By What Authority?

Criminal law reform in colonial New South Wales 1788-1861

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Contents

Summary

In colonial New South Wales (NSW) between 1788 and 1861, criminal law was the primary State apparatus through which social relations were conducted. In an era before representative democracy (1857) and during a time of brutal colonisation, the criminal law was, undoubtedly, an implement of coercive colonial power. But criminal law also provided a forum in which social grievances could be heard and against which were made counter-hegemonic claims to fundamental rights and civil liberties.

This thesis proposes that a broad coalition of social groups relied upon the criminal law to democratise their society as well as the law itself, in which they participated either as its subjects, as lawyers or social commentators. In making such a claim, this thesis constructs a new typology specifically designed to describe social relations related to the legal history of the criminal law. It does so by identifying structural relationships between three distinctive social groups who occupied colonial society throughout the period: 'colonised peoples and working-class peoples', 'civic radicals' and 'constitutional radicals'. Accordingly, this thesis examines how various struggles and interventions by these groups eventually led to the reform of criminal law in colonial NSW.

The reform achieved throughout this period made the law fairer, particularly for colonised peoples. But it also ensured the longevity or 'hegemony' of a section of the colonial ruling-class who supported reform. The legacy of this reform has since been carried into the twentieth century where, concerningly, towards its end and at the beginning of the next, efforts have been to dismantle much of the reforms hard-won during the mid- to late-colonial era. Long forgotten are the people *for whom* that reform exists - those who continue to occupy unequal space, often on the fringes of Australian cities and towns and in the prisons and courts of the Australian criminal justice system.

Statement of Originality

This work has not been submitted for a higher degree to any other university or institution.

Signed:

(Eugene Schofield-Georgeson)

Acknowledgments

My former life as a criminal lawyer, much of which was spent working with Aboriginal people in the Northern Territory, involved a great deal of misery. Prison vans, prison cells, cranky magistrates, judges, pushy police and, of course, the terrible suffering of my clients, were a routine part of life. They were also the best possible motivation to write this thesis. Compared to that life, the time I have spent writing this thesis has been positively delightful. I have savoured every fascinating moment along the way and am truly grateful to the people who have helped make this thesis by offering their wisdom, encouragement and advice along the way.

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List of Abbreviations & Acronyms

AC	Appeal Cases
AC	The Australasian Chronicle
ADB	Australian Dictionary of Biography
AG	Attorney General
ALJR	Australian Law Journal and Report
ALR	Authorised Law Reports
ANZLH	Australia New Zealand Legal History
Catton	Catton Papers
CCJ	Court of Criminal Jurisdiction
CJ	Chief Justice
CLR	Commonwealth Law Reports
Cox CC	Cox's Criminal Cases
Deb	Debates
DPP	Director of Public Prosecutions
Edw	Edward
Geo	George
HC	House of Commons
HCA	High Court of Australia
HRA	Historical Records of Australia
JA	Judge Advocate
J	Justice
KB	King's Bench
Leach	Leach's Crown Cases
Legge	Legge's Supreme Court Cases
ML	Mitchell Library
NSW Sel Cas (Dowling)	Dowling's New South Wales Select Cases
NSWKR	New South Wales Kercher Reports
NSWSC	New South Wales Supreme Court
NSWSupC	New South Wales Supreme Court
NSWSupCMB	New South Wales Chief Magistrates' Bench
OBSC	Old Bailey Sessions Papers
PROV	Public Record Office Victoria
QB	Queen's Bench
S	Section
SG	Sydney Gazette
SM	Stipendiary Magistrate
SM	The Sydney Monitor
SMH	Sydney Morning Herald
SRNSW	State Records New South Wales
TPC	The Parramatta Chronicle
UKHL	United Kingdom House of Lords
Vic	Victoria
Wm	William

Preface

Emanating from England and the US in the late 1970s, neoliberalism or 'fiscal conservativism' has taken hold of much of the world's public governance. Governments across the globe have embraced the 'minimal state',[1] dismantling public sector institutions while redirecting public resources towards the privatisation of social services. In the process, police powers and prisons have rapidly expanded, enforcing law and order in decaying social spaces previously sustained by a welfare state. Driven by Thatcherite public inquiries in Britain in the early 1980s, neoliberalism has also permeated the realm of 'criminal process', changing it dramatically. Court time and the proper scrutiny of evidence have been significantly reduced. Rehabilitation and educational programs in prisons have been axed, and in some cases prisons and security services have been completely privatised.[2] Cost-cutting measures have seen the erosion of basic procedural rights and civil liberties such as the 'hearsay' rule, the right to silence, the freedom of association, majority jury verdicts, and restrictions against circumstantial evidence such as DNA. Legal aid has been slashed at the same time as neoliberal governments have rushed to implement costly mandatory sentencing regimes, longer disproportionate prison sentences, 'tough' bail laws, and increased police powers permitting arbitrary arrest

[1] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) ix.

[2] The first wave of Thatcherite reform to criminal procedure was premised upon the findings of the Thatcher government's, Royal Commission into Criminal Procedure 1981. See: L.H. Leigh, 'The Royal Commission on Criminal Procedure' (1981) 44(3) *Modern Law Review* 296. It was followed by the Royal Commission on Criminal Justice in 1991, whose principal terms of reference required it 'to examine the effectiveness of the criminal justice system in England and Wales …having regard to the efficient use of resources'. See Clive Walker, *Miscarriages of Justice: A Review of Justice in Error* (Blackstone Press, 1999) 3.

and detention in certain circumstances – all factors which have consistently proven ineffective in curbing crime and in some cases contribute to recidivism.[3]

As this thesis will show, such developments represent a 'turning back' of landmark historical reforms in criminal process and an attack on hard-won civil rights. They effectively amount to a dismantling of the enlightened achievements of social justice reformers that led to the humanisation of criminal process in Britain and the English-speaking world, including Australia. By undoing these reforms and reviving penalism, the 'new' laws that govern and regulate crime and criminality evoke eighteenth-century Royal Justice. Like the laws of that cruel era, this neo-penalism targets only the most marginalised in the community, with Indigenous and working-class people, in the Australian context, bearing the burden of its pernicious consequences – most notably, increased chances of incarceration.

[3] These trends and outcomes are discussed by a range of commentators. See, for instance, Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998), 41-42; and John Pratt, *Penal Populism* (Routledge, 2007) 3-4, 172-4.

Chapter 1: Introduction

The ubiquity of mass media-based portrayals of crime and punishment has generated widespread familiarity with 'criminal process' – or at least media representations of it. Basically these centre on the apprehension and management of those who commit a crime, and include, at the very least, police arrest and the laying of charges for the crime, and then acquittal or conviction, followed by judicial sentencing, through a trial process. This thesis critically examines the development of 'criminal law and process' or, more briefly, 'criminal process'[4] in New South Wales (NSW) between 1788 and 1861. It proceeds from the premise that this historical development both reflected and influenced the prevailing social relations of the period and was, thus, a site of power and contestation. In particular, criminal process was an arena through which dominant minority interests sought to maintain and advance their privilege at the expense of the majority of the early colony's inhabitants: convicts, Aborigines and free settlers. By 1861, however, a majority of the colony's voters had elected a number of politicians who assisted the passage of legislation to improve or humanise criminal process by securing fair trial rights – a democratic advancement that depended on reforming the magistracy and significantly limiting the severity of punishment.

The primary focus of the thesis is how criminal law and process – in particular the evolution of fair trial rights – was reformed through challenge and resistance by members of the colonial majority in NSW. The thesis highlights how the struggles involved in this historical development were critical to advancing the majority's

[4] Brown, et al., above n 3, 17, 259-262.

legitimate entitlement to challenge and resist the minority's control over legal power. The historical analysis offered here provides a foundation for a fresh and critical understanding of contemporary criminal process.[5] As criminologist David Garland puts it, 'the point is not to think historically about the past but rather to use that history to rethink the present'.[6]

Social struggles that reformed criminal process throughout the period happened in a range of diverse locations across NSW from 1788. Some of these struggles were finalised in court, becoming case law. Others evolved as popular and collective resistance: fighting, refusing, petitioning; protest in the streets; and direct democratic participation in the legislative process. More than any other factor, it appears to have been social class that distinguished each form of social struggle in terms of the actors, location, organisation and efficacy involved in reforming criminal process.[7] In this way, social class is the primary theoretical lens through which criminal law and process is examined here and it is the theoretical tool of analysis that has escaped the attention of Australian legal historians since the early 1990s (discussed below). According to Australian social historian Terry Irving class differentiation also characterised the struggle for representative democracy in NSW in 1857. For Irving, it was enacted through what he has described as 'reformist radicalism' which took three forms: *constitutional, civic* and *plebeian* (explained further in detail below, see pp. 32-36).[8] Together, these constituted a collective social movement that sought to abolish the prevailing mode of rule and governance in colonial NSW, and to replace it with one that gave voice to the majority. While this movement was united to the

[5] A similar approach can be found in: Mark Brown, 'Colonial history and theories of the present: some reflections upon penal history and theory' in Barry S Godfrey and Graeme Dunstall (eds.), *Crime and Empire 1840-1940: Criminal justice in local and global context* (Willan Publishing, 2005) 76.
[6] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press, 2001) 2.
[7] Michael Ignatieff and Amy Gutman, *Human Rights as Politics and Idolatry* (Princeton University Press, 2001) 67-68.
[8] Terry Irving, *The Southern Tree of Liberty: The Democratic Movement in NSW before 1856* (Federation Press, 2006) 127-150.

extent that it centred on establishing a more democratic form of rule and governance, it operated around three main 'nodes' of reforming practice, namely, constitutional, civic and plebeian. Despite these differentiations, all were unanimous in their mission to 'root out' the old and replace it with the new; hence their common cause as 'radicals'. Central to the argument I develop in this thesis is that the reform of criminal process in colonial NSW was informed by the ambitions of the larger project of 'reformist radicalism', and the structure of the conflicts and struggles that characterised it.

Criminal process in early colonial NSW was, of course, the progeny of the British legal system. As such, it had evolved through judicial adherence to ancient custom within English common law.[9] Anglo-Saxon procedures such as *habeas corpus*, the practice of bailment, evidence on oath, trial by ordeal, the use of writs or formal charges, as well as the use of grand and petit juries, began to evolve from around 850 CE at a time when social organisation in southern Britain was undergoing a transition from kinship-based Germanic chiefdoms to a feudal mode of production underpinned by an early form of social contract. Power was vested in nobles and royals who promised to protect vulnerable social groups from Viking raiders in return for the exploitation of their agrarian labour and tithings.[10] These processes can be found in full working order in the medieval courts of Henry II between 1154 and 1189.

The rebellion of the feudal barons in 1215 forced King John to codify some of these procedural 'rights' in *Magna Carta.* These rights to legal processes were accompanied

[9] Brian Simpson, 'The Common Law and Legal Theory' in William Twining (ed.) *Legal Theory and Common Law* (Blackwell, 1986).
[10] Alan Harding, *A Social History of English Law* (Penguin, 1966) 21-58.

by important social rights enshrined in the *Charter of the Forest.*[11] They ensured that the liberty of the subject was protected from arbitrary exercises of executive power as well as the subsistence of the peasantry through access to and use of the King's common land ('the commons'). Together, these legal (or civil) and social rights formed the basis of English law until the English Revolution of 1688, after which only individual civil rights, together with parliamentary rights, were incorporated into the English *Bill of Rights 1689*. Social rights, however, lived on as custom through 'the moral economy' and were occasionally recognised by jurisprudence.[12] Many of these rights have come to form the basis of our contemporary civil liberties. While some of these criminal processes were the result of nineteenth century 'Whig progressivism', many are ancient and persist as the outcome of hard-fought struggle by the many against the few.[13]

This thesis tells the story of the further evolution of English legal (or civil) rights as embodied in the development of criminal process in the specific colonial context of NSW. It emphasises the way in which majoritarian resistance has contributed to criminal law reform and the realisation of human rights. In terms of Irving's three-tiered typology, constitutional, civic and plebeian radicalism became the vehicles that translated this resistance into social change through law reform. Before turning to further explanation of this approach, I will first examine the ways in which criminal process has been represented and understood within legal discourse and practice.

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[11] Peter Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (University of California Press, 2008) 21-45.

[12] For a thorough analysis of custom and customary lore see E.P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (The New Press, 1993); and E.P. Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century' (1971) 50 *Past & Present* 76. William Blackstone published both *The Great Charter and the Charter of the Forest* in 1759 (held by The British Library) and the United Nations passed the *International Covenant on Economic, Social and Cultural Rights 1966,* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

[13] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press, 1987); Christopher Hampton, *A Radical Reader: The Struggle for Change in England, 1381-1914* (Pelican Books, 1984).

'Criminal law and procedure' and its socio-legal critics

'Criminal law and process' operates side by side with 'criminal law and procedure' within legal discourse and practice. 'Criminal law and procedure', however, is pre-eminent within the field.[14] Since the twelfth century, 'criminal law' has been distinguished from 'procedure'. The former has been understood as substantive. Substantive law, according to a long lineage of jurists, is that discrete body of principles and morals ascribed to human behaviours deemed criminal or excusable.[15] Classical liberal jurists such as Glanville Williams, for example, have argued that substantive criminal law is an interpretive exercise in compassion, humanity and the assertion of value judgments.[16] Criminal procedure, by contrast, is understood as law about law – an inflexible series of rules to be followed by officials and adjudicators from the moment of arrest through to trial and conviction that firmly set the parameters for the operation of substantive law.[17] A significant body of predominantly non-legal research by sociologists, criminologists and historians, however, suggests that this distinction between substance and procedure does not prevail in practice.[18]

One of the earliest contributors to this critique is criminologist Pat Carlen. She has proposed that 'criminal law and procedure' was understood as possessing specific

[14] Kevin Heller and Markus Dubber, *The Handbook of Comparative Criminal Law* (Stanford University Press, 2010) 415; Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 3rd ed., 2014); Carrie E. Garrow and Sarah Deer, *Tribal Criminal Law and Procedure* (Rowman & Littlefield, 2015).

[15] See, for instance, the writings of jurists Ranulf de Glanvil and Henry de Bracton, cited in Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the time of Edward I* (Cambridge University Press, 2nd ed., 1895 / 1968) 38-39, 558-573. In the eighteenth and nineteenth centuries, the distinction was continued by legal philosophers such as Jeremy Bentham and John Austin. See, for instance, Jeremy Bentham, 'First Lines of a proposed Code of Law for any Nation complete and rationalized' Philip Scholfield and Jonathon Harris (eds) *Jeremy Bentham Legislator of the World: Writings on Codification, Law and Education* (Clarendon Press, 1998) 223-230.

[16] See, for instance, Glanville Williams, *The Sanctity of Life and the Criminal Law* (Knopf, 1967).

[17] Debates within legal theory since the postwar period have been dominated by legal theory that accepts this distinction. See for instance, H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1961/1994) 81; and Lon Fuller, *The Morality of Law* (Yale University Press, 1964/1969) 96-97.

[18] See, for instance, Doug Hay, 'Property, Authority and the Criminal Law', in Hay et al, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Pantheon Books, 1975); Pat Carlen, *Magistrates' Justice* (Martin Robinson, 1976); Russell Hogg and David Brown, above n 4.

features that legitimated its operation. These were that law and procedure appeared to be 'homogenous' (not conflicted), 'unproblematic' (self-evident), 'external' (a corpus of sanctified rules outside human practice), 'inevitable' (in its consequences), 'essential' (socially indispensable) and 'eternal' (or ahistorical).[19]

According to Carlen, these features are understood within the legal system to ensure objectivity and impartiality, denying the development of criminal law as an historical and social process expressive of political interests. Carlen's contribution suggests that the prevailing distinction between substantive law and procedural law, appearing to be objective theoretical categories of legal discourse, is a false dichotomy and may have more to do with a division of labour between legal officials (namely the police and the judiciary).

Since the 1970s, Carlen's analysis has led to a wider body of scholarship discussing these observations in more detail.[20] In its wake, commentators such as Malcolm Feeley in the United States have proposed the concept of 'criminal process' to replace that of 'criminal law and procedure'.[21] These socio-legal commentators argued that 'criminal process' more accurately represents the ensemble of various practices that comprise the criminal law and its operation, and includes both legal actors and agencies, as well as those who become the objects of its enactment. They proposed that 'criminal process' incorporates discrete practices such as police investigation, arrest and detention, the interpretation of evidence law and the

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[19] Carlen, above n 18, 99-100.

[20] Paul Rock, 'Witnesses and Space in a Crown Court' (1991) 31(3) *The British Journal of Criminology* 266; Harvey A Moore and Jennifer Friedman, 'Courtroom Observation and Applied Litigation Research: A Case History of Jury Decision-Making' (1993) 11(1) *Clinical Sociology Review* 11; Linda Mulcahy, *Legal Architecture: Justice, due process and the place of law* (Routledge, 2010); (Carlen's methodology has since become a staple teaching technique in criminal law, criminology and sociology. See, for instance, Elizabeth Callaghan, 'What They Learn in Court: Student Observations of Legal Proceedings' (2005) 33(2) *Teaching Sociology* 213.

[21] See for instance, Malcolm Feeley, *The Process Is The Punishment* (Russel Sage Foundation, 1979/1992). The influential impact of the book is discussed by Jennifer Earl in '*The Process is the Punishment*: Thirty Years Later' (2008) 33(3) *Law and Social Inquiry* 735.

adjudication of court practice. To speak of criminal process then is to acknowledge a combination of law and related procedure. This process is inherently political insofar as it always involves the discretion, agency and moral judgment of legal officers, from the police to the judiciary.[22] In the United Kingdom, socio-legal scholars such as Doreen McBarnett have argued that criminal process occurs mainly at the lowest 'tiers of justice'[23] – the police and the magistracy. According to these commentators, the higher tiers of justice – where indictable proceedings are heard, such as the district and supreme courts – are not the major site of criminal process.[24]

In Australia, socio-legal scholars such as Michael Grewcock and Pat O'Malley have noted that the exercise of criminal process at the lower tiers of justice is often devoid of formalised justice and that what passes for 'law' is merely a technocratic exercise in processing the subjects of criminal law.[25] This pattern has been referred to by Feeley, the U.S. socio-legal scholar, as 'the process as punishment'.[26] As a group, these criminologists have argued that criminal process becomes punishment when it is abstracted from fair trial rights and due process which are, in turn, merely performed for the public in a tiny minority of cases – when justice is 'on display' at the highest 'tiers of justice' within the criminal legal hierarchy.[27] The technocratic and punishing nature of such process means that criminal defendants frequently opt for the processes of the lower tiers of justice rather than expend the time and resources having their rights to due process realised. It is evident from Feeley's – and a large body of criminological – research that the 'choice' of these defendants is shaped by their social composition as predominantly working-class, African-American or

[22] Ibid, 34.
[23] Brown et al, above n 3, 17, 259-262. For the etymology of the phrase 'tiers of justice', see Doreen McBarnett, *Conviction: Law, The State and The Construction of Justice* (MacMillan, 1981) 140.
[24] Ibid (McBarnett), 143-9, 150, 152-3; see also, Lucy Welsh, 'Are magistrates courts really a 'law free zone'?' (2013) 13 *British Society of Criminology Conference Papers* 3, 7, 12-13.
[25] See, for instance, Grewcock, above n 4, 259-425; and Patrick O'Malley, 'Technocratic justice in Australia' (1984) 2 *Law in Context* 31, 45-7; and Russell Hogg, 'Criminal justice and social control: Contemporary developments in Australia' (1989) 3 *Journal of Studies in Justice* 89, 108-10.
[26] Feeley, above n 21.
[27] McBarnett, above 23, 80.

Hispanic young men. In other words, their social marginalisation imposes major constraints on access to resources that would permit them to challenge their criminalisation. Nevertheless, contemporary Australian scholarship suggests that Australian court users (who have more extensive access to legal aid services than their North American counterparts) do in fact value due process and the right to challenge their accusers.[28] Despite these values within Australia, criminal process has become more technocratic and processional, as fair trial rights and the right to challenge authority are increasingly eroded.[29]

These North American, British and Australian perspectives challenge the premise that criminal process is simply technical and procedural. They propose that criminal process is a critical site of procedural and social rights. Procedural rights have dominated law reform discourse throughout the latter half of the twentieth century. They have been indivisibly linked to civil and political rights that were enshrined and ratified in the *International Covenant on Civil and Political Rights (ICCPR) (1966)*.[30] In the 1970s, Oxford jurist Joseph Raz developed a body of legal norms from this covenant specifically related to criminal process that he called 'fair trial rights'.[31] Since then, contemporary Australian jurisprudence has keenly pursued law reform arising from these rights, prompting some Australian commentators to refer to a 'Human Rights Revolution in Criminal Procedure'.[32] Accordingly, this revolution has generated the codification of fair trial rights with various Bills and Charters of rights and freedoms

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[28] Kathy Mack and Sharyn Roach Anleu refer to an Australian Survey of Social Attitudes in which 86.7 percent of respondents indicated that impartiality and due process values were essential in the courtroom: see 'Performing Impartiality: Judicial Demeanour and Legitimacy' (2010) 35 *Law and Social Inquiry* 137, 141; see also Kathy Mack and Sharyn Roach Anleu, 'In-Court Judicial Behaviours, Gender and Legitimacy' (2012) 21(3) *Griffith Law Review* 728, 730.

[29] O'Malley, above n 25; Pratt, above n 3; Garland, above n 6.

[30] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 and 1057 UNTS 407 (entered into force 23 March 1976) Art. 9 and 14.

[31] Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81(5) *Yale Law Journal* 823. 'Fair trial rights' as a body of principles were first recognised in Australian law in *Jago v District Court of NSW* (1989) 168 CLR 23 at 56-7 per Deane J; and *Dietrich v R* (1992) 177 CLR 292 at 299 per Mason CJ and McHugh J.

[32] Paul Roberts and Jill Hunter, *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing, 2012) 1.

across the common law world including parts of Australia such as Victoria and the Australian Capital Territory.[33]

Undoubtedly the modern development of fair trial rights has played a major role in advancing democratic rights. However, this thesis offers an intervention into the widely held understanding that such a development emerged from the foment of the 1960s and the struggle for civil and political rights, especially in the United States. First, it demonstrates that fair trial rights have a much lengthier history and have in fact been formative in socio-legal development in Britain, at least since *Magna Carta* in 1215, and in Australia since colonisation. Second, it shows that the making of these rights occurred in a specific and conflicted social context, and was tethered to broader claims and struggles about social and economic rights – for example, to a decent standard of living and access to social resources such as fair working conditions, education, social welfare and healthcare. As discussed in the Preface, the erosion of legal rights in Australia, and in particular access to legal aid, means that, increasingly, fair trial rights are becoming less accessible to those with limited social resources. It is high time to rediscover *for whom* such rights matter most.

History and Hegemony

As previously mentioned, Irving's concept of 'reformist radicalism' plays a central role in this thesis. Though developed in the context of Australian historical scholarship, its provenance lies with a wider international project – 'radical history'[34] – which evolved from the labour and social history movements between the 1960s and the 1990s in Britain, North America, Europe and Australia. Radical history recognises and maps the life and culture of subaltern and class resistance to

[33] *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); and, to some extent, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
[34] Terry Irving and Raewyn Connell, 'Scholars and Radicals: Class Structure in Australian History Revisited' (Keynote Address at the Historical Materialism Conference, Sydney 2015).

dominant social structures and, in Australia, taps into a large colonial historiography.[35] Yet rather than focusing exclusively on history from below, as social history has done, radical history seeks to identify specifically *political* interventions by radicals of *all* social classes.

Social history movements have been the subject of criticism by the right and left alike. From the left, Australian historian Humphrey McQueen, has opposed the idea of effective social resistance beyond the Marxist conceptualisation of 'class struggle'. Accordingly, he has dismissed the idea that struggles by particular groups outside the organised, industrial working class can be understood as significant social resistance, able to contribute to the advancement of democracy. For instance, McQueen has written that convict challenges to prevailing governance in colonial NSW amounted to no more than 'surly defiance, dumb insolence and even impudent mockery'.[36] For McQueen, convicts had a 'lumpen-proletarian or petty bourgeois … ideology' which predated 'class consciousness' formed during the 'making of the English working class' between 1780 and 1832.[37]

McQueen's approach preceded the scholarship of Thompsonite historians whose work on the seventeenth and eighteenth century 'mob' in England and 'the deep-sea proletariat' (transatlantic maritime workers and slaves), showed the efficacy of resistance – and even class solidarity – against exploitative and oppressive practices by a merchant class and aristocracy, well before the advent of Marx's industrial

[35] See, for instance the work of Alan Atkinson, *The Europeans in Australia, Volumes I-II* (Oxford University Press, 1997) and [assuming the editor is the same[*Volume III,* (Oxford University Press, 2015); and Grace Karskens, *The Colony* (Allen & Unwin, 2010); Henry Reynolds, *The Other Side of the Frontier: An Interpretation of the Aboriginal Responses to the Invasion and Settlement of Australia* (Penguin, 1982); Henry Reynolds, *Dispossession: Black Australian and White Invaders* (Allen & Unwin, 1989); and Erin Ihde, *Edward Smith Hall and The Sydney Monitor, 1826-1840* (Australian Scholarly Publishing, 2004).
[36] Humphrey McQueen, 'Convicts and Rebels' (1968) 15 *Labour History* 3, 13.
[37] Ibid, 25; E.P. Thompson, *The Making of the English Working Class* (Penguin, 1963).

working-class.[38] These historians showed how the importance of so-called 'primitive', pre-class-conscious workers, slaves, and commoners 'of all nations' sowed the seeds of revolution and social change particularly in England, the American colonies and France.[39] While the end-result in each case was liberalism, social historians Peter Linebaugh and Marcus Rediker have demonstrated that although these struggles ignited spontaneously around a utopian goal, they were fuelled by suffering from the bottom up and eventually resulted in social change.[40] From their perspective, concepts such as 'false consciousness' and 'primitive rebellion' seem altogether unnecessary, if not anachronistic.[41] In Australia, scholarship by colonial historians such as Alan Atkinson and Ian Duffield and, more recently, Emma Christopher, Grace Karskens and Erin Ihde, have drawn on the work of these Thompsonite scholars. Accordingly, these Australian scholars have explained how diverse forms of social resistance were critical to consolidating nascent working-class identity in colonial Australia in relation to ruling class power.[42]

Orthodox legal historians, on the other hand, have often projected a view of law divorced from social history. Their technocratic accounts of procedure emphasise the judgments and oratory of great men of the law, often at the expense of the defendant, whose 'unfortunate' plight at the end of a rope or 'cat' is usually – like their presence in the courtroom – an afterthought.[43] Orthodox legal history has

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[38] See for instance, Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners and the Hidden History of the Revolutionary Atlantic* (Beacon Press, 2000) 36-70, 211.
[39] Ibid, 158, 164.
[40] Ibid.
[41] Ian Duffield in "Haul Away the Anchor Girls': Charlotte Badger, Tall Stories and The Pirates of 'The Bad Ship Venus" (2005) 7 *Journal of Australian Colonial History* 35, 45. For histories of 'primitive rebellion' premised on class consciousness, see E. J Hobsbawm, *Primitive Rebels: Studies in Archaic Forms of Social Movement in the 19th and 20th Centuries* (W.W. Norton, 1965); E.J. Hobsbawm, *Bandits* (Pelican Books, 1969).
[42] Atkinson, Karskens, Ihde, n 35; Ibid (Duffield); Emma Christopher, 'Ten thousand times worse than the convicts': rebellious sailors, convict transportation and the struggle for freedom', (2004) 5 *Journal of Australian Colonial History* 30.
[43] See, for instance, John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2005); James Q. Whitman, *The Origins of Reasonable Doubt* (Yale University Press, 2008); John Hostettler, *The Politics of Criminal Law: Reform in the Nineteenth Century* (Rose, 1992); J.M. Beattie, *Crime and the Courts in England, 1600-1800* (Oxford University Press, 1986).

generally neglected to examine and explain the relationship between the criminal law and process, and the social divisions and conflicts within which it operates.[44] As a consequence, legal history has largely relinquished scholarly investigation of wider social origins and impacts, leaving to social historians the histories of marginalised and, in the case of this thesis, colonised voices and their contributions to civil society, such as law reform.

While social historians have reclaimed some of this ground by investigating the impact of criminal law on the lives of those colonised by it, their research rarely integrates both schools of history: *legal* and *social*. Such an integration, as proposed here, allows us to see legal history 'from below' while situating top-down legal history in its proper social and political context. This approach shows that the language of the law has not always been the language of the powerful. It conceptualises political power in relation to the law in specific historical contexts such as colonial NSW as *hegemonic* and social change - a constantly relational process between collective interests within social relationships such as those of class, 'race' – or ethnicity – and gender. 'Hegemony' is used here in its original Gramscian sense to mean the institutional methods by which one class establishes and maintains its dominance, not simply through the monopolisation of force, but by exerting a moral and intellectual leadership and making compromises (within limits) to coerce the *consent* of the governed.[45] As anti-fascist intellectual Antonio Gramsci discovered from prison, the law is a key apparatus (or institution) by which hegemonic rule is maintained and social change effected.[46] By the end of the nineteenth century in Europe, according to Gramsci, there had been a 'revolution in criminal law and in

[44] Peter Linebaugh, '(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein', (1985) 60 *N.Y.U. Law Review* 212. The concept of political 'hegemony' was invented by Antonio Gramsci in *The Prison Notebooks, Vol. III (Sixth Notebook)* (Columbia University Press, 1932/2007) 64-65.
[45] Tom Bottomore, *A Dictionary of Marxist Thought* (Blackwell, 1991) 230; Alastair Davidson, *Antonio Gramsci: Towards an Intellectual Biography* (Merlin Press, 1977) 260.
[46] Gramsci, above n 44; and Antonio Gramsci, *The Prison Notebooks, Vol. I (First Notebook)* (Columbia University Press, 1930/2007) 198.

criminal procedure and historical materialism'. This revolution had swept away 'old procedures', including 'torture' and most 'capital crimes', while introducing 'new procedures', such as 'cross-examination', in which 'the highest importance is ascribed to material evidence and the testimony of witnesses'. From prison, Gramsci was not able to confirm his thesis but urged his supporters to 'find out … the connection between … two phenomena': criminal law reform and 'the element of innovation that Marx brought to the study of history' – historical materialism.[47]

By looking from both 'the bottom-up' *and* 'top-down' it is possible to see that some of the most important interventions in the criminal law in the name of human rights have been hard-fought by radical reformers. From the protestations and plain-spoken English resistance of criminal defendants – or plebeian radicals – to the spirited and sometimes banal eloquence of their middle class 'protectors' – constitutional and civic radicals – the law has changed. Reform happened through a combination of action from the top down *and* the bottom up.

From this perspective, forms of legal process such as evidence and procedural law, implemented by the professional bourgeoisie during the eighteenth century, which undeniably impeded criminal prosecution, take on a new radical significance.[48] Legal historians have commonly seen the implementation of such procedure as an affront to 'truth', an anachronism from an era when 'too much truth meant too much death'.[49] In other words, at the height of the *'Bloody Penal Code'* in the eighteenth century, lawyers relied on new and complex procedural law to obfuscate the truth in criminal trials to save criminal accused from the death penalty. Structural Marxist scholars have also readily dismissed these interventions as fostering a sense of 'false

[47] Ibid, 198.
[48] The emergence of the of the professional bourgeoisie in the legal profession during the eighteenth century is documented by Langbein, above n 43; and Philip Gerard, *Lawyers and Legal Culture in British North America: Beamish Murdoch of Halifax* (The Osgoode Society and Toronto University Press, 2011).
[49] Langbein, above n 43, 6.

consciousness', noting that 'when the ruling class acquitted men on technicalities they helped instil a belief' in the law and that 'its very inefficiency, its absurd formalism, was part of its strength as ideology'.[50] Through a humanist and historical materialist lens, however, these arcane processes (and albeit 'Band-Aid' measures) assume a very different role. In short, as this thesis documents, these 'fair trial' processes have always been vitally important in protecting vulnerable people from the worst excesses of criminal justice. The current crisis of incarceration, suggested by some to verge upon 'carceral genocide',[51] provides all the justification needed for retaining them. So long as disproportionate rates of Indigenous imprisonment and the incarceration of the most marginalised sections of working-class people prevail, the absolute necessity of civil and procedural rights will continue.[52] Indeed, if the 'truth' operates to reinforce unjust social relations, there is little justice in prosecuting it.

In Australia legal historians, especially C.H. Currey, J.M. Bennett, and, to a lesser extent, Alex Castles and G.D. Wood, have largely avoided these meta-debates about the socio-legal origins of the discipline. Currey, writing in the 1960s, and more recently Bennett, reflect the orthodox approach to legal history. Each paints a view of the law as the work of great British men whose personal brilliance and professionalism led to a triumph of ideas and legal practices that were sometimes progressive. While Castles, in the 1980s, and Wood in the early 2000s chose not to

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[50] Doug Hay, 'Property, Authority and the Criminal Law', in Hay et al, above n 18, 33. Hay does not specifically use the phrase 'false consciousness' but this is a corollary of deploying the word 'ideology' in its Structural Marxist sense as contemplated by George Lukács, *History and Class Consciousness: Studies in Marxist Dialectics* (MIT Press, 1920/1971) and Louis Althusser, *On Ideology* (Verso, 1971/2008).

[51] See Angela Y Davis, *Are Prisons Obsolete?* (Seven Stories Press, 2003) 76; and Eileen Baldry and Chris Cunneen, 'Imprisoned Indigenous women and the shadow of colonial patriarchy' (2014) 47(2) *Australian & New Zealand Journal of Criminology*, 276.

[52] Currently, 24 per cent of NSW prisoners are Indigenous while Indigenous people make up less than 2.5% of the overall population. See: www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~New%20South%20Wales~10015. In the Northern Territory, 86% of prisoners are Indigenous while Indigenous people make up around 33% of the overall population. See: http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~Northern%20Territory~10021.

aggrandise lawyers, their accounts of criminal law in the colonial period are generally populist in their 'factualism' and relatively detached from the material conditions under which the law was made. Maintaining largely separate lives and trajectories within the academy,[53] the legal histories of Bruce Kercher, Paula Byrne, David Neal and Alastair Davidson, by contrast, describe a set of legal relations that are socially and politically contingent. Neal in 1991 and Kercher in 1995 each begin with political history. They craft a nuanced narrative drawing on a combination of political philosophy from the period and social history in ours to explain the development of the judiciary and executive in colonial NSW. Kercher's history extends beyond the period, plotting the course of the rule of law throughout the ensuing century. Davidson in 1991 and Byrne in 1993 can be distinguished from the generalist histories of Neal and Kercher. They deploy specialised frameworks of political analysis to their respective histories of law in colonial NSW. Davidson invokes structural Marxism to describe the formation of the Australian State (including the judiciary) throughout the long nineteenth century, while Byrne uses Thompsonite social history to discuss a range of lower court cases across a contrastingly narrow timespan during the 1820s and 30s. Since the 1990s, there have been no substantive histories of criminal law in colonial NSW informed by the methods of critical historical analysis adopted by Davidson and Byrne, albeit in their distinctly different ways. The approach followed in this thesis represents a return to this broadly critical approach to legal historical inquiry, while altering the theoretical lens and readjusting the subject matter, in light of contemporary developments in the criminal law.

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[53] C.H. Currey, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of NSW* (Angus & Robertson, 1968); JM Bennett, *A History of the NSW Bar* (Law Book Company, 1969); and Alex C. Castles, *An Australian Legal History* (The Law Book Company, 1982); G.D. Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (The Federation Press, 2002); Bruce Kercher, *An Unruly Child: A History of Law in Australia,* (Allen & Unwin, 1995); Paula J. Byrne, *Criminal Law and Colonial Subject: NSW, 1810-1830,* (Cambridge University Press, 1993); David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early NSW,* (Cambridge University Press, 1991); Alastair Davidson, *The Invisible State: The Formation of the Australian State 1788-1901,* (Cambridge University Press, 1991).

The major works produced by this group, however, have largely neglected the relationship between law and Indigenous peoples – although Kercher has compiled an extensive body of work in respect to Aboriginal peoples and colonial law.[54] More recently, scholarship by Lisa Ford, Kristyn Harman and Libby Connors has been exclusively devoted to the relationship between Aboriginal peoples and colonial law.[55] Nevertheless, these legal histories of Indigenous peoples do not – and nor do they intend to - cover the commonalities and connections between European and Indigenous *subjects* of criminal law. Such a bridge between these social groups is proposed here through a discussion of the shared relationships between predominantly English working-class free labourers and Aboriginal people, and convicts.

Shared Relationships and Common Interests

In investigating the development of criminal process in early colonial NSW from a socio-legal perspective, as the preceding review has suggested, members of the marginalised majority are accorded a central and agentic place. It is from amongst this marginalised majority that the subjects of criminal law throughout the period are constituted. This thesis refers to this group of predominantly colonised and working-class peoples through their shared relationships and common interests. These shared relationships (discussed in Chapters 2 and 3) occupy a central place in colonial

[54] Ibid (Kercher) 1-17; Bruce Kercher and Brent Salter (eds), *The Kercher Reports, 1788-1827* (The Federation Press, 2009). See also Kercher's extensive database of colonial Australian case law in which he has retrieved and catalogued most known colonial case law relating to Australian indigenous people: http://law.mq.edu.au/research/colonial_case_law/NSW/cases/subject_index/, accessed 1 May 2016.

[55] Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836,* (Harvard University Press, 2010); Kristyn Harman, *Aboriginal Convicts: Australia, Khoisan and Maori Exiles* (UNSW Press, 2012); Libby Connors, *Warrior: A Legendary Leader's Dramatic Life and Violent Death on the Colonial Frontier* (Allen & Unwin, 2015).

histories, especially those of European imperialism where non-Europeans have traditionally been referred to as 'colonised peoples'.[56]

In this thesis, the phrase 'shared relationships' is used in a way that reflects the work of Linebaugh and Rediker in their studies of 'slaves, sailors and commoners'.[57] In their terms, those who shared relationships include a diversity of actors: the 'hewers of wood and drawers of water' – those who performed the labour of empire or competed for it as well as dispossessed fringe-dwellers and beggars - the 'rabble', the 'motley', the 'vulgar', the 'coarse' and the 'plebeian' of the empire.[58] This approach has been echoed by Australian colonial historians Grace Karskens[59] and Emma Christopher.[60]

Such a representation of shared relationships and common interests captures the plurality of peoples ensnared by the processes of conquest, dispossession and domination involved in colonisation – a predominantly European imperial process played out across multiple places and times, and not necessarily simultaneously. Accordingly, those who shared these relationships are not limited to the non-European 'populations' of the lands colonised by and beyond European states. They also include those subject to 'internal' European colonisation, or 'internal colonialism' as South African historian Harold Wolpe explained in the mid-1970s. As Wolpe explains, internal colonialism is the practice of rapid capitalist expansion by a colonising group that '[occupies] *the same territory* as the colonized people'. It is distinct from colonialism involving a coloniser located in a spatially separate

[56] see Frantz Fanon, *The Wretched of the Earth* (Grove Press, 1963) 1 and 35. For the original use of these terms in postcolonial scholarship see Albert Memmi, *The Colonizer and The Colonized* (Beacon Press, 1957/1965); Frantz Fanon, *Black Skin, White Masks* (Pluto Press, 1967) 83.
[57] Linebaugh and Rediker, above n 38.
[58] Ibid, 56.
[59] Karskens, above n 35.
[60] Christopher, above n 42.

metropole.[61] According to this theory, the process of capitalist expansion replaces a pre-capitalist or non-capitalist mode of production. This transformation results in the *partial* destruction of the colonised group as the colonising group extracts the material resources and exploits the labour-power of the colonised group.[62] The process is assisted by a complex ideological articulation of cultural domination and superiority on the basis of 'race' and ethnicity.[63] The concept of internal colonialism has been adopted and adapted to explain various forms of colonialism, predominantly in the Americas.[64] It has also been used to describe patterns of enclosure and proletarianisation on the 'Celtic fringes' of Britain.[65] Australian political economist Mervyn Hartwig has applied this theory to the Australian experience of colonialism.[66]

The theory of 'internal colonialism' has attracted criticism, however, for two reasons: first, for being 'unproductive'[67] (without further explanation) and second, as having 'no basis' where 'the economic exploitation of Aboriginal labour … was not

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[61] (Italics his). See, Harold Wolpe, 'The Theory of Internal Colonialism – the South African Case', in Ivar Oxaal, Tony Barnett and David Booth, *Beyond the Sociology of Development: Economy and Society in Latin America and Africa* (Routledge, 1975) 229. For further South African perspectives, see G.M. Carter et al, *South Africa's Transkei: The Politics of Domestic Colonialism* (Heinemann, 1967); H.J. and R.G. Simons, *Class and Colour in South Africa, 1850-1950* (Harmondsworth, 1969); South African Communist Party, *The Road to South African Freedom* (Inkululeko, 1962).

[62] Ernesto Laclau, 'Feudalism and Capitalism in Latin America', 67 *New Left Review,* (1971) 243, 250.

[63] Wolpe, above n 61, 241.

[64] See, for instance, Rodolfo Acuna, *Occupied America: The Chicano's Struggle toward Liberation,* (Canfield Press, 1972); Stokely Carmichael and Charles V. Hamilton, *Black Power* (Harmondsworth, 1969); Pablo Gonzalez Casanova, 'Internal Colonialism and National Development', in Irving L. Horowitz et al (eds.), *Latin American Radicalism* (Vintage Books, 1970); Guillermo V. Flores and Robert Bailey, 'Internal Colonialism and Racial Minorities in the U.S.: An Overview', in Bonilla and Girling (eds.) *Structures of Dependency,* (Stanford University Press, 1973); Eugene Havens and William Finn (eds.) *Internal Colonialism and Structural Change in Colombia* (Praeger Publishers, 1970); J.H. O'Dell, 'Colonialism and the Negro American Experience', *Freedomways* 6 (Autumn, 1966) 296-308; E. Palma Patterson, *The Canadian Indian: A History Since 1500* (Don Mills, 1972); Rodolfo Stavenhagen, 'Classes, Colonialism and Acculturation', in Irving L. Horowitz (ed), *Masses in Latin America* (Oxford University Press, 1970).

[65] See, Michael Hechter, *Internal Colonialism: The Celtic fringe in British national development, 1536-1966,* (Routledge & Kegan Paul, 1975). The colonisation of Europeans is also recognised as 'colonialism' more generally by Noel Castree, Rob Kitchin and Alisdair Rogers in *A Dictionary of Human Geography* (Oxford University Press, 2013), published online: (footnote continues) www.oxfordreference.com/view/10.1093/acref/9780199599868.001.0001/acref-9780199599868-e-236?rskey=Lz6UDU&result=236, accessed 13 July 2016.

[66] Mervyn Hartwig, 'Capitalism and Aborigines: The Theory of Internal Colonialism and its Rivals', in Wheelright and Buckley, *The Political Economy of Australian Capitalism,* Vol. 3 (Australia and New Zealand Book Company, 1978).

[67] Anne Curthoys and Clive Moore, 'Working For The White People: An Historiographic Essay on Aboriginal and Torres Strait Islander Labour', 69 *Labour History* (Nov. 1995), 8.

systematic or effective'.[68] However, to see exploitation solely in economic terms, rather than through the combination of economic *and* cultural relationships between people with competing and enduring intergenerational interests, such as those of class, is to misconceive of the *social* relations of production.[69] Economic determinist approaches take a narrow view of class as purely the product of a specifically industrial form of capitalism. They fail to address the exploitation and oppression of those who maintained their existence through hunter-gatherer and subsistence modes of production, such as First Peoples and commoners, as well as the existence of class in *agrarian* capitalist societies. In fact, the exploitation and oppression of these peoples was specifically addressed by Marx in his early writings on law and crime in respect to the theft of wood in mid-century Germany, in which he demanded the preservation of 'a customary right' for the 'poor, politically and socially propertyless'.[70]

The concept of shared relationships refers to a specific historical and collective identity that transcends ethnic characteristics. Central to the conceptual formulation of 'shared relationships' are three particular relationships in which the subjects of criminal law were forced to participate across Empire: (1) to land, in that they had been driven from it and were rendered homeless, itinerant or ghettoised; (2) to labour, in that they were either rendered unemployed or coerced to perform it for the benefit of others; and (3) to coercion by the state, predominantly as subjects of criminal process and sometimes genocide or war. In colonial NSW, those who shared these relationships were proletarian convicts, Aboriginal people and free

[68] Robert Castle and Jim Hagan, 'Settlers and the State: The Creation of an Aboriginal Workforce in Australia', *Aboriginal History,* 1988, Vol. 22, 33.
[69] Karl Marx, *Capital: A Critique of Political Economy, Vol. I* (Penguin Classics, 1867/1992) Ch. 33; later developed by Weber in *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, 1922/1978) 4.
[70] Karl Marx, 'Debates on the Law on Thefts of Wood: Proceedings of the Sixth Rhine Province Assembly. Third Article', (October 25, 1842) No. 298, *Rheinische Zeitung* (Supplement). [Marx and Engels, *Collected Works* I.224-261] See also, Tom Bottomore, *A Dictionary of Marxist Thought* (Blackwell, 1991) 85.

labourers who often held similar interests and participated in similar cultures as a polyglot of people who became 'the mob'. They are referred to collectively, throughout this thesis as 'colonised and working-class peoples'.

It must be noted, however, that working-class free labourers were *not* colonised peoples. While they shared relationships to land, labour and coercive law with the colonised, they did not experience categorisation by race - such as that experienced by Aboriginal people and, to a lesser degree, convict and Celtic peoples in colonial NSW. As Curthoys has recently explained, whereas all Europeans were enfranchised and encouraged to participate in electoral democracy in NSW in 1856, Aboriginal peoples were not enfranchised to the same extent and remained colonised peoples.[71] I would add that the advent of electoral democracy, together with the end of transportation in 1840, led to the decolonisation of formerly colonised Europeans in NSW, although a complete description of this process is beyond the theorisation of this thesis.

The concept of 'shared relationships' is drawn from E.P. Thompson's definition of class. For Thompson, 'class happens when some men [sic], as a result of common experiences (inherited or shared), feel and articulate the identity of their interests as between themselves, and as against other men [sic] whose interests are different from (and usually opposed to) theirs'.[72] This definition is broadly similar to that provided by Marx: 'Insofar as millions of families live under economic conditions of existence that separate their mode of life, their interests and their culture from those of the other classes, and put them in hostile opposition to the latter, they form a class'.[73] As Raymond Williams discerned, 'class' is both an economic category and a social

[71] Anne Curthoys, 'The Many Transformations of Australian History: a Personal Account' (Keynote address at the Australia New Zealand Law and History Conference, Perth 2016). While Aboriginal men were enfranchised, very few turned out to vote.
[72] Thompson, above n 37, 8.
[73] Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (*The People,* 1897) Pt. VII, 106.

formation through which people are grouped, ranked and ordered.[74] It is inescapably conflictual and cultural. The concept of class is central to the analysis of law and society offered here and, in fact, is used to organise the chapter structure of this thesis (see p. 25). In this thesis, the term 'working class' (discussed more fully in Chapters 2 and 3) is deployed to refer to a group who included free labourers and soldiers. However, where 'working class' refers to a group of people who are involved in an organised political struggle, predominantly against those who own the means of production, 'shared relationships' is a broader term that encompasses a range of social relationships and historical conditions beyond the theorisation of class and includes Aboriginal people. It is also a useful term to describe those who comprised the 'lower orders' of social relations in colonial NSW from 1788, particularly where the 'working class' was not fully formed in England until 1832 (with the enactment of the Great Reform Act).[75] Further, for the analytical purposes of this thesis, class analysis does not account for the complexities involved in the relationship between Indigenous people and their colonisers. Just as significantly, it under-theorises the place of law in the formation of a range of relationships between dominant and subordinate groups, unlike theories of colonialism in which coercive legal power is often central.[76]

Despite their common interests, social relations among those who shared relationships in colonial NSW were far from harmonious. Just as the ruling class was riven by infighting between 'exclusives' (free settlers and traders) and 'emancipists' (former convicts), the shared relationships between colonised and working-class peoples were frequently divided by racism and sectarianism. The manual labour of

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[74] Raymond Williams, *Keywords* (Oxford University Press 1976/1983) 68.
[75] E.P. Thompson has found that 1832 is the date at which the English working class came into existence, above n 37.
[76] Sally Engle Merry 'Law and Colonialism: Review Essay' (1991) 25(4) *Law & Society Review* 889; see also Diane Kirkby and Catharine Colebourne, *Law, History, Colonialism: The Reach of Empire* (Manchester University Press, 2001).

genocide and dispossession against Aboriginal people, for instance, was carried out largely by working-class soldiers, agrarian workers and rival groups of Aboriginal people (as trackers and bush policemen).[77] However, as Australian colonial historian Andrew Markus has found, there existed less discrimination between Aboriginal and European workers than between Europeans and other non-European workers.[78] Yet despite sectarian schisms and tensions between these groups, they shared wider, dynamic and enduring interests arising from the aforementioned relationships involving *land*, *labour* and *coercive law* discussed more fully in the following.

i) Land

A great many of the English, Irish, Scottish and Welsh working-class convicts and soldiers were commoners. They were proletarianised after being forced from their commons by colonising processes of enclosure. In many cases, these processes had occurred generations before, in England between the sixteenth and eighteenth centuries.[79] As English and Australian social historians have shown, the culture of people from predominantly collective and subsistence-based societies translated into shared moral economies, common customs and freeborn assertions of rights, transmitted intergenerationally.[80] The Irish chapter of this story persisted well into the period under discussion and overlapped with the Australian Aboriginal experience. As settlers and the colonial state invaded and enclosed Aboriginal land, Aboriginal people resisted.[81] But they were, over time, dispossessed, displaced,

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[77] Marie H. Fels, *Good Men and True: The Aboriginal Police of the Port Phillip District 1837-1853* (Melbourne University Press, 1988); Jonathon Richards, *The Secret War: A True History of Queensland's Native Police* (University of Queensland Press, 2008).
[78] Andrew Markus, 'Talka Longa Mouth' (1978) 35 *Labour History* 138, 139.
[79] J.R. Wordie, 'The Chronology of English Enclosure, 1500-1914' 36(4) (1983) *The Economic History Review* 483; JM Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700*-1820 (Cambridge University Press, 1993); Iain Fraser Grigor, *Highland Resistance: The Radical Tradition in the Scottish North* (Andrews UK Limited, 2014); Roger JP Kain, John Chapman, Richard R. Oliver, *The Enclosure Maps of England and Wales 1595-1918: A Cartographic Analysis* (Cambridge University Press, 2004); Audrey Horning, *Ireland in the Virginian Sea: Colonisation in the British Atlantic* (UNC Press Books, 2013).
[80] E.P. Thompson above n 37, 8; Alan Atkinson, above n 35; Grace Karskens, above n 35.
[81] Reynolds (*Frontier*) above n 35.

removed from their common land and forced to 'come in' to the fringes of white settlements and towns.[82] Just like the Scots, the English commoners, the Welsh, the Irish and many other First Peoples across the Empire, Aboriginal people were driven from their land, away from access to shared common resources into urban spaces where they were proletarianised.[83] Proletarianised Aborigines on the urban fringe mingled with the outcasts of white society. It was through the processes of settler-colonialism and urbanisation that groups as diverse as the Irish and Aboriginal people came into contact with each other and formed a 'motley' proletariat of 'all nations'.[84]

Nevertheless, much of the culture and pre-colonial lore of these peoples, particularly in respect to property and patterns of socialisation, remained intact. While specific modes of colonial exploitation affected different groups in different ways, many of these peoples nevertheless shared more 'customs in common'[85] with each other than they did with the dominant culture and its criminal law. Accordingly, these peoples shared a collective opposition to the dominant class, against whom they sometimes realised their shared interests by making collective claims and, as argued here, asserting rights in ways that reformed criminal process.[86]

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[82] Reynolds (*Dispossession*) above n 35, 124. The paintings of Augustus Earle recall vivid depictions of such scenes. See, for instance, 'Natives of N.S. Wales as seen in the streets of Sydney', 1830.

[83] Penelope Edmonds, *Urbanizing Frontiers: Indigenous Peoples and Settlers in 19th Century Pacific Rim Cities* (UBC Press, 2010).

[84] Ibid. Phrases like, 'motley' and 'all nations' are self-describing phrases discovered by class historians (namely Rediker, Linebaugh, Karskens, Ihde) that refer to the multicultural, diverse and generally squalid conditions of proletarians effected by colonisation throughout the eighteenth and early nineteenth centuries. 'Motley' was a phrase typically used by sailors, whose forms of organic egalitarianism, particularly during mutinies and aboard pirate ships (often in response to the practice of 'impressment'), found its way into working-class language and culture more generally. One synonym for 'motley' was the phrase 'All Nations', another self-descriptor, referring to a common alcoholic drink of the late eighteenth century – a cheap and rude concoction of all the dregs from various spirit bottles left on the shelf in the tavern. See Linebaugh and Rediker, above n 38, 27-28.

[85] E.P. Thompson, *Customs In Common* (Merlin Press, 1991).

[86] As the prison camp of empire, NSW housed a wide range of political dissidents from the following resistance movements: the Irish Defenders (1794), the United Irishmen (1800), the Caravets, Carders, Whiteboys, Rightboys, Hearts of Steel, Ribbon Men (1815-1840), the Scottish Martyrs (1794), the Radical Weavers (1820), the Luddites in 1812, the East Anglian food rioters (1816), those involved in the Pentrich Rising (1817), the Cato Street Conspirators (1820), the Yorkshire Radical Weavers (1821), the Bristol Rioters (1831), the Welsh rioters (1835), the Swing rioters and machine breakers (1830), the Tolpuddle Martyrs (1834) and numerous Chartists (1839-1848). There were numerous South African

ii) Labour

Throughout the eighteenth and nineteenth centuries, people from a plurality of subjugated groups laboured at the lowest rungs on the ladder of the 'aristocracy of labour'.[87] Aboriginal proletarians were beggars, prostitutes, timber getters and domestic helpers – of the same caste as those Irish and English 'criminal class' convicts who became 'the hewers of wood and drawers of water' in colonial NSW.[88] Aboriginal women became domestic workers – often as the wives and companions of white sealers and pastoral workers – whose 'half-caste' children became farmhands, deckhands and rousabouts, mixed in 'race' as well as a hard pre-industrial working-class culture.[89] As colonial historians Anne Curthoys and Clive Moore have explained, in these occupations 'Aboriginal workers were never slaves in the strict sense, but neither were they free'.[90] Rather, they inhabited an industrial grey zone, working for rations, not wages.[91] This was a system of serfdom that resembled indentured or bonded labour. As Wolpe has explained, internal colonialism 'involves the conservation, in some form, of the non-capitalist modes of production and social organization'.[92] Many Aboriginal workers shared the working conditions of

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blacks who had resisted early apartheid law between 1828 and 1834 as well as Maoris who had fought the British before the Treaty of Waitangi 1840, and 153 Canadian and U.S. republicans.

[87] The phrase, 'aristocracy of labour', was coined by Karl Kautsky in response to Leninist socialism in, 1(10) 'Trades Unions and Socialism' (1901) *International Socialist Review,* www.marxists.org/archive/kautsky/1901/04/unions.htm, accessed 28 July 2016.

[88] Robert Castle and Jim Hagan, above n 69, 24 and 26.

[89] Lyndall Ryan, *The Aboriginal Tasmanians,* (St Lucia, 1981) 66-71; Ann McGrath, *Born in the Cattle: Aborigines in Cattle Country,* Sydney 1987; Dawn May, *From Bush to Station: Aboriginal Labour in the North Queensland Pastoral Industry 1861-1897,* Townsville 1983.

[90] Curthoys and Moore, above n 67, 1 and 4.

[91] Penelope Heatherington, *Settlers, Servants & Slaves: Aboriginal and European Children in the Nineteenth Century in Western Australia* (University of Western Australia Press, 2002), 26-29; Senate Standing Committee on Legal and Constitutional Affairs, *Unfinished Business: Indigenous Stolen Wages* (December 2006) www.qld.gov.au/atsi/documents/having-your-say/stolen-wages-reparations-scheme/stolen-wages-taskforce-report-web.pdf, accessed 20 September 2016.

[92] Wolpe cited in Mervyn Hartwig, above n 51, 129.

indentured convict labour.[93] Meanwhile, all working-class labourers in NSW – free, indentured and bonded – shared the same work.

As the colony grew in size and pastoralism spread across the continent, Aboriginal workers became more prominent in other areas of colonial production including the pastoral, mining, rainforest and maritime economies.[94] Aboriginal labour increased dramatically, particularly during times of labour scarcity such as the settler boom in the 1840s and the gold rush in the 1850s, and Aboriginal people began to join the labour aristocracy. They shared occupations with European workers as shearers, sealers, whalers, seamen, tanners, blacksmiths, joiners, gardeners, labourers, guides, shepherds, stockmen, drovers, bullock drivers, reapers, ferrymen, police and postal workers.[95] Skilled labour such as blacksmithing, droving and police work saw some Aboriginal workers share the status of their European, respectable, working-class counterparts, outfitted with uniforms, horses and guns. But working people in colonial NSW began to share more than just their work for a common master.

The cultures of the English working class, Irish rebels and Aboriginal people melded into a culturally diverse polyglot of common interests – a pluralised communality.[96] Historian of Indigenous labour Richard Broome deduced that 'Aboriginal workers who dressed like white workers, and took many of their on-the-job cues from observing fellow workers, probably learned work patterns from white workers as well as from their customary ideas'.[97] Conversely, Russel Ward appreciated the roving independence and egalitarian attitude of Aboriginal workers, transmitted to many

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[93] Shirleene Robinson, *Something Like Slavery?: Queensland's Aboriginal child workers, 1842-1945* (Australian Scholarly Publishing, 2008).
[94] Noel Loos, *Invasion and Resistance: Aboriginal-European Relations on the North Queensland Frontier, 1861-1897,* Canberra, ANU Press, 1982.
[95] Richard Broome, 'Aboriginal Workers on South-Eastern Frontiers', *Australian Historical Studies,* (1994), 26:103, 202.
[96] Inga Clendinnen, *Dancing With Strangers: Europeans and Australians at First Contact* (Cambridge University Press, 2005); Karskens, above n 35, 33-61; 117-156.
[97] Ibid, 219.

Australian pastoral workers through shared labour between agrarian workers since colonisation.[98] This is not to conclude, as Ward did, that Aboriginal workers were lazy.[99] Rather, work occupied a sacred place within Aboriginal society, demonstrated by the re-enactment of hunting and gathering and the use of weapons and tools in traditional ceremony, in a similar manner to which European guilds and artisans sanctified work through antinomian Protestant and Methodist ritual and tradition.[100] Perhaps the most important commonality between Aboriginal and European workers for present purposes was, as Bain Attwood discovered, that Aboriginal workers 'began to speak the language … of the working class and trade unionism, demanding fair wages, bonuses and shorter hours'.[101] As this thesis proposes, the articulation of rights and interests translated into demands for fairness from authority in criminal procedure. As shared interests developed among racial groups within the working class, workers and colonised people became agents of social change. They made their own history and helped shape for themselves many reforms to criminal process that made the law fairer.

iii) Coercive law

The emergence of shared relationships between working-class and colonised peoples was obvious to observers in the late eighteenth century. As trans-Atlantic revolutionary Thomas Paine observed in 1791, there emerged 'a large class of people … which in England is called the "mob"', who expressed their interests in ways that

[98] Russel Ward, *The Australian Legend* (Oxford University Press, 1958) 207-262.
[99] Curthoys and Moore, above n 67, 2-3. See Russell Ward, 'Aboriginal Communists' (1988) 55 *Labour History* 1, 3. Ward claimed that Aboriginal people have 'certain basic assumptions about the nature of human life, assumptions very different from those held by most white Australians' such as valuing leisure over work.
[100] For a description of Aboriginal ceremonies and the use of ceremonial objects in the Sydney area, see Val Attenbrow, *Sydney's Aboriginal Past: Investigating the Archaeological and Historical Records* (UNSW Press, 2nd Ed. 2010) 112-126. For the connection between labour and protestant religion see Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Courier Corporation 1905/2012), 109-110; and Thompson, above n 37, 37-83.
[101] Bain Attwood, *The Making of the Aborigines,* (Allen & Unwin, 1989) 65.

were often resistant and frequently rebellious.[102] Paine also witnessed the brutal reciprocity of class relations, saying that the mob 'have sense enough to feel they are the objects aimed at; and they inflict [it] in … turn'.[103] He observed that 'it is over the lowest class of mankind that government terror is intended to operate, and it is on them that it operates to the worst effect'.[104] During Paine's time, criminal process was the organ of state terror and its effects were a defining feature of a transnational proletariat: an underclass, a 'race of deviants', rabble, a caste of untouchables and First Peoples from the South Pacific to the North Atlantic. Their shared experiences of colonisation led one young military officer (turned colonial prison guard), Watkin Tench, to reflect that 'untaught unaccommodated man, is the same in Pall Mall as in the wilderness of NSW'.[105] Meanwhile, transportation commissioner, John Bigge, found any racial and ethnic difference in 'the rabble' indecipherable, reporting to the metropolitan ruling class that the colony was 'chiefly inhabited by the most profligate and depraved part of the [British] population'.[106] Bigge's comments perfectly illustrate the idea that shared experiences of class mean that social classes constitute themselves and express their interests *relationally,* as a class as against others.[107]

As criminal process rolled out across the colonial frontier of NSW, it shaped the experiences of class and colonisation and laid the basis for an aggressive mode of agrarian capitalist production in NSW during the period 1788 to 1861.[108] Criminal justice was administered mostly by justices of the peace (magistrates) – an office which, as class historians Raewyn Connell and Terry Irving have explained, vested

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[102] Thomas Paine, 'The Rights of Man' in *Peter Linebaugh Presents Thomas Paine, Rights of Man and Common Sense,* (Verso, 2009) 86.
[103] Ibid.
[104] Paine, above n 103.
[105] Watkin Tench, 'An Account of the Settlement at Port Jackson' (1793) in Tim Flannery, *Watkin Tench's 1788* (Text Publishing, 2011) 268.
[106] British Parliament, House of Commons, (Commissioner John Thomas Bigge) *Report of the Commissioner of Inquiry on the Judicial Establishments of NSW and Van Diemen's Land*, (1823) 78.
[107] E.P. Thompson, above n 37, 8.
[108] R.W. Connell and Terry Irving, *Class Structure in Australian History: Poverty and Progress* (Longman Cheshire, 1992) 33-61.

state power exclusively in the hands of a dominant minority of ruling class 'exclusives', or 'free settlers'.[109] As land owners and entrepreneurs, these men were prestigious, wealthy, private individuals who acted judicially in an honorary capacity.[110] They were military men, lawyers and agrarian and mercantile capitalists. Criminal law and procedure became a central technique of social control and coercion applied by this dominant coalition of British colonisers in NSW.[111] The risk of challenge to the political order and property rights demanded brutal methods of state terror. In respect to Aboriginal people, coercive law was predominantly administered in the form of genocide and frontier warfare until 1837,[112] when *all* Aboriginal people officially became the subjects of British law.[113] For working-class Europeans, the lash and the gallows, designed in England on the principle of spectacle,[114] operated regularly in colonial NSW.[115] Despite their wealth and power, however, the ruling class were as outnumbered by a majority of their subjects as they were distant from their colonial metropole in London. By 1828 a proletarian class of convicts and their children comprised 87 per cent of the European population in the colony.[116] It is also possible that Aboriginal people accounted for over one in two people by mid-century, even after a drastic decline in numbers of due to disease and genocide in the preceding seventy years.[117] By 1861 many of these people and their

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[109] Ibid, 33-36.
[110] David Neal, 'Law and Authority: The Magistracy in NSW: 1788-1840' (1985) 3 *Law in Context* 45, 45.
[111] The term, 'colonisers' and related terms such as 'colonial order' have tended to be used exclusively by feminist postcolonial historians (for instance, Ann Laura Stoler, *Carnal Knowledge and Imperial Power: Race and the intimate in colonial rule,* (University of California Press, 2002); Lauren Benton, *Law and Colonial Cultures: Legal regimes in world history, 1400-1900* (Cambridge University Press, 2002) to refer to a ruling-class within the metropoles of the global North who enacted globalising historical processes such as, 'colonisation'.
[112] Patrick Wolfe, *Settler Colonialism* (A & C Black, 1999).
[113] See, *R v Wombarty, 1837, Sydney Gazette*, 19 August 1837. See also Lord Glenelg to Governor Bourke, 26 July 1837, *Historical Records of Australia, Ser. I,* vol. XIX, p. 48. This case and correspondence are commonly confused with the proposition that Aboriginal people first became subject to British law in relation to *inter se* murder in *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSWSupC 35.
[114] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin, 1978) 3-9.
[115] Robert Hughes, *The Fatal Shore: A History of The Transportation of Convicts to Australia, 1787-1868* (The Harvill Press, 1986).
[116]Manning Clarke, *A History of Australia* (Melbourne University Press, 1973), 406.
[117] The figure of 'one in two' is calculated as follows:

children came to comprise much of the democratic majority that participated in changing social relations towards their own interests.

Clearly, relationships of class and 'race' endure within the present, particularly in respect to the demographic background of criminal defendants and patterns of incarceration. The persistence of structural inequalities associated with the persistence of liberal capitalism, and the current intensification of those inequalities associated with the ascendency of neoliberalism, have meant that the 'social' descendants of oppressed people in Australia – working-class and Aboriginal Australians – continue to suffer the consequences of criminalisation and incarceration.[118] This point is frequently ignored or neutralised by much contemporary criminology and legal history.

By suggesting the existence of shared relationships between colonised and working-class peoples in colonial NSW, this thesis does not seek to challenge the legitimacy of claims to land and social recognition based on the specific colonised relationship of Indigenous Australians or Australia's First People. Clearly, while Indigenous Australians shared much in common with their non-Indigenous counterparts vis-à-vis the dominant colonial class, they also experienced a particular relationship to colonisation that many have suggested distinguishes relations of class from those of

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a) The total population of Australia in 1861 was 405,356 (see: Australian Bureau of Statistics 2010, 'Australian Demographic Statistics', Sep 2009, Cat.no. 3101.0, Canberra, viewed 25th March, 2013, http://www.abs.gov.au).

b) The total Indigenous population of Australian in 1861 is not known. However, in 1788, the Indigenous population totalled between 318,000 and 1,000,000 (an average of 659,000). By 1900, on the Eastern seaboard (not necessarily the interior or Western half of the continent) the Indigenous population numbered 90,000 (Australian Bureau of Statistics, 'Aboriginal and Torres Strait Islander Population' Feb 2008, 1301.0 Year Book Australia, 2008, viewed 9 April 2014, http://www.abs.gov.au).

c) The figure of 'one in three' quoted above, is an estimate based on an average of the 1788 population estimates (659,000) and a concomitant rate of population decline of 5080 people per year between 1788 and 1850. This leaves 254,040 Indigenous people in 1850.

[118] Don Weatherburn, *Arresting Incarceration: Pathways out of indigenous imprisonment,* (Aboriginal Studies Press, 2014), 11-21; see also, Greg Noble, Scott Poynting and Paul Tabar, *Kebabs, Kids, Cops and Crime: Youth, Ethnicity and Crime,* (Pluto Press, 2000).

race and, more specifically, 'indigeneity'.[119] At the heart of this distinction in Australia were State policies of territorial dispossession, confinement, segregation, assimilation and removal, exclusive to Indigenous people, which gave rise to white Australian nationalism and the birth of the Australian nation state.[120] Nevertheless, as I argue in this thesis in relation to the law and criminal process in colonial NSW, Aboriginal and proletarianised Australians experienced much in common as they became subjects of the criminal law.

Civic radicals and reformers

I began this project wanting to investigate whether criminal law reform in the colonial period had been advanced in any way from the bottom up. Along the way, I found that, although not widely published, colonial historians rather than legal historians had identified numerous instances and episodes of resistance to the barbarities and injustices of criminal process. However, the more I read, the clearer it became that the impact of social resistance on the law was much more significant than colonial historians had ever considered. So great was the evidence of resistance that it led me to reconsider formalist, legal historical (top-down) accounts of legal power in the colony – not just at the level of summary jurisdiction, where resistance manifested so clearly, but from the Governor and Supreme Court, down. The evidence suggested that legal power was well and truly *relational* – and, thus, not readily discussed through exclusively social-historical and legal-historical perspectives.

[119] See, for instance, Patrick Wolfe *Traces of History: Elementary Structures of Race* (Verso Books, 2016). See also, Geoffrey Stokes, 'Citizenship and Aboriginality: Two Conceptions of Identity in Aboriginal Political Thought' in Geoffrey Stokes (ed.) *The Politics of Identity in Australia* (Cambridge University Press, 1997) 158.
[120] Wolfe, above n 113.

'Relational' in this context means two things with regard to criminal law and process. First, that the operation of colonial law in general and criminal process in particular was an institution that operated as a site or arena of *social relations*. In other words, the operation of law and criminal process was both constituted by and constitutive of these social relations.[121] Second, with respect to this thesis, the dominant social relations involved in the exercise of colonial criminal law and process were those associated with class and colonisation. In colonial NSW, criminal law and process were formative of class relations and vice-versa. Such an approach accounts for common interests and shared histories of law reform between people of different classes. This perspective has not been considered in any critical way by historians such as Woods and Castles whose legal histories are primarily organised around formalist interpretation and application of legislation and common law in colonial NSW.[122] At the same time, the social history of law, such as that of Paula Byrne, has not addressed and examined the vital role played by the resistance of colonised peoples to the colonisers – specifically through criminal process – in advancing law reform.[123]

The specific relational approach adopted in this thesis suggests that the resistance of colonised peoples to colonial law and criminal process intersected and engaged with other social dynamics that were predominantly class-based, and which were also played out through the law and criminal process. The principal agents in these dynamics can be understood in terms of Irving's theorisation of the main groups of participants involved in the advancement of democracy in Australia. [124] They were: 'civic radicals' and 'constitutional radical' reformers.

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[121] Christopher Tomlins (forthcoming), 'Why Law's Objects Do Not Disappear: On History as Remainder', in Andreas Philippopoulos-Mihalopoulos (ed.), *Routledge Research Handbook on Law & Theory*, (Routledge, 2016).
[122] Woods, above n 53, and Castles above n 53.
[123] Byrne, above n 53.
[124] Irving, above n 8.

Civic radicals were typically middle-class or members of the local emerging labour aristocracy. They were often radical newspaper men, skilled labourers or 'guildsmen', and they were pivotal in organising colonised peoples and the working class into a mass democratic movement (Chartism) in both colony and metropole in the mid-nineteenth century. Their class position can be distinguished from that of colonised and working-class peoples as a consequence of their access to and possession of 'cultural capital', comprising social assets, exclusive of economic means, that include education, qualifications, style of speech, intellect, dress and physical appearance.[125] They accord greater social power to those who 'possess' them than those who do not.

This group was 'radical' in the sense that its members encouraged a civic or popular engagement with *political reform*. Like their metropolitan counterparts, they were by no means militant nor revolutionary socialist in their activism, although they became so from the 1870s onwards.[126] Rather, from the early- to mid-nineteenth century, radical reformers engaged systematically in organising working-class support for parliamentary reform and suffrage, as well as 'legality, constitutionalism, electoralism, and representative institutions'.[127] Radical reformers embraced democracy at a time when this ideal was synonymous with 'popular power' – a subversive, dissident and egalitarian idea that government could be administered by the many and not the few.[128] With virtually no examples of the practice of these ideas, radical reformers often encouraged, and did not distinguish between, competing definitions of 'democracy' that emerged from within a liberal epistemology at the end of the

[125] Pierre Bourdieu, discusses the ideas and practices of 'cultural capital' in Bourdieu and Jean-Claude Passeron, 'Cultural Reproduction and Social Reproduction' at Richard K. Brown (Ed.), *Knowledge, Education and Cultural Change* (Tavistock, 1977).
[126] Williams, above n 74, 264.
[127] Ralph Miliband, *Marxism and Politics* (Oxford University Press, 1977) 172.
[128] See, for instance, Edmund Burke, *Reflections on the Revolution in France* (The University of Adelaide Library, 1790/2014). The concept of 'popular power' was coined by Williams, above n 76, 94.

eighteenth century. Jeremy Bentham in England and Alexander Hamilton in the United States, for example, sought to replace 'popular power' with the concept of 'representative democracy' – the notion of rule by elected representatives that lay at the heart of the United States Constitution.[129] In colonial NSW, both forms of democracy – 'popular power' and 'representative democracy' – were invoked by civic radicals in a manner suggesting that one followed the other. Both 'democracy' and 'democratic' are often used throughout this thesis to describe various legal reforms to criminal process. Their meaning relies on the first definition, invoking notions of popular power.

Constitutional radicals and ruling-class reformers

As German sociologist Robert Michels found in 1911, the great paradox of democratic reform had been the reliance by civic democracy movements on a ruling class of bourgeois officials and leaders.[130] These officials formed part of, and had access to, the State's juridical and political institutions that were, in turn, an essential component of social change from the top-down. In colonial NSW, reformist officials were often judges, barristers, politicians and the occasional governor who shared some of the radical and democratic ideals of civic radicals. They frequently represented and sympathised with colonised and working-class peoples and, hence, maintained politically contradictory positions. It is Gramsci's concept of 'hegemony',[131] however, which provides some explanatory power in understanding this contradictory quality of democratic governance. In short, such was the intensity of the conflict between the dominant minority and subordinate majority in colonial

[129] Willi Paul Adams, 'The Liberal and Democratic Republicanism of the First American State Constitutions, 1776 -1780' in Jürgen Hiedeking and James A. Henretta, *Republicanism and Liberalism in America and the German State,* 1750-1850 (Cambridge University Press, 2004) 132. Frederick Rosen, *Jeremy Bentham and Representative Democracy: A Study of 'The Constitutional Code'* (Oxford University Press, 1983).
[130] See, Robert Michels' concept of the 'iron law of oligarchy' in *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (Transaction Publishers, 1911/2009).
[131] Perry Anderson, 'The Antinomies of Antonio Gramsci', Nov-Dec 1976, I/100 *New Left Review,* 5, 20-25.

NSW that the dominant were forced to develop a mode of governance or rule that required some political concessions to the majority without relinquishing political dominance. According to Gramsci, such concessions in relation to class dynamics typically took a form that involved a reduction of coercive power by the dominant minority over the majority and the establishment of a range of institutional measures that secured the consent of the majority to continued social and political domination. The democratic and egalitarian application of the rule of law became a primary device used by ruling-class reformers to gain this consent.

Of course, the dominant class would never have dominated had they all agreed on democratic ideals. This meant that central to the figure of the ruling-class reformer was a profound disagreement or split within the colonial ruling class about democracy. Reformers were part of the dominant minority but they had a different view to others within their class – especially squatters and magistrates – about the role of the State and law which they administered. By contrast to the mode of authoritarian legal governance favoured by fellow members of their class, because of their cultural and educational background, ruling-class reformers, often as lawyers, were reflexive to reason over authority. All the more so, when reason indicated the implosion of the society upon which their class superiority and privilege depended if they failed to enact reform. They saw themselves as protectors of the 'unwritten British constitution' and 'freeborn rights'. It is from this idealism that the term 'constitutional radicals' is derived. As a result, ruling-class reformers were often swayed by the opinion of the democratic majority and were responsive to democratic struggles from below.

Structure

This thesis is structured in three parts, following Irving's typology of plebeian, civic and constitutional radicalism. The first part, comprising chapters 2 and 3, analyses how *plebeian radicalism,* the direct action of colonised and working-class peoples - as both criminal defendants and radical dissidents – was a major and hitherto unacknowledged force in the reform of criminal process. Chapter 2 examines techniques employed by colonised and working-class peoples to improve their lot under the criminal law of colonial NSW including guerrilla warfare, escape, revenge, riot, rebellion and refusal. In the period 1788 to 1861, these strategies of resistance changed over time. They increased in sophistication as colonised and working-class peoples strengthened their tactics and organisation, educating themselves from their shared experience. Chapter 3 recounts how rallies, petitioning and the use of the law itself became widely used tools of legal and social change. As techniques of resistance changed, so too did the efficacy of that resistance. By the 1830s, oppressed people and their advocates played an active role in changing social relations, partly by performing the legal rituals of their colonisers. As E.P. Thompson put it in relation to British class struggle, by mid-century, 'subordination [was] becoming (although between grossly unequal parties) negotiation'.[132] Negotiation was, in part, made possible by a middle class of *civic radicals* who organised the working class in England in response to the ravaging effects of industrial capitalism. Civic radicals were often newspaper men and skilled labourers or 'guildsmen' whose efforts eventuated in the rise of a mass democratic movement (Chartism) in the mid-nineteenth century.

The second part of the thesis, starting with Chapter 4, focuses on how *civic radicalism* worked to reform criminal process. The experience of organisation transformed the working class from 'mob' to 'citizenry' through meetings, newspapers and mass civil

[132] E.P. Thompson, 'Patrician Society Plebeian Culture' (1974) 7(4) *Journal of Social History,* 382, 384.

disobedience, and resulted in universal 'manhood' suffrage and self-government in NSW by the late 1850s. Yet these struggles accomplished much more. They were critical to the implementation of many of the rights and liberties that shaped modern criminal process in NSW. In Chapter 5 the focus narrows to explore the meta-themes revealed in Chapter 4. Drawing on the method of micro-history, this chapter narrates the indefatigable and fearless activism of a particular civic radical, Edwin Withers, and his struggle for fair trial rights at Parramatta in Western Sydney in the 1840s. A similar approach has been developed by Italian micro-historian Giovanni Levi in respect to individual subjects of history in order to show the 'possibilities for personal interpretations and freedoms' and 'social action' within wider social structures.[133]

The third part of the thesis, comprising Chapters 6 and 7, addresses the ways in which ruling-class radicals, or *constitutional radicals* – politicians and reformist men of the law – sometimes aided rebels, workers and revolutionaries in their struggles. It demonstrates how social change percolated in the private studies, across the bar tables and in the parliamentary chambers of the colonial ruling class. The motivations of these men were mixed. Occasionally, lawyers shared radical ideals. More often than not, they simply acted for fee while singing technocratic songs about procedure that sometimes achieved radical applause. The history of their achievements, as well as that of their 'less fortunate' clients, is also the history of fair trial rights and criminal process in NSW. Chapter 6 focuses on the way that the split between constitutional radical reformers and authoritarian squatters and magistrates manifested within criminal law and process in colonial NSW. Finally, Chapter 7 provides an account of how the law of evidence was regularly used by reformers to obfuscate the truth in criminal matters in order to save colonised peoples from the

[133] Giovanni Levi, cited in Alison Holland and Barbara Brookes (eds), *Rethinking the Racial Moment: Essays on the Colonial Encounter* (Cambridge Scholars Publishing, 2011) 260.

draconian consequences of criminal law. The thesis concludes by tabling major reform to criminal process throughout the period. The table shows how reform was largely a result of social struggles that pressured actors within a colonial ruling-class to make law that was often against their own immediate interests, in order to maintain power.

In offering this contribution to legal and historical scholarship, this thesis draws on extensive primary research from the colonial period, spanning both local and national archives. It goes well beyond traditional sources of legal history, namely, bench books, depositions and other legalistic documentation. It draws upon diverse archival sources including local newspapers, folksongs and other forms of cultural practice in documenting the case I make throughout that colonised and working-class peoples understood the law and used it to challenge authority. Colonial newspapers are also used for accounts of higher court legal proceedings in the colony. Such a method is progressively becoming an accepted method of historical legal research and owes much to the archival research of Bruce Kercher.[134] Kercher has collected and transcribed much of this material that appears in the thesis and, as a check on its accuracy, has advised of comparable and contrasting newspaper accounts. Kercher's online archive at Macquarie University Law School has proven invaluable in this respect.[135]

There are a number of episodes explored in Chapters 2 and 3 that mention resistance by Aboriginal, convict and working-class women to various forms of legal power and authority. These snippets offer tantalising evidence of women's participation in the

[134] See, Bruce Kercher and Brent Salter, *The Kercher Reports: Decisions of the NSW Superior Courts, 1788 to 1827* (The Francis Forbes Society for Australian Legal History, 2009); and TD Castle and Bruce Kercher, *Dowling's Select Cases 1828 to 1844: Decisions of the Supreme Court of NSW* (The Francis Forbes Society for Australian Legal History, 2005).
[135] 'Decisions of the Superior Courts of NSW, 1788-1899':
http://law.mq.edu.au/research/colonial_case_law/NSW/cases/subject_index/

processes of contestation and reform described more broadly by feminist legal scholars and historians and canvassed in this thesis.[136] Their work reminds us of the intensely gendered social relations perpetuated by the colonial legal order. Feminist historians have also pointed to the significance of class in women's history.[137] The extent to which women shared their experience of law equally or, indeed, with their male counterparts requires a more focussed study beyond the scope of this thesis. The focus, here, has been on class and shared relationships. In this respect, this thesis is the first of its kind in Australia to consider the law as historically relational, and criminal law reform as the product of both bottom-up and top-down responses. The male dominance of colonial society at all levels helps explain the male dominance of much of the evidence, but the silences, as well as the vocal interjections, are telling. Inasmuch as they appealed to their rights, women shared oppressive and exploitative relationships with colonised and working-class men. However, a specifically gender analysis of these processes and relationships would offer further nuance, including of the relationships between men (masculinities), and is a development I look forward to.[138]

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[136] See, for instance, Joy Damousi, *Depraved and Disorderly* (Cambridge University Press, 1997); Paula Byrne, 'Convict Women Reconsidered…and Reconsidered', Vol 2(1) (2004) *History Australia* 13; Babette Smith, *A Cargo of Women: Susannah Watson and the Convicts of the Princess Royal* (Rosenberg Publishing, 2005); Deborah J. Swiss, *The Tin Ticket: The Heroic Journey of Australia's Convict Women* (Berkeley Books, 2010); Kay Daniels, *Convict Women* (Allen & Unwin, 1998); Angela Woollacott, *Gender and Empire* (Palgrave MacMillan, 2006), Heather Radi and Judy Mackinolty, *In Pursuit of Justice: Australian women and the law 1788-1979* (Hale & Iremonger, 1979), among many others. Gender and criminal process in a contemporary Australian context has been discussed by numerous commentators, most notably Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (The Federation Press, 1996, 2nd edn 2002).

[137] Ibid, Damousi, Byrne, Swiss, Daniels. See also, Deborah Oxley, *Convict Maids. The Forced Migration of Women to Australia* (Cambridge University Press, 1996); Elizabeth Windschuttle, *Women, Class and History: Feminist Perspectives on Australia, 1788-1978* (Collins, 1980); and N. Grieve and A. Burns (eds), *Australian Women: Contemporary Feminist Thought* (Oxford University Press, 1994); Kay Saunders and Raymond Evans, *Gender Relations in Australia: domination and negotiation* (Harcourt Brace Jovanovich, 1992).

[138] The theory of 'hegemonic masculinity', pioneered by R.W. Connell in *Masculinities* (University of California Press, 1995) may certainly have resonance from an historical perspective. I note that some steps have been made in this direction by Robert Hogg in *Men and Manliness on the Frontier: Queensland and British Columbia in the Mid-Nineteenth Century* (Palgrave Macmillan, 2012). Meanwhile, Connell's approach has been adapted to explain crime and criminality in much contemporary criminology. See, for instance, James W. Messerschmidt and Stephen Tomsen, 'Masculinities, Crime and Criminal Justice', *Oxford Handbooks Online: Scholarly Research Review* (Feb 2016) http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-129 accessed, 20 December 2016.

In the period between 1788 and 1861, law and society in colonial NSW underwent monumental change. By the end of the period, criminal process had become fairer through the realisation of democratic ideals from a previous era. The work of this reform was not attributable to the benevolence of an enlightened ruling class. Rather, it originated from a well-spring of local and transnational popular dissent and struggle that challenged the legitimacy and power of the ruling class. When it reached those in positions of juridical and political power, it was met by a mixture of hostility and compromise, which sometimes resulted in progressive legal change. The cumulative impacts of that change resulted in a recognisably common-law criminal justice system that enshrined a variety of legal rights that improved the lives of colonised and working-class peoples. Such an outcome would not have occurred without the efforts of those people themselves.

Chapter 2: Violence, Resistance & Criminal Process

In the early colonial period, the administration of criminal process was frequently brutal and draconian as a lay magistracy of military men and squatters was instructed 'to proceed in a more summary way' than in the metropole of London.[1] In response, colonised and working-class peoples in New South Wales (NSW) commonly resisted, resorting to violence or escape from their masters. There is a considerable literature on such resistance to colonial authority,[2] but only a narrow segment has understood it as a correlate of criminal process. This chapter argues that colonised and working-class peoples' resistance to criminal process in early colonial NSW represented a collective – albeit disorganised – *challenge* to legal power and authority, and a flagrant repudiation of established legal rights. From such a perspective, escape, suicide, bushranging, attacks on police, revenge against masters, piracy and 'excarceration'[3] (prison-breaking) were largely generated by colonial criminal processes. Accordingly, when colonised and working-class peoples committed such offences, they often did so as explicit acts of resistance to what they saw as legal oppression and denial of their 'rights'. This chapter explores these episodes and their consequences. It shows that sometimes such actions resulted in progressive law reform but, overwhelmingly, they succeeded in establishing a strong culture of democratic opposition to the

[1] *Letters Patent '(First) Charter of Justice' 1787* (UK) (issued under 27 Geo III c 2, 2nd April 1787).
[2] See, for instance, the exhaustive literature review provided by Grace Karskens in respect to histories of colonial escape in "The Spirit of Emigration': The Nature and Meanings of Escape in Early NSW' (2005) Vol 7 *The Journal of Australian Colonial History* 1.
[3] Peter Linebaugh, *The London Hanged: Crime & Civil Society in the Eighteenth Century* (Verso 1991/2006) xxvi, 3, 361-2.

control of law by a dominant minority. This political consolidation ultimately led to widespread social change and longer-term law reform by the 1860s.

Winnowing meaning from spasmodic episodes of resistance is a contested historical exercise. For orthodox legal historians, such a process involves turning 'little crooks into class warriors' while wearing 'rose coloured glasses of the deepest hue'.[4] Similarly, Australian Marxist historians have dismissed popular resistance to colonialism as the expressions of individualist and self-serving motives of a majority of convicts and, therefore, as antithetical to 'class consciousness'.[5] Yet, as many Marxist humanists – historians, in particular – have argued, questions of 'consciousness' are almost impossible to determine with any meaningful precision.[6] This is particularly important when attempting to analyse and interpret the history of colonised and working-class peoples – social groups not especially known for creating written records and bequeathing testamur to their own existence. A.G.L. Shaw, for example, estimated that 'class-conscious' convicts and political prisoners constituted around 0.5 per cent of the penal population.[7] These appeals to a doctrinaire Marxist perspective focus on literal and conscious expressions of political activism as 'genuine' collective resistance, ignoring wider socio-cultural practices indicative of shared class and experience.

