Chapter 4

PUNISHING THE BODY

The modern era's preoccupation with the redemption or taming of the criminal body through the instrument of the prison was not exclusive of other approaches to punishment. Over a long period of time, the legitimacy of corporal punishment and execution was challenged in Australia as elsewhere. A fundamental cultural ambivalence towards punishments of the body is still evident, especially in recurrent calls for the application of both the death penalty and corporal punishment in response to horrific crime or outbreaks of violence. Hence the presumption that the decline of punishments of the body represents an irreversible growth of the civilising impulse requires historical examination. Through an understanding of this protracted history we can also appreciate the influence of some of those fundamental emotions to which punishment appeals and which it aspires to satisfy.

Corporal punishment and changing sensibilities

Well before the end of capital punishment in Australia flogging went out of fashion. By the time Ronald Ryan was hanged in the last execution in this country in 1967 corporal punishment was effectively finished as a penalty in criminal justice sentencing. Like the death penalty, however, flogging remains a significant presence in the collective psyche, constantly hovering on the verge of recovery. Calls for its re-introduction mark out one of the limits of what is possible in penal reform. Because corporal punishment has passed we cannot assume that it will not be re-introduced. Moreover in an age of cultural relativism and of post-Mabo spirit the decline of flogging in European penality in Australia deserves more reflective treatment than we might otherwise expect. The debates in Australia on the legitimacy of corporal punishment in indigenous cultures are current enough to suggest that the basis of non-indigenous attitudes toward the use of such punishment requires a history of its own.

Australian punishment changed in ways which were shared by other settler and European societies in the nineteenth century. But local cultures have their own decisive mechanisms of change. In the case of colonial Australia the novelist Marcus Clarke was one of the most influential shapers of opinion on the country's immediate past. For Clarke the use of the lash

was an emblem of the brutality and brutalising effects of the convict system. His novel, *For the term of his natural life*, was serialised first in the Melbourne-based *Australian Journal* between 1870 and 1872. To Michael Davitt visiting Australia in 1895, two decades after Clarke's novel was published, the work was 'immortal' and linked explicitly to the 'reaction in the public mind out there against the horrible outrages which irresponsible prison power committed in the "old days"[1]. 'One hundred lashes', the title of one of the chapters, depicted the awful spectacle of corporal punishment in a degraded and inhuman institution. Here Clarke used flogging as a device for demonstrating Rufus Dawes' courage, virtue and then his degradation all in the same episode. Having been ordered to flog a young fellow-convict, Kirkald, who collapses from the effects, Dawes refuses to flog any further. Then he is flogged himself, though his previous beatings have given him a toughened back which enables him to withstand the pain - eventually after one hundred and twenty lashes endured in silence he breaks down, not crying out but swearing oaths and blasphemies against his tormentors: 'he seemed to have abandoned his humanity', writes Clarke[2]. It was indeed a common Victorian objection to flogging that it debased humanity, both of the flogged and the flogger.

We will return to the ambiguities of response to flogging later, to questions of humanity and of manliness. There is no doubting however the persuasive power of such depictions of flogging. If a novel is not merely a reflection of opinion but an agent of political and cultural formation in this period then Clarke's account of the convict system helped create a view of the unacceptable nature of flogging and other such abuses of power which he saw as inherent in the convict system[3].

Yet we know also that Clarke was no distant observer of a long past practice. His association with the Melbourne Gaol governor, J B Castieau, an active one during the years in which *His Natural Life* was written, was recorded in the latter's diaries and suggests the possibility of Clarke's drawing on images of that institution in his own portrait of the punishment system. On one occasion in February 1871 Castieau recorded Clarke's attendance at one of the gaol's occasional floggings.

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[1] Davitt, *Life and progress,* pp. 414, 418-419.

[2] Clarke, M. *For the term of his natural life*, St. Lucia, UQP, 1976, p. 285.

[3] An influence which is evident long after his death in the citations of Clarke in parliamentary debate on issues of punishment: e.g. Mr Styants, MLA Kalgoorlie, in a speech on the Punishment of Whipping Abolition Bill, 1952 - 'I believe whipping is an outmoded system of punishment. We have read books on the early history of Australia, particularly one called 'For the term of his natural life', which reeks of floggings from the front page to the back', WAPD, 13 Nov 1952, p. 2101; Mr Cook, MLA, Vic, in debate on Supply, Penal Establishments, cites Clarke's novel, in particular the case of Kirkland, to condemn the association of prisoners in the same cell, VPD, 23 Jan 1900, p. 3190.

> There was a man flogged this afternoon. The Members of the Press & the usual "loafers" were present in addition to the officials. The prisoner was an "old hand" with a face that would bring in a verdict of "Guilty" from most Juries. He displayed most stolid endurance without the slightest bravado or flashness & took his fifty lashes without a groan & scarcely a movement except a horrible twitching & trembling in the muscles of his arms which he kept strained to the utmost. This was the most severe flogging I have yet seen administered. Marcus (check) Clark (sic) "The Peripatetic Philosopher" met me in the street this morning & came to the Gaol to see the "Punishment" this afternoon. I was glad to see he did not believe much in its efficacy as a rule though he believed flogging could occasionally be resorted to with advantage.[4]

This is an illuminating comment. At the very time that Clarke was depicting the awfulness of the convict system as a well-forgotten relic of the past he was able to witness in Melbourne a flogging punishment and convey his own view of its 'efficacy'[5]. His prison governor host Castieau was sceptical of its utility and throughout the following decade expressed privately in his diary the view that flogging was degrading and ghoulish.

We can see this again in 1872 when Judge Redmond Barry sentenced a bestiality case in Melbourne, as Castieau recorded:

> The Criminal Sittings commenced this morning & I was at the Court by ten o'clock to be in attendance upon the presiding Judge who this time was Mr Justice Barry. There were no cases of importance; one miserable looking deformed blear eyed youth pleaded Guilty to an Unnatural Offence. He was caught in the act with a Goat. Mr Barry seized the opportunity & dealt out an elaborate sentence, Ten Years on the Roads & to be three times whipped by the Common Hangman, 25 lashes on the breech with a cat o nine tails.

Having indicated his distaste for the severity of such a sentence Castieau elaborated on the circumstances of the boy's upbringing, in a passage which suggests a depth of difference between the judge and the prison governor:

> The horrid part of this matter after all is the statement made by the prisoner when arrested which was that he had learnt the crime he had committed from seeing the boys at Sunbury commit themselves in the same way with the Goats that were about the Station. The sentence of Judge Barry's would have been a righteous one if the culprit had been a man but with this idiotic infant I think it lacketh discretion & will cause the judge tribulation[6].

[4] Castieau Diaries, NLA, Mss. 2218, 13 Feb 1871.
[5] Cf B. Elliott, *Marcus Clarke,* Oxford: Clarendon Press, 1958, p.161 re Clarke's predisposition to flogging in some of his journalistic comments on convicts.
[6] Castieau Diary 15 August 1872

It was such conflict between officialdom which helped to shape subsequent penal practice leading to the eventual demise of corporal punishment.

So how did flogging decline and why did it retain its appeal to some and elements of legitimacy even to those who wanted to condemn it as a sign of a barbaric past? The question is of course complex and reaches out into areas of cultural history which are only tangentially related to the mechanics of punishment. Documenting the decline implies a need also to identify the place of flogging in earlier penality.

Early modern European punishment included whipping in various guises. Its uses were mixed: the penalty was an instance of Foucault's semio-technique, demonstrating to a public the awfulness of the consequences of breaching the law. Flogging would work as both a punishment and deterrent. Exercised more often against petty thieves and lower class offenders, it was a punishment which increasingly was supplemented by others. Whipping and banishment was a common sentence in colonial America against itinerant or foreign offenders, while whipping as well as imprisonment was a common option in late eighteenth and early nineteenth century sentencing in Britain.[7]

The transformation of bodily punishments was linked to changes in sentencing more generally. Whipping or beating was widely used in summary punishment for centuries before it became a major element in punishment for the more serious category of felony. Its increased use in early modern English penality appears linked to the search for alternatives to the death penalty and transportation. As the favoured punishment for the less serious charge of petty larceny Beattie finds that its use increased in the late seventeenth century during a period in which it appears that juries were looking to reduce the risk of passing a capital sentence on a person convicted for grand larceny. As transportation to the American colonies became increasingly favoured after the Act of 1718, the use of whipping declined: transportation offered a severity greater than whipping or branding, while stopping short of the death penalty[8].

