1974, pp.13-33, for the number of criminals executed under his Governorship see p.13.

[60] 'Bedford, William (1781-1852)', *Australian Dictionary of Biography* 1966, http://adb.anu.edu.au/biography/bedford-william-1760, viewed on 28 October 2013.

William Ullathorne and William Bedford were models for conscientious and well-meaning men of religion whose want for the criminal to die penitent was foremost in their efforts. As already noted by Australian historians, this desire was something that dovetailed handily with the needs of those who ran the execution.[61] However, it should be pointed out that clergymen did not work on behalf of the state in some grand conspiratorial manner. Men of faith like Ullathorne and Bedford placed existential demands on the condemned before death out of a sincere concern for the spiritual welfare of those in their care. Clergymen of any denomination would have wanted a penitent criminal, remorseful as they countenanced eternal life and steeled for the coming judgment of God. It was merely a matter of mutual convenience that, with the help of spiritual advisors, the sheriff was more likely to have a contrite and dignified criminal on the scaffold.

The Sheriff and Executioner

A criminal with a soul properly prepared to meet the afterlife often delivered the executioner a body of little resistance. However, this was never a *fait accompli* since the clergy were not always successful in their attempts at getting the criminal to repent for the crime. For example, the recalcitrant John Jenkins was tended to by the experienced Father John McEncroe on the scaffold, a man who had attended some seventy-five executions in three years.[62] In these situations it often fell to the sheriff and executioner to take charge of the situation. The executioner could apply physical coercion directly to the body of the criminal whereas the sheriff, as representative of the law, ran the ceremony to his pleasure and could use other means to reduce the likelihood of criminal misbehaviour.

To assess the role of the sheriff on days of execution a good place to start is with the hanging of John Troy and Thomas Smith, two highway robbers who mounted the scaffold in Sydney after being found guilty under the Bushranger Act.[63] Smith was coolheaded in putting the case to the crowd that his companion, due at the gallows only

[61] Laster, 1994, p.8; Hamish Maxwell-Stewart, *Closing Hell's Gates: The Death of a Convict Station*, Sydney: Allen & Unwin, 2008, p.215; Sturma, 1983, pp.4-6.

[62] Patricia K. Phillips, 'John McEncroe', unpublished M.A. thesis, The University of Sydney, 1965, p.29; *The Sydney Herald*, 13 November 1834, p.2.

[63] For a record of Troy and Smith's trial, see *Australian*, 10 August 1832, p.3.

a few days later, was to hang for a crime that he had in fact committed. Troy then came forward to state that Smith was innocent, placing full responsibility for the crime in question upon his own shoulders. One correspondent present at the hanging records how these diplomatic objections were subtly dealt with by the Sheriff:

> The Sheriff here interrupted him, observing that 'he had done very right in allowing the justice of his own sentence, but begged he would not arraign the justice of another's. He did not like to interrupt him at such an awful moment, but it was his painful duty.' On hearing this, Smith again spoke, 'surely Mr. Sheriff, you do not begrudge us these few moments to speak our minds.' The Clergymen … recommended that their last words should be in prayer.[64]

Another example of a Sheriff, or in this case the Under-Sheriff, intervening to the advantage of proper decorum was at the 1848 execution of William Fyfe, a Moreton Bay convict who was tried and hanged in Sydney. Found guilty of murder, Fyfe was convinced of his innocence and carefully penned a speech to recite on the gallows that reflected this sentiment. However, Fyfe was never able to read his hand-written speech as it was "surreptitiously" taken off him by the Under-Sheriff while the criminal was still in his cell.[65] A less than pleased Reverend William Richie told a newspaper the following day that the condemned man in his care "knew nothing of the loss [of his speech] till he put his hand into his bosom to feel for the document, which assuredly was there when about to leave his cell".[66] Ritchie agreed that Under-Sheriff Prout had the right to strip the prisoner of such material before leaving for the gallows but to do it without informing him was unreasonable. "If this be not theft," wrote the Reverend, "I know not how to designate the deed."[67] On the scaffold, the Under-Sheriff read the death warrant aloud to the waiting crowd but when Fyfe repeatedly declared his innocence the cap was hastily pulled over his eyes by the executioner and the bolt was drawn.[68] *The Sydney Morning Herald* did not care for the wish of the authorities to

[64] *The Sydney Gazette and New South Wales Advertiser*, 21August 1832, p.3.

[65] *The Sydney Morning Herald*, 6 July 1848, p.3.

[66] *Ibid.*

[67] *Ibid.*

[68] *Sydney Chronicle*, 8 July 1848, pp.2-3; *Bell's Life and Sporting Reviewer*, 8 July 1848, p.3.

suppress Fyfe's plea of innocence and published his pre-prepared speech alongside the details of his hanging. The troublesome document that was taken off the body of Fyfe concluded with the line: "I shall appear at the bar of Almighty God as innocent as the child in its mother's womb."[69]

If the Sheriff, or his representative, was unable to prevent the criminal from misbehaving, it was left to the executioner who, as a last resort, would muscle the condemned into place. Executioners were not averse to the physicality required for the job, with the official post of hangman so undesirable that vacancies were mostly filled from within the criminal class (see Chapter 4).[70] Alexander Green, one of Australia's most well-known colonial executioners, was himself transported to New South Wales in 1824 for shoplifting. He soon became chief 'scourger' at the gaol before assuming the position of the colony's official executioner in 1828.[71] His post as chief hangman of New South Wales lasted from 1828 to 1855 during which time he was said to have executed 490 criminals.[72] A biographical work on Green recounts numerous episodes of him carrying through with his duty in the face of violent resistance on the part of the criminal. Examples range from being pushed off the scaffold himself by a wild felon to restraining another from jumping off the scaffold and committing suicide.[73] It demonstrates how Green was there to make sure the law's wishes were fulfilled, no matter the level of verbal or physical hostility emanating from the criminal.

Private Executions

On the day of an execution, the hangman, sheriff, and religious advisor were all working towards the same end. Even if the personal motivations of these key figures on the scaffold differed, the criminal was herded into a position whereby penitence and

[69] *The Sydney Morning Herald*, 5 July 1848, p.3.

[70] Testament to his convict background, when Green accompanied Ullathorne to Norfolk Island in 1834 he recognised an old friend while in the process of pinioning his arms: "[Green] suddenly recognised him, and exclaimed: 'Why, Jack, is that you?' 'Why Bill,' was the answer, 'is that you?' He then shook his old friend by the hand, and said: 'Well, my dear fellow, it can't be helped.'"; Ullathorne, 1891, pp.104-105.

[71] Ray Beckett and Richard Beckett, *Hangman: The Life and Times of Alexander Green, Public Executioner to the Colony of New South Wales*, Melbourne: Thomas Nelson Australia, 1980, pp.6, 31 and 67.

[72] *Ibid.*, pp.67 and 185.

[73] *Ibid.*, pp.97 and 144-146.

contrition was the only acceptable form of conduct. Yet even with this time-tested configuration of the public gallows many criminals still misbehaved, and it was an enduring sight of discomfort for those who ran the execution. The introduction of private hangings did nothing to touch this fundamental interaction between the criminal and his minders. Yet it shielded the condemned from having to interact with the crowd as well as distancing him or her from the immediacy of their expectations.

In addition to the large throng of casual observers, the crowd at public executions often comprised many of the criminal's peers who only served to exacerbate feelings of defiance. Writing in a letter home to Lancashire, Joseph Fogg Taylor was an early Adelaide resident who witnessed the execution of one particularly obstinate criminal. The man smoked on the scaffold, made faces at the clergyman, kicked the hangman's shins and dared him to remove his disguise. These behaviours were, according to Taylor, "greatly applauded by his comrades" gathered below the drop who remarked that "he was game & died like a 'pebble'".[74] By contrast, the private execution of Andrew George Scott in 1880 at Darlinghurst Gaol demonstrates the effect of a gentrified crowd on criminal behaviour. In his cell Scott had expressed a desire to make a dying speech but hesitated when on the gallows platform. Upon seeing a number of spectators stationed within the gaol-yard, a distressed Scott asked the Chaplain: "What does this mean? What do these people mean? I must speak".[75] In response the Chaplain assured Scott that there was "no one except magistrates and officials present".[76] Upon hearing this Scott changed his mind and "did not insist upon making any address".[77] There are, of course, individual temperaments to consider in these two examples but it is hard to deny that replacing one's peers with the detached faces of officialdom removed a key incentive to misbehaviour and unhelpful speeches prior to death.

By excluding the general public and placing the law's final punishment ever deeper within the prison walls, the temptation to misbehave was further reduced. This occurred

[74] John Fogg Taylor, 'Letter from John Fogg Taylor of Tundemunga, near Adelaide, 1840, to "John" in Wigan, Lancashire, England, dated September 1840', State Library of South Australia, D 7310, pp.20-21.

[75] *The Brisbane Courier*, 21 January 1880, p.3. The details of this execution are expressed similarly in *The Sydney Morning Herald*, 21 January 1880, p.7; *The Bulletin*, 31 January 1880, pp.4-6.

[76] *The Brisbane Courier*, 21 January 1880, p.3.

[77] *Ibid.*

at one level because private executions succeeded in removing the criminal's peers from below the drop. In another way though, by making officials the only witnesses present, the criminal was subtly shielded from the immediacy of the public gaze and their expectations of a 'game' death. As a result of private executions Perth's *The Inquirer and Commercial News* even suggested that the practice of 'dying game' was almost extinct in the Australian colonies. Writing in 1874 the newspaper remarked how, "the gameness or cowardice of the depredator is veiled from the eyes of the public".[78] Thus, displays of 'gameness' had "gradually disappeared" from the scaffold in consequence of private executions.[79] Hangings conducted inside the prison shielded the criminal from publicity and the cultural expectations of the crowd. It worked to the advantage of those running the execution by removing this key incentive to misbehaviour and made it more likely for outward displays of penitence to be observed.

Criminal Behaviour, Execution Narratives and the Primacy of Context

At the gallows the criminal was in the peculiar yet privileged position to influence the narrative of his or her very own death. In the Australian context, Kathy Laster conducted research on the last words of nineteenth and twentieth century criminals on the Victorian scaffold. Laster begins by establishing the importance of last words in lending legitimacy to the spectacle but is also quick to point out how unstable the 'message' of punishment can become when it is left in the hands of the soon to die criminal:

> These last words of the condemned are often more powerful than any pronouncements by courts of governments of the day: they may provide the ultimate justification for the State's resort to a draconian penalty or they may completely refute even the most well-reasoned contentions that justice has been done. The State fears the power of last words. There is an understanding that the 'message' can only be manipulated so far. Attitudes to punishment are not fixed nor immutable.[80]

[78] *The Inquirer and Commercial News*, 8 April 1874, p.2.

[79] *Ibid.*

[80] Laster, 1994, p.2.

For these reasons Laster suggests that the state was "always taking a gamble" every time a criminal spoke on the gallows.[81] In the blink of an eye, "villains can become heroes, scoundrels martyrs and those reviled by the society the object of both pity and admiration".[82] The criminal's final words—but this could easily be extended to incorporate his or her actions and demeanour as well—was an uncontrollable and unpredictable element of the spectacle that could shape its very legitimacy. It is the reason why, as explored above, those running the execution were so keen to placate the criminal and ensure that he or she played the penitent.

There is, nevertheless, one more layer to be added to Laster's analysis that can be made in reference to some of the work of David Garland and Philip Smith discussed in Chapter 1. It is the primacy of the cultural context within which the criminal's execution occurred, something that was completely out of the hands of those administering the execution. These wider contexts had dramatic ramifications for the justice of the sentence in the popular mind. Gameness was one such narrative through which the criminal's behaviour was read that has already been discussed. However, there were even broader cultural contexts and societal forces at work on the day of execution. No matter how the criminal behaved on the scaffold—even if it was with complete complicity—these wider contexts regularly took hold of the narrative of the execution.

The most obvious and long-lasting example of cultural context taking primacy over the criminal's behaviour on the scaffold is that of Ned Kelly. The 'Kelly Gang' were Victorian bushrangers who had, among other exploits, murdered police and robbed banks between 1878 and 1880. At a shootout with police in Glenrowan in June 1880, three of the Kelly Gang were killed while Ned Kelly himself was arrested and sentenced to hang.[83] An Irish Catholic who felt short-changed by an Anglo-Protestant orthodoxy, Kelly defined himself in opposition to local police and wealthy landowners. Many Victorians, especially those of the High Country, identified with such sentiments

[81] *Ibid.*, p.3.

[82] *Ibid.*, p.2.

[83] Bill Gammage, 'Kelly, Edward 'Ned (1855-80), in G. J. Davison, Hirst, S. Macintyre (eds), *The Oxford Companion to Australian History*, revised edition, Melbourne: Oxford University Press, 2001.

and it caused them to take a lesser view of the very real crimes the Kelly Gang committed. For example, some 60,000 signatures were collected in protest against Ned Kelly's execution, almost a fifth of the population of Melbourne at the time.[84] Eric Hobsbawm's work on 'social bandits' and 'primitive rebels' is not out of place when talking about Ned Kelly in this light.[85] A violent and criminal subversion of dominant economic, power and social structures of colonial society was fodder for contemporary and later mythmakers who saw in Kelly a symbol of popular resistance. Opinion of the Kelly Gang's crimes was read into this rebellious cultural narrative long before Ned Kelly himself mounted the drop at the Melbourne Gaol to receive his punishment in 1880. When Kelly did, in fact, appear on the gallows the behaviours he elicited were always going to be related back to this wider context.

Kelly's death has had a lasting cultural impact in Australia that continues to the present day. Whether intended or otherwise, Australia's most famous anti-hero contributed to his own mythmaking by having his final words reported in the colonial press. These last words—'Such is Life'—have since floated out of the cellblock window and into the public imagination. The alternate version of Kelly's last words—'Ah well, I suppose it has come to this'—spoken as the rope was tightened around his neck was jettisoned by the mythmakers in favour of a snappier version that better fit the tale. [86] Moreover, Kelly's execution gave rise to a peculiarly Australian turn of phrase—'As game as Ned Kelly'—that, according to his entry in the *Australian Dictionary of Biography*, described "the ultimate in bravery".[87] As an example of usage, Father John Brosnan

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[84] Peter Norden, 'Ned Kelly: Hero or Hell Raiser?', *Australian Geographic Magazine* 2014, http://www.australiangeographic.com.au/topics/history-culture/2014/06/ned-kelly-hero-or-hell-raiser/, viewed 8 February 2015.

[85] Eric Hobsbawm, *Bandits* [1969], revised edition, London: Abacus, 2001; Eric Hobsbawm, *Primitive Rebels*, Manchester: Manchester University Press, 1959.

