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Hang the Convicts: Capital Punishment and the Reaffirmation of South Australia's Foundation Principles

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... the cap had been drawn over his face, and the prayers were concluded ... But here commenced one of the most frightful and appalling sights that ever perhaps will be again witnessed in the colony. The noose had been so badly managed, that the knot, instead of the ear, came right under the chin of the dying man; and as the cart was very slowly drawn from under him, he did not fall, but merely slid gradually off; and there he was, hanging in the air, uttering the most excruciating cries, 'Oh God! Oh Christ! Save me!'¹

With these agonising shrieks ringing out across the Adelaide Parklands, the history of capital punishment in the colony of South Australia began. The unfortunate man was Michael Magee, an Irish Catholic who had been convicted of attempting to murder the Sheriff. The botched hanging was only resolved when the executioner made a 'fiendish leap upon the body of the dying man' so that the extra weight on the neck would quicken the strangulation.² Magee was the first of sixty-five men and one woman to be hanged in South Australia, with the last execution occurring on 24 November 1964.³ Not all were as primitive affairs as the one just described. Instead of rope slung over the protruding branch of a gum tree, portable gallows were conceived, and a permanent hanging tower was eventually erected inside the Adelaide Gaol.

There exists a curious commonality amongst those sentenced to death in the first twenty-five years of European settlement in South Australia. Of the thirty hangings conducted, twenty-two were Indigenous persons and seven (including Magee) were former or escaped convicts; it took some eighteen years before a free settler of

¹ T. H. James, *Six Months in South Australia; with Some Account of Port Philip and Portland Bay in Australia Felix*, Adelaide, 1962 [1838], pp. 59-60.

² *Ibid.*, p. 60.

³ D. Towler and T. Porter (eds), *The Hemp Collar: Executions in South Australia: 1836-1964*, Adelaide, 1990, pp. 145, 148-50.

European origin was hanged for a crime.⁴ In this article we examine the reasons why the hangman visited former or escaped convicts more than any other group.⁵ It is now well established that all Australian colonies experienced a growing abhorrence of convicts and the convict past, a revulsion that coalesced around the anti-transportation campaigns and which reflected and were shaped by an increasing mood for self-governance and sovereignty.⁶ However, in South Australia this phobia was particularly acute, because the colony prided itself on being convict free. It was and remains a state whose people are proud of a foundation set in the ideas of systematic colonisation, untarnished by the 'moral leprosy of convictism'.⁷ Escapees from Van Diemen's Land like Magee, or migrating emancipists, were not the immigrants whom the South Australian authorities wanted. This mentality is exemplified in a letter written by Governor George Grey to the Secretary of State for War and the Colonies in September 1845, seven years after Magee's execution, protesting the advertisements appearing in the Van Diemen's Land press which encouraged conditionally pardoned convicts to settle in all Australian colonies, including South Australia:

In the first place, as the strongest possible prejudice against a convict population has always existed here, the adoption of the system of granting conditional pardons

⁴ The first non-convict to hang in South Australia was William Bell who was executed for 'brutally murdering' Augustus Ulbrecht at Port Adelaide on 9 November 1854. *South Australian Register*, 8 December 1854, p. 3.

⁵ On the execution of Indigenous people, see R. Barber, 'Rape as a Capital Offence in Nineteenth Century Queensland', *Australian Journal of Politics and History*, Vol. 21, No. 1, 1975, pp. 31-41; C. Harris, 'The "Terror of the Law" as Applied to Black Rapists in Colonial Queensland', *Hecate*, Vol. 8, No. 2, 1982, pp. 22-48; S. Davies, 'Aborigines, Murder and the Criminal Law in Early Port Philip, 1841-1851', *Historical Studies*, Vol. 22, No. 88, 1987, pp. 313-335; L. Connors, 'The Theatre of Justice: Race Relations and Capital Punishment at Moreton Bay 1841-59', in R. Fisher (ed.), *Brisbane: The Aboriginal Presence, 1824-1960*, Brisbane, 1992, pp. 48-57; J. McGuire, 'Judicial Violence and the "Civilizing Process": Race and the Transition from Public to Private Executions in Colonial Australia', *Australian Historical Studies*, Vol. 29, No. 111, 1998, pp. 187-209; M. Finnane and J. McGuire, 'The Uses of Punishment and Exile: Aborigines in Colonial Australia', *Punishment & Society*, Vol. 3, No. 2, 2001, pp. 279-298; R. Foster, R. Hosking and A. Nettelbeck, *Fatal Collisions: The South Australian Frontier and the Violence of Memory*, Adelaide, 2001; S. Adams, *The Unforgiving Rope: Murder and Hanging on Australia's Western Frontier*, Perth, 2009; A. Pope, *One Law For All?: Aboriginal People and Criminal Law in Early South Australia*, Canberra, 2011.

⁶ For recent scholarship, see D. A. Roberts *et. al.*, 'Beyond "the Stain": Rethinking the Nature and Impact of the Anti-Transportation Movement', *Journal of Australian Colonial History*, Vol. 14, 2012, pp. 205-79.

⁷ *South Australian Register*, 10 September 1845, p. 2.