Whipping declined in stages which are marked by progressive restriction of its application. The informal exclusion of gentlemen from the classes liable to be publicly whipped[9] was a sign of the transformation to come. Hence early in the nineteenth century women and girls were removed from the list of those who could be so punished - the power to order a

[7] David Rothman, 'Perfecting the Prison', in N. Morris and D. Rothman (eds), *The Oxford History of the Prison*, OUP, 1995, p. 112; J. Beattie, *Crime and the courts in England, 1660-1800*, Clarendon, 1986, pp. 461-2, 560-2.
[8] Beattie, *Crime and the courts*, pp. 485-7; L. Radzinowicz and R. G. Hood, *The Emergence of penal policy in Victorian and Edwardian England,* Oxford, New York: Clarendon Press, 1990, pp. 689 ff.
[9] Ibid, p. 463.

whipping of females whether in public or private was abolished in England and Wales in 1820[10]. Measures against cruelty to animals fit into this sequence of gradual restrictions on physical punishments, with the first statutory prohibitions on cruelty dating from the 1820s. Women's exclusion from the list of those who could be punished corporally appears incidentally responsible for the development of a particularly resilient form of prison discipline from the early nineteenth century, ie the punishment of solitary confinement which originated in the need to establish a form of discipline which could replace whipping. Thereby, it has been suggested by Byrne, women in the convict colonies were also subjected earlier to the rigors of prison discipline[11].

The result of the progressive restrictions was that by the second half of the nineteenth century whipping was confined to specific social groups, and to a great extent to specific offences. Those who remained liable to whipping as a punishment were juvenile males and prisoners. Indeed the link between corporal punishment and the need to discipline the behaviour of unruly young males has remained one of the strongest themes in debates about appropriate punishment to our own day. The degree to which flogging might still be appropriate for boys even when its use on adult males was frowned on is well illustrated in the debates on discipline in English prisons in the 1850s. By this time flogging in the English prisons was rare, so much so that prisons like Reading Gaol which were recording three floggings a year were attracting critical notice. Yet corporal punishment of boys was still approved by those who otherwise criticised it for men. One prison governor thus urged the necessity of separating boys and men in the gaol, not just because of the danger of contamination, the common reason for such a proposal, but because of the need to discipline them differently. In clarification of what he meant when he said 'treat them as boys', Capt Williams was asked by a Select Committee member, 'By treating them as boys you mean now and then flogging them?', to which he agreed. Even so, he wanted to use such a punishment carefully as its effects varied between individuals; others felt that flogging juveniles merely 'hardened them'.[12]

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[10] *Report of the Departmental Committee on Corporal Punishment* (Cadogan Committee), London, HMSO, 1938 is indispensable on the legislative history; see also L. Radzinowicz and R. G. Hood, *The Emergence of Penal Policy in Victorian and Edwardian England,* Oxford, New York: Clarendon Press, 1990, ch. 21 ('The mentality of the cat and the birch').

[11] Irish Law Reports, 1840; P.J. Byrne, 'On her own hands: women and criminal law in New South Wales, 1810-1830', in Philips and Davies (eds), *A Nation of Rogues*, pp. 34-5; Salt, *These Outcast Women*, ch. 5.

[12] Select Committee on Prison Discipline, *Report,* BPP, 1850, xvii: ev of Capt W. Williams, 771-3; even so whipping of adult male prisoners was intensively used in English prisons and increased under the Du Cane regime in the 1860s and 1870s, see Radzinowicz and Hood, *Emergence of Penal Policy*, pp. 552-556.

Such reservations were also admitted by the authors of the most substantial inquiry into penalties and sentencing in Australia in the second half of the nineteenth century, the Victorian Royal Commission on Penal and Prison Discipline (1870-1872). The Commissioners nevertheless laid their qualms aside in their desire to avoid the greater evil of imprisonment of juveniles with adults. Failing other social preventive measures against juvenile crime, such as public education and the substitution of 'healthful and rational recreation' for immoral and indecent popular amusements, the Commissioners acknowledged the difficulty of summarily punishing juveniles other than by 'personal chastisement'. Their reluctance to endorse whipping was evident since there existed 'and properly, a strong repugnance to the infliction of corporal punishment on youths' - among other objections it destroyed 'self-respect' and permanently degraded 'the moral feelings'. Endorsement of whipping as a punishment was therefore hedged around with qualifications, including that two justices including a police magistrate be required to order it, and that jurisdiction be limited to proclaimed police districts for a certain time only. The whipping was to be by birch rather than lash and to a maximum of 25 strokes. It is evident that the Commissioners saw such a measure as a special resort to deal with what they hoped to be a temporary problem[13].

Prisoners, but only male ones, were a second category of persons who might be whipped, for offences committed within a prison. Again the history of this formal punishment extended well into the second half of the twentieth century, although Australian prison governors were mostly disinclined to use such disciplinary means. At Brisbane in 1868 a parliamentary Select Committee recommended the construction of punishment cells to limit the use of the 'lash', but noted at the same time that the instrument had been used only once in the previous 15 months[14]. Although Michael Davitt noted a number of institutions in which prisoners might still be whipped in the 1890s the incidence of such formal punishment was very low[15]. In 1944, when John Barry surveyed the state prison administrators in Australia on the uses of corporal punishment he could find only scanty evidence of its survival as a practice, even though it remained as a formal option. The South Australian authorities regarded it as 'a deterrence against assaults on prison officers', as the Cadogan Committee in England had also. In Victoria, the Visiting Justice had no power to award corporal punishment although whipping as a result of a court sentence (whether for a prison offence or otherwise) was still known - the Victorian Inspector-General emphasised the leniency of those which did take

[13] Royal Commission into Penal and Prison Discipline, *2nd Report*, pp. xii-xiii, VPP, 1871.
[14] Report of the Select Committee on Prison Discipline, p. 11, QPP, 1868.
[15] Davitt, *Life and Progress*, p

place, stressing rather the effect produced by the 'solemnity of the occasion, the ritual accompanying it, the suspense beforehand and between each stroke'. The comments suggest the depth of the transition since the convict period, when the physical intensity of the whipping, the laying on hard of each stroke, had been a matter of dispute. Other states reported the rarity of corporal punishment in prisons, and in NSW there had been no whipping since 1905[16].

A third group remaining susceptible to whipping was made up of offenders against specific aspects of the criminal law. Here the definition of the category appears to have been the product of quite particular social anxieties. Hence a specific offence warranting whipping in England between 1862 and 1947 was that of robbery, in its various categories. The garrotting panic of 1862 and other English debates over violence against women and children had provoked a revival of faith in the benefits of whipping as a punishment of violent offenders and was echoed in the recommendations of the Victorian Royal Commission on Penal and Prison Discipline[17]. Endorsing a more clearly defined range of penalties for different scales of violence the Commissioners, led by the Chief Justice, William Stawell, recommended that the judges' powers to order private whipping in cases involving personal violence and for unnatural offences, 'be extended to aggravated cases of offences against women and children, and to crimes perpetrated under circumstances of cruelty or brutality'[18]. In spite of support for the preservation of corporal punishment as a sentencing option, the rates of use for those adults convicted under such offences varied noticeably across the period. In Edwardian Britain the use of whipping of adults convicted for robbery with violence was rare, notably so in comparison with the 1890s and the 1920s[19]. In Australia, in spite of such recommendations as those of the Victorian Royal Commission, sentencing orders including whipping continued to be infrequent, although some jurisdictions show suggestive variations.

Thus in Western Australia which had shared with other jurisdictions in the 1880s a disinclination to use whipping as a sentence there was a revival of the order in the 1890s, especially for the punishment of Aboriginal offenders. Although the official statistics do not record the characteristics of offenders subject to these whippings, it is likely that the great

[16] Sir John Barry Papers, NLA, Ms 2505/ series 41, fol. 74-109 reports the survey, which had been undertaken in connection with his preparation of a chapter on prisons and punishment for a book on the criminal law in Australia, in collaboration with Prof George Paton and Geoffrey Sawer (later published as *An Introduction to Australian Criminal Law* in 1947).

[17] See J. Davis, 'The London Garotting Panic of 1862', in V.A.C. Gatrell et. al. (Eds) *Crime and the Law. The Social History of Crime in Western Europe since 1500.* London, Europa, 1980; Radzinowicz and Hood, *Emergence of Penal Policy,* pp. 692-694.

[18] Royal Commission into Penal and Prison Discipline, *2nd Report*, p. vii, par 16 (3), VPP, 1871.

