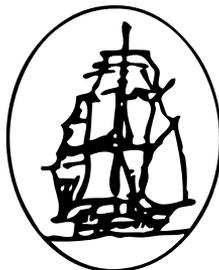


TASMANIAN HISTORICAL STUDIES
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A Tasmanian Judge Jeffreys? John Lewes Pedder in Popular History

Jacqueline Fox

On 10 March 1951, a Sydney tabloid published the latest instalment in a series called 'The Bad Old Days'. Its semi-fictionalised narratives of life in the Australian colonies featured exaggerated tales of convicts, bushrangers, explorers and officials. In that week's edition of *The World's News*, author Oxley Batman turned his attention to the first Chief Justice of Van Diemen's Land, caricaturing Sir John Pedder as 'Tasmania's Hanging Judge'.¹ An illustration accompanying the article shows the menacing figure of a bewigged judge towering over a line of prisoners, hands cuffed behind their backs and a ball and chain at their ankles. His enormous pointing finger directs the men through a brick archway reminiscent of the mouth of Moloch, the Old Testament god to whom the Canaanites sacrificed their children. Underneath this image we read the caption: 'The motto of Chief Justice Pedder was "Flog and hang"'.²

In the introductory paragraph, Pedder sentences eighteen men to the gallows, setting a 'record' that even the 'notorious Black Judge Jeffreys would have found hard to beat'.³ For Tasmania's hanging judge, we are told, this was 'routine'.⁴ Batman invokes Judge Jeffreys a second time, assuring readers that, 'If ever there was a Hanging Judge, that Judge was John Lewis [*sic*] Pedder'.⁵ As proof, he cites a *Hobart Town Courier* report of 1829, which detailed Pedder's sentencing in Launceston in January that year: eighteen men were to be hanged—'when not one of them had committed the capital offence of murder'—another four were destined for the Macquarie Harbour penal station; three more were sentenced to be flogged for 'trivial offences'. The *Courier*, Batman contends, was 'too much in awe' of the judge to pass 'any unfavourable comment' on his sentencing practices.⁶ Next, Batman takes aim at Pedder's use of military juries. This 'suited the Hanging Judge', he declares, as jurors would 'hesitate to differ' from Pedder, knowing that 'a word' to Lieutenant-Governor Arthur (as Colonel, also the senior military

1 Oxley Batman, 'The Bad Old Days: Tasmania's Hanging Judge', *The World's News*, 10 March 1951, p 10.

2 Batman, 'The Bad Old Days', p 10.

3 Batman, 'The Bad Old Days', p 10.

4 Batman, 'The Bad Old Days', p 10.

5 Batman, 'The Bad Old Days', p 10.

6 Batman, 'The Bad Old Days', p 10.

Figure 1: 'The Bad Old Days: Tasmania's Hanging Judge,' The World's News, 10 March 1951, p 10

THE BAD OLD DAYS

SENTENCING eighteen men to hang, at one court sitting, is a record even England's notorious Black Judge Jeffreys would have found hard to beat.

But to John Lewis Pedder, Tasmania's first Chief Justice, it was routine.

Chief Justice Pedder was the favored crony of Lieutenant-Colonel George Arthur, Tasmania's most hated Governor. The ruins of the dreadful penal settlement of Port Arthur are a grim memento of Governor Arthur's regime.

Pedder and Arthur arrived in Tasmania, then Van Diemen's Land, in 1824—within a month of each other. They worked in close contact. Their motto was—'Flog and hang.'

Their first act was to make the already terrible prison discipline as

The motto of Chief Justice Pedder was "Flog and hang."

Tasmania's HANGING JUDGE

harsh as their united heads could devise.

"If ever there was a Hanging Judge, that Judge was John Lewis Pedder," writes one historian. In January, 1829, the Hanging Judge went up to Launceston and established a record by sentencing 18 men to hang when not one of them had committed the capital offence of murder.

The men who received the death sentence were—

William Ashton, William Baker, Joseph Moulds and John Gibson—for burglary;

Joseph Stepnall, James Sillet, John Long, Bernard Shields, John Baker and Daniel Mackey — sheep stealing;

P. Large—rape; John Lynch and Daniel Leary—stealing a bullock;

Benjamin Laws—robbery on the highway, involving a few sacks of flour; J. Morrison—setting fire to a stack of wheat;

Thomas Rogers, Charles Williams and George Palmer—stealing from a dwelling house.

At the same sitting the Hanging Judge "recorded" sentence of death against John Grant and Philip Best, for sheep stealing, and Charles Towers and William Gulien, for receiving stolen property.

This meant that the men would be sent to the penal settlement of Macquarie Harbor, described as "the very sink of Hell."

His Honor finished up by sentencing three men to be flogged for trivial offences.

He wasted no time in sending the 18 men to the scaffold, and they were hanged immediately the sitting finished.

The Hobart-Town Courier, which recorded these facts in its Country News column, was too much in awe of the Governor and the Chief Jus-

tice to make any unfavorable comment.

However, it did remark that Charles Williams, one of the 18 who received the death sentence, was "quite a youth—not more than seventeen!"

Under the Arthur-Pedder regime, prisoners were tried by a military jury, irrespective of whether they were convicts or free settlers.

Pedder refused to follow the NSW Chief Justice, Francis Forbes, in granting trials by civilian juries, which he considered "unconstitutional."

His attitude greatly incensed the free settlers, who claimed the British right of trial by civilian jury.

BY OXLEY BATMAN

A military jury suited the Hanging Judge. Military officers would hesitate to differ with the Chief Justice when a word from him to the Lieutenant-Governor would endanger their privileges.

The only military juror on record who dared to defy Chief Justice Pedder was a Lieutenant Thomas Mathison. He was foreman of a jury which heard the trial on March 6, 1829, of two convicts, John Salmon and Daniel Brown, for the murder at Macquarie Harbor of another convict named Stopford.

Both men, so their confessions disclosed, could no longer endure the awful conditions at the penal settlement. They determined to commit murder so that they might be removed, even at the price of their lives.

Brown murdered Stopford with an axe while the man slept. Salmon took no active part in the murder.

The Hanging Judge considered

both men should hang; Salmon was as guilty as Brown, he said. Before the jury retired he addressed them at length and made his opinion quite clear.

While the rest of the jury agreed with the Chief Justice, Mathison declared, with unusual courage, that he would not bring in a verdict which was against his conscience and his oath. Salmon should not hang, as he had not committed the act of murder.

Furious at Mathison's rebellion, Pedder ordered the jury to be locked up again to "reconsider." The jury's retirement lasted from Wednesday at four o'clock to the following Saturday at six o'clock.

Once they attempted to break out, but Pedder had them rounded up again and used convict constables to guard the locked jury room.

Finally, Mathison said he was "sick of the whole thing and would consent to a verdict of guilty." His Honor promptly ordered the men to be hanged on Monday, adding that "he was so exhausted he could not make any observations on the case."

Great was the rejoicing when Governor Arthur left Van Diemen's Land in 1836. He was booed and hissed as he boarded his ship, and the True Colonist, which was not afraid of his power, declared on June 3, 1836: "The removal of Colonel Arthur is a most merciful deliverance to the Colony. But while Judge Pedder remains, the colonists cannot hope to derive any substantial benefit from the change of Governors."

But without Arthur's support, the power of Chief Justice Pedder waned. He lasted through the governorship of kindly Sir John Franklin, but came into violent collision with Sir William Denison and, in 1854, the colony rejoiced when the Hanging Judge finally retired.●

THE WORLD'S NEWS, MARCH 10, 1951

officer in the colony) 'would endanger their privileges.'⁷ One juror, we are told, 'dared to defy' Pedder, by refusing to find a prisoner guilty of murder. 'Furious at Mathison's rebellion,' Pedder 'locked up' the whole jury for four

7 Batman, 'The Bad Old Days,' p 10.

days to 'reconsider', until the recalcitrant finally submitted and the prisoner was promptly hanged.⁸

The judge's links to Lieutenant Governor George Arthur further condemn him: as a 'favoured crony' of the hated administrator, Pedder worked in 'close contact' with Arthur 'to make the already terrible prison discipline as harsh as their united heads could devise.'⁹ This brutal and arbitrary 'Arthur-Pedder regime' ended only with Arthur's recall to London in 1836.¹⁰ Batman concludes his narrative by quoting the opposition *True Colonist*, which lauded Arthur's departure as a 'merciful deliverance' that occasioned 'great rejoicing', at the same time cautioning that 'while Judge Pedder remains, colonists cannot hope to derive any substantial benefit from the change of governors.'¹¹ With Pedder's own departure from office in 1854, Batman tells readers, the 'colony' again 'rejoiced when the Hanging Judge finally retired.'¹²

In many ways Batman's article is emblematic of the 'hanging judge' narrative in Tasmanian popular historical imagination, for it contains key elements of the trope as it has been applied in the three centuries since Judge Jeffreys: an 'ill-tempered' judge posthumously condemned for ordering 'harsh' sentences and mass executions, and for strong political and/or personal links to an unpopular regime. Some additional aspects are specific to Van Diemen's Land—in particular, settler antipathy towards Lieutenant-Governor Arthur and the historiographical influence of polemics from opposition pressmen, many of whom were tried by Pedder for libelling Arthur's government. Folk memory of the 'dark days' of convictism has also helped to sustain the narrative's appeal. Adherence to the 'trivial offenders theory' is evident in the underlying assumption, in both popular and scholarly iterations, that murder was the only justifiable capital offence. Underpinning this conceptual framework, my paper suggests, is a significant gap in the legal historiography of the island, which encourages the conflation of the convict management system with the criminal code.