[86] "Such is life" were the words recorded by a 'Melbourne Correspondent' who wrote a report of the execution that found circulation in many of Victoria's regional newspapers such as the *Geelong Advertiser* and *The Ballarat Star*. By contrast, *The Argus* and *The Sydney Morning Herald*'s correspondents make no mention of this phrase, instead recounting variations of his alleged last words – "Ah well, I suppose it has come to this" and "Ah, well! It's come to this at last". A gaol warden who was present at the execution and in close proximity to Kelly the moment the drop was activated disputes that he ever uttered the words "Such is life". See *Geelong Advertiser*, 12 November 1880, p.3; *The Argus*, 12 November 1880, p.6; *The Ballarat Star*, 12 November 1880, p.2; *The Sydney Morning Herald*, 12 November 1880, p.5.

[87] John V. Barry, 'Kelly, Edward (Ned) (1855-1880)', *The Australian Dictionary of Biography* 1974, http://adb.anu.edu.au/biography/kelly-edward-ned-3933, viewed 12 November 2013. For a more substantial discussion of this phrase, see Amanda Laugesen, 'As Game as Ned Kelly', *Ozwords: A Blog from the Australian National Dictionary Centre* 2012, http://ozwords.org/?p=3014, viewed 12 November

was the Catholic comforter to Ronald Ryan in 1967 and used it to describe his final moments. Brosnan commented on the "courage" of Ryan, how his "step did not falter" as he mounted the gallows and looked the executioner and other members of officialdom squarely in the eye.[88] At the conclusion to Brosnan's eye witness account of Australia's last ever hanging he wrote that: "Murderer or not, the condemned man died well, 'like a Kelly', as they say."[89]

For the record, contemporary reports show that Kelly died without a struggle, his actions appearing outwardly compliant to the stated aims of the punishment as best as could be hoped by those running the execution. Moreover, no one but officials and journalists were present at the hanging, the public having been completely excluded from Melbourne Gaol on the day. Still, Australian culture found a way of producing a counter discourse for his execution. The symbols of the Kelly legend that have since entered the Australian popular psyche do so not as an index to punishment or triumphant state power but as a celebration of Australianness itself, and who we think ourselves to be. For example, when stage performers at the Sydney Olympic Opening Ceremony in 2000 were playfully dressed in Kelly-like tin armour one historian suggested that, "it is probably fair to say that Ned Kelly meant nothing more for many young people than something uniquely Australian, like water tanks, windmills, kookaburras and kangaroos: things that evoked the bush".[90] Kelly is a practical example of how the intended narrative for an execution could be upended when 'read' by the public; killers could become heroes and thugs the object of collective sympathy.

The execution of Ned Kelly is without doubt the most vivid example in Australian history, both then and now, that demonstrates how cultural context worked to subsume the symbolism of punishment. It did, however, take place on much smaller scales and in ways that are perceptible even many years after such events took place. For instance, it

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2013; Graham Seal even titled his study of Ned Kelly in popular culture with this phrase in mind, Graham Seal, *Tell 'em I Died Game: The Legend of Ned Kelly*, second edition, Melbourne: Hyland House, 2002.

[88] Tom Prior and John Brosman, *A Knockabout Priest: The Story of Father John Brosnan*, Melbourne: Hargreen Publishing Company, 1985, p.1.

[89] *Ibid.*

[90] Bob Reece, 'Tell 'Em I died Game: The Legend of Ned Kelly – Book Review', *Journal of Australian Studies*, no.82, 2004, pp.159-160.

is far from sensational to say that the execution of a woman or Indigenous person would be read into wider nineteenth century beliefs on femininity or Aboriginality, no matter how they behaved on the scaffold. Moreover, these wider contexts were not always going to be set in total opposition to the aims of those punishing the perpetrators as in the case of Kelly. For example, in the formative years of South Australian settlement the public vigorously supported the execution of runaway or ex-convicts in their settlement. South Australia, of course, was unique in the Australian context in that it was never once a formal site of convict transportation. No matter the actions of the condemned on the scaffold, sympathy and compassion for their position was not forthcoming from new immigrants who came to the colony on the express promise that it was free from the convict scourge.[91] What is interesting about the Kelly case is that the criminal did, in fact, behave with almost total complicity but Australian culture still managed to find a way to subvert the official narrative of his punishment.

Clearly, the official 'lesson' of the gallows—that crime had consequences—could always be amended, rejected or reinforced by the cultural context in which the punishment took place. Of course, criminal behaviour mattered and it was well worth trying to regulate in the eyes of someone like the sheriff. A penitent, rather than a game criminal, was much easier to manage on the scaffold and less likely to provide a distraction to those looking on. However, what the Kelly case demonstrates is that the words and actions of the criminal could always be subsumed, or even totally disregarded, by a culture that was eager to take what it wanted from the hanging.

Conclusion

From the examples of John Jenkins and Daniel Jepps it is possible to understand how colonial executions can go down two very different paths. To die penitent or 'game' was a very real choice available to the colonial criminal. The first option agreed with the wishes of those who ran the execution while the latter only served to distract from its intended 'lesson'. Religious advisors like William Ullathorne and William Bedford prepared the condemned for their impending fate in the days leading up to the execution and instructed them on how to behave when at the gallows. If the criminal did not obey

[91] Steven Anderson and Paul Sendziuk, 'Hang the Convicts: Capital Punishment and the Reaffirmation of South Australia's Foundation Principles', *Journal of Australian Colonial History*, vol.16, 2014, pp.83-111.

religious instruction in his or her final moments, the sheriff and executioner were left to deal with any obstinacy and proceed with the penalty regardless. Private executions broke the immediacy of the criminal's interaction with the crowd and their expectations. Criminals were at the centre of the execution ceremony and their behaviour was well worth regulating for that reason. However, as the case of Ned Kelly demonstrates, the narrative of their death could often be determined by the wider cultural context in which the execution took place.

CHAPTER 6
The Onlooker

This chapter details the changing ways that interested persons watched executions in colonial Australia. Across the colonies the public execution crowd was perceived to consist largely of women, children and lower class spectators. This was something deeply concerning to the middle and upper echelons of colonial society who believed that public displays of violence only served to harden and demoralise the onlooker. The attendance of these three impressionable groups at the public scaffold also conflicted with their culturally defined role in society as idealised by these same elites. Colonial anxieties were tempered when public executions finally gave way to private ones. The Private Execution Acts explicitly listed the officials required by law to be present at the execution while, on the morning of the hanging itself, colonial sheriffs closely guarded the admission of the general public into the prison. It served to refocus colonial executions on the central lesson of capital punishment – that crime had consequences. Talk of the lowly crowd, their behaviour and the pernicious effect witnessing violence had on their character would, it was hoped, disappear once private executions were introduced.

Colonial Elites, Public Executions and the Crowd

Elites played a key role in the exchange of ideas between the Australian colonies and elsewhere. For a start they were the most transient and mobile set of colonists, able over the course of a lifetime to move between colonies, or maybe even arrive in Australia with an eye to returning to Britain after only staying for a fixed number of years. Education and a degree of wealth enabled privileged access to a communicative exchange going on between 'Home' and the colonies in the form of book and periodical purchases. For example, John Dunmore Lang, one opponent of public executions discussed below, had a private library that numbered over six hundred volumes.[1] After listing off almost every conceivable genre of book in his possession, one historian remarked: "It seemed to comprise almost everything a nineteenth-century scholar could

[1] Jan Kociumbas, *The Oxford History of Australia: Possessions, 1770-1860*, vol. 2, Melbourne: Oxford University Press, 1992, p.251.

have wished to read."[2] Moreover, Lang moved between the colony of New South Wales and Britain six times before his death in Sydney in 1878.[3] It is a degree of mobility not commonly associated with the colonial era and only available to a certain class of colonists. The role of colonial elites in facilitating this exchange of ideas to Australia from elsewhere should not be underestimated.

The result of this relatively high level of mobility and ready access to the latest literature from England is that colonial Australians higher up the social scale were more likely to know about, and be updated on, developments in England and elsewhere regarding capital punishment.[4] Colonists knew about William Ewart's push for the total abolition of the death penalty in mid-nineteenth century England. They were highly knowledgeable of Charles Dickens' influential letters to *The Times* about the public execution of the Mannings in London.[5] Indeed, a discomfort with the violence of executions and its perceived effect on those who watched (see below) was similar to many discussions that prominent reformers were already having in England.[6] These influences obviously had an impact in Australia since some of these worldly colonists of high social rank had time spare to write down their thoughts on executions in a published format. In the first half of the nineteenth century these writings expressed a deep displeasure at public executions and the crowd that went to watch.

Peter Cunningham, John Dunmore Lang, and Nathaniel Kentish were three such writers who, to varying degrees of brevity, displayed concerns over the way executions were carried out. All were highly literate, white collar, well-heeled and well-connected

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[2] George Nadel, *Australia's Colonial Culture: Ideas, Men and Institutions in Mid-Nineteenth Century Eastern Australia*, Cambridge, Massachusetts: Harvard University Press, 1957, p.79.

[3] *Ibid*.

[4] It should be noted that the lower classes were not entirety excluded from this exchange of ideas from abroad regarding capital punishment. Colonial newspapers frequently reprinted news from 'Home' on the issue, and the spread of Mechanics' Institutes in the mid-nineteenth century ensured that members of the working class, so long as they were literate, could freely access books and other forms of published material.

[5] According to one newspaper, "The letter of Mr. Charles Dickens recommending the disuse of public executions has been published with approval in several of the colonial journals". See *The Moreton Bay Courier*, 15 June 1850. For an example of where Dickens' opinions were raised in a colonial parliament, in this case the Tasmanian Parliament by the Solicitor General, see *The Courier*, 1 August 1855, pp.2-3.

[6] Randall McGowen, 'Civilizing Punishment: The End of the Public Execution in England', *Journal of British Studies*, vol.33, no.3, 1994, pp.260-266; Randall McGowen, 'History, Culture and the Death Penalty: The British Debates, 1840-70', *Historical Reflections*, vol.29, no.2, 2003, pp.236-237.

Australian colonists, very far removed in their personal circumstances from the level of the perspiring labourer. All three were united in their opinion that witnessing violence demoralised the onlooker and searched for solutions to a problem framed in those terms. Together they represent some of the earliest published evidence in Australia (outside of the colonial newspapers) that sought to banish forms of execution that took place in full view of the public. It is a window into the cultural beliefs of a social group whose opinion carried much weight in the colonies but one that was not far removed from that of journalists and lawmakers. It also provides a welcome, albeit overdue, opportunity to investigate why the middle to upper end of colonial society tended to dislike the sight of public executions in city streets and largely stayed away from them.

Peter Cunningham was a well-travelled ship's surgeon who settled briefly in New South Wales in the 1820s after being leased farming land on the Upper Hunter River.[7] During his time in Australia he wrote a popular series of published letters containing his thoughts on the colony of New South Wales. The book went through three editions in just two years and was even translated into German.[8] One of these letters penned in New South Wales and sent home to England expressed his disdain for public punishment in much detail.[9] Cunningham's belief was that public executions hardened the spectator and acclimatised them to violent acts. It was an effect that he could personally relate to:

> A man who has been in the habit of witnessing public punishments of any kind must feel with what different sensations he contemplated the *first* instance to the *last* … The first time I saw a man flogged, every lash made me wince as if it had fallen upon my own shoulders; but now I could see a back scarified without moving a muscle … Can it be with this view that legislators familiarize individuals to the sight of capital punishments; – to make them think lightly of the gallows, and

[7] L.F. Fitzhardinge, 'Cunningham, Peter Miller (1789-1864)', *Australian Dictionary of Biography* 1966, http://adb.anu.edu.au/biography/cunningham-peter-miller-1942, viewed 6 March 2015.

[8] *Ibid.*

[9] Peter Cunningham, *Two Years in New South Wales: Comprising Sketches of the Actual State of Society in that Colony, of its Peculiar Advantages to Emigrants, of its Topography, Natural History, & c. &c.*, vol.2, London: Henry Colburn, 1827, pp.296-311.

> steel their minds preparatory to the trial when their own turn may come?[10]

Cunningham thought that being an eyewitness to the death penalty only served to harden the spectator rather than deter future crime. His solution was therefore to play on the imagination of the spectator rather than rely on the graphic reality of the death itself. To achieve this end the symbolic elements of the death penalty would need to be heightened:

> Every effort ought to be made to impress powerfully upon the *imagination* of the multitude the terrible nature of our punishments, without permitting them to be actual *spectators* thereof. The having [of] a black board, bearing in large letters the names, ages, and crimes of the delinquents, posted up conspicuously before the prison; a black flag with emblems of death hung out; a minute-bell tolled until the criminals [are] issued from their cells; and the clergyman to appear briefly *with them on* a stage in front of the prison, and kneeling with them to call upon the multitude to join in prayer on behalf of the unhappy culprits: – I think it might be at least worth the serious consideration of the legislature whether these solemnities, or such as these – this display of the 'pomp and circumstance' of death – this appeal, in fact, to the imagination (whose peculiar property it is to exaggerate), – may not be far better calculated to answer the purposes of warning and deterring than the actual brutal exhibition, notoriously turned by the reprobate into a disgusting joke.[11]

Cunningham's suggestion of a new mode of execution, penned while in the penal colony of New South Wales, shares much with a later account by John Dunmore Lang. Lang was a Presbyterian clergyman of many talents; a politician, educationalist, journalist, historian and anthropologist according to his entry in the *Australian*

[10] *Ibid.*, pp.309-310, emphasis original.

[11] *Ibid.*, pp.310-311, emphasis original.

Dictionary of Biography.[12] In a larger work on the general topic of New South Wales published in 1837, Lang registered his disgust at the "uniformly demoralizing character" of executions and the "withering and blasting influence of the feelings they awaken".[13] Lang's personal experience with the "miserable perverseness of human nature" inclined him to believe that "there are individuals who would actually be incited to crime by the prospect of such a death".[14] Lang appealed to the colony's lawmakers to adopt a form of midnight executions that he believed to take place in Venice, whereby only officials could witness the death:

> Better surely that the system of Venice—revolting as it seems to Britons—should be revived … that the criminal should be conducted at midnight over the Bridge of Sighs, and the work of death performed by torchlight and in solemn silence, in the presence of no other witness than the jailer and the sheriff![15]

Taking the suggestions of both Cunningham and Lang together, they identify a shared problem with public executions. Namely, it hardened the innocence of the spectator, accustomed them to violence, and had the possibility to incite future criminal behaviour. Moreover, their solution was, though taking on different forms, aimed at achieving the same outcome. Both Lang's support for midnight executions and Cunningham's focus on the symbolism rather than the reality of death itself sought to shield the spectator from the raw violence of the hanging.

