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# Convicts, Thieves, Domesticity and Wives in Colonial Australia: The Rebellious Lives of Ellen Murphy and Jane New

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CAROLINE FORELL\*

**Convicts, Thieves, Domestic, and Wives in Colonial  
Australia: The Rebellious Lives of Ellen Murphy and Jane  
New**

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*“Well-behaved women seldom make history.”*  
—Laurel Thatcher Ulrich

**Abstract**

This Article examines the lives of two female convicts who rebelled against the law and the Australian penal system in the early nineteenth century. It follows Ellen Murphy and Jane New from their first arrests through their experiences with and exits from the penal system. As thieves, convicts, domestics, and wives, Ellen and Jane interacted repeatedly with the law. Both the notorious Jane (who was the subject of a habeas corpus action in *In re Jane New*), and the more representative Ellen, began thieving as young teenagers in the teeming cities of England. The law arrested, tried, and convicted them. Next it transported them to Van Diemen’s Land (now, Tasmania). It then unsuccessfully attempted to manage their lives.

The law influenced convict women’s choices in more overt ways than it did free women although, as this Article discusses, many similarities existed between the legal disabilities imposed on both groups and, on occasion, as with Jane New, the law doubly disabled convict women because they were assigned to their husbands. Nevertheless, Ellen and Jane’s interactions with the law illustrate how convict women were able to make meaningful choices even in the heavily regulated penal systems of Governors Arthur of Van Diemen’s Land and Darling of New South Wales.

I. Introduction

A. Ellen Murphy and Jane New

Ellen Murphy and Jane New were teenagers when they were arrested, convicted, and sent to the penal colony of Van Diemen’s Land (VDL), now known as Tasmania, during 1820–1840, the peak period of British transportation of convicts to Australia.

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While both young women's original crimes were similar, their rebellions against the penal laws were very different.

Ellen and Jane's histories illustrate how women retained their agency and shaped their lives even when entangled with England's bureaucratic and heavily regulated early nineteenth century penal system (the System). Their criminal conduct led to the law's involvement. Thereafter, with only limited success, the System attempted to control them until they obtained their freedom. While their experiences with freedom differed dramatically—Ellen lived within the bounds of the law while Jane was an outlaw—they each chose how to live their lives both inside and outside the System.

In 1830 Ellen Murphy, who is my great-great-grandmother,<sup>1</sup> was convicted at the Old Bailey in London when she was thirteen.<sup>2</sup> Her crimes were shoplifting four books<sup>3</sup>

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<sup>1</sup> In April 1988, my mother stopped by my home to share a letter from her twin brother Bob who lives in Hobart, Tasmania. The letter contained extraordinary family news. Bob's letter said:

Dear Jude, . . . You will have seen the enclosed sheets before you read this. . . . I wonder what you will think of the news of our Mainwaring ancestors in Van Diemen's Land—especially in the light of your reading of [Robert Hughes's] "*The Fatal Shore*"! George and Ellen M. were the parents of our grandmother Elvie Jacklyn and I had no idea that they had been convicts until [our cousin Bob Mainwaring] spilt the beans . . . by showing [me] the results of an enquiry he had sent to the Archives Office . . . . What he got back was a sheet of paper about George [Mainwaring] and a sheet of paper about Ellen [Murphy], setting out their essential convict records. . . .

[U]ntil recently [Australian] convict ancestry had been such an embarrassment that . . . a cover-up story was invented, so that after one or two generations the knowledge itself, within the family, became lost. . . . The few Mainwarings I have talked to so far . . . had known almost nothing about George and Ellen. [O]ur grandmother Elvie was the youngest of [George and Ellen's] ten children . . . .

Thank goodness we can now look openly at our Australian past—at such things as the fascinating drama of Ellen Murphy's life, hidden away for all these years. . . . She was undoubtedly high-spirited and no amount of Solitary Confinement (in [a] darkened cell, by the way) on Bread and Water, which was said to be dreaded by the prisoners, seem[s] to have [had] the least effect. . . .

I have become quite absorbed over Ellen Murphy. Perhaps it is a pity she was not to know that she would have a doting great-grandson . . . . [N]ot a great deal has been recorded about the females and as far as I know, no female convict has left an account of her experiences in [Van Diemen's Land] . . . . Great pity.

Letter from Bob Jacklyn, to Judy Forell (Mar. 26, 1988) (on file with author). Since reading my Uncle Bob's letter, like Patricia Williams in writing about her great-great-grandmother, "I have been picking through the ruins for my roots" as well as searching for a way to tell Ellen's story. Patricia J. Williams, *On Being the Object of Property*, 14 SIGNS 5, 5 (1988).

The embarrassment and shame of having convict ancestors was called the "convict stain." ROBERT HUGHES, *THE FATAL SHORE* xi (1986). See also TONY RAYNER, *FEMALE FACTORY, FEMALE CONVICTS* 5 (2004) ("Until the late 1970s there were still quite strong taboos in Tasmania about discussing convict ancestors . . . . This even had an official edge to it: the Archives Office of Tasmania refused access to all convict records until they received a written undertaking that no name or other material that might identify an individual convict was to be published or disseminated.").

and four and a half yards of “jean” material.<sup>4</sup> Ellen, an Irish Catholic, was sentenced to fourteen years transportation out of the country<sup>5</sup> to VDL, the island down under the mainland of Australia which later became Tasmania.<sup>6</sup>

Ellen’s record<sup>7</sup> indicates that the domestic service that convict girls and women were assigned to do while serving out their sentences was not to her liking. During Ellen’s nine years in the System, she served twenty different masters and committed twenty-five separate offenses. Her transgressions against the System’s requirement of compliant domestic service led to punishments ranging from reprimands to months of solitary confinement on bread and water.<sup>8</sup>

Ellen Murphy is an example of a female rebelling against the law and social conditions of her time. She arrived in VDL along with 185 other female convicts on the *America* in 1831. While many of her shipmates committed offenses while in domestic service, Ellen’s stubborn refusal to do what the law required of her, regardless of the legal consequences, was at odds with the System’s more rapid domestication of most female convicts including many of her shipmates.<sup>9</sup>

In searching for another female VDL convict whose behavior was also particularly rebellious to compare to Ellen (preferably someone more connected to historical events) a woman mentioned in an article by Australian legal historian Bruce Kercher<sup>10</sup> piqued my interest. Like Ellen, Jane New was transported to VDL for shoplifting; however, unlike Ellen or any other female convict I have come across, Jane

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<sup>2</sup> THE PROCEEDINGS OF THE OLD BAILEY 43 (London, Dec. 9, 1830), *available at* <http://www.oldbaileyonline.org/browse.jsp?ref=t18301209-75> (last visited Oct. 18, 2011); *id.*, *available at* <http://www.oldbaileyonline.org/browse.jsp?ref=t18301209-76> (last visited Oct. 18, 2011).

<sup>3</sup> *Id.*, *available at* <http://www.oldbaileyonline.org/browse.jsp?ref=t18301209-75> (last visited Oct. 18, 2011).

<sup>4</sup> *Id.*, *available at* <http://www.oldbaileyonline.org/browse.jsp?ref=t18301209-76> (last visited Oct. 18, 2011).

<sup>5</sup> *See id.*, *available at* <http://www.oldbaileyonline.org/browse.jsp?ref=t18301209-75> (last visited Oct. 18, 2011); *id.*, *available at* <http://www.oldbaileyonline.org/browse.jsp?ref=t18301209-76> (last visited Oct. 18, 2011).

<sup>6</sup> The British established Van Diemen’s Land (VDL) as a penal colony in the early nineteenth century. *History of Australia*, NATIONS ONLINE PROJECT, <http://www.nationsonline.org/oneworld/History/Australia-history.htm> (last visited Oct. 22, 2011). It is now Tasmania, one of Australia’s six states, located off of the southeast coast of the mainland. *Id.*

<sup>7</sup> Because transportation involved a penal system that kept detailed records, there is a wealth of information on Australian convicts, people. These people were often economically deprived and illiterate, would ordinarily have disappeared from history. Only a couple female convicts transported to VDL left any writings about their experiences. *See, e.g.*, Letter from Maria Turner (1841), in CONVICT WOMEN 132–33 (1998). Therefore, the penal records are the main source of women convicts’ histories.

<sup>8</sup> In contrast, Ellen’s eventual husband and my great-great-grandfather George Mainwaring had a clean record. Convicted in 1834 of theft of fire tongs and sentenced to seven years transportation to VDL, he became a free man in 1841 with no recorded offenses during his penal servitude. George Mainwaring (Mannering), Archives Office of Tasmania, database # 47625 [hereinafter George Mainwaring] (on file with author).

<sup>9</sup> I reviewed the penal records of all Ellen’s shipmates aboard the *America*. Copies of convict records in possession of Bob Jacklyn, Hobart, Tasmania.

<sup>10</sup> Bruce Kercher, *Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700–1850*, 21 LAW & HIST. REV. 527, 575 (2003) [hereinafter Kercher, *Perish or Prosper*].

was the star of a legally and politically important case, *In re Jane New*.<sup>11</sup> As an added bonus, Kercher's footnotes suggested that Jane had lived a colorful life that included escapes of a completely different order from Ellen's absconding from her assigned masters.<sup>12</sup>

Colorful turned out to be an understatement. As described below, in 1829 Jane became deeply entangled with the Stephen family, then the leading family of lawyers and jurists<sup>13</sup> in the penal colony of New South Wales (NSW).<sup>14</sup> Furthermore, she was one of the rare women to escape the watchful eye of the System and from Australia entirely. What allowed a woman from a background similar to my great-great-grandmother's to become the talk of Sydney society and the central figure of an important Supreme Court case? How did an illiterate thief, convict, and wife of an ex-convict (to whom she was assigned) manage this? I suggest that Jane's personal traits—most notably her sexual attractiveness, infertility, and enjoyment of risky business—combined with the legal, political, and social contexts of Sydney in the late 1820s made her extraordinary.

## B. Background and Context

Convict women played a crucial role in the founding and development of Australia. From the arrival of the first convicts with the First Fleet at Botany Bay, near Sydney, in 1788 and continuing until 1853, women were sent from Great Britain to serve sentences of seven or fourteen years or a lifetime.<sup>15</sup> The almost 25,000 female convicts (half of whom were sent to VDL)<sup>16</sup> were a distinct minority of the total 160,000 convicts.<sup>17</sup> Most came from either Lancashire, like Jane and her mother Elizabeth, or London, like Ellen and her codefendant Margaret.<sup>18</sup>

The mid-1820s through the early 1830s, the period during which Ellen and Jane were arrested, convicted, and transported, was on the cusp between Britain's "long eighteenth century"<sup>19</sup> marked by the Bloody Code<sup>20</sup> that was frequently circumvented

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<sup>11</sup> *In re Jane New* [1829] NSWSC 11 (Austl.), available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1829/in\\_re\\_jane\\_new/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/in_re_jane_new/).

<sup>12</sup> Kercher, *Perish or Prosper*, *supra* note , at 575 n.183.

<sup>13</sup> See *infra* notes and accompanying text.

<sup>14</sup> New South Wales (NSW), currently an Australian state, was the first penal colony that the British established in Australia. *History of Australia*, NATIONS ONLINE PROJECT, <http://www.nationsonline.org/oneworld/History/Australia-history.htm> (last visited Oct. 22, 2011). It began with the arrival of the First Fleet in 1788, led by Captain Phillip, and its main city was and still is Sydney. *Id.*

<sup>15</sup> *Convicts and the British Colonies in Australia*, AUSTRALIA.GOV.AU, <http://australia.gov.au/about-australia/australian-story/convicts-and-the-british-colonies> (last updated Feb. 17, 2010).

<sup>16</sup> RAYNER, *supra* note , at 23. The exact figure for all women convicts was 24,960. DEBORAH OXLEY, *CONVICT MAIDS: THE FORCED MIGRATION OF WOMEN TO AUSTRALIA* 3 (1996).

<sup>17</sup> Kercher, *Perish or Prosper*, *supra* note \_\_, at 528.

<sup>18</sup> KAY DANIELS, *CONVICT WOMEN* 52 (1998).

<sup>19</sup> Peter King describes this "as the golden age of discretionary justice—particularly if property crime was the focus." PETER KING, *CRIME, JUSTICE, AND DISCRETION IN ENGLAND 1740–1820*, at 355 (2000). It is also known as the Hanoverian or Georgian period. HUGHES, *supra* note , at 19–25. The last of the Hanoverian

through the exercise of discretion and mercy by judges and juries,<sup>21</sup> and the Victorian era,<sup>22</sup> marked by an emphasis on personal and societal morality,<sup>23</sup> many more prosecutions with the goal of reforming criminals,<sup>24</sup> and an increase in enforcement of rules of law<sup>25</sup> (including evolution of the rules of evidence).<sup>26</sup> The early to mid-nineteenth century was a period of social upheaval and transition into the modern era in Great Britain. Industrialization was accompanied by rapid urbanization and population growth. In 1770 Manchester had a population of 27,000; by 1830 it had grown to 180,000.<sup>27</sup> London's population in 1750 was 675,000; by 1851 it had swelled to two and a half million.<sup>28</sup> The number of young urban poor ballooned<sup>29</sup> and the propertied class became more fearful of the masses, in particular, what they perceived as the "criminal class."<sup>30</sup>

The British faced the ongoing problem of what to do with their increasing numbers of convicted criminals. One well-established solution was to ship them to another land.<sup>31</sup> During the eighteenth century, approximately 50,000 British convicts were sent to the American colonies.<sup>32</sup> Losing the American Revolutionary War deprived England of this means of ridding itself of many of its convicts, most of whom were thieves.<sup>33</sup> Options were limited. The penitentiary movement had begun<sup>34</sup> but abolition of capital punishment and transportation was still decades away.<sup>35</sup> The Bloody Code authorized hanging many of those convicted of property crimes, and in fact executions

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kings, George III, died in 1820. *George III (1738–1820)*, BRIT. BROADCASTING CORP., [http://www.bbc.co.uk/history/historic\\_figures/george\\_iii\\_king.shtml](http://www.bbc.co.uk/history/historic_figures/george_iii_king.shtml) (last visited Oct. 22, 2011).

<sup>20</sup> This term is used to describe the myriad of statutes that were enacted during the eighteenth century for which the death penalty was available. *Glossary*, THE PROCEEDINGS OF THE OLD BAILEY, <http://www.oldbaileyonline.org/static/Glossary.jsp> (last visited Oct. 22, 2010). *See also* KING, *supra* note \_\_\_. In 1823, the number of capital crimes in England was estimated to be 200. LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 4 (1948).

<sup>21</sup> KING, *supra* note \_\_\_, at 355; MARTIN J. WIENER, RECONSTRUCTING THE CRIMINAL: CULTURE, LAW, AND POLICY IN ENGLAND, 1830–1914, at 57 (1990).

<sup>22</sup> Born in 1819, Victoria took the throne at the age of 18 and reigned until her death in 1901. *Victoria (1819–1901)*, BRIT. BROADCASTING CORP., [http://www.bbc.co.uk/history/historic\\_figures/victoria\\_queen.shtml](http://www.bbc.co.uk/history/historic_figures/victoria_queen.shtml) (last visited Oct. 22, 2011).

<sup>23</sup> WIENER, *supra* note \_\_\_, at 11.

<sup>24</sup> *Id.* at 49. Increased prosecution "had its greatest effect on . . . those who were unrespectable, poor, and young." *Id.* at 51.

<sup>25</sup> *Id.* at 57.

<sup>26</sup> JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003).

<sup>27</sup> JOHN RULE, THE LABOURING CLASSES IN EARLY INDUSTRIAL ENGLAND 1750–1850, at 16 (1986).

<sup>28</sup> *Id.* at 17.

<sup>29</sup> WIENER, *supra* note \_\_\_, at 17.

<sup>30</sup> HUGHES, *supra* note \_\_\_, at 24–27.

<sup>31</sup> *See* Transportation [Remission of Sentences] Act, 1790, 30 Geo. 3, c. 47:25 (Eng.).

<sup>32</sup> Kercher, *Perish or Prosper*, *supra* note \_\_\_, at 527.

<sup>33</sup> Approximately eighty percent of all convicts were transported for crimes against property and more than eighty percent of female convicts were transported for theft. HUGHES, *supra* note \_\_\_, at 163.

<sup>34</sup> OXLEY, *supra* note \_\_\_, at 38.

<sup>35</sup> Capital punishment was abolished in England in 1850. WIENER, *supra* note \_\_\_, at 15. Transportation to Australia ended in 1868. *Convict Records*, STATE RECORDS OFFICE OF W. AUSTRALIA, <http://www.sro.wa.gov.au/collection/convict-records> (last visited Oct. 22, 2011).

rose dramatically in the ten years following the loss of the American colonies.<sup>36</sup> However, hangings were still relatively uncommon and not a morally or politically viable long-term alternative.<sup>37</sup>

As a stopgap measure, many convicts, both male and female, were warehoused on decrepit hulks (moth-balled naval ships) in England's ports and in filthy and overflowing jails such as Newgate Prison and Liverpool Jail. Beginning in 1788, this was supplemented by the transportation of convicted men and women "upon the seas, beyond the seas"<sup>38</sup> to penal colonies on the continent of Australia, a place which the British deemed unoccupied or "terra nullius" despite the aboriginal peoples who had lived there for thousands of years.<sup>39</sup> During the late eighteenth century through the mid-nineteenth century transportation to Australia provided an effective way of permanently disposing of many of those men and women who were perceived as members of England's criminal class while at the same time strategically establishing a British foothold in the Pacific.<sup>40</sup>

The first penal colony established in Australia was New South Wales (NSW) with Sydney as its colonial capital. NSW included VDL, which today is the island state of Tasmania. Its largest town, Hobart, became VDL's colonial capital when it became a separate colony in 1825.