This article traces Pedder's construction as a Tasmanian Judge Jeffreys through a close reading of key sources, which introduce and consolidate the trope of the 'hanging judge'. It argues that these newspaper 'histories'—aimed at popular audiences and presented as objective history supported by archival sources—belong to a recognisable literary tradition. Specific examples are contextualised against colonial editorial comment, statute law, and other official documents to illustrate how these narratives simultaneously overes-

8 Batman, 'The Bad Old Days', p 10.

9 Batman, 'The Bad Old Days', p 10.

10 Batman, 'The Bad Old Days', p 10.

11 Batman, 'The Bad Old Days', p 10.

12 Batman, 'The Bad Old Days', p 10.

timate Pedder's power of life and death and underplay the social meaning of capital punishment during a period of declining, but still significant, support for the ultimate sanction. The first part of this paper elucidates the trope and interrogates two key texts. The second section posits that, in the absence of quantitative analysis of the use of the death penalty on the island, abolitionist sentiment feeds into more scholarly iterations of the hanging judge narrative. This article proposes an alternative interpretative response, which emphasises the time and context-specific nature of criminal punishment. The final section examines the perspective of Pedder's contemporaries and finds that—far from the bloodthirsty hanging judge of fiction—he was eulogised as 'one of the most upright and humane Judges that ever presided on the Bench'.¹³

The trope of the 'hanging judge'

John Lewes Pedder (1793-1859) was appointed by the Colonial Office to establish the Supreme Court of Van Diemen's Land in 1824. When the former equity barrister began his thirty-year judicial career in Hobart Town, more than 200 offences remained punishable by death under a criminal justice system characterised by historians as the 'bloody code'.¹⁴ In a recent quantitative survey in the sister colony of New South Wales, Tim Castle identifies the period 1826 to 1836 as the 'heyday of capital punishment'.¹⁵ The same epithet may be applied to Van Diemen's Land. Where Castle identifies 363 executions in New South Wales during the decade from 1826, approximately 260 prisoners were hanged in Van Diemen's Land in the twelve years from 1824.¹⁶ As the only Supreme Court judge on the island between 1824 and 1833, Pedder is inexorably linked to what Hamish Maxwell-Stewart has characterised as the 'appalling rate of judicial carnage' practised during the administration of George Arthur (1824-36).¹⁷ Significantly, both Castle and Maxwell-Stewart frame their analysis in terms of gubernatorial policy. Indeed, Castle does not identify any of the New South Wales judges who passed sentences of death during the administrations of Governors Darling (1825-31)

13 *Mercury*, 27 August 1873, p 3.

14 D J Bentley, *English Criminal Justice in the Nineteenth Century*, London, 1998, p 11; L Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, Vol. 1, London, 1948, pp 4-5.

15 T Castle, 'Watching Them Hang: Capital Punishment and Public Support in Colonial New South Wales, 1826-1836', *History Australia*, Vol 5, No 2, 2008, p 43.2.

16 Castle, 'Watching Them Hang', p 43.2; R P Davis, *The Tasmania Gallows: A Study of Capital Punishment*, Hobart, 1974, p 13.

17 H Maxwell-Stewart, "I could not blame the rangers...": Tasmanian Bushranging, Convicts and Convict Management', *Papers and Proceedings of the Tasmanian Historical Research Association*, Vol 42, No 3, 1995, p 117.

and Bourke (1831-37). By contrast, Chief Justice Pedder has acquired personal notoriety as a 'hanging judge'.

The trope of the 'hanging judge' has a long tradition in the Anglophone world. Its seventeenth-century archetype, Judge Jeffreys (1645-89), was one of five judges sent to the Western Assizes in 1685, following the Duke of Monmouth's failed rebellion against James II. In the wake of Monmouth's defeat at the Battle of Sedgemoor, approximately 200 of his supporters (of 1,381 tried) were executed for treason.¹⁸ Soon after the so-called Bloody Assizes, Jeffreys was appointed Lord Chancellor, and his loyalty to James II sealed his fate. With the arrival of the Protestant Prince William of Orange in the Glorious Revolution of 1688, Jeffreys was sent to the Tower, where he died the following year. Condemning Jeffreys as a traitor, posthumous pamphlets 'poured scorn upon' the judge for his association with the late Catholic king. The most influential of these was John Tutchin's *The Western Martyrology, or, The Bloody Assizes* (1689). An aggrieved journalist who had been sentenced by Jeffreys to be whipped, Tutchin produced a 'sensational' text which informed representations of this exemplary 'hanging judge' for the next three centuries.¹⁹

Like Jeffreys at the Bloody Assizes, Pedder has been absorbed into an ideologically inspired popular tradition of hanging judges in revolutionary times or frontier locales. Similar constructions have been applied to Lord Norbury, Chief Justice of the Irish Common Pleas (1800-27), and Isaac C Parker, a US District Court Judge (1875-96), for example.²⁰ The mythologised career of Pedder's near contemporary, Sir Matthew Baillie Begbie, provides some specific parallels. A generation younger than Pedder, Begbie (1819-94) was appointed to establish judicial apparatus in a frontier society in the remote settler colony of British Columbia. Like Pedder, he maintained a close relationship with the colony's governor and enjoyed a similar reputation for judicial fairness during his lifetime. Begbie's biographer, David Ricardo Williams, disputes his posthumous reputation as a hanging judge, citing the 'stern' criminal law of the age and Begbie's extra-curial efforts to obtain reprieves for

18 P Halliday, 'Jeffreys, George, First Baron Jeffreys (1645-1689)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, May 2009, <<http://www.oxforddnb.com/view/article/14702>> accessed 20 August 2014. Most of those convicted were transported to the West Indies.

19 Halliday, 'Jeffreys, George, First Baron Jeffreys'.

20 R Keane, 'Toler, John, first earl of Norbury (1745-1831)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2008. [<http://www.oxforddnb.com/view/article/27498>, accessed 20 Aug 2014]; R H Tuller, 'Let No Guilty Man Escape': *A Judicial Biography of 'Hanging Judge' Isaac C Parker. Legal History of North America, Vol 9*, Norman, 2001, pp 5-8.

the many Indigenous people he had sentenced to death.²¹ Williams attributes Begbie's own 'sternness' on the bench to 'an act of policy adopted to impress all sections of the community'.²² Differentiating the demands of judicial duty from personal inclination, Begbie's sentencing practices were, Williams argues, unrepresentative of his 'real nature, which was essentially humane and compassionate'.²³ As Williams' reassessment of Begbie highlights, posthumous hanging judge narratives frequently conflate the professional and the personal in a way that contemporaries did not.

Writing for the Hobart *Mercury* in 1873, retired Surveyor-General James Erskine Calder was the first local commentator to apply the trope of the hanging judge to Pedder. Calder was employed at the Survey Department from 1829 to 1870, and had been a contemporary of Pedder in the colonial government; he was no supporter of the Arthur administration, however.²⁴ In retirement, Calder became a 'prolific writer' and published a series of newspaper sketches and opinions about the 'old days' under the heading 'Tasmanian History'.²⁵ Historian Michael Roe usefully problematises Calder's 'reminiscences', drawing our attention to the amorphous line between 'witness-evidence' and 'history'.²⁶ Calder was certainly present in Hobart Town during part of the period he describes, and might indeed have witnessed trials and hangings. However, he wrote at a distance of nearly twenty years after Pedder's retirement, and almost forty years after the 'heyday of capital punishment' on the island.

Hanging judge narratives also draw on the conventions of eighteenth-century radical satire and reformist critique, in which judges are cast in the 'time-honoured role' of 'bloodthirsty enemies of the poor'.²⁷ In his seminal *The Hanging Tree* (1994), Vic Gatrell endorses this familiar assessment of judges as bad tempered reactionaries, who should be viewed as 'a peculiar and diminished species of being in whom benevolence, sympathy, love and the imaginative faculties were denied'.²⁸ Familiarity with this literary tradition is

21 D R Williams, 'Begbie, Sir Matthew Baillie' in *Dictionary of Canadian Biography*, Vol 12, University of Toronto/Université Laval, 2003. [http://www.biographi.ca/en/bio/begbie_matthew_baillie_12E.html accessed 20 Aug 2014].

22 Williams, 'Begbie, Sir Matthew Baillie'.

23 Williams, 'Begbie, Sir Matthew Baillie'.

24 Calder was allied with Arthur's successor, Sir John Franklin.

25 J B Thwaites, 'Calder, James Erskine (1808-1882)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University [<http://www.adb.online.anu.edu.au/biogs/A010179b.htm>, accessed 22 August 2014].

