Kelly, C. (2021). Medicine, Law, and the Lash: Militarized Medicine and Corporal Punishment in the Australian Colonies 1788-1850. *Legal History*, *2020*(0), 34-56. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3543431

Peer reviewed version

Medicine, Law, and the Lash: Militarized Medicine and Corporal Punishment in the Australian Colonies 1788-1850

Catherine Kelly[1]

In 1798, Arthur Bowes Smyth, surgeon of the convict transport the *Lady Penrhyn*, wrote of the female convicts under his care:

> *…it frequently becomes indispensably necessary to inflict Corporal punishment upon them, and sorry I am to say that even this mode of proceeding has not the desired Effect since every day furnishes proofs of their being more harden'd in their Wickedness…*[2]

Throughout the period of transportation to Australia, ship's surgeons like Smyth, and medical officers were expected to oversee corporal punishments administered to convicts and soldiers. This article considers the relationships between medical practitioners in the Australian colonies, legal punishment, and the British Empire in the first half of the nineteenth century. It makes a connection between those relationships and the militarization of medicine during the Napoleonic Wars that I have previously examined.[3] By tracing the legal development of the medical officer's duty to oversee punishment on both sea and land, the article builds on the work of historians who have made in-depth investigations of specific sites of medical authority in the colonies, including the authority of the ship's surgeon on convict transports.[4] I argue that across this period, medical superintendence of punishments evolved from a customary practice to a codified legal responsibility and increasingly medical practitioners became the conduit through which physical punishments were authorised and legitimized by the State. Despite much scholarship on the evolution of relationships between medicine, discipline and punishment in Britain from the mid-nineteenth century onward, the relevance of earlier military and colonial experiences to those relationships is largely unexplored.[5] The State's deployment of medical expertise to devise and administer punishment in the first half of the nineteenth century is important because it demonstrates both that a militarized relationship between the British Empire and medical practitioners in her employ persisted well beyond the close of the Napoleonic Wars, and also that chronologies of medical control and doctors as agents of the state must be reconsidered as having begun before the mid-nineteenth century.

---

[1] Reader in Law, University of Bristol. Research for this article was generously supported by a Harold White Fellowship at the National Library of Australia.

[2] P.G. Fidlon and R.J. Ryan (eds), *The Journal of Arthur Bowes Smyth, Surgeon, Lady Penrhyn, 1787-1789* (Sydney: Australian Documents Library, 1979), 47-48.

[3] Catherine Kelly, *War and the Militarization of British Army Medicine, 1793-1830* (London: Pickering & Chatto, 2011).

[4] See e.g.: John Pearn, 'Surgeon-superintendents on convict ships' *Australian and New Zealand Journal of Surgery*, 66 (1996), 253-6; Katherine Foxhall, *Health, medicine, and the sea: Australian Voyages c.1815-1860* (Manchester: Manchester University Press, 2012); Katherine Foxhall, 'From Convicts to Colonists: The Health of Prisoners and the Voyage to Australia, 1823–53', *The Journal of Imperial and Commonwealth History*, 39 (2011), 1-19.

[5] For a later treatment of this topic see Satadru Sen, *Disciplining punishment: colonialism and convict society in the Andaman Islands*, (Oxford: Oxford University Press, 2000).

Recent scholarship has demonstrated strong links between service in the Napoleonic Wars (particularly the Peninsular campaign) colonial administrations and colonial culture.[6] This was also true within the medical service as most of the medical men in the early colonies had served with the British forces and had come to embrace a professional identity as 'military medical officers'. The medicine they practiced was heavily militarized in its outlook. It incorporated the practical needs of military operations into schemes for the preservation of health and adopted the military norms and values that prevailed at the time.[7] Military medicine in this period also gave birth to a preventative, disciplinary medicine which included medical regulation of hygiene, diet, daily routine and regular physical inspection.[8] This article further examines the implications of this militarized medicine and demonstrates that following the Wars, the British State continued to view medicine and medical practitioners as useful tools in the regulation and discipline of Imperial bodies. Building on the work of scholars who have shown that the use of medicine in the colonial enterprise was aligned with contemporary developments in penal theory, and 'reformatory' discipline, I argue that the militarized culture prevalent among medical practitioners in the service of the British Empire also lent itself to the use of medical expertise in the design and supervision of corporal punishments.[9]

Through a series of case studies this article will trace how medical practitioners became embedded in the colonial government's disciplinary mechanisms. A central focus of the article is the significance of the State 'writing down' or codifying the duties of medical practitioners in punishments. Beginning with Governor Hunter's 1798 inquiry into the conduct of the Master and Surgeon of the *Brittania*, the article tracks this process of codification at sea. It then turns to evaluate similar developments on land where the military culture of the colonies required medical practitioners to exercise disciplinary functions: supervising corporal punishments; determining whether a person was fit to be punished; and, (by diagnosing various medically defined crimes) sentencing convicts to punishment. The article focuses on the legal and regulatory technologies used by the British government and colonial authorities to incorporate medical practitioners in frameworks of control over colonial bodies. It investigates the relationship between Empire and medical practitioners by drawing together disparate legal sources and analyzing them as part of an overarching regulatory strategy which developed across the period - including case reports, Acts,

---

[6] Zoe Laidlaw, *Colonial Connections, 1815-45: Patronage, the information revolution and colonial government* (Manchester: Manchester University Press, 2005); Christine Wright, *Wellington's Men in Australia, Peninsular war veterans and the making of empire c.1820-40* (New York: Palgrave MacMillan, 2011).
[7] Kelly, *War and the Militarization of British Army Medicine*.
[8] Erwin H. Ackerknect, *Medicine at the Paris Hospital 1794-1848* (Baltimore: Johns Hopkins Press, 1967). See also David Vess, *Medical Revolution in France, 1789-1796* (Gainsville, Florida: University Presses of Florida, 1975); Laurence Brockliss and Colin Jones, *The Medical World of Early Modern France* (Oxford: Clarendon Press, 1997), 692-700.
[9] On medicine and 'reformatory discipline' in the Australian colonies see Kim Humphrey, 'A New Era of Existence: Convict Transportation and the Authority of the Surgeon in Colonial Australia', *Labour History*, 59 (1990), 59-72. For India in a slightly later context see, S. Dutta, 'Disease and medicine in Indian prisons: confinement in colonial Bengal, 1860-1910' (unpublished DPhil thesis: University of Oxford, 2008) in which the author shows that medical officers were heavily involved in devising and administering punishment in prisons for Indian civilians.