Most of the legal history of Great Britain and the penal colonies of NSW and VDL has focused on how laws affected men. Colonial law included the law applicable to convicts, law focusing on colonial governance, and the law according to Blackstone, whose commentaries were "the most important law books carried on the First Fleet in 1788."<sup>41</sup> Like the law in all common law jurisdictions at this time, colonial law treated convict men differently from convict women, just as it treated free men differently from free women. Convict men were subject to harsh physical punishment including the lash<sup>42</sup> and often labored outside for either the State or a private master.<sup>43</sup> Once they had served

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<sup>36</sup> In the years of 1769–1778, 787 people were convicted of capital crimes in the London area, of which 357 were executed. The number of convictions increased to 1152 and executions increased to 531 for the period between 1779 and 1788. In 1782, 108 people were convicted of capital crimes and 45 were executed. In 1783 (the year the American Revolution ended) the number of convictions increased dramatically to 173 but only 53 were executed. By 1785, 97 were executed but in 1788 (the year transportation to Australia began) the number plummeted to 25 and remained at around that level for the rest of the century. While the number of capital convictions in 1789 to 1798 went down to 770, a number similar to the decade of 1769 to 1778, the number of executions plummeted to 191 and fell even further the following decade to 126, even though 804 people were convicted of capital crimes. The correlation between the availability of penal colonies and executions is therefore quite clear. RADZINOWICZ, *supra* note , at 147. *See also* HUGHES, *supra* note , at 35.

<sup>37</sup> HUGHES, *supra* note , at 35.

<sup>38</sup> *Id.* at 129.

<sup>39</sup> *See* LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900*, at 168–94 (2002); BRUCE KERCHER, *AN UNRULY CHILD: A HISTORY OF LAW IN AUSTRALIA* xi (1995) [hereinafter KERCHER, *AN UNRULY CHILD*].

<sup>40</sup> HUGHES, *supra* note , at 161.

<sup>41</sup> KERCHER, *AN UNRULY CHILD*, *supra* note , at xii. Kercher noted: "Blackstone assumed a paternalistic model . . ." *Id.* at xiii. This included strong/masters/husbands who protected weak/servants/wives and who were owed a duty of obedience in return. *Id.*

<sup>42</sup> *See* HUGHES, *supra* note , at 309.

<sup>43</sup> *Id.* at 287–89.

their sentences, marriage had no effect on their rights to contract, own property, or engage in various trades. Many married but that was not what defined them. Their labor as a farmer, tradesman, professional, or bushranger, was how they were viewed. In NSW and VDL the white male population was further categorized as Government Men (still serving convicts), Ticket of Leavers (akin to being on probation),<sup>44</sup> Emancipists (former convicts who became free when their sentences expired and their offspring and their political sympathizers who favored broad-based self-rule), and Exclusives (those who arrived in Australia as free settlers and their offspring who viewed themselves as the elite class and sought to retain the status quo).<sup>45</sup>

The reasons for transporting women, the regulation of them while serving their sentences, and their experiences under the colonial law of NSW and VDL, differed dramatically from that of male convicts. The men were viewed as responsible for Britain's "swelling wave of crime,"<sup>46</sup> as criminals rather than, as female convicts were viewed, purveyors of immorality. As noted by Paula Byrne, the original purpose for transporting women was to provide a sexual balance.<sup>47</sup> "[A]fter 1810, they were to be wives with a moral term of conviction in domestic service behind them."<sup>48</sup> The law provided that female convicts be housed in female factories and assigned as domestic servants. Assignment meant that the governors of the penal colonies transferred the state's property interest in the labor of a female convict to a private master in exchange for the master's upkeep and domestication of her.<sup>49</sup> Thus, female convicts were expected to live and work in someone else's home and their transgressions usually resulted in removal from that home and temporary confinement in the prison-like setting of a female factory before being placed with another master. Most married before or after their sentence was up and, like all women under the law of coverture,<sup>50</sup> lost their civil rights upon marrying.<sup>51</sup> Like other women they were expected to be wives and mothers and not engage in a profession or trade.<sup>52</sup> This was a time when the cult of domesticity was in the process of capturing the imagination of the middle-class who demanded that the working class follow their lead. Women, both free and convict, were expected to and did play specifically gendered roles caring for husbands and children in the private domestic sphere of the home.<sup>53</sup>

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<sup>44</sup> Tickets of leave were first invented by New South Wales's Colonial Governor King in 1801. Kercher, *Perish or Prosper*, *supra* note \_\_, at 548. A forerunner to parole, they allowed convicts to live independently and earn their own wages and served as an incentive for good behavior. *Id.*

<sup>45</sup> BENTON, *supra* note \_\_, at 187–88.

<sup>46</sup> HUGHES, *supra* note \_\_, at 25–26. *See also* WIENER, *supra* note \_\_, at 14.

<sup>47</sup> PAULA J. BYRNE, *CRIMINAL LAW AND COLONIAL SUBJECT: NEW SOUTH WALES 1810–1830*, at 41 (1993).

<sup>48</sup> *Id.*

<sup>49</sup> Kercher, *Perish or Prosper*, *supra* note \_\_, at 544.

<sup>50</sup> DEBORAH RHODE, *JUSTICE AND GENDER* 10 (1989).

<sup>51</sup> JOCELYNNE SCUTT, *WOMEN AND THE LAW* 205-06 (1990).

<sup>52</sup> Many married women during this period were in fact equal partners with their husbands in his trade or occupation. Upon marriage, Ellen Murphy farmed along side her husband and Jane New operated her husband's tavern when he was unavailable. *See infra* notes \_\_ and accompanying text.

<sup>53</sup> MARILYN YALOM, *THE HISTORY OF THE WIFE* 181 (2001).

For the vast majority of female convicts, including both Ellen and Jane, the legal justification for their transportation was their conviction for some form of property crime.<sup>54</sup> Yet, like all female convicts, Ellen and Jane’s personal morality was highly suspect. As a group, female convicts were deemed not only criminals but also debased strumpets. They were labeled as whores even though the law did not make prostitution a transportable offense.<sup>55</sup> Only twenty to thirty percent of the women transported were known to have engaged in prostitution, usually less as a profession than a temporary undertaking based on circumstance.<sup>56</sup> Nevertheless in England, “[m]ost female criminality was seen as rooted in prostitution”<sup>57</sup> and in Australia the suspect morality of female convicts justified the need to treat them as fallen women.<sup>58</sup> This view of them made the goal of the transportation system appear especially daunting. Through the domesticating<sup>59</sup> effects of the System, “damned whores”<sup>60</sup> who, in fact, were mostly thieves, were to be reformed and transformed into respectable wives and mothers, to marry within their class, and do reproductive labor for the growing colonies.<sup>61</sup>

The law influenced convict women’s choices in more overt ways than it did free women, although there were many similarities between the legal disabilities of female convicts and married women.<sup>62</sup> Once they served their time, convict women’s options were the same as for all women: remain single and retain your legal rights with few options for legitimate work (the most available forms of employment, prostitution, and theft, were illegal); or marry and perform your roles as wife and mother without compensation and without legal rights. The infringement on their agency was greater for women who were still serving time because the law did not allow them to choose their

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<sup>54</sup> HUGHES, *supra* note , at 244.

<sup>55</sup> OXLEY, *supra* note , at 7. Until the 1970s, historians accepted the claim that women convicts were whores. *Id.* at 7–11; DANIELS, *supra* note , at 33.

<sup>56</sup> HUGHES, *supra* note , at 244.

<sup>57</sup> WIENER, *supra* note , at 17.

<sup>58</sup> Michael Sturma, *Eye of the Beholder: The Stereotype of Women Convicts, 1788–1852*, 34 *LABOUR HIST.* 3 (1978) (Austl).

<sup>59</sup> To “domesticate” is defined as, *inter alia*, “to bring into a degree of conformity and comfortable accommodation with one’s home environment,” “to cause to be domestically engaged, inclined, or adapted,” or “to force into a mold of accepted conduct or thought.” *WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED* 671 (Philip Babcock Gove ed., Merriam-Webster Inc. 1993) (1961). It is no accident that female convicts served as assigned domestic servants before the property interest in their labor and bodies was transferred to their husbands. Domestication of female thieves and so-called whores was an overt and important goal of the colony. And through the domestication of female convicts, the penal system hoped to also domesticate the male convicts who came to share their lives. *See* OXLEY, *supra* note , at 242–43.

<sup>60</sup> Lt. Ralph Clark of the First Fleet is quoted as exclaiming “No, no—surely not! My God—not more of those damned whores! Never have I known worse women!” ANNE SUMMERS, *DAMNED WHORES AND GOD’S POLICE: THE COLONIZATION OF WOMEN IN AUSTRALIA* 267 (1975). Forty years later in 1830, Governor Darling opined that “the women sent out to this country are of the very worst description, not in general being transported until there is no longer any hope of their reformation at home.” *Id.* at 272.

<sup>61</sup> JOY DAMOUSI, *DEPRAVED AND DISORDERLY: FEMALE CONVICTS, SEXUALITY AND GENDER IN COLONIAL AUSTRALIA* 44, 67 (1997).

<sup>62</sup> Neither had rights to sue or be sued, to own property, or contract with others. Husbands were viewed as having similar authority over wives as masters did over domestic servants.

master and neither the home they labored in nor the children they cared for were their own; instead a stranger, almost always a man, had a property interest in them.

Ellen Murphy and Jane New are two of the many convict women who rebelled against the legal constraints of the System which, as Marian Quartly notes, both “trapped and enabled” them.<sup>63</sup> Their interaction with the legal authorities illustrates how women retained their agency and exercised choice even in the heavily regulated penal system of Governor Arthur of VDL and Governor Darling of NSW.

Part two of this article traces Ellen Murphy and Jane New’s lives from the crowded cities of England to their transportation and service in VDL to their lives outside the System. It demonstrates that neither Ellen nor Jane were mere victims and that each made choices that indicate her agency and self-determination under the specific circumstances she faced. As with other transported women, the System sought to domesticate these two young female thieves and transform them first into well-behaved domestic servants and then into well-behaved wives and mothers. I conclude that the most important difference between Ellen and Jane is that while service did not domesticate Ellen, her offenses were transgression with a small “t” and her marriage resulted in Ellen’s domestication under conditions that suited her. In contrast, although service appeared to domesticate Jane, in fact neither service nor marriage succeeded in taming her. As a childless married woman, likely infertile, she was not housebound as were most married women.<sup>64</sup> She was therefore able and chose to both flaunt the law and transgress social norms on the public stage.

Part three examines *In re Jane New*<sup>65</sup> and its aftermath. It discusses the effect of this decision on the colonies of NSW and VDL. Jane played a leading role in legal history, something highly unusual for a woman of any class or marital status until the twentieth century. Her case was important to many people including Jane, but the interests it served were not hers.<sup>66</sup> Through her case, Governor Darling and the NSW Supreme Court continued their battle for power, as did those who sided with the colonial independence and rights of masters, whether of convict origin or free settlers, versus the imperial power of Great Britain and its representative, Governor Darling. The result also involved a father’s concern for his wayward son, a husband’s interest in his wife and servant, and a lover’s obsession that ruined his career. It should come as no surprise that Jane’s interests were of little concern to anyone (other than perhaps her husband and her lover) except when her interests happened to coincide with the interests of other groups in the their struggle for power. Nevertheless, Jane’s actions after her case was decided

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<sup>63</sup> Marian Quartly, *Gender Relations in Australia: Domination and Negotiation*, in *BENDING THE BARS: CONVICT WOMEN AND THE STATE* 156 (Kay Saunders & Raymond Evans eds., 1992), *quoted in* DANIELS, *supra* note , at 46.

<sup>64</sup> See RAYNER, *supra* note , at 186 (noting many convict women neither married nor had children).

<sup>65</sup> *In re Jane New* [1829] NSWSC 11 (Austl.), *available at* [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1829/in\\_re\\_jane\\_new/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/in_re_jane_new/).

<sup>66</sup> Powerful groups of men were not averse to using the law and women to suit their political ends. Convict Ann Rumsby’s plight is another example. When in 1822 she refused to testify in support of trumped up charges that her master Dr. Henry Grattans Douglas was taking advantage of her, she was convicted of perjury and imprisoned. KIRSTEN MCKENZIE, *SCANDAL IN THE COLONIES: SYDNEY & CAPE TOWN, 1820–1850*, at 143–45 (2004).

demonstrate that she never succumbed to domestication. She indeed was a badly behaved woman who made history.

## II. Ellen, Jane, and the Law

### A. Their Interaction with the Criminal Law in England

When they first caught the attention of the criminal justice system, both Ellen and Jane were lower class female adolescents living in English cities in the early nineteenth century. In England at that time the nonexclusive options for adolescent girls and young women without money or connections were domestic service, factory work, marriage and motherhood, or the streets.<sup>67</sup> Many such girls and women dabbled in thievery and prostitution (described as being “on the town”)<sup>68</sup> while a minority engaged in one or both of these as their occupations. The records for Ellen and Jane provide no evidence that either engaged in prostitution.<sup>69</sup> However, Jane may have been a professional thief while, most likely, Ellen was not.

Ellen and Jane lived in the midst of major transitions in British society and law. Their families likely moved to the teeming cities of Manchester and London from rural parts of Great Britain. This was prison reformer Elizabeth Fry’s<sup>70</sup> and social critic Charles Dickens’<sup>71</sup> urban England. It was also criminal law reformer Robert Peel’s urban England.<sup>72</sup>

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<sup>67</sup> Approximately forty-five percent of English working women and over sixty-five percent of English-trying convicts were employed as domestic servants during this time, a significantly higher percentage than in other professions. OXLEY, *supra* note \_\_, at 165– fig.6.5. Most women who engaged in prostitution and/or thievery were not professional criminals but instead sold their bodies or stole occasionally when needed. RULE, *supra* note \_\_, at 200–01 (prostitution). *See also* OXLEY, *supra* note \_\_, at 9–10, 42–44.

<sup>68</sup> HUGHES, *supra* note \_\_, at 244; DANIELS, *supra* note \_\_, at 186. When reviewing the records of Ellen’s shipmates approximately thirty percent were described as having been “on the town” for some period of time. This is slightly greater than the one-fifth estimate for women convicts as a whole. HUGHES, *supra* note \_\_, at 244. Prostitution was not a transportable offense but nevertheless women convicts were often described as whores. *Id.*

<sup>69</sup> Neither of their records described them as “on the town.”

<sup>70</sup> Elizabeth Fry (1780–1845) was a prison reformer who advocated for women prisoners and for improved conditions in prisons such as Newgate, where Ellen was imprisoned. *Elizabeth Fry (1780–1845)*, QUAKERS IN BRITAIN, <http://www.quaker.org.uk/fry> (last visited Nov. 1, 2011). Fry helped shift the focus of incarceration from deterrence to rehabilitation. DANIELS, *supra* note \_\_, at 111; J.E. BROWN, ELIZABETH FRY: THE PRISONER’S FRIEND 29 (1902).

<sup>71</sup> Acclaimed British writer and social reformer, Charles Dickens (1812–1870), concentrated his literary efforts on pointing out the decency and the corruption of the human condition. Both *Great Expectations* and *Oliver Twist* included scenes from Newgate Prison, where Ellen was incarcerated. *See* CHARLES DICKENS, GREAT EXPECTATIONS (Charlotte Mitchell ed., Penguin Books 1996) (1861); CHARLES DICKENS, OLIVER TWIST (Philip Horne ed., Penguin Books 2002) (1839).

<sup>72</sup> Sir Robert Peel (1788–1850) significantly improved and modernized the British criminal justice system. *See* Marjie Bloy, *Sir Robert Peel*, THE VICTORIAN WEB, <http://www.victorianweb.org/history/pms/peel/peel10.html> (last updated Mar. 11, 2002). As Home Secretary, he consolidated several criminal statutes, repealing outdated laws, and instituted a police force in 1829. *Id.*; FRANK O’GORMAN, THE LONG EIGHTEENTH CENTURY: BRITISH POLITICAL AND SOCIAL HISTORY

Ellen and Jane had similar run-ins with the criminal law in the transitional decade of 1820 to 1830, viewed as the end of the long eighteenth century. Their legal entanglements therefore bridged the pre-modern and modern eras.<sup>73</sup> Each was arrested for shoplifting more than once. They both shoplifted with female accomplices and while alone. Shoplifting was a much less common crime for females than the most common crime, theft from a home, which was typically an inside job resulting from domestic service.<sup>74</sup> Despite the traditional common law doctrine that children under age fourteen were not presumed legally responsible,<sup>75</sup> both Jane and Ellen were thirteen when first convicted. They were also both sentenced to many years of penal servitude in VDL.

As noted earlier, theft of one sort or another was the crime for which a vast majority of women (and men) were transported.<sup>76</sup> And, like Ellen and Jane, for many of these women their transportable offense was not the first crime they were caught committing.<sup>77</sup> However, most women were ten to fifteen years older than either Ellen or Jane when they were uprooted and sent across the seas to virtual exile.<sup>78</sup> Nevertheless, Ellen and Jane quickly learned how to establish their own lives within and outside the System.

#### 1. Maria Wilkinson a.k.a. Jane Henrie (later Jane New)<sup>79</sup>

Jane most likely began her life as Maria Wilkinson in Leeds, West Yorkshire in 1805.<sup>80</sup> Jane's father was probably laborer Isaac Wilkinson.<sup>81</sup> We know for certain that her mother was Elizabeth Wilkinson, who, like Jane, was convicted and transported to Australia in the mid-1820s. Maria went by the name Jane Henrie by the time she was transported to VDL. Jane's mother, Elizabeth, was transported to Sydney, hundreds of miles to the north in the separate penal colony of NSW. At the time of her transportation, Jane's mother claimed she was a widow with three children, two in Yorkshire and Jane. Some time after Jane was born, she and her mother moved to Manchester in Lancashire.

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1688–1832 (1997). As John Braithwaite notes, Peel replaced “the death penalty with transportation for various property offences [and t]he beneficiaries of these liberalising laws went to Australia instead.” John Braithwaite, *Crime in a Convict Republic*, 64 MOD. L. REV. 11, 32–33 (2001).

<sup>73</sup> See generally O’GORMAN, *supra* note ; KING, *supra* note ; WIENER, *supra* note .

<sup>74</sup> OXLEY, *supra* note , at 68, 73, 91.