If there was a sense of paternalism underlying an upper class dislike of public executions then it reaches its logical conclusion in an abolitionist essay written by Nathaniel Kentish in 1842. Kentish was a member of a transient class of colonists in Australia. English born, he trained as an engineer and worked as a surveyor in New South Wales, South Australia and Van Diemen's Land while later attempting to

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[12] D.W.A. Baker, 'Lang, John Dunmore (1799-1878)', *Australian Dictionary of Biography* 1967, http://adb.anu.edu.au/biography/lang-john-dunmore-2326, viewed 10 July 2015.

[13] John Dunmore Lang, *An Historical and Statistical Account of New South Wales, both as a Penal Settlement and as a British Colony*, vol.2, second edition, London: A. J. Valpy, 1837, p.50.

[14] *Ibid.*

[15] *Ibid.*

establish an agricultural assurance scheme in Port Phillip.[16] He was, in addition, a man of literary ambition; publishing his own poetry, writing book length commentary on current events and he was, at one point, the owner-editor of the *Sydney Times*. One of Kentish's works was titled *An Essay on Capital Punishments* (1842) and, first and foremost, it couched his abolitionist stance in deeply religious terms.[17] Most prominent was his idea that man had wrongfully usurped God's divine right to terminate life and therefore had no business conducting capital punishments. That said, Kentish's concerns over the effect of witnessing a violent spectacle also feature prominently throughout. Rather than merely hide the spectacle within the prison, capital punishment should be abolished completely to prevent such a corruption of innocence.

A lengthy poem was included in Kentish's *Essay* that included a key stanza focusing on the disgust he felt towards public executions. Penned in Adelaide and published in Hobart, it implies that those colonists who delighted in 'scenes of blood' had lapsed into a fallen state, despite being given all the tools by God to advance beyond mere barbarism:

> Emerging gradually from a bar'rous state,
> In which it pleased his Maker, to place Man
> With organs, faculties, and reas'ning powers,
> By exercise of which he might attain
> To all the comforts, pleasures, virtuous joys
> In store for him; it not surprising is,
> That e'en as he advanced in love of Truth –
> Of Knowledge, Virtue, and Religion too,
> His fallen nature should the seeds retain
> Of cruel habits sown 'midst scenes of blood.[18]

[16] L.J. Blake, 'Kentish, Nathaniel Lipscomb (1797-1867)', *Australian Dictionary of Biography* 1967, http://adb.anu.edu.au/biography/kentish-nathaniel-lipscomb-2302, viewed 5 January 2015.

[17] Nathaniel Lipscomb Kentish, *Essay on Capital Punishment* [short title], Hobart Town: S.A. Tegg, 1842.

[18] *Ibid.*, pp.5-7, emphasis original.

In the latter half of the stanza Kentish laments the large number of people attending the 'scaffold scene' calling them a stain on 'Britain's character':

> What but this *habit* and a *horrid taste*
> For tragic scenes, could cause *so foul a stain*
> *On* BRITAIN'S *character,* for valour famed,
> As that attached to every public scene
> Of woe and shame? BRITANNIA'S DAUGHTERS, *blush!*
> Blush deep for what is said – and hear, and weep!
> What's said, alas! *Is true* – to your reproach –
> Your Fathers' – Brothers' – Sons'! The Scaffold scene –
> The gibbet where the trembling Culprit hangs –
> The scene of ignominy, guilt, and shame –
> Of woe commencing – (who knows *when* to end
> Or *where?)* – this is the spectacle which draws
> The largest concourse of my Country's Sons!
> I weep to own it – *of her Daughters too!!*[19]

At the conclusion of Kentish's publication he includes a proposed 'Petition to the Crown' to abolish capital punishment that also reveals his fears over the negative effect that violence has on the onlooker. This document, addressed "To the Queen's Most Excellent Majesty," states that, "*the very exhibition* of male-factors being hanged, *has a lamentable tendency to demoralize the good, and to harden the depraved and ill-disposed*".[20]

The thoughts of Lang, Cunningham and Kentish indicate that a person who would actively choose to watch violent spectacles, offended something deep within what might be termed the 'middle class' cultural sensibility of colonial Australians. Henry Kingsley, for example, was a novelist who lived in Victoria from 1853 to 1857 and assumed the "superiority of upper-class Englishmen" upon arrival.[21] In an outline of his

[19] *Ibid.*, emphasis original.

[20] *Ibid.*, p.58, emphasis original.

[21] A.A. Phillips, 'Kingsley, Henry (1830-1876)', *Australian Dictionary of Biography* 1974, http://adb.anu.edu.au/biography/kingsley-henry-396, viewed 4 April 2015.

life it was noted how he was briefly in the mounted Victorian police but soon quit: "compelled by duty to attend an execution, he was so much affected that he threw up the appointment in disgust".[22] Similarly, a "popular pressman" named 'Bob' O'Toole, active in Melbourne during the late 1890s, was said to avoid reporting on executions at all costs:

> There are one or two things upon which he [O'Toole] prides himself, one of which is that he has always managed to escape reporting an execution. He draws the line at seeing the common hangman draw the bolt, and the *Free Lance* congratulates him upon his excellent good taste.[23]

As early as 1855 public executions had become, for many respectable colonists, "A thing to shudder at, not to see", according to the *The Argus*. [24]

Even the very sight of the gallows itself was enough to disgust well-to-do colonists. After one of the 1842 executions in Port Phillip, the administration back in New South Wales had instructed Superintendent Charles La Trobe (later Lieutenant-Governor La Trobe) to leave the gallows permanently erected to save on the £5 cost of repeatedly assembling and dismantling the cumbersome structure. La Trobe obliged, leaving the gallows where they stood for months outside the gaol. However, the public and press were so outraged by the very sight of the idle structure that he soon ordered it to be taken down without seeking permission from Sydney.[25] While the gallows stood erect in Melbourne's streets the press viewed it as a "standing eye-sore" and an "outrage upon public decency".[26] Edmund Finn was another who called the gallows an "uncouth and repulsive looking object" when recounting this story in his own work.[27]

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[22] Clement Shorter, 'A Note on Henry Kingsley', in Henry Kingsley, *The Recollections of Geoffry Hamlyn*, New York: Longmans, Green & Co., 1899, pp.vii-xxiii, quote on p.xvii.

[23] *The Free Lance*, 12 September 1896, p.3.

[24] *The Argus*, 19 October 1855.

[25] Edmund Finn (pseudonym 'Garryowen'), *The Chronicles of Early Melbourne 1835 to 1852: Historical, Anecdotal and Personal* [1888], centennial edition, Melbourne: Heritage Publications, 1976, p.400; H.F. Behan, *Mr. Justice J.W. Willis: With particular reference to his period as First Resident Judge of Port Phillip 1841-1843*, Melbourne: Harold Frederick Behan, 1979, p.225.

[26] *Ibid.*, p.400.

[27] *Ibid.*

It is an interesting thought as to whether a lowly opinion of public executions had some kind of social utility. "In the 'Antipodes' as at 'Home'," writes the historian Penny Russell, "manners served to define social position in an unstable world, providing grounds for exclusion from the elites, as well as mapping the road into them."[28] Condemning the 'barbarity' of public executions may have played some small part in defining oneself in the muddled social world of the Australian colonies in the same way that manners and bodily conduct would in many other situations. Bald displays of morbid curiosity by the scaffold crowd as well as the persistent thought that their innocence was being corrupted were very troublesome to the colonial elite. It provided a fertile milieu for the ready acceptance of private executions that took place in Australia during the 1850s.

With all this in mind, it comes as little surprise to find that the middle and upper echelons of colonial society are not mentioned as frequenters of public executions. Stay away from the public gallows, *The Argus* of Melbourne warned its readers, lest you be "ranked amongst the hopelessly-depraved classes of society".[29] In the *South Australian Register* it was written that, "People of refined morals or cultivated taste would feel themselves entirely out of place in the vicinity of the scaffold, which is consequently abandoned to the profligate, the thoughtless, and those whose minds are morbidly disposed."[30] The result of this tendency for the middle classes to avoid setting foot near such 'demoralising' spectacles was very damaging to the legitimacy of public executions as a whole. It was only natural that a civil ceremony without the presence of the community's more esteemed citizens was destined to disintegrate into its very worst incarnation – a "kind of satanic high festival" as *The Argus* labelled public executions in 1855.[31] Those lower down the social rung, meanwhile, voted with their feet and continued to engage with the spectacle of public executions until their abolition. To the

[28] Penny Russell, *Savage or Civilised?: Manners in Colonial Australia*, Sydney: The University of New South Wales Press, 2010, p.3.

[29] *The Argus*, 1 April 1853.

[30] *South Australian Register*, 13 December 1854.

[31] *The Argus*, 19 October 1855. For how this very same process of middle class non-attendance affected the legitimacy of capital punishment in Antebellum America, see Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865*, Oxford: Oxford University Press, 1989, pp.95-100.

last they came to watch public executions, secure in the knowledge that their attendance would be severely censured by colonial periodicals and those higher up the social ladder.

The Public Execution Crowd

Joseph Long Innes, police superintendent and later magistrate, gave evidence at the 1849 Select Committee that inquired into concerns over discipline and safety at Darlinghurst Gaol in Sydney. While acting in his professional capacity Innes observed many public executions at the Gaol over a period of eight years. He was asked explicitly by the Committee: "What class of people generally attend executions?" [32] The answer given by Innes was recorded as follows: "The labouring class, and an enormous number of women and children." [33] Innes continued by stating how the demeanour of the public execution crowd was "appalling" and distinguishable by their "levity and total want of feeling".[34] Even mothers came with their children to "hold them up in their arms, [so] that they may have a good sight of the execution".[35] This preliminary picture of the public execution crowd as outlined by Innes is worth investigating further. This section assesses the size of the crowd at public executions and their behaviour. It also offers a brief overview of the women, children and members of the so-called 'lower class' that were said to attend these spectacles.

A random sample of crowd estimates for the era of public executions demonstrates a large degree of variation across the colonies. The estimation of 10,000 Sydneysiders at John Knatchbull's execution in 1844 seems far and away the largest of the colonial era.[36] In Hobart 600 people attended an execution in 1827 but this number had jumped to as many as 2000 for a relatively uneventful hanging in 1853.[37] All 900 of Moreton

[32] New South Wales, 'Report from the Select Committee on the Darlinghurst Gaol, with Appendix and Minutes of Evidence', *Votes and Proceedings of the Legislative Council*, 1849, vol. 2.

[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.*

[36] *Australian*, 15 February 1844, p.3.

[37] For the 1827 crowd number, see Hamish Maxwell-Stewart, *Closing Hells Gates: The Death of a Convict Station*, Sydney: Allen and Unwin, 2008, p.214. For the 1853 estimate, see *The Courier*, 14 February 1853.

Bay's convict population witnessed that settlement's first ever hanging in 1830.[38] South Australia's first execution was performed in front of at least 1000 people according to one witness. It was a huge proportion of Adelaide's population, which at that time was said to be around 2800.[39] That said, John M. Skipper's hastily composed practice sketches of other South Australian executions suggest a much smaller spectatorship was the norm.[40] In the absence of anything nearing an official means to record attendance at public executions these anecdotal estimates are, of course, all too susceptible to exaggeration and plain inaccuracy on the part of the observer.

Edmund Finn's record of crowd numbers in the context of Victoria is about as definitive a sample as one can get for the public execution era. Finn had a habit of making crowd estimates at the many public executions he attended in the history of early Melbourne. His estimates appear throughout *The Chronicles of Early Melbourne* (1888) but comprise of the following when arranged together: 6000 spectators attended the execution of 'Bob' and 'Jack' in 1842; 7000 watched Daniel Jepps, Charles Ellis and Martin Fogarty hang in 1842; 300 for John Healy in 1847; 2000 for Augustus Dauncey in 1848, and finally, 700 to 800 spectators came to watch the hanging of Patrick Kennedy in 1851.[41] It goes without saying that Finn's estimates are just as anecdotal as those that appear in the newspapers. However, made by the same observer over the period of a decade, they should be given a little more weight by comparison. Taken at face value, Finn demonstrates that very large crowds would commonly appear to watch Melbourne's executions but it was not the norm. Rather than demonstrating an

[38] Two convicts were executed on this occasion. For more details, see Christopher Dawson, *Dirty Dozen: Hanging and the Moreton Bay Convicts*, Brisbane: Inside History, 2007, pp.31-32.

[39] T. Horton James, *Six Months in South Australia: with some account of Port Philip and Portland Bay, in Australia Felix: with advice to emigrants: to which is added a monthly calendar of gardening and agriculture, adapted to the climate and seasons* [1838], Adelaide: Public Library of South Australia, 1962, pp.54 and 57. Another account does not put the crowd number at 1000 but says that there were certainly "upwards of 500 persons present". See Henry Capper, *Capper's South Australia: Containing the history of the rise, progress and present state of the colony, hints to emigrants ... embellished with three maps showing the maritime portion of the located districts, the ... districts of Adelaide and Encounter Bay, and the City of Adelaide*, third edition, London: H. Capper, 1839, p.97.

[40] John M. Skipper, 'Execution of George Hughes and Henry Curran, Adelaide, 16 March 1840', pencil on card, 15.0 x 20.1cm, 1840, Art Gallery of South Australia, 367D4; John M. Skipper, 'Execution of Joseph Stagg, Adelaide, 18 November 1840, pen and brown ink on paper, 10.7 x 12.8 cm, 1840, Art Gallery of South Australia, 367D5; John M. Skipper, 'Early execution, South Australia', pencil on paper, 16.3 x 20.1 cm, c.1840, Art Gallery of South Australia, 367D3; John M. Skipper, 'A Sketch of South Australia's First Execution by John M. Skipper, 1838', pencil on paper, 13 x 18 cm, 1838, State Library of South Australia Pictorial Collection, B 7797.

[41] Finn, 1976, pp.395, 397, 403, 405 and 406.

upward or downward trend over the longer term, crowd numbers appear to fluctuate quite dramatically depending on the profile of the person executed.

If the stereotype is to be believed, the public execution crowd was primarily comprised of those low in social standing. Labouring types were strongly represented as Joseph Long Innes suggests while large portions of the unemployed, perhaps even a small criminal element, were thought to lurk below the drop. One of the more sensational descriptions of the scaffold crowd was produced in Adelaide at the execution of William Wright for murder in 1853. The hanging was conducted early on a Sunday morning and the *South Australian Register* began its report by stating that there "could hardly have been less than a thousand persons" gathered at the base of the gallows.[42] It depicted the social make-up of the crowd as follows:

> [I]f there could be a more disgusting sight than the gallows itself, it was presented by the bulk of the spectators – unwashed loungers, reeking from the night's debauch, or only half recovered from its effects by a hasty hour or two of sleep; women hurrying to the spot as if pressing to join in some ordinary amusement, and some even carrying with them their shivering unweaned infants … Every purlieu of the city's worst locality seemed to have belched forth its inmates and frequenters, and to have assembled them around the frightful structure.[43]

At an earlier execution in 1850 the very same newspaper wrote that, "with scarcely any exception," the crowd was composed of the "most abandon class".[44] In Sydney it was reported that "mechanics, labourers, vagrants, thieves, prostitutes" all swelled with a "horrible and unnatural anxiety for the time when 'the show would begin'".[45] In Tasmania spectators to public executions were described, somewhat more politely, as being from the "humbler classes".[46] For a public hanging near Queen Street Gaol in

[42] *South Australian Register*, 14 March 1853.

