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The politics of punishment

Rape and the death penalty in colonial Australia, 1841–1901

Amanda Kaladelfos

In the second half of the nineteenth century, Australian law permitted colonial governments to order capital punishment for crimes that were no longer punishable by death in England, including attempted murder, robbery under arms and, most controversially, rape. Australian lawmakers knew their obsolete criminal codes reflected badly on their reputation as merciful and enlightened. Yet when politicians proposed the abolition of the death penalty, they faced strong opposition. All agreed that an effective criminal justice system held an important role in securing colonial authority and power, but they differed in their conception of the best way to achieve this end.

This article examines public debates about capital punishment from the 1840s onwards, with a focus on the highly politicised issue of the punishment for rape. Despite a long-standing reformist campaign, successive New South Wales governments did not back down. Instead, they retained capital punishment for rape until 1955. Most political leaders thought it necessary to maintain this penalty to control two groups – Aboriginal men and white men from poor moral backgrounds – arguing they equally threatened white colonial women’s virtue. Capital punishment for rape thus became an overtly violent symbol by which the colonial state asserted itself as the true guardian of female purity.

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‘The execution of a man for the crime of rape’, wrote a newspaper correspondent in 1857, ‘preaches a homily on vice ... [which] will operate beneficially from one end of the country to the other’. This letter, penned by a man calling himself ‘Mentor’, articulated the views of colonials

who believed the death penalty was the most fitting punishment for rape. Mentor's remarks began with the proviso that in every case a jury must rigorously uncover the 'character' of the female victim. But once they had done so, and her character was shown to be unblemished, nothing should stand in the way of the full force of the law. Like other commentators of the time, Mentor claimed that the social structure of New South Wales demanded death as the only fitting punishment. To his mind, frontier life engaged fathers and husbands in work that took them away from their families for weeks at a time. Men's absence from rural homes, combined with shortcomings in education and moral teaching, had created a dangerous situation, all the more volatile in a colony still feeling the effects of decades of convictism. It was clear that NSW had 'not yet purged ... the leaven of old acquaintanceship with villainy', wrote Mentor, and as consequence white women were left 'day by day in their huts, to the mercy of any lewd prowling vagabond'.¹

Mentor wrote in reaction to W B Dalley's 1857 'Capital Punishment for Rape Abolition Bill'. Dalley promoted the Bill after acting as the defence counsel in the case of Henry Curran, an 18-year-old white man with a criminal record, executed for the rape of a married white woman near the Bathurst gold diggings.² Curran's pending execution created a minor scandal in the district with 300 leading citizens signing a memorial begging the government to show mercy. Their first petition argued that the execution should not be carried out due to the victim's poor character (as a sly-grog seller). When that petition failed, they tried another, claiming that Curran was of a low intellect; that he been raised without any religious or moral training; and that NSW needed to follow the lead of England, which had recently removed rape from the list of capital offences.³

Mentor's reaction and that of Bathurst locals illustrates the range of public perspectives on the appropriate punishment for rape. Both supporters and opponents of the law distrusted female morality: lawmakers rarely differed in the opinion that the 'character' of the female victim should have a bearing on the penalty. Rather, hostile divisions formed when attempting to balance philosophies of justice and mercy, which it was suggested were pursued in Britain, with the belief that colonial Australians needed to govern taking into account their own particular conditions. The issue had been contentious in the colonies

1 *Sydney Morning Herald (SMH)*, 16 May 1857.

2 *Bathurst Free Press*, 21 March 1857.

3 *Bathurst Free Press*, 29 April 1857; *Empire*, 12, 14 May 1857; *SMH*, 23 May 1857.

since 1841, when the British parliament, reforming their arcane 'Bloody Code', removed the death penalty for rape. Going against liberalisation elsewhere, NSW and a dozen or so other British colonies chose not to adopt the reform.⁴ In the face of a growing abolition movement, successive governments stood their ground and refused to remove the penalty.

Supporters of the law saw a division between the will of the metropole and the power dynamics of the colony. Conservatives gave many reasons for bucking the trend of the British world. As justification for keeping what was an increasingly outmoded style of punishment, they cited Australia's racial make-up, its skewed gender ratio, its penal heritage and acute social tensions in rural Australia. Their beliefs met with growing opposition. A variety of male reformers challenged the law through Supreme Court appeals, petitions and attempts at legislative change. By the 1870s, capital punishment abolition had much wider appeal, culminating in a series of rowdy street marches attended by thousands of citizens spurred on by the proposed executions of young white men – bushrangers and larrikins. The fate of Aboriginal men occasionally attracted the attention of anti-capital punishment reformers and humanitarian activists as well, but communities rarely organised petitions in their favour – a fact duly noted by one perceptive commentator during the Curran controversy.⁵ Racial and gendered distinctions thus permeated punishment debates: abolitionists equated NSW justice to that of less 'advanced' countries, reformers were selective in their sympathy for condemned men, and parliamentarians affirmed over and over again that the death penalty was retribution for sexual crimes against respectable white females of the bush, to the exclusion of all others.

NSW punishment debates differed in interesting ways to other colonies of the British empire where a fear of the 'Black Peril' drove the retention of the law. By contrast, public discourse in NSW was not solely concerned with black male violence. This did not mean that the government did not apply the laws to black men. To the contrary, there was clear racial bias in capital punishment decisions: Aboriginal men constituted nearly half those executed for rape in NSW during the period of this study, with

4 The Australian colonies that maintained the penalty were Western Australia, Victoria, Tasmania and Queensland. In the British world, the list included Natal, Nyasaland, Rhodesia, Kenya and several provinces of Canada. It was also introduced under the Australian administration of Papua. Hank Nelson 'The swinging index: capital punishment and the British and Australian administrations of Papua and New Guinea, 1888-1945', *Journal of Pacific History* 13 (3), 1978, 142-144.

5 *SMH*, 15 May 1857.

nearly one in three Aboriginal men convicted of rape being executed, compared to just over one in seven white men.⁶ While Aboriginal men were clearly marked for execution, they were rarely mentioned in public debates about rape in NSW. Rather, lawmakers regularly positioned white men with criminal propensities (said to be derived from either their poor upbringings or remnants of convictism) as pressing threats to white women. Even the Bathurst press, sympathetic to the plight of Curran in 1857, believed sexual crimes did not reflect favourably upon white Australian men: 'It is lamentable to think, that for the want of the simplest rudiments of cultivation, there are such noxious weeds of humanity growing up amongst us.'⁷ In the second half of the nineteenth century, NSW politicians could depict both white and black men as 'lewd prowling vagabonds' of the bush. Colonial governments used execution for rape to send an important message: the state would protect white virtue by any means necessary.