[19] See *Report of the Departmental Committee on Corporal Punishment*, London, HMSO, 1938, p. 130.

bulk of those who were so whipped on summary conviction from 1892 were Aboriginal. In that year the government reversed an 1883 decision to remove whipping as punishment for 'aboriginal natives'. The Attorney-General justified the revival of whipping on explicitly racialist grounds: 'You can only deal with them ['all these coloured races', including 'blackfellows, or Indians, or Chinamen'] like you deal with naughty children - whip them...Give them a little stick when they really deserve it, and it does them a power of good'. [20] On numerous occasions in the 1890s it was contemplated in the Western Australia legislature that whipping be used to control the 'natives', for example as a deterrent in place of sending offenders to the Aboriginal prison on Rottnest Island. The infliction of pain to enforce labour at Rottnest was advocated during parliamentary discussion in 1895 on the allegedly pampered conditions at the Island: enforcement of hard labour through flogging and chaining to a wheelbarrow, it was said, would reduce the incidence of spearing cattle[21].

The reversion to whipping in such cases was a late colonial endeavour to use a punishment which was increasingly deplored in other jurisdictions including Australian ones- its exceptional nature was belatedly the cause of attack by one Western Australian MLA on the 1892 bill as 'an outrage on humanity'[22]. Only a few years before this, the 1887 Queensland Board of Inquiry into Prisons had considered whether corporal punishment might be an alternative punishment for Aboriginal prisoners, especially in view of the Board's critical assessment of the effects of incarceration on them - but recommended against it since 'no matter how carefully regulations under which the flogging should be given were framed, abuses would be certain to arise, and unnecessary cruelty be practised'.[23]

TABLE - WHIPPING AS A SANCTION, WA, 1887-1900

	total	property
1887	3	2
1888	5	3
1889	13	4
1890	5	0
1891	4	0
1892	115	104
1893	91	63
1894	111	93

[20] WAPD, 29 Jan 1892, p. 398 (S. Burt, Attorney-General). WA 55 Vic, no. 18, The Aboriginal Offenders Act (Amendment) 1892 prescribed the maximum number of strokes (25 for adult males, 12 for juvenile males) to be used in whipping of Aborigines tried summarily. In spite of the Attorney-General's comment, the Act applied to Aboriginal offenders only.
[21] WAPD, 22 Aug. 1895, p. 673.
[22] Ibid, 3 Feb 1892, pp. 427-430.
[23] Board of Inquiry, p. xxvi, QPP, 1887.

1895	62	48
1896	83	59
1897		31
1898		9
1899		13
1900		4

Source: WA Statistical Register, 1896, 1900 - totals illegible for 1897-1900.

The example of whipping replicates one common feature of the history of punishment - the idiosyncratic nature of the pattern of sanctions in particular jurisdictions. Precisely because its use became so marginal, the occasions on which it was invoked as a penalty point to some of the elementary local conflicts which determine policy and practice. For at the same time as Western Australia, somewhat eccentrically in the Australian context, was still endorsing its use in the case of Aboriginal offenders, policy recommendations in the same colony were coming forward which deplored its use in other settings. The 1899 Penal Commission reviewed some international evidence on the changing use of corporal punishment, noting even that Italy had banned its use by parents. Yet while the Commission wanted it retained as an option believing it had a deterrent effect, and that the use of the birch on youthful offenders was especially worth preserving, it drew the line at its use in prison. Influenced particularly by the Visiting Justice to Fremantle Prison who had described the flogging of prisoners as degrading the Commission recommended it be abolished as a disciplinary instrument within prisons. [24]

Such recommendations for abolition were by now mostly consistent with sentencing practice. Occasional flurries of use in relation to juvenile crime are evident, as in South Australia in 1900 when 26 juveniles are recorded as subject to whipping for larceny offences. But a special provision of the NSW Criminal Law Amendment Act in 1883 allowing two justices sitting together to order a whipping was by 1900 used by no-one. Other jurisdictions were equally uninclined by this time to use whipping at all.

By the time an international comparison (or at least one within the bounds of the old Empire) was conducted in 1937 for a British committee (the Cadogan Committee) inquiring into its use, punishment by whipping in Australia (and New Zealand) was rarer still, especially in comparison with other comparable settler societies, including Canada and Southern Rhodesia[25]. In that year it was reported that the highest rate of use had been in Victoria where

[24] WA RC, 1899, Final Report, p. 14

[25] See Report of the Departmental Committee on Corporal Punishment, London, HMSO, 1938, Appendices; the situation in the United States was generally even more unfavourable still to flogging as a punishment, ibid, p. 144 and see M.C. Glenn, *Campaigns against corporal punishment*, Albany, SUNY Press, 1984 for the successes

there had been 10 cases in the previous five years. In NSW there had been none since 1905 - though as we will see shortly there were in fact a number of whippings ordered but later remitted. On the evidence of various cases it appears that while the number of offences for which whipping might be ordered in Australian jurisdictions was formally quite broad, in practice there was a tendency in some jurisdictions from the 1870s to apply it to cases of sexual offences - including especially homosexual offences but also applying to some cases of indecent assault, incest and carnal knowledge. This is a notable contrast with English practice where the emphasis was on its use in controlling robbery - and where attempts to add whipping to the range of punishments for sexual offences were generally unsuccessful in the later nineteenth century[26]. The link between whipping and sexual offences was nevertheless stubbornly revived from time to time in Australia - even as late as the 1960s in Victoria when a judge called expert evidence in consideration of a possible order for whipping in a case of robbery in company involving personal violence[27].

It appears then that while the use of flogging in English-speaking countries was in a long decline, there were nevertheless some interesting and provocative differences between jurisdictions in its use. Moreover these cultural differences may be much more subtle than we might expect. How do we explain the much greater incidence of the use of whipping in both criminal sentencing and prison discipline in the twentieth century in Britain, as compared with Australia? Some differences, as we have already noted for Western Australia at the end of the nineteenth century, appear inflected by racial thresholds in the definition of a population suitable for punishment. Hence in 1938 the Cadogan Committee reported that there was an annual average number of 436 whippings ordered against adult males in courts in Southern Rhodesia - in no case had one of these been ordered against a European. Some evidence of a similar racial distinction may be noted in Australia at the same time - in the Northern Territory in the 1930s, corporal punishment against Aboriginal offenders was still regarded as an essential instrument of discipline - a patrol officer later to become a distinguished anthropologist, TGH Strehlow, advised in 1936 that his possession of summary

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of the ante-bellum campaigns against corporal punishment. On the rarity of use in New Zealand (for property offences, although it had also been extended to some sexual offences in 1868) see Pratt, *Punishment in a perfect society*, pp. 91, 149, 207.

[26] Radzinowicz and Hood, *Emergence of Penal Policy,* pp. 695-6, 702 - an exception was whipping as a punishment for offences under the White Slave Traffic Act, 1912.

[27] 'Whipping as a penal sanction: its consideration in a recent case', *ANZ Journal of Criminology*, 1968, 1, March, 10-25.

corporal punishment powers 'is actually an essential requirement for upholding the authority of the patrol officer', in order to control the anarchy of the tribes in the centre[28].

Aside from such exceptions, the evidence is strong that whipping declined in use in Australia as officialdom became increasingly sensitive to its use. While there remained the occasional whipping judge or magistrate and inevitably the odd politician or journalist to argue in its favour, the difficulties inherent in administering a punishment which many people regarded as distasteful grew. We can see some of these arising in debates over the use of corporal punishment in NSW earlier this century.

The altered context for whipping was evident in the obstacles placed in the path of those few judges who wished to see it exercised in exemplary cases. There were a number of such cases in NSW between 1905 and 1940. Like the Melbourne prison governor Castieau some decades before, prison and other criminal justice officials in NSW in each case expressed distaste for carrying out corporal punishment. In 1923 the NSW Comptroller General of Prisons, on whom fell the burden of administering such punishments, requested advice from the Justice Department regarding administration of a sentence of whipping on a 47 year old man found guilty of indecent assault on a boy of eleven years. He noted that the 'last flogging' for indecent assault on a male had been in 1900 and the last of any kind, of ten lashes, had been for attempted bestiality. In 1919 a 17 year old youth on a charge of bestiality had been sentenced at Bathurst Quarter Sessions to a week's light labour and ten strokes of the lash: the flogging was remitted by the Executive Council. Not disguising his feeling against the punishment, the Acting Under Secretary of Justice noted:

> Apart from the question of whether flogging a man 47 years of age, which prisoner says he is, I need only say at this stage that there is no official flagellator and some difficulty would probably arise if a warder were asked to flog a prisoner[29].