[43] *Ibid.*

[44] *South Australian Register*, 6 September 1850.

[45] *Bell's Life and Sporting Reviewer*, 9 November 1850.

[46] *Colonial Times and Tasmanian Advertiser*, 6 August 1852.

Brisbane there was "scarcely a person of respectability," to be seen, "except [for] those required" to be present.[47] In Victoria, one letter addressed to the Editor of *The Argus* described the Melbourne crowd as "a mixed assembly of unthinking, vicious and profane men, women, [and] children".[48]

The mention of women at public executions was frequent in the colonial newspapers and almost always accompanied by a moralising judgment. The *Bathurst Free Press* was no exception to this rule. After demonising female spectators to a hanging in 1849, it offered a somewhat farcical suggestion to remedy their continued attendance:

> [A] very large proportion [of the crowd] consisted (as usual) of women and children. There is indeed something truly shocking in the avidity with which – in the case of ignorant and uncultivated females – these kind of spectacles are sought after. We observed more than one vehicle literally *crammed* with them, and we could not help wondering … [what] induced a whole bevy of fair dames to undertake a journey of twenty miles in order to feast their eyes upon the dying agonies of a miserable fellow-creature! Sincerely did we wish that every female present could have been sentenced to six months incarceration, as a means of rewarding her for her gratuitous display of shameful curiosity.[49]

Another publication called for a woman so "forgetful of her sex" as to attend executions that she deserved nothing less than "a good whipping".[50] The *Moreton Bay Free Press*, though it was "blush to write it", mentioned that many women in the township had come to watch a hanging in 1854.[51] Those women who could stomach such a scene did "no credit to her sex," according to the writer, since "humanity is one of woman's ennobling characteristics".[52] While Sydney's the *Australian* wondered aloud: "Is the

[47] *Moreton Bay Free Press*, 29 August 1854.

[48] *The Argus*, 27 June 1848, p.4.

[49] *Bathurst Free Press*, 27 October 1849, emphasis original.

[50] *The Atlas*, 8 July 1848.

[51] *Moreton Bay Free Press*, 29 August 1854.

[52] *Ibid.*

mind of woman, which we have hitherto admired for its gentleness, purity, and innocence, so utterly lost and debased as to delight in gazing upon the dying agonies of the condemned?"[53] This disapproval of female spectators in New South Wales was on full display for an execution at Darlinghurst Gaol in 1840. A traveller to Sydney wrote about how, on this particular occasion, women were deliberately excluded from freely entering the prison yard to watch the death.[54] It is a passing example that usefully illustrates the very real concern over female attendance in the era of public executions.

The last group that Joseph Long Innes suggests attended public executions were children. In 1841 Tom Petrie was only "nine or ten years old" when an elderly prisoner took him by the hand to view a recently hanged Indigenous man lying in his coffin:

> Stooping, he [the prisoner] pulled the white cap from the face of the dead blackfellow, exposing the features. The eyes were staring, and the open mouth had the tongue protruding from it. The horror of the ghastly sight so frightened the child that it set him crying, and he could not get over it nor forget it for long afterwards.[55]

Tom's father, Andrew Petrie, had constructed the gallows used at this particular execution in Moreton Bay so the boy's ready access to the body of the dead criminal was likely a result of this family connection and thus a rare occurrence.[56] Still, there are many more references to children viewing executions throughout the colonies. In Perth, for example, there were a "not inconsiderable number" of children who watched the hanging of William Dodd in 1855.[57] Prior to the execution of Eliza Benwell in Tasmania there was an "abundance" of young boys who found room on the pavement to play "leap-frog, marbles, and other juvenile games".[58] At an execution at Brisbane's

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[53] *Australian*, 15 February 1844.

[54] Alexander Marjoribanks, *Travels in New South Wales*, London: Smith, Elder, and Co., 1847, p.169.

[55] This encounter was recorded much later in a memoir written by Tom Petrie's daughter, Constance Campbell Petrie. It was said to have occurred at the execution of Mullan and Ningavil at Moreton Bay in 1841. See Constance Campbell Petrie, *Tom Petrie's Reminiscences of Early Queensland*, Brisbane: Watson and Ferguson, 1904, p.175 and 245.

[56] For details of the Petrie family's connection with prison and gallows construction in early Queensland, see Christopher Dawson, *The Hanging at the Brisbane Windmill*, Brisbane: Inside History, 2009, p.29.

[57] *The Inquirer and Commercial News*, 17 October 1855, p.2.

[58] *Launceston Advertiser*, 2 October 1845, p.3.

Queen Street Gaol in 1851 it was to the "shame and disgrace of the town" that a large number of children could be counted among the spectators.[59]

There is a strong possibility that children were actively brought to public executions as a means to teach them the consequences of wrongdoing. In his evidence to the Select Committee, Joseph Long Innes states that children were held up by mothers to better see the gallows. It is an action that implies parental approval to view proceedings as opposed to an image of disobedient youths sneaking to the foot of the gallows without consent. Pieter Spierenburg is one scholar who briefly countenanced the idea of the gallows as a parental aid in the context of Amsterdam. According to Spierenburg, after witnessing an execution a father might say to his son: "Take a good look; this is what will happen to you, if you stray from the right path".[60] Public executions may have been used as a mechanism of parental instruction but, without hearing from these attendees directly and only through the lens of disapproving newspaper correspondents, it is difficult to make this claim conclusively in the Australian context.

Innes' observation that the behaviour of the lower classes, women and children at executions was 'appalling' holds true as an umbrella term for the negative construction of the crowd in the press. At one execution in Melbourne alone, Edmund Finn labelled the crowd "white barbarians," complaining that they, "shouted and yelled and vented their gratification in explosions of uproarious merriment, as if they were participating in the greatest sport".[61] At the same hanging the *Port Phillip Gazette* also reported that a "most disgusting spirit" was on display, describing how spectators clambered for vantage points on nearby trees and walls, some even mounting the criminal's coffins for a better view.[62] If this one execution can serve as a guide to others, negative slurs on crowd behaviour were widespread across the colonial era. In England the uncomfortably "sporting tone" that executions took on was noted by John Pratt while Thomas W. Laqueur contextualised crowd behaviour within that nation's history of

[59] *The Moreton Bay Courier*, 29 August 1854 as quoted in Christopher Dawson, *That Gingerbread Structure: The Trials and Tribulations of the Queen Street Gaol*, Brisbane: Inside History, 2010, p.36.

[60] Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression; From a Preindustrial Metropolis to the European Experience*, Cambridge: Cambridge University Press, 1984, p.97.

[61] Finn, 1976, p.395.

[62] *The Port Phillip Gazette*, 22 January 1842.

carnival days.[63] The sporting analogy is not completely out of place in the Australian colonies, especially when considering the cultural expectation of the crowd that the criminal 'die game' (see Chapter 5). However, a genuine fear of the crowd was seldom expressed in the colonies. In fact, only on one extremely rare occasion was the military guard actually called upon by the sheriff to settle violent or interfering spectators.[64]

Although the crowd at public executions was not placed in a positive light across the Australian colonies, there are some references to spectators behaving in a way that matched the solemnity of the occasion. The colonial historian, John West, wrote how onlookers were "affected to tears" when a group of condemned men died singing a hymn on the Hobart scaffold.[65] The travelling Scotsman, Alexander Marjoribanks, witnessed numerous hangings in both England and Australia. He suggested that the Sydney crowd was comparatively docile to those found abroad: "The spectators behave with a remarkable degree of propriety in that country on such occasions, very different from what I have often seen in Britain."[66] For Marjoribanks, this was best illustrated by the way people related to the public executioner who was "always treated with great respect".[67] As with any stereotype there are always counter-narratives to be discovered. However, Marjoribank's observations were exceptions to the rule as the scaffold crowd was only very rarely looked upon in a favourable light.

It is worth probing further into the criticism directed at the public execution crowd with reference to the earlier comments made by colonial elites like Lang, Cunningham and Kentish; *viz*., their belief that scenes of violence were something that demoralised and

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[63] John Pratt, *Punishment and Civilization: Penal Tolerance and Intolerance in Modern Society*, London: SAGE Publications, 2002, pp.15-34; Thomas W. Laqueur, 'Crowds, Carnival and the State in English Executions', in A.L. Beier, D. Cannadine and J.M. Rosenheim, *The First Modern Society: Essays in English History in Honour of Lawrence Stone*, Cambridge: Cambridge University Press, 1989, pp.305-355.

[64] In 1826 a man named Jefferies was travelling in a cart to the site of his execution in Launceston. Jeffries had, among other crimes, murdered an infant and as he travelled to the gallows: "Several attempts were made by the people to take him out of the cart that they might wreak their vengeance upon him". As a result, "it became necessary to send to Town for a stronger guard". For details of this particular case, see Geoffrey Chapman Ingleton, *True Patriots All, or News from Early Australia*, Sydney: Angus and Robertson, 1952, p.107.

[65] John West, *The History of Tasmania* [1852], A.G.L. Shaw (ed.), Sydney: Angus and Robertson, 1971, p.421.

[66] Marjoribanks, 1847, p.170.

[67] *Ibid.*, p.132.

hardened the spectator. Understanding this point helps to unlock the endless criticism directed at the women, children and lower classes who attended public executions. In *Australia's Colonial Culture* (1957), George Nadel identifies that 'improvement' was a key concept in Australia's intellectual culture from the 1830s to the 1860s.[68] The proliferation of the Mechanics' Institutes across the colonies during this time, for instance, marked a desire to raise the labouring classes away from sensual pleasures to higher intellectual endeavours. If colonial society did indeed have an idealised cultural role for the lower classes to aspire toward, it certainly did not involve keeping company at the foot of the public scaffold.

As for women and children attending executions, scholars like Anne Summers and Jan Kociumbas may have part of the answer. A number of historians have identified how colonial women were placed in narrowly defined domestic, sexual and reproductive roles during the colonial period.[69] Summers' *Damned Whores and God's Police* (1975), for example, puts the birth of the "bourgeoisie family" in Australia around the 1840s and 1850s, a period where females were told to assume "moral guardianship of society".[70] These types of roles designated for women, usually curated, enforced and exemplified by middle class families, clashed with the idea of female attendance at the violent spectacle of public hangings. As for underage spectators to executions, Kociumbas' history of Australian childhood emphasises how the juvenile mind was usually conceived of as a malleable and pliable object. Schooling, play, family, discipline—all the elements of a proper upbringing—were thought to influence not just the child's individual prospects but the future health of the nation. These ideals were replicated in the raising of the children of the colonial elite, who were inculcated from

[68] Nadel, 1957. Identifying that the concept of improvement was prevalent in mid-nineteenth century Australia complements the work of Asa Briggs on the Victorian period as a whole. See Asa Briggs, *The Age of Improvement, 1783-1867*, second edition, Harlow: Pearson Education Limited, 2000; Asa Briggs, *Victorian People: A Reassessment of Persons and Themes, 1851-1867*, London: Penguin Books, 1954; Asa Briggs, *Victorian Cities*, Harmondsworth: Penguin Books, 1963.

[69] See, for example, Raymond Evans and Kay Saunders, 'No Place Like Home: The Evolution of the Australian Housewife', in K. Saunders and R. Evans (eds), *Gender Relations in Australia: Domination and Negotiation*, Sydney: Harcourt Brace Jovanovich Publishers, 1992, pp.175-167; Margaret Anderson, 'Good Strong Girls: Colonial Women and Work', in K. Saunders and R. Evans (eds), *Gender Relations in Australia: Domination and Negotiation*, Sydney: Harcourt Brace Jovanovich Publishers, 1992, pp.225-245; Miriam Dixson, *The Real Matilda: Women and Identity in Australia–1788 to the Present* [1976], fourth edition, Sydney: UNSW Press, 1999, pp.138-154.

[70] Anne Summers, *Damned Whores and God's Police: Women's Lives in Australia*, second revised edition, Melbourne: Penguin Books, 1975, p.67.

birth with the virtues of good habit, respectability and appropriate gender roles.[71] The existence of children at the gallows, their corruption of innocence and crude introduction to violent death, flew in the face of all elite conceptions of proper child rearing. Children, and the mothers who brought them to watch, were thus free targets for sanction and concern.

Putting aside for one moment all sensation and feeling about those who attended public executions, the spectator performed an important role that bolstered the overall legitimacy of capital punishment. Above all, the free and unhindered access of the general public to the death of a criminal was the central guarantor of due process. As the *South Australian Register* pointed out in 1854:

> [T]he publicity of an execution has been advocated as a kind of guarantee to the criminal and the public that the sentence of the law shall be honestly carried out. The execution being in the open face of day, the whole community can testify – first, that the sentence of the law has really been carried out; and next, that no unnecessary or extra-judicial sufferings have been inflicted on the criminal. The openness of the execution is thus regarded as the best pledge that the law has been simply obeyed – neither more nor less.[72]

The public execution crowd was the prized English principle of transparency in action, providing a check and balance on both the punished and the punisher. However, such noble ends of the scaffold crowd were rarely acknowledged and attendees were subject to the persistent ridicule of the colonial newspapers and the upper classes. It was a criticism bolstered by the cultural belief, exemplified by elite writers, that bearing witness to scenes of violence demoralised and hardened one's character. With the introduction of private executions it was left to employed officials and select members of the public to sign off on the fact that a criminal had been executed. With a means to guarantee transparency in the closed world of private executions, the widely reviled public execution crowd could finally be consigned to the past.

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[71] Jan Kociumbas, *Australian Childhood: A History*, Sydney: Allen and Unwin, 1997, pp.55-71.

[72] *South Australian Register*, 28 December 1854.

Who the Sheriff 'may think fit': Spectators to Private Executions

The following is the clause within the New South Wales Private Execution Act that designates who was able to attend these new executions within the prison walls. The legislation passed in the other colonies offer very similar recommendations, though in slightly different wording:

> The sheriff, under sheriff, or deputy as aforesaid, shall be present at such execution, together with the gaoler and proper officers of the gaol, including the physician or surgeon, together with all magistrates who shall think fit, and such constables, military guard, and adult spectators as the said sheriff, under sheriff, or deputy as aforesaid, may think fit.[73]

The official witnesses to private executions, noted in the legislation to be present, usually totalled no more than a dozen and provided a number of functions. The officers of the gaol were required to bring the prisoner from the cell to the scaffold and, along with any police or military present, maintain security as the private execution unfolded. The medical officer confirmed the prisoner was deceased and signed off on the fact. Magistrates, if they chose to attend, were a way for a member of the judiciary to witness that the sentence of the court was upheld. The sheriff ran the event while the executioner and clergy rounded out those needed to perform the task. Journalists communicated news of the execution to the wider public. These were the official witnesses to private executions. They represent a distilled version of all who were legally and practically required to perform the task of hanging. The previous chapter dealt with how these functionaries (especially the clergy, executioner and sheriff) participated in colonial executions and their roles are better discussed in that context. Thus, this section focuses solely on those spectators, outside of that required by law to be present, whom the sheriff allowed to watch private executions.