Despite limited written evidence, the study of 'bottom-up' resistance to the rule of law in colonial NSW has identified a range of measures adopted by colonised and working-class peoples in defiance of their subjugation. In his classic piece, 'Four Patterns of Convict Protest', Alan Atkinson explains how, in NSW between 1824

[4] John Langbein, 'Albion's Fatal Flaws' (1983) 98(1) *Past & Present* 96, 101.
[5] Humphrey McQueen, 'Convicts and Rebels' (1968) 15 *Labour History* 3, 13.
[6] See for example, John Lewis, 'The Althusser Case' (1972) *Australian Left Review* 1(37) 16, 16-26; and more broadly, the Marxist humanist tradition, embodied by E.P. Thompson.
[7] A.G.L. Shaw, *Convicts and The Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and other parts of the British Empire* (Melbourne University Press, 1966) 152-3.

and 1838, convicts protested their treatment through: i) attack (physical and verbal); ii) appeals to authority (such as convict regulations and 'freeborn rights'); iii) refusal to work; and iv) retribution (revenge, such as hay rick-burning). As Atkinson pointed out, only the first of these forms of protest sought to destroy the existing order. All other forms of resistance operated *within* and appealed to a hegemonic rule of law.[8] They sought squarely to achieve reform. More recently, Australian colonial historian, Emma Christopher, has identified further sites of working-class resistance to colonisation in colonial NSW. She has studied patterns of solidarity between sailors and convicts on transport ships and documents episodes of resistance to flogging, incarceration and discipline.[9] According to Christopher, echoing the findings of Linebaugh and Rediker,[10] sailors and convicts in NSW confronted colonising authority through protest, refusal to work, solidarity, escape, desertion, suicide and claims against 'poor usage' through the assertion of 'rights', 'liberty' and 'a fair wind for France'. For E.P. Thompson, such rituals had a much longer history, representing counter-hegemonic displays of justice.[11] As Atkinson put it, somewhat more playfully:

> the gentleman certainly had the more formal ceremony of petty sessions - the bar, the bench, the triangle - with which to orchestrate his performance. But in reply the convict, equally concerned with precedent, might adorn his argument with a sudden blaze in the night. This was his counter ritual.[12]

As previous historical scholarship suggests, the success of the British colonising project in NSW was contingent on the administration of criminal process. As the following chapter outlines and discusses, however, it met with fierce resistance that

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[8] Alan Atkinson, 'Four Patterns of Convict Protest' (1979) 37 *Labour History* 28, 43.
[9] Emma Christopher, 'Ten thousand times worse than the convicts': rebellious sailors, convict transportation and the struggle for freedom', (2004) 5 *Journal of Australian Colonial History* 30, 30-46.
[10] Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners and the Hidden History of the Revolutionary Atlantic* (Beacon Press, 2000).
[11] E.P. Thompson, 'Patrician Society, Plebian Culture' (1974) 7(4) *Journal of Social History* 382, 389-90, 400-402.
[12] Atkinson, above n 8, 41. Such an act might also be seen as a performative 'speech act', as described by Judith Butler in, *Excitable Speech: A politics of the Performative* (Psychology Press, 1997) 59.

was played out in a number of ways. As my analysis of the historical record suggests, these included: escape, attacks against authority, strikes, riots, combination as well as coordinated Aboriginal attack. Central to this analysis is the argument that such opposition, though diverse and predominantly disorganised, represented an effective collective challenge to established legal order.

Escape

> 'We'll wander over mountains and we'll gallop over plains -
> For we scorn to live in slavery, bound down in iron chains'.
>
> From 'The Wild Colonial Boy'[13]

> 'I'd range those woods and valleys like a wolf or a kangaroo,
> Before I'd work for government says bold Jack Donoghue'.
>
> From 'Bold Jack Donaghue'[14]

Colonial ballads and balladeers often sang loudly about physical freedom and personal liberty. Such lyricism was a form of dissent towards State terror, subjugation and colonised life. This simultaneity of asserted 'rights' and contempt for authority is captured in the two extracts above, championing the anti-authoritarian figure of the 'Bushranger'. Importantly, these extracts speak of that most precious penal fantasy, escape. Excarceration from 'iron gangs' within 'the government service', and from indentured labour was, in fact, common. Some authors suggest that as many as 3000 convicts escaped from NSW by sea before 1820.[15] Prisoners had around a 28 per cent (or one-in-four) chance of 'doing the bolt'.[16] Other authors have found that

[13] A.B. 'Banjo' Paterson, *The Old Bush Songs* (Createspace Independent Publishing, 1905/2014) 35.
[14] in Georges Denis Zimmerman, *Songs of Irish rebellion: political street ballads and rebel songs, 1780-1900* (Folklore Associates, 1967) 270.
[15] D.R. Hainsworth, *The Sydney Traders: Simeon Lord and his contemporaries, 1788-1821* (Cassell Australia, 1972) 12.
[16] Karskens, above n 2, 4 and 13.

between 15 and 40 per cent of 'First Fleeters' simply left or disappeared.[17] Scores of others escaped to join groups of Indigenous people.[18] Caselaw on convict escape tells a similar story, with a multitude of prosecutions focusing on escape attempts. The caselaw also created fine legal distinctions between those who escaped and those who aided and abetted escape, imposing sentences of different degrees, depending on whether the escape was by land or sea.[19] These laws acknowledged that when prisoners escaped, they cheated criminal process.

For the first Judge-Advocate, David Collins, escape was social. He felt that 'the wish (of convicts) to return to their friends appeared to be the prevailing idea'.[20] Since that time, escape from indenture and colonial prison has been discussed by a great many colonial historians.[21] For Robert Hughes, it was a simple matter of cause and effect. Horror and oppression led to escape.[22] Warwick Hirst saw escape as resourcefulness.[23] John Hirst felt that escape was the exercise of working-class agency by convicts.[24] Atkinson took this idea a step further, viewing escape as a shared and inherited experience of resistance common to maritime and Irish radicalism.[25] Paul Carter, Patrick O'Farrell and Martin Thomas have written about escape as a form of

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17 Alan Atkinson, 'The Pioneers Who Left Early' (1991) 29 *The Push* 110, 110-116.
18 Grace Karskens, *The Colony* (Allen & Unwin, 2010) 484.
19 There are numerous cases throughout the period. For a selection of cases on convict and prisoner escape attempts, see for instance: *R v Williams* [1797] NSWKR 2; *R v Roberts* [1800] NSWKR 1; *R v Peyton* [1807] NSWKR 3; *The Governor v Riggs* [1820] NSWKR 5; *R v Clarke and others* [1821] NSWKR 3; *R v Poole and others* [1822] NSWKR 5; *R v Ryan, Steel, McGrath and Daley* [1832] NSWSupC 95, *Sydney Gazette* 15 and 19 December 1832; *R v Blackhall, Martin and Watkins* [1838] NSWSupC 4; *R v Powell* [1839] NSWSupC 82, *Sydney Herald* 4 November 4 1839; *R v Chubb* [1840] NSWSupC 4, *Sydney Herald,* 3 February 1840; *R v Montgomery* [1857] NSWSupCMB 19 *Moreton Bay Courier,* 10 October 1857.
For a selection of cases on 'assisting' and 'harbouring' convicts see: *R v Kingston* [1799] NSWKR 11; *R v Wilkinson* [1807] NSWKR 5; *R v Bendall* [1812] NSWKR 4; *R v Hopkins* [1831] NSWSupC 53, *The Australian* 18 August 1831; *R v Mossman and Welsh* [1835] NSWSupC 1, *Sydney Herald,* 5 February 1835; *R v Castling* [1857] NSWSupCMB 12, *Moreton Bay Courier,* 10 October 1857.
And for cases involving penalties and sentencing discretions in respect to escape, see: *R v Dunn and Young* [1837] NSWSupC 7, *Sydney Gazette,* 11 February 1837; and *R v Dugurd* [1836]NSWSupC 58, *Sydney Herald,* 18 August 1836.
20 David Collins, *An Account of the English Colony in NSW* (T. Cadell & W. Davies, 1804) 139.
21 See, for instance, an entire issue of the *Journal of Australian Colonial History* (2005) Vol 7, devoted to the subject.
22 Robert Hughes, *The Fatal Shore: A History of The Transportation of Convicts to Australia, 1787-1868* (The Harvill Press, 1986), 203-243.
23 Warwick Hirst, *Great Convict Escapes in Colonial Australia* (Kangaroo Press, 2003) 1-5.
24 John Hirst, *Convict Society and its Enemies: A History of Early NSW* (Allen & Unwin, 1983) 127, 137-8.
25 Atkinson, above n 17.

utopian idealism.[26] More recent contributors, such as Grace Karskens, have described it as 'fluid, … blurring into absconding, becoming lost, wandering away, disappearing for some days and then reappearing'.[27] Some academic trendsetters have even turned the lens of spatial and global history onto the subject of escape.[28] Karskens has identified four main groups of escapees: i) recently arrived convicts and soldiers; ii) those serving life sentences; iii) those who counted the days and years and knew their sentences had expired (also discussed by Atkinson[29]); and iv) skilled workers who resented exploitation of their skills by the convict system.

Escape was imbricated within a democratic anti-colonial culture borne on the high seas. This culture belonged to a motley seafaring proletariat who decamped from the empire wherever it spread.[30] Aboard the HMS *Hillsborough* in 1798, 12 seamen escaped and offered convicts below decks the chance to accompany them.[31] Such a culture involved the development of strategies to defeat bondage (both indentured and carceral) and evolved organically through co-operation between people of the same rank and class as they shared planning and decisions.[32] In one escape case, Judge-Advocate Wylde was clearly impressed by the level of organisation and planning surrounding the escape. 'It was truly astonishing', he remarked, 'the quantity of property, the enumeration of the articles nearly filled a side of foolscap; and, among the number, the prisoners had provided themselves with a Bible!'.[33] Above all else, escapees were reliant upon the trust of helpers both inside and outside the

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26 Paul Carter, *The Road to Botany Bay* (Faber, 1987); Patrick O'Farrell, *The Irish in Australia* (University of Notre Dame Press, 2001)*;* and Martin Thomas, *Artificial Horizon: Imagining the Blue Mountains* (Melbourne University Press, 2004).
27 Karskens, above n 2, 9.
28 Clare Anderson, 'Multiple Border Crossings: "Convicts and Other Persons Escaped from Botany Bay and residing in Calcutta"' (2001) 3(2) *Journal of Australian Colonial History* 1.
29 Alan Atkinson, *The Europeans in Australia, Vol. I* (Oxford University Press, 1997) 75; and Atkinson above n 17, 113.
30 Linebaugh and Rediker, above n 10, 143-174, 211-248.
31 Christopher, above n 9, 42.
32 Marcus Rediker, *Outlaws of the Atlantic: Sailors, Pirates, and Motley Crews in the Age of Sail* (Beacon Press, 2014) Chapters 6 and 7.
33 *R v Poole and others* [1822] NSWKR 5; [1822] NSWSupC 5, *R v Peacock, R v Cammell, Clensey, R v Kanann, R v Webb, R v McCann,* Sydney Gazette, 11 October 1822.

group.[34] Trust within the group was assured through the development of a democratic culture aboard the ship.

Democratic culture between sailors was nowhere more apparent than aboard pirate vessels. While there were many motivations for mutiny and piracy, much piracy in the coastal waters of NSW was the product of escape from penal settlements and desertion from bad maritime masters.[35] 'Liberty or Life!' was the mutinous cry of the convict sailors aboard the merchant vessel the *Wellington* in 1826, as they seized control of the ship.[36] Similar expressions of democratic idealism prevailed aboard other pirate ships in NSW between 1788 and 1840.[37] It was aboard pirate vessels such as these that sailors developed their own democratic methods of governance, electing their own captains and creating councils to decide issues of criminal justice.[38]

In NSW, American ships meant freedom for many escapees. Irish-American sailors tended to share the Jacobin spirit of the recent French and American Revolutions. As Judge-Advocate Collins recalled, there was 'so certain a system'[39] between escapees and American sailors that consecutive governors created a myriad of port regulations and fines (of up to £500) for any shipmaster who carried away convicts.[40] Governor Macquarie added so many regulations to prevent escape through the

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[34] Ibid.

[35] Christopher, above n 9, 40; See instances of convict escape involving assistance offered to convict escapees by ships' officers in *R v Kingston* [1799] NSWKR 11; [1799] NSWSupC 11; and aboard the *Scarborough* discussed in Chapter 3.

[36] Erin Ihde, 'Pirates of the Pacific: The Convict Seizure of the *Wellington'* (2008) 30(1) *The Great Circle* 3, 6.

[37] See, for instance, the story of Mary Bryant and the Government Cutter in 1791, as well as similar mutinies aboard *The Cumberland* in 1797, *The Venus* in 1806, *The Harrington* in 1808*, The Trial* in 1816, *The Cyprus* in 1828, and *The Frederick* in 1833, discussed in Ihde *ibid,* and Ian Duffield, 'Haul Away the Anchor Girls': Charlotte Badger, 'Tall Stories and the Pirates of the "Bad Ship Venus"' (2005) 7 *Journal of Australian Colonial History* 35. A complete catalogue of the mutinies and attempted risings aboard the transports is provided in Vide Charles Bateson, *Convict Ships* (Glasgow, 1959).

[38] Eugene Schofield-Georgeson, 'Customs in Common Across The Seven Seas' (2015) 2 *Law & History* 111.

[39] Collins, above n 19, 49.

[40] Phillip to Nepean, 22 August 1790 *HRA* 1, Vol. 1, 206; King to Portland, 10 March 1801 *HRA* 1, Vol. 3, 85.

harbour that, by 1820, colonial Commissioner Bigge complained that Sydney's port was the most inconvenient and expensive in the empire.[41]

Like most struggles for rights and social change during the period, the penalty for failed escape attempts was high. On the transport *Britannia* in 1796-7, 31 convicts plotted a mutiny and were tortured to extract confessions, each being given 300 lashes.[42] Upon arrival at Port Jackson, 'they whare to be chaind by 8 or 9 togather and to be worked all day like horses and driven to their cells at night' [sic].[43] Such an incident occurred on the *Marquis Cornwallis* in 1795, with the ringleaders hanged and others dying from neglect after severe floggings.[44]

These episodes did not go unnoticed by the colonial regime, which grew particularly concerned about the solidarity shown among colonised and working-class peoples against the State. Sailors and convicts were often found in league together, bonded not only by class interest but also by conditions and discipline. For instance, the Duke of Wellington's disciplinary technique of 'flogging round the fleet' quickly evolved into 'flogging round the camp' in NSW. In one case, a ship's captain and first mate were tried for 'aiding and abetting' an escape when they rescued a known escaped convict who was stranded on Lord Howe Island as punishment.[45] They were nevertheless acquitted by a sympathetic jury.

Prisoners slipped out of convict huts in the night. They went overboard on ships or confronted ships' captains as a mutinous mob. They stole long-boats or whole ships

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41 John Thomas Bigge, *Report of the Commissioner of Enquiry on the Judicial Establishments of NSW and Van Diemen's Land* (1823) House of Commons (UK) 78-81; John Thomas Bigge, *Report of the Commissioner of Enquiry on the State of Agriculture and Trade* (1823) House of Commons (UK) 54-5.
42 Christopher above n 9, 40.
43 Ibid.
44 Ibid, 42.
45 *R v Stein and Aldride* [1835] NSWSupC 44, *Sydney Gazette,* 14 May 1835.

in the harbour under cover of darkness.[46] They slunk off quietly from road-gangs when overseers turned their backs. Prison-breaking (excarceration) – perhaps the most dramatic form of escape – captured the attention of the most powerful men in the colony. The Gordon Riots and the storming of Newgate Prison in Britain in 1780 were recent memories for many prisoners of the Crown, as they were for their political overseers. These events played a major role in the British policy of transportation which saw a forced migration of an excess 'criminogenic' proletariat from the crowded slums of London and Manchester to a 'gulag' in the South Seas.

Prison-breaking has mainly been discussed in Australian history through the example of the Castle Hill Rebellion in 1804. Historians of all persuasions appear to agree that 'Castle Hill' or 'The Battle of Vinegar Hill', as it is sometimes known, is the closest Australia has ever come to violent revolution.[47] The events at Castle Hill were a mass expression of an organised effort, mainly by Irish convicts at Rouse Hill and Constitution Hill (Toongabbie), to escape their bondage and overthrow harsh British penal discipline to establish a 'New Republic'.[48] The leader of the rebellion, Phillip Cunningham, was serving a sentence for his pivotal role in the Irish Rebellion of 1798 against the *Penal Laws* and had also been involved in various mutinies and other escape attempts throughout the period, including one aboard the the *Anne*. The story is well known: 400 rebels armed with pikes and farm tools, proclaiming 'death or liberty', charged the British ranks (57 loyalist militia and professional military men). The rebels were resoundingly defeated. Fifteen rebels were killed in battle. There were no British casualties.

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[46] See, for instance, the case of *R v Spratt and Others* [1822] NSWKR 6 in which eight men stole a whaling-boat to escape.

[47] R.W. Connell and T.H. Irving, *Class Structure in Australian History: Documents, Narrative and Argument* (Longman Cheshire, 1980) 32; 'Castle Hill' is the focus of McQueen, above n 5, 6-9; see also Karskens, above n 18, 292; Hughes, above n 21, Lynette Silver, *The Battle of Vinegar Hill*: *Australia's Irish Rebellion, 1804* (Doubleday, 1989).

[48] Rebel leader, Phillip Cunningham planned to form the 'Republic of New Ireland': see Silver (ibid), 87.

The immediate response of the Governor was to declare martial law under which 300 alleged rebels were arrested in the ensuing days. Nine rebel leaders were executed summarily and 66 more were lashed and sentenced to secondary transportation. Law reform was a long way off. Nevertheless, the rebels succeeded in articulating their utopian democratic ideals and the colonial ruling class took notice. Pastoralist John MacArthur felt he had 'every reason to believe to be true … that an insurrection was intended' and that 'from the bustle and veracity of the Irish prisoners' and 'the general conduct of the Irish on similar occasions … nothing but the apprehension of the prisoners prevented it'.[49] Legal rights such as liberty were being demanded but they were advanced as part of a larger social movement. At its core, this social movement had the very clear goal of freedom from gaol.

Unlike the planned events at Castle Hill, excarceration was, more often than not, disorganised and spontaneous. In July 1827, a group of men saw their friend, John Bates, being marched toward the Sydney Gaol in the custody of soldiers. They angrily demanded Bates' release. When the soldiers refused, they formed a mob with other locals and attempted to free Bates by attacking the soldiers. They overcame the guard and the prisoner fled. He was recaptured and, at his trial before the Sydney Quarter Sessions, Constable Thomas Amsden described how the soldiers 'drew their bayonets and would have attacked the mob but for the deponent's (Amsden's) persuasions'.[50] Like the Castle Hill rebellion, this small escape attempt demonstrates that excarceration could have been met with brutal reprisal by the military regime. The attitude of the Constable, however, reflects a growing acceptance on the part of colonial legal authorities that escape was a routine and even a reasonable response to colonial legal order and criminal process.

[49] *R v O'Dwyer and Ors* [1807] NSWKR 2.
[50] John Bates, Sydney Quarter Sessions, July 1827, 42, Reel [4/8447], NSW State Records.

During the Rose Hill Breakout in 1791, 21 convicts escaped their prison, taking clothes, tools and a week's rations. They headed north. A few days later, they were captured but absconded again shortly after.[51] Another convict, Jack Place, attempted escape and told authorities he was attempting to get to China.[52] He was punished with 500 lashes, the standard punishment for escape attempts. In this case punishment appears to have strengthened Place's resolve. A year later, he became one of the leaders of the Castle Hill rebellion and was hanged.

When colonised and working-class peoples were not fleeing gaol, they often fled the jurisdiction of the court. Assize courts were the precursor to the 'circuit court' system of rural and regional justice in England and later, in NSW. In the colony, assize courts involved members of the judiciary travelling to distant parts of the settlement in order to perform the spectacle of metropolitan justice. They were part of a key strategy in territorialising the land by applying law across it. Colonised and working-class inhabitants of every district of the colony welcomed the 'assizes' with desertion and escape. Just as many Aboriginal people 'melted' into the bush upon the approach of white invaders; escaped and indentured convicts fled towns such as the Green Hills at the first sign of legal authority. In 1795 Magistrate Samuel Marsden travelled to the Green Hills to hold court and found that 'the people will absent themselves as soon as they know I'm coming'.[53] He discovered that many defendants simply 'did not care for the Governor or the Orders of the colony', declaring that 'they were free men and wou'd do as they pleased'.[54]

There were numerous escape attempts by Aboriginal captives and convicts for whom the suffering of being disconnected from Country was often far worse than

[51] Karskens, above n 2, 19-20;
[52] *Sydney Gazette*, 18 December 1803, 3.
[53] Karskens, above n 18, 128.
[54] Ibid.

imprisonment and the lash. Colebe and Bennelong were captured, shackled and imprisoned by Governor Phillip. The pair had a complicated relationship with the Governor but were essentially kept against their will to be paraded and studied as 'botanical' curios. Colebe ran away but Bennelong remained incarcerated. Collins recalled that, while under guard, Bennelong was 'trembling alive to the joyful prospect of escaping'.[55] But Bennelong knew his Country around Government House better than the Governor and his guard. He escaped by walking away some days later.

Escape was a form of first contact between working-class English and Irish prisoners and Indigenous people. In the early colony, escapees sought refuge beyond the surveillance of Sydney Town and congregated up the river at the foot of the Blue Mountains in the 'Green Hills' around Windsor.[56] As Karskens explains, the Green Hills were one of the first alternative enclaves within the colony.[57] Aborigines and escapees shared the landscape, often hunting naked together in the forest. In the period prior to 'the Black Wars' they partied, danced and held sporting contests together. Escaped convict Edward Corbett was captured and blamed for the desertion of the colony's cattle on Emu Plains near the Green Hills. He told authorities that he 'frequently fell in with the natives' and that, unlike the colonial regime, they would never 'treat him ill'.[58] The democratic value of liberty appears to have been respected equally among colonised and working-class peoples.

Prisoners escaped by committing suicide - an 'escape without leaving the brig',[59] as it were. In turn, suicide subverted penal processes, particularly secondary transportation, by depriving the State of a prisoner's labour power before the

[55] Collins, above n 20, 74.
[56] Karskens, above n 18, 117-133.
[57] Ibid.
[58] John White, *Journal of a Voyage to NSW* (Angus & Robertson 1790/1962) 142.
[59] Karskens, above n 2.

prisoner could be 'reformed'. Suicide also robbed the State of any vengeance it enjoyed through the death penalty. In 1819, George Jackson killed his overseer with an axe because, as he explained to the court, 'he was tired of his life'.[60] Absurdly, the death penalty became a means of Jackson's escape, while the death of a cruel overseer assisted his fellow convicts. Similarly, in the 1830s, Chief Justice Francis Forbes explained to the Molesworth Committee on Transportation that a number of prisoners at Norfolk Island had decapitated each other because they 'deliberately preferred death'. 'There was no chance of escape, and they stated they were weary of life', Forbes added. Indeed, '[they] would rather go to Sydney and be hanged'.[61] In this way, prisoners used criminal process to escape. But in 1838, a year after the Molesworth Report, Daniel Maloney came before the Supreme Court, charged with murdering a fellow convict in a chain-gang. In court, 'the prisoner said he was tired of his life from the usage he got', put to work on an iron-gang while regularly 'receiving fifty lashes on the breech' and his 'feet … all cut with the irons'. He preferred death to the iron gang and Justice Willis granted his wish through the sentencing process.[62] Numerous similar instances occurred at Port Arthur, Brisbane and Port Macquarie.[63]

Soldiers were mostly young men who encountered similar working-class conditions to the prisoners they guarded. As vice and crime were a 'way out' for many prisoners in the 'thief colony', so too were the rowdy ranks of the NSW 'Rum Corps' for many soldiers. Like their prisoners, soldiers suffered from their employment and longed to escape. As one NSW magistrate put it, 'no punishment, in my opinion, that the

[60] *R v George Fendrick Jackson*, CCJ 1819, COD448, 2703 [SZ788] 4, 69, NSW State Records.
[61] Report from the Select Committee of the House of Commons on Transportation, (Chairman Sir William Molesworth), House of Commons, London (1838) 16; and Minutes, 16-17.
[62] *R v Maloney and Reid* [1838] NSWSupC 51, in *Sydney Gazette,* 19 May 1838.
[63] See Lynette Ross, 'The Final Escape: An Analysis of Suicide at the Penal Settlement of Port Arthur' 7 (2005) *Journal of Australian Colonial History* 181.

prisoner receives is equal to half the quantity inflicted in the army'.[64] In 1793, eight soldiers planned to steal a long boat and sail to Java, but were discovered and arrested. Two escaped arrest and went on a rampage before being recaptured. As with the prisoners, escape attempts by soldiers were punished brutally and summarily by floggings of between 300 and 800 lashes.[65] Admiralty Court records between 1797 and 1839 show that there were roughly between five and fifteen formal court martials per year for desertion. The minimum penalty was exile for seven years to a place of secondary transportation and in many cases, such as desertion involving mutiny, that punishment was for life.[66]

Soldiers deliberately mutilated themselves to be relieved of duties.[67] In some cases they were sent to Norfolk Island and punished by employment as 'scavengers'. Sometimes, soldiers attempted escape by committing crime in order that they be stripped of their uniforms. This was highlighted in the case of two soldiers, Sudds and Thompson, and was publicised by Wentworth in *The Australian* to generate public support for his campaign for civil liberties in the colony. This example is discussed in further detail in Chapter 4.

The problem of escape and runaways directly threatened the agrarian economy in NSW because it relied upon indentured convict labour in the countryside. Escape was often a personal affront to the lay magistracy, who also often acted as convict masters in their role as local squatters. But the employing class also comprised small settlers and traders, who regularly employed escaped convict labour because it was cheaper and did not expire under sentence of indenture. Nevertheless, the squatters and magistrates comprised a majority of the unelected Legislative Council and, in

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[64] Alex C. Castles, *An Australian Legal History* (Law Book Co., 1982) 58.
[65] Karskens, above n 2; Collins, above n 20, 303.
[66] Courts Martial, 1789-1839, Mitchell Library, Admiralty. 1/5328-5494, PRO 6925-6927.
[67] C.H. Currey, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of NSW* (Angus and Robertson, 1968) 192.

1825, they enacted the *Runaway Convicts Harbouring Act.*[68] The Act imposed an obligation upon free settlers 'to apply to any Justice of the Peace … to enquire into the fact whether any … labourer or servant is or is not at large contrary to such regulations'.[69] An omission to do so was criminalised by a fine of 'fifty dollars',[70] the equivalent of the average annual wage. In this way, the escape of colonised and working-class peoples split the colonial ruling class and led to the potential criminalisation of a majority of colonial inhabitants, including many free settlers. In responding punitively toward both escapees and minor settlers alike, the State galvanised popular opinion against penal discipline in support of a free and cheaper labour market amongst both masters and servants. Chapters 3 and 4 discuss this transformation of popular opinion in respect to criminal process.

Colonised and working-class peoples spoke the language of liberty and opposed criminal process through escape. Over time, their excarceral activism whittled away at the convict system before it was ultimately disbanded. While escape alone was not responsible for this reform, its ubiquity was an obvious indictment on the efficacy of convictism, evident to both convicts and administrators alike.

Attacks and Revenge

Colonised and working-class peoples typically used violence against colonial authorities and their masters directly in response to their brutalisation. In the face of limited legal redress for legitimate grievances, colonised and working-class peoples attacked law enforcement officials. Sometimes attacks were spontaneous and happened by any means available. At other times, attacks were carefully planned

[68] *1825* (NSW) (No 2a 5 Geo IV No 3) 19 January 1825.
[69] Ibid, s 2.
[70] Ibid, s 1. 'Dollars' was a common synonym for pound sterling.

theatrical events coded with clear symbolic meaning.[71] Spontaneous or not, attacks can be understood as retaliatory 'counter-rituals' that appealed to a form of justice described by Thompson as 'the moral economy' – 'a popular consensus as to what were legitimate and illegitimate practices … grounded upon a consistent traditional view of social norms and obligations, of the proper economic functions of several parties within the community'. As Thompson explains, 'an outrage to these moral assumptions … was the usual occasion for direct action'.[72] But the morality of these attacks extended well beyond the goal of mere subsistence or economic justice. In many instances, attacks and revenge were informed by cultural opposition to the State and capital and such opposition was, in turn, informed by colonised and working-class peoples' shared experiences of exploitation and oppression. While the State was often harsh and swift in repressing such dissent, over time such resistance contributed to a growing popular understanding of the need for law reform and social change even at the highest reaches of the judiciary and colonial government.

Bushranging or social banditry is a well-worn area of social history, particularly in a colonial Australian context.[73] Unlike their British counterparts (highwaymen), who stole exclusively from private individuals, Australian bandits attacked and robbed both colonial authorities and wealthy squatters or landowners. In colonial NSW, freemen and Indigenous men alike turned to bushranging. Bushrangers, however, were predominantly escapees from convict indenture and prison bondage. Infamous colonial bushrangers such as Black John Caesar, Jack Donohoe, ('the wild colonial

[71] Thompson, above n 11.
[72] E.P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (The New Press, 1993) 188.
[73] There are scores of books on the subject. Some of the more notable titles include: Peter Carey, *True History of the Kelly Gang* (University of Queensland Press) (a work of fiction); Robert Sands Frearson, *The History of Bushranging in Australia: From the Earliest Times* (Australian History Promotions, 2004); Evan McHugh, *Bushrangers: Australia's greatest Self-Made Heroes* (Penguin, 2012); Pat Studdy-Clift, *The Lady Bushranger* (Hesperian Press, 1996); Bill Scott, *Australian Bushrangers* (New Holland, 2000); Colin Kerr and Margaret Goyder Kerr, *Australian Bushrangers* (Rigby, 1978); Carlo Cantani, *The Origins of Australian Social Banditry: Bushranging in Van Diemens Land, 1805-1818* (The Author, 1973); George Boxall, *The History of the Australian Bushrangers, Volumes I-II* (Cornstalk, 1924). Note that the bushranger, 'Jack Donahoe' has been memorialised in folklore using a number of different spellings, e.g. 'Donahue', 'Donahugh', 'Donahoe' etc.

boy'), Captain Moonlight, William Geary, the Gang of Six, the McNamara Gang and the John Armstrong Gang were all either escapees or spent their lives running from police, until they were shot dead by police or captured and hanged by the State.[74] The bushranger William Westwood was incarcerated at Cockatoo Island, Port Arthur and Norfolk Island prisons until he participated in the rebellion at Norfolk Island and was eventually hanged. These bushrangers' attacks focused primarily on the colony's rulers and its overseers of criminal process. One Indigenous bushranger, William White, had the power to unite 'nearly every settler' in the district of Wollombi against the corrupt and harsh treatment meted out by police on residents throughout the 1850s and 1860s.[75] European bushrangers in NSW signified their participation in an anti-authoritarian tradition of banditry inherited from Britain and Ireland by blackening their faces or, wearing flamboyant clothes, masks and elaborate disguises.[76] In 1824, bushranger Thomas Donahue seized Constable John Hunt and called him a 'bloody hangman, a bloody Orangeman and a bloody constable'.[77] Such acts may be thought of as guerrilla rights of reply to criminal process. They were common throughout the period and are discussed in more detail in Chapter 3.

Attacks on Authority

> 'A sergeant of the horse police discharged his carabine,
>
> And loudly cries to O'Donoghue to fight or to resign.
>
> To resign unto you, you cowardly dog, it's a thing I ne'er will do,
>
> I'd rather fight with all my might says famed Jack O'Donoghue'.
>
> From 'Bold Jack Donoghue'.[78]

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[74] Chris Cunneen and Mollie Gillen, 'Caesar, John Black (1763–1796)', *Australian Dictionary of Biography* (ANU Press, 2005).
[75] Stephan Williams, *William White alias Yellow Billy, Hunter Valley 1863, 1865-6 / compiled from contemporary newspaper reports and other published sources in the collection of Stephan Williams* (Popinjay Productions, 1994).
[76] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Acts* (Pantheon, 1975) 21.
[77] Karskens, above n 18, 194.
[78] Zimmerman, above n 14.

The relationship between colonised and working-class peoples and the colonial police was characterised by hatred and mistrust. Policing the colony was a lowly-paid enterprise from the outset, resulting in corrupt and brutal methods of coercive law enforcement.[79] Police were predominantly employed to 'keep the peace' and protect property. The targets of their work were almost always those whose greatest offence against property was to have none.[80] 'Public order' and 'status offences' were the most common in the colony.[81] Such offences effectively criminalised non-ownership of property, for example, through offences such as 'vagrancy' and 'public drunkenness'. General offences against property such as theft, forgery and robbery were the next most popular form of criminality.[82] Arrest for property offences was often a vicious and punishing affair. Courtroom defences in response to charges of public order offences (discussed in Chapter 3) told of police brutality, and vividly recounted why police were so frequently attacked by colonised and working-class peoples.

In 1812 Mary Barker 'assaulted' Constable William Redmond. She followed him back to his house in Sydney and stood in the street yelling abuse.[83] In 1816, Constable William Spears had rocks hurled at him as he was attempting to quell a street disturbance.[84] At Parramatta incidents of violence and offensive language against police were rife. Robert Grundy attempted to take the staff of Constable Samuel Blackman in 1829, adding that, 'he would take the staff [baton] from any bloody

[79] Mark Finnane, *Police and Government: Histories of Policing in Australia* (Oxford University Press, 1994); David Dixon (ed.) *A Culture of Corruption: Changing an Australian Police Service* (The Federation Press, 1999).
[80] Thompson, *The Making of the English Working-Class* (Penguin, 1963) 66.
[81] Paula J. Byrne, *Criminal Law and Colonial Subject: NSW, 1810-1830* (Cambridge University Press, 1993) 160-161, 173-176.
[82] Ibid.
[83] Ibid, 163.
[84] Ibid.

constable on the watch'.[85] In 1826 Richard Watts assaulted George James saying, 'you old bugger you ought to have been hung years ago and may you be the first man that is hung and I'll stand Jack Ketch [hangman] for you'.[86]

The emancipist Kable family at the Green Hills was legendary for its hatred of police.[87] Attacks on police by Kable descendants continued in the Windsor area for many years after the frontier period. At Windsor in 1823, four youths were prosecuted after they attacked a number of constables who were escorting a convict to gaol. They freed the convict and 'knocked down the officers', beating them so 'severely' that they required 'surgical relief'. When a larger force of police came to arrest them, the youths formed a 'mob' and 'renewed their attack on the officers of justice as violently as ever'. In court, local witnesses from the Green Hills area refused to concede that the youths had shown any violence toward police.[88]

In Brisbane in 1851 a stone mason, Phillip Galligan, was on his way home from work when he was arrested for the public order offence of being drunk on the street at night. He stabbed his arresting officer with stone chisels, cutting and wounding the policeman and causing grievous bodily harm. Galligan alleged that he was a victim of a conspiracy among the local police. In passing sentence, the judge in this case 'remarked upon the frequent occurrence of acts of violence and outrage here' committed predominantly against 'officers of justice'.[89] At Port Macquarie the members of an iron gang attempted to murder their overseer, Constable Thomas Milbourne. The men said in court that 'they would not be tyrannized over'.

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[85] Ibid
[86] Ibid.
[87] Ibid, 195.
[88] *R v Dargon and others* [1823] NSWKR 8; [1823] NSWSupC 8; *R v W Dargon*; *R v Freeman; R v Baker*, *Sydney Gazette,* 1 May 1823.
[89] See the remarks of Dickinson J in, *R v Galligan* [1851] NSWSupCMB 16, *Moreton Bay Courier,* 24 May 1851.

Milbourne told the court that his prisoners had said of gaolers and police that 'a good many of the buggars ought to be served the same'.[90]

Attacks on authority, however, were not confined to the police. Magistrate and penal administrator John Price was notorious for his brutal and terrifying treatment of prisoners at penal facilities in Hobart, Norfolk Island and Port Phillip.[91] Anglican bishop Robert Wilson visited Norfolk Island in 1852, while it was under the management of Price. Wilson observed that:

> the state of the yard, from the blood running down men's backs, mingled with the water used in washing them when taken down from the triangle – the degrading scene of a large number of men … waiting their turn to be tortured, and the more humiliating spectacle presented by those who had undergone the scourging … were painful to listen to.[92]

Five years later Price was inspecting a new penal station at Williamstown when he was recognised by an iron-gang of prisoners whom he had terrorised on 'The Island'. One prisoner threw a large rock which knocked Price to the ground. Seven others stomped on him before hacking him to death with a spade.[93]

In 1833, harsh treatment of assigned workers by largescale landowners and magistrates, such as Major James Mudie, led to a convict uprising in Western NSW. Six men (Anthony Hitchcock, John Poole, James Riley, David Jones, John Perry and James Ryan) claimed to have been 'driven to desperation' by the 'bad treatment, flogging and bad provisions' at Mudie's estate, Castle Forbes.[94] They stole guns from

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[90] Ibid.
[91] John V. Barry, 'Price, John Giles (1808-1857)', *Australian Dictionary of Biography*, (Melbourne University Press, Vol. 2, 1967). See also, Hughes, above n 22, 543-551.
[92] Cited in Robert Macklin, *Dark Paradise: Norfolk Island – isolation savagery, mystery and murder,* (Hachette, 2013).
[93] *Bendigo Advertiser,* 31 March 1857.
[94] *R v Hitchcock and others* [1833] NSWSupC 114, *Sydney Herald,* 12 December 1833.

their master and robbed the homestead at gunpoint. They were recaptured and, at trial, spoke of their motivations. They told the court how most of their number were denied their legal rights, being 'due for their tickets [of leave] … but had not received them yet'.[95] One of their overseers recounted how during the incident he had been fired upon, his attacker yelling that 'I should never flog another man; they said "you will never take another man to Court;" they have all been taken to Court and flogged'. A convict witness told how the rebels yelled at another overseer, 'You villain, you tyrant, I'll make you remember flogging, I will, you tyrant', before firing at him. Another told the court that, 'there is a great deal of flogging going on'.[96] Five of the rebels were hanged within days of being convicted by a military jury, while another was sent to Norfolk Island.[97]

The actions of convict rebels like these precipitated a humanitarian activist campaign by middle class radicals against convictism and the cruel and degrading treatment of prisoners (discussed further in Chapter 4). This struggle, initiated from the bottom up, ultimately saw Governor Bourke order a government enquiry into convict complaints, overseen by Attorney-General John Plunkett. The enquiry resulted in the appointment of a new stipendiary magistrate in the Castle Forbes district who effectively stripped squatter-magistrates of their power and restricted sentences of flogging upon convict workers to the statutory limit imposed by Governor Bourke's '50 Lashes Act'.[98]

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[95] Ibid, *Sydney Herald,* 16 December 1833, p.3.
[96] Ibid.
[97] Excluding a short experiment with civilian juries in the mid-1820s, prior to 1832, juries consisted of seven military jurors. In 1832, juries could be comprised of seven military jurors and five civilians (including ex-convicts). In 1833, free persons were entitled to be tried by an entirely civilian jury. Military juries were not abolished until 1839: see G.D. Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (The Federation Press, 2002) xvi – xvii.
[98] Bourke to Stanley 15 April 1831, *HRA* Ser I, Vol XVII 409.

Revenge Against Squatters

Agrarian capitalism meant that the dominant social class throughout the period comprised mainly pastoralists or squatters, many of whom were magistrates.[99] Squatters who settled and occupied the land were almost always masters in the workplace. As landowners and masters, they administered coercive law against colonised and working-class peoples through the system of indentured labour, master and servant law (which was predominantly criminal in its effect) and the exercise of 'settler sovereignty'.[100] This law meant that for many colonised and working-class peoples the only practical means to obtain justice was through revenge, usually by attacks, acts of sabotage, or theft from squatter-masters.

Attacks on squatters were almost always a form of revenge exacted by colonised and working-class peoples in response to their treatment as workers or Indigenous inhabitants. For instance, one master, John McIntyre, was murdered and robbed by four men. Two of them were his own assigned servants. Shortly before pulling the trigger, one of the servants, Patrick Daley, reminded his companions that they all 'knew what sort of a tyrant Mr M'Intyre was, and added, that he was always getting him [Daley] flogged'. The men shot McIntyre in the neck and watched him die for 'a quarter of an hour' before burning the body. Another servant added that, 'if we did not shoot Mr McIntyre, he would certainly get us hanged'.[101] All four men were hanged. Two servants, Sarah McGregor and Mary Maloney, beat their master to death on the kitchen floor. He had threatened to separate these women workers and, in the words of their trial judge, had subjected them to 'ill usage'. Four male convicts were in the master's kitchen at the time. Each refused to intervene. The women also selected and stole clothing from their master's wife. They were convicted and put to

[99] Connell and Irving above n 47, 34.
[100] Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Harvard University Press, 2010).
[101] *The Sydney Monitor,* 19 December 1832, 2.

death.[102] After years of notorious maltreatment the convicts of reviled convict master, Major Mudie besieged and ransacked his homestead.[103] In another case, convict William Larrissey had been informed that his tea and sugar ration would be stopped. Larrissey grabbed his master by the collar and said, 'damn my bloody limbs and bones, if I don't have the worth of that tea and sugar out of you'. He spent the next 12 months in irons.[104]

Between 1810 and 1861 it was hardly surprising that theft was the primary criminal offence committed in the 'thief colony' of NSW. As Linebaugh has shown in respect to civil society in eighteenth century London, theft happened most commonly in the workplace.[105] Australian social historians have reached similar conclusions about early colonial NSW.[106] Workers who took things from their masters often did so to compensate for poor treatment and exploitative practices such as unpaid wages and overtime. Items taken or made on the boss's time were known by all manner of names: 'perquisites', 'perks', 'homers', and were vital to the economic survival of low-paid waged or indentured labourers and their families.[107] Theft constituted more than 50 per cent of all crime in the colony.[108] Unless they were household servants, workers 'stole not from the house of the employer, but from the particular work in which they were involved, whether it was going on a message, carting, or from the workshop'.[109]

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[102] W.G. McDonald, 'Captain Waldron Deceased' (1972) *Illawarra Historical Society* 31, 14.
[103] B.T. Dowd and Averil Fink, 'Harlequin of the Hunter: "Major" James Mudie of Castle Forbes (Part II)' (1969) 55(1) *Journal of the Royal Australian Historical Society* 85, 85-93; Sandra J Blair, 'The Revolt at Castle Forbes: A Catalyst to Emancipist Emigrant Confrontation' (1978) 64(1) *Journal of the Royal Australian Historical Society* 19.
[104] Atkinson, above n 8, 39-40.
[105] Linebaugh, above n 3, xxvii.
[106] Byrne, above n 81, 32, 37 and 85; Adrian Merritt, 'Methodological and Theoretical Implications of the Study of Law and Crime' (1979) 37 *Labour History* 108, 116-117; and Michael Sturma, *Vice in a Vicious Society* (Queensland University Press, 1983) 104, 106 and 109.
[107] Jesse Adams Stein, 'Making 'foreign orders': Australian print-workers and clandestine creative production in the 1980s' (2015) 28(3) *Journal of Design History* 275.
[108] 'Crime' in this context refers to convictions recorded. For the figures, see: Merritt, above n 106, Byrne, above n 81 and Sturma, above n 106.
[109] Byrne, above n 81, 37.

Over 50 per cent of that crime involved the theft of clothes – a consumable good and one of the few in the colony.[110] Sometimes convicts simply lost or destroyed their master's property as revenge. They slaughtered or 'lost' livestock or, as one master put it, were 'stubborn and inattentive to their duty and destroyed the tools entrusted to work with'.[111] Irish convicts John Jeweson, Joseph Saunders and Moses Williams were caught using Aboriginal spears to hunt government cattle on the cowpastures.[112] The cowpastures were on Muringong land and, not surprisingly, were subject to regular raids by local Indigenous people.[113] These episodes serve as further examples of shared attitudes to subsistence rights and a resort to the 'moral economy' by colonised and working-class peoples in the face of coercive law.

Arson was the great counter-spectacle employed by colonised and working-class peoples against their squatter-masters from the earliest days of the colony. Whether it was used as sabotage by setting fire to crops, fences, barns, hayricks or farm houses or simply as revenge, arson was a terrifying form of payback used by colonised Indigenous and non-Indigenous peoples alike. British historians Eric Hobsbawm and George Rudé documented a similar history of 'struggle against poverty and degradation' by proletarianised, pauperised rural poor in agrarian England between 1820 and 1850.[114] They attributed sporadic episodes of 'rickburning' (arson or incendiarism) by English country labourers to the barriers labourers faced in 'constituting themselves as a class and to fight collectively as such'.[115] As the London County Fire Office found, 'in almost every instance, wherein conviction has taken place, the culprit has been a servant of the sufferer or person living near to him,

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[110] Jane Elliot, 'What Price Respectability? Another Look at Theft in NSW, 1788-1815' (1995) 1 *Australian Journal of Legal History* 167, 168.
[111] See the evidence of Daniel Deering Matthews in *Re: George and William Green,* Sydney Police Magistrate's Bench, 18 October 1820, *Series 3402* NSW State Records.
[112] Karskens above n 18, 477.
[113] Ibid, 286, 299.
[114] Eric Hobsbawm and George Rudé, *Captain Swing* (Pantheon Books, 1968) 15.
[115] Ibid, 52.

acting under some motive of revenge'.[116] And as Hobsbawm and Rudé concluded 'there is evidence that in 1830 the labourers and their sympathisers did not normally want a disruption of the old society, but a restoration of their rights within it, modest, subaltern, but *rights'*.[117]

More than 500 such convicted rebels were transported to NSW in that period.[118] Nevertheless, the earliest recorded case of arson used by colonised and working-class peoples against squatters in colonial Australia pre-dated their arrival. It involved the Aboriginal rebel leader Musquito at Portland Head (in the Hawkesbury region of Northern Sydney) in 1805.[119] No sooner had squatter Abraham Young settled on Dhurrug land earlier that year, than he was met with fierce resistance by local Dhurrug people who enacted economic sabotage against his agricultural ventures. Young used his convicts to fence-in Dhurrug land but the Dhurrug people asserted their rights to country by jumping the fences and burning Young's 'Barn and Stacks' to the ground.[120] Clearly, the Dhurrug did not care for Young's assertion of settler sovereignty and the coercive law that it imposed across the landscape. As Kristyn Harman, historian of Indigenous imprisonment points out, Dhurrug strategy here represented a shift away from traditional methods of warfare employed by Aboriginal people using spears, stones and boomerangs, towards the use of Europeanised methods of warfare like fire.[121] Australian pre-historian Bill Gammage has discovered that Indigenous people across the continent had been using fire to manage the land

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[116] Edward.Gibbon Wakefield, *Swing Unmasked, or, The Causes of Rural Incendiarism* (E. Wilson, 1831) 8-13; *The Times,* 24 November 1830.
[117] (emphasis theirs) Hobsbawm and Rudé, above n 114, 61.
[118] Ibid, 242.
[119] The case of *R v Pawson* [1795] NSWKR 2; [1795] NSWSupC 2, CCJ, Minutes of Proceedings, 1796 to 1797 Apr 1795 - Dec 1797, State Records N.S.W., 5/1147B, is the earliest recorded instance of arson in the colony. Arson was used as revenge by the wife of one settler against the wife of a neighbouring settler.
[120] Kristyn Harman, *Aboriginal Convicts: Australia, Khoisan and Maori Exiles* (UNSW Press, 2012) 12.
[121] Ibid.

for many thousands of years.[122] In this sense, when Europeans blighted the Aboriginal landscape by occupying it, fire must have seemed to Indigenous people an obvious tool to protest the colonisation of their country.

Arson, and more specifically, rickburning, did not catch on as a widespread form of political revenge and sabotage in England until the 1830s, when it became known as 'Captain Swing' and was performed *en masse* by Chartists and rural labourers. Some British historians provide isolated examples of the practice in East Anglia between 1815 and 1817 as agricultural workers struck back at employers with respect to working conditions and pay.[123] In NSW in 1825 Dennis Kieffe was charged with destroying the ricks of Masters Berry and Wollstonecraft at Shoalhaven among a series of 'depredations' by local bushrangers.[124] The following year, four men at Stonequarry complained to the local magistrate that they were underfed and mistreated by their master, William Elyard. The matter was referred to the Attorney-General but no action was taken. By April, Elyard's barn was burnt to the ground. The men were charged and tried on strong evidence before the same local magistrate and their case was dismissed. Atkinson suggests that this case reflects widespread recognition of the 'moral economy' at work in the field and, on occasion, by Stipendiary Magistrates (as in this case) in the courtroom.[125]

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[122] Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Allen & Unwin, 2011) 13-16. Gammage has warned, however, that the use of fire by Aboriginal people to maintain their country was sometimes misinterpreted by settlers as a form of attack: Bill Gammage, 'How Aborigines Made Australia', Public Lecture, UTS, 17 June 2015.

[123] J.L. and Barbara Hammond, *The Village Labourer, 1760-1832: A Study in the Government of England Before the Reform Bill,* (Longmans, Green & Co, 1911).

[124] Byrne, above n 81, 64

[125] Atkinson cites another case of rickburning where an accused was convicted but not hanged for this capital offence due to the sympathies aroused through the operation of the moral economy in the courtroom, above n 8, 42.

In 1829 Patrick Byrne was indicted for attempting to burn a rick of wheat belonging to his master at Minto.[126] A similar case was recorded in 1831 when William Inman and John Quilter set fire to a stack of their master's wheat in Ravensworth. The indictment added that, at the time of the offence, neither co-accused 'had the fear of God in his eyes'.[127] That is, they felt justified in their actions. Servant John Crisp was punished by the local magistrate on evidence of his misconduct given by his master. After being flogged, Crisp 'threatened to do [them] an injury in recompense for it' and burnt down both their barns. He was sentenced to death.[128] At the same time as the Swing riots took hold in England in 1832, the masters of agrarian NSW found themselves in the grip of an outbreak of arson and rickburning. Three more convicts were charged.[129] The defendants in each case were sentenced to death, with one man, Thomas Kent, challenging his condemning judge and any police collaborators by saying that 'if he was to suffer, it might be near the huts of the men who bore testimony against him'.[130]

In 1833, when thirteen-year-old Samuel Rooney was mistreated by his rural master, he burnt the farm's wheat supply in revenge. Justice Burton sentenced him to death but recommended that mercy, combined with 'frequent whipping', would be a more age-appropriate punishment.[131] In 1837, a long-running feud between servants and a violent master at Nyrang resulted in the master's £300 wheat-rick being burnt in the night. The accused in this case, Thomas Bennett, was found 'not guilty' after another servant-witness revealed to the court that his master had bribed him to give evidence against the accused.[132] George Berwick was a master at Maitland who placed his men

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126 *R v Byrne* [1829] NSWSupC 28, *The Australian,* 22 May 1829.
127 *R v Inman and Quilter, Sydney Gazette,* 26 November 1831; *The Australian,* 2 December 1831; *Sydney Herald*, 28 November 1831.
128 *R v Crisp, The Australian,* 24 June 1831.
129 *R v Kent*, *Sydney Herald*, 20 February 1832; *R v Fitzsimmons*, *Sydney Gazette*, 15 May 1832; and *R v Williams*, *Sydney Gazette,* 19 May 1832.
130 *Sydney Herald,* Monday 20 February 1832.
131 *R v Rooney* [1834] NSWSupC 14, *Sydney Gazette,* 27 February 1834.
132 *R v Bennett* [1837] NSWSupC 23, *Sydney Herald,* 11 May 1837.

on government rations and frequently threatened to prosecute them for 'neglect of work'. On a hot February day in 1839, his barn was burnt to the ground by his servant, Tobias Hagan.[133] In 1842, John O'Neil, a chain gang convict worker, took revenge on his master, Mr Cross, by having 'a bonfire'. O'Neil burnt down his master's barn and its contents of maize worth £100. The 'prisoner stated at the same time, that he had done it as revenge on Mr. Cross, whom he would have shot, if he could have found a gun'.[134] In the same year, John Moore, an Honorary Magistrate and convict master at Gosford, had his house burnt to the ground by a group of unidentified convict servants.[135]

Captain Swing continued to rage throughout the colony in the 1840s. In 1845 Mary Lawrence, a 'laundress' in the service of Win Byrnes at Parramatta, 'flung' a basket of clean clothes in the yard, dirtying them before stacking a pile of logs in the laundry and burning it to the ground. As the editor of the *Parramatta Chronicle* put it, Miss Lawrence seemed 'desirous of being chronicled as the Parramatta "Swing"', telling the court that, 'she was the best servant in the colony and Mr Byrnes was the worst possible master'. She was sentenced to two months' imprisonment in the third class of the Parramatta female factory.[136] In the same year, Timothy Horrigan, an old Canadian servant from Canada Bay (a participant in the Canadian Patriot Rebellion, exiled to NSW), was charged with setting fire to a hayrick and destroying property to the value of £1000 at his master's farm in Five Dock.[137] He had been discharged from the service of his master, a Mr Rochester, the previous night after complaining to his master that he had not been paid for months. Horrigan told the court that

[133] *R v Hagan* [1839] NSWSupC 5, *Sydney Herald,* 13 February 1839.
[134] *R v O'Neil* [1842] NSWSupC 39, *Sydney Herald,* 11 January 1842.
[135] *R v Stanaway* [1842] NSWSupC 48 *R v Chown, Sydney Gazette,* 13 October 1842.
[136] *The Parramatta Chronicle,* (hereafter, '*TPC*') 31 May 1845.
[137] Canadian rebel convicts were indentured at a series of estates at Canada Bay. See Tony Moore, *Death or Liberty: Rebel Exiles in Australia 1788 – 1868* (Allen & Unwin, 2010) 1-2, Chapter 4.

Rochester 'had made him drunk when settling with him' and 'charged 1 s for every pint of ale he supplied him'.[138]

These acts of sabotage did not go unnoticed. In April 1830, the *Sydney Monitor* declared that 'the most important feature of this paper' was its reportage on the Swing Riots in England in 1830, in which agricultural labourers resorted to machine-breaking and incendiarism in an attempt to salvage their collective rights to work and a fair standard of living. As the Editor of the *Monitor,* E.S. Hall, wrote,

> the people seem driven by their distresses to these outrages, to make their wants better known, and to gratify their increasing anger towards the rich, whom they seem to consider now to be their essential oppressors.[139]

These passages appeared in the same column as news of the fall of the Tory Government in Britain to Lord Grey's Whigs. This reflects the conclusion of Hobsbawm and Rudé that 'there was a connection between Swing and Reform' and that while sporadic and spontaneous acts of agrarian violence in the 1830s lacked centralised organisation, they became 'one factor among several' that 'must have been in the minds of those who weighed the dangers of Reform against those of social upheaval'.[140]

Strikes, Riots and Combination

Strikes, riots and 'combination' (the organisation of labour) were commonplace throughout the history of the early colony and were another method of direct action used by colonised and working-class peoples to resist and reform coercive law. They operated to liberate the subjects of coercive law from harsh working conditions and the subjugation that commonly accompanied them. In the bush, Aboriginal people

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[138] *TPC,* 29 November 1845.
[139] *Sydney Monitor,* 6 April 1831, 3.
[140] Hobsbawm and Rudé, above n 114, 296-297.

resisted colonisation by organising multiple tribes into resistance forces, while teams of agrarian labourers frequently erupted in spontaneous violence against their masters. At sea, sailors mutinied and conspired against their captains to assert their rights on the high seas. Both in Europe and in the colony of NSW, this resistance culminated in the revolutionary decade of the 1840s, with no less than 11 large-scale riots in Sydney between 1840 and 1851.[141]

Combination (and strikes, which frequently resulted when workers combined) was a serious offence in both colony and metropole. It had been criminalised by various conspiracy laws since the seventeenth century, most notably the *Combination Act* of 1799, which rendered the crime of combination punishable by imprisonment and seven years' transportation.[142] In 1799, imprisonment was the most common penalty for combination. The law changed, however, in England in 1824 to permit combination under highly regulated circumstances while retaining criminal punishment for strikes. Strikes against the 1799 Act were the catalyst for its repeal and the implementation of the 1824 Act.[143] These laws were frequently applied by colonial legal authorities in NSW.[144] Indeed, 'combined convict action' was a particular fear of the colonial ruling class, as Commissioner Bigge disclosed at the hearings of his Inquiry into the State of the Colony of NSW in 1819.[145]

Before 1840 and prior to the organisation of labour, resistance to work discipline was small-scale and often spontaneous. For instance at Stonequarry in the 1820s, five

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141 Terry Irving, *The Southern Tree of Liberty* (The Federation Press, 2006) 166.
142 (UK) (39 and 40 Geo III c 106). The *Combination Act 1799*, specified a maximum penalty of three months imprisonment. Transportation was a punishment reserved for cases of combination dealt with on indictment, generally regarded as a crime of 'conspiracy': see Peter Gillies, *The Law of Criminal Conspiracy* (The Federation Press, 2nd Ed., 1981) 79-80.
143 *Combinations of Workmen Act 1824* (UK) (5 Geo. 4 c. 95). See also *Combinations of Workmen Act 1825* (UK) (6 Geo 4 c 129).
144 Byrne, above n 81, 33.
145 Evidence of Hutchinson, Bigge Inquiry, 10 November 1819, *Bonwick Transcripts* 19, p. 131, cited in Byrne above n 81, 33.

men surrounded their overseer, abused him and 'positively refused to work'.[146] Strikes such as this were typical during this period but never succeeded in uniting colonised and working-class peoples across the colony. In a similar incident in 1828, soldiers refused to eat their bread ration where their bread had been baked using maize rather than flour. They returned it to the baker, a Mr Girard, before rioting and shooting every pane of glass in his house. According to Erin Ihde, 'the participants believed they were defending traditional rights and customs' against illegitimate practices.[147] As Thompson explains, similar conduct in England was consistent with 'the moral economy of the poor'.[148] The legitimacy of the soldiers' appeal to customary law was lent tacit support from the highest office in the colony, with Governor Darling noting that baker Girard had 'practiced the grossest imposition' and that the attack by the soldiers was 'in revenge' for the 'ill baked and unwholesome Loaves'.[149] A General Order was quickly passed, henceforth granting the soldiers maize-free bread.[150]

Convict escapee and friend of Aboriginal people, Jeremiah Buckley, was 'one of the leaders of a number of "combining men"'. He was prosecuted for 'encouraging them to strike their work'.[151] It was through such practices that workers, both free and indentured, frequently arrived in court to be prosecuted. However, such a forum permitted them to articulate their grievances, as the following example shows. In 1832, the Supreme Court heard a case in which convicts and free sailors combined to strike over unpaid wages and then attempted a mutiny aboard a convict transport. The incident began when a convict, Anderson, 'refused to obey' orders to 'hang out

146 Ibid, (Byrne).
147 Erin Ihde, "A Smart Volley of Dough-Boy Shot': A military food riot in colonial Sydney', (2001) 3(2) *Journal of Australian Colonial History* 23.
148 E.P. Thompson, 'The Moral Economy of the English Crown in the Eighteenth Century' (1971) Vol. 50 *Past & Present,* 76, 78-9.
149 Darling to Murray, 24 July 1830, *HRA, Ser.* I, Vol. IV, 604.
150 General Order of 23 July 1831.
151 Trial of Jeremiah Buckley and Thomas Burke, Sydney Police Magistrates Bench, 14 October 1820; Trial of Benjamin Helston, Sydney Police Magistrates Bench, 6 January 21, Dixson Library DL 154 (awaiting confirmation of extended citation from Dixson Library).

some clothes' and to remain at the poop deck, presumably to await punishment by the Captain. At this, 'the whole of the sailors interfered and attempted a rescue, stating that unless Anderson's punishment was remitted, they would not touch another rope in the ship'.[152] As the prosecutor put it, the sailors 'were in an alarming state of disturbance' and, as Anderson and his supporters amongst the sailors were placed in irons, 'the whole of the sailors [were] refusing to supply his place'.[153] The Captain convinced nine sailors to return to work: 'however, the prisoner Griffiths, changed his mind in the course of the day, and said he wished to be again put in irons, for *he would do no more duty unless the others were liberated*'.[154] Later that morning, the Captain attempted to induce the soldiers guarding the prisoners - 'the guard' - to put down the uprising. At this 'the whole of the guard ran upon deck' while 'one of them exclaimed … "Hurra for the sailors!"' and 'he did not care for being flogged'.[155] Such contempt for corporal punishment was crucial to the reform of penal discipline.

In that same year, under pressure from numerous penal reform campaigners and colonists, Governor Bourke restricted the number of lashes that could be given as punishment, in what became known as the '50 Lashes Act' (discussed further in Chapter 5).[156] Until then, prisoners were charged with 'revolt' which was a 'capital felony' under the *Piracy Act* of 1698.[157] Justice Dowling examined a range of English caselaw and found that a 'revolt … as between the master and crew of a vessel' had the same meaning 'as between the Sovereign and subject'.[158] That is, it was equivalent to treason. The jury were required to decide whether 'the prisoners at the bar combined together for the purpose of subverting the lawful authority of the master' and whether 'the orders given by the captain' were 'just and reasonable'. All co-

[152] *R v Anderson, Davis and others* [1832] NSWSupC 8, *SG* 17 April 32.
[153] Ibid.
[154] (emphasis added) Ibid.
[155] Ibid.
[156] *The Magistrates Act 1832 (NSW)* (3 Wm IV No 3).
[157] (UK) (11 Wm III c 7).
[158] *R v Anderson, Davis and others* [1832] NSWSupC 8, *SG* 5 June 1832.

accused were found guilty of revolt, for which the penalty was death. Dowling concluded his sentencing remarks by recounting the premise of the *Combination Acts*. He simply 'could not suffer it', that 'a mere forfeiture of wages would be the sole result of a combination to controul [sic] the conduct of a master of a vessel in the prosecution of his voyage'.[159]

Another mutiny by combination had occurred one month earlier aboard the whaling vessel the *Harmony*.[160] A decade later, in *R v Blandford*,[161] mutinous seamen were once again charged with combining in a 'revolt' through 'insubordination on the high seas'. The men of the immigrant ship the *Brothers* complained 'of a deficiency of hands' and said 'that the Captain had no right to place the men in stocks, which [they continued] had been constructed on board for the purpose of punishing those who were refractory'. They asserted 'that they had been maltreated by being ironed for three days in such a way that they could not answer the calls of nature'.[162] Dowling heard the case, this time as Chief Justice. He agreed that the mutiny constituted 'piracy' and the men were convicted. In mitigation of their sentence, the crew told the court of their brutal treatment by their captain - a use of criminal process through which the crew saved themselves from hanging. Death was 'recorded' and their sentences commuted to transportation to a penal station. Again, Dowling used the case to reiterate the importance of the *Combination Acts,* emphasising the significance of a conviction to secure 'the commercial interests of the colony'.[163]

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159 Ibid.
160 *R v Firth and others* [1832] NSWSupC 96, *SG,* 3 March 1832.
161 [1841] NSWSupC, *Sydney Herald,* 14 April 1841.
162 Ibid.
163 Ibid. In fact, the men were prosecuted, convicted and sentenced under the wrong *Piracy Act* (of 1700, 11 and 12 Wm III c 7). The Act of 1700 was amended in 1837 (7 Wm 4 and 1 Vic c 88) and the death penalty for piracy, abolished. Had the men been legally represented and the error detected, it is likely they would have been acquitted due to the rules of strict pleading that existed at the time. Had they been convicted under the correct *Piracy Act* (of 1837), however, it is unlikely that their sentence would have been substantially different to that imposed in this case.

Neglect and refusal to work were further means of resistance to maltreatment at work. Those who adopted them talked about 'going slow', 'Tom-Cox's traverse', 'two turns around the longboat', 'having a pull at the scuttlebutt', being 'up one-hatchway and down the other' or 'keeping one hand for yourself and one hand for the ship'.[164] In 1820 an overseer, Dennis Bryant, appeared before the Sydney Police Magistrate and stated that 'yesterday afternoon about three I detected the two prisoners Edward Marcelle and John Merchant absent from their gang and government work without leave, they had a fire in the bush and were laying down either side of it'.[165] At Stonequarry, Elizabeth Turpin told the court that 'she had not been accustomed to washing or [other] work, and as the place did not suit her, she would not take it in hand'.[166] William Teasdale complained of his master that 'he had not been a good master since he came to the country' and that as a convict he 'would not be a better man'.[167] Edward Sheehan refused to work simply because he 'could not stand his master'.[168]

Summary court records list an almost infinite number of offences relating to refusals to work: 'refusal to boil a kettle when asked', 'refusing to work before 6 a.m.' and 'absence from work' are some of the notable ones.[169] Yet again, servants resorted to all manner of defences, from the ingenious to the indignant. One servant said he

164 Linebaugh, above n 3, 134.
165 Trials of Edward Marcelle and John Merchant, Sydney Police Magistrates Bench, 3 November 1820, DL 154.
166 1 August 1831, Bench Books [(Stonequarry) Yass Court of Petty Sessions], SRNSW, Series 4/7572, Reel 671.
167 31 August 1836, Bench Books [Yass Court of Petty Sessions], SRNSW, Series 3559, 4/5709, Reel 682.
168 Edward Sheehan (complaint) 14 March 1826, Bench Books [Bathurst Court of Petty Sessions], SRNSW, Series 2772, 2/8323, Reel 663.
169 Trials of Margaret McRedman, 2 September 1828; Benjamin Helston and others, 6 January 1821; James Murgean, 12 February 1816, DL 154 Proceedings [Police Magistrates' Bench, Sydney].

thought 'this was a holiday given to him',[170] another that the overseer was 'a bloody niagar [nigger] driver … I've never seen such a niagar driver in my life',[171] he said.

Many riots involved the excarceration of prisoners by their colleagues and friends. In 1840 the Sydney Chief Constable of Police responded to a disturbance at a sailors' tavern - 'Mrs Brown's Eating House' in Castlereagh Street - by ordering a 'large body of Police' to the enter and clear the premises. They arrested a number of sailors and naval officers and 'caused … a desperate resistance'. *The Australasian Chronicle* reported that 'a mob, composed mostly of the brother officers of the prisoners, assembled without and attempted their rescue'. After an hour of fighting in the street between police and sailors, the sailors stopped fighting and demanded that the police release their comrades. One seaman had been stabbed through the hand. However, in a show of class solidarity with the police constables, the sailors collectively distributed the sum of £5 amongst the police as recompense for their efforts during the riot. Meanwhile, the sailors served the Chief Constable with a writ for prosecution in the Magistrates' Court.[172]

In October 1841, 200 sailors rioted in the streets of Sydney for two days after they had been treated in an 'officious and violent manner' by police. The Sydney *Free Press* considered the sailors' reaction as 'understandable' in retaliation to such 'coercion'.[173] The sailors attacked the police watchhouse on Harrington Street in the Rocks, tearing up the cobblestoned streets and hurling large stones at the building until the barricaded windows and doors were smashed open. Once inside, they released five comrades and demolished the building. Down the street at the Argyle Cut, the mob

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170 Trial of Richard Wethers, 19 March 1821, Proceedings [Police Magistrates' Bench, Sydney] (awaiting full record)…

171 Trial of Charles Wright, 4 March 1816, SRNSW, Proceedings [Police Magistrates' Bench, Sydney], Series 3402, 9/2643), Reel 2667.

172 *The Australasian Chronicle,* 3 January 1840, 1.

173 *The Free Press,* 9 October 1841; the *Omnibus and Sydney Spectator,* 9 October 1841. See also, sympathetic reportage in *The Australasian Chronicle* (ibid).

grew in number to 5000 and raged into the heart of the town to the Supreme Court complex and St James' Police Station. Police fled as the mob stormed the building, smashing what they could and releasing all prisoners. The buildings' fittings were taken as souvenirs and brassy additions to the slum houses of Sydney. The next stop for the rioters was Sydney Police Headquarters on the corner of George and Druitt Streets. By the time the mob reached Police Headquarters, they had dwindled in number to around 600. The building was the last bastion of police control in the city and was heavily fortified by police armed with cutlasses and rifles. Meanwhile, a military force had amassed around the corner from the mob, trapping the rioters in a pincer movement from the east.[174] When protesters began to rip up cobblestones and bricks and throw them at the line of police, the constables responded by firing blanks. Apparently, they were met with laughter by the rioters, who continued to throw stones. Police then fired shots into the air, causing the mob to panic and retreat. They were met by a bayonet charge of the waiting military while the police flooded the street, attacking the rioters with bayonets, clubs and pikes. It remains unknown how many rioters died that day, or as a result of their injuries in the aftermath; but accounts of the reaction by the State paint a picture of indiscriminate retaliation. 'A respectably dressed person was run through the body with a bayonet by one of the constables and killed', reported the *Omnibus.*[175] Others were shot.[176] More were knocked to the ground by police pikes and one man was 'struck several blows on the head and left insensible'.[177]

The outcome of the uprising was reform to police process. The Superintendent of Police published new police guidelines stating that,

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[174] *The Free Press,* 7 October 1844, 9 October 1841, 21 October 1841, *Omnibus and Sydney Spectator,* 9 October 1841.
[175] *Omnibus and Sydney Spectator,* 9 October 1841.
[176] Irving, above n 141, 152-153.
[177] *Omnibus,* 9 October 1841.

> A constable is not, in case of affray or tumult, to rush indiscriminately upon the people, striking them with his staff, but he is to single out the ringleader or ringleaders, and either secure the offenders then or to keep them in his sight (if possible) until he can procure aid to capture them.[178]

During the 1840s, popular unrest translated into riot far more frequently than ever before. Riots gripped the city on polling day for the Legislative Council in 1843 when proletarian mobs raged through the streets of Sydney. Their anger was fuelled by property qualifications on voting rights.[179] The Establishment press blamed the Irish Chartist candidate, Captain Maurice O'Connell, who, by agitating for universal suffrage, had 'raised a Hydra which rears a head in every quarter of the city'.[180] Riots by coal-miners in Newcastle drew the military onto the streets.[181] The unrest continued in Windsor, Port Phillip and Campbelltown, with a number of protesters killed and injured, and property destroyed. Mass rallies at Government House and the Race Course in Sydney provoked skirmishes between protestors and the police and military.[182] Elections the following year saw mobs rally around their preferred candidate at polling booths across the city, with fights erupting against supporters of opposing candidates.

In 1843, convicts at Hyde Park Barracks went on strike. They refused to 'shift their sleeping place from a clean room … to one infested with vermin'. The convicts jeered in the face of a military dragoon that had been sent to disperse them and some were sentenced to secondary transportation on Cockatoo Island.[183] New Year's Day in 1844 saw a large mob in Hyde Park join forces with convicts in the nearby

[178] *The Free Press,* 21 October 1841.
[179] Under the *NSW Constitution Act 1842* (UK) (5 and 6 Vic c 76), voting rights were restricted to men who owned freehold property to the value of at least £200 or who leased property at a price of at least £20 per annum.
[180] See, *The Colonial Observer,* cited in Irving, above n 141, 156.
[181] *The Sydney Morning Herald* (*SMH*)*,* 27 June 1843.
[182] Irving, above n 141, 156.
[183] *SMH,* 25 October 1843, 3.

Barracks to protest and riot in Queen's Square. When the Governor arrived with the military to keep order, he was met by a series of rebukes and demands. One former convict woman implored him to cut the prison workload by 'end[ing] the taking-in of washing by the convicts at the Female Factory'. Meanwhile, the crowd surrounded the Governor and chanted 'what should we go to our homes for; we've got nothing to eat'. At this, another agitator urged the crowd 'to go further, and do as the Canadians did', excarcerating their fellow radicals and burning British prisons.[184] They were cleared away by a charge from the surrounding military. Numerous further riots and protest, both spontaneous and organised, rocked Sydney that decade; and they occurred in prominent places throughout the town. The most common locations, however, were the centres of legal power such as law courts and Government House.

The riots of the 1840s culminated in a spectacular riot involving a mob of over 400 sailors, soldiers and youths. The mob split into two, rioting at the Rocks and the Barracks respectively and rampaging through the central business district. Here they destroyed the St James watch-house once again while burning and looting, until they met in the centre of the town. On the boot-heels of all that had happened in Europe in 1848, some in the crowd were heard to yell 'long live the [French] Republic!'.[185]

Aboriginal workers also staged strikes. Woiworung workers at the Plenty Ranges were paid half the rates of their European co-workers. In the 1850s they went on strike for equal pay. They made similar demands and struck again some years later. Aboriginal workers across the country realised the potential for social change through economic sabotage. Many Aboriginal workers achieved this by asserting Aboriginal custom against the rigid time discipline of the agrarian workplace. As

[184] Irving, above n 141, 164-165.
[185] *The Peoples' Advocate,* 21 July 1849 and 22 January 1849.

labour historians Robert Castle and Jim Hagan explain, Aboriginal workers used 'walkabout' as a weapon against settlers, removing their labour at times most inconvenient to the employer.[186] Their brazen combination and offences against master and servant law went undisciplined and unpunished until their masters conceded to their demands.

The period was riven by turbulent and violent protest and resistance that fomented amongst workers. Sometimes, resistance arose directly from working conditions. At other times, it emerged from solidarity between workers whose friendships and collective experiences of work manifested in a rebellious, anti-authoritarian culture. Whatever the catalyst, the fury of workers was directed at those representative of the penal state that coerced them to work – masters, gaolers and police.

Aboriginal Attack

Criminal law did not formally apply to most Indigenous people in NSW until the Supreme Court extended its jurisdiction over them in *R v Wombarty* in 1837.[187] Until that point, most Indigenous accused were considered unable to take an oath or understand British law and morality and were deemed subject to their own customs and lore.[188] The case of *Wombarty,* in combination with an order from the Colonial Office, reversed the legal opinion on these considerations in order to assert British sovereignty over Aboriginal people and their land.[189] Nevertheless, Indigenous Australians such as the Eora in the Sydney region demanded that the white invaders accede to their customary rights from the earliest days of settlement. In 1792 the

[186] Robert Castle and Jim Hagan, 'Settlers and the State: The Creation of an Aboriginal Workforce in Australia' (1988) 22 *Aboriginal History* 24, 27.
[187] *Sydney Gazette*, 19 August 1837. See also Lord Glenelg to Governor Bourke, 26 July 1837, *HRA,* Ser. I, vol. XIX, p. 48.
[188] See *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSWSupC 35, *Sydney Herald,* 8 February, 18 April, 5 and 16 May, 1836, *The Australian,* 9 February, 12 April 1836, *Sydney Gazette,* 23 February, 12 April, 1836. Although these rules were relaxed in this case to allow the trial of two Indigenous co-accused in relation to matters exclusively involving *inter se* violence.
[189] Lord Glenelg to Governor Bourke, 26 July 1837, above n 187.

colonial Surgeon, John Harris, found that 'the Whole Tribe with their visitors have plagued us ever since nor can we now get rid of them they come and go at pleasure'.[190] Similarly, Governor Phillip found that settlers 'could scarcely keep them out of their houses in daytime'. The Eora 'made a practice of threatening any person whom they found in a hut alone unless bread was given them'.[191] As Karskens puts it, the Eora 'acted as if they owned the place'.[192] But as the occupation and enclosure of Aboriginal land wore on, it was met by stronger resistance. Aboriginal people coordinated inter-tribal attacks and reprisals across the frontier.

Colonial historian Lisa Ford has documented a range of instances between 1788 and 1836 in which Aboriginal people practised their own lore and culture alongside British justice.[193] Such lore defied dominant British criminal law by operating as an alternative system of justice. Indigenous people exacted their own justice against white settlers for killing their kin and dispossessing them of their land. Ford makes the argument that the resistance was so intense that it was recognised by the colonial State as a *de jure* means by which it could ensure peace between both settlers and Indigenous people on the frontier. Indeed, the invocation of Indigenous lore against white settlers which involved violence often went unpunished by the colonial State until 1837.[194] In this way, Ford claims that both Indigenous and British law operated alongside each other as a form of legal pluralism - a mutually respectful, egalitarian 'discourse' of 'retaliation and reciprocity'.[195] Certainly, Indigenous people fought back, challenging settler sovereignty and its attendant criminal justice system. Contrary to Ford's claims, however, this thesis takes the view that the extent of

[190] Surgeon John Harris, Letter (unaddressed), 20 March 1791, Harris Papers, Mitchell Library A1597.
[191] Ibid.
[192] John Hunter, *An Historical Journal of the Transactions at Port Jackson and Norfolk Island* (John Stockdale, 1794) 430.
[193] Ford, above n 100.
[194] See, *R v Wombarty, 1837, Sydney Gazette*, 19 August 1837. See also Lord Glenelg to Governor Bourke, 26 July 1837, above n 187. This case and correspondence are commonly confused with the proposition that Aboriginal people first became subject to British law in relation to *inter se* murder in *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSWSupC 35.
[195] Ford, above n 100, 30-40.

Indigenous genocide and the ultimate triumph of the British colonising project in NSW meant that it was not egalitarian *pluralist* social and legal relations that defined the relationship between the colonial State and Indigenous people. Rather, these social and legal relations were *hegemonic*. British law was colonising. It came to dominate Indigenous people and often had even worse consequences for *traditional* Aboriginal people when it was enforced by settlers in accordance with so-called 'pluralism', rather than the State, throughout the time that Ford periodises. When the alternative to State coercion was genocide, this was plainly not a law that offered Indigenous people much choice in the matter of their colonisation, less so pluralist equality.

The Black Wars in the late 1790s involved a large front of Aboriginal attack, designed and orchestrated to return occupied land to its rightful customary owners. In 1797 the Battle of Parramatta saw the Aboriginal warrior, Pemulwuy, lead a band of over a hundred warriors into the most brutal of British penal settlements at Toongabbie, where they attacked the British troops garrisoned there. Both convicts and Aboriginal warriors shared a hatred of this penal station - the same one from which the Irish convicts launched their Castle Hill Rebellion seven years later. British military reprisals against Aborigines and convicts were indiscriminate. Aborigines were hanged from trees and, in the case of the Rebellion, 'many fine young men were strung up like dogs'. British Military leaders announced that 'every third man whose name was drawn should be hanged'.[196] At Toongabbie, Aboriginal warriors were perhaps more skilful in battle than their fellow colonised convicts, with only five being killed in the affray. Pemulwuy was riddled with shots, but survived.[197]

[196] Joseph Holt, *Memoirs of Joseph Holt: General of the Irish Rebels in 1792, Volume II* (H. Colburn, 1838) 202.
[197] Collins, above n 20, 27.

Pemulwuy was revered and feared amongst the colonists. According to Judge-Advocate Collins, he was 'said to have been at the head of every party that attacked the maize grounds'.[198] Such was Pemulwuy's strategic military prowess that he commanded the respect of the colony's other chief military man, Governor King. One month after the Toongabbie attack, King visited Pemulwuy in hospital at Parramatta. Pemulwuy asked the Governor whether he was 'still angry with him', to which the Governor diplomatically replied that he was not.[199] King was keenly aware that any other answer risked sustained resistance and further warfare. Not only were the grievances of Pemulwuy and his people too strong to be ignored but a delegation of elders had expressly met with King to seek redress. The elders informed King of the importance of their customary rights to the land and resources. Following their visit, King recalled,

> they did not like to be driven from the few places that were left on the banks of the river, where alone they could procure food; that they had gone down the river as the white men took possession of the banks; if they went across the white men's ground the settlers fired upon them and were angry, that if they could retain some places on the lower part of the river they should be satisfied and not trouble the white men.

King promised them 'no more settlements would be made down the river'.[200] When this promise was broken, Aboriginal customary law foretold the response. Settlers' huts were attacked down-river.

As the settlers increasingly encroached on Indigenous land, Aboriginal reprisals followed. Macarthur's estate, to the South of the colony, was hit by guerrilla raids led by Tedbury, son of Pemulwuy. He was accompanied by up to 400 warriors. Stock

198 David Collins, *An Account of the English Colony in NSW, Volume 2* (T. Cadell & W. Davies, 1802) March 1798.
199 Karskens above n 18, 477.
200 Ibid, 482-3.

losses were immense and, as the *Gazette* remarked, the warriors' English was good and they were not afraid of guns.[201] Inland from Sydney-town, Aboriginal people burnt settler huts and crops. They raided maize, which the warriors regarded as rightfully theirs since it had been grown on their land, using their resources.[202] Meanwhile on the coast, attacks by various Koori warriors resulted in the occasional killing of a settler. Over time, the guerrilla tactics of the Aboriginal resistance became finely honed. As one settler remarked, 'at times nothing was heard of them; then all was silence. When they appeared again, then there was a hue and cry'.[203] The colonial state offered an extrajudicial response. In 1801, Governor King declared Pemulwuy an outlaw. Military reprisals by genocide became common and Pemulwuy was killed.[204]

Other Aboriginal resistance fighters such as Tedbury, Branch Jack, Bulldog and Musquito continued to lead raids on settlers. They were captured by the British but, as natives, they could not be tried by British law and were simply removed without trial to destinations of secondary transportation (such as Norfolk and Goat Islands).[205] Tedbury and Musquito were eventually released and returned to their people. They continued their fight against colonisation as bushrangers. Before a particular robbery in 1809, Tedbury and another Dhurrug man, Bundle, yelled to their approaching victims 'who comes there, white men I believe!'. Tedbury was killed two years later during a reprisal raid by colonial surgeon Edward Luttrell Jnr.[206]

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[201] *Sydney Gazette,* 12 May 1805.
[202] Karskens, above n 18, 458.
[203] George Caley, *Reflections on the Colony of NSW* (Angus & Robertson, 1966) 49. See also, S.T. Gill 'Marauders' etching (book cover), 1859.
[204] Governor King to Sir Joseph Banks, 5 June 1802, in FM Bladen, *Historical Records of NSW, IV: Hunter and King* (Government Printer, 1979) 783. This event occurred at the height of the Hawkesbury and Nepean Wars between British settlers and Dhurrug people between 1795 and 1816.
[205] Harman, above n 120, 12-13.
[206] Karskens, above n 18, 490.

Colonisers were often attacked when colonised and working-class peoples combined. Emancipated convict John Wilson was adopted into an Aboriginal tribe to the west of Sydney. He became, 'Bun-bo-e' and was joined by a band of convict runaways including William Knight, Thomas Thrush and Black Caesar. As the Judge-Advocate put it, Wilson was 'a wild, idle young man who preferred living among the natives to earning the wages of honest industry'.[207] The colonial ruling class were well aware that cross-cultural friendship could enhance the efficacy of anti-colonial resistance, particularly when it came to the transmission of military knowledge. As one NSW Corps Officer put it, 'we have always been cautious in letting the natives see that it is necessary to put anything in the Gun to do Execution with it'.[208] In the early 1790s, John Wilson taught his new family of Western Sydney Aborigines about the use and limitations of reloading single-shot muskets.[209] This was a skill that tribal warriors readily deployed in defending land rights against settlers. Pemulwuy frequently used these technologies against the Redcoats. In turn, Aboriginal people taught the runaways bushcraft and survival skills, enabling them to fight together against the attacks of squatters and the British army.[210]

In 1801 Governor King ordered colonial botanist George Caley and his men to shoot Aborigines in order that they be 'driven back from settler's habitations'.[211] Caley's servants, however, had other ideas, having developed close personal relationships with members of the Gundungurra, Dhurrug and Tharrawal peoples to the south and west of Sydney. According to Caley, his servants refused 'to apprehend

[207] Collins, above n 20, 284.
[208] George Worgan, *Journal of a First Fleet Surgeon: 1788* (Project Gutenberg Australia) Wednesday, 28 May 1788.
[209] Jan Kociumbas, *The Oxford History of Australia, Vol 2, 1770-1860* (Oxford University Press, 1991) 57.
[210] Ibid.
[211] Karskens, above n 18, 479.

natives by force that night' with one servant being arrested and imprisoned on the orders of Magistrate Samuel Marsden.[212]

As historian Michael Flynn explains, ruling-class fears of attack by Irish Rebels and Aboriginal warriors were often expressed in similar terms – both as 'outrages' dehumanised in similarly racist and demeaning language.[213] The enemy of the colonial elite was defined as an enemy of society, a collective threat, a rabble or 'many-headed hydra'. As various spatial histories have shown, military and judicial policy responses to such threats shared many similarities across the Empire.[214] For instance, after the uprising in Ireland in 1798, Governor King followed the same English model of suppressing agrarian rebellion in respect to Aboriginal resistance fighters and sought to 'identify and remove the leaders'.[215] Meanwhile, both Irish and Aboriginal resistance shared common goals. Underpinning both forms of anti-colonial struggle was an assertion of land rights or 'commoning' such as rights to farm, hunt, fish, collect wood and subsist. Since 1500, commoners of Britain had been aware that 'the law locks up the man and woman who steals the goose from off the common, but leaves the greater villain loose who steals the common from the goose'.[216] In NSW, commoners put into practice the lesser known concluding couplet in that poem, that 'geese will still a common lack, until they go and steal it back'.[217] In 1834 at Brisbane Water, Aboriginal resistance fighters raided settlements to steal cattle and crops grown on their land. They taunted local settlers in similar tones to the fiery language of British commoners, inverting the language of colonialism to justify their cause and assert their lore. 'Black fellow was best fellow', they said. 'Black fellow master now

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212 Ibid.
213 Michael Flynn, *Holroyd History and the Silent Boundary Project: A Research Report* (Holroyd City Council, 1997) 49.
214 Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge University Press, 2002); Lauren Benton and Richard J Ross (eds), *Legal Pluralism and Empires, 1500-1850* (NYU Press, 2013); Christopher L Tomlins, Bruce H Mann, *The Many Legalities of Early America* (Omohundro Institute of Early American History and Culture, 2001).
215 Roger H Hull, *The Irish Triangle: Conflict in Northern Ireland* (Princeton University Press, 2015) 82.
216 Cited in Peter Linebaugh, *Stop, Thief!: The Commons, Enclosures, and Resistance* (PM Press, 2014) 1.
217 Cited in David Bollier, *Silent Theft: The Private Plunder of Our Common Wealth* (Routledge, 2013) i.

rob every body - white fellow eat bandicoots and black snakes now', they continued.[218] During an attack in 1843, another Aboriginal warrior, Melville, justified the rape of a settler's wife by saying that white fellows 'take all land, and give nothing for it'. He continued, 'white fellows have black gins, and now black fellows have white gins'.[219] As the attack continued, he screamed, 'you bl..dy white b…s hang Black fellows now'.[220] With the onset of the 'Black Wars', Aborigines on the Hawkesbury told settlers they would 'kill all the white men they meet'.[221]

Frontier-era Aboriginal warriors such as Musquito were inducted into working-class culture when they were indentured to work aboard merchant vessels. Thereafter, their language in courtrooms showed they had learned the culture of 'all nations' and that their *own* cultural difference was absorbed within the 'motley' multitude of working-class sailors aboard the ship.[222] This is not to say that their culture was assimilated. Rather, their anti-colonial resistance was sharpened when it melded with the ideals of freedom advanced by sailors. Musquito was at his fiercest after he left the ship to become a bushranger in Tasmania.

In the early colonial period, Indigenous attacks halted the pace of colonisation in some parts of the country and proved to the colonial State that Aboriginal people required recognition in courtrooms and protection against reprisal on the frontier. Acts of violence against Indigenous people were criminalised. Meanwhile, colonial administrators made numerous attempts to prosecute settlers accused of killing Aboriginal people. Many such attempts were defeated by military juries who,

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[218] John Connor, *The Australian Frontier Wars, 1788-1838* (UNSW Press, 2002) 16; *R v Monkey and Others* [1835] NSWSupC 6.
[219] Harman, above n 120, 82.
[220] Ibid, 83.
[221] Karskens above n 18, 478;
[222] Linebaugh and Rediker, above n 10.

sometimes complicit in these crimes, acquitted the accused.[223] At times, however, the pressure of Indigenous attack required that criminal process be exercised in the interests of Indigenous people and the death penalty was imposed against a number of white settlers who had been caught in the act of killing Indigenous people.[224]

The picture that emerges at the end of this chapter is that white settlers and those who sought to exercise settler colonialism against colonised and working-class peoples were hemmed in on all sides by the resistance of those they sought to exploit. Squatters, magistrates and their police faced violent threats that challenged not only their legal authority but their very existence as a ruling minority. The threat came from a multitude of colonised and working-class peoples - black, white and every motley shade in between, including criminal and free labourers alike.

Conclusion

Every coercive law imposed against colonised and working-class peoples created an undercurrent of desperation and was met with a wave of counter-violence. When such violence erupted, it was usually quelled by the State with brutal efficiency. Nevertheless, violence was a critical means by which colonised and working-class peoples made themselves heard when they could not do so through criminal process. While such violence rarely achieved law reform directly, the threat of violence was an important motivator to sections of the colonial ruling class in progressing law reform that hegemonised class relations. As we shall see in the following chapter, over time the voices of colonised and working-class peoples grew in strength as they combined

[223] Ford, above n 100, 103-104.
[224] See, for instance, the case of *R v John Thompson and John Kirby,* SR NSW Court of Criminal Jurisdiction, Indictments, Informations and Related Papers, 1816-1824, 22 November 1820, [SZ792], COD 452B, 49, NSW State Records. See also, *R v Kilmeister (No. 2)* [1838] NSWSupC 110.

and challenged coercive law. As opposition was vocalised – expressed through the language of rights and the discourse of law – claims for liberty and legal rights became impossible for the ruling class to ignore.