<sup>75</sup> Their prosecution despite their young age and despite the common law rule was not unusual. WIENER, *supra* note , at 51.

<sup>76</sup> Braithwaite, *supra* note , at 32; HUGHES, *supra* note , at 163, 244.

<sup>77</sup> Braithwaite, *supra* note , at 32 (discussing actual run-ins with law). See also *id.* at 33 (discussing the likelihood they had committed quite a few crimes for which they were not caught); KING, *supra* note , at 51. But see OXLEY, *supra* note , at 71.

<sup>78</sup> The average age of transported women was twenty-seven. DANIELS, *supra* note , at 52.

<sup>79</sup> Jane's many name changes assisted her in establishing her many identities. By the time Jane disappears from history, she had been Maria Wilkinson, Jane Henrie, Jane New, Frances Dixon, and Mrs. Jones.

<sup>80</sup> Alexander McLeay, Description of one Female Prisoner who arrived in Sydney from Hobart Town per Medway, 50, Oct. 4, 1827, *microfilmed on SRNSW Reel* \_\_\_\_, 4/2023, File 29/2007 (State Records of New South Wales, Kingswood, NSW, Australia) [hereinafter McLeay's File] (on file with author).

<sup>81</sup> Lancashire County Record Office, Preston, Quarter Sessions Order Books [hereinafter L.C.R.O., QSO]/\_(need the reference number)\_ (1819) (describing Elizabeth as wife of laborer Isaac Wilkinson).

They were convicted together (along with another woman, Josephine Townley) in 1818 at the Lancaster Quarter Sessions for stealing two pairs of boots<sup>82</sup> from Ann Mainwaring.<sup>83</sup> Jane would have been thirteen at that time; she pleaded guilty, while a jury found her mother and Townley guilty.<sup>84</sup> After this Jane and her mother appeared to go their separate ways.

Elizabeth was convicted three more times, all at Lancaster Quarter Sessions. Twice in 1820 she was convicted alone. Together with Mary Thompson (also a widow with three children) she was convicted in July 1823 and sentenced to seven years transportation. Jane, listed as age fourteen, was twice convicted of theft with Ann Ogden, age thirty-three, in 1820 at Lancaster Quarter Sessions. As a result, she served one year “hard labour” in Liverpool Gaol for stealing “Print” cloth. Such a severe punishment suggests that Jane was viewed as a pretty tough character.<sup>85</sup>

Finally, at the age of nineteen, she was convicted under the name Jane Henrie of shoplifting “one yard of woolen cloth of the value of 5 shillings and one piece of cloth of the value of 5 shillings of the goods and chattels of David Jackson” at the Chester Quarter Sessions on April 27, 1824 and sentenced to seven years transportation.<sup>86</sup> She was kept at the Castle of Chester Jail until she was sent of Australia.<sup>87</sup> Upon arrival in Australia she was described on her VDL penal record as having a “notorious” and “bad” character. This and her later exploits in Sydney suggest that she may have been a thief both by inclination and profession.<sup>88</sup>

Jane’s mother, Elizabeth Wilkinson sailed with other female convicts on the *Grenada* to Sydney. When she arrived on January 23, 1825, she was listed as a 42-year-old widowed laundress who had a daughter crossing on the *Henry*. Jane Henrie sailed on the *Henry* and arrived along with 76 other female convicts in Hobart, VDL on February 9, 1825,<sup>89</sup> a couple weeks after her mother arrived in Sydney<sup>90</sup> and a few months before

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<sup>82</sup> The boots were valued at one penny per pair that most likely was substantially below their true value. This was probably an example of “pious perjury” where juries and even judges reduced the value of stolen items to avoid the specter of the death penalty. 4 WILLIAM BLACKSTONE, COMMENTARIES \*239.

<sup>83</sup> Coincidentally the victim of their crime had the same last name as Ellen Murphy’s husband, George Mainwaring, who was tried and convicted at the same Lancaster Quarter Sessions in 1834. *See infra* note and accompanying text.

<sup>84</sup> L.C.R.O., QSO/2 *supra* note \_\_, at 188.

<sup>85</sup> Interview with Randall McGowan, Professor and legal historian, Univ. of Or., in Eugene, Or. (June 2006).

<sup>86</sup> McLeay’s File, *supra* note \_\_, at 62 (Copy of the Record of the Conviction of Jane Henrie alias Maria Wilkinson, convicted 27 Apr 1824). In her penal records Jane was described as stealing “Black Cloth” (used in funerals) instead. *See* Jane Henrie, Archives Office of Tasmania, database # 32131 [hereinafter Jane Henrie] (on file with author).

<sup>87</sup> McLeay’s File *supra* note \_\_, at 64 (Enclosure No. 4 (with Remarks on Mr. Stephen’s Answers to five charges) Letter: James Dowling to Alexander McLeay, Dec. 24, 1830).

<sup>88</sup> *See infra* note and accompanying text.

<sup>89</sup> P.R. Eldershaw, GUIDE TO THE PUBLIC RECORDS OF TASMANIA, Section Three, Convict Department 55 (Archives Office of Tasmania 2003).

<sup>90</sup> Jane and her mother may have been briefly reunited before they were transported and therefore have known that they were both likely to be sent to Australia. *See* CAROL BAXTER, AN IRRESISTIBLE TEMPTATION: THE TRUE STORY OF JANE NEW AND A COLONIAL SCANDAL 17 (2006).

VDL became a separate colony from NSW.<sup>91</sup> Jane was listed as single, Protestant, and eighteen years of age (although she was likely a couple years older than that). Her penal record further described her as being also known as Maria Wilkinson and noted that her mother had been transported on the *Grenada*.

## 2. Ellen Murphy

Ellen Murphy was probably born in 1817 but whether in Ireland or England is unknown. Her parents are also unknown. Murphy is the most common Irish surname<sup>92</sup> and a number of Murphy families lived in London's Oxford Buildings where she was residing at the time of her encounters with Britain's criminal justice system.

Ellen's interaction with London's criminal justice system reads like a chapter from a Charles Dickens novel. All of her arrests occurred within a two-month period when she was thirteen years old. While she may have been thieving before this, it seems probable that, unlike Jane, she was not well versed in crime at the time she was transported. In September 1830, Ellen was arrested for theft of three silver spoons and a silver fork valued at two pounds, the property of a Mr. Lucas Humphries,<sup>93</sup> and held at Newgate Prison.<sup>94</sup> It is unclear whether this alleged crime, described as "larceny,"<sup>95</sup> was the theft by a domestic servant or shoplifting. For some reason, the charge was dropped and Ellen was freed without being tried.<sup>96</sup>

Next time the charges stuck. On November 15, 1830, Ellen and another Irish Catholic lass, Margaret Corbet (also described as age thirteen) decided to spend the evening engaging in criminal pursuits.<sup>97</sup> Whether this was solely their idea or was at the urging of others is uncertain from the trial transcript. Nevertheless, Ellen and Margaret pretty clearly were on a mission that was anything but innocent. At a minimum they

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<sup>91</sup> Order-in-Council dated 14 June 1825, as authorized by the New South Wales Act, 1823, 4 Geo. 4, c. 96 (Eng.).

<sup>92</sup> See Kimberly Powell, *Common Surnames of Ireland*, ABOUT.COM, [http://genealogy.about.com/cs/surname/a/irish\\_surnames\\_2.htm](http://genealogy.about.com/cs/surname/a/irish_surnames_2.htm) (last visited Nov. 1, 2011).

<sup>93</sup> London Metropolitan Archives, London, Old Bailey Session Rolls, OB/SR/599 (1830).

<sup>94</sup> First established in the 12th Century, construction on the Newgate prison where Ellen was imprisoned was finished in 1785. *Newgate Prison*, CAP. PUNISHMENT U.K., <http://www.capitalpunishmentuk.org/newgate.html> (last visited Nov. 1, 2011). It was the main prison for London and Middlesex, housing prisoners of both sexes and included all sorts of accused and convicted, ranging from debtors to murderers. JOHN ASHTON, *THE OLD BAILEY AND NEWGATE* (1902).

<sup>95</sup> "Blackstone divided simple larceny into *grand* larceny, stealing goods 'above the value of twelvepence', and *petit* larceny, the stealing of goods of lesser value. This distinction dictated the degree of punishment, but the ingredients of the offence were in each case the same. Larceny [was defined as] 'the felonious taking, and carrying away, of the personal goods of another.'" G.D. WOODS, *A HISTORY OF CRIMINAL LAW IN NEW SOUTH WALES: THE COLONIAL PERIOD 1788–1900*, at 15 (2002) (emphasis in original).

<sup>96</sup> Prosecution at this time was a highly burdensome task for the victim of crime. See LANGBEIN, *supra* note , at 40.

<sup>97</sup> All the descriptions of Ellen Murphy's two thefts, arrests and convictions are taken from THE PROCEEDINGS OF THE OLD BAILEY 43 (London, Dec. 9, 1830), available at <http://www.oldbaileyonline.org/browse.jsp?ref=t18301209-75> (last visited Oct. 18, 2011); *id.*, available at <http://www.oldbaileyonline.org/browse.jsp?ref=t18301209-76> (last visited Oct. 18, 2011).

intended to get shopkeepers to give them money under false pretenses; more likely, they set out that evening fully intending to shoplift.

They stole from two different shops, although the chronological order of the thefts is uncertain. Both times they worked as a team, representing themselves as sisters whose father, the watchman, was either dead or homeless.

They were tried together for both crimes at the Old Bailey on December 9, 1830. As a result, the full records of their trials are easily accessible. Although attorneys were becoming more involved in criminal trials, like most defendants at that time, Ellen and Margaret (and almost certainly Jane and her mother) were not represented by counsel.<sup>98</sup> Most likely their prosecutors were also unrepresented. Their trials<sup>99</sup> were therefore more representative of eighteenth than nineteenth century justice which Martin Wiener describes as an “intimate family or communal drama” where the judge is in the father role, the jury plays the role of relatives or neighbors, and the prosecutor/victim confronts the criminal/injurer.<sup>100</sup>

The two trials of Ellen and Margaret were almost certainly before the same judge and jury and, most likely, took about the typical time of approximately eight minutes.<sup>101</sup> In one of their trials, Mary Lane, the wife of shop owner Daniel Lane, testified. She described how Ellen and Margaret came to the shop asking for charity, saying that they needed money to bury their father, the watchman. When Mrs. Lane told them that her husband knew the watchman, the girls responded that their father was the watchman before the current one. Mrs. Lane told them that she could not give them anything but that if they came back the next morning and her husband knew of their father, he would give them something.

At this point Ellen moved to the end of the shop counter while Margaret asked for one pence.<sup>102</sup> Margaret then told Ellen (calling her “Mary”) that the mug in her hand needed washing, handing it to Ellen. This appears to have been a diversionary tactic. Margaret then asked Mrs. Lane whether they could return at 10:00 p.m. that evening. They departed when Mrs. Lane said “no,” with Margaret saying they would return at 9:00 a.m. the next morning. After they left, Mrs. Lane noticed that four and a half yards of jeans material, worth four shillings, was missing. Although Ellen and Margaret were arrested the next day, the material was never recovered. The only defense that either Margaret or Ellen made was Ellen’s question to Mrs. Lane: “Did you see us take it?” Mrs. Lane responded that she did not see them take it. However, Mrs. Lane added that when Ellen took the mug from Margaret, Ellen then left the shop closing the door behind

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<sup>98</sup> Only approximately one quarter of the defendants tried at the Old Bailey at this time were represented by an attorney. KING, *supra* note , at 228 n.23.

<sup>99</sup> See *infra* note .

<sup>100</sup> WIENER, *supra* note , at 60.

<sup>101</sup> *Trial Procedures*, THE PROCEEDINGS OF THE OLD BAILEY, <http://www.oldbaileyonline.org/static/Trial-procedures.jsp> (last visited Nov. 1, 2011). As many as ten to twelve trials a day took place at the Old Bailey at this time. LANGBEIN, *supra* note , at 18. They were tried to a single jury who typically deliberated for no more than two to three minutes per trial. *Id.* The jury would remain in the courtroom and gather around the foreman without withdrawing to deliberate before giving their verdict. *Id.* at 22.

<sup>102</sup> One pound contained twenty shillings and each shilling contained twelve pence.

her, implying that Ellen took the material at the same time. Both Ellen and Margaret were convicted of shoplifting the material and sentenced to seven years transportation each.

The other trial demonstrated that Ellen and Margaret were not sophisticated thieves. Some time between 6:00 and 7:00 p.m. on November 15th, Ellen and Margaret came to James Matthewson's shop at Manchester Square. Matthewson's daughter Matilda was minding the shop when Ellen and Margaret arrived and asked Matilda for money to assist their father, the watchman, who they claimed had been evicted. Matilda told the girls that her father was out and they left. When Matthewson returned an hour later, he found four books missing from a shelf near where Ellen and Margaret had been standing.

Ellen's cross-examination of Matilda echoed her question in the other trial. "Did you see me take the books?" she asked. Matilda replied in the negative. This might have been a pretty good defense if Matilda had been the only witness. However, she was not.

The next witness was Edward Daniels, a bookseller whose shop was located on Marylebone Lane, just a few blocks away from Matthewson's. Daniels testified that on the evening of November 15th, Ellen and Margaret came to his shop seeking to sell four books. He was immediately suspicious because the books were unmatched volumes and asked the girls what happened to the other volumes. When they answered lamely that the other volumes had worn out and were used for waste paper, Daniels told the girls he was keeping the books and for them to fetch their mother. As soon as Ellen and Margaret left the shop, Daniels located a police officer<sup>103</sup> and requested that he follow them but, by then, they had disappeared. Daniels also said that he believed he saw Ellen and Margaret talking to two young men after they left his shop.

The third witness was William Bloomfield, the police officer who captured Ellen and Margaret when, incredibly, they returned the next day to the scene of their attempt to fence the books. Bloomfield testified that when called to the scene he found one of them in the shop and the other in a room under a bed-quilt.

Margaret spoke in her defense, stating that they had not taken the books. Instead, she claimed, two young men approached them and offered to give them each six pence to sell the four books on the men's behalf.

Ellen's defense elaborated on Margaret's story. She testified that when Daniels said he was keeping the books and asked them to fetch their mother, she asked him if their oldest brother could come instead and Daniels said "yes." The next day they returned to the shop, planning to meet the young men who had asked them to sell the books. But when she and Margaret went to get the books back from Daniels they were arrested.

It is hard to fathom why Ellen and Margaret thought they would be safe in returning to Daniel's bookstore after he kept the books. Perhaps there were indeed two men involved who participated in this scheme and the other crime and they convinced the girls that there was little risk in their returning to the bookstore. Regardless, the end result

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<sup>103</sup> The concept of a police officer was still quite novel since a police force had only been created in June of that year as a result of Peel's Police Act of 1829. RADZINOWICZ, *supra* note , at 569–70.

was that Ellen and Margaret were each sentenced to seven years transportation for shoplifting the four books worth twenty-one shillings.<sup>104</sup>

On January 6, 1831, less than two months after they were arrested, Ellen and Margaret left Newgate Prison and friends and family behind forever when they set sail with 187 other convict women on the *America* bound for VDL. The women spent five months at sea aboard the *America*, arriving in Hobart on May 9, 1831, having lost three of their number on the voyage. Ellen and Margaret's conduct during the voyage was described as "rather idle."<sup>105</sup>

Fourteen years transportation for the two crimes—a sentence greater than their age—was harsh, especially for girls as young as Ellen and Margaret with no previous convictions.<sup>106</sup> Most people transported for theft, even those with previous convictions like Jane and her mother, were sentenced to seven years.<sup>107</sup> As Irish Catholics, Ellen and Margaret's criminal behavior was most likely viewed less charitably than that of Jane, Elizabeth, and other Protestant Englishwomen.<sup>108</sup>

### B. The Law and Women's Options

As with all transported convicts, the law shaped Jane and Ellen's lives. It caught them, tried them, convicted them, and sentenced them to transportation beyond the seas—virtual exile. Chief Justice Forbes of the NSW Supreme Court noted in *In re Jane New* that "transportation is a conditional pardon and servitude is the condition."<sup>109</sup> In the penal colonies of VDL and NSW most female convicts' only lawful options, prior to the expiration of their sentences, were the factory, domestic service, or marriage.<sup>110</sup> The latter two often overlapped when marriage occurred before the woman either received her ticket of leave or served her entire sentence.

Upon arrival in Australia, the first stop for many female convicts was the female factory. The female factories (there were no male factories) were multipurpose sites—

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<sup>104</sup> At the time, simple grand larceny, a capital offense, was punishable by seven years transportation. RADZINOWICZ, *supra* note , at 632–33 (describing the Piracy Act, 1717, 4 Geo. 1, c. 11 (Eng.)). *See also* OXLEY, *supra* note , at 111.

<sup>105</sup> While at sea, convict women were often put to work cooking, sewing, washing, and cleaning. BABETTE SMITH, *A CARGO OF WOMEN: SUSANNAH WATSON AND THE CONVICTS OF THE PRINCESS ROYAL* 28–30 (1988).

<sup>106</sup> Transportation of girls under fifteen was extremely unusual. None of Ellen and Margaret's 187 shipmates were under fifteen. Of 6758 women examined by Deborah Oxley, only 0.6% were fourteen or younger. OXLEY, *supra* note , at 113.

<sup>107</sup> Concerning women convicts, Robert Hughes notes that "[s]entences of more than seven years were exceedingly rare." HUGHES, *supra* note , at 244.

<sup>108</sup> OXLEY, *supra* note , at 141. *See* FRIEDRICH ENGELS, *THE CONDITION OF THE WORKING CLASS IN ENGLAND* 123–26 (Penguin Books 1987) (1845) (illustrating firsthand how poorly Irish immigrants to England were viewed in the nineteenth century).

<sup>109</sup> *In re Jane New* [1829] NSWSC 11 (Austl.), available at

[http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1829/in\\_re\\_jane\\_new/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/in_re_jane_new/).