Gaining admittance to a private execution was an arbitrary decision made by the sheriff, very much subject to his personal discretion. Sometimes it was as simple as being

[73] New South Wales, no.40 of 1853, *An Act to Regulate the Execution of Criminals*, 1855.

present outside the gaol on the day of execution in the hope of being one of the chosen few picked out. Later in the century, many sheriffs preferred to distribute "cards of admission" in the days leading up to the execution to those who had applied.[74] William Sams in Tasmania and W. R. Boothby in South Australia are two sheriffs who provide passing examples of the different ways that one might gain admittance to a private execution. In Hobart, Sams acted as Sheriff for the hanging of John Halley and two others in 1861 and was welcomed outside the gaol by a large group of people "most anxious to obtain admittance".[75] "Upon three having gained admittance," wrote *The Cornwall Chronicle*'s correspondent, "all assembled followed the Sheriff from that lobby to the yard."[76] For an execution at Adelaide Gaol in 1883, Sheriff Boothby had a "large number of applications for admission to the Gaol" but granted none of them.[77] The *South Australian Register* thanked Boothby for denying the "morbid tastes of the applicants" concluding that he conducted his duty in the true "spirit of the Act" by attempting to prevent the criminal "being paraded before the public" any more than was necessary.[78]

The sheriff often employed a good deal of discretion and calculation in deciding who should attend, especially since admittance to the scaffold scene was usually in high demand. In Queensland, two labourers of a Pacific Island background were executed at the Maryborough lockup in 1877. On the day of execution some five hundred fellow Islanders showed up in the town who had been encouraged by police and local plantation owners to be privy to the event. However, of these hundreds, only "six 'representative' Polynesians" were allowed into the yard by the Under-Sheriff. [79] The sight of the six admitted into the lockup was said to have "unmanned" one of the condemned men who burst into tears and fell silent upon seeing them.[80] On another

[74] For passing references to these "cards of admission" granted to spectators who had applied to watch the private execution, see *Queanbeyan Age*, 24 August 1889, p.4; *Darling Downs Gazette*, 14 November 1888, p.3; *The Sydney Morning Herald*, 8 January 1887, p.8; *Wallaroo Times*, 10 July 1867, p.5.

[75] *The Cornwall Chronicle*, 25 May 1861, p.5. Though this newspaper labeled William Sams 'Sheriff' for this execution, he was, according to his obituary at least, probably the sub-Sheriff at this time. See *The Cornwall Chronicle*, 29 September 1871, p.2.

[76] *The Cornwall Chronicle*, 25 May 1861, p.5.

[77] *South Australian Register*, 19 January 1883.

[78] *Ibid.*

[79] *Maryborough Chronicle*, 19 May 1877, p.2.

[80] *Ibid.*

occasion, again in Queensland, the father of a murdered daughter knocked on the gate to the Boggo Road Gaol early in the morning so that he could see her killer, James Gardiner, executed. After providing paperwork confirming his identity, the elderly man was granted permission to watch. As the execution was underway the father positioned himself directly opposite Gardiner and "gazed long and earnestly" at the corpse after it was cut down.[81] According to *The Brisbane Courier* he left the gaol silently with a "satisfied look on his face, and no doubt feeling in his heart that his daughter was avenged".[82]

For high profile private executions there seems to be a sudden jump in spectator numbers, though it seems to be largely confined to New South Wales. For example, at the execution of Henry James O'Farrell, the Irishman executed for an attempt on the life of the visiting Duke of Edinburgh in 1868, the number of spectators swelled to "upwards of a hundred persons" inside Darlinghurst Gaol.[83] This number was surpassed many years later in 1887 when the perpetrators of the Mount Rennie rape were executed at Darlinghurst Gaol. On that occasion 120 people, not including officials and policemen, were reported to be present.[84] The prison yard "resembled a scene in a theatre" according to one newspaper:

> The top gallery was set apart for the general public and visitors. The second gallery, on a level with the scaffold, was reserved for the press, members of Parliament and JPs. The floor was reserved for medical and scientific men. A strong force of police guarded each side of the scaffold. A subdued hum of voices filled the large open space, until the sheriff in stentorian tones demanded silence on pain of expulsion.[85]

The dramatic surge in numbers at very prominent private executions was in many ways to do with the upshot in interest from men of officialdom as well as journalists. At the execution of O'Farrell, for example, MPs and Justices of the Peace were strongly

[81] *The Brisbane Courier*, 16 October 1883, p.3.

[82] *Ibid.*

[83] *Maryborough Chronicle, Wide Bay and Burnett Advertiser*, 28 April 1868.

[84] *The Riverine Grazier*, 11 January 1887, p.4.

[85] *Ibid.*

represented, equal to that of the "well-known private citizens" that attended.[86] Still the large number of attendees at prominent private executions seems to be a practice limited to New South Wales. To contrast these two hangings with the most infamous private executions to occur in colonial Victoria—that of Ned Kelly and, later, Frances Knorr (nicknamed the 'Brunswick baby farmer' by the press)—no private citizens were listed as being present.[87] Moreover, if counting the signatures on official witness declarations are anything to go by, the total number of spectators to private executions (including officials) rarely exceeded a dozen in the case of Tasmania.[88]

Sometimes the press accused the private spectators of being lowly and depraved just as they had the public execution crowd. At the 1861 execution of Thomas Sanders in Melbourne a "favoured few" members of the public gained admittance but they behaved "just like a crowd of low persons … rushing the entrance to a theatrical pit or gallery".[89] These members of the public displayed a "rude eagerness" when trailing the condemned criminal to the drop in a manner that made the officials "most unhappy".[90] The behaviour of the private execution crowd in 1858 at the hanging of Young and Burns in Launceston was particularly scandalous. Their excitement drew comparisons to the "refined savages who flock to bull-fights and gloat over the sanguinary scenes of the arena".[91] The conduct of the chosen members of the public seemed to worsen in the case of botched executions, a scourge that continued unabated for much of the private execution era. The crowd hissed and jeered the hangman immediately following the execution of an Indigenous man known as 'Scabby Harry' at Goulburn Gaol in 1859.[92] The executioner, having terribly bungled the task by allowing the body to hit the ground, ran to the gaoler's quarters in fear for his personal safety but was soon recalled to suspend the criminal's corpse in the proper manner.

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[86] *Maryborough Chronicle, Wide Bay and Burnett Advertiser*, 28 April 1868.

[87] Twenty-three spectators attended the execution of Kelly while thirteen came to watch Knorr's hanging but all were present in a professional capacity. See 'Witnesses to Kelly's Execution, 11 October 1880', Public Record Office Victoria, VPRS 4969/2/78; *The Argus*, 16 January 1894, p.5.

[88] 'Copies of Declaration by Witnesses and Doctors of the Execution of Convicted Persons, 1 January 1856 to 31 December 1946', Tasmanian Archives, SC485/1/1.

[89] *The Mercury*, 15 June 1861.

[90] *Ibid.*

[91] *Melbourne Punch* reprinted in *The Colonist*, 9 November 1858, p.3.

[92] Cries of "scandalous" and "shameful butchery" were just some of the phrases yelled at the executioner on this occasion. See *The Moreton Bay Courier*, 1 June 1859.

The controlled environment of private executions made it much easier for scientific experts to be admitted by the sheriff for research purposes. Christopher Dawson, in the context of Queensland, unearthed the story of a Russian anthropologist named Nikolai Milkhoulo-Maclay who attended four executions in Brisbane during the year 1880.[93] The criminals were from ethnicities the anthropologist had labelled Australian, Melanesian, Malayan and Mongolian. Immediately following the execution the brain of each criminal was removed from the skull and then dissected, photographs being taken at each relevant stage. For the purposes of posterity it may be noted that Mikhoulo-Maclay found that each physical brain did not appear so different as to "justify the concept of higher and lower races".[94] In Victoria, on at least one occasion in 1872, local medical students were allowed into the prison to watch the post-mortem being carried out by the medical officer. In an era where cadavers where in short and unpredictable supply, the prison governor at Melbourne Gaol wrote in his diary how both student and doctor alike "revelled in the luxury of a fresh & healthy corpse".[95]

Phrenology was gaining traction in the latter half of the nineteenth century and its practitioners were frequently permitted by various sheriffs to attend private executions. These men of pseudoscience were one of the main reasons for the growing prevalence of death masks being taken of executed criminals in the late colonial period.[96] Travelling phrenologists like Professor G.A. De Blumenthal claimed at lectures that, for the purposes of "scientific research", he attended twenty-two executions in the colonies by the year 1895.[97] Taking physical measurements and casts of the head immediately following the hanging was a means to conduct an analysis of criminal character. De Blumenthal's "phrenological chart", an analysis of the hanged criminal's head, was

[93] For Dawson's account, see Christopher Dawson, *The Prisoners of Toowong Cemetery: Life, Death and the Old Petrie Terrace Gaol*, Brisbane: Inside History, 2006, p.51.

[94] C. L. Sentinella quoted in *Ibid.*

[95] The criminal being inspected was Edward Feeney. For more details on his post-mortem, see John Buckley Castieau, *The Difficulties of My Position: The Diaries of Prison Governor John Buckley Castieau, 1855-1884*, M. Finnane (ed.), Canberra: National Library of Australia, 2004, pp.181-182.

[96] Dean Wilson, 'Explaining the "Criminal": Kelly's Death Mask', *The La Trobe Journal*, no.69, 2002, pp.51-58.

[97] *Wagga Wagga Express*, 21 May 1895, p.2.

often published in the colonial newspapers.[98] The phrenologist's task could be a gruesome one, as in the case of Frances Knorr who was executed at Melbourne Gaol in 1894:

> The white cap was removed from the face of the dead woman, and the female warders were compelled to hold up the woman's head, with the blood streaming down all over their hands, in order that a phrenologist should take certain measurements with a tape, and the hideously contorted blood besmeared face of a decrepit little woman was exposed to the public gaze.[99]

Another prominent colonial phrenologist, Professor Archibald S. Hamilton, preferred to avoid the execution altogether and instead examine the culprit in the cell before death.[100] That said, Hamilton was known to seek out the death masks of criminals after their hanging as he gave his lectures surrounded by "upwards of forty skulls, various casts, and numerous diagrams".[101] Through the display of the heads of dead criminals phrenology tapped into the sensational possibilities of hangings, especially in the visually starved era of private executions. For instance, the death mask of Ned Kelly may have been initially commissioned for medical or scientific purposes but a wax likeness of his head appeared on public display in Bourke Street the day immediately following his execution.[102] Hamilton's personal reading of Kelly's cranium appeared in a newspaper not long after that.[103]

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[98] For two examples of De Blumenthal examining the heads of deceased criminals during the year 1889, see *Bendigo Advertiser*, 19 March 1889, p.1; *Geelong Advertiser*, 18 October 1889, p.3.

[99] *The Armidale Express and New England General Advertiser*, 19 January 1894, p.4.

[100] For details of A.S. Hamilton's career as a phrenologist, in so far as it intersected with executions, see Alexandra Roginski, *The Hanged Man and the Body Thief: Finding Lives in a Museum Mystery*, Melbourne: Monash University Press, 2015; Wilson, 2002; A.S. Hamilton, *Abstract of a Lecture on Criminal Legislation, Prison Discipline, and the Causes of Crime, and on Capital Punishments*: *with Delineations on the Characters of Alexander and Charles Ross*, Sydney: F. Cunningham, 1863.

[101] *Bendigo Advertiser*, 3 December 1867, pp.2-3.

[102] Wilson, 2002, p.51. For the original death mask, see Maximilian L. Kreitmayer, 'Ned Kelly Death Mask', plaster, 28.0 x 21.5 x 18.5 cm, 1880, National Portrait Gallery of Australia, LOAN2000.39.

[103] *The Herald*, 18 November 1880, p.2.

On the day of a private execution many members of the public still congregated outside colonial prisons just to partake in the drama of the event. Estimates of the crowd gathered outside the walls of Melbourne Gaol at the execution of Ned Kelly ranged anywhere from four to several thousand.[104] Most were "larrikin-looking youths" and "nearly all were of the lower orders" according to *The Mercury*.[105] The death of Frances Knorr attracted some fifteen hundred spectators outside Melbourne Gaol.[106] Many of the women gathered were said to have "relieved their overcharged feelings with tears" – according to one report.[107] The vast majority of estimates of crowd numbers outside the walls vary and range from anywhere from a handful to several hundred. As the sun set on the colonial era this eager group of hopeful attendees became more and more out of place on city streets. By 1901 Brisbane's *Evening Observer* wrote that many people "hurrying to their work" looked at a group of men waiting "nervously for admittance" outside the gaol with a great deal of curiosity.[108]

The interaction between prison officials and the crowd gathered outside the walls was mediated by mutually understood symbolism. It was common for a black flag to be raised from within the prison to indicate to those waiting outside that the culprit was dead. At Darlinghurst Gaol it was frequently reported that a lengthy bell toll took place at the hour fixed for the execution.[109] In Western Australia, the Private Execution Act stipulated that official documentation confirming the death had to be displayed for a 24-hour period at the entrance gate of the prison.[110] There were some occasional interactions between the official spectators to the hanging and those gathered outside the prison. At one of the earliest private executions in Sydney, of two criminals named Samuel Wilcox and William Rogers, almost two hundred spectators gathered outside the prison. One account states how the official witnesses to the execution were "deeply

[104] National Trust of Australia, *The Old Melbourne Gaol*, Melbourne: National Trust of Australia, 1991, p.30.

[105] *The Mercury*, 15 November 1880, p.3.

[106] *The Argus*, 16 January 1894, p.5.

[107] *The Dubbo Liberal and Macquarie Advocate*, 17 January 1894, p.3.

[108] *Evening Observer*, 4 December 1901.

[109] *The Bird O' Freedom*, 2 June 1894, p.4.