[in VDL] is rapidly introducing into this community a class of persons who are disliked and are regarded as a separate and distinct class, placed in an inferior social state to the rest of the population, and who consequently ... will neither be able to mingle with the rest of the population, nor to separate themselves from their former companions. In the second place ... many respectable families who emigrated here in the full belief that no persons would be permitted to pass into South Australia from the neighbouring colonies ... will become seriously alarmed as to the effect that this circumstance may have upon the future prospects of their children, and they will also be apprehensive ... that other respectable persons will be deterred from emigrating to a settlement in which a numerous class of individuals holding such conditional pardons is known to exist.⁸

To borrow the main thrust of historian Douglas Pike's authoritative account of the first twenty-years of South Australia, this new colony was, above all, intended to be a 'paradise' for religious dissenters and ambitious free men and women.⁹ Governor Grey, along with those governors before and after him, were determined to illustrate that South Australia would be no Eden for Australia's convict population. However, considering it was legally difficult and almost practically impossible to prevent ex-convicts from entering the colony,¹⁰ how did the early lawmakers deter these fallen settlers from emigrating? As will be revealed, capital punishment expanded beyond its punitive function to become an important tool that was employed by the early colonists to reaffirm the foundation principles of South Australia. To deter these 'illegitimate' settlers from arriving, those with a convict past were sometimes hanged for crimes that, in any other circumstance, may not have warranted the law's most extreme punishment. Furthermore, the rhetoric surrounding all convict hangings was depressingly constant. Beginning with the trial of Magee in 1838, the

⁸ Grey to Stanley, 6 September 1845, in *South Australia, Convicts (Van Diemen's Land): Copies of all correspondence between any person or persons interested in South Australia and the Colonial Office, respecting the effect upon that Province, of the official notice of the Comptroller-General [sic] of Van Diemen's Land, of the 21st day of June 1845, relative to convicts in that colony who were holders of conditional pardons*, House of Commons, 26 August 1846, Barr Smith Library Rare Books Collection, University of Adelaide.

⁹ D. Pike, *Paradise of Dissent: South Australia 1829-1857*, London, 1957.

¹⁰ P. Sendziuk, 'No Convicts Here: Reconsidering South Australia's Foundation Myth', in R. Foster and P. Sendziuk (eds), *Turning Points: Chapters in South Australian History*, Adelaide, 2012, pp. 33-47.

belief that those with a convict past were responsible for almost all crime committed by European settlers was often asserted. Thus, capital punishment was a way of reassuring the early settlers that action was being taken to control the criminal class. By hanging these 'outsiders', it was thought South Australia could be purified of these unwanted emigrants and shaped in a way that was true to its founding ideals.

Given its controversial nature and continuous existence on the statute books for 140 years, capital punishment remains a surprisingly under-researched area of South Australian history.¹¹ The closest this subject receives in the way of genuine historical analysis is a 1970 article by A. R. G. Griffiths, which is a largely quantitative account of capital punishment that establishes the total number of people either hanged or whose death sentence was commuted.¹² Towler and Porter's *The Hempen Collar* provides a compendium of primary sources concerning capital punishment in South Australia.¹³ Robert Clyne, a historian of the early South Australian Police Force, provides the only sustained legal and historical account relating to the position of runaway and ex-convicts held in colonial South Australian society. Clyne examined the relationship between 'legitimate' and 'illegitimate'

11 The literature concerning the use of capital punishment in the eastern colonies is much more extensive. See R. Barber, 'Capital Punishment in Queensland', B.A. (Hons) thesis, University of Queensland, 1967; R. Davis, *The Tasmanian Gallows: A Study of Capital Punishment*, Hobart, 1974; M. Sturma, 'Public Executions and the Ritual of Death, 1838', *Push from the Bush*, No. 15, 1983, pp. 3-11; A. Lattas, 'The Aesthetics of Terror and the Personification of Power: Public Executions and the Cultural Construction of Class Relations in Colonial New South Wales, 1788-1830', *Social Analysis*, No. 19, 1986, pp. 3-21; R. Douglas and K. Laster, 'A Matter of Life and Death: The Victorian Executive and the Decision to Execute 1842-1967', *Australia & New Zealand Journal of Criminology*, Vol. 24, No. 2, 1991, pp. 144-66; K. Laster, 'Famous Last Words: Criminals on the Scaffold, Victoria, Australia, 1842-1967', *International Journal of the Sociology of Law*, Vol. 22, No. 1, 1994, pp. 1-18; M. Finnane, *Punishment in Australian Society*, Melbourne, 1997, pp. 126-39; T. Castle, 'Constructing Death: Newspaper Reports of Executions in Colonial New South Wales, 1826-1837', *Journal of Australian Colonial History*, Vol. 9, 2007, pp. 51-68; T. Castle, 'Watching Them Hang: Capital Punishment and Public Support in Colonial New South Wales, 1826-1836', *History Australia*, Vol. 5, No. 2, 2008, pp. 43.1-43.15.

12 A. R. G. Griffiths, 'Capital Punishment in South Australia 1836-1964', *Australian and New Zealand Journal of Criminology*, Vol. 3, No. 4, 1970, pp. 214-22. Griffiths overlooked some executions occurring in the first twenty-five years such as the hanging of Nultia in 1843, and omits the 1840 hanging of Pilgarie and Mangarawata in the aftermath of the Maria Massacre, believing it to be a 'doubtful case' (p. 222). Griffiths also states that an Indigenous person was executed in 1906, but the hanged man was in fact a Muslim immigrant. See *The Adelaide Times*, 17 November 1906.