Colonial perspectives on violence and punishment

NSW is the only Australian state for which no long-term study of capital punishment exists (a gap my current research aims to fill).⁸ Historical research in NSW has covered important aspects of gender and punishment, including the 'domestic discount' given in punishments for femicide and broader questions of patriarchy and the law.⁹ Scholarship on rape has been dominated by investigations of Sydney's infamous 'Mount Rennie Outrage' of 1886 – the gang rape of a sixteen-year-old girl for which four young

6 See footnote 61.

7 *Bathurst Free Press*, 2 May 1857.

8 Research into rape and capital punishment is well covered in Queensland. Ross Barber 'Rape as a capital offence in nineteenth century Queensland', *Australian Journal of Politics and History* 21 (1), 1975, 31–41; Carmel Harris 'The "terror of the law" as applied to black rapists in colonial Queensland', *Hecate* 8 (2), 1982, 22–48. In Victoria, there has been substantial quantitative criminological research into execution for murder but few studies focusing on punishment of rape. R Douglas and K Laster 'A matter of life and death: the Victorian executive and the decision to execute 1842–1967', *Australian and New Zealand Journal of Criminology* 24, 1991, 143–159. There are several studies on execution in Western Australia but few with specific focus on rape. For example, a recent publication included only one short descriptive chapter on rape: Simon Adams *The Unforgiving Rope: Murder and Hanging on Australia's Western Frontier*, Crawley: UWA Press 2009.

9 Carolyn Strange 'Masculinities, intimate femicide, and the death penalty in Australia, 1890–1920', *British Journal of Criminology* 43, 2003, 310–339; Judith Allen *Sex and Secrets: Crimes Involving Australian Women Since 1880*, Melbourne: Oxford University Press 1990.

white 'larrikins' were hanged.¹⁰ The 'Mount Rennie Outrage' certainly shaped political opinions on capital punishment, sexual violence and gender in the 1890s, but existing scholarship depicts debates in this case as unprecedented, symptomatic of the emergence of urban larrikinism as a social problem. In fact they formed part of long-running discussions in the British world about male violence and colonial authority. Tracing the longevity of these debates sheds new light on heavily politicised contests over the punishment of rape. The symbolic importance of the penalty changed over time but there were continuities in its use.

From the time NSW was a penal colony, politicians insisted that capital punishment for rape was essential in controlling the behaviour of two groups: white men from disreputable backgrounds and Indigenous Australian men. Both were depicted as threatening the sexual purity of all respectable white colonial women, whether young, married or widowed. The convict period is the most well covered era in Australian scholarship on crime and punishment.¹¹ During this time, reforming the death penalty took a back seat to political efforts to reform and control corporal punishments and end convict transportation.¹² Colonial authorities claimed public execution held an important role in asserting British jurisdiction over Aboriginal land and people. In this, rape trials were particularly important: the first Aboriginal man tried (and the first legally executed) by the NSW government was convicted of the rape of a young white girl near Parramatta in 1816. This was a landmark case, representing the erosion of Indigenous sovereignty and the extension of British law over Aboriginal subjects.¹³ In the penal colony, execution was a common form of punishment for white men too. The greatest number of hangings recorded was in the decade 1826–1836, when the NSW Executive Council approved 363 executions. Those executed comprised one white woman, four Aboriginal men, and 358 white men (many of

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- 10 David Walker 'Youth on trial: the Mt. Rennie case', *Labour History* 50, 1986, 28–41; Juliet Peers 'The tribe of Mary Jane Hicks: imaging women through the Mount Rennie rape case 1886', *Australian Cultural History* 12, 1993, 127–144; Kate Gleeson 'White natives and gang rape at the time of the centenary', in Scott Poynting and George Morgan (eds) *Outrageous! Moral Panics in Australia*, Hobart: ACYS Publishing 2007, 171–180.
 - 11 Recent publications include: Hamish Maxwell-Stewart *Closing Hell's Gates: The Death of a Convict Station*, Sydney, NSW: Allen & Unwin 2008; Bruce Kercher *Outsiders: Tales from the Supreme Court of NSW, 1824–1836*, Melbourne: Australian Scholarly Publishing 2006; Lisa Ford *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836*, Cambridge: Harvard University Press 2010.
 - 12 John Gascoigne *The Enlightenment and the Origins of European Australia*, Cambridge: Cambridge University Press 2002, 123–125.
 - 13 Lisa Ford and Bruce Salter 'From pluralism to territorial sovereignty: the 1816 trial of Mow-watty in the Superior Court of New South Wales', *Indigenous Law Journal* 7 (1), 2008, 67–86.

whom were convicts). Legal historian Tim Castle sees the rapid increase of convict transportation as central to these decisions, with the government seeking power over a white male population it feared was becoming ever more violent and rebellious.¹⁴

In this period, British middle-class distaste for public hangings grew rapidly. In a relatively short time span, European punishment practices shifted away from the gallows and toward penitentiaries. Most British scholarship explains this by drawing on Norbert Elias's 'civilising process', positioning the decline of public punishment alongside new middle-class sensibilities that sought to ameliorate pain and violence.¹⁵ However, historians of colonial punishment have complicated European analyses, highlighting the racially coded meanings colonial power holders attached to the death punishment.¹⁶ In British Africa, penal violence 'itself was to become a "civilizing" force, moulding Africans into obedient subjects', an ideology that remained even after the removal of public punishment.¹⁷ Similarly, in colonial NSW, it was thought execution for rape held a 'civilising' potential. But the main difference to practices in other colonies, where execution was typically used in the case of black prisoners, was that in NSW hangings were not only seen as 'teaching' white law to Aboriginal men, but were considered essential in restraining the behaviour of violent white men.

Yet it was not the case that NSW simply resisted all penal reforms prompted by middle-class liberal sensibilities. The NSW government abolished public hangings in 1855, thirteen years before England would enact the change. The English reform campaign, vocal since the 1830s, was

14 Tim Castle 'Watching them hang: capital punishment and public support in colonial New South Wales, 1826–1836', *History Australia* 5 (2), August 2008, 43.2.