Similar reasoning won the day in the other cases of this kind in the 1920s. Failing appeal against the sentence, the whipping portion of a sentence was always remitted. The gap between some judicial opinion and the justice and prisons bureaucracy became evident. Occasionally judges would resort to the sentence, as did Judge Edwards in a 1925 case, again of an indecent assault on a boy: 'Flogging is the only remedy in cases of this kind. There are far too many of them. It is disgraceful.' [30] But again in the absence of an 'official flogger', as

[28] T. Rowse, 'Strehlow's Strap: Functionalism and Historicism in Colonial Ethnography', in B. Attwood and J. Arnold, (eds), *Power, Knowledge and Aborigines,* La Trobe Uni Press, Melbourne, 1992, p. 91.
[29] NSWSA, Attorney-General Special Bundles, 12/1351.1, Sexual Offenders, 1919-1945, minute 16 Nov.1923.
[30] ibid, min 11 Mar.1925.

the Under Secretary of Justice put it, there was an immediate administrative problem in carrying out such an order.

In any case flogging was no longer the 'only remedy'. Responding to a call in 1937 by a branch of the Country Women's Association for flogging as a deterrent against sexual attacks especially on young girls, the general secretary of the Racial Hygiene Association, Mrs L E Goodisson, countered that such offenders should be classed among the mentally unfit - psychiatry and segregation colonies were the remedy[31]. These were not always exclusive remedies, however. In Victoria in 1923 a rash of attacks on women and children inspired a campaign for penal reform to deal with the issue - both flogging and psychiatric treatment received support in public meetings and deputations on the issue, alongside calls for 'high ideals in dress and conduct' in some victim-blaming opinion[32]. A mix of response was similarly evident two decades later when in 1946 the Housewives Association of NSW urged that the lash was the 'only means of preventing a repetition of the brutality and cruelty being exercised by some lower classes of the community' - but a supplementary resolution called for a psychiatrist to be employed and for second offenders to be segregated for life[33]. As we have seen in the previous chapter, the latter course was in fact the one being taken by the criminal law during this period as legislators sought to refine a response to the phenomenon of sexual offences.

Yet alternative remedies, such as psychiatric treatment or reformatories failed to deliver the emotional return that corporal punishment might. Even in the course of repudiation of a call for the lash, the possibilities of a good lesson through physical punishment of an informal kind might emerge. On the eve of war in 1939 the NSW Minister for Justice received a deputation of the Women's Justices Association on the problem of sexual assaults. Rejecting a call from one woman for the use of the lash, Minister Martin was asked what the government would do 'if women took the law into their own hands and caught one of these men and dealt with him'. The law was that self-defence justified force in stopping an attack but Mr Martin also remembered 'a case where a lot of women got hold of a man who offended and gave him a frightful thrashing. We would not bother our heads in a case like that'[34]. Such a concession suggests something about the limits of the case against corporal punishment, limits which allowed its survival in other kinds of social relations and institutions, especially

[31] *The Sun*, 2 Sept 1937 (AG 12/1351.1).
[32] *The Argus,* 17 May, 4 Jun, 11 Jun, 18 Jun, 1923.
[33] NSWSA, 12/1351.1- minute 4 July 1946.
[34] Ibid, Minutes of deputation 23 Mar.1939.

the family, the school and in non-regulated social life. All the same, what we know about the incidence of bodily punishment suggests in fact the rarity of women taking the law into their own hands in this way - especially in comparison with the survival of wife-beating and other abuse later to come under the heading of 'domestic violence'.[35]

This example of women demanding more severe sanctions for violent assault suggests that penal and sentencing practice operated in predictable tension with so-called popular opinion. Every well-publicised case of sexual assault or other violent crime brought out a variety of commentators making their views known to government - from individual letter writers through to community groups and political parties. Anonymously, 'Humanity' from Sydney urged the government to stop the sentence of whipping imposed on a 17 year-old for bestiality: 'the sooner this kind of thing is put a stop to the better for Australia'. Such appeals against the lash typically recalled its use in slavery or the convict period, or deployed arguments dating from the humanitarian reformers of the early nineteenth century, in which the lash was held to degrade both the flogger and the flogged. Calls by Police Commissioner Childs in 1933 for the reintroduction of the lash prompted the *Tamworth Northern Leader* to cite the diminishing use of the lash since the convict days as authority against revival: 'All the official records of convictism prove conclusively that flogging never reduced crime, but on the contrary effectually prevented the criminal's reformation'[36]. But enlightened rural opinion was countered by other appeals to history: writing from Fremantle in Western Australia, a correspondent advised the NSW Minister for Justice to look to the lash to remedy the evil of overcrowded gaols: 'it stamped out garrotting in London many years ago and one sentence in Liverpool cured ruffianism' - a reference to a well-worn mythology about the effectiveness of whipping[37].

There were always of course such opinions raking up anecdotal evidence of the efficacy of corporal punishment. And, as with hanging, there were those who declared they would not shrink from a role in the infliction of punishment. In 1929, following the NSW Government's introduction of the lash to counter razor gangs and child molesters, John L, married and father of five children, resident at Auburn west of Sydney, offered to solve the government's

[35] See Myra C. Glenn, *Campaigns against corporal punishment*, State University of New York Press, Albany, 1984 ch.4 on the significance of wife-beating as an exception to the antebellum crusade against corporal punishment; Allen, *Sex and Secrets*, pp. 46-52 and K. Saunders, 'The study of domestic violence in colonial Queensland', *Historical Studies*, no. 82, 1984, pp. 68-85 for Australia; C. Conley, *The Unwritten Law*, Oxford, Oxford University press, ch. 3 for Victorian Kent.

[36] *Tamworth Northern Leader,* 27 Jun 1933, in NSWSA, 12/1351.1.

[37] Letter of HB 28 May 1930 in NSWSA, 12/1351.1; see Radzinowicz and Hood, *Emergence of Penal Policy,* pp. 703-705 for the uses of such argument in England.

publicly acknowledged problem of a lack of a 'public flagellator': 'my reason for applying for the position is that I am strict disciplinarian and I believe in the law being carried out especially on this class of criminal'. He had, he said, seen plenty of birching carried out (perhaps in Britain, where thousands of birchings per annum were still being administered on juveniles up to the 1920s) and thoroughly understood how to carry out the punishment.[38] But other memories of the flogging spectacle were that it was a past best forgotten: a branch of the Australasian Society of Patriots reminded the government in 1928 that there had been a public appeal for funds to assist the man last flogged in Sydney[39].

The decline of whipping has not meant the end of calls for its reintroduction. Recurrently the issue is raised in the same circumstances in which it has been since the middle of the nineteenth century - usually in response to a particularly violent act, somewhat short of murder, or else in the aftermath of a periodic outburst of juvenile misbehaviour. The image of a vigilante mob gathered outside a court should not dominate the picture of those who call for whipping. Judges, politicians and journalists have all been among those who have advocated its use in the last twenty years in Australia. In 1973 the Chief Justice of Victoria, Sir Henry Winneke suggested that the courts might once again have to consider the birch for some assault cases, and opinion polls reported that over 60 per cent of Australians supported 'the whipping of some convicted bashers'[40]. In 1994 the populist Queensland MP, Vince Lester, was active in putting onto a National Party conference agenda a call for the reintroduction of flogging. This was just 8 years after the National Party government tin Queensland had in fact been responsible for removing whipping from the state's Criminal Code sentencing options[41]. The orthodoxy however is that in western societies corporal punishment is now frowned on - hence the difficulty of recognising such punishments as tribal spearing in indigenous law. Explanations of the decline therefore face the need to consider both the causes of a decline in infliction of the punishment and its persistent popularity in certain quarters.

A proper historical explanation has to surmount the weight of two centuries of rationalism in debates about punishment. The influence of such views is evident for example in the explanations for the demise of corporal punishment advanced by criminologist and Professor

[38]Letter of JL, 6 Mar. 1929 in NSWSA, 12/1351.1; on birching in England see *Report of the Departmental Committee on Corporal Punishment*, London, HMSO, 1938, pp. 19-20.
[39]Letter 14 Mar. 1928 in 12/1351.1.
[40] 'Birching, whipping and public comment', *Australian and New Zealand Journal of Criminology,* 6, 3, 1973, p. 133; McNair Surveys, APOP, Poll no. 05/7/73 - press release. Interestingly the strongest opinion **against** flogging was in NSW (43 %) and the weakest in Victoria (28%).
[41] Queensland, Criminal Code Amendment Act, No. 1, 1986.

of Law Norval Morris in 1966. Responding to a request for advice during sentencing in a Victorian case Morris strongly opposed the use of whipping in spite of the gravity of the associated violence in the case. It had fallen into disuse for at least four reasons: statistical evidence that it was useless as a deterrent; statistical evidence that its use contributed to greater brutality of those flogged; its antipathy to 'our professed, and to a degree practised, correctional aims', looking back to vengeance rather than forward to prevention; and finally its brutalising effects on the community using it, since in such a situation 'we are the floggers'[42]. Such reasons however, alternately positivist in their appeal to evidence or rhetorical in their reliance on principle, point more to the marshalling of arguments in favour of or against whipping than to explanations of the decline itself.