Chapter 3: Talking Back

While criminal law served as a coercive instrument of colonialism across the Empire, it nevertheless met with fierce resistance that challenged the colonising project. Colonised and working-class peoples' modes of resistance were as diverse as their specific histories and cultures. Among them, those who spoke and read the dominant language of the colony and directly challenged the law for its social injustices, formed a distinctive sub-group. They are referred to here as 'plebeian radicals'.[1] They were the very working-class men and women who formed the Chartist movement for civil rights in England during the same period. Many were transported to NSW for their acts of radicalism against the British State and their histories have been analysed by a number of Australian colonial historians such as Alan Atkinson, Paula Byrne, Grace Karskens, Tony Moore and Emma Christopher.[2] These histories have not, however, examined the effects of this dissent, and the dissent of other colonised and working-class peoples, on reforming criminal process in the colony. Certainly, such a project has never been considered within the dominant orthodoxy of legal history.[3] This

[1] E.P. Thompson first uses the term, 'plebeian Radicals' in his article, 'God and King and Law' (1957) 3 *The New Reasoner* 69, an essay about Peterloo and the writing of social history.

[2] See, for instance, Alan Atkinson, 'Four Patterns of Convict Protest' (1979) 37 *Labour History* 28, 43; Paula J. Byrne, *Criminal Law and Colonial Subject: New South Wales, 1810-1830* (Cambridge University Press, 1993); Grace Karskens, *The Colony: A History of Early Sydney* (Allen & Unwin, 2009); Tony Moore, *Death or Liberty: Rebels and Radicals Transported to Australia, 1788-1868* (Murdoch Books, 2010); Emma Christopher, 'Ten thousand times worse than the convicts': rebellious sailors, convict transportation and the struggle for freedom' (2004) 5 *Journal of Australian Colonial History* 30, 30-36.
Note: I am indebted to both Alan Atkinson and Paula Byrne for their discoveries of many of the cases and stories referred to in this chapter. See, for instance, Atkinson's 'Four Patterns of Convict Protest' and Byrne's *Criminal Law and Colonial Subject*.

[3] See John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2005); Bruce Smith, 'The Presumption of Guilt and the English Law of Theft' (2005) 23 *Law & History Review* 133 (A); Bruce Smith, 'Did the Presumption of Innocence Exist in Summary Proceedings?' (2005) 23 *Law & History Review* 191 (B); Alex C. Castles, *An Australian Legal History* (Law Book Co., 1982); and, to some extent, Bruce Kercher, *An Unruly Child: A History of Law in Australia,* (Allen & Unwin, 1995). Kercher's work has predominantly been devoted to recovering the lost cases and archival legal sources of colonial Australian history. This thesis would be impossible without his foundational work. Kercher's scholarship acknowledges the contribution of social history to the project of legal history but is nevertheless a history of lawyers, judges and governors.

chapter explores the manner in which plebeian radicals articulated their dissent in the face of criminal process by appealing to law, custom and rights. In turn they shaped the criminal law to better reflect their interests as a class.

Aboriginal people in the towns and on the fringes of the colony also resisted their colonisation through law. Like that of their working-class counterparts, resistance by Indigenous people was mostly violent and spontaneous and corresponded with an equally violent strain of European settler-colonialism, all of which has been well documented.[4] A lesser known story, however, involves the ways in which Indigenous people engaged with the colonising discourse of criminal process to vocalise their dissent and to assert their rights as non-colonised subjects.

While non-violent dissent by colonised and working-class peoples was common, it was by no means typical. When it did happen, however, it proved that some colonised and working-class peoples were undaunted by the spectacle of criminal process, the 'visible and elaborate manifestation of state power'.[5] Some saw criminal process as the best vehicle by which to change their own situation. For many, the courtroom 'occupied a sacred place' because it gave voice to a vision of liberty and fairness expressed socially.[6] Inside the court, legal rights were 'not an expression of authority, but of community and tied to common tradition and circumstances'.[7] British historian J.A. Sharpe made similar findings in respect to the experience of

[4] See, for instance, Henry Reynolds, *Forgotten War* (NewSouth Publishing, 2013); Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (UNSW Press, 2006); Eric Wilmot, *Pemulwuy, the rainbow warrior* (Bantam Books, 1988); Howard Pedersen and Banjo Woorunmurra, *Jandamarra and the Bunuba Resistance* (Bookland Press, 2013); Libby Connors, *Warrior: A Legendary Leader's Dramatic Life and Violent Death on the Colonial Frontier* (Allen & Unwin, 2015); Fergus Robinson and Barry York, *The Black Resistance: An Introduction to the History of the Aborigines' Struggle Against British Colonialism* (Widescope, 1977).

[5] Doug Hay et al, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Pantheon Books, 1975) 27.

[6] Alan Atkinson, *The Europeans in Australia: A History Vol. II – Democracy* (Oxford University Press, 2004) 4.

[7] Alan Atkinson, 'The Freeborn Englishman Transported: Convict Rights as a Measure of Eighteenth-Century Empire' (1994) 144(1) *Past and Present* 88, 90.

working-class litigants in industrialising England, who 'were aware they were acting within a context of some sort of community of social values and were concerned that their conduct should be, and should be seen to be, broadly in accord with those values'.[8] Operation within a political community was a means to obtain individual justice for shared experiences of injustice on a daily basis. These experiences played a crucial role in educating people about the law and crystallising plebeian radicalism in the place of formal education. As Governor Hunter wrote in April 1799, 'the people grow insolent from what they suffer'.[9] This suffering found a voice in plebeian radicalism within the courtroom, noteworthy not only for its 'primitive' discursive contribution to reforming legal processes, but also for its strident articulation of a sophisticated code of morality and custom, contingent in many respects upon a moral economy.[10] The more that oppressed peoples suffered, the more they protested and appealed to rights. As Atkinson concludes:

> rights do not exist only in the minds of those with the power to concede them; they evolve within a system of unequal relationships, and they depend on the dynamics of the system. The convicts certainly thought in terms of rights and claims, and they were often ready to defy their masters when they thought their ticket was due.[11]

The language of law and criminal process pervaded colonial newspapers which were read by colonised and working-class peoples, or read *to* them in gaol cells, by fireplaces and in public houses throughout the colony.[12] Those who reported on colonial legal matters and criminal process often shared understandings of the way the law worked to colonise subaltern peoples. In response, radical newspapermen

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[8] J.A. Sharpe, "Such Disagreement betwyx Neighbours': Litigation and Human Relations in Early Modern England', in J Bossy (ed.), *Disputes and Settlements: Law and Human Relations in the West* (Cambridge University Press, 1986) 167-8;

[9] Governor Hunter in *Historical Records of New South Wales*, *Vol. III* (Govt. Printer, 1979) 226.

[10] See, for instance, the work of Erin Ihde, "A Smart Volley of Dough-Boy Shot': A military food riot in colonial Sydney', (2001) 3(2) *Journal of Australian Colonial History* 23.

[11] Atkinson, above n 2, 35.

[12] See, for example, colonial newspapers such as *The Censor Morum, The Parramatta Chronicle, The Australian, The Monitor, The Star, The People's Advocate, The Northern Star.*

provided a firebrand education in the language and processes of the criminal law as well as legal rights within their newspapers. As one commentator has written, plebeian radicals in the 1840s and 1850s were readers and a 'diet of printer's ink and paper was prepared for readers who were open, outward-looking, citizens of the world'.[13] Paine, Locke and Rousseau were all consumed by a wide popular audience.[14]

Legal education also happened in other ways. As the earliest Australian legal history shows, when the Assizes were in town, courts crowded with onlookers and spectacle-seekers.[15] They provided popular theatre for district audiences. Such public spectacle had long served as a key objective of public justice.[16] Law was also made accessible through the circulation of legal texts and manuals designed by expert lawyers in the metropole for use by honorary magistrates on the frontier. Texts such as *Burn's Manual*[17] and *The Australian Magistrate*[18] had a wider readership than the lay magistracy and could often be found in respectable working-class homes and the offices of small businessmen across the countryside.[19] Many historians have considered the numbers of copies of *Blackstone's Commentaries* in the early colony as indicative of widespread knowledge and application of the law at the time.[20] In what is perhaps the earliest study of Australian legal history, H.V. Evatt found that one of the earliest Judge-Advocate's decisions in 1808 was informed by written submissions from a 'blunt sea captain' in which the Captain referred the court to 'that venerated

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[13] Paul A. Pickering, 'Was the Southern Tree of Liberty an Oak?' (2007) 92 *Labour History* 139, 140-1.
[14] Benjamin T. Jones, 'Colonial Republicanism: Re-Examining the Impact of Civic Republican Ideology in Pre-Constitution New South Wales' (2009) 11 *Journal of Australian Colonial History* 129, 136; and Stuart Macintyre, *A Concise History of Australia,* (Cambridge University Press, 2009) 92.
[15] C.H. Currey, *The Brothers Bent: Judge-Advocate Ellis Bent and Judge Jeffery Hart Bent,* (Sydney University Press, 1968) 50-1.
[16] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage Books, 1977) 33-34.
[17] Richard Burn, *Justice of the Peace and Parish Officer* (known as, 'Burn's Manual') (Shaw and Sons, c. 1755/1840).
[18] John Hubert Plunkett, *The Australian Magistrate: A Guide to the Duties of a Justice of the Peace,* (W.A. Colman, c. 1835/1840).
[19] See G.D. Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900* (The Federation Press, 2002) 175; Byrne, above n 2.
[20] See, for instance, Wilf Prest, 'Antipodean Blackstone: The Commentaries "Down Under"', (2003) 6(2) *Flinders Journal of Law Reform* 151; G.D. Woods, (ibid), 8; Bruce Kercher, above n 3, xii. See also, Chapter 6.

commentator on the British Laws, Mr Justice Blackstone'.[21] Other recitations of Blackstone in the early case law are not uncommon. In 1820 one defendant, William Brown, illustrated his understanding of the standard of proof by referring to Blackstone while making the submission that the prosecution had failed to prove the 'knowledge' element of an offence. He summed-up his own case by saying:

> The learned Blackstone says, that 'if there is a doubt of a prisoner he must be acquit for better ten guilty men escape than one innocent man suffer', my paying the notes is no proof of my knowing it to be stolen.[22]

But popular knowledge of the law did not necessarily reflect 'received' legal education of the period. As Byrne explains, 'between 1810 and 1830 the colonial population shaped and modified what it understood to be criminal law' and 'it made use of some regulations and ignored others'.[23] Byrne's study focuses on the popular use of criminal law to regulate social relations. In examining the use of law by working-class people, Byrne's study mainly examines the way in which the working class used the law to *prosecute* each other through a culture of accusation and defence. A significant outcome, she concludes, was the centrality of working class interests in shaping the development of the law. As Byrne comments, however, 'these interests may have had little in common with preserving good relations or with the intentions of the law'.[24] Indeed, one of the main uses of the law by colonised and working-class peoples was to *resist* their masters – a purpose inimical to the dominant 'intentions' of the law but one that operated counter-hegemonically in shaping and directing criminal process. It meant that when ex-convict and former Tolpuddle Martyr,

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[21] H.V. Evatt, *Rum Rebellion* (Angus & Robertson, 1965) 171.

[22] *R v William Brown and others,* Court of Criminal Jurisdiction (hereafter referred to as 'CCJ'), December 1820, New South Wales State Records (hereafter referred to as 'SRNSW'), 2703 [SZ792] 21. p. 295.

[23] Byrne, above n 2, 208. Nevertheless, Byrne's observations recall Thompson's well-known aphorism that 'the rule of law is an unqualified human good', see *Whigs and Hunters: The origin of the Black Act,* (Pantheon Books, 1975) 266.

[24] Ibid, 239.

George Loveless, returned to England after having served his sentence of transportation for combination,[25] he said:

> Arise, men of Britain and take your stand! Rally round the standards of Liberty, or forever lay prostrate under the iron hand of your land and money-mongering taskmasters! … Transportation has not had the intended effect on me, but after all, I am returned from my bondage with my views and principles strengthened. It is indelibly fixed in my mind that labour is ill-rewarded in consequence of a few tyrannising over the millions … *I believe that nothing will ever be done to relieve the distress of the working classes unless they take it into their own hands.*[26]

Early Indigenous understandings of British law took two main forms. First, Indigenous people came to understand European criminal process and punishment through cultural transmission, in towns and through shared workplaces. Second, in cases where Indigenous people had not had sufficient contact with British law, they asserted their own existing customary lore, rights and morality, in some cases accepted by Europeans as a form of 'natural law' or moral economy.[27] For instance, upon commencing to net load upon load of fish from the Eora fishing grounds of Sydney Harbour, British officer John White recalls that 'no sooner were the fish out of the water than they (the Eora) began to lay hold of them, *as if they had a right to them*, or as if they were their own; upon which the officer of the boat, I think very properly, restrained them, giving, however, to each his part'.[28] Other narratives involving Indigenous understandings of rights relating to property and the moral

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[25] Loveless and five other protesters were actually prosecuted under an antiquated penal provision from 1797 forbidding the swearing of illegal oaths'. The provision was used to prosecute 'combination'.

[26] (Emphasis added). Loveless made this statement in Dorsett in 1837, after returning from Van Diemen's Land. Cited in Moore, above n 2, 135.

[27] 'Lore', as distinct from 'law', is a set of rules associated with a way of living derived from a social and spiritual connection to culture and country: see Tom Calma, 'The Integration of Customary Law into the Australian Legal System' (2007) 25(1) *Law in Context* 74.

[28] Inga Clendinnen, *Dancing With Strangers* (Text Publishing, 2003) 83.

economy have shown that Aboriginal people living along the colony's early agricultural belt seized maize and harvested other crops at their leisure.[29] They regarded the crops as rightfully theirs when grown on their own ancestral land. It was in these myriad of ways that Aboriginal people engaged with legal discourse – particularly that involving property and theft - on their own terms, challenging the law of their colonisers.

Use of Law and Appeals to Rights

John Langbein has found that before 1836 in England, medieval inquisitorial trial was the most common form of prosecution.[30] Its central characteristic was to compel an accused person to speak in their defence. Though the right to silence had existed at common law since the English Revolution, in practice it was used sparingly among a small number of superior courts.[31] It was in 1836 that the right to silence was legislated into widespread usage through the Prisoner's Counsel Act.[32] After 1836, so the dominant strain of legal history goes, 'testing the prosecution' case became the focus of the criminal trial.[33] Under this method of trial, according to many legal historians, the right to counsel, exclusionary rules of evidence (the rules against hearsay, credibility, opinion evidence, the privilege against self-incrimination, etcetera) and proof beyond reasonable doubt meant that the voices of lawyers were privileged over those of the accused.[34]

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[29] Grace Karskens, above n 2, 458.
[30] John Langbein, 'The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries', in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (University of Chicago Press, 1997) 82-83.
[31] A history of the right to silence is explored in detail in Chapter 7.
[32] *1836* (UK) (6 and 7 Wm IV c 114).
[33] See, for instance, Langebein above n 30; and Bruce Smith above n 3.
[34] Ibid. The focus of the trial shifted from the prosecution to the defence and from defendant to defence counsel.

This view of legal history is not reflected clearly in the history of criminal process in NSW. The voice of the accused in the traditional archive of Australian legal history is often like a rare bird call amidst the crowing of higher-flying colonial identities, particularly in the period before 1836. As Byrne has found, the official legal records (the Sydney Bench Books in particular) often show that convicts and defendants in colonial courtrooms were characterised more by their silence than their appearance.[35] The volume of court matters, the speed of proceedings (most trials lasted no longer than 30 minutes) and the lack of attention to law and evidence (mostly by honorary magistrates) apparently show that defendants were rarely given a voice. Accused men and women were even prevented by law from giving evidence – although this rule was routinely ignored, especially during the frontier period in colonial NSW.[36] Nevertheless, the fact that legal counsel appeared in only a minority of colonial cases meant that defendants who contested charges used procedural law to cross-examine witnesses and make submissions in their defence on sentence.[37] As discussed in the Introduction, a range of archival sources such as local newspapers, depositions and bench books from the peripheries of the colony tell a different story. They show that many colonised and working-class peoples, particularly Irish and English convicts, were well acquainted with court procedure and criminal process, especially that surrounding punishment.[38] In this respect, the 'official' metropolitan archive frequently belies an historical reality in which colonised and working-class peoples understood the law and used it to their advantage.

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[35] Byrne, above n 2, 287; see also Jane Elliot, "What Price Respectability?': Another Look at Theft in New South Wales, 1788-1815' (1995) 1(2) *Journal of Australian Legal History* 167.
[36] The right of an accused to give evidence and hence, to make a defence, was not formally permitted in NSW until the 1890s: see Woods, above n 19, 373-386.
[37] Byrne, above n 2, 270.
[38] Babette Smith, *The Luck of the Irish: How a shipload of convicts survived the wreck of 'The Hive' to make a new life in Australia* (Allen & Unwin, 2014) 22.

Understanding Punishment

Sentencing and the selection of punishment are the final procedures in the criminal justice process. As discussed in Chapter 1, these elements were key tools in controlling and subjugating colonised and working-class peoples. But, just as these processes were meted out unflinchingly by colonial overseers, magistrates and judges, colonised and working-class peoples reflexively resisted them. They appealed to the law to mitigate their punishments, offering critical perspectives on dominant forms of law. They also applied punishments of their own when they had opportunities to retaliate against their overseers and prosecutors often creating their own *rules* of law, informed by a 'moral economy' or Indigenous customary law. When confronted with the prospect of 'the cat' (of nine tails) or secondary transportation, defendants need not have been acquainted with the work of Cesare Beccaria to understand the difference between a harsh and proportionate sentence. Indeed, their language and knowledge of the 'plea' process shows that they knew exactly what to say to mitigate their punishment.

In 1799 one convict, Alexander Major, attempted to make a bargain with the Bench to mitigate his sentence. During his plea he proposed that 'if his Corporal Punishment was remitted he could make some Discovery of a part of the property which had been stolen from Mr Dole'.[39] Some defendants also appeared to know the utilitarian value of a well-timed plea. A bank clerk, Francis Williams, was charged in 1822 with embezzlement from the Bank of NSW. 'In pleading guilty', he said, 'I have been actuated by a sense of respect to this honourable tribunal in order to spare them the trouble of a tedious enquiry into circumstances and events connected with

[39] Trials of Alexander Major, 2 Feb 1799, p. 46, 23 July, 1799, 29 July 1799, SRNSW, *Minutes and Proceedings of the Bench of Magistrates at Sydney,* 8 December 1798 - 5 March 1800, 23/7/99*,* Reel 655, [SZ767].

this case'.[40] Williams' sentence was reduced accordingly. In *R v Banham* [1842] the prisoner performed his own plea in mitigation in a murder case before the Supreme Court.[41] He had been intoxicated at the time of the murder and he 'implored mercy on the ground that he was incapable of knowing what he was about; that he remembered nothing of the transaction, and had never quarrelled (sic) with or borne malice against deceased (sic)'.[42] His intoxication was taken into account and he was successful in mitigating his sentence of death to transportation for life. From the 1840s, local newspapers reported self-represented pleas in Police Magistrate's Courts across many districts of NSW. Examples from Parramatta Court alone provide ample evidence that self-represented defendants were able to successfully mitigate their sentences (see Appendix).

Some defendants displayed knowledge of punishment that showed an appreciation of the technical rules, maximum penalties and underlying purposes of the law. Their submissions appealed to dominant legal theories of the time, including the jurisprudence of utilitarian rational choice. For example, one convict defended himself in a theft matter by denying a motive of greed put to him by the prosecutor. As the defendant put it, he would never 'nap that swag … because neither I had no money and believe it would be a hanging job if I were found out'.[43]

Other defendants made use of recent law reform to assist their own reformist causes. Shortly after the passing of the '50 Lashes Act',[44] bullock drivers at Port Macquarie refused 'to yoke up a single bullock for any authority on the settlement…until McNamara (a driver who proposed to undercut them) was turned away from the yard'. They took their chances with punishment, making the rational calculation that

[40] *R v Francis Williams* CCJ 1822, p. 101 and p. 399, SRNSW, Reel 1976, [SZ796].
[41] NSWSupC 29, *The Australian,* 15 March 1842.
[42] Ibid.
[43] *Bonwick Transcripts,* 2 August 1820 (Mitchell Library Box 23).
[44] The '50 Lashes Act' was formally known as *The Magistrates Act 1832* (NSW) (3 Wm IV No 3).

they 'could only get fifty lashes the first time, and a fortnight in the cells the second and that would be a good spell for them'.[45] Before giving evidence, another convict witness calculated that 'it was only seven years for perjury, and he would get that rather than return to the iron-gang'.[46] Similarly, in the convict escape case of *R v Clarke and others* [1821],[47] the unrepresented prisoners clearly understood that a higher punishment attached to stealing the vessel they used to escape, than to their escape itself. They admitted their conduct in respect to the escape but were careful to deny any involvement with the theft. They were nevertheless convicted of both. Sometimes, when punishment was inevitable, defiance was the only option. 'My Lord and Gentlemen of the Jury, it is only five minutes choaking' (sic), said John Judd, after being condemned to the scaffold.[48]

For some colonised and working-class men, the barbarism wrought by British justice was so routinised that it must have seemed natural and inevitable. Indeed, some who resisted the law, such as bushrangers, frequently developed moral codes and punishments that derived directly from British law and how it was meted out to them. For example, in 1830 a party of bushrangers stopped the magistrate, Robert Venour Dalhunty, on the road through the Hunter Valley. The men asked the magistrate whether he was the man responsible for the death of a fellow bushranger, Thomas Muston. Dalhunty said he was not. However one of the bushrangers recognised Dalhunty as the magistrate who had sentenced Muston to serve time on an iron gang. The bushrangers sentenced Dalhunty to be flogged.[49] In a further instance, four bushrangers approached a police constable whom they forced to his knees, vowing to take his life within fifteen minutes. One of the men took off his

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[45] Trial of Joseph McNalty and John Norman, 1 April 1834, and John Norman 12 April 1834, SRNSW, Bench Books [Port Macquarie Court of Petty Sessions], Series 3331, 4/5638, Reel 2724.
[46] See, *R v Absolam and Gardner* [1828] NSWSupC 5, *The Australian,* 13 February 1828.
[47] NSWKR 3; [1821] NSWSupC 3, *R v O'Hara, R v Coulton, R v Read,* in the *Sydney Gazette,* 17 February 1821.
[48] *Sydney Gazette*, 6 May 1830.
[49] *R v William Dalton* SCCJ 22 and 25 June 1830, SRNSW, 13477 [T31] 30/174, pp. 166-7.

shirt and showed the constable evidence of a scar at the back of his neck, accusing him of having shot him. The bushrangers said they would give the constable 'a boy's flogging', tying him to a post and ordering another to give the constable fifty lashes. 'Mind boatswain do your duty', the bushranger told his scourge.[50] He had clearly witnessed the gruesome spectacle as a routine feature of naval discipline.

Just as the brutality of naval and penal discipline had an effect on bushrangers, so too did it shape practices of piracy in NSW. When the convict crew of the merchant vessel *The Wellington* captured the ship, they elected a captain and a 'council of seven…to judge and punish misdemeanours, regulate the supply of provisions & water'.[51] Stealing from the collective appears to have been the primary offence for consideration by the pirate 'council'.[52] When it came to punishing fellow pirates, however, the lash was off limits. Common pirate punishments – including those used aboard *The Wellington* – were marooning, extra shifts and cuts to grog rations.[53] These customary forms of justice can also be understood in the context of English practices such as *charivari*.[54] The targets of such practices were invariably informers, traitors, constables, scourgers and magistrates. In this context, justice operated not merely as a primitive form of revenge and humiliation for class opponents but as a deterrent to those who might thwart the moral economy – the collective interests of colonised and working-class peoples.[55]

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[50] *R v Tennant, Ricks, Cane and Murphy* [1828] NSWSupC 40, *Sydney Gazette* 2 and 6 June 1828.
[51] *The Australian,* 23 February 1827, p. 3*;* Darling to Bathurst, 10 February 1827, *HRA,* Series I, vol. XIII, p. 104.
[52] Erin Ihde, 'Pirates of the Pacific: The Convict Seizure of The Wellington' (2008) 30(1) *The Great Circle* 7.
[53] Ibid; see also, Marcus Rediker, *Between The Devil and The Deep Blue Sea: Merchant Seamen, Pirates and the Anglo-American Maritime World, 1700-1750* (Cambridge University Press, 1993); and Ian Duffield, "Haul Away the Anchor Girls': Charlotte Badger, Tall Stories and The Pirates of 'The Bad Ship Venus" (2005) 7 *Journal of Australian Colonial History* 35.
[54] 'Charivari' was a form of humiliation, social exclusion, sometimes involving corporal punishments like taring and feathering, exercised collectively by disapproving communities of European peasants. See, E.P. Thompson, *Customs in Common,* (Merlin Press, 1991) 467-538; E.P. Thompson, '"Rough Music": Le Charivari anglais,' (1972) 27 *Annales: Économies, Sociétés Civilisations* 285.
[55] Byrne, above n 2, 137-8.

British punishment provoked responses from Indigenous people that frequently surprised and frustrated the early colonisers of NSW. At Botany Bay in March 1789, a party of errant convicts stole from the Dharawal people. The Dharawal responded in kind, killing one of the raiding party and wounding seven. Governor Phillip ordered the surviving convicts flogged and insisted that the captured Aboriginal warrior, Arabanoo, watch the spectacle of British justice. But Phillip was disappointed by the result. As Watkin Tench recalls, Arabanoo merely 'displayed on occasion symptoms of disgust'.[56] It was not apparent to this great warrior – a man who came from a culture that practised corporal punishment by spearing – just what the gruesome spectacle of flogging was designed to achieve.

In a second recorded incident, when a convict attempted to steal fishing tackle from Daringa, the wife of Colbee, an Aboriginal man well known within the settlement, Phillip organised an audience of Aboriginal people to witness British justice being dispensed by flogging. As cultural historian Inga Clendinnen reports, Daringa wept, and her friend Barangaroo refused to allow the convict's suffering by seizing a stick and attempting to bring the flogging to an end by beating the flogger.[57] Clendinnen concludes that such resistance to British punishment was due to the 'impersonality' of British law. While Phillip saw flogging as 'the glory of the law', it was obvious to colonised and working-class peoples that such a procedure was a protracted exercise in brutality, 'profoundly anti-social, and therefore inhuman'.[58]

In 1823 the Aboriginal resistance leader Musquito articulated what is perhaps the first anti-colonial critique of the process of British punishment in English by an Indigenous person. He had formed a rebel alliance with the Oyster Bay people, committing a number of acts of guerrilla warfare against settlers in the NSW

[56] Watkin Tench, *An Account of the Settlement at Port Jackson* (C. Nicol, 1793) 17 (Chapter III).
[57] Clendinnen, above n 28.
[58] Ibid.

countryside. Captured and tried for 'aiding and abetting in the wilful murder of William Hollyoak, at Grindstone Bay, on the fifteenth November, 1823', Musquito was convicted and sentenced to death. In reply to the court he pronounced 'hanging no good for black fellow … very good for white fellow, for *he* used to it'.[59] Apparently to ensure against martyrdom, his death sentence was commuted to transportation to Van Diemen's Land where he eventually turned to bushranging (see previous Chapter). For mainland Aborigines, transportation to Van Diemen's Land spelled a particularly tyrannical punishment as it involved a removal from country and a disconnection from all social and spiritual ties. Over time, mainland Aborigines came to refer to Van Diemen's Land as 'Old Man Cruel'.[60]

In 1846 Koombra Kowan Kunniam was convicted by a white jury of breaking and entering. He received seven years transportation to 'Old Man Cruel'. Koombra challenged the sentence, shouting, 'Borack! Borack!' or 'No, not so!'.[61] Another resistance leader, Wellington, was charged with spearing a bullock. At the reading of the charge he 'merely grinned in the judge's face, and denied the charge'. Wellington was convicted and sentenced to ten years transportation to Van Diemen's Land. When Justice Dowling delivered the sentence, Wellington 'laughed outright, as if he considered it all a very fine joke'.[62] In these ways, Aboriginal people communicated to British authority that they were unimpressed by the spectacle of criminal process. Their opinion coincided with that of other colonised and working-class peoples and reformers who comprised the majority in colonial NSW.

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[59] Cited in Robert Cox, *Steps to the Scaffold: The Untold Story of Tasmania's Black Bushrangers* (Cornhill Publishing, 2004) 61.
[60] As recalled in the *Journals of George Augusts Robinson: Chief Protector, Port Phillip Aboriginal Protectorate, Vol. 4, 1844-1845* (Heritage Matters, 2000) 336, 18 October 1845.
[61] Kristyn Harman, *Aboriginal Convicts: Australian, Khoisan and Maori Exiles* (UNSW Press, 2012) 114; see also, Michael Powell, *Musquito: Brutality and Exile. Aboriginal resistance in New South Wales and Van Dieman's Land* (Fuller's Bookshop, 2016).
[62] *The Sydney Morning Herald,* 14 September 1842, 2.

Appeals to Rights

Colonised and working-class peoples resisted authoritarian colonial power by appealing to their legal and customary rights in the face of authoritarian criminal process. One of the key legal rights in this struggle was the right to silence. The emergence of the right to silence is located within radical social and political struggles played out in sixteenth century England when justices of the peace and judges were first assigned to examining suspects.[63] Examination required suspects to 'swear to the truth' during trial by ordeal, Star Chamber or compurgatory oath.[64] Such investigations frequently targeted religious and political dissidents. In the throes of torture or behind the clink of cell doors, suspects resisted their examiners by refusing to answer their questions. They united in the rallying cry that 'no man is bound to accuse himself'.[65] As a result, most were whipped, imprisoned or chained to a stake and roasted in flames.[66]

So was the fate of many political dissidents in seventeenth century England including the leader of the Levellers, John Lilburn, in 1637. Lilburn was a political rebel charged with importing seditious books into England. He was subjected to trial by Star Chamber, during which he was compelled to respond to interrogation. Like his rebellious forebears, Lilburn insisted that 'no man is bound to accuse himself'.[67] He was then charged with contempt for refusing to answer the Chamber's interrogatories before being whipped, pilloried and imprisoned until he agreed to co-operate.[68] Still, he refused. It should be noted that the Star Chamber drew no adverse

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[63] (1 and 2 *Philip & Mary* c. 13 (1554)) and (2 and 3 *Mary* c. 10 (1555)) (UK).
[64] William Hudson, *A treatise of the Court of Star Chamber / William Hudson; edited by Francis Hargrave, as taken from Collectanea juridica, consisting of tracts relative to the law and constitution of England, volume the second ; with a new introduction and notes by Thomas Garden Barnes* (Lawbook Exchange, 1577/2008).
[65] Leonard Levy, *The Origins of the Fifth Amendment* (Oxford University Press, 1968) 3 and 62.
[66] Ibid.
[67] Frank Riebli, 'The Spectre of the Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court's Self-Incriminaton Jurisprudence' (2002) 29(4) *Hastings Constitutional Law Quarterly* 807.
[68] Levy, above n 65.

inference from Lilburn's lack of evidence. Indeed, without such evidence, Lilburn could not be convicted of the substantive offence of importing seditious books. Lilburn's resistance to coerced interrogation has since been recognised as establishing the legal principle of 'voluntariness' of confessional evidence.[69]

Lilburn's revolutionary protest went further than asserting the maxim of voluntariness. As he remarked to the Earl of Dorset during his examination, 'Sir, I know you are not able to prove, and to make that good which you have said (without my evidence)'.[70] Rather, Lilburn's objection against the law lords was that if an accused must bear the accusations of the State, the State must bear an onus to prove its allegations (the burden of proof). Crucially, Lilburn's argument with and opposition to the Earl of Dorset and his affiliates was but one expression of a broader approach to the rule of law that was based on the development of the Levellers' moral and political philosophy. The Levellers were a political movement whose general aspirations were to liberate 'the poorest he that is in England'.[71] Comprised of working men and women, ex-soldiers and religious radicals, their struggles took the form of direct collective action against violent and exploitative capitalist practices like enclosure, impressment and slavery.[72] One of the Levellers' key tools was the rule of law, which as the 'freeborn' Lilburn pointed-out, was summed-up for all Englishmen in Chapter 39 of *Magna Carta*.[73] Critically, the

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[69] Ibid. Discussed at length in Chapter 7.

[70] John Lilburn, 'The Trial of John Lilburn and John Wharton, for Printing and Publishing Seditious Books' in Thomas Bayley Howell et al (eds.). *Cobbett's State Trials*, *Vol. 3* (R. Bagshaw, 1809) 1322 and 1326.

[71] See the comments of Leveller leader, Sir Thomas Rainborough in A.S.P. Woodhouse (ed), *Puritanism and Liberty: Being the Army Debates (1647-9)* from the *Clarke Manuscripts with Supplementary Documents* (Dent, 1986), see preface by Ivan Roots.

[72] Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners and the Hidden History of the Revolutionary Atlantic* (Beacon Press, 2001)104-110.

[73] Linebaugh, Peter, 'The Secret History of the Magna Carta' (2003) *Boston Review* http://bostonreview.net/books-ideas/peter-linebaugh-secret-history-magna-carta
Incidentally, the phrase, 'the rule of law' was coined during the revolutionary decade of the 1640s by the revolutionary theologian and politician, Samuel Rutherford in his 1644 book, *Lex, rex: the law and the prince, a dispute for the just prerogative of king and people, containing the reasons and causes of the defensive wars of the kingdom of Scotland, and of their expedition for the ayd and help of their brethren of England* (John Field, 1644) 247.

Levellers observed that 'those who … tyrannised over … the honest men of England'[74] monopolised the rule of law in such a way that 'hedges the weake out of the Earth, and either starves them, or else forces them through poverty to take from others, and then hangs them for so doing'.[75] The Levellers understood that liberation from what the ruling class called 'crime' did not lie in repressive law. Rather, they proposed that 'freedom in planting the common land will prevent robbing, stealing and murdering, and Prisons will not so mightily be filled with Prisoners; and thereby we shall prevent that hart breaking spectacle of seeing so many hanged ever Sessions as they are'.[76] As the Levellers well knew, criminal defendants were more often than not 'the poore; your hunger-starved brethren' and 'those whom your unjuste Lawes hold captive in your owne Prisons'.[77] In these circumstances, the right to silence was never an abstract legal rule, but rather a socially contingent political device designed to protect the vulnerable from the powerful.

Following Lilburn's conviction and imprisonment, the problem for the new Parliament of England was that the pamphlets and books of the Levellers were second only in popularity to the Bible.[78] Killing Lilburn in respect to this offence would not only martyr him but also publicise the principles of Levelling and legal rights in England. A parliamentary Committee of the House of Commons acquitted Lilburn and conceded that 'the Sentence of the Star-Chamber given against John Lilburn is illegal, and against the Liberty of the subject, and also bloody, cruel, wicked, barbarous and tyrannical'.[79] From that moment, the State accepted the onus

[74] Woodhouse, above n 71.
[75] See the comments of Leveller leader Gerrard Winstanley in George H. Sabine, *The Works of Gerrard Winstanley* (Russell & Russell, 1965)492.
[76] See The Levellers' 'An Appeal to All Englishmen', March 1649 and 'A Letter to Lord Fairfax', June 1649 in Lewis Berens, *The Digger Movement in the Days of the Commonwealth* (Merlin, 1961).
[77] See Leveller pamphleteer, Richard Overton, 'A Remonstrance of Many Thousand Citizens' (1646) www.constitution.org/lev/eng_lev_04.htm, accessed 23 February 2014.
[78] Levy, above n 65, 81-82.
[79] Lilburn, above n 70, 1347.

of proving criminal cases unassisted by the defendant. The defendant could choose to do or say nothing.

Following the English Revolution, these processes became the birthright of all 'freeborn' Englishmen. In the colonies of the Empire one hundred years later, colonised and working-class peoples of all nations - Irishmen, Aborigines and convicts - waged similar struggles for the same freedoms. Dominant expressions of these highly technical procedural rights (often referred to as 'the Golden Thread' and its 'six limbs'[80]) were ushered into the common law by powerful men (mainly lawyers and judges). These episodes of lawmaking will be discussed in Chapters 6 and 7. Nevertheless, colonised and working-class peoples sometimes asserted these rights and used them to their own advantage, independent of assistance from the powerful. One of the foremost struggles in this respect concerned a key element of the right to silence: the 'voluntariness' of confessional evidence.

An inquiry undertaken by the House of Commons in 1826 showed that the colonial gentry in NSW (i.e. Magistrates) frequently used torture to extract confessions from Defendants.[81] The Inquiry reviewed 30 such instances of torture, noting that

> as a general corollary from the whole of their inquiries the Council have no doubt whatever that the practice complained of (flogging to extract confession) was resorted to as early as the records bear date, and has been followed with more or less frequency until the year 1823, when it appears to have been adopted as one of the ordinary modes of punishment.[82]

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[80] See, for instance, Lord Sankey in *Woolmington v DPP* [1935] AC 462; [1935] UKHL 1; *Petty and Maiden v R* (1991) 173 CLR 95, 90; *Weissensteiner v R* (1993) 178 CLR 217; Catherine Eakin, 'Note: *RPS v R*: The Resilience of the Accused's Right to Silence', 22 *Sydney Law Review,* 669 (2000).
[81] 'House of Commons Inquiry, 17 April 1826, *Papers Relating to the Conduct of Magistrates in New South Wales, in Directing the Infliction of Punishments upon Prisoners in that Colony*, Colonial Department, Downing Street.' 17 April 1826, 5.
[82] Ibid, 1.

When records were kept, an example of the usual order read as follows:

> Henry Bayne, attached to the Domain party, sentenced to receive twenty-five lashes every morning, until he tells where the money and property is, stolen from the house of William Jaynes, at Parramatta, by him.
>
> (signed) *H.G. Douglass*, J.P.

Henry Bayne suffered 25 lashes per day for a week before being sentenced to secondary transportation at Port Macquarie of one year.[83]

Time and again, proletarian defendants like Henry Bayne stood firm at the triangles, maintaining their silence and class solidarity by refusing to accede to the demands of the State. The Irish guerrilla leader and political exile, Joseph Holt, recalls the flogging of young Paddy Galvin, a young man of about 20 years age, at the hands of the 'flogging parson', Samuel Marsden.[84] In a widely quoted passage, Holt wrote:

> he was ordered to get 300 lashes. He got one hundred on the back, and you could see his backbone between his shoulder blades. Then the Doctor ordered him to get another hundred on his bottom. He got it, and then his haunches were in such a jelly that the Doctor ordered him to be flogged on the calves of his legs. He got one hundred there and as much as a whimper he never gave. *They asked him if he would tell where the pike were hid. He said he did not know, and would not tell.* 'You may as well hang me now', he said, 'for you never will get any music from me so'. They put him in the cart and sent him to the Hospital.[85]

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[83] Ibid.
[84] Joseph Holt, '[sic, i.e. The Life] and Adventures of Joseph Holt, 1800-1803' (Compiled from transcript in the Mitchell Library, 1800s, precise date of publication unknown) 293-295.
[85] (Emphasis added) Ibid.

In other words, the prisoner was tortured for confession. In this case, Governor King intervened and ordered that Galvin was to be flogged again and sent to Norfolk Island with a number of other rebels.[86]

In NSW during the 1830s and 40s, dissident convicts transported from across the Empire took a similar stance against flogging. The 'Upper Canadian' rebel convicts 'agreed to resist flogging as one man to the death'. In their defiance, they cited the Eighth Amendment to the American Constitution, forbidding 'cruel and unusual punishments'.[87] Like the Levellers two centuries before, these united in their silence against torture for confession. They were to endure lash after lash, until they reminded the State of what had been forgotten. In the 1820s, such incidents triggered a colonial inquiry, which prompted NSW Chief Justice Francis Forbes to enforce the right to silence in colonial NSW (see Chapter 7). And in 1824, the colony's chief law officer attempted to ensure that all prisoners were provided their procedural rights.[88]

It took some time, however, before the right to silence was provided to all prisoners. For instance, in 1825 in *R v Byrne, Wright and Murphy*,[89] Forbes CJ failed to provide a direction in respect to the prisoner's right to silence. The indictment in this case was brought under the notorious 'Waltham *Black Act'* which imposed the death penalty for over 50 offences including the robbery-related offence before the court.[90] Two co-accused pleaded 'guilty' while the third, James Murphy, maintained his innocence. A police constable alleged that Murphy had confessed to the offence in hospital, but

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[86] Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868* (The Harvill Press, 1988) 188-189.
[87] William Gates, *Recollections of Life in Van Diemens Land* (Lockport, c. 1850/1977).
[88] See the judgment of Forbes CJ in the case of *R v Stack and Hand* [1824] NSWSupC 15 (26 August 1824), *Sydney Gazatte* 2 September 1824.
[89] [1825] NSWSupC 25, *Sydney Gazette,* 30 June 1825.
[90] *1723* (UK) (9 Geo 1 c 22). For further commentary on the 'Black Act' see E.P. Thompson, above n 23. Note that the substantive provisions of the Act were repealed in July 1823, while 'arson against dwelling-houses' and 'shooting at a person' remained capital offences: see Leon Radzinowicz, 'The Waltham Black Act: A Study of the Legislative Attitude Towards Crime in the Eighteenth Century' (1945) 9(1) *Cambridge Law Journal* 56, 81.

the prisoner swore he had always maintained his silence. There is no mention of any direction given to the jury by Forbes CJ in favour of Murphy. The jury convicted the prisoner and he was hanged. In 1826, a prisoner charged with stealing clothes pointed out to the Supreme Court that the only evidence in his case 'rested solely on his confession' and that this had been 'obtained under a promise' from the prosecutor 'that no proceedings would be taken against him'.[91] Acting Chief Justice Stephen recognised that this inducement subverted the principle of voluntariness and directed the jury to acquit.

While procedural rights such as the right to silence were enshrined within the procedure enforced by the Supreme Court, in the Police Magistrate's Court they were frequently non-existent. Certain summary offences, such as the law of theft, retained a reverse onus of proof, which dispensed with the right to silence altogether.[92] In such cases, the mere allegation of theft created a burden of *dis*proof borne by the defendant. There are a number of instances in which unrepresented prisoners accused of summary offences retained their right to silence after receiving advice from concerned local citizens. These middle-class 'friends of the Court' appear to have commenced a volunteer community legal aid service at Parramatta Local Court in the 1840s and often faced arrest and imprisonment for their activism. The story of their civic radicalism is discussed in Chapter 5.

The right to silence was codified in Britain by the Attorney-General and Whig reformer Sir John Jervis in 1848. The 'Jervis Acts'[93] were adopted in NSW in 1850.[94]

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91 *R v Cossar* [1826] NSWSupC 20, *Sydney Gazette,* 18 March 1826.
92 Bruce Smith, above n 3 ('A' and 'B').
93 The 'Jervis Acts' were three separate Acts, otherwise known as, the *Indictable Offences Act 1848* (UK) (11 and 12 Vic c 42); the *Summary Jurisdiction Act 1848* (UK) (11 and 12 Vic c 43); and the *Justices Protection Act 1848* (UK) (11 and 12 Vic c 44).
94 *Imperial Acts Adoption and Application Act 1850* (NSW) (14 Vic No 43). See also, *Duties of Justices (Indictable Offences) Act 1848* (NSW) ss. 17 and 18, in which Victoria adopted Jervis' Acts, two years earlier than NSW.

As labour historian Christopher Frank explains, the story of the *Jervis Acts* begins in England in the 1820s. It was here that the codification of procedure was a parliamentary response to organised labour at a time when the early British labour movement was using the courts to advance the interests of workers. According to Frank, criminalisation of workplace discipline through the *Master and Servant Acts* saw organised labour respond by using lawyers to vigorously exercise common law procedural rights. Most such cases were determined by honorary 'gentlemen' magistrates, who generally possessed only a lay understanding of the law. They were no match for formally trained legal counsel, hired by the labour movement to defend workers against prosecution for infractions of workplace discipline. Following repeated frustration and humiliation of many employers and gentlemen magistrates at the hands of labour lawyers, the House of Commons organised an inquiry into the codification of procedural law so that employers and magistrates could re-establish their power over it. Such codification rendered procedural law easier to learn and administer and, according to Frank, readily facilitated the prosecution of workers in industrial England.[95] Arguably, however, this codification saw the implementation of rights-based processes that benefited workers and criminal accused as much as it saved the ruling class from embarrassment. As will be explained in Chapter 5, the implementation of the *Jervis Acts* in the colonies was very different to its implementation in the metropole. In the colonies, radical reformers understood the draconian effects such legislation could have on working-class defendants. Very soon after their enactment in NSW, the Acts were amended to enhance the rights of criminal accused so that, by the 1880s, criminal defendants and workers regularly defended themselves against prosecution and litigated their workplace rights in the courts.[96]

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[95] Christopher Frank, *Master and Servant Law* (Ashgate , 2010) 91.

[96] See Adrian Suzanne Merritt, *The Development and Application of Masters and Servants Legislation in New South Wales – 1845 to 1930* (PhD Thesis, Australian National University, 1981); see also Rob

Appeals to Procedural Rights

Procedure was often mocked or derided by criminal defendants in the early colony. In 1828, three bushrangers pleaded 'guilty' to various offences.[97] When asked by Justice Dowling whether they were 'aware of the consequences of that plea', one replied

> I don't care my Lord I am tired of my life and as they seem determined I am ready for it. We were tried and sentenced to death last Session and have been kept in chains ever since and now we are brought up to be tried again.[98]

Perversely, the lives of these prisoners were spared by procedural technicality. As the Attorney-General pointed out, the indictment was based on a form prescribed by a repealed statute. Dowling advised the prisoners to withdraw their plea and to take their chances or rather 'take your trial as you are charged with a capital offence'.[99] One replied, 'very well not guilty if you like'.[100] The other prisoners chimed in, 'oh anything you like, not guilty, you may try us the easiest way to yourselves'.[101] They were then offered the opportunity to challenge any prejudicial jury members who were at this time comprised of military men. The men replied with similar jocularity, 'O, its all the same to us who you have, a parcel of blackfellows, would do just as well!'.[102] In another case one convict defendant would say of his jurors, 'well there's a pretty set of fellows to be jury men they know more about a dish of ominey (convict

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McQueen, 'Master and Servant Legislation as 'Social Control': The Role of Law in Labour Relations on the Darling Downs 1860-1870' (1992) 10(1) *Law in Context* 123.

97 *Sydney Gazette* 28 May 1828.

98 Ibid.

99 Ibid.

100 Ibid.

101 Ibid.

102 *Sydney Gazette* 14 May 1827.

maize) a good deal - what should they know about a jury'.[103] And another, 'I like em all well enough'.[104]

Some prisoners, however, complained when fair trial procedure was not being followed.[105] In *Hughes and Donnelly* [1828],[106] the co-accused were accused of stealing. They complained to the Supreme Court that the matter had proceeded to Quarter Sessions without a committal hearing and they demanded to know the case against them. The complaint caught the attention of Justice Dowling who supported the co-accused and found that 'in all cases a prisoner had a right to hear the depositions given against him, and to be confronted with his accusers'.[107] He rebuked the local magistrates who had failed to follow correct procedure in this respect, but allowed the case to proceed. The prisoners were found guilty and sentenced to death. Due to their advocacy, however, their sentences were commuted to secondary transportation. Reporting the case, *The Australian* supported the accused, advocating the right of prisoners to be present when witnesses made their statements and depositions. It lamented that this was a 'rule of law…which has been very frequently departed from here' in the colony.[108]

Similarly, in *R v Marshall* [1801],[109] the defendant objected to 'the competency of the Court' on the basis of perceived bias against him. He proved that one of the military jurors, Captain Mackellar, had 'made use of opprobrious language' toward him aboard *The Harrington* during his passage, some days before the trial. Marshall also

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[103] *Sydney Gazette* 16 April 1827.
[104] *Sydney Gazette* 18 April 1827.
[105] 'Fair trial procedure' refers to that body of law discussed in detail in Chapters 6 and 7. A pertinent example is the case of *R v Peckham* [1841] NSWSupC 29 *Sydney Herald,* 18 February 1841, in which the accused was a convict at Newcastle who appealed his conviction to the Supreme Court in 1841, unassisted by counsel.
[106] NSWSupC 43, *The Australian,* 13 June 1828, *Sydney Gazette,* 13 June 1828.
[107] Ibid.
[108] 20 June 1828.
[109] NSWKR 1; [1801] NSWSupC 1, CCJ, *Minutes of Proceedings,* February 1801 to December 1808, State Records, NSW, 5/1149.

'took great exception to his treatment during the trial' where he was 'interrupted by some of the members of the court and haughtily and angrily told not to insult them'.[110] Marshall was convicted and complained to Governor King. The Governor intervened twice, and on the second time Marshall secured a quashing of his sentence on condition that he leave the colony. In other cases, prisoners objected to the misuse of evidence law, as illustrated in criminalised 'master and servant' proceedings. 'It is a queer court to allow you…to swear to what you were not present at',[111] remarked one convict labourer when the court permitted evidence from a master who was attempting to provide hearsay testimony.

In some cases, prisoners successfully argued for adjournments, suborned witnesses and cavilled with the technical accuracy of warrant and summons, which in some cases led to their own exoneration. Other prisoners argued for the right to counsel, some years before this right was implemented in the metropole in 1836.[112] In another case, five unrepresented prisoners aboard a prison hulk freed themselves by issuing and arguing a writ of *habeus corpus* before a Full Bench of the Supreme Court (see Appendix). Imprisonment after the expiry of sentences was a common procedural irregularity in the colony and prisoners often counted the days of their sentence and used the law to free themselves, unless they escaped.[113]

In 1841, five years after the *Prisoner's Counsel Act,* the murder case of *R v Lawler* saw an accused go to trial without counsel. The prisoner applied for counsel on the day of trial but met with opposition from the Attorney-General. Chief Justice Dowling supported the prosecution, informing the prisoner 'that he ought to have made his

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[110] C.H. Currey, above n 15, 27.
[111] See, for example, the trial of John Hall, 21 September 1829, Bench Books [Picton Court of Petty Sessions] 1829-33, SRNSW, Series 3315, Reel 671, SRNSW.
[112] It is noted that despite the existence of a right to counsel, there has never been a right to counsel provided by the State: *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292 (13 November 1992).
[113] Grace Karskens, '"The Spirit of Emigration": The Nature and Meanings of Escape in Early New South Wales' (2005) 7 *Journal of Australian Colonial History* 1.

application sooner'.[114] The trial proceeded without counsel and, perhaps in acknowledgment of the denial of counsel, the prisoner was acquitted. The adoption of the right to counsel is discussed in detail in Chapter 7.

The brutal irony of the right to counsel was that, despite its legal enshrinement, it did not operate in practice. It was a classic liberal right in the sense that it could only be enjoyed by those with the means to afford it. Nevertheless, many working-class defendants *did* organise legal representation by organising 'a collection' of pooled incomes from family members, co-workers and concerned local community members.[115] Just as commonly, however, defendants simply gave themselves over to the coercive power of criminal process. As one defendant implored the Bench in 1820, 'having no means to employ a solicitor I throw myself on the mercy of the court'.[116]

These cases show that some of the seeds of liberty within Australian common law and legislation were agitated by common people. The early development of rules of evidence and fair trial procedure in New South Wales was not simply the product of lawyers and judges. Rather, as the historical record presented here discloses, it was a contested process in which colonised and working-class peoples' demands that their procedural legal rights be enacted contributed directly and significantly to progressing due process.

[114] *R. v. Lawler* [1841] NSWSupC 6, *Sydney Herald,* 2 February 1841.
[115] Merritt, above n 96.
[116] *R v Dominick McIntire, Daniel Tierney,* June 1820, CCJ, SRNSW, COD451B, 2703 [SZ791], p. 586.

Giving Evidence – Defences

Unrepresented criminal defendants often used highly technical legal defences in facing prosecution in colonial courtrooms. Though not permitted to swear an oath until 1891, defendants frequently gave evidence in court in the form of an 'unsworn statement'.[117] Defendants often used unsworn statements to assert their innocence. From 1824, evidence from Aboriginal witnesses (defendants or otherwise, who were 'incapable of taking an oath') had the same status as an unsworn statement – tantamount to the status of the evidence of an accused in a criminal trial before 1891.[118] Such a statement required 'further corroborating evidence' in order to be received by a court.[119] This meant that Aboriginal and working-class defendants often co-operated in the courtroom to corroborate each other's evidence and defences. The significant point to be drawn here is that such demonstrations of solidarity assisted in the creation of a common-law right to a defence.

The legal principle forbidding accused from making their own defence derived from Coke's *Third Institute* (1628). The official rationale was that, where an accused was unrepresented, the court should act as counsel.[120] The rule also had the effect of excluding from evidence self-serving statements by guilty accused. In other words, if an accused could only rely solely on their own account of their innocence, their evidence was a presumed to be a self-serving fabrication. Contrary to legal doctrine, however, 'Minutes of Proceedings' from the Judge-Advocate's Court between 1788 and 1815 show that each of the military judges during this early period of the colony

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[117] Woods, above n 19, 365-387. See the *Criminal Law and Evidence Amendment Act 1891* (NSW) (55 Vic No 5) s. 6.

[118] Ibid. Note that Aborigines became British legal subjects and were considered competent to give unsworn evidence in 1837, see Chapter 7.

[119] This was the common law position, developed by Chief Justice Forbes in *R v Fitzpatrick and Colville* (1824) NSWKR 2; [1824] NSWSupC 3. This position was restated in the *Colonial Evidence Act 1843* (NSW) 'An Act to Authorise the Legislatures of Certain of Her Majesty's Colonies to Pass laws for the Admission in Certain Cases, of Unsworn Testimony in Civil and Criminal Proceedings' (6 and 7 Vic c 22).

[120] Sir Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason and Other Pleas of the Crown and Criminal Causes* (W. Clarke and Sons, c 1644/1809) 137.

– Collins, Bent and Atkins – allowed prisoners reasonable opportunity to be heard in their own defence. Prisoners also raised alibis and presented evidence to defend themselves, even though they were technically prevented from giving sworn evidence on their own behalf.[121] Accused took full advantage of these relaxed conditions in colonial NSW.

The legal status of these unsworn statements in NSW courtrooms was not made clear until 1834 in *R v Clarke* [1834],[122] a murder case in which an unrepresented accused pleaded self-defence. He was a constable of Liverpool District, obviously familiar with court process and the defences open to him as an operative of the law. Clarke told the court that the victim was 'a drunk' who had assaulted him in the course of his duties.[123] Justice Dowling ruled on the evidence 'that the statement of a prisoner could have no weight against that of a witness on oath'.[124] Dowling J nevertheless decided that, where a prisoner's statement 'was found consistent with other evidence and supplied certain links in the chain of circumstances, it might be fairly taken into consideration for his benefit'.[125] The jury acquitted the unrepresented accused. This remained the position on the evidence of an accused in NSW until the 1890s (see Chapter 7 for further discussion on this point).[126]

Self-represented defendants and convicts often relied on written defences. As Byrne notes, written defences were never as successful as personal legal representatives.[127] Nevertheless, numerous written depositions remain. They are testament to the comprehension of criminal proceedings by defendants and their participation in the making of criminal procedure. These, as well as references to Blackstone, Coke and

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[121] Castles, above n 3, 60.
[122] NSWSupC 50, *Sydney Herald,* 8 May 1834.
[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] See Woods above n 19, 373-386.
[127] Byrne, above n 2, 268.

procedural rules of evidence, attest to the engagement of colonised people with technical legal doctrine in order to defend themselves in court (see Appendix).

Warrigal Jemmy was an Indigenous man from the 'Loddon River' in the Port Phillip District. In 1846 he was arraigned before the Supreme Court, ten years after Aboriginal people became legal subjects in NSW.[128] He stood accused of an array of charges relating to attacking a shepherd and stealing his sheep. 'Borac me do it; nother black fellow', he responded and defended himself through legal argument.[129] Jemmy questioned the ability of the prosecution to identify him as the offender. He suggested that the offence could have been committed by '(an)*other black fellow*'. A jury convicted Jemmy in respect to only a handful of the charges laid against him. But, as one Protector of Aborigines later commented, Jemmy was 'convicted on the evidence of one man who had been speared through the leg with his back turned'.[130] Jemmy was sentenced to transportation to 'Old Man Cruel' where, after repeated escape attempts, he died without seeing his Country again. He was 35 years old.[131] While this case was something of a pyrrhic victory for Warrigal Jemmy, it was nevertheless the first time that an Australian Indigenous prisoner attempted to use criminal process to defend himself in a colonial courtroom. The reforms to criminal process that made this possible are discussed further in Chapter 4.

When prisoners raised defences in court, they often did so through a collaborative process that challenged and subverted dominant criminal procedure. Fellow prisoners, workmates, friends and acquaintances were all recruited to corroborate defences. The courtroom antics of Irish convicts were so successful that, as early as

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[128] *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSWSupC 35.
[129] *R v Warrigal Jemmy* 1846, VPRS 30/P/O, Unit 5, File 1-28-8, PROV; *Melbourne Argus,* 22 September 1846, p. 2; *Melbourne Argus,* 20 October 1846, p. 3.
[130] *Assistant Protector, Edward Parker to Chief Protector Robinson*, 12 December 1846, SRNSW, 46/1896 and 4/2779.3.
[131] Harman, above n 61, 118-123.

January 1798, Governor Hunter complained that 'they are all liars and perjure so much that it is impossible to gain a conviction'.[132] In the early nineteenth century, Judge-Advocate Richard Atkins had similar grievances. In exercising his 'judicial capacity', Atkins found 'the difficulties, almost insurmountable, of getting at truth among a sett (sic) of people used to every species of vice and Newgate chicanery is (sic) amazing'.[133] As the colonising project hurtled onwards, it seemed that very little had changed in this respect. By 1830, the *Sydney Gazette* remarked that 'witnesses can be obtained to swear anything that may be required of them'.[134]

The practice of prisoners' collaborative subversion frustrated criminal process again in the sheep stealing case of *R v Halloran and Waldron* [1834][135]. Two co-accused called a number of witnesses in their defence who failed to appear at trial. Fortunately for the Defence, a key Crown witness turned on the prosecution. The witness was a workmate of the accused who corroborated the defence from the witness box. The prosecutor had him declared a hostile witness and cross-examined him. But his evidence proved unassailable and all the prisoners were acquitted. Similarly, in *R v Kaine* [1830], another theft case, the prisoner simply called several friends to corroborate his alibi. He was acquitted.[136]

The crime of perjury was the foremost mechanism developed by the British common law to prevent the swearing of false evidence. Perjury prosecutions against defence witnesses were common.[137] In the Judge-Advocate's Court, witnesses found guilty of 'grossly and wilfully departing from deposition(s) on Oath' often received

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132 Governor Hunter, *HRANSW Vol. III*, 348.
133 *Journal of Richard Atkins, 1792-1810,* Microfilm Mitchell FM 3585, p. 21.
134 *Sydney Gazette*, 12 January 1830.
135 NSWSupC 85.
136 NSWSupC 2.
137 See, for instance, *R v Macarthy and others* [1835] NSWSupC 94, *Sydney Gazette*, 19 November 1835, in which the co-accused called their own witnesses. The accused were convicted and the witnesses charged with perjury.

imprisonment.[138] Forty years later, *R v Scott* [1841] saw two witnesses sentenced to three months imprisonment for obvious 'false swearing' in the Supreme Court.[139] In this case, the perjured witnesses succeeded in thwarting the conviction of their comrade Charles Scott, whom they knew would be hanged or deported to a place of secondary transportation if convicted.[140] As Willis J recognised, Scott was indeed 'very fortunate'.[141]

Friends and family of an accused who attempted perjury to save them from the death penalty faced more punitive sanctions. In *R v McGhee, Laycock and Dawson* [1816],[142] three co-accused called their friends as witnesses. Their evidence failed. They were charged with perjury and the co-accused in the substantive case were hanged. In response to the perjurers, 'His Excellency the Governor' was 'pleased to appoint, their bodies afterwards delivered up to be dissected and anatomized'.[143] Such a fate was designed to punish the friends and families of condemned men and women. As Peter Linebaugh has shown, in London, this practice was often violently resisted by onlookers at the gallows who rioted against and fought with 'body snatchers', officials and medical men who attempted to profit from prisoners' corpses.[144] There is evidence to suggest that these resistant behaviours continued in the colony.[145]

As will be discussed further in Chapter 5, evidence given by accomplices was known as 'approver' evidence. It acquired a special common law status in which accomplices were considered no more truthful than criminal accused. In most cases, approvers

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[138] See, for instance, the defendants in *R v Hecking* [1799] NSWKR 9; [1799] NSWSupC 9 (Dore JA), *CCJ Minutes of Proceedings,* State Records N.S.W., X905, 372-373.
[139] *R v Scott* [1841] NSWSupC (Port Phillip), *Port Phillip Patriot,* 20 June 1841.
[140] Ibid.
[141] Ibid.
[142] NSWKR 1
[143] In accordance with the '*Murder Act' 1752* ('An Act for Better Preventing the Horrid Crime of Murder') (UK) (25 Geo II c 37) s. 5. Frederick Garling acted as the Judge-Advocate in this case.
[144] See, Peter Linebaugh, 'The Riot Against the Surgeons' in Hay, above n 5; and Peter Linebaugh, *The London Hanged: Crime & Civil Society in the Eighteenth Century* (Verso 1991/2006).
[145] *Journal of Australian Colonial History, Escape: Essays on Convict Australia, Volume 7* (2005).

were used by prosecutors to inform on their partners in crime. Less understood, however, are the ways in which approver evidence was used as a form of collective protection against the death penalty. In *R v Baxter and others* [1822][146] one co-accused, Baxter, 'pleaded Guilty three several times; in order, he said, to exculpate his fellow prisoners, whose innocence he strongly asserted'.[147] Judge-Advocate Wylde refused to accept this creative inversion of the procedure and noted that such a plea 'neither would save the alleged innocent prisoners, nor be available to himself'. Baxter withdrew the plea and pleaded, 'not guilty'. He was convicted and sentenced to seven years transportation but by his advocacy, Baxter had managed to save a fellow prisoner, Gardner, who was acquitted. In *R v Oliver; R v Smith* [1821],[148] two co-accused defended themselves at trial. They elected to put the Crown to proof and 'totally denied knowing anything of what they were engaged with'[149] in relation to a cattle stealing offence. They were convicted on the evidence of an approver under the loose rules of proof that applied to property offences (see Chapter 5).

Cross-Examination

Cross-examination was the most common method of making a defence prior to prisoners being permitted to take an oath. It remains the key test of oral evidence to this day. In NSW, the right to cross-examination was afforded to prisoners almost without qualification. In one case, a convict, John Cullyhorn, was permitted to cross-examine Governor Phillip. Cullyhorn was charged with quarrelling with the Governor, after speaking 'to the Prejudice of His Honour Robert Ross, Esqr'. Governor Phillip alleged Cullyhorn said that Ross told him that, as a convict, he would be fed by the public store regardless of whether he worked. Phillip maintained

[146] *R v Gardner, R v Kelly, R v Maddock, R v Haggerty, R v Mullaton* NSWKR 13; [1822] NSWSupC 13, *Sydney Gazette,* 11 October 1822.
[147] Ibid.
[148] NSWKR 22.
[149] Ibid.

that the gentleman, Ross, simply would not say such a thing. In essence, the charge was a form of criminal defamation based on class bigotry. Nevertheless, at trial, Cullyhorn asked the Governor 'Did not Y[ou]r Ex[cellenc]y when you rose from the Table in Warmth, ask me, what the L[ieutenan]t Gov[erno]r said to me?'. Phillip denied this, insisting that he was offended at Cullyhorn's 'manner of speaking'.[150] Cullyhorn was convicted and flogged severely. Like the case of Warrigal Jemmy, the case of Cullyhorn demonstrates that fair trial rights existed and allowed colonised people an avenue for resistance in the face of a legal hegemony that enforced dominant colonial interests.

In other cases, prisoners (bushrangers in particular) took the opportunity of cross-examination to put their case to the court and sometimes shine a spotlight on poorly executed or corrupt police investigation (see Appendix for examples). An 1839 Legislative Council Report referred to failures in the reward system arising from Chief Constables naming themselves as 'informant' on arrest warrants in order to claim police rewards.[151] Police pay was conventionally lower than that of day-labourers and had, since the days of the London 'thief-takers' in the late seventeenth century, been supplemented by the reward system.[152] Under the reward system, courts collected revenue from fines and redistributed 'moieties' to police upon successful conviction and punishment of an offender. It was clearly a motivation for arrest, as Michael Sturma has demonstrated, showing how the abolition of moieties for drunkenness after 1850 corresponded with a significant decline in arrests for that offence.[153] When prisoners exercised their procedural right to cross-examination and challenged dominant forms of power and corruption, they upheld the interests of a

[150] Alan Atkinson, *The Europeans in Australia, Vol 1* (Oxford University Press, 2004) 96-7.
[151] *Report of the Committee on Police and Gaols* (Legislative Council, Votes and Proceedings, 1839) 56-7.
[152] David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales,* (Cambridge University Press, 1991) 155; and Gerald Howson, *The Thief-Taker General: The Rise and Fall of Jonathon Wild* (Hutchinson, 1970).
[153] Michael Sturma, *Vice in a Vicious Society* (University of Queensland Press, 1983) 72.

democratic majority in fair police process. These processes would ultimately be addressed by various Commissions of Inquiry held over the ensuing decades following the democratic franchise in NSW.

Reception of Defences by Finders of Fact

Successful defences relied not only on the awareness of an accused but on the receptiveness of decision-makers. One Honorary Magistrate, Henry O'Brien, paid more attention than other magistrates to defences raised by convicts. When masters prosecuted their servants, O'Brien frequently compelled them to attend court to undergo cross-examination by their accused workers. In one case, an accused servant requested an adjournment to allow him time to seek and call a witness in his defence.[154] Twenty years shy of the Jervis Acts – which implemented this process as a matter of course – O'Brien adopted such procedure into his routine practice.[155] In the case of James Brown, charged by his master with laziness and insolence and beaten for his trouble, the Bench Book records that 'the complainant [was] admonished and the case dismissed, with a request to Mr Hume not [to] strike his men again'.[156]

Character and Credibility Evidence

The use of character and credibility evidence by colonised and working-class peoples in colonial courtrooms reflected wider social economies of respect and recognition within the dominant culture. For a privileged few who belonged to the dominant culture, 'good character' was something to be born into or gained by extraordinary efforts to evade social circumstances. 'Bad character', on the other hand, was attained

[154] Trial of William Lupton, 21 April 1835, Bench Books [Yass Court of Petty Sessions] SRNSW, Series 3559, 4/5709, Reel 682.
[155] Atkinson, cites the trials of James Winters, Amay Conway and William Wilkinson as further examples of such practices: above n 2, 46.
[156] Bench Books [Yass Court of Petty Sessions], above n 156, 21 May 1835.

by most people in the early colony simply by existing. It was the issue of character that divided colonial society into two opposing political blocs of 'Exclusives' (free settlers, soldiers and administrators) and 'Emancipists' (ex-convicts or those who had inherited the 'convict stain'). Indeed, good character was a condition of emancipation, with the Government General Order requiring that all ticket holders demonstrate that they were 'industrious, sober, honest and truly meritorious'.[157] In 1805, the *Sydney Gazette* reported that:

> Character is as essential in civil society as is morality to true religion. As we are studious of preserving it, so must we expect to rank in the esteem of the world, and though credit may be impaired and even annihilated by misfortune, yet it may maintain its independence amid surrounding difficulties…Upon character depends every social comfort to the subordinate; it forms his very treasure, bereft of which he must be poor indeed.[158]

With the growth of mercantile and agrarian capitalism within the colony, however, wealth did not discriminate between good or bad character and in many cases favoured the latter. By the 1840s, aristocratic discourses on hereditary class characteristics were slowly giving way to forms of respectability based strictly upon liberal values such as the ability to accumulate capital through individual effort and industry, as well as the corresponding ability to comport oneself within polite society. This meant that by mid-century working-class and other colonised peoples could acquire good character by their wealth and status, despite their 'convict stain'. Common to both aristocratic and liberal understandings of character, however, was the notion of social class as *the* determining characteristic.

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[157] Government General Order, 9 January 1, 813, *HRA*, Vol. IV*,* Series I, 142.
[158] *Sydney Gazette,* 16 December 1805.

Of course, character evidence reigned from above and newspapers were awash with criminal law reports in which 'the Judge-Advocate expressed the deepest regret that a man who had for a length of time supported a fair character, should at length plunge himself into crime'.[159] As the law men throughout the colony recognised, good character was worth more in Australia 'because it was more difficult to be met with'.[160] So sought after was respectability and good character that theft of dignified and expensive clothing became a leading means to obtain a facade of respectable character.[161] Just as some criminal defendants stole to obtain 'good character' over time, many prisoners learnt to use character evidence to their advantage in colonial courtrooms.

Prisoners frequently invoked the dominant discourse of character to defend themselves. As legal historian John Beattie has found, in London before 1850, most defendants without lawyers relied on witnesses to speak of their good character, rather than challenging the prosecution case in great detail.[162] Other legal historians have made the more obvious point that lay understandings of character evidence were well developed through experiential contact with the law.[163]

In one of the first reported cases from the NSW colony, a prisoner, Isaac Nicholls, drafted and delivered his own defence, relying on character evidence.[164] He called witnesses to support his character, criticised the information against him and observed that his prosecution was premised upon hearsay evidence. Judge-Advocate Dore preferred hearsay evidence to the evidence of a convict attaint and Nicholls

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159 *Sydney Gazette,* 22 June 1805.
160 William Charles Wentworth, *Statistical, Historical and Political Account of the Colony of New South Wales*, Part IV (G & W.B. Whittaker, 1819).
161 Elliot, above n 35, 193-195.
162 JM Beattie, 'Crime and the Courts in Surrey', in JS Cockburn (Ed), *Crime in England 1550-1800* (Princeton University Press, 1977) 170.
163 Bruce Smith, above n 3; Norma Landau, 'Summary Conviction and the Development of the Penal Law' (2005) 23(1) *Law and History Review* 173; and Langbein, above n 3.
164 *R v Nicholls* [1799] NSWKR 3; [1799] NSWSupC 3, *CCJ,* Minutes of Proceedings, State Records N.S.W., X905, pp 102-114.

was convicted and sentenced to 14 years secondary transportation.[165] Similarly, in June 1826, when a defendant at Bathurst was arrested by Mounted Police, he defended his presence in the area by avowing that 'Mr Terry (sic) could swear to his character'. Nicholls was nevertheless sentenced to 50 lashes and returned to the Barracks.[166]

In 1820, indentured worker, Peter McCue, attempted to mitigate his sentence by explaining his own offending or 'poor carickter' by reference to his social circumstances: '(I) hope that my present situation be my excuse', he said. He also attempted, however, to impugn the character of the key prosecution witness, who he said had given 'melisious evidence against' him at trial. McCue portrayed the witness, 'Mary Jacob', as having led him toward criminality while she was 'a fellow servant in the house with me in the imploy of Mr Faithful', when he 'formed a criminal connection with her with which connection caused me to draw the principle part of my wages of my master to give to her'. His lack of concern for impugning his own character by adducing this evidence shows that he probably understood the complex nature of character evidence in the courtroom and hence, the benefit of this evidence to his own case.[167]

Sometimes defendants referred to the evidence of Aboriginal people to corroborate character evidence. As discussed above, Aboriginal witnesses could not give sworn evidence and the value of such evidence was technically lower than the sworn evidence of European witnesses (as will be discussed in Chapter 7). To the extent that such evidence was relied upon by European witnesses, however, there appears to have been a begrudging respect for the 'simple truth' asserted by Aboriginal

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[165] Currey claims that Dore 'had become warped by the influence of the military oligarchy': above n 15, 22; see Evatt, above n 21, 26.
[166] Trial of unknown defendant, 27 June 1826, SRNSW, Bench Books [Bathurst Court of Petty Sessions], Series 2772, 2/8323, Reel 663.
[167] *R v Peter McCue, John McKay*, June 1820, CCJ, SRNSW, COD451A, 2703 [SZ791] 4, p. 60.

judgments of character – judgments so clearly informed by a culture premised upon highly sophisticated forms of sociality.[168] In March 1814, Caleb Wilson was tried for 'unnatural assault' or buggery. He called two defence witnesses to give evidence in relation to the credibility and character of the prosecutor. 'The prosecutor has always gone ever since I have known him by the name of Whangyjemmy - it means lying James', he said. As Wilson explained, 'it is a native name (and) when a Black man thinks you are telling him a lie he says 'Whanga''.[169] The second witness recalled that the prosecutor went by the name of 'Whanga Cunningham' and that 'the children call him by no other name'. Through his deft use of evidence law and the sagacity of Aboriginal judgments of character, the defendant convinced the jury of his innocence and was acquitted. In another case, prisoners knew that Aborigines would be called as witnesses to their crime in slaughtering a bullock for food. Weighing up the strength of their case at the crime scene, one prisoner reasoned that 'the blacks' word would be taken before ours, and that we had better kill another bullock and produce the hide as that belonging to that which the blacks saw us cutting up'.[170] These examples also show that while criminal process classified Aboriginal evidence and witnesses as inferior and subhuman, working-class Europeans recognised the undeniably human and truthful value of Aboriginal witnesses. These events highlight a moment of solidarity between colonised and working-class peoples against criminal process.

The regularity with which colonised and working-class peoples relied upon character evidence in court was an important step in the evolution of character evidence as a major exclusionary rule and mitigating factor involved in criminal process. Its use by

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168 W.E. Edwards, *An Introduction to Aboriginal Societies, 2nd Ed.* (Thomson, 2005).
169 *R v Parker and Donavan* [1829] NSWSupC 59, *The Australian,* 30 September 1829.
170 Ibid.

defendants and convicts forced law reform on related issues such as the doctrine of 'felony attaint'.[171] This issue is explored in more detail in Chapter 7.

Complaints Against Masters and Appeals to Rights

Masters met with less resistance by their servants when they treated them with respect and accorded them 'their rights'. This was one lesson in class relations that servants taught their masters. Servants, both free and indentured, accomplished this by appealing to legal authority and hierarchy. Complaints about work and prison conditions were common. At Port Macquarie, a convict filed a complaint with the Commandant about conditions, saying 'if that does not do, I'll write to the Governor'.[172] Two other convicts had their overseer punished for corruption and another attempted to expose camp conditions by writing to the *Sydney Monitor*.[173] Yet it was common for convicts to suffer prosecution for 'neglect of duty' and 'insolence' as well as innumerable other work discipline offences if they protested against their masters. (See Appendix for examples).

Less common, but perhaps more significant for present purposes, was the use of procedure in court to complain about masters. This was always a courageous act, especially given the procedural regime of criminal sanctions and punishment that lay in wait for those prisoners whose complaints failed. In 1824, for instance, the Bathurst Bench of Magistrates gave three assigned servants of George Innes 25 lashes each for 'making a groundless complaint against their master'.[174] Newcastle

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171 Felony attaint' was the legal status ascribed to convicted felons (convicts) that rendered them unable to litigate, hold property and enjoy a range of civil and political rights as a result of their convict past.

172 Trial of James Stapleton, 4 July 1831, SRNSW, Bench Books [Port Macquarie Court of Petty Sessions] Series 3331, 4/5637, Reel 2723.

173 See respectively, the trials of Edward James Gray, 10 and 12 March 1832, *ibid*; and the trial of Jams Hopkins 16 May 1834, SRNSW, Bench Books [Port Macquarie Court of Petty Sessions] Series 3331, 4/5638, Reel 2724.

174 David Roberts, "A sort of inland Norfolk Island'?: Isolation, coercion and resistance on the Wellington Valley Convict Station', (2000) 2(1) *Journal of Australian Colonial History* 50, 67.

Bench was similarly notorious for punishing unsuccessful complainants automatically and without formal charge.[175]

Sometimes, however, violent protest against masters outside of court was legitimated by court process. For example, Daniel Barry was prosecuted for assault and misconduct after he struck his master, saying 'it is very unthankful to make money for another person'.[176] He was reprimanded and discharged, with the court confirming that Barry had indeed been poorly treated by his master, Henderson, a small landowner. The bench found 'the evidence contradictory' and that 'Mr Henderson should have given the prisoner into the constable's charge instead of taking the law into his own hands'.[177] (See Appendix for further examples.) So frequently did the law legitimise violent defensive conduct and protest that, according to Byrne, 'ordinary people were aware of permissible levels of violence with justifiable causes'.[178]

Demands for social and economic rights were asserted in courtrooms often using the procedures of criminal law. It was the workplace that generated most disputes. As Atkinson has found, at the Scone Bench in 1833, there were 210 complaints from masters, constables and overseers against convict servants exclusively for work discipline offences.[179] Only six civil complaints were received from convicts, although all succeeded.[180] Adrian Merritt and Rob McQueen have each shown that this trend reversed in the period following the establishment of representative democracy in

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175 Atkinson, above n 2, 36.
176 Trial of Daniel Barry, 15 April 1826, Bench Books [Liverpool Court of Petty Sessions], Series 3117, ML A1499, Reel 2682.
177 Ibid.
178 Burn's Manual defined 'assault' and 'battery', as, 'an attempt to offer with force, and violence to do corporal hurt to another, striking at him with or without a weapon, presenting a gun at him at such a distance to which the gun will carry, pointing a pitchfork at him standing within reach of it or by holding one's fist at him or by any such like done in an angry or threatening manner': above n 17, 173. See also, Byrne, above n 2, 88.
179 Atkinson, above n 2, 35.
180 Ibid.

NSW. After 1856, workers brought far more legal claims against their masters than were brought against them for work discipline offences.[181]

In 1834 at Stonequarry, one master prosecuted his convict servant, Thomas Coleman, for insolence. The master informed the court that

> on account of the prisoner idling away his time…[I] ordered his tea and sugar to be stopped for that week. He remonstrated a good deal and *insisted that he had as much right to it as anyone else*, and when … [I] pointed out to him that *it was entirely a matter of favor (and not of right) his receiving it at all*, he was very impertinent.[182]

Coleman spent 14 days in gaol and was discharged 'by consent of his master'. The phrase 'as much right as anyone else' is a classic statement of egalitarianism. It appeals to the operation of a 'moral economy' within the colony and within power relations between classes both in the workplace and in the prison. This same idea is found again in the evidence of another convict servant, Charles Evans, who risked punishment to complain to the Police Magistrate's court about his poor treatment by his master. He informed the court that 'no gentleman would have allowed him to remain in his hut three days sick living on salt junk and bran'.[183] Yet another master gave evidence to the Police Magistrate at Picton that his servant had said 'I warn you to have a pr. Of shoes, a shirt and a pair of trowsers, ready for me by the next court day, or I will complain to Major Anthill'.[184] Anthill gave him six months on a chain-gang for insolence.

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[181] Merritt; above n 96; R McQueen, above n 96.
[182] (Emphasis added) 14 May 1834, SRNSW, Bench Books [(Stonequarry) Picton Court of Petty Sessions], Series 3315, 4/5626, Reel 672.
[183] Trial of Charles Evans, 6 November 1833, SRNSW, Bench Books [Invermein Court of Petty Sessions], Series 3086, 7/90, Reel 677.
[184] Trial of James Briars, 17 September 1832, SRNSW, Bench Books [Picton Court of Petty Sessions], Series 3315, 4/7573, Reel 672.

Some convict-servants attempted to use their labour power to bargain for more humane penal process. George Durman was a convict overseer and skilled worker with the magistrate William Windeyer. He was charged with insolence after trying to protect a fellow convict worker. He told his master 'if you flog that man…I will never do you a sixpence worth of good'.[185] Samuel Bowman, according to his master Charles Throsby, 'refused to continue the labour assigned to him to mind the pigs, he refused to leave the premises till he'd got something to eat and went away swearing to throw stones at the pigs in a disrespectful manner and made away with five yards of Parramatta Cloth'.[186] The taking of the cloth in this context is clear evidence of the operation of a moral economy – 'blood for blood', as moneyless exchanges were known.[187] Just as the hungry silk-weavers and rag-pickers of Spitalfields took 'fents, noils, thrums, rags and ends' from employers when times were tough,[188] taking cloth at Parramatta was understood as remuneration for unpaid and unfair working conditions.[189] Another of Throsby's men, John Dunn, was brought before the Bench in 1824 after he refused to comply with a command, saying 'he would be damned for it'. He also 'grumbled disrespectful language' and had 'attempted to throw a stone at him previously'. But, before Throsby could get to court to prosecute his servant for insolence, he realised that 'the prisoner followed for the sake of preferring a complaint'. Dunn lodged his own complaint against Throsby but nevertheless received 50 lashes.[190] Smaller landowners faced similar complaints from their indentured servants in much closer quarters. At Goulburn, small landholder, Peter Stuckey, prosecuted his servant, George Daniels for

185 Trial of George Durman, 20 March 1835, SRNSW, Bench Books [Dungog Court of Petty Sessions], Series 2966, 4/7569, Reel 667.
186 Samuel Bowman, 8 January 1827, Argyle Police district Magistrates Records Berrima-Throsby Park, Mitchell Library, B773, Reel CY 336 – Seq. 2.
187 Linebaugh, above n 144, 256-287.
188 Ibid.
189 In Australia, this practice has been known colloquially as the making of 'foreign orders'. See, for example, Jesse Adams Stein, 'Making 'Foreign Orders': Australian Print-workers and Clandestine Creative Production in the 1980s' (2015) 28(3) *Journal of Design History* 275.
190 Trial of John Dunn, 29 March 1824, SRNSW, Bench Books [Liverpool Court of Petty Sessions], Series 3117, ML A1499.

insolence. He alleged that Daniels had refused to work, saying 'how can you expect me to work without shoes and (that) his feet were all cut for want of them'. In court, Daniels agreed that he had complained that he and his fellow convict workers had 'no quart pots or cooking utensils and they had no hut to live in'. As Daniels put it, 'he would sooner be hung up a tree than stop with him'.[191] By asserting his rights, Daniels initiated a bargaining process allowing him to ventilate his complaints and those of his fellows in a public forum. As a result, Stuckey agreed not to punish Daniels. In 1830, one of John Macarthur's servants, James Andrew, 'refused to work until he would be supplied (sic) with a bed and blanket'.[192] The Macarthur family were the largest landholders in the colony and they appear to have received this message from their workers loud and clear. By 1837, James Macarthur (son of John), reported to one colonial committee that it was in the financial interests of masters, 'where a man behaves well, to make him forget, if possible, that he is a convict'.[193]

In some cases, convict workers appealed to regulations in order to justify and bargain with their employers. Appeals to regulations frequently involved disputes about remuneration through rations. In 1833, two brickmakers refused to commence work until their government-regulated tea and sugar ration was restored.[194] In four other cases, men argued in court that, if private masters employed them on meagre Government rations, they could not work longer than Government hours.[195] Six men refused to leave their huts to work, 'as they had not got their beefs'.[196] Fourteen men went on strike and 'combined' at Musswellbrook when their masters failed to provide

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191 Trial of George Daniels, 28 January 1828, SRNSW, Bench Book [Goulburn Court of Petty Sessions], Series 3031, ML Mss 2482 part.
192 Trial of James Andrew, 3 May 1830, SRNSW, Bench Books [(Stonequarry) Picton Court of Petty Sessions], Series 3315, 4/7572, Reel 671.
193 Evidence of James Macarthur before the Select Committee on Transportation (House of Commons), 1837 (518) XIX, 19 May 1837, p. 164.
194 Trial of John Harper and Joseph Coote, 5 January 1833, Liverpool NSWSA 5/2697.
195 Trials of Thomas Collins, 8 May 1824, Newcastle, Mitchell Library MSS 2482/5; James Mayor, 10 July 1824, Liverpool, Mitchell Library A1499; John Johnson 14 July 1835, George Groom 22 October 1835, SRNSW, Bench Books [Yass Court of Petty Sessions], Series 3559, 4/5709, Reel 682.
196 25 July 1826, Bathurst, Mitchell Library, F32.

wheat rations. They were offered rye instead but refused. In court, they justified their action by appealing to law and regulations. 'He did not take the rye', said William Clegg, 'because it is not in the regulations'.[197] Colonial historian Erin Ihde has documented similar refusals to eat substandard rations by both soldiers and convicts.[198] A majority justified their conduct by reference to 'the regulations'. Similarly, the amount of labour time convicts were required to work, followed established customary practices. Benjamin Ray, a convict, understood the customs of labour time on public works projects. He approached his overseer and said 'do you see that, after that's down I'll work for no man'.[199] Working-class men and women justified their impertinence by reference to established law and custom.

Middle-class reformers made it their 'civilising mission' to reform convict felons. Despite their 'good intentions' however, they were beset by difficulties arising from the social relations of production.[200] Edward Smith Hall and Father John Therry were two such 'reformers' whose accounts of daily interactions with their own servants and labourers were often uneasy. 'I shall not work a bloody stroke, for you or bloody Father Terry (sic) until I get a jacket',[201] said James McLaughlin to his master at Yass. Aboriginal Protector and missionary, Reverend Lancelot Threlkeld, had similar problems when his assignees refused to eat bad meat. He told the court at Newcastle that 'one and all' of his men dumped a bag of their meat ration on his doorstep, saying 'they would make me a present of it'.[202] Some masters, however, appear to have learnt from their relationships with colonised and working-class peoples that

197 Trials of William Clegg and John Thomas (and 12 others) 31 July 1832, SRNSW, Bench Books, [Muswellbrook Court of Petty Sessions], Series 3204, 4/5599, 670.
198 Ihde, above n 10.
199 Trial of Benjamin Ray, 2 April 1832, SRNSW, Bench Books [Port Macquarie Court of Petty Sessions], Series 3331, 4/5637, Reel 2723.
200 For a general discussion of 'the problem of good intentions', see Stephen Gray, *The Protectors: A Journey Through Whitefella Past,* (Allen & Unwin, 2011).
201 Trial of James McLaughlin, 1 July 1836, SRNSW, Bench Books [Yass Court of Petty Sessions], Series 3559, 4/5709, Reel 682.
202 Trial of Seven Men, 27 July 1838, SRNSW, Bench Books [Newcastle Court of Petty Sessions], Series 3233, 4/5608, Reel 2722.

there was a connection between poor treatment and uncooperative behaviour. Utilitarian prison reformer Alexander Maconochie implored his fellow reformers to realise that 'they (the prisoners) have their claims on us also'.[203] Maconochie responded to calls for rights from below and developed 'the Marks System'. 'Let us offer our prisoners, not favours', he said, 'but *rights*, on fixed and unalterable conditions'.[204] In practice this meant 'just wages', which Maconochie thought 'will equally stimulate to care, exertion, economy and fidelity'.[205] By making sustained 'claims' on their masters through complaints and appeals to rights, labourers were sometimes successful in reforming their masters' harsh and exploitative practices of labour and discipline.

Tickets of Leave

The ticket of leave system is another widely discussed penal procedure within Australian colonial history.[206] Tickets of leave were phased out in NSW, along with convictism, following the end of transportation between 1838 and 1840. It has been replaced by the modern system of parole, which nevertheless bears a distinct resemblance to the kinds of extra-carceral surveillance availed by the ticket of leave system. Developed by Governor King in 1801, the ticket of leave system operated as a system of privileges, allowing prisoners early release or simply free time, usually to perform their own agricultural work.[207] The system was premised upon the executive or 'royal' prerogative of mercy. This meant that every ticket of leave required the authority of the Governor, although the scheme was administered almost entirely by

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[203] Alexander Maconochie, *Report on the State of Prison Discipline in Van Diemen's Land* (available online at National Library – awaiting library card to check page reference).
[204] Maconochie, encl. 7 in Gipps to Russell, Feb. 25, 1840, *HRA*, Vol. 20, p. 544.
[205] Maconochie, encl. 2 in Gipps to Russell, *HRA*, Vol. 20, pp. 532-533.
[206] See, for instance, Stephen Nicholas, *Convict Workers: Reinterpreting Australia's Past* (Cambridge University Press, 1988)*;* Babette Smith, above n 38*;* Neal, above n 152; AGL Shaw, *Convicts and The Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and other parts of the British Empire* (Melbourne University Press, 1966).
[207] Ibid (Shaw) 73.

magistrates. Tickets of leave were, in law, a form of 'royal pardon'.[208] There were three varieties of pardon: absolute (restoring citizenship within the Empire); conditional (restoring citizenship within the colony); and ticket of leave (freedom from assignment and forced labour while continuing to serve a sentence of transportation). Tickets expired after one year, after which they were required to be renewed. They could be revoked by a court at any time and were designed to ensure surveillance of the prisoner outside the prison and the assignment system. It was standard practice for the Governor to issue tickets of leave after a prisoner had served four years of a sentence of transportation (which ranged in duration from seven to fourteen years and up to life in some cases). Owing to the scarcity of white women with the colony, many female convicts were granted tickets of leave on arrival.[209]

Demands for tickets of leave grew into expectations. Convicts clearly felt entitled to sentencing concessions and demanded ticket of leave pardons as a matter of right. One convict, thinking that his ticket was due, trudged to the nearest magistrate's court to tell the bench he had been 'humbugged long enough' and that his master 'should bounce him no longer'.[210] One of John Macarthur's convict assignees, Thomas Hoare, left his station for the same reason. Macarthur withheld his ticket for six months 'as a caution to others who might be inclined to behave in a similar manner'.[211] By simply withholding the ticket of leave (a procedural right held at the discretion of the master), the master was forced to acknowledge that the ticket was a *right,* albeit subject to suspension.[212]

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[208] Woods, above n 19, 6.
[209] Hughes, above n 86, 184 and 307.
[210] Trial of Samuel Davis, 16 April 1834, SRNSW, Bench Books [(Stonequarry) Picton Court of Petty Sessions], Series 3315, 4/5626, Reel 672. See also, Atkinson, above n 2, 35.
[211] Ibid (Trial of Samuel Davis) 6 September 1832.
[212] John McLaughlin, *The Magistracy in New South Wales, 1788-1850* (PhD Thesis, University of Sydney, 1973) 344.