[110] Western Australia, no.15 of 1871, *An Act to Provide for Carrying Out of Capital Punishment Within Prisons*, 1871, section 9.

impressed by the melancholy spectacle".[111] The witnesses then emerged as one group from within the gaol and "announced" to those waiting outside that the execution had successfully taken place.[112]

Sometimes the signals of a successful execution were not enough to satisfy the curiosity of the crowd outside the gaol. In fact, there were many attempts to peek over the prison walls and view proceedings first hand. Correspondents to William Ryan's private execution in 1855, the first of its kind in Australia, reported how the roofs of tall buildings nearby the Darlinghurst Gaol were covered with spectators.[113] One writer took comfort in the fact that these pariahs could only see but not hear the death so that it was only "half so great and so pleasurable" as it was under the "good old system".[114] In South Australia, at the 1861 execution of the Rainbird Murderers, there was a like-minded group of people attempting to see into the Adelaide Gaol. Before the execution took place a "considerable concourse of persons" had gathered outside the gaol but all were "wisely and properly" refused admittance by the Sheriff.[115] Once it was clear that they would not be able to attend the execution *The Advertiser* wrote that:

> A rush was then made to an eminence a little to the westward of the jail, from which we understand that the scaffold was just visible – but a small detachment of the mounted police, who were in attendance under Sergeant-Major Hall, were ordered to clear the ground, and succeeded tolerably in keeping the people back. Among the crowd, which numbered over 50 persons, were a great many youths and children, all anxious to obtain a view of the disgusting scene.[116]

A similar scene occurred in Brisbane at the execution of Thomas Wood in 1860 where excluded spectators, including women, climbed trees to the rear of the prison to watch

[111] *Empire*, 6 July 1855, p.3.

[112] *Ibid.*

[113] *Colonial Times and Tasmanian Advertiser*, 4 March 1855.

[114] *The Argus*, 5 March 1855, p.5.

[115] *The Advertiser* reprinted in *The Mercury*, 15 June 1861, p.2.

[116] *Ibid.*

the spectacle from over the walls.[117] Outside the Old Dubbo Gaol in regional New South Wales there was a large tree that was climbed by enterprising young boys in the late nineteenth century to watch both the everyday workings of the prison as well as the occasional execution. The Prisons Department were so concerned about this intrusion that they had the tree levelled.[118]

The Private Execution Acts made the sheriff the final arbiter of attendance at colonial executions. For the first time it was possible to actively exclude women, children and the lower classes from viewing the spectacle of death. By law 'adult spectators' were only allowed to watch private hangings so children were, in effect, barred from the outset. Tasmania was the only colonial parliament to, in the actual wording of the Act, state outright that the 'adult spectators' be male.[119] Yet, despite the fact that females in the other colonies were technically allowed admittance into the prison, one is hard pressed finding a reference to a female spectator at a private execution. The concern over lower class spectators was easily managed now the sheriff could personally discern the status of those asking to attend. Such unwanted spectators were replaced by the press, appropriate officials, select members of the public and even the occasional scientific observer. It was a collection of individuals thought by the sheriff to conform to the solemnity and tone of the occasion. If enthusiastic members of the public were gathering outside the prison on the day fixed for execution, or even attempting to peek over the walls to see in, it was a comparatively small price to pay for the newfound decorum brought about by private executions.

There is one last aspect of spectatorship that ought to be covered in any discussion on the transition to private executions in Australia. Namely, how the vast majority of colonists became almost fully dependent on newspapers for their information on executions after the passage of the Private Execution Acts. Overnight, reading emerged as the dominant medium through which the death of a criminal could be understood by the public. Newspaper reportage on hangings, it must be noted, was as constant and

[117] *The Moreton Bay Courier*, 8 December 1860.

[118] Bill Hornadge, *Old Dubbo Gaol*, Dubbo: Old Dubbo Gaol Restoration Committee, 1974, p.13.

[119] Van Diemen's Land, no.2 of 1855, *An Act to Regulate the Execution of Criminals*, 1855, section 2. In the consolidated Tasmanian Criminal Code of 1924 this stipulation that members of the public watching private executions must be male was adhered too. See Tasmania, no.69 of 1924, *The Criminal Code Act*, 1924, section 397, clause 2.

dependable as before the transition to private executions – there was still comment on the criminal and his crime, the crowd who watched, whether it was conducted in the proper manner, and any other detail that may be relevant to the reader. However, it was now a scene fully processed and communicated via a privileged intermediary, *viz.* the journalist. The reporters' own beliefs, reasoning and language were always going to colour their description of an important judicial event whether they meant it or not. Moreover, the detail they omitted from their columns, or whatever information the correspondent did not think fit to report due to personal preference, remained forever unknown to their readers. The means to personally attend the hanging and evaluate it on his/her own terms was something reserved for only the very few in the era of private executions.

This was hardly a problem for most readers who felt that the journalist had placed them right there with the criminal at the final scene. As one reader of *The Argus* wrote in a Letter to the Editor in 1859:

> Personally I have never witnessed an execution, and yet I can understand the feelings which are produced by the sight of one. The disgusting details have been heralded forth in the daily papers, and such has been the accuracy with which the proceedings have been described that I am as perfectly acquainted with all the interesting details as if I had stood at the foot of each scaffold.[120]

Despite never witnessing an execution, this reader ('J.W.K.') was convinced that hangings were an affront to the "refinement of our manners" and the "increasing delicacy of our sentiments".[121] It is not to say that such comments were unjustified or illegitimate observations for the reader to make; what should be noted is that J.W.K. could only ever construct his/her evaluation of executions through the lens of a straight-laced journalist.

[120] *The Argus*, 14 May 1859.

[121] *Ibid.*

As time went by journalists were less likely to write of the gory realities of death by hanging. In part this was a matter of taste. For example, in 1879 the Premier of Queensland stated in Parliament that "we must condemn any portion of the Press that would seek to put too prominently forward the sickening details connected with an execution".[122] But in another way this was simply because journalists were less able to write about gory realities as time went by – the tarp draped below the drop at Melbourne Gaol immediately comes to mind (see Chapter 4). Private executions added layers of distance between the onlooker and the death of a criminal in ways that were not immediately perceptible. Trapping the image of colonial hangings within the journalist's own viewpoint without a means of recourse was yet another way in which executions were sanitised and refocused. If executions are to be considered a communicative exercise that attempted to convey the consequences of crime to the onlooker then private hangings, on a whole number of levels, transmitted that intended message far more safely.

Conclusion

The only spectators to the private hanging of Malachi Martin in December 1862 at the Adelaide Gaol were the press and various government officials – members of the public had been completely excluded from the scene. It was cause for the *South Australian Register* to congratulate the Sheriff on his "strict adherence" to the "will of the Legislature":

> There was no crowd of people crushing with heartless curiosity to gain eligible standing ground … no wilderness of upturned faces, expressing pity, disgust, or horror, to distract the thoughts of the doomed man … There was a preternatural stillness in the large and gloomy building. … This certainly must be regarded as a great improvement upon the old system, where the disorder and indecorum of a mob too often perverted the sad and serious lesson which the law intended a public execution to inculcate.[123]

[122] Instead of "pandering to the worst feelings of humanity" by providing such details, he thought that, "A brief mention in the Press to the effect that the execution has taken place is sufficient." Thomas McIlwraith quoted in *The Darling Downs and General Advertiser*, 13 June 1879, p.3.

[123] *South Australian Register*, 26 December 1862.

The introduction of private executions allowed for much greater control over who could digest such scenes of violence in the Australian colonies. The sheriff was granted the power to exclude the troublesome groups that people like Joseph Long Innes (and many others) thought attended public executions – women, children and the lower classes. Once the execution was hidden inside the prison, the vast majority of the public were reduced to gathering outside its walls to wait for an appropriate signal indicating that the criminal had died. Upper class writers like Cunningham, Lang and Kentish could finally rest a little easier knowing that the sheriff was able to prevent large swathes of the colonial population from viewing an execution. The concern of these writers was predicated on the cultural belief that scenes of violence demoralised the onlooker and fundamentally transformed their character for the worse. The introduction of private executions sought to remedy these concerns and refocus colonial hangings on the central 'lesson' of capital punishment. As the correspondent to the hanging of Martin pointed out, private executions allowed for the "sad and serious lesson" of the punishment to come to the fore while thoughts of the "disorder and indecorum" of the crowd could, at long last, be put to one side.

Conclusion

Between 1864 and 1866, the United Kingdom's Royal Commission on Capital Punishment inquired into the operation of the capital code and the manner in which executions were currently being carried out. It is not widely known that, even though it was conducted in faraway London, the Australian colonies were party to the Royal Commission's evidence gathering. The Commissioners wrote to the respective Australian Governors for their opinion on the transparency of private hangings and whether they were considered an effective deterrent to crime.[1] Western Australia was the only colony not to be consulted since it was still yet to adopt the reform at the time of their investigation. The Australian correspondence was published in the Appendix to the 1866 Report and, a century and a half later, it stands as a lasting testament to the colonies' wholehearted approval of private executions.

The first batch of correspondence from Australia that was printed in the Commission's 1866 Report came from Dominick Daly, the Governor of South Australia. His contribution concluded with the following remark:

> I do not believe that any objection is entertained to the present state of the law in respect to capital punishment in this colony, and I feel satisfied that a return to the old system of public executions would be very generally resisted in any of these colonies were such a change to be proposed.[2]

Charles Henry Darling, Governor of Victoria, also forwarded his approval of private executions:

> [M]y own experience has long been in favour of the less public mode of execution; and that the result of my local inquiries, and of my further consideration of the subject since I received the despatch to

[1] For the Australian evidence reprinted in full, see United Kingdom, 'Report of the Capital Punishment Commission: Together with the Minutes of Evidence and Appendix', London: Printed by George E. Eyre and William Spottiswoode, 1866, pp.584-605.

[2] *Ibid.*, p.585.

> which I have now the honor of replying, has tended to confirm me in that opinion.[3]

More than just a nondescript endorsement of private hangings, the Australian Governors were keen to express their relief at the demise of the 'game' criminal and the public execution crowd when given the opportunity. George Bowen arrived in Queensland to assume his post as Governor with a "feeling of approval" for public executions but very quickly changed his mind once he had sounded out local opinion on the new system.[4] Bowen wrote approvingly that 'gameness' was now a thing of the past:

> It seems a further point of much importance [to the Commission's investigations] that even the most atrocious criminals generally assure a show of bravado, and attempt to 'die game' (as they phrase it), when led forth to suffer before a multitude composed, in a large degree, of sympathising associates in guilt. Nothing of this kind happens when the execution takes place in the presence of only the officers of justice, and of a select number of spectators who regard heinous crime with aversion.[5]

In Tasmania, Governor Thomas Gore Browne, was another who believed that there was an impulse among the condemned to "die game" and to be "remembered as a sort of Jack Sheppard".[6] Browne was therefore, like Bowen, relieved that private hangings removed the "opportunity for display" and withdrew this "stimulant" to criminal wrongdoing.[7] Browne also commented at length on the demoralised onlooker to public punishments:

> The effect of public execution on the class of persons who assemble to witness it, among whom there are usually a large number of women

[3] *Ibid.*, p.602.

[4] *Ibid.*, p.594.

[5] *Ibid.*

[6] *Ibid.*, p.596.

[7] *Ibid.*

> and children, is demoralizing in the extreme. The conduct of the mob is frequently ribald and disgusting, and when sympathy is displayed it is generally with the condemned, and certainly not with the law under which he is about to suffer.[8]

Governor John Young from New South Wales responded most diligently to the Commission's original terms of reference. Pleased with the new system, he wrote how public hangings "served no good purpose of warning or example".[9]

The final Report was published in 1866 and the Commission, among other recommendations on changes to the capital code, directed British Parliament to pass an Act stipulating that executions be conducted privately within prisons.[10] It was written that, "with very few exceptions", all witnesses to the Commission desired an end to public executions in the United Kingdom, so much so that it was "impossible to resist such a weight of authority".[11] (However, without going into the strategic reasons for why this was the case, prominent abolitionists on the Commission rejected this assessment and signed an accompanying 'Declaration' stating that they were "not prepared to agree to the Resolution respecting private executions".)[12] Buried in a final report over 700 pages long, it cannot be said with any confidence what role the 21 pages dedicated to the correspondence from Australia had on the Commission's final deliberations. For instance, dispatches on all aspects of capital punishment were received from numerous European nations and individual American States, not to mention the scores of witnesses that gave evidence to the Commission in person. Nonetheless, when asked by the Royal Commission for their opinion, the Governors of Australia answered Britain with a united voice. Not only did private hangings fulfil their strictly punitive function but they also consigned the more unsavoury elements of public executions to the history books. The evidence confirms just how proud the

[8] *Ibid.*

[9] *Ibid.*, p.588.

[10] For the Report's recommendations, see *ibid.*, pp.xlvii-lii.

[11] *Ibid.*, pp.l-li.

[12] Not that it was mentioned in the Report, many abolitionist MPs were afraid that private executions would starve them of their most powerful arguments against capital punishment. For a copy of this 'Declaration' that appeared below the Commission's major findings, see *ibid.*, p.lii.

Australian Governors were of private executions, the benefits it had brought to their colony, and the special feeling of advancement it had given them.

***

The causes of the transition to private executions in Australia can be characterised as having a short term trigger with longer term trends underpinning a desire for change. When Henry Grattan Douglass introduced the first Private Execution Act in 1853 he did so as a means to publicise to Britain that New South Wales was becoming a little more civilised and refined. As Chapter 2 explored, it was a desire deeply rooted in the cultural legacy of convictism and a wish to distance the colony from its penal past. This trigger for reform was impossible to replicate in Britain's other substantial possessions and it propelled the Australian colonies' early abolition in the context of the Empire. Underpinning this unique desire was a public execution spectacle that had, for a long time, been the subject of concern for all of the colonies.

One of the most longstanding problems with the colonial gallows related to execution procedure and how frequently hangings were botched. As detailed in Chapter 4, amateur hangmen, faulty equipment and lasting flaws in technique caused a great deal of avoidable pain for the condemned and outrage on the part of the onlooker. In the interests of 'humanity and decency' the Colonial Office in London attempted to standardise execution procedure in 1880 by circulating a Memorandum to the Australian colonies on proper technique. However, as the 1858 Report of Sheriff Claud Farie in Victoria demonstrates, a feeling of contempt towards capital punishment could often arise at hangings conducted exactly according to plan. It signalled how a more fundamental aversion to pain and suffering was developing among colonists during the 1850s, even when applied to the body of a deserving criminal.

As explained in Chapter 5, a penitent criminal was desired for those running the execution but the allure of 'dying game' was a powerful cultural expectation working against this outcome. It was often left to a diligent clergyman to direct the condemned away from bravado and toward a more remorseful and dignified exit from this world. On the day of execution the sheriff and hangman also worked to manufacture some kind of penitence from the criminal. Though acting 'game' gave the condemned an

opportunity to construct the narrative of the execution, the behaviour of dying criminals could often be subsumed into larger cultural contexts. This was most obvious in the aftermath of Ned Kelly's hanging. He died displaying very little resistance at the gallows, uttering a seemingly innocuous statement in front of no one other than official witnesses. However, as Kelly's legacy demonstrates, even the actions of a compliant criminal were able to produce a narrative that was contrary to that of the colonial administration.

