“Equals of the White Man”: Prosecution of Settlers for Violence Against Aboriginal Subjects of the Crown, Colonial Western Australia

AMANDA NETTELBECK

“Crime is a great leveller,” stated Western Australia’s *The Inquirer* in October 1853. “Policy requires that we should convince the native population that in our Courts of Justice they really are what we profess and tell them they are—the equals of the white man, whatever they may be elsewhere.”[1] *The Inquirer* was responding to a case that had just come before Perth’s Quarter Sessions, in which John Jones was tried for the murder of Neader in the colony’s southwest. Jones was found guilty of manslaughter and sentenced to transportation for life.[2] Given that Australia’s colonies were notable for their failure to bring settlers to trial for violence against Aboriginal people,[3] it is significant that *The Inquirer*’s editor did

1. The Quarter Sessions, *The Inquirer*, October 12, 1853 p1.
2. Quarter Sessions October 1853, *Perth Gazette*, October 7, 1853.
3. For example, Alex Castles, *An Australian Legal History* (Sydney: Law Book Co., 1982), 521–52; Henry Reynolds, *Frontier: Aborigines, Settlers and Land* (Sydney: Allen and Unwin, 1987); Susanne Davies, “Aborigines, Murder and the Criminal Law in Early

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not regard Jones' conviction and sentence as a sign that the Courts of Justice were working as they professed to do. The charge was one of wilful murder, and the evidence indicated that "if ever a foul and deliberate murder was committed, it was on the occasion which led to this trial." The verdict that Jones was guilty only of manslaughter, he continued, was indicative of the jury's disregard of the law's impartiality when a white man was on trial for the murder of an Aboriginal man. If the law was to make a distinction between white and black, "let it be declared: but to say there is none, and to act as if there were, is a mockery."

What meaning did Jones' trial have within the wider context of prosecuting violent offenses against Aboriginal people in colonial Australia? A striking feature of Western Australia's colonial criminal justice history is that a considerable number of Europeans—twenty-nine between the colony's foundation and the establishment of a centralized Aborigines Protection Board some 50 years later—were tried for violent offenses against Aborigines, and of these, only eight were acquitted.[4] Although comprehensive data on Europeans prosecuted for such crimes across Australia's colonies is yet to be mapped,[5] an overview of the available scholarship helps to put this figure in perspective. Bruce Kercher's and Brent Salter's recovery of New South Wales (NSW)'s criminal case history

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Port Phillip 1841–1851," *Historical Studies* 22 (1987): 320–25; Richard Broome, "The Statistics of Frontier Conflict," in *Frontier Conflict: The Australian Experience*, ed. Bain Attwood and Stephen Foster (Canberra: National Museum of Australia, 2003), 88–98; Tony Roberts, *Frontier Justice: A History of the Gulf Country to 1900* (St Lucia: University of Queensland Press, 2005); and Mark Finnane and Fiona Paisley, "Police Violence and the Limits of Law on a Late Colonial Frontier," *Law and History Review* 28 (2011): 143.

4. This case history has been reconstructed by cross-listing the Criminal Sittings Register 1830–1887 (Acc 3422/1, State Records of Western Australia [hereafter, SROWA]) with available Court Records Indictment Files (Series 122, SROWA) and trials from the Quarter Sessions (before 1861) and the Supreme Court (after 1861) reported in the *Perth Gazette* and *The Inquirer*. The Criminal Sittings Register has been transcribed by Brian Purdue as "An Index to Violent Indictable Crime in WA" (2002), held at SROWA. Up to 1886, twenty-nine Europeans were tried for violent crimes against Aborigines across twenty-five cases. This figure does not include two cases of sexual violence against an Aboriginal girl and boy that led to the executions of Edwin Gatehouse in 1854 and John Caldwell in 1860: since all cases of rape incurred the death penalty until the early 1870s, it is difficult to differentiate these cases from prosecutions of settlers for crimes against each other. Of the twenty-five cases identified here, twenty-one entailed Aboriginal fatalities (see Appendix).

5. The collection of such data will be one outcome of the Australasian Legal History Digital Library, an Australasian Legal Information Institute (AustLII) project in progress (based at the University of Technology, Sydney) that aims to recover Australia's colonial case histories.