On average convicts in NSW worked around five and a half days per week compared with the standard six-day working week for slaves and free labourers across the Empire.[213] The prisoner, Edward Gill, told a court in the 1830s that 'I had been working all week like the rest of the men and took out the sheep on Sunday to oblige my master. On Monday when I told Mr Free [the overseer] I would not work, I thought I had a right to half of that day having been at work [also] all day Saturday'.[214] Colonial historian Babette Smith has linked these expectations of fairness to the modern labour law doctrine of 'time in lieu'. Clearly, there is yet another link here between the reform of criminal process and the evolution of early labour law. Smith also cites the example of convict James Brown, who told an interrogator that 'it is not a practice to work the men on Sunday, not latterly. I have known wheat to be cleaned and bagged on a Sunday about 18 months ago, for which the men were to be paid extra. This occurred three or four times'.[215] Brown is referring here to the practice of 'time of their own', a sub-category of the ticket of leave. Smith concludes that this sort of complaint is evidence of the earliest practice of 'penalty rates'.[216] This is further evidence of the reform of criminal process through the development of labour law.

Complaints Against Police and Appeals to Rights

Like the experience of labour, the experience of being policed and prosecuted at work motivated many colonised and working-class peoples to litigate and express their civil rights. Most such cases involved disputes over the legitimacy of arrests and possession of valid search warrants by police. Cases of complaints against police occurred from about 1810 onwards, coinciding with the establishment of the Police Magistrates' Court. In this early period, the records show that the Judge Advocate

[213] Nicholas, above n 205.
[214] Babette Smith, above n 38, 43.
[215] Ibid, above n 38, 43.
[216] Ibid.

and magistrates were not particularly concerned by the absence of police warrants, particularly during the search of dwellings. Lack of a warrant certainly did not render a search or evidence invalid.[217] But in *R v Ballard and others* [1813][218] three gentlemen were charged with 'assaulting a constable in the execution of his duty and with forcibly securing and setting at large' their friend who had been arrested. In their defence they asserted that no charge had been laid against the prisoner and no reason given for his arrest. Bent JA acquitted all four men. This case, and others like it, set in train new practices of transparency amongst the police force so that by 1815-16 constables in the courtroom began to refer to 'proceeding due to instructions' from a magistrate when conducting searches.[219] For example, in 1817 Constable James Lane was making an arrest for disorderly conduct when, as he recalled, 'we were interrupted by Archibald Wood', a resident of The Rocks, 'who desired the woman (suspect) not go with me unless I had a warrant and she was a free person who had no right to be confined without one'.[220] Another 'lag' told a constable that by conducting a search without warrant he was 'exercising a degree of tyranny unauthorised by the magistrate'.[221] (See Appendix for further examples.)

In *R v McMahon* [1821][222] the accused was a worker who had been indicted for assaulting a constable. McMahon defended himself by asserting that the arrest was unlawful because the constable had attempted to arrest him without warrant or any other reason. In this case, the constable was found to be acting 'under the verbal order of a Magistrate…for the disturbance and a breach of the peace'. For his impertinence, the defendant was convicted and sentenced to six months imprisonment, a £20 fine and a good behaviour bond for two years. Nonetheless, the

[217] Byrne, above n 2, 165-167.
[218] NSWKR 7; [1813] NSWSupC 7, CCJ Minutes, 1813-1815, SRNSW, 5/1121.
[219] See, for instance, the trials of Charles Wright and George New, 31 January 1816, SRNSW, Proceedings [Police Magistrates' Bench, Sydney], Series 3402, 9/2643), Reel 2667.
[220] *R v Archibald Wood*, CCJ, January 1818, SRNSW, COD441, 2703 [SZ781] 21, 293.
[221] Trial of James Boyle, 17 February 1837, SRNSW, Bench Books [Port Macquarie Court of Petty Sessions], Series 3331, 4/5639, Reel 2724.
[222] NSWKR 4; [1821] NSWSupC 4, *SG,* 3 March 1821.

issues raised by the accused in this case compelled the Judge Advocate to establish a code of principles for arrest for the first time in the colony. The court told the local constabulary that 'a constable was so far charged with the preservation of the public peace' and no more, so 'as to be authorised to arrest any person in the actual breach of it, and to keep him in custody until he could conveniently be brought before a Magistrate'.[223] McMahon had suffered so that the court would impose basic limitations on police powers.

By 1847 civil rights and liberties, in respect to police, had become common knowledge amongst workers and colonised and working-class peoples. In that year an unknown Aboriginal farmhand stood up to a local constable who attempted to arrest and detain him on insufficient evidence and without charge. The farmhand refused to be arrested and even 'threatened' the 'constable…with action for false imprisonment'.[224] The worker complained to his local member who told the Legislative Council that 'the employment of the aboriginal natives' had meant that some showed 'perfect acquaintance with the laws and customs of the colony'.[225]

Plebeian Radical Resistance in Court (Language and Behaviour)

At the time of colonisation in NSW, European visitors to England were shocked by the lack of deference to authority shown by the working class.[226] This attitude certainly appears to have been transported to NSW along with the convicts. The sheer number of summary 'insolence' cases is testament to their resistant attitudes. Some historians have taken a different view, explaining how the success of the

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223 Ibid. In the false imprisonment case of *Agar v. Holmes* [1851] NSWSupCMB 1, *Sydney Morning Herald (SMH)*, 28 July 1851, Stephen CJ, Dickinson and Therry JJ confirmed that when, 'there is no allegation of expressed manifest intention to commit a breach of the peace, nor of terror or violence, nor of such excessive amount of violence as to create a reasonable apprehension of a breach of the peace. The constable might have turned the plaintiff out, and there left him'.
224 *Maitland Mercury,* 19 June 1847, 3, and *SMH* 19 June 1847, 3.
225 Ibid.
226 E.P. Thompson, *The Making of The English Working Class* (Penguin, 1963) 66.

colonising project in NSW created a national character defined by 'obsequiousness'.[227] This thesis has chosen to avoid aggrandizing arguments about consciousness and national character, instead focusing on specific and documentable forms of resistance that specifically contributed to the reform of criminal process in the interests of colonised and working-class peoples. One of the primary modes was the 'lip', 'cheek' and 'saucy' language directed by subjugated defendants toward judicial officers, prosecutors and prosecution witnesses in colonial courtrooms.

Colonised and working-class peoples used language to comment on criminal procedure in the courtroom in a variety of ways. Their comments mainly consisted of insubordinate language coupled with behaviour - a 'symbolic interaction'[228] with court process in defiance of unfair procedure. A less common but perhaps more effective deployment of language by the subjects of criminal law happened through appeals to procedural rights and an engagement with the hegemonic discourse of law. Both forms of interaction are explored here.

In 1827 a convict, William Potts, appeared before the Sydney Bench of Magistrates. A magistrate asked 'What is the prisoner?', meaning was he bond or free. Potts answered 'I am a man'. He was sentenced to seven days solitary confinement.[229] Potts defied his effacement through criminal process by asserting his humanity and legal subjecthood.

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[227] See, for instance, Alastair Davidson, *The Invisible State: The Formation of the Australian State, 1788-1901* (Cambridge University Press, 1991). For these historians, the success of the colonising project in subordinating colonised and working-class peoples also serves to explain the failure of any truly democratic social revolution in Australia.

[228] See Herbert Blumer, *Symbolic Interactionism* (University of California Press, 1969). Examples of symbolic interactionist approaches applied to the criminal law include, Pat Carlen's, *Magistrates' Justice* (Martin Robinson, 1976); and more recently, Kathy Mack and Sharyn Roach Anleu, 'Performing Impartiality: Judicial Demeanour and Legitimacy' (2010) 35 *Law and Social Inquiry* 137, 141; see also Kathy Mack and Sharyn Roach Anleu, 'In-Court Judicial Behaviours, Gender and Legitimacy' (2012) 21(3) *Griffith Law Review* 728, 730.

[229] *Sydney Monitor*, 10 December 1827.

Attempts to humanise court process can be seen in other cases involving protest over sentencing. The classic tale of thirteen-year-old Denis Maloney, caught stealing currants and sitting on the grass during work hours, is one such example. The child was ordered to receive 50 lashes. He was taken to a nearby paddock and flogged by soldiers. A number of women in an adjacent yard observed the punishment. They screamed at the soldiers that they were 'killing the boy', calling them 'bloody murderers'.[230] The women were brought before the camp commandant, Major Sullivan, who acted as an honorary justice. He charged the women with 'abusing the authorities in the execution of their duty'. Upon being removed from the dock, one of the defendants, Catherine Donohue, 'laid hold of a bottle and threw it at Major Sullivan's head whilst sitting on the bench, with all her power'. The bottle landed 'a great blow' on Sullivan's chest, while 'the rest of the prisoners at the bar made a rush from it and one of them Ann Cahill attacked Mr. McIntyre (the surgeon who attended the flogging)'.[231] An iron bar was found on the floor of the dock following their removal from the court. In the same month, William Shea and another prisoner were charged with larceny. They smuggled four half-bricks into court. Upon entering the dock and facing the magistrate, they let fly with the projectiles. One of the bricks hit the magistrate, Major Benjamin Sullivan, in the hip and injured him.[232]

In a similar case, an overseer alleged that his convict servant had said 'that a prisoner was better than me [the overseer] or any freeman that came to the country'.[233] The same convict had the common sense to ask his overseer 'what would any freeman do

[230] Atkinson, above n 2; and 9 October 1833, SRNSW, Bench Books [Port Macquarie Court of Petty Sessions], Series 3331, 4/5638, Reel 2724.
[231] Ibid.
[232] Ibid.
[233] Trial of William Rigby, 14 January 1835, SRNSW, Bench Books [Invermein (Scone) Court of Petty Sessions], Series 3086, 7/90, Reel 677.

if it was not for the prisoners'.[234] Karl Marx would ask the same question in an essay on the political economy of crime less than 30 years later.[235] Finally, in court, the fellow stated that 'he would not allow himself to be punished at the discretion of any person, as if he was a child'.[236] (Similar outbursts are listed in the Appendix.)

A number of studies of convict life have consistently shown that female convicts used language in court to humiliate and subvert the authority of the courtroom and their masters.[237] For Byrne, the 'tough girls' of the Female Factory in Parramatta 'were the bane of the early judge because they used the law as a weapon', running 'rackets to get (other) women out of the factory'.[238] Indeed, as colonial barrister and judge Roger Therry recalled, court sessions held at 'The Factory', frequently ended mid-session with defendants throwing chairs in the courtroom, which, on occasion, led to prison riots that could scarcely be contained by a regiment of red coats.[239]

Convict language challenged the 'linguistic imperialism'[240] of government authority. Language frequently mounted an aggressive challenge to discipline and was in turn the cause of much discipline.[241] This was a colony in which seventy per cent of convicts were literate and the remainder, along with a large Indigenous population,

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234 Ibid.

235 Marx wrote, 'A philosopher produces ideas, a poet poems, a clergyman sermons, a professor compendia and so on. A criminal produces crimes. If we look a little closer at the connection between this latter branch of production and society as a whole, we shall rid ourselves of many prejudices. The criminal produces not only crimes but also criminal law, and with this also the professor who gives lectures on criminal law and in addition to this the inevitable compendium in which this same professor throws his lectures onto the general market as "commodities"', *Theories of Surplus Value* (Lawrence & Wishart, c 1861/1969) I, 387-388.

236 Trial of William Rigby, above n 224.

237 See, for instance, Joy Damousi, *Depraved and Disorderly: Female Convicts, Sexuality and Gender in Colonial Australia* (Cambridge University Press, 1997) 6, 5, 61 and 75. For an inverse perspective of the use of language and power in colonial society, see also, Greg Denning, *Mr Bligh's Bad Language: Power, Passion & Theatre on The Bounty* (Cambridge University Press, 1994).

238 Paula Byrne, 'Convict Women Reconsidered … and Reconsidered' (2004) 2(1) *History Australia* 1, 2-3 and 13.

239 Roger Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (Sydney University Press, 1863/1974) 217-219.

240 Paul Carter, *The Road to Botany Bay* (University of Minnesota Press, 1987/2010) 318; see also Amanda Laugesen, 'The Politics of Language in Convict Australia' (2003) 4(1)*Journal of Australian Colonial History* 17.

241 Atkinson, above n 6, 71.

were inculcated within an 'oral culture'.[242] Language was a weapon. Its use by colonised and working-class peoples affected the colonial ruling class both inside and outside the courtroom. Convict cant or language became the subject of one of Major Mudie's most malicious invectives. As an honorary magistrate, he said:

> their language, disgusting when heard even by profligate men, would pollute the eyes cast upon it in writing…Their fierce and untameable audacity would not be believed. They are…lower than the brutes, a disgrace to all human existence.[243]

From a more sympathetic perspective, the young Watkin Tench observed that such 'flash or *kiddy* (sic) language in some of our early courts of justice' was a 'miserable perversion of our noblest and peculiar faculty'. He found that 'an interpreter was frequently necessary to translate the deposition of the witness, and the defence of the prisoner'.[244] As if in reply to the worthy young Tench, the convict James White was heard to say while building a road, 'Damn and bougre Capt. Tench and Mr Long' - he would 'knock their Heads off … (and) … would not let them come thro'.[245]

Other convicts demonstrated a healthy understanding of the spectacle and theatrics of courtroom procedure, satirising those who tormented them in court and had condemned them to the colonies. One Irish rebel remembered that while 'crossing the herring pond at the King's expence (sic)' (during his transportation to NSW), his fellow 'seven-year passengers'[246] would

> hold regular Old-Bailey sessions, and try individuals in exquisite mock-heroic style … Barristers [in one instance], with blankets round them for gowns,

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[242] Atkinson, above n 150, 96. See the work of linguistic scholar Walter Ong, in respect to 'oral cultures', *Interfaces of the World: Studies in the Evolution of Consciousness and Culture* (Cornell University Press, 1977).
[243] James Mudie, *The Felonry of New South Wales* (Whaley & Co, 1837) 122.
[244] Watkin Tench, 'A Complete Account of the Settlement at Port Jackson in New South Wales' (1793), Chapter 18, The Project Gutenburg Ebook #3534, www.gutenberg.org/files/3534/3534-h/3534-h.htm, accessed 8 May, 2006.
[245] Atkinson, above n 143, 95.
[246] Peter Linebaugh, above n 144, 154.

> pleaded eloquently the causes they were engaged in, brow-beating and cross-questioning the witnesses according to the best-laid-down rules, and chicanery of law; while the culprit stood quaking in the dock, surrounded by the *traps* of office, awed by the terrific frowns which the indignant judge now and then cast upon him, when evidence bore hard upon the case.[247]

In colonial courtrooms this attitude was emboldened and combined with a backhanded respect for the rule of law. As one convict told Magistrate O'Brien at Yass, 'Government should not appoint fools to the magistracy'.[248] Yet another defendant, a free labourer, accused one honorary justice of wanting 'to prove himself a gentleman' here, when 'he cannot do so at home'.[249] Working-class locals at Bathurst despised their local magistracy, despite their apparent respect for the rule of law more generally. In 1826, a convict servant at Bathurst, Thomas Maddox, preferred to travel all the way to Sydney rather than appear before the local bench, 'as he would not get justice there'.[250] Likewise a labourer, William Garside, was sure that if the Bathurst magistrate John Street heard his case he would lose, probably due to collusion between the court and the police. Garside decided that 'he would not go to the Bathurst bench but … would go to their masters', the Supreme Court in Sydney, 'a bench where there would be no whispering with Jackey Street' (the reviled Bathurst magistrate).[251] Street and another magistrate, William Lawson, were exposed by their own convicts in court as being brutal masters.[252] Mistrust of the Bathurst Bench and its conflict with progressive and radical lawyers and defendants continued until the 1850s and will be explored further in Chapter 5.

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[247] Peter Cunningham, *Two Years in New South Wales,* Volume II (Henry Colburn, 1827) 237-8. Cunningham was one of the Irish Rebels who led the Castle Hill Rebellion.
[248] Trial of Richard Stock, 1 September 1835, Bench Books [Yass Court of Petty Sessions] SRNSW, Series 3559, 4/5709, Reel 682.
[249] Ibid.
[250] 4 July 1826, Bathurst Magistrate's Court, Mitchell Library, F32.
[251] 26 February 1833, SRNSW, Bench Books [Bathurst Court of Petty Sessions], Series 2772, 2/8324, Reel 663.
[252] See the trials of Edward Sheehan, 14 March 1826 and Laurence Colley, 4 April 1826, Mitchell Library F32.

Conclusion

Plebeian radicals used the language of law and rights to assert their interests against those of a dominant class. In their demands for due, fair and proper procedure these colonised and working-class peoples asserted libertarian rights in the face of coercive forms of criminal process. They believed in a rule of law that was fair and that had the capacity to reflect their own interests. As importantly, assertions of custom and demands for fairness by colonised and working-class peoples appealed to a moral economy, founded upon basic rights to subsistence. Indeed, the subjects of criminal law realised that liberty and access to justice could not be achieved without access to social and economic rights or equality – a point often neglected by lawyerly histories of law reform.

Most episodes of resistance discussed in this chapter come from the early Australian colonial period – 1788 to the 1840s. This was a time when protest and violence by colonised and working-class peoples was still very much spontaneous and atomised. Taken in isolation from other historical struggles and reform throughout the wider period (1788-1861), these episodes might appear to lack political significance and their effect on progressive law reform seems difficult to grasp. However, a few of these protests reached the sympathetic ear of some reformers within the colonial administration. As we shall see in the final two chapters, it was the upsurge of this resistance, taken as a whole, that threatened the ruling class to act in order to reform the law, thereby maintaining its grip on colonial power.

In the following two chapters, however, we shall observe that these early demands for legal rights and liberties reached a crescendo by the 1840s. It was during this period that such demands became less spontaneous and violent (although spontaneous violence remained a very real threat) and more organised and collective.

It was through organisation that previously colonised European peoples became more able to challenge dominant forms of criminal process from within legal institutions. Many of their demands were even incorporated into the discourse of criminal process by some ruling-class law reformers.

Chapter 4: Radical Reformers

Law reform in England during the 1840s – and its adoption in New South Wales (NSW) in the 1850s – might have been enacted in the halls and courts of imperial power, but it was in the streets and radical press that organised workers and middle-class radicals united to demand their legal rights. Radical reformers shared the egalitarian ideals and values of colonised peoples but were distinguished from them by their class origins. Radicals were often educated, professional and salaried, sometimes religious, and frequently had connections to the democratic movement in Britain. But these radical reformers did not belong to a colonial ruling class of statesmen, merchants and squatters (although a few succeeded in being elected to the colonial legislature). Rather, radicals had the 'cultural capital' to gain a foothold within respectable society yet shunned the acquisitive values and practices that defined the dominant social class.[1] A large contingent of radicals were newspaper men, such as Edward Smith Hall, Edward Mason, Edward Hawksley, W.A. Duncan, James McEachern and Johann Lhotsky. Some were politicians, including John Dunmore Lang, Henry Parkes, David Buchanan and Robert Nichols. Others were artisans, guildsmen and workers.

This chapter examines major reform to criminal process between 1820 to 1861 that resulted from struggles by social justice campaigners or 'civic radicals' (see Introduction). These reforms played a major role in transforming the legal landscape in colonial NSW, moving it from reliance upon the authoritarian customs of Royal

[1] Pierre Bourdieu, discusses the ideas and practices of 'cultural capital' in Bourdieu and Jean-Claude Passeron, 'Cultural Reproduction and Social Reproduction' in Richard K. Brown (ed.), *Knowledge, Education and Cultural Change* (Tavistock, 1977). See Introduction for further analysis of this concept.

Justice towards a system of modern criminal process. The modern version was one that increasingly protected the rights and liberties of colonised and working-class peoples against the power and privilege of the colonial ruling class. The specific struggles for reform discussed in this chapter include: i) the end of transportation, indenture and corporal punishment as a result of campaigns waged by the radical press; ii) reform to criminal process at the level of summary jurisdiction that arose from struggles by organised labour; and iii) struggles against the authoritarian magistracy, waged by civic radicals of all stripes. As has been seen in the previous two chapters, colonial society in NSW constantly simmered with the social unrest of colonised and working-class peoples. Civic radicals frequently seized upon these tensions as cause for reforms, as they pursued the claims of plebeian radicals with the ruling class. Yet, where the radical working class often failed to articulate their claims with any precision, or used violence, lacked social organisation and were excluded from the dominant culture, civic radicals often succeeded in creating direct law reform through their elevated class position, based mainly on their capacity for political organisation. The roots of their movement lay in early nineteenth century Britain.

In the 1830s in Britain, the Chartist movement united working- and middle-class radicals in a struggle for democratic rights. Reform to criminal process was directly implicated. As we have previously seen, demands for legal rights often sprouted from the same tree as demands for rights to basic human subsistence. At the beginning of the nineteenth century, the Poor Laws, the Corn Laws and the *Combination Acts* comprised a legislative trinity that threatened the subsistence of a majority of Britons by securing for the ruling class the social conditions for maximum exploitation of the

working population.[2] The effect of these laws was to starve and pauperise the working class (the Corn Laws), forcing many into the factory system (the Poor Laws), while ensuring division and disorganisation among workers by punishing their 'combination' (the Combination Acts) as a criminal offence.[3] Those proletarians who were prisoners of the Crown or were interned in the workhouse, forfeited not only the right to personal liberty but, by law, most other civil, political and social rights of modern citizenship.[4] The Chartists responded by rallying for a 'People's Charter' (1837) designed to enfranchise the propertyless working class.[5] They demanded that the ruling class recognise that 'the universal political right of every human being is superior and stands apart from all customs, forms, or ancient usage, a fundamental right not in the power of man to confer; or justly to deprive him of'.[6] The broad spectrum of rights demanded by Chartists reflected a popular will to democratise and reform society not merely at the ballot box but through a range of social institutions: in the workplace, the market, the school, the family, the street, the gaol and the courthouse.[7]

When it came to criminal law reform, the loudest cries for change issued from the radical press, usually proclaiming themselves advocates of 'the people'. Dorothy Thompson explains that the use of the term 'the people' in Chartist speeches and the radical press was especially significant and represented a complex articulation of democratic and majoritarian interests.[8] The phrase was used by Thomas Paine and

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[2] Here 'Poor Laws' refers to the *Poor Employment Act 1817* (UK) (57 Geo III c 34); 'Corn Laws', to the *Importation Act 1815* (UK) (55 Geo 3 c 26); and 'Combination Acts' to the *Combination Act 1799* (UK) (39 Geo III c 81) and *Combination Act 1800* (UK) (39 and 40 Geo III c 106).
[3] Eric J. Hobsbawm, *The Age of Revolution, 1789-1848* (Vintage Books, 1966) 27-52.
[4] T.H. Marshall, *Class, Citizenship, and Social Development* (Anchor Books, 1965) 88. Marshall's conception of 'modern citizenship' encompassed 'social' as well as civil and political rights.
[5] Micheline Ishay, 'The Socialist Contributions to Human Rights: An Overlooked Legacy' (2005) 9(2) *The International Journal of Human Rights* 225, 230.
[6] Chartist Petition (28 February 1837) London, cited in Dorothy Thompson, *The Early Chartists* (University of South Carolina Press, 1971) 62.
[7] See, for instance, Thomas Carlyle's unofficial Chartist manifesto, *Chartism* (J. Fraser, 1837) 1-9.
[8] Dorothy Thompson, 'Who Were the People?' in Malcolm Chase and Ian Dyck (eds), *Living and Learning: Essays in Honour of J.F.C. Harrison* (Aldershot, 1996) 118-132.

various French and American revolutionaries throughout the previous century to address a wide democratic intersection of interests. Yet in both Britain and NSW, it was those who were disenfranchised by their class position for whom the phrase resonated loudest. They were united by the radical language of the 'the people' within both the press and the civic organisations to which they belonged.

In NSW, Chartist journalist Edward Hawksley's newspaper the *People's Advocate* spoke clearly to 'the working men of the colony'.[9] Epithets such as this are broadly reflective of press history during the same period, as surveyed by Raymond Williams in *The Long Revolution*.[10] As Williams clarified, the growth of the British popular press began between 1820 and 1850 through a form of radical fringe journalism that was gradually co-opted by a mainstream press as it gained popularity.[11] By the 1840s, newspaper content squarely targeted 'the mass', or 'masses', who, as Williams explained, formed 'a particular kind of impersonal grouping, corresponding to aspects of the social and industrial organization of … capitalist society'. 'The masses' became a crucial force in 'the struggle for social democracy' – a development closely linked to their engagement as readers of the popular press.[12]

While Chartists faced mass arrests and massacres by the military in Britain, Chartism found a voice in the constitutional, civic and plebeian radicalism of NSW in the

[9] 6 January 1849, 1; and 13 January 1849, 1. Andrew Messner, 'Contesting Chartism from afar: Edward Hawksley and the *People's Advocate*', (1999) 1 *Journal of Australian Colonial History* 62.
[10] Raymond Williams, *The Long Revolution* (Pelican Books, 1961).
[11] Ibid, 200-236. Across the empire and in NSW, the 1840s were a peak time for popular agitation of criminal law reform, following two decades of bitter struggle between radical pressmen and various colonial lawmakers. England narrowly avoided a Chartist uprising in 1848 while colonies in Lower Canada, the Cape, Ceylon, St Lucia and the Punjab were almost lost to armed uprisings. Supply stoppages and revolt occurred in British Guiana, the Cape Colony and Van Diemen's Land. See, for instance, Chris Holdridge, 'Putting the Global Back into the Colonial Politics of Anti-Transportation' (2012) 14 *Journal of Australian Colonial History* 272, 277.
[12] Williams, above n 10, 200-201.

1840s.[13] Newspapers like *The Star, The Parramatta Chronicle, The Working Man's Guardian* and *The Censor Morum* championed the rights of 'the oppressed, defenceless and destitute', the 'labouring poor' and, most pertinently, 'the prisoners of the Crown'.[14] Radical newspapermen defined 'the people' by their common experience of oppression and demanded their protection 'against the tyranny of the monied interest' through civil and political rights.[15] As street violence and riots gripped Sydney throughout the 1840s, the conservative press noted that a coalition of middle- and working-class radicals had 'raised a Hydra which rears a head in every quarter of the city'.[16] Unsurprisingly, members of the progressive political ruling class conceded some of their demands throughout the ensuing decade.[17]

Alan Atkinson developed the thesis that when radical newspapermen in NSW spoke of 'rights', they were speaking within a tradition of English radicalism, perhaps best known by the ideas of Tory radical journalist William Cobbett. As Atkinson puts it, 'rights were not an expression of authority, but of community, and were tied to common tradition and circumstances'.[18] Indeed, such rights had a much older history in Britain and, in fact, had their basis in 'the community of the people of Britain', part of a revolutionary tradition springing from the establishment of the *comyn wele* ('commonwealth' – which literally translated means the welfare of the community). Rights, in this sense, were first articulated by the English rebels of 1281 and inserted into *Magna Carta*.[19] E.P. Thompson viewed class resistance in the eighteenth century

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[13] Terry Irving, *The Southern Tree of Liberty: The Democratic Movement in NSW before 1856* (The Federation Press, 2006).
[14] Ibid, 145.
[15] Ibid.
[16] See, *The Colonial Observer,* 28 June 1843, cited in Irving, above n 13, 156.
[17] The right to silence was codified in Britain by the Attorney-General and Whig reformer, Sir John Jervis in 1848. The 'Jervis Acts' were adopted in NSW in 1850. See the *Imperial Acts Adoption and Application Act 1850* (NSW) (14 Vic No 43). See also, *Duties of Justices (Indictable Offences) Act 1848* (NSW) (11 and 12 Vic c 42) ss. 17 and 18.
[18] Alan Atkinson, 'The Freeborn Englishman Transported: Convict Rights as a Measure of Eighteenth-Century Empire' (1994) 144(1) *Past and Present* 88, 90.
[19] Benjamin Thomas Jones, 'Colonial Republicanism: Re-examining the Impact of Civic Republican Ideology in Pre-Constitution NSW' (2009) 11 *Journal of Australian Colonial History* 129, 130-134; David

as directly 'consistent' with a 'traditional view of social norms and obligations' from the Middle Ages that upheld 'the proper economic functions of several parties within the community, which, taken together, can be said to constitute the moral economy of the poor'.[20] Charles Tilley subsequently demonstrated how, in the nineteenth century, the working class fomented and actuated political change around the specific goals of the moral economy, which culminated in the Peaceful Revolution.[21] The ideas of this early nineteenth century radical reform movement united a newly emergent middle class with a nascent working class against gross forms of exploitation enforced by punitive law. This unity was formative in the writings of radical colonial journalists. Perhaps the key figure among this group was Edward Smith Hall.

Edward Smith Hall and *The Sydney Monitor*

Hall arrived in NSW in 1813 and became a mercantile business partner of wealthy emancipists R.W. Loane and Simeon Lord. He helped establish the Bank of NSW where he worked until 1819, when he attempted to join the NSW Bar. Given his keen interest in law and social justice but apparent lack of legal qualifications, Governor Macquarie appointed Hall to the position of Coroner. Hall lasted in this position until 1821 when he took up a series of land grants at Lake Bathurst. As an active Wesleyan, he was involved in establishing some of the formative charities in the colony, including The Benevolent Society. When his farm failed in 1826, Hall returned to Sydney and commenced publishing *The Sydney Monitor* (*'The Monitor'*). In the first issue of 19 May 1826, he wrote: 'the injured and oppressed, high or low,

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Rollinson, 'The Specter of the Commonalty: Class Struggle and the Commonweal in England before the Atlantic World' (2006) 63(2) *William and Mary Quarterly* 221.

[20] E.P. Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century' (1971) 50 *Past and Present,* 76, 78-9.

[21] Charles Tilley, *Popular Contention in Great Britain, 1758-1834* (Harvard University Press, 1995).

bond or free, shall, in the conductors of the MONITOR, meet with firm, consistent, persevering and *prudent* friends'.[22]

The Monitor covered life in NSW between the years 1826 and 1839. At the most critical point of its existence in 1827, Hall claimed that weekly sales were 492 per week. He placed subscriptions for competitor newspapers such as *The Australian* at 289 in the previous year.[23] By 1834, circulation of *The Monitor* stood at 910 per issue, double that of *The Australian* and *Sydney Gazette* and equal to the *Sydney Herald.*[24] The size of the readership saw Hall's 'revolutionary scribblings', as Governor Darling described them, penetrate a mass audience that prepared a colonial public for social change and criminal law reform throughout the ensuing decades.[25]

Hall understood that social change was only possible if colonised and working-class peoples themselves became the agents of their own destiny. For Hall, social change meant participation by informed 'subjects' within the legal system, particularly where the legal system in colonial NSW operated as a *de facto* legislature.[26] Hall saw it as his duty to instruct those who would not or could not read.[27] He knew that many of these people '[went] seldom … into a chapel or read a religious tract, or [heard] them read' but that 'men read *newspapers* [or liked to hear them read]'.[28] The content of Hall's instruction over the following 30 years in the colony involved the transmission of radical ideas accompanied by an explanation of some of the most complex workings of the criminal procedural system. Drawing on the work of

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[22] *The Sydney Monitor (SM)*, 19 May 1826.
[23] Erin Ihde, *A Manifesto for NSW: Edward Smith Hall and the Sydney Monitor 1826–1840* (Australian Scholarly Publishing, 2005), 9.
[24] *SM,* 18 March 1834, 2.
[25] *HRA,* Ser I, Vol. 12, p. 762.
[26] The use and operation of NSW courts as a legislature is an idea that evolved throughout a string of Australian legal history during the 1990s. See, for instance, David Neal, *The Rule of Law in a Penal Colony* (Cambridge University Press, 1991); Alistair Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* (Cambridge University Press, 1991); Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995).
[27] Ihde, above n 23, 8; *SM*, 24 May 1834, 2; 1 June 1827, 420.
[28] Ihde, above n 23, 8. *SM*, 2 July 1824.

Thomas Paine, Robert Owen and William Cobbett (the last of whom Hall regularly published in *The Monitor*), Hall expressed ideas such as 'equality for all, "natural" rights, universal suffrage and revolution'.[29] His work on almost every subject evinced a humanist zeal. Convicts were 'neither dogs nor horses, *but men*', never to be deprived 'of their claim to humanity, and its privileges'.[30]

Hall was so committed to a radical democratic discourse that he regularly published content from convicts, particularly those from penal settlements who were critical of the administrative injustice that characterised the convict experience of criminal process. The *Monitor* earned the name 'the Convict Journal'.[31] Hall embraced the label and knew that, by exposing instances of unfair treatment and procedural injustice against convicts, magistrates and masters would be more wary of treating them badly lest their actions be reported in the *Monitor*.[32] Erin Ihde and Alan Atkinson have emphasised Hall's major contribution to the social and economic rights of convicts.

While Hall's thinking was frequently expressed in the language of 'law', 'custom' and 'free-born rights', he did not simply clamber for a blanket implementation of all 'rights'. Rather, Hall opted instead for a specific 'rule of law', a particular political system that recognised some rights more than others. As he put it in 1828:

> What have we to do with the vices, the follies, the bigotries, and the old moral ulcers of England? All her good laws we have a right to. They are ours

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[29] Ihde, above n 23, 21.

[30] *SM*, 9 February 1829, 1492; 9 February 1829, 1491-2. Convicts were, of course, also women, whose emancipation as convicts depended on these very rights and struggles. In some cases, female convicts also resisted (male) authority and made claims to their liberties and rights (although rarely in a legal context): see Joy Damousi, *Depraved and Disorderly* (Cambridge University Press, 1997) and Paula Byrne, 'Convict Women Reconsidered … and Reconsidered', (2004) Vol 2(1) *History Australia* 13; Babette Smith, *A Cargo of Women: Susannah Watson and the Convicts of the Princess Royal* (Rosenberg Publishing, 2005); Deborah J. Swiss, *The Tin Ticket: The Heroic Journey of Australia's Convict Women* (Berkeley Books, 2010); Kay Daniels, *Convict Women* (Allen & Unwin, 1998); Angela Woollacott, *Gender and Empire* (Palgrave MacMillan, 2006) 14-39, 81-104.

[31] *SM* 10 February 1827, 307; 20 April 1827, 388; 1 June 1827, 420; 5 July 1827, 493.

[32] Erin Ihde, 'Monitoring the situation: the "convict journal," convict protest and convicts' rights' (1999) 85(1) *Journal of the Royal Australian Historical Society* 20, 24.

> by law. The constitution and law have made all her *good* institutions OURS. They are our *birthright* … But the *bad* laws of England are *not* ours. We have no right to *them*. For it is not fit that an infant Colony should be inoculated with the virus of England's moral wounds, which have diseased for ages.[33]

As Hall embraced custom and tradition to lend legitimacy to his morality, he also embraced a modernity in which new laws could be moulded to the Painite 'rule of common sense'.[34] 'People have a right to the advantages of *the customs of their country*', he said, adding:

> When certain customs are beneficial, they partake of the nature of *law*. Of that species of law which is grounded on prescriptive right. And although, seeing this Colony is not more than forty years old, all our customs are within the memory of man, yet, looking to the *reason* of the thing, we consider, all beneficial popular customs established here ought to have somewhat the force of those prescriptive laws which in England hold, by reason of their immemorial usage. An usage, or custom, is a law made by the people themselves for their own convenience, dictated either by necessity or a very strong expediency. And such laws are the most binding in the world, because they are the most expedient in the world.[35]

Many colonial radicals recognised that the effects of unjust criminal process were not confined to the ranks of the colonial working class but afflicted colonised Aboriginal people also. As Atkinson argues, radicals such as Hall spoke out against the treatment of Aboriginal people on the frontier and often campaigned for legal rights on their behalf under the broad umbrella of democratic reform.[36] Hall specifically argued for the right of Aboriginal people to give evidence in court. His calls for law

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[33] (Italics theirs) *SM*, 19 May 1826, 2.
[34] *SM,* 9 December 1835, 3.
[35] *SM*, 28 June 1828, 1237, cited in Erin Ihde, 'A smart volley of dough-boy shot': a military food riot in colonial Sydney' (2001) 3(2) *Journal of Australian Colonial History* 23, 30.
[36] Alan Atkinson, 'The Unelected Conscience' (1997) 41(6) *Quadrant* 17, 21.

reform in the interests of Aboriginal people were joined by fellow civic radical and Austrian naturalist and pamphleteer, Johannes Lhotsky. Lhotsky appreciated Aboriginal culture and defended both Aboriginal people and convicts, saying that both groups 'will have, perhaps, as good Franklins and Washingtons, Byrons and Shakespeares, as the cannibals and wild fellows which the Romans once called Picts'.[37]

More poignant, perhaps, was Hall's understanding of Aboriginal 'depredations' on white settlers and land as a form of resistance to colonisation and British law. He was one of the first European colonists to describe settlement as the 'usurpation' of Aboriginal land.[38] To this end, Hall observed that Aboriginal people had a distinct proprietorial understanding of land, with each family possessing 'its own estate or patch of hunting ground'.[39] Accordingly, Hall viewed the 'Impounding' and 'Fencing' Acts in NSW between July and August 1828 as distinctly resembling the enclosure laws in Britain.[40] The Acts introduced a system of poundkeepers and fines for impounded animals, as well as up to one month imprisonment for the owners.[41] Hall said the Acts were 'fraught with … evil to the poor', preserving 'the clover filled paddocks of the rich, at the expense and raiment and bedding and personal liberty of the poor'.[42] He compared the laws to the *Black Acts* and game laws of England, saying they were obviously drafted by:

> a class just about as intelligent, as patriotic, and as considerate to the poor, as the present race of country-gentlemen in England; who instead of giving away their ale and beef to the poor as their ancestors used to do on saint days and other holydays *in the dark ages,* would much rather see them caught in a

[37] Irving, above n 13, 14.
[38] Atkinson, above n 36.
[39] *HRA*, I, XIII, p. 596.
[40] Ihde, above n 23, 106-107.
[41] Ibid, 107. There were numerous prosecutions relating to livestock roaming in the streets in Parramatta during the same period.
[42] *SM*, 2 August 1828, 1276.

> man-trap, or shot through the heart by means of a spring gun … or severed for life from their families for killing one of their numerous hares![43]

Hall's criticisms were borne out in policing practice when constables seized the cattle of poor settlers that were grazing on enclosed land, fining the farmers up to sixty pounds each.[44] He noted that the constables dared not touch the cattle of the Colonial Secretary and wealthy settlers, whom they anticipated would defend themselves in court.[45] Clearly, such observations disclosed a keen understanding of the injustices of colonial criminal process in NSW.

Transportation, Indenture and Corporal Punishment

Civic radicals railed against the 'cruel and unusual' treatment of fellow human beings through the convict system.[46] Cruelty was a dominant theme within radical discourse that sought to persuade the public and lawmakers to reform criminal process. Cruelty struck a chord with a reading public raised on eighteenth century morality tales, for whom the most powerful men in the colony appeared to match the parts of villains from their fairy-tales and folklore. In this way, civic radicals challenged colonial legal hegemony, or changed it by bold journalistic exposé or public confrontation that often resulted in the criminalisation and imprisonment of radicals themselves.[47]

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[43] Ibid.

[44] As discussed in Chapter 2, the average wage was £50 per annum. A fine of this magnitude would almost certainly have created an unpayable debt, leading to imprisonment.

[45] Ihde, above n 23, 110-111.

[46] This phrase was first used in the English *Bill of Rights 1689* (1 William and Mary Sess 2 c 2). It was repeated in the US and French revolutionary Bills of Rights and frequently referred to by both anti-slavery and anti-transportation campaigners during the first half of the nineteenth century, appearing in the *Slave Trade Act 1807* (UK) (47 Geo III Sess 1 c 36) and the *Slavery Abolition Act 1833* (UK) (3 and 4 Wm IV c 73). It is best known today in the 'Eighth Amendment' to the U.S. Constitution.

[47] Catie Gilchrist, "'This Relic of the Cities of the Plain": Penal Flogging, Convict Morality and the Colonial Imagination', (2007) 9 *Journal of Australian Colonial History* 1.

Sometimes radicals illustrated cruelty by comparison with other well-known forms of colonial authoritarianism and practices such as slavery.[48] This was certainly a central theme of the Molesworth Select Committee into Transportation in 1837. The Molesworth enquiry united abolitionist struggles against slavery with those against transportation, primarily by shunning the practice of flogging.[49] However, arguments about reform to transportation, from the bottom up, were more sophisticated than this. As Scottish rebel and gentleman convict, John Grant, asked Governor King: 'by what right do you make Slaves of Britons? ... all Free-born Britons are no longer slaves … this Slave system blasts all exertion and until this is done away with, this Country can never flourish'.[50] Grant drew up a 'Bond of Union' denouncing colonial authorities, demanding restoration of British rights, freedom of the press and trial by jury.[51] Judge-Advocate Atkins asked him 'why do you espouse in this way the cause of the prisoners? We have never treated you as a prisoner!!!'.[52]

Throughout the period, other radical newspapermen waged similar struggles against the autocratic power of the State. Robert Howe was the editor of the *Sydney Gazette.* He had been a member of William Wilberforce's Evangelical movement in London before arriving in the colony. In 1828, Howe criticised an honorary magistrate, Henry Douglas, for dispensing illegal punishment (torture) of prisoners. Howe was prosecuted for criminal libel but successfully defended the case.[53] He was awarded security of costs prior to the commencement of the case as a deterrent against

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[48] Marcus Wood, 'William Cobbett, John Thelwall, Radicalism, Racism and Slavery: A Study in Burkean Parodics', 15 *Romanticism on the Net,* August 1999, http://id.erudit.org/iderudit/005873ar accessed 4 January 2015.
[49] Isobelle Barrett Meyering, 'Abolitionism, settler violence and the case against flogging: A reassessment of Sir William Molesworth's contribution to the transportation debate' (2010) 7(1) *History Australia* 6, 1.
[50] Grant cited in Yvonne Cramer, *This Beauteous, Wicked Place: Letter and Journals of John Grant, Gentleman Convict* (National Library of Australia, 2000) 10-11.
[51] Ibid, 6-12.
[52] Grace Karskens, *The Colony* (Allen & Unwin, 2009) 252-253.
[53] *R v Howe* [1828] NSW SupC 35; sub nom. *R v Howe* (No. 1) (1828) Sel Cas (Dowling) 291, *Sydney Gazette*, 23 May 1828.

malicious prosecution. Howe won on a technicality, due to a defect in the information. (The prosecution failed to attach the relevant newspaper article in which the alleged libel had been made.) In his defence, Howe claimed that he had not defamed Douglas directly, for 'it was impossible to say that any person against whom such imputations should be proved, was fit for any society'.[54]

Radicals gained support for their reformist vision by reference to gruesome stories of maltreatment by flogging, starvation and torture. Their writing sought to engage convicts and others, fostering an understanding that representations of their experience in the press could be a powerful form of social change and criminal law reform. For example, John Macdonald was sentenced to death for murder at Norfolk Island. Shortly before he was 'switched off', he requested that the court 'allow Mr Edward Smith Hall's clerk to go down to the gaol' to convey his experience of cruelty to 'the proper authorities'.[55] The request was refused. Nevertheless, the story featured in Hall's newspaper some months later.

Hall was disgusted by the cruelty of the convict system. He demonstrated his resistance to it by any means necessary. Sometimes Hall valorised and encouraged violent resistance and excarceration among colonised and working-class peoples, saying it 'shewed that even convicts, when free-born Englishmen, [were] a superior race even to *free* men of other slavish countries'. It showed, said Hall, that they were 'noble-minded men … intent of quitting the land of their degredation and slavery' and, as a result, 'should not be scourged or flogged'.[56] According to *The Monitor,* in October 1830 '[William] Jones, free, was charged by Mr Justice Bunn [sic] with insulting him generally, and particularly in threatening to show him up in the *Sydney*

[54] Ibid.
[55] *SM*, 22 February 1832, 2.
[56] *SM*, 30 June 1826, 50 and 23 March 1827, 3355.

Monitor Newspaper'. Jones created his own court-room spectacle, 'kicking the constables' shins when they attempted to apprehend him for his insolence, and divers other turbulent acts'.[57]

For Hall, the end of cruelty in the convict system began with 'the customs of English society, to see to it, that such persons are adequately fed, clothed and lodged'.[58] Hall spelled out the consequences of failing to reform convictism. If 'the brave and the enterprising among the convicts, determined that as the rights of human nature were not allowed them,' he reasoned, 'they would retaliate on that government and that public who deprived them of those rights'.[59] Nevertheless, Hall's suggestions were consistently extinguished by Governor Darling, with whom he would clash many times throughout the late 1820s. In 1828 Darling held firm to the view that 'it is important that radical notions should be put down and rooted out of this land'.[60]

Hall was instrumental in a number of victories for democratic criminal process. In one case, a convict tried to send a letter to *The Monitor* and two more had their overseer punished for corruption as a result of an exposé in Hall's newspaper.[61] In 1830, Hall published a letter from a convict at Moreton Bay documenting in great detail some of the worst atrocities at the penal station. Hall was convinced that enlightened reformers within the British government – perhaps some of his old colleagues in the Clapham Sect – would intervene to reform criminal procedure at Moreton Bay. Less than two months later, new regulations were issued.[62] Other reforms followed suit - on the back of journalism like this.

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[57] *SM*, 30 October 1830, 3.
[58] *SM*, 9 July 1832, 2.
[59] *SM*, 9 July 1832, 2.
[60] C.H. Currey, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of NSW* (Angus & Robertson, 1968) 197.
[61] Alan Atkinson, 'Four Patterns of Convict Protest' (1979) 37 *Labour History* 28, 31.
[62] *SM*, 14 August 1830, 2.

Perhaps the reform in which Hall played his most critical role was the campaign against corporal punishment. Hall viewed the problem as a lack of procedural oversight in respect to masters and magistrates. 'If a man think he is at liberty to swear at and bully his convict servant', he wrote:

> we should detest that Magistrate who would flog the servant of such a master for being insolent in return; just as much as we should detest him for flogging him for striking a master when the latter conducted himself so disgracefully as to strike his servant first; or as we should detest him for flogging a man for not doing a day's work, who was ill-fed or ill-clothed.[63]

Here, we see Hall directly engaging with the plight of rebel convicts and their appeals to a moral economy (as discussed in Chapter 2). He proposed that their suffering could be redressed through criminal law reform such as clear procedural guidelines and sanctions against overseers who failed to follow due criminal process. 'To establish this basis', Hall continued, 'masters must be *punished* when they do wrong, as well as their servants'.[64] According to Hall, the appropriate course on sentence for the master should be revocation of the convict assignment and, for a second offence, reprimand by the Governor.[65] He mused that, if prisoners' rations were so low that they were forced to steal to survive, any sentence of flogging might 'be inflicted on [the] Commissariat Authorities in Sydney'.[66] Given the circulation of *The Monitor,* Hall commanded a significant swathe of democratic popular opinion.

After many long years of agitation on the issue of flogging, as well as a range of social problems resulting from the infliction of the lash on men in the Government Service, as previously mentioned, Governor Bourke intervened and reduced the severity of flogging as punishment pursuant to the '50 Lashes Act' in 1832. As Catie

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[63] *SM*, 10 December 1827, 307.
[64] Ibid.
[65] John Hirst, *Convict Society and its Enemies* (Allen & Unwin, 1983) 109.
[66] *SM*, 24 October 1829, 4; Ihde, above n 23, 164.

Gilchrist explains, flogging finally came to an end through a cultural shift in the colonial imagination.[67] The catalyst was a press-led campaign resulting in public revulsion at flogging as punishment. The campaign featured graphic descriptions of flogging in a range of newspapers throughout the late 1820s and early 1830s, including *The Monitor*. A year after Bourke's intervention, one journalist described a typical flogging at Hyde Park Barracks in 1833 in the following way:

> We defy them to bring forward one single instance in England wherein a poor devil has had his legs bound to the feet of a narrow table – a pillow placed beneath his stomach, which has the effect of erecting his back, and tight'ning the fibres in the flesh, so that they crack under the lash – while the arms of the suffering wretch are extended to the opposite end of the table, by means of tightly-drawn cords. Is this in accordance with the laws of England?[68]

The article's rhetorical conclusion made clear its call to abolish State sanctioned barbarity in NSW. In January 1844 the populist *Sydney Morning Herald* ran the headline, 'The South Sea Abomination' and the editors sought to educate Sydney readers on the spectacle of flogging on Norfolk Island that 'outraged common decency'.[69] As cultural historian Kirsten McKenzie explains, such journalism tapped into a recent Whiggish discourse opposed to slavery and conjoined it with a new trend opposed to transportation.[70] Radical reformers within the colony managed to convey their views on transportation to the highest colonial authorities, resulting in the Molesworth inquiry.

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[67] Gilchrist, above n 47, 28.
[68] *Sydney Gazette and NSW Advertiser,* 28 September 1833.
[69] Gilchrist, above n 47, 23-24.
[70] Kirsten McKenzie, 'Discourses of Scandal: Bourgeois Respectability and the End of Slavery and Transportation at the Cape and NSW' (2003) 4(3) *Journal of Colonialism and Colonial History* 10.1353.

In the same year, radical reformer John Dunmore Lang travelled to London where he published a book opposing transportation and spoke at a hearing of the Molesworth Committee.[71] While Lang tempered his rhetoric by citing the liberal Beccaria on proportional punishment, he blamed the decidedly more polemical 'mode of treating a criminal' for the causes of crime.[72] His evidence attacked the core of unfair process in NSW, identifying honorary magistrates as a key component. They were 'a portion of the system of convict management', he said, and recreated British social hierarchy in the colony.[73] Instead of obedience to class authority, Lang proposed 'rights' and 'community'. He made a two-pronged argument that spoke not only to the abolition of transportation but to colonial democratic self-government. 'Full-grown communities', he said, 'have just as good a right to their entire freedom and independence, as her Majesty has to her crown'.[74] Lang advocated 'a great extension of the franchise so as to include whole classes of the community who are at present debarred from all political rights'.[75] Accordingly, he proposed abolition of the assignment system and concentration of convict labour strictly on public works projects, for the common good.[76] Quoting Bentham, Lang vowed to deliver the 'greatest possible good to the greatest possible number'.[77] But he redefined Bentham's conception of 'the good' and broadened the Aristotlean *polis* in accordance with the Chartist principles of popular government. He posed the radical pluralist question: in whose interest is 'the good' enacted – that of a 'majority' of 'colonists' or 'the Squatting interest'?[78]

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[71] Lang's book was entitled, *Transportation and Colonization: Or, The Causes of the Comparative Failure of the Transportation System* (A.J. Valpy, 1837).
[72] Ibid, 25. Beccaria's *Of Crimes and Punishments* (1764), was a major influence on Lang.
[73] Lang, above n 71, 64; See also, *Report from the Select Committee on Transportation,* House of Commons (UK) 14 July 1837, Evidence of John Dunmore Lang, 30 May, 2 June, 6 June, 1837, 225-268.
[74] David John Headon and Elizabeth M. Perkins, *Our First Republicans: John Dunmore Lang, Charles Harpur, Daniel Henry Deneihy: Selected Writings 1840-1860* (The Federation Press, 1998) 20.
[75] *SMH*, 20 July 1850, 7.
[76] Lang, above n 71, 158.
[77] In fact, he continued to do so until the mid-nineteenth century. See, for example, *The Sydney Morning Herald*, 24 July 1850, 2.
[78] Ibid. Incidentally, there is some evidence from Lang that Forbes was secretly involved in a campaign for trial by jury and freedom of the press together with Lady Forbes and possibly the Chief Justice himself: see Lang's letter to Lady Forbes, 29 July 1824 Mitchell Library A1381, p. 198.

The reformers in London took note. In 1838 William Molesworth told the House of Commons of a growing democratic movement in NSW that was 'naturally desirous to obtain some of the rights of Englishmen' and rebuked the 'despotic character' and 'moral horrors' of the penal system. Echoing Lang, Molesworth explained that this system 'gave to the colonists no voice whatever in the management of their own affairs'.[79] The findings of the Molesworth Committee ultimately saw the end of Transportation – officially decreed by an Order-in-Council of the British Government shortly afterward on 22 May 1840.[80] Intrinsically linked to transportation, flogging also ceased. It is noted, however, that flogging by cane remained legal and was in fact used as a form of discipline in NSW High Schools until 1997.[81]

While convictism persisted, Hall continued to champion convict 'rights' within the criminal process. His view was that 'tickets of leave' were 'the most perceptible and forcible' of all convict rights' for he knew the importance of that 'decent earthly blessing, namely, *liberty*'.[82] The reach of Hall's radicalism was not limited to the chain-gangs and convict barracks. In 1827, Hall apparently (mis)quoted Supreme Court Judge, Sir Alfred Stephen, as having said, 'that the rights of prisoners were as sacred in the eye of the law as those of free men, and … he would never allow them to be impugned and treated carelessly'.[83] Governor Darling requested that the Judge explain himself. Stephen claimed to have been misquoted but issued a sharp rebuke to Darling for presuming to interfere with the court in the exercise of its duty.[84] In a letter to Darcy Wentworth, Hall described the low rate of remuneration set by

[79] William Molesworth, 1838a. 'Speech on colonial administration, 6 March', House of Commons Debates. Vol. 41: 482.
[80] Order-in-Council ending transportation to NSW, 22 May 1840, State Records NSW, 2010.
[81] Corporal punishment in schools was finally banned by the Carr Labor Government pursuant to the Education Reform Amendment (School Discipline) Bill 1997 (NSW).
[82] *SM*, 16 August 1827, 591; 13 January 1827, 274.
[83] *SM*, 9 March 1827, 3.
[84] Currey, above n 60, 241-243.

magistrates and masters. He was critical and noted that the rate of wages was 20 pounds per annum 'with a present of £2.10 in money or clothes … at the end of every six months'.[85] This amount of clothing was clearly not enough to sustain many workers, as demonstrated by two particular workers in 1826, Joseph Sudds and Patrick Thompson.

Sudds and Thompson were soldiers. They stole shirting material worth 10 pence from a local Sydney shop. Their intention was to clothe themselves and, by committing a theft, be dismissed from the army. At Quarter Sessions they were sentenced to seven years secondary transportation. Governor Darling intervened, quashed the order of the court and designed a specific corporal punishment that would cast the soldiers 'as examples of just abhorrence to their comrades'. He ordered that the pair work on a chain gang in chains comprising 'an iron collar with an iron projection at front and back, about 6 1/2 inches long, 3/4 inch broad, and 1/8 inch thick, iron basils, which were clamped on their legs three inches above the ankle, and chains, about the size of a strong dog chain, which connected the collar and basils'. Each set of chains weighed 13 pounds 12 ounces. It was further ordered that the men be stripped in the barrack square before their regiment where they were forced to wear convict uniforms. The chains were delivered to the square and riveted to them. Darling directed that the men then be marched to the convict barracks while four drummers played the 'Rogue's March'. Sudds died three days later.[86]

By intervening and amending the order of the court, Darling claimed to be exercising legitimate procedure, pursuant to a new local enactment from 1826. This law provided the Governor with power 'to withdraw any person … now or hereafter to

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[85] Paula J. Byrne, *Criminal Law and Colonial Subject: NSW, 1810-1830* (Cambridge University Press, 1993) 23.

[86] Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868* (The Harvill Press, 1988) 447-451; Alex Castles, *An Australian Legal History* (Law Book Company, 1982) 159-60; Kirsten McKenzie, *Scandal in the Colonies* (Melbourne University Press, 2004) 115-116.

be transported or sent to any penal settlement, and to employ him … either in irons on the public roads, or works, or in the ordinary service of the Crown'.[87] Clearly, His Excellency failed to read the critical verb in this sentence, 'to withdraw' and, according to the private advice of Chief Justice Sir Francis Forbes, may have acted illegally.[88] Dismissing Sudds' death as 'unlucky' and the Chief Justice's opinion as a string of 'legal niceties', Darling stated, 'it is evident that no substantial injustice was practiced'.[89] The Secretary of the Colonial Office, Viscount Goderich, saw things differently. He pointed to the flagrant abuse of procedure established by s. 6, noting: 'I cannot but think that, until the transportation shall have actually been carried into effect, and until the convict has reached the penal settlement, the Governor's power of withdrawing him cannot be lawfully exercised'. He directed that 'Thompson be discharged from further punishment'.[90]

Colonial radicals were outraged by the Governor's disregard for due criminal process. *The Monitor* and *The Australian* wrote scathing criticisms of Darling.[91] William Wentworth used the affair to agitate for his various civil rights campaigns including 'Trial by Jury', 'No Taxation Without Representation' and 'a legislative assembly and such other institutions as are recognised by the British Constitution'.[92] Darling was bruised by the affair and ultimately had Hall imprisoned for libel for six months (see Appendix for details).

Despite being imprisoned, Hall continued to publish papers arguing for an end to transportation and the cruelty of the convict system while denouncing the tyranny of Governor Darling and his honorary magistracy. Darling's pride was stung with every

[87] (7 Geo IV No 5) s. 6.
[88] *HRA*, Ser I, Vol. xii, p. 756.
[89] Ibid, p. 750.
[90] *HRA*, Ser I, Vol. xiii, pp. 440-1.
[91] See September 1826 issues.
[92] *HRA*, Ser I, Vol. xii, p. 751.

printed barb and he and the Tory Magistrates retaliated with a vendetta against Hall.[93] This time, the Governor connived to gag Hall by giving him 'less means of disseminating his poison (so) that the tranquillity of the Colony would be the better preserved'.[94] Darling's 'tranquillity' began with the forced removal and arrest of one of Hall's most loyal and skilled convict workers, Peter Tyler. Tyler was employed by Hall as the foreman at the *Monitor* printery.[95] Tyler's position was extraordinary in that it gave a convict a direct role in Hall's plain-spoken and unrelenting critique of the convict system and its attendant procedural hierarchy. While Hall viewed the employment of serving convicts as editors and reporters as biased, he was nevertheless happy to employ ex-convicts in these roles.[96]

Tyler served three years of his five-year sentence with Hall and the pair had developed a good working relationship. So, when the law came knocking on Hall's door for Tyler, Dowling recounts that Tyler had to be 'forcibly taken by Mr Hely the Superintendent of Convicts, against the will of the servant from his Masters service'.[97] Darling's spiteful plan to remove Tyler from Hall's service directly countermanded the recent findings of the Supreme Court in *Jane New's Case.* On 21 March 1829, the Full Bench found that the Governor had no power to revoke a convict assignment 'at pleasure' and the decision was published in the *Gazette.* Guided by this Supreme Court authority, Hall advised Tyler to disregard a series of letters from the Superintendent of Convicts announcing Tyler's impending arrest. As defiant as ever, Hall placed a running advertisement in the *Monitor* 'warning all Constables and others against capturing his assigned servant'.[98] Meanwhile, Darling

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[93] Neal, above n 26, 140.
[94] Darling to Murray, 6 July 1829, *HRA,* Ser 1, Vol. 15, p. 53.
[95] Currey, above n 60, 343.
[96] Ihde, above n 23, 16-17. See also, Sandra Blair on this question and Hall's conflict with the ticket-of-leave man, William Watt. Sandra J. Blair, 'The "Convict Press": William Watt and the Sydney Gazette in the 1830s' (1979) 5 *The Push From the Bush: A Bulletin of Social History*, 98.
[97] *In re Tyler; R. v. Rossi and others* (1828) NSW Sel Cas (Dowling) 568; [1829] NSWSupC 25, in Dowling, *Select Cases,* Vol. 2 Archives Office of NSW, 2/3462.
[98] Ibid, see Wentworth's remarks*, Sydney Gazette,* 4 July 1829.

had his Colonial Secretary, Alexander MacLeay, prepare an executive authority to reassign Tyler and, for good measure, lay criminal charges against Hall.[99] On 5 April 1829 Tyler was arrested, transported and, over the ensuing months, put to work in irons on a road gang in the Wellington Valley.

Hall was summonsed to appear before the head of the Sydney Police and Police Magistrate, Captain Francis Rossi. At the Rum Hospital court that day, Rossi was accompanied by three gentlemen magistrates: George Bunn, Edward Wollstonecraft and Warren Jemmett Brown, Esquires. Hall stood before this 'learned quartet' charged with 'harboring his own assigned servant'.[100] As he pointed-out to the Bench, the charge was an oxymoron at law. The Governor had assigned Tyler to his service. Further, the charge was laid pursuant to an irrelevant local ordinance, 'An Act to prevent the harbouring and employing of runaway convicts, and the encouraging of convicts tippling or gambling'.[101] Hall also reiterated that the Supreme Court had, days before, ruled against reassignment at the Governor's pleasure in *Jane New's Case.*[102]

The Summary Bench heard only what they wanted to hear. The Crown Solicitor, Kerr, submitted that the Supreme Court had not definitively decided the question of assignment. Accordingly, the magistrates accepted the Crown's argument and refused to hear the defendant. One justice went to 'the length of saying that *his law* was as good as that of the Judges'.[103] Hall was convicted and fined 'six dollars'.[104]

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[99] Ibid, see the Affidavit of Hall.
[100] Ibid, Wentworth, *The Australian*, 23 June 1829.
[101] *Runaway Convicts Harbouring Act 1825* (NSW) (5 Geo IV No 3).
[102] Wentworth in, *In re Tyler; R. v. Rossi and others* (1828) 23 June 1829.
[103] Ibid, per Dowling J, *Sydney Gazette*, 4 July 1829.
[104] Ibid. 'Dollars' was a common synonym for pound sterling. At this time, a labourer earned around £50 per annum.

He appealed immediately. With Wentworth as counsel, Hall sought first to free Tyler from the chain-gang by filing a writ of *habeas corpus*. Second, he sought to quash his conviction by issuing a writ of *certiorari* (that the decision had not been authorised by law). Third, he attempted to (prosecute) lay criminal information against the justices. Hall charged the magistrates with his 'malicious conviction' and their 'gross contempt' by ignoring the authority of the Supreme Court in *Jane New's Case*. Wentworth delivered Hall's motion to indict the magistrates at his apoplectic best. He challenged the Supreme Court 'to vindicate its own dignity and to prove to these defendants [the magistrates] that they are not to presume to treat its decision in the way in which it is sworn they have done'. In this final act, the radical newspaper man, Hall, would place summary justice on criminal trial. Forbes hastily quashed Hall's conviction and returned Tyler to his former service. More surprisingly perhaps, the Full Bench took seriously Hall's incendiary challenge to indict the justices. As the justices sweated in the dock 'below', the Judges adjourned overnight to consider the issue. The next morning, Justice Dowling delivered a joint judgment. The court humiliated the magistrates, stating that 'if Justices, in the situation of these gentlemen, were in England … they would expose themselves to severe and just animadversion'. Dowling continued, 'we are really at a loss to divine how it could enter the minds of the magistrates below, that this case came within the operation of the local ordinance'.[105]

The demeaning spectacle was protracted as Dowling referred the justices to 'Burn's Justice', a common magistrate's manual in which the primary instruction provided that magistrates lacked jurisdiction to deal with cases such as Tyler's. Finally, the 'inferior magistrates', said Dowling, had exercised 'so much obliquity' that they should be forced to pay Hall's costs.[106] But in accordance with Forbes' view that

[105] *R v Rossi*, *Sydney Gazette*, 4 July 1829.
[106] Ibid.

magistrates should be protected from prosecution, the Supreme Court declined to lay Information against (charge) the magistrates.[107] By the time Tyler was returned to Hall, Hall was imprisoned for criminal libel.[108]

While in prison, Hall became the subject of two further prosecutions and had his sentence increased from 12 months to 3 years. However, Hall struck back at the magistrates from prison, launching five civil law suits and winning four.[109] Ironically, Darling's personal attack on Hall empowered the radical journalist by enabling *The Monitor* to ventilate its polemic in the courts and among the highest reaches of colonial power. In 1830, Darling's gubernatorial right to revoke assignments at will was vindicated by the Crown Law officers at the Colonial Office in London. Yet, rebuked by Viscount Howick in January 1830 about Darling's 'crack-down' on the press and his handling of the Sudds-Thompson Affair, Darling was recalled to London by Viscount Goderich in March 1831.[110]

Hall's struggle to reform convictism had seen him become the first person in the colony to be prosecuted for criminal libel. He went on to be the subject of eight further criminal libel prosecutions, during which he advanced and won a range of fair trial rights which changed the criminal process in NSW (see Appendix for further details). In 1891, one-time Chartist Sir Henry Parkes commemorated the coming of constitutional government and the friends of Australian liberty by saying that Hall was 'a man of singularly pure and heroic disposition' and that 'this country and all Australia can never adequately thank that singular pioneer in the cause of civil

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[107] Ibid.
[108] *R v Hall (No. 2)* [1829] NSWSupC 23, *Australian,* 15 April 1929.
[109] M.J.B. Kenny, 'Hall, Edward Smith (1786–1860)' in *Australian Dictionary of Biography* (Melbourne University Press, 1966).
[110] Ibid. For further commentary on this incident, see Neal above n 26, 111 and 129-39. Neal argues that Forbes' attempted to thwart Darling by characterising the assignment relationship as being about property, rather than government service. See also, C.H. Currey, above n 60, 343-7.

liberty'.[111] As the voice of radical reform in the colony, Hall could not be silenced and he ultimately won the contest with the NSW establishment.

Civic Radicals, Organised Labour and Reform to Criminal Process

Until the late nineteenth century, working-class people were brought into daily contact with the criminal law through the workplace. The contract of employment was enforced by criminal punishment. Work hours, completion of work, as well as workplace behaviour and discipline were policed through fines and imprisonment. As we have seen in Chapters 1 and 2, workers, both indentured and free, resisted these laws through violence as well as sporadic assertions of procedural law, rights and custom. Workers and radicals, however, also resisted coercive law by collectivising within guilds, unions and societies. They fought the criminalisation of their working lives in courts and parliament. In the midst of these struggles, they reformed the technical legal processes that operated against colonised and working-class peoples. One of the central mechanisms of this civic radical reform movement was the petition.

The petition evolved as a grassroots method of law reform during the nineteenth century and had its roots in a democratic tradition that emerged during the English Revolution. In 1628, a coalition of English radicals and gentlemen law reformers organised the Petition of Right in which they asserted rights to trial by jury and *habeas corpus* and freedom from taxation, in the face of the authoritarian governance of Charles I who had declared martial law.[112] From that time, petitions became a staple form of democratic political activism throughout Britain and revolutionary America. It was from the petition or charter that the Chart-*ists* – in the 1830s – derived their

[111] *SMH,* 11 August 1891, 3.
[112] *The Petition of Right 1628* (UK) (3 Car 1 c 1), Parliamentary Archives, House of Commons, Parliament, Westminster, London, www.bl.uk/collection-items/the-petition-of-right, accessed, 18 June 2015.

enormous strength, becoming, arguably, one of the most effective democratic forces in the history of modernity.

Petitions emerged as a means of reforming criminal process in colonial NSW during the Macquarie era (1810-1821). In 1819 emancipists William Redfern and Edward Eagar organised a 'Petition for the Redress of Grievances'. Both men had strong personal grievances with the class-based system of criminal law that dominated colonial society. Redfern was a former ship's surgeon who had organised his crew to mutiny against their captain in 1797 and since his emancipation had risen to become an eminent surgeon within the colony who opened a free health clinic in Sydney catering for convicts and the city's working class. Governor Macquarie appointed him a magistrate but Lord Bathurst intervened from London to nullify his appointment one month later.[113] It was at this point that Redfern began to work with the emancipist attorney Eagar to petition the metropole for legal rights in NSW. The reformers demanded a range of rights, not least of which included rights to own and possess property. Their first demand was for 'a Change in the Form of our Courts of Justice and of Trial by Jury'.[114] They argued for reform to criminal process through participatory democracy. Only a few months before, organised workers in Northern England had gathered at St Peter's Field in Manchester to demand the participatory democratic right to vote (in what would become the Peterloo Massacre).

In colonial NSW, in support of their claim for reform of criminal process, radical 'colonists' pointed out in their petition that 'the Hindoo in India, the Hottentot in Africa and the Negro Slave in the West Indies' – all similarly colonised peoples – exercised the same criminal process rights to trial by jury as in England. Further, they

[113] Lord Bathurst had replied to the notice of appointment, before Redfern was sworn in but his reply was delayed due to the delivery time of correspondence between colony and metropole.
[114] 'Petition by Colonists for Redress of Grievances', *Macquarie to Bathurst,* 22nd Mar., 1819, *HRA*, Ser I, Vol X, pp. 52-65.

argued that such rights in NSW were warranted because colonial society owed its very existence to the broad mass of people 'by whose … Exertions and Labour the Country has been cleared and cultivated'. As importantly, it was largely through 'the people' 'that ties and connections … [had) been formed, and … (were) daily forming … (uniting) Man to Man, and strengthening the bonds and union of society'. Finally, since they saw themselves as 'respectable Inhabitants', they proposed that free men were 'sufficient and perfectly competent for Jurymen'.[115] These radical petitioners were no longer prepared to tolerate colonial authoritarianism. In these circumstances, the radicals decried tremendous injustice in the administration of criminal process in NSW by a military-industrial complex of soldier-juries and squatter-magistrates whom the radicals claimed were 'bound to believe a Man Guilty before … his Trial'. 'It has happened more than once', the petitioners exclaimed, 'that the very Accuser of the Prisoner was a Member of the Court and one of his Judges'.[116]

By combining property rights with rights to due process, the radicals appealed to the emancipist faction of the colonial ruling-class. The result was that their petition was by signed by 1260 'Gentlemen, Clergy, Settlers, Merchants, Land-Holders and other free Inhabitants'.[117] Macquarie endorsed the petition and sent it to Lord Bathurst. Redfern and his followers followed up with a second attempt at criminal law reform in 1821, through 'The Humble Petition of the Emancipated Colonists of the Territory of NSW'.[118] This time, the petitioners included not merely the colonial gentry but 'a majority … by whose Labour, Industry and Exertions, your Majesty's Colony has been cleared and cultivated, its Towns built, its Woods felled, its Agriculture and commerce carried on'. They sought 'the unquestioned restoration of

[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Enc., *Macquarie to Bathurst,* 22 No., 1821, *HRA* Ser I, Vol X, p. 549.

… all civil Rights and privileges of free subjects' including, 'giving evidence in Courts of Justice', and 'personal liberty', 'character' and 'credit'. Under this wider franchise, the petitioners saw themselves not merely as 'a society', as they had in 1819, but 'a system of humane and benevolent society'.[119]

These demands for democracy and law reform resonated with a fellow law reformer at the Colonial Office, Francis Forbes. As Chief Justice, he had previously been involved in a major struggle with an authoritarian Governor in Newfoundland. He had returned to London to recuperate from the battle and take up a post at the Colonial Office in 1822. While in London, Forbes met with Redfern who had accompanied his petition to present it to the Prince Regent in person. Redfern quickly learned that Forbes had been tasked with drafting a new constitution for the colony, which Forbes would subsequently administer as the new Chief Justice of NSW. As Redfern wrote of Forbes in a letter to D'Arcy Wentworth from London:

> I had the pleasure of an interview with him two days ago. He is the very man that is, in my opinion, fitted for NSW. He is clever, sensible, unaffected and well conversant with colonial law business, and appears to have a very proper notion of the distinction between law and justice. He will, if I mistake not, be exceedingly popular.[120]

While Forbes drafted the new constitution, pressure was brought to bear on him by another former colonial Chief Justice (of Trinidad) and Colonial Office employee, Commissioner John Thomas Bigge, who had just returned from NSW and presented Forbes with a copy of his 'Report Into the State of the Colony of NSW'.[121] Bigge's views on colonial democracy and trial by jury were well known. He opposed them

[119] 'The Humble Petition of the Emancipated Colonists of the Colony of the Territory of NSW and its Dependencies', Macquarie to Bathurst, 22 October 1821, *HRA,* Series 1, Vol. X, p. 549.
[120] From the 'Wentworth Papers', cited in Currey, above n 60, 22.
[121] House of Commons (UK) (19 June 1822), Series 2, Vol. 7.

both.[122] Bigge was supported in his advice to Forbes by two fellow arch-Tory judges from NSW, Barron Field and John Wylde. It appears that Forbes was pressured by his superiors into drafting an Act that expressed their concerns. Military jury was retained and a small concession to the petitioners was made by increasing the number of jurors from six to seven while requiring a unanimous verdict as opposed to a majority.

During the drafting process, however, the radical democrats from NSW continued to petition the colonial office. Edward Eagar followed-up his petition on 1821 by sending Forbes and the head of the Colonial Office, Earl Bathurst, a lengthy letter, again outlining the democratic claims for trial by jury and refuting Bigge's authoritarian vision for NSW. The radical claims for democratising criminal process in NSW did not go unheeded by Forbes and were manifested in practice when the new Chief Justice arrived in the colony in 1824. Swayed by the radicals who continued their campaign in a number of local newspapers, Forbes interpreted s. 19 of his new Act to permit jury trials by 12 civilian jurors in all criminal matters (that were not heard in the Supreme Court and not punishable by death) at the new Court of Quarter Sessions (also established by the Act).[123] The British Government reversed Forbes' decision in 1828, but over the ensuing decade expanded the Legislative Council and its power to implement law reform. Throughout the 1830s, radicals like E.S. Hall and even William Wentworth continued to rage against authoritarian criminal process and advocate for trial by jury in their newspapers and pamphlets. Wentworth demanded 'all the liberties granted by the Glorious Revolution'[124] and, in 1835, Hall published 'The Rights of Juries: In Ten Essays'.[125] Their efforts nourished a growing tide of popular democracy and after a series of

[122] Ibid, 36.
[123] *R v Magistrates of Sydney,* 14 October 1824, *The Australian,* 21 October 1824.
[124] Castles, above n 83, 126-127; see also Andrew Tink, *William Charles Wentworth: Australia's greatest native son* (Allen & Unwin, 2009).
[125] Edward Smith Hall, *The Rights of Juries: In Ten Essays* (Sydney Monitor Office, 1835).

amended Bills, first providing the option of civilian jury trial in 1833, an Act implementing civilian jury trial in all criminal matters was implemented on 31 October 1839.[126]

Radical condemnation of the cruelty of criminal process persisted throughout the 1830s, finding a popular voice by the end of the decade in the mass protests of the Anti-Transportation League and the emergence of the democratic movement. As previously described, the democratic movement was built from a collection of workers, guildsmen and radicals who waged campaigns in response to a wide spectrum of social concerns. Reforming criminal process was one of these. In the 1840 elections, John Dunmore Lang's Chartist slogans of 'universal suffrage' and 'equal electoral districts' were complemented by equally rousing cries for 'the complete abolition of convict transportation'.[127] The Anti-Transportation League of the late 1840s was, however, a complex beast. It was informed by both popular humanitarianism and a range of sectarian ideologies, as well as working-class radicalism. Like the respectable working-class Chartist movement, the politics of the Anti-Transportation League were broadly opposed to transportation on the basis of the moral 'stain' that convictism left on the character of the general population. It should not be forgotten that the first demand inscribed on *The People's Charter 1838* was 'a vote for every man twenty-one years of age, of sound mind, *and not undergoing punishment for a crime*'.[128]

John Dunmore Lang was the leader of the early Chartist movement in colonial NSW and he was no convict sympathiser. By some, he has been considered 'the artful

[126] G.D. Woods, *A History of Criminal Law in NSW: The Colonial Period, 1788-1900* (The Federation Press, 2002) 72.
[127] Irving, above n 13, 184.
[128] (Italics added) *The People's Charter 1838,* s. 1.

dodger of Sydney',[129] and by others, a 'Protestant bigot'.[130] Yet he was also a radical, separatist, republican, communitarian and anti-authoritarian reformer. Lang vehemently opposed British colonisation, saying: 'the galling and degrading yoke under which we have so long groaned as a British colony governed by absolute Secretaries of State and tyrannical governors, is broken at last. Peace! Freedom! And the Republic of NSW!'.[131] Later Chartists such as Henry Parkes described Lang as a champion of the Sydney *comuyns,* the 'suffering poor', and called his election to parliament a 'national triumph'.[132] Lang confronted middle-class progressives such as Irish Whig reformer and Attorney-General John Plunkett, under whose laws 'crime itself was dignified by the name of misfortune'.[133] Lang was found guilty of libelling the emancipist editor of the *Sydney Gazette* as one such 'criminal'.[134] But Lang also identified connections between Chartism and anti-transportation and campaigned to 'extend the elective franchise to all respectable persons of that [convict] class' and 'maintain their eligibility to sit as members of a future House of Assembly'.[135]

Much working-class opposition to transportation was due to its perceived effect of undermining waged labour through indenture and further immigration. For instance, Lang opposed transportation on the basis 'that the superintendents of convicts should underbid free labour … and thereby take the bread out of the mouth of the free labourer'. He asked:

> Would such a measure, on the part of the government, be tolerated by the labouring poor in a free country? Or rather ought it be tolerated? Would not

[129] *Illustrated Sydney News,* 3 June 1854, 1.
[130] Irving, above n 13, 48.
[131] Headon and Perkins, above n 74, 11.
[132] Jones, above n 19, 144.
[133] *Ex parte O'Shaughnessy, in re Lang* (1835) NSW Sel Cas (Dowling) 806; [1835] NSW SupC 48, *Sydney Herald,* 22 June 1835.
[134] Ibid.
[135] Ibid.

> insurrections, rick-burning, prison-breaking, martial law, and ten thousand convictions for sedition be the result?[136]

Following the strategy of Chartists in England, these demands were expressed to authorities by way of petition.[137] Such concerns were very real for the early working class in NSW, particularly as social unrest grew in relation to the continued criminalisation of labour law and workers in the 1840s.

The Masters and Servants Bill 1840 retained the British criminal process of the mid-eighteenth century. Breach of contract by workers remained punishable by a mandatory sentence of imprisonment.[138] Prison sentences were compounded by mandatory fines so that 'every person convicted of so offending as aforesaid shall *forever* forfeit all or such part of his or her wages'.[139] The 1840 Bill was designed to maintain cheap labour by flooding the labour market with migrant labour. It was introduced to the Legislative Council by 'non-official members' – pastoralists and merchants – supported by the Tory leaders of the house, John Jamison and James Macarthur. The strategy was for the State to pay bounties to employers who sponsored British immigration. The Bill coupled this plan with further penal sanctions and an expedited program of criminal process weighted against workers. The Tories attempted to sell the Bill to political opponents by reducing the term of imprisonment for workers from six months to three (in practice, workers already rarely received more than three months imprisonment). The Bill also took away workers' claims to unpaid wages while empowering a single magistrate (as opposed

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136 Lang, above n 71, 32-33.

137 The petitions were drafted throughout the 1840s and have been compiled in the following text: *NSW. Transportation. The petitions for and against the resumption of transportation : presented to the Legislative Council of NSW between the 30th day of August, 1850, and the 28th day of September, 1850; together with the abstract of such petitions, as prepared by the Clerk of the Legislative Council, by order of the Legislative Council, shewing 36, 589 petitions against, and 525 for transportation. and an index to the petitions* (NSW Association for Preventing the Revival of Transportation, 1850).

138 The *Masters and Servants Act 1840* (NSW) (4 Vic No. 23) did not amend the Masters and Servants Act 1828 (NSW) (9 Geo IV No 9). Under the 1828 Act, justices were required to 'commit every person convicted of so offending (to gaol)'. This had been the state of labour law since the 1730s.

139 (Italics added). s. 2.

to the two or more magistrates customarily required) to judge, convict and imprison workers. Convictions of workers, under the Bill, would be satisfied on the oath of a single witness or employer.

The radical press led the campaign against the Bill, labelling it 'indefensible'.[140] The *Australasian Chronicle* and its editor, W.A. Duncan, responded to the concessions by saying 'it is obviously "too severe" to imprison a man for *six months,* and cause him to forfeit all his wages, for refusing to work diligently, or for absenting himself from work for a few hours' and that 'it is incorrect to say that the Bill is an amelioration of the Act, for if the term of imprisonment is shortened, the provisions of the bill [sic] are much more extensive, stringent and arbitrary than those of the present act'. The *Chronicle* quoted *Magna Carta* in the by-line of its article: 'No freeman shall be imprisoned but by the laws of our kingdom, or the lawful judgment of his peers'.[141] Duncan demanded that conviction occur 'not by one or more justices, upon the single oath of the complainant, but upon the oath of two disinterested witnesses and by the verdict of a jury of the peers of the accused'. The press were well attuned to what the process ought to be. 'The glory of British liberty', they said, 'does not permit a justice of the peace … in a civil action like that of a dispute between master and servant, to punish one of the parties as a criminal upon ex parte and avowedly insufficient evidence'. The problem of unfair process was expressly put in terms that implicated class and colonialism. The only solution, as the press saw it, was to 'extend trial by jury, and restrict our colonial J.P.'s to similar innocent occupations … but we know them too well to trust them with the extensive powers conferred by this bill'.[142]

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[140] *AC*, 29 September 1840, 2; See also *SM,* 29 September 1840; and Leila Thomas, *The Development of the Labour Movement in the Sydney District of NSW* (M.A. Thesis, USYD, 1919/1962). The author notes that WA Duncan was editor of the *The Australasian Chronicle* until he was replaced in 1843.
[141] *AC*, Ibid.
[142] Ibid.

Meanwhile, labourers, both skilled and unskilled, met to express their grievances with the Bill in a series of six large public meetings held at the Sydney Mechanics School of Arts between 1840 and 1843. It was from these meetings that organised labour in NSW had its first major victory against unfair criminal process. Through the process of fiery democratic debates, the workers formulated a petition with a list of demands and declarations about criminal process and the criminalisation of labour law. The petitioners demanded nothing less than respect for the rule of law and freeborn rights, and clearly stated the position of organised labour on issues concerning criminal process.

At the first meeting of workers, the *Chronicle* recalled that 'the whole interior of the building was crowded to excess'.[143] A compositor, J.K. Heydon, addressed the crowd, reminding the men that they 'had met to resist the imposition of [a] … law [the Masters and Servants Bill 1840] that … reproached (them) with idleness and debauchery … insults and oppressions'. Heydon called upon his comrades 'to vindicate themselves' by appealing to the rule of law – to 'proclaim to the rulers of England that falsehood and injustice existed in NSW … that the people of this colony were as deserving of the laws, and customs, and treatment awarded to free, and civilised, and moral men'. He was received with cheers of support.[144] Throughout the meeting, the Bill was compared with the caste system, slavery and indenture.[145] Rather than curbing civil liberties and fair trial rights by suspending jury trial and transferring power to the justices, Heydon proposed that dishonesty and criminality, where it did exist, should be treated through widespread social change

[143] *AC,* 29 September 1840.
[144] Ibid.
[145] See Appendix for Heydon's comments in relation to slavery.

such as 'enlightened' education, in 'infant schools', or systems derived 'from Captain Maconochie at Norfolk Island'.[146]

Like other radicals of his time, Heydon spoke bitterly about the class bias of the honorary magistracy and demanded adjudication of criminal law by 'impartial men'. They were 'unfit to be trusted' with administering a law which held 'out too many inducements to oppression even in a virtuous community, much less in a land where vice predominated in high places'.[147] Another worker, Kelly, protested the 'strong bias against the working man' that 'existed in the minds of all magistrates, whose interests and whose prejudices ran in the same current with those of the parties bringing charges against their servants'. Kelly said that magistrates had:

> almost unlimited power … which rendered the rights and liberty of the … labouring population liable to be infringed by every petty complaint brought against him by his employer or overseer, even on unjust and unfounded charges.[148]

Other workers at the meeting complained that the 'process' contemplated by the Bill was too complex for workers to bring successful complaints against masters.[149] At this, the meeting moved its first resolution condemning the Bill 'with feelings of the utmost alarm'.

The petition reflected a tension between those who sought consensus and those who proposed more radical techniques. A radical tradesman, Belford, objected that the resolution 'did not go far enough' and demanded 'nothing less than the total abolition of the Bill' and a general strike. 'It was the duty of every man' he said, 'to

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[146] *AC,* above n 140. The 'marks system' was a well-known alternative and humane method of penalism developed by Scottish prison reformer, Alexander Maconochie on Norfolk Island throughout the early 1840s, before it was quickly abolished in 1843 due to a perception of leniency to offenders by Lord Stanley of the Colonial Office. Maconochie's achievements are chronicled by Hughes, above n 86, 498-516.
[147] *AC* Ibid.
[148] Ibid.
[149] See Appendix.

give immediate notice to his employer of his intention to leave his service'. But Pritchard, a labourer, disagreed. He suggested that each man 'work by day only' so as to receive wages and not disrupt the lives of their families while 'extending the hand of fellowship to all classes of the community'. Pritchard remarked that 'in its title' the Bill 'professed to be a measure for the better regulation of servants and workmen, but in reality it was merely a code of fines and punishments that might be awarded for the most trivial offence which they might happen to commit'. It was this comment that led to the drafting of a second resolution, condemning the Bill: 'to be at utter variance with equity' allowing 'the frivolous complaint of a malicious or avaricious employer or overseer, to be not only mulcted in heavy pecuniary fines, but to also be subjected to such treatment as they have elsewhere seen only awarded to felons'.[150] A further resolution was also passed, calling for an end to the power of a single magistrate to act summarily to impose penalties.[151]

Finally, a Lee proposed a resolution to provide the petition to the Chief Justice, whom the workers would then request to present the document to the Governor and Legislative Council. Given the intended destination of the petition, the workers restated their overall Chartist platform, adding a demand for a free legislative assembly, thus linking reform of criminal process to democratic reform of the parliamentary system. As Kelly argued, criminal process would be reformed by 'the working-classes … amounting to perhaps four-fifths of the whole number of free persons', who he said were neither 'devoid of mental sensibility' nor 'ignorant of their just weight and influence in the body politic' but 'so large a portion of the community' that they would implement their 'natural rights'. In a similar way, a mechanic, Crosby, observed that 'the higher classes of society in this colony' sought

[150] *AC,* above n 140.
[151] Michael Quinlan, 'Australia 1788-2013: A Workingman's Paradise?' in Doug Hay and Paul Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press, 2000) 226.

'to deny their humbler, yet at least equally honest, fellow citizens, the enjoyment of those common rights established and acknowledged by the present enlightened views of the relative classes composing the body politic'.[152] The meeting concluded with 'three cheers for the Chief Justice' and 'three tremendous groans for Hannibal Macarthur, the avowed enemy of the working classes'.[153]

The petition was signed by 3000 working men and presented to Chief Justice Dowling. The Chief Justice agreed with the workers' demands and circulated the petition to other progressive members of the Legislative Council, ensuring that they blocked the most draconian provisions of the Bill while amending others in accordance with the petition. In amending the Bill, the Legislative Council enacted a new statutory criminal defence of 'reasonable and sufficient excuse'. This defence did not exist in any other act at the time.[154] It was accompanied by a further requirement that all offences under the summary *Masters and Servants Act* be heard by a minimum of two magistrates. As radical journalist, W.A. Duncan put it, the workers of Sydney had told the 'pure Merinos' in the Legislative Council that 'they were unwilling to part with their liberty unless accompanied by their lives'.[155] He celebrated this 'pressure from without' as 'a time when a PEOPLE first manifested their existence … the time when real colonists, the real producers of wealth first boldly informed the drones of the hive … that they were men … through whom alone it could be ruled in peace'.[156]

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[152] *AC,* above n 140.
[153] Ibid.
[154] Adrian Suzanne Merritt, *The Development and Application of Masters and Servants Legislation in NSW – 1845 to 1930* (PhD Thesis, Australian National University, 1981) 36.
[155] Irving, above n 13, 45.
[156] (Emphasis theirs) Ibid.