Regulations, and military orders. Through close textual analysis of these sources, the article illuminates the strategic approach of the post-war British State (domestic, Imperial and colonial) to the use of medical expertise.

Discipline at Sea

In contrast to their land-based colleagues, the role of the ship's surgeon in relation to convicts has been given extensive consideration. Historians have demonstrated that the surgeon's role grew across the period of transportation, and that their expanding authority was codified in ever more detailed official 'Instructions to Ships Surgeons'.[10] The regulation of shipboard life was increasingly managed by the surgeon, and following the reforms of 1815, when transports became required to employ former naval surgeons, mortality rates significantly declined.[11] John Pearn argues that the surgeon's role grew from 'one of amateur casualness with a primary responsibility to the system…to a highly efficient, courageous professionalism.'[12] More recently, Katherine Foxhall has shown that in later decades the authority of the surgeon extended beyond the medical treatment of convicts to their physical and spiritual reform.[13] While each of these works considers the authority of the ship's surgeon, their analytic focus is on the surgeon's supervisory and regulatory role.[14] Historians have noted that the duties of the surgeon included punitive discipline, but that function is only mentioned in broader analyses of authority and regulation linked to changes in penal policy during the period. Histories of the ship's surgeon to date have a Foucauldian focus on the surgeon's expanding responsibility for the physical regulation of the convict, their education and moral reform.[15] This article takes a different focus, and explores in detail the under-examined responsibility for corporal 'spectacular' punishment given to the surgeon by the state.

To understand how medical practitioners came to occupy a central role as gatekeepers of corporal punishment in the Australian colonies, it is necessary to examine the foundations of that role at the commencement of the convict experience. To do this we turn to the early transports, before the reforms of 1815. Probably the most infamous case of punishment aboard one of these ships also provides the greatest insight into customary views of all parties about the role and duties of the ship's surgeon. The *Brittania* sailed for New South Wales

---

[10] Humphrey, 'A New Era of Existence'

[11] All these works draw attention to the influence of naval practitioners on the improvement of health and discipline on convict transports. In this regard, it is important to understand that naval surgeons had developed and implemented such regimes from a significantly earlier period, see Christopher Lawrence, 'Disciplining Diseases: Scurvy, the Navy and Imperial Expansion, 1750-1825', in D. Miller and P. Reill (eds.), *Visions of Empire* (Cambridge: Cambridge University Press, 1996), pp. 80-106. For the history of naval medicine in this period see generally: C. Lloyd and J. Coulter, *Medicine and the Navy, 1200-1900, 1714-1815* (3 vols., Edinburgh: Livingstone, 1961), iii; L. Brockliss, J. Cardwell, M.Moss, *Nelson's Surgeon, William Beatty, Naval Medicine, and the Battle of Trafalgar* (Oxford: Oxford University Press, 2005), ch. 1.

[12] John Pearn, 'Surgeon-superintendents on convict ships' Australian and New Zealand Journal of Surgery, 66 (1996):253-6.

[13] Foxhall, *Health, Medicine, and the Sea*; Foxhall, 'From Convicts to Colonists'.

[14] The same can be said for the limited historical analysis of the authority of medical practitioners in the colonies, discussed below.

[15] Michel Foucault, *Discipline and Punish: The Birth of the Prison, translated from the French by Alan Sheridan* (New York: Pantheon, 1977).

from Ireland in 1797. While docked at Rio, a plot among the convicts to take the ship was discovered and Thomas Dennott, master of the ship, commanded floggings of the conspirators. The most severe sentence saw one convict given 300 lashes followed the next day by a further 300. These punishments resulted in the deaths of six convicts and on arrival at Sydney, Governor Hunter ordered a Bench of Magistrates, including the surgeon to the Colony, Dr William Balmain, to inquire into the conduct of Captain Dennott. It was alleged during the inquiry that Dennott had ordered the punishments without consulting the ship's surgeon or allowing the surgeon to intervene. In his defence, Dennott countered that, far from protesting, the ship's surgeon Mr Augustus Beyer had sat on the quarter-deck during the floggings and quietly tallied the strokes on his chalkboard.[16]

Despite a dearth of written law about the obligations of master and surgeon aboard ship at this time, the transcript of the *Brittania* inquiry shows that all parties were clear about the facts relevant to be proved, and thus reveal the quasi-legal standards to which all parties were held. It was a particular point of inquiry from the Bench whether the surgeon had been consulted regarding the initial sentences of punishment, and again whether he had been consulted at any point during their administration. In his own defence, Dennott repeatedly asked witnesses questions designed to adduce evidence that he had not restrained Surgeon Beyer from speaking out, had consulted Beyer, and thereby in ordering the punishments he had not sought to 'supercede [Beyer] as a surgeon, or act in that capacity myself.'[17] Implicit in Dennott's line of questions was a concession that the surgeon was vested with the power to allow, continue, and stop corporal punishment of convicts. This view was held not only by the Magistrates, Dennott himself and the crew, but also by the convicts themselves who gave evidence to the inquiry:

> I heard my companions say that they never heard of so severe a punishment without ye assistance and advice of a surgeon.[18]
>
> …he heard some of ye soldiers say that it was very hard to see such murder going on without consulting the Dr. as to their being able to receive it.[19]
>
> I did hear them complain that they were punished without ye advice of ye surgeon.[20]

From this we can see that while convicts to some extent accepted or were resigned to the infliction of physical punishments, they (and all involved) believed those punishments to be legitimate, or proportionate, only if sanctioned by medical authority. This view reflects traditional responsibilities exercised by surgeons in the Navy (and also the British Army) and suggests that the command structures and division of responsibilities given to surgeons in those militarized spaces had to some extent already permeated the culture of the convict transports.