26 M Roe, *An Imperial Disaster: The Wreck of the George the Third*, Hobart, 2006, pp 239, 251.

27 Williams, 'Begbie, Sir Matthew Baillie'.

28 V A C Gatrell, *The Hanging Tree: Execution and the English People, 1770-1868*, Oxford, 1996, p 499.

implicit in the language of Calder's 'histories'. Like the 'ill-tempered' judges of the satirists, Calder's 'Sir Petulant Pedder' is portrayed as 'sometimes unnecessarily harsh, and never over merciful to the unfortunate creatures' he tried.²⁹ Strikingly, Calder's assertion that Pedder had 'probably passed more death sentences than any other colonial Judge living' recites (almost word for word) newspaper editor James Grant's 1837 assessment of English circuit court judge Sir Robert Graham, who was reputed to have 'sentenced more unfortunate human beings to death than any other judge who ever presided at a county assizes'.³⁰

Forty years after Calder, a Melbourne tabloid revived the hanging judge construction in *The History of Tasmania written specially for 'Truth'* (1915), which was first serialised, then published in book form.³¹ Originally established by 'radical politicians' in the 1880s, the *Truth* presented a 'weekly journal of sport, crime and exposé articles' to which its new, Englishborn proprietor John Norton added an 'even more sensational formula of abuse', targeting figures of British authority.³² Against this background, the *Truth* employed a strategy of presenting its tabloid narrative as impartial history: 'The object of this "History of Tasmania", its anonymous author avers, 'is to tell in a plain way the true story of the bad old days in Van Diemen's Land'.³³ The text abounds with language designed to reinforce this claim: the 'whole work' is a 'reliable record' based on 'authentic official records from public and private archives'.³⁴ In portraying Pedder as a hanging judge, *The History of Tasmania* reassures readers that 'This estimate of the man is not made without a due sense of responsibility for the statement, nor shall it appear without the production of ... the proofs from which the premises are drawn'.³⁵ The

29 *Mercury*, 19 August 1873, p 3. In addition to his newspaper criticism, Calder's unpublished papers record that he had witnessed a tendency to 'peevisness' in the judge, which earned the judge the 'sobriquet of Sir Petulant Pedder'. J M Bennett, *Sir John Pedder: First Chief Justice of Tasmania, 1824-1854*, Sydney, 2003, p 64; R Ely (ed), *Carrel Inglis Clark: The Supreme Court of Tasmania. Its First Century*, Hobart, 1995, p 16, n 34.

30 J Grant, *The Bench and the Bar, by the Author of "Random Recollections of the Lords and Commons" and "The Great Metropolis, &c., &c., in Two Volumes. Vol. I*, London, 1837, p 76.

31 *The History of Tasmania written specially for "Truth". Compiled from Authentic Sources*, Melbourne, 1915.

32 M Cannon, 'Norton, John (1858-1916)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University [<http://www.adb.online.anu.edu.au/biogs/A110048b.htm>, accessed 20 Aug 2014].

33 'Preface', *History of Tasmania*, [no pagination].

34 *History of Tasmania*, p 106.

35 *History of Tasmania*, p 106; and cf. John Marryatt Hornsby's *Old Time Echoes of Tasmania* (1896), which similarly claimed that the 'facts adduced are fortified from official records which cannot be questioned'. *Daily Telegraph*, 11 March 1896, p 4. See below for further discussion of Hornsby's text.

proofs, however, are flimsy. Archival evidence is used selectively, and supporting examples do not bear out the text's claims. Like Tutchin's account of the Bloody Assizes, however, the significance of the *Truth's* narrative lies less in its historical inaccuracies than in its capacity to rework the hanging judge trope for a new audience.

In a series of hyperbolic sketches, *The History of Tasmania* depicts Pedder as the 'embodiment of judicial murder and devilish heartlessness': in a land which 'ran with blood', it declares, he 'fed on the hanging of men'.³⁶ The text repeatedly conflates the workings of the convict management system and the criminal code, while the summary justice of the magistrates bench is little differentiated from the statutory regime of the superior court. In the monstrous and arbitrary regime conjured by the *Truth*, Chief Justice Pedder actively collaborates with Lieutenant-Governor Arthur to 'increase the streams of blood that cried aloud with a thousand outraged tongues to high heaven ... for cessation'.³⁷ The text features many 'sensational stories painting convicts as murderers, ruffians and rapists', but also trivialises particular crimes in order to illustrate Pedder's determination to hang every offender who came before him.³⁸ 'Gentile or Jew, man or woman', *The History of Tasmania* asserts, 'once before Pedder on a capital offence, [the defendant] was sent swinging out of this world to meet his Maker in the next'.³⁹ To demonstrate this point, the cases of a Jewish man and a Scotswoman are introduced; neither is identified as a convict in the text.

The first example concerns Abraham Aaron, distinguished as 'the first Jew to be hanged in Vandemonia'.⁴⁰ Contemporary press reports indicate that Aaron, a young man transported for stealing a silver pointer from a London synagogue, had 'pleaded guilty to stealing various articles of clothing' from his master in May 1828.⁴¹ In a lean year for court reporting, the *Hobart Town Courier* stated cursorily that Aaron was 'sentenced to be hanged' and

36 *History of Tasmania*, pp 105-7.

37 *History of Tasmania*, p 106.

38 A Alexander, *Tasmania's Convicts: How Felons Built a Free Society*, Sydney, 2010, p 218.

39 *History of Tasmania*, p 106.

40 *History of Tasmania*, p 106. For a brief biography of Aaron, see JS Levi, *These are the Names: Jewish Lives in Australia, 1788-1850*, Melbourne, 2006, pp 1-2.

41 *Hobart Town Courier*, 19 July 1828, p 3. Abraham Aaron conduct record, CON31/1/1, f 48, Tasmania Archive and Heritage Office (hereafter TAHO). [http://search.archives.tas.gov.au/ImageViewer/image_viewer.htm?CON31-1-1,433,52,L,80, accessed 20 Aug 2014].

‘suffered the sentence of the law’ on 1 August 1828.⁴² Supreme Court records confirm that Aaron pleaded guilty to the capital offence of burglary.⁴³ *The History of Tasmania* decries the severity of Aaron’s execution ‘for robbing his master’, asserting that his offence was ‘a crime that nowadays [1915] might have secured him 18 months’ imprisonment softened with remissions for good behaviour.’⁴⁴ This anachronistic comparison implies that Pedder punished Aaron with unusual harshness. In fact, statute law gave the trial judge no discretion in sentencing. Addressing several prisoners convicted of burglary in 1829, Pedder explained the mandatory sentence of death:

Your offence was always, and still is, an offence at common law, and by certain acts passed for that purpose, it has long been subject to the penalty of death. [...] by that act of Mr Peel’s which was in force when you were tried, it is enacted that persons convicted of burglary shall suffer death. Of that offence you have so been convicted. The sentence of death therefore is that which I must pass upon you.⁴⁵

As clarified by Pedder’s remarks, it was the criminal code, not the caprice of the judge or the colonial administration, that condemned Abraham Aaron to death. He had pleaded guilty to a capital offence, the jury had no alternative but to convict, and the trial judge was required by law to impose the death penalty.

Suggesting that Aaron’s fate did not offend contemporary sensibilities in Van Diemen’s Land, editorial comment at the time of his execution did not question the appropriateness of the sentence. Instead, Hobart Town pressmen showed greater interest in his recent conversion to Christianity, which

42 *Hobart Town Courier*, 19 July, 1828, p 3 and 2 August 1828, p 2. Stefan Petrow and Bruce Kercher note that no law reports were published in 1828 by the *Hobart Town Gazette* or *Colonial Times*; few cases appeared in the *Hobart Town Courier* and *Colonial Advocate*; and the *Tasmanian* recorded only brief summaries of the defendant, charge and verdict. See footnote to R v James, Pennel and McGuire [1828], *Decisions of the Nineteenth Century Tasmanian Superior Courts* [http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1828/r_v_james_pennel_and_mcguire/, accessed 20 Aug 2014].

43 Register of prisoners tried in criminal cases, SC41/1/3, ff 43-43a, Case No 182, reel Z733, TAHO.

44 *History of Tasmania*, p 106.

45 *Hobart Town Courier*, 31 October 1829, p 1; R v Madden and others [1829], *Decisions of the Nineteenth Century Tasmanian Superior Courts* [http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1829/r_v_madden_and_others/, accessed 20 Aug 2014]. Pedder refers to the *Larceny Consolidation Act* (1827), section 11 of which provided that ‘every person convicted of burglary shall suffer death as a felon’.

provided their readers with an appropriately 'penitent' execution narrative.⁴⁶ Where *The History of Tasmania* interprets Aaron's conversion and exhortation from the scaffold as evidence of a man turning 'renegade on the religion of his forefathers under sentence of death',⁴⁷ even the humanitarian editor of the *Tasmanian and AustralAsiatic Review* reported with approbation that Aaron 'appeared to meet his fate with resignation. He shortly addressed the spectators, particularly the Jews, and assured them there is no salvation but through the blood of our Lord Jesus Christ'.⁴⁸

In relating the case of Mary McLauchlan, *The History of Tasmania* chooses another 'first': this time, the 'first woman to terminate her existence on the scaffold'.⁴⁹ McLauchlan was tried in 1830 for the 'wilful murder of her male bastard child', who had been found dead in a privy at the Female House of Correction soon after birth.⁵⁰ Mary had been separated by transportation from her husband and children in Scotland, and sympathetic contemporaries adopted the conventional assumption that she had 'been driven to commit the crime by a sense of degradation and shame from the fear that the birth of her child would become known to her relatives at home'.⁵¹ Elizabeth Rapaport's exploration of infanticide in law and myth demonstrates that 'dominant representations of infanticide in popular media and in scholarship' cling to the binaries of 'mad woman or desperate girl'.⁵² Implicitly diminishing the criminality of her actions, the anonymous author of *The History of Tasmania* constructs McLauchlan as the latter, and her illegitimate child becomes 'a babe, ditch delivered of a drab'.⁵³ The child was 'born into a world of suffering and vice, and in the unfortunate woman's eyes [was] better out of the way'.⁵⁴

46 *Hobart Town Courier*, 2 August 1828, p 2. On penitent execution narratives, see P King, 'Newspaper Reporting and Attitudes to Crime and Justice in Late-Eighteenth- and Early-Nineteenth-century London', *Continuity and Change*, Vol 22, No 1, 2007, p 99.

47 *History of Tasmania*, p 106.

48 *Tasmanian and Austral-Asiatic Review*, 2 August 1828, cited in Levi, *These are the Names*, pp 1-2. Editor Robert Lathrop Murray used his newspaper to condemn whipping and, later, the continued use of capital punishment for sheep and cattle stealing in the colony. E M Miller, *Pressmen and Governors: Australian Editors and Writers in Early Tasmania*, Sydney, 1973, pp 12, 186.