After public pressure subsided, the 1840 Act was quickly replaced by the *Masters and Servants Act* of 1845 which undid most of the major gains.[157] But while the 1845 legislation was a significant setback for criminal process, workers nevertheless managed to trade some of their rights for new rights against employers. They could sue for 'ill usage', for instance.[158] And wage claims became enforceable by detention of employers' property, with fines for employers who breached contract.[159] By 1857 workers eventually reclaimed the ground they had lost in 1845, when all rights fought for under the 1840 Act were reintroduced under the last and final *Masters and Servants Act* of the nineteenth century.[160]

The history of the 1857 *Masters and Servants Act* is not well known. The only Australian historian of this Act has, to date, been unable to identify the specific arguments leading to its reform.[161] The research undertaken for this thesis, however, is able to show that the 1857 Act was, once again, linked to reforms made by the Australian democracy movement. The Act was informed by a range of evidence from various Select Committees into related legal issues affecting the NSW working class. These issues were brought to light immediately following the commencement of the NSW parliament and the extension of the democratic franchise to all adult men in 1856 and 1857. Indeed, the sheer volume of parliamentary business concerning criminal law in the first year of operation of the new NSW parliament showed that criminal law reform was a central (if not *the* central) social issue on the schedule of democratic reform in that period.[162] Importantly, much of this criminal law reform was raised by petition through concerned citizen activists.[163]

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157 *Masters and Servants Act 1845* (NSW) (9 Vic No 27).
158 'Ill usage' was generally constituted by violence, cruelty or sexual assault by an employer or overseer against a servant in the workplace.
159 ss. 3, 5 and 12.
160 *Masters and Servants Act 1857* (NSW) (20 Vic No. 28).
161 Merritt, above n 154, 102.
162 See, for instance, *Rules of Court at Moreton Bay*, 11 August 1857; *Petition from Goulburn for Remuneration of Jurors*, passed into law, 27 November 1857; *Papers Relating to Secondary Punishment*, 11 August 1857; *Petition from Mudgee that District Courts be invested with Criminal Jurisdiction*, 23 October 1857; *Petition from*

In 1856, the Select Committee on the Administration of Justice in the Country Districts heard that the *Masters and Servants Act* (the 1845 Act) was 'unpopular among the class generally dealt with under' its auspices and that 'there would be a feeling of greater confidence' if it 'were administered by Stipendiary rather than by unpaid Magistrates, as at present'.[164] The chairman of one committee asked about the *Masters and Servants Act*: 'would you not call it oppression to put a man in the lock-up, and to keep him waiting from week to week for a Magistrate?'.[165] Similarly, he put the proposition that 'Magistrates are masters' and questioned: 'do you not think that the Court House, which is a public building, has a right to be used for any purpose for which it may be required by the public?'.[166] Robert Nichols chaired the Select Committee on Master and Servant law in 1856. Unlike a similar Select Committee in 1845, which only heard evidence from masters,[167] under the steerage of Nichols, the Committee heard a range of evidence documenting workers' experience of imprisonment under the legislation.[168] Nichols proceeded to draft a new Act in 1857 to address these concerns. Imprisonment as punishment for breach of contract and work discipline offences was abolished, replaced by fines. The defence of 'without

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Wagga Wagga Praying Establishment of District Courts, 27 October 1857; *Report of Thomas Abbott Late Chief Constable at Dungog*, 25 August 1857; *Correspondence of William Taylor-Fine at Wagga Wagga*, 20 October 1857.

163 See NSW Legislative Assembly 1857, Sessional Papers.

164 *Select Committee on the Administration of Justice in the Country Districts*, NSW Legislative Assembly 1857, Sessional Papers.

165 Ibid, 25 November 1856, Question from the Chairman to Luke Sibthorpe, Clerk of Petty Sessions, pp. 957-958.

166 Ibid, 25 November 1856, Question to Michael Fitzpatrick Esq., p. 971.

167 See Merritt, above n 154, 110-120.

168 See Contents of the Select Committee Report, tabled 1857. NSW Legislative Assembly 1857, Sessional Papers, *Breaches of Masters' and Servants' Act*, 11 August 1857; see also Votes and Proceedings of the NSW Legislative Assembly 1856, *Report From The Select Committee on the Masters' and Servants' Acts Continuation Bill: Minutes of Proceedings and the Bill Framed by the Committee*, p. 467; see also, NSW Parliament Sessional Papers, Minutes of Evidence Taken Before the Select Committee on the Administration of Justice and Conduct of Official Business in the Country Districts, 19 November 1856, p. 940, www.parliament.nsw.gov.au/HHP/Pre1991/Votes/Papers/Sessional%20Papers%20-%201st%20Parliament%201856-57.pdf, accessed 19 June 2015. Questions by the Chairman, John Robertson, Esq., and Forster, to William Colburn Mayne, Esq., M.L.C.

reasonable cause' remained, while penalties for negligent loss of a master's property were also abolished.[169]

The results for working people were quantifiable. In the 1830s and 40s, 47 per cent of all convictions for work discipline and breach of contract matters resulted in imprisonment.[170] Following the implementation of the 1857 Act, sentences of imprisonment for work discipline offences (including some remaining ticket-of-leave holders) diminished to zero by 1880.

Civic Radicals and Reform to the Magistracy

In the period between 1830 and 1860, the NSW magistracy became one of the central grievances of 'the People'. The magistrates and their administration of criminal justice generated fierce critique by radical journalists like Edward Hawksley on an almost daily basis.[171] Hawksley had been editor of the British Chartist journal *The Citizen,* before establishing the *People's Advocate* in Sydney in the late 1830s.[172] The *People's Advocate* blamed magistrates for 'the system of coercion, intimidation and bribery' entrenched within criminal process – a process that had 'arrived at such a height that it is absolutely necessary that the ballot should be enforced in order to put a stop to this whole sale [sic] corruption'.[173] As we have seen above, radicals suggested that a cure to corruption and unfairness lay not only in the rule of law, but also in a program of democratic enfranchisement.

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169 Merritt, above n 154, 102.
170 Ibid, 241.
171 *The People's Advocate,* 6 January 1849, 1; 13 January 1849. For vicious critiques of the Magistracy in colonial newspapers see: *The Working Man's Guardian*, *The Star, The Atlas* and *The Parramatta Chronicle*; Ihde, above n 24, 31, 34; Ruth Knight, *Illiberal Liberal: Robert Lowe in NSW, 1842-1850* (Melbourne University Press, 1966).
172 Hawksley became one of the founding members of the NSW Constitutional Association in 1849, together with John Dunmore Lang with whom he shared a program of radical Chartism and the rhetoric of the free-born Englishman: see Peter Cochrane, *Colonial Ambition* (Melbourne University Press, 2006) 251.
173 3 February 1849 and 27 October 1849, p.1.

In the 1840s the increasing politicisation of working men saw many working-class people become involved with the struggle to reform the municipal franchise.[174] Prominent radical speakers attended working men's meetings across Sydney in an effort to gather support for a range of grassroots legal causes. The speakers included the painter and glazier John Carruthers (chair of meetings), the compositor Richard Jones, the journalist Edward Hawksley and the stonemason, John Lynch. Together, these men argued that the city's working-class residents should have the right to vote for a stronger police force and laws that affected the magistracy. These issues took equal place with struggles for reform to labour law as well as localised platforms for cleaner streets, better lighting and sanitation. As one newspaperman put it, these problems would never be addressed by a ruling class of landlords and masters who comprised the political class, because they 'lived in splended mansions in airy situations [sic]' away from the city.[175]

In the Legislative Council, John Dunmore Lang agreed. He placed before Parliament a Bill drafted by the working men of Sydney to reform the municipal franchise and put an end to the appointment of magistrates based on patronage and class connections. The men proposed that the popularly-elected Sydney City Council should nominate city magistrates. Council elections were subject to a lower property qualification, would allow small businessmen, artisans and skilled workers to vote and thereby directly access and influence the power of a metropolitan magistracy.[176] In 1842, the demands of the workingmen were carried into effect with the passage of the *Sydney City Incorporation Act*[177] (known as the 'Sydney Corporation Act'). The Act followed English precedent and stipulated that the elected Mayor would operate as

[174] Hilary Golder, *High and Responsible Office: A History of the NSW Magistracy* (Sydney University Press, 1991) 65-68.
[175] Irving, above n 13, 45.
[176] Golder, above n 174, 66.
[177] *1842* (NSW) (6 Vic No 3).

an *ex officio* justice of the peace. It also empowered the Governor to select a separate city bench of magistrates that would be more representative of and sympathetic to the experience of inner-city working-class defendants. A further Act, the *Sydney Police Act*,[178] was passed shortly after and vested metropolitan magistrates with all the powers of Police Magistrates. As a result, metropolitan magistrates (the Mayor and aldermen) sat most days and usurped many of the duties of the Sydney Police Magistrate, Charles Windeyer. Windeyer complained to the Committee that they lacked his detailed knowledge of the 'criminal class' who regularly graced the dock at Hyde Park Barracks.[179]

During the 1840s, politicians from working-class districts expressed the concerns of their constituents as they denounced the magistracy. Robert Lowe was one such politician, elected in NSW in 1848 in the same cohort as Parkes. Lowe harboured a distinct distaste for magistrates whom he observed were often 'military officers, youths just escaped from school, and ignorant vulgar men scarcely able to write their own name … petty tyrants of our remote police offices … '. He felt that:

> none but wealthy people, can obtain redress for wrongs which they may suffer at the hands of the Justices of the Peace … in nine cases out of ten where they proceed summarily, they act contrary to law. And considering their entire ignorance of legal principles it cannot be otherwise … in some parts of the interior they rule with all the authority of eastern despots.

Lowe suggested a complete professionalisation of the magistracy so that 'the Government' might 'appoint none but staid, experienced and well educated gentlemen to the Commission of the Peace'. Critically, Lowe recognised that 'though

[178] *1843* (NSW) (13 Vic No 1); Golder, above n 174, 65-7.
[179] Ibid (Golder), 66.

this could not afford any guarantee for legality, it would at all events, in some respects, secure fairness and impartiality in their decisions'.[180]

John Darvall was another radical in the Legislative Council in this period. He aligned himself with other democrats within the parliament, including Cowper, Lang and Parkes. Darvall was elected to the Western Suburbs seat of Cumberland but, as a barrister from the Middle Temple in London, he was quickly appointed Solicitor-General.[181] Together with Nichols, Darvall oversaw the introduction of proportionality within the criminal justice system, decreasing the maximum penalties of a range of common offences by increasing the number of crimes that could be dealt with summarily. These radical democrats began building a case against coercive law based on quantitative data about social conditions and crime. They presented to the parliament a range of statistics collected by the Benevolent Society showing a connection between poverty and the routine caseloads of superior and summary courts.[182] They relied on this evidence in 1850 when introducing the *Juvenile Offenders Act,* creating summary trial for children under 14 in relation to larceny (the most common juvenile offence). They used the data again in 1852 when they raised the age limit of juvenile offenders to 16 and, most importantly, prescribed that most theft offences (those involving stolen goods valued at less than 5 shillings) could be dealt with summarily.[183] In 1855, this limit was increased again to 40 shillings.

One of the most dramatic changes to the magistracy occurred following the transition to Responsible Government in 1856 with complete manhood suffrage in 1858. Aboriginal men were accorded the vote (only to be disenfranchised by

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[180] *The Atlas*, 22 March 1845.
[181] R.W. Rathbone, 'Darvall, Sir John Bayley (1809–1883)' *Australian Dictionary of Biography,* Vol. 4 (Melbourne University Press, 1974).
[182] See, for instance, Votes and Proceedings Legislative Council, 20 June 1852.
[183] *Larceny Summary Jurisdiction Act 1852* (NSW) (16 Vic No 6).

Federation in 1901[184]). As historian Terry Irving discovered, the struggle for responsible government was the major achievement of Chartist and working-class radicalism in nineteenth century NSW.[185] Not surprisingly, with a shift in power from authoritarian oligarchy to majoritarian democracy came laws and, in particular, criminal process, that reflected the will of a democratic majority. This democratic revolution in NSW spelt seismic change for the magistracy between 1856 and 1861. During this period, executive power over the Magistracy was transferred from the Governor to the legislature. In 1856, the first year of democratic governance, the Parker-Donaldson Government appointed 174 new justices. Between 1857 and 1863, NSW Premier, 'Slippery Charlie' Cowper, appointed 791 justices.[186] Nevertheless, most were honorary appointments and by 1861, there were only 25 paid Police Magistrates outside of Sydney.[187]

Cowper was a Tory who became a Liberal in 1861. He took suggestions for appointments from members of parliament and appointed a number of small businessmen and skilled workers to the Commission of the Peace (honoraries).[188] Most appointments were made on the basis of factional pragmatism rather than progressivism.[189] Golder claims that it was the 'voters of NSW' who ultimately 'rejected the ideal of an honorary magistracy'.[190] In turn, this allowed for the enactment of laws based on a backlog of petitions against unfair criminal process, received by the Legislative Council since the 1840s. By 1861, there was a popular

184 The *Franchise Act 1902* (Cth) prohibited Aboriginal voting, although the Australian Constitution preserved it under s. 41: see George Williams et al, *Blackshield & Williams: Australian Constitutional Law & Theory* (6th ed. The Federation Press, 2013) 135.
185 Irving, above n 13.
186 *Select Committee on the State of the Magistracy 1858,* Votes and Proceedings of the Legislative Council; and Alan Powell, *Patrician Democrat: the political life of Charles Cowper, 1843-1870* (Melbourne University Press, 1977).
187 Golder, above n 174, 74.
188 *Select Committee on the State of the Magistracy*; Powell, above n 186; Ibid (Golder), 72.
189 Ibid (Golder).
190 Ibid.

push for stipendiary Police Magistrates to take over from honorary magistrates. It was led by radical campaigners.

David Buchanan was a firebrand Chartist politician and friend to the vulnerable and marginalised throughout the colony. The Catholic son of a Scottish barrister, Buchanan was practised in sheep-dipping and roustabout work in Bendigo before being elected to the working-class seat of Morpeth in the Legislative Assembly. He later returned to England to qualify for the Bar before returning to NSW to implement further radical reform to criminal and early divorce law.[191] The law reform introduced to parliament by Buchanan in 1861 marks the final step toward modernisation of criminal process in the period under discussion.

In February 1861 Buchanan was the primary witness to the Select Committee on the Unpaid Magistracy.[192] His evidence was scathing of the magistracy, particularly in rural areas. In the witness box, Buchanan told of a case where a man had been imprisoned for fourteen days on a charge of drunkenness, due to the laziness of a local squatter who simply refused to attend to his duties as an honorary magistrate by releasing the defendant from custody. He spoke of how local citizens frequently intervened by writing letters or riding long distances to fetch a magistrate who might release a prisoner from local police cells. In one case, a defendant was sentenced to six months' imprisonment for angrily suggesting that a court clerk was taking too long to process his depositions. The defendant 'said he would shoot the Clerk of the Bench unless he got a Magistrate to try him next day'.[193] Buchanan spoke of another case in 1860 in which a local gentleman acted as both prosecutor and judge in his

[191] Martha Rutledge, 'David Buchanan (1823-1890)' *Australian Dictionary of Biography*, Vol. 3 (Melbourne University Press, 1969).
[192] *Minutes from the Select Committee on the Unpaid Magistracy*, 20 February 1861, NSW Legislative Assembly Sessional Papers, p. 903.
[193] Ibid, Evidence of David Buchanan, 20 February 1861, p. 2.

own case. The Committee heard from other witnesses in respect to more routine cases involving corruption and collusion between honorary magistrates, local squatters and police cases in which the bench ignored the evidence of servants and imposed excessive bail and sentences against working men.[194] Politicians from working-class districts used their time in the witness box at the inquiry to suggest that the magistracy should be elected by 'the people'. Further, they should be suitably qualified through judicial examinations to ensure their 'intelligence', 'competence' and lack of 'social distinction' so that they would be less 'likely to be swayed by class feelings than the country gentlemen themselves'.[195]

The picture of the honorary magistracy that emerged from the inquiry was not pretty. Accordingly, in March 1861, Buchanan introduced the Magistrates (Powers Limitations) Bill to NSW Parliament. The Bill sought 'to limit the power of Police Magistrates and Justices of the Peace, from inflicting a longer term of punishment than six months imprisonment'.[196] It divided the house but eventually passed by majority.[197] By 1861 the radical parliamentary democrats had managed to secure a decrease in maximum summary sentences that would not be significantly increased until the twentieth century. Through the Act, they also ensured that stipendiary magistrates became the norm in NSW and their powers were restricted in accordance with the summary nature and class prejudice of their power.[198]

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[194] See, for instance, the evidence of James Ralfe Esq., William Denton Esq., Charles Hamilton Walsh Esq. and T. Garrett Esq.
[195] See the evidence of T. Garrett, 1 March 1861, p. 13.
[196] Votes and Proceedings of NSW Legislative Assembly, 27 March 1861, p. 233.
[197] The Bill passed the Legislative Council on 9 May 1861 as 'An Act to limit the power of Justices of the Peace in certain cases'. Votes and Proceedings of NSW Legislative Assembly, 9 May 1861, p. 423.
[198] *Justices Powers Limitation Act 1861* (NSW) (24 Vic No 25).

Conclusion

Organised democratic resistance was an effective strategy against the coercive power of the magistracy and their law. The year 1861 marks the time when this resistance reached its zenith, resulting in some of the most influential and humanitarian interventions to criminal process in the modern era. Importantly, the roots of this parliamentary reform lay in radical majoritarianism – the result of Chartist struggles and an organising labour movement over the course of the early nineteenth century. As this chapter has argued, this movement was able to unite rage and dissent to create and prosecute legitimate demands that reflected the will of a democratic majority. Previously violent and disorganised resistance was channelled into political opposition within legal institutions. The broad-sweeping reforms achieved by radical reformers, discussed throughout this chapter, represented a crystallisation of many of the demands being made by colonised and working-class peoples since 1788. The relationship between these demands and their enactment as law is illustrated in the Table annexed (to the Conclusion).

Clearly, reform to criminal process was associated with large-scale political change that emerged in unison with an early democratic movement in NSW. As the demands of colonised and working-class peoples, together with those of radical reformers reached new heights, the following chapters show that further reform would follow. The next chapter examines the development of reform to criminal process by radical democrats in finer detail. It uses the approach of micro-history to focus on the efforts of one individual civic radical campaigner in the Western Suburbs of Sydney who made a major contribution to democratic law reform by arguing for the implementation and amendment of the English *Jervis Acts* – a code of criminal

procedure – in colonial NSW.[199]

[199] Examples of influential micro-historical approaches include E.P. Thompson's *Whigs and Hunters: The Origin of the Black Acts* (Pantheon, 1975) and Natalie Zemon Davis, *The Return of Martin Guerre* (Harvard University Press, 1983).

Chapter 5: Civic Radicalism & the Jervis Acts in NSW

Edwin Augustus Withers was a colonial intellectual and an eccentric. He was the proprietor of the Temperance Coffee-House at the settlement of Parramatta in New South Wales (NSW) during the 1840s. From the day he protested his illegal conviction for a misdescribed charge, to the day he was released from Tarban Creek Lunatic Asylum by writ of *habeas corpus*, Withers wagered his life and liberty – and sanity – for the advancement of fair trial rights in NSW. He consistently battled the magistracy and advocated on behalf of 'prisoners of the Crown', most of whom were former convicts or convict descendants. Such was the vigour of Withers' activism – frequently marked by outraged outbursts – that he regularly attracted coverage in Edward Mason's *Parramatta Chronicle*.[1] Withers' impassioned protest, however, was not simply the subject of early colonial newspaper reportage. It influenced major changes to court procedure, particularly at the level of Magistrates' and Quarter Sessions' Courts. More importantly, his specific demands shaped key amendments to the adoption in the Colony of the *Jervis Acts 1848* – one of the most significant procedural reforms to criminal law throughout the nineteenth century.

Withers' idealism and social activism gained momentum within the working-class heartland of Parramatta in mid-nineteenth century NSW, later earning the support of reformist politicians and lawmakers. A range of procedural or 'fair trial' rights that

[1] In 1843 Mason vowed to protect 'the prisoner of the crown from all oppression' and 'the labouring poor against the tyranny of the monnied interest (sic)'. Mason's approach to newspaper editing is discussed in Terry Irving, *The Southern Tree of Liberty: The Democratic Movement in NSW before 1850* (The Federation Press, 2006) 145.

protected the liberty of the subject from a harsh and punitive colonial State ensued. The story of Edwin Withers unfolded in three parts. First, he gained notoriety among the Parramatta Justices by protesting for fair trial rights at the local Courthouse. Second, Withers conducted what can only be described as a lay-person's or *civic* legal aid service between the police cells and the Parramatta Courthouse. Third, he struggled against political persecution which involved his arrest and detention in Tarban Creek Lunatic Asylum on the orders of the Justices at the Parramatta Quarter Sessions.

Police brutality and corruption were endemic to policing and summary procedure in the Colony in the early-to-mid-nineteenth century. Policing was conducted by both the military and the local constabulary, both skilled in a peculiarly colonial method of law enforcement that combined rationalist procedural administration with barbaric brutality.[2] Summary justice was dispensed by both stipendiary magistrates and honorary 'Justices of the Peace'. 'Justices', as they were known, were predominantly appointed on the basis of existing wealth and power, as they had been in the feudal administration of Britain since the Middle Ages.[3] Local residents of Parramatta were unimpressed by this system. They voiced their rage and frustration with the police force in letters to the editors of the district newspapers, *The Parramatta Chronicle* and *The Star and Working Man's Guardian.*[4] In turn, newspaper editorials reflected the people's grievances.[5] Between 1843 and 1845 the legal columns of local papers

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[2] See, for instance, the work of Paula J. Byrne, *Criminal Law and Colonial Subject: NSW 1810-1830* (Cambridge University Press, 1993); Mark Finnane (ed.), *Policing in Australia: Historical Perspectives* (NSW University Press, 1987); Alastair Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* (Cambridge University Press, 1991); David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early NSW* (Cambridge University Press, 1991).

[3] See Hilary Golder, *High and Responsible Office: A History of the NSW Magistracy* (Sydney University Press and Oxford University Press, 1991) 3; R.W. Connell and Terry H. Irving, *Class Structure in Australian History: Documents, Narrative and Argument* (Longman Cheshire, 1980) 33-34; and more broadly, John Kennedy McLaughlin, 'The Magistracy in NSW, 1788-1850,' (LL.M. thesis, University of Sydney, 1973); Douglas Hay and Peter Craven (eds.), *Masters, Servants and Magistrates in Britain and the Empire, 1562-1955* (The University of North Carolina Press, 2004).

[4] See, *The Parramatta Chronicle* (hereafter referred to as, '*TPC*') and *The Working Man's Guardian* (State Library of NSW, microfilm, 1843-1845). Edward Mason was editor of both newspapers.

[5] See both *TPC* and *The Working Man's Guardian,* 1843-1845.

protested the plight of criminal defendants in respect to what it labelled 'Police Jurisprudence' in the streets of Parramatta.[6]

The Chronicle advocated for fair trial rights and published weekly accounts of police misconduct and popular unrest in the Parramatta district. In a case of 'assault police' in which 'the prisoner stoutly denied the charge', the paper tells us, 'no less than three constables belaboured him unmercifully with their staves without any occasion'.[7] On the same day, another man who faced similar charges arising from a separate incident asserted 'self-defence' after he was 'attacked by the military and beaten severely'.[8] The lock-up opposite the Court erupted. According to the *Parramatta Chronicle* there were 'regular riots there with the soldiers'.[9] Highlighting the viciousness of the constabulary, *The Chronicle* told the story of an inquest into the death 'of an unfortunate man named Rogers, who lost his life through the brutality of a constable named Barry, of the Sydney Police, who thrust his stick into the man's eye when confined in the watch-house one day last week'.[10] It vowed to 'fearlessly uphold liberty'[11] in the face of 'the Parramatta Police', led by the reviled, 'Chief Constable Fox and his men'.[12] 'The ruffians', as the paper labelled the police, beat a suspect 'in the presence of an assembled multitude who cried shame on the unmanly ruffians'.[13] On 17 February 1844 the *Parramatta Chronicle* claimed to have commenced 'warfare with the Parramatta Police'.[14] In the same edition, Mason, the editor, drafted an open letter to the police, proposing a list or charter of fair trial rights and police

[6] *TPC,* 17 February 1844, 1.
[7] *TPC,* 30 December 1843, 2.
[8] *TPC,* 30 December 1843, 2.
[9] *TPC,* 30 December 1843, 2.
[10] *TPC*, 13 January 1844, 4.
[11] *TPC*, 20 January 1844, 1.
[12] *TPC*, 27 January 1844, 1
[13] *TPC*, 17 February 1844, 3.
[14] *TPC*, 17 February 1844, 3.

procedure.[15] It called on the local magistrate and police to ensure the following procedures:

> (i) Court to open at one particular hour every day …
>
> (ii) Transact all police business in public …
>
> (iii) Public Magistrate to come to the adjudication of every case without an intimate knowledge of all its details, as derived from ex-parte statements made in the private room …
>
> (iv) The Police Magistrate never, in any case in which he intends to give evidence, to sit as judge …
>
> (v) The unpaid Magistrates … never to undertake a case singly, without possessing at least a competent knowledge of the common law of evidence …
>
> (vi) To guard against professional prejudices …
>
> (vii) That an accused party is protected by the testimony of three credible and respectable … witnesses against the 'hard-swearing' of two interested informers, or … the police …
>
> (viii) An Impartial and Intelligent judge …
>
> (ix) To refrain from hunting-up cases … with the aid of disguised informers … for the purpose of sharing in fines and penalties obtained on conviction by the hard-swearing of their constables.[16]

The editorial reflected recurrent and common complaints about summary justice at this time, also identifying other problems at the local court, including: judicial bias toward the police by the Police Magistrate; disregard for the presumption of innocence and the concoction of evidence ('hard-swearing') by police constables. The editorial called for the abolition of the reward system for police constables – a system which effectively incentivised over-zealous law enforcement, leading to

[15] The list proposed eleven major reforms to police conduct in the district under the banner, 'Police Jurisprudence,' *TPC*, 17 February 1844, 1.
[16] *TPC,* 17 February 1844, 1. (emphasis theirs.)

corrupt policing.[17] The *Parramatta Chronicle* demonstrated that these concerns were shared by local Parramatta residents who, as the newspaper reported, asserted them week after week as criminal defendants at the Parramatta Magistrates' Court throughout the mid-1840s. In so doing, the newspaper fanned the flames of community anger toward the administration of summary criminal process. It was amid this storm of repression and popular resistance to the criminal law in the satellite town of Parramatta that Mr Edwin Withers first came to the attention of the local authorities.

Withers' Protests for Fair Trial Rights

Withers was an educated, middle-class man in his mid-thirties. With his wife and family of three daughters, he arrived in Sydney aboard a commercial vessel from London in 1840.[18] He cut an unremarkable figure, being a man of 'slight build', 'brown eyes', 'sallow complexion' and 'brown hair'.[19] In May 1845 he bowed and entered the courtroom at Parramatta Police Magistrate's Court, and sat toward the rear. Within minutes, however, he was up on his feet protesting about improper courtroom practice and police procedure that had led to a number of recent convictions. Police Magistrate Elliot halted proceedings. He summoned the protester to the bar-table and asked Withers about his connection with proceedings before the Court. Withers replied, 'my connection is the administration of justice'.[20] At this, the magistrate threatened Withers with imprisonment and he was ejected from the Courthouse.

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[17] *TPC,* 17 February 1844, 1.
[18] Barque of Arrival: 'Mary Catherine,' *Vessels Arrived,* 11 October 1840, State Records NSW [SRNSW], 11 October 1840, COD40. Note that Withers had purchased cabins for his entire family; they were not 'steerage' passengers.
[19] *Parramatta Gaol Entrance Books*, 1844, SRNSW, 4/6554.
[20] *TPC*, 31 May 1845, 2.

Withers resumed his courtroom protests twice more that week.[21] The following Monday, he was at it again. Once more, the magistrate ordered Withers' removal. Once again, Withers marched back into Court to continue his noisy 'sit-in'. The magistrate ordered his arrest. According to the *Chronicle,* Withers resisted 'boxing with a Constable in the dock', while demanding to know, 'in a loud voice … the charge against him'.[22] A charge of 'disorder in the Court' was muttered from Bench to Bar-table, and Chief Constable Fox quickly prepared and read it onto the record. From the dock, Withers chimed, 'and don't go too fast, I need to write this down'.[23] But Withers' claims for fair trial rights did not stop there. He demanded 'an hour's time' to prepare, 'and pen, ink and paper' so that he might properly answer the charges against him.[24]

Withers' claims here are significant proof of popular grassroots support for the codification of fair trial rights in the colony: a project that was well underway in the metropole where it resulted in the passing of the *Jervis Acts 1848*. The Acts were primarily designed to protect magistrates from appeal and prosecution by wrongly convicted defendants.[25] However, they did not operate in this way in NSW, mostly due to law reform campaigning by grass-roots radicals like Withers and their high-powered allies, such as Robert Nichols, the constitutional radical lawyer and local member for the predominantly working-class electorate of Northumberland Boroughs (which included Parramatta).[26] In NSW the *Jervis Acts* succeeded in

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21 *TPC*, 31 May 1845, 2.
22 *TPC*, 7 June 1845, 2.
23 *TPC*, 7 June 1845, 2.
24 *TPC*, 7 June 1845, 2.
25 The long title of the Act was: 'An Act to adopt and apply certain Acts of Parliament passed for facilitating the performance of the Duties of Justices of the Peace and for protecting them from vexatious actions and to prevent persons convicted of offences from taking undue advantage of mere defects or errors in form [2nd October, 1850]' (NSW) (14 Vic No 43). Meanwhile, the preamble to the Act noted that 'the adoption of these several Acts … would not only tend greatly to the ease of Magistrates … but to the advancement of Justice in respect of all proceedings by and before them out of sessions' (UK) (14 Vic No 43) (hereafter referred to as *The Jervis Acts – Summary Act*).
26 The difference between the operation of the *Jervis Acts* in NSW and Great Britain is supported by the work of A.S. Merritt, 'The Development and Application of Masters and Servants Legislation in NSW – 1845 to 1930,' (PhD thesis, Australian National University, 1981); and Rob McQueen, 'Master

recognising the fair trial rights of criminal defendants more effectively than in Britain. As labour historians Adrian Merritt and Rob McQueen demonstrate, in the period following the enactment of the Acts, workers flocked to the Courts to negotiate their grievances and defend themselves from criminal prosecution.[27] Likewise, Hilary Golder has argued that the Acts assisted criminal defendants by increasing the powers of legally qualified 'Stipendiary Magistrates'. For instance, the Acts allowed 'Stipendiaries' to act alone, handing them more power than their 'honorary' counterparts who were required to act on benches of no less than two Justices.[28] As Chapter 3 has shown, working-class criminal defendants consistently referred to 'fair rules' of procedure in Court. These defendants reminded magistrates about 'hearsay' and corroborative evidence, railed against the 'hard-swearing' of police constables and performed short but effective pleas in mitigation.

The *Jervis Acts* also enforced strict descriptions of 'property' for all theft charges.[29] They officially sanctioned the common law rule discharging a defendant upon non-appearance of prosecution witnesses.[30] Prosecutors were not permitted to rely on evidence of the defendant's character during a hearing.[31] A prosecutor could be sued if the information was dismissed.[32] Amending legislation in 1849 required Petty Sessions to be held in 'fit and proper places', preventing Justices from convening Courts in public houses and the private estates of country squatters.[33] In Withers' quotes referred to above we see a reference to some of the key provisions of the *Jervis Acts*: the right to depositions when faced with offences requiring bail or imprisonment, and the right of the accused to an adjournment or reasonable

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and Servant Legislation as 'Social Control': The Role of Law in Labour Relations on the Darling Downs 1860-1870,' *Law in Context,* 10.1 (1992), 123-39.

[27] Ibid (Merritt and McQueen).

[28] Golder, above n 3, 65, 75, particularly following the *Justices Act Amendment Act 1853* (NSW) (17 Vic No 39).

[29] *The Jervis Acts – Summary Act*, s. 4.

[30] *The Jervis Acts – Summary Act*, s. 13.

[31] *The Jervis Acts – Summary Act,* s. 14.

[32] *The Jervis Acts – Summary Act*, s. 26

[33] (12 and 13 Vict. C. 18).

preparation time to meet the case against them.[34]

The summary hearing in Withers' case commenced on an afternoon in early June 1845, the same day as his arrest. The magistrate questioned Withers as to his defence. In reply, Withers 'leaned over the Bar' giving the impression 'that he was about to jump from the box to the bench' and 'told the Police Magistrate he was unfit [to hear the case] and ought not to be on the Bench'.[35] Withers was fined £80. Unable to pay, he was immediately sent to gaol. A month later, Withers had served his sentence. In mid-1845 he agitated about his conviction before 'nearly all the Magistrates of the District' at the monthly Sydney Quarter Sessions in Parramatta.[36] But at Withers' first interruption, the Chairman (of Quarter Sessions) accused him of committing a crime. Withers interrupted twice more, the *Chronicle* recalls, 'asserting that he had committed none' and that if he had 'he desired to be put on trial'.[37] Withers was ejected from the Court and refused further entry.

Withers' Experiments with 'Community Legal Aid'

In August 1845 a local man, Peter Rooney, was charged and tried for the offence of 'assaulting a Constable in the execution of his duty'.[38] The accused claimed police had 'rough-handled him' following an argument.[39] Rooney asserted self-defence. Rooney's wife was the only eyewitness, but she was prohibited from giving evidence because the Court assumed she would only corroborate Rooney's story.[40] The following day Rooney was escorted from the police watch-house to the courthouse to commence proceedings. On the way, he came across Withers. According to

[34] *The Jervis Acts – Summary Act*, ss. 27 and 3; *The Jervis Acts – Summary Act*, s. 13 (following the 1853 amendment).
[35] *TPC,* 7 June 1845, 2.
[36] *TPC*, 5 July 1845, 3.
[37] *TPC*, 5 July 1845, 3.
[38] *TPC*, 23 August 1845, 3.
[39] *TPC*, 23 August 1845, 3.
[40] *TPC*, 23 August 1845, 3.

police, Withers 'enquired of him if he wanted a lawyer, and whether he would have either Mr Charles Lyons or Mr Lambton', two reputable local counsel.[41] After a short conversation, Withers advised Rooney to go with Lambton and, according to police, 'ran off to that gentleman's office' while, 'ordering Rooney, by no means, to stir until he brought Mr L. to him'.[42] In other words, Withers advised Rooney, first of all, of his right to counsel and second, of his right to silence. At this, police reported that, 'Rooney … got very violent and was unwilling to come on' into court.[43] Later that afternoon, Withers shared a court cell with Rooney.

Withers was charged with 'inciting a prisoner in custody of Police to resist them in the execution of their duty'.[44] He pleaded 'not guilty' and objected to the jurisdiction of the court, presumably on the basis that the Prosecutor, and possibly even the Bench, were witnesses in the Prosecution case and held a conflict of interest. Withers suggested that other Police Magistrates in nearby districts could just have easily have heard the matter.[45] But Magistrate Elliot decided that the case could 'only be adjudged by the Police Magistrate … under the Town Police Act'. Withers retorted, 'it is not delicate of you to sit, Sir'.[46] During his hearing, Withers continued his protest against the perceived conflict of interest, objecting to being cross-examined by Chief Constable Fox. He also objected to the Clerk of the court being called as a Prosecution witness, asserting that he was 'not receiving a fair trial' and that neither had Rooney. He continued, 'if others were of the same opinion as him, Rooney should not go to the watch-house'.[47]

41 *TPC*, 23 August 1845, 3.
42 *TPC*, 23 August 1845, 3.
43 *TPC*, 23 August 1845, 3.
44 *TPC*, 23 August 1845, 3.
45 *TPC*, 23 August 1845, 3.
46 *TPC*, 23 August 1845, 3.
47 *TPC*, 23 August 1845, 3.

For his final act that day, Withers closely studied the charges against him (which he had carefully written down with 'ink, pen and paper') and discovered an error that proved fatal to the Prosecution case. The offence was alleged to have been committed in Church Street, rather than outside the court on George Street – where the Parramatta Local Court remains to this day.[48] The magistrate specifically instructed the Constables to refuse Withers 'any future admissions into the Court House'.[49] On his acquittal, Withers paid homage to the rules of strict pleading and a respect for the power and importance of the rule of law to democratic ideals which favoured the liberty of the subject.

We see here that Withers resorted to very similar tactics to those deployed by British Chartists and trades unionists between the 1820s and 1840s. Petitioning and protest against individual magistrates in superior courts was a key strategy, while procedural law and technicality became a cornerstone of this legal resistance, representing a significant political challenge to the class power of employers and their fellow magistrates.[50] Like British legal historian, Christopher Frank, Australian social historian, Paula Byrne, concludes that for solicitors in colonial NSW 'legal technicalities were the prime mode of defending cases'.[51]

Assertions of procedural technicality were assisted by a doctrine of strict legalism, enforced by statute[52] and insisted upon by many lawyers and judges. Those who did so usually subscribed to a politics that reflected popular tenets of constitutional or

[48] The Parramatta Magistrate's Court has existed in five separate buildings in Parramatta since 1826. Four of those buildings, including the 1826 courthouse, were located within two blocks of each other on George Street.
[49] *TPC,* 23 August 1845, 3.
[50] Christopher Frank, *Master and Servant Law* (Ashgate, 2010) 44, 47.
[51] Byrne, above n 2, 269.
[52] See, Letters of Patent pursuant to the Act (4 Geo IV c 96) (NSW Act), 'The Third' *Charter of Justice 1823* (UK).

Tory-Radicalism.[53] As we shall see in Chapter 6, when applied in the courtroom, strict legalism could mean that technical rules governing indictments, for instance, were 'convoluted and little short of Byzantine'.[54] In fact, in some English cases, it was not uncommon for prosecutors to take up to two days to read a single indictment, after having drafted up to 70 alternative counts in respect to a single crime to ensure that every conceivable version of events was provided for.[55] In NSW defendants were sometimes acquitted when their name was misspelt or innocently miscommunicated in an indictment.[56] For Whig legal historians such as Sir James Fitzjames Stephen, these rules created an 'irrational system', which meant that 'the law relating to indictments was much as if some small proportion of prisoners convicted had been allowed to toss up for their liberty'.[57] Indeed they had. Fifty years earlier, many reformers used technicality to humanise a barbaric procedural system in which 'too much truth meant too much death'.[58] As Withers realised in the 1840s, technicality was the only fair and strategic legal response to arbitrary imprisonment.

Two days after protesting Rooney's case, Withers continued his protest in the street outside the courthouse. Chief Constable Fox arrested him and dragged him into the courtroom. Curiously, Withers stood charged not with a public order offence, but 'perjury', a serious offence arising from an alleged misuse of courtroom procedure in Rooney's case. Committal proceedings were commenced against Withers immediately. The Chief Constable re-called Rooney's victim, a police constable, to give evidence. In the witness box, the constable swore that Mr Withers had 'behaved

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[53] This argument is developed in more detail in my ongoing research. For analysis of Tory-Radicalism, see E.P. Thompson, *The Making of the English Working Class* (Victor Gollancz Ltd, 1963) 90.
[54] David Plater, 'The Development of the Role of the Prosecuting Lawyer in the Criminal Process: Partisan Persecutor' or 'Minister of Justice'?' *ANZLH E-Journal*, 2006, 36, www.anzlhsejournal.auckland.ac.nz/papers/papers-2006.html, accessed 22/4/2016.
[55] See for instance *R v Grace* (1846) 2 Cox CC 101, cited in James Fitzjames Stephen, *A History of the Criminal Law of England Vol. 1* (Macmillan, 1883) 287.
[56] See *R v Guyse* [1828] NSWSupC 29, *The Australian,* 9 May 1829.
[57] Stephen, above n 55, 284.
[58] John Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2005) 6.

in a very violent and disrespectful manner'.[59] This was enough to satisfy the magistrate that there was a case to answer. Withers was committed to stand trial for perjury at the next Quarter Sessions. At this, Withers 'sneered and stamped' in court,[60] obviously indignant about being committed to trial on evidence from a constable of conduct that did not even resemble 'perjury'. Magistrate Elliot responded by remanding Withers at Parramatta Gaol until the sitting of the next Quarter Sessions (a fortnight). Bail was set at £80, roughly four times the average yearly income.[61] It is not clear how this incident was resolved, but given that the next Quarter Sessions were two weeks later, it is safe to assume that Withers served at least two weeks imprisonment – possibly longer – for his civic activism.

Withers Tried for 'Dangerous Lunacy'

Withers reappeared in Parramatta Court on 15 November 1845 to complain about the behaviour of Constable Ryan of the Parramatta Police. As usual, he was ejected from the court. The *Chronicle* noted that 'Mr Withers … submitted to the expulsion [from court] with the air of a patriotic martyr'.[62] At this stage Withers had evolved into something of a local hero. This was also a time when 'Captain Swing' was in full flight in the suburbs of Sydney, as discussed in Chapter 2.[63] In the same week, Timothy Horrigan from Canada Bay, Sydney – probably one of the Canadian rebels expelled by the English in 1837 – was accused of setting fire to a hayrick at a farm in

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59 *TPC,* 23 August 1845, 3.
60 *TPC,* 23 August 1845, 3.
61 *TPC,* 23 August 1845, 3. A note on average earnings: in 1838 the compositors union achieved a per diem salary of 5s5d for its workers in that industry. This work was skilled labour, however, and likely reflects a significantly higher annual income than in unskilled industries such as the pastoral industry in which the bulk of the workforce within the colony were employed. Connell and Irving estimate that a rate of £20 per year, plus rations, could be regarded as typical rate for pastoral workers in the 1820s and 1830s. See Connell and Irving, above n 3, 42-43.
62 *TPC*, 15 November 1845, 3.
63 'Captain Swing' was the anonymous name penned to a series of threatening letters sent to employers by aggrieved agricultural workers during the English 'Swing Riots' in the 1830s. Arson (targeting hayricks and barns) was the primary weapon used by labourers against their masters. See, Eric Hobsbawm and George Rude, *Captain Swing,* (Pantheon, 1968).

Five Dock.[64] Horrigan had been dismissed from employment at the farm the night before.[65] *The Chronicle* conjoined the stories of Withers and Horrigan in the same editorial.[66] This set the stage for Withers' final incendiary showdown with the Justices of Parramatta, in the name of fairness and liberty.

Withers attended the Quarter Sessions yet again, the following month. No sooner had he bowed and entered the courtroom than two of the honorary Magistrates, George Forbes Esq. and Dr Anderson, ordered Withers to be arrested. They signed a warrant committing him to Parramatta Gaol to await proceedings under the new *Dangerous Lunatics Act 1843*, to be certified as insane and detained indefinitely.[67] Chief Justice Stephen would decide whether Withers was a 'dangerous lunatic' in accordance with the provisions of the *Dangerous Lunatics Act.* Section 1 prescribed involuntary detention of 'dangerous lunatics' when a person was arrested 'under circumstances denoting a derangement of mind and a purpose of committing suicide or some crime'.[68] In order to commit the person to an asylum, the Act required that two Justices hear evidence from two medical practitioners that the person 'is a dangerous idiot or dangerous lunatic'.[69] The person was then to be confined in strict custody until discharged on the order of two Justices or a Supreme Court Judge, or removed to a public asylum.[70]

The *Dangerous Lunatics Act* connected the medical and legal professions through the criminal law in a way not seen since the time of the Tyburn surgeons.[71] In the 1840s

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[64] For an account of the Canadian rebels in Canada Bay, see Tony Moore, *Death Or Liberty: Rebel Exiles in Australia, 1788-1868* (Allen & Unwin, 2010) vi, 435-36.
[65] *TPC*, 15 November 1845, 3; *TPC,* 29 November 1845; 3.
[66] *TPC*, 15 November 1845, 3.
[67] *The Australian*, 20 December 1845, 4.
[68] *Dangerous Lunatics Act 1843* (NSW) (7 Vic No 14).
[69] *Dangerous Lunatics Act 1843* (NSW) (7 Vic No 14).
[70] See, Philip Powell, *The Origins and Development of the Protective Jurisdiction of The Supreme Court of NSW* (The Federation Press, 2004) 15.
[71] The 'Tyburn Surgeons' were members of the Royal College of Physicians who employed 'body-snatchers' to take the bodies of the condemned, hanged at Tyburn in London, for anatomical

it was the asylum, rather than the gallows, that conjoined the professions in their ordering of colonial society. As cultural historian Stephen Garton has found in *Medicine and Madness*, the asylum was part of a shift towards 'regularising' the colonial population at a time when the professional medical class preached 'moral reform' of those minds (not bodies) that threatened Victorian social order.[72] Back in the metropole, the political class was rocked by *M'Naghten's Case*.[73] In January 1843, Scottish woodturner Daniel M'Naghten shot and killed the Prime Minister's personal secretary. At McNaughton's murder trial, a number of eminent psychiatrists gave evidence that McNaughton suffered paranoid delusions. He was acquitted. Queen Victoria herself ordered the Law Lords to re-examine the findings.[74] They did, and invented the defence of 'insanity' to murder. McNaughton was confined to Broadmoor Lunatic Asylum. The following year, asylum numbers in Britain swelled by six times their number at the turn of the century.[75] As Garton and Mark Finnane have found, the 1843 legislation was primarily concerned with 'dangerousness'.[76] Mental illness had not yet entered the discourse.[77] If those rendered 'mad' were dangerous, one of the ultimate consequences of institutionalisation in this period meant permanent or long-term 'incapacitation'.[78] NSW asylums were places of constant surveillance, brutality and privation. The Catholic Bishop of Hobart, Dr R.W. Wilson, said of one of the earliest asylums in NSW – the Tarban Creek facility on the Parramatta River – that it 'contravened every tenet of human treatment'.[79] The asylum was a prison for the 'mad'.

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dissection. See, Peter Linebaugh, 'The Riots Against the Surgeons' in Doug Hay et al*, Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Pantheon Books, 1975) 65-118.

[72] Stephen Garton, *Medicine and Madness: A Social History of Insanity in NSW 1880-1940* (NSW University Press, 1988) 11-17.

[73] (1843) 10 C & F 200.

[74] Richard D. Schneider, *The Lunatic and the Lords* (Irwin Law, 2009) 89.

[75] Garton, above n 72, 16.

[76] Ibid; and Mark Finnane, 'From Dangerous Lunatic to Human Rights,' in Catherine Coleborne and Dolly MacKinnon (eds)*, Madness' in Australia: Histories, Heritage and the Asylum* (University of Queensland Press, 2003) 23-33.

[77] Ibid (Finnane), 26-27.

[78] Ibid, 24.

[79] Garton, above n 72, 21.

At Withers' 'insanity' hearing, more than forty witnesses were called to give evidence. Every policeman and magistrate in the district swore that Withers was of 'unsound mind'.[80] Of the ten medical witnesses, six doctors agreed with their fellow gentlemen on the bench that Mr Withers was in fact 'mad'.[81] Two doctors positively stated that Withers was sane. The remaining two could not positively provide a diagnosis. According to *The Australian* – which began covering the case once it entered the superior Jurisdiction of the Supreme Court – 'no two of them [medical experts] agreed in their opinion as to the phase his insanity had assumed. Scarcely one of them could define the class of insanity which he attributed, and all supported their different opinions, by theories equally unintelligible and inconsistent'.[82] To make matters worse, Withers was prevented from cross-examining the Prosecution witnesses.[83]

Meanwhile, eighteen lay witnesses were 'unanimously of the opinion that he was of sound mind, and had been ill-treated by the Police'.[84] They were all Parramatta locals.[85] Some of their insights into Withers' disposition are telling. Under examination by Withers, one said, 'your ill-treatment was common talk … I do not think that every obstinate man is mad'.[86] This was corroborated by another witness who said that he 'saw [Withers] handled more like a felon [by Police] than any other'.[87] Another stated that Withers was 'a very clever, shrewd intellectual man, never saw him violent, don't think him mad, he is eccentric, puts himself in curious

[80] *TPC*, 20 December 1845, 2.
[81] *TPC*, 20 December 1845, 2.
[82] *The Australian*, 20 December 1845, 4.
[83] *The Australian*, 20 December 1845, 4.
[84] *TPC*, 20 December 1845, 2.
[85] *TPC*, 20 December 1845, 2.
[86] *TPC*, 20 December 1845, 2.
[87] *TPC*, 20 December 1845, 2.

ways and laughs, is very off-handed'.[88] Yet another identified Withers as an activist, saying he is 'sometimes cranky and attends meetings'.[89] A further witness found Withers to be a 'sober, industrious man, perfectly rational'.[90] One witness recognised that Withers was on trial for his political activism, observing that Withers was 'very much of the French disposition, if he is mad, almost every French-man is mad'.[91]

As to Withers' sanity, no lesser counsel than the Solicitor-General William Manning told the court that he did 'not consider him more mad than I am' and that the 'ill-treatment he saw by Police would make any man insane'.[92] Manning noted that Withers had been 'pulled and dragged about as no man ought to be … pushed off the Portico and down the steps, advised to be quiet'. While Manning conceded that 'he is such an irritable sort of man', he nevertheless empathised with Withers' struggle against Police corruption and feckless summary procedure. As Manning told the court, 'what we see one day and is sworn the next [by the Police] is almost disgusting for any honest man to sit and hear … [and] … I have addressed Mr. Elliot myself [on this point]'.[93]

The Chaplain of the Parramatta Gaol told the court that Withers had said 'they've sent me here as a madman' and that 'the Church was too high for him and he confined himself to reading for four months'.[94] But it was nevertheless the view of the clergyman that 'they were unacquainted with a radical in Parramatta and wondered why Dan O'Connell [the Irish political leader] was not [also] confined'.[95]

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[88] *TPC*, 20 December 1845, 2.
[89] *TPC*, 20 December 1845, 2.
[90] *TPC*, 20 December 1845, 2.
[91] *TPC*, 20 December 1845, 2.
[92] *TPC*, 20 December 1845, 2.
[93] *TPC*, 20 December 1845, 2.
[94] *TPC*, 20 December 1845, 2.
[95] *TPC*, 20 December 1845, 2.

Finally, Withers addressed the Bench by stating that he 'had done so much good in Parramatta that the Magistrates sat to empty benches'.[96] Chief Justice Stephen and Justice Dickinson summed up the evidence. According to *The Australian*, the Chief Justice formed 'his opinion that Mr Withers *was* (in fact) sane' but deferred to the opinion of the medical men.[97] The Supreme Court committed Withers to the Tarban Creek Lunatic Asylum at Gladesville, indefinitely. The admissions register at the asylum claims that Withers entered the institution suffering 'partial intellectual mania'.[98]

By this time, however, 'the Lunacy Case' – as it had become known in the mainstream press – had caught the attention of some of the colony's highest ranking law men.[99] The following week, Robert Nichols applied to the Supreme Court for a writ of *habeas corpus* to have Withers released from Tarban Creek. Nichols pointed out to Justice A'Beckett that an application could be made for release under the new Act if signed by two legal practitioners.[100] Nichols visited Withers at the asylum. Unsurprisingly, Withers had already synthesised his grounds of appeal. As he told Nichols, the Justices at Parramatta had detained him pursuant to a mere *order* and not by *warrant* complete with a certificate, signed and sealed by each Justice. Nor did the Justices find Withers to be a 'dangerous lunatic, or dangerous idiot' in accordance with Section 1 of the Act. The warrant did, however, state that Withers was of 'unsound mind and not safe to go at large'.[101] Incidentally, the requirement that magistrates document all cases of imprisonment and the movement of prisoners by warrant was a further procedural right to emerge from the implementation of the

96 *TPC*, 20 December 1845, 2.
97 *The Australian*, 20 December 1845, 4.
98 *Tarban Creek Lunatic Asylum Admissions Register,* 1 October to 31 December 1845, SRNSW, Series 4/2689.2, COD45/9386. I am grateful to the assistance of Archivist, Angela Kavuzlu, in locating this reference.
99 *The Australian,* 20 December 1845, 4.
100 *TPC*, 27 December 1845, 3.
101 *The Sydney Morning Herald* (hereafter referred to as *'SMH'*), 23 December 1845, 3.

Jervis Acts in NSW by Robert Nicols, some years later.[102] Other procedural errors in the document included a failure to note: i) who committed Withers; ii) *how* he was proved insane; and iii) the signature of two qualified medical practitioners.

These grounds were agitated before Justice A'Beckett of the NSW Supreme Court the following week. A'Beckett found that 'the whole thing appeared to be as illegal as it possibly could be'.[103] After consulting with two other judges of the court, Chief Justice Stephen and Justice Dickinson, A'Beckett quashed the warrant of commitment. Withers was discharged a few days before Christmas in 1845, after spending over a month in the asylum. *The Sydney Morning Herald* was moved to write 'we award our humble meed of praise to the Judges who, particularly investigated this extra-ordinary transaction and would not allow themselves to be duped by the crude sophisms and unsupported theories of men nicknamed, "medical"'.[104]

The conventionally conservative *Herald* celebrated Withers' radical triumph beneath the banner, 'sworn to no master, of no sect am I'.[105] Following the incident, the *Cumberland Times* reported that the committing justices 'attempted to absolve themselves from blame respecting the missing warrant' and the Crown Prosecutor at the Supreme Court proceedings resigned from his office.[106]

This incident did not deter Withers from his civic activist campaign for fair trial rights in Parramatta. Days after his release from Tarban Creek, he was arrested yet again while monitoring police procedure outside Parramatta Courthouse and advising

[102] *The Jervis Acts – Summary Act*, s. 24.
[103] *SMH*, 23 December 1845, 3.
[104] *Bell's Life in Sydney & Sporting Reviewer*, 27 December 1845, 2.
[105] *SMH,* 23 December 1845, 3.
[106] *The Cumberland Times,* 17 January 1846, 2.

criminal defendants of their rights to due process.[107] By this time, however, his activism was catching-on, particularly among the middle-class residents of Parramatta. The witnesses who supported Withers during his Supreme Court trial clearly show that he was not alone. One Parramatta resident, Charles Blakefield, wrote to Governor Gipps explaining that the latest episode was 'a case of unparalleled oppression'. He claimed support for Withers' activism not only among the working-class defendants of the Parramatta district but from the 'respectable' portion of the inhabitants of Parramatta'. He reiterated the basic facts of the case, telling the Governor that Withers had 'this day again been incarcerated for merely attempting to go outside the courthouse'. 'I humbly suggest to your Excellency', continued Blakefield, 'the necessity of a judicial investigation as the respectable portion of the inhabitants of Parramatta are of opinion that he [Withers] is and has been previously, illegally confined'. The 'respectable' men and women of Parramatta were equally appalled by the irony that after, fighting so hard for the legal rights and representation of the most vulnerable members of the Parramatta community, Withers himself was now 'not … able to pay a barrister' to represent him in the Supreme Court.[108] Governor Gipps took the complaint seriously. His comments on Blakefield's letter show that, while reluctant to interfere with judicial power, the Governor forwarded the letter to all three judges of the NSW Supreme Court in Sydney.[109]

Withers was released shortly after the letter had been circulated at the highest levels of colonial government. His struggle continued throughout the remainder of the decade. By 1846 his confrontations with authority had completely impoverished him

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[107] *Letter from Charles Blakefield to Governor Gipps,* 30 December 1845, *Colonial Secretaries Correspondence, 1845,* SRNSW, 4/2693.1, Item 7933.
[108] *Letter from Charles Blakefield to Governor Gipps,* 30 December 1845.
[109] *Letter from Charles Blakefield to Governor Gipps,* 30 December 1845. Gipps' notations on the letter stated: 'application should be made to the judges; cannot interfere in this matter; Forward to Supreme Court'.

and his family. Not only was he unable to afford counsel, he was repeatedly imprisoned as a result of being unable to pay bail sureties.[110] Between 1846 and 1847 he served numerous prison sentences in Parramatta Gaol. Upon his final admission to Parramatta Gaol in 1847, Withers staged a hunger strike for five to six weeks to protest his imprisonment in respect to his advocacy work.[111] News of the strike did not travel past the gaol walls, and authorities at the gaol appear to have used the strike to confirm Withers' 'madness'. He was once again transferred to Tarban Creek Asylum, which would become the regular place of his confinement following all court protests he staged thereafter.[112] 'Mad' Edwin Withers was last admitted to Tarban Creek Asylum in 1852 at the age of forty-four as a 'pauper'.[113] The incidents at Parramatta left Withers a broken man and the details of the remainder of his life are unknown.

Withers' Impact on Legal Reform

Withers' case led to a public enquiry into the management of NSW public asylums. The 1846 Select Committee Inquiry into the Tarban Creek Asylum condemned the brutality with which the institution was run and recommended the appointment of a medical superintendent to oversee the treatment of patients.[114] The post was formalised in 1848. But Withers' case was not limited to reforming the asylum system.

As discussed above, his case (and many like it) had wider implications for procedural reform of the criminal law in NSW. In July 1850 Robert Nichols voiced the identical

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110 *Letter from Colonial Secretary to Attorney-General,* 16 October 1846, *Colonial Secretaries' Correspondence 1846*, SRNSW, 4/2717.3, Item 8412.
111 *Tarban Creek Lunatic Asylum Admission Register,* SRNSW, 4/7655, 325.
112 *Tarban Creek Lunatic Asylum Admission Register,* 325.
113 *Tarban Creek Lunatic Asylum Admission Register,* SRNSW, 4/10564, 333.
114 Stephen Bottomley, 'Law and Psychiatry: Aspects of the Relationship in NSW' (1984) 2(1) *Australian Journal of Law and Society*, 57.

arguments of 'Mad' Mr Withers in the NSW Legislative Council (discussed below). Indeed, Nichols himself appears to have been radicalised by similar skirmishes against the magistracy as Withers. At Stonequarry, in 1839, Nichols clashed with Honorary Justice Major Anthill, opposing Anthill's notoriously vague and preferred charge of 'disorderly conduct'. Anthill's riposte was to refuse Nichols' defence of the prisoner. Nichols met similar resistance from Quarter Sessions Justices – all fellow squatters – in Bathurst and Stonequarry (Picton). In case after case, Nichols appealed to the Supreme Court, enforcing the procedural right to counsel in the farthest reaches of the colony.[115]

But Nichols belonged firmly to a ruling class of colonial administrators. In this respect, he drafted the *Water Police Act 1840* and appeared regularly in the Water Police Magistrate's Court to prosecute sailors and waterside workers on behalf of employers.[116] In drafting the Act, however, Nichols was not 'prepared to advocate any very stringent laws unless they are made reciprocal, unless they apply equally to the masters and the men'.[117] It appears too that he fell into the role of prosecuting in this court at the very time he was excluded from appearing in the Court of Quarter Sessions and Magistrate's Court at Parramatta. Doubtless, payment from middle-class Ship's Captains was a sure-earner during these times. But even while prosecuting sailors and waterside workers, Nichols maintained that:

> seamen are not always in fault; perhaps there is no class of men in the

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[115] See, for instance, *Ex Parte Dillon* [1839] NSWSupC 67, *The Australian,* 24 September 1839, concering Nichols' right to appear and the right to counsel before the Bench of Magistrates at Bathurst; and *Ex Parte Nichols* [1839] NSWSupC 76, *Sydney Herald,* 14, 28, 30 October, 13 November 1839, *The Australian,* 31 October 1839, in respect to Nichols' right to appear and the right to counsel before Magistrate Anthill at Stonequarry.

[116] Kerry Mills, 'George Robert Nichols (1809-1857): Forgotten Patriot and Lawmaker' (2009) 11 *Journal of Australian Colonial History* 101, 105-108. In drafting the *Water Police Act 1840*, Nichols appears to have been responding to the *Report of Committee on Police and Gaols* 1838. The draconian conditions imposed by the act such as search without warrant, arrest, detention and prosecution, as well as new offences to prosecute seamen for 'stowaway' related crime, are discussed by Michael Quinlan in, 'Regulating labour in a colonial context: Maritime labour legislation in the Australian colonies, 1788-1850' (2008) 29 *Australian Historical Studies,* 303.

[117] *SMH*, 5 March 1846.

> world who are so badly treated as seamen, and if you treat men as dogs you cannot expect them to behave like men. Look at the accommodation for seamen on board of nine ships out of ten in port, and then consider if there is any cause for wonder in sailors wishing to go on shore. And then it is proposed that sailors who are on shore after nine o'clock at night without a pass shall be locked up! Why should sailors any more than bullock drivers or shepherds, or any other free labourers be so treated?[118]

Nichols argued against the establishment of a Water Police Court in his own working-class electorate of Northumberland Boroughs (Parramatta). He was a radical in that he recognised, first, that summary justice criminalised colonised and working-class peoples and, second, just like his client Withers, that reform of this criminal process might offer redress. His primary contribution to reforming criminal process occurred through amendments he made to the *Jervis Acts* in the early 1850s. Before turning to Nichols' influence any further, however, the substance of the *Jervis Acts* must be considered.

The *Jervis Acts*

If the history of criminal process can be said to have had a climax, it is certainly the passing of three acts – the *Jervis Acts* in 1848.[119] These were adopted in NSW in 1850 and amended in 1853. They codified a range of important processes including fair trial rights, such as the right to silence, and applied to all courts acting 'out of Sessions' (meaning all courts except Quarter Sessions). They were a complete code of practice and procedure.[120] Among other pre-existing procedural rights, the Acts

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[118] Ibid.
[119] (UK) (11 and 12 Vic c 42, 43, 44 and a fourth Act in 1849 – 12 and 13 Vic c 18).
[120] David Freestone and J.C. Richardson, 'The Making of English Criminal Law: Sir John Jervis and his Acts', (1980) 3 *Criminal Law Review,* 5, 9.

confirmed the right to counsel, *habeas corpus*,[121] and reiterated a defendant's right to a copy of charges, information (as an initiating process) and depositions.

The legislation was drafted by British Whig politician, QC and Judge, Sir John Jervis and a committee of five commissioners. The Acts were formulated in response to a 'judicial crisis' in the 1840s. At the heart of the crisis was a class relationship between working-class defendants and middle-class prosecutors and magistrates. This was a time when organised labour, through the Chartist movement, openly challenged the authority and class-bias of British magistrates, and when workplace law was involved in the exercise of criminal sanctions through the *Masters and Servants Acts*. It was also a time of revolutionary reaction and social change across Europe. The British State responded.

Sir John Jervis was a Whig from a legal dynasty.[122] He was selected by the reformist Prime Minister, Sir Robert Peel, to Chair the Law Reform Commission to modernise criminal procedure law in mid-nineteenth century Britain.[123] Jervis was a reformer and legal commentator. From 1832 onward, he published a commentary on the new rules of the common law courts, updated annually. After serving as British Attorney-General from 1846 to 1850, Jervis died in office as Chief Justice of Common Pleas in 1856. The Acts were certainly Jervis' life's work and the breadth of their reform was recognised by other jurists at the time. Nineteenth century jurist, John Archbold, famously said, 'Her Majesty's present Attorney-General (Jervis) has by these Acts done more for the due administration of criminal justice throughout England, than has ever yet been done by any other person, with the single exception perhaps of Sir

[121] The Act imposed new restrictions on 'discharge from custody' by *habeas corpus, 'by reason of any defect or error' in form (mistakes) but not of substance*, s. 9.
[122] Freestone and Richardson, above n 120.
[123] John Hostettler, *The Politics of Criminal Law Reform in the Nineteenth Century* (Barry Rose Law Publishers, 1992) 54.

Robert Peel'.[124]

While sympathetic to Bentham's ideas about codification, Jervis was no egalitarian. Rather, he earned his ruling-class credentials prosecuting Chartists to the 'universal applause' from both sides of Parliament.[125] In 1848, Jervis drafted the *Felony Treason Act 1848*[126] to mop up any remaining 'democratic resistance'.[127] The 'Treason Act' was greatly assisted by his 'Three Acts' which he introduced to the House of Commons in 1848 as Attorney-General under Lord John Russell, saying that he sought only to regularise the best practice of the Justices, and to protect them from vexatious and frivolous prosecution.[128] The Acts reflected '*all* the Statutes and Decisions applicable to the Proceedings and Duties of Magistrates', he said.[129] To this end, the Acts codified existing practice, rather than adding new fair trial rights. Codification, it was thought, would curb procedural error and protect Justices from the humiliation of civil litigation and appeal that they were beginning to suffer at the hands of an increasingly organised labour movement.[130]

As discussed above, by 1848, trade unionists had begun to take advantage of procedural technicality particularly in the higher courts. They used the appeal process, through Chartist lawyer, W.P. Roberts.[131] Christopher Frank argues that the Acts protected the class interests of the magistracy and employers by preventing technical error, thereby limiting appeals to higher courts.[132] Indeed, the long title of

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124 Archbold, *Jervis' Acts* (1848 3rd ed. 1851).
125 *Law Magazine* (1857) Vol. II p304.
126 (UK) (11 and 12 Vic c 12).
127 See *Hansard ,* Vol. 98 cols 421, 423 (1848) – see also *State Trials* (New Series) Vol. VI: *Fussell,* p 723; *Williams and Vernon ,* p 775; *Ernest Jones* p783; Vol VII: *Dowling* p382; *Cuffrey and Ors* p467; *Francis O'Donnell and ors p.637; Rankin* p. 711.
128 *Hansard,* Vol 96 col 4 (1848).
129 Freestone and Richardson, above n 120.
130 Frank, above n 50.
131 Ibid; and Christopher Frank, 'Britain: The defeat of the 1844 Master and Servants Bill' in Hay and Craven, above n 3, 402-421.
132 See Frank, above n 50, 92.

the Act was:

> An Act to adopt and apply certain Acts of Parliament passed for facilitating the performance of the Duties of Justices of the Peace and for protecting them from vexatious actions and to prevent persons convicted of offences from taking undue advantage of mere defects or errors in form [2nd October, 1850].[133]

Meanwhile, the preamble to the Act noted that 'the adoption of these several Acts … would not only tend greatly to the ease of Magistrates … but to the advancement of Justice in respect of all proceedings by and before them out of sessions'.[134] According to Frank, the Acts would succeed in silencing organised labour in Britain for the following 20 years. So they did. But as Frank does not recognise, organised labour was silenced in part by improved conditions for criminal defendants brought about by these very Acts. It would appear that the British labour movement had forced the hand of its ruling class. The Acts were a compromise, not a *fait accompli* for the British ruling-class. The procedural detail of the legislation is quite clear.

As tripartite legislation, the *Jervis Acts* consisted of: (1) a code of indictable criminal procedure; (2) a code of summary procedure; and (3) an act indemnifying magistrates from 'vexatious' prosecution. The first two Acts, i) the *Indictable Offences Act* (c. 42); and ii) the *Summary Jurisdiction Act* (c. 43), codified the following procedures: information (initiating process), complaint, summons, warrant, imprisonment, fine, execution and accountability for money received, as well as introducing non-obligatory standard forms for each procedure. The Acts further codified the following common law fair trial rights:

i) the right to silence, s. 18;

ii) voluntariness of confessional evidence, s. 18;

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[133] (UK) (14 Vic No 43).
[134] Ibid.

iii) accused' right to cross-examination of prosecution witnesses, s. 17;

iv) time limits on detention for investigation (8 days rather than arbitrary detention), s. 21;

v) bail for all offences except treason, s. 23;

vi) requirements for magistrates to document all cases of imprisonment and the movement of people using warrants, s. 24;

vii) right to depositions when faced with offences requiring bail or imprisonment(for fee of 3 and a half-pence for each folio of ninety words), s. 27 and s. 3;

viii) right to copies of examination and cross-examination;

ix) right to appeal (20 day appeal limit), s. 12;

So while the Acts consolidated the rule of the Justices, they also provided a raft of new rights for criminal defendants. The codification of these rights came at a time when Chartists ceaselessly invoked other forms of codification– *Magna Carta* or the English *Bill of Rights*– to clarify the position and enhance the rights of working-class defendants at law. The Acts assisted criminal defendants by allowing Stipendiary Magistrates to act alone, handing them more power than their 'honorary' counterparts.[135] The laws also enforced strict descriptions of 'property' for all theft charges.[136] They officially sanctioned the common law rule discharging a defendant upon non-appearance of prosecution witnesses.[137] Prosecutors were not permitted to rely on evidence of the defendant's character during a hearing.[138] A prosecutor could be sued if the Information was dismissed.[139] Amending legislation in 1849 empowered Petty Session Divisions to provide 'fit and proper places' for the holding of Petty Sessions, preventing (in the case of NSW) courts being held in public houses

[135] Reaffirmed by the *Justices Act Amendment Act 1853* (NSW) (17 Vic No 39) and Golder, above n 3, 65 and 75.
[136] 'Summary Act', s. 4.
[137] s. 13.
[138] 'Summary Act', s. 14.
[139] ' Summary Act', s. 26.

and the private estates of country squatters.[140]

Interestingly, the *Jervis Acts* did not have the same coercive effect on criminal defendants in NSW as in Britain. Thanks in part to the law reform campaigning of working-class radicals and their high-powered allies in NSW, the *Jervis Acts* succeeded in recognising the fair trial rights of criminal defendants more broadly. As Adrian Merritt and Rob McQueen (discussed below) have shown, in the period following the adoption of the Acts in NSW, workers flocked to summary courts to negotiate their grievances and defend themselves from criminal prosecution.[141] As my findings show, working-class criminal defendants consistently referred to 'fair rules' of procedure in court. They reminded magistrates about 'hearsay' and corroborative evidence, challenged the 'hard-swearing' of police constables and performed short but effective pleas in mitigation.

The Acts were proposed for adoption into NSW law by Attorney-General John Plunkett in July 1850 for the same reasons as in Britain. Upon introducing the Bill to the Legislative Council, Plunkett said that it 'would be of great advantage to the Magistrates to have in one Act, the various rules by which they were governed'.[142] Radicals such as Nichols, however, argued that the *Acts* should be amended to make copies of charges and formal Informations available to defendants for free rather than for the fee of 3 and 1/2 pence for each folio of 90 words. He was outvoted eleven to one.[143] Nichols 'agreed in principle' with the adoption of the Acts 'but thought it inexpedient to resort to this wholesale system of legislation'.[144] Rather, Nichols contended that 'the adaptation of English law to local circumstances was the

[140] (NSW) (12 and 13 Vic c 18).
[141] Merritt, above n 26; McQueen, above n 26.
[142] *SMH*, 27 July 1850, 3.
[143] *SMH*, 27 July 1850, 3.
[144] *SMH*, 27 July 1850, 3. Such a course was also required by the *Australian Courts Act 1828* (UK) (9 Geo 4 c 83) s. 24.

proper course'.[145] His objections forced Plunkett to redraft certain provisions of the Bill protecting magistrates from prosecution by aggrieved litigants and defendants. Nichols did this in consultation with the Chief Justice who gave 'his most laborious attention … to adapt the English provisions to the circumstances of the colony'.[146] The resulting Bill was, in Plunkett's words, 'more efficient and more safe than the measures introduced by the members opposite'.[147] Four days after the Act came into force, Chief Justice Stephen described it as being 'of more importance, as affecting the administration of justice, than any other Statute passed by the Colonial Legislature'.[148] He continued: 'the duties of a Justice of the Peace … were clearly defined; *and while magistrates were protected from all vexatious actions, there were means provided by which all those who were affected by magisterial proceedings could protect themselves against error or injustice,* by resorting to a most simple and inexpensive proceeding of a summary nature, by which the intervention of the Supreme Court would be obviated'.[149]

Nichols argued to amend the *Jervis Acts* again in 1853, apparently with little consultation from the conservative members of the Legislative Council. In August, he introduced a seemingly innocuous Bill into the Legislative Council under the unsuspecting name of the Prohibition and Amendment Bill. Under this title, the Bill and its contents appear to have been hidden from the scrutiny of the Legislative Council and the conservative press. Upon the first reading of the Bill in Council, Nichols omitted both short and long titles of the legislation. Vaguely, he noted that the Bill was intended 'to amend, the Act 11th Victoria No. 43'.[150] The second and third readings of the Bill occurred late in the evening between August and October 1853. Only upon the third reading did Nichols announce his intention to amend the

[145] *SMH*, 27 July 1850, 3.
[146] Ibid.
[147] Ibid.
[148] Chief Justice Sir Alfred Stephen, cited in McLaughlin, above n 3, 368.
[149] Ibid (McLaughlin, emphasis added), 366-69.
[150] *SMH,* 10 August 1853, 4.

name of the Act to the 'Justices Act Amendment Act'.[151] By this stage it is unlikely that the other members of the Council would have seriously contemplated, much less read, the contents of the Act. No debate was had, nor questions put and the amending Act was passed on 7 October 1853 as the *Justices Act Amendment Act* (17 Vic., No. 39). Nichols' arguments echoed the demands of Withers at the Parramatta Magistrates Court in 1845: time to prepare, enhanced appeal rights and diminished power for honorary justices all featured prominently. The amendments were supported by former radical newspaperman-turned-politician, James McEachern. McEachern was another key contributor to the debate on the adoption of the *Jervis Acts* and criminal law reform in the Legislative Council.[152] As a newspaper editor back in 1842, he had written and published, *The Indefeasible Rights of Man.*[153] In the months during the first and second reading of the 1853 Act, he connected moral custom with the codification of rights which, he told the NSW Democratic League, 'were guaranteed to them by *Magna Carta* and handed down to them with the utmost care by their ancestors'.[154] McEachern celebrated the 'spirit' of customary rights to due process contained within the NSW version of the *Jervis Acts.*[155]

In sum, Nichols' amendments aimed at limiting the power of magistrates and targeted honorary justices. In turn, the amending Act enhanced the power of criminal defendants by:

i) Enforcing rules of evidence in summary hearings, s. 15;

ii) Extending the time limit for appeal (tripling it in certain cases): s. 4;

[151] *NSW Legislative Council 1825 – 1856*: *Votes and Proceedings*, 7 October 1853.
[152] Ibid.
[153] Irving, above n 1, 58.
[154] *People's Advocate,* 11 December 1852, cited in Paul A Pickering, "The oak of English liberty': popular constitutionalism in NSW, 1848-1856', (2001) 3(1) *Journal of Australian Colonial History* 1, 4-5.
[155] See Hawksley and the *People's Advocate,* 14 February 1852, 8 and 6 August 1853, 8.

iii) Extending the power of judges to hear appeals and prohibit any orders of all magistrates at all times (as opposed to merely during the law term), s. 5 and 10;

iv) Extending the power of judges to grant bail without surety while hearing an appeal, s. 6;

v) Extending the power of circuit court judges to determine appeals, s. 10;

vi) Broadening the class of appeals to 'any necessary allegation or finding' omitted at first instance, s. 10;

viii) Codifying the doctrine of proportionality by introducing 'manifestly excess' on sentence as a ground of appeal for the first time, s. 10;[156]

ix) Extending the power of stipendiary or police magistrates 'to do alone … whatever might be done by two or more [Honorary] Justices', s. 11;

x) Confining honorary Justices to rural areas and separating them from metropolitan magistrates, s. 12;

xi) Ensuring the 'attendance of witnesses for the prisoner' by providing expenses to the witness or allowing an adjournment for the witness to attend, s. 13;

xii) Making prosecutors competent witnesses in their own case, thereby reducing the need for trained lawyers to represent the prosecuting party, s. 14.

Legal historian, C.H. Currey has made vague reference to Nichols as a law maker 'independent' from British colonial influence.[157] In this episode, Nichols certainly lived up to that description but showed that his influence lay more with colonised and working-class peoples than the colonial administration.

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[156] 'Manifest excess' was referred to as those orders that, 'shall be bad in respect of some excess which may…be corrected', s. 10.

[157] C.H. Currey, 'The Influence of the English Law Reformers…on the law of NSW', (1937) 23 *Journal of Royal Australian Historical Society,* 238.

Unlike the situation that persisted in Britain, the amending Act of 1853 simplified appeals from magistrates to the Supreme Court. In NSW, complaints about magistrates increased dramatically after 1853, particularly from rural areas.[158] They did not decline as in Britain,[159] Rather, when workers were criminal defendants, they followed and used the codification of criminal procedure to their advantage. This was especially effective in relation to employment. As discussed in Chapter 3, between 1810 and 1830, most summary criminal prosecutions were undertaken by employers against workers for work discipline infractions.[160] Prosecutions were predominantly pursued under the *Masters and Servants Acts*.[161] According to labour historian, Michael Quinlan, reform of the Acts from this period consolidated legal power in the hands of employers but nevertheless made court process accessible to unrepresented workers, many of whom were criminal defendants.[162] Adrian Merritt[163] and Rob McQueen[164] have conducted quantitative analysis in respect to the application of *Masters and Servants* laws from the mid-to-late-nineteenth century in the summary jurisdictions of NSW and Queensland. Among other things, their findings demonstrate the ways in which the amended *Jervis Acts* helped workers and self-represented litigants resist the criminalisation of the employment relationship.[165] Most revealingly, Merritt shows that workers understood and used criminal procedure in conjunction with the *Masters and Servant Acts* to secure industrial rights

158 See Merritt, above n 26, 297-418.
159 See Frank, above n 50.
160 Byrne, has quantified comparative numbers of such offences in this period. See above n 2, 216-7.
161 The use of plurals in respect to this Act refers to multiple amendments of the Act in numerous jurisdiction across the empire between 1547 and 1945. In NSW alone, during the period under enquiry, the Act was amended no less than nine times in 1828 (NSW) (9 Geo IV n 9), 1832 (3 Wm IV n 3), 1840 (4 Vic n 23), 1845, (9 Vic n 27), 1847 (11 Vic n 9), 1852 (16 Vic n 42), 1854 (18 Vic n 30), 1855 (19 Vic n 35) and 1857 (20 Vic n 28).
162 Michael Quinlan, 'Australia, 1788-1902: *A Workingman's Paradise?*' in Hay and Craven above n 3, 219-250. See also Doug Hay, 'England, 1562-1875: The Law and its Uses', in Hay and Craven, above n 3, 59-116.
163 Merrit, above n 26.
164 R. McQueen, above n 26.
165 The *Masters and Servant Act 1823* (UK) (4 Geo IV c 34) was introduced in the colony in 1828. Merritt discusses its various permutations throughout the nineteenth century. Much of this law criminalised what was in effect labour law and had done since the Statute of Artificers in the 16th century.

and entitlements. Workers drew on lay understandings of criminal process to defend themselves from criminal prosecution and sanctions such as fines and imprisonment by their employers. In Golder's view, the Acts 'did make some inroads on both irresponsibility and confusion'.[166] Similarly, John McLaughlin has recognised that in NSW these procedural interventions meant that rather than resort to 'mere technicality', the object of the Acts was to decide cases, 'according to the plain facts and merits of each case'.[167]

Conclusion

For Withers' part in this struggle, he has not been remembered. However, Nichols' obituary in the *Sydney Morning Herald* read:

> When it was hard indeed to find that small still voice which speaks from ink and paper to proclaim and defend the liberties of the people, Mr Nichols devoted his private property … to make that voice heard' [resurrecting and editing the *Australian* newspaper] … Earnest in the cause he believed to be right—deeply imbued with what in his time were called popular principles, but scorning to be ruled himself by popular prejudices; the earnest, eloquent, and graceful advocate of all that was good in the way of intellectual progression—the stern, determined, and resolute foe of anything approaching to bigotry or oppression in his political character—at least, in the silence of his death chamber, no voice, no shadow from the past can come to reproach him.[168]

As Withers' case demonstrates, civic radicals in colonial NSW used the power of

166 Golder, above n 3, 55.
167 McLaughlin, above n 3, 369.
168 *SMH*, 14 September 1857, 5.

their knowledge about history and 'freeborn' English rights against the maladministration of criminal process. Their struggles embodied all the injustice that plebeian radicals encountered within the criminal law. Yet radicals like Withers were able to use their knowledge and connections not only to save themselves but to change the law. Their primary method of resistance was to stand up to an authoritarian magistracy by appealing to higher authorities. Chapters 6 and 7 will explore how this majoritarian resistance influenced reform within the colonial government by triggering a political split within the colonial ruling class.

Chapter 6: Criminal Process & Ruling Class Division

As a young barrister, Roger Therry walked to work at the Supreme Court opposite the Convict Barracks. On his way, he passed, 'a miserable convict, writhing in an agony of pain – his voice piercing the air with terrific screams'. It was impossible not to notice 'the ordinary occurrence' of 'horror … the painful scenes … of convict flogging'. Indeed, every morning when 'the gates of the convict prison were thrown open, and several hundred convicts were marched out and distributed',[1] it was obvious that penality was everywhere and Therry was directly implicated in it.

Therry was an Irish Catholic Whig and a close friend of Governor Bourke. He travelled to the colony a free man, aboard a convict ship with a boatload of his countrymen. Like other progressives of his time, Therry believed he had helped create in New South Wales (NSW) 'a judicious and sound system of penal discipline' in which 'human life had been spared, thousands of criminals coerced effectively, and very many of them rendered useful to society, without being subject to the torture of the lash'.[2] Therry was a reformer. He believed in a form of egalitarian fairness derived from an unwritten British constitution. In an age of colonialism, this made him a radical – a constitutional radical.[3]

Where criminal process reflected the prevailing social relations of the period, it was clear that in early colonial NSW the honorary magistracy was in charge. Struggles

[1] Roger Therry, *Reminiscences of Thirty Years' Residence in NSW and Victoria* (S. Low, Son and Company, 1863) 41-43.
[2] Ibid, 496.
[3] The terms 'reform' and 'radical' are defined in the Introduction to this thesis.

were consistently waged between, on the one hand, a petit bourgeois class of squatters and merchants – appointed to positions of governance within the magistracy – and, on the other, radicals of all classes: plebeian, civic and constitutional. Throughout the period, radicals consistently attempted to reform law and process imposed by the magistrates. The question answered here is, *why?* The final two chapters of this dissertation focus on struggles to reform the law between the (predominantly) honorary magistracy and constitutional radicals. Both were members of the colonial ruling class with the latter including lawyers, governors and Supreme Court judges. Squatters and merchants owed their class power primarily to their ownership and control of the colony's agricultural economy. The class power of governors, the judiciary and the legal fraternity, on the other hand, derived from their legitimacy in governing and ruling – a power accorded by the British colonial State.

At stake were competing authoritarian and hegemonic methods of governance. Both groups imposed law that reflected their respective class interests but where the magistrates resorted to brutality and coercive law, constitutional radicals sought to achieve the consent of a democratic majority.[4] Ruling-class reformers challenged coercive law by appealing to two recurring legal arguments: constitutional legal custom and procedural technicality. Reformers often justified their resort to these vague concepts through complex webs of evidence law and procedure. By the early nineteenth century, strategies to evade the authoritarian consequences of coercive law had become so complex that they resulted in two major reforms to criminal process: the right to counsel (and associated rights such as the right to silence) and an attempt to codify procedural law**.** This chapter explores the effect of procedural law

[4] A democratic majority can, of course, be anti-democratic, 'coerced' or 'coercive' when it is 'deliberative' and not 'discursive', that is, when it is uninformed by discussion or when its constituents are misled or, when they misunderstand their own interests: see Gramscian theorist, Adam Przeworski, 'Deliberation and Ideological Domination' in Jon Elster (ed) *Deliberative Democracy* (Cambridge University Press, 1998) 140-160. See the Introduction for further discussion of the concept of 'coercive law'.

upon criminal process in the context of struggles between constitutional radicals and the magistrates. The following chapter explores this political relationship through the process of criminal evidence law.

The Ruling Class & Reform

The motivations of ruling-class reformers were complex. They ranged from benevolence and paternalism to sympathy. But reformers were also driven by a will to maintain political hegemony. In some ways, these competing motivations have always characterised the project of social justice reform, particularly on the frontier. All of its participants were conscious of their paternalism, occupying a position of domination at the same time as acting to ameliorate and eliminate the horrors of a life they would never experience themselves. Indeed, as one of the great nineteenth century reformers, John Stuart Mill, noted in respect to the Reform Act in 1832:

> the changes which have been made, and the greater changes which will be made, in our institutions, are not the work of philosophers, but of the interests and instincts of large portions of society recently grown into strength.[5]

Political hegemony, in the Gramscian sense, is an important concept here for it allows us to understand the conflicted character of ruling-class reformers in a critical way. Hegemony of a ruling group, said Gramsci, is maintained in two key ways. First, by the *coerced consent* of a subaltern group but also through the political *compromise* of a ruling group who are forced to do so in order to create social equilibrium – in order to maintain a grip on power.[6] It is precisely in this way that social justice campaigners

[5] John Stuart Mill, 'Bentham' (1838) 31 *London and Westminster Review* 250, 251.
[6] As Gramsci put it, 'the 'normal' exercise of hegemony in a particular regime is characterized by a combination of force and consensus variously equilibrated, without letting force subvert consensus too much, making it appear that the force is based on the consent of the majority': cited in Thomas R. Bates, 'Gramsci and the Theory of Hegemony' (1975) 36(2) *Journal of the History of Ideas* 351, 363.

within the ruling group in colonial NSW exercised hegemonic control – a reflexivity to a 'democratic revolution' from below.[7] The primary medium of this social control was criminal process.

The colonial ruling class in NSW was a conflicted beast, riven by infighting between exclusives and emancipists throughout the early period. This segregation reflected the Whig-Tory split that had existed in Britain since the Revolution. Whigs like Macquarie, Bourke, Dowling, Plunkett, Therry and even Alfred Stephen combined a zeal for utilitarian progress with populist nineteenth century humanitarianism. The Tories, however, rode a less rational pony. Tory judges such as John Wylde, Francis Forbes, William Burton and Willliam A'Beckett supported colonisation of the most ruthless kind at the same time as maintaining – in varying degrees – an unassailable commitment to 'freeborn' English rights. They held a deep respect for *Magna Carta,* the *Bill of Rights 1689* and the *Habeas Corpus Act 1679* and showed an imperious sympathy for their colonised and working-class subjects. Burton J proclaimed it his 'duty' to apply English law, 'the main pillar of the Constitution, not to be removed, or bent or deformed, according to the views of particular judges, but only by the authority of parliament'.[8] It was precisely during their time in office that, as Thompson recounts, there emerged a 'Tory-Radical strain which runs from Cobbett to Oastler' and 'reached its meridian in the resistance to the Poor Law of 1834'.[9] The point is that reformers existed on both sides of the Whig-Tory political divide within the colony.[10]

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[7] See Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (Verso, 2nd ed, 1985/2001) xv.
[8] *MacDonald v Levy* (1833) 1 Legge 39; [1833] NSWSupC 47, *Sydney Gazette,* 11 June 1833.
[9] E.P. Thompson, *The Making of the English Working Class* (Pantheon, 1963) 90.
[10] This divide has sometimes been discussed as one between 'emancipist' convicts and 'exclusive' free-settlers. 'Emancipists' generally conformed to the Whiggish politics of mercantile free trade while 'exclusives' were aligned with traditional Tory land ownership. The 'emancipist/exclusive' dichotomy is less pertinent to an analysis of ruling class reformers, however, where most, if not all, arrived in the colony as 'free' men.