---

[16] Historical Records of Australia Series I 2:31, 36-68
[17] See for example HRA Series I 2:45, p.47, p.58, p.59
[18] Evidence of Francis Cox, a convict, HRA Series I 2:54.
[19] Evidence of John Rutlidge, a convict, HRA Series I 2:55.
[20] Evidence of James Brady, a convict, HRA Series I 2:56.

Interestingly, while the inquiry demonstrates a widespread customary or cultural acceptance of the exercise of medical expertise for punitive purposes, it also illuminates a related expectation that the doctor should tend the injuries of the punished, care for them, and ensure that they healed. In fact, the issue of Beyer's conduct as a doctor, and his 'humanity' in treating the prisoners generally and especially after the punishments was raised repeatedly. Dennott asked, 'Do you think Dr. Beyers as a professional man, conducted himself with humanity towards ye prisoners?' Further, Beyer's enthusiastic and callous encouragement of the punishments was alleged several times:

> Q – When Brannon was punished ye second time, did not the doctor say that "his hide was a tough as a buffaloe's and could not be taken off,"…?
> A – He did say so.
> …
> A – The man was crying out several times for ye doctor for God's sake to let him down, for he was not able to bear any more. The doctor replied, "You be dam'd you - ____; you are yet able to bear more."[21]

The transcript of the inquiry reveals a much murkier and complex story than is usually told of the *Brittania*. Ultimately, it is unclear what transpired and what role the surgeon played. However, in its findings the Bench emphasised that the responsibility for punishment and care of convicts should rest with the surgeon. While Captain Dennott's conduct was found to be 'imprudent and ill-judged', Beyers was censured in the most severe terms:

> the surgeon was beyond all the other bystanders particularly culpable in not steadfastly protesting against the cruelties … and was therefore inexcusably negligent and indifferent in the performance of his duty … [22]

Following the inquiry, Balmain recommended that changes should be made to the instructions given to all surgeons going with convicts to New South Wales. The resulting document imposed specific duties on the surgeon regarding his visiting of the sick and his care for them but, strangely given its impetus, did not mention responsibility for punishments, nor did the orders issued to ship's masters at this time.[23] Accordingly, the tension between master and surgeon on the issue of punishment was not resolved by the new instructions, instead they each were kept in check by reporting on the other - the master to keep a log book, and the surgeon a diary, both to be presented to the Governor on arrival.

As has been mentioned above, a significant review of the role of the ship's surgeon was prepared by the colonial surgeon (and former convict) William Redfern in 1814. That report recommended that ships' surgeons 'be recruited from mature and experienced naval surgeons … and that they were to be independent of the master and ship owner in matters pertaining to

---

[21] HRA Series I 2:46
[22] HRA Series I 2:67-68.
[23] See Historical Records of Australia p.228; The Transport Commissioners to Acting Governor King, HRA, Series 1, 3:97-98; For these same instructions in 1812 with more explicit reference to attendance and management of the sick see 'Instructions to Surgeons Having the Care of Convicts on their Voyage to New South Wales' in the Report from the Select Committee on Transportation, *House of Commons Parliamentary* Papers, 1812 (341), Appendix 27.

the health welfare and treatment of convicts during the voyage'.[24] The report was approved by Governor Macquarie and was forwarded to London where its recommendations were implemented in 1815. The orders subsequently issued to surgeons were significantly more detailed and, as Kim Humphry has noted, made the surgeon responsible for the complete 'care and management' of the convicts.[25] However, although it may have been implicit in the scope of this document, there was still no explicit written acknowledgement of the surgeon's role in authorising corporal punishments.

In 1822, Commissioner John Bigge used his extensive report on the state of the colony to highlight the persistence of problematic tensions between master and surgeon over control of the convicts. He identified that this lack of clarity was a problem of law, stating that the power of inflicting punishment:

> …is not at present given to either by any law or instruction; and those who have had recourse to it, have been content to rest their justification upon the circumstances of each particular case.[26]

Bigge recommended that this failure of law should be resolved by legislating to vest the power of ordering moderate corporal punishment 'in the surgeon superintendent rather than in the captain of the transport.'[27] This recommendation was put into effect, and codification of the surgeon's customary authority over punishments at sea was effected in 1824 with the passing of *An Act for the Transportation of Offenders from Great Britain* which revised and consolidated all laws related to the subject of Transportation. Clause 6 provided:

> …it shall be lawful for the surgeon or principal medical officer …to inflict or cause to be inflicted on such misbehaving or disorderly offender such moderate punishment or correction as may be authorized by the instructions …Provided always, that no such punishment or correction shall be so inflicted unless the master … shall first signify his approbation thereof in writing under his hand.[28]

Instructions to surgeons issued pursuant to that Act in the 1830s stipulated that 'whenever it may be necessary to inflict Corporal Punishment on a Convict, you are to do so in the most public Manner possible…' Further, the orders prescribed an escalating scale of punishment from, 'mild and persuasive means' on a first offence, to (and only if those measures failed) reducing the daily allowance of provisions, confinement in a dark cell with only bread and water, to moderate whipping. Significantly, articulating the State's use of medical expertise to strike a fine balance between severity and the preservation of life, the orders stated that the surgeon:

---

[24] HRA Series 1 8:274-292
[25] Humphrey, 'A New Era of Existence', p.63
[26] Report of the Commissioner of Inquiry into the State of the Colony of New South Wales, House of Commons Parliamentary Papers, 1822 (448) p.8.
[27] Ibid
[28] 5 Geo. IV. C. 84 in John Frederick Archbold *Peel's Acts, and All the Other Criminal Statutes: Passed from the first year of the reign of George IV to the Present Time* (London: Saunders and Benning, 1835) v.1 p.137

must never fail to be present at infliction of Punishment *in order that [he]may judge how far the State of the Convict's bodily health will admit of its being carried*, and 12 convicts must also be present.[29]