49 *History of Tasmania*, p 106.

50 R v McLauchlan [1830], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, [http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1830/r_v_mclauchlan/, accessed 20 Aug 2014].

51 H MacDonald, *Human Remains: Episodes in Human Dissection*, Melbourne, 2005, p 61.

52 E Rapaport, 'Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth', *Fordham Urban Law Journal. Special Feature: Women as Perpetrators of Crime*, Vol 33, 2006, p 258.

53 *History of Tasmania*, p 106. The quote comes from *Macbeth*, in which the 'Finger of a birth-strangled babe/Ditch delivered by a drab' is among the ingredients added to the witches' cauldron.

54 *History of Tasmania*, p 106.

By contrast, the *Hobart Town Courier* reported the ‘popular view’ at the time that McLauchlan had killed the child out of ‘malice towards the father.’⁵⁵

As with Aaron’s case, *The History of Tasmania* compares McLauchlan’s sentence of death with the penalty for infanticide in 1915: ‘Today’, it asserts, she ‘would receive perhaps a month’s imprisonment, or may be, as sometimes happens, she would have been imprisoned till the rising of the Court.’⁵⁶ In fact, child murder remained a capital offence in 1915, and three women had been hanged in Melbourne as recently as the 1890s during a ‘moral panic’ over reproductive crimes.⁵⁷ McLauchlan’s execution for the murder of her child was also regarded as severe by the standards of the 1830s. In contemporary English practice, the *Tasmanian and Austral-Asiatic Review* opined, ‘even when the dreadful crime of murder is proved, the last extremity of punishment seldom follows.’⁵⁸ In England and the colonies, conviction for child murder was rare in the early nineteenth century. Post-mortem evidence was problematic, so that doctors were often unable to determine whether a child had been born alive.⁵⁹ At the same time, an increasingly ‘pathological view of maternal infanticide’ and sympathy for the mother meant that juries were reluctant to convict on the capital charge of murder.⁶⁰ More usually, a defendant was acquitted, or the charge was reduced by the jury to the non-capital offence of manslaughter or concealment of birth.⁶¹

Kathy Laster’s reading that the capital punishment of women affronted the ‘arbitrary chivalry’ of attitudes towards female offenders is echoed in contemporary reaction to McLauchlan’s sentence of death.⁶² As the *Tasmanian and Austral-Asiatic Review* declared following her execution: ‘There is something more than ordinarily dreadful in ... putting a woman to death at any time.’⁶³ Members of the Executive Council who reviewed the case sought to ‘avert the distressing necessity’ of publicly hanging a woman for a crime that

55 *Hobart Town Courier*, 24 April 1830, p 3; MacDonald, *Human Remains*, p 79.

56 *History of Tasmania*, p 106.

57 K Laster, ‘Arbitrary Chivalry: Women and Capital Punishment in Victoria, 1842-1967’, in D Phillips and S Davies (eds), *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia*, Melbourne, 1994, pp 171-6.

58 *R v McLauchlan* [1830].

59 For another local example, compare the medical evidence adduced in *R v Masters* [1835], *Decisions of the Nineteenth Century Tasmanian Superior Courts* <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1835/r_v_masters/>, accessed 20 Aug 2014].

60 Rapaport, ‘Mad Women and Desperate Girls’, p 554.

61 Under the *Offences against the Person Act* (1828), manslaughter and concealment of birth could be punished with terms of imprisonment.

62 Laster, ‘Arbitrary Chivalry’, p 167, identifies an ‘informal system of chivalry’, ostensibly deployed to protect women offenders ‘from the full rigour of the law’.

63 *R v McLauchlan* [1830].

‘was not of frequent occurrence.’⁶⁴ As an ex officio member of the Council, Pedder advised that there was no legal objection to the jury’s guilty finding, and therefore could not advise the Governor in Council to ‘interfere with the course of the law.’⁶⁵ At a second meeting, Pedder reiterated this advice.⁶⁶ In her nuanced account of McLauchlan’s case, Helen MacDonald suggests that Pedder ought to have advised Governor Arthur to ‘interfere with the course of the law’, as he had in other cases.⁶⁷ More significantly for testing Pedder’s construction as a hanging judge, however, MacDonald points to the crucial role of his friend and colleague, Joseph Hone, who ‘shows up everywhere in this case’ – as coroner, presiding over the investigation into the child’s death; as Master of Supreme Court, responsible for taking depositions from witnesses; and as an emissary of the Executive Council, tasked with attending Mary McLauchlan in Hobart Town Gaol to learn whether she had ‘any statement’ to make in mitigation of her crime which might allow the governor to respite her sentence of death.⁶⁸ Compared with Hone’s pivotal roles in the case, Pedder’s involvement appears relatively limited.

In contrast to the case of the burglar Abraham Aaron, there was little public appetite for the execution of a ‘wretched woman’ like Mary.⁶⁹ Even the jurymen who convicted McLauchlan wrote to the governor ‘recommending her to mercy.’⁷⁰ Significantly, press commentary and the records of the Executive Council illustrate that advocates for mercy focused not on the trial process or the judge, but on the governor, who held the ultimate power to relieve a condemned prisoner. No contemporary press criticism was directed towards Pedder for his role in McLauchlan’s trial and execution. Unlike *The History of Tasmania*, which rebukes the chief justice for sending McLauchlan ‘aloft’, even the most critical colonial pressman condemned Mary’s unnamed seducer as the ultimate ‘author of her destruction.’⁷¹

64 Minutes of Proceedings of the Executive Council, 16 April 1830, EC4/1/1, f 534, reel Z1474, TAHO.

65 Minutes of Proceedings of the Executive Council, 16 April 1830. *The Hobart Town Courier* did not report any of the evidence presented at McLauchlan’s trial, but observed that it was ‘of the most clear and positive nature’. *Hobart Town Courier*, 17 April 1830, p 3 and 24 April 1830, p 2.

66 Minutes of Proceedings of the Executive Council, 17 April 1830, EC4/1/1, f. 536, reel Z1474, TAHO.

67 MacDonald, *Human Remains*, p 78.

68 MacDonald, *Human Remains*, pp 79-80 and H MacDonald, ‘A Dissection in Reverse: Mary McLauchlan, Hobart Town, 1830’, *Lilith: A Feminist History Journal*, Vol 13, 2004, p 20; Minutes of Proceedings of the Executive Council, 17 April 1830.

69 *Hobart Town Courier*, 24 April 1830, p 2.

70 Minutes of Proceedings of the Executive Council, 17 April 1830.

71 *History of Tasmania*, p 106; *Tasmanian and Austral-Asiatic Review*, 23 April 1830, cited at R v McLauchlan [1830].

For all its spurious claims to authenticity, *The History of Tasmania* is not a history of Tasmania. Rather, its melodramatic narrative of a brutal criminal code in the 'bad old days' appeals to the sensibilities of its own age. Yet, as part of a broader literary phenomenon in which judges are posthumously transformed into judicial murderers, it is worthy of further investigation. Tracing the reception history of this ephemeral text is problematic. Norton's biographer Michael Cannon postulates that wide national circulation gave the *Truth* and its editor an 'influence on popular attitudes ... which was more far reaching than has been generally recognized'.⁷² The *Truth* was 'immensely popular with the working class', Cannon explains.⁷³ Its *History of Tasmania* therefore had a potentially large (albeit unidentified) popular audience. Moreover, as Stefan Petrow's analysis of John Marryatt Hornsby's *Old Time Echoes of Tasmania* (1896) suggests, the *Truth* was tapping in to an existing public appetite (and market) for tales of the 'dark days' of convictism.⁷⁴ Like the *History of Tasmania*, Hornsby's *Old Time Echoes* was first serialised in Launceston's *Daily Telegraph* and then collected in a single volume, priced at two shillings.⁷⁵ Citing the book's compilation as evidence of the articles' popularity, Petrow estimates that the *Daily Telegraph* had a local daily circulation of 4,000-5,000.⁷⁶ With a 'huge' national circulation, the *Truth* advertised its *History of Tasmania* for sixpence a copy:⁷⁷

A Startling Book!
 THE HISTORY OF TASMANIA
 (FROM AUTHENTIC OFFICIAL RECORDS)
 Published by John Norton
 A True and Tragic Story of The Bad Old Days of Convictism in Van
 Diemen's Land.
 FORTY THRILLING CHAPTERS
 THE MOST STARTLING BOOK OF THE CENTURY
 Retail selling price sixpence each
 Special terms to newsagents
 NOW READY
 From your Newsagent, or General Manager, 'Truth' Office, 3 Royal Lane,
 Melbourne.⁷⁸

72 M Cannon, 'Norton, John (1858-1916)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University [<http://www.adb.online.anu.edu.au/biogs/A110048b.htm>, accessed 20 Aug 2014].

73 Cannon, 'Norton, John (1858-1916)'.

74 S Petrow, 'History From Below: John Marryatt Hornsby's Reflections on Tasmania's Past', *Tasmanian Historical Studies*, Vol 18, 2013, pp 75-6.

75 Petrow, 'History from Below', p 82.

76 Petrow, 'History from Below', p 82.

77 Cannon, 'Norton, John (1858-1916)'.

78 *Truth*, 18 September 1915, p 4 [<http://nla.gov.au/nla.news-article119778426>, accessed 14 Oct 2014].