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up to 1827 reveals that in NSW's first three decades only four settlers were prosecuted for Aboriginal murder, and of these only one (a runaway convict) was found guilty and hanged.[6] As historians have noted, the dearth of cases before the mid-1820s in which either Europeans or Aborigines were tried for injury to each other was a clear symptom of the profound uncertainty in the early decades of Australian settlement about British law's jurisdiction over Aboriginal people.[7] However, even after Aboriginal people were deemed amenable to and protected by British law—a shift commonly positioned in relation to two landmark cases in NSW, the inter se murder trial of *R. v Murrell* in 1836 and the conviction and hanging of seven white men for the Myall Creek massacre in 1838—Australia's colonial courts only occasionally prosecuted, let alone punished, settler crime against Aborigines. In NSW, the successful prosecution of the Myall Creek murderers proved to be an exception to the more general rule in years to come that settlers would not be tried for crimes against Aborigines.[8] The guilty verdict in the Myall Creek case excited such opposition from NSW settlers that soon afterwards Governor Gipps chose not to pursue any prosecution over the Waterloo Creek massacre of the same year, writing to Secretary of State Lord Glenelg that given the "excitement" produced in the colony by the Myall Creek hangings, "no further proceedings could, with propriety, be adopted; and that if any of the parties were placed on their trial, the result would inevitably be an acquittal."[9] By the late 1840s, Robert Reece has argued, the NSW government had largely relinquished any concerted efforts to capture settler–Aboriginal conflict within the law.[10]

Australia's other colonies suggest a similar dearth of successful prosecutions for settler violence. In Van Diemen's Land, Kercher argues, "it was blacks who were hanged after incomprehensible trials, not whites."[11] In the history of Port Phillip, there were only three cases in which Europeans

6. Brent Salter, "'For Want of Evidence': Initial Impressions of Indigenous Exchanges with the First Colonial Supeior Courts of Australia," *University of Tasmania Law Review* 27 (2008): 145–60.

7. For example, Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Sydney: Allen & Unwin, 1995); and Lisa Ford, *Settler Sovereignty Jurisdiction and Indigenous People in America and Australia 1788–1836* (Cambridge, MA: Harvard University Press, 2010).

8. Robert H.W. Reece, *Aborigines and Colonists: Aborigines and Colonial Society in NSW in the 1830s and 1840s* (Sydney: University of Sydney Press, 1974), 145–66; Castles, *An Australian Legal History*, 521.

9. Gipps to Lord Glenelg, July 22, 1839, *Despatches of the Governors of the Australian Colonies, with the Reports of the Protectors of Aborigines*, House of Commons Parliamentary Papers (hereafter HCPP), no. 627 (1844), 8. See also Kercher, *An Unruly Child*, 15; Castles, *An Australian Legal History*, 521.

10. Reece, *Aborigines and Colonists,* 214.

11. Kercher, *An Unruly Child*, 7.

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were brought to trial for Aboriginal murder, all in the early 1840s and all leading to acquittals.[12] Reece details another dozen investigated cases that never went to trial, mostly because they rested on legally inadmissible Aboriginal testimony.[13] South Australia might have suggested a different history because of the founding promise of its 1836 proclamation to protect Aboriginal people as British subjects; but over the colony's first three decades of pastoral expansion, only seven Europeans in five cases were prosecuted for violent crime against Aborigines, and only one—an ex-convict from another colony—was convicted of murder.[14] Colonial Queensland stands somewhat apart from its sister colonies because of the violence against Aborigines that took place through the second half of the nineteenth century at the hands of the Native Police Force.[15] However, even when legal procedures were followed, such as holding coronial inquiries into Aboriginal deaths on Queensland's pastoral frontiers, there was little sign that justice for crimes against Aborigines would be achieved.[16] Historians have suggested that the formal government inquiries undertaken into the Native Police's operations in "dispersing" Aboriginal people did little more than encourage the force's greater turn to secrecy about the ongoing violence of its methods.[17]

In comparison, then, it might seem that Western Australia's prosecution of twenty-nine Europeans before the 1886 Aborigines Protection Act, resulting moreover in a minority of acquittals, represents a more effective reach of its early judicial system coupled with a stronger administrative

12. Barry Patton discusses two of these cases from 1842 and 1843. Barry Patton, "Unequal Justice: Colonial Law and the Shooting of Jim Crow", *Provenance* 5 (2006) http://www.prov.vic.gov.au/provenance/no5/UnequalJustice6.asp. Reece identifies a third in 1840 in his table "Return of Aboriginal natives killed by the Whites", Port Phillip 1836–1844. Reece, *Aborigines and Colonists,* 222–223.