To behold large numbers of women, children and members of the lower class gathering enthusiastically at the foot of the public scaffold was cause for great concern. As demonstrated in Chapter 6, elite writers thought that witnessing scenes of violence actively demoralised and hardened the onlooker. It was the key reason that more respectable colonists tended to avoid public executions and chastise those who did attend. The Private Execution Acts guaranteed that spectators would only attend executions in a strictly professional capacity; everyone else now required the personal approval of the sheriff to witness the scene. This fundamentally altered the way colonists interacted with the gallows since it forced interested observers to read about the death rather than view it firsthand. By trapping the experience of the punishment within the description provided by journalists, it sanitised the death penalty and further distanced the onlooker from the gruesome reality of executions.

A cursory glance at the decision of South Australia and Western Australia to selectively reintroduce public executions for offenders of an Indigenous background appears to counter a nineteenth century narrative that was said to appreciate more hidden forms of execution. However, as Chapter 3 explained, on the untamed and newly established frontiers of these two colonies, the 'terror' that public executions could evoke in local Indigenous populations was viewed as immensely valuable. Belief in their efficacy was deeply rooted in disparaging European cultural constructions of Indigenous intellect, temperament, and habit. The colonies to the east avoided amending their own legislation, though Queensland was more flexible in tailoring the private execution audience to match the ethnicity of the criminal hanged. Despite the sentiments of South Australian and Western Australian lawmakers, Indigenous hangings on the frontier were never widespread after the Amendments were passed.

From reviewing the arguments presented in this thesis it should be abundantly clear that the different cultural beliefs and customs of Australian colonists had a profound impact upon the way executions were practised in the nineteenth century. As Chapter 1 explained, a preoccupation with individual reformers, intellectual lineages, and notions of penal 'progress' always need to be evaluated critically and with reference to broader changes in society. The perceptive thoughts of Michel Foucault on the relationship of punishment to issues of power, social control, discipline, and surveillance do not easily apply themselves to the decision of the Australian colonies to abolish public executions in the 1850s. Marxist scholarship that associates changes in the penal code with broader transformations in the economic base of society or ideas of maintaining class dominance are similarly hard to detect. A focus on the concept of 'civilisation' is relevant to the debate over public executions in the 1850s but to link such a belief to Norbert Elias' Civilizing Process comes with its challenges. It also makes it difficult to integrate cultural beliefs, entirely separate from developments in state formation, that were of great consequence to the way in which executions were practised in the colonies – the memory of convictism, constructions of Aboriginality, 'dying game', and British cultural legacies to name only the most prominent. In regards to the question of penal change, these differing candidates of analysis can never be entirely disregarded as contributing factors. However, the substance of available primary material and other relevant historical contingencies must always guide the approach taken in different contexts.

Drawing upon the work of David Garland, Philip Smith and Louis P. Masur, it is possible to mount a 'culturalist' argument of penal change and contemplate it seriously alongside other possibilities. Not only do these scholars consider the primacy of cultural context to be of upmost importance but they also promote the idea of punishment as a communicative exercise. In the colonies executions aimed to communicate a simple punitive message—or 'lesson'—to the criminal and onlooker on the consequences of crime. It was, however, a message that was often 'read' incorrectly by the onlooker due to these cultural factors operating outside of the penal sphere. The introduction of private executions served to refocus the penalty on the consequences of crime and remove the unhelpful distractions that came with public executions. This appears to have been largely successful – although, as the case of Ned Kelly demonstrates, wider

cultural contexts could still find a way to redefine private executions in a manner that was in opposition to the immediate aims of the authorities.

The history of capital punishment in Australia has already been served by many talented scholars. However, all have tended to limit their inquiries to variables in scope, timeframe, jurisdiction or other related subject matter. A continental-wide, book-length study of the Australian gallows—as found in comparative contexts like England and the United States—is still sorely lacking from the historiography. It is hoped that this thesis may go some way to addressing some of the many gaps that exist in the secondary literature. This is particularly the case for the subject matter covered in Part 2 where the plight of the onlooker, the behaviour of the criminal, and the tightening regulation of execution procedure have only been addressed fleetingly in the Australian context. The abolition of public executions has been examined by John McGuire already but, as Part 1 demonstrates, this thesis differs in both its approach and the conclusions reached. There is still much to be understood about the complex interaction between the law and popular attitudes that took place in nineteenth century Australia. Any future studies that relate to capital punishment in colonial Australia ought to be alert to the historically conditioned beliefs and customs prevalent in wider society at that time and recognise the key role that these diverse cultural forces had in guiding the development of penal strategies.

Appendices

APPENDIX ONE

The Private Execution Acts

The following are facsimiles of the Private Execution Acts that were passed through the colonial parliaments. Please note that the Moreton Bay settlement, later Queensland, was under the jurisdiction of New South Wales when this legislation was passed.

No. XL.

PRIVATE EXECUTIONS.

An Act to regulate the Execution of Criminals. [*Reserved—4th October*, 1853.]

Preamble. WHEREAS it is expedient to alter and amend the practice attending the execution of Criminals Be it enacted by His Excellency the Governor of New South Wales with the advice and consent of the Legislative Council thereof as follows:—

Execution to be carried into effect within the walls of the Prison. 1. Whenever judgment of death shall have been passed upon any person and a day be fixed for the execution of such judgment the Sheriff Under Sheriff or some Deputy appointed by the Sheriff shall execute or cause the same to be executed within the walls of the Prison of the County City Town or District in which the conviction was had or within the enclosed yard of such Prison.

Sheriff Officers of the Gaol &c. to witness Execution. 2. The Sheriff Under Sheriff or Deputy as aforesaid shall be present at such execution together with the Gaoler and proper Officers of the Gaol including the Physician or Surgeon together with all Magistrates who shall think fit and such Constables Military Guard and adult Spectators as the said Sheriff Under Sheriff or Deputy as aforesaid may think fit.

Witnesses to sign declaration. 3. All the persons as aforesaid attending such execution shall remain in the said enclosed place until execution shall have been done according to law and until the Medical Officer shall sign a certificate in the form A appended to this Act and the said Sheriff Under Sheriff or Deputy and the said Gaoler Officers of the Gaol and Constables and such other persons present as may think fit shall before their departure from the Gaol subscribe a declaration according to the form marked B appended hereto.

Penalty for making false declaration. 4. Any person who shall subscribe any such certificate or declaration knowing the same to be false or to contain any false statement shall be deemed guilty of felony and being thereof lawfully convicted shall be liable to be transported for any period not exceeding fifteen years or to imprisonment with or without hard labor for any period not exceeding three years.

Complete execution recorded in Supreme Court. 5. Every such certificate and declaration as aforesaid shall be transmitted by the Sheriff Under Sheriff or Deputy as aforesaid (whichever shall be present at such execution) to the Prothonotary of the Supreme Court in Sydney and shall be entered and kept in his office as a record of the said Court and shall be published in the *Government Gazette* on two separate occasions.

SCHEDULE.

A.

I (A. B.) being the Medical Officer of the Gaol of do hereby declare and certify that I have this day witnessed the execution of C. D. lately convicted and duly sentenced to death at the Court of and I further certify that the said C. D. was in pursuance of such sentence "hanged by the neck until his body was dead."

Given under my hand this day of in the year

B.

B.

WE the undersigned do hereby declare and testify that we have this day been present when the extreme penalty of the law was executed on the body of C. D. lately convicted at the Court held on the day of and duly sentenced to death and that the said C. D. was in pursuance of said sentence "hanged by the neck until his body was dead."

Sheriff
Under Sheriff or Deputy Sheriff
Gaoler
Turnkey
Constables
Magistrates
Other Spectators.

[RESERVED ACT ASSENTED TO.]

VICTORIA.

ANNO DECIMO OCTAVO

VICTORIÆ REGINÆ.

By His Excellency Sir Charles Hotham, *Knight Commander of the Most Honorable Military Order of the Bath, Lieutenant Governor of the Colony of Victoria, &c., &c., &c.*

No. XLIV.

An Act to regulate the Execution of Criminals.

Reserved 23rd November, 1854.
Assented to 6th June, 1855.

Preamble.

WHEREAS it is expedient to alter the practice relating to the execution of criminals: Be it therefore enacted by His Excellency the Lieutenant Governor of Victoria by and with the advice and consent of the Legislative Council thereof as follows:

Execution to be carried into effect within the walls of the Gaol.

I. From and after this Act coming into operation sentence of death passed on any person by the Supreme Court or any Circuit Court of the Colony of Victoria or by any Judge thereof shall be carried into execution by the Sheriff or Deputy Sheriff within the walls or within the enclosed yard of such Gaol as the Lieutenant Governor may by writing under his hand direct and not otherwise or elsewhere.

Sheriff, Officers of Gaol, &c., to witness Execution.

II. The Sheriff or Deputy Sheriff the Gaoler and such of the officers of the Gaol as the Sheriff or Deputy Sheriff may require including the Medical Officer in attendance on the occasion shall be present at every such execution together with any Justices of the Peace Ministers of religion and Officers of Police who may desire to attend and such military guard and adult spectators as the said Sheriff or Deputy Sheriff may think fit to admit.

Medical Officer to sign Certificate and Witnesses to sign Declaration.

III. Each of the persons aforesaid who may attend or be present at any such execution shall continue and remain within the walls or enclosed yard of the Gaol until the sentence shall have been carried into execution and completed according to law and until the Medical Officer shall have signed a certificate in the form set forth in the Schedule to this Act annexed marked A. and the said Sheriff or Deputy Sheriff Gaoler and officers of the Gaol and such other persons present as may think fit shall before their departure from the Gaol subscribe a declaration according to the form set forth in the said Schedule marked B.

Body not to be buried within eight hours and to be viewed.

IV. The body of any person on whom the sentence of death shall have been carried into execution as aforesaid shall not be buried or removed from the Gaol where such execution is had within eight hours next

Published as a Supplement to the 'Victoria Government Gazette' of Wednesday, October 10, 1855.—*No.* 101.

next after such execution and every person who shall within that time produce to the gaoler of such gaol an order from any Justice of the Peace of the said Colony requiring such gaoler to admit the bearer of such order to view the body of such person shall and may be admitted by such gaoler accordingly.

Inquest to be held on the body of every person executed.

V. The coroner of the district in which any gaol may be situated wherein any sentence of death shall have been carried into execution upon the body of any person shall so soon after as conveniently may be hold an inquest upon the body of such person and the jurors of the jury on such inquest shall enquire and find whether such sentence was duly carried into execution.

Penalty for making false Declaration.

VI. Any person who shall subscribe any certificate or declaration as aforesaid knowing the same to be false or to contain any false statement or who shall bury or remove from such Gaol within the time aforesaid any such body as aforesaid shall be deemed guilty of felony and being thereof lawfully convicted shall be liable to be kept at hard labor on the public works of the said Colony for any period not exceeding seven years or to be imprisoned with or without hard labor for any period not exceeding two years.

Certificate and Declaration to be recorded and published.

VII. Every such certificate and declaration as aforesaid shall be forthwith transmitted by the Sheriff or Deputy Sheriff as aforesaid to the Prothonotary of the said Supreme Court in Melbourne and shall be entered and kept in his office as a record of the said Court and shall be published in the *Government Gazette* on three separate occasions.

SCHEDULES REFERRED TO IN THIS ACT.

(A.)

I, A. B., being the Medical Officer in attendance on the execution of C. D. at the Gaol of do hereby certify and declare that I have this day witnessed the execution of the said C. D. at the said Gaol, and I further certify and declare that the said C. D. was in pursuance of the sentence of the Court hanged by the neck until his body was dead.

Given under my hand this day of , in the year of Our Lord One thousand eight hundred and , at the Gaol of

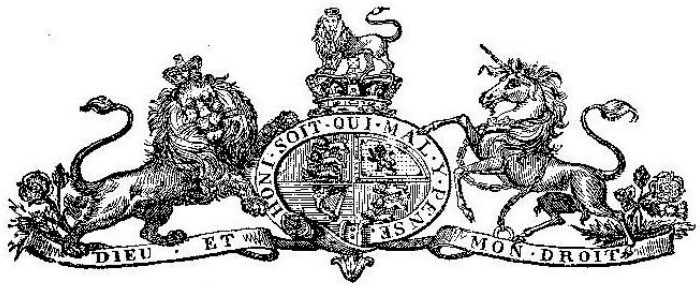
(B.)

We do hereby testify and declare that we have this day been present when the extreme penalty of the law was carried into execution on the body of C. D., convicted at the Criminal Session of the Supreme [*or Circuit*] Court held at on the day of , and sentenced to death, and that the said C. D. was in pursuance of the said sentence hanged by the neck until his body was dead.

Dated this day of , A.D. 18 , at the Gaol of

Sheriff or Deputy Sheriff.
Gaoler.
Turnkey.
Constables.
Justices of the Peace.
Other Spectators.

By Authority: JOHN FERRES, Government Printer, Melbourne.



ANNO DECIMO-NONO

VICTORIÆ REGINÆ,

No. 2.

By His Excellency Sir Henry Edward Fox Young, *Knight, Captain-General and Governor-in-Chief of the Island of Van Diemen's Land and its Dependencies, with the Advice and Consent of the Legislative Council.*

AN ACT to regulate the Execution of Criminals.

[8th August, 1855.]

Preamble.

WHEREAS it is expedient that the practice of executing Criminals publicly should be discontinued, and that the Execution of Criminals should henceforth be carried into effect privately within the walls of the Prison: Be it enacted by His Excellency the Governor of Van Diemen's Land, by and with the advice and consent of the Legislative Council thereof, as follows:—

Executions to be carried into effect privately within Prison.

1 Whenever judgment of Death shall have been passed upon any person, and a day fixed for the execution of such judgment, the Sheriff, Under Sheriff, or some Deputy appointed by the Sheriff, shall execute, or cause the same to be executed, privately within the walls of the Prison mentioned in the Warrant for the execution of such judgment, or within the enclosed yard of such Prison.

Sheriff, &c., to witness Execution.

2 The Sheriff, Under Sheriff, or Deputy as aforesaid shall be present at such Execution, together with the Gaoler and proper Officers

of the Prison, and all Magistrates who shall think fit, and such Constables, Military Guard, and adult male spectators as the said Sheriff, Under Sheriff, or Deputy as aforesaid may think fit to admit.

Witnesses to sign Declaration that Execution effected.

3 All the persons as aforesaid attending such Execution shall remain in the said enclosed place until execution shall have been done according to law; and the said Sheriff, Under Sheriff, or Deputy, and the said Gaoler, Officers of the Prison, and Constables, and such other persons present as may think fit, shall, before their departure from the Prison, subscribe a Declaration according to the Form No. 1 in the Schedule annexed.

Medical Officer to certify that body dead.

4 After such Execution, and on the same day, the Medical Officer of the Prison shall examine the body of the person executed, and shall sign a Certificate in the Form No. 2 in the Schedule annexed.