<sup>110</sup> Unlike women who are convicted and sentenced for crimes today, this really was not that different from the options for free women where the most viable legitimate employment option was domestic service, the best alternative to which was marriage.

more for punishment and warehousing of convicts than for productive labor (other than childbirth).<sup>111</sup> The term factory was a wishful thinking misnomer.<sup>112</sup> The employment in the factories was rarely anything other than make-work and laundry. Once a convict woman was assigned to her first master, the factory was intended to be a place of punishment for those who refused to obey the rules that accompanied domestic service. By trying to make life in the factory the least attractive of the limited set of lawful options, the authorities intended to transform whores and thieves into wives and then mothers—to domesticate rebellious women.

However, as Ellen's experience will demonstrate, domestic service was often very unappealing to convict women. Being assigned to service was much more restrictive for most women than for most men. Women were confined to the house and on call twenty-four hours a day, seven days a week, while men were often only expected to work specific hours. There was little or no privacy for a woman servant and, of course, there was a risk that her master would take sexual advantage of her.<sup>113</sup> There was also little in her life she could call her own since, unlike male convicts, there was no legitimate possibility of women working for themselves outside of service during their free time and very few opportunities to socialize with other convict women.<sup>114</sup> It is therefore not surprising that, like Ellen, a substantial number of women preferred the factory to service and therefore, through disobedience and refusal to be domesticated, used the law to return them from service to the factory.<sup>115</sup>

Marriage did not mean convict women escaped domestic service. Instead, it was a popular means of choosing one's husband as one's master.<sup>116</sup> When free women married,

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<sup>111</sup> Tony Rayner describes the multiple uses for the women who were placed there:

[W]hen they first arrived in the colony while waiting to be assigned; when they were punished for serious offences; when they were punished locally by a few days in the cells and a factory was nearby; while they were pregnant and unable to work; while they were having the baby and breastfeeding; while they were serving their sentence for having got pregnant; while they were ill or otherwise unable to work; if they were mentally ill; while they were on remand facing trial; when they were traveling and needed to stay overnight; when they were between assignments; when they were returned from an assignment in order to protect them, or because the assignment had proven unsuitable, or the employer had been deemed unsuitable; when they were assigned to the government nearby and especially if they worked at the factory itself (most staff and particularly nurses were either assigned or ticket-of-leave convicts).

RAYNER, *supra* note , at 133–34.

<sup>112</sup> See DANIELS, *supra* note , at 107.

<sup>113</sup> One example is the tragic case of Mary McLauchlin, executed for infanticide of her baby whose father was very likely her former master. See HELEN MACDONALD, *HUMAN REMAINS: EPISODES IN HUMAN DISSECTION* 42–85 (2005); DANIELS, *supra* note , at 86.

<sup>114</sup> KERCHER, *AN UNRULY CHILD*, *supra* note , at 24.

<sup>115</sup> *Id.* at 31 (citing Paula Byrne).

<sup>116</sup> In the colony of NSW in 1828, 303 convict women were assigned to their husbands; in contrast, 267 were assigned to other masters in Sydney; and 367 were assigned elsewhere in NSW. BYRNE, *supra* note , at 46. In addition, 453 female convicts were in a variety of institutions, 413 of them being lodged at the Parramatta Factory. *Id.*

their husbands acquired power over them comparable to that of masters over women convicts. When a female convict married while she still had time to serve on her sentence, her husband often officially became her master, as was the case for Jane when she married James New.<sup>117</sup> As masters as well as husbands, these men could have the authorities discipline their wives for failure to do as they were told and even have them sent back to the factory.<sup>118</sup>

### C. Working the System

Ellen and Jane's experiences with the VDL Penal System differed dramatically. Jane had a lucky start to her new life in Australia by being assigned upon arrival to Dr. Robert Officer of New Norfolk<sup>119</sup> who was described in his obituary as having "unostentatious benevolence to the poor."<sup>120</sup> She was fortunate in not having to spend any time in the dilapidated and overcrowded Hobart Town Female Factory.<sup>121</sup> In contrast, Ellen was one of the few women aboard the *America* who did not already have an assignment to go to when she arrived. She therefore began her Australian life, separated from Margaret and her other shipmates, in the newly constructed Cascades Female Factory in Hobart. From these different beginnings Jane's VDL penal experience was smooth sailing while Ellen's can charitably be described as choppy and unsettled.

#### 1. Jane New

Part of the information that an individual's penal records usually provided was a physical description of the convict. Jane's appearance is of particular interest because, at least when she moved to Sydney, she was able to attract the attentions of many men of distinction. Colonial descriptions of both Jane and her mother survive. The most dependable description of Jane is that at age twenty she was five foot, three and one half inches tall, with a fresh ruddy complexion, dark brown hair, and black eyes.<sup>122</sup>

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<sup>117</sup> Kercher, *Perish or Prosper*, *supra* note , at 564. Interestingly, the reverse was also true. When a male convict married a free woman, she was permitted to enter into contracts, and own property in her name. *See id.* at 565–67. If her husband became free, she became like other wives under coverture, losing the rights she had held. *Id.* A woman who wanted to continue to "wear the pants in the family" therefore was well advised to marry a convict with a life sentence.

<sup>118</sup> Ironically, women convicts assigned to their husbands had a greater ability to escape domestic violence than their free counterparts because they could complain of abuse and be returned to the factory. DANIELS, *supra* note , at 96.

<sup>119</sup> Jane Henrie, *supra* note .

<sup>120</sup> 2 AUSTRALIAN DICTIONARY OF BIOGRAPHY, 1788–1850, at 298 (Douglas Pike ed., 1967), *available at* <http://adb.anu.edu.au/biography/officer-sir-robert-2519>.

<sup>121</sup> *See* RAYNER, *supra* note , at 116–17.

<sup>122</sup> McLeay's File, *supra* note \_\_, at 50 (Description of one Female Prisoner who arrived in Sydney from Hobart Town per Medway, 4 Oct. 1827). *Accord* Testimony by Mr. Ryan during the 1834 Executive Council Inquiry concerning John Stephen, Jr. Transcript of Despatches from Governor Bourke in the Case of J. Stephen, Jr., A1267, Reel 895 at 432. Another description of Jane was given in an affidavit describing a woman named Frances Dixon, who almost certainly was actually Jane New when she was 23. *See infra* notes and accompanying text. Dixon was described as being about 21, five foot six or seven, dark brown

In contrast to Jane's description, the descriptions of her mother, Elizabeth Wilkinson, suggest that her years in New South Wales were very hard. When she arrived in Sydney in 1825 Elizabeth was described as much shorter than her daughter at four foot, nine and one half inches tall.<sup>123</sup> She had a pale complexion, hazel grey eyes, and black or dark hair.<sup>124</sup> Five years later, when she became a free woman, already married to Richard Baker since 1826, she had been transformed into an old hag. Still the same height and eye color, she now had grey hair and a dark, sallow, wrinkled complexion. In addition, she was described as having lost all her lower front teeth and as having a flattened nose and a small hairy mole on the right side of her chin.<sup>125</sup> One shudders to think what experiences caused this dramatic decline in her appearance. It must have been a sobering shock for Jane to see her mother so changed.

Jane's first master, Robert Officer, moved to New Norfolk (about twenty miles from Hobart) in 1824 where he was kept very busy. He served as the surgeon for the military garrison and families, and was in charge of New Norfolk Hospital and the convicts on the public works.<sup>126</sup> He was also expected to attend all corporal punishments carried out at the jail. "[H]e was criticized for sending convicts from road-gangs to New Norfolk for treatment, thereby interfering with their discipline . . . ."<sup>127</sup> He responded to this criticism by saying that he had "no desire to be known as a mere slave driver."<sup>128</sup> During his marriage, Officer had thirteen children; however, since he married in late 1823,<sup>129</sup> there were only two young children to care for during the time Jane was in his service from February 1825 until July 1826. Unlike many of the convict women, Jane's criminal records do not describe her profession although she is later described as a dressmaker.<sup>130</sup> And there is nothing else that informs us whether she had ever been in domestic service before her assignment to Officer.<sup>131</sup>

In his 1827 recommendation to Governor Arthur that Jane be allowed to go to Sydney with her husband, Officer described Jane's conduct as steadfast. Two years later, in June 1829, he wrote to Governor Arthur much more effusively:

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hair, hazel eyes, and a fresh complexion. 15 LIBRARY COMM. OF THE COMMONWEALTH PARLIAMENT, HISTORICAL RECORDS OF AUSTRALIA, SERIES I, at 692 (1922) [hereinafter HISTORICAL RECORDS OF AUSTRALIA] (Affidavit of Notary Public John Raine, from Murray to Darling). Even if Jane was only five foot three or four, this was tall for a convict woman.

<sup>123</sup> My review of the women who arrived with Ellen Murphy on the "America" in 1831 indicates that their heights typically ranged from four foot, nine to five foot two. Many were, like Elizabeth and Ellen, less than five foot in height.

<sup>124</sup> NSW Convicts Index 654/134.

<sup>125</sup> Elizabeth Wilkinson's Certificate of Freedom (Aug. 17, 1830), *microfilmed on SRNSW Reel 986, 4/4302* (State Records of New South Wales, Kingswood, NSW, Australia).

<sup>126</sup> 2 AUSTRALIAN DICTIONARY OF BIOGRAPHY, 1788–1850, *supra* note , at 297.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* See also BAXTER, *supra* note , at 24.

<sup>130</sup> McLeay's File, *supra* note , at 50 (Description of One Female Prisoner who Arrived in Sydney from Hobart Town per *Medway*, Oct. 4, 1827).

<sup>131</sup> Carol Baxter speculates that Jane was in service with her mother in Manchester. BAXTER, *supra* note , at 6–7.

I cannot say that her conduct was faultless, but I can most truly declare that she was the best servant I have ever had, and the only one of her class, whom during seven years observation, I have ever perceived to have any permanent feelings of gratitude for kindness received. Of the real existence of such feelings, I have ample proof up to a very recent date.<sup>132</sup>

The feelings referred to here at least raise questions as to whether Jane's relationship with Officer was limited to that of master-servant.

During her assignment to Officer, Jane Henrie met and was courted by fellow convict James New. At the time of their courtship and marriage New had already received his ticket of leave, which was akin to being on parole. New was entrepreneurial. By 1827 he was operating "The Spread Eagle" in Hobart, a combination public house and store that sold silks and other materials. New was highly regarded by his former master, James Neal, for whom he worked for four years prior to receiving his ticket of leave. His convict record was almost spotless and he appeared to be reliable and hard working. He completed his seven-year sentence for committing the "grand larceny" of stealing 260 pounds of licorice-root from the man whom his father and other family members had worked for over many years.<sup>133</sup> Like Ellen, James was tried at the Old Bailey; however, unlike Ellen or most people tried for crimes at that time, he was represented by counsel. Nevertheless James was convicted. His words in his own defense at his Old Bailey trial at least raised doubt as to whether he was indeed guilty of this crime or, instead, had been doing his master's bidding. He ended his defense with: "I was examined four times, and they would not let me speak once. I do not call this shewing a prisoner justice."<sup>134</sup> James became a free man on April 12, 1827, about a year after his marriage to Jane.

Everyone who was still serving time in the penal system was required to apply to the convict department authorities for permission to marry. Jane and James did this and, after getting permission, they married on July 24, 1826.<sup>135</sup> At the time of their marriage, James was either 28 or 29 years old and Jane was 21 or 22. The marriage records indicate that Jane married under the name Maria Wilkinson and that she and James signed their names with an "X," indicating they were both illiterate.

In addition to being James's wife, Jane was also assigned to him as his domestic servant. This was a common practice when a convict without a ticket of leave married either a ticket of leaver or a free person. Thus, ironically, under the law of that time, marriage doubly disabled Jane in relation to James. As his wife and as his assigned servant she had no right to own property, to sue or be sued, or to enter into contracts. His property right to Jane's service as his domestic servant (as opposed to his concurrent

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<sup>132</sup> McLeay's File, *supra* note , at 56 (Letter, R. Officer to Colonel Arthur, June 1, 1829).

<sup>133</sup> See THE PROCEEDINGS OF THE OLD BAILEY 349 (London, Apr. 12, 1820), available at <http://www.oldbaileyonline.org/browse.jsp?ref=t18200412-171> (last visited Nov. 5, 2011).

<sup>134</sup> *Id.*

<sup>135</sup> Tasmania Pioneer Index, Ref.36/1826/970.

property right to her as his wife) later was the basis of the NSW Supreme Court habeas corpus case, *In re Jane New*.<sup>136</sup>

On September 24, 1827, James New, now a free man, petitioned VDL's Lieutenant Governor George Arthur for permission to take his assigned servant, Jane New, from the colony of VDL to Sydney in the colony of NSW.<sup>137</sup> This request was unusual but not extraordinary. About a dozen such petitions were granted each year. James explained that he wanted to move because of better business prospects in Sydney and that he had respectable friends there. He had already been to Sydney to check out his prospects shortly before filing his request. Most likely his enthusiasm for moving received strong support from Jane who knew her mother was there.

H.J. Emmett, Chief Clerk of the Colonial Secretary's Office, supported James's petition, asking: "May she go? I have long known the man and never heard anything against him."<sup>138</sup> Arthur somewhat reluctantly granted permission on September 25th, noting with regard to James, that "it would not appear that there is any thing particularly meritorious in his conduct." But he then stated that if their characters were "tolerable, even" he approved the petition.<sup>139</sup>

The quick grant of the petition allowed James and Jane to depart for Sydney the next day on the *Medway*. This ended Jane's time in VDL—or, most likely it did.

## 2. Ellen Murphy

When Ellen and Margaret arrived in Hobart on May 9, 1831, detailed descriptions of them were entered on their convict records.<sup>140</sup> They had aged considerably in the five months since they were tried and both listed as being thirteen. Ellen was now listed as fifteen and Margaret as seventeen. However, Ellen probably was only thirteen or fourteen at the time of her arrival. She was described as being thirteen both times she was arrested and her reported age at her death is consistent with thirteen being her age in 1830. As Irish Catholics, they were in the distinct minority. Unlike NSW,<sup>141</sup> where many of the convicts were from Ireland or of Irish descent, less than one in ten of the female convicts arriving in VDL before 1840 were of Irish origin.<sup>142</sup>

Ellen's physical description in her convict record said that she was four foot, ten and one half inches tall, with dark brown hair, dark grey eyes, and a pale complexion.

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<sup>136</sup> *In re Jane New* [1829] NSWSC 11 (Austl.), available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1829/in\\_re\\_jane\\_new/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/in_re_jane_new/).

<sup>137</sup> Colonial Secretary's Record Files, 1824–1836, at 41-351, File # 4448.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Ellen Murphy, Archives Office of Tasmania, database # 51649 [hereinafter Ellen Murphy] (on file with author); Margaret Corbet, Archives Office of Tasmania, database # 14958 [hereinafter Margaret Corbet] (on file with author).

<sup>141</sup> Approximately forty percent of the women transported to NSW before 1841 were Irish. RAYNER, *supra* note , at 29.

<sup>142</sup> *Id.*

She had a high forehead, large nose, and thick lips. Like many convicts, she had tattoos: the letters LTJ, HP, and a faint M on her right arm.<sup>143</sup>

Margaret was described as being four foot, eleven inches tall with a freckled dark complexion, and light grey eyes. She too had tattoos: a blue spot on the back of her left hand and JW on her left arm. Unlike Ellen or most convicts, however, Margaret could read and write.<sup>144</sup>

These diminutive partners-in-crime who were together at the Old Bailey, in Newgate Prison and on the voyage across the seas, were now separated. Like the vast majority of the female convicts, Margaret, whose trade was described as “house servant,” was immediately assigned to her first master. Ellen, whose trade was listed as “nurse girl,” began her life instead in the Cascades Female Factory that had replaced the old Hobart Factory in early 1829. It was poorly located, perpetually in the shadow of Mount Wellington, and would have provided a gloomy, cold, and damp beginning to Ellen’s life in Australia. Already holding twice the number of women it was designed for within a year after it opened, it was overcrowded and understaffed.

Upon her arrival at the Cascade Female Factory, Ellen would have been placed in the first of three classes of prisoners as a female who was eligible and waiting to be assigned to service. The other two classes were for women who had committed offenses of varying levels of seriousness—Ellen would soon get to know these classes all too well.<sup>145</sup>

The first evidence in Ellen’s records that she had been assigned as a domestic servant came four and one half months after she arrived when her master, Burnipp, had her discharged and reprimanded for disobeying orders. He evidently allowed her to rejoin his household because he again returned her to the Factory for “general neglect of duty and insolence” a month later. Disobedience, neglect of duty, and insolence, along with being absent without permission and absconding, were the most common offenses convict women committed.<sup>146</sup> No longer did these convicted criminals steal; instead, they simply refused to be respectful or to do what they were told.

At the time Ellen was first returned, she was placed in the second class for three months, which was designed for women guilty of minor offenses who after a time would

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<sup>143</sup> David Kent, in his article *Decorative Bodies: The Significance of Convicts’ Tattoos*, 21 J. AUSTRALIAN STUD., no. 53, 1997 at 78, \_\_\_, reported that of the convicts who arrived in New South Wales in 1831, about ten percent of the women and thirty percent of the men had tattoos. See *Convicts Tattoos*, CONVICTS TO AUSTL., <http://members.iinet.au/~perthps/convicts/res-14.html> (last visited Nov. 7, 2011). Ellen’s husband, George Mainwaring, upon his arrival in VDL was described as having the following tattoos: “Tree Serpent Adam and 2 trees inside right wrist. Anchor and Cable, G.M. back same hand. Ring finger same hand. Sailor holding bottle and glass. Anchor and Cable. Woman. G. Mannering: 24-M. Mannering: 24. Happy above elbow. Sailor and woman. Mermaid below elbow left arm.” George Mainwaring, *supra* note .

<sup>144</sup> Overall, only 22% of convict women could read and write, compared to 41.9% who could read but not write, and 36.1% who were illiterate. OXLEY, *supra* note , at 265. Among female convicts from England, 34.6% could read and write, 45% could read only, and 20.4% were illiterate. *Id.* at 266.