It was not primarily the voice of reason which brought an end to flogging but the marshalling of emotions. References to statistics are relevant, but prior to the Cadogan Committee - by which date flogging was in major decline - they had not been seriously examined. The significance of the emotions as the source of opposition to flogging is the degree to which they can be considered successful in particular campaigns. In Australia, flogging declined without explicit policy direction: it simply stopped being used. But it did so in the aftermath of a campaign against its use in the first half of the nineteenth century. The flogging of soldiers in the British Army was the subject of a specific reform campaign in the 1820s and 1830s, significantly at a time when the punishment of convicts was also a preoccupation of public life. Although flogging of soldiers continued under some restrictions until 1881[43], the earlier campaign effected a significant reduction in use of this disciplinary technique. Major figures in penal reform, like Bentham, had been sympathetic to the campaign. But the historian of the campaign concludes that rational argument was less effective in this context than 'appeals to visceral feeling': the Duke of Wellington in fact had the advantage in the statistical arguments on the effectiveness of flogging in maintaining army discipline, but such defenders of the hard school were finding it increasingly difficult to counter the effects of emotional appeals based on the brutalising effects of the punishment on all concerned in the exercise[44].

This history of the success of an appeal to the emotions is an important lesson in the Australian context. For what also requires explanation is the demise in Australia of whipping in a juridical context in which the punishment was for long a realistic and considered

[42] ''Whipping as a Penal Sanction: Its consideration in a recent case', *ANZ Journal of Criminology,* 1, 1968, p. 23.
[43] J. Dinwiddy, 'The early nineteenth-century campaign against flogging in the army', *English Historical Review*, xcvii, 1982, pp.308-331.
[44] Ibid, p. 325.

sanction. Morris's arguments of 1966 in fact suggest more the influence of two English inquiries - the Cadogan Committee and its successor of 1960 the Barry Committee - than a close attention to the fact that the demise occurred in some common law jurisdictions well ahead of the trend in the parent of that tradition. In this respect we have the strong evidence marshalled by Cadogan that the use of corporal punishment was much less in Australia and New Zealand than it was in Britain, Canada or southern Africa, all of them common law jurisdictions. Morris in fact drew attention to the possible significance of this difference:

> Australia has a rich heritage of the lash. It will not further our social history to perseverate[sic] that chapter of our history. If there is one lesson that we should have learnt from that history it is that of the futility of the lash.[45]

To what extent was the memory of the convict era a factor in the demise of flogging in the post-1850s? An argument in favour of this explanation would be consistent with what we know of the larger history of changes in punishment in western penality in the modern period. Those changes have to be explained in the last resort not in terms of changing economic modes or the preferences of the judiciary but in terms of an altered cultural connotation attached to punishments of the body. Changing sensibilities are highly selective, suggests David Garland[46]: hence the differing statuses accorded men, women, children, certain racial groups in judicial sanctions, as well as in private (e.g. non-legal, domestic) punishment. But the long term changes which saw growing restrictions on public punishments including both execution and flogging, as well as the stocks and public penal labour, are an index of an alteration in social relations and individual sympathies. What we may have in the relatively early demise of whipping in Australia is the demonstration of the peculiar power of a particular cultural context to decisively change the possibilities of punishment. *For the term of his natural life* is an emblem of the rejection of the putative brutality of the convict era. Its critique of the abuses of punishment, coming from one who was not himself totally opposed to flogging, speaks for the rejection of flogging in a way which was more broadly shared in later colonial society. By 1900 this rejection was so consolidated that NSW and Tasmania had all but seen their last such punishments and other states were not far behind them. Yet was it merely an accident that Victoria and South Australia, most free from the convict heritage, were still the places by the 1950s where judicial whipping could be considered -

[45] 'Whipping as penal sanction', p. 23.
[46] Garland, *Punishment and modern society*, p. 243.

indeed in the latter state there were at least 18 whippings in the decade up to 1964[47]? In corporal as in capital punishment we observe the capacity of culture to disturb our expectations of what constitutes progress and enlightenment. Reason has its role to play in debates on such punishment - but the history of the emotions and their invocation in public debate probably have more to tell us of why corporal punishment declined as a sentencing option.

Execution

After 73 years as a public gaol, the Darlinghurst Gaol was opened to the public in July 1914 in an early demonstration of the potential of cultural tourism. Enormous crowds visited the gaol - 14,000 on the opening day, with the admission price raising a total of £170 for the Prisoners' Aid Society. After the first week, during which the *Sydney Morning Herald* reported that 100,000 visitors had been through the gaol, the government decided to stop the gala. Particularly disturbing was the macabre interest in the gallows site, where souvenir-hunters had torn off bits of the trap-door at the drop. The Attorney-General was 'disagreeably surprised ...The popularity of the opening evidenced the existence of a morbid sentiment which it is desirable to suppress rather than encouraged'.[48]

There have been few legal executions in Australia in the twentieth century and none at all since 1967. Yet the 'morbid sentiment' discerned in 1914 and the continuing popularity of the death penalty as a penal option both speak to the reality that the extinction of hanging in Australia was primarily a political act, rather than the result of a wholesale cultural conversion. The possibilities of reversion to exemplary punishments of the body remains a real one, evident in the example of one of the cultures closest to our own, the United States as well as in the instance of one more distant, such as Iran.[49] Opinion poll evidence for Australia suggests that in spite of the *de jure* as well as *de facto* extinction of capital punishment, the option of the death penalty survives as a desire of about half the Australian population, more in some states than others - a desire which increased in the 1980s and after, following a fall in popularity during the 1960s and 1970s. A careful analysis of national attitudinal survey data by Kelley and Braithwaite suggested that the length of time during which abolition had been in place significantly influenced attitudes to revival of the death penalty as an option. Nevertheless the strong popular support for the death penalty (less among women than men)

[47] N. Morris and C. Howard, *Studies in Criminal Law*, Oxford, Clarendon Press, 1964, p. 161.
[48] NSWSA: 2/2142, news cuttings; *Sydney Morning Herald*, 21 July 1914 and 28 July 1914
[49] See eg R. Hood, *The Death Penalty,* Oxford: Clarendon Press, 1989.

suggests again that sanctions and law reform do not by any means reflect mass popular opinion[50].. It is difficult to disagree with these researchers that what prevents revival of the death penalty in Australia is the likely resistance of the political elites, a coalition crossing conventional political boundaries., as well as the possibility of very substantial conflict around any use of the penalty, as was evident in the controversy over the hanging of Ronald Ryan in Victoria in 1967.

Does the demise of the execution as a penal practice in Australia really share the same historical space as that implied by the title of this chapter? The history of punishment is one of overlapping incidents and practices. It is one marked also by what appear to be contradictions, seen at one distance, becoming harmonies seen from another. From a current perspective the demise of whipping and hanging seem part of the same story: a growing sensitivity to (a resistance to) the sight of blood and human (or even animal) physical suffering explains the intolerance of modern western societies to the use of corporal sanctions such as whipping and hanging. In England especially the evidence is strong that there was in the eighteenth century a significant shift in conceptions of the body and its place in the language of politics - historian Randall McGowen has shown how the political metaphor of the body politic, which justified capital punishment as an excision of a diseased limb, was challenged by a new psychology of the individual which emphasised the self-interest and capacity for sympathy of persons, diminishing the rationale for collective rituals of punishment.[51] Yet whipping could survive to some extent this challenge, since it was intended to reform as well as deter - and it was conceived in sentencing practice in the eighteenth century as one of the alternatives to the death sentence.

Our history of transportation has earlier indicated its inter-relation with the changing disposition to the death penalty. Transportation that is was an alternative penalty, more lenient and palatable, but still severe enough to offer some hope that it was a deterrent: indeed, for those condemned to it, the prospect may well have been more terrifying than death. The search for other alternatives to the severity of hanging, of which transportation was one, similarly brought to prominence the use of whipping, before a sentence of imprisonment in penal servitude replaced them both. For the best part of two centuries however the new and the old stood side by side. The most severe sanction in the English common law, which had been death, was supplemented first by transportation then by 'penal

[50] J Kelley and J. Braithwaite, 'Public opinion and the death penalty in Australia', *Justice Quarterly*, 7, 3, 1990, pp.529-563.
[51] R. McGowen, 'The Body and Punishment in Eighteenth-Century England', *Journal of Modern History*, 59, 1987, pp. 651-679.

servitude for life' or at least for a long time. The range of capital offences contracted until only murder and treason earned the penalty - but all the same for over a century, prisons had their special cells for the condemned, and whipping posts for those so sentenced.