15 John Pratt 'Explaining the history of punishment', in Barry Godrey and Graeme Dunstall (eds) *Crime and Empire, 1840–1940: Criminal Justice in Local and Global Context*, Cullompton, Devon: Willan Publishing 2005, 25–42.

16 On colonial execution see Stacey Hynd 'Killing the condemned: the practices and process of capital punishment in British Africa, 1900–1950s', *Journal of African History* 49, 2008, 403–418; John McGuire 'Judicial violence and the 'civilizing process': race and the transition from public to private execution in colonial Australia', *Australian Historical Studies* 26 (111), October 1998, 187–209. On colonial punishment systems see Steven Pierce and Anupama Rao (eds) *Discipline and the Other Body: Correction, Corporeality and Colonialism*, Durham: Duke University Press 2006; Mark Finnane and John McGuire 'The uses of punishment and exile: Aborigines in colonial Australia', *Punishment and Society* 3 (2), 2001, 279–298. This follows broad historiographical trends towards empire-wide studies: see Godrey and Dunstall *Crime and Empire*; Martin Wiener *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870–1935*, Cambridge: Cambridge University Press 2009; Angela Woollacott 'Whiteness and the "imperial turn"', in Jane Carey, Leigh Boucher and Katherine Ellinghaus (eds) *Historicising Whiteness: Transnational Perspectives on the Construction of an Identity*, Melbourne: RMIT Publishing 2007, 9.

17 Hynd 'Killing the condemned', 404, 418.

not successful until a Royal Commission recommended removing public punishment in 1868. During the 1860s, the imperial office wrote to all British colonies requesting information on punishment practices. NSW and Victoria proudly reported that they had introduced private execution over a decade before and that it had been a resounding success.¹⁸ British officials exhibited the same global mindset when instituting electoral reform: to British liberals, reforms in the colonies provided experiments for their successful implementation in racially similar societies.¹⁹ After the end of public punishment in NSW, there was a corresponding decrease in the number of prisoners executed (official statistics listing 65 executions during 1874–1901).²⁰ By the late nineteenth century, mercy was the most common directive of the NSW colonial government.²¹

As execution became less common, capital punishment abolitionists became more vocal. Early reformers such as N L Kentish wanted lawmakers to remove capital punishment in the spirit of liberalism. Kentish called for the removal of the death penalty to further ‘the advancement of our Country ... in the onward progress of civilisation’.²² In 1857, he claimed there would never be a better time for Victoria to lead the way than at ‘this glorious epoch in our Colonial History’ following the introduction of white manhood suffrage. It was the perfect opportunity for colonials to demonstrate their ‘Wisdom, Mercy, and Christianity’ through ‘enlightened, sound and philanthropic legislation in Victoria, which shall add more to our renown as a British Colony’.²³ Kentish and other colonial reformers were loyal to both colony and Crown, claiming such freedoms were a virtue of their rights as white men.²⁴

It is unsurprising, then, that opponents of capital punishment routinely contrasted the innate progressiveness they saw in white reformist sensibilities to caricatures of justice meted out in ‘uncivilised’ countries.

18 ‘Report of Capital Punishment Commission Together with Minutes of Evidence and Appendix’, London: George Eyre and William Spottiswoode 1866, 587–593, 603–604. Available at House of Commons Parliamentary Papers Online, <http://parlipapers.chadwyck.co.uk/home.do>. Accessed 14 December 2011.

19 Leigh Boucher ‘Trans/national history and disciplinary amnesia: historicising White Australia at two *fin de siècles*’, in Jane Carey and Claire McLisky (eds) *Creating White Australia*, Sydney: Sydney University Press 2009, 58–59.

20 T A Coghlan *New South Wales Statistical Register, 1902 and Previous Years*, Sydney: Government Printer 1903, 831.

21 Carolyn Strange ‘Discretionary justice: political culture and the death penalty in New South Wales and Ontario, 1890–1920’, in Carolyn Strange (ed) *Qualities of Mercy: Justice, Punishment, and Discretion*, UBC Press: Vancouver 1996, 131–165.

22 N L Kentish *Essay on Capital Punishment*, Tasmania: William Pratt, 1842, iii.

23 N L Kentish *Valedictory Letter*, Melbourne: Walker May and Co 1858, 35.

24 Ann Curthoys ‘White, British and European: historicising identity in settler societies’, in Carey and McLisky (eds) *Creating White Australia*, 16–17.

They gave a variety of religious, scientific and philosophical reasons for reform. However, they consistently married their concerns with racialised hierarchies of justice, governance and progress. In 1867, for example, John Hubert Plunkett MLA, a consistent supporter of liberal law reform, claimed that the sooner the NSW parliament adopted his abolition bill, 'the better for the country, and the more honourable to us as Christian men'. Expanding upon colonial men's moral responsibilities, he quoted from Thomas Erskine May's *Constitutional History of England* (1863) that 'the deepest stain' of English politics was 'the history of criminal law. The lives of men were sacrificed to a reckless barbarity, worthier of an Eastern despot, or African chief, than of a Christian state.'²⁵

Reformers made similar claims in later years. On the eve of the 1888 Centenary, the *Bulletin* – popular, anti-British, anti-Chinese and often anti-woman – derided the celebrations, arguing that the NSW criminal code would disgrace 'the annals of an Ashantee sultan'. Displaying an extensive knowledge of 'barbaric' practices, it went on: 'The scalp adorned wigwams of the Cherokees ... the skull adorned temples of Dahomey when GEZO's palace was festooned with human bones, could hardly show a bloodier offering.'²⁶ Racially specific sentiments appeared again when staunch abolitionist John Haynes (the former editor of the *Evening News* and co-creator of the *Bulletin*) sponsored another reform Bill, proclaiming the 'time has arrived when we ought to say that New South Wales is not on all-fours with Persia, Abyssinia [and] China' in maintaining such a 'barbaric practice'.²⁷ To these reformers, the removal of capital punishment was a pressing issue precisely because they saw it as somehow damaging the innate authority of white men's leadership.