<sup>145</sup> The following descriptions of Ellen Murphy’s and Margaret Corbet’s penal experiences in VDL are taken from their penal records cited earlier at notes .

<sup>146</sup> DANIELS, *supra* note , at 80.

be moved to first class and be available for a new assignment. Thus began the pattern that was consistent throughout Ellen's time in the System: assignment, offense, return to the Factory, repeated over and over again. She differed from most female convicts who either adapted immediately to domestic service or acted up a bit in the first few months before becoming domesticated.

Ellen's next transgression indicates that, like many assigned convict women, she enjoyed the taste of freedom. For a girl familiar with wandering the crowded streets of London both day and night, the restrictive confinement and isolation from one's peers that domestic service provided clearly chafed on Ellen. Almost a year to the day after she arrived, she was returned by her master to the Factory for being out late "and endeavoring to pass herself off as Free Woman." For this petty outrage, Ellen was given six days in a cell. She would soon become well accustomed to cell life.

A month later, Ellen was reprimanded for being absent without permission from her latest master. A week later she was returned to the Factory with the following cryptic notation: "Out at 12 o'clock at night, it appearing to be the blame of her master." In response to this offense, it was decided that she should be assigned "to the Interior" which referred to farther north and inland near Launceston, which was a step taken for particularly recalcitrant women. Margaret had been sent "to the Interior" almost immediately after she arrived, having been returned to the Factory in June 1831, because her conduct was not good.<sup>147</sup>

Even though in June 1832, it was recommended that Ellen be sent to the north, she was assigned to two more masters from the Hobart area; both returned her for being out after hours. Finally in February 1833 she was actually assigned to a master in the Interior. This was not necessarily bad news for Ellen since it meant that when not in service she would be housed at the notoriously mismanaged George Town Factory and would occasionally be reunited with Margaret while in that factory. In July 1832, the *Launceston Advertiser* bemoaned that the George Town facility "as a place of punishment . . . is useless. The dilapidated state of the building, and the want of employment [prevents discipline and control] . . . the doors are without sufficient means of security, and the walls . . . would give way before the least force . . . [the main door] without hinges even."<sup>148</sup>

Both Margaret and Ellen spent a lot of time at the George Town Factory, much of it overlapping, for the eighteen months before the new, more secure, and better-designed Launceston Factory was opened in January 1835. Ellen was returned to George Town for drunkenness and disobedience (7 days in a cell on bread and water (b&w)); disobedience (11 days b&w); assaulting a woman (one month); and absence without leave (three months including 14 days on b&w in solitary confinement). While the punishments sounded quite harsh, because of the lax supervision, most likely there were many opportunities for the women to enjoy each other's company. During those eighteen

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<sup>147</sup> Margaret Corbet, *supra* note . . .

<sup>148</sup> LAUNCESTON ADVERTISER, July 24, 1832, *quoted in* RAYNER, *supra* note , at 105 (first alteration added).

months, Margaret was at the George Town Factory for a total of five months for various offenses.

This pattern of repeatedly returning to the factory was followed by a number of the women who preferred the company of their own kind and the idleness of factory life to domestic service.<sup>149</sup> Because female convicts were expected to be on call round the clock and lived in close quarters with the family to which they were assigned without being part of that family,<sup>150</sup> independent and rebellious young women like Ellen and Margaret felt too constrained. Factory life provided them with greater opportunities to be themselves and hang out. One observer noted that the prison authorities were “plagued with a host of these unmanageable, idle women.”<sup>151</sup> Authorities bemoaned the fact that many convict domestic servants “made a point of doing what they could in order to be sent to the factory . . . .”<sup>152</sup>

The Launceston Factory opened in January 1834. Octagonal in shape, it was designed to allow classification, segregation and better discipline.<sup>153</sup> Ellen soon tried it out, returning to factory life this time because of disorderly conduct. This led to a month in the C (Criminal) Class. However, as soon as she was returned to service she took off. Gone for a week, she was eventually captured by the police. Some of Ellen’s time spent in the Launceston Factory overlapped with Margaret, which may explain why she chose to return so often.

No matter how well treated Ellen was by her master, she still refused to buckle down to service. This is evident from her time assigned to Dr. William Brown, the chaplain at Launceston and a champion of better conditions for convicts. Apparently, she was so determined to be disobedient that she absconded when asked to keep her hair up, as required.<sup>154</sup> Finally he sent her back to the Factory for being absent without leave on December 23, 1835.

The year 1836 began with more of the same for both Ellen and Margaret. But in July 1836, Margaret sought to change her life dramatically by applying to marry an ex-convict shoemaker John Bates. They married in September. As a result she was assigned to her husband and returned no more to the Factory. Her first child arrived seven and one half months later and, with this baby, one could describe Margaret as well on the way to domestication, but on her terms rather than those of the System.<sup>155</sup>

Ellen spent her time between March 1836 and getting her ticket of leave in February 1840 doing significant amounts of time at the Launceston Factory, most of it purportedly in solitary confinement on bread and water. Her factory time included periods of seven days, twenty-one days, six months, ten days, two months, three months,

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<sup>149</sup> DAMOUSI, *supra* note , at 50.

<sup>150</sup> *Id.* at 67.

<sup>151</sup> JAMES BONWICK, *CURIOUS FACTS OF OLD COLONIAL DAYS* 282 (1870).

<sup>152</sup> HOUSE OF COMMONS, PARLIAMENT, REPORT FROM THE SELECT COMMITTEE ON TRANSPORTATION 39 (1837).

<sup>153</sup> RAYNER, *supra* note , at 106.

<sup>154</sup> WILLIAM BROWN’S JOURNAL, Dec. 15, 1835.

<sup>155</sup> However, her husband did report her for being out after hours in 1838, while he was left to care for their baby.

and ten days. Finally, she was given a whopping twelve months, starting in April 1838. By now, Ellen was seriously considering the other meaningful option to service, the factory or being on the lam: marriage.

Women were at a premium in VDL where the ratio imbalance of men to women greatly heightened any woman's marriage prospects.<sup>156</sup> Ellen sought to marry three different men. Ellen's application to marry a free man, Ephriam Digby, was approved on June 12, 1837. But the marriage never took place. Perhaps he got cold feet when he found that his future wife was sent back to the Factory's Criminal Class for being absent all night without leave, two days after her application to marry him was filed. He married another woman soon thereafter.

After serving a year in the Factory that ended in April 1839, Ellen tried again, applying to marry free man Henry John Wallis in September 1839. This application was approved but, for some unknown reasons, there were no wedding bells for Ellen this time either. Finally, on March 10, 1840, fellow convict George Mainwaring applied to marry Ellen. The records indicate that this application was neither approved nor disapproved. Nevertheless, Ellen married George soon after they both received their tickets of leave.

No longer was Ellen assigned to anyone, not even her husband. And, as indicated on her convict record by the word "Run," never again did she interact with the Penal System, not even to attend the required musters.<sup>157</sup>

#### D. Making a Life On the Outside

VDL's penal system had markedly different effects on Ellen and Jane. Ellen rebelled continuously until, after nine years of penal servitude, she was granted her ticket of leave and married. Most likely she would have remained in the System for her entire fourteen-year sentence if she had not married. Once outside, she apparently settled down as a wife, mother, and farmer. She no longer needed to rebel against the rules the law imposed and therefore her legal history ends with the section below.

In contrast, Jane quickly married and left the colony, still a convict assigned to her husband, but without one black mark on her VDL record. Soon after her arrival in Sydney, Jane was the talk of the town and deeply embroiled with the law and lawyers. Her legal history still had a few more chapters.

##### 1. Ellen Murphy

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<sup>156</sup> It was 10:1 in VDL in 1820. DANIELS, *supra* note , at 229. Nevertheless, many female convicts did not marry. One estimate is that as many as one-third of VDL female convicts neither married nor had children. RAYNER, *supra* note , at 186.

<sup>157</sup> Musters were times when all convicts were required to report and be officially counted. Ellen was expected to show up at musters but did not do so.

George Mainwaring applied to marry Ellen Murphy in March 1840.<sup>158</sup> She received her ticket of leave on February 7, 1840, most likely because the Authorities expected her to marry soon thereafter. And on April 27, 1840, she did indeed marry George Mainwaring, who had received his ticket of leave in January 1840. They were married by a Church of England minister at the Westbury Police Office. Both Ellen and George signed with an X, indicating their illiteracy. Upon arrival in Hobart in 1825, George was described in his convict records as a ploughman and shepherd who was twenty-five years old, five foot, six and one half inches tall, with a dark complexion, black hair, and dark brown eyes.<sup>159</sup> Convicted at Lancaster Quarter Sessions, he had been sentenced to seven years transportation for stealing a fire poker and pair of pincers. In contrast to Ellen, George appeared to be the model convict both aboard the ship, where his conduct was described as “good” and “well-behaved,” and during his assignment to his two masters, neither of whom made any complaints against him.

As ticket of leavers, George and Ellen were entitled to work for wages, own property (in George’s name), and choose where they resided. Ellen and George settled near to where they met while both were working for masters, in the area of North-Central Tasmania, between Longford and Deloraine. Seven and one half months after Ellen married, her first child, George, was born, shortly after his father had become a free man by serving his full sentence.<sup>160</sup>

Marriage and children apparently suited Ellen. Like Margaret, this was domestication on her terms rather than the System’s. She had no more run-ins with the law. In 1844 she finished serving her fourteen-year sentence and became a free woman. She engaged in both production and reproduction, working along side her husband as a farmer and regularly bearing children. Her tenth and final child, Elvie, was born in 1865 when Ellen was 47. After thirty years of marriage, Ellen died of stomach cancer five years later, leaving George (who never remarried) to raise Elvie and any other children who were still at home. He died “a gentleman,” living with Elvie’s family in the Huon Valley south of Hobart, in 1893.<sup>161</sup>

## 2. Jane New

### a. Sydney Power and Politics in the mid-1820s

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<sup>158</sup> MEMORIALS FOR MARRIAGE, Archives Office of Tasmania, Hobart, CON 52/1/1, at 121, *available at* [http://digital.statelibrary.tas.gov.au:1801/view/action/nmets.do?DOCCHOICE=CON2-1-1.xml&ds=1320717413230~261&local=en\\_US](http://digital.statelibrary.tas.gov.au:1801/view/action/nmets.do?DOCCHOICE=CON2-1-1.xml&ds=1320717413230~261&local=en_US).

<sup>159</sup> George Mainwaring, *supra* note .

<sup>160</sup> One wonders how women like Margaret and Ellen were able to control their fertility to the extent that they did. Both spent years in an environment where it seems quite likely they were sexually active and yet both did not have children until they found husbands. The birth control methods of the time were few and unreliable: douching, coitus interruptus and, perhaps, primitive sponges and condoms. *See* ANGUS MCLAREN, *A HISTORY OF CONTRACEPTION: FROM ANTIQUITY TO THE PRESENT DAY* 185 (1990); SIÂN REES, *THE FLOATING BROTHEL: THE EXTRAORDINARY TRUE STORY OF AN EIGHTEENTH-CENTURY SHIP AND ITS CARGO OF FEMALE CONVICTS* 91 (2002).

<sup>161</sup> Death certificate for George Mainwaring, Franklin, Tasmania.

Jane's arrival in Sydney in 1827 came at a time when changes in the roles of and personalities in the Executive and Judicial branches of NSW's colonial government coincided with growing power struggles between the Exclusives and the Emancipists.<sup>162</sup> Since the founding of NSW, British-appointed Governors had ruled without almost any checks from other branches of government. There were no independent judicial or legislative branches and law was promulgated, interpreted, and enforced through the Governor. In the mid-1820s both British (described as Imperial)<sup>163</sup> legislation and the arrival or return of men who would vie for power during this decade significantly threatened and eventually altered the status quo.

Lieutenant General Ralph Darling replaced Sir Thomas Brisbane as Governor of NSW on December 19, 1825. His arrival followed close on the heels of Frances Forbes, the man appointed as the first Chief Justice in March 1824, and who presided over the opening of the permanent Supreme Court of NSW in May 1824.<sup>164</sup> Forbes had played a major role in drafting the Imperial New South Wales Act in 1823<sup>165</sup> that created the Court as well as the Legislative Council. Both these new institutions limited the NSW Governor's formerly unfettered power to rule as he wished.<sup>166</sup> In particular, the new statute created a form of judicial review of all legislation proposed by the Governor.<sup>167</sup> Under the 1824 statute, the Chief Justice was required to review any new law to determine that "such proposed Law is not repugnant to the Laws of *England*, but is consistent with such Laws, so far as the Circumstances of the said Colony will admit."<sup>168</sup> Ironically, however, on matters concerning who had superior property rights to convicts' services, the Governor or the master, it was the Supreme Court of NSW that failed to follow the "Laws of England."<sup>169</sup>

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<sup>162</sup> Exclusives included those settlers who had never served time as convicts and their offspring; Emancipists included those settlers who had served time as convicts and their offspring. *See supra* note and accompanying text.

<sup>163</sup> Two kinds of legislation applied to the colonies of VDL and NSW: Imperial and Colonial. Until the mid-1820s law made in the colonies for the colonies derived directly from the Governor. WOODS, *supra* note \_\_, at 48. The establishment of both the Legislative Council and the NSW Supreme Court in 1823, brought significant changes to how colonial law was made. *Id.* *See also infra* notes and accompanying text.

<sup>164</sup> 2 C.M.H. CLARK, A HISTORY OF AUSTRALIA 39 (1968).

<sup>165</sup> New South Wales Act, 1823, 4 Geo 4, c. 96 (Eng.).

<sup>166</sup> The Legislative Council was not a democratic institution. WOODS, *supra* note \_\_, at 48. However it did dilute the Governor's power by requiring some consultation with other senior officials, including the Chief Justice, when making colonial law. *Id.*

<sup>167</sup> KERCHER, AN UNRULY CHILD, *supra* note \_\_, at 70.

<sup>168</sup> New South Wales Act, 1823, 4 Geo. 4, c. 96, § 29 (Eng.).

<sup>169</sup> The repugnancy provision was converted into a mere warning in the same statute that the NSW Supreme Court misinterpreted to favor masters over the Governor in *In re Jane New*. Australian Courts Act, 1828, 9 Geo. 4, c. 83, § 22 (Eng.). *See* Bruce Kercher, *Why the History of Australian Law is not English*, 7 FLINDERS J.L. REFORM 177 (2004), where he observed that:

new legislation had to be enrolled in the Supreme Court after which any individual Supreme Court judge had 14 days in which to protest to the governor that the law was repugnant to English law. If a judge did object, the law was suspended until the governor

During this period in NSW history, the Emancipists, who chafed at autocratic colonial rule and viewed Forbes as sympathetic to their cause, began to push for greater independence from Britain. They sought the right to a jury of their peers (propertied men regardless of their origin) and a free press. Opposed to the Emancipists' demands were the Exclusives who supported Governor Darling's struggle to retain limits on self-government, especially if it included the former convicts and their offspring. This power struggle was supported by newspapers on both sides. The establishment newspaper, *The Sydney Gazette*, while no longer controlled by the Governor, supported his views and those of the Exclusives.<sup>170</sup> Two new newspapers appeared around this time, the radical *Sydney Monitor* edited by E.S. Hall and *The Australian*, whose two editors, W.C. Wentworth and Wardell, were lawyers who sympathized with the Emancipist cause. Both papers were highly critical of Governor Darling who fought back, unsuccessfully at first, by trying Wardell for seditious libel.<sup>171</sup> Wentworth, "the son of a convict mother and an almost convict father,"<sup>172</sup> who arrived back in NSW from England as a newly minted lawyer in 1824 was to play a major role in the fate of Jane New.

The power struggle between the Governor and the Chief Justice and the Exclusives and the Emancipists played out on many fronts.<sup>173</sup> Bruce Kercher notes: "Convict rights were central to the politics of the squabbling colony centered at Sydney Cove."<sup>174</sup> More important, however, were masters' rights. It became clear almost immediately that Forbes sided with the masters' interests, not only against Governor Darling's interests but also against Imperial and convicts' interests. One of the most innovative and pro-convict colonial laws was that which granted convicts tickets of leave before their sentences were up. This predecessor to probation began under NSW Governor King in 1801. By the time Forbes and Darling arrived, it was firmly established that the Governor could routinely grant convicts tickets of leave and that the British government supported this practice.<sup>175</sup>

Not surprisingly, many colonists, whether they were Exclusives or Emancipists, were not fond of a law that freed assigned convicts from masters and allowed them to live on their own and make their own way.<sup>176</sup> In 1827, the ticket of leave system was challenged in court. Despite the long-established practice of granting tickets of leave, a new Imperial statute that appeared to bolster its legitimacy, and the obvious benefit of this practice to convicts themselves, Chief Justice Forbes declared tickets of leave to be

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and Legislative Council reviewed it. This time, however, they could stick to their legislation and send it to London for final decision.

<sup>170</sup> WOODS, *supra* note , at 50.

<sup>171</sup> *Id.*

<sup>172</sup> KERCHER, AN UNRULY CHILD, *supra* note , at 67.

<sup>173</sup> The rivalry between the Governor and the Chief Justice was so acrimonious that Sir George Murray, Secretary of State for War & the Colonies wrote to Darling in August 1828 threatened to "recall the Judges, and at the same time to relieve you from your Command" unless they stop the dissension among them. HISTORICAL RECORDS OF AUSTRALIA, *supra* note , at 365.

<sup>174</sup> Kercher, *Perish or Prosper*, *supra* note , at 570.

<sup>175</sup> KERCHER, AN UNRULY CHILD, *supra* note , at 29.

<sup>176</sup> *Id.*

unlawful in the *Convict Assignment Opinion*.<sup>177</sup> His main reason for voiding this long-established practice was that it interfered with masters' property interests in assigned convicts under the recently enacted Imperial transportation statute.<sup>178</sup> This was ironic since the statute expressly bolstered the Governor's power over convicts. As Professor Bruce Kercher notes, the statute repealed parts of the 1718 transportation statute<sup>179</sup> that referred to private contracts of transportation and at last matched enacted law with the actual practice in Australia's penal colonies of the Governor having a property interest in convicts' services which he could assign to someone else.<sup>180</sup> British Parliament responded to Forbes' decision immediately by expressly affirming the validity of tickets of leave in its next statute directed at NSW in 1828.<sup>181</sup>

The dispute over who had a superior property right in assigned convicts did not end with the reauthorization of tickets of leave. Within two years of Jane New's arrival in Sydney, the legal question of who had superior property rights to her services, the Governor or James New as her master, was to become the next flashpoint on this issue.