13 D. Towler and T. Porter (eds), *The Hempen Collar: Executions in South Australia: 1836-1964*, Adelaide, 1990.

settlers in the period 1836 to 1848; the 'legitimate' settler representing someone who conformed to Edward Wakefield's vision of a hardworking and law-abiding British colonist, and the 'illegitimate' settler connoting the escaped convict, emancipist and ticket-of-leave men who arrived in the colony unannounced and unwanted.¹⁴ These terms were part of South Australian discourse during this period. Clyne concluded that, despite the inflated rhetoric, the 'legitimate' settler largely overstated the threat emanating from the convict population.¹⁵ South Australian settlers certainly feared the incursion of escaped and ex-convicts, and as we argue, the gallows became an instrument where settler anxieties could be calmed and a degree of control exerted over this unwanted group of immigrants.

* * *

Among the first 'illegitimate' settlers to suffer the death penalty in South Australia were two of a trio of runaway convicts named George Hughes, Henry Curran and James Fox. In early 1840, these three men embarked upon profoundly under-whelming careers as 'bushrangers'. Their short-lived crime spree commenced on 26 January 1840 when they arrived at the house of a family of German immigrants, Michael and Mina Pffender, who lived with their daughter on the Little Para River. The encounter began harmlessly enough with the men asking politely for some bread and eggs to eat, as well as wine to drink, after an unsuccessful day hunting emus in the bush. As night fell, the men prepared to depart, at which time Mrs Pffender asked if they would be kind enough to pay for what they had eaten. In a sudden change of mood, Hughes rejected the offer, pushed the family towards the bed and 'took the lamp and held it to the thatch, and said that unless they got money they would set the house on fire'. While Fox stood guard at the door of the house, Hughes and Curran persisted with their demands until it became apparent that no money was kept on the premises. The runaway convicts were only successful in procuring some of Mr Pffender's spare clothes and his wife's bag, along with a length of rope to tether their horses. As the thieves made their escape, Mina Pffender was spotted on foot trying to raise the alarm and was subsequently shot at, most probably by Curran, who missed in the

¹⁴ R. Clyne, 'Legitimate Settler: Reaction Against the Escaped Convict and Other Illegitimates in South Australia, 1836-1848', BA (Hons) thesis, Flinders University, 1976, p. v.

¹⁵ *Ibid.*, p. 52.

darkness of night.¹⁶ After the incident at Pffender's house, the men allegedly took foodstuffs from the tent of an overseer two days later and, not long after that, stole a gun and other minor items from the tent of a Mr Jones.¹⁷ The trio were soon captured while 'helplessly drunk' at 'Crafers bush public-house', a hotel in the Adelaide Hills.¹⁸

On 6 March 1840, Hughes, Curran and Fox appeared in the South Australian Supreme Court to answer for their actions. Although the charges were routine, they were quite numerous. Collectively they faced four counts of theft, one count of receiving, one accusation of assault and, most seriously, they had to explain why a firearm was discharged in the vicinity of Mina Pffender.¹⁹ Although there was some degree of truth in the other charges levelled at the trio, the jury eventually found the prisoners not guilty on all charges except one — the theft of items totalling £5.²⁰ In sentencing, the judge decided to implement the law's most severe penalty by declaring that Hughes, Curran and Fox were to be executed outside the Adelaide Police Barracks on 16 March 1840. In 1887, almost fifty years later, Thomas Giles recalled the scene:

I see before me now as if yesterday Curran killing the small black flies as they pestered his eyes ... I see Hughes before me quickly mounting the gallows ladder, blowing defiantly a 'long cloud' in the full bravado of his brutal nature. He struggled with the hangman (masked), tried to kick him, and in being turned off he caught the edge of the trapdoor with one heel, and there remained supported by the rope round his neck and his heel on the side of the trap for some seconds. Hughes died like a wild beast, Curran with decency.²¹

The author neglected to mention that Fox's sentence of death had been commuted to transportation for life the previous evening.²² Michael Pffender's insistence that Fox was 'very unhappy and unwilling to do what he was doing' proved pivotal in the prisoner's change of

¹⁶ *South Australian Register*, 7 March 1840, p. 5.

¹⁷ *Southern Australian*, 5 March 1840, p. 4.

¹⁸ J. Hawker, *Early Experiences in South Australia*, Adelaide, 1975 [1899], p. 65.

¹⁹ 'Supreme Court Indictments (and Some Depositions) Criminal Sittings 1837-1850', GRG 36/1, State Records of South Australia (SRSA).

²⁰ *South Australian Register*, 7 March 1840, p. 5.

²¹ *Ibid.*, 16 December 1887, p. 7.