In a similar vein, colonial abolitionists drew upon the achievement of white male suffrage as proof that change was necessary. At the very least, reform would bring NSW law in line with England. On this point, their focus shifted to the death penalty for rape, which, according to Frederick Lee, a member of the 'Society for the Abolition of Capital Punishment', was a 'gross and wicked libel on the people of New South Wales'. This was because the punishment suggested a

people so advanced in civilisation as to be fit to be entrusted with the utmost amount of political freedom, a freedom unknown in the mother country, viz., manhood suffrage, possess such criminal instincts that the law as administered in the mother country is

25 *SMH*, 1 Nov 1867.

26 *Bulletin*, 21 January 1888.

27 NSW Parliamentary Debates (NSWPD), Legislative Assembly, 'Capital Punishment Abolition Bill', 1896, 667.

not sufficiently severe, but must be sanguinary in order to restrain their licentiousness.

Lee's 1867 commentary on capital punishment for rape highlighted the main arguments in the abolitionist arsenal: that 'an innocent man might fall victim to an abandoned woman'; that the law was a stain on the character of colonial men; and that once Britain had seen fit to temper justice with mercy so should its colonies.²⁸

Patriarchal ideologies often underwrote legislative attempts to remove capital punishment for rape. W B Dalley's assumption that many rape prosecutions originated with women whose 'conduct was such as to encourage the crime' embodied this view.²⁹ This argument would not ultimately persuade supporters of the death penalty, as they too believed that a woman's character should play a part in determining the punishment. To their minds, it was up to the (male) jury, the Executive Council, and the Governor to consider a victim's character when they recommended punishment. Such was the response of David Buchanan to another attempt to remove the law in 1861. Buchanan stated that there were many 'trumped up' charges, but in the most violent cases of rape, death was certainly the appropriate remedy. Had the crime been committed on their own daughters, he asked fellow legislators, would it not be 'equal in enormity to murder?'³⁰ To conservatives, the law was not there for the protection of 'depraved' women, but for virtuous white women whose reputations would be ruined by sexual violence. Or, as Colonial Secretary Henry Parkes – who had formerly supported the abolition of capital punishment – would claim in 1879: the law protected the 'honour of our virgins'.³¹

If Frederick Lee believed that death punishment was a libel on white colonial men, conservatives believed that men who sought its removal were guilty of a corresponding libel on colonial women. Sir Alfred Stephen, MLC and long-serving Chief Justice of the Supreme Court, frequently described abolitionists as mawkish sentimentalists, wasting sympathy on criminals that would be better expended upon victims. Speaking about a series of demonstrations against the execution of three men for rape in 1879, Stephen lamented that the community's sympathies lay with criminals: 'some men hold the opinion that women cannot be raped ... Some, to their shame, appear to believe that a woman

28 *Argus*, 9 December 1867.

29 *SMH*, 26 August 1857.

30 *Empire*, 26 January 1861.

31 *Sydney Mail*, 24 May 1879.

will submit to the embraces of any man.’³² To conservatives like Stephen, the abolitionist position was unmanly.

According to colonial legislators, those destined to suffer most at the hands of violent men were white women of the bush. Their protection was the most persuasive argument put forward by supporters of the death penalty for rape. The *Argus* made this case in ridiculing Lee’s letter of 1867, which ‘entirely overlooked’ Australian women’s social position. Their conditions were different to England, said the *Argus*, living as they did in isolated country districts, themselves ‘their own and sole protector’. These conditions, ‘added to the large preponderance of male over the female portion of the population, has wisely induced our legislators to visit with capital punishment the gravest offence which, next to murder, it is possible to commit.’³³ In this conception, the paternalistic state became a woman’s ‘natural protector’, declaring male guardianship over colonial women’s sexual purity.

A majority of male politicians found this logic so persuasive that over a dozen Bills introduced during the nineteenth century were defeated and rape remained a capital offence. This follows a pattern of NSW lawmaking in the early decades of colonisation pointed to by Bruce Kercher: local authorities commonly modified and adapted British law to suit colonial conditions.³⁴ Supporters of the death penalty were keen to cloak themselves in the recognised authority of the British legal system, while at the same time justifying the right to have laws that ran contrary to the political direction of the metropole. As Angela Woollacott has explained, politicians’ settler experience – land expansion and frontier violence – ‘added new tests and definitions of manliness’ that contributed to the ‘prising of control away from the imperial Metropole’.³⁵ In the punishment of rape, we see the same aspiration: colonial lawmakers embraced the value of their independent legal culture and the power to administer colonial justice to suit colonial conditions as they saw fit.

Rape was an important part of public discourse in colonial Australia, as recurring political discussions showed. Prominent and powerful men had a lot to say on the subject, many of them championing the law’s ‘protection’ of female virtue by assigning the ‘supreme’ punishment to

32 NSWPD, Legislative Council, ‘Criminal Law Amendment Act’, 1881, 315.

33 *Argus*, 9 December 1867.

34 Bruce Kercher *An Unruly Child: A History of Law in Australia*, Sydney: Allen and Unwin 1995, xi–xxi; Kercher *Outsiders*, ch 3.

35 Angela Woollacott ‘Frontier violence and settler manhood’, *History Australia* 6 (1), April 2009, 11.1.

the crime. Taking such statements at face value, we could be forgiven for thinking that rape was harshly penalised in this period. In reality, despite political condemnation of rape, conviction rates for sexual violence remained far lower than other violent crimes.³⁶ The political discussions I have examined, therefore, took place alongside a distinct lack of successful rape prosecutions. We can understand this in several ways – the first, an obvious, but important, point.

For most of the nineteenth century, elite male voices dominated public life. Men condemned rape in parliament and spoke about upholding female virtue through capital punishment. Before the late nineteenth century, it is difficult to know what women thought about the punishment, although it was not uncommon for female victims to petition for mercy on behalf of their male attackers.³⁷ The courtroom became the chief public forum for women to articulate their experiences of sexual violence. But here, where it was deemed necessary for female victims to describe male violence with reference to their own sexed bodies, women were routinely depicted as unrespectable, unfeminine, depraved and untrustworthy. The law may have decreed that execution was to be the punishment for rape, but it did not follow that male jurors, medical experts, barristers or judges upheld the value placed elsewhere upon female virtue when faced with *women* calling out men's violence.³⁸ This was especially so when the woman who appeared in court was not of the same social standing or race as the chaste colonial woman depicted in men's political debates about sexual violence.³⁹

Throughout men's political debates, rape figured as a discursive mechanism that symbolised a spectrum of social, economic, gendered and colonial concerns. But for many women, the reality behind this rhetoric was one that limited their ability to seek protection under the criminal justice system. Historian Pamela Scully has noted that tendencies in historiography to separate 'rape as a metaphor' from rape

36 On conviction rates see Barber 'Rape as a capital offence', 35; Allen *Sex and Secrets*, 58–59; Jill Bavin-Mizzi *Ravished: Sexual Violence in Victorian Australia*, Sydney: University of New South Wales Press 1995, 21; Amanda Kaladelfos, *Crime and Outrage: Sexual Villains and Sexual Violence*, PhD thesis, University of Sydney 2010, appendix.