In a recent exploration of the legacy of the convict period in post-transportation Tasmania, Alison Alexander suggests that this ‘cheap paperback’ from the ‘notorious *Truth*’ was not ‘likely to be taken seriously’ by contemporaries, and finds ‘no other writer from the period’ who mentions it.⁷⁹ Throughout the twentieth century, however, its narratives were taken up in the press. In particular, the *Truth*’s assertion that, ‘If ever there was a hanging judge, that judge was John Lewis [*sic*] Pedder’, appears word for word and is legitimised through its attribution to an ‘historian’, as in Batman’s narrative in the *The World’s News* in 1951.⁸⁰ As a critical reading of these ‘histories’ demonstrates, the tabloid strategy of presenting sensationalist narratives as objective history has not been sufficiently problematised by academic historians, with the result that Pedder’s popular construction as a ‘hanging judge’ has implicit parallels in more scholarly treatments of the death penalty in Van Diemen’s Land.

Scholarly iterations of the hanging judge trope

Historians of capital punishment frame responses to crime along a continuum of conflict and consensus models of social order. Where the conflict model privileges power relations, the consensus model assumes shared community norms and a ‘collective intolerance of particular offences.’⁸¹ With half of all state-sanctioned executions in Van Diemen’s Land/Tasmania ordered between 1824 and 1836,⁸² understanding the cultural and legislative bases of

79 Alexander, *Tasmania’s Convicts*, p 218.

80 For example, barrister/legal historian Bryan Keon-Cohen cites the text as a secondary source in a scholarly article in the 1970s. B Keon-Cohen, ‘Mad Judge Montagu: A Misnomer?’, *Monash University Law Review*, Vol 2, 1975, p 63. Hobart writer Carrel Inglis Clark published a series on the history of the Supreme Court in 1922 and 1923, in which he repeated the *Truth*’s comparison of Pedder to Judge Jeffreys. *Critic*, 21 April 1922, cited in Ely, *Carrel Inglis Clark*, p 17.

81 T D Miethe and H Lu, *Punishment: A Comparative Historical Perspective*, Cambridge, 2005, pp 16-17, 1956. Key scholars who focus on power relations include E P Thompson and Douglas Hay, whose seminal texts remain influential. See E P Thompson, *Whigs and Hunters: The Origin of the Black Act*, Harmondsworth, 1977 and Hay’s seminal 1975 essay, ‘Property, Authority and the Criminal Law’, in D Hay, P Linebaugh, J G Rule, E P Thompson, and C Winslow (eds), *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England*, London, 1975, pp 1763. The consensus model is well represented in the scholarship of Randall McGowen, among others. See R 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 31234; ‘From Pillory to Gallows: The Punishment of Forgery in the Age of the Financial Revolution’, *Past and Present*, Vol 16, 1999, pp 107–140; and ‘The Body and Punishment in Eighteenth-Century England’, *Journal of Modern History*, Vol 59, 1987, pp 65179.

82 Davis, *The Tasmanian Gallows*, p 13. The first executions took place in 1806; the last in 1946. Capital punishment was formally abolished in Tasmania in 1968.

the death penalty in the early nineteenth century is critical to interpreting the paradigm in which Pedder and his contemporaries operated. Yet, the popular and scholarly treatments of capital punishment which have contributed to Pedder's reputation as a 'hanging judge' typically fail to acknowledge the complex and intersecting range of 'penal purpose', which Simon Devereux defines as a 'triad' of 'retributive severity, deterrent terror, and reform'.⁸³ Instead, conventional accounts of the convict period overwhelmingly privilege the 'trivial offenders theory',⁸⁴ and favour subjective and emotive readings in which the penalties for certain offences are decoupled from their political, economic and statutory contexts.

The only standard reference on the local application of the death penalty, Richard Davis' *The Tasmanian Gallows* (1974), illustrates this point. Contrasting the 'savage punishments' of the early colonial period with 'modern enlightened opinion', Davis decries the death penalty for stealing cattle, sheep, or horses: 'It is difficult to see the theft of livestock in the 1820s as more morally reprehensible than tax evasion today [1974]', he argues.⁸⁵ Here, Terance Miethe and Hong Lu's comparative sociological perspective on punishment provides a useful alternative frame, which recognises the shifting sensibilities and practices of penal philosophy, and highlights the need for detailed quantitative research to identify 'contextspecific punishment responses' across time and place.⁸⁶

In this model, offences are categorised as *mala en se* and *mala prohibita*. *Mala en se* offences are inherently wrong and 'said to violate widely held public standards of morality'.⁸⁷ These include murder, rape, and particular forms of theft. Capital sentencing is often mandatory for these offences, and greater constraints are applied to the exercise of mercy. *Mala prohibita* offences are legislatively 'defined as illegal' for political, religious, or social reasons, or in response to a particular threat.⁸⁸ They include morality offences (such as adultery and sodomy) and economic offences, which attract greater flexibility in sentencing and the application of mercy. From this perspective stock theft and tax evasion are clearly not morality offences, but legislatively determined economic crimes. Davis' valueladen statement therefore not only

83 S Devereux, 'In Place of Death: Transportation, Penal Practices, and the English State, 1770-1830', in C Strange (ed), *Qualities of Mercy: Justice, Punishment, and Discretion*, Vancouver, 1996, pp 56, 72.

84 D Oxley, 'Counting the Convicts: The Unlikely Love Affair Between Convicts and Historians', in D Gare and D Ritter (eds), *Making Australian History: Perspectives on the Past Since 1788*, Melbourne, 2007, p 116; Alexander, *Tasmania's Convicts*, pp 215-18.

85 Davis, *The Tasmanian Gallows*, p 26.

86 Miethe and Lu, *Punishment*, p 210.

87 Miethe and Lu, *Punishment*, p 195.

88 Miethe and Lu, *Punishment*, p 195.

implicitly minimises the gravity of a particular historical felony, but also fails to compare like offences. Moreover, the respective impact of the two crimes in communities with vastly different economic and demographic structures means that the standards of 1974 cannot be meaningfully applied to the pre-industrialised 1820s.

To gain a better understanding of the significance of historical offences to the community at the time, this study employs the nine modern categories of crime developed by the *Old Bailey Proceedings Online* project: breaking the peace, damage to property, deception, killing, offences against the King (Queen), sexual offences, theft, theft with violence, and other offences.⁸⁹ By no means exhaustive, the table below nonetheless illustrates the variety of offences tried in the Supreme Court during the first three Sessions of Oyer and Terminer, between May 1824 and June 1827.⁹⁰

Table 1: Offences tried in the Supreme Court of Van Diemen's Land, 1824-27

Category of offence	Specific offences
Breaking the peace	assault; assaulting a constable in the execution of his duty; assault and false imprisonment on the high seas; assaulting and stabbing; challenging to fight; conveying the challenge; cutting and maiming; libel; maliciously shooting at; maliciously shooting on the high seas with intent to kill; putting in fear (by gestures or shouting); stabbing with intent to kill
Damage to property	Arson
Deception	cheating; cheating and defrauding; forgery; forging and counterfeiting; forging and uttering as true a certain Bill of Exchange; forging and uttering and publishing as true, promissory notes; fraud; obtaining goods under false pretences; obtaining money under false pretences; offering and putting away a promissory note with intent to defraud; perjury
Killing	assault with intent to commit murder; manslaughter; murder; murder, accessory before the fact

89 C Emsley, T Hitchcock and R Shoemaker, 'Crimes Tried at the Old Bailey: Explanations of Types and Categories of Indictable Offences', *Old Bailey Proceedings Online* [<http://www.oldbaileyonline.org/static/Crimes.jsp>, accessed 20 Aug 2014].

90 Register of Prisoners Discharged by Proclamation, SC45/1/1, ff 1-133, reel Z225, TAHO.

Offences against the King (Queen)	coining; seditious libel; a breach of the Custom laws ... evading the prescribed duty
Sexual offences	aiding and abetting rape; assault with intent to commit rape; rape; assault upon an infant under the age of ten years with intent to carnally know her; bestiality; sodomy
Theft	accessory after the fact; animal theft [cattle stealing, horse stealing, sheep stealing]; burglary; embezzlement; housebreaking; killing [an animal] with intent to steal the carcass; larceny in a boat; larceny in a dwelling house; larceny from the person; receiving stolen goods; privately stealing in a shop [shoplifting]; privately stealing in a warehouse; stealing in a dwelling house; stealing in a dwelling house and putting in fear; stealing from [one's] master
Theft with violence	highway robbery; robbery; robbery from the person; robbery from the prison
Other offences	concealment of birth; piracy; piracy on the high seas

Davis does not pretend to offer a wholly dispassionate analysis of penal philosophy in Tasmania. Indeed, his text – written only six years after the repeal of the death penalty on the island – clearly evinces his abolitionist sentiment.⁹¹ Charting capital punishment from the earliest days of settlement until its abolition in 1968 (the last execution was carried out in Hobart in 1946), *The Tasmanian Gallows* in many ways exemplifies what American historian Randall McGowen characterises as ‘ameliorist narratives’, which ‘unreflectively credit the present with more humanity than the past’.⁹² This ‘ameliorist’ perspective is clearly reflected in Davis’ language, as he writes about the ‘slow growth of humanitarian feeling’, ‘faults far short of murder’, a ‘more rational society’, and as he fears ‘regression to preEnlightenment attitudes’.⁹³ This tendency also distorts his analysis of Pedder’s judicial role. Accusing the chief justice of ‘a naïve and callous utilitarianism’, Davis asserts that there is ‘no indication ... Pedder was concerned about the frequent application of the death penalty’.⁹⁴

91 Davis fears that a change of government could herald the return of the death penalty in the state. Davis, *The Tasmanian Gallows*, pp xiii, 100.