In the colonies this range of penalties for serious offences was imitated. But in a place in which transportation was already the reality of a way of life, the use of the death penalty if anything increased in use as the military governors sought to maintain control over a large body of convicts without the control of prison walls. The convict years witnessed the use of hanging as a criminal law sanction to a degree which exceeded that in England relatively and even approached it in absolute terms. Although the numbers of executions can be difficult to determine with accuracy, the data suggest that in New South Wales but especially in Tasmania hanging was used to excess in the years to 1850. The imposition of control through the savage use of hanging as a deterrent became a characteristic of Governor Arthur's governorship in Tasmania, one which was continued for a few years by Sir John Franklin into the 1840s.[52] The death penalty in England at this time was used in less than ten per cent of capital convictions, the great majority of sentences to death being commuted to life imprisonment. In Van Diemen's Land the rate of use of the death penalty was part of a persistent attempt by Governor Arthur to establish security of the free settlement in the midst of a penal colony.[53]

TABLE: CAPITAL PUNISHMENT IN NEW SOUTH WALES, VAN DIEMEN'S LAND AND ENGLAND AND WALES

	NSW	VDL	E&W
1821-5	127	57	364
1826-30	129	163	307
1831-5	159	54	207
1836-40	87	20	51

Source: for New South Wales and Van Diemen's Land, Mukherjee, *Social and criminal Statistics*, pp. 651-2, and Grabosky, *Sydney in Ferment*, p. 65 for 1829; for England and Wales, Gatrell, *Hanging Tree*, p. 617.

This relatively intense use of the death penalty did not survive the mid-century. A number of conditions had altered. One was the demise of convictism as the dominant force of colonial life, a social system which demanded that political authority be exercised with firmness and in which the capacity for self-government was limited. The second was the construction of

[52] R. P. Davis, *The Tasmanian Gallows*, Hobart, 1974, chs. 2-3 contains a detailed account of the execution policy and many cases.

[53] See Davis, *Tasmanian Gallows*; L. Robson, *A History of Tasmania Vol. 1*, Melbourne, Oxford University Press, 1983, pp. 147-8.

the prisons and the establishment of penal servitude as the dominant criminal sanction. Third, reform of the criminal law which in England had begun to diminish the number of offences carrying the death penalty became a significant force in the colonies as well.

The subsequent history of capital punishment in Australia was one in which hanging (the only form used) was the penalty in a minuscule proportion of cases while attracting enormous political attention. The abolitionist movement was of growing significance, with many friends in parliament. At the same time sections of the media through their role in publicising the crimes and trials of those sentenced to death inflamed political controversy over the choices facing governments with the power of mercy in their hands, through their recommendations to the governor in each state for reprieve and commutation of the death penalty into life imprisonment. From the 1880s on the parliaments and the press constantly debated the continuation of the death penalty.

Before considering the abolitionist movement, the ultimate victor in this parliamentary battle, the specificity of the death penalty bears some comment. For the reality was that as the number of capital offences contracted (with, broadly speaking, non-violent offences going first, then rape, leaving only murder and treason) so did the kinds of offending in specific cases which would warrant carrying out the death sentence. Judges might exercise their own discretion - the sentence of 'death recorded' (in non-homicidal cases) being a judicial resort which avoided the risks of the executive of the day proceeding to hang in a case which the judge considered less serious.[54] Then the executive might agree that the sentence not be carried out, a judgment that on occasion took place in the context of enormous political pressures from both pro- and anti-hanging forces. The result is that the record of punishment displays certain characteristics with regard to offences and offenders which bear notice.

A thorough study of the exercise of the death penalty in any Australian jurisdiction remains to be undertaken. Data from South Australia and Victoria provide the most complete overviews available from published research. A study by Griffiths of the prison records relating to the 76 executions in South Australia from 1836 to the last hanging in 1964 showed that of these persons, all but 2 were men. In a pattern which is replicated elsewhere in Australia, Aborigines were over-represented: 20 of the 76 were Aborigines. Aborigines also benefited however from the prerogative of mercy, accounting for 28 of the 108 commutations. Women sentenced to death were very likely as in all jurisdictions to receive

[54] Davis, *Tasmanian Gallows,* p. 39; R. Douglas and K. Laster, 'A matter of life and death: the Victorian executive and the decision to execute, 1842-1967', *ANZ Journal of Criminology*, 1991, 24, 2, p. 145.

the benefit of mercy - in South Australia only two women were executed (in 1873, a white woman, and 1900, an Indian woman, both for murdering their husbands), while at least nine had their death sentences commuted. [55] These patterns were replicated in the larger population of Victoria, where 606 were sentenced to death between 1842 and 1967, of whom 185 were executed. Only five women were hanged in Victoria of the 335 charged with capital offences over the period 1842-1967 - and the execution of the death penalty was usually in these cases a contentious matter[56]. Although there are some apparent proportional differences between the races in risk of being executed following a capital charge, these are not statistically significant and more detailed scrutiny by Douglas and Laster suggested that controlling for time of the trial and other variables revealed 'a (barely significant) relationship between being aboriginal and being *acquitted*'. Their suggestion that the effects of racial discrimination operated more subtly than might be expected on first glance is likely to be important in explaining this and other results of a similar kind in other jurisdictions, with colonial and later opinion questioning whether Aborigines in all cases were fully equal legal subjects.[57]

Table - Executions in Victoria, 1842-1967

	No. charged capital off.	% acquitted	%convicted	%executed/ charged
female	335	53.0	1.3	1.5
male	2256	38.1	24.6	7.9
Aboriginal	28	39.3	32.2	10.7
Chinese	30	33.3	36.6	16.7
Other	2533	40.6	24.8	7.1

Source: adapted from Douglas and Laster (1991), p. 156[58]

The hanging of women inflamed controversy of considerable note, becoming by the 1890s inter-woven with deeply felt presumptions about the nature of woman and her responsibilities and burdens. The Governor of New South Wales, Lord Carrington, made no secret of his

[55] ARG Griffiths, 'Capital Punishment in South Australia, 1836-1964', *ANZ Journal of Criminology*, 3, 4, Dec 1970, pp. 214 -222.
[56] See Michael Cannon, *The woman as murderer*, Mornington, Vic. 1994; K. Laster, 'Arbitrary chivalry: women and capital punishment in Victoria, 1842-1967', in D. Philips and S. Davies (eds), *A Nation of Rogues: Crime, Law And Punishment in Colonial Australia*, Melb. 1994.
[57] R. Douglas and K. Laster, 'A matter of life and death', pp. 152-3.
[58] See fn. 53.

great distaste for this part of his office during the political debate over the prospective hanging of convicted husband-poisoner, Louisa Collins in 1888-9. Collins had vocal public advocates of mercy who deputised Carrington - who also received angry letters from supporters of the death penalty, such as that advising him that a public meeting against the death penalty being administered had been filled with 'free thinkers' and 'RCs' [Roman Catholics] (an allegation which demonstrates unwittingly the broad coalition of ant-hanging forces). Women supporters of Collins' case (marked by uncertain forensic evidence and which had gone to three juries before conviction) did not disguise the basis of their sympathy: from Gulgong Mrs Rachel Elliott told the Governor that Collins had already endured the pains of hell five times in bringing five children into the world.[59] In reviewing the five cases of women hanged in Victoria Laster has documented the intersection of their fates with the prevalent discourses of femininity, but noting in the end how vulnerable to a particular constellation of political forces was the decision to carry through the execution of the death penalty. [60]

In South Australia and in other jurisdictions the hanging of Aborigines was assumed during the early colonial period to be an essential weapon in the securing of the frontiers of settlement[61]. Nevertheless arguments about mercy were also commonly advanced in some of these cases - especially in relation to the vexed issue of Aborigines' status at law and their knowledge of white man's law. In some cases this matter was addressed on explicitly racialist grounds, as suggested by Douglas and Laster in their citation from an 1897 Victorian petition for mercy 'having regard to the well-known intense animal passions of the Aborigines, their degraded ancestry and evil tribal influences; all so widely different from the heredity and circumstances of white men'.[62] But there were those who advanced a different kind of argument, one which took more sceptical notice of the facts of colonisation. A cogent plea on behalf of an Aboriginal defendant was advanced in the South Australian parliament in 1893 by a vocal opponent of abolition, Mr Solomon. In respect of a number of cases involving both Aborigines and whites mercy had been extended by the Governor who by this time had to act on the advice of the Executive, the cabinet of the day. Solomon was particularly disturbed by what he saw as evidence of different standards being applied to a respectable white farmer, involved in a wilful and premeditated murder by shooting of a girl, and an Aboriginal half-