37 Feminists from the late nineteenth century onwards made their voices heard on these issues. See, Marilyn Lake 'Frontier feminism and the marauding white man', *Journal of Australian Studies* 49, 1996, 12–20.

38 Kaladelfos, *Crime and Outrage*, 1–18.

39 David Philips 'Anatomy of a rape case, 1888: sex, race, violence and criminal law in Victoria', in David Philips and Susanne Davies (eds) *A Nation of Rogues?: Crime, Law and Punishment in Colonial Australia*, Carlton, Victoria: Melbourne University Press 1994, 97–122.

‘as an act of violence’ need to be united.⁴⁰ Rape did not exist ‘exclusively on the level of signs and symbols’.⁴¹ For example, a victim’s race had important implications for policing and prosecution of crime. Records of colonial Queensland show the dearth of Aboriginal women in criminal prosecutions of rape despite the high level of violence known to have occurred there.⁴² In NSW, a small number of sexual assault cases with Aboriginal prosecutrices made their way to the higher courts, but these were few and far between. In my survey of 268 cases of sexual violence heard at the NSW Supreme Court, I found only five cases (two per cent) that involved Aboriginal or mixed-race female victims.⁴³ Of those five, two had Aboriginal defendants. Similarly, in murder prosecutions, Aboriginal people were more likely to be treated as victims when the crime was intraracial rather than interracial, a practice that legitimised white violence and massacre on the frontier.⁴⁴ It is important to recognise that political discourse on sexual violence worked with a different dynamic from policing practices and courtroom rulings. Public and political rhetoric about rape was not an all-encompassing perspective on actual instances and treatment of sexual violence in colonial Australia. Rather, the rhetoric held specific symbolic purposes, which had little to do with ensuring just prosecution of violent actions.

Punishment practices

While Australian lawmakers made it abundantly clear that virtuous white women were the victims of capital offences, they spoke with far less certainty about just who they imagined the violent man to be. Members of the NSW press made the most specific claims: the problem for them was the ex-convict population. In the 1850s, the *Sydney Morning Herald* reported

40 Pamela Scully ‘Rape, race, and colonial culture: the sexual politics of identity in the nineteenth-century Cape Colony, South Africa’, *American Historical Review* 100 (2), April 1995, 337.

41 Elizabeth Kolsky ‘“The body evidencing the crime”: rape on trial in Colonial India, 1860–1947’, *Gender and History* 22 (1), April 2010, 109.

42 Raymond Evans *Fighting Words: Writing About Race*, St Lucia, Qld: University of Queensland 1999, 206–209; Mark Finnane and Jonathan Richards ‘Aboriginal violence and state response: histories, policies and legacies in Queensland 1860–1940’, *Australian and New Zealand Journal of Criminology* 43 (2), 2010, 252.

43 This survey is based upon cases heard at the Supreme Court of NSW at five-year intervals between 1870 and 1930. Records consulted include State Records Authority of NSW (SRNSW): Supreme Court, NRS 880, Papers and Depositions, Sydney and Circuit 1870–1930; Supreme Court, NRS 13492, Register of Criminal Indictments, 1870–1919; Supreme Court, NRS 883, Registers of Cases Heard Before the Central Criminal Court, 1886–1930.

44 Finnane and Richards ‘Aboriginal violence’, *passim*.

that the imperial government had not ordered the colony to remove the death penalty for rape due to the 'the large number of prisoners, and desperate character of many persons who had been transported to these shores'.⁴⁵ A decade later the paper affirmed that it was 'the consequence of penal systems to leave a large residuum of incurable villainy'.⁴⁶ These opinions resonated with public commentators even in the late nineteenth century, finding new meaning in concerns over larrikinism and the questionable quality of Australian manhood, as I will show later.

NSW political debates on the death penalty frequently revolved around its imposition in cases involving white men. For instance, the prosecution of a wealthy white man for the rape of his servant sparked fiery parliamentary debates over the death penalty for rape in 1855.⁴⁷ Much like the petitions opposing Curran's execution in 1857, these debates expressed doubts about the reliability of the victim's testimony and lamented the vengeful nature of criminal law as applied to (white) men. Abolitionists certainly believed that the death penalty for rape was unwarranted as a punishment for white men, as we saw in Frederick Lee's juxtaposition of NSW's harsh criminal laws with the liberal voting rights of Australian men.

Most often however, when supporters of the law spoke about those who committed rape, they drew upon an amorphous image of a violent man. The editor of the *Argus* depicted men who committed rape as 'scoundrels' who had 'lost all sense of manliness ... have no sense of shame, know nothing of degradation, and can sink no lower. They have no right to be longer regarded as men.' They 'belong to a class ... whose only watchwords are rapine and plunder'.⁴⁸ Justice Hargrave expressed similar sentiments on sentencing a white labourer to death for rape, a punishment he thought was most fitting. It was 'man's inclination' to protect women, he said; thus, in taking an opportunity of 'gratifying his ruffianly lust', the prisoner had 'forgotten his manhood'.⁴⁹ As in these examples, most commentators did not specify that the common perpetrators of rape were white men, but this becomes clear when we consider commentary explicitly about Aboriginal men.

In colonial Queensland and elsewhere in the British empire, politicians saw the character of black men as the most important reason for maintaining the death penalty for rape. In the Queensland of the 1860s,

45 *SMH*, 15 April 1851.

46 *SMH*, 29 January 1861.

47 *SMH*, 15 August 1855.

48 *Argus*, 21 March 1868.