²² Hawker, *op. cit.*, p. 67.

fortunes.²³ This said, the colony's newspapers rejoiced in the decision to hang the runaway convicts. 'However abhorrent such scenes may be to humanity', wrote the *Adelaide Chronicle*, 'it is absolutely necessary that the hardened villains who escape from punishment in the neighbouring colonies, be taught that they have no triflers to deal with here — that there is a determination, on the part of the Government, to protect to the utmost, the lives and properties of its constituents'.²⁴ The Executive Council, when considering the possibility of granting clemency, certainly expressed such determination. Governor George Gawler argued 'that the position of a young colony without any military force on the frontier of a penal settlement from which the most depraved and hardened offenders were willing to pour in upon it rendered very energetic measures necessary for the prompt and effectual suppression ... of bushranging'. Therefore, 'when such offenders as the Prisoners Hughes and Henry Curran could be convicted on clear evidence it was important for the welfare of the colony that the extreme penalty of the law should be inflicted on them'.²⁵ The *Register* mirrored this perspective, further proselytising the benefits of hanging escaped convicts:

[W]hen the lives and properties of hundreds of settlers are put in opposition to the lives of two or three hardened and determined bandits, it is, not only just, but absolutely necessary, that strong measures be resorted to, to show that in South Australia the laws which bind society together will not be trampled on with impunity ... We trust that this execution will bring under the notice of Government the absolute necessity that exists for preventing the wholesale importation of convicts from the neighbouring colonies ...²⁶

With the event receiving a resounding endorsement from the colony's young newspapers, a precedent had been established whereby it became the norm to treat offenders haunted by a convict background with exemplary severity. Hughes and Curran had been found not guilty of attempting to murder Mina Pffender, and had thus been executed for stealing items to the value of £5. This was by no means an extravagant amount even in 1840. For the purposes of comparison, £5

²³ *South Australian Register*, 7 March 1840, p. 5.

²⁴ *Adelaide Chronicle*, 17 March 1840, p. 2.

²⁵ Minutes of the Meeting of the Executive Council, 15 March 1840, GRG 40/1/Vol. 1 (1838-1840), SRSA.

²⁶ *South Australian Register*, 21 March 1840, p. 5.

was the same amount of a fine incurred for lighting unauthorised fireworks in the colony's capital.²⁷ From this example, it becomes apparent that capital punishment was employed as a deterrent to would-be 'illegitimate' settlers from emigrating. Like the majority of settlers undoubtedly aware of the new colony's foundation principles, those operating the levers of the law in South Australia were determined to ensure that the stain of convictism would never taint Australia's southern shores.

This enthusiasm for hanging those with a convict past extended to the execution of Thomas Donnelly in 1847. Donnelly was a former convict who had been transported to New South Wales in 1841. Six years later, Donnelly travelled to the 'free colony' of South Australia and eventually found employment at the station of Mr Davenport near Rivoli Bay.²⁸ On the morning of 1 September 1846, Donnelly had, for reasons not mentioned, been 'discharged' from Mr Davenport's station. When eating his last lunch at the station hut, Donnelly quarrelled with some of the other men who were in the employ of Davenport. He left shortly thereafter saying a final 'Good-bye' but to no answer.²⁹ Not long after, an inflamed Donnelly was spotted returning to the hut by a nearby Indigenous man commonly referred to as 'Billy'. Perhaps sensing menace in Donnelly's actions, Billy let out a loud 'coo-ee' and yelled repeatedly, 'white man coming', to warn those in the hut.³⁰ Upon hearing the words of Billy, the men remaining in the hut began to load their rifles in the expectation of his return. However, as the station hands prepared for violence, a shot sounded in the distance. To borrow the words of G. H. Pitt who researched the case in 1941, 'It would appear that Donnelly was approaching to do Smith [one of the men in the hut] some injury and, annoyed with Billy for giving warning, shot him dead in a blaze of angry resentment'.³¹

Although to the modern observer a clearly terrible crime wholly deserving of severe punishment, to the colonist of the mid-nineteenth century, trials of this nature were very uncommon. The *Southern Australian* acknowledged the rarity of Donnelly's charge, proudly

²⁷ R. Clyne, *Colonial Blue: A History of the South Australian Police Force*, Adelaide, 1987, p. 29.

²⁸ G. H. Pitt, 'Thomas Donnelly and the Shooting of the Native "Billy"', State Library of South Australia, Research Note 237.

²⁹ *Southern Australian*, 16 March 1847, p. 5.

³⁰ *Ibid.*

³¹ Pitt, *op. cit.*, np.

declaring that 'To the credit of the Province be it said that never before in our Courts has a white man been brought up for the deliberate and wilful murder of a native, and we give this credit with the greater confidence, because our police are so vigilant and active, that if there had been cases of murder they would long ere this time have been discovered'.³² Though a statement beginning with an untruth³³ and ending in wishful thinking, the general notion that Europeans were seldom called to the dock to answer for the murder of an Indigenous person is correct. Settlers on the frontier tended to conceal any wrongdoing towards Indigenous peoples and police were often half-hearted in pursuing culprits. However, the obvious dislike of Donnelly by the men on Davenport Station's meant that the normal conventions of concealment and understatement were not activated on this occasion.³⁴

In addition to the infrequency of the charge, another uncommon aspect of the case was that Donnelly was convicted with the aid of the testimony of a ten-year-old Indigenous boy. Nicknamed 'Jemmy' by the European station hands, he was the only witness to Donnelly's crime and thus formed an important part of the case for the prosecution. The admissibility of Aboriginal evidence had been secured by law in 1844, only three years prior to the trial,³⁵ although the cumbersome fashion in which 'Jemmy' was sworn in illustrates the misgivings many had over this newfound right:

The court required that a native witness should declare that he will speak the truth, the whole truth, and nothing but the truth. This boy did not understand the abstract word truth, but could say that he would tell no lies. It was got over by him repeating, word by word, by rote, the prescribed form after Mr Moorhouse [the then Protector of the Aborigines], who explained that the natives had no idea of abstract words, no word meaning

³² *Southern Australian*, 16 March 1847, pp. 3-4.