13. Reece, *Aborigines and Colonists*, 222–223.

14. Amanda Nettelbeck and Robert Foster, "Colonial Judiciaries, Aboriginal Protection and South Australia's Policy of Punishing with Exemplary Severity," *Australian Historical Studies* 41 (2010); and Alan Pope, *One Law for All? Aboriginal People and Criminal Law in Early South Australia* (Canberra: Aboriginal Studies Press, 2011), 319–336.

15. Jonathan Richards, *The Secret War: A True History of Queensland's Native Police* (St Lucia: University of Queensland Press, 2008).

16. Mark Finnane and Jonathan Richards, "'You'll Get Nothing Out of It': The Inquest, Police and Aboriginal Deaths in Colonial Queensland," *Australian Historical Studies*, 35 (2004), 84–105.

17. Finnane and Richards, 'You'll Get Nothing Out of It; Luke Godwin, "The Fluid Frontier: Central Queensland 1845–1860," in *Colonial Frontiers: Cross-cultural Interactions in Settler Colonies,* ed. Lynette Russell (Manchester: Manchester University Press, 2001), 116; and Alison Palmer, *Colonial Genocide* (Adelaide: Crawford House, 2000), 52–56.

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endeavor to meet the principle of Aboriginal equality under the law.[18] Given that Western Australia was not founded until 1829, the decades from the 1830s to the 1880s encompass a critical period in colonial policy relating to Aboriginal legal protection, stretching from the cusp of emerging humanitarian priorities in Britain's Colonial Office to the emergence of centralized Aborigines Protection Acts in a number of Australia's colonies.[19] However, if Western Australia successfully tried more settlers for crimes against Aborigines over those decades than did other Australian colonies, it does not follow that its judicial system fulfilled the promise of the colony's founding proclamation that those crimes would be legally punished "as if the same had been committed against any other of His Majesty's subjects."[20] This article will more closely examine Western Australia's case history of Europeans on trial for Aboriginal murder, manslaughter, or assault, from the time of foundation until the establishment of the Aborigines Protection Board in 1886, in order to ask what this case history might tell us more broadly about legal responses to settler violence in colonial Australia in the period after Aborigines were deemed to be British subjects.

"Subjects of the Crown"

The evangelical humanitarian politics in Britain during the 1830s that culminated in the 1837 Report of the House of Commons Select Committee on Aborigines included the ideal of bringing Aboriginal peoples under the protective umbrella of British law. Although the Report's recommendations did not challenge Britain's imperial project, it recast the Colonial

18. The most complete examination of Western Australia's colonial administration of Aboriginal people remains Paul Hasluck, *Black Australians: A Survey of Native Policy in Western Australia 1829–1897* (Melbourne: Melbourne University Press, 1947). For a fuller examination of how legal mechanisms were employed to create Aboriginal people as "a different kind of subject" in colonial Western Australia before the establishment of a Supreme Court, see Ann Hunter, *A Different Kind of Subject: Colonial Law in Aboriginal–European Relations in Nineteenth Century Western Australia 1829–1861* (Melbourne: Australian Scholarly Publishing, 2012). However Hunter's study does not undertake to examine in any detail how the law treated Europeans who committed violent crimes against Aboriginal subjects.

19. Western Australia's centralized Aborigines Protection Board was established on the strength of the Aborigines Protection Act in 1886. Victoria's Central Board for the Protection of Aborigines had been in place since 1869, replacing the Central Board established in 1860, and NSW's Aborigines Protection Board since 1883. Queensland passed an Aborigines Protection Act in 1897 and South Australia passed one in 1911.