92 R McGowen, ‘Revisiting *The Hanging Tree*: Gattrell on Emotion and History’, *British Journal of Criminology*, Vol 40, No 1, 2000, p 8.

93 Davis, *The Tasmanian Gallows*, pp xiii, xiv, 23, 24, 26, 28, 29, 31.

94 Davis, *The Tasmanian Gallows*, p 24.

Colonial newspaper summaries give an indication of the frequency of hangings in the mid-1820s. Like Batman in *The World's News*, Calder uses his *Mercury* article to emphasise that Pedder ordered prisoners to be hanged 'literally by dozens'.⁹⁵ Hanging prisoners *en masse* was indeed a regular feature of colonial justice in the 1820s, and Calder correctly states that the 'scaffold seldom sufficed' for the executions ordered on a 'judgement day' at the end of a criminal sittings.⁹⁶ As illustrated in the table below, Calder's claim that the condemned men were usually 'disposed of in instalments of six or eight at a time' is supported by a summary of executions published in the *Colonial Times* at the beginning of 1827.⁹⁷ The number of men hanged in groups ranges from three, executed for murder on a single day in January 1825, to nine, hanged for non-murder offences on 18 September 1826.

Table 2: Mass executions, July 1824 to September 1826

Date	Total executed	Murder offences	Non-murder offences
22 July 1824	5	0	5
28 January 1825	3	3	0
25 February 1825	8	3	5
26 February 1825	4	0	4
31 August 1825	5	5	0
6 January 1826	8	0	8
7 January 1826	6	0	6
4 May 1826	5	5	0
5 May 1826	6	6	0
13 September 1826	7	5	2
15 September 1826	7	0	7
18 September 1826	9	0	9

⁹⁵ *Mercury*, 19 August 1823, p 3.

⁹⁶ *Mercury*, 19 August 1823, p 3.

⁹⁷ *Colonial Times*, 5 January 1827, p 4. Several of the offenders executed for murder had also been convicted of non-murder charges.

With its New Year summary of 1827, the *Colonial Times* reported that, since the opening of the Supreme Court in 1824, ‘seventy-six ! have suffered ; most of whom for murder ; and other very daring offences’; a further thirty ‘unfortunate men’ had ‘forfeited their lives’ in the northern town of Launceston.⁹⁸ This calculation does not appear to have been intended as criticism of Pedder or the capital code, but as context for the recent ‘judgement day’ reported on the same page. ‘On Saturday last,’ readers were informed, twelve men were sentenced to be executed: ‘six on Monday, and six on Tuesday next.’⁹⁹

Criminal trials were held at Sessions of Oyer and Terminer and General Gaol Delivery in Hobart Town, Launceston and Oatlands, during which all prisoners held in the town gaol were to be ‘tried, punished or delivered’.¹⁰⁰ Replicating the practice of the English assizes and the Old Bailey, prisoners convicted of non-murder offences in the Supreme Court were returned to the gaol to await sentencing ‘in batches’ at the ‘judgement days’ held at the end of a criminal sessions. As required by the *Murder Act* (1752), prisoners found guilty of that offence were generally sentenced upon conviction and executed within a few days.¹⁰¹ As Pedder later informed his patron at the Colonial Office, he had arrived in Hobart Town in 1824 to find ‘a Gaol full of Prisoners and much litigation calling loudly for the opening of the Court.’¹⁰² With the opening of the Supreme Court, capital offences could be tried locally for the first time since colonisation in 1803.

This new era in the administration of justice coincided with a number of factors that help to contextualise the frequency of executions. By the mid 1820s convict numbers were increasing rapidly, so that young, male offenders (often recidivists) formed a large proportion of the colony’s demographic profile. At the same time, an expanding free settler population demanded protection from a bushranging ‘crisis’ and escalating conflict with Indigenous people.¹⁰³ On the frontiers of settlement and in the towns, property crime and crimes of violence were also commonplace. As the *Hobart Town Gazette* explained in 1825, the new Supreme Court had ‘cognizance of all crimes from the highest treason to the lowest misdemeanour.’¹⁰⁴ The common-law world (outside

98 *Colonial Times*, 5 January 1827, p 4.

99 *Colonial Times*, 5 January 1827, p 4 (emphasis in original). Two others were sentenced to death but respited; twelve others were sentenced to seven years’ transportation.

100 W Blackstone, *Commentaries on the Laws of England*, Book 4, Chapter 19, Oxford, 1765-69, pp 266-8.

101 25 Geo III, c 37, *An Act for Better Preventing the Horrid Crime of Murder* (1752).

102 Pedder to Robert Wilmot Horton, private, 13 September 1825, CO 280/4, f 272a, reel PRO 231, Australian Joint Copying Project.

103 See S Petrow, ‘Military Police’, *Bushrangers and The Struggle for Order in Van Diemen’s Land 1803-1826*, *Law and History*, Vol 1, 2014, pp 79-111.

104 *Hobart Town Gazette*, 22 July 1825, p 4.

the United States of America) no longer distinguishes between felonies and misdemeanours; however, this distinction remained important during the early colonial period. Defined by statute or common law, felonies were (or had been) punishable by death, forfeiture of property, or corruption of the blood.¹⁰⁵ Misdemeanours were punished with a range of noncapital sanctions. Grave offences, like murder and treason, attracted mandatory sentence of death.

All capital convictions were potentially subject to review, and many death sentences were pardoned or commuted when the prerogative of mercy was exercised by the king (or his colonial delegates), frequently in response to petitions for clemency from patrons or friends of the condemned person. From 1823, the *Judgment of Death Act* authorised additional discretionary sentencing for nonmurder offences in cases where the prisoner was 'a fit and proper Subject to be recommended to the Royal Mercy'.¹⁰⁶ A formal sentence of 'death recorded' was commuted to imprisonment or transportation from the bench. Courts could also exercise considerable discretion in sentencing for non-capital offences, which attracted a range of penalties including fines, sureties for good behaviour, public whipping, branding, imprisonment and transportation.

The table below identifies the range of sentencing options available to Pedder in the mid 1820s, with examples drawn from the first three Sessions of Oyer and Terminer in the Supreme Court. Following Miethe and Lu, penalties are categorised as economic sanctions, nonlethal corporal punishments, incapacitative sanctions, capital punishment, and postmortem punishments.

105 Emsley, Hitchcock and Shoemaker, 'Crimes Tried at the Old Bailey'.

106 4 Geo IV, c 48, *An Act for enabling Courts to abstain from pronouncing Sentence of Death in certain Capital Felonies* (1823).

Class of sanction	Penalty	Explanation/examples
Economic sanctions	Pecuniary fine	1 shilling to £200, depending on the offence and the prisoner's ability to pay
	Recognizance and sureties for good behaviour	Recognizance of up to £200, with sureties of up to £100 each 'for good behaviour' for a specified period, e.g. 12 months
Non-lethal corporal punishments	Public whipping	To be publicly whipped 'at the cart's-tail' along a specified route through the town
	Branding (burning in the hand), with a successful plea of benefit of clergy	Sentence of death was not carried out in 'clergiable' capital offences. Benefit of clergy could be claimed only once, and was abolished in 1827.
Incapacitative sanctions	Imprisonment, with or without hard labour	Terms of imprisonment typically ranged from several months to several years. Brief periods of imprisonment were also combined with fines, recognizances and sureties for good behaviour.
	Transportation, to a penal station in Van Diemen's Land or New South Wales	'To be transported to a location at the Lieutenant Governor's discretion' for 7 or 14 years, or 'for the term of his natural life'. For a convict already under sentence of transportation from Britain, this constituted secondary transportation.
Capital punishment	'Death recorded'	Under the Judgment of Death Act (1823), formal sentence of death was recorded, but commuted to imprisonment or transportation by the judge.
	Death by public execution (hanging)	'To be hanged' in the town gaol or, occasionally, at a location near the scene of the crime as a particular deterrent.

Table 3: Sentencing options in the Supreme Court, 1824-27

Colonial perceptions of the 'hanging judge'

Within the English legal traditions imported to Van Diemen's Land in the early colonial period, prevailing punishment philosophies embraced both specific retribution and general deterrence. Citing the most influential conservative theorist of the age, Gattrell reminds us of William Paley's injunction

that the ‘chief end of criminal law was not justice, but “the welfare of the community”’.¹⁰⁷ In line with the ‘retributive principle of *lex talionis*’ – an eye for an eye – the colonial press gave voice to popular expectations that punishment should ‘fit the crime’.¹⁰⁸ This principle was also shared by those responsible for prosecuting criminal offences in the colony. In his opening address to the court in May 1824, Attorney General J T Gellibrand (acting as Crown prosecutor) summed up the conventional stance, quoting from Lord Chief Justice Hale’s influential seventeenth century rules for dispensing justice:

If in criminals it be a measuring cast, to incline to mercy and acquittal.

In criminals that consist merely in words, when no more harm ensues, moderation is justice.

In criminals of blood, if the fact be evident, severity is justice.¹⁰⁹

Two years later, Gellibrand’s adherence to Hale’s precepts was evident in his implicit complaint to Lieutenant-Governor Arthur that too many prisoners were being spared ‘by a Judge and Jury distinguished for humanity’.¹¹⁰

Castle’s study of New South Wales demonstrates that in principle support for the use of capital punishment was a ‘constant feature’ of newspaper editorials and execution narratives during the 1820s.¹¹¹ Hobart Town pressmen replicated the sentiments of their Sydney colleagues. Reporting the execution of Alexander Pearce ‘for *murder!*’ in July 1824 – in the first public hanging ordered by Pedder – the *Hobart Town Gazette* unambiguously supported retributive justice and the deterrent value of the gallows. In the biblically inflected language typical of contemporary executive narratives, the *Gazette* declared:

107 Gatrell, *The Hanging Tree*, p 518; W Paley, *Principles of Moral and Political Philosophy, Vol. II. The Seventh Edition, Corrected*, London, 1790, p 302.