³³ For example, in September 1841 a man named William Roach was tried for the murder of the Indigenous person, Wortu Kudnaitya. A. Pope, 'Aborigines and the Criminal Law in South Australia', Ph.D. thesis, Deakin University, 1998, pp. 89-90.

³⁴ For further discussion on the policing of the frontier and how the 'language of concealment' operated, see R. Foster, "'Don't Mention the War': Frontier Violence and the Language of Concealment', *History Australia*, Vol. 6, No. 3, 2009, pp. 68.1-68.15.

³⁵ South Australia, No. 8 of 1844, *An Ordinance to Allow the Aboriginal Inhabitants of South Australia and the Parts Adjacent, to Give Information and Evidence Without the Sanction of an Oath*, Adelaide, 1844.

truth in their language, but that they would express themselves thus – 'Mine is not the language of lies'.³⁶

In the witness stand, 'Jemmy' testified that Donnelly shot Billy with a 'piccaninny gun; he shoot blackfellow; blackfellow then sit down at Miami [the name of the deceased's hut]; blackfellow was hurt very much'. Then, in a peculiar scene, the boy exited the dock and crawled on the courtroom floor to mimic Billy's agonised movements immediately following the shooting.³⁷

Alan Pope, considering how Indigenous evidence was weighted and interpreted in South Australian courts, noted that 'In cases involving Europeans ... Aboriginal evidence was treated very cautiously, often to the point of dismissal. Even where the European accused's offence was minor, Aboriginal evidence was given little credence'.³⁸ This distrust of Aboriginal evidence is exemplified in an amendment passed in 1846, the year before Donnelly's execution, which proclaimed, 'No persons, whether Aboriginal native or other, shall be adjudged to suffer death or be sentenced to transportation upon conviction of any offence upon the sole unsworn testimony of such uncivilized persons'.³⁹ However, in the case of the ex-convict Donnelly, discounting some initial objections in court, the customary doubt that accompanied 'native evidence' was not forthcoming. The testimony of the ten-year-old was said to have validated the other witness statements, with a reporter opining that the 'evidence of a white man on oath was never more firmly believed than the evidence of that boy ... After this, no one can sneer at native testimony'.⁴⁰ Thus, on the evidence of 'Jemmy' and the other station hands, the Supreme Court pronounced the sentence of death upon Thomas Donnelly. He was subsequently executed before a public audience on 29 March 1847 at the Adelaide Gaol.⁴¹

³⁶ *South Australian Register*, 17 March 1847.

³⁷ *Southern Australian*, 16 March 1847, p. 5.

³⁸ Pope, 'Aborigines and the Criminal Law in South Australia', p. 106.

³⁹ South Australia, No. 5 of 1846, section 5, Act to Amend 'An Ordinance to Allow the Aboriginal Inhabitants of South Australia and the Parts Adjacent, to Give Information and Evidence Without the Sanction of an Oath', Adelaide, 1846. Note that Donnelly was not convicted solely on the testimony of the 'native boy' but upon other evidence too. Therefore, his guilt was not arrived at unlawfully. Still, the admissibility of and weight given to Jemmy's testimony was irregular at the time.

⁴⁰ *Southern Australian*, 16 March 1847, p. 4.

⁴¹ *South Australian Register*, 31 March 1847, p. 2.

While the jury had presumably made the correct decision in finding the defendant guilty, it is evident that Donnelly's convict past weighed heavily against him in the case. Donnelly was hanged on a charge rarely heard in court and upon some evidence that was usually regarded with a high degree of scepticism. In the 140-year history of capital punishment in South Australia, Donnelly remained the only person to be hanged for the murder of an Indigenous person. Considering the countless other cases of Aborigines murdered in the process of colonisation going largely untried, perhaps the experience of Donnelly represents a highly uncharacteristic urge on the part of the judiciary to finally dispense justice on behalf of murdered Aborigines. However, with the colony just over a decade old and still obsessed with remaining convict free, the judge's atypical actions more realistically indicate that Donnelly's convict heritage was an important factor leading to his eventual demise.

Other doomed men who unhappily bore the burden of a convict past to a sitting Supreme Court judge were Joseph Stagg in 1840, James Yates in 1850 and William Wright in 1853. All three were found guilty of murder and suffered the extreme penalty of the law. In the case of Wright, a man accused of fatally stabbing Robert Head, the colony's newspapers argued that the former convict's charge should have been downgraded and given a lesser sentence. This is because Wright's actions were widely seen to be provoked by the deceased, a man 'long known to the police as a violent and dangerous character'.⁴² The *Adelaide Times* protested vehemently against the sentence of death soon after it was delivered: 'We solemnly believe that there could scarcely be found another English lawyer of moderate attainments in his profession, who would not have charged a jury, that a crime perpetrated in hot blood, in the presence of a considerable number of witnesses, is manslaughter, and not murder'.⁴³ Even after a petition was sent to the governor, pleading for the commutation of his sentence to imprisonment for life, leniency was not forthcoming. The Executive Council was the body charged with deciding Wright's fate and comprised the Governor, Colonial Secretary, Advocate General, Surveyor General and, on this occasion, the man who presided over the case, Justice Cooper. Unfortunately the reasoning behind its decision to reject clemency remains obscured as the details of the

⁴² *Adelaide Times*, 5 March 1853, p. 3.