20. Proclamation of Lieutenant-Governor James Stirling, June 18, 1839, in J.M. Bennett and Alex C. Castles, *A Sourcebook of Australian Legal History* (Sydney: Law Book Co, 1979), 257.

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Office's energies toward producing what Alan Lester has called a new class of "civilised and assimilated black Britons."[21] In 1838, Secretary of State Lord Glenelg forwarded to NSW's Governor Gipps a plan for establishing a Crown-appointed protectorate in the Port Phillip District, a model that would also be adopted in the recently established colonies of South and Western Australia.[22] As well as furthering Aboriginal "civilisation and Christianisation." one of the key roles of the protectors would be to ensure that crimes committed by settlers against Aboriginal subjects of the Crown would be prosecuted.[23]

Ultimately these goals would not be meaningfully met. By the early 1850s, the humanitarian wave that had driven Colonial Office policy over the past decade and a half was on the wane, undermined by the resistance of powerful settler lobbies, by the failures of colonial policy to produce a new class of indigenous subjects inducted into Christian civilization, and by the lack of interest of Aboriginal people themselves in being claimed for "reform" by missionaries and other colonial officials.[24] Most of all, Elizabeth Elbourne has argued, the era of humanitarianism in colonial policy was rendered unstable because in fixing its attention on the "amelioration" of colonized subjects, it neglected to address the structural causes of frontier conflict, key among these being the imperial government's failure to recognize that prior Aboriginal sovereignty could have existed on the Australian continent.[25] In 1849, the Port Phillip Protectorate was abandoned, and although the protectorates as dedicated institutions lasted some years longer in Western and South Australia, these also ultimately disappeared. However, the enduring legacy of the humanitarian shift in colonial policy was that from the late 1830s the status of Aboriginal peoples as British subjects was considered settled, at least officially. After the decline of dedicated colonial protectorates and until the establishment of centralized Aborigines Protection Boards, oversight for Aboriginal people's legal protection as subjects of the Crown formed part of the many duties of frontier police and magistrates.

21. Alan Lester, "British Settler Discourse and the Circuits of Empire," *History Workshop Journal* 54 (2002): 30.

22. *Historical Records of Australia: Governors' Despatches to and from England* (Sydney: Library Committee of Commonwealth Parliament, 1914–1925), series 1, vol 19, 252.

23. Reece, *Aborigines and Colonists*, 133.

24. For example, Lester, "British Settler Discourse," 33–34; and Richard Broome, *Aboriginal Australians* (St Leonards: Allen & Unwin, 1982), 49–51.

25. Elizabeth Elbourne, "The Sin of the Settler: the 1835–6 Select Committee and Debates over Virtue and Conquest in the Early 19th Century British Settler Empire," *Journal of Colonialism and Colonial History* 4 (2003) muse.jhu.edu/journals/journal_of_colonialsim_and_colonial_history/v004/4.3elbowne.html. See also Henry Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Sydney: Allen and Unwin, 1996).

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The colony of Western Australia might have appeared well positioned to provide the kind of legal protection to Aborigines envisaged by Colonial Office policy. Like South Australia, the only other of Australia's later-settled free colonies, Western Australia had legislative structures in place soon after foundation, which allowed a greater measure of local autonomy in the administration of justice than had been the case in early NSW.[26] Although Western Australia did not establish a Supreme Court until 1861, from soon after foundation criminal justice was administered by a Court of Quarter Sessions, convened by a legally trained Chairman, William Henry Mackie, and attended by justices of the peace who had been appointed within the colony's first 6 months.[27] The intention, as Alex Castles notes, was to ensure the new colony's jurisdiction "over all serious criminal offences" from its beginning.[28] Over the 1830s, the cases that came before the Quarter Sessions reflected the fairly limited jurisdiction of a new colony, relating mostly to robbery and assault within the settler community and within the vicinity of Perth. By the 1840s, however, with the spread of settlement and a commensurate increase in frontier conflict, local courts had become established outside the Perth district, convened by locally based stipendiary magistrates who would be the "backbone" of justice in outlying districts.[29]