Meanwhile, Tory squatters and their coercive arm – justices of the peace or lay magistrates – had become the dominant social class in the colony, controlling most of its agriculturally-based economy. The 'tyranny of distance',[11] the isolation of the frontier and the general powers of police (as universal municipal functionaries) that were vested in the lay magistracy meant that these men were well and truly in charge. The nature of their power was, by colonial necessity, authoritarian. Constitutional radicals, on the other hand, opposed authoritarian magistrates' justice. They realised that the deeply entrenched class and colonial tensions in the colony could not withstand authoritarian legal governance. Accordingly, they frequently clashed with the magistrates and those who represented the interests of the squatters. According to Australian legal historian Tim Castle, among the reformers the judges were acutely political or 'activist', weaving reform through 'a combination of technical and creative arguments, whilst never formally repudiating [legal] doctrine'.[12]

In both Europe and the colonies, ruling-class reformers were motivated by both political necessity and an increasingly democratic political culture that penetrated the professions and political institutions. Given the mass action of Chartism, revolutionary socialism and anti-colonial struggle throughout Europe and the colonies during the 1830s and 40s, the potential consequence of ruling-class inaction would have been catastrophic to its grip on power.[13] But many reformers acted out of genuine humanitarianism.[14] As the young reformer John Stuart Mill saw it in 1838, 'the basis of English law was, and still is, the feudal system', which he likened to 'a tribe of rude soldiers, holding a conquered people in subjection'.[15] Reformers wrung their hands in political meetings of various sects and societies and vexed endlessly

[11] Geoffrey Blainey, *The Tyranny of Distance* (MacMillian, 2001).
[12] Tim D. Castle, '"The 'practical administration of justice': The adaptation of English law to colonial customs and circumstances, as reflected in Sir James Dowling's 'Select Cases' of the Supreme Court of NSW, 1828 to 1844', (2004) 5 *Journal of Australian Colonial History,* 61.
[13] Eric Hobsbawm and George Rudé, *Captain Swing* (Pantheon Books, 1968) 296-297.
[14] Lindsay Farmer, Michael Lobban and Markus Dubber, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners 1833-45', (2000) 18(2) *Law and History Review* 397.
[15] Mill, above n 5, 262.

about immoral social conditions that tainted their newfound prosperity through economic liberalism – conditions that they and their fellow 'gentlemen' had unleashed upon slaves, workers and 'the poor'. The London Corresponding Society, for example, was a late eighteenth century reform league which preached that liberty was 'man's birthright' while 'his supreme duty' was to preserve it.[16] The Clapham Sect was another such liberal society. It was the political home to some of the most powerful men in the Empire – Lord Brougham, William Wilberforce and James Stephen were all members. Prime Ministers, Lord Charles Grey and Lord John Russell were founding members of The Society of the Friends of the People. Armed with their reformist ideas and motivated by the consequences of failing to act, they went on to abolish slavery, reform the 'Poor Laws' and increase the electoral franchise. Reform was also spurred by evangelical Christianity – Methodism, Anglicanism, an enlightened education and sometimes both. Where religion taught ethics and equalitarianism, education taught a libertarian history in which the Glorious Revolution of 1688, the *Bill of Rights* of 1689, the *Habeas Corpus Act 1679* and the *Magna Carta* of 1215 were commonly asserted to support the boast that, 'Britons will never be slaves'.[17] As we have seen, these exhortations to social change were being asserted by 'patrician, demagogue and radical alike' and, like the working-class movements around them, reformers relied on the ancient rhetoric of Constitution, rather than Revolution, to achieve social change.[18] It was law and custom then that united both middle- and working-class emancipation movements.

Intra-class challenges to the magistracy were not peculiar to NSW. From the 1820s-40s in England, Chartists and trade unionists developed a practice of petitioning and protesting individual magistrates in superior courts.[19] As Frank argues, the mainstay

[16] Tony Moore, *Death or Liberty: Rebels and Radicals Transported to Australia* (Murdoch Books, 2010) 26.
[17] Ibid, 38.
[18] Thompson, above n 9, 85.
[19] Ibid, 44 and 47.

of this legal resistance to the class power of employers and their fellow magistrates was procedural law and technicality. Unionists and chartists operated through radical lawyers such as the Chartist solicitor, W.P. Roberts who mobilised a range of technical legal arguments to challenge criminal prosecutions of workers, predominantly under the *Masters and Servants Acts*. Roberts used two main legal arguments. One distinguished labour law from criminal law by asserting that it was a form of civil or contract law. The other proposed that coercive labour law threatened the liberty of the subject.[20] As Byrne concurs, 'legal technicalities were the prime mode of defending cases' in colonial NSW.[21] Yet no major Australian study has examined how they worked in terms of the role they played in the reform of criminal law and process.

As in England, the most common technical legal victories in NSW involved: (1) challenging the form of the criminal information (including the description of offence and jurisdiction), warrant or summons by finding errors and/or omissions in those documents;[22] (2) cross-examination of prosecution witnesses to discredit their character or show inconsistency in their evidence;[23] (3) proving that an arresting official or employer had broken a procedural or contractual rule (such evidence usually mitigated any sentence of imprisonment to a fine rather than acting as a complete defence);[24] (4) issuing writs of *habeas corpus* or *certiorari* to the Supreme Court (appeals to higher courts had the effect of not only redesigning the law at summary

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[20] Ibid, 14.
[21] Paula J. Byrne, *Criminal Law and Colonial Subject: NSW 1810-1830* (Cambridge University Press, 1993) 269.
[22] *R v Lucas* (1837) NSW Sel Cas (Dowling) 312; [1837] NSW SupC 74, Dowling, Notes for Select Cases, S.R.N.S.W. 2/3466, p. 82[1]; *R v Herbert* [1840] NSWSupC 21, *The Australian* 23 May 1840; *Ex parte Allen, in re Bull* (1836) NSW Sel Cas (Dowling) 807; [1836] NSW SupC 74, Dowling, Select Cases, Vol. 7, S.R.N.S.W. 2/3465, p. 89.
[23] G.D. Woods, *A History of Criminal Law in NSW: The Colonial Period, 1788-1900* (The Federation Press, 2002) 147.
[24] *R v Gwillin* [1823] NSWKR 5; [1823] NSWSupC 5, *Sydney Gazette,* 2 October 1823; *R. v. Emerson* [1827] NSWSupC 28, 16 May 1827.

level but also exposing magistrates to costs for false imprisonment claims);[25] and (5) using legal proceedings to expose social grievances and problems.[26] The main means by which constitutional reformers challenged the power of the squattocracy and supported the democratisation of criminal process in colonial NSW involved reform to the magistracy and the implementation of strict procedural rules in respect to the writ system, jury trial, criminal charges, double jeopardy, warrant and summons. Each of these processes is examined in turn (below).

Such legalistic resistance was aided by constitutional radicalism which prescribed a rigid adherence to a black letter rule of law that had evolved predominantly during the English Revolution.[27] This doctrine of strict legalism meant that technical rules were numerous and had to be followed (as mentioned in the previous chapter). Australian legal historian, David Plater, explains that the rules in respect to the capacity of witnesses (children in particular) and indictments were 'convoluted and little short of Byzantine'.[28] As was observed in the previous chapter, in some English cases it was not uncommon for prosecutors to take up to two days to read a single indictment after having drafted up to 70 alternative counts in respect to a single crime to ensure that every conceivable version of events was provided for.[29] In NSW, defendants were sometimes acquitted when their name was misspelt or innocently miscommunicated in an indictment.[30] For Whig legal historians such as Stephen, these rules created an 'irrational system' which meant that 'the law relating to

[25] *In re Byrne et al.* [1827] NSWSupC 9, *The Australian,* 1 March 1827; *Ex parte Lacelles* [1833] NSWSupC 98, Dowling, Proceedings of the Supreme Court, Vol. 83, State Records of NSW, 2/3266; *R. v. Ningollibin* [1845] NSWKR xxx, *Port Phillip Patriot*, 17 January 1845; *Taylor v. Taylor* [1855] NSWSupC 20, *Moreton Bay Courier*, 14 September 1855. Writs of *habeas corpus* and *certiorari* are explained below.

[26] See for instance, numerous cases concerning criminal libel, false imprisonment, attaint, bushranging, for instance in Bruce Kercher and Brent Salter, *The Kercher Reports: Decisions of the NSW Superior Courts, 1788-1827* (The Federation Press, 2010); and T.D. Castle and Bruce Kercher, *Dowling's Select Cases:1828 to 1844* (The Federation Press, 2005).

[27] See, for instance, the constitutional structure provided for under the *NSW Act,* c. 34.

[28] David Plater, 'The Development of the Role of the Prosecuting Lawyer in the Criminal Process: Partisan Persecutor' or 'Minister of Justice'?' *ANZLH E-Journal*, 2006, 36, www.anzlhsejournal.auckland.ac.nz/papers/papers-2006.html, accessed 22/4/2016.

[29] See, for instance, *R v Grace* (1846) 2 Cox CC 101, cited in Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan and Co, London, Vol 1, 1883) 287.

[30] See *R v Guyse* [1828] NSWSupC 29, *The Australian,* 9 May 1829.

indictments was much as if some small proportion of prisoners convicted had been allowed to toss up for their liberty'.[31] Indeed, they had. But such a system was the only rational response to a rule of law in which exposing the truth in court could spell death on the gallows and, by extension, arbitrary imprisonment.[32]

Reforming the Magistracy

Throughout the period, criminal process was defined by ongoing clashes between reformist governors, judges, advocates and honorary justices. As has been seen in Chapters 3 and 4, complaints to the Supreme Court against the conduct of magistrates were common. So it was to the legal aristocracy – the Supreme Court – that prisoners and civic radicals appealed for relief from the 'rogues' justice' of the magistracy and their Quarter Sessions. The compact between proletarians and some judges echoed a similar phenomenon in Britain at the same time.[33] Sandwiched between prisoners and their learned superiors, magistrates like Edward Wollstonecraft suffered the 'Revilings of the Mob' while feeling the 'Censures of dignified persons',[34] particularly when liberal judges awarded costs against them and one Colonial Officer even threatened to remove the convention that the State pay their damages.[35] Throughout the period, however, lay magistrates would lose more than simply protection from 'the Mob'.

From the outset, magistrates had been supervised by the governor. All minutes of proceedings and sometimes sentences were required to be signed by him.[36] This oversight, however, did not appear to extend to a lay magistracy who territorialised

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[31] Stephen, above n 29, 284.
[32] John Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2005) 6.
[33] Christopher Frank, *Master and Servant Law* (Ashgate , 2010) 11, 91-119.
[34] *HRA*, Series IV, Vol. 1, pp. 48-55, 122-44, 180-1.
[35] Magistrates who were sued by defendants in the Supreme Court due to incompetence and negligence were indemnified by the Government. See Murray to Darling 16 July 1830 *HRA*, Series I Vol XV, p. 587; Goderich to Bourke 25 January 1832, *HRA*, Series I, Vol XVI, p. 509.
[36] See Alex C. Castles, *An Australian Legal History* (The Lawbook Company, Sydney, 1982) 78; and John McLaughlin, *The Magistracy in NSW, 1788-1850* (PhD Thesis, University of Sydney, 1973) 70.

vast expanses of rugged countryside. In 1802, William Balmain lamented that not all Courts were 'free from corruption'.[37] Indeed, by 1809, the power of the squatter-magistrates and their loyal Rum Corps resulted in a full-scale military coup (the Rum Rebellion) by the dominant minority within the colony against reformist governor, William Bligh. At the head of this squatter junta was the colony's largest landowner and grazier, John MacArthur, who became the *de facto* governor. Throughout the period, MacArthur regularly stacked the Criminal Court with Rum Corps officers. MacArthur commonly manipulated criminal procedure in order to escape sedition charges while convicting and exiling his detractors.[38] In one telling case, an accused was charged with 'uttering an untruth and falsehood' about the Rum Corps Lieutenant Governor. Defence evidence consistent with innocence was ignored. The sentence was 600 lashes.[39]

Following the Rum Rebellion and the influence exerted against the Judge Advocate by the Rum Corps, the Whiggish military Governor Macquarie tightened his reign and surveillance over the exercise of criminal procedure by the Sydney Bench of Magistrates. During his time in NSW, Macquarie complained bitterly about the brutal influence of the lay magistracy on colonised and working-class peoples.[40] In an effort to curb the favour and patronage exercised by the justices, he promoted the colony's first policeman, D'Arcy Wentworth, to the role of its first stipendiary magistrate. This was the first of many manoeuvres between the frontier period and self-governance that saw the ruling class attempt to rein in the magistracy.

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[37] *Balmain to Banks,* 24th May 1802, Enclosure 'Courts of Justice', *HRA,* Series IV, Vol. I, 36.
[38] See H.V. Evatt, *Rum Rebellion* (Angus & Robertson, 1965), particularly the trial of Isaac Nicholls in 1799, 26-29.
[39] *R v Callaghan* [1789] NSWKR 2; [1789] NSWSupC 2, CCJ, 31 July 1789, SRNSW, CCJ Proceedings, Series 2700, 5/1147A and B, Reel 2391.
[40] See, for instance, the hostility between Macquarie and the Tory squattocracy (Macarthur and Marsden in particular), regarding Marsden's consistent failure to follow due process at convict hearings, excessive punishments as well as Macquarie's mistrust of Marsden's missionary capabilities, with Macquarie excluding Marsden from involvement with local Aboriginal people at Parramatta: see, Marion Phillips, *A Colonial Autocracy: NSW under Governor Macquarie, 1810-1821* (Thesis, London School of Economics, 1909) 271-2.

Convict attorneys like Edward Eagar thought that the governor himself was the problem. The officers of the court, Eagar objected, were 'entirely dependent upon the governor, their commanding officer',[41] for promotion. Indeed, no person in the colony was entitled to challenge the executive power to appoint a magistrate or judge.[42] To some extent, these problems were addressed by the young law reformer, Francis Forbes, who drafted the colony's Third Charter of Justice in 1823 and arrived to administer it as Chief Justice in 1824.[43] Under the Charter, Forbes created an independent judiciary while also providing himself (as Chief Justice) with the power of veto over all decisions made by the governor and executive within the colony.

Forbes' new Act provided for a right of appeal from magistrates' courts to the Supreme Court.[44] In hearing appeals from magistrates, however, the Supreme Court exercised a delicate jurisdiction. British control of the territory of NSW was entirely dependent on the willingness of magistrates to discipline and territorialise their outlying districts. To balance this right to appeal, Francis Forbes granted immunity from suit to all justices of the peace.[45] This was a move that Forbes may well have regretted over his thirteen years in the colony during which his vision for criminal process (informed by democratic principles from the British constitution) was constantly at odds with the authoritarian rule of the squatters.

The more time he spent in the colony, the more critical Forbes became of the magistracy. In 1825, the Chief Justice found that 'the Magistrates of NSW have passed sentences upon persons convicted, which have been rendered necessary by

[41] *R v Callaghan,* above n 39.
[42] Castles, above n 36, 54.
[43] ('3rd Charter of Justice'), *Letters Patent,* 13 October 1823.
[44] *New South Wales Act 1823* (UK) (4 Geo IV c 96) (hereafter referred to as '*NSW* Act').
[45] Ibid, s. 19.

circumstances, but which have not been sanctioned by law'.[46] He took the first of many steps to strip the magistracy of its powers, proclaiming that 'he did not feel the force of any difficulty, in the removal of indictments from the [Petty] Sessions into the Supreme Court'.[47]

In *R v Rossi, Prinicipal Superintendent of Police* [1826],[48] Forbes CJ heard a corruption allegation against the Chief Constable and Police Magistrate, Captain Rossi, which he found 'highly irregular'. He nevertheless dismissed the allegation as a 'mistaken feeling' on the part of the prosecutor and reassured the magistracy by advising that, in future, magistrates were to be afforded special notice before an action could be commenced against them, reminding them that his NSW Act said so.[49] Forbes walked a political tightrope, on the one hand, defending the legitimacy of the colonial authorities while, on the other, disciplining the offending magistrate. But as Forbes wrote in private correspondence to his colleague Robert Wilmot-Horton at the Colonial Office in London:

> Now I admit it. I had strained hard to prevent any cases being inquired into, prior to the passing of the NSW Act, and the establishment of regular tribunals of justice in the Colony – I knew that not one, but one thousand cases of unauthorized jurisdiction and irregular sentences, would be found on the records of the different benches of Magistrates, in the course of two or three years.[50]

Two years later, similar complaints were brought against Chief Magistrate Rossi. Forbes realised that such wilful disobedience, corruption and authoritarian governance by the squatters and the magistracy had fractured into a feud.

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[46] 'Points for Consideration in proposed NSW Bill', Francis Forbes, 1 January 1823, *HRA* Ser IV, Vol I, p. 417. Forbes referred to *Ann Rumsby's Case* as one example. For further details of the case, see Kirsten McKenzie, *Scandal in the Colonies: Sydney and Cape Town, 1820-1850,* (Melbourne University Press, 2004) 143-145.
[47] *Criminal Procedure Case* [1825] NSWSupC 46, *The Australian,* 6 October 1825.
[48] NSWSupC 43, *The Australian,* 22 July 1826, *Monitor,* 4 August 1826, *SG,* 12 August 1826.
[49] *NSW Act*, s. 19.
[50] Forbes to Wilmot-Horton, 15 May 1827, Mitchell Library, Reel CY 760.

Accordingly, he reasserted his supreme authority over the legal governance of the colony by reminding his fellow reformers and the magistrates that 'one of the incidents of our jurisdiction is a supreme and paramount control over all inferior magistrates'.[51] He set to disciplining the magistracy in an arduous campaign of supervision that persisted long after his departure from the Supreme Court.[52] The schism between the Supreme Court and the magistrates was widely reported in the mainstream media and heartened popular radicalism, evident in the large spike in false imprisonment cases against magistrates by workers and criminal defendants over the ensuing decade.[53]

By this time, reformers in London were fully apprised of the situation in NSW. The

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[51] In, *Tyler; R v Rossi and others* (1828) NSW Sel Cas (Dowling) 568; [1829] NSWSupC 25. Sydney Gazette, 4 July 1829.

[52] The following were appeals from the magistrates in which new trials were ordered under supervision by the Supreme Court or in which jurisdiction was seized by the Judge-Advocate or Supreme Court: *Wentworth v Crossley*, [1801] NSWKR 2; [1801] NSWSupC 2; *Hudson v Fitzgerald* [1811] NSWKR 1; [1811] NSWSupC 1; *Kable v Lord* [1812] NSWKR 7; [1812] NSWSupC 7; *Lord v Harris and McLaren* [1813] NSWKR 1; *Kable and Underwood v Crossley* [1814] NSWKR 7; [1814] NSWSupC 7; *The Governor v Ritchie* [1819] NSWKR 6; [1819] NSWSupC 6; *Cooper and Wife v Best* [1825] NSWSupC 38; *Clayton v Rowe* [1825] NSWSupC 25; *Payne v Smithers* [1825] NSWKR 5; NSWSupC 50; *Rowe v Wilson* [1825] NSWSupC 58; *R v M'Ara*, [1825] NSWSupC 34; *Solomon v Moore* [1826] NSWSupC 21; *R v Bensley* (1828) Sel Cas (Dowling) 293; [1828] NSWSupC 42; *R v Hall* (No. 7) [1829] NSWSupC 86; *R v Hall* (No. 4) (1829) NSW Sel Cas (Dowling) 789; *Ex parte Cheetham* (1832) NSW Sel Cas (Dowling) 769; [1832] NSWSupC 10; *Septon v Cobcroft* [1833] NSWSupC 110; *Jennerett v Smeathman* [1834] NSWSupC 26; *Lyons v Morgan* [1837] NSWSupC 32; *MacDermott v Smart* [1841] NSWSupC 101; *Starke v. Weller* [1841] NSWSupC 75; *Walker v Flint* (1844) NSW Sel Cas (Dowling) 495; [1844] NSWSupC 14; *Cunningham v Gray and Munce* [1850] NSWSupC 2 [Masonic Lodge – prohibition – appeals]; *R v Emerson* [1859] NSWSupCMB 28; *McLellan v Rudd* [1898] NSWSupC 2, 1898. After Forbes' departure from the Bench in 1836, supervision of the magistrates was continued by Attorney-General John Plunkett – see his extensive folios of 'Despatches to the Outlying Districts of NSW' in *Copies of Letters Sent to Magistrates,* Ser. 297, Aug 1839-Aug 1842 (4/6658), Aug 1842-May 1846 (9/2679), May 1846-Jul 1849 (4/6659), 1865-68 (ML A843). 4 vols, NSW State Records.

[53] See, for instance, the following false imprisonment cases: *Harris v Kemp* [1799] NSWKR 6; [1799] NSWSupC 6; *Thompson v McCarthy* [1804] NSWKR 1; [1804] NSWSupC 1; *Arkinstall v Ferguson* [1806] NSWKR 4; [1806] NSWSupC 4; *Hook v Paterson*, *Foveaux, Atkins* [1810] NSWKR 3; [1810] NSWSupC 3; *The Governor v Riggs* [1820] NSWKR 5; [1820] NSWSupC 5; *R v Mitchell (No. 1)* [1825] NSWSupC 15; *Merrett v Kenn, MacCleod and Butterworth*, [1826] NSWSupC 22; *Adams v Dawson* [1827] NSWSupC 19; *Broadbear and wife v McArthur et al* [1827] NSWSupC 16; *McDowall v Middleton* [1827] NSWSupC 76; *Nowlan v Young* [1828] NSWSupC 90; *Bardsley v Lockyer and Another* [1829] NSWSupC 40; *Roberts v Moncrief* (1828) Sel Cas (Dowling) 88; [1828] NSWSupC 7; *Thompson v Willet* [1829] NSWSupC 68; *Ready v Macquoid* [1830] NSWSupC 30; *Roach v Fitzpatrick* [1830] NSWSupC 40; *England v McQuoid and Murray* [1831] NSWSupC 27; *England v Sandilands* (1831) NSW Sel Cas (Dowling) 860; [1831] NSWSupC 51; *Hogan v Hely* (1831) NSW Sel Cas (Dowling) 115; [1831] NSWSupC 13; *Taylor v Christie* [1831] NSWSupC 47; *Austin v Biddle* [1832] NSWSupC 23; *Morris v Evernden* [1832] NSWSupC 49; *Plaistowe v Daley* [1832] NSWSupC 22; *McLaughlin v Parrott* [1834] NSWSupC 98; *Lewis v Lambert* (1835) NSW Sel Cas (Dowling) 225; [1835] NSWSupC 73; *Moore v Faunce* [1837] NSWSupC 45; *Donnison v Faunce* [1837] NSWSupC 72; *Taylor v Stuart* [1837] NSWSupC 61; *Palmer v Sloman* [1841] NSWSupC 83; *Ebden v Willis* [1843] *Port Phillip Gazette,* 25 November 1843; *Hartley v Dorsey* [1852] NSWSupCMB 2; *Agar v Holmes* [1851] NSWSupCMB 1.

head of the Colonial Office James Stephen commented that 'the legality of this mode of proceeding (summary jurisdiction) was, at all times, a subject of great doubt'.[54] Even the Tory Colonial Secretary, Sir George Murray, felt that 'the Magistrates' would 'increase, to an indefinite extent, the vast number of offences punished, and recorded as crimes in General Quarter Sessions, and in Petty Sessions, and before single magistrates, [which] are unknown as offences cognizable by Courts of Justice in the Mother Country'.[55] Too much discipline burdened the State. 'Absconding from service, disobedience of order, insolence, neglect of work, and other petty misdemeanours … would seem to swell enormously the apparent criminal calendar of NSW', said Sir George. He imposed further conditions on the power of justices and ordered them to consult directly with the governor lest they 'seek to relieve themselves from responsibility'. Nevertheless, honorary magistrates and landowners continued to discipline each other's indentured servants; but they were in turn disciplined by the Supreme Court, which threatened and occasionally acted to withdraw indentured workers from their service.[56] At stake here was a clash between the long view of the reformers who sought to build a society (albeit an unequal one) based on consensual forms of penal and labour discipline, and the short view of the squatters who saw only their immediate personal interest in accumulating capital quickly by asserting their authority.

By 1834, a Full Bench of the Supreme Court took decisive action against the magistrates. Forbes, Dowling and Burton recommended to Bourke a number of reforms to criminal procedure.[57] They denounced the state of criminal procedure in the colony, highlighting defective trial preparation, failures within the investigation

[54] Cited in McLaughlin, above n 36, 617.
[55] Sir George Murray to Governor Darling, 5 June 1829, *HRA*, Ser I, Vol XV, p. 10.
[56] See, for instance, *Hall v Hely* [1830] NSWSupC 18; *sub nom Hall v Hely (No 1)* (1830) NSW Sel Cas (Dowling) 570; *Hall v Rossi and others* [1830] NSWSupC 16; *Hayes v Hely* [1830] NSWSupC 17; *R v Mansfield (No. 2)* [1830] NSWSupC 70; *McNamara v Wilson* [1834] NSWSupC 27; *Lamb v Brenan and Holden,* 1837, *SG,* 31 October 1837. See also, David Neal, 'Law and Authority: The Magistracy in NSW 1788-1840' (1985) 3 *Law in Context,* 45.
[57] Judges to Bourke, 4 January 1834, *HRA* Ser. I, Vol. XVII, 360.

process as well as the triviality of cases being brought before the Supreme Court. They identified eight causes of these problems:

> 1. The duties of Justices of the Peace respecting the taking of examinations, the admitting to bail, and committing persons brought before them for trial, and for securing the testimony and attendance of witnesses *are not laid down with sufficient precision*; the Statute 7 Geo. IV. C. 64, which has been adopted by the local Legislature, not being in some of its provisions applicable in the Colony, and in fact not followed in practice, and not laying down the duties of Justices of the Peace so fully as gentlemen filling that office in this Colony require for their instruction.
>
> 2. There is a great want of discrimination on the part of the Justices, in the cases of persons brought before them, in *committing for trial persons whom they ought to punish summarily* upon the spot.
>
> [3. Erroneous committals of prisoners to Sydney.]
>
> 4. There is a great *want of care in the investigation of cases* before the Magistrates from which it happens that the Attorney-General received the depositions in an incomplete state.
>
> 5. There is a *want of a fit person in each district, who as a Stipendiary Magistrate* might be expected to give his entire attention to the business of police and judicial investigation of cases preparatory to trial.
>
> 6. There is a *want of some proper person in each district* as Clerk to the Magistrates whose duty it should be to prepare and bring cases before them, whether *for summary prosecution* or for investigation, to conduct preliminary examination, and to communicate with the Attorney-General.
>
> [7. Want of system in the office of Attorney-General.]

[8. Want of regulation by the Supreme Court.].[58]

Accordingly, the Judges recommended 'a Stipendiary Magistrate in each district, possessing the requisite qualifications', to hold a regular Court within each district, assisted by a 'professional person as Clerk'.

The preference of radicals and reformers for stipendiary magistrates was primarily due to a marked difference in the attitudes and technical legal competence of stipendiaries compared with honorary magistrates. Unlike honoraries, stipendiaries had no direct pecuniary interest in disciplining colonised and working-class peoples and were often lawyers, trained in the discourse of constitutionalism. Where honorary magistrates frequently disciplined the workers of fellow masters and squatters, in *R v Wilson and Windeyer* [1838],[59] Tory Police (Stipendiary) Magistrates, Henry Croasdaile and Charles Windeyer, refused to enforce the Seamen's Act in favour of a ship's master against a number of sailors who deserted ship in protest against their working conditions. The stipendiaries formed the view that the Act caused 'absolute inequity' and 'hardship' to seamen.[60] While the magistrates sentenced a number of deserting seamen in this case to 30 days' imprisonment, they refused to award costs to the prosecuting employer because the captain had mistreated the men, confiscated their clothes and refused payment of wages. Tory Attorney-General Alexander Baxter appealed to the Supreme Court, emphasising the importance of the Act to the 'prosperity, strength and safety of the Realm' which was, of course, 'dependent upon a large supply of seamen'.[61] However, a Full Bench of the Supreme Court agreed with the stipendiaries and confirmed their findings.

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[58] Ibid, 362-364 (emphasis added).

[59] NSWSupC 62, *Sydney Herald,* 18, 25 June 1838.

[60] Ibid.

[61] Ibid. Baxter was Attorney-General between 1827-1830. After two months in the position, Governor Darling reported to the Colonial Office that, 'Dandy Baxter had never before had a brief in his life, was totally inexperienced as a lawyer, incapable of addressing either court or jury and helpless against Robert Wardell and William Charles Wentworth': see 'Baxter, Alexander McDuff (1798-1836)', *ADB,* (MUP, Vol. 1, 1966).

The conflict within the legal hierarchy of the colony flared again in 1835 when the progressive Irish Whig Governor Bourke removed from the honorary magistrates their most coercive powers. Bourke's position was espoused by close reformist allies such as Therry who saw problems within the magistracy as a result of the class composition of the colonial bourgeoisie. 'The maladministration of the law', said Therry:

> may no doubt be attributed to the improper materials of which the magistracy at an early period was composed. Many of its members had been commanders and mates of convict and other ships, and of small coasting-vessels; and the 'rough-and-ready justice' of the quarter-deck was transferred to the magisterial benches of NSW. Not a few were needy and selfish settlers, who sought to extort by the lash the maximum of labour from prisoners assigned to them.[62]

In 1835, Bourke had Forbes draft the '50 Lashes Act'[63] (discussed in Chapters 3 and 4). Bourke was determined to end 'the illegal sentences which magistrates were daily passing upon convicts brought before them' as well as achieving 'some mitigation in the severity of corporal punishment'.[64] The Act restricted a single justice from imposing more than 50 lashes. It also imposed some measure of accountability on justices, requiring that a Court of Petty Sessions could only be appointed by the Governor and constituted by two or more justices sitting together.[65] Magistrates complained that the 'customary' practice was a punishment of '100 lashes'.[66] Bourke was also clearly attuned to reformist views on stipendiary magistrates and, in 1837, required that the position of Chairman of the Quarter Sessions was restricted to

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62 Therry above n 1, 46-47.
63 *Offenders Punishment and Justices Summary Jurisdiction Act* 1832 (NSW) (3 Wm IV No 3) ('*Summary Jurisdiction Act*').
64 Bourke to Goderich, 30 October 1832, *HRA* Ser I, Vol XVI, 780-782.
65 *Summary Jurisdiction Act,* s. 16.
66 *HRA* Series I, Vol. 3, pp. 48, 418-9.; see also Hilary Golder, *High and Responsible Office: A History of the NSW Magistracy* (Sydney University Press and Oxford University Press, 1991) 37.

persons 'possessing competent knowledge of the law'.[67]

Nevertheless, justices continued their authoritarian rule through other aspects of criminal process. In *Ex parte Ingless, in re Wilson,* 1837[68] a defendant prosecuted a magistrate, H.C. Wilson Esq., for assault. The magistrate had imprisoned a soldier's wife in the local police lock-up at Miller's Point. She was alleged to have been standing on the road waiting for her husband. She refused to answer questions relating to her identification. The magistrate claimed he was exercising his extraordinary powers of search and detention granted to him pursuant to the *Bushranging Act* and the *Vagrancy Act* which had been drafted and implemented by Bourke and Forbes some years earlier. Upholding the legitimacy of the law, the Supreme Court refused to indict the magistrate but disciplined him by requiring him to pay the prosecutor's costs, finding that the magistrate 'had not acted corruptly, but illegally'. Acting Chief Justice Dowling used the opportunity to articulate a new test for prosecution of a magistrate, premised on 'malicious, oppressive, cruel and corrupt' conduct. In expressing the test in this way, Dowling continued Forbes' delicate dance with the magistracy. Maintaining hegemony meant pursuing subtle reform while legitimating dominant forms of oppressive criminal process.

As discussed in Chapter 4, Chief Justice Dowling supported broad reform of the magistracy, petitioned for and presented to him by 'the workingmen of the colony'. In 1841, he exercised complete authority over the jurisdiction of the magistracy, saying that it was 'a maxim in the constitution of the inferior Courts, that the chief officers or head in each of these respectively, had full power to control all the inferior Officers in the Court of which he was the head'.[69] In 1844, he addressed the same point, using English constitutional law to reinforce the authority of the

[67] See *General and Quarter Sessions Act 1829* (NSW) (10 Geo IV No 7) s. 5.
[68] *Sydney Herald*, 16 October 1837.
[69] *R v Peckham* [1841] NSWSupC 29, *Sydney Herald,* 18 February, 16 March 1841.

Supreme Court:

> This Court is the creature of the act of Parliament, 9 Geo. 4 c. 83 (1828) and as a Supreme Court has conferred upon it all the powers of the four Courts at Westminster. Vested with the like jurisdiction as the Queen's Bench, it has the power of correcting and examining all manner of errors of fact and in law of all justices, in their judgments, process and proceedings: Coke *Institutes*, eighteenth ed., London, 1823, p. 71. Its jurisdiction is very high and transcendent. It keeps all inferior jurisdictions within the bound of their authority, and may either remove their proceedings to be determined here; or prohibit their progress below. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition: Blackstone's *Commentaries*, Vol. 3, p. 42.[70]

Preservation of the rule of law required continual condemnation of the magistrates for illegal procedural conduct. In *Arnold v Johnston* (1844),[71] Burton and Stephen JJ heard a civil claim against a magistrate, Major Johnston, for 'assault and imprisonment'. The magistrate was found to have kept a prisoner 'twelve hours in the lock-up, before he went into the examination, … keeping the prisoner in handcuffs [the entire time]'.[72] This was followed by a 'subsequent refusal to give bail, or to send to a second magistrate for that purpose'. The actions of the summary justice were condemned as 'very improper … unjustifiable in the extreme'. Meanwhile, the Supreme Court noted that 'there was not a tittle of evidence to substantiate the charge … and not a shadow of proof' showing that the defendant

[70] *R v Hodges and Lynch (No 1)* (1844) NSW Sel Cas (Dowling) 267; [1844] NSWSupC 7, See Dowling, above n 26, 267; See also *R v Hodges and Lynch (No 2)* (1844) NSW Sel Cas (Dowling) [1844] NSWSupC 8, ibid, 273; *R v Croome* [1849] NSWSupC 29.
[71] 1 Legge 198. *Sydney Morning Herald,* 19 April 1844. ('Legge' refers to the 'Legge Reports', compiled by Gordon Legge in, *A Selection of Supreme Court cases in NSW from 1825 to 1862* (Sydney Government Printer, 1896)).
[72] Ibid, 199.

'could [not] have had any knowledge of it'. Burton castigated the magistrate for a lack of attention to law and condemned his procedural irregularity. The result of the magistrate's misuse of power, according to Burton, was that he 'acted very harshly', and was therefore 'unfit to retain office'.[73]

In 1850, a full bench of the Supreme Court, consisting of Stephen CJ, Dickinson and Therry JJ, heard the appeal of *R v Marrington.*[74] It involved a charge of criminal nuisance heard at Quarter Sessions. At first instance, three or four different magistrates had sat for different periods throughout the trial. The Chairman of Quarter Sessions had not even heard the case, let alone the jury's recommendation of mercy, and delivered a guilty verdict, imposing a fine of £50. On appeal, Dickinson J reminded the magistrates that the legislation required two justices sitting together, *at the same time.* The Full Bench declared a 'mis-trial' and ordered that the judgment of the court at first instance be vacated and the amount of the fine returned to the appellant.

The same Court heard the matter of *Moore v Furlong,*[75] an appeal from Newcastle in which the magistrate, Captain Richard Furlong, had issued a warrant for a constable to seize a cask of tallow. The Court found that the magistrate had taken the property without any reasonable cause and certainly not pursuant to correct procedure, as outlined in the *Larceny Act.*[76] In effect, the magistrate had ordered a break and enter and a theft of the plaintiff's property! The episode added fuel to the fire of the reformers in the Supreme Court.

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[73] Ibid.
[74] 1 Legge 643, (For the first instance decision, see: *SMH,* 27 July 1850).
[75] (1847) 1 Legge 397.
[76] See, the *Larceny Act 1829* (UK) (7 and 8 Geo 4 c 29). The *Larceny Act* was adopted via the *Australian Courts Act 1828* (UK) (9 Geo 4 c 83) pursuant to s. 24.

Procedures

The Writ System

As struggles for power within the ruling class intensified, the procedural mechanisms through which they were waged at common law became more complex. The Supreme Court became increasingly reliant upon Royal Justice through the writ system to usurp, reverse, remit and countermand the inferior powers of the magistrates.[77] The Supreme Court justified this affront to the inferior magistrates by detailed reference to the technical apparatus of common law prerogative writs – the standard application for a legal claim or action pursuant to *Magna Carta.*[78] The Supreme Court grounded its power to issue and act on prerogative writs in the Royal Prerogative, inherent in the jurisdiction of King's Bench.[79] Accordingly, the writ system had evolved into a form of appeal. It was reliant on a motion or application from an aggrieved party from a lower jurisdiction – an appellant – to bring their case before a superior court by issuing a writ or order from a superior court against the use of legal power by an inferior court. The five most common forms of writ used in the colony in this period were: *quo warranto*, *habeas corpus*, *prohibition, mandamus* and *certiorari.*

A writ of *quo warranto* (Latin, 'by what authority') enabled the Court to exercise a power of enquiry. It was described by the King's Bench as 'a writ of right for the King against persons who claimed or usurped any office, franchise, liberty or privilege belonging to the crown, to enquire by what authority they maintained their claim, in order to have the right determined'.[80] Higher Courts used writs of *mandamus*

[77] Ibid, 133.
[78] Cotton MS. Augustus II. 106, Clauses 29, 34 and 36; On this point, see also Alan Harding, *A Social History of English Law* (Peter Smith, London, 1973). Harding suggests that the writ system may have even had Anglo-Saxon origins.
[79] McLaughlin, above n 36, 474.
[80] *Selwyn Nisi Prius* (1842) 1143, cited in William Holdsworth, *History of English Law* (Methuen and Co., London, Vol. 1, 1903) 228-229; In *Ex parte Gaunson* (1846) 1 Legge 348, the Supreme Court issued an order compelling a magistrate to provide reasons for his decision.

(Latin, 'we command') to direct inferior courts or government officials to exercise particular powers.[81] Writs of *prohibition* were issued to prohibit inferior courts from exceeding power during pending or unfinished proceedings.[82] For magistrates, the writ of *certiorari* (Latin, '(we wish) to be informed') was perhaps the most intimidating of all the prerogative powers available to the King's Bench. It was used to usurp the authority and then quash a decision of an inferior court.[83] The writ of *habeas corpus* (Latin, 'have the body') was perhaps the most celebrated during this period, particularly among prisoners and the working class, as a right against the wrongs of illegal punishment and imprisonment.[84] It was first articulated in Clause 29 of *Magna Carta,* and was expanded following the English Revolution through the *Habeas Corpus Act 1679* which extended the power of *habeas corpus* to the King's Bench.[85]

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[81] *R v The Magistrates of Sydney* [1824] NSWKR 3; [1824] NSWSupC 20, *The Australian*, 14 and 21 October, 11 November 1824; *Sydney Gazette*, 14 and 21 October 1824; See also, *Ex Parte Nichol*s (1839) 1 Legge 123, B and C 271; and *Ex parte Dillon* [1839] NSWSupC 67, for similar use of mandamus to *Nichols*.

[82] *Walker v Scott* (No 1) [1825] NSWKR 6; [1825] NSWSupC 60; *Walker v Scott (No 2)* [1826] NSWSupC 4; *The Schooner Darling* (1829) NSW Sel Cas (Dowling) 911; [1829] NSWSupC 94; *Smith v Elder* (1831) NSW Sel Cas (Dowling) 222; [1831] NSWSupC 69; *Cunningham v Gray and Munce* [1850] NSWSupC 2 [Masonic Lodge – prohibition – appeals]; *Bewger v Mayne* [1858] NSWSupCMB 1; *R v Glassford* [1858] NSWSupCMB 20; *In re Newnham* [1859] NSWSupCMB 11; *In re Wilks* [1859] NSWSupCMB 12; *Emerson* [1859] NSWSupCMB 28; *R v Thorn* [1859] NSWSupCMB 37. A writ of *prohibition* was used in *R v Mann* (1844) 1 Legge 182, to quash improper use of judicial functions at Quarter Sessions.

[83] *In re King* [1824] NSWSupC 25; *R v M'Ara* [1825] NSWSupC 34; *R v Tindal* [1826] NSWSupC 24; *Ex parte Mathews* [1827] NSWSupC 24; *Ex parte Dunn* [1828] NSWSupC 64; *In re Lookaye alias Edwards* (1828) Sel Cas (Dowling) 521; [1828] NSWSupC 16; *In re Nowlan* (1828) Sel Cas (Dowling) 762; [1828] NSWSupC 50; *In re Clarke* (1828) NSW Sel Cas (Dowling) 766; [1829] NSWSupC 49; *In re Tyler; R v Rossi and others* (1828) NSW Sel Cas (Dowling) 568; [1829] NSWSupC 25; *R v Long* (1829) NSW Sel Cas (Dowling) 507; [1829] NSWSupC 10; *In re Stone* [1832] NSWSupC 38; *In re Maher* [1834] NSWSupC 72; *Ex parte Girard* [1839] NSWSupC 75; *R v Betts* [1841] NSWSupC 120*; R v Peckham* [1841] NSWSupC 29; *R v Hodges and Lynch (No. 1)* (1844) NSW Sel Cas (Dowling) 267; [1844] NSWSupC 7; *R v Hodges and Lynch (No. 2)* (1844) NSW Sel Cas (Dowling) 273; [1844] NSWSupC 8; *In re Bardsley* (1828) Sel Cas (Dowling) 757; [1828] NSWSupC 24.

[84] *R v Johnson* [1824] NSWSupC 7; *In re Byrne et al* [1827] NSWSupC 9; *In re Foster* [1827] NSWSupC 45; *In re Harris* [1827] NSWSupC 43; *In re Mahony* [1828] NSWSupC 31; *R v Baxter* [1829] NSWSupC 9; sub nom *R v Baxter (No. 1)* (1828) NSW Sel Cas (Dowling) 202; *Ex parte England, Mackay and Coomber* (1830) NSW Sel Cas (Dowling) 574; [1830] NSWSupC 79; *England v McQuoid and Murray* [1831] NSWSupC 27; *In re Canney* [1831] NSWSupC 22; *R v Kelly* (1831) NSW Sel Cas (Dowling) 224; [1831] NSWSupC 72; *Storey v Storey* [1832] NSWSupC 62; *Ex parte Lacelles* [1833] NSWSupC 98; *In re Harrison* [1833] NSWSupC 40; *In re Maher* [1834] NSWSupC 72; *In re Hallett* [1841] NSWSupC 81; *Re Carrington* [1842] *Port Phillip Gazette,* 5 May, 4 August 1842; *R v Hill* [1843] *Port Phillip Gazette,* 28 June, 22 July, 1 August; *R v Kirrup* [1845] NSWKR xxx; *R v Ningollibin* [1845] NSWKR xxx; *In re Penson* [1857] NSWSupCMB 6; *In re Frost* [1853] NSWSupCMB 1; *Taylor v Taylor* [1855] NSWSupC 20; *Faunce v Cavenagh* [1838] NSWSupC 24, concerning illegal punishment of a convict servant by a master who was stopped by a writ of *habeas corpus*. See also, *In re King* [1824]; *R v M'Ara* [1825]; *R v Tindal* [1826]; *In re Lookaye alias Edwards* [1828]; *R v Nichols* [1837]; *In re Clarke* [1829]; *In re Tyler – R v Rossi and others* [1829]; *In re Stone* [1832]; *R v Betts* [1841] referred to above.

[85] (1297 31 Car II c 2) (*Magna Carta* Statute). Note, the right to *habeus corpus* was located in Chapter 39 of the original 1215 Charter.

Essentially, *habeas corpus* is an order to compel the production of the body of a detained person. Under a writ of '*habeas*', a Court is compelled to enquire into the detention of the person and, if detention is found to be unlawful, to order that the person be released.[86]

The extraordinary *habeas corpus* case of R. *v. Muldoon, Bolton, McKoldrick, McMoren and Horan* [1828] has been discussed in Chapter 2. Yet just as extraordinary as the use of the writ system by prisoners in this case was that the Supreme Court took decisive action to quash the illegal imprisonment of three men aboard a prison hulk at the hands of the magistrates. After receiving the prisoners' petition on 16 August 1828, all three Justices of the Supreme Court – Forbes, Dowling and Stephens – boarded the ship. Without any formal hearing or writ, the Court exercised its *general supervisory jurisdiction* to implement what amounted to an order for *habeas corpus*. In doing so, the Court released three of the prisoners, stating:

> In both these two cases it appears to the Court that the Justices below have exceeded their jurisdiction, and the Court by virtue of its superintending authority over inferior jurisdiction in the Colony doth order and adjudge that these prisoners be discharged from their commitments respectively.[87]

The third prisoner was released due to the magistrates having exceeded their power by extending the prisoner's sentence beyond expiry of his original term.[88] This problem had been tested on numerous occasions in the colony and would remain an issue until the modernisation of procedure in the late 1840s.[89]

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[86] *Oxford Australian Law Dictionary,* (Oxford University Press, 2010).
[87] Sir James Dowling, *Letters and Opinions,* Vol. 1, 137, N.S.W.A., Location 2/3470.1, pp. 145-6.
[88] *R v Muldoon, Bolton, McKoldrick, McMoren and Horan* [1828] NSWSupC 62, *The Australian,* 22 August 1828.
[89] *R v Callaghan* [1789], above at n 39; and *R v Kingston* [1799] NSWKR 11; [1799] NSWSupC 11, were both expired sentence cases. See also, *In re Jane New* (1828) NSW Sel Cas (Dowling) 549, 551, 874; [1829] NSWSupC 11. In *R v Murray* (1846)1 Legge 287, the court revisited its power to test the legality of inferior court sentences.

Technicality played an important role in the exercise of prerogative authority. In one instance, the Supreme Court invoked *certiorari* to usurp jurisdiction and quash a conviction where a magistrate at first instance failed to 'sufficiently state the circumstances upon which the conviction was founded'.[90] In accordance with these powers, Forbes CJ had found in 1824 that inferior courts 'could not lay down any rule of practice'. Rather, as he cautioned the justices, 'the proper mode of proceeding' was to derive procedure from 'the principles of law'.[91] He proceeded to remove a series of Quarter Sessions cases from the hands of the justices and heard them himself in the Supreme Court. It was through these procedures that the writ system became the central mechanism by which the new Court Supreme Court brought the Magistracy to heel by a process of judicial review.

Jury Trial

In the early period, military juries reflected the authoritarian will of the military regime and the squatters, many of whom had been military officers. Over time, reformers challenged control of juries by the squatters. For instance, Governor King consistently intervened in the decisions of the Criminal Court when it appeared that the Judge-Advocate, Richard Atkins, was unable to properly direct and control his military jurors.[92]

Australian legal history has focused a substantial volume of scholarship on the case of *R v Magistrates of Sydney* [1824][93] and its implications for jury trial (for free men) in the colony.[94] Jury trial remains an important fair trial right.[95] It has since been

[90] *Ex parte Girard* [1839] NSWSupC 75;
[91] *Criminal Procedure Case* [1825] NSWSupC 46, *The Australian* 3 October 1825.
[92] See, for instance, *R. v. Marshall* [1801] NSWKR 1; [1801] NSWSupC 1, Court of Criminal Jurisdiction, Minutes of Proceedings, Feb 1801 to Dec 1808, State Records N.S.W., 5/1149, in which the Governor directed the Judge Advocate to re-open the case.
[93] NSWKR 3; [1824] NSWSupC 20; *The Australian,* 21 October 1824.
[94] See, for instance, Castles, above n 36, Castles even refers to the case as, 'the first major constitutional case', 186.; C.H. Currey, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of*

enshrined within the Australian Constitution. Less studied, however, is the connection between jury trial and its symbolic relationship with 'freeborn rights', the *Magna Carta* and a radical tradition of English civil rights, as discussed in the previous chapter.

In 1824, a quorum of honorary magistrates aligned to crush the procedural rights of prisoners by refusing to empanel juries for the trial of free settlers at the Court of Quarter Sessions. NSW Attorney-General, Saxe Bannister, took action by seeking a writ of *mandamus* to compel the magistrates to empanel grand and petit juries at Quarter Sessions. And 'the word *mandamus*', he warned, 'carried with it a sounding name' of rights and reform. Initially, the magistrates elected William Wentworth to represent them but, as an ardent supporter of jury trial, he declined. They opted for Solicitor-General, John Stephen, instead. Bannister recognised the historical importance of the procedure being debated. He referred the court to the procedural manual, 'Burn's Justice',[96] and to 'Viner's Abridgment'

> where it is laid down that 'whenever an Act of Parliament makes an offence, and is silent as to the manner of trying it, it shall be intended to be a trial *per pais*, according to Magna Charter [sic]'.[97]

The case was heard before Forbes CJ who seized the opportunity to reassert the supremacy of imperial law. This was 'a colony in which English law prevails', he said, finding that the *NSW Act* gave 'summary power' over convicts *only*. *'Free persons'* were to be granted all procedural rights including, trial by jury, in accordance with 'the birthright of the subject, and the bond of allegiance between the colonist and their sovereign'. He issued *mandamus* against the magistrates, pronouncing that 'this was a

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NSW (Angus & Robertson, 1968); J.M. Bennett, *Sir Francis Forbes: First Chief Justice of NSW, 1823-1837* (The Federation Press, Annandale, 2001) 117-122.

[95] A right to jury trial on indictment is provided in s 80 of the Australian Constitution.

[96] … and quoted 'p. 207': *R v Magistrates of Sydney* [1824], *The Australian,* 21 October 1824.

[97] Ibid. *'Per pais'* literally translates to 'by the country' (Fr.) which, in this case, means trial by jury or trial pursuant to Magna Carta.

universal rule of law to which the most rigid adherence should be given'.[98] Giving voice to his Tory radicalism that supported the reformist struggles of the streets and magistrates' courts, he proclaimed with full judicial authority: 'it would not merely be against the express language of *Magna Charta* [sic] to try free British subjects without the common right of a Jury, but against the whole Law and Constitution of England'.[99] The radicalism of Forbes' decision in this case is highlighted by contrast with Chief Justice Pedder's decision in Van Diemen's Land to refuse trial by jury.[100]

It should be noted that Forbes' support of democratic jury deliberation extended to his agreement with the goals of the democratic movement in NSW. Indeed, Forbes had provided for a five member Legislative Council within his *NSW Act* of 1823 and then said, 'Amen' to an emancipist petition for an increased electoral franchise and legislature.[101] Some sources also point to a series of letters between the firebrand radical, John Dunmore Lang, and Lady Forbes, as evidence to suggest that the Chief Justice was a member of a secret society campaigning behind the scenes for liberal and fair trial rights in the colony.[102]

The decision against the magistrates of Sydney was soon nullified by the *Australian Courts Act 1828*.[103] Nevertheless, in 1832, Governor Bourke permitted civilian juries in limited cases. In 1833, the trials of 'free persons' were permitted to be determined by a civilian jury of 12 men, but military juries (of seven military jurors) continued to operate in most criminal matters until 1839 when criminal trial by civilian jurors was

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98 Ibid. He referred to 'Volume 19', 'p. 588'.
99 Ibid.
100 J.M. Bennett, *Sir John Pedder: First Chief Justice of Tasmania 1824-1854* (Federation Press, 2003).
101 Members of the first Legislative Council were appointed by the Governor (Brisbane) and included the Lieutenant-Governor, the Chief Justice, the Colonial Secretary, the Principal Surgeon and the Surveyor-General. The proposal of the emancipists sought to grant colonists electoral parity with the members of the Legislative Council in electing members of the Council. See J.M. Macarthur, *NSW: Its Present State and Future Prospects: A Statement Submitted in support of Petitions to His Majesty and Parliament* (D. Walther Publishing, London, 1837) 133. This proposal was enacted in 1843.
102 Lang to Lady Forbes, 29 July 1824, Mitchell Library, A1381, p. 198.
103 (9 Geo IV c 83).

enacted by a democratic majority of the local legislature.[104] By 1846, Attorney-General, Plunkett, estimated that 20 per cent of the population were ex-convicts.[105] He 'proposed to place on jury lists those who, after serving their terms of punishment, had proved by their good character, by their reformed lives, … their worthiness to exercise this trust'.[106] These proposals from some the most powerful men in the colony were in fact less restrictive and provided for a more democratic pool of jurors than the current provisions of the *Jury Act 1977*(NSW).[107] Clearly, the will of the majority had been heard.

The Criminal Charge

Maintaining hegemony in the face of the authoritarian power of squatters and their allies meant that the Supreme Court and the NSW Bar relied on an ever-increasing volume of complex technical legal procedure related to laying criminal charges. A criminal charge is the primary procedure by which the State makes process transparent to an accused and the general public within a court of law. Indeed in England, by 1788, the criminal charge had come to be perceived as a procedural right of 'due process'. In colonial NSW too, the criminal charge assumed a new significance and was often the basis of key disputes within the colonial ruling class over reform and criminal process. The charge process also contributed to the tension between superior and inferior courts where it was sometimes ignored or crudely administered by squatter magistrates, only to be invoked on appeal to save the lives of colonised and working-class peoples.

The criminal charge dates back to Clause 29 of *Magna Carta* and had undergone

[104] At this time, the legislature (of 7 members) was appointed by the Colonial Office, pursuant to the NSW Act, pp. 36-37.
[105] Tony Earls, *Plunkett's Legacy: An Irishman's Contribution to the Rule of Law in NSW* (Australian Scholarly Publishing, 2010) 146.
[106] Ibid, 145.
[107] The *Jury Act 1977* (NSW), Schedule 1 prohibits a range of 'persons' who have committed various offences and served certain sentences of imprisonment from serving as jurors.

various permutations in both statute and common law since the thirteenth century. The earliest reference to the criminal charge in English law relates to an order by Edward I in 1285 requiring all indictments to be laid by a Sheriff.[108] The procedure of charging an accused was, in fact, critical to establishing the right of an accused to enforce the accountability of the sovereign's representative (usually a magistrate) for any resulting trial and punishment. And, as Langbein has found, most objections to the authority of the sovereign since the middle ages were raised in response to the criminal charge.[109] The founding legal document of NSW, the *Letters Patent*, of 1787, specified that any 'Charge or Charges' were to be put 'into writing and exhibited by our Judge Advocate to be read over to such offender or offenders'.[110] This section of the First Charter has frequently been overlooked in much Australian legal history,[111] which has tended to overemphasise the founding instruction to the judiciary to 'proceed in a more summary way than is usual'.[112] Complexity affected criminal charges in two key ways: first, through the jurisdiction in which the charge originated (jurisdictional technicality) and, second, through the content, specificity and particulars with which the charge was worded. Jurisdictional technicality will be examined first.

Jurisdiction

The Supreme Court relied on two particular features of jurisdictional technicality relating to a distinction between the type of criminal charge laid and the procedural mechanisms by which a prosecution was commenced. Some categories of charge were more complex and coercive than others and, in court, were known variously as criminal information, indictment or complaint, depending on the jurisdiction and

[108] See the *Sherriff's Tourn Act 1285* (UK) (13 Edw 1 c 13).
[109] Langbein, above n 32, 26.
[110] *The First Charter of Justice for NSW,* Letters Patent, 2 April 1787.
[111] See, for instance, Castles, above n 36; Currey, above n 94; J.M. Bennett, *A History of the NSW Bar* (Law Book Company, 1969); Bruce Kercher, *An Unruly Child: A History of Law in Australia,* (Allen & Unwin, 1995).
[112] *First Charter of Justice,* above n 110.

procedural mechanisms involved. The type of charge was, in turn, dependent on the seriousness of a charge as prescribed by legislation and common law. Summary 'complaints' could be made by private parties and police, and were dealt with by Magistrate's Courts. Serious offences were dealt with either on 'information' or 'indictment' in a Court of Quarter Sessions or, if the offence involved rape or murder, in the Supreme Court.

The terms, 'information' and 'indictment',[113] were used interchangeably throughout the *NSW Act.*[114] 'Indictment' was a method of criminal prosecution that had been evolving in England since the twelfth century. It allowed a private party to prosecute a complaint as a criminal charge in the public realm. The process involved the presentation ('presentment') of a petition from a private party before a grand jury and a justice.[115] The jury was required to find that the petition was a 'true bill' by 'Examination of such Prisoner, and Information of those that bring him' in respect to 'the Fact[s] and Circumstance[s]' of the matter.[116] If so, an accused would be 'indicted' by the grand jury and the indictment would proceed to trial in a Court of Quarter Sessions or the Supreme Court (usually before a petit jury). Information, by contrast, was a form of direct public prosecution which permitted one of the King's numerous 'informers' to draft, file and prosecute a person, most commonly in the Court of Star Chamber for a crime against the State.[117] It allowed a prosecutor to bypass the grand jury system by laying an *ex officio* information before a magistrate. The prosecutor sought a declaration as to a true bill of indictment before filing the indictment to 'commit' the accused for trial in the superior jurisdiction.[118] This process was codified with the introduction of the *Jervis Acts* and, thereafter, became

[113] *NSW Act,* s. 4.
[114] *NSW Act,* ss. 7, 23, 50 and 53.
[115] The process of grand jury was codified by the *Marian Committal Statute* (1555) (2 and 3 *Phillip & Mary* c 10).
[116] Ibid, s. 2.
[117] Harding, above n 78, 76-77.
[118] Castles, above n 36, 76.

known as 'committal'.[119]

Soon after the enactment of the *NSW Act*, the NSW Supreme Court articulated a distinction between information and indictment. In *R v Howe* [1824],[120] an information was considered a public prosecution while an indictment was a private prosecution. This distinction lasted until 1883 when it was wholly replaced by indictment.[121] Yet, while this distinction persisted, indictments often proved difficult for private parties to prove against criminal defendants due to their technical requirements.[122] This complex procedure often served the interests of an accused by preventing malicious private prosecutions and vesting the power of criminal prosecution almost exclusively in the office of an Attorney-General. The Attorney-General was often more competent, better resourced, accountable to the executive government and more distanced from the outcome of the case than private parties.

Hegemonic power relations between the reformers and the squatters were often a marked feature of those rare cases when private parties attempted private prosecutions by indictment. In *R v Hardy* [1836],[123] honorary magistrate, John Lamb Esq., attempted to file his own indictment for criminal libel against John Hardy, Editor of *The Australian.* Attorney-General Plunkett refused to prosecute the case. As Lamb filed his initiating process in the Supreme Court, Roger Therry (who happened to be in court that day) jumped to his feet to object to what he saw as misuse of process. Therry cited the Chartist case of the '*Magistrates of Lancashire* [1st Chitty, 602]', defended by radical lawyer, W.P. Roberts, and asserted the principle that 'all prosecutions in the name of the King, must be instituted by a law officer of the

[119] Ibid.
[120] NSWSupC 2, *Sydney Gazette*, 24 June 1824.
[121] Bennett, above n 111, 69-70. 'Information' as a method of criminal process continues to this day in a number of Australian jurisdictions such as the Northern Territory.
[122] See, for instance the prosecution of Robert Wardell for criminal libel which took over four separate legal actions before a successful indictment could be proven: *R v Wardell (No 4)* [1827] NSWKR 2, *Sydney Gazette*, 10 March 1827.
[123] NSWSupC 12, *Sydney Herald*, 18 February 1836.

Crown or by a Barrister of the Court, who is in the character of a public officer'. He was joined in this submission by radical barrister, John Mackaness. Their submissions were a telling display of legal hegemony at work, advancing a public interest in highly technical criminal process at the same time as asserting the financial interest of the profession. Mackaness asserted that 'the Court was bound to protect them [barristers] in their rights, and not let in applications of this nature' in order to preserve 'decorum' and ensure 'that the Court should not be converted into an arena where everyman might occupy the public time in the discussion of matters of which he knew nothing'. Forbes CJ agreed. Some weeks later, magistrate Lamb laid his indictment after hiring a barrister.

Committal was the main procedural mechanism by which charges were commenced in the colony, starting from 1788. Committals were an inquisitorial process that dispensed with the right to silence, encouraging defendants to speak to defend themselves, so as to ensure that all the evidence was before the court at the outset of trial.[124] As will be discussed in the next chapter, this process lapsed toward the end of the eighteenth century when reformers implemented common law interventions that enshrined the right to silence as a rule of practice. In the early colony, it was the committal process that occasioned the first tensions between superior and inferior courts. In 1810, the Deputy Judge-Advocate (and later First Chief Justice), Ellis Bent, ordered the magistrates, following committal, to draft all depositions for trial and forward them to the Chief Magistrate before trial.[125] Bent complained of considerable 'delay' occasioned by the frequent failure of magistrates to comply with this convention.[126] In addition, very few magistrates properly scrutinised evidence to find against indictments during the committal.

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[124] Bruce P. Smith, 'The Modern Privilege: Its Nineteenth-Century Origins', in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (University of Chicago, 1997) 145 at 154.
[125] *Bent to Cooke,* 29th January 1810, *HRA,* Series IV, Vol. 1, 51.
[126] 'Court Announcement 1820', *Sydney Gazette,* CCJ, 25 March 1820.

It was at this time that committals and informations were beginning to replace grand juries and the presentment as the dominant procedural mechanism used to lay an indictment. Legal historians have observed that in eighteenth century England, particularly in London, grand juries 'seemed to have taken a perverse delight in quashing meritorious prosecutions before a bill of indictment could issue'.[127] After visiting colonial NSW, arch-Tory Commissioner Bigge advised the Colonial Office to dispense with the use of the grand jury system because of the difficulty of obtaining jurors of 'good character' in rural areas.[128] It was not without precedent. In 1819, the British Parliament passed the *Misdemeanours Act*,[129] a repressive procedural reform and one of 'the Six Acts' that followed the Peterloo Massacre of early Chartists in Britain that year. The Act was designed to expedite prosecution by handing the power to commence private prosecutions directly to the Attorney-General, thereby dispensing with indictment by grand jury. In this sense, the Six Acts did away with a layer of process that had previously protected many criminal defendants from the draconian consequences of eighteenth century punishment. Accordingly, the *NSW Act* of 1823 gave the NSW Attorney-General similar powers to those of the British Attorney-General under the *Misdemeanours Act,* providing the colony's chief lawyer with discretion to lay and prosecute 'all crimes, misdemeanours, and offences cognizable in the Supreme Court … by information'.[130] The Act combined the roles of Attorney-General and grand jury, in effect dispensing with the grand-jury system that had operated in England since the 13th Century.[131]

In the criminal libel case of *R v Wardell (No. 2)* [1827], the prominent civil rights

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[127] David Bentley, *English Criminal Justice in the Nineteenth Century* (Hambledon Press, 1998) 132.
[128] Castles, above n 36, 177.
[129] (UK) (60th Geo III and 1st Geo IV c 4).
[130] *NSW Act*, s. 4.
[131] As noted above, however, grand jury was technically available to private parties who sought to prosecute an accused on indictment by laying a presentment before a grand jury.

barrister, Robert Wardell, argued against adopting the procedure under 'the Six Acts' in the colony, despite its apparent inclusion in the Third Charter of Justice. Having drafted the Charter himself and, reflecting his particular brand of legal hegemony within the colony, Chief Justice Forbes unsurprisingly felt bound by it. Siding with the reformers since his arrival in the colony, Forbes chose to give the Act a more libertarian interpretation than similar provisions under the *Misdemeanours Act* in Britain. Forbes provided a reformist critique of the use of 'information'. He went so far as to compare it with 'the mode of proceeding … practised by the Star Chamber'. He nevertheless found that since the roles of prosecutor and the bench had been separated 'by the Act of William and Mary' (the *Bill of Rights 1689*) this minimised much of the unfairness to the accused.[132] But Forbes reminded the Attorney-General that the Act 'equalises justice' by imposing a 12 month time limit on criminal informations, after which the prosecution would 'be debarred from proceeding after that lapse of time'.[133] As the accused in this case, Wardell defended himself by challenging the process by which the indictment was laid. Wardell's challenge also demonstrated the importance of technical procedure as a hurdle to prosecution at a time when criminal defendants were not entitled to give sworn evidence (and when, in this particular case, the offence of libel was punishable by imprisonment). In his concluding address to the jury, Wardell appealed to their 'mercy' and 'honour' in hearing his case.[134] Railing against Forbes' progressive reading of the *Misdemeanours Act,* the prosecution demanded the unusual process of a 'right of reply' following the defence closing address. However, Forbes found that while 'the right [of reply] certainly did exist', it was held at the prosecutor's discretion and that in fairness to defendants 'it was not usual to exercise it'.[135] The jury acquitted Wardell.

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[132] *R v Wardell (No. 4)* [1827], above n 122.
[133] *R v Wardell (No. 2)* [1827] NSWSupC 55, *Sydney Gazette,* 17 September 1827.
[134] Ibid.
[135] *R v Wardell (No. 2)* [1827] above n 133.

The absence of grand juries caused suspicion among some reformers about this apparently undemocratic increase in the power of the Executive. In the 1840s, it caused NSW Chief Justice Stephen to 'almost shudder at' the possibility 'of an unsuspected feeling by himself as by others' that this discretion left justice wide open to errors of individual judgement.[136] He argued instead for a grand jury consisting of thirteen jurors, with seven having authority to issue indictments.[137] While Stephen's suggestions never became law, the Supreme Court imposed a number of public interest limitations on the Attorney-General's new role. In a reformist move, the court intervened to ensure that the discretion of the Attorney-General in deciding whether to prosecute was further subject to the discretion of the Supreme Court.[138]

Content & Particulars

The procedural complexity of laying criminal charges was trebled by the precision required in drafting and particularising a charge. An error in drafting a charge or an omission of the most trivial detail frequently resulted in acquittal of an accused. Errors and omissions in informations (initiating process) were precisely the kind of technical defects in criminal process that favoured defendants. Nineteenth century jurist, Sir James Stephen, certainly had 'some doubt whether they were not popular, as they did mitigate, though in an irrational, capricious manner, the excessive severity of the old criminal law'.[139]

The technical complexity surrounding the drafting of charges arose during the early seventeenth to mid-nineteenth centuries when the criminal charge was shaped by the writings of Lord Coke. Coke valued the idea of 'certainty' that common law due

[136] *Stephen to Lieutenant-Governor,* Alfred Stephen's Letter Book, Vol. 1, pp. 197-203, A669 (Mitchell Library).
[137] Ibid.
[138] *R v Smart* [1838] NSWSupC89, *The Australian*, 2 October 1838. In *R v Wardell* (No. 1)[1827] NSW SupC 44, *The Australian,* 29 June 1827, the Supreme Court estopped the Attorney-General from laying an *ex officio* information on behalf of a private party.
[139] Stephen, above n 29, 284.

process provided to all parties, including criminal accused. Accordingly, he developed a lengthy treatise classifying 'certainty' in a number of different ways. All physical (*actus reus*) and fault (*mens rea*) elements constituting an offence were to be stated with a degree of detail and specification regulated by circumstances.[140] In 1827, this approach was codified by the *Statute of Additions*.[141] As Stephen noted, 'the rule that the indictment must set out all the elements of the offence charged, was some sort of security against the arbitrary multiplication of offences and extension of the criminal law by judicial legislation in times when there were no definitions of crimes established by statute'.[142]

However, during the frontier period in NSW, magistrates at the lower tiers of justice paid scant regard to the wording and content of criminal charges. Charges are barely legible in the bench books of this period and, where they do exist, are frequently denoted by one or two cursory words jotted in a court ledger – 'stealing', 'neglect of duty', 'drunkenness'.[143] Between 1788 and 1814, increasing attention was paid to the drafting of serious criminal charges on indictment or information by a series of senior naval officers (Collins, Dore, Atkins) who acted as both prosecutor and judicial officer in the role of Judge-Advocate in the superior Court of Criminal Jurisdiction. Their notes and bench books show that these officers attempted to ensure that Informations approximated English precedent of the day and that the subject of the charge was corroborated by evidence in the form of depositions or witness statements.[144] Judge-Advocates even appear to have thrown out charges

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140 Ibid, 281.
141 *1413* (UK) (1 Hen V c 5).
142 Stephen, above n 29, 293.
143 See, for instance, Bench of Magistrates Proceedings, 1788-1820, SRNSW; and Bench Books from all Courts of Petty Sessions in NSW between 3 Sep 1846-28 Feb 1855 (4/5612-15; microfilm copy SR Reels 2733-2736), to, 13-18 May 1867 (4/5619), Ser. 3302, SRNSW.
144 *Informations, depositions and other papers, 1796-1824*, SRNSW, Series 2703, 5/1145-46, Reels 2392-93 and 1975-1981. See also Castles, above n 36, 59. Much has been written about the debauched, drunken character of Judge-Advocate Atkins. Kercher has revised historical opinion on Atkins, emphasising the 'cheap, easily comprehended system' of law and the 'broad notion of fairness' that he and the military Judge-Advocates more generally brought to the position of the colony's chief law

containing an error that they themselves had drafted.[145] However, the conflict between executive and judicial power inherent within the role of Judge-Advocate in this period made it nearly impossible for a criminal information to be adjudged objectively and impartially. As the military and their favoured squatters grew in power and influence, particularly during the reign of the Rum Corps between 1808 and 1810, the impartiality of the Judge-Advocate was further compromised. Military juries, bribery, corruption and other forms of political interference were rife. Due process in the drafting of charges became a mere nicety and was sometimes dispensed with entirely.[146]

Adherence to the process of drafting an information became important for a brief period between 1814 and 1815, during the reign of the first Supreme Court under the volatile guidance of 'the brothers Bent'.[147] The judges emphasised the importance of drafting and particularising charges in accordance with strict legalism (even under the First Charter of Justice) in the face of an honorary magistracy that frequently neglected these processes.[148] However, with the decline of the Supreme Court in 1815, these processes fell into disarray until 1824 upon the arrival of Francis Forbes and his *NSW Act 1823* (UK).[149] One of the key pillars of this new constitutional document was to resurrect the Supreme Court together with limited power for trial by jury. The Act formalised 'due process' in the colony.[150] More specifically, it established that criminal practice would be subject to all procedural laws and

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office, before the arrival of the 'expensive' and ineffective first Supreme Court and its Chief Justice, Ellis Bent in 1814. See Kercher, above n 111, 47-57.

145 See, for instance, *R v Till and Bottom* [1793] NSWKR 1; [1793] NSWSupC 1, in which Judge Advocate Collins acquitted both prisoners of robbery where he had made an error in drafting the charge. While there was evidence of larceny, there was no evidence of violence as alleged as an element of robbery.

146 Evatt, above n 38.

147 C.H. Currey, *The Brothers Bent: Judge Advocate Ellis Bent and Judge Jeffery Hart Bent* (Sydney University Press, 1968).

148 Ibid.

149 (4 Geo IV c 96).

150 Neal, above n 56.

principles of strict legalism in the equivalent 'Court of Record in England'.[151] After a short time, it became clear to the new Supreme Court that magistrates consistently failed to adapt to the new practice – a practice aimed squarely at making them accountable for their administration of criminal process, particularly in the countryside. As a result, magistrates' decisions carried little weight on appeal and the Justices and Judges tracked on a collision course over the next thirty years.

By 1834, both the Attorney-General and the Supreme Court were growing frustrated with the inability of the magistrates to correctly comprehend the complexities of legitimate criminal informations. Their lack of adherence to complex procedure frequently resulted in mistrials and procedural error. Maintaining the rule of law and legal hegemony required procedural change. Accordingly, Justice Burton redefined the technical requirements of a valid criminal Information in NSW. 'A good information', he said, 'must contain all the facts necessary in law, to support the charge and should contain nothing more'.[152] This had the immediate effect of simplifying the charge process while limiting procedural defences by criminal defendants. On a wider and more enduring scale, however, it made criminal procedure more accessible to an overwhelming majority of self-represented accused. Clarifying the ingredients of a criminal charge paved the way for a more important procedural right that ultimately transformed the criminal law only a few years later – the right of the accused to be provided with a copy of the 'information' and to see the charges and evidence against them before trial.

The right to an information and its supporting depositions was a key step in facilitating a foundational fair trial right – the right to a defence. It became law in England with the passage of the *Prisoners' Counsel Act* in 1836. Where Commissioner

[151] *NSW Act,* s. 4.
[152] see Burton J *in R v Douglas and others* [1834] NSWSupC 81, *Sydney Gazette*, 13 September 1834.

Bigge had once criticised the 'highly improper practice'[153] of magistrates' clerks allowing defendants to obtain (for a fee) copies of information taken by magistrates, in 1840, the NSW Supreme Court began compelling magistrates and their clerks to do so.[154] In the same year, the NSW Supreme Court carried fair trial rights a step further. It ruled that the Attorney-General had no inherent right to obtain defence affidavits. Rather, defence evidence could be provided to the prosecution at the discretion of the accused.[155]

Sometimes, a clever appeal to technicality in respect to an error or omission in the indictment saved the lives and liberty of criminal defendants. One of the last strong assertions of strict adherence to technical procedure in the colony was in *R v Lucas* (1837).[156] This was a murder case in which a trivial error in the indictment, spelling the name of the deceased as Mr 'Waterworth' (rather than 'Watersworth'), was enough for the court to discharge the jury from giving a verdict. Similarly, an accused was acquitted in the forgery matter of *R v Herbert* [1840] when the prosecution case failed due to an inconsistency between the information alleged and the evidence presented. The prosecution proved that the accused had forged a signature on a genuine promissory note but the defence pointed out that the note was bona fide. This 'confusion' within the evidence was resolved by reference to two old English maxims or 'rules of law'. As Chief Justice Dowling put it, the evidence was to be construed '*in favorem libertatis*' (in favour of liberty), while in addition, the evidence was to be subject to the parole evidence rule (requiring that only the best evidence of

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153 Commissioner John Thomas Bigge, *Report of the Commissioner of Inquiry, on the judicial establishments of NSW, and Van Diemen's Land* (2nd Report) (Great Britain, Parliament, House of Commons, 1823) 74.
154 *R v Howe* [1840] above n 120. In *Donnison v Fisher* [1838] NSW SupC 31, *Sydney Herald*, 26 March, 1838, the AG refused to provide the Accused with copies of the depositions, even after the Accused had offered to pay for them. Where the Accused had been acquitted, the Chief Justice supported the AG in refusing to provide the Accused with copies of the evidence against him. Burton J said he could have them if 'he intended to bring an action against the committing magistrates for a malicious prosecution'. But this was not the Accused's intention.
155 *Ex parte Lettsom* [1840] NSWSupC 65, *Sydney Herald,* 3 June 1840.
156 NSW Sel Cas (Dowling) 312; [1837] NSW SupC 74, Dowling, Notes for Select Cases, S.R.N.S.W. 2/3466, p. 82.

a document - an original document - be admissible). These technicalities, or 'legal difficulties' as Chief Justice Dowling put it, meant that the accused was 'spared from passing the remainder of his days at a penal settlement'.[157] In *Ex parte Allen, in re Bull* (1836),[158] Chief Justice Dowling dismissed a libel case on the grounds of insufficient information due to technical error. The victim had failed to point to the libellous conduct in their affidavit. In theft cases, defendants were acquitted when the property had been insufficiently particularised.[159]

One of the most common inconsistencies within an information or indictment was disorder in the prosecution case. In a perjury trial, the defendant was acquitted where the prosecutor was not ready with documentary evidence that matched the charge.[160] As is often the case in contemporary assault cases, prosecution informations failed due to the unwillingness of witnesses to give evidence against an accused with whom they sympathised or had a close relationship. In *R v Talbot* [1851],[161] a Crown witness failed to appear. The matter was adjourned for two days. The defendant, a seven-year-old girl, was remanded in custody until the next hearing date. She was discharged when the Crown witness failed to show on the next occasion. In *R v James,* the case proceeded without prosecution witnesses. The court found that the prosecution had a duty to ascertain whether all the witnesses proposed to be called were in attendance and in a fit state to be examined.[162]

The most powerful remedy against a defective prosecution was 'arrest of judgment' or setting aside judgment. Given the rule in respect to *autrefois acquit* (discussed

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157 NSWSupC 21, *The Australian*, 23 May 1840.
158 NSW Sel Cas (Dowling) 807; [1836] NSW SupC 74, Dowling, *Select Cases*, Vol. 7, S.R.N.S.W. 2/3465, p. 89.
159 See, for instance, *R v Ryley* (1830) NSW Sel Cas (Dowling) 328; [1830] NSWSupC 12, Dowling, *Select Cases*, Vol. 2, Archives Office of NSW, 2/3462.
160 *R v Baxter* (1830) Dowling, *Select Cases*, Vol. 2, 2/3462, p. 275.
161 NSWSupCMB 51, *Moreton Bay Courier,* 15 and 22 November 1851.
162 *R v James* (1836) NSW Sel Cas (Dowling) 309 [1836] NSWSupC 59, *Sydney Herald*, 15 February 1836.

below), arresting judgment in a prosecution meant that the same charge could not be laid again. Arrest of judgment was never ordered lightly and applications for it failed in as many cases as they succeeded.[163] An application most often succeeded due to jurisdictional error (usually when the crime had been committed outside the jurisdiction) or to a serious error in the information.[164] Barristers like Rowe and Wardell appear to have moved for an 'arrest of judgment' more regularly than other practitioners with mixed results. Sometimes the mere suggestion of the rule was enough to mitigate penalty.[165]

While the constitutional radicalism of the Supreme Court often sided with majoritarian reform to criminal process, it was certainly not a decolonising project. Hegemony meant upholding a rule of law and enforcing social control, in an arbitrary fashion that often lacked mercy or compassion. This meant that complex procedural argument occasionally failed to assist the subjects of criminal law. For example, in 1828, after a forgery conviction, defence counsel argued for a stay of conviction on the grounds that proper process had been breached in three different ways (one of which involved the drafting of the indictment). He asserted that: i) there had been a mistrial where the jury verdict was not delivered by the senior juror; ii) there was insufficient averment of intent in the indictment; and that iii) an unsigned deed of gift cannot be the object of forgery.[166] Forbes CJ responded that i) the point in respect to the jury verdict is a mere matter of form; ii) the last count averred an

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163 Examples of cases where arrest of judgment failed are: *R v Smithers and Smithers* [1826] NSWSupC 81*; R v Best* [1826] NSWSupC 40; *R v Hogarty, How, Bailey and Laragy* [1826] NSWSupC 15; *R v Hall (No. 7)* [1829] NSWSupC 86; *R v Troy and Bradley* (1828) Sel Cas (Dowling) 636; [1828] NSWSupC 83; *R v Lynch* [1827] NSWSupC 36; *R v Short* [1826] NSWSupC 31.

164 See, for instance, *R v James* [1825] NSWSupC 16; *R v Kirwan* [1825] NSWSupC 31; *R v Davison* [1827] NSWSupC 52; *R v Hughes* [1827] NSWSupC 5; *R v M'Dowall* [1827] NSWSupC 18; *Hall v Mansfield (No. 1)* (1830) NSW Sel Cas (Dowling) 792, 884; [1830] NSWSupC 26.

165 See, for instance, *R v Gwillin* [1823], above n 24, in which a term of transportation was significantly reduced even though 'arrest of judgment' was dismissed. See also, *R v Emerson* [1827], above n 24, in which an actual death sentence was commuted to 'death recorded' where an 'arrest of judgment' failed.

166 *R v Troy and Bradley* (1828) Sel Cas (Dowling) 636; [1828] NSW SupC 83, *The Australian*, 21 October 1828.

intention which was enough to support the indictment; and iii) the deed was good in law and therefore the object of forgery. Due process was addressed in a thorough and sophisticated way but the prisoner was hanged (see Appendix for similar examples).

Duplicity, Double Jeopardy, *Autrefois Acquit*, No Retrospective Prosecution

'Duplicity' is a short-hand term for the common law rule against charging the same act twice ('double-counting') on an indictment or information. The rule also means that multiple acts cannot be prosecuted by a single charge.[167] It is an extension of the principles of the criminal charge, developed through Coke's concept of 'certainty', discussed above. It was adopted into the common law of the colony in 1826, with Forbes CJ finding that it was 'every day's practice' to accept two charges and discount one on sentence.[168] It became a key device used by reformers in some of the central power struggles of the era.

In 1827, Wardell used the rule to defend himself once again against criminal libel. The charge had been laid by the Attorney-General at the request of Governor Darling and his contingent of squatters. The Attorney-General was forced to choose to proceed by criminal information or by civil action, with the Crown eventually being forced to enter a *nolle prosequi* (annulled prosecution), abandoning the prosecution altogether. Echoing Wardell's procedural argument, the court found that 'it is inconsistent with the spirit of English law, that any man should be perplexed with a double course of proceeding, at the same time, for the same cause'.[169] In 1841, a duplicitous indictment saved the life of one defendant and further served to mitigate sentence, with Willis J noting that the rule of process was indeed 'very

[167] Stephen, above n 29, 282.
[168] *R v Short* [1826] NSWSupC 31, *The Australian*, 31 May 1826.
[169] *R v Wardell (No. 4)* [1827] NSWKR 2, *Sydney Gazette*, 10 March 1827.

fortunate'[170] for the prisoner.

Not to be confused with the rule against 'duplicity' is the procedural rule as to 'no retrospective prosecution'. It is an ancient right dating back to a royal feud in the 12th century. In the intervening period it has been defined, redefined, named and renamed at common law and in legislation, without altering the basic premise of the rule: no prosecution for an act or offence for which a person has been tried '*autrefois*' (French, literally 'in the past').[171] By the nineteenth century, the defence had come to be known as *'autrefois acquit* (formerly acquitted)*'* and '*autrefois convict* (formerly convicted)*',* depending on whether the defendant had already been acquitted or convicted of the offence. This rule was commonly asserted when the prosecution withdrew a defective information or indictment and attempted to re-lay the same charge. It was first successfully upheld by the Supreme Court in 1825 when two co-accused were acquitted of sheep stealing and the prosecutor attempted to lay the same charges and facts with a different date.[172] The Supreme Court had, however, built in a discretionary exception to the rule, frequently finding that procedural irregularity meant that 'the prisoners had not been in jeopardy on the first information'.[173]

The rule became important to a crucial struggle between the constitutional radicals and the squatters in the Myall Creek Massacre case.[174] Two years after Forbes and Bourke had enacted the Aborigines Protection Act, the empire appeared to acknowledge that the dominant class of squatters in NSW had embarked on a

[170] *R v Scott* (18 June 1841 – NSWSC, Port Phillip), *Port Phillip Patriot*, 20 June 1841.
[171] Martin Friedland, *Double Jeopardy* (Clarendon Press, 1969) 9.
[172] *R v Harding and M'Alister* [1825] NSWSupC29, *Sydney Gazette,* 30 June 1825.
[173] *R v Taylor and Farrell* (1828) NSW Sel Case (Dowling) 295; [1828] NSW SupC 67, Dowling, *Select Cases*, Vol. 1, Archives Office of N.S.W., 2/3461. For similar findings, see also *R v Davison* [1827] NSWSupC 52; *R v Guyse* (1828) Sel Cas (Dowling) 307; [1828] NSWSupC 29, *The Australian*, 9 May 1828; *R v Sullivan* [1832] NSWSupC 78; *R v Stokes* [1834] NSWSupC 95; *R v James* (1836) NSW Sel Cas (Dowling) 309; [1836] NSWSupC 59; *R v Jones* [1838] NSWSupC 80.
[174] *R v Kilmeister (No. 1)* [1838] NSWSupC 105, *Sydney Gazette,* 20 November 1838.

program of genocide against Indigenous people. In acknowledgment of this new policy toward colonised peoples, Attorney-General Plunkett and co-counsel Therry attempted to prosecute a squatter and his employees in respect to a massacre of Indigenous people at Myall Creek. Proceedings were commenced against eleven co-accused for the murder of two members of a tribe on the property of Henry Dangar in North Western NSW. The all-white, male jury acquitted. Plunkett and Therry immediately requested that all co-accused be remanded so that further charges might be laid. After some reformulation of the indictment, charging the murder of a child and a complete withdrawal of charges against four of the initial eleven co-accused, the defence raised the prospect of *autrefois acquit*. A'Beckett argued that the remaining co-accused had already been tried for murder. The prosecution distinguished the second indictment from the first, however, by charging the murder of a different victim. Clearly, procedure was not disregarded here but used to allow the admonition of some squatters while preventing the further deaths of all co-accused. This was accepted by the court and the *autrefois* argument failed. Following a second trial, all co-accused were convicted and hanged.[175]

An '*autrefois* defence' succeeded in roughly one in two cases. In *R v Lucas and England* (1831)[176] a mispelling of the victim's name ('Watersworth', *not* 'Waterworth' – discussed above) proved fatal to the initial charge. A new indictment was laid but the reformers, Wardell, Therry and Rowe, all appeared in the Supreme Court *pro bono,* in defence of the co-accused and successfully argued the principle of *autrefois acquit*. Their submissions were peppered with references to 'custom', and supported by the English jurists, Foster, Chitty and Leach. A retrial proceeded on downgraded charges. Two years later, the reformers turned out again in defence of the same

[175] *R v Kilmeister (No. 2)* [1838] NSWSupC 110, *The Australian,* 26, 29, 1 November, 6 December 1838, *Sydney Gazette,* 6 December 1838. See also, Woods, above n 23, 91-92.
[176] [1831] NSW Sel Cas (Dowling) 312; [1831] NSWSupC 58.

principle.[177] Dowling J ruled that the defence did not apply. Therry, however, appealed the matter to his friend and fellow Irish Whig, Governor Bourke, and both co-accused were acquitted by the Governor-in-Council.

R v Tennant, Ricks, Cane and Murphy (1828)[178] was another display of constitutional radicalism by the Supreme Court that saved the lives of a band of convicts accused of bushranging. They each pleaded 'guilty', saying that they had been 'tried and sentenced to death the last Sessions', only to be 'brought up to be tried again'.[179] The Attorney-General confessed that the men had been tried under a repealed statute and now stood indicted on different information. Having regard to the principles of *autrefois convict,* Dowling J advised the men to 'withdraw your p[l]ea, and take your trial; you are charged with a capital offence'. They did and were acquitted, narrowly avoiding the death penalty. 'God save, the King, the Judge and the Jury', they shouted. At play here was Hay's concept of 'law's Majesty'.[180] The rule of law was maintained through complex processes that sometimes operated with benevolent results to secure the consent of the colonised to their own subjugation. It involved an exchange of power between unequal parties who even acknowledged as much in court. Similar spectacles occurred through the commutation or pardon of sentence on the scaffold at Gallows Hill and Darlinghurst Gaol, moments before an execution.[181] Through complex procedure, verging on farce, British law demonstrated that it was not despotic or totalising. Rather, it was hegemonic.

Warrant & Summons

The authoritarian power of the magistracy was no more at stake than when it came

[177] *R v Murray and Cunningham* [1833] NSWSupC 61*, The Australian,* 24 May 1833.
[178] [1828] NSWSupC 40, *Sydney Gazette* 2 and 6 June 1828.
[179] Ibid.
[180] Doug Hay, 'Property, Authority and the Criminal Law', in Hay et al, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Pantheon Books, 1975) 17-65.
[181] Castles, above n 36, 63, echoing the argument of Hay (ibid) and Peter Linebaugh, *The London Hanged*: *Crime & Civil Society in the Eighteenth Century* (Verso 1991/2006).

to the issue of warrants and summons. These procedures directly concerned the liberty of the subject and, through the development of procedural technicality surrounding their use, they became yet another flashpoint between reformers and the dominant group of magistrates. The NSW Supreme Court took a strong view in relation to the attendance of witnesses arising from concerns about fairness to and the welfare of criminal defendants. In *R v Kable and Murray* [1828],[182] non-attendance and delay occasioned by Crown witnesses was treated as a contempt offence. Forbes CJ sympathised with the defendant and acknowledged the right of the defence to call witnesses. He emphasised that the process should be facilitated by the court 'up to the latest moment', particularly 'in matters of life and death'. And in *Attorney General v Green* [1833],[183] the court dismissed the prosecution case where the prosecutor managed to ensure the attendance of 'not one of their five witnesses'. In doing so, the court held that the 'just prerogatives of the Crown … must not be at the expense of injustice to the subject'. The court went further and found a Crown duty to ensure the attendance of witnesses and that the defendant was entitled to a verdict. 'Where its engine [the Crown] is so powerful against the subject the latter is entitled to every chance in his favour', the court said.[184] In dismissing the case, the court barred any further prosecution against the accused for the same offence, re-confirming its position on the application of the rule of *autrefois acquit*.

Ensuring the attendance of defendants and witnesses to give evidence at trial was a further fair trial right that evolved during this period. 'Arrest warrants' and 'summonses to appear' were the two main procedures from English law which facilitated this process. The procedures remain almost unchanged to this day. By

[182] NSWSupC 69, *The Australian*, 3 September 1828.
[183] NSWSupC 38, Dowling, *Proceedings of the Supreme Court,* Vol. 83, State Records of NSW, 2/3266.
[184] Ibid.