108 Miethe and Lu, *Punishment*, pp 16-17.

109 M Hale, ‘Things Necessary to be Had Continually in Remembrance’, in G Burnet, *The Life and Death of Sir Matthew Hale, Kt., Sometime Lord Chief Justice of His Majesties Court of Kings Bench*, London, 1682, pp 44-45; R v Tibbs [1824], *Decisions of the Nineteenth Century Tasmanian Superior Courts* [http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1824/r_v_tibbs/], accessed 23 November 2011].

110 Gellibrand to Arthur, 4 January 1826, *Historical Records of Australia*, Series III, Vol V, Sydney, 1922, p 289.

111 Castle, ‘Watching them Hang’, p 43.5.

We trust that these awful and ignominious results of disobedience to law and humanity will act as a powerful caution ; for blood must expiate blood ! and the welfare of society imperatively requires, that all whose crimes are so confirmed, and systematic, as *not* to be redeemed by lenity, shall be pursued in vengeance and extirpated with *death* !¹¹²

While the notorious case of the ‘cannibal convict’ generated (and continues to elicit) particular horror and fascination,¹¹³ reporting of more quotidian offences reveals that press support for capital punishment extended to less sensational, nonmurder convictions. Celebrating the ‘annihilation’ of the bushrangers who plagued the colony in the mid-1820s, for example, the *Colonial Times* lamented that settler-colonists had ‘been compelled to witness ... the dreadful procession of the Sheriff, proceeding to demand some unhappy wretch to expiate his crimes by an ignominious death’.¹¹⁴ The retributive and deterrent values of capital punishment, however, were not fundamentally questioned.

In contrast to Davis and the tabloid histories, the colonial press regularly decried what later generations have downplayed as ‘trivial’ offences. Referring to the bushrangers’ ‘nefarious’ companion crime of sheep stealing,¹¹⁵ the *Colonial Times* noted in January 1827 that ‘numerous melancholy examples’ had also been made of the ‘depredators’ who depleted the flocks of settler-capitalists.¹¹⁶ In an editorial which resonated with the fears of this readership, the *Colonial Times* did not argue against the effectiveness of the death penalty, but rather for better detection of crime, urging that a ‘more vigilant and active civil force [be] stationed in the interior, for the protection of the property of the Settlers’.¹¹⁷ Only a few months earlier, the *Colonial Times* had heartily endorsed Pedder’s sentencing of John Cruett, John Davis, and Thomas Savell for sheepstealing. All three were, the newspaper declared, ‘notorious characters, who had long infested the Settlement of Pitt Water’.¹¹⁸ Their crime was:

112 *Hobart Town Gazette*, 24 July 1824, p. 2 (emphasis in original).

113 See for example D Sprod, *Alexander Pearce of Macquarie Harbour: Convict, Bushranger, Cannibal*, Hobart, 1977, and P Collins, *Hell’s Gates: The Terrible Journey of Alexander Pearce, Van Diemen’s Land Cannibal*, Melbourne, 2002, and republished as *Hell’s Gates: The True Tasmanian Story of the Escaped Convict who turned to Cannibalism to Survive*, Melbourne, 2014.

114 *Colonial Times*, 5 January 1827, p. 2.

115 *Colonial Times*, 22 September 1826, p. 3.

116 *Colonial Times*, 5 January 1827, p. 2.

117 *Colonial Times*, 5 January 1827, p. 2.

118 *Colonial Times*, 22 September 1826, p. 3.

one of the most ruinous offences in the Colony; for, almost every man, and every thing, depends upon our exports of wool; in illustration of which remark, we need only quote the observation made by Chief Justice Pedder, upon passing sentence on these unhappy men. His Honor said – “As respects the crime of sheep-stealing, we live here by this species of property; and the extensive acts of depredation were such as to affect not merely individual property, but the whole community.”¹¹⁹

Another non-murder offence condemned by colonial pressmen was the ‘obnoxious’ crime of stealing from one’s master. Reporting that an ‘in-door assigned [convict] servant’ named John Rowles had ‘forfeited his life for robbing his master in the daytime, during Divine Service’, the *Colonial Times* approved this instance of exemplary justice. The ‘little humpedbacked man’ was the first in the colony to be hanged for this offence:

Thus an example was made of this man ... as a caution to assigned prisoners, as well as *all* servants, in whom, more or less, confidence is placed by their masters or employers. Let them remember it was the confidence reposed in him, and broken, so shamefully, which precluded him from mercy, rendering his crime so obnoxious in the eye of the law.¹²⁰

In contrast, then, to the ‘trivial offenders theory’ evinced by the hanging judge narratives, colonial editorial comment of this kind suggests that Pedder’s contemporaries did not regard nonviolent property offences as minor or victimless crimes.

By the late 1820s, the criminal law reform movement was gaining momentum in the imperial parliament. In 1827, the new Whig Home Secretary, Sir Robert Peel, introduced a suite of consolidated legislation, which drastically reduced the number of capital offences.¹²¹ At the same time, shifting public attitudes towards capital punishment were reflected in a vocal colonial press. Having initially promoted the salutary terror of the scaffold, Hobart Town pressmen later unfavourably compared particular local practices with the more ‘humane’ punishments imposed for the same offences in England. In 1831, the trial of free settler George Woodward for forgery attracted particular attention because of the anticipated changes to statute law in the House

119 *Colonial Times*, 22 September 1826, p 3 (emphasis in original).

120 *Colonial Times*, 22 September 1826, p 3.

121 ‘Mr Peel’s Acts’ encompassed 7 & 8 Geo IV, c 27, *Criminal Statutes (Repeal) Act* (1827); 7 & 8 Geo IV, c 28, *Previous Convictions (Proof) Act*; 7 & 8 Geo IV, c 29, *Larceny Consolidation Act* (1827); 7 & 8 Geo IV, c 30, *Malicious Injuries to Property Act* (1827); 9 Geo IV, c 31, *Offences against the Person Act* (1828); and 11 Geo IV & 1 Will IV, c 66, *Forgery Act* (1830).

of Commons. Although Woodward had pleaded guilty – knowing forgery to be a capital offence – the government received petitions ‘from 193 persons principally connected with commerce, urging their desire to have the punishment of death for forgery abolished.’¹²² Reporting Woodward’s reprieve in December 1831, the *Colonial Times* was delighted that ‘no more blood will be offered up in this Colony, as a sacrifice to the folly of our ancestors, in having constituted forgery a capital offence’ when so many other crimes ‘of a graver die’ remained ‘punishable in a manner that scarcely deserves the name of punishment.’¹²³ With the clear implication that grave offences warranted harsh punishment, a change in attitude towards nonmurder and nonviolent offences is evinced in the newspaper’s ‘ameliorist’ language. In a ‘triumph of enlightened opinions over barbarity and folly’, the *Colonial Times* editorialised, Woodward’s life had been spared when the colonial government yielded to the ‘unquestionable spirit that is prevalent among the enlightened part of the Mother Country, in opposition to making forgery a capital offence.’¹²⁴

Again urging reform by comparing local practice with developments at the imperial centre, the *Tasmanian and AustralAsiatic Review* condemned the 1835 hanging of four men for burglary without violence. Subverting the Old Testament idiom typical of earlier execution narratives, it posed the rhetorical question: ‘Who will deny that these men are fresh victims to that all devouring and devastating MOLOCH!’¹²⁵ Two years later, pressmen in Hobart Town and Launceston expressed both horror and frustration when the body of John Lamb was gibbeted near the scene of a murder in a ‘revival of a disgusting relic’ of a ‘barbarous age.’¹²⁶ Having been executed in Hobart Town, Lamb’s body was taken to the Northern Midlands town of Perth, where it was ‘arranged in the usual iron casing’. The gibbet was ‘20 feet high’ and located ‘about 450 yards from the main road’ as ‘near to the spot at which he committed the murder as possible.’¹²⁷ Here, it is not Lamb’s execution for murder that is condemned, but the rarely applied post-mortem punishment of gibbeting. Hanging in chains had been abolished in England in 1834.

122 Minutes of Proceedings of the Executive Council, 12 December 1831, EC4/1/2, ff 204-5, reel Z1474, TAHO.

123 *Colonial Times*, 28 December 1831, p 2.

124 *Colonial Times*, 28 December 1831, p 2.

125 *Tasmanian and Austral-Asiatic Review*, 13 February 1835, p 55. Original capitalisation.

126 *Hobart Town Courier*, 19 May 1837, p 2, which reprinted commentary from the *Launceston Advertiser*; Davis, *The Tasmanian Gallows*, p 35. See R v McKay and Lamb [1837], *Decisions of the Nineteenth Century Tasmanian Superior Courts* [http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1837/r_v_mckay_and_lamb/, accessed 20 Aug 2014].

127 R v McKay and Lamb [1837].

In contrast to the hanging judge narratives, which imply that Pedder imposed death sentences capriciously, he was, in fact, often constrained by statute law, which included mandatory sentencing or limited judicial discretion. In cases where he could not influence a prisoner's fate from the bench, he was frequently able to advocate for mercy during post-sentencing review in the Executive Council. Peter King's quantitative analysis of Home Office pardoning policies in the late eighteenth century illustrates that otherwise mandatory punishment was 'individualised during the pardoning process'.¹²⁸ Newspaper reports and the minutes of the Executive Council reveal that many prisoners were pardoned during the review stage, and that their sentence of death was often commuted to some alternative sanction, such as transportation. By tracing the outcomes for individual prisoners after their capital conviction in the Supreme Court, we discover that many were spared the hangman's noose.