Thus, we can see that across the first half-century of transportation to the Australian colonies, the customary role of the ship's surgeon in the infliction of corporal punishments was refined and written down. Culturally, this duty was reinforced after 1815 when transports were required to employ former naval surgeons. Legally, instruments and the orders issued to surgeons became increasingly specific and expansive in this regard. Legal recognition and endorsement of this customary aspect of the medical role aboard ship emerged at the same time as the role of the ship's surgeon came to encompass the physical and moral reform of convicts. While that latter role represents a profound and significant development in penal strategy, it is clear from the foregoing that we cannot confine our understanding of medical expertise aboard transports to healing and reforming. Towards the end of the 1830s the ship's surgeon was characterised in the evidence of Francis Forbes (Attorney General NSW) to the Select Committee on Secondary Punishments as the person in whom was vested responsibility for the convicts, who was 'bound to preserve discipline on board being armed with a sort of power as justice of the peace.'[30] The role of the surgeon in authorising and administering punishments was central to the State's understanding of how discipline should be maintained at sea.

Discipline on Land

Turning now to developments in the colonies themselves, we see that the role of the medical practitioner in authorising corporal punishments drew on and further refined the responsibility aboard ship. Society in the early Australian colonies was heavily militarised. In the words of Evans and Thorpe it was a 'military, penal, colonial and colonizing matrix [that] thus fostered discipline, inequality, deference and brutality.'[31] In this place they argue, 'British naval discipline at sea was transferred to Australian *land* and those compelled to remain upon it.'[32] This transition from Navy (or military) to colony was also true for the officers of the Colonial Medical Service (CMS) which had been established in 1788 as part of

[29] My emphasis. See 'Instructions to Surgeons Superintendent on board Convict Ships proceeding to New South Wales or Van Diemen's Land' in *First Report from the Select Committee of the House of Lords appointed to inquire into the present state of the several gaols and houses of correction in England and Wales*, Appendix 26, House of Commons Parliamentary Papers, 1835 (438)(439)(440)(441); see also National Library of Australia, MS 6169 *Orders appointing Smith to the Surrey dated 17 March 1834*, in Log Book of John Smith, Surgeon, Convict Ship 'Clyde' from Kingston to Ireland to NSW Sydney 1838.

[30] Report from the Select Committee on Transportation; together with the minutes of evidence, appendix, and index, House of Commons Parliamentary Papers 1837 (518) p.1

[31] Evans, R., & Thorpe, B, 'Commanding Men: Masculinities and the Convict System' in *Journal of Australian Studies*, no 56, 1998, pp 17-34.' p.19

[32] Evans & Thorpe, 'Commanding Men: Masculinities and the Convict System' p.24. Evans and Thorpe liken flogging to the "crude surgical operations where an 'unofficial' surgeon, the scourger, partially dissected the convict male body's flesh in the presence of the officially qualified surgeon who was there to assess the effects of this 'operation'."

the civil administration of the colony.[33] The officers of the CMS were largely drawn from the ranks of military or naval surgeons and they brought with them a militarized approach to medicine, which was reinforced by the duties of their position as articulated by the colonial government.[34] Officers of the CMS had responsibility for providing medical care, acting as members of medical boards (usually regarding repatriation), running hospitals and attending executions. In addition, they were expected to attend the administration of punishments.[35]

The colonial government's requirement for medical attendance at punishments was linked to its commitment to spectacular punishment as form of convict (and soldier) control. Commissioner Bigge had been critical of the use of corporal punishment in the colonies, reflecting growing sensibilities and humanist philosophies taking hold in London at this time.[36] While this sensibility was echoed among some circles within the colonies,[37] a stronger local concern persisted that punishments being meted out were not consistently severe enough. In the early 1830's allegations were made that the summary punishment that justices of the peace were empowered to order (a maximum of 50 lashes)[38] was too mild, and that the instrument used to inflict corporal punishments was 'so inefficacious as to cause the power of the magistrates to be derided'.[39] To investigate the uniformity of floggings across the colony a circular was sent to the Superintendents of Police, Resident Magistrates and Superintendent of Hyde Park Barracks on 28 August 1833 asking them to attend punishments for the next month and record their observations regarding the degree of suffering experienced by the prisoners.[40]

Those writing the returns made strenuous attempts to fulfil the unusual requirement to describe and measure the suffering they witnessed. The returns thus provide extensive detail

---

[33] This service was supplemented by regimental surgeons and a limited number of private practitioners. For a comprehensive administrative history of the Colonial Medical Service see Cummins, C.J. *The Administration of Medical Services in NSW 1788-1855,* Australian Studies in Health Administration No 9, 1969

[34] On militarized medicine in this period see Kelly, *War and the Militarization of British Army Medicine*.

[35] Cummins, C.J. *The Administration of Medical Services in NSW* p.8 It was a matter of some dispute whether they performed this duty assiduously and in 1821 the Reverend William Cowper told Commissioner Bigge that although flogging usually brought blood after four lashes the medical officers did not bother to attend for sentences of less than one hundred. See Ritchie, J., *Punishment and profit: the reports of Commissioner John Bigge on the Colonies of New South Wales and Van Diemen's Land, 1822-1823; their origins, nature and significance* (Melbourne, Heinmann, 1970) p. 197. However c.f. the claims of 'Silex' that problems were created by the strict adherence to this requirement in Maitland, *The Sydney Herald,* Silex to the Editors 'The Convict System, The Discipline of Botany Bay. Maitland, April 9th, 1835.

[36] See for example, G. T. Smith, 'Civilised People Don't Want to See That Kind of Thing: The Decline of Physical Punishment in London, 1760-1840' in C. Strange (ed.) *Qualities of Mercy: Justice Punishment and Discretion*, UBC Press, Vancouver, 1996.

[37] For discussion of views opposing corporal punishment in the colonies, and the resulting social and cultural dichotomies see Catie Gilchrist, *Male Convict Sexuality in the Penal Colonies of Australia, 1820-1850,* University of Sydney PhD Thesis 2004, pp10-14.