October 1850, Plunkett spoke of 'class distinction as a great evil'.[185] In around 1835, Plunkett's *Australian Magistrate* manual included a range of 'General Forms' to assist the magistracy in drafting legal process, such as warrants and summons, without falling into error and risking appeal. As the manual explained, 'when a complaint is made to a Justice of the Peace … his duty is to issue a summons or warrant to bring the party before him, in order that he may examine and enquire into the matter of the charge, and commit, or bail or discharge the party'.[186] In cases of misdemeanour, Plunkett explained, 'it is not usual … to issue a warrant' and 'is usually sufficient to issue a summons' requesting a person's attendance at court.[187] In respect to witnesses, the usual process involved issuing a summons.[188] Plunkett advised against issuing arrest warrants to compel the attendance of witnesses on the basis of English case law.[189]

Search warrants were another variety of warrant that extended the authority of the State to intervene in the liberty and freedom of citizens. As has been seen, in the frontier period convicts and working-class defendants were well aware of and, in fact, demanded limits to the State's authority, particularly in respect to warrants. The Supreme Court helped to establish the limits of search warrants. In *R v Gillman* [1824],[190] a magistrate was prosecuted after issuing an illegal search warrant to a free settler, Vicars Jacob. The warrant was found to be 'extra-judicial' and 'unlawful'. Gillman had complained about 'the poor attitudes of Jacob's convicts' and challenged him to a duel and searched his house. Jacob was represented by Wentworth, who claimed 'that an act of the grossest and most unjustifiable

185 Earls, above n 105, 145. Similarly, in 1837, Plunkett said that, 'a gentleman is no more entitled to respect than a poor man' and that he hoped that class inequality in NSW would never be as bad as Ireland where 'there is one law for the rich, and another for the poor": *R v Donnison,* 1837, *Sydney Herald,* 2 March 1837.
186 John Hubert Plunkett, *The Australian Magistrate: A Guide to the Duties of a Justice of the Peace* (W.A. Colman, c. 1835/1847) 90, 449-450 and 478-480.
187 Ibid, 90-91.
188 Ibid, 103.
189 Ibid, 103-4.
190 NSWKR 4; [1824] NSW SupC 21, *The Australian*, 28 October 1824.

oppression has been brought home to Captain Gillman in his capacity of magistrate'.[191] The court found that the search went 'beyond the exigency of the warrant' and Gillman 'acted not in his official, but in his private character, and became personally liable to the complainant for every injury he had sustained'.[192] Forbes CJ said that: 'a search warrant was a most valuable instrument to society. It should, however, be used with extreme caution and tenderness, and with every consideration for the feelings of individuals'.[193]

Conclusion

The colonising project in NSW required the enforcement of coercive law. But between 1788 and 1861, the ruling group within this colonial society were divided by their approach to coercion. Resistance to coercive practices by colonised and working-class peoples and the evolution of a reform movement in Britain were decisive factors in fermenting change and fragmentation within the dominant group. Within this group, a section of radical reformers became increasingly responsive to what was happening 'beneath' them and acted, against the will of a powerful lobby of squatters and magistrates, to change criminal process. The reformers frequently intervened in the criminal process by resorting to complex procedural law to implement rights and liberties. These changes made the law fairer but, just as significantly, they secured the hegemonic power of the class from which the reformers originated. Those subjugated by coercive law, in turn, accepted the power of top-down reform as an improvement on the authoritarian forms of justice against which they had struggled. As previous chapters have shown, many of these improvements were first articulated in colonial NSW by the working class

191 *The Australian* 14 October 1824, 3.
192 *SG* 28 October 1824, 3.
193 *Ibid.*

themselves.

As the colonising project in NSW intensified throughout the period, so too did the schism amongst the powerful. Courts remained the central site of political contestation. Procedural rules and the law of evidence, in particular, assumed a new importance. These laws were articulated with ever increasing complexity as reformers continued to respond to the criminalisation and coercion of colonised and working-class peoples, generating a hegemonic grip on power in the process. It is in this context that the next chapter explores the use of evidence law by colonial reformers.

Chapter 7: Obfuscation & Evidence Law

This chapter furthers the argument that constitutional radicals deployed a range of democratic interventions against authoritarian rule by squatter-magistrates, reforming the administration of criminal process. Such a development certainly advanced legal rights – but, as this thesis has proposed, it also played a critical role in achieving consent by colonised and working-class peoples to a colonial rule of law. Where the previous chapter discussed reform and intervention through procedural law, this chapter explores the development of a body of *evidence law* that arose through conflict between the two dominant groups within the colonial ruling class – constitutional radicals or reformers, and lay squatter magistrates. Much of this law evolved through a discourse about the rule of law that emerged during struggles over the constitution and parliamentary democracy in Britain between the twelfth and nineteenth centuries. The effect of this discourse upon criminal process within the colony demands in-depth analysis of the situation in the British metropole from which the discourse originated. Accordingly, the development in NSW of evidence law discussed in this chapter is analysed in relation to the British context. The discussion focuses on a number of key rules of evidence, particularly those relating to fair trial rights such as the right to silence (and its various limbs, including the right to counsel), and the proliferation of exclusionary rules of evidence (those against hearsay, credibility and character evidence).

The history of evidence law in New South Wales has attracted limited Australian legal scholarship. British and North American legal research, by contrast, has

generated a substantial body of scholarship on the origins and development of evidence law.[1] Rarely do these scholars engage with the emergence of rules of evidence from within a social and political context.[2] As Peter Linebaugh has commented, such histories offer a 'legal view of social relations', rather than 'a social view of legal relations'.[3] A critical survey of the field, however, reveals that the emergence of evidence law in England during the late eighteenth and early nineteenth centuries was a product of the social transformation of that society from feudalism to capitalism. In particular, the use of evidence law reflected massive social upheaval within the ruling class of the late eighteenth and early nineteenth centuries, as it transformed from an aristocracy whose wealth and power were traditionally associated with landed estates and territorial dominion, to a bourgeoisie whose wealth and power were primarily liquid and situated within commerce and industry.

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[1] See, for instance, John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2005); John Hostettler, *The Politics of Criminal Law: Reform in the Nineteenth Century* (Rose, 1992); James Q. Whitman, *The Origins of Reasonable Doubt* (Yale University Press, 2008); Bruce Smith, 'The Presumption of Guilt and the English Law of Theft' (2005) 23 *Law & History Review* 133 (A); Bruce Smith, 'Did the Presumption of Innocence Exist in Summary Proceedings?' (2005) 23 *Law & History Review* 191 (B); J.M.Beattie, 'Crime and the Courts in Surrey', in J.S. Cockburn (Ed), *Crime in England 1550-1800* (Princeton University Press, 1977; Norma Landau, 'Summary Conviction and the Development of the Penal Law' (2005) 23(1) *Law and History Review* 173. Although some work has been done in an Australian context. See, for instance: David Plater and Penny Crofts, 'Bushrangers, the Exercise of Mercy and "the last Penalty of the Law" in New South Wales and Tasmania, 1824-1856' (2013) 32 *University of Tasmania Law Review* 295; and Russell Smandych, 'Contemplating the Testimony of 'Others': James Stephen, The Colonial Office, and the Fate of Australian Aboriginal Evidence Acts, Circa 1839-1849' (2004) 8(2) *Australian Journal of Legal History* 237.

[2] Even Hostettler, (ibid) in 'The Politics of Criminal Law', presents a Whiggish history of law as the heroic accomplishment of great British men, without any mention of social history.

[3] (specifically referring to John Langbein). See, Peter Linebaugh, '(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein' (1985) 60 *New York University Law Review,* 212, 1. From this perspective, two views have emerged. One, pioneered by Doug Hay , views the protections afforded to the working-class by the rule of law as a form of class 'conspiracy' – mere 'ideology', dressed and designed to fool the working-class into consent and submission by its 'majesty' and its 'spectacle'. The other, proposed by E.P. Thompson (1975) and continued by Peter Linebaugh, proposes that the rule of law is contested. For Thompson, while the law was mostly repressive, it nevertheless provided a space in which the hegemony of a ruling-class could be challenged by relationally opposed social movements. For Linebaugh, those subjugated by the institutions of law are the same force who have struggled for law reform throughout history and who have developed the revolutionary precepts of modernity that underlie the rule of law. On this view, what Langbein sees as a dishonest process in the right to silence can, for social historians, be a form of resistance to a long history of dishonest economic and political relationships. In this case, evidence law offers a small measure of protection to colonised and working-class peoples against a coercive hegemony of State and civil interests.

One of the key factions to emerge from this new dominant group was the professional bourgeoisie, of which lawyers constituted a substantial portion. At the end of the seventeenth century, philosopher John Locke declared that 'government has no other end but the preservation of property'.[4] His work proved influential over the course of that century in urging a new class of mercantile traders and their lawyers to use the criminal law to protect the source of their power – tangible property – from theft, predominantly by those who did not own property. They enacted draconian laws punishing theft by death or transportation.[5] But as numbers of local executions and the requirement for expensive penal colonies grew in Britain, so too did social unrest. Lawyers were directly threatened by the very real possibility of social revolution if they failed as a class to reform these laws.[6] At the same time, lawyers sought to protect the source of their wealth – their technical knowledge – from non-lawyers. They extended social and professional distinctions based on legal knowledge to lower rungs within the profession, with legal education courses commencing at Oxford University and Trinity College Dublin in the late eighteenth century. But the 'science of law' was more than mere technical knowledge and professional control. Professors such as William Blackstone and legal theorists such as Jeremy Bentham educated their pupils on a diet of reason and constitutionalism.[7] So, when it came to law reform, many lawyers were motivated to reform the criminal law after having been exposed to the revolutionary struggles of *Magna Carta,* the English Civil War and, in some cases, the grievances of their subaltern clients. Lawyers relied upon the law of evidence as a means of evading the authoritarian, repressive and punitive excesses of eighteenth century criminal law.[8]

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[4] John Locke, *Second Treatise of Civil Government* (John Wiley & Sons, London, 1689/2014) 94 ('Chapter 17 – Constitutional Government').

[5] During the eighteenth century in Britain, the 'Bloody Code' created over 200 various theft offences punishable by death: Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750: The Movement for Reform, 1750-1833,* Volume 1 (Macmillan Company, 1948) 728.

[6] See also, Peter Linebaugh, *The London Hanged*: *Crime & Civil Society in the Eighteenth Century* (Verso 1991/2006).

[7] William Twining, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld & Nicolson, 1985).

[8] Langbein, above n 1, 6.

Evidence law contributed significantly to the political hegemony of the ruling class in two main ways. First, it operated as a method by which those who resisted bourgeois rule in various ways could defend their actions and have them recognised by legal authority as *not* criminal. The existence and operation of such a mechanism supported the idea that while social division and inequality were certainly real, the law permitted the subordinate and less privileged to be heard and their grievances addressed. The law permitted the less powerful to be recognised as rights bearing and, as such, the same as the more powerful. Second, because evidence law was technically complex, it demanded legal expertise to decipher and interpret it. This technical imperative ensured an ongoing market for legal services and the proliferation of lawyers who formed a major faction within the ruling class.

The law of evidence arrived in New South Wales in two stages. The first involved the establishment of legal authority within the penal colony. The process involved the reading aloud of King George's Letters Patent by the colony's second-in-command, newly appointed Judge-Advocate Collins (a man with no professional legal experience).[9] The Letters Patent were a direct executive order from the King in Council to establish courts of 'criminal' and 'summary' jurisdiction. As Collins rattled off the rules and regulations that would apply within the Colony to a motley assembly of soldiers and convicts at Farm Cove, an astute convict would have recalled the King's Order that criminal process in the colony required the laying of a criminal charge and proof of the crime through the conventional procedure: 'by examining Witnesses upon oath to be administered by the said Court of Criminal Jurisdiction as well for as against such offenders respectively'.[10] At this stage, rules of

[9] The reading took place on 7 February 1788, roughly two weeks after the fleet had sailed through the heads of Sydney Harbour. See, Watkin Tench, *A Narrative of an Expedition to Botany Bay* (J. Debrett, 1789) 65-66.
[10] *The First Charter of Justice for New South Wales,* Letters Patent, 2 April 1787.

evidence were relatively simple and did not differ greatly from Edmund Burke's analysis in the late eighteenth century. 'The rules of evidence', wrote Burke, 'are so few and so general and applied with such a number of reservations and exceptions that a parrot of moderate abilities could learn them in half an hour and repeat them in five minutes'.[11] Indeed, as we have seen, convicts and criminal defendants frequently asserted rules of evidence in colonial courtrooms as their natural 'right'.

The second stage in the early development of evidence law in NSW was the introduction and operation of a formalised and complex body of technical procedures. This development was indivisibly linked to the professionalisation of law. By the 1830s, the legal profession in Britain had grown enormously and with it, a body of evidence law. In New South Wales, Attorney-General John Plunkett devised a manual to explain these increasingly complex common-law rules of evidence to the lay magistracy and lay observers. Plunkett's manual outlined the various categories of admissible and inadmissible evidence, including the following:

i) The 'best evidence rule' (applying to documents);

ii) Hearsay evidence and its exceptions;

iii) Opinion evidence and its exceptions;

iv) Credibility and oaths;

v) Confessional evidence and the privilege against self-incrimination;

vi) Character evidence;

vi) Privileged communications, immunities and incapacities.[12]

As discussed in Chapter 2, these rules were more often than not asserted by defendants rather than prosecutors. In 1836, the *Prisoners' Counsel Act* cemented some of these rights in statute for the first time in the history of English law. For Stephen, 'the most remarkable change introduced into the practice of the courts [from the

[11] F.P. Lock, *Edmund Burke: Volume II 1784-1797* (Oxford University Press, 2006) 460.
[12] John Hubert Plunkett, *The Australian Magistrate: A Guide to the Duties of a Justice of the Peace* (W.A. Colman, c. 1835/1847) 165-168.

middle of the eighteenth century] was the process by which the old rule which deprived prisoners of the assistance of counsel in trial for felony was gradually relaxed'.[13] As discussed in Chapter 4, all of these rights were implemented by the *Jervis Acts* of 1848.

The spread of evidence law from metropole to the colony of NSW owed much to the political economy of legal work. As the profession crowded the Inns of Court at the London Bar in the 1830s and 40s, many of its members looked elsewhere for 'briefs'.[14] They spread throughout the Empire, forging a legal diaspora that connected colony to metropole by applying the intricate gospel of English Law Lords and statesmen to their colonial subjects.[15] Between 1824 and 1861 total admissions to the New South Wales Bar grew from 3 to 112, almost a forty-fold increase.[16] As has been seen, many of these lawyers struggled against others within the ruling group in NSW, such as honorary magistrates, who had not been legally trained and who predominantly preferred coercive law to processes that sometimes reflected the rights and interests of a democratic majority.

The Right to Silence

By far the most important rule of evidence that protected colonised and working-class peoples from prosecution was the right to silence. As was seen in the previous chapter, it evolved in England throughout the eighteenth and nineteenth centuries and was then imported into colonial NSW. Its subsequent development in NSW will

[13] James Fitzjames Stephen, *A History of the Criminal Law of England Vol. 1* (Macmillan, 1883) 424.
[14] Cerian Charlotte Griffiths, 'The Prisoners' Counsel Act 1836: Doctrine, Advocacy and The Criminal Trial' (2014) 2 *Law, Crime and History,* 28, 32-40.
[15] Philip Gerard, *Lawyers and Legal Culture in British North America: Beamish Murdoch of Halifax* (The Osgoode Society and Toronto University Press, 2011).
[16] Peter Moore, *A Comparative Analysis of the Legal Profession in New South Wales, South Australia and New Zealand, 1824-1900* (PhD Thesis, University of Technology Sydney, forthcoming 2017; cited by permission).

now be considered in the light of its current characterisation by the High Court of Australia, which is Australia's final court of appeal.

According to the High Court, the right to silence 'is that right which provides the fundamental bases for the common law rules governing the admissibility and reception of confessional evidence'[17]. As such, the 'right to silence' refers to a branch of legal rights comprising the following six limbs: i) voluntariness of confessional evidence[18]; ii) the presumption of innocence[19]; iii) the burden and standard of proof ('beyond reasonable doubt')[20]; iv) the protection against self-incrimination[21]; iv) a prohibition against any adverse inference being drawn against the accused from their silence 'during official questioning'[22]; and vi) the right to counsel.[23] There have been a series of minor exceptions to the application of the right to silence,[24] but, the right in all its forms has been regarded by the High Court as 'a fundamental rule of the common law'.[25]

i) Voluntariness of Confessional Evidence

The seventeenth-century struggles of John Lilburn and the articulation of the right to silence by the Levellers were discussed in Chapter 2. One of the primary arguments made through Lilburn's refusal to confess his crimes to the Court of Star Chamber

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17 Mark Aronson and Jill Hunter, *Litigation, 5th Edition* (Butterworths, 1995) 326.
18 NSW Law Reform Commission Report 95, 31; see also *R v Swaffield; Pavic v The Queen* [1998] HCA 1; 192 CLR 159; 151 ALR 98; 72 ALJR 339 (20 January 1998).
19 NSW Parliamentary Library Briefing Paper 12/2000 Pre-Trial Defence Disclosure: Background to the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000, Chapter 3. The *Evidence Act 1995* (NSW) s. 89 (1)(a) (repealed) provided for a pre-trial right to silence, while s. 20 provided for a right to silence at trial.
20 Ibid.
21 Ibid.
22 See *Petty and Maiden v R* (1991) 173 CLR 95, 90, codified by the *Evidence Act 1995* (NSW) s. 89(1)(a) (repealed); and modified by *Weissensteiner v R* (1993) 178 CLR 217.
23 *R v Dietrich* (1992) 177 CLR 292, [1992] HCA 57.
24 See *Weissensteiner,* above n 22, where the High Court found that an adverse inference against an Accused is permissible under a high threshold test in which circumstances clearly show that the accused possesses knowledge about the charge and it would be reasonable for them to provide evidence of their innocence, at [229].; and *EPA v Caltex* (1993) 118 ALR 392, in which corporations did not possess a right to silence. Neither are witnesses at Royal Commissions and within State and Federal Crime Commission investigations permitted a right to silence.
25 *Petty and Maiden,* per Mason CJ, Deane, Toohey, and McHugh JJ, at [2], above n 22.

was that confessional evidence should be made voluntarily.[26] This principle of 'voluntariness' (sometimes referred to as 'the rule against involuntary confessional evidence') is first recorded as being introduced to the Old Bailey in the form of the 'confessional rule' in 1738.[27] It was later refined in Rudd's Case in 1775 and confirmed at the Old Bailey in *R v Warickshall*[28] in 1783. In *Warickshall's* case, the accused was found with a number of stolen items hidden in her bed. She was charged with receiving the property knowing it to have been stolen. She assisted the Prosecutor and confessed her guilt. But her confession was induced by 'promises of favour'.[29] The Court found that evidence of confession is improperly obtained where:

> a confession forced from the mind by flattery of hope, or by the torture of fear, comes in to questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected…it would be an exceeding hard case, that a man's whole life is at stake, having been lulled into a notion of security by promises of favour … should afterwards find that the confession … is to rate against him.[30]

The Court in *Warickshall's* case even went so far as to render inadmissible *all* evidence 'obtained in consequence of an extorted confession'[31] – a concept sometimes known as 'the poison tree'. Over time, the law of voluntariness would come to form one of the staple protections commonly asserted by lawyers to defend predominantly working-class defendants from prosecution.

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[26] This is implicit within his refusal to confess: 'no man is bound to accuse himself'.
[27] *Ann Wilcox,* Surrey Assize Papers (August 1738), cited in John M. Beattie, *Crime and the Courts in England 1660*-1800 (Princeton University Press, 1986) 346-7.
[28] *R v Jane Warrickshall,* 1 Leach 115, 118, 168 *Eng. Rep.* 160, 161 (K. B. 1775).
[29] Ibid, 222.
[30] Ibid, 223-4. See also, *R v Thomas Freeman, OBSP* (Oct 1784 #1002) at 1336.
[31] Ibid, see Nares J.

In the colony the right to silence evolved slowly, beginning with the establishment of the second Supreme Court in 1823. As was seen in Chapter 2, defendants in colonial New South Wales exercised their right to silence even in the face of torture and illegal practices by the State and judiciary. The extreme suffering of these accused men and women was eventually recognised as potentially illegal in 1826 with the Inquiry into the Infliction of Punishments upon Prisoners. The Inquiry took place over a number of years and examined evidence from between 1823 and 1826. It heard evidence from three key colonial administrators: Chief Justice Sir Francis Forbes, acting Lieutenant-Governor William Stewart and Colonial Secretary Frederick Goulburn.[32] In 1824, Chief Justice Forbes, perhaps not wanting to be embarrassed by the release of the report in the British Parliament, took the first steps to implement the right to silence in criminal trials in the colony. In the murder trial of *R v Stack and Hand* [1824], Forbes heard evidence that the magistrate at committal proceedings had induced a confession from both co-accused.[33] The magistrate had told the co-accused that, 'if they hoped for mercy', they would tell the truth.[34] Between committal and trial, however, both co-accused had received legal advice about their right to silence. At trial, they denied all knowledge of the offence. Forbes warned the jury that 'the confession could not be received; as the conversation that took place between the Magistrate and the prisoner Stack was certainly calculated to convey hope to the mind of the prisoner'. This was the first articulation of the right to silence in the colony and it was articulated through the doctrine of voluntariness. Such legal doctrine, however, mattered little in the face of the authoritarian power of a military jury and after five minutes' deliberation the jury returned a verdict of 'guilty'. Forbes had little choice but to impose the death penalty. A similar result occurred in *R v Coleman* [1830] in which a military jury ignored a judicial warning

[32] *Papers Relating to the Conduct of Magistrates in New South Wales, in Directing the Infliction of Punishments Upon Prisoners in the Colony,* House of Commons, 1826*,* 6.
[33] *R v Stack and Hand* [1824] NSWSupC 15 (26 August 1824), *Sydney Gazatte* 2 September 1824.
[34] Ibid.

about involuntary confession and convicted the prisoner of theft on the evidence of a wealthy squatter who had induced the confession. Death was recorded.[35]

The principle of voluntariness was developed further during the 1820s and 30s and, in many cases, protected vulnerable defendants from harsh punishment. Miss Feeby was a working-class woman from inner Sydney charged with stealing in 1828. She confessed to the prosecutor that she had taken a number of items from his house but later told the Court that her confession was false and that she feared reprisal from the prosecutor.[36] The *Sydney Gazette* reported,

> His Honor … after summing up the whole of the evidence, told the Jury, if they were of opinion that the confession of the prisoner was made under influence of hope from any promise held out to her by the prosecutor, and that the subsequent confession to the constables, was made under the same impression in consequence of what the prosecutor stated, that they would be warranted in finding a verdict of not guilty, upon the humane principle of the British law, which would not suffer an individual to be unwittingly the instrument of his own conviction.[37]

The jury considered the rule of voluntariness and acquitted Miss Feeby. Similar acquittals were obtained in a number of other cases throughout the period when lawyers relied upon the principle of voluntariness (see Appendix for details). Decidedly more acquittals resulted from this rule as military juries were gradually replaced by civilian juries in NSW throughout the 1830s.

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[35] *R v Coleman* [1830] NSWSupC 77, *Sydney Gazette* 25 November 1830.
[36] *R v Feeby* (1828) NSWSupC 66, *The Australian* 28 August 28. It is unclear which Judge heard this case.
[37] 29 August 1828.

ii) The Presumption of Innocence; & iii) The Burden & Standard of Proof

The presumption of innocence is a complex principle that contains two sub-principles: the onus (or burden) of proof and the standard of proof. The most recent and accurate definition of the presumption of innocence was provided by the High Court of Australia in 1980 (and restated by Chief Justice French in 2011):

> The presumption of innocence in a criminal trial is relevant only in relation to an accused person and finds expression in the direction to the jury of the onus of proof that rests upon the Crown. It is proof beyond a reasonable doubt (the criminal standard of proof) of every element of an offence as an essential condition precedent to conviction which gives effect to the presumption.[38]

As Lord Sankey put it in the House of Lords in the 1930s, 'throughout the web of the English criminal law one golden thread is always to be seen—that it is the duty of the prosecution to prove the prisoner's guilt'.[39] The concept is ancient: it can be found in Roman law of the third century CE and was adopted by Justinian: 'proof lies on him who asserts, not on him who denies'.[40] Lilburn's exclamation in the seventeenth century that 'no man is bound to accuse himself' can also be thought of as a revolutionary antinomian reformulation of this idea. In 1678, the English King's Bench gave formal recognition to the presumption in the revolutionary 'Popish Plot' case.[41] But it was during the eighteenth century that lawyers began to treat incriminating evidence with serious caution by adding an increasingly complex number of limbs and protections to this 'right' such as the burden and standard of proof.

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[38] See Gibbs, Stephen, Murphy, Aickin and Wilson JJ, in *Howe v The Queen* (1980) 55 ALJR 5 at 7; 32 ALR 478 at 483; French CJ in *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1 at [53].

[39] *Woolmington v DPP* [1935] AC 462.

[40] Alan Watson, *The Digest of Justinian, Vol. 6* (University of Pennsylvania Press, 1998) 22.3.2], where the phrase, '*Ei incumbit probatio qui dicit, non qui negat* (proof lies on him who asserts, not on him who denies)' is attributed to the third-century jurist Paul.

[41] See Chief Justice Scroggs in *R v Edward Coleman,* 7 St. Tr. 1, 14 (K.B. 1678) who adopted the arguments of the first Popish Plot defendants. He said, 'the proof belongs to [the crown] to make out these intrigues of yours; therefore you need not have counsel, because the proof must be plain upon you, and then it will be in vain to deny the conclusion'.

In 1769, Blackstone wrote in his *Commentaries* that 'all presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer'.[42] Prominent London barristers such as Sir William Garrow developed pithy phrases such as 'innocent until proven guilty'.[43] The barristers insisted that all evidence be carefully assessed by a jury, whom they required to be almost certain that an accused committed a crime or rather that they were 'without reasonable doubt'.[44] These democratic interventions within the rule of law made it more difficult to convict criminal defendants – the overwhelming majority of whom were working-class. In the eighteenth century, however, when a majority of these defendants were charged with property theft offences, the law created a special exception to the presumption of innocence. When charged summarily, property offences such as receiving and stealing reversed the burden of proof.[45] This knot within the 'golden thread' evolved through practice during the development of mercantile capitalism in Britain. Since the seventeenth century, poverty-stricken workers subsidised their meagre wages through customary practices like the taking of perquisites - 'perks', 'spillage', 'excess' - from their workplace.[46] In the eighteenth century, merchants and their private police forces clamped down on these practices, criminalising workers as 'pilferers' and 'thieves'. To better prosecute workers, River Police Magistrate Patrick Colquhoun required 'the Delinquent', rather than the prosecutor, to 'account' for possession of stolen items, creating a burden of disproof.[47] Legal historian Bruce Smith explains how the reverse onus of proof became commonplace for property offences prosecuted summarily.[48]

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[42] (Vol 4: 352).
[43] John Beattie, 'Garrow and the detectives: lawyers and policemen at the Old Bailey in the late eighteenth century' 11(2) *Crime, History and Societies* (2007) 5-24; and John Hostettler and Richard Braby, *Sir William Garrow: His Life, Times and Fight for Justice* (Waterside Press, 2009).
[44] Ibid.
[45] Bruce P. Smith, above n 1(A).
[46] See Chapter 2 for further discussion of these practices.
[47] Smith, above n 1(A), 154.
[48] Ibid.

In NSW, this reverse onus was retained in only a slim minority of dishonest acquisition cases relating to the crime of 'receiving stolen property'. It continues to exist to this day under the summary charge of 'goods in custody'.[49] However, when general property offences were charged summarily and heard by lay magistrates, the burden of proof was frequently reversed, confused or completely neglected.[50] But in superior courts from the earliest days of the colony, the practice of the Judge-Advocate and the first NSW Supreme Court in theft cases was to uphold the presumption of innocence through due process. While the early colonial cases (until 1812) do not specifically refer to the presumption of innocence and the burden of proof, they clearly demonstrate these principles at work by requiring a prosecutor to support any allegation of theft with evidence from at least one other (and usually multiple) reliable witnesses[51] - after which a prisoner would be afforded an opportunity to defend the allegation.[52]

Two major theft cases decided in 1827 and 1828 are outstanding exceptions to this practice. Each case saw Chief Justice Forbes reverse the onus of proof, clearly demonstrating that evidence law was a rubbery instrument adaptable to the 'intents and purposes' of those who administered or wielded it. In each case, Forbes

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[49] A reverse onus of proof exists in respect to the charge of being '…unlawfully in possession (custody) of property': *Crimes Act 1900 (NSW),* s. 527C.

[50] This is demonstrated clearly in numerous 'despatches' by Attorney-General, John Plunkett, to the magistrates of the 'Outlying Districts of New South Wales' in *Copies of Letters Sent to Magistrates,* Ser. 297, Aug 1839-Aug 1842 (4/6658), Aug 1842-May 1846 (9/2679), May 1846-Jul 1849 (4/6659), 1865-68 (ML A843) 4 vols, NSW Records.

[51] *R v Bennett* [1788] NSWKR 6; [1788] NSWSupC 6; *R v Plowman* [1789] NSWKR 1; [1789] NSWSupC 1; *R v Halford* [1790] NSWKR 2; *R v Pear (or Parr)* [1790] NSWKR 3; *R v Paul* [1790] NSWKR 5; *R v Ashford* [1793] NSWKR 2; [1793] NSWSupC 2; *R v Bevan* [1794] NSWKR 3; [1794] NSWSupC 3; *R v Nicholls* [1799] NSWKR 3; [1799] NSWSupC 3; *R v Dabbs* [1805] NSWKR 5; [1805] NSWSupC 5; *R v Dawson* [1809] NSWKR 2; [1809] NSWSupC 2; *R v de Grassa* [1809] NSWKR 14; [1809] NSWSupC 14; *R v Lawrence and Lindsay* [1818] NSWKR 11; [1818] NSWSupC 11; *R v Delworth and others* [1820] NSWKR 14; [1820] NSWSupC 14; *R v Fennel and others* [1820] NSWKR 8; [1820] NSWSupC 8; *R v Davis* [1821] NSWKR 18; [1821] NSWSupC 18; *R v Halden and others* [1823] NSWKR 10; [1823] NSWSupC 10; *R v Welsh and Sullivan* [1823] NSWKR 12; [1823] NSWSupC 12; *R v Wise* [1825] NSWSupC 8; *R v Bullock and Clarke* [1826] NSWSupC 19; *R v Cossar* [1826] NSWSupC 20; *R v Jones (No 1)* [1826] NSWSupC 23; *R v Laurie* [1826] NSWSupC 3; *R v Sheik Brown* [1826] NSWSupC 8; *R v Short* [1826] NSWSupC 31; *R v Palmer and Palmer* [1827] NSWSupC 34; *R v Absolam and Gardner* [1828] NSWSupC 5; *R v Williams* [1829] NSWSupC 58.

[52] Ibid. Such conflict has been discussed at length in the previous chapter.

permitted defendants to be prosecuted for charges of theft instead of preferring what counsel pointed out were, in fact, cases of receiving. In the 1827 case, Forbes found that 'whenever a person was in possession of the property of another, unless he could prove how he came by it, the presumption of law was that he had stolen it'.[53] Over the protestations of counsel, Forbes shifted the burden of proof to the defendant. This case involved cattle theft and occurred at around the same time as a military jury had acquitted a wealthy squatter for the same offence.[54] In that case, the judge had actually instructed the jury to acquit on the basis of the presumption of innocence, reminding the jury that 'it was better … that a prisoner escape, whatever might be the moral conviction of the Court as to his guilt, than that the rules of evidence should be strained to bring about a conviction'.[55] The second major theft case heard by the Supreme Court involved an alleged bushranger, identified by and accused of wearing a waistcoat stolen during a highway robbery. Forbes directed the jury that 'unless the accused could satisfactorily account for how he had acquired it ... the law would pronounce the person in whose possession a stolen article was found, to be the thief'.[56] Once again, the onus of proof was reversed. The prisoner was convicted and Forbes pronounced death. Forbes's findings in *Morgan* are perhaps best thought of as a common-law precursor to the *Bushranging Act* of 1830, which Forbes lobbied for and drafted and which also reversed the presumption of

[53] *R v West and West* [1827] NSWSupC 67*Sydney Gazette* 23 November 1827.
[54] Ibid. The first case was *R v Davison* [1827] NSWSupC 52, *The Australian* 5 September 1827.
[55] *R v Davison* [1827] NSWSupC 52, *The Australian* 7 November 1827.
[56] *R v Morgan* [1828] NSWSupC 63, *The Australian* 27 August 1828.

innocence.[57] Indeed, bushranging was seen as a crime that threatened the very foundation of the rule of law and legal hegemony within the colony.[58]

Despite judicial resistance to the presumption of innocence blatantly reflected in the *Bushranging Act*, one constitutional radical judge on the Supreme Court, Justice William Burton, continued to instruct juries to consider the presumption of innocence and the burden and standard of proof in bushranging cases.[59] In 1834, he opposed the extension of the Act[60] and attempted to use the repugnancy provision under the *Australian Courts Act 1828*[61] to strike down a further two years of 'emergency measures'. The repugnancy clause provided the Governors, counselled by the judiciary, with power to make laws for the 'peace, welfare and good government' of the colonies on condition that the laws were not 'repugnant' to the laws of England.[62] It was the first time that the repugnancy provisions had been implemented in NSW. In providing reasons as required by s. 22 of the Act, Burton took the opportunity to reassert the presumption of innocence in a manner that, for the first time in the colony, linked the presumption to the burden and standard of proof. He even went so far as to instate a common law right to damages for wrongful arrest and false imprisonment. Burton said:

> It is a principle of the common law of England that every man is presumed to be free until he has been proved to have forfeited or been

[57] Forbes drafted the *Bushranging Act 1830* (NSW) (2 Geo IV c 10). Section 2 of the Act provided that: 'every suspected person who shall be taken before any Justice of the Peace as aforesaid, shall be obliged to prove, to the reasonable satisfaction of such Justice, that he is not a felon under sentence of transportation ; and, in default of such proof, such Justice of the Peace may cause such person to be detained in safe custody until it can be proved whether he is a transported felon or free; and, in every such case, the proof of being free shall be upon the person alleging himself to be free: Provided always, that every such Justice of the Peace may, in his discretion, cause every such suspected person to be securely removed to Sydney, to be there examined and dealt with in like manner as aforesaid': C.H. Currey, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of New South Wales* (Angus & Robertson, 1968) 416-420.

[58] David Plater and Penny Crofts, 'Bushrangers, the Exercise of Mercy and the "Last Penalty of the Law" in New South Wales and Tasmania 1824-1856' (2013) 32(2) *University of Tasmania Law Review* 294.

[59] *R v Burn* [1833] NSWSupC34, *Sydney Herald,* 23 May 1833.

[60] *1830* (NSW) (2 Geo IV).

[61] (UK) (9 Geo IV c 83) s. 22.

[62] Ibid, s. 27.

> deprived of his legal character as a free man; and the law casts upon the party, charging another with having committed an offence, or seeking to deprive him of his liberty, the burden of proving his guilt … no man is bound, upon a charge against him, in the first instance to prove his innocence; but, on the contrary, his accuser is bound to prove all the facts which the law makes necessary to constitute the offence charged, and that, in all cases, whether depending upon actual commission or guilty intention, and if an innocent party be injured by wrongful arrest, the law gives him a remedy by action against the party injuring him.[63]

Perhaps it was in response to Justice Burton's stance on bushranging that Forbes sent him to Norfolk Island to hear the convict rebellion case (discussed in Chapter 2). Even in the face of the undeniably treasonous and revolutionary conduct of the co-accused in this case, Burton managed to reiterate Blackstone's maxim on the standard of proof that 'it is better that a guilty man should escape justice, or thousands, if they were involved in the same principle, than that convictions should take place on such evidence'.[64] Nonetheless, a majority of the co-accused were convicted by military jury and Burton was required to hang 13 of them.

The first common-law example of the presumption of innocence within the colony (outside of its connection with the law of the theft) occurred through the professionalisation of the superior court system with the appointment of a trained barrister, Ellis Bent, to the position of Judge-Advocate. Appointed in 1810, in 1813, Bent articulated the first abstract declaration of 'the golden thread', noting that the

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[63] '*Opinion' of Burton expressed to Bourke*, 25 August 1834, *HRA*, Ser I, Vol XVII, pp. 524-33. Burton even railed against 'illegal searches' of property and disputed ss. 1, 2, 4, 5, 7 and 8 of the Act.
[64] *R v Douglas and others* [1834] NSWSupC 81, *Sydney Gazette*, 13 September 1834.

evidential burden rests with the Crown to prove its case 'beyond reasonable doubt'.[65] It was a murder case in which two soldiers had killed a man with whom they had been drinking. Bent instructed the military jury that 'if any rational doubt shall arise in your minds on this head, I am convinced you will acquiesce in the mild and benevolent principles of the British law, and giving to the prisoners the advantage of that doubt, acquit them altogether'.[66] The military jury returned a verdict of manslaughter. The prisoners were fined one shilling each and given six months imprisonment. Governor Macquarie was outraged by the leniency shown by the court but nevertheless accepted the decision.

Throughout the 1820s, Justice Stephen continued to restate the importance of the presumption of innocence in a variety of cases heard by the second NSW Supreme Court. In *R v White* (1826), a murder case, Stephen carefully instructed a jury that 'if a doubt existed, it was a principle of the British law, that the ends of substantial justice would be better answered by letting twenty guilty persons escape, than that one innocent man should perish'.[67] Stephen routinely directed juries to construe evidence *in favorem vitae* (in favour of life) rather than convict and consign to death.[68] In some cases, juries were directed so strongly 'in favour of life' that, as *The Australian* put it, judges 'made it imperative on the Court to tell the Jury that the prisoner was entitled to his acquittal'.[69]

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[65] Bent JA in *R v McNaughton and Connor* [1813]NSWKR 8; [1813] NSWSupC 8, *Sydney Gazette* 17 July 1813, Court of Criminal Jurisdiction, Minutes of Proceedings, May. 1813 to July 1815, State Records N.S.W., 5/1121 – 38. Incidentally, this case also saw the first statement of the Blackstonian principles of murder and manslaughter outlined in the colony which were strongly reliant on circumstances and context.

[66] Ibid.

[67] *R v White* [1826] NSWSupC 26, *The Australian,* 29 April 1826.

[68] See, for instance Stephen J in *R v Sheppard, Piper and Pate* (1827) 1st Leech, 252; see also *R v Curran* [1834] NSWSupC 7, *Sydney Gazette* 11 February 1834; and *R v Davison* (1827) NSWSupC 52, *The Australian*, 22 August 1827.

[69] Ibid (*R v Davison*).

iv) The Protection Against Self-Incrimination

The protection against self-incrimination began to be taken very seriously in England at the height of the 'Bloody Code' when executions, mostly for property crime, increased by 50 per cent within a thirty year period, between 1765 and 1795.[70] It was at precisely this time that judges and counsel began to advise criminal accused about the protection against self-incrimination, that: 'though you are permitted to speak, it is greatly to your own disadvantage to begin your defence before they begin your charge'.[71] Alternatively, some lawyers of the era explained to their clients that 'by entering into any part of your defence now, you give them [the prosecution] an opportunity of applying their evidence to your answer', which might have, in turn, resulted in conviction and death.[72] By reminding accused men and women that they were entitled to assert the privilege against self-incrimination, lawyers not only saved lives but emphasised the importance of silence as a fair trial right.

There was a similar trend in New South Wales when the number of capital executions peaked at around 300 per year between 1830 and 1839, mainly due to the introduction of the *Bushranging Acts* in the early 1830s.[73] In a colony of fewer than 80,000 inhabitants, the Acts meant that each year the State executed roughly 1 out of every 233 people.[74] In tandem with developments in the metropole related to the protection against self-incrimination, colonial NSW embarked on the same path. In 1834, when Forbes put his case to the Governor and Colonial Office to extend the *Bushranging Act* for a further two years, Justice Burton pressed an opposing case,

[70] The Old Bailey (online) statistical tool shows that the total number of executions over a 239 year period between 1674 and 1913 was 12, 093, or an average of around 50 executions per year. Over a thirty year period, between 1765 and 1795, there were 2,564 executions, a rate of about 86 executions per year. See: www.oldbaileyonline.org/forms/formStats.jsp, accessed 11 October 2015.
[71] The trial of David Clary and Elizabeth Gombert, *OBSP* (Apr. 1788, #270), at 367, 368.
[72] Ibid, 371.
[73] See NSW Capital Convictions Database: http://research.forbessociety.org.au/graphs, accessed 22 December 2015.
[74] For population numbers, see: Robert B. Madgwick, *Immigration into Eastern Australia, 1788-1851* (Sydney University Press, 1937) 30-40.

arguing that the Act ran counter to the spirit of the British Constitution.[75] In an effort to counteract these claims and yet preserve the hegemony of the rule of law in the colony, the Chief Justice was forced to compromise. That year, in *R v Vials,*[76] Forbes formulated and applied a caution against self-incrimination for the first time in NSW. He confirmed that a defendant must be cautioned or advised about their right to silence, before giving evidence, saying that 'due caution had been given to the prisoner not to say anything which might criminate him'. After nevertheless allowing the defendant's confession, resulting in conviction, Forbes was at pains to state that judicial officers should not interfere with the defendant's right to silence. He said: 'it was not the proper course for magistrates to adopt by examining a prisoner in the way of question and answer'.[77]

As discussed in Chapters 3 and 5, those accused of criminal offences – 'criminal accused' - sometimes asserted the protection against self-incrimination and witnesses who had been accomplices or 'approvers' often did the same.[78] However, the privilege does not seem to have been widely asserted by criminal defendants or indeed advised by the profession until Forbes's ruling in *Vials*. Two years later, upon Forbes's departure from the bench and at the expiration of the *Bushranging Act* in NSW, Chief Justice Dowling confirmed the protection against self-incrimination as an unqualified fair trial right, saying: 'it is a well-known rule in British Law, that no person is bound to say anything that will criminate himself'.[79]

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[75] K.G. Allars, 'Burton, William Westbrooke (1794-1888)' *Australian Dictionary of Biography, Vol .1* (Melbourne University Press, 1966).
[76] NSWSupC 92 (22 August 1834), *Sydney Herald,* 24 August 1834.
[77] Ibid.
[78] *R v Kaine* [1830] NSWSupC 2, *Sydney Gazette*, 2 February 1830; *R v O'Brien and others* [1831] NSWSupC 37, *Sydney Gazette*, 21 June 1831; *R v Smith* [1831] NSWSupC 36, *Sydney Gazette*, 18 June 1831; *R v Blake* [1832] NSWSupC 3, *Sydney Gazette,* 9 February, 1832.
[79] *Ex parte Ingless, in re Wilson*, 1837, *Sydney Herald*, 16 October 1837.

v) Prohibition Against Adverse Inference

It is a fundamental principle of the right to silence that no adverse inference should be drawn against an accused person for maintaining their silence.[80] In the early nineteenth century, however, the prohibition against adverse inference had not yet been articulated as a separate doctrine of law, distinct from the privilege against self-incrimination. As some legal historians point out, prohibitions against adverse inference were the exception, not the norm.[81] Indeed, direct examples of judicial directions on the prohibition against adverse inference in colonial NSW are scarce. Occasionally, English courts did expressly recognise the prohibition.[82] And, as this survey of decisions by the New South Wales Supreme Court until 1861 reveals, a prohibition against adverse inference was, at times, implied but not expressly stated.

The prohibition against adverse inference can be located between the principles of voluntariness of confessional evidence and the protection from self-incrimination.[83] That is, when a confession is excluded or an accused fails to give or refrains from giving evidence, the logical assumption that can be drawn is that an accused has maintained their silence. This is tactically useful for an accused where prosecution evidence is uncertain or doubtful, or relies on an admission of guilt by the accused (confession), in which case maintaining the right to silence or excluding confessional evidence obtained involuntarily, can often result in acquittal. The prohibition against adverse inference prevents a finder of fact (a judge or jury) from inferring guilt from an accused's failure to give evidence, that is, in the case of an accused who exercises their right to silence. However, if an accused remains silent in the face of reliable evidence against them, they will usually be convicted.

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[80] *Weissensteiner v R; Petty v Maiden,* above n 22.

[81] G.L. Davies, 'The Prohibition Against Adverse Inferences from Silence: A Rule Without Reason?' Part I (2000) 74 ALJ 26 at 34; see also Part II (2000) 74 ALJ 99; Susan Nash, 'Silence as evidence: a commonsense development or a violation of a basic right?' (1997) 21 *Criminal Law Journal* 145, 146.

[82] *R v Watson* (1817) 2 Stark 115 at 157–158 per Holroyd J (171 ER 591).

[83] See Appendix. See also, the trial of Mary Ann Gallagher, 13 September 1830 in which confession evidence of was ruled inadmissible where the defendant had been told by investigators that, 'it would be better for her to confess': *Sydney Gazette*, 14 September 1830.

In colonial NSW, many cases involving Indigenous accused resulted in conviction because the accused were unable to understand the case and evidence against them, and hence unable to refute the evidence. In each of these cases there was no prohibition against adverse inference. On occasion, however, some colonial Judges intervened to halt proceedings which they perceived as unfair because Indigenous accused were unable to comprehend the case against them and were thereby denied a defence. In these cases, failure to comment by Aboriginal accused created uncertainty in the prosecution case. Accordingly, judges directed juries that any uncertainty should be construed *in favorum vitae* or in favour of an accused, resulting in acquittal.[84] When this practice operated, it might be viewed as something like an implied prohibition against adverse inference which assisted colonised and working-class peoples to evade the consequences of criminal law. The prohibition against adverse inference was eventually codified in NSW through the *Criminal Evidence Act 1898* s. 1(b).[85] The section expressly prohibited the prosecution from commenting upon the accused's silence.[86]

vi) The Right to Counsel

Since the time of Lord Coke in the early seventeenth century, it had been a principle of English common law that judges should act as counsel for prisoners.[87] However, the rise of lawyers throughout the eighteenth century saw defence counsel replace judges as the legal representatives of the accused. In this sense, advocacy by an adversarial legal representative completed the right to silence. It meant that an accused person was not required to speak at all during their contact with the criminal

[84] See, *R v Carter (No. 1) and (No. 2)*, reported in *The Australian*, 12 and 23 June 1829, in which confession evidence was refused in an initial trial and the accused acquitted. It was permitted, however, in a retrial and the accused was found guilty.
[85] This provision was enacted by amending legislation under the *Accused Persons Evidence Act 1898* (NSW).
[86] *Criminal Evidence Act 1898* (NSW) s 1(b); (1997) 21 CRIMLJ 145 at 146.
[87] 3 Institute 137.

process, which significantly reduced the chance of incrimination. By the late eighteenth century in Britain, the legal system accepted the right to counsel as a rule of practice that was tethered to the right to silence. 'God forbid that you should be hindered from saying anything in your defence' said one Old Bailey judge to an accused, 'but if you have only questions to ask, I would advise you to leave them to your Counsel'.[88]

As we have seen in Chapters 3, 4 and 5, struggles for the right to counsel were waged by working-class and civic radicals throughout the early nineteenth century. This right was eventually enacted as law in Britain by constitutional radicals and reformers following the 'Peaceful Revolution' in the early 1830s. The parliamentary debates preceding the Prisoners Counsel Act of 1836 canvas a wide variety of political perspectives on fair trial rights and are surveyed in the Appendix. However, it appears that the overarching purpose of the Bill was to mitigate the draconian effect of criminal law on working-class defendants. Among other arguments, radical Whigs such as Dr Stephen Lushington spoke at length in parliament of the plight of defendants such as 'thirty-one prisoners', all sailors, who 'were convicted upon certain evidence and sentenced to execution' and that, 'a few days after (following intervention by counsel) other prisoners were, upon the very same evidence, found not guilty'. The Act, it was proposed, would end such injustice by introducing a range of reforms such as the right to counsel, the right of an accused and defence counsel to address juries, and the right to depositions and written copies of charges (at a fee to the defendant).[89]

As Langbein has found, before the enactment of the Prisoners' Counsel Act in 1836, it was common practice for English judges to remind unrepresented defendants who

[88] See the trial of *Jacob Thompson*, *OBSP* (December 1783, #145) at 154, 159.
[89] (6 and 7 Wm IV c 114: 142-148); See David JA Cairns, *Advocacy and the Making of the Adversarial Criminal Trial, 1800-1865* (Clarendon Press, 1999) Chapter 4.

pleaded guilty about the possible consequences of their plea.[90] This was also common practice in colonial NSW. The Chairman of Quarter Sessions, for instance, according to the *Sydney Gazette,* 'mercifully reminded' a prisoner at Windsor in 1828 'that if he persisted in a plea of guilty, nothing could appear in court in extenuation of punishment, whereupon the prisoner withdrew his plea and pleaded - Not Guilty'.[91] As has been seen, Justices Dowling and Burton acted similarly throughout the 1820s and 30s.[92] The shift to representation by counsel and its enshrinement as a right, however, was yet another of the great struggles between the reformers and the squatters.

Throughout the 1820s and 30s, assertions of the right to counsel were often upheld, and in some cases, recommended by the Bench in the NSW Supreme Court. On the frontier, however, the right to counsel challenged the technical legal knowledge and therefore the authority of the squatter magistrates. The lay justices frequently refused to hear counsel, instead preferring their own parochial and authoritarian methods of process and punishment. Following a clash with a magistrate who refused to hear his appearance at Picton,[93] the bold reformer, Robert Nichols, agitated for the right to counsel in the Supreme Court. Acting through the common law power of *mandamus* (discussed in Chapter 6), Dowling CJ forced the recalcitrant magistrate to uphold the right to counsel. Conscious of exercising its superior power, the Supreme Court nevertheless deferred to the class prejudice of the magistrates, saying:

> It is no disparagement to their honour, their integrity, or their general good sense and intelligence to imagine the possibility of their deriving advantage from the assistance of an advocate duly qualified in the satisfactory

[90] Langbein, above n 1. For a similar example of this practice in colonial NSW see, for instance, Justice Dowling in *R v Tennant, Ricks, Cane and Murphy* [1828] NSWSupC 40, *Sydney Gazette,* 2 June 1828.
[91] *Sydney Gazette,* 16 January 1828.
[92] Dowling J, above n 90. See also, Burton J, above n 63.
[93] Picton was formerly referred to as 'Stonequarry'. See the case of *Ex Parte Nicols* [1839] NSWSupC 76, *Sydney Herald,* 14 October 1839.

> administration of laws, often complicated, and involving to the parties concerned, important rights of property and liberty.[94]

Similarly, in *Ex parte Dillon* [1839],[95] Roger Therry complained to the Supreme Court by way of *mandamus* in respect to the conduct of Port Macquarie squatter and magistrate William Bell Carlyle. The magistrate had refused to allow prisoners to be represented in the courtroom by their counsel, John Dillon. Chief Justice Forbes and Justice Stephen confirmed Dowling's recognition of the Prisoners' Counsel Act, usurping the power of the magistrate by *mandamus* to uphold the right to counsel. Less deferential than Dowling, Forbes let the magistracy know that 'the Supreme Court has paramount authority over the inferior Courts of the Colony' and 'will protect the liberty of the subject'.[96]

The right to depositions (for fee) under the Prisoners' Counsel Act was tested in the colony in 1840. It was the regular practice of Clerks of the Peace at Sydney Quarter Sessions to refuse to copy the charges or prosecution depositions for defence counsel, preventing an accused from knowing or answering the prosecution case against them.[97] Yet again, it was Robert Nichols who took action when a clerk complained to him that the fee offered for copying the documents was 'too small'.[98] The lay magistrates on the Sydney Bench did nothing. In the Supreme Court, the Attorney-General defended the practice, saying that 'there was not sufficient machinery in the colony to carry the said cause of the Prisoners' Counsel Bill into effect'. Nevertheless, a Full Bench of the Supreme Court found that an accused was in fact entitled to copies of depositions, pursuant to the Prisoners' Counsel Act. Chief Justice Dowling went so far as to find that 'the question of expense could never interfere with the distribution of justice', while Stephen J found that the right

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[94] Ibid, *Sydney Herald,* 30 October 1839.
[95] NSWSupC 67, *The Australian* 24 September 1839.
[96] Ibid.
[97] *R v Alderson* [1840] NSWSupC 37, *Sydney Herald* 3 August 1840.
[98] Ibid.

to depositions was even more important than the right to counsel.[99] Against the protestations of the magistrates and the Attorney-General, the Court asserted that 'if Acts were adopted it was the duty of the Executive to provide the machinery'. Judge Willis agreed, asserting that the right to counsel 'was simply a consequence of a constitutional right'.[100]

The right to depositions upon payment illustrates perhaps the most important dimension of the right to counsel, particularly for colonised and working-class peoples. In effect, it commodified the right to silence and was restricted to those with the means to afford legal representation. Commenting on the restricted access to rights imposed by prohibitively costly fees associated with them, the French socialist Louis Blanc asked in 1848, 'what does the right to be cured matter to a sick man whom no one is curing?'.[101] In that same year, a Commission of English Law Reformers considered whether the right to counsel should be extended to all criminal defendants. The reformers advised Parliament that the just exercise of criminal procedure relied on unqualified access to legal representation.[102] Frederic Calvert, a radical member of the London Bar, spelled it out: the government should provide agents 'employed at public expense to inquire into criminal charges on behalf of the prisoner'.[103] It would take until the development of the welfare state in the late twentieth century for these suggestions to be implemented.

As with its decision on access to charges and depositions, when it came to the provision of legal services, the Supreme Court in colonial NSW adopted a progressive stance. In serious matters, the court often required solicitors to act *pro*

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[99] Ibid.
[100] Ibid.
[101] Cited in, Roland Sanders and Albert Fried (eds), *The Socialist Thought* (Columbia University Press, 1992) 235.
[102] The findings of the Jervis Inquiry Commissioners cited in, John Hostettler, *The Politics of Criminal Law Reform in the Nineteenth Century* (Barry Rose Law Publishers, 1992) 54.
[103] See Frederic Calvert, cited in, Hostettler (ibid), 51.

bono and as defence counsel where no barristers were available.[104] Barristers, on the other hand, could not be ordered to do so where they were not officers of the court. In a murder case in Moreton Bay in 1851, the accused, Mr Semple, 'had no money to fee counsel'.[105] A solicitor, Mr Purefoy, one of Moreton Bay's only solicitors, was ordered to represent the accused. In other cases, perhaps where publicity counted as much as payment, counsel was willing to respond to the Court's request. William A'Beckett, for instance, appeared *pro bono* on behalf of the prisoner in *R v Long Jack* [1838][106] at the request of Justice Burton. In another case involving cattle-stealing, the judge ordered that proceeds of crime be used to fee Counsel.[107]

Where the subjugated subjects of criminal law were guaranteed access to counsel, they had access to liberty. In many cases, as has been observed, this was assured by counsel's assertion of technical legal defences and reliance upon evidence law (see Appendix for survey of defences and cases). In many such cases, lawyers relied on evidence law in ways that were frequently contradictory from case to case. This demonstrates that, for middle-class reformers, the law of evidence was not necessarily about establishing a uniform code of rules. Rather, the ends to which evidence was put in protecting criminal defendants from harsh penal discipline, especially corporal and capital punishment, justified the means. To this extent, the use of evidence law in colonial NSW reflected the use of law and lawyers by a rapidly organising English working-class against exploitative and oppressive work practices in the metropole at this time.[108] Correspondingly, the right to counsel was integral to upholding legal hegemony in NSW by offering colonised and working-class peoples some small measure of democratic treatment.

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104 *Solicitors as Defence Counsel* (Case) [1852] NSWSupCMB 22, *Moreton Bay Courier,* 13 November 1852.
105 *R v Semple* (No. 1) [1851] NSWSupCMB 46, *Moreton Bay Courier*, 17 May 1851, p. 2.
106 NSWSupC 44, *Sydney Herald*, 7 May, 1838.
107 *R. v. Welsh and Birgan* [1828] NSWSupC 33, *The Australian,* 14 May 1828.
108 Christopher Frank, *Master and Servant Law: Chartists, Trade Unions, Radical Lawyers and the Magistracy in England, 1840-1865* (Ashgate, 2016) 91-185.

As discussed in Chapter 5, the right to silence was codified in England by the Attorney-General and Whig reformer Sir John Jervis in 1848, before being adopted in New South Wales in 1850.[109] The Jervis Acts specifically required magistrates and judges to caution criminal defendants about their right to silence before giving evidence in court. The formulation of the caution differs little from its contemporary equivalent. Before giving evidence, defendants were asked:

> Having heard the evidence do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so but whatever you say will be taken down in writing and may be given in evidence against you upon your trial.[110]

Along with the requirement that the defendant be cautioned as to their statutory right to silence, the Acts stipulated that the defendant was to be clearly advised that no adverse, nor advantageous, inference be drawn from a confession. The provision provided that the defendant should understand that they had, 'nothing to hope from any promise or favour *and nothing to fear from any threat* which may have been holden out to him to induce him to make any admission or confession of his guilt'[111]. Jervis' enquiry spanned fifteen years, ending in 1848. Throughout the period, his recommendations were echoed in judicial policy in NSW. An 1847 edition of Plunkett's *Australian Magistrate* required interrogation of an accused to include a warning that he could expect no favour from confessing.[112] While such policy was no surety against the incorrect and draconian application of evidence law on the frontier, it nevertheless indicates that the reformers had some effect.

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[109] *Imperial Acts Adoption and Application Act 1850* (NSW) (14 Vic No 43) See also, *Duties of Justices (Indictable Offences) Act 1848* (NSW) (11 and 12 Vic c 42) ss. 17 and 18.
[110] *Imperial Acts Adoption and Application Act 1850* (NSW) (14 Vic No 43).
[111] Ibid.
[112] Cited in G.D. Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788 - 1900* (The Federation Press, 2002) 175.

Hearsay

The rule against second-hand or hearsay evidence ('the hearsay rule') is designed to exclude evidence from consideration by a judge or jury at trial because the evidence is unreliable as a result of not being directly perceived by a witness.[113] Like most exclusionary rules of evidence, the hearsay rule derives from the presumption of innocence. More precisely, it derives from the evidential burden borne by a prosecutor to prove the existence of a crime and that a defendant committed it.[114] Accordingly, the presumption of innocence requires that all information that might interfere with the process of fact-finding must necessarily be excluded. The hearsay rule was commonly asserted in colonial NSW and evolved over time, providing counsel and the subjects of criminal law with another protection against the harsh consequences of the criminal justice system.

The earliest record of the rule dates to 1454 when English Chief Justice Holt required a witness to speak in court of 'what hath fallen under his senses'.[115] Jurors were encouraged to discuss matters privately with witnesses both in and out of court, 'to inform themselves' before trial'.[116] The treason trials of the Star Chamber in the seventeenth century, however, saw some accused question the veracity of hearsay evidence for the first time. Sir Walter Raleigh, for instance, was a protestant aristocrat and libertarian politician. He was prosecuted for treason in 1603. The substance of the charge was that Raleigh had attempted to overthrow King James I to install a

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[113] See, for instance, the *Evidence Act 1995* (NSW) s. 59 and *Lee v The Queen* (1998) 195 CLR 594 at [21]–[22]. An example of second-hand hearsay evidence is the assertion of the existence of a fact by a witness that the witness has learned through another party or source. Nevertheless, second-hand hearsay evidence will be admissible as proof that the assertion was made but not the truth of that the fact which it attempts to assert: *Evidence Act 1995* (NSW) s. 60.

[114] *Woolmington v DPP* [1935], above n 39; *Purkiss v Crittenden* (1965) 114 CLR 164; Australia, Senate Standing Committee on Constitutional and Legal Affairs, *The Burden of Proof in Criminal Proceedings,* Parliamentary Paper 319/1982, 2.1-2.2.

[115] See Holt CJ in *R v Charnock 'Charnock's Trial'* 12 id 1454.

[116] John H. Wigmore, 'The History of the Hearsay Rule', (1904) 17(7) *Harvard Law Review* 437.

more benevolent Stuart monarch. The evidence against Raleigh consisted of a signed and sworn confession by fellow conspirator, Henry Brooke, 11th Baron Cobham. Raleigh challenged the use of the document as an out-of-court hearsay statement. '[Let] my accuser come face to face, and be deposed'[117] he said. When his life was under threat by a vindictive and repressive State, Raleigh could see clearly that, 'were the case but for a small copyhold, you would have witnesses or good proof to lead the jury to a verdict; and I am here for my life!'.[118] The evidence was allowed and Raleigh was imprisoned for thirteen years before being executed in 1618. Throughout the events of the long English Revolution, courts of the Restoration regime (1680 to 1688) appear to have adopted certain exclusionary rules of evidence, including the hearsay rule,[119] probably to appease the libertarian Whig revolutionary forces that eventually defeated the regime in 1688. In consecutive revolutionary trials, judges told witnesses: 'you must not come to tell a story out of another man's mouth',[120] 'speak of what you know yourself',[121] and 'we must not hear of what another said that is no party to this cause'.[122] Shortly after, Matthew Hale justified the rule on the basis of 'confrontation', articulated by Raleigh, and 'second-hand' hearsay evidence became known as 'no evidence'.[123]

During the rise of the lawyers in the 1780s, 'no evidence' began to be asserted more frequently by barristers like Garrow who commonly invoked the rule to defend predominantly working-class criminals accused at the Old Bailey.[124] Garrow expanded the justification for the rule by using it as a shield against involuntary

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[117] Sir Nicholas Throckmorton and David Jardine, *Criminal Trials* (The Society for the Diffusion of Useful Knowledge (London) Vol 1, 1832) 438.
[118] Ibid.
[119] Wigmore, above n 116, 445.
[120] *Gascoigne's Trial* (1680), cited in Wigmore, ibid, 446.
[121] *Plunkett's Trial* (1681), cited in Wigmore, ibid.
[122] *Braddon's Trial* (1684), cited in Wigmore, ibid.
[123] Matthew Hale, *The History of the Common Law of England* (Charles M. Gray ed., 1971/ 1st ed. 1713) 163-4. The articulation of hearsay as 'no evidence' is derived from *Mason's Case* (1732) George Mason, *OBSP* (December 1731) at 13, 14.
[124] See, for instance, *William Jones,* OBSP (December 1783, # 102) at 130, 131.

confessions uttered to a witness that had resulted from 'hope of favour' or 'fear'.[125] As Langbein explains, by the 1820s, exclusion of hearsay evidence was well and truly established as a rule of practice and lawyers thrived on its operation.[126] Under their influence, the dominant justification for the hearsay rule was that hearsay evidence should be excluded where it prevented the opposing party from cross-examining the original deponent of the statement.[127]

The hearsay rule does not appear to have been widely used in New South Wales until the arrival of Chief Justice, Forbes. As Evatt found, before the establishment of the Second Supreme Court, the use or rather misuse of hearsay evidence by the Court of Criminal Jurisdiction under the influence of the Rum Corps was staggering.[128] For instance, in *R v Nicolls* [1799] the accused was a former convict turned Chief Government Overseer who reported to the Governor on corruption between the Rum Corps and the Squatters. The wealthiest squatter, John Macarthur, had him charged with receiving stolen tobacco. At the trial, Macarthur and his witnesses, including Macarthur's servants, gave evidence of conversations twice removed from the original evidence. The squatters stacked 'hearsay upon hearsay upon hearsay'[129] to secure a conviction against Nicolls, the emancipated convict. Nicolls received 14 years transportation to Norfolk Island.

In 1824, Forbes arrived in the colony and heard the murder case of *R v Donovan.*[130] Two issues of hearsay evidence arose. First, the Court was required to decide the admissibility of a dying declaration by the victim to a witness alleging that the

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[125] *Michael Hay,* OBSP (May 1789, #365) at 464, 469.
[126] The first case to use the term 'hearsay' was *R v Woodcock* (1789) 1 Leach 500, 168 Eng. Rep. 352. See Langbein, above n 1, 246.
[127] See Thomas Starkie, *A Practical Treatise of the Law of Evidence, and Digest of Proofs in Civil and Criminal Proceedings* (London, 1824) 40.
[128] Particularly during the trial of Isaac Nicholls in 1799. See H.V. Evatt, *Rum Rebellion* (Angus & Robertson, 1965) 26-29.
[129] Ibid, 27.
[130] [1824] NSWSupC 14, *Sydney Gazette*, 26 August 1824.

accused was the murderer. A second question of admissibility arose where the statement was not uttered in the presence of the defendant. The Court ruled both statements inadmissible. Despite this degree of fairness to the accused, he was convicted by a jury and hanged. In a civil case, *Corbett v May* [1831],[131] second-hand hearsay evidence about the character of a defendant was deemed inadmissible.

Since the English case of *Atwood and Robbins*[132] in 1787, circumstantial evidence was seen as an extension of the hearsay rule and excluded accordingly. In the colony, courts acknowledged the rule in most cases. In *R v Needham* [1833], for example, an involuntary statement combined with circumstantial evidence saved a female defendant from the death penalty. However, there were a range of capital cases heard under the 'emergency' powers of the Bushranging Act in which there was no distinction between direct and circumstantial or uncorroborated evidence.[133] In *R v Burn* [1833], for instance, the accused was seen 'blacking his face' shortly before a robbery but not engaging *in* the robbery. He was convicted on the basis of this circumstantial evidence and sentenced to death[134]. It seems that the mere act of 'blacking' and its cultural associations with poaching and criminality from the previous century implied guilt by association.[135] In these ways, the use and administration of the hearsay rule was consistent with the political hegemony maintained by the constitutional reformers.

But use of the hearsay rule in upholding this political hegemony was controversial. The rule was consistently ignored by squatter magistrates on the frontier. Accordingly, in 1835, reformist Attorney-General Plunkett drafted written

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131 NSW Sel Cas (Dowling) 889; [1831] NSWSupC 73, *Dowling, Select Cases*, Archives Office of N.S.W., 2/3466.
132 James Atwood and Thomas Robbins, 1 *Leach* 464, 168 *Eng. Rep.* 334 (1788) [sic. 1787].
133 See, for instance, *R v James* (1836) NSW Sel Cas (Dowling) 309 [1836] NSWSupC 59, *Sydney Herald,* 15 February 1836.
134 NSWSupC 34, *Sydney Herald,* 23 May 1833.
135 See, for instance, E.P. Thompson, *Whigs and Hunters: The Origin of the Black Acts* (Pantheon, 1975).

instructions to the magistrates on the admissibility of evidence pursuant to the hearsay rule. He asserted the principles of confrontation and professional control, advising against allowing hearsay evidence that: 1) had not been given on oath; and 2) where the maker of the statement could not be cross-examined[136]. Further, Plunkett clearly and strictly established that the only 'non-hearsay purpose' for which hearsay is allowed is to clarify 'what a witness has been heard to say at another time … in order to invalidate or confirm the testimony he gives in Court'.[137] Thereafter, the law of hearsay became a further hurdle against conviction for working-class criminal defendants at the level of Magistrate's Courts.

Credibility & Character Evidence

Credibility and character evidence are further exclusionary rules that have been discussed in Chapter 3, with an emphasis on the ways in which these socially divisive legal rules were used by colonised and working-class peoples to defend themselves and mitigate punishment in the courtroom. Indeed, both rules favoured the innocence of an accused. In this chapter, these rules are discussed as developments by reformers that increased their own discretionary power and, in some cases, allowed for the implementation of a democratic program that protected colonised and working-class peoples from the worst excesses of the criminal law.

Toward the end of the eighteenth century in English criminal trials, the concept of 'believability' became the 'science of credibility'.[138] In the colony, however, discussion of 'credibility' evidence was rare. The veracity of evidence relied less upon technical grounds than on legal precedent. Over time, a body of law about the reliability or

136 Plunkett, above n 12, 166-7.
137 Ibid, 166.
138 See, for instance, *R v Atwood and Robbins*, 1 Leach 464, 168, Eng. Rep. 334 (1788) [sic; 1787]. The first reference to the idea that evidence had 'credit', however, seems to appear in *Warickshall* [1783], discussed above n 28.

credibility of evidence was established in the colony. In *R v James* [1836],[139] the Supreme Court dismissed a murder trial due to the unreliability of a witness who was drunk. Justice Burton advised the jurors of his 'utter inability to understand what the witness meant to convey to the Court' and the jury replied that 'they could not think of forming an opinion upon testimony given by a person in such a state'.[140] The court took the credibility rule so seriously that the matter was adjourned while the drunken witness was ordered to be 'taken to the General Hospital … to undergo a course of purgation by means of the stomach-pump or emetics'.[141] When the witness could not be sobered, he was charged with contempt of court and later convicted and sentenced to imprisonment for a month. A retrial of the case was ordered and the accused was convicted.

Nothing was more important than character when it came to an assessment of a witness's credibility in court. Credibility was most commonly considered in relation to 'approver' evidence – the testimony of accomplices. Fortunately for their co-accused, accomplices were seldom believed by the colony's military and middle-class jurors. For instance, two prisoners in a theft case were found 'not guilty' after it was shown that the eyewitness was an 'approver' who had previously been found guilty of perjury.[142] Multiple co-accused in a bushranging case were acquitted when Justice Burton instructed the jury that the evidence of an 'approver' lacked credibility.[143] He told the defendants 'that they owed their escape to that bad man, Ryan's, evidence not being believed'.[144] In *R v Harris and Piesnell* [1832][145], Therry objected to the evidence of an approver whom he discredited on the basis of character. He also managed to assert the credit of his own client whom another witness described as

[139] NSW Sel Cas (Dowling) 309 [1836] NSWSupC 59, *Sydney Herald* 15 February 1836.
[140] Ibid.
[141] Ibid.
[142] *R v Absolam and Gardner* [1828] NSWSupC 5, *The Australian* 13 February 1828.
[143] *R v Clarke, Goodyear and others* [1837] NSWSupC 52, *The Australian* 11 August 1837.
[144] Ibid.
[145] NSWSupC 87, *Sydney Gazette* 10 November 1832.

'the hardest working man in the neighbourhood'.[146]

In the 1830s, the concept of credibility was also used to protect accused against unqualified or lay 'opinion' evidence. As Plunkett explained in his Magistrate's manual, when a person is not an expert, evidence of their opinion lacks credibility and is inadmissible to prove a fact in court.[147] This had been a common-law rule of evidence for centuries and was conventionally used in criminal matters to assess medical and forensic evidence.[148] The rule was taken so seriously that, in forgery cases, a person whose name was alleged to have been forged was considered an incompetent witness, often to the benefit of a criminal accused.[149]

As discussed in Chapter 3, character was not only significant for the interpretation of evidence in the convict colony, it also formed a dividing line between exclusivist and emancipist colonists. The struggle against the use of character evidence to impugn emancipated convicts was foundational to the making of Australian democracy. Having a convict record or 'felony attaint', as it was known, has been discussed in great detail by a variety of Australian colonial historians.[150] The effect of felony attaint was to strip 'attainted' people of a range of legal rights including the rights to own property, sue in the courts and give evidence. 'Attainted' people were not 'fit and proper persons' to exercise these rights.[151] This was the law in England and it

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[146] Ibid.
[147] Plunkett, above n 12, 166-7.
[148] See, for instance, the *writ de ventre inspeciendo,* used to determine pregnancy by a group of 12 specialist matrons or by juries of merchants to try mercantile cases: see Justice RS French, 'Expert testimony, opinion argument and the rules of evidence', [2008] *(Journal of) Federal Judicial Scholarship* 3, www.austlii.edu.au/au/journals/FedJSchol/2008/, accessed 9 March 2016.
[149] See, for instance, *R v Vignell* (1828) Sel Cas (Dowling) 351; [1828] NSWSupC 28, *The Australian*, 7 May 1828.
[150] See, for instance, C.H. Currey, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of New South Wales* (Angus & Robertson, 1968); Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995); Paula J. Byrne, *Criminal Law and Colonial Subject: New South Wales, 1810-1830* (Cambridge University Press, 1993); David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991); Robert Hughes, *The Fatal Shore: A History of The Transportation of Convicts to Australia, 1787-1868* (The Harvill Press, 1986).
[151] *Ellis Bent to Bathurst*, 1 July 1815, *HRA* IV, I, p. 155.

was codified in the First Charter of Justice in New South Wales[152]. But, as Bruce Kercher explains, the necessities of colonial life meant that the rule of 'attaint' was not applied in the courts of the colony until the *Eagar* cases in 1820. Until this time, both serving and emancipist convicts were regularly allowed to sue and give evidence in a Magistrate's Court.[153] Emancipists such as Henry Kable, Simeon Lord and Samuel Terry were some of the largest property holders in the colony.[154] Three emancipist convict attorneys, George Crossley, Edward Eagar and George Chatres - were permitted to practise law in the courts, with Crossley becoming personal legal counsel to both Governors King and Bligh.[155] Meanwhile, emancipists D'Arcy Wentworth and William Redfern, were appointed to the magistracy.

In 1814, the appointment of legal formalist Justice Jeffrey Bent to the first Supreme Court of NSW saw a crackdown on the legal rights of convicts, particularly the right to give evidence. Bent received unwavering support from his brother, Ellis Bent, who had been appointed to as the first Chief Justice of the New South Wales Supreme Court, five years earlier in 1809. As a Tory who kept the company of exclusivist squatters and magistrates such as Samuel Marsden, Jeffrey was appalled by the effective suspension of the rule of attaint in the colony's courts.[156] He was equally unimpressed by his brother's practice of allowing emancipist attorneys to work as 'law agents'.[157] In response, he refused to let emancipist lawyers practise and closed the Supreme Court due to the lack of any other trained lawyers in the colony. The

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[152] *The First Charter of Justice for New South Wales,* above n 10.
[153] See Bruce Kercher, above n 150, 32; and the following cases: *Cable v Sinclair* [1788] NSWKR 7; [1788] NSWSupC 7; *R v Plowman* [1789] NSWSupC 1*; Boston v Laycock* [1795] NSWKR 3; [1795] NSWSupC 3; *Morris v Lord* [1800] NSWKR 3; [1800] NSWSupC 3; *Doe dem Jenkins v Pearce* [1818] NSWKR 4; [1818] NSWSupC 4.
[154] Kercher, above, n 149, 33.
[155] K.G. Allars, 'Crossley, George (1749–1823)' *Australian Dictionary of Biography*, Volume 1 (Melbourne University Press, 1966); Alex C. Castles, *An Australian Legal History* (The Law Book Company, 1982) 16, 98-99, 106-7; and Neal, above n 150, 99.
[156] C.H. Currey, 'Bent, Jeffery Hart (1751-1852)' *Australian Dictionary of Biography,* Volume 1 (Melbourne University Press, 1966). See also, Murray Gleeson, Chief Justice of Australia, who described Bent as 'the worst … judge in NSW', Keynote Address, *175th Anniversary Dinner of the Supreme Court of NSW*, 17 May 1999.
[157] C.H. Currey, *The Brothers Bent: Judge-Advocate Ellis Bent and Judge Jeffery Hart Bent* (Sydney University Press, 1968) Chapters 2-3.

court did not re-open until 1817, when Bent was sacked and a new appointment made. Between the sacking and the arrival of a new judge, the emancipist lawyer Eagar organised a series of petitions to allow his fellow 'harried, shady writ-pushers'[158] to practise law once again. Eagar's struggle came to an end in 1820 when the Supreme Court confirmed the imperial position on felony attaint. Evidence from convicts (both past and present) was disallowed.

Soon after Bent's removal, the reformers began to side-step the law of attaint once more. Governor Macquarie arranged a complicated set of legal processes involving official pardons of ex-convicts that he authorised (under the Great Seal of England and the colony's public seal).[159] After 1823, newly appointed Chief Justice Francis Forbes assisted in skirting the rule by finding that any party who alleged attaint against a legal opponent (criminal or civil) was required to produce a record of criminal conviction to prove the attaint.[160] In many cases, the practicality of producing a record of conviction from a British court was simply impossible and attaint could not be proven.[161] In 1825, Lord Bathurst was alerted to the loophole and wrote to Governor Darling saying that 'Laws of the Colony must coincide with the Law of England'.[162] Bathurst was adamant that attaint rendered a person incapable of giving evidence unless a pardon had been granted. He relied on the legal advice of James Stephen from the Colonial Office. But in 1831, Dowling and Stephen JJ overlooked this colonial command. In *R v Farrell, Dingle and Woodward* [1831], the judges recommenced the practice of accepting evidence from attainted

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158 Hughes, above n 150, 337.

159 Should be Castles, above n 155, 96.

160 See the decisions of Forbes CJ in *R v Charles Kable* [1826] NSWSupC 39, *The Australian*, 8 July 1826; *Polack v Josephson* [1825] NSWSupC 35, *Sydney Gazette*, 18 August 1825; and *Hart v Rowley* [1825] NSWSupC 52, *Sydney Gazette*, 3 November 1825.

161 Often the original 'convict indent' could not be located. See: *R v Redfern and Wells* [1827] NSWSupC 47; *R v Raine, Lee and Kemp* [1828] NSWSupC 105; *Cooper v Clarkson* [1831] NSWSupC 34; *sub nom Cooper v Clarkson (No. 2)* (1831) NSW Sel Cas (Dowling) 974; *Hogan v Hely* (1831) NSW Sel Cas (Dowling) 115; [1831] NSWSupC 13; *Belcher v Deneen* (1832) NSW Sel Cas (Dowling) 168; [1832] NSWSupC 25; *Septon v Cobcroft* [1833] NSWSupC 110; *R v Mossman and Welsh* [1835] NSWSupC 1.

162 *HRA*, Series 1, vol. 11, 495-496.

witnesses, finding that colonial circumstances prevailed over blackletter law and that no repugnancy arose.[163] The fact that this case involved evidence deposed by a prosecution witness to a bank robbery probably meant that the Colonial Office was reluctant to reassert its position, despite protestations from defence counsel, Roger Therry. The law in relation to acceptance of evidence from convict attaints was not finalised, however, until 1844, when the Supreme Court determined once and for all that 'the common law rule against the admission of convict evidence was not applicable in New South Wales'.[164]

The character of 'approvers' or accomplices was a recurring issue throughout the period. And, while convict witnesses were accorded their legal rights, the credibility of their evidence remained inferior to that of the free population. This disparity was often to the advantage of criminal defendants. Indeed, military juries were often quick to acquit when the only accusation of guilt came from an approver.[165] Judges directed juries to acquit for the same reason.[166] The issue of approver evidence and fairness to the accused was resolved through executive intervention by Governor Bourke. In *R v Ryan, Steel, McGrath and Daley* [1832],[167] four co-accused were convicted by a military jury and sentenced to death on the accusation of a perjured co-accused. Bourke intervened and remitted the matter to Viscount Goderich, head of the Colonial Office, recommending mercy for one of the men and a complete pardon for two others. He pointed to the admission of tainted evidence on the basis of the character of the approver, along with a confession by a co-accused who

163 *R v Farrell, Dingle and Woodward* (1831) 1 Legge 5; (1831) NSW Sel Cas (Dowling) 136; [1831] NSWSupC 44, *Sydney Gazette,* 26 July 1831, 2 August 1831.
164 Kercher, above n 150, 38.
165 See *R v West and West* [1827] NSWSupC 67, *The Australian*, 23 November 1827, in which Mr Rowe raised the issue of the character of an accomplice who pointed the blame at a father and son co-accused for stealing and who had himself been convicted of stealing on prior occasions.
166 In *R v Bensley* (1828) Sel Cas (Dowling) 293, Dowling directed the jury to acquit the accused in a cattle-stealing case, on the uncorroborated evidence of an approver: see *The Australian,* 6 June 1828.
167 NSWSupC 95, *Sydney Gazette* 15 December 1832.

shouldered blame for the entire act.[168]

Favourable character evidence also worked to the advantage of criminal defendants. In a stealing case, five Magistrates gave evidence 'of the highest respectability in the Colony … as to the general conduct and character of Mr Hovell, as unsullied, and uniformly just and honorable in his dealings'.[169] The defendant was instantly acquitted and discharged before the Supreme Court.

Documents

The application of the parole evidence or 'best evidence' rule in respect to documentary evidence was critical to reforming the operation of criminal procedure of the early colony. The rule required evidence of the existence of a document to prove any fact asserted by that document. It was crucial to a small capitalist society governed not by money but by handwritten promissory notes as well as 'various webs of correspondence, institutional exchanges, and publication networks'.[170] Not surprisingly, it was the first rule of evidence in Plunkett's manual.[171] But the significance of the best evidence rule for criminal law reform was that it often worked to the advantage of criminal accused. After all, without any evidence of convict records, a convict could have no criminal record.[172]

Throughout the 1820s, strict adherence to the best evidence rule was an effective strategy that countered allegations of 'convict attaint', allowing previously colonised

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168 *HRA,* Series 1, Vol. 17, pp 50-51. The result of the letter is unknown.
169 *R v Hovell* [1824] NSWSupC 4, *Sydney Gazette,* 1 July 1824. See Appendix for further cases in respect to credibility evidence.
170 Tony Ballantyne, 'Rereading the Archive and Opening up the Nation-State: Colonial Knowledge in South Asia (and Beyond) in A. Burton (ed.) *After the Imperial Turn: Thinking With and Through the Nation*, (Duke University Press, 2003) 113. See also, Anna Johnston, *The Paper War: Morality, Print Culture, and Power in Colonial New South Wales* (UWA Publishing, 2011).
171 See Plunkett, above n 12, 166.
172 See the decision of Forbes CJ on convict attaint in '*Eagar's Case', Eagar v Field* [1820] NSWKR 3; [1820] NSWSupC 3, *Sydney Gazette,* 11 September 1820, *HRA*, Series 1, Vol. 10 at 351-364 (selected parts of enclosures: 4-5).

Europeans to participate in civic life, unimpeded by the aspersions on character cast by a criminal record. To this end, the Supreme Court consistently required not only written evidence of a conviction to prove attaint, but also a witness to prove the provenance of the document.[173] The best evidence rule worked to the advantage of criminal accused in other ways too. In *R v Herbert* [1840],[174] for instance, evidence of a promissory note was construed strictly, using the best evidence rule to exclude an oral description of the alleged note. The accused was acquitted.

The Right of an Accused to make a (sworn) Statement

Throughout the period, the evidence of colonised peoples was legally classified as inferior to that of their colonisers. Criminal defendants, former convicts and Aboriginal people had no right to give sworn evidence in court because of a number of reasons related to their social standing. This was particularly problematic for criminal defendants where it hindered their right to a defence and meant that they could not make closing submissions.[175] An apt prisoner or practitioner ensured that the defence case was aired during cross-examination or, if an accused was willing to waive their right to silence, simply to give unsworn evidence (evidence that did not have as much credibility as a statement of fact sworn on the bible). Such evidence had the value of mere assertion, open to contradiction by the evidence of a sworn witness. It placed the accused at a distinct disadvantage to the prosecution. Reform to these laws was slow and would eventually occur well after the period under discussion (in the 1870s for Aboriginal people and the 1890s for criminal defendants and convicts). The path toward reform, however, was laid by the same constitutional radical reformers and was due to a strange combination of sympathy and expediency that ultimately thwarted the interests of squatters who used these laws to better

[173] *R v Badderly and Howard* (1828) Sel Cas (Dowling) 290; [1828] NSWSupC 26, Dowling, *Select Cases*, Vol. 1, Archives Office of N.S.W., 2/3461.
[174] [1840] NSWSupC 21, *The Australian*, 23 May 1840.
[175] See Woods, above n 112, 365-386.

prosecute and colonise Aboriginal and working-class people.

Some legal historians have argued that the advent of the Prisoners' Counsel Act and widespread use of the right to silence after 1836 compounded the disadvantage of accused people by further silencing them.[176] Yet, the alternative to these developments in the eighteenth and early nineteenth centuries was that the accused were forced to speak at trial, often incriminating themselves.[177] The changes in 1836 were an improvement upon Royal Justice. Failure to understand the socio-legal underpinnings of the right to silence has meant that its critics - cultural historians in particular – have struggled to explain how the same reformers who implemented this right were also responsible for the struggle to accredit the evidence of colonised peoples (and working-class criminal defendants) with the status of sworn evidence. Instead, the reformers are seen as men of 'great contradictions' who swam in a sea of colonial complexity.[178] Considered in the context of hegemonic reform, however, the motivations of the reformers are far clearer: maintaining power by helping to save the lives and liberty of the most vulnerable people – the subjects of criminal law.

The rationale for the rule against evidence by prisoners was similar to attaint. How could the evidence of an accused person, it was thought, be believed given the obvious tendency of evidence from an accused towards a self-serving statement? Added to the injustice of a mute defendant was that the prosecution were provided 'a right of reply' upon conclusion of the defence case at the discretion of the prosecutor.[179] Conversely, as Therry asked, 'how was a convict – "*civiliter mortuus*" - to seek redress for any wrong, however gross and illegal, of which he was the

[176] See, for instance, John Langbein and cultural historians Katherine Biber and Anna Johnston, who both reach similar conclusions to Langbein using Foucauldian discourse analysis. Langbein, above n 1; Johnston, above n 170; Katherine Biber, 'How Silent is the Right to Silence?' 18(3) *Cultural Studies Review* 148.
[177] Ibid (Langbein), 48-60, 170-171.
[178] See, for instance, Johnston above n 170, 2-13, Ballantyne, above n 170.
[179] *R v Wardell (No. 2)* [1827] NSWSupC 55, Sydney Gazette, 17 September 1827.

victim…especially in remote parts of the country…?'.[180] As Chapter 2 has shown, violent resistance was one possible way.

Some of the greatest procedural problems of the era transpired through the illegitimacy of Aboriginal evidence.[181] In *R v Murrell* (1836), for example, the first time in the history of colonial NSW, Justice Burton held Aborigines liable for *inter se* violence, making them subject to British law. At the same time, they continued to hold few procedural rights and their evidence was excluded in colonial courtrooms.[182] In Port Phillip, resident judge Willis provided a limited basis on which to accept Aboriginal evidence, deciding that Indigenous witnesses were compellable to give testimony but that due to an 'unchristian nature', could not swear an oath nor enter a plea.[183] In effect, all Aborigines – accused or not – were accorded a social and legal status similar to that of convict attaints. Indeed, this comparison was made by the Full Bench in *R v Murrell* when it referred to 'the cases if the men at Norfolk Island, who were *civiliter mortuis'* (sic).[184]

The rule against Aboriginal evidence frustrated the reformers, perhaps as much as it did criminal accused. It often led to absurd results. For instance, in *R v Hatherly and Jackie* [1822],[185] two Aboriginal men stood accused of murdering a settler. In court, each co-accused blamed the other. The court found that 'there existed no other proof against the prisoners than their own declaration, which could not legally, in this

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[180] Roger Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (S. Low & Son, 1863) 46

[181] Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Harvard University Press, 2010) 85-108.

[182] *R v Murrell and Bummarree* (1836) 1 Legge 72; [1836] NSWSup 35, *Sydney Herald*, 8 February 1836.

[183] *R v Bonjon* 1841, *Port Phillip Patriot,* 20 September 1841. See also, Janine Rizetti, 'Judge Willis, Bonjon and the Recognition of Aboriginal Law' (2011) 1 *Australia New Zealand Law and History Society E-Journal,* Refereed Paper No (5). In such cases, the court frequently entered a plea of 'not guilty' on behalf of the prisoner.

[184] *R v Murrell,* above n 182, *SG,* 22 February 1836.