[59] NSWSA, 4/895.1 - Petitions re commutation of death sentence on Louisa Collins (1887-8).
[60] See Laster, 'Arbitrary chivalry', pp. 169, 185.
[61] S. Davies, 'Aborigines, murder and the criminal law in early Port Phillip, 1841-1851', *Historical Studies*, 22, no 88, 1987, pp. 313-335
[62] Douglas and Laster, 'A matter of life and death', p. 153.

caste whose life history was eloquently laid before the House by Solomon, who had been to the Darwin gaol to interview him. In terms reminiscent of debate in the famous Stuart case over sixty years later, Solomon recounted that Flannagan had been born of a Queensland Aboriginal mother and a white father, taken from his tribe when a few years old by Queensland overlanders ('some of the Queenslanders in the back blocks were about the lowest scum to be found in the whole of Australia' he added) and 'was brought over by these cattle men and travelled between Queensland and the Northern Territory, occasionally changing hands from one brutal master to another'. Having read the details of both cases Solomon thought mercy had been 'strained' in the case of the white farmer Page and that it might now be exercised in favour of Flannagan:

> Flannagan was a half-caste blackboy and was now about 20 years of age, but from his childhood he had been merely a chattel, handed over from one person to another, and he had never had any opportunity of knowing right from wrong or of knowing what our English law was.[63]

As this case suggests the debate about capital punishment moved uncertainly between the principles of justice in particular cases and the ethics of capital punishment as a penalty. The debates on mercy vented the former and became a vehicle through which the social contexts of criminality and the individualisation of the offender were developed as principles determining degree of culpability and mode of punishment. The courts were normally the forum for such considerations - the debates around the death penalty, however, whether as a moral absolute or in particular cases broadened the forum of debate on punishment.

As well as femininity and Aboriginality, youth was a factor likely to inspire political controversy around appeals for clemency. The most famous case involving appeals on the grounds of the youth of the offenders was the Mt Rennie rape case in 1886-7, which again had involved Carrington. The controversy exposed tensions of great moment in colonial life - anxieties about larrikinism and the condition of youth in colonial society, the demand of women for protection, the anti-feminism of significant sectors of colonial culture, especially centred on *The Bulletin*, the class tensions which found expression in the attacks on the judicial system and the role of Judge Windeyer in the trial and sentencing decision[64]. The

[63] SAPD, 13 July 1893, pp. 397-8.

[64] See D. Walker, 'Youth on trial: the Mt Rennie case', *Labour History,* 50, 1986, pp. 28-42; Allen, *Sex and Secrets*, pp. 54-64; J. Peers, 'The tribe of Mary Jane Hicks: Imaging women through the Mount Rennie case 1886', *Australian Cultural History: Crimes and Trials,* 12, 1993, pp. 127-144; D. Philips, 'Anatomy of a Rape Case 1888: Sex, Race, Violence and the Criminal Law in Victoria', in Philips and Davies, *A Nation of Rogues*, pp. 108-110.

youth of offenders had already been the focus of an earlier campaign by some high-profile colonials who objected in 1879 to the death sentence being executed in another rape case. At the Mudgee Assizes a 14 year old Aboriginal youth and his 19 year old associate had been found guilty of rape. A petition of over 6,400 signatures initiated, it appears, by a group of Sydney lawyers, including a future Prime Minister (barrister Edmund Barton), was signed also by the Anglican Bishop of Sydney. The petition argued that the colonies should not be executing persons for an offence which had been removed from the list of capital offences in England, that the youth of the two convicted was a ground for mercy, and that future juries would be reluctant to convict on a charge of rape if the likely consequence was the carrying out of the death penalty[65]. The evidence is strong that juries were sensitive to the prospective sentence of death in their calculations of guilt, especially in the case of a rape charge which survived as a capital offence in Australian jurisdictions for many decades after its removal in England in 1841.[66]

These were among the more cogent arguments in favour of abolition which became part of Australian political debate over the next eight years. The abolitionist case had already been advanced in the late convict era, part of the movement of 'moral enlightenment' to which Michael Roe traced many of the characteristic reforms of institutions in New South Wales and Tasmania before self-government in the 1850s.[67] Yet the achievement of abolition was long in coming. Why was this so? The durability of hanging as a punishment of last resort is particularly striking in the light of what I have argued earlier was the relatively speedy demise of whipping. True, both punishments were rarely used by the 1920s, and in most jurisdictions neither was formally abolished by this time - but there is a sense in the debates around punishment that whipping became more unthinkable before the cessation of the death penalty. Indeed exchanges in the Victorian Legislative Council in 1959 illustrated just that presumption, with the persistent Labor abolitionist J W Galbally in disbelief chiding the Country Party's D J Walters, a defender of both capital and corporal punishment: 'do not tell me that you are in favour of whipping now'.[68]

The reasons may be plumbed at some depth in examining the different domains within which each punishment circulated. Whipping, as we have seen, was increasingly restricted to a number of subject populations - juveniles, male prisoners for prison offences, and (in

[65] NSWSA, 4/6029, Petition in Case of an Aboriginal Alexander Metcalf and of Charles E. Wilkinson (1879).
[66] See esp. R. Barber, 'Rape as a Capital Offence in Nineteenth Century Queensland', *Aust Journal of Politics and History* , xxi, 1, 1975, pp. 31-41; Douglas and Laster, 'A matter of life and death', pp. 153-4.
[67] M. Roe, *Quest for authority in Eastern Australia, 1835-1851*, Melbourne: 1965, esp. pp. 197-8.
[68] VPD, 21 Oct 1959, p. 799.

Australia) sex offenders. In each case its purpose was doubtless manifold - an exemplary and deterrent punishment, but also an aid to changing the behaviour of the prisoner. In this second respect its use remained consistent with changes in punishment more generally - towards reformation of the individual offender. The readiness with which latter day advocates of corporal punishment recall with nostalgia their own character-forming experiences under the paternalistic hand of a parent, teacher or policeman, is also consistent with this view of whipping as essentially a reformative, even character forming, punishment.

The application of the death penalty on the other hand precludes such a possibility. Its finality speaks to other purposes. Those purposes were of ancient lineage and continue to be influential in ways that are still evoked in the passionate and angry debates which are occasioned by horrific crimes. To surrender access to such responses - to abandon the eye for an eye approach - required very substantial cultural and personal change. To an audience reading a book like this in a country like Australia, abolition is such an element of faith that its rationale does not need to be rehearsed. More understanding of the long survival of capital punishment, and the hankering after it has long gone, may come from looking at the rhetoric of those who opposed the frequent legislative attempts to abolish the death penalty in the Australian states.

If what marked the eighteenth century movement against bodily punishment was a changing conception of the body itself, paralleling a challenge to an organic conception of the body politic[69], that movement by no means succeeded in wholly transforming the way popular and political discourses conceived of the uses of capital punishment. The overwhelming impression of pro-abolitionist opinion however was its increasing incoherence, especially ranged against the often learned arguments of the proponents of abolition. Faith in the stability of the common law and its defence of the community was ranged on one side against the rationalist arguments of abolitionists who increasingly could marshal the evidence of jurisdictions which had ceased executions without aggravating their crime rates. Both sides called on religious traditions - the Mosaic law and its interpretation as a rationale for retribution being a common cause of dispute[70], while more general principles of respect for life and justification for killing in canonical, secular and international law were also debated at length. In Melbourne the *Argus* consistently to the 1950s upheld the retentionist cause, bringing in behind it a panoply of opinion. To the *Argus* the death penalty was an immutable

[69] McGowen, 'The body and punishment'.
[70] See especially SAPD, 12 Aug. 1891, p. 717; 4 Nov. 1891, p. 1869, on a motion by Mr V.L. Solomon (MHA for the Northern Territory) for abolition of capital punishment..

part of the common law tradition, and evidence of its impermanence as a penalty just confirmation of a deteriorating social order.

> A labour party governed only by its own crude impulses and unchecked by the salutary discipline of a Parliamentary second chamber has already abolished the death penalty in Queensland... There should be no weakening of moral fibre when capital punishment is considered in the abstract....Has society not a right and a duty to protect its members by the most efficacious methods against its enemies? Unquestionably it has[71].