⁴³ *Ibid.*, 14 March, 1853, p. 3.

discussion go unrecorded in the minutes of the meeting.⁴⁴ As a result of this failed attempt to attain a reprieve, the 'Convict Wright' was executed, pursuant to the orders of the court, on 12 March 1853.⁴⁵

* * *

To test whether or not escaped or former convicts in South Australia suffered exceptional punishment we have widened the scope of investigation. How did they fare in other colonies that were also established as free settlements? And during the first twenty-five years of white settlement, did they meet more severe punishment for non-capital offences compared to European offenders of non-convict origin? Unfortunately conclusions are difficult to draw. The Swan River colony, also established as a free colony, provides a logical comparison, although it accepted convict transportation in 1850. The development of the Swan River colony was curtailed by a chronic shortage of labour and capital which predisposed it to accept convicts even before transportation officially began. Between 1842 and 1849, for instance, the colony received some 234 juvenile offenders from Parkhurst Prison on the Isle of Wight, accepted with the approval of Governor John Hutt and the Agricultural Society.⁴⁶ South Australians, on the other hand, fiercely opposed the proposal to send Parkhurst prisoners to the colony and none were received.⁴⁷

A comparison between the punishment for lesser offences committed by those with and without convict backgrounds is also difficult to make. In the first place, non-capital cases were less likely to attract newspaper coverage or have their proceedings recorded in diaries, letters, petitions or other forms of correspondence. In the absence of detailed court records for this period, these are the only sources from which to determine the facts of the case and the offender's background. There is also the problem of nomenclature, as the use of the word 'convict' changed considerably during the period. Where 'convict' and 'prisoner' once carried two separate and distinct meanings ('convict' being shorthand for a criminal who had been transported, and 'prisoner' for someone who was not necessarily a

⁴⁴ Minutes of Executive Council meeting, 28 February 1853, GRG 40/1/Vol. 3 (1843-55), pp. 407-8, SRSA.

⁴⁵ *Adelaide Observer*, 19 March 1853, p. 3.

⁴⁶ A. Gill, *Convict Assignment in Western Australia: The Parkhurst 'Apprentices', 1842-1851*, 2nd ed., Perth, 2004.

⁴⁷ See for example, *South Australian Register*, 9 January 1845 and 22 January 1845.

transportee but had been imprisoned for a crime), the two words had become interchangeable by the 1850s. In cases that did not attract detailed discussion in the press or private correspondence, and thus for which very little information survives, the use of the word 'convict' to describe offenders offers no certainty as to their background. Of course, it was in the interests of escaped or ex-convict offenders never to disclose the particulars of their criminal pasts to a South Australian judiciary. If it were not for a close confidant revealing to the police the offender's convict heritage, or sometimes the scarring from past whippings to give him or her away, it would have been a fairly easy secret to keep.

Even so, in the context of South Australia it is possible to roughly determine if escaped or ex-convict offenders were more or less likely than 'non-convict' offenders to have their death sentences commuted to imprisonment or transportation. Such cases generally did attract the attention of the press and occasioned petitions for clemency. Judges' notebooks, records of the Colonial Secretary's Office and the Adelaide Gaol, Police Correspondence files, as well as records of the Supreme Court, have proved useful in this regard.⁴⁸ Unfortunately, the minutes of the Executive Council rarely record its discussion and reasons for either upholding or commuting the sentence of the Court.⁴⁹ The evidence reveals that between 1836 and 1861, twenty non-Indigenous offenders had their death sentences commuted for crimes including shooting and wounding, burglary, theft, and assault. Of these, three certainly had convict backgrounds, three *might* have been former convicts, and fourteen were most likely not ex-convicts.⁵⁰ Given that eight Europeans were hanged during this period (seven of whom had a convict background) and a further three ex-convicts had their

⁴⁸ We thank Therese McCarthy of The University of Adelaide for her assistance.

⁴⁹ See Executive Council meeting minutes, GRG 40/1, vols 1-4, SRSA. Of the cases we cite below, only half were recorded as being discussed at various meetings of the Council. Those occurring before 1843 are largely undocumented. In no cases were the offenders' backgrounds (convict or otherwise) reported in the minutes, nor are explicit reasons given for why the Council decided to uphold the sentence of death or apply the Royal Prerogative of Mercy.

⁵⁰ The three who might have been convicts were George Clark (alias Scroggins), who was arrested with convicts Morgan and Magee for the murder of the Sheriff; William Brown, who had emigrated from Sydney; and Jeremiah Collins, who committed his crime with Brown and had emigrated from Van Diemen's Land. In commenting on a list of cases (including those of Brown and Collins), the presiding judge noted that 'only seven were South Australian emigrants, the whole of the remainder being convicts from the neighbouring colonies, mostly brought overland on stock expeditions'. See *South Australian Register*, 7 March 1840, p. 5.