[38] by the Colonial Act, 3 Gul. IV. No. 3

[39] See for example 'Petition of certain Landholders and Free Inhabitants of the District of Hunter's River, praying the Repeal of certain parts of the Summary Punishment Act' House of Commons Sessional Papers 1834 (614) Secondary Punishment (Australia) Further Correspondence on the Subject of Secondary Punishment pp. 15-16.

[40] "the amount of bodily suffering in every case which the infliction shall appear to have produced; whether evidenced by the effusion of blood, or by laceration, or other symptoms of bodily injury" Colonial Secretaries Office, Circular No. 33-38, 'To the Superintendents of Police', House of Commons Sessional Papers 1834 (614) Secondary Punishment (Australia) Further Correspondence on the Subject of Secondary Punishment, pp. 17-18.

about the scenes of punishment medical officers were required to attend, the physical effect on prisoners, and the consequent cultural impression of surgeons.[41] Typical commentary from the returns referred to whether the man's skin had broken, and whether he had cried out. Statements such as 'he appeared to suffer much, bled freely, and fainted after the punishment' predominate in the records. The most harrowing accounts for the modern reader are of the punishments (usually under 25 lashes) inflicted on boys, most often for malingering. While all these returns make for fairly grim reading, we must remember that these were the mildest punishments available, for relatively minor infractions. In the performance of their duty medical officers saw much worse. Some insight into the cultural perception of doctors resulting from the role they performed is revealed in statement of Magistrate George Kenyon Holden reported during the inquiry:

> I do not profess to have yet acquired the power of witnessing the infliction of pain with such unmoved nerves … as in a surgeon when inflicting pain for the beneficial purposes of his art.… Dr Kenny, on the other hand, who had long served with the army in India, and repeatedly witnessed army punishment professionally, thought the punishment light compared with that of the army...[42]

This window into both the prevailing sentiment and concerns of the colony, and the horrors of the punishment yard can be usefully kept in mind when considering the development of the medical officers' role detailed below.

As it had been at sea, the requirement for surgeons to attend floggings was first a customary duty, generally understood to be part of their role, and later became embedded in the regulatory apparatus of the government in New South Wales. In 1830, *An Act for the punishment and transportation of Offenders in New South Wales* was passed, authorising (among other things) Commandants or Superintendents of penal settlements the power to inflict moderate punishment for misbehaviour or disorderly conduct.[43] That power was refined by a Proclamation of Governor Darling on 26 October 1830 requiring that,

> no order for increased Labour or other Punishment…shall be carried into Effect, *without the consent of the Medical Officer of the Settlement*…and that no Number of Lashes, beyond Twenty-five, shall be inflicted *without the actual Presence of the Medical Officer*, who is to be answerable that no greater Number of Lashes shall be inflicted without than the bodily strength of the Offender can bear without endangering life…[44]

---

[41] The returns are found in the House of Commons Sessional Papers 1834 (614) Secondary Punishment (Australia) Further Correspondence on the Subject of Secondary Punishment, pp.18-34.
[42] Ibid p.25.
[43] Section 10, 11. Geo IV or *Offenders' Punishment and Transportation Act 1830 No 13a* http://www.austlii.edu.au/au/legis/nsw/num_act/opata1830n13462.pdf
[44] My emphasis. Sydney Gazette and New South Wales Advertiser, 26 October 1830 page 1. Similarly, in Tasmania the police magistrate was required to 'take care that, when flagellation is ordered, it is executed with due severity, in the presence of the surgeon, who shall attend for the usual puposes.' *Standing Instructions for the Regulation of the Penal Settlement on Tasman's Peninsula* (1833) para 62.

Evidence on how this duty was performed and understood was produced during a dispute between a colonial surgeon, Dr James Mitchell and the deputy inspector general of hospitals John Vaughn Thompson in 1836. [45] At this time Mitchell and Vaughn Thompson were embroiled in a wide-ranging power struggle over governance structures in the CMS. In the course of this struggle, Thompson made an allegation of insubordination against Mitchell which hinged on Mitchell's failure to attend punishments even in the face of repeated orders. In the course of this dispute a large volume of correspondence was produced evidencing both medical and government understanding of the duty as a part of the medical remit of the CMS.[46] Mitchell's defence was that he had been far too busy performing the 'interior' duties of the CMS – providing medical care to patients in the hospital - and that it was a convention within the service to send a junior officer to perform the exterior duties such as attending punishments. One of Mitchell's supporting arguments was that this 'very disagreeable service' was one most medical officers would gladly avoid, and thus the practice of sending a junior officer had naturally evolved.[47] To further evidence a convention that the duty fell to assistant surgeons, Mitchell produced documents detailing the refusal to attend punishments of assistant surgeon Dr. Imlay in 1831, which had required Imlay to resign from his appointment. Despite any aversion Mitchell may or may not have felt for this duty beyond a concern for his status, his dispute with Thompson leaves no doubt that the colonial administration expected, as a condition of employment, that medical officers would assume responsibility for both effective punishment and the welfare of the punished. Further, the Governor's proclamation that medical officers would be 'answerable' for the lives of those being punished placed their medical expertise in fine-tuning the severity of punishment at a particular premium. Once again, the medical officer was expected to ensure the State inflicted the most severe punishment possible, while also being responsible for the State's provision of humanity and compassion.

This fine balance was not only exercised at the punishment yard. Returns of punishments show that a large proportion of convicts (especially boys) were flogged for the offence of malingering – or feigning sickness. The procedures for determining the guilt of an alleged malingerer placed medical officers at the centre of the State's disciplinary regime. In New South Wales, Acts passed in 1830 and 1832 explicitly provided that malingering was to be proved entirely by a certificate signed by the 'Principal or other Surgeon' attending the malingerer. No counter-signature or other opinion was required.[48] Effectively, the medical

---

[45] Elizabeth Guilford, 'Mitchell, James (1792–1869)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/mitchell-james-2462/text3295, published first in hardcopy 1967, accessed online 16 February 2016.