Penalty for false Declaration or Certificate, &c.

5 Any person who shall subscribe any such Declaration or Certificate knowing the same to be false, or to contain any false statement, shall be deemed guilty of felony, and being thereof lawfully convicted shall be liable to be kept in penal servitude for any period not exceeding Ten Years, or to imprisonment with or without hard labour for any period not exceeding Three Years.

Complete Execution to be recorded in the Supreme Court.

6 Every such Declaration and Certificate as aforesaid shall be transmitted by the Sheriff, Under Sheriff, or Deputy as aforesaid (whichever shall be present at such Execution) to the Registrar of the Supreme Court at *Hobart Town*, and shall be entered and kept in his Office as a Record of the said Court, and shall be published in the *Hobart Town Gazette* on two separate occasions.

Commencement of Act.

7 This Act shall commence and take effect on the first day of *October* next.

SCHEDULE.

No. 1.

We, the undersigned, do hereby declare and testify that we have this day been present when the extreme penalty of the law was executed on the body of [*C.D.*], lately convicted at the Supreme Court held at and sentenced to death; and that the said [*C.D.*] was, in pursuance of the said Sentence, "hanged by the neck until his body was dead."

Sheriff, Under Sheriff, *or* Deputy Sheriff.
Gaoler.
Turnkey.
Constables.
Magistrates.
Other Spectators.

No. 2.

I [*A.B.*] being the Medical Officer of the Prison at do hereby declare and certify that I have this day examined the body of [*C.D.*] lately convicted and sentenced to death at the Supreme Court held at and I further certify that, upon such examination, I found that the body of the said [*C.D.*] was dead.

Given under my hand, this day of 185

A.B.

MICHAEL FENTON, *Speaker.*

Passed the Legislative Council this seventh day of August, one thousand eight hundred and fifty-five.

FR. HARTWELL HENSLOWE,
Clerk of the Council.

In the name and on the behalf of Her Majesty I assent to this Act.

H. E. F. YOUNG,
Governor.

Government House, Hobart Town,
8th August, 1855.

JAMES BARNARD,
GOVERNMENT PRINTER, VAN DIEMEN'S LAND.

ANNO VICESIMO SECUNDO

VICTORIÆ REGINÆ.

A.D. 1858.

No. 23.

An Act to regulate the Execution of Criminals.

[Assented to, 24th December, 1858.]

Preamble.

WHEREAS it is expedient to alter the practice relating to the execution of criminals—Be it therefore enacted by the Governor-in-Chief of the Province of South Australia, with the advice and consent of the Legislative Council and House of Assembly of the said Province, in this present Parliament assembled, as follows:

Execution to be carried into effect within the walls of the Gaol.

1. From and after this Act coming into operation sentence of death passed on any person by the Supreme Court of the said Province, or by any Judge thereof, shall be carried into execution by the Sheriff, within the walls or within the enclosed yard of the Gaol of Adelaide, or of such other Gaol as the Governor may, by writing under his hand, direct.

Sheriff, Officers of Gaol, &c., to witness execution.

2. The Sheriff, the Gaoler, and such of the officers of the Gaol as the Sheriff may require, including the Medical Officer in attendance on the occasion, shall be present at every such execution, together with any Justices of the Peace, Ministers of Religion, and Officers of Police, who may desire to attend, and such military guard and adult spectators as the Sheriff may think fit to admit.

Medical Officer to sign certificate and witnesses to sign declaration.

3. Each of the persons aforesaid who may attend or be present at any such execution shall continue and remain within the walls or enclosed yard of the Gaol until the sentence shall have been carried into execution and completed according to law, and until the said Medical Officer shall have signed a certificate in the form set forth in the Schedule to this Act annexed marked A, and the Sheriff,

and

and the said Gaoler, and officers of the Gaol, and such other person present as may think fit, shall, before their departure from the Gaol subscribe a declaration according to the form set forth in the Schedule to this Act annexed, marked B.

Inquest to be held on the body of every person executed.

4. The Coroner of the district in which any Gaol may be situated wherein any sentence of death shall have been carried into execution upon the body of any person, or if there be no such Coroner then the nearest Special Magistrate, shall, so soon after as conveniently may be, hold an inquest upon the body of such person, and the jurors of the Jury on such inquest shall enquire and find whether such sentence was duly carried into execution.

Penalty for making false declaration.

5. Any person who shall subscribe any certificate or declaration as aforesaid knowing the same to be false, or to contain any false statement, or who shall bury or remove from such Gaol any such body, until after such inquest shall have been duly held, shall be deemed guilty of felony, and being thereof lawfully convicted, shall be liable to penal servitude for any period not exceeding four years.

Certificate and declaration to be recorded and published.

6. Every such certificate and declaration as aforesaid shall be forthwith transmitted by the Sheriff to the Master of the said Supreme Court, and shall be entered and kept in the office of the said Master as a record of the said Court, and shall be published in the *South Australian Government Gazette* on three separate occasions.

Commencement of Act.

7. This Act shall take effect from the first day of January, one thousand eight hundred and fifty-nine.

SCHEDULES

SCHEDULES REFERRED TO.

A

I, A. B., being the Medical Officer in attendance on the execution of C. D., at the Gaol of do hereby certify and declare that I have this day witnessed the execution of the said C. D. at the said Gaol, and I further certify and declare that the said C. D. was, in pursuance of the sentence of the Court, hanged by the neck until his body was dead.

Given under my hand this day of , in the year of our Lord one thousand eight hundred and , at the said Gaol.

B

We do hereby testify and declare that we have this day been present at the Gaol of , when the extreme penalty of the law was carried into execution on the body of C. D., convicted at the Criminal Session of the Supreme Court held on the day of , and sentenced to death, and that the said C. D. was, in pursuance of the said sentence, hanged by the neck until his body was dead.

Dated this day of , A.D. 18 , at the said Gaol.

Sheriff.
Gaoler.
Turnkey.
Constables.
Justices of the Peace.
Other Spectators.

Adelaide: Printed by authority by W. C. Cox, Government Printer, Victoria-square.

WESTERN AUSTRALIA

ANNO TRIGESIMO QUARTO

VICTORIÆ REGINÆ

No. 15

An Act to provide for carrying out of Capital Punishment within Prisons. [*Assented to 2nd January*, 1871.

WHEREAS it is expedient that capital punishments should be carried into effect within prisons: Be it enacted by His Excellency the Governor of Western Australia and its Dependencies, by and with the advice and consent of the Legislative Council thereof, as follows:—

Short title

1. This Act may be cited for all purposes as 'The Capital Punishment Amendment Act 1871.'

Judgment of death to be executed within walls of prison

2. Judgment of death to be executed on any prisoner sentenced after the passing of this Act on any information, indictment, or inquisition, shall be carried into effect within the walls of the prison, in which the offender is confined at the time of execution.

Sheriff, &c., to be present

3. The Sheriff charged with the execution, and the Gaoler and Surgeon of the prison, and such other officers of the prison as the Sheriff requires, shall be present at the execution. Any Justice of the Peace, Minister of Religion, and such relatives of the prisoner, or other persons, as it seems to the Sheriff or the Visiting Justices of the prison proper to admit within the prison for the purpose, may also be present at the execution.

Surgeon to certify death; and declaration to be signed by Sheriff, &c.

4. As soon as may be after judgment of death has been executed on the offender, the Surgeon of the prison shall examine the body of the offender, and shall ascertain the fact of death, and shall sign a certificate thereof, and deliver the same to the Sheriff. The Sheriff, and the Gaoler, and such Justices and other persons present (if any) as the Sheriff requires or allows, shall also sign a declaration to the effect that judgment of death has been executed on the offender.

Coroner's inquest on body

5. The Coroner of the district in which the prison is situate wherein judgment of death is executed on any offender, shall, within twenty-four hours after the execution, hold an inquest on the body of the offender, and the jury at the inquest shall inquire into and ascertain the identity of the body, and whether judgment of death was duly executed on the offender; and the inquisition shall be in duplicate, and one of the originals shall be delivered to the Sheriff. No officer of the prison, or prisoner confined therein, shall in any case be a juror on the inquest.

Power of Colonial Secretary to make rules, &c., to be observed on execution of

6. The Colonial Secretary shall from time to time make such rules and regulations to be observed on the execution of judgment of death in every prison as he may from time to time deem expedient for the purpose, as well of guarding against any abuse in such execution as

judgment of death

also of giving greater solemnity to the same, and of making known without the prison walls the fact that such execution is taking place.

Such rules to be laid before the Legislature

7. All such rules and regulations shall be laid upon the table of the Legislative Council within six weeks after the making thereof, or if the Legislature be not then sitting within fourteen days after the next meeting thereof.

Penalty for signing false certificate, &c.

8. If any person knowingly and wilfully signs any false certificate or declaration required by this Act, he shall be guilty of a misdemeanour, and on conviction thereof shall be liable, at the discretion of the Court, to imprisonment for any term not exceeding two years, with or without hard labour and with or without solitary confinement.

Certificate, &c., to be sent to Colonial Secretary, and exhibited on or near entrance to prison

9. Every certificate and declaration and the duplicate of the inquisition required by this Act, shall in each case be sent with all convenient speed by the Sheriff to the Colonial Secretary, and copies of the same several instruments shall, as soon as possible, be exhibited, and shall for twenty-four hours at least be kept exhibited on or near the principal entrance of the prison within which judgment of death is executed.

Provisions as to duties and powers of Sheriff, &c., extended

10. The duties and powers by this Act imposed on or vested in the Sheriff may be performed by and shall be vested in his Under-Sheriff or other lawful deputy acting in his absence and with his authority, and any other officer charged in any case with the execution of judgment of death. The duties and powers by this Act imposed on or vested in the Gaoler of the prison may be performed by and shall be vested in the Deputy-Gaoler (if any) acting in his absence and with his authority, and (if there is no officer of the prison called the Gaoler) by the Governor, Keeper or other chief officer of the prison and his deputy (if any) acting as aforesaid. The duties and powers by this Act imposed on or vested in the Surgeon may be performed by and shall be vested in the Chief Medical Officer of the prison (if there is no officer of the prison called the Surgeon).

Forms in Schedule

11. The forms given in the Schedule to this Act, with such variations or additions as circumstances require, shall be used for the respective purposes in that Schedule indicated and according to the directions therein contained.

Saving clause as to legality of execution

12. The omission to comply with any provision of this Act shall not make the execution of judgment of death illegal in any case where such execution would otherwise have been legal.

General saving

13. Except in so far as is hereby otherwise provided, judgment of death shall be carried into effect in the same manner as if this Act had not been passed.

FREDK. A. WELD,
GOVERNOR AND COMMANDER-IN-CHIEF.

THE SCHEDULE

Certificate of Surgeon

I, A.B., the Surgeon [*or as the case may be*] of the [*describe prison*] hereby certify that I this day examined the body of C.D., on whom judgment of death was this day executed in the [*describe same prison*], and that on that examination I found that the said C.D. was dead.

Dated this day of 18 .

(Signed) A.B.

Declaration of Sheriff and Others

We, the undersigned, hereby declare that judgment of death was this day executed on C.D. in the [*describe prison*], in our presence.

Dated this day of 18 .

Signed, E.F., Sheriff.
L.M., Justice of the Peace.
G.H., Gaoler of
&c., &c.

APPENDIX TWO

The Private Execution Amendment Acts

The following are facsimiles of the Private Execution Amendment Acts passed in South Australia in 1861 and Western Australia in 1875.

ANNO VICESIMO QUARTO ET VICESIMO QUINTO

VICTORIÆ REGINÆ.

A.D. 1861.

No. 1.

An Act to amend an Act, No. 23 of 22nd Victoria, intituled "An Act to Regulate the Execution of Criminals."

[Assented to, 18th July, 1861.]

Preamble.

WHEREAS by an Act, No. 23 of 22nd Victoria, intituled "An Act to Regulate the Execution of Criminals," it was enacted that sentence of death passed on any person should be carried into effect within the walls, or within the enclosed yard, of the Gaol of Adelaide, or of such other gaol as the Governor, by writing under his hand, might direct: And whereas it may be desirable in certain cases, that sentence of death passed on any of the aboriginal natives of the Province of South Australia, should be carried into effect at the place where the crime for which such sentence shall have been passed was committed—Be it therefore Enacted, by the Governor-in-Chief of the Province of South Australia, with the advice and consent of the Legislative Council and House of Assembly of the said Province, in this present Parliament assembled, as follows:

Aboriginal natives may be executed where the crime was committed.

1. It shall be lawful for the Governor, with the advice and consent of the Executive Council, by writing under his hand, to order that any sentence of death, which shall have been lawfully passed on any aboriginal native of the said Province, may be publicly carried into execution at the place at which the crime, in respect of which such sentence shall have been passed, was committed, or as near to such place as conveniently may be; and to order that, after such sentence shall have been executed, the body of any such aboriginal native shall be buried at the place of execution, or at such other place as the Governor may deem expedient; and the said Act to regulate the

execution of criminals shall not be applicable to proceedings consequent on any such order of the Governor, with the advice and consent aforesaid.

Commencement of Act.

2. This Act shall take effect from the 25th day of May, 1861.

In the name and on behalf of the Queen I hereby assent to this Act.

RICHARD GRAVES MACDONNELL,
Governor.

Government House, Adelaide,
18th July, 1861.

Adelaide: Printed by authority, by W. C. Cox, Government Printer, Victoria-square.

Western Australia

WESTERN AUSTRALIA

ANNO TRIGESIMO NONO

VICTORIÆ REGINÆ

No. 1

An Act to amend 'The Capital Punishment Amendment Act, 1871.' [*Assented to 21st December*, 1875.

Preamble

WHEREAS it is expedient to amend 'The Capital Punishment Amendment Act, 1871': Be it therefore enacted by His Excellency the Governor of Western Australia and its Dependencies, by and with the advice and consent of the Legislative Council thereof, as follows:—

34 Vic., No. 16

Short title

1. This Act may be cited for all purposes as 'The Capital Punishment Amendment Act 1871 Amendment Act, 1875.'

Section 2 of the said Act not to apply to aboriginal natives

2. The second section of the said Act shall be taken and read as if the words following were added to and formed part thereof, that is to say:—'except in the case of such of the aboriginal natives who may from time to time be condemned to death, in which case such judgment shall be carried into effect by the proper officer at such place as may be appointed by the Governor for that purpose.'

Execution of aboriginal natives to take place as if the said Act had not been passed

3. Such executions as last aforesaid, if the place appointed for the same as aforesaid be without the walls of a prison, shall take place in public; and such rules and regulations shall apply to the same in all respects as if the said Act had not passed.

This Act incorporated with principal Act

4. This Act and the said Act shall be taken and read together as one Act.

WILLIAM C. F. ROBINSON,
GOVERNOR.

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