sentences commuted, we can determine that 70% of those with a convict background who were sentenced to death were indeed executed. (The proportion of those hanged remains high at 53.8% if one includes the additional three men who *might* have had convict pasts.) Conversely, only one of the fifteen Europeans without a convict background was executed after being sentenced to death.⁵¹ Some of the 'non-convict' offenders (like their convict counterparts) had prior convictions, which somewhat eliminates this as a mitigating factor. Of the three escaped or ex-convicts whose sentences were commuted, two (William Morgan and James Fox) were associated with former convicts who were hanged for their crimes (the aforementioned Magee who fired a gun towards a Sheriff, and Curran and Hughes who were executed for the theft at the Pffender property). It might therefore be argued that the 'message' conveyed by hanging former convicts was still clearly communicated. In the case of the third man, James Stevenson, whose death sentence was commuted to fifteen years imprisonment, the judge urged the jury to acquit on the grounds of discrepancies in the evidence, yet the jury still found him guilty.⁵²

Yet, among the fourteen 'non-convicts' whose sentences were commuted, several were found guilty of serious crimes for which, given the time, one might have expected them to pay the ultimate price. John Wilson was found guilty of shooting and wounding a constable with intent to commit murder while trying to escape police custody (circumstances not unlike those involving the condemned ex-convict Magee), yet his death sentence was commuted to transportation.⁵³ Similarly, John Jones (alias John Downs) and Francis Howard were convicted of jointly assaulting their victim and stealing £8 — more than the value of property taken during the robbery at the Pffender residence for which Curran and Hughes were hanged — but they evaded the hangman's noose.⁵⁴ In his notes on the trial submitted

⁵¹ Three of these fifteen were women, convicted of aiding and abetting Joseph Thompson and George Davey who had committed an assault and robbery. Leniency in sentencing was regularly extended to women, so their cases are not absolutely comparable to those involving offenders with convict backgrounds, all of whom were male.

⁵² He was later pardoned and discharged. His case is reported in *Southern Australian*, 15 November 1842; *Examiner*, 16 November 1842; *South Australian Register*, 19 November 1842.

⁵³ See *Southern Australian*, 9 March 1841, p. 3; *Adelaide Chronicle*, 10 March 1841; *The South Australian Register*, 13 March 1841, p. 2. Also see Judge's Report of the case of John Wilson, 6 March 1841, GRG 24/1, 1841/85a, SRSA.

⁵⁴ *Adelaide Observer*, 27 November 1852, p. 8, and 4 December 1852, p. 2.

to the Executive Council, Justice Cooper stated 'I know of no reason ... why the sentence should not be carried with execution but ... I have thought that justice would be satisfied by commuting the punishment of death to imprisonment with hard labor for life'.⁵⁵ In the case of another 'non-convict' offender, Joseph Hawkshaw, who burgled a home and shop and stole property, the jury recommended mercy because the premises were not well protected and 'invited burglary'.⁵⁶ In none of the cases involving escaped or ex-convict offenders were the victims blamed for the crimes of the perpetrators.

Of course, it is possible that the date and type of the crimes committed, and the gender and age of the offenders (rather than, or in addition to, their convict backgrounds) influenced the Executive Council when it decided whether or not to apply mercy. Certainly all proven cases of murder were punished with death regardless of the offender's past circumstances. But, as already discussed, three of the seven men with convict backgrounds were executed for crimes less than murder, while none in the non-convict group suffered this fate. The time of the crime also does not appear to have been an issue. Support for the death penalty both in Britain and the colonies did wane towards the middle of the nineteenth century, but in South Australia it remained strong during the first decade of white settlement when the imperative of maintaining law and order was most keenly felt. Yet all but one of the non-convict cases that resulted in the commutation of the death sentence occurred before the end of 1842 (that is, during the period in which support for capital punishment in South Australia was at its peak), whereas those with convict pasts were executed at regular intervals until 1853. The possible effect of an offender's gender and age on the discrepancy in sentencing between the two groups cannot be deduced because all of the ex-convict offenders were male and above the age of eighteen. Leniency in sentencing was regularly extended to female offenders, especially if they were caring for children, and this might have applied to the three women in the non-convict group whose lives were spared. But given the composition of the sample it is impossible to determine whether this factor would have outweighed the convict backgrounds of the offenders in the other group. In summary, then, while not completely excluding the influence of mitigating factors, it is fair to say that there was a bias in sentencing owing to an offender's convict past, although one must be cautious in

⁵⁵ Cooper to Colonial Secretary's Office, 30 November 1852, GRG 24/6, 1852/3415, SRSA.

⁵⁶ *South Australian Register*, 5 September 1840, p. 4; *Adelaide Chronicle*, 9 September 1840.

drawing absolute conclusions and in relying on a relatively small number of cases.

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Due to South Australia's unique historical underpinning, its population cultivated a heightened dislike of convicts. Differing in heritage and background, convicts and emancipists were isolated culturally from conventional South Australian society, becoming the objects of collective disapproval. They were a 'separate and distinct class', as Governor Grey put it, 'placed in an inferior social state to the rest of the population'.⁵⁷ Another prominent South Australian, the Colonial Secretary Robert Gouger, called convicts more generally a 'species of slave-labour' saying that the colony ought to be 'protected against the mass of hardened vice which flows in with such a [convict] population'.⁵⁸ Indeed, local colonial authorities were forceful in asserting that escaped and former convicts were almost entirely responsible for crime in the new colony. This was epitomised in a speech given by Governor Gawler to the Legislative Council in 1840, in which he contrasted the 'highly respectable and very valuable settlers from the neighbouring colonies' with the 'large number of persons who have been first transported to those colonies for offences committed in the mother country' who had 'by different means ... found their way to South Australia'. Although he 'once indulged the hope that these persons, weary of crime, of disgrace and of punishment, might, in blending with our population, become useful and creditable members of society', Gawler regretted that, in his opinion, 'with a large number, this has not been the case'.⁵⁹