Commenting on the refusal of the New South Wales Government to commute the death sentence on a 17 year old in 1936, the paper applauded this upholding of the authority of the law, a law which allowed the exercise of mercy only in the most deserving or doubtful cases. One correspondent affirmed support for capital punishment, not as retaliation, but because violent criminals were 'not fit to live in a civilised State', while others appealed to religious authority (although the Bible was quoted on both sides) - 'Christian Conscience' cited Genesis, ix, 6, 'Whoso sheddeth man's blood by man shall his blood be shed' and warned that 'Humanitarianism, when it seeks to override God's word, is nothing less than an insult to the Almighty'[72].

By the 1950s however the debates centred largely on the deterrent value of capital punishment. The value of the death penalty as retribution or denunciation was not wholly given away, especially in the judgment as to the type of crime which would merit hanging - and Lord Denning's exposition of denunciation as the ultimate justification for punishment before the United Kingdom Royal Commission into Capital Punishment was picked up by Australian defenders of the death penalty[73]. But few advocates of hanging were prepared to rest on retribution as the core of the case for hanging, however much this may survive as a popular justification[74]. Instead the solidity of resistance to abolition in the post-war period appears to have become centred in Australia on a compact between the state and its security

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[71] *Argus,* 6 July 1936, p.8

[72] *Argus*, 13 May 1936, p. 6; 21 May, p. 10; 23 May, p. 24 - all relating to case of Edward Hickey.

[73] See VPD, 21 Oct. 1959 (R.J. Hamer, M.L.A., cited Denning: ' The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime; and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty').The same passage was cited with approval in the almost contemporaneous debate in the South Australian parliament, SAPD, 16 Sep. 1959, p. 759 (Mr Jenkins, M.H.A.).

[74] This is consistent with some evidence about the context of decision-making in capital cases by the mid-twentieth century. According to a reminiscence of Sir Rupert Hamer, the Victorian Premier who eventually sponsored the parliamentary bill abolishing the death penalty, during the controversial Tait case in 1962 he 'never heard Bolte or other ministers express any savage determination that Tait should be executed'. Cannon, *The woman as murderer*, p. 228.

arm - the police and prison officers. In this respect it was noteworthy that the last person to be hanged was on a conviction for the killing of a warder during an escape. The decision of the Victorian government to proceed with the hanging of Ronald Ryan was in fact a virtual denouement to a script of statist defence which had been written by Australian conservative leaders in the previous decade.

The evidence for this may be seen in the responses of two significant politicians in adjacent states to abolitionist arguments in 1959. In that year well-known Labor abolitionists John Galbally in Victoria and Don Dunstan in South Australia each attempted to enact a bill in their cause. Galbally introduced as a private member into the Legislative Council, as he did a number of times before and after, a straightforward 'abolition of capital punishment' bill. Dunstan aimed at the same end by removing from the state's criminal law acts the provisions for the death penalty in relation to particular offences. Each of the abolitionists made extensive use of some of the international debate on the issue over the previous decade. Influential support for their case was drawn from two inquiries: the UK Royal Commission on Capital Punishment (1949-53) which had undertaken an extensive international inquiry, and a more recent Commission to inquire into the possible restoration of the death penalty in Ceylon, a commission chaired by Norval Morris, formerly of the Melbourne University Criminology Department and in 1959 a Professor of Law at the University of Adelaide. As Dunstan repeatedly pressed, the UK Commission had not had the power to make a recommendation on the death penalty although the trend of its Report was against it; while the Ceylon Commission recommended strongly against restoration. Much time was spent in debate reviewing the statistical evidence of murder rates before and after abolition in different jurisdictions including Queensland (abolition in 1922) and New South Wales (no execution since 1939 and statutory abolition in 1955).

The weight of international evidence and the weakness of various pro-hanging arguments was telling when the Liberal Party's Rupert Hamer spoke against abolition while conceding most of the ground to Galbally - indeed one member suggested that Hamer might have been speaking in support of the latter. Hamer was to become Victorian Premier in 1973 and enact abolition, and was also a Cabinet minister in the government which decided Ryan should hang, a decision he opposed in Cabinet. In 1959 however he could not give way completely. On this matter he felt, citing some opinion in the UK Commission's Report, a government should not advance too far ahead of public opinion, which in Australia was still clearly in a majority in favour of retention. But the conclusive point for Hamer was the possible deterrent value in special cases. Especially the government should not

> remove that deterrent and not offer protection, as I think we should, to police officers and warders in the course of performing their duties. We should remember that in our prisons there are a number of men who have been committed there for life for murder and for whom there is no other deterrent whatsoever to the committing of murder in, say, an attempt to escape.[75]

According to Hamer's later account of the Ryan case, he had evidently changed his opinion by 1966 on this fundamental point and argued that a number of more repulsive murders had resulted in commutation - but the Cabinet was persuaded by Attorney-General Rylah's conviction that the 'government must be seen to be 'protecting the protectors' - such as the prison warder who was murdered during the escape from Pentridge. Premier Bolte was also and unusually 'outspoken' on this occasion, believing that ' the public's guardians such as police and warders must be safeguarded at all costs'.[76]

Protecting the protectors had also become the one final shot in the armoury of arguments against abolition in South Australia. There, in spite of the UK Royal Commission's explicit demonstration of the weakness of this argument which had been strongly urged by police (and which Dunstan cited in parliament), the Premier of the day Sir Thomas Playford insisted on retention as the ultimate deterrent. Parliament, he said, had not only a strong moral obligation to protect innocent people from crimes of violence, ' but also a particular obligation to members of our Police Force, who, because, of the very nature of their profession, are most concerned in this matter'. His case was strengthened by reference to the Westminster parliament's retention in the Homicide Act 1957 of the death penalty for a restricted number of offences including murder of a police officer on duty.[77] The retentionist imagination had long postulated the threats posed to social order once the restraint of the noose was removed - hence the conservative Melbourne *Argus* in 1929, quoting an English writer on the dangers of abolition:

> so long as the legal punishment for treason and murder is death, the 'Red' agitator will have difficulty in finding tools to carry on the 'heavy civil war' hoped for by Moscow; once that punishment is reduced to imprisonment for life, there will be no lack of ruffians willing to shoot policemen and other Government servants in the back. [78]

Perhaps it was precisely this focus on defence of the state which doomed the retentionist argument - for political decision-makers had gradually surrendered the death penalty for most

[75] VPD, 21 Oct 1959, p. 797.
[76] Cannon, *The woman as murderer*, pp. 228-9.
[77] SAPD, 26 Aug 1959, p. 618.
[78] *Argus* 5 Jan 1929, p. 8, citing W G Carleton Hall writing in the *English Review*.

capital offences, however grave and shocking their violence. It says much about the close alliance between government and police in this era, on the eve of the eruption of major social conflict over the role of the police from the late 1960s one, that the last stronghold of political argument in defence of the death penalty centred not on the violence of a criminal act as on the broader threat to the state if its officials were rendered more vulnerable by abolition. With the passing of the old guard of Bolte and Playford however even the cogency of this argument lost its appeal, in the face of the lack of real evidence to support the worst fears of police and their political allies.[79]

The abolition of the death penalty was in fact one of those transformations in the history of punishment which illustrates the signal influence of the political process in determining an outcome which would by no means have flowed from a referendum of popular opinion. It is true that the completion of abolition in Australia took place at what appeared to be a particularly low ebb in the popularity of the death penalty. But the demise of the penalty had started well in advance of popular opinion, if we think of that as a single voice. Of course it was not and never was, which was one of the reasons for the emergence of abolition as something more than a utopian wish, in spite of substantial support for hanging. Some writers see the administration of capital punishment as a sentencing option, with its shift from the judicial into the political arena for adjudication on the mercy prerogative, as part of its most offensive character[80]. We could consider on the other hand whether the politics of this particular punishment is the epitome of what punishment is, of what purposes it serves and what limits must be put on it, more so than all the precision of a judicial sentencing code and a regular prison regime under determinate sentence.

[79] For a contemporary comment on the lack of evidence on the deterrent value of the death penalty in relation to the killing of police and prison warders, see Stanley W. Johnston, 'Why can't we be reasonable about hanging?', *The Australian*, 17 Dec 1966, (reprinted in B. Jones (ed), *The Penalty is Death,* Melbourne, Sun Books, 1968) after the decision to proceed with Ryan's execution.

[80] E.g. Laster, 'Arbitrary chivalry', Douglas and Laster, 'A matter of life and death'; Gatrell, *Hanging Tree,* passim.