Investigating just one of the eighteen death sentences enumerated by Batman in *The World's News* underscores the need to follow prisoners through the archives. One of those sentenced to be hanged at Pedder's 'record' session in 1829, for example, can be identified as Benjamin Laws, a convict transported in 1820. Batman has Pedder sentencing him to hang for 'robbery on the highway, involving a few sacks of flour'.¹²⁹ A search of the *Hobart Town Courier* (cited by Batman) reveals that Laws had, in fact, stolen 82 lbs (37 kg) of flour belonging to a major landowner, Richard Dry.¹³⁰ Laws' convict conduct record reveals that he was a repeat offender, who had already stolen £10 worth of 'wheaten meal' from Dry.¹³¹ The same edition of the *Courier* also confirms that Laws was not hanged, but reprieved (with another three of the original eighteen) a few days before the scheduled execution, and was ultimately granted a Ticket of Leave in 1834.¹³²

Batman's selective use of archival sources is further exposed in his claim that sentencing such numbers was 'routine' for Pedder. In its contemporary report of the Supreme Court sittings, the *Launceston Advertiser* in fact lamented that 'so heavy a calendar of Capital convictions' had 'never occurred in this town before'.¹³³ Another feature noted by colonial commentators is the emotional impact on Pedder of performing his judicial duty. In a passage ignored by Batman, the *Launceston Advertiser* went on to observe that,

128 P King, *Crime, Justice and Discretion in England, 1740-1820*, Oxford, 2000, p 314.

129 Batman, 'The Bad Old Days', p 10.

130 *Hobart Town Courier*, 21 February 1829, p 2 (extracted from the *Launceston Advertiser*, 9 February 1829, p 3). The *Courier* reports 820 lbs, but Laws' handwritten conduct record has 82 lbs. Benjamin Laws conduct record, CON31/1/27, TAHO.

131 Benjamin Laws conduct record, CON31/1/27, TAHO.

132 *Hobart Town Courier*, 21 February 1829, p 2 and 18 April 1834, p 2.

133 *Launceston Advertiser*, 9 February 1829, p 3.

in condemning so many to be hanged, the chief justice ‘appeared deeply affected’, and addressed the ‘unhappy men’ in a ‘most feeling and impressive manner’ before sentencing.¹³⁴

Press reports regularly noted that the chief justice was visibly distressed when sentencing prisoners to hang. On sentencing of a group of convicts who had murdered a constable during an escape from the Macquarie Harbour penal station in 1827, for example, the *Hobart Town Courier* observed that the judge was ‘almost overcome by the lamentable and unexampled spectacle of nine human beings convicted of so cold blooded a murder’.¹³⁵ ‘Greatly agitated and affected’ by another murder case in 1840, the *Launceston Courier* noted that Pedder’s ‘voice was frequently broken, and tears were rolling profusely down his cheeks’.¹³⁶ Replicating these observations in his 1873 letter to the *Mercury*, Pedder’s old friend JW Kirwan provides similar insights into the emotional strain of mandatory sentencing on a judge charged with enforcing it. Refuting Calder’s characterisation of the judge as ‘illtempered’ and ‘harsh’, Kirwan vividly recalled that the ‘struggle between duty and the softer and gentler feelings of his heart was visible to all’.¹³⁷ Whenever it was his ‘painful duty to pass sentence of death on a fellow creature’, Kirwan averred, Pedder’s ‘whole frame trembled’ and he was ‘overcome with the humane emotions of his nature’.¹³⁸ At such times the sensitive chief justice ‘endured more agony than the prisoner in the Dock’.¹³⁹

In contrast to the claims of Davis and the newspaper histories, Pedder’s judicial biographer JM Bennett has more recently argued that the chief justice ‘could never shut his mind to the finality of capital punishment’.¹⁴⁰ Highlighting Pedder’s evident discomfort at pronouncing sentence of death, Bennett refutes his bloodthirsty reputation (particularly as propounded by Calder) as ‘virtually the antithesis of the truth’.¹⁴¹ Bennett usefully traces the myth of Pedder’s ‘infirmity of temper’ to the ‘columns of early hostile journalists’, who engaged in ‘polemics against authority’, often in defence of libel proceedings against themselves.¹⁴² He reads Calder’s ‘obsessive criticisms’ of Pedder as an embellishment of this local tradition.¹⁴³ Again, Kirwan can be

134 *Launceston Advertiser*, 9 February 1829, p 3.

135 *Hobart Town Courier*, 15 December 1827, p 3.

136 *Launceston Courier*, 11 April 1842, cited at R v Ainsworth [1842], *Decisions of the Nineteenth Century Tasmanian Superior Courts* [http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1842/r_v_ainsworth/], accessed 20 Aug 2014].

137 *Mercury*, 27 August 1873, p 3.

138 *Mercury*, 27 August 1873, p 3.

139 *Mercury*, 27 August 1873, p 3.

140 Bennett, *Sir John Pedder*, p 62.

141 Bennett, *Sir John Pedder*, pp 63-4, 66.

142 Bennett, *Sir John Pedder*, pp 63-4.

143 Bennett, *Sir John Pedder*, pp 63-4.

read as supporting Bennett's interpretation. The former Clerk of the Executive Council directly challenged the implications of Calder's claim that Pedder had 'passed more death sentences than any "living Judge"'.¹⁴⁴ Given Pedder's thirty years on the bench, Kirwan did not dispute the fact that he had sentenced many offenders to death. Instead, he asked: 'Was this the fault of the Judge?'¹⁴⁵ Offering a useful counterpoint to Calder's personal hostility towards Pedder, Kirwan sought to 'vindicate' the 'memory of one of the most upright and humane Judges that ever presided on the Bench in Her Majesty's dominions'.¹⁴⁶ In his view, the judge was 'simply the living mouth-piece of the law' and if, 'like Draco's', it had been 'written in letters of blood' it was not by Pedder, but the imperial parliament.¹⁴⁷

Conclusions

Sir John Pedder's reputation as a Tasmanian Judge Jeffreys does not reflect the attitudes of his contemporaries in Van Diemen's Land. An attentive reading of later newspaper 'histories' reveals that his construction as a hanging judge owes more to a compelling literary device than the evidence of the colonial archive. The enduring popular appeal of a trope which posthumously casts frontier judges as judicial murderers is evident in the writings of James Erksine Calder (*Mercury*, 1873), *The History of Tasmania written specially for 'Truth'* (1915), and Oxley Batman (*The World's News*, 1951). Examples of key motifs of this centuriesold literary tradition (including 'harsh' sentences ordered by an 'illtempered' judge) are freely applied to Pedder. Some additional elements resonate in the Van Diemen's Land context, such as the antipathy of reformist pressmen towards the Arthur administration, of which Pedder was a central member. Postcolonial folk memory of the 'dark days' of convictism also adds to the narrative's popularity, and inspires sympathy for offenders—many of them the readers' ancestors—rather than curiosity about the operation of the criminal code in a penal colony.

Just as the vocabulary of the tabloid histories reiterates the core theme of the 'bad old days', the only substantial scholarly treatment of capital punishment in Van Diemen's Land/Tasmania is redolent with 'ameliorist' language, and betrays its abolitionist sentiments with phrases like 'the slow growth of humanitarian feeling' in a 'more rational society'. Like the tabloid histories, Richard Davis' *The Tasmanian Gallows* (1974) reflects the preoccupations of its own day and condemns rather than problematises the death penalty. In the

144 *Mercury*, 27 August 1873, p 3.

145 *Mercury*, 27 August 1873, p 3.

146 *Mercury*, 27 August 1873, p 3.

147 *Mercury*, 27 August 1873, p 3.

process, it decouples historical offences from the intersecting imperatives of an important transitional period in penal philosophy and practice.

At the risk of reading like an apologia for the death penalty, this article argues that identifying the statutory framework and social meanings of the bloody code in the early colonial period is essential for understanding its application. Following Miethe and Lu, it uses archival evidence to demonstrate that punishment is both time and context-specific. Where early nineteenth-century abolitionists sought to temper severity with justice, colonial editorials indicate that mainstream advocates of the death penalty continued to echo Chief Justice Hale's precept that, in certain cases, severity *was* justice. On the other hand, public opinion increasingly anticipated legislative reform, so that the death penalty for nonviolent property offences, such as forgery, was condemned in the colonial press by the early 1830s. Murder and other crimes of violence (including sexual offences), however, continued to inspire community horror and expectations of retributive justice as the nineteenth century progressed.

In contrast to the capricious capital felony process conjured in popular (and even scholarly) imagination, the law, penal philosophy and community consensus that punishment should fit the crime frequently constrained the exercise of judicial discretion. Mandatory capital penalties could often be moderated during the post-sentencing review process, so that many of those initially condemned to death were later reprieved. Future comparative quantitative analysis has the potential to fill a significant gap, both in the legal historiography of the island and in our knowledge of the true execution rate during the so-called 'heyday of capital punishment'.

As chief justice of a penal colony in the dying decade of the 'bloody code', Pedder undoubtedly sentenced many individuals to the scaffold. By uncritically replicating his construction as a Tasmanian Judge Jeffreys, however, the hanging judge narratives diminish our capacity to make sense of a profoundly different penal philosophy paradigm. Indeed, the evocative archival traces of Pedder's emotional responses are perhaps even more unsettling than the familiarly loathsome stock character invoked by the name of Judge Jeffreys, for they challenge us to contemplate the gallows regime from the perspective of one of its reluctant agents.