[46] A significant proportion of this correspondence is reproduced in the body of and annexures to, James Mitchell *Statement of the case of Jas. Mitchell, Esq., late surgeon on the civil establishment of New South Wales* (Sydney, Herald Office, 1838)

[47] Mitchell, *Statement*, p.22

[48] *An Act for the punishment and transportation of Offenders in New South Wales*. *[12th May,* 1830.] 11 Geo. IV (Offenders' Punishment and Transportation Act 1830 No 13a); and *An Act to Consolidate and Amend the Laws for the transportation and punishment of Offenders in New South Wales* 3 Wil. IV., No 3 [5 September 1832] (Offenders Punishment and Justices Summary Jurisdiction Act 1832 No 18a)**:** "And whereas it frequently happens that persons under sentence … either wilfully disable themselves from working, or designedly prevent or protract the cure of any disease of complaint which they have contracted, in order to evade servitude… **and in every such case a certificate, under the hand of the Principal or other Surgeon … who shall have the**

officer's signature sentenced the convict to punishment. Similarly, in Van Dieman's Land the expertise of medical officers was required for the administration of punishment for malingering, but in that jurisdiction medical expertise was called on to rebut the presumption of malingering that applied to every individual received into hospital:

> The Surgeon's most difficult duty is the distinguishing of feigned from real illness. He shall not exempt any individual from labour or receive him into hospital, without taking down for subsequent report a minute detail of the symptoms of his case, to which must be added the reasons which induced him to conceive the disease not to be feigned but real.[49]

In the context of malingering, medical officers had the power and responsibility to condemn men and boys to punishments in which they were also participants – they gave witness to the punishments and their presence was required to ensure the punishment did not cripple or kill the convict. Afterwards medical officers became responsible for healing the convict of the wounds he or she had received.

Thus, by the 1830s legislation and subordinate regulation clearly required the presence and sanction of a medical officer for corporal punishment in the Australian colonies. This legislative requirement was supported by general community expectation which saw the presence of a surgeon as an important guard against the potential dangers of a flogging gone wrong.[50] Indeed, in some circumstances the surgeon's presence was characterised as a prudent check on cruelty and tyranny.[51] Aside from Mitchell's possibly self-serving characterisation of attending punishments as 'disagreeable', medical practitioners also appear to have accepted this role as a part of their professional duty. At most, some expressed doubts about the efficacy of flogging in favour of other disciplinary techniques.[52] The dual

---

care of, and be attending upon, such person, that he or she had so wilfully disabled himself or herself… shall be deemed sufficient proof of such offence." My emphasis. http://www.austlii.edu.au/au/legis/nsw/num_act/opajsja1832n18616/

[49] Standing Instructions for the Regulation of the Penal Settlement on Tasman's Peninsula, Colonial Secretary's Office 25 January 1833 (Report from the Select Committee on Transportation (14 July 1837) Appendix 1, p.53) https://parlipapers.proquest.com/parlipapers/docview/t70.d75.1837-016922?accountid=9730

[50] See for example *The Sydney Herald,* Silex to the Editors 'The Convict System, The Discipline of Botany Bay. Maitland, April 9th, 1835.' '…the resident magistrate is required to superintend all punishments under fifty lashes…without the presence of a surgeon is necessarily a dangerous one. Suppose a prisoner were to die under chastisement not from the severity of the punishment, but from the sudden action of fear, other passions…Thus for the want of a surgeon and hospital the magistrate is placed in jeopardy.'

[51] See in relation to excessive floggings in an orphanage *Colonial Times Hobart Town* 'The Orphan School and the Courier. ' (20 August 1839): 'Well might Mr. McLachlan insist on the expediency of having a surgeon in attendance, who should test the pulse of the sufferer, and ascertain to what extremity it might be urged without endangering life.'

[52] see for example P. Cunningham, Surgeon R.N., *Two Years in New South Wales* (London, Henry Colburn, 1827) pp. 261-262: "A flogging may serve effectually to check the poor cowardly, pitiful thief; but it only hardens the bold and courageous, while it essentially debases the feelings of *both* – but bread and water suit all manner of thievish temperaments; and while it more effectually punishes, neither brutalises nor degrades." It is especially interesting that practitioners in Australia did not voice more concern given that in other contexts some medical officers were becoming critical of flogging – or at least its excesses – within the army and that this was causing some tension within the army. See J.R. Dinwiddy, 'The early nineteenth century campaign against flogging in the Army', *English Historical Review*, 97 (1982), 308-31; Peter Burroughs, 'Crime and punishment in the British Army, 1815-1870', *English Historical Review*, 100 (1985), 545-7; Douglas Peers, 'Sepoys, soldiers

characteristics of medical expertise in the colony: a pervasive military heritage and a related concept of 'tough' and potentially painful therapeutic interventions, may account for a noticeable lack of expressed disquiet from medical practitioners about their role in supervising these punishments. However, part of the explanation for a lack of any expressed ethical qualm, may also lie in the notion that the surgeon was present above all to preserve the life of the prisoner (explicit in the Proclamation above) and that this aspect of the duty also informed the medical officer's professional self-image. It appears that with the acquiescence of the medical practitioners themselves the medical and moral authority of the doctor within the penal establishment and colonial society was deployed by the state to both legitimate and mediate its use of legal punishments.

Prison Medical Service

The medical officer's role at the nexus of legal punishment persisted and developed throughout the mid-nineteenth century in the Australian colonies and is seen clearly in the natural extension of the colonial surgeon, the prison surgeon, a specialty which emerged in Australia during the 1830s.[53] Here, foreshadowing the development of the specialty in other jurisdictions, the prison surgeon was a focus of the disciplinary functions of the state. It is significant to note that the prison medical service developed earlier in the Australian colonies than in Britain.[54] The experience and work of colonial prison surgeons was certainly fed back to the British centre in reports and parliamentary inquiries, and we must consider that the colonial experience informed the metropole. This is especially important in the context of a significant body of work on later nineteenth century prisons in Britain and America that has shown that prison doctors were integrated into systems of authority relations as mediators of state violence to control prisoners.[55] Historians have argued that in Britain prison medical officers 'were [by 1850] at the centre of the tension between punishment and care which lay at the heart of the Victorian prison system.'[56] However, we can see this same tension in the Australian colonies a generation previous, where the role of the prison medical officer in sanctioning and monitoring punishments was crucial.[57]

---

and the lash: race, caste and army discipline in India, 1820-50', *Journal of Imperial and Commonwealth History*, 23 (1995), 211-47.