[185] NSWKR 10; [1822] NSWSupC 10, *Sydney Gazette*, 2 January 1823.

instance, be construed into a confession'[186] and they were acquitted. It is unclear as to whether this was due to the inability of the co-accused to understand proceedings or whether their evidence was discounted as a result of their inability to swear an oath.[187]

The repercussions of excluding Aboriginal evidence were demonstrated in a manslaughter case against five co-accused who had 'assaulted an Aboriginal black woman, which terminated in death' – an act perhaps better characterised as murder, in the course of what appeared to be a massacre on the O'Connell Plains near Bathurst. The prosecution case hinged on the admissibility of evidence from an Aboriginal witness. While technically required to exclude the evidence due to the rule against Aboriginal evidence, Forbes was frustrated by the injustice of the situation. He refused to dismiss the case and required the co-accused to present a defence case (which nevertheless resulted in acquittal).[188] Forbes's sympathy for Aboriginal people had been revealed a month prior to trial when he advised the Colonial Secretary, Wilmot Horton, that clashes between settlers and Aborigines had been 'infinitely exaggerated' and caused by 'an improvident destruction of Kangaroos and other wild animals upon lands occupied by the natives, and an abuse of their women'.[189] Other reformers like Roger Therry and Robert Nichols defended Aboriginal accused on the same basis.[190] Nichols went further, arguing that the Supreme Court had no jurisdiction over Aboriginal accused.[191] Indigenous people, he said, were 'the primary

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[186] *SG,* 2 January 1823.
[187] Another Aboriginal accused escaped prosecution in respect to the murder of a European settler for the same reason in *R v Binge Mhulto* (1828) Sel Cas (Dowling) 1; [1828] NSWSupC 82, *The Australian*, 26 September 1828.
[188] *R v Johnstone, Clarke, Nicolson, Castles and Crear* [1824] NSWSupC 8, *Sydney Gazette*, 12 August 1824.
[189] *Letters in Catton Papers,* Australian Joint Copying Project, Reel M791.
[190] See Nichols in *R v Jackey* [1834] NSWSupC 94, *Sydney Gazette*, 12 August 1834 (below). Similarly, Roger Therry, cross-examined a Brisbane Water settler asking, 'if he was not aware that he had been a squatter for some time on Lego'me's ground, and had frequently committed depredations on his kangaroos?': see, *R v Lego'me* [1835] NSWSupC 4, *Sydney Herald*, 16 February 1835. He made a similar argument in *R v Boatman or Jackass and Bulleye* (1832) NSW Sel Cas (Dowling) 6; [1832] NSWSupC 4, *Sydney Gazette*, 25 February 1832.
[191] See *Parramatta Chronicle* advertisement in which he called upon the Protection Society to recognise Aborigines.

tenants of this soil', they 'subsisted in the woods by fishing and hunting' and it was immoral for anyone 'to disturb them in the possession of these natural rights'.[192] This was a proposition ultimately rejected by Forbes.[193]

Nichols' arguments in defence of Indigenous peoples' land rights were presented at court in the case of *R v Jacky* (1834) while representing an Aboriginal man from the Hunter Valley. Jacky had thrown a spear at an assigned convict at a local farm and the convict had later died of his wounds Jacky, the accused, was known on the farm to nine identifying witnesses and was certified by an interpreter in court as being able to understand 'divinity and a future state' and therefore able to give evidence. Nichols, however, had other plans and attempted to take advantage of colonial circumstances to save his client from a death sentence. In this respect, cultural historians have criticised Nichols for silencing the accused, reading the case as being about 'who could speak in court … who possessed a legitimate speaking (and subject) position'.[194] But Nichols was keenly aware of the unfairness wrought by the rule against Aboriginal evidence and told the court that there were no defence witnesses because they were Aboriginal and 'their evidence would not be received' by the court.[195] He then used the rule against Aboriginal evidence as an extension of the right to silence, arguing that it was 'manifestly a mere mockery to call upon the prisoner to make his defence before persons by whom he could not be understood'.[196] Given the confusion arising from the perceived inability of the defendant to testify, the accused was convicted of manslaughter rather than the murder with which he had been charged, and was transported to Van Diemen's Land.[197] In this case, the rule against Aboriginal evidence created unfairness for

[192] *R v Jackey* [1834] NSWSupC 94, *Sydney Gazette,* 12 August 1834.
[193] Ibid.
[194] Johnston, above n 170, 191.
[195] *R. v. Jackey* [1834], above n 190.
[196] Ibid.
[197] Johnston, above n 170, 191.

Aboriginal people but it also showed that a clever reformer could use the irrationality of racist colonial evidence law to mitigate punitive criminal process.

It was Aboriginal people themselves, however, who suffered most in the face of this procedural bar against their evidence. The rule against Aboriginal evidence was widely used to the advantage of squatters to cover up frontier violence.[198] It was asserted by settlers on the Hawkesbury in a number of cases between 1797 and 1838.[199] It had a particularly profound effect in the first *Myall Creek Massacre Case* in 1838,[200] where evidence of genocide witnessed by an Aboriginal farmhand, Davey, could not be relied on by the prosecution since Davey was not a Christian and therefore, could not swear an oath on the bible.[201] This meant that the Crown could not prove 27 of the 28 murders of Aboriginal men, women and children on the estate of wealthy squatter Henry Dangar.

Another reformer to realise the damaging effects of the rule against Aboriginal evidence was Lancelot Threlkeld. Threlkeld had been the interpreter in *Jacky's Case* and many others involving Aboriginal defendants in NSW throughout the 1820s and 30s. An English missionary and Protector of Aborigines, Threlkeld claimed to speak a range of Aboriginal languages. Through his work as an interpreter before 1836, Threlkeld attempted to gain legal recognition for Aboriginal people. In the case of *R v Murrell,* he told the Supreme Court that, 'on asking the Blacks who made all things, one of them immediately to his surprise replied, God! And on being further questioned as to his source of knowledge, Threlkeld replied it was at Lake Macquarie

198 Brent Salter, "'For Want of Evidence": Initial Impressions of Indigenous Exchanges with the First Colonial Superior Courts of Australia' (2008) 27 *University of Tasmania Law Review* 145.
199 See, for instance, *R v Millar and Bevan* (1797) NSW Sel Cas (Kercher) 147; *R v Hewitt* (1799) NSW Sel Cas (Kercher) 154; *R v Powell and Ors* (1799) NSW Sel Cas (Kercher) 209; *R v Luttrell* (1810) NSW Sel Cas (Kercher) 419.
200 *R v Kilmeister (No. 1)* [1838] NSWSupC 105.
201 Peter Stewart, *Demons at Dusk: Massacre at Myall Creek* (Temple House, 2007).

(where Threlkeld had a mission)'. [202] Nevertheless, Threlkeld was outraged by the result of the case, and summarised its effect on the law as follows:

> … the present state of the law (whereby) a black witness, having been rejected by the Court that not one of his people could enter the witness-box to speak in evidence, being incompetent in consequence of our forms of justice …(is) now proclaimed to be subject to, and under the protection of our Courts of Law!'.[203]

Appointed as Chief Protector in the same year, Threlkeld devoted himself to living with Aboriginal people and assimilating them to literacy and Christianity, partly to ensure that Aboriginal people could participate in the criminal process. In 1838, in the face of the Myall Creek massacre, Threlkeld argued that Aborigines must be accorded the same legal status as white witnesses. From Threlkeld's perspective, 'the Aborigines …were capable of (religious) instruction' and therefore able to give evidence.[204]

Threlkeld's persistent efforts in respect to this issue resonated with the British *Parliamentary Select Committee on Aboriginal Tribes (British Settlements)* which, in 1837, broadly recommended better treatment of Aboriginal people in the criminal justice system.[205] In that year, the Secretary for the Colonies and reformist Whig, Lord Glenelg, wrote to Governor Bourke to advise that Aboriginal people required protection but that they must also be held completely subject to British law (not simply with regard to *inter se* matters as per *R v Murrell* (1836)).[206] Three weeks later,

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202 Kristyn Harman, *Aboriginal Convicts: Australia, Khoisan and Maori Exiles* (UNSW Press, 2012) 71.
203 L.E. Threlkeld, 'Report of the Mission to the Aborigines at Lake Macquarie, for 1836', in Niel Gunson, *Australian reminiscences & papers of L.E. Threlkeld, missionary to the Aborigines, 1824-1859* (Australian Institute of Aboriginal Studies, 1974).
204 Threlkeld cited in Henry Reynolds, *Dispossession: Black Australians and White Invaders* (Allen & Unwin, Crows Nest, 1989) 110.
205 Johnston, above n 170, 213. The section of the Report of the Select Committee addressed, 'Punishment of Crimes'.
206 See Lord Glenelg to Governor Bourke, 26 July 1837, *Historical Records of Australia, Ser. I,* vol. XIX, p. 48.

Justice Burton found as much in the case of *R v Wombarty*.[207] Following the Myall Creek Massacre case, over which Burton J presided, he drafted the first Aboriginal Protection Act, designed to educate Aboriginal people (albeit through an assimilationist program of labour) so that they might better defend themselves and their people in court by giving evidence.[208] Although never implemented, this utilitarian program provided a clear illustration of a simultaneously coercive and emancipatory exercise of hegemonic power over colonised peoples.

In 1839, NSW Governor Gipps proposed a new Bill that sought to raise the status of this evidence to that of 'approvers' (ie a codification of the common law rule that named Aborigines as 'witnesses' and their testimony, 'evidence'). It was passed by the NSW Legislature but disallowed by the Home Secretary, Lord John Russell, on advice from barristers within the Colonial Office. In fact, Russell and his deputy, James Stephen Jr, disagreed with the advice, with Russell stating that the failure to admit Aboriginal evidence was 'repugnant to the Laws of England' and 'the general principles of those laws - such as torturing a prisoner to make him confess his guilt'.[209] On 8 October 1840, Governor Gipps wrote to Lord Grey advising of 'some valuable suggestions with regard to the treatment of the aborigines'. He enclosed a copy of a report 'from Captain Grey, late commandant of an expedition into the interior of Australia'. Grey recommended that unsworn evidence should be allowed from Aboriginal witnesses. Among the injustices committed by the British legal system against Aborigines, Grey observed the following:

> Several of them were induced to plead guilty, and on this admission of their having committed the crime, sentence was pronounced upon them.

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[207] *R v Wombarty, 1837, Sydney Gazette*, 19 August 1837.
[208] See An Act for the Amelioration and Protection of the Natives of the Territory of New South Wales (1838), see Shaunnagh Dorsett, 'Travellling Laws: Burton and the Draft Act for the Protection and Amelioration of Aborigines 1838 (NSW)', in Shaunnagh Dorsett and John McLaren (eds), *Legal Histories of the British Empire: Laws, Engagements and Legacies* (Routledge, 2014) 171-185.
[209] Smandych, above n 1, 249.

> But when others denied their guilt, and found that this denial produced no corresponding result in their favour, whilst at the same time they were not permitted to bring forward other natives to deny it also, and to explain the matter for them, they became perfectly confounded…(I) was subsequently applied to by several intelligent natives to explain this mystery to them …(but)… failed in giving such an explanation as would satisfy them.[210]

The colonial authorities in NSW persistently failed to enact an *Aboriginal Evidence Act* until 1876 finally allowing Indigenous people to give unsworn evidence in court.[211] Criminal defendants more generally were eventually granted the right to give sworn evidence in 1891.[212]

Conclusion

In NSW, as in England, evidence law was used by enlightened reformers to soften the effects of a draconian and disproportionate form of criminal law. In this sense, reformers attempted to democratise criminal law in the interests of those colonised and oppressed by it. By the eighteenth century in England, Lilburn's statement about the right to silence was eventually adopted into the English common law and drafted into statute.[213] It was inserted into the American Constitution[214] and in the twentieth century, was included in the United Nations Covenant on Civil and Political Rights[215]. Since that time, the right to silence has been formally recognised as a

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[210] Grey, George, *Journal of Two Expeditions of Discovery in North-West and Western Australia* (T & W Boone, 1841) http://gutenberg.net.au/ebooks/e00054.html, accessed 17 May 2016.
Letter from Captain G. Grey to Lord John Russell, entitled, 'Report Upon the Best Means of Promoting the Civilization of the Aboriginal Inhabitants of Australia', 18.
[211] (NSW) (40 Vic No 8).
[212] Woods, above n 112, 365-387. *Criminal Law and Evidence Amendment Act 1891* (NSW) (55 Vic No 5) s. 6.
[213] See *Ann Wilcox,* Surrey Assize Papers (August 1738), cited in John M. Beattie, *Crime and the Courts in England 1660*-1800 (Princeton University Press, 1986)346-7, confirmed in *R v Jane Warickshall,* 1 Leach 115, 118, 168 *Eng. Rep.* 160, 161 (K. B. 1775) and later codified by the *Jervis Acts,* (specifically the *Indictable Offences Act 1848* (UK) (11 and 12 Vic c 42) cl 18.
[214] *Constitution of the United States of America* (1791) Amendment V.
[215] *International Covenanant on Civil and Political Rights 1966 (United Nations),* Article 14(g).

fundamental human right.[216]

Clearly, benevolence played a role here. But there were other pressing issues at stake for reformers within the institutions of power. Through reform, those who sought to govern consolidated a rule of law that would not incite political unrest. Evidence law was vital to securing this political stability from the bottom-up because it softened the coercive impact of criminal process on colonised and working-class peoples. It also gave reformers the upper hand in courtroom disputes with a rival faction of squatter-magistrates. Evidence law further contributed to the development of a complex mire of procedural law, rendering the services of the legal profession obligatory in obtaining justice. This combination of reform through criminal process assisted in entrenching the State and legal power in New South Wales in such a way that a rival faction within the ruling class would not seek to challenge it to any significant degree for more than a century.

[216] *Petty and Maiden v* R (1991), above n 22, at 626.

Chapter 8: Conclusion

The reform of criminal process in colonial New South Wales (NSW) resulted from a combination of three main developments: i) resistance by colonised and working-class peoples to a legal authoritarianism that subordinated and marginalised them; ii) co-operation in this resistance by civic radicals who agitated for greater fairness in the criminal process; and iii) the successful establishment by the professional, legal bourgeoisie (that jostled for dominance with the squattocracy) of technical propriety in the administration of criminal law over the otherwise arbitrary authority of squatter-magistrates. While the reform of criminal process advanced legal rights, it by no means constituted part of a more ambitious project for revolutionary social change. It operated, in fact, as a form of political hegemony. Specifically, the abolition of arbitrary criminal process and its replacement with one characterised by the application of ostensibly impartial technical procedures indicated that the criminal process favoured no social or political interest. Accordingly, it appeared that all members of the society were equal beneficiaries.

Legal reform in colonial NSW, then, played a central role in defusing large-scale and organised resistance to ongoing social and legal inequality, and in the manufacture of majority consent to it. However, where it did confer legal rights, improvements in the lives of colonised and working-class peoples ensued. The major reforms to criminal process throughout the period have been summarised in the annexed table which traces the origin of reform to the activism of various social actors, in most cases from the bottom up. Whether they resisted the law through violence or escape, or made the law in judgments and legislation, those who engaged with the law in an

attempt to change it had an impact on its progressive change over time toward a more egalitarian criminal justice system.

The period 1788 to 1861, both in colonial New South Wales and across the Empire, saw enormous social and legal change. The major legal changes that occurred in colonial NSW, as Bruce Kercher has noted, occurred roughly every twenty years and mirrored dominant forms of social and political organisation. Kercher maps five key phases of Australian law, with the first three falling within the period 1788 to 1861: i) the 'frontier' period from 1788 to 1824; ii) the establishment of British law, through the second Supreme Court of NSW from 1824 to 1850; and iii) the period of 'responsible government', from 1850 to 1896. The one discernible trend throughout this period, according to Kercher and others such as retired Australian High Court Justice Michael Kirby, is that during each period 'Australian law … moved steadily away from its English parent'.[1] These findings are consistent with the findings in this thesis that the establishment and *improvement* of criminal process in NSW challenged the power of a dominant colonial minority, who primarily identified as British in a way that colonised and many working-class peoples did not, and whose grip on both the law and main organs of economic production coincided.

During the 'frontier period', as Kercher has commented, colonial authorities had 'a practical opportunity to reject English legal principles'.[2] As this thesis has found, a powerful and privileged minority of squatter-magistrates was certainly attuned to such an opportunity and acted upon it with zeal. However, its jettisoning of English legal principles was so dramatic and severe that it represented an assault on basic civil liberties that had long been established in the imperial metropole. Consequently, progressive law reform in NSW during this period was predominantly limited to

[1] Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995) 203; see also Michael Kirby, 'Living With Legal History in the Courts' (2003) 3 *Australian Journal of Legal History* 17.
[2] Kercher, above n 1, 202.

securing and establishing the foundations of democratic process already won and implemented in the metropole. The rights of 'freeborn Englishmen' were important in this respect. But so too was the recognition and enforcement of a more universal code of civic, political, social and cultural rights – a moral economy and an appeal to the common 'customs' of convicts, free labourers and Aboriginal people – the colonised and working-class peoples of the Empire.

Popular struggles and resistance during this period began with episodic violence and dissent by colonised and working-class peoples, and often resulted in legitimate, progressive law reform (as the table shows). Popular dissent triggered colonial and parliamentary inquiries, petitions, judicial decisions and ultimately legislation that saw the following concrete reforms:

- Improved rations and prison conditions;
- An end to flogging and corporal punishment;
- An end to transportation and indenture;
- A separation of powers;
- Reform to police brutality and corruption;
- The implementation of a 'ticket of leave' or parole system;
- The end of punishment by masters as magistrates;
- The professionalisation of the magistracy (stipendiary magistrates);
- An impartial tribunal of fact (judges or juries);
- Caps on punishments available to magistrates;
- Challenges to settler sovereignty and limited recognition of Aboriginal sovereignty; and
- Representative democracy.

While many of these reforms originated from popular resistance during the frontier period, many were overseen by the Second NSW Supreme Court in the period

between 1824 and 1850. It was during this time that a middle class of civic radicals began to form powerful alliances against the dominant minority in colonial NSW. Accordingly, struggles for law reform became more organised, and less violent and unpredictable. Reform to criminal process during this period was predominantly done discursively, through appeals to rights and law in courtrooms, in petitions, in the press, in the NSW Legislative Council and at meetings of workers and guildsmen. As Chapters 3 and 4 demonstrated, colonised and working-class peoples contributed to this discourse by articulating their rights and the law across a range of legal spaces. One of the most distinctive aspects of criminal law reform during this period was a link with an emerging organised labour movement. Struggles waged predominantly during this period saw the implementation of the following reforms to criminal process:

- The right (of accused people, approvers and Indigenous people) to give sworn evidence;
- The right of accused people to court process (such as calling witnesses, issuing subpoenas and adequate resources to do so);
- A statutory defence of 'reasonable and sufficient excuse';
- The rule against retrospective prosecution;
- The right to cross-examination;
- The right to silence (protection against self-incrimination and voluntariness of confessional evidence);
- The presumption of innocence;
- The prohibition against adverse inference;
- The burden of proof;
- The standard of proof;
- The right to counsel;
- Identity evidence;

- Alibi evidence;
- Hearsay evidence;
- The 'best evidence rule' (documentary evidence);
- Opinion evidence;
- Credibility evidence;
- Character evidence;
- Privileged communications, immunities and incapacities;
- Enforcement of rules of evidence in summary proceedings;
- Mitigating factors on sentence;
- Proportionality;
- Strict pleading and drafting of criminal charges, information and indictment;
- Strict drafting of criminal process (warrant, summons, subpoena);
- Limitations on search warrants;
- Bail/*habeas corpus*;
- adjournment / adequate time and facilities to prepare a defence;
- The right to a written copy of depositions and charges;
- Jury trial;
- The tort of wrongful imprisonment and arrest (and damages);
- Decriminalisation of breach of contract and work discipline offences;
- Civic legal aid service;
- Right to appeal / extension of time to appeal)/ 'supremacy clause';
- Public 'open' justice.

These reforms represented an adoption of English criminal process in the colony. For Kercher and others, it was a distinctive national or colonial legal identity that lay behind the achievement of these fairer outcomes. Kercher explains a process of

adaptation of British law to the particular 'colonial circumstances' of NSW through the mechanism of 'repugnancy provisions' enacted and overseen by Sir Francis Forbes from the mid-1820s, and by other judges up to the mid-1930s.[3] While this certainly occurred at the highest reaches of local colonial power, the repugnancy provisions and the inception of an Australian nationalist legal discourse were not, on their own, determinative of juridical democracy. Rather, as this thesis concludes, reform to criminal process owed as much to popular agitation against authoritarian legal and political power in *both* colony and metropole, and to an international solidarity between working-class people. It built upon the 'unruly' but determined resistance of colonised and working-class peoples to a brutal mode of rule and governance. As Australian labour historians have shown, the outcomes of these reforms within the colony meant that the experience of labour law (subject to criminal sanctions) became very different for free labourers in the colony compared to the metropole. Accordingly, in the colony, reform not only democratised criminal law but labour law.

The commencement of the era of 'responsible government' in NSW, from the 1850s to 1861, saw reform occur under yet another very different set of colonial circumstances. The establishment of an electoral franchise in NSW in 1843 meant that elections of legislative councillors were open to any person on the basis of a property qualification.[4] In 1857, however, all resident, natural-born or naturalised male British subjects who were free from imprisonment and over the age of 21 were

[3] Kercher, above n 1, 103-123 and 202-203. 'Repugnancy provisions' provide a legal mechanism by which a superior legal jurisdiction maintains power over an inferior legal jurisdiction by invalidating any laws of the inferior jurisdiction that are inconsistent with or 'repugnant' to the laws of the superior jurisdiction. A contemporary example of a repugnancy provision is s. 109 of the Australian *Constitution* which specifies the relationship between the laws of the Australian Commonwealth Government and the six Australian States.

[4] Voting was restricted to any person holding freehold property to the value of £100, holding leasehold property to the annual value of £10, possessing a pastoral licence, having a salary of £100 per year, paying board for lodgings to the value of £40 per year: *The Electoral Atlas of NSW* (NSW Department of Lands Electoral Mapping Unit, 2006).

entitled to vote[5] – 'universal manhood suffrage'. Indigenous men were included in the franchise (although very few were enrolled to vote).[6] The transformation of criminal process that owed its existence to this electoral franchise and representative parliamentary democracy in the late 1850s and early 1860s included the following reforms:

- Professionalisation of the magistracy;
- Restrictions on magistrates' sentencing dispositions (punishment capped at six months imprisonment);
- Juvenile Offenders Act (increase in age limit of juvenile offenders to 16 and summary trial and punishment for children);
- Larceny Summary Jurisdiction Act (summary trial of theft offences involving goods valued at less than 40 shillings);
- Uniform Procedure law (the *Jervis Acts 1848*) and its reform/adaptation to colonial NSW; and
- The right of Aboriginal people, criminal accused and accomplices to give evidence (occurring between 1878 and 1891).

As the final two chapters of this thesis have shown, the state of political hegemony that existed throughout the latter two periods (between 1823 to 1861) played a formative role in implementing reform. The schism between the judiciary and the legal profession on one hand, and the lay magistracy and the squattocracy on the other, meant that the subjects of criminal law and civic radicals had powerful allies at the highest reaches of colonial power. Together, they formed a democratic majority who were able to influence and reform the law against the power of a dominant minority who wielded criminal process in their own interests.

[5] Ibid.
[6] Australian Electoral Commission, *History of the Indigenous Vote* (2006) 1.

Since the colonial period, criminal process has undoubtedly remained the primary coercive mechanism of the Australia State, consistently punishing the most marginalised of Australian society, with divisive social consequences. Radicals, lawyers and humanitarian reformers, meanwhile, have continued to struggle for reform to the criminal law and, until the mid-1980s, achieved significant change to fair trial rights and civil liberties in NSW. These changes accompanied the amelioration of many of the more extreme social problems from throughout the period analysed in this thesis - primarily due to the intervention of the welfare state since the post-war period. Since this time, however, relationships involving land, labour and coercive law – those that defined shared relationships and commonalities between colonised and working-class peoples throughout the colonial period - have re-emerged within contemporary society as defining trajectories of social and political inequality.

At present, much democratic reform to criminal process documented by this thesis is in a state of reverse. Much of the hard-won progress during the colonial period and beyond is being wound back. Procedural rights and civil liberties have been curbed in the name of 'fiscal emergencies' and 'national security'. The growth of 'tougher' sentences and bail laws occupies public discussion of procedural law, while new sentencing laws extend prison time, particularly for summary offences, well beyond the limits of the 1861 reforms. Forays into 'therapeutic justice' experiments occasionally provide scant window-dressing for a massive network of new prisons, prison industries and overcrowded prison conditions, with an ever-shrinking emphasis on education and rehabilitation on the inside. Meanwhile, Royal Commissions are ordered into the subjects of old Royal Commissions. At the time of concluding this thesis another Royal Commission has been announced concerning the issue of Indigenous imprisonment. While recommendations and findings stack

up, they are conveniently shelved, along with those of previous inquiries. Contextual criminology and sociology have, for some time, provided answers to these difficult social and legal questions. Yet 'popular punitiveness', not 'rights' and 'liberties', sets the tone of popular debate.[7] It is in this context that a history of colonial criminal process and its crucial connection to the social and radical history of democracy provides an alternative critical perspective to inform and contribute to public understanding of this commonly misconceived issue.

[7] Anthony Bottoms, 'The Philosophy and Politics of Punishment and Sentencing', in C. Clarkson and R. Morgan (eds) *The Politics of Sentencing Reform* (Clarendon Press, 1995) 40.

Reform to Criminal Process Table

This table provides a snapshot of reform to criminal process by examining episodes of resistance and reform (origins of reform) along with the agents of social change who implemented legal change over time. Such a perspective makes it possible to see the social democratic underpinnings of reform. This table does not refer to each specific episode of resistance or reform. Indeed, the methodology of this thesis is not to provide an exhaustive summary of every single such episode. Given that each episode often involved multiple actors (from one or two to upwards of 5,000) and that the numbers provided in the archive are often estimates, such an exercise would itself be inexact.

Reform	**Origin of Reform**	**Agents of Change**	
Improved rations and prison conditions	Escape, excarceration, bushranging, strikes, riots, combination, Inquiry into Convict Complaints (1832), appeals to rights, appeals to law, complaints against masters, courtroom protest, newspaper exposé, publication of convict letters.	Convicts, prisoners, newspaper editors, lawyers, governors.	Ch. 2, 3, 4
Reform to flogging and corporal punishment	Escape, excarceration, bushranging, attacks on prison authorities, Inquiry into Convict Complaints. strikes, riots, combination, appeals to rights, appeals to law, reciprocal punishment of magistrates, House of Commons Inquiry into the Conduct of Magistrates in New South Wales in Directing the Infliction of Punishments upon Prisoners in that Colony (1826), courtroom protest, newspaper exposé, publication of convict letters, publication of books, pamphlets, extension of the voting franchise, petitions, gubernatorial intervention, '50 Lashes Act' (1832), directions from the Secretary of State for the Colonies.	Convicts, Irish rebels, Aboriginal people, prisoners, newspaper editors, civic radicals, lawyers, judges, politicians, governors.	Ch. 2, 3, 4, 6
End of transportation and indenture/ Improved indentured living conditions	Escape, excarceration, bushranging, theft, attacks against masters, Inquiry into Convict Complaints (1832), refusal to work, strikes, riots, combination, mutiny, appeals to rights, appeals to law, complaints against masters, courtroom protest, Molesworth Select Committee into Transportation (1837), Anti-Transportation League, newspaper exposé, publication of convict letters, publication of books,	Convicts, prisoners, newspaper editors, workers, lawyers, judges, governors, politicians.	Ch. 2, 3, 4, 6

	pamphlets, extension of the voting franchise, petitions, public meetings, rallies, demonstrations.		
Improvements to prison labour conditions	Escape, excarceration, bushranging, Inquiry into Convict Complaints, refusal to work, strikes, riots, combination, appeals to rights, appeals to law, courtroom protest, newspaper exposé, publication of convict letters.	Convicts, prisoners, newspaper editors, civic radicals, governors.	Ch. 2, 3, 4
Separation of Powers	Escape (the Sudds and Thompson affair), abolition of the role of Judge-Advocate**,** petitions, common law, charter of fair trial rights and police procedure, complaint to the Supreme Court, *(Third) Charter of Justice 1823* ('supremacy clause').	Soldiers, lawyers, 'emancipist attornies', newspaper editors, civic radicals, judges.	Ch. 2, 4, 5, 6
Reform to police brutality/ Implementation of police guidelines	Attacks on police, riots, appeals to rights, appeals to law, complaints against police, courtroom protest, newspaper exposé, complaints, introduction of stipendiary magistrates, Select Committee on the Unpaid Magistracy, courtroom protest, charter of fair trial rights and police procedure.	Convicts, workers, Aboriginal people, civic radicals, newspaper editors, politicians.	Ch. 2, 3, 4, 5.
Reform to police process corruption	Attacks on police, riots, appeals to rights, appeals to law, complaints against police, courtroom protest, newspaper exposé, complaints, petitions, introduction of stipendiary magistrates, Select Committee on the Unpaid Magistracy, courtroom protest, charter of fair trial rights and police procedure.	Convicts, workers, Aboriginal people, civic radicals, newspaper editors, politicians,	Ch. 2, 3, 4, 5.
Tickets of leave (from indenture and imprisonment) / Parole	Escape, attacks on prison authorities, Inquiry into Convict Complaints, strikes, riots, combination, mutiny, appeals to rights, appeals to law, complaints against authorities, complaints against masters.	Convicts, prisoners, Governors.	Ch. 2, 3, 4
The end of punishment by masters as magistrates	Escape, attacks on masters, petition by working-men of Sydney, appeals to rights, appeals to law, newspaper exposé, appointment of emancipist magistrates, public meetings, rallies, demonstrations, *Sydney City Incorporation Act 1842*, *Sydney Police*	Convicts, newspaper editors, civic radicals,	Ch. 2, 3, 4, 5, 6.

	Act 1842, charter of fair trial rights and police procedure.	workers, lawyers, governors, stipendiary magistrates.	
Stipendiary magistrates / Professionalisation of the magistracy	Escape, attacks on masters, petition by working men of Sydney, appeals to rights, appeals to law, newspaper exposé, appointment of emancipist magistrates, public meetings, rallies, demonstrations, *Sydney City Incorporation Act 1842*, *Sydney Police Act 1842*, Select Committee on the Unpaid Magistracy, *Jervis Act Amendment 1853*, common law, judicial recommendations to the Governor, appellate court intervention, gubernatorial intervention.	Convicts, newspaper editors, civic radicals, workers, lawyers, governors, stipendiary magistrates, politicians.	Ch. 2, 3, 4, 6.
Impartial tribunal of fact	Appeals to rights and appeals to law, courtroom protest, newspaper exposé, pamphlets, extension of the voting franchise, petitions, appointment of emancipist magistrates, common law, public meetings, rallies, demonstrations, *Sydney City Incorporation Act 1842*, *Sydney Police Act 1842*, Select Committee on the Unpaid Magistracy, courtroom protest, charter of fair trial rights and police procedure, *Jervis Act Amendment 1853*, judicial recommendations to the Governor, gubernatorial intervention, *NSW Act 1823*.	Convicts, workers, civic radicals, newspaper editors, lawyers, judges, governors, politicians, stipendiary magistrates.	Ch. 3, 4, 5, 6
Magistrates (Powers Limitations) Bill (capping summary punishment at 6 months imprisonment)	Attacks on magistrates, appeals to rights and appeals to law, courtroom protest, newspaper exposé, pamphlets, extension of the voting franchise, petitions, appointment of emancipist magistrates, common law, gubernatorial intervention, public meetings, rallies, demonstrations, *Sydney City Incorporation Act 1842*, *Sydney Police Act 1842*, Select Committee on the Unpaid Magistracy, charter of fair trial rights and police procedure, *Jervis Act Amendment 1853*.	Convicts, workers, civic radicals, newspaper editors, lawyers, judges, governors, politicians.	Ch. 2, 3, 4, 5, 6
Recovery of unpaid wages and compensation for	Attacks on masters, theft, sabotage, rickburning, arson, cattle-theft, refusal to work, strikes, riots, combination, mutiny, appeals to rights, appeals to law, complaints against masters, petitions, common law, Anti-Transportation League,	Convicts, workers, soldiers, newspaper editors, Aboriginal	Ch. 2, 3, 4, 6

overtime, poor treatment in the workplace, starvation wages	public meetings, rallies, demonstrations, pamphlets, extension of the voting franchise, petitions, public meetings, rallies, demonstrations, Chartists, suffrage, increased franchise, Select Committees on the Administration of Justice in the Country Districts, Select Committee on Master and Servant law, Select Committee on the Unpaid Magistracy, procedural technicality, strict pleading and legal drafting, Challenging the form of the Information, including the description of offence, jurisdiction, warrant or summons, by finding errors and, or omissions in those documents, cross-examination of prosecution witnesses to discredit their character or show inconsistency in their evidence, proving that an arresting official or employer had broken a procedural or contractual rule, issuing writs of habeus corpus or certiorari to the Supreme Court, using legal proceedings to exposé social grievances and problems.	people, lawyers, judges, politicians.	
Challenging settler sovereignty, territorialisation of Aboriginal land /Recognition of Aboriginal sovereignty.	War, attacks on masters, squatters, bushranging, theft, sabotage, rickburning, arson, cattle-theft, combination, appeals to rights, appeals to law, courtroom protest, newspaper exposé, *Aboriginal Protection Act,* prosecutions for Aboriginal massacres, submissions on genocide and dispossession in court as a defence to 'depredations' on settlers.	Aboriginal people, convicts, newspaper editors, civic radicals, lawyers, judges, governors.	Ch. 2, 3, 4, 6, 7.
Universal manhood suffrage	Riots, appeals to rights, pamphlets, petitions, Anti-Transportation League, Chartists, extension of the voting franchise, reform to the Municipal Franchise.	Workers, civic radicals, newspaper editors, soldiers, politicians.	Ch. 2, 3, 4
Right to Give Evidence – Defendants, Approvers, Aboriginal people	Appeals to rights, unsworn statements, written statements, convention, convict pardons, the best evidence rule, cross-examination, appeals to Aboriginal witnesses by colonial authorities and criminal accused, correspondence from frontier missionaries to the colonial office.	Convicts, workers, Aboriginal people, lawyers, judges, governors, attornies-general, missionaries, interpreters.	Ch. 3, 7

Right of defendants to call witnesses, issue subpoenas and the provision of adequate resources to do so	Courtroom protest, courtroom submissions, legislative intervention, *Jervis Act Amendment Act 1853,* judicial intervention.	Convicts, lawyers, judges, politicians.	Ch. 3, 5, 6
Statutory Defence (of 'reasonable and sufficient excuse' (under the *Masters and Servants Act 1840*))	Appeals to rights and appeals to law, newspaper coverage, pamphlets, extension of the voting franchise, petitions, public meetings, rallies, demonstrations.	Workers, civic radicals, newspaper editors, judges, politicians.	Ch. 4
Rule against retrospective prosecution	Autrefois acquit/convict ('double jeopardy'), strict pleading (requirement that each element of the offence be pleaded in the charge), common law, arrest of judgment, legal commentary, gubernatorial intervention.	Lawyers, judges, governors.	Ch. 6
Right to Cross-Examination	Appeals to law, courtroom advocacy, common law, *Jervis Acts.*	Convicts, civic radicals, reformers, politicians.	Ch. 3, 5
Right to silence (protection against self-incrimination and voluntariness of confessional evidence)	Appeals to law, appeals to rights, *Jervis Acts,* common law, public meetings, rallies, demonstrations, courtroom protest, civic legal aid advice, charter of fair trial rights and police procedure, no prosecution right to defence evidence before trial, *Plunkett's Manual*, submissions in court, *Inquiry into the Infliction of Punishment upon Prisoners 1826 (UK)*, legal commentary, compulsory cautioning of accused and accomplices in court and provision of legal advice before the giving of evidence, exclusion of involuntary confession.	Levellers, British political dissidents, convicts, civic radicals, newspaper editors, lawyers, judges, politicians, attorney-general, legal academics.	Ch. 3, 4, 5, 6, 7
Presumption of Innocence	Appeals to law, appeals to rights, *Jervis Acts,* common law, public meetings, rallies, demonstrations, courtroom protest, civic legal aid advice, charter of fair trial rights and police procedure, no prosecution right to defence evidence before trial, *Plunkett's Manual*, submissions in court, *Inquiry into the Infliction of Punishment upon Prisoners 1826 (UK)*, legal commentary, *Australian Courts Act 1828* (repugnancy	Levellers, British political dissidents, convicts, civic radicals, newspaper editors, lawyers,	Ch. 7

	provisions), instructions to jury.	judges, politicians, attorney-general, legal academics.	
Prohibition Against Adverse Inference	Directions to juries to construe evidence *in favorum vitae* (in favour of life).	Lawyers, judges.	Ch. 7
Burden of Proof	Appeals to law, denial of charges, common law, charter of fair trial rights and police procedure, submissions in court, *Australian Courts Act 1828* (repugnancy provisions), instructions to jury.	Convicts, newspaper editors, Lawyers, judges.	Ch. 3, 5, 7
Standard of Proof	Appeals to law, common law, public meetings, rallies, demonstrations, courtroom protest, charter of fair trial rights and police procedure, appellate court intervention, legal commentary, *Australian Courts Act 1828* (repugnancy provisions), instructions to jury.	Convicts, newspaper editors, lawyers, workers, judges.	Ch. 3, 4, 5, 6, 7
Right to Counsel	Appeals to law, collective revenue raising, common law, *Prisoners' Counsel Act*, submissions in court, appeals to higher courts from magistrates and prison authorities, the *Jervis Acts*, as 'a consequence of a constitutional right'.	Convicts, workers, civic radicals, lawyers, judges, politicians.	Ch. 3, 5, 7
Identity Evidence	Appeals to law, unsworn statements, calling witnesses, common law, charter of fair trial rights and police procedure, blaming a co-accused.	Convicts, Aboriginal people, civic radicals, newspaper editors, lawyers, lawyers, judges.	Ch. 3, 5, 6, 7
Alibi Evidence	Appeals to law, unsworn statements, calling witnesses, common law, charter of fair trial rights and police procedure.	Convicts, Aboriginal people, civic radicals, newspaper editors, lawyers, judges.	Ch. 3, 5,
Hearsay Evidence	Appeals to law, common law, charter of fair trial rights and police procedure, *Plunkett's Manual*, courtroom submissions, exclusion of 'dying declarations',	Convicts, lawyers, civic radicals,	Ch. 3, 5, 7

	directions to magistrates, appellate review, cross-examination, oath-taking.	newspaper editors, judges, attorney-general.	
The 'best evidence rule' (documentary evidence)	Submissions in court, judgments, *Plunkett's Manual,* requirement of documentary evidence of convict attaint, requirement of physical documentary evidence in counterfeiting cases.	Emancipist attorneys, lawyers, judges, attorney-general.	Ch. 7
Opinion Evidence	Submissions in court, judgments, *Plunkett's Manual,* cross-examination, expert qualifications.	Lawyers, judges, attorney-general.	Ch. 7
Credibility Evidence	Submissions in court, judgments, *Plunkett's Manual*, requiring witnesses to give evidence in person, cross-examination, testing of approver evidence.	Lawyers, judges, attorney-general.	Ch. 7
(Manipulation of) Character Evidence	Appeals to law, common law, submission in court, *Plunkett's Manual,* appointment of emancipists to the magistracy, pardons, 'law agents', requirement of documentary evidence of attaint, use of approver evidence to obtain acquittal.	Convicts, lawyers, judges, attorney-general, newspaper editors, governors, emancipist magistrates.	Ch. 3, 7
Privileged Communications, Immunities and Incapacities	Submissions in court, judgments, *Plunkett's Manual.*	Lawyers, judges, attorney-general.	Ch. 7
Enforcement of rules of evidence in summary proceedings	Appeals to rights and law, common law, charter of fair trial rights and police procedure, *Jervis Acts Amendment Act 1853,* judicial recommendations to the Governor, appellate court intervention.	Civic radicals, workers, newspaper editors, politicians, lawyers, judges.	Ch. 4, 5, 6
Mitigating factors on Sentence	Appeals to law, sentence bargaining, use of character evidence, common law.	Convicts, lawyers, judges, attorney-general.	Ch. 3, 7
Proportionality	Appeals to law, sentence bargaining, use of character evidence, common law,	Convicts, lawyers,	Ch. 3, 4, 5,

	demonstrations, public meeting, rallies, *Sydney City Incorporation Act 1842*, *Sydney Police Act 1842,* quantitative analysis of crime and social conditions, Benevolent Society statistics, *Juvenile Offenders Act*, Select Committee on the Unpaid Magistracy, Magistrates (Powers Limitations) Bill, *Jervis Act Amendment Act 1853*, gubernatorial intervention, appellate court intervention.	workers, judges, politicians, stipendiary magistrates.	7
Strict Pleading and Drafting of Criminal Charges, Information and Indictment	Appeals to law, common law, public meetings, rallies, demonstrations, introduction of stipendiary magistrates, Select Committee on the Unpaid Magistracy, courtroom protest, courtroom protest, submissions in court, appeals to higher courts from magistrates and prison authorities, judicial recommendations to the Governor, appellate court intervention, jurisdictional technicality (classification of a charge as either a complaint, information, or indictment), content, specificity and particulars of a charge, common law, judicial interpretation, requirement that each element of the offence be pleaded in the charge.	Convicts, newspaper editors, workers, civic radicals, lawyers, judges.	Ch. 3, 4, 5, 6
Strict Drafting of Criminal Process (Warrant, Summons, Subpoena)	Appeals to law, common law , introduction of stipendiary magistrates, Select Committee on the Unpaid Magistracy , courtroom protest, submissions in court, appeals to higher courts from magistrates and prison authorities, *Jervis Acts*, judicial recommendations to the Governor, appellate court intervention, judicial intervention, Plunkett's Magistrate's manual.	Convicts, workers, civic radicals, newspaper editors, lawyers, judges, attorney-general.	Ch. 3, 4, 5, 6
Limitations on Search Warrants	Courtroom protest, appellate review and intervention, common law.	Defendants, lawyers, judges.	Ch. 3, 6.

Bail/*Habeus Corpus*	Appeals to law, submissions in court, appeals to higher courts from magistrates and prison authorities, the *Jervis Acts*, *Jervis Act Amendment Act 1853*, appellate court intervention, *Magna Carta*, the writ system.	Convicts, civic radicals, newspaper editors, lawyers, judges.	Ch. 3, 4, 5, 6
Adjournment / Adequate time and facilities to prepare a defence	Appeals to law, *Jervis Acts* and amending act, courtroom protest.	Convicts, civic radicals, Judges.	Ch 3, 5
Right to a written copy of depositions and charges	Appeals to law, common law, introduction of stipendiary magistrates, Select Committee on the Unpaid Magistracy, courtroom protest, courtroom protest, *Prisoners' Counsel Act, Jervis Acts*, common law, appellate court intervention.	Convicts, newspaper editors, civic radicals, lawyers, judges, politicians.	Ch. 3, 4, 5, 6, 7
Jury Trial	Newspaper articles, petitions, common law, legislative drafting, increasing numbers of military jurors, civilian juries, disobeying colonial authorities, public meetings, rallies, demonstrations, appellate court intervention, gubernatorial intervention, 'Constitutional' rights, the writ system, legal commentary, common law, judicial interpretation.	Newspaper editors, civic radicals, lawyers, judges, governors, attorney-general.	Ch. 4, 6
The tort of wrongful imprisonment and arrest (and damages)	Civil claims, common law, introduction of stipendiary magistrates, Select Committee on the Unpaid Magistracy, breach of the presumption of innocence and the burden of proof.	Newspaper editors, civic radicals, lawyers, judges.	Ch. 4, 5, 7
Decriminalisation of breach of contract and work discipline offences	Appeals to rights and appeals to law, newspaper coverage, pamphlets, extension of the voting franchise, petitions, public meetings, rallies, demonstrations, suffrage, increased franchise, Select Committees on the Administration of Justice in the Country Districts, Select Committee on Master and Servant law.	Workers, civic radicals, newspaper editors, judges, politicians.	Ch. 3, 4
Juvenile Offenders Act (increase in age limit of juvenile offenders to 16 and summary trial and	Suffrage, increased franchise, petitions, rallies, demonstrations, quantitative analysis of crime and social conditions, Benevolent Society statistics, *Juvenile Offenders Act*.	Lawyers, politicians, civic radicals.	Ch. 4

punishment for children)			
Larceny Summary Jurisdiction Act (summary trial of theft offences involving goods valued at less than 40 shillings)	Suffrage, increased franchise, petitions, rallies, demonstrations, quantitative analysis of crime and social conditions, Benevolent Society statistics, *Juvenile Offenders Act.*	Lawyers, politicians, civic radicals.	Ch. 4
Uniform Procedure (the *Jervis Acts 1848*) and their reform//adaptation to colonial NSW	Charter of fair trial rights and police procedure, courtroom protest.	Civic radicals, lawyers, politicians, newspaper editors.	Ch. 4, 5
Civic legal aid service	Volunteer legal advice; attendance of police cells and magistrates courts by volunteers; judicial orders to officers of the court (lawyers) in the case of unrepresented accused in serious matters.	Civic radicals, lawyers, judges.	Ch. 5, 7
Right to Appeal / extension of time to appeal)/ 'Supremacy clause'	Courtroom protest, submissions in court, common law, *Jervis Acts, Jervis Act Amendment Act 1853*, *Third) Charter of Justice 1823* ('supremacy clause'), appellate court intervention, the writ system (mandamus, habeas corpus, quo warranto, prohibition and certiorari).	Convicts, lawyers, politicians, judges.	Ch. 3, 5, 6
Public 'open' justice	Courtroom protest, courtroom submissions, *Jervis Act Amendment Act 1853*.	Convicts, lawyers, newspaper editors, civic radicals, politicians, judges	Ch. 3, 5.

Appendix

Note: The information extracted in this appendix is signposted in the chapters. It contains auxiliary evidence and, in some cases, finer detail than that provided throughout the body of the thesis.

Chapter 3

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On pleading guilty to a charge of being an 'idle and disorderly person', Catherine Hudgy of Parramatta met the charge with relevant evidence, informing the court that 'a Mr Isaacs whom wanted a cook … would employ her directly'.[1] She was released from custody on condition that she accept this offer of employment.[2] Ellen Spears was charged with disorderliness in public. She pleaded guilty. Asked whether she was drunk, she replied, 'I wasn't drunk and I wasn't sober'.[3] At this, the Magistrate threatened imprisonment, to which Spears implored him to 'think of (her) poor little children'.[4] She received a fine. Another defendant pleaded guilty to 'being a runaway'. He told the court:

> I am an ould sojer, sir (says I), and was tried by general Court Martial, twelve years ago, and transported, sir (says I) and I worked at Menangles sir, (says I) at Mr Tapiers sir, and I am free by servitude, sir, and I lost my certificate, sir.[5]

Such a heartfelt plea appeared to have satisfied the bench of the man's innocence (and confusion) and he was discharged. Other defendants appealed to humour to mitigate their fate. As another prisoner, charged with 'drunkenness', told the court

[1] *The Parramatta Chronicle (TPC),* 13 January 1844, 2.
[2] Ibid.
[3] *TPC,* 20 January 1844, 2.
[4] Ibid.
[5] *TPC,* 10 February 1844, 4.

'he was a carpenter, but the traps (Police) had nailed him and he saw plane that they wanted to chisel him, so he must gouge out the brades'.[6] He received a fine instead of imprisonment.

P. 114

Prisoners who were able to use procedure in their favour, however, were not always guaranteed a fair outcome. In the Norfolk Island uprising case, heard before the Assize jurisdiction of the Supreme Court on the Island, prisoners sought time to prepare and complained about their lack of preparation.[7] In support of their submission for more time, they emphasised the seriousness of the offence and the consequences (the death penalty) upon conviction. The prisoners persuaded the court to grant them 24 hours to prepare. In court the following day, the prisoners used proceedings to draw attention to the plight of prisoners on the island. One accused said that his 'deplorable condition…had …induced' him to obtain 'his liberty' and 'therefore hoped his Honour the Judge would endeavour to obtain for the prisoners on the Island *some change of system which would better their situation*, and give them some hope of pardon if their conduct should deserve it'.[8] Burton J realised that the prisoners were all 'men of capacity and understanding', but hanged them anyway.[9]

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[6] (underlining theirs) *TPC,* 31 August 1844, 3. Note: 'Brades' was the brand of an eighteenth century English tack-hammer that came to be used as an adjective to describe nails or pins that had been hammered into wood.
[7] *R v Douglas and others* [1834] NSWSupC 81, *Sydney Gazette,* 10, 11, 12, 14, 22 July, 20 September 1834.
[8] (Emphasis added) Ibid.
[9] Ibid.

R v Jenkins and Tattersdale [1834][10] concerned the trial of two co-accused charged with the murder of liberal reformer, journalist and barrister, Dr Robert Wardell, at his estate in Petersham. They were represented by a junior member of the Bar, Joseph Kinsman, who was no match for the intimidating authority of the prosecutor, Attorney-General John Plunkett. Plunkett attempted to bend procedure on behalf of the powerful men of the law who were clearly aggrieved by the loss of their colleague. He started by objecting to the appearance of defence counsel and then moved to have Kinsman disbarred. In the face of this pressure, as one of the co-accused later told the court, 'Mr Kinsman had shrunk from his duties'. Both co-accused were convicted. Upon the verdict being read, one of the co-accused, Jenkins, made an application for arrest of judgment. He claimed 'he had not had a fair trial in the first place, that b-ody old woman (his counsel), had been shoved in upon them for the purpose of leading them to their destruction'. The prisoner continued, saying 'he could have conducted his own case with a better chance of justice; and to shew the manner in which the feeling was against him - the Jury were not out a second, when they brought him in guilty'. Jenkins' tirade here is important, not simply because he decried the misuse of trial procedure. Rather, it demonstrates the expression of an entitlement by a prisoner at the bar to (competent) counsel, only two years before the passing of the *Prisoner's Counsel Act 1836*.[11] Furthermore, as the Attorney-General showed, such a right could be threatened at the mere submission of prosecuting counsel.

Jenkins' oratory did not save him from the death penalty and, no sooner was the sentence handed down, he exclaimed that he 'did not care a b-ody d-n for either Judge or Jury, or the whole b-ody Court, when (he) would shoot with the greatest

[10] NSWSupC118, *Sydney Gazette,* 25 September 1834; *Australian,* 26 September 1834; *Sydney Herald,* 10 November 1834.
[11] (UK) (6 and 7 Wm IV c 114).

pleasure if he had his gun here'.[12] Jenkins rampaged through the court striking the dock with his fists. His protest appears to have resonated with other members of his 'ruffian' class in the dock. As the *Gazette* reported, 'some few ruffians' were 'observed to exchange smiles with the prisoner during the trial, who seemed gratified at the … ferocity of (his) conduct; indeed, one ruffian was heard to say, what a pity such a fine fellow should die such a death'.[13] Next, Jenkins attempted to use proceedings before the court to confess to 'several robberies of various descriptions' of which he 'could furnish ample proof of him being the depredator'.[14] His intention was to ensure 'that after his death innocent persons might not suffer for the same'.[15] The court refused to hear him, but that did not end Jenkins' radical tirade. At the scaffold, the *Australian* reported Jenkins:

> addressed his fellow prisoners as fellows: - Good morning my lads, as I have not much time to spare I shall only just tell you that I shot the Doctor for your benefit; he was a tyrant, and if any of you shoould (sic) ever take the bush, I hope you will kill every b-ody tyrant you come across. He confessed having committed many robberies in the bush, and concluded by requesting the people pray for him.[16]

Jenkins showed contempt for his partner in crime (Tattersdale) who confessed to the killing at trial and threw himself on the mercy of the court. Jenkins leapt the dock and punched Tattersdale twice in the face upon his confession. At the gallows, he refused to shake Tattersdale's hand before they dropped. As vicious and callous as Jenkins was, he was no respecter of those who betrayed the solidarity of the many against the few.

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[12] *SG,* 25 September 1834.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] *The Australian,* 26 September 1834.

The case of *R v White, Leary and Price* (1828)[17] further illustrates the understanding that many prisoners had of the complexity of trial procedure and their right to counsel in enabling them to negotiate it. All three co-accused refused to enter a plea in respect to a charge of sheep stealing unless provided legal representation. They also understood enough procedural law to demand that the court organise the attendance of their witnesses, 'owing to lack of means to subpoena them'.[18] The court advised that the correct procedure was for a subpoena to issue through the gaol. One of the prisoners replied that they 'had given the required notice to a deputy officer in the gaol, who refused to listen to their application'.[19] The trial proceeded despite their demands. Nevertheless, the court agreed to subpoena defence witnesses on behalf of all the prisoners, resulting in only one co-accused being convicted.

The case of highwayman Thomas Smith in 1834 shows that prisoners used technical process to mitigate the authoritarian effects of criminal process. Smith appeared self-represented at his trial before Justice Burton. He was dragged from the dock to the bar table, where he told the court 'that he had subpoenaed Mr. Thomas Raine, a material witness on his behalf, who had not attended and the Jury, on the evidence before them, had returned a verdict of guilty'.[20] He was sentenced to death but, in view of the circumstances raised by the prisoner, Justice Burton referred the case to the Legislative Council and recommended mercy.

Similarly, when John Trotter was convicted of cattle stealing in 1826, he appealed to the Supreme Court, stating that he had a defence witness who could prove his innocence but whom he could not afford to summons. The Chief Justice told him that 'nothing had been brought before the Court in extenuation' but that 'any proofs

[17] Sel Cas (Dowling) 11; [1828] NSWSupC 79, *Australian,* 17 September 1828.
[18] Ibid.
[19] Ibid.
[20] *R v Smith (No. 1)* [1834] NSWSupC 61, *Sydney Herald,* 22 May 1834.

of innocence which the prisoner might be able to bring forward should be laid before the Governor'.[21] Trotter thus secured for himself a possibility of exoneration.

In *R. v. Muldoon, Bolton, McKoldrick, McMoren and Horan,* five unrepresented prisoners aboard the prison hulk *Phoenix* used a writ of *habeus corpus* to complain to the Supreme Court that they were being held illegally. [22] Their petition stated that the Sydney Bench of Magistrates had ordered them to serve additional prison sentences exceeding their original sentences while they were at liberty on tickets of leave. The court reacted immediately, finding that the magistrates had 'exceeded their jurisdiction' and released three of the prisoners.

P.118

Charged with burglary from a kitchen in 1822, Edward Melville defended himself by writing:

> The kitchen is under the same roof as Peter Stuckey it is my place of abode … a child of about seven years perceived some remarkable communication between the said Mrs Stuckey and your petitioner - which Ann Stuckey was very afraid would reach Peter Stuckey bearing on her character, she thought she might impute this to clear herself.[23]

Here, the defendant shows his awareness of the elements of burglary: that a premises must be entered without the consent of the occupier. In this case, however, the prisoner's defence failed and he hanged.

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[21] *Sydney Gazette,* 28 February 1830.
[22] [1828] NSWSupC 62, *The Australian,* 22 August 1828.
[23] *R v Edward Melville*, CCJ, March 1822, SRNSW, Reel 1976, 2703 [SZ796] 70, p. 95.

Another defendant, William Ring, was charged with receiving. In his defence, he appears to have unwittingly challenged the 'knowledge' or 'intention' element of the offence. And while awaiting trial in prison, he undertook his own detective work. In 1820 he wrote to the prosecutor, acknowledging that he had committed the guilty act of possessing the stolen goods but that:

> I have found the person that I had them things of that I was committed for and should be glad if you would come down to Sydney to me to see if it is the same man that you brought yours of no doubt by description. Five foot three inches, smallpox. So if you will come to Sydney Gaol you will find this man you bought the things of - as soon as possible.[24]

The outcome of this letter remains unknown but it shows that some defendants had a sophisticated understanding of criminal process and attempted to use it to their advantage.

Similarly, in 1820 Dominick McIntyre stood charged with stealing food. In his defence, he impugned the credibility of the prosecution evidence by alleging that the prosecutor and the prosecutor's wife had concocted the case against him. The prosecutor's wife, McIntyre maintained, had 'proposed to her husband that he should swear that the prisoner and a man named Turney, son-in-law to the prosecutor were the Persons that stole the sheep [in order] to extricate himself'.[25] To emphasise his point, McIntyre inverted the Blackstonian maxim on the presumption of innocence. He said that he had heard the prosecutor's wife say 'that she would hang twenty [rather] than he should be hurt'.[26] Accordingly, McIntyre requested the gaoler to 'subpoena three witnesses who had heard the prosecutor and his wife

[24] *R v James Crow, William King, James Kirton*, CCJ December 1820, SRNSW, COD452B, 2703 [SZ792] 22, p. 326.
[25] *Op cit, R v Dominick McIntyre, Daniel Turney*, CCJ, June 1820.
[26] Ibid.

consulting together several times'.[27] In taking the deposition, the clerk of the court added further weight to the defence case, noting that the prisoner 'begs leave (to state)' that, though he lived at the farm, 'the property was found on the prosecutor's part of the farm'.[28] Nevertheless, both defendants were convicted.

P.122

Law reports for many cases throughout the period provide lengthy transcripts of cross-examination by prisoners at Assize and Supreme Court sessions. In the case of *R v Fowler and others* [1835],[29] a convict road-gang turned bushrangers were prosecuted for various bushranging-related offences. They exercised their right to cross-examination against the Chief Constable of Police at Liverpool, Frederick Meredith. One prisoner relentlessly put alternative propositions to the witness. Another prisoner, William Smith, proposed to the witness that:

> Taylor, the hut-keeper, was in the cart which you were driving when I stopped you; he said he had charge of the carts, as the overseer had gone to the contractor's; he was taken into custody as well as the rest, but was discharged by the magistrates.[30]

Another prisoner, Whitehead, invited the witness to comment on the proposition that:

[27] Ibid.
[28] Ibid.
[29] NSWSupC 42
[30] Ibid.

> You were driving the second cart, which was laden with various lumber, and covered with a tarpaulin; I do not remember stating that nothing was found in your cart - the caps were found in a harness-cask in your cart.[31]

While these questions might attract technical legal scrutiny on the basis that they conflate a series of propositions within the one statement, they nevertheless demonstrate a high level of detail and recall by the examiner. In the same case a third prisoner, Burns, was 'a youth about eighteen years of age, who displayed a shrewdness in his cross-examination of the Chief Constable, which will no doubt render him an object of peculiar regard, by his associates in crime'.[32] Poignantly, Burns 'seemed ambitious of being the spokesman, and altogether exhibited a hardihood characteristic of the most experienced delinquent'.[33] He attempted to determine the forensic provenance of a substance that the prosecution alleged was 'gunpowder' by interrogating a police constable. 'I believe there was a small quantity of tobacco dust, and a few hob-nails among the powder and shot; I did not mistake the tobacco dust for powder, and the hob-nails for shot', the Constable answered. Burns' questions even touched upon the police 'chain-of-custody' in collecting and storing the evidence, to which the Chief Constable responded:

> there were about twelve grains of shot; but I did not of course count the grains of powder; I think there was about a small thimble full; it is not in Court; (another) constable neglected to preserve it; it was put on the Magistrates desk and swept off; the constable that took it out of your pocket in my presence, is not here; I did not think it necessary to bring him; the powder and shot was given into my hand, and I put it before the Magistrates.[34]

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[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] Ibid.

Burns used this evidence not only to demonstrate feeble methods of policing in the early colony but also corruption and collusion between police and magistrates.

> A pretty fellow you are for a chief constable; has not brought either powder and shot, which you say were taken out of my pocket, nor the constable who found it; what sort of evidence do you call that? recollect you are not in the Liverpool Court House now, my chap, cutting capers before the Magistrate; you had it all *your own way there* I believe, eh; *you are in the Sydney Court now my lad, you must not think to do as you like here*; I suppose you are aware what an oath is; you know the consequence of telling a lie.[35]

The young bushranger contrasted corrupt policing practices by appealing to the authority and fairness of 'the Sydney Court', the sanctity of the 'oath' and implied that the 'consequences' of dishonest policing were subject to exclusionary rules of evidence. In his closing remarks, Burns alleged a conflict of interest in the police prosecution, drawing the court's attention to the conventional monetary reward received by the Chief Constable of Police as well as the customary policing practice of pilfering money from suspects upon arrest. He asked:

> You thought you would make a good job of us; let's see, there's ten of us; aye, £50 that's not bad; you expected to get all that, did you not? What did you do with my 10s. which you took off me in Liverpool Court House, which *I earned by my industry*?[36]

Despite (or perhaps as a consequence of) Burns' advocacy in this case, a jury found eight of ten co-accused 'guilty' and each of the convicted men was sentenced to death. But the procedural rights exercised by these men challenged dominant forms of power and corruption within police process.

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[35] Ibid.
[36] Ibid.

P. 128

One master complained to the bench that his indentured labourer had refused to take his hat off for him.[37] Another, that his servant had suggested that 'he might go and fuck himself'.[38] Yet another master complained that his convict servant had said 'that it was no use to flog him that he would never be mastered'.[39] One convict, George Wiggey, refused to work and told the court 'he would sooner be up a gum tree then be ordered about by any bugger'.[40] Another convict servant told Magistrate Wentworth that 'he would rather be in the jail gang than with any settler in the country, adding that McNully (overseer) can do the work himself'. He was given 25 lashes and sent back to his master.[41]

P.129

At Yass, one master complained to the Magistrate that he had threatened his servant with prosecution only to be told by his servant: 'you took me there often enough before and I got the better of you'.[42] Process proved a wily beast for another master at Picton. In 1832, the assigned convict John Mullens was charged with insolence on account of 'his looks and manner' in church, described by his master as 'more

[37] Trials of James Redhead, 15 and 22 May 1832, SRNSW, Bench Books [Muswellbrook Court of Petty Sessions], Series 3204, 4/5599, Reel 670.
[38] Trial of James Murray, 1 November 1825, SRNSW, Bench Books [Bathurst Court of Petty Sessions], Series 2772, 2/8323, Reel 663.
[39] Trial of James Blackett, 5 November 1836, SRNSW, Bench Books [Yass Court of Petty Sessions], Series 3559, 4/5709, Reel 682. Blackett was ordered to join an iron gang for 12 months.
[40] Wiggey was punished for 'neglect of duty'. See the trial of George Wiggey, 3 April 1826, Argyle Police district Magistrates Records Berrima-Throsby Park, Mitchell Library, B773, Reel CY 336 – Seq. 2.
[41] John McLaughlin, *The Magistracy in New South Wales, 1788-1850* (PhD Thesis, University of Sydney, 1973) 149.
[42] Alan Atkinson, 'Four Patterns of Convict Protest' (1979) 37 *Labour History* 28, 46.

aggravating than if he had made use of the worst language'.[43] But Magistrate Anthill refused to 'take notice of this charge, as … the men need not respond [in prayers] unless they think proper'.[44]

P.137

A police constable told the Sydney Magistrate's Court that he had asked another servant, Jeremiah Monday, 'where he was going and what he was carrying'.[45] According to the constable, Monday knew that the policeman did not have a warrant and said 'he would not tell me but told me to ask my arse'. Monday continued by saying that 'he would not satisfy any of us kind of gentlemen (about having a warrant) and if he did satisfy anyone it should be our master'.[46] In 1820 Constable John Leary was prevented from entering and searching a house, 'not having a search warrant'.[47]

P. 141

Upon receiving yet another lagging, one convict was heard to scream at a Magistrate 'no man shall keep me from a woman'.[48] Meanwhile, Irishman John Reilley was sent to Wellington Valley after the court heard that he had been 'threatening to knock an

[43] Trial of John Mullens, 2 April 1832, SRNSW, Bench Books [Picton Court of Petty Sessions], Series 3315, 4/7573, Reel 672.
[44] Ibid.
[45] Trial of Jeremiah Monday, 27 March 1820, DL 154 Proceedings [Police Magistrates' Bench, Sydney].
[46] Ibid.
[47] Trial of James Riley, 13 November 1820, DL 154 Proceedings [Police Magistrates' Bench, Sydney].
[48] A 'lagging' was convict cant for 'a term of imprisonment'. Ian Duffield, "'Haul Away the Anchor Girls": Charlotte Badger, Tall Stories and The Pirates of "The Bad Ship Venus"' (2005) 7 *Journal of Australian Colonial History* 35, 56.

overseer's brains out with an axe' and said he would do the same in court.[49] When free labourer, John Eggleton was accused of cattle theft in the dock, he told the prosecutor in court to 'go and put your bloody head in a bag, do not bounce [bully] me'.[50] In *R v Mayne* [1839] a prisoner was found guilty of murder by the doctrine of common purpose and sentenced to death.[51] The prisoner offered his thoughts on the subject, approaching the bar table to state that 'he had been all through the country and never shot anybody, but was sorry he didn't shoot every - tyrant that he had met; he had been baited like a bulldog; if only he had (had) the Judge there (at the crime scene), he would (have) muzzle(d) him'.[52] He was removed from the courtroom and continued his tirade for some time.

Chapter 4

P. 165

Darling responded by calling Wentworth a 'vulgar, ill-bred fellow' and of Hall, he said:

> Nothing short of positive coercion will answer with such a man as the editor of the *Monitor* …I have only not proceeded against [him] from a consideration that such a step at the present moment would be likely to embarrass (sic) you [Wilmot-Horton] in carrying the new Bill through Parliament as petitions would in all probability be sent home should the press

[49] David Roberts, 'A sort of inland Norfolk Island'?: Isolation, coercion and resistance on the Wellington Valley Convict Station' (2000) 2(1) *Journal of Australian Colonial History* 50, 64.
[50] Trial of Charles Penfray, 31 May 1844, Gosford Bench Books, Colonial Trials and Court Records, State Records NSW, 1973, microfilm 665.
[51] NSWSupC 34, see *Sydney Morning Herald,* 17 May 1839; *Sydney Gazette*, 18 May 1839. 'Common purpose' is a legal doctrine that infers that all participants in a criminal offence share equal criminal responsibility for the offence, regardless of the extent of their involvement in committing the offence.
[52] Ibid.

> be interfered with just now. When there is no longer any chance of their having an opportunity of forwarding a petition in time to interfere with your proceedings, it is my intention to order the prosecution of Mr Hall, of the *Monitor*, should he continue his present style of writing.[53]

Darling's response to Hall in this passage also demonstrates a ruling-class fear of the popular petition as an emerging technique for radical change.

In 1827 Darling prosecuted Hall for libel. True to form, Hall used procedure to fight for fairer treatment. He elected for his trial to be heard by Chief Justice Forbes, sitting alone, rather than a military jury. Hall knew that Forbes had found against Darling in the aftermath of the Sudds and Thompson affair.[54] In his defence, Hall appealed to technicality. He argued that *The Monitor* was 'a book' and 'not a newspaper' and that it did not, therefore, fall within the terms of the indictment, which located the libel as having occurred in a 'newspaper'.

Darling vented his frustration with Hall again in 1829 in another prosecution for criminal libel. Once more, Hall used his prosecution as a platform to protest against unfair criminal process in relation to the issue of military jurors.[55] In *The Monitor* he said 'if an Emancipist be now a good member of Society, we care not what he has been, but will uphold him' and put the bench on notice that he sought either a new trial with civil jurors or an appeal to twelve Privy Council Judges.[56] The court refused his request and Hall was sentenced to six months imprisonment for libel against the Deputy Commissary General, James Laidley.

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[53] *HRA*, Ser I, Vol xii, pp761-2.
[54] *R v Hall* [1827] NSWSupC 53.
[55] *R v Hall* (No. 7) [1829] NSWSupC 86; *R v Hall* (No. 4) (1829) NSW Sel Cas (Dowling) 789
[56] Erin Ihde, *A Manifesto for New South Wales: Edward Smith Hall and the Sydney Monitor 1826–1840* (Australian Scholarly Publishing, 2005) 117.

P. 169

In 1834, Hall was indicted with yet another count of criminal libel.[57] He was accused of slandering a prominent Tory doctor – Charles Smith – whom he labelled a 'Tyburn Surgeon'.[58] Hall argued a number of procedural defences and was ultimately acquitted. During the courtroom melee he argued for an open committal procedure to be argued between an accused and the Attorney-General in court, as opposed to the Grand Jury process of England. He contended that a defendant should not be forced to disclose their defence during the committal process and nor should they pay for the privilege. The court agreed.

P. 179

Heydon said:

> 'Here, as in those islands, there existed a large body of landholders and master-men …men to whom the sufferings of their fellow creatures were of as little moment as the petty annoyances of everyday life to an English gentlemen …who had for a long series of years been used to a system of slavery' enforced by 'the lash'.[59]

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[57] *R v Hall* [1834],NSWSupC 128.
[58] See Peter Linebaugh's essay on 'The Riots Against the Surgeons' in Hay et al, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Pantheon Books, 1975). Linebaugh's thesis is that the frequency of hanging (from the 'Tyburn tree' – Tyburn being the location of the gallows in eighteenth century London), to punish the working-class predominantly for property offences, spurred a new industry of 'body-snatchers' who were paid by the Royal College of Surgeons to take the bodies of the dead from the gallows to the salon for experimentation and dissection. Meanwhile, working-class families and friends of the deceased often waged often violent struggles and riots in the streets against the surgeons and body-snatchers, to reclaim the bodies of their kin. The figure of the 'Tyburn surgeon' in popular memory clearly continued to resonate with colonial audiences 40 years later.
[59] Ibid. See also, *Australasian Chronicle (AC)*, 19 September 1840, 1 October 1840 and 26 December 1840.

Another tradesman, Mr Belford recalled the lesson of recent legal history saying that if the Bill passed it 'would have the effect of reducing every free man to the situation of a convict' and 'in a modified form would merely elevate them to the same level with men holding tickets-of-leave'.[60]

P. 180

Mr Kelly, for instance, argued that the Bill was so 'completely hedged in by the forms of process' that 'all the broad principles of equity and justice would be lost sight of in studying to find whether the form of information or complaint was perfect'. This critique of process was one that rested not 'on the justice of the charge, but whether it had been technically proved'.[61]

Chapter 6

P. 267

Similarly, in *R v Sharland,* defence counsel pointed out that the name of the county in which the crime was alleged to have occurred was omitted from the indictment. Forbes CJ declared this to be unnecessary so long as the words of the indictment 'bring it within the jurisdiction of the Court and the party accused every benefit of his defence'.[62] In a perjury case, two co-accused were charged on the same

[60] AC, 29 September 1840.
[61] Ibid.
[62] *R v Charland or Sharland* [1824] NSWSupC 13 and 19.

indictment.[63] This was held to be a technical defect entitling both co-accused to an acquittal. A retrial was ordered but, of course, the second indictment was void pursuant to the rule on double jeopardy. The matter was resolved by reference to the pointedly obscure '7G4.C.64 s20' - a slip-rule forbidding 'judgment upon any indictment for felony or misdemeanor' from being 'stayed or reversed for want of the averment of any matter unnecessary to be proved'.[64] In this case, the prisoners were convicted, but the defective indictment mitigated their punishment and they were sentenced to two years transportation. In the capital cases of *R v Mustin and Brown* and *R v Benson, Cogan, Sprole, Rodney and Campbell,* the court applied the 'slip rule' to excuse an error in Information, sending all defendants to their deaths.[65] The complexity and arbitrariness of the criminal charge allowed the Supreme Court to exercise enormous discretion over the rule of law. But the court did so in a manner that mostly accorded with majoritarian democratic principles, frequently against the will of the squatters and magistrates.

More generally, technicality in other fields of procedure such as bail was frequently resolved in favour of the Crown. A recognizance on bail was rendered void where the pound sign '£' appeared instead of the word, 'pounds'. Chief Justice Stephen considered this 'a mere arbitrary sign' and enough to void the prisoner's bail. However, the issue was resolved in favour of the Crown with Therry and Dickinson JJ delivering a joint judgment favouring different and equally obscure procedure.[66]

Particularities of the charge were argued again in *R v Hogarty, How, Baily and Laragy*

[63] *R v Pickering and Baxter* (1829) NSW Sel Cas (Dowling) 205; [1829] NSW SupC 44.
[64] (Emphasis theirs) Ibid.
[65] *R v Mustin and Brown*[1826] NSWSupC 63; *R v Benson, Cogan, Sprole, Rodney and Campbell* [1825] NSWSupC 4.
[66] *In re Boughton* [1850] NSWSupC 4 - 'figures not words'.

[1826],[67] a case in which four co-accused were convicted of being accessories after the fact in a robbery. Their counsel, Mr Rowe moved for an arrest of judgment due to the indictment having been laid jointly rather than each defendant being charged separately. He also argued that the charges should be 'rolled up' into one charge. Both arguments were rejected and Acting Chief Justice Stephen declared that the prisoners be 'severally sentenced to be transported for 7 years'. In *R v Charland or Sharland* [1824],[68] Mr Rowe applied for an 'arrest of judgment' - a permanent stay of conviction – in a murder case, on the basis that the information failed to include the place of the crime. While this defence was successful in having the prosecutor withdraw and enter a *nolle prosequi* (annulled prosecution) in respect to a back-up charge of assault with intent to murder, it nevertheless failed to convince Forbes CJ as to the importance of technicality and the accused was convicted of the lesser offence. Similarly, Therry objected to the place described in the indictment and cited a NSW assize case in Belmont where the court had dismissed a case for a similar technical defect.[69] He argued that such an interpretation must be given to his argument '*in favorem vitae*' (in favour of life). The Full Bench found that place names are important in Britain where they demarcate jurisdictional boundaries and every place name is known. However, 'in the territory' of NSW, where place names are not as well known, they mattered less. Technicality was ignored and death pronounced.

Chapter 7

P. 284

[67] NSWSupC 15.
[68] NSWSupC 13 and 19.
[69] *R v Moore and Others* (1831) NSW Sel Ca (Dowling) 335; [1831] NSWSupC 33.

The middle-class *together* with the working-class rallied for law reform. They organised a petition against the death penalty. For many middle-class petitioners, particularly shop-keepers, abolition of the Bloody Code was merely pragmatic – a means to secure more convictions in theft matters where otherwise the conscience of some middle-class jurors would result in acquittal through the exercise of 'pious perjury'.[70] For lower middle class artisans and skilled tradesmen, reform to criminal process represented democratic progress. It shared a longer historical engagement with a half century of revolution. The Gordon Riots, Peterloo, the Cato Street Conspiracy, Nottingham Castle and the Bristol Riots, all involved popular social movements that either directly or indirectly reformed the criminal law and had as their objective, the excarceration of friends, fellow workers and family members.[71] Employers were openly challenged in the courts. And this pressure from below spurred reformers on both sides of parliament toward a wave of procedural reform.[72] In 1820, shortly after Peterloo and the Cato Street Conspiracy, the Tories repealed the *Black Act. The Combination Acts* were abolished soon after in 1824 and the 'Bloody Code' together with its 200 capital offences were mostly dismantled in 1827 (the death penalty was maintained for political crime such as riot, machine-breaking, rickburning, cattle-maiming and duffing and destroying buildings).[73] Robert Peel established the first widespread public Police Force – 'the Bobbies' or 'Peelers' – in 1829 (and convict numbers doubled accordingly between 1824 and 1830). Whig Reformers like Samuel Romilly and his friend, Jeremy Bentham had sought to reform the criminal law in the first decade of the nineteenth century. It was the respective Whig Governments of Lord Grey in 1831 and Lord Russell in 1846 together with their jurists, Brougham and Jervis, who enquired into, took petitions and redrafted

[70] Michael A. Rustigan, 'A Reinterpretation of Criminal Law Reform in Nineteenth Century England', (1980) 8 *Journal of Criminal Justice,* 205, 209-210.
[71] Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (Verso 1991/2006).
[72] This is the general argument of Eric Hobsbawm and George Rudé, in *Captain Swing,* (Lawrence and Wishart, London, 1969/2014).
[73] *Trade Unions Under the Combination Acts: Five Pamphlets 1799-1833* (Arno Press, New York, 1972).

volumes of procedural law (as discussed in Chapters 4 & 6).

As organised labour and Chartism gained momentum during the 1830s and 1840s, the ruling class relied upon the quasi-criminal master and servant law to crush trade union activity in Britain. Employers were provided with capacity to seek imprisonment against workers for work discipline offences targeting groups of combining workers (when combination had ceased as an offence). Interestingly, these repressive laws had the opposite effect on workers. As Hay and Craven put it, 'union litigation and their 1844 campaign against the extension of master and servant penalties to new trades, coincided with popular political protest, including the democratic demands of the Chartist movement of 1838-48'.[74] Popular unrest in Britain was at its historical zenith. Riots by the mob gave way to more organised and effective forms of political resistance which, in turn, translated into reform to repressive criminal law.

As discussed in Chapter 2, throughout the 1830s and 40s, organised labour in Britain appealed magistrate's decisions and were consistently vindicated by the judges.[75] An interesting relationship of mutual respect appears to have taken place between organised labour and aristocratic judges to the exclusion of middle-class magistrates. For instance, when workers won a criminal appeal, it was not uncommon for judges to order tortious damages against magistrates for wrongful imprisonment of workers. Working-class newspapers like the *Northern Star* praised 'the Real Law' of the Queen's Bench for 'negativing the assertion that there is one law for the rich and another for the poor'.[76] Magistrates and their traditional party of power, the Tories, were outraged and humiliated. They commissioned Sir John Jervis to investigate. In

[74] Douglas Hay and Peter Craven (eds), *Masters, Servants and Magistrates in Britain and the Empire, 1562-1955* (The University of North Carolina Press, 2004).
[75] Christopher Frank, *Master and Servant Law* (Ashgate, 2010).
[76] *Northern Star,* 4 May 1844, p. 4, cited in, Frank, ibid, p. 102.

1848, the standardisation of criminal procedure through the *Jervis Acts,* reflected an attempt to reassert control over the liberal democratic aspirations of mass Chartist agitation which began with organised labour and swept across Britain in that year. The Acts saw the emergence of the first major reform to criminal process since the standardisation of British law following the English Revolution.

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In *R v Needham* [1833], the accused was charged with arson. A witness told the court that Ms Needham had been seen running from her own burning house saying, 'its no use running now. *I've done it*'.[77] After cross-examining the witness, Roger Therry told Justice Burton that the confession could not be taken into account where 'there was no proof whatever (other evidence) that she had been the cause of the fire'.[78] The court agreed and Ms Needham was acquitted. Excluding the confession was a nod to its questionable voluntariness and circumstantial veracity. And, by following the rule on voluntariness, Justice Burton had probably achieved fairness through intellectual dishonesty. He acknowledged the peculiar situation in which the court found itself, commenting to the accused that

> you have been acquitted of the offence with which you were charged; but I recommend you, in future, to be very careful with respect to the expedients to which you may have recourse, in order to make your husband miserable. Had you been found guilty to day, you would, in all probability, be hanged; and that, no doubt, would have made him very miserable.[79]

[77] NSWSupC 78, *SG* 22 August 33.
[78] Ibid.
[79] Ibid.

There was an altogether different result in the case of *R v Atkin* [1840] NSWSupC 43, in which a woman accused of infanticide was acquitted despite her confession to the murder of her child. She was arrested and taken into custody where she was cajoled by a midwife to confess that she had been too poor to afford either a midwife and a doctor and that the child had died and she had buried it. Forensic evidence showed that the baby had died from head wounds. All evidence in respect to the conversation in custody, however, was excluded by Justice Foster on the grounds that 'the prisoner had been induced to confess after she had been taken into custody'.[80]

In *R v Coleman* [1830], a prisoner faced prosecution for theft by wealthy emancipist, Samuel Terry. To investigate the disappearance of a considerable sum of his cash, Mr Terry visited the accused in prison and agreed to provide the prisoner with 'a blanket and some provisions' on condition that the prisoner 'would tell where the money was, and that he had better at once tell the truth; adding that if he did so, he (Mr. Terry), would use all his interest to save his life, if he were found guilty, and that the Superintendent of Police had promised to do the same'.[81] The prisoner offered a partial confession. After allowing the confession into evidence, the judge advised the jury to 'reject it altogether from their minds'. But the jury convicted Mr Coleman and he was hanged.

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There were roughly four main political positions on the Bill. First, there were those who opposed it due to social inequality. 'The man who had a guinea in his pocket

[80] *Sydney Herald,* 12/8/1840.
[81] *R v Coleman* [1830] NSWSupC 77, *Sydney Gazette* 25 November 1830.

would be able to avail himself of the benefit of Counsel, while the poor man without a farthing in the world might be condemned, from his inability to procure Counsel',[82] said the radical utilitarian MP, John Roebuck. This view was supported in the House by another reformist Whig - the Governor of Van Diemen's Land, Sir John Eardley-Wilmot, who was of the view that the Act 'would only benefit pettifogging attorneys'.[83] But Wilmot's argument was stifled by his reputation, having been labelled 'a muddle-brained blockhead' by no less than his own Prime Minister.[84]

Second, some opposed the Bill on the basis of efficiency and law and order. For some Tories, the Act meant 'placing prisoners in a better situation than defendants in civil suits…enabling prisoners…to get up defences which would defeat the ends of justice, and to gain acquittals to which they were not entitled, by the assistance of those low and disreputable attornies who were always ready to enter into such disgraceful proceedings'.[85] For some Whigs, 'this Bill would not adequately compensate for the great increase of expense it would occasion'.[86] Those opposed to the Act on both sides saw it as an affront to the power of the lay Magistracy, saying that 'it would be extremely injudicious to allow prisoners brought before Magistrates Counsel and Attorneys to defend them'.[87]

Third there were those who supported the Bill on the basis of social equality. When one Tory member argued that 'nobody could present a single authenticated case of innocence having been convicted for want of the aid of Counsel', the Irish Repeal leader John O'Connell (son of Republican leader, Daniel O'Connell) replied, 'I can'.[88] Radical egalitarian Whigs affiliated with abolition and anti-capital punishment

[82] Mr Roebuck, HC Deb 03 July 1834, Vol 24, cc. 1097-9.
[83] Sir Eardley Wilmot, HC Deb 09 July 1835, Vol 29, cc. 355-63.
[84] W. P. Morrell, *British Colonial Policy in the Age of Peel and Russell* (Oxford University Press, 1930) 389.
[85] Lord Wynford, HL Deb 15 July 1836, Vol 35, cc. 228-32.
[86] These arguments sound very familiar in the present-day context of law and order politics. In particular, see, Mr Edward Buller, HC Deb 09 July 1835, Vol 29, cc. 355-63.
[87] Mr Nicholas Fitzsimon, HL Deb 30 June 1836, Vol 34, cc. 1061-3.
[88] HC Deb 17 June 1835, Vol 28, cc. 865-73.

campaigns, supported the Bill. They were led in the House by former judge and Chairman of the British East India Company, Dr Stephen Lushington. Lushington recognised that 'the hardship inflicted on prisoners by denying their Counsel a right of addressing the Jury', only affected working-class defendants.[89] In respect to the case of 31 sailors facing the death penalty due to the inadmissibility of their evidence, Lushington told the house how he had 'laboured for three hours to make the Jury acquainted, through his mode of cross-examination, (a defence address was not permitted) with certain indispensable points, which they were wholly unable to comprehend' but that 'his efforts were vain, and the prisoners were acquitted only on a point of law'.[90] Another egalitarian supporter said he knew 'of an instance… where two persons were ordered for execution, one was reprieved and the other executed' and that, according to the Attorney-General, 'if the person executed had had Counsel he would have been reprieved also'.[91] He asked the House, 'how could the Judge be the prisoner's Counsel?'.[92] Lord Holland expressed perhaps the most radical egalitarian reformist view. He said that the Bill would improve process 'by placing the prisoner tried for felony upon a more equal footing with his prosecutor'[93] and equated the 'public' interest in saving an accused from unfair punishment was 'little if at all inferior in importance' to 'the objective' of arriving at 'the truth'.[94] The fourth position on the Bill openly supported the financial advantage and control that the Bill bestowed upon the legal profession. Supporters who adopted this position assured the House that any 'inequality was only in appearance' and that, 'the damage of the few was the insecurity of the many'.[95]

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[89] Ibid.
[90] Ibid.
[91] Ibid, See Mr Thomas Lennard.
[92] Ibid.
[93] HL Deb 30 June 1836 vol. 34 ccl 1061-3.
[94] HL Deb 15 July 1836 vol 35 cc228-32.
[95] Mr Horace Twiss, HC Deb 10 June 1835 vol 28 cc628-33.

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At Windsor Quarter Sessions in 1827, solicitor Richard Kelly, railed against the authority of the court, telling the magistrate that the sentence against his client 'was illegal'.[96] William Wentworth raged and ranted in the Supreme Court, consistently demanding liberty for his clients. As counsel (and later, colonial Judge), Frederick Garling also argued that liberty was a principle of procedural interpretation. Seizing upon the 'more summary way'[97] that things were to be done in New South Wales, he urged the court to find that the indictable crime of forgery did not apply in 'the distant colonies' where it should 'constitute only a simple larceny'.[98]

In the mid-1820s, solicitor Thomas Rowe, pursued a range of ingenious technical and procedural defences in an attempt to secure the liberty of his clients. Rowe successfully argued that this was beyond the court's jurisdictional power, since pardons were issued pursuant to Royal prerogative.[99] In 1826, he argued that no theft could occur where convict defendants were rightfully in possession of Government property.[100] He proposed (and the court confirmed) that no forgery could occur where the defendant was accused of forging a Spanish dollar and not British currency.[101] In another case, he asked the court to accept evidence from a perjured convict witness where no record of the perjury existed.[102] In other cases, Rowe argued *against* convict rights in order to save convict clients from further punishment.

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[96] Paula J. Byrne, *Criminal Law and Colonial Subject: New South Wales, 1810-1830* (Cambridge University Press, 1993) 268-9.
[97] *New South Wales Charter of Justice*, Letters Patent 2 April 1787.
[98] He reasoned that forgery should not apply in the colonies because they had not yet, 'become extensive in Trade and credit'[98]. Instead, he mounted the procedural defence that, 'the offence of forgery on a foreign Bill of Exchange constitutes only a simple larceny'. The argument failed and 'the unhappy prisoner' was sentenced to transportation for life: see *R v John Gilchrist,* CCJ June 1819, SRNSW, COD448, 2793 [SZ788] 5, 86.
[99] *SG,* 14 April 1825.
[100] *SG,* 22 November 26.
[101] *SG,* 9 May 28.
[102] *SG,* 13 February 28.

For instance, he submitted that no theft could occur where the prosecutor was a convict and not entitled to own property.[103] Similarly, he argued that evidence could not be given by a convict witness.[104] At the same time as arguing for all the rights and liberties of Freeborn Englishmen, Rowe asserted that colonial context precluded a finding of guilt in a forgery case[105] - a clear contradiction.

Such technocratic and occasionally nonsensical criminal defences were argued successfully by other colonial practitioners. Roger Therry, for example, argued that theft of emus did not constitute theft of food, in accordance with Peel's Act.[106] While drunkenness was no defence to to any crime,[107] it was available as a defence to stealing horses, when combined with clear evidence of 'mental imbecility'.[108] Meanwhile, the first successful use of the defence of accident was permitted by the Bench and upheld by two separate juries in response to murder charges.[109] Both examples involved the accidental discharge of firearms, which may, incidentally, display a popular acceptance of the risk involved with owning firearms as part of a frontier colonial existence. In each example, the ends justified the peculiar means.

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For example, Chief Justice Forbes became dissatisfied with the ways in which defence counsel used the 'moral middle class' sensibilities of colonial jurors to

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[103] *SG* 8 July 1826.
[104] *SG* 6 August 1827. In this case, the Chief Justice reminded him of *Eagar's Case* and required Rowe to prove the attaint by evidence of the witness' conviction. Rowe could not.
[105] *SG* 16 May 1827;
[106] *SG* 27 February 1830;
[107] *R v Hagan* [1835] NSWSupC 92, see also *R v Phoenix* (1837) (unreported, 3 November 1837, NSWSC);
[108] *R v Harney* [1854] NSWSupCMB 11 (17 May 1854);
[109] *R v Jones* [1827] NSWSupC 6; and *R v Fuller* [1827] NSWSupC 25.

impugn the credibility of prosecution witnesses.[110] In *R v Hopkins and Long* (1834),[111] a group of cattle thieves gave evidence against each other. The Chief Justice cited 'from the text book, the law as relating to the admissibility of the evidence of accomplices, in which it was laid down that where the statement of an approver is corroborated in any material particular by other unimpeached testimony, it may be acted upon'. Accordingly, a witness's poor credibility did not always result in acquittal. In *R v Simms and others* (1831),[112] Therry objected to the credit of an approver witness on the basis of prior conviction. The conviction was evidenced by a pardon. The court found that, while credit was affected, the witness was nevertheless 'competent' and so their evidence, was good. However, in *R v Smith* [1831],[113] Therry complied with the 'best evidence' rule and called upon the clerk of the court to produce a record of conviction in respect to an approver. The record was produced, along with another certificate documenting that the approver had received an unconditional pardon. The court held that the pardon did not alleviate the approver's bad character for the purpose of evidence law and the approver's evidence was received, despite the witness's lack of credit.

In 1831, Dr Wardell questioned the credibility of evidence given by a convict who had been induced to testify by the offer of a pardon from the prosecutor. The evidence was allowed and the approver was advised that he was entitled to exercise the privilege against self-incrimination. On this evidence, the accused was convicted and sentenced to 14 years transportation.

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[110] The phrase, 'moral middle class', was coined by Judith Brett, Australian historian of the Liberal Party of Australia. See: Judith Brett, *Australian Liberals and the Moral Middle Class: From Alfred Deakin to John Howard* (Cambridge University Press, 2003). For an investigation of the historical roots of middle class culture during the period, see Kirsten McKenzie, *Scandal in the Colonies: Sydney and Cape Town, 1820-1850* (Melbourne University Press, 2004).

[111] *R v Hopkins and Long* [1834] NSWSupC 86, (*Sydney Gazette,* 7 August 1834). In the same column as reportage on *R v Halloran and Waldron* [1834] NSWSupC 85.

[112] NSW Sel Cas (Dowling) 132.

[113] NSWSupC 36.

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