49 *SMH*, 27 October 1871.

a period of violent frontier expansion and Indigenous dispossession, abolition was not a popular position to hold. John Bramston, Member of the Legislative Assembly, explained the necessity of the law: white women in the Queensland colony were in a more ‘defenceless position’ than those of Britain due to ‘the absence of their natural protectors; and they are also liable to assaults by the Aborigines. For the Aborigines, I believe, hanging is the only thing that brings home to them the terror of the law.’⁵⁰ In the same period, the government of Ontario, Canada, also refused to enact the British change to rape law, citing ‘the frequency of rape committed by negroes ... prone to felonious assaults on white women’ as the reason.⁵¹ In the British world the prevalence of captivity narratives – stories of white women kidnapped by ‘savage’ peoples – tell us about the widespread circulation of racialised conceptions of sexual danger, with white female virtue constantly under threat.⁵² Underpinning these fears were highly significant economic and social imperatives. For instance, in the 1840s powerful pastoralists used the story of the ‘White Woman of Gippsland’ to justify further invasion and dispossession of Aboriginal land.⁵³ Elsewhere in the British Empire, moral panics about the ‘Black Peril’ coincided with moments of social dislocation: an economic depression in Natal was the catalyst for their rape scare.⁵⁴ Although NSW politicians usually assumed white men were perpetrators of capital offences, in practice the government still routinely applied the penalty to Aboriginal prisoners. The archetypal colonial white woman threatened in the bush could easily fit scenarios of both black and white violence.

A comparison of three Australian colonies highlights racialised practices of execution. There is no mistaking that the application of Queensland law took account of the presence of a ‘hostile’ black population. Historians have shown that Aboriginal men convicted of murder were *more* likely than white offenders to have their sentences commuted. The reverse was true in rape convictions, suggesting the potent anxiety about the sexual safety of white women.⁵⁵ In the decades following Queensland’s separation from NSW in 1859, fourteen men were executed for rape.

50 Queensland Parliamentary Debates, 1865, vol 2, 394 cited in Ross Barber, *Capital Punishment in Queensland*, BA honours thesis, University of Queensland 1967, 57.

51 Future Prime Minister John A Macdonald, 1868, cited in Barrington Walker *Race on Trial: Black Defendants in Ontario’s Criminal Courts, 1858–1958*, Toronto: University of Toronto Press 2010, 116.

52 Angela Woollacott *Gender and Empire*, Hampshire: Palgrave Macmillan 2006, ch 2.

53 Victoria Haskins and John Maynard ‘Sex, race and power: Aboriginal men and white women in Australian history’, *Australian Historical Studies* 36 (126), 2005, 198.

54 Jeremy Martens ‘Settler homes, manhood and “houseboys”: an analysis of Natal’s rape scare of 1886’, *Journal of Southern African Studies* 28 (2), 2002, 379–400.

55 Finnane and Richards ‘Aboriginal violence’, 252.

Of these, thirteen were black – ten Aboriginal men, and three Pacific Islanders. The last was hanged in 1892. The one exception was the execution of a white man in 1882. When the Queensland criminal code came under review in the late 1890s, the fact that another white man was awaiting execution for rape caused considerable public controversy. In response, the government commuted his sentence and abolished the penalty following the review.⁵⁶ In the minds of many Queensland legislators, this was a penalty primarily intended for black men. After the introduction of so-called ‘protective’ welfare policies in Queensland in 1897, the government used these, rather than the criminal justice system, as the way to exert authority over Aboriginal populations.⁵⁷

Racially determined practices in Queensland appear even starker when compared to Victoria. Following separation from NSW in 1851, there were eleven executions in Victoria for the crime of rape, the last in 1932. All were non-Indigenous men. During the 1840s, one of Victoria’s bloody periods of frontier conflict, the NSW Executive Council was responsible for ordering the execution of Victorian Indigenous men for murder. This practice was specific to the early period: no Aboriginal prisoners were executed in Victoria after 1847.⁵⁸ Only one of the eleven men hanged for rape was black: James Wallace, an African American, in 1873. It seems likely that significant developments in Victoria including 1860s welfare legislation, high-profile Supreme Court challenges to the rights of Aboriginal rights under British law and the devastating loss of Aboriginal population all had bearing on the limited application of capital punishment to Victorian Aboriginal men.⁵⁹ In contrast to the use of execution in other Australian colonies, the Victorian government found other ways to assert governmental authority over the Indigenous male population. In the punishment of rape, the practice in Victoria seems to have been to support execution in cases of (white) men convicted of child rape. Such cases comprised eight of the eleven executions, including the only man executed during this period of study for sexual violence committed on a boy.

56 Barber, *Capital Punishment*, 65. The proportion of black to white men convicted of rape in this period is unknown.

57 Finnane and McGuire ‘The uses of punishment and exile’, 289–293.

58 Statistics on Victoria are drawn from Trevor J Porter *Execution in the Colony and State of Victoria: 1842–1967*, Parafield Gardens, SA: The Wednesday Press 1999; Register of Decisions on Capital Offences, 1842–1944, units 1-2, VPRS 7583, Public Records Office of Victoria, Melbourne; execution reports in *Argus* and *SMH*.

59 On this period see Richard Broome *Aboriginal Victorians: A History Since 1800*, Sydney: Allen and Unwin 2005. On Supreme Court trials see Simon Cooke ‘Arguments for the survival of Aboriginal customary law in Victoria: a casenote on *R v Peter* (1860) and *R v Jemmy* (1860)’, *Australian Journal of Legal History* 5, 1999, 201–243.