[53] Pearn, 'Surgeon-superintendents on convict ships'. Aust N Z J Surg. 1996 Apr:66(4):253-6.

[54] Anne Hardy considers the disagreement among historians about the origins of the English Prison Medical Service, 'For Joe Sim, it begins with the Act of 1774, for Richard Smith with the incorporation of the local prison service under government control in 1877. If, however, the prison medical service is considered as a professional entity, providing full-time careers for dedicated employees, it is clear that the formation of the PMS should be dated to 1850, when the passing of the Act for the Better Government of Convict Prisons (13&14 Vict c.39) brought the convict prisons under central government control." 'Development of the prison medical service, 1774–1895', in R. Creese, W.F. Bynum and J. Bern (eds), *The Health of Prisoners: Historical Essays* (Amsterdam: Rodolpi, 1995), 59–80, at 60.

[55] See especially. Jo Sims *Medical Power in Prisons: The Prison Medical Service in England 1774–1988* (Milton Keynes: Open University Press, 1990), 46. See also Foucault, Ignatieff.

[56] Anne Hardy 'Development of the prison medical service, 1774–1895' at 75.

[57] Breathnach, Ciara, 'Medical Officers, Bodies, Gender and Weight Fluctuation in Irish Convict Prisons, 1877–95' Med Hist. 2014 Jan; 58(1): 67–86. 'The Prison Medical Officer played a crucial part in the sanction of corporal punishment … if during the administration of lashes, there was a threat to health the PMO could halt the process.'

The way in which the prison medical officer was used by the state in the Australian colonies is well illustrated by an inquiry into 'unnatural crimes' in the penal and probation stations in the 1840s.[58] The case study shows that, as it had with the offence of malingering, the state continued to rely on medical expertise to determine definitively whether a convict had committed a crime – a crime for which the punishment could be very severe.[59] The study also serves to demonstrate both the interest of the metropole in these colonial developments, and the persistence of administrative procedures in medicine that had been developed during the Napoleonic Wars.

The inquiry into the incidence of unnatural crimes was initiated after escalating reports in the mid-1840s about the moral state of the convict population. These anecdotal reports caused such concern within the colonies and also in London that in late 1845 and again in February 1846 the acting Comptroller-General William Champ sent an order or 'circular' to every medical officer requiring them to medically inspect each convict for physical signs of 'disease from unnatural crime'. Champ also requested that medical officers include in their reports recommendations for the prevention of the crime. The use of a circular to request information from medical officers, with the intention of using the collected body of reports to evaluate the incidence of disease, or determine the best manner of curing it, replicates military medical information gathering structures pioneered by Sir James McGrigor during the Napoleonic Wars.[60] He continued to use the method as Director General of the Army Medical Department in the years following the Wars. Its use here demonstrates the continued influence of military medical norms and reporting structures in the colonial context. As a consequence of this order the bodies of nearly 10,000 convicts were examined and evidence taken by medical officers.

The reports of Medical officers in response to this circular commonly state that they 'carefully', 'thoroughly' or 'minutely' examined all the men in their charge and that only a handful of suspicious cases had been identified. Before moving to the results of those examinations, it is worth pausing to reflect on the invasive physical process of such an examination and the violence inherent in medical practitioners exerting this state ordered control over the convict body. In the light of the work of historians who have considered the punitive impact of the Contagious Diseases Acts on women in the later nineteenth century it is not unreasonable to consider these examinations a form of corporal punishment in and of

---

[58] The papers referred to in this section are all found in 'Copy of a Despatch from Lieutenant-Governor Sir Eardley-Wilmot to Lord Stanley, (No 54) 17 March 1846, in House of Commons Parliamentary Papers Online, 'Correspondence on the Subject of Convict Discipline and Transportation (Presented to Both Houses of Parliament February 16, 1847', pp 46-56. https://parlipapers.proquest.com/parlipapers/docview/t70.d75.1847-024338?accountid=9730

[59] Sodomy remained a capital crime until 1861, although the last execution for the crime took place in 1835. For Victorian laws on homosexual crimes see A. D. Harvey, 'Prosecutions for Sodomy in England at the Beginning of the Nineteenth Century'. 1978, *The Historical Journal*, 21, pp 939-948; Lindsay Farmer, *Making the Modern Criminal Law, Criminalization and Civil Order* (Oxford: OUP, 2016) pp.271-280. During the planning for the penal settlement it had been proposed that men guilty of unnatural transgressions would be fed to the 'cannibals' of New Zealand, O. Rutter, *The First Fleet* (London: Golden Cockerel Press, 1937) p.57

[60] Kelly, *War and the Militarization of British Army Medicine*, chs 2, 6.

themselves.[61] Indeed, indications are that many convicts objected strenuously to the examinations and in some stations the convicts protested. At the Hospital Probation Station in Deloraine these protests themselves led to a redoubling of medically authorised punishments. Mr Hall, Surgeon at the station reported that he had ordered the punishment of the protestors:

> naked inspections are not generally practised by the medical officers, and the consequence has been, that in some few instances men have refused to submit to this examination, or have endeavoured to evade it, and have been punished for so doing, on my charge before the Visiting Magistrate.[62]

Hall's use of the words 'on my charge' is evocative of the effect of earlier regulations on malingering but suggests a more self-aware adoption of a punitive role as a part of his professional remit, directly related to the exercise of his medical function.