Given such remarks, it is unsurprising that public protests and meetings were common. One such event in September 1845 had the Sheriff as chairperson with notable South Australian politicians, businessmen and barristers speaking vehemently against the feared influx of conditionally pardoned men from the other colonies — all of which reinforced the otherness of Australia's convict population. At this meeting, the former Supreme Court Judge, Henry Jickling, also spoke to the convict question and 'could not do better' according to the *South Australian Register* than to end his speech by quoting 2

⁵⁷ Grey to Stanley, 6 September 1845, in *South Australia, Convicts (Van Diemen's Land)*.

⁵⁸ R. Gouger, *South Australia in 1837; in a Series of Letters; with a Postscript as to 1838*, Adelaide, 1962 [1838], pp. 8, 11.

⁵⁹ *South Australian Register*, 2 May 1840, p. 7.

Corinthians 6:17: 'Come out from among these people and be ye separate, touch not the unclean thing, and ye shall be my sons and daughters, said the Lord'.⁶⁰ It may be true that for much of the nineteenth century Australia may have been a continent in irons but the South Australian elite was never going to accommodate such people of 'unclean' origin into their moral society.

As Judge Jickling's biblical quotation suggests, it was only natural that the judiciary should treat someone of convict origin more severely; the criminal justice system is, after all, made up of lawmakers, judges and juries who are extracted from the very society in which the system operates. To paraphrase Douglas Hay, the criminal law has always safeguarded the 'opinion' of the ruling class, the legal system forming one of their 'chief ideological instruments'. As for the importance of hangings within a criminal system, 'The death sentence ... was the climactic emotional point of the criminal law — the moment of terror around which the system revolved'.⁶¹ That said, South Australia was far from unique in targeting capital punishment at a subgroup in society; 'outsiders' in every context were more likely to feel the full force of the law. Louis P. Masur noticed this phenomenon when writing of executions in Antebellum America (1776-1865):

Juries most likely found it easier to convict outsiders – defined as foreigners, minorities, and those literally not from the immediate community – of capital crimes, and governors felt less pressure to commute the death sentence of those with few ties to the community. Those executed were people for whom spectators might feel the least sympathy, and, as a result, authorities hoped, the assembled would unite against the condemned to defend social stability.⁶²

South Australia's first hanging of Michael Magee in 1838 shared many of the characteristics of an 'outsider' execution and set the tone for convict hangings to come. Reflecting on the execution, almost half a century later, the overarching aim of convict hangings was not lost on the young Annie Watt, another colonist present at Magee's death:

⁶⁰ *Ibid.*, 10 September 1845, p. 2.

⁶¹ D. Hay, 'Property, Authority and the Criminal Law', in E.P. Thompson *et al.*, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, London, 2011 [1975], pp. 26, 28.

⁶² L. P. Masur, *Rites of Executions: Capital Punishment and the Transformation of American Culture, 1778-1865*, New York, 1989, p. 39.

I doubt very much if Magee would have been hanged for the offence at the present day, but so many bad characters were coming into the colony from Tasmania and New South Wales that it was determined so savage an outrage should be visited by the extreme penalty of the law, so as to be a warning to others.⁶³

In the eyes of 'legitimate' settlers, men of Magee's background reeked of mischief and were seen to corrupt the very character of the new colony by violating its proud claim of being convict free. Portrayed as the chief threat to South Australian society, the battle to exclude them was waged on a number of fronts. The *South Australia Act* of 1834 and the resulting immigration policy was the first filter in the exclusion process,⁶⁴ closely followed by legislation passed in 1839 and 1858 which attempted to make the presence of convicts in the colony illegal.⁶⁵ However, with South Australia's porous borders making it easy for those of convict origin to trespass, this policy of exclusion was doomed to fail. Contrary to what is often stated, convicts did come to settle in South Australia but it was mainly left to the judiciary to deal with these cultural 'outsiders'. In investigating the early capital cases involving convict offenders in South Australia, it is clear that the judiciary dealt with convicts in a harsher way than might otherwise have been the case. Though very likely, to discover whether this bias was a disadvantage to convicts tried for non-capital offences is difficult to determine but leaves a tantalising avenue for future research. However, when it came to capital punishment, one can be certain that the theatre of convict hangings in South Australia was a reflection of the shared social values of the young colony and was essential in buttressing a society that was determined to march in concert with its founding ideals.

⁶³ Annie Watt, quoted in *South Australian Register*, 11 July 1887, p. 7.

⁶⁴ The clause of *The South Australia Act* forbidding transportation of convicts to the colony read: 'no person or persons convicted in any court of justice in Great Britain or Ireland or elsewhere shall at any time or under any circumstances be transported as a convict to any place within the said province.'

⁶⁵ South Australia, No. 5 of 1839, *Act to Facilitate the Apprehension in South Australia of Convicts escaping from the Neighbouring Penal Settlements*, Adelaide 1839; South Australia, No. 18 of 1858, *Act to Prevent the Introduction into the Province of South Australia of Convicted Felons and other Persons Sentenced to Transportation for Offences against the Laws*, Adelaide, 1858.