#### b. Jane New in Sydney Before *In re Jane New*

Jane New's life in Sydney in no way resembled that of Ellen's in northeast Tasmania or, for that matter, most married women, whether free or not. She arrived from Hobart in early October 1827 with her husband and master, James New. The records upon her arrival described her as a dressmaker and there was evidence that she sold silks at James' public houses in both VDL and Sydney. James had visited Sydney without Jane in May 1827, most likely in order to make arrangements for moving there and perhaps to meet Jane's mother, Elizabeth. Upon arrival, Jane and James settled in the oldest and most crowded section of Sydney, the Rocks, located on the southern shore of Sydney Harbor.<sup>182</sup> The Rocks was not a high-class neighborhood.<sup>183</sup> Many of its residents were Ticket of Leavers and Emancipists.<sup>184</sup>

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<sup>177</sup> *Convict Assignment Opinion* [1827] NSWSC 62 (Austl.), available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1827/convict\\_assignment\\_opinion/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1827/convict_assignment_opinion/).

<sup>178</sup> Transportation Act, 1824, 5 Geo. 4, c. 84 (Eng.).

<sup>179</sup> Piracy Act, 1717, 4 Geo. 1, c. 11 (Eng.). This transportation act was directed at the practice of transportation of convicts to the American colonies. This practice differed significantly from the practice in the Australian colonies. Therefore, for many years, the Imperial legislation did not fit what Britain was doing with convicts under the colonial penal systems in Australia. See Kercher, *Perish or Prosper*, *supra* note , at 532–33.

<sup>180</sup> Kercher, *Perish or Prosper*, *supra* note , at 569.

<sup>181</sup> Australian Courts Act, 1828, 9 Geo. 4, c. 83, § 9 (Eng.).

<sup>182</sup> See GRACE KARSKENS, *THE ROCKS: LIFE IN EARLY SYDNEY* (1997). Karskens' commentary on Jane and James New is comically inaccurate. See *infra* note .

<sup>183</sup> See BAXTER, *supra* note , at 34–35.

<sup>184</sup> Half the New South Wales' population of 36,000 in 1828 consisted of convicts still serving time. See *Colonial Census—A Transportation to 1828*, SYDNEY MORNING HERALD (Sept. 17, 2007), <http://www.smh.com.au/news/national/colonial-census--a-transportation-to-1828/2007/09/16/1189881342992.html>.

James quickly set up shop as the publican of the *Mermaid* and later the *Shipwright Arms* on Cumberland Street. Jane and James lived nearby on Cambridge Street. Jane very likely was quickly reunited with Elizabeth, who had been in Sydney for almost three years. Elizabeth was still serving her sentence and also lived on Cumberland Street, the wife of Richard Baker who, by that time, was an Emancipist, having completed his seven-year sentence.

Despite having a husband with a steady occupation, within three months of her arrival, Jane apparently had taken up shoplifting again. The crime which most affected Jane New and the colony was Jane's theft from Madame Josephine Rens, a French milliner,<sup>185</sup> for which she was eventually tried and found guilty in January 1829.<sup>186</sup> Rens had arrived in NSW with her daughter in January 1827.<sup>187</sup> Rens, like many businesswomen, lacked a husband and the accompanying legal disabilities of coverture. She was therefore able to operate her own shop as a *femme sole*.<sup>188</sup> Rens accused Jane of stealing twenty-eight yards of French spotted chocolate colored silk from Rens' fabric shop on George Street on December 18, 1827.<sup>189</sup>

As the Rens case demonstrated, Jane's modus operandi was similar to that of Ellen and Margaret's.<sup>190</sup> According to Rens, the day before the theft Jane visited her shop and looked at the silk in question. Rens reported that the next day Jane and another woman came to her shop and asked to see various silks. Jane, the other woman, Rens and Rens' fourteen-year-old daughter (who interpreted for her) were the only people in the shop. After spending about fifteen to twenty minutes looking at the silks on the counter, Jane and the other woman left without buying anything. As soon as they departed, Rens noticed the French silk was missing.<sup>191</sup> She immediately went looking for the women, whom she did not know by name, and caught sight of Jane nearby with the silk in the basket on her arm. Because Rens spoke no English (she testified at trial through a translator), she did not approach Jane at the time. However, she did report the theft to a constable who passed by soon after, but nothing came of this.

The day after the theft, Rens spotted Jane and the other woman talking to a Mr. Bunn whom Rens knew by name. He was Jane's landlord and later testified on Jane's behalf at her trial. Rens had her daughter, who spoke English quite well, ask Mr. Bunn the names of the women to whom he was speaking. At trial, Mr. Bunn said that he told Rens that Jane "was an honest woman." And when Rens said Jane had robbed her of some silk Bunn told her: "I don't think she would do such a thing!" That same day Rens told Colonel Morrisett, the Principal Superintendent of Police and a magistrate, about the

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<sup>185</sup> The 1828 census in New South Wales listed Rens as "Coymanos Vidonia Rens" and described her as a milliner. Madame Rens, Wikipedia (2012).

<sup>186</sup> JUSTICE DOWLING'S NOTEBOOK, Vol. 14 [SRNSW ref: 2/3197, at 73–96]. (The following pages of describing the trial come from this source).

<sup>187</sup> Madame Rens, Wikipedia (2012)

<sup>188</sup> *Beale v. Raine* [1829] NSWSC 41 (Austl.), available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1829/beale\\_v\\_raine/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/beale_v_raine/).

<sup>189</sup> HISTORICAL RECORDS OF AUSTRALIA, *supra* note , at 29.

<sup>190</sup> See *supra* notes and accompanying text.

<sup>191</sup> JUSTICE DOWLING'S NOTEBOOK, *supra* note , at 73.

theft and left a sample of the silk with him.<sup>192</sup> It was either through Morrisset or Bunns that she learned that the woman who took her silk was Jane New; regardless, Morrisset knew that Rens was accusing Jane New when Rens went to him to report the theft.

What happened after this is uncertain. In particular, it is not clear why Jane, a convict serving her sentence for shoplifting, was not arrested soon after the theft was reported. Rens testified at trial that two or three days after the theft she asked Morrisset to issue a warrant to search Jane's house. She also testified that while she was at the police station, there were a number of "gentlemen, who seemed to know all the [Jane New] business and they laughed" at her. That gentlemen were viewing Rens as a joke suggests that as early as December 1827 Jane already had friends in high places willing to protect her.

Rens then reported that three or four months after the theft, she saw a Mrs. Tomkins with a silk gown on that was made from the silk that Jane had stolen from Rens. When Rens asked Mrs. Tomkins where she had gotten the silk Tomkins said she had purchased it from a man named McCann. Rens located McCann and asked him where he got it and he told her he had purchased it from Jane New at her husband's public house. Thus, the silk was clearly linked to Jane. Obviously, this made Rens case a lot stronger and may have explained why action was finally taken against Jane.

By August 1828 there appears to have been at least one other basis for the legal authorities, reluctant though they may have been, to finally pursue Rens' complaint. The Sydney newspapers reported that Jane and a confederate, Hannah Ralph, engaged in a shoplifting spree on August 11, 1828 that included stealing from three different shops.<sup>193</sup> Jane was tried on August 12, 1828 for another instance of shoplifting.<sup>194</sup> She was found guilty and sentenced to having her original seven-year sentence extended for an extra year and returned to her husband and master.<sup>195</sup> Governor Darling later asserted that during the time between the theft from Rens in December 1827 and her trial for that theft in January 1829, Jane was "guilty of several other Acts of shoplifting."<sup>196</sup> Jane was not arrested for shoplifting from Rens until August 22, 1828, eight months after the theft. The next day Jane appeared before John Stephen, Jr., and two other magistrates and, despite her many charms, was charged and put in jail.<sup>197</sup> But Jane was not imprisoned for long. Justice Dowling granted her bail on August 28th, unaware that she had been recently convicted of similar crimes.<sup>198</sup>

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<sup>192</sup> *Id.* at 75.

<sup>193</sup> SYDNEY MONITOR, Aug. 16, 1828, available at <http://trove.nla.gov.au/ndp/del/pages/4244404>; AUSTRALIAN, Aug. 20, 1828. See also BAXTER, *supra* note , at 41–42, available at <http://trove.nla.gov.au/ndp/del/page/4249727>.

<sup>194</sup> McLeay's File, *supra* note , at 130 (Principal Superintendent J.T. Morrisset to McLeay, Sept. 5, 1828).

<sup>195</sup> *Id.*

<sup>196</sup> HISTORICAL RECORDS OF AUSTRALIA, *supra* note , at 29. Carol Baxter asserts that Jane was convicted in Sydney five other times. BAXTER, *supra* note , at 97.

<sup>197</sup> McLeay's File, *supra* note , at 130 (Principal Superintendent J. T. Morrisset to McLeay, Sept. 5, 1828); BAXTER, *supra* note , at 77–78.

<sup>198</sup> McLeay's File, *supra* note , at 10 (McLeay to Principal Superintendent of Convicts, Sept. 22, 1828).

Rens' case against Jane was not tried until early January 1829, more than a year after the theft.<sup>199</sup> Despite Rens having reported the theft to Superintendent of Police Morrisset immediately after it happened and Jane committing at least three more thefts in the meantime, she remained free for most of this time. The official reason given for not bringing her to trial on the Rens matter sooner was that her husband James, who was described as a "material witness" even though he did not testify at her trial, was in VDL at the time. (Records indicate that James New departed from Hobart, VDL for Sydney on September 11, 1828 which makes it likely that he was in VDL in August 1828.) Jane's attorney Sidney Stephen asked that, because of James's absence, her trial be postponed. Justice Dowling granted this request and therefore it was set over to the next "Sessions" in January 1829. On September 5, 1828 Jane was reportedly operating her husband's public house while he was in VDL and remained free until her trial in January.<sup>200</sup>

This was all quite out of the ordinary. On September 8, 1828, Colonial Secretary Alexander McLeay wrote Attorney General Alexander Baxter and asked for a report and opinion concerning Jane New's release on bail and therefore her being "at large in Sydney."<sup>201</sup> On January 10, 1829, McLeay referred Baxter to his September request and again requested a "report on the extraordinary delay which took place in bringing the offender to trial."<sup>202</sup> Governor Darling later noted that "from some extraordinary interposition, whenever an attempt was made to bring on the Trial, it was defeated."

Who was protecting Jane? Her greatest friend was attorney John Stephen, Jr., Registrar of the Supreme Court of NSW, who arrived in Sydney from London only a few months before Jane in April 1827.<sup>203</sup> Jane attracted his attention and likely that of other men of distinction soon after she arrived.<sup>204</sup> John, Jr. was extremely well connected. The

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<sup>199</sup> AUSTRALIAN, Jan. 6, 1829.

<sup>200</sup> McLeay's File, *supra* note , at 77 (Memorandum, unsigned, undated). *See also* BAXTER, *supra* note , at 80–81.

<sup>201</sup> McLeay's File, *supra* note , at 28 (Memorandum of the Correspondence in the case of Jane New).

<sup>202</sup> *Id.* Baxter responded on January 13, 1829 and noted that after granting a postponement at Jane's request, the case was held over to the next session and then delayed, despite Jane's repeated requests to be tried promptly, because there were other cases involving parties and witnesses from out of town and because of the view that her case was not as pressing considering she was out on bail. *Id.* at 91 (29/361 – Jan. 14, 1829, Attorney General Alexander M. Baxter to Colonial Secretary Alexander McLeay, Jan. 13, 1829).

<sup>203</sup> John Stephen, Jr. was accompanied to Australia by his wife Mary and his children. However, Mary is not listed in the census November 1828 and there is some question as to whether she was in Sydney during the time he was involved with Jane New (by at least August 1828 through July 1829). According to Carol Baxter, Mary was in England in April 1829. BAXTER, *supra* note , at 154. Nevertheless, Mary remained married to John and bore him more children after the Jane New scandal. John died in 1854 in Melbourne and Mary died in Scotland, 37 years later in 1891. Genealogical research of Marjorie Jacklyn, Hobart, Tasmania.

<sup>204</sup> Articles in the *Australian* newspaper in March and April 1829 describe two men who were interested in Jane. Neither description fits John Stephen, Jr. The March 24th edition claimed: "A certain influential personage, we are told, endeavored once to take improper liberties with [Jane New], in which the satyr was worsted; and hence busy rumors say, maybe dated the rancor which pursued her even beyond conviction." The April 8th edition noted "that the *old gentleman* is very anxious about the safety of Jane's *New* retreat." AUSTRALIAN, Apr. 8, 1929, *available at* <http://trove.nla.gov.au/ndp/del/article/36864304> (emphasis in original). John was neither old nor were his liberties with Jane rebuffed. Regarding Jane's attractiveness to

first cousin of Sir James Stephen, who was the Under Secretary of Britain's Colonial Office,<sup>205</sup> and the co-drafter of the legislation that created the Supreme Court of NSW in 1824,<sup>206</sup> John, Jr. was also the son of John Stephen, Sr., one of the three judges first appointed to the Supreme Court of NSW (the others being Chief Justice Francis Forbes and Justice James Dowling). Soon after John, Jr. arrived in, two of his brothers, Sidney and Francis, began practicing law in Sydney. Another brother, Alfred, was the Solicitor General of VDL under Governor Arthur.<sup>207</sup> John, Jr.'s connections paid off. Governor Darling appointed him as Land Commissioner in October 1827 and Registrar of the Supreme Court on February 18, 1828 even though, according to Justice Darling's biographer, Brian H. Fletcher, Justice Stephen and his sons were friendly with Wentworth and other Emancipists who were hostile to the Governor.<sup>208</sup> Interestingly, John, Jr., was appointed without consulting with Forbes or the other judges. Despite John, Jr. being the son of Justice John Stephen, Sr., Forbes viewed the way in which John, Jr., was imposed upon the Court as an unwelcome power play by Governor Darling.<sup>209</sup>

John, Jr. was also appointed as a magistrate and it was in this role that he had his first official interaction with Jane when she was charged with shoplifting from Madame Rens. In a letter to Jane's former master, Robert Officer, written in May 1829 (at a time when he was in deep trouble over his actions on behalf of Jane New), John, Jr. (who was not known for his truthfulness), stated that in August 1828 he was acting in Morrisset's

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Sydney gentlemen, she appeared to fit Joy Damousi's description of convict women as "a threat from within." She observes that "[t]here was both a fear and fascination with the unsettling power of the 'other'—in terms of gender and class—embodied in convict women." DAMOUSI, *supra* note 1, a 4.

<sup>205</sup> Sir James Stephen was son of James Stephen, Sr., who, along with his brother-in-law William Wilberforce, succeeded in having the British slave trade abolished. Like his father, Sir James Stephen actively involved in ending the slave trade. See generally Russell Smandych, "To Soften the Extreme Rigor of Their Bondage": James Stephen's Attempt to Reform the Criminal Slave Laws of the West Indies, 1813–1833, 23 LAW & HIST. REV. 537 (2005). He was also the great-grandfather of Virginia Woolf. See J.E. Egerton, *Stephen, Sir James (1789–1858)*, AUSTRALIAN DICTIONARY OF BIOGRAPHY, <http://adb.anu.edu.au/biography/stephen-sir-james-2694> (last visited Nov. 28, 2011).

<sup>206</sup> New South Wales Act, 1823, 4 Geo. 4, c. 96 (Eng.).

Legislation to [establish this court] was prepared in London by James Stephen, counsel to the Colonial Office, and Francis Forbes, Chief Justice of Newfoundland and Chief Justice designate of New South Wales. Consequently Letters Patent were sealed on 13th October, 1823, and proclaimed in Sydney on 17th May, 1824. They are known as the third Charter of Justice.

*A History of the New South Wales Supreme Court*, SUPREME COURT NEW SOUTH WALES, [http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_sprcrt\\_hist1](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_sprcrt_hist1) (last updated July 19, 2007).

<sup>207</sup> He was later to become the Attorney General of Tasmania. In 1839, Alfred Stephen became the Chief Justice of the Supreme Court of New South Wales, a position he held for more than thirty years until his resignation in 1873. He was knighted in 1846 and died at the ripe old age of 92. 6 AUSTRALIAN DICTIONARY OF BIOGRAPHY, 1851–1890, at 180–87 (A.G.L. Shaw & C.M.H. Clark, eds., 1976), available at <http://adb.anu.edu.au/biography/stephen-sir-alfred-1291>

<sup>208</sup> BRIAN H. FLETCHER, RALPH DARLING: A GOVERNOR MALIGNED 279 (1984).

<sup>209</sup> C.H. CURREY, SIR FRANCIS FORBES: THE FIRST CHIEF JUSTICE OF THE SUPREME COURT OF NEW SOUTH WALES 320–22 (1968).

place as Superintendent of Police (Governor Darling disputes this claim) when Jane was brought before him charged with theft. John, Jr. wrote Officer that days earlier Jane had been

charged with a similar offence before a Bench of Magistrates, and discharged for want of any the slightest Evidence. Whilst the investigation was proceeding, a party specially employed were parading the streets to obtain other charges, and they contrived to procure two others to be preferred, which were equally without merit, from which Mrs. New was accordingly acquitted. [Rens'] case, which we submitted before me and two other magistrates, . . . was a Felony said to have been done in December preceding.<sup>210</sup>

John, Jr. then claimed that it was Jane New who sought to have the Rens trial take place so that her innocence could be proved. He asserts that otherwise the magistrates would not have found sufficient evidence to try her!