The use of capital punishment for rape in NSW had yet another trajectory compared to its neighbours to the north and south. There were 23 men hanged for rape in NSW between 1841, when English law removed capital punishment for rape, and the last execution for a sexual violence in 1901. Ten of the 23 were non-white men (43 per cent): nine Aboriginal and one an 'American black'. Of those convicted of rape in this period, almost one in three Aboriginal men were executed, compared to just over one in seven white men.⁶⁰ The number of men executed for rape in NSW is higher than the other states partly because of the simultaneous hanging of the four white 'larrikins' for the 'Mount Rennie Outrage'. Before their executions in 1887, the ratio of black to white men executed for rape was even more skewed: 17 men hanged, ten of them black (59 per cent).⁶¹ Following the Victorian pattern, five of the other nine white men executed during the period – excluding the four Mount Rennie criminals – were hanged for the rape of young female children, including two for incestuous violence. After 1880, the NSW government applied the death penalty only to white men convicted of rape. Two developments help explain this change in practice. In 1883, the NSW government created the Aborigines Protection Board, ending the period of 'dual occupation' and forcing Aboriginal people onto reserves; if NSW followed the pattern of other Australian states, then punitive welfare policies replaced earlier practices, which controlled Indigenous men by criminal prosecution.⁶² Further, after the 1870s, racial ideologies took up degeneration theory, portraying Aboriginal men as sexually powerless rather than sexually threatening.⁶³ In this context, NSW governments turned their attention to controlling the sexuality of white males.⁶⁴

60 In this period 29 black men and 92 white men were sentenced to death for rape.

61 The statistics in this section have been compiled from various sources including: Tabled Parliamentary Returns, *SMH*, 3 May 1860; 11 December 1867; NSW Votes and Proceedings, 'Administration of Justice: Trials for Rape', vol 3 (1879–80), 347; Coghlan *New South Wales Statistical Register*; Sherriff's Office, Copies of Miscellaneous Returns, 1894–1910, NRS 13230 (X/2290), SRNSW; Department of Prisons, Death Register, 1914–1926, NRS 2469, COD184, SRNSW; execution reports in *SMH*, *Maitland Mercury* and *Bathurst Times*; Tim Castle, Amanda Kaladelfos, Ken MacNab, 'Integrated Database of NSW Capital Convictions 1788–1954', to be published on the website of the Francis Forbes Society for Australian Legal History in early 2012.

62 On Aboriginal policy in this period see Heather Goodall *Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770–1972*, Sydney: Allen and Unwin 1996, 57–72, 88–97.

63 Haskins and Maynard 'Sex, Race and Power', 206.

64 On conceptions of white male sexuality see Lisa Featherstone 'Pathologising white male sexuality in late nineteenth-century Australia through the medical prism of excess and constraint', *Australian Historical Studies* 41 (3), 2010, 337–351.

Challenging the death penalty

The punishment of Aboriginal men for rape attracted considerable public attention in frontier regions during the mid-nineteenth century. One instance was in NSW 1848 when two men were executed for the rape of white female victims. In the same year an Aboriginal man, known as Darby, had his sentence commuted for a similar crime. The vitriolic *Moreton Bay Courier* read the differing penalties as signs of governmental protection of Aboriginal men at the expense of whites. The *Courier* did not inform readers that one of the men executed was a black American, for it would have ruined their narrative of white settler oppression at the hands of humanitarians. With notable sarcasm, the *Courier* reported the case of Darby as evidence that Aboriginal men were ‘looking up to the fatal beam on which *white men* are hanged and blessing their stars they were born in the woods of Australia’.⁶⁵ Earlier in the year, a *Sydney Morning Herald* correspondent labelled the decision to commute Darby’s sentence ‘mistaken mercy’, and predicted violent reprisals by family men in its wake.⁶⁶ Three years earlier Richard Windeyer MLC stated that preventing ‘private retribution’ was the purpose of state justice. If they removed the death penalty for rape, Windeyer warned, ‘it would be difficult to restrain the desire of revenge’.⁶⁷

Parliamentarians gave the same reason decades later to justify the continued use of public execution of black men after the introduction of private execution. During the 1860s, Queensland introduced a system of semi-public executions for Aboriginal and Pacific Islander men. South and Western Australia codified racially discriminatory practices that maintained the use of public punishment, often at the location of the crime, for Aboriginal men. One justification for the policy was that public execution was the only way to teach black men the consequences of committing crime. Another justification was that it demonstrated to white settlers that the government wielded considerable power over Aboriginal populations and thus extra-legal reprisals were unnecessary.⁶⁸

Despite much fanfare about introducing liberal reforms to punishment systems,⁶⁹ the NSW government continued to execute Aboriginal men in public. In late 1859, when Moreton Bay was still under NSW jurisdiction,

65 *Moreton Bay Courier*, 21 November 1849.

66 *SMH*, 3 October 1848.

67 *SMH*, 2 October 1845.

68 McGuire ‘Judicial violence and the “civilizing process”’.

69 *Empire*, 15 August 1859.

the Governor ordered the execution of two Aboriginal men for the rape of a married white woman. The authorities forced Aboriginal prisoners and members of the native police to witness the spectacle. The *Courier* compared the scene to one from the annals of notorious seventeenth-century English hangman Jack Ketch. Its displeasure stopped there, however, as the paper again evoked the image of the vulnerable bush woman and noted that it was essential that Aboriginals were given visual demonstrations of ‘how crime was punished’:

Vengeance is the creed of the blackfellow; Revenge is the passion he best understands; and on Thursday we had a specimen of the terrible vengeance of whiteman’s law, which generally tempers justice with mercy. As the bodies went backwards and forwards, we thought the teaching of the Law’s Schoolmaster was horrible. The loneliness and unprotected state of females in the bush were pictured to our imagination. We had the words of judgement ringing in our ears, ‘Dick and Chamery, you have lived with white men, and you knew it was wrong to commit such a crime,’ and we thought, with all its solemnity, that it was not the time to advocate the abolition of death punishments.

The *Courier* ended with a plea to Christianise the Aboriginal population, so that the ‘revenge of the aboriginal may be tempered with kindness, and thereby the white be protected from outrage.’⁷⁰ This report, like other tracts on capital punishment, positioned white justice alongside that of non-white communities, simultaneously portraying the two men as ‘civilised’ while claiming that violence was the only language they could understand.

Through the second half of the nineteenth century, middle-class reformers made efforts to limit the application of criminal law to Aboriginal men. The first was the Supreme Court appeal, *R v Peter*, in NSW in 1851. The appeal (which was unsuccessful) rested upon the question of whether the NSW government was justified in creating laws that ran contrary to those in England.⁷¹ In Victoria in 1860, there was another highly significant appeal involving an Aboriginal man convicted of rape. In this case, it was argued (also unsuccessfully) that Aboriginal customary law, which punished rape through physical assault, should take precedence over British law.⁷² This pushed beyond reformers’ earlier erroneous arguments that Aboriginal men should not be executed because sexual violence was a usual part of Aboriginal

70 *Moreton Bay Courier*, 6 August 1859.