The exercise produced a collection of reports from medical officers at all stations that was indicative of 7 confirmed cases per 1000 men. While difficult to read because they are extensively redacted in the official record, the reports themselves are a testament to the rigour with which medical officers applied their expertise, and to their unwillingness to find guilt in any case that was not unequivocal. Jurisprudential texts at the time were divided about what physical signs were definitive evidence of anal sex but do give some guidance to the practitioner.[63] As a cohort the medical officers' engagement with the forensic aspect of the examination was considered and conservative. Many expressed concerns about the usefulness of a medical examination in establishing the incidence of this sexual activity.

Representative comments include:

> I must confess I am not acquainted with any appearances which are infallible signs of * * * *.'[Mr Hall, Surgeon, HM Colonial Hospital Westbury];
>
> still, it is to be remembered that there is no means for the detection of this crime, except in those who submit to the act, those acting never showing any mark by which they can be detected, and yet the propensity may exist to a very great extent among those very parties.' [W.H. Baylie Assistant Surgeon, Impression Bay];
>
> but the appearances presented by several other cases, although very suspicious, were not of so unequivocal a nature as to enable me to determine to what extent it exists.' [James Macnamara Surgeon][64]

The efforts of medical officers to negotiate – or limit – the ways in which their expertise and reports were understood by the state provide a snapshot of the ongoing state/medical dialogue about medical authority and expertise across this half century, and the active participation of

---

[61] See e.g. Phillipa Levine, *Prostitution, Race and Politics: Policing Venereal Disease in the British Empire* (New York: Routledge, 2003)

[62] My emphasis. Mr Hall to Dr Robertson, February 25, 1846, within Despatch from Eardley-Wilmot to Stanley, (No 54), p.51.

[63] For a detailed and critical analysis of these texts see: Ivan Crozier, 'The Medical Construction of homosexuality and its Relation to the Law in Nineteenth-Century England', *Medical History*, 2001, 45: 61-82

[64] Inclosures within Despatch from Eardley-Wilmot to Stanley, (No 54), p.50; p.56, p.52.

medical practitioners in the state's construction of medicine's role in disciplinary frameworks. In the 1829 edition of his influential work on medical jurisprudence, Dr Theodrick Beck had argued that 'No man … ought to be condemned [of buggery] on medical proofs solely. The physician should only deliver his opinion in favour or against an accusation already preferred'.[65] However, in the case of these colonial examinations, medical proofs were the only evidence required to condemn at least 70 men – although it is not recorded what punishment those men suffered as a consequence. Lieutenant Governor Sir E. Eardley Wilmot reported to his superiors in London, that the reports of the medical men were as definitive a result as could be achieved, 'the result of the inquiry, through the medical reports transmitted, will be, as far as on such a subject it can be, satisfactory.'[66]

The use of medical officers to perform this inquiry, and the returns they sent further confirm that the nature of medical authority in the penal establishments was militarized and intimately bound up with Britain's Imperial governance. Equally, it is clear that authorities placed significant weight and reliance on the expertise of medical officers in determining guilt or innocence for this crime.

Conclusion

The service of medical practitioners in the Australian colonies, coming as it did so close on the heels of two generations of war, gives us an important insight into the effects of those wars both upon the practice of medicine in the service of the British State, and also the State's attitude to the use of medical expertise. It is clear that in the militarized spaces of transport and colony, militarized medicine persisted and developed as an important lynchpin in the discipline and control exercised over convict bodies.

This article does not seek to deny the findings of studies that have found that the role of medical practitioners aboard transports developed in ways consistent with a general trend in penology, to focus on reformatory discipline and the most effective ways to promote rehabilitation of mind and spirit such as solitary confinement. It is clear from those excellent histories that this was certainly one way in which medical roles in service of the State evolved during the nineteenth century. What this article does seek to emphasise is that older disciplinary techniques of spectacular punishment persisted, and that the role of medical practitioners was more significant – indeed central – than has previously been drawn out. If we consider Parliamentary inquiries into punishment aimed at introducing reformatory discipline, it is significant to note that practitioners such as James Wade, surgeon of Milbank Penitentiary, and Thomas Galloway surgeon superintendent of convict voyages, were asked questions such as the following:

[65] Theodrick Beck and John Darwall, *Elements of Medical Jurisprudence*, 3rd Edition, London, Longman et al, 1829, p.70.
[66] Despatch from Eardley-Wilmot to Stanley, (No 54), p.46.

> The object of the Committee is to ascertain *how far punishment may be rendered as severe as possible*, at the same time shortening the period of confinement, having due regard to what is just and proper?[67]

This article has shown that a longstanding, but unwritten, shared understanding that surgeons were to be present at floggings aboard ship was captured in writing in the Australian context, and that as iterations of the duty were legislated (or ordered) that duty became more specific and expansive. In writing down the duty, the State was able to take control of it and shape the expectations of medical practice and identity in these spaces. The necessity of preserving the punished convict's life was spelled out, but as the orders regarding malingering show clearly, the written duties more and more emphasised the overarching obligation of the medical practitioner to the State. By the end of the period under consideration we see some practitioners self-consciously collaborating with authorities in the use of their diagnostic expertise as a disciplinary tool. However, as the *Inquiry into Unnatural Acts* demonstrates, while medical practitioners may have accepted their role as gatekeepers of discipline and punishment, they were not willing to have the State co-opt their expertise to support 'guilty diagnoses' that could not be unequivocally proven.

The service of medical practitioners in Australia was inextricably bound up with war, brutality and a heavily militarized culture. Their medical expertise was thus useful to the State in understanding the best ways to discomfort and hurt people, without quite killing them. This expertise was perceived as useful by the State, and further cultivated in the ongoing design of the medical role in the colonies that came to hark forward to the prison officer of the later nineteenth century whose role, balanced precariously between punishment and care, has been of such interest to penologists and medical historians.

---

[67] My emphasis. House of Commons Parliamentary Papers Online, Report from the Select Committee on Secondary Punishments (22 June 1832) p.49 https://parlipapers.proquest.com/parlipapers/docview/t70.d75.1831-013419?accountid=9730 See also questions posed to Thomas Galloway, Report from the Select Committee on Transportation (14 July 1837) pp.178-185 https://parlipapers.proquest.com/parlipapers/docview/t70.d75.1837-016922?accountid=9730