Jane was tried for stealing from Madame Rens in the Supreme Court of Criminal Justice. As in England,<sup>211</sup> in most criminal trials in NSW at that time the defendant appeared pro se.<sup>212</sup> Not so for Jane, who was represented by John, Jr.'s older brother, Sidney Stephen. The roles in a criminal trial such as Jane's are described as follows in the *Sydney Gazette*:

[T]he Attorney General exhibits the information and conducts the prosecution. . . . The Chief Justice has no voice in the verdict, having nothing more than the powers of one of the English Judges vested in him; in consequence of which the Jury retire without the Chief Justice. . . . [T]he Members [of the jury] must be unanimous in their verdict.<sup>213</sup>

The jury consisted of seven military officers.<sup>214</sup> According to Paula Byrne, a criminal trial “entailed *dialogue* between at least the judge, the prosecution, the witnesses and the defendant, if not the defendant's solicitor [Sidney Stephen in Jane's trial]. . . . The dialogue was usually continued in the address of the judge, either Judge Dowling, or Chief Justice Forbes or Justice Stephen [to the jury].”<sup>215</sup>

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<sup>210</sup> McLeay's File, *supra* note , at 58 (Letter: John Stephen Jr. to Robert Officer, May 5, 1829). *See also* BAXTER, *supra* note , at 75–76.

<sup>211</sup> *See supra* note and accompanying text.

<sup>212</sup> BYRNE, *supra* note , at 274.

<sup>213</sup> SYDNEY GAZETTE, *quoted in* BYRNE, *supra* note , at 273.

<sup>214</sup> Australian Courts Act, 1828, 9 Geo. 4, c. 83 (Eng.). In the mid-1820s, there had been a push by Chief Justice Forbes and other supporters of greater autonomy for the colony, such as D'Arcy Wentworth, to require juries of citizens for trials of free settlers. This was opposed by then Solicitor General John Stephen, Sr. The 1828 Act reconfirmed that military juries would continue for the time being. ALEX C. CASTLES, AN AUSTRALIAN LEGAL HISTORY 184–86 (1982).

<sup>215</sup> BYRNE, *supra* note , at 273 (emphasis in original).

Jane's case was tried on January 5, 1829 before Justice Dowling who kept detailed records of the cases he was involved in including Jane's trial.<sup>216</sup> Madame Rens, her daughter, and John McCann, the man who purchased the silk from Jane New, testified on behalf of the prosecution. Sidney Stephen's cross-examination mainly focused on the physical arrangement in Rens' house and shop, attempting perhaps to imply that other people could have entered and stolen the silk. Jane chose not to testify in her own defense. Instead the defense constructed an alternate explanation for how Jane came to possess the silk that was identical to the sample Rens provided. Through various witnesses from both VDL and Sydney they sought to prove that Jane had obtained the silk that she had sold to McCann while she was in VDL and had brought it with her to Sydney. This defense did not persuade the jury who found Jane guilty. As a result, she was sent to Sydney Jail.<sup>217</sup>

The next day, Jane appeared before Chief Justice Forbes and Justice Dowling for sentencing. Justice John Stephen, Sr., was absent, reportedly because he was ill. Jane was sentenced to "death recorded,"<sup>218</sup> which meant that the death penalty would probably not be carried out but, instead, would be converted into transportation for life or an even lesser sentence. She was to be sent to the notorious Moreton Bay penal settlement<sup>219</sup> (near today's city of Brisbane) with other attainted persons.<sup>220</sup>

John Stephen, Jr., was not about to let this happen to Jane. He immediately went to work gathering support for her appeal to the Executive Council. John's labors on Jane's behalf produced amazing results. Four days later he presented seventeen signatures of respectable gentlemen on an affidavit attesting to her innocence.<sup>221</sup> Even more remarkably, he arranged for Jane to petition the Executive Council, protesting her

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<sup>216</sup> JUSTICE DOWLING'S NOTEBOOK, *supra* note , at 73–96. Dowling later served as Chief Justice of the New South Wales Supreme Court from 1837 to 1844 and was succeeded by John Stephen, Jr.'s brother Alfred.

<sup>217</sup> AUSTRALIAN, Feb. 6, 1829, *available at* <http://trove.nla.gov.au/ndp/del/page/4249923>.

<sup>218</sup> WOODS, *supra* note , at 115–16 (discussing Judgment of Death Act, 1823, 4 Geo. 4, c. 48 (Eng.)). According to Woods, except in cases of murder, the judge had discretion when a person was convicted of a felony punishable by death to instead treat the offender as if Royal mercy had been exercised. *Id.*

<sup>219</sup> Established in 1824, Sydney's worst convicts were sent to Moreton Bay penal settlement. As of 1828, only three women were being kept at Moreton Bay. BYRNE, *supra* note , at 46. Moreton Bay was a very unpleasant place. One commentator noted that "it was uncomfortably sited [and] was by intention something of a hell camp." MICHAEL ALEXANDER, MRS. FRASER ON THE FATAL SHORE 71 (Phoenix Press 2001) (1971).

<sup>220</sup> *In re Jane New* [1829] NSWSC 11 (Austl.), *available at* [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1829/in\\_re\\_jane\\_new/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/in_re_jane_new/) (quoting THE AUSTRALIAN, Mar. 20, 1829). The law of felony attaint applied to convicts who had been sentenced to death, even if that sentence was converted into transportation for life. It meant they had no rights to sue or own property. *See* Kercher, *Perish or Prosper*, *supra* note , at 559–64. Of course, as a married woman, Jane had neither of these rights anyway.

<sup>221</sup> *In re Jane New* [1829] NSWSC 11 (Austl.), *available at* [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1829/in\\_re\\_jane\\_new/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/in_re_jane_new/) (quoting THE AUSTRALIAN, Mar. 20, 1829). Of these eighteen names, seven were justices of the peace. This is the first of many examples of John, Jr.'s willingness to manufacture facts. As Governor Darling noted: "Mr. Stephen is busily engaged in getting affidavits to rebut the facts." HISTORICAL RECORDS OF AUSTRALIA, *supra* note , *quoted in* BAXTER, *supra* note , at 147.

innocence, claiming that Madame Rens had a grudge against her. He and two other magistrates signed the petition as follows: “We the undersigned, before whom the original depositions were taken, most earnestly recommend the prayer of this petitioner to the most merciful consideration of the Council.”<sup>222</sup> On a separate page eleven more magistrates signed the following: “Although I do not approve of the reflections made on Madame Rens and her daughter, I nevertheless, on account of the former good conduct, recommend the applicant to mercy.”<sup>223</sup>

In the end, however, a grant of mercy was unnecessary. At the Executive Council hearing, Chief Justice Forbes, who sat on the Council, voiced his concern that a fatal procedural flaw existed in the prosecution and conviction of Jane for stealing from Madame Rens.<sup>224</sup> The statute under which Jane was charged,<sup>225</sup> (a statute that removed the benefit of clergy if the amount stolen from a dwelling house exceeded 40 shillings),<sup>226</sup> had been repealed by Robert Peel’s new laws in 1827<sup>227</sup> before she committed her crime and the applicable part of Peel’s criminal code did not take effect in NSW until April 1828, after the time Jane purportedly committed the crime.<sup>228</sup> Therefore, the charges brought against her for her theft, like a number of others that occurred during that gap, were based on a statute had not yet been enacted in NSW. As a result Jane’s conviction was deemed “null and void”<sup>229</sup> by the Executive Council and this finding was affirmed when the Governor referred Jane’s case to the Supreme Court.<sup>230</sup>

With this change in Jane’s fortunes, the expectation of Jane, John, Jr., and James New was that Jane would be returned to James as her master and husband. But Governor Darling decided otherwise. As noted in a letter from Colonial Secretary McLeay to Sheriff Macquoid on February 19, 1829, Darling was “pleased to remit [Jane’s] sentence” and directed that she be sent “to the Factory at Parramatta by the earliest opportunity.”<sup>231</sup> He further ordered that she be placed in the Second Class which meant she could not be reassigned to another master.<sup>232</sup>

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<sup>222</sup> Colonial Secretary Correspondence File, *microfilmed on SRNSW*: 4/2023 File 29/2007 unnumbered (State Records of New South Wales, Kingswood, NSW, Australia).

<sup>223</sup> *Id.*

<sup>224</sup> Minutes of the Executive Council, Jan. 8, 1829, *microfilmed on SRNSW* ref: 4/1516 p.84; Reel; 2436 (State Records of New South Wales, Kingswood, NSW, Australia); BAXTER, *supra* note , at 106.

<sup>225</sup> Parliament Act, 1712, 12 Ann. St. 1, c. 7 (Eng.).

<sup>226</sup> DOWLING’S SELECT CASES 1828 TO 1844: DECISIONS OF THE SUPREME COURT OF NEW SOUTH WALES 553–54 (T.D. Castle & Bruce Kercher eds., 2005). Benefit of clergy mitigated the severities of English law that imposed the death sentence on a wide variety of crimes, both serious and trivial. Kercher, *Perish or Prosper*, *supra* note , at 530.

<sup>227</sup> As Deborah Oxley noted: “In 1820 the Black Act was repealed, and over the next seventeen years Robert Peel and John Russell between them removed almost two hundred capital offences.” OXLEY, *supra* note , at 38.

<sup>228</sup> *In re Jane New* [1829] NSWSC 11 (Austl.), available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1829/in\\_re\\_jane\\_new/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/in_re_jane_new/).

<sup>229</sup> *Id.*

<sup>230</sup> CURREY, *supra* note , at 342.

<sup>231</sup> McLeay’s File, *supra* note , at 11 (McLeay to Thomas Macquoid, Sheriff, Feb. 19, 1829).

<sup>232</sup> *Id.* at 68 (William Dumeresq, Parramatta Factory to McLeay, Feb. 25, 1829).

Governor Darling's decision to send Jane to the Parramatta Factory instead of returning her to James New, was an exercise in imperial power. It infuriated many in Sydney who believed that masters had a superior property right to that of the Governor over the convicts assigned to them. However, Jane had been found guilty of at least two crimes of shoplifting (the very thing for which she was transported) during her brief time in Sydney. Therefore, Governor Darling's decision to send her to the Factory "to prevent her from continuing her depredations"<sup>233</sup> instead of returning her to her husband does not seem unreasonable. It is much more defensible than his later removal of a convict assigned to the *Sydney Monitor* newspaper's editor E.S. Hall, a man who frequently criticized Darling, as discussed in the March 1830 decision *Hall v. Hely*.<sup>234</sup>

### III. In re Jane New and its Aftermath

#### A. The Case

Jane's arrest and eventual prosecution and conviction, and the voiding of that conviction, may not have been influenced by the power struggles. Even Governor Darling's order that Jane be sent to the Parramatta Factory instead of being returned to James New, may not have been politically motivated. Jane had gotten off to a rocky start with the law since arriving from VDL, having been convicted of two and perhaps more thefts.<sup>235</sup> She had also caught the roving eye of one or more gentlemen. As noted Australian historian Manning Clark described Jane, she was a "loin-stirrer."<sup>236</sup> Darling may have suspected that she was not really returning to her husband but, instead, to her gentleman friend or friends. Darling did not have a high opinion of women convicts generally;<sup>237</sup> he also had a moralistic streak that may have influenced his decision to refuse to return Jane to her husband and master if that meant she would in actuality be more a courtesan than a wife.

Regardless of the reasons for Darling's decision to revoke her assignment to her husband, it made Jane the center of the power struggle over assignment of convicts between the Governor and masters, who had the tacit support of the judges on the

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<sup>233</sup> HISTORICAL RECORDS OF AUSTRALIA, *supra* note , at 30.

<sup>234</sup> *Hall v. Hely* [1830] NSWSC 18 (Austl.), available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1830/hall\\_v\\_hely](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1830/hall_v_hely). Hall sued the Principal Superintendent of Convicts for trespass on his chattel valued at 300 pounds (his assigned servant Peter Tyler who worked for him as a printer). The Governor's removal of Tyler was blatantly in retaliation for the Monitor's criticism of him. It was a clear attack on freedom of the press. The jury awarded Hall twenty-five pounds compensation for this trespass. *Id.*

<sup>235</sup> Transcript of Despatches, *supra* note , at 25 (Extract from the Minutes of the Executive Council #24, June 23, 1829).

<sup>236</sup> CLARK, *supra* note , at 102 (saying this in the context of explaining why Sydneysiders ignored explorer Captain Charles Sturt's return in 1830 from exploring the rivers of New South Wales). He noted that the news of these discoveries "fell not so much on deaf ears, as on ears not ready to be distracted from the political tumult of Botany Bay. For Sydney town was still humming with stories both grave and gay about the Jane New case as the gallant captain, his cheeks still caked with inland clay, came back to tell them what he had seen." *Id.* at 101-02.

<sup>237</sup> See SUMMERS, *supra* note , at 272.

Supreme Court. In the background was the love triangle between Jane, James New, and John Stephen, Jr.

In early March 1829, a petition for a writ of habeas corpus was directed at Ann Gordon, the Matron of the Parramatta Factory, not on behalf of Jane but, because she was his property, purportedly on behalf of Jane's master and husband, James New. It was filed with the Supreme Court of NSW, and argued before Chief Justice Forbes, and Justices John Stephen, Sr., and Dowling. The court sessions were overseen by Jane's likely lover, John Stephen, Jr., as Registrar. Two lawyers, Frances Stephen and W.C. Wentworth, represented James New. Thus, the Court was presented with the extraordinary situation in which a son of one of the Justices represented the party who was challenging the authority of Governor Darling and another son was both the Registrar of the Court and, most likely, the lover of Jane, the property in dispute. The writ of habeas corpus asserted that when James New "went to the gaol for the purpose of receiving [Jane's] body . . . he was informed that [s]he . . . had been removed to the Female Factory at Parramatta where she was now [unlawfully] confined."<sup>238</sup>

The case was argued over the course of a number of sessions. The final decision was handed down on March 21, 1829, three weeks after the original petition had been granted. Except for the night before the first hearing when, incredibly, due to a snafu, Jane ended up spending the night at her home,<sup>239</sup> Jane remained at the Parramatta Factory, despite efforts to have her released while the case was being heard. Each time the case was argued, Jane was brought to court from the factory. The various newspapers covered the case, with the most thorough coverage coming from *The Australian*, which, since its founder, W.C. Wentworth, represented James New, was clearly biased against Governor Darling's position.

On March 6, 1829, Justice Forbes voiced his reluctance to grant writs of habeas corpus, noting that "[p]risoners of the Crown in this Colony are placed in a very different situation from the Mass of the Kings subjects in the Mother Country."<sup>240</sup> Nevertheless he granted the writ in this case because there was no evidence presented as to why, once her conviction had been vacated, she should have been detained. He then ordered the parties to return the following week on March 16th, at which time the Justices would hear arguments from both sides. Representing Governor Darling at the next hearing were both Attorney General Baxter and Solicitor General Sampson. The legal firepower on both sides was an indication of how important this case was. The critical issue was whether the Governor or the master had the superior property right in an assigned convict. An 1828 Imperial statute, the Australian Courts Act, section 9, was directly on point. It stated:

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<sup>238</sup> *In re Jane New* [1829] NSWSC 11 (Austl.), available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1829/in\\_re\\_jane\\_new/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/in_re_jane_new/) (quoting Dowling, *Select Cases*, Vol. 2, Archives Office of NSW, 2/3462 at 146).

<sup>239</sup> BAXTER, *supra* note , at 117.

<sup>240</sup> *In re Jane New* [1829] NSWSC 11 (Austl.), available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1829/in\\_re\\_jane\\_new/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/in_re_jane_new/) (quoting Dowling, *Select Cases*, Vol. 2, Archives Office of NSW 2/3462, at 148).

[I]t shall and may be lawful for the Governors or the said Colonies respectively, [referring to NSW and VDL] from time to time, as to them shall seem meet, to revoke any such Assignments of Offenders as may have been or as shall hereafter be made in pursuance of the said Act, and to grant to any Offender or Offenders transported to the said Colonies, such temporary or partial remissions of their Sentences [Tickets of Leave] as to such Governors may seem best adapted for the reformation of such Offenders, and such temporary or partial remissions from time to time to revoke and renew, as occasion may require . . . .<sup>241</sup>

Ironically, this was the statute that the British Parliament was compelled to enact to reverse Chief Justice Forbes' decision in 1827 that tickets of leave were unlawful because they violated the property rights of the masters of assigned convicts. The statute made clear that tickets of leave were within the Governor's power to grant. The question before the Court in *In re Jane New* was how much more power, if any, this statute granted to governors to intervene between a master and his assigned servant. Was Governor Darling empowered by this statute to remove Jane New from her master without a specific cause such as abuse by the master, or disobedience against the master by the convict? On its face the statute appeared to provide the Governor with the power to revoke assignments at will and therefore find against James and Jane New. But the "and" between the two main clauses provided some wiggle room.

How this case was to be resolved was of immense importance in NSW. There was strong pressure on the judges to find for James New, and thereby for all masters. Such a decision would likely please both Emancipists and Exclusives because many from both groups had convicts assigned to them. It would also lessen the Governor's power, which would satisfy Emancipists in particular. Both these reasons for finding in favor of James New most likely explain why Wentworth was one of his attorneys.<sup>242</sup> Of course, from Jane's perspective the preferred outcome was clear. She wanted her husband to prevail so that she could return to the life she was living before she was arrested for shoplifting.

Arguments before the Court on March 16 and 18 provided it with a reasonable way to avoid answering the broad question of whether the statute authorized governors to remove assigned convicts without cause. The case could have been resolved by finding that Governor Darling of NSW lacked the authority to remove a convict from a master to whom the convict had been assigned by a governor of another colony, that is, Governor

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<sup>241</sup> Australian Courts Act, 1828, 9 Geo. 4, c. 83, § 9 (Eng.).

<sup>242</sup> According to Robert Hughes, Wentworth's pro-master view was so extreme that in 1839:

Wentworth actually proposed that assignment should be cancelled altogether and that convicts be sold outright to the highest bidder. Worse still, he wanted to institute group punishments of assigned convicts. If one man on a property committed a crime, all the other servants should be penalized by an automatic extension of their sentence unless they informed on him.

HUGHES, *supra* note , at 305.