71 *SMH*, 11, 15, 16, 24 April 1851.

72 Cooke ‘Arguments for the survival of Aboriginal customary law’, 208.

life: 'a custom ... the first step in their courtship.'⁷³ In all these cases, appellants claimed that Aboriginal men did not understand white men's laws or moral codes.

Similar arguments were put forward in the case of 'Alfred, the Aboriginal' in 1879, the last Aboriginal man hanged for rape in NSW and the only one whose fate gained widespread public sympathy. Over ten thousand Sydney petitioners asked the Governor to show mercy to Alfred because of his 'extreme ignorance': he was an 'untutored savage without the restraints of moral teaching and even a knowledge of the law'.⁷⁴ The plight of Alfred only attracted public attention because his execution coincided with the proposed execution of two young white men for rape. The result of the month long mercy campaign for all three men, including numerous public protests, was a shameful compromise: the NSW administration saved the two white men but ordered the execution of Alfred, hanged in June at Mudgee gaol. The justification for leniency in the cases of the white men was that during the protests they had not attempted to discredit the virtuous reputation of their victim. It is worth noting that Alfred also never spoke a word against the chastity of his victim, but this concession was only offered to white men. This case demonstrates that conceptions of white manhood were central to punishment debates.⁷⁵

This moment, which placed the punishment of black and white prisoners side by side, galvanised widespread public sympathy for white men facing the gallows. In the 1880s, street protests against the execution of bushrangers and larrikins became a feature of the political landscape. The early 1880s saw mass protests against the executions of (white) bushrangers, including Captain Moonlite and Ned Kelly in 1880 and Frank Johns (also known as Thomas Williams) in 1885.⁷⁶ The respectable press often described the behaviour of bushrangers and larrikins as being like black men, some labelling white criminals 'inhuman savages'

73 *The Australian*, 6 March 1835.

74 NSW Votes and Proceedings, LA, 'Case of Medcalf and Wilkinson and case of Alfred', 3: 1879–80, 329, 334.

75 I have discussed this case at length elsewhere. Amanda Kaladelfos 'The "condemned criminals": sexual violence, race and manliness in colonial Australia', *Women's History Review*, 2012 (forthcoming).

76 John Woods and John Dowie *The Condemned Prisoners Scott and Rogan: Mercy! Mercy! Mercy!*, Sydney: Gibbs and Shallard 1880; Melissa Bellanta 'Leary kin: Australian larrikins and the blackface minstrel dandy', *Journal of Social History* 42 (3), Spring 2009, 677; Thomas Walker *Mr Thomas Walker's Letter to the People of the Colony on the Case of the Condemned Man, Johns: An Appeal Against State Murder*, Sydney: NSW Secular Association 1885.

or 'reincarnated blackfellows'.⁷⁷ In 1886, the proposed execution of six young white larrikins for the gang rape at Mount Rennie prompted similar street protests and public petitions against the punishment. This was the only proposed execution to inspire a counter-movement: a pro-hanging lobby founded by social inquirer Burton Bradley, the author of a study of what he termed the 'genus larrikin'.⁷⁸

In settler societies such as Natal, where the black population outnumbered white, a fear of the 'Black Peril' dominated debates about sexual violence. NSW's anxieties sprung from a shameful penal heritage and large contingent of unmarried itinerant white men. Some politicians saw the behaviour of these white men, like the larrikins of Mount Rennie, as indicating racial degeneration within colonial society. The sexual crimes of white men supported the belief that the Australian environment promoted a slide into 'savagery', a fear that resonated throughout colonial culture.⁷⁹ The fears of supporters of the death penalty for rape seemed justified by the crime at Mount Rennie; an exhibition of violence, which, as the *Sydney Morning Herald* put it, belonged 'not to men but about some other race'. The reporter claimed he had never heard of 'practices like this prevailing amongst the lowest savages. The natural instinct of the wildest aborigines teaches them better things in their natural state.'⁸⁰ Chief Justice of the Supreme Court, William Charles Windeyer, expressed the same sentiments upon sentencing the Mount Rennie criminals to death: they had committed 'a crime so horrible that every lover of his country must feel that it is a disgrace to our civilisation'. It was a crime that revealed 'amongst us in this city a class worse than savages, lower in instincts than the brutes below us'.⁸¹ Particularly horrifying was the fact that sexual danger had moved beyond the bush, where the long-standing colonial anxiety lay, to the modern city which should have been the emblem of progress from ex-penal colony to modern metropolis. Yet even here NSW was unable to escape its tainted past. As fears about racial degeneration became increasingly important in the late nineteenth century, explanations of sexual violence once applied to black men now signalled a fault-line in the character of white Australian manhood.

77 *Daily Telegraph*, 29 November 1886; *Bulletin*, 25 May 1881 cited in Bellanta 'Leary kin', 679.

78 *Daily Telegraph*, 3 March 1887.

79 Penny Russell *Savage or Civilised: Manners in Colonial Australia*, Sydney: UNSW Press 2010.

80 *SMH*, 29 November 1886.

81 *Daily Telegraph*, 29 November 1886.

Conclusion

The spectre of ‘savagery’ was never far from the minds of colonial lawmakers when they punished black and white men convicted of sexual violence. Penny Russell has shown that, in order to understand nineteenth century Australia, we need to take into account the ‘interplay of ... foundational experiences: conquest, convictism and coloniality’.⁸² These three factors are essential in understanding the political importance of executions for rape. Colonial politicians sought to assert their right to govern Australian subjects as they saw fit. They rejected the British removal of rape as a capital offence, asserting their authority to legislate for colonial ‘conditions’. Australian lawmakers would not bend to the will of liberal reformers on this issue. To them, it was more important that the law be seen to protect the beacons of ‘civilisation’ – virtuous white colonial women – in danger from the ‘vagabonds’ of Australia’s penal past and Indigenous people. NSW political leaders opted to maintain the ‘ultimate’ penalty for fear of the loss of manliness if they took any other course. This was always a symbolic gesture. It was a law written by elite white men that did little to guarantee prosecution and conviction in cases of sexual violence, but much to demonstrate the power of their authority.

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82 Penny Russell ‘Unsettling settler society’, in Martin Lyons and Penny Russell (eds) *Australia’s History: Themes and Debates*, Sydney: UNSW Press 2005, 39.