Arthur of VDL.<sup>243</sup> Reaching this decision would have allowed Jane to return to James and masters to breathe a little easier and yet not require the Court to give a dubious interpretation of the statute, the language of which seemed to give the Governor unfettered authority.

Near the end of the session on March 18th, Forbes asked the parties whether the case could be disposed of on another point since the question of who had a greater property interest in an assigned convict was “of considerable delicacy, and we wish to avoid the discussion of it unless in a case where no other question arises.”<sup>244</sup> When the parties provided nothing further concerning an alternative basis for deciding the case, Forbes concluded by saying that the court would rule shortly and that the judges would likely dispose of the case on an alternative ground.<sup>245</sup> At the very end of this session, Judge Stephen asked the Solicitor-General whether he objected to allowing Jane out on bail. However, Judges Forbes and Dowling disagreed with Judge Stephen on this point and therefore Jane was returned to the factory.<sup>246</sup>

On March 21, 1829 the judges unanimously reached a decision in *In re Jane New*; each wrote a separate opinion. In dicta, both Forbes and Dowling made clear that, had they reached the issue of who had the superior property interest in an assigned convict, they would have found for the masters. This was what the bulk of their opinions addressed. Forbes stated that “this power of revocation is not sustainable under any circumstances, in the large and discretionary form in which it has claimed by the [Governor].”<sup>247</sup> Commenting on the importance of assigned convicts to their masters, Forbes noted that “without [convict] labor, land in [NSW] is useless” and the landowners’ estates of little value.<sup>248</sup> The actual holding of the case, however, was astonishing. It went against accepted practice and provided a means of removing even more power from the Executive branch of colonial government than a mere finding in favor of James New would have produced. It also meant Jane New would have to leave NSW, something that most likely pleased John Stephen, Sr., who probably was aware of his namesake’s obsession with her.

The Court held that VDL Lieutenant Governor George Arthur had exceeded his authority by permitting Jane, a convict transported to VDL, to move to NSW. This was a sweeping rejection of governors’ authority to continue the longstanding practice of occasionally allowing prisoners to move from one colony to another. The Court therefore held “that the Prisoner Jane New is unlawfully at large in this Colony.”<sup>249</sup> Forbes’s opinion concluded that “we feel ourselves bound to remand her to the custody of the

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<sup>243</sup> *In re Jane New* [1829] NSWSC 11 (Austl.), available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1829/in\\_re\\_jane\\_new/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/in_re_jane_new/) (referring to Forbes Papers, Mitchell Library, A 742). See also *id.* (quoting from THE AUSTRALIAN, Mar. 20, 1829) (description of the argument on Mar. 16, 1829); *id.* (quoting from THE AUSTRALIAN, Mar. 20, 1829) (description of the argument on Mar. 18, 1829).

<sup>244</sup> *Id.* (quoting from the Forbes Papers, Mitchell Library, A742).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* (quoting from THE AUSTRALIAN, Mar. 20, 1829) (description of the argument on Mar. 18, 1829).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* (quoting from the Forbes Papers, Mitchell Library, A1267).

Government, for the purpose of being sent back to van [sic] Diemens Land, the place of her original, and unsatisfied term of transportation.”<sup>250</sup> The concurring opinions offered Jane no solace. Justice Stephen tersely concluded: “I entirely coincide in the view taken of this case by His Honor the Chief Justice . . . . I think that the Prisoner Jane New under the circumstances must be remanded.”<sup>251</sup> Justice Dowling was particularly unsympathetic to Jane. He was untroubled by sending her to the Parramatta Factory instead of returning her to her husband until arrangements were made to send her back to VDL, stating: “It does not appear that she has been treated there with any degree of unnecessary restraint, and for anything that appears to the contrary, she may have been sent there for better accommodation than the Gaol of Sydney would afford until she could be removed to Van Diemen’s Land . . . .”<sup>252</sup> Perhaps his harsh conclusion derives from his having presided over her earlier trial for shoplifting from Madame Rens. Regardless, he concluded that Jane “may be treated as a Runaway Prisoner of the Crown from Van Diemen’s Land and returned to that Colony until her original Sentence shall have expired. . . . there to be dealt with according to Law.”<sup>253</sup>

The Court had ruled. Jane, James, and John, Jr. had lost, as had Governors Darling and Arthur. The big winners were the masters who were delighted by the dicta supporting their rights in assigned convicts, the Emancipists who reveled in any diminution of Executive power,<sup>254</sup> and, perhaps, Justice John Stephen, Sr., whose son would no longer be able to entangle himself with Jane.

However, the sweetness for the victors was short-lived. Governors Arthur and Darling immediately sent messages to London protesting the Supreme Court’s decision. Their protests were sympathetically received. As soon as a ship was dispatched to England and back, the Justices of the NSW Supreme Court were informed that they had misinterpreted the Imperial law on both counts. Regarding the power of the Governor over assigned servants, the British Attorney General and Solicitor General stated:

We are clearly of the opinion that, under the 9th section of 9 Geo. IV, c. 83, a Governor can revoke the assignment of a convict, of whose sentence it is not intended to grant a remission; and we think that there is nothing, either in the context or the apparent policy of the Act, which militates against this construction.<sup>255</sup>

Justice Forbes issued a reluctant *mea culpa* to Colonial Secretary Sir George Murray:

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> This dicta was particularly important to the editors of *THE Australian* and *Monitor*. Ten days before the Court issued its opinion in *In re Jane New*, Governor Darling had revoked the assignment of a convict assigned to an editor of each newspaper. CURREY, *supra* note , at 333. Unlike Darling’s revocation of the assignment of Jane to James, both these revocations were clearly in retaliation for the critical press Darling received from these newspapers.

<sup>255</sup> *Id.* at 344.

Could you, Sir, . . . transfer yourself to this Colony, and look at the case as it presented itself to us in all its local bearings and circumstances, I think, Sir, you would perceive that, however the Judges may have been in error in their construction of the law, yet their opinion was given in good faith and with a sincere desire to preserve harmony in the Colony.<sup>256</sup>

## B. The Aftermath

From Jane's perspective, the ruling of the Supreme Court in her habeas corpus case meant her life in Sydney was over. But it did not mean she would return to VDL. As she had demonstrated throughout her young life, Jane was not someone who bent to the will of the law. Instead, with the assistance of her gentlemen friends, Jane beat the System. Much of what follows, which describes what happened to Jane after her case was decided, is taken from the Proceedings of the Executive Council in the Case of Mr. John Stephen, Jr. in July 1834.<sup>257</sup>

After the decision in Jane's case was handed down on March 21, 1829, Jane was to be escorted back to the Sydney Jail. Two constables were to take her there but, while still at the courthouse,<sup>258</sup> John Stephen, Jr., as Registrar, insisted that only one, Jail Constable Samuel Cleme, (who had brought Jane to the court that morning) was necessary, and that Jane should be taken to the factory instead.<sup>259</sup> Jane and Constable Cleme left for the factory, accompanied by James New.<sup>260</sup> Cleme later described what happened next:

On the way through Elizabeth-street Mrs. New begged to be allowed to get a drink of water, to which he [Cleme] gave consent, following her into the house of one Thomas Evans, . . . [Mrs. New] took off her bonnet and shawl, and then went into a bedroom, where, from motives of delicacy, [Cleme] did not follow her. On finding, after waiting a short time, that she did not return, he requested Mr. New to seek for her. The woman of the house then observed—"She's gone out the front door." . . . [Cleme] then returned to the room, and took charge of the bonnet and shawl.<sup>261</sup>

When Jane was discovered missing, James commented to Cleme: "Perhaps she is gone to see Mr. Stephen on some business she may have forgotten." John, Jr. later hotly disputed that he was the Stephen to which James was referring. Instead he claimed James was referring to one of his brothers. John, Jr. also disputed that it was he that was the Stephen who James reported immediately appeared at the scene of the escape. Nevertheless a Mr. Stephen reportedly told James to "take care of your wife." James then

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<sup>256</sup> *Id.* at 347.

<sup>257</sup> Transcript of Despatches, *supra* note . . .

<sup>258</sup> *Id.* at 33.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 34.

<sup>261</sup> *Id.*

replied, “She’s gone, Sire, she had made her escape.” Cleme then searched the house to no avail. “The bonnet and shawl he took to the gaol.”<sup>262</sup>

Whether John, Jr. had inside information that enabled him to prepare in advance for Jane’s escape is unknown. However, it seems quite likely that John, Jr., aided in Jane’s escape (a convict woman Ellen Fraser reported that Jane told her that he had taken Jane in a gig to her first hiding place).<sup>263</sup> It is less certain that James New also participated in Jane’s flight from the law. Nevertheless, James later provided support for many of John, Jr.’s false claims about what transpired after Jane’s case was decided. Considering the power difference between James and John, Jr., John may have made James an offer he could not refuse.

On March 31, 1829, Wentworth’s *Australian* provided the following headline regarding Jane’s escape and recapture: “Capture Extraordinary: ‘the bird has flown.’”<sup>264</sup> It reported that Chief Constable John Skinner had captured Jane in the home of an unnamed person in Irish Town, Sydney. Jane was returned to the Parramatta Factory. No one was charged with assisting her in her escape.

Jane was not to be stopped. The *Australian* gleefully reported that on April 5th, she somehow managed to escape again, this time over the wall of the Parramatta Factory. It said: “That fair creature, so much the subject of recent altercations between the big wigs . . . has again escaped from her guardians at Parramatta. There is nothing NEW in this, all matters fairly considered.”<sup>265</sup>

Mrs. Gordon, the matron in charge of the Parramatta Factory, testifying in a report into the management of the factory, described the events leading up to the second escape as follows:

[A]t a quarter after five o’clock, at the close of evening worship, she saw Jane New among the other women—they were proceeding to their respective yards. At six o’clock the women were assembled for their tea, when it appears that Jane New was absent from her mess, but was not reported by the monitress; at half-past six Johnson, the principal convict overseer, reported to Mrs. Gordon, that Jane New was absent from her room; the most diligent search was then made in every part of the buildings, but without success . . . .<sup>266</sup>

Again, no one was ever charged with aiding Jane in her escape. Obviously, however, someone else was involved.

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<sup>262</sup> *Id.*

<sup>263</sup> Minutes of Proceedings of the Committee for the Management of the Female Factory (Apr. 6, 1829); HISTORICAL RECORDS OF AUSTRALIA, *supra* note , at 47–48; BAXTER, *supra* note , at 137.

<sup>264</sup> AUSTRALIAN, Mar. 31, 1929, *available at* <http://trove.nla.gov.au/ndp/del/article/36867779>. The paper also provided a poem on behalf of Jane: “how like a froward child, That lets it hop a little from her hand, And with a silk thread plucks it back again, So loving-jealous of its liberty.” *Id.*

<sup>265</sup> AUSTRALIAN, Apr. 8, 1829.

<sup>266</sup> Minute of Proceedings of the Committee for the Management of the Female Factory, Apr. 6, 1829, *reported in* Transcript of Despatches, *supra* note , at 37.

This time Jane was not recaptured. However, the authorities came extremely close. On June 17, 1829 (more than two months after Jane's escape from the factory), Chief Constable Skinner and others descended at midnight upon the premises of former convict Amos Crisp in Minto, near Campbelltown, twenty-seven miles from Sydney. They had information that Jane New was hiding out in a room John, Jr., rented in the Crisp home. When they entered the room they reported that it was empty but the bed was still warm.<sup>267</sup> According to both Crisp and John, Jr., a woman named Frances Dixon, who looked remarkably like Jane New, had been keeping the room in order for John, Jr.<sup>268</sup> This woman was never found and no official record of her existence was ever provided. Most damning, however, were the two certificates of freedom the constables found in the room. Both were handwritten and signed by John Stephen, Jr., as Supreme Court Registrar.

One certificate said: "*I hereby certify that the bearer hereof, Mrs. Dickson, is free. 10 May, 1829, John Stephen, Jun. J.P.*"<sup>269</sup>

The other certificate, dated May 1, 1829 said: "*I hereby certify that the bearer hereof, Jane New, became free on the 27<sup>th</sup> ult., as appears by affidavits filed in my office. John Stephen, Jun., Registrar of Sup. Court.*"<sup>270</sup>

As a result of the authorities discovering these certificates, Governor Darling suspended John Stephen, Jr. from his position as Registrar. John, Jr., fought tooth and nail to try to prove his lack of involvement in Jane's escapes, taking his case to England and back.<sup>271</sup> The 1834 Proceedings of the Executive Council in his case, under a new Governor, confirmed what all other inquiries had found: John Stephen, Jr., aided and abetted Jane New in escaping.<sup>272</sup>

There are conflicting reports about what happened to Jane after her midnight flight. They range from her returning to VDL with James,<sup>273</sup> to her fleeing to England with John, Jr. She did neither. The most convincing evidence indicates, instead, that she took refuge in Wentworth's home, *Vaucluse*, until a ship was found that would take her out of the colony.<sup>274</sup> In the Executive Inquiry regarding John Jr., the owner of the cutter *Emma Kemp* testified that in 1829 his ship was bound from Sydney for New Zealand. The captain asked Mitchell to allow Jane New to go to Hobart on board the *Emma Kemp*

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<sup>267</sup> HISTORICAL RECORDS OF AUSTRALIA, *supra* note , at 42–43 (Affidavit of J. Skinner, June 18, 1829).

<sup>268</sup> *Id.* at 690 (Amos Crisp), 679 (John Stephen, Jr.).

<sup>269</sup> Transcript of Despatches, *supra* note , at 15.

<sup>270</sup> *Id.*

<sup>271</sup> Wentworth represented John, Jr., who threatened to bring a claim of trespass by the authorities on John's property and the wrongful taking of his papers including the two certificates of freedom. McLeay's File, *supra* note , at 94 (Enclosure with 29/5750—Chare: To Francis Nicholas Rossi from W. C. Wentworth, Attorney for John Stephen, Jr., July 17, 1829).

<sup>272</sup> Transcript of Despatches, *supra* note .

<sup>273</sup> This was John, Jr.'s version. *See id.* at 128. John even arranged for Jane's mother, Elizabeth Wilkinson, nee Baker, to testify in support of this version. *Id.* at 124

<sup>274</sup> The authorities suspected that she might leave with John Jr., so that when he went to board a ship around the same time, in his own words: "I was further insulted on my embarkation by having myself closely examined (by special order) to ascertain our Sex." HISTORICAL RECORDS OF AUSTRALIA, *supra* note , at 685 (Reply of Mr. John Stephen, Jr., to Charges preferred by General Darling).

in exchange for payment of as much as sixty pounds.<sup>275</sup> Mitchell claimed he refused but that nevertheless Jane was smuggled on board in men's clothing from a boat rowed out into Sydney Harbor from Vaucluse and that payment of fifty pounds was made instead of the usual fee of twenty pounds for passage to New Zealand.<sup>276</sup> The cutter sailed from Sydney in early July 1829. Jane apparently resided for a few years as a Mrs. Jones in New Zealand<sup>277</sup> until she felt it necessary to leave, this time bound for Wahoo, later known as Oahu. There her trail turns cold.<sup>278</sup>

#### IV. Conclusion

Examining Ellen and Jane's lives illustrates that many women transported to Australia were not easily domesticated. Like most other female convicts, their histories include time as thieves, convicts, domestics, and wives. However, Ellen and Jane's experiences in these roles differed dramatically.

Upon arrival in Australia, Jane played the role of domestic that the System assigned her very well. But domestic service, whether for a master or a husband or both, was merely a means to her ends. No one ever succeeded in domesticating Jane. She was the exception that proved the rule. Jane was an incurable thief and seductress. Her transgressions were of the kind that could get one hanged. She was an outlaw who used her fresh start in Australia, and her sexual charms, to do things and take her places that were unimaginable for most women, convict or free. Like domestic service, law and male lawmakers became means for Jane shaping her life as she pleased. The law bent to Jane's will and this made her truly exceptional.

Ellen's life story was more typical. Like many female convicts, she was spunky and stubborn. And like most female convicts who transgressed, she did not act criminally. Her offenses were rebellions against serving someone else rather than property crimes. Thus, she embraced the fresh start that transportation to a new world provided in ways that the System did not expect, such as preferring life in the female factories to working in domestic service. Eventually, however, the System's ultimate goal for convict women

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<sup>275</sup> Transcript of Despatches, *supra* note , at 128.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at # 112A (Memo, unsigned, Oct. 21, 1829). See also MEGAN HUTCHING, OVER THE WIDE AND TRACKLESS SEA.

<sup>278</sup> According to the journal of a resident trader Stephen Reynolds, the *Bee*, which arrived in Honolulu from Sydney via New Zealand on January 4, 1834, is the only ship that fits the time frame for when Jane reportedly left New Zealand bound for Wahoo/Oahu. RHYS RICHARDS, HONOLULU CENTRE OF TRANS-PACIFIC TRADE: SHIPPING ARRIVALS AND DEPARTURES 1820 TO 1840, at 203 (2000). The British Consul seized the *Bee* and its Captain was jailed in Honolulu because he was "carrying away convicts from VDL." The Captain escaped and took the *Bee* with him. *Id.* at 204. Reynolds commented: "I think she will never reach Sydney." See also Letter from Richard Charlton of the British Consulate to King Kamehameha III (Feb. 18, 1834) (on file with the Hawai'i State Archives), in which Charlton warned the King that Cuthbert was planning to escape aboard a ship. He wrote: "I have to request your Majesty to give an order to me to prevent the said vessel from taking away Mr. Cuthbert." Apparently this request failed to prevent Cuthbert's escape. Whether Jane was ever on board the *Bee* and whether she remained in Honolulu or departed on the *Bee* or some other ship remains a mystery.

was usually achieved. Like Ellen, they transformed themselves from law-breakers into law abiders. They married and became the founding mothers, producing the future citizens of a free Australia.

Most women Britain transported to Australia spent much of their lives in the domestic sphere to which married women were relegated, with even fewer official legal rights than when they were convicts assigned as domestic servants. However, in contrast to what their lives might have been had they remained in Great Britain, convict women were able to shape their domestic sphere to serve their purposes: a home of their own, respectability, and a bright future for their children. Jane may have had more adventures, but Ellen and women like her founded a nation.