This decade coincided with the governorship of John Hutt, who took seriously the Colonial Office's goal of ensuring the amenability of Aboriginal people to British law. During his governorship, Hutt initiated a broad-reaching set of "experiments" intended to assimilate Aboriginal people into the colonial economy, including schemes for adult training and children's education, and rehabilitation measures at the Aboriginal prison on Rottnest Island.[30] Secretary of State Lord Stanley thought so well of Hutt's efforts "to protect and civilise the natives" that in 1843 he asked Hutt to forward an outline of his measures to Superintendent La Trobe, Governor Gipps, and Governor Grey with a view to applying them in Port Phillip, New South Wales, and South Australia.[31] In 1841, also, Western Australia became the first Australian colony to have in operation an act for the legal admissibility of Aboriginal testimony, a measure that in theory would remove the profound disability facing Aboriginal

26. Castles, *An Australian Legal History*, 295.

27. Enid Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979* (Perth: University of Western Australia Press, 1980), 18.

28. Castles, *An Australian Legal History*, 297.

29. Ibid., 307; see also Hasluck, 72–76; 103–5.

30. Hutt to Lord Glenelg May 3, 1839 and August 19, 1840, HCPP 627, 363–66; 373–75.

31. Lord Stanley to Grey July 10, 1843, HCPP 627, 341.

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people in the courts.[32] At about this time, Europeans began to appear before Western Australia's Quarter Sessions charged with violent offenses against Aborigines. This was precisely the time when the recommendations of the Select Committee's 1837 Report could be put to the test.

For colonial judiciaries, however, one of the difficulties of meeting these recommendations was continuing doubt about Aboriginal people's status under British law, even after they were decided in policy to be British subjects. As historians have argued, these doubts were reflected across a number of Australia's colonies in the tendency of courts to commute death penalties for inter se murder well after the law's jurisdiction over Aboriginal subjects was considered clarified.[33] This was true in Western Australia, where over the course of the nineteenth century, the great majority of Aboriginal inter se murder cases brought before the courts led to commuted sentences.[34] In Western Australia's first inter se murder prosecution, the 1842 case of *R. v Wi-war*, defense counsel Edward Landor argued, although ultimately without success, that the court did not have the jurisdiction to try the case, because "the aboriginal inhabitants could not be subject to our laws for offences committed amongst themselves without their previous assent to and acceptance of those laws."[35]

Landor's argument might seem to indicate some advocacy for Aboriginal defendants brought without their consent or "cognizance" within the criminal code, but he was not to prove sympathetic to the principle of Aboriginal legal equality. In 1847, he published a memoir in which

32. This process was not straightforward. An earlier Aboriginal Evidence Act proposed in 1840 was tied to an act to allow magistrates to award summary punishment on Aborigines, and was overruled by the imperial government. A separate act to allow Aboriginal evidence without the sanction of an oath was passed by the colony's Legislative Council in October 1841, but like the first, was ultimately rejected by the imperial government. However, Hutt did not receive notification of its rejection from Lord Stanley until late in 1843, soon followed by notification that a bill had been passed enabling colonial legislatures to pass laws authorizing the admission of unsworn Aboriginal testimony. Given this time lapse, historians have argued that Western Australia's 1841 Act did operate from the time it was passed by the Legislative Council. See Russell Smandych, "Contemplating the Testimony of Others: James Stephen, the Colonial Office and the Fate of Australian Aboriginal Evidence Acts c 1839–1849," *Australian Journal of Legal History* 8 (2004), 237–283; Ann Hunter, "The Origin and Debate Surrounding the Development of Aboriginal Evidence Acts in WA in the Early 1840s,", *UNDALR* 9 (2007), 115–145.

33. Ann Hunter, "The Boundaries of Colonial Criminal Law in Relation to Inter-Aboriginal Conflict in Western Australia 1830s–1840s," *Australian Journal of Legal History* 8 (2004): 215–36; Mark Finnane, "Settler Justice and Aboriginal Homicide in Late Colonial Australia," *Australian Historical Studies* 42 (2011): 244–59.

34. Brian Purdue, *Legal Executions in Western Australia* (Perth: Foundation Press, 1993), 79 (table).

35. Quarter Sessions January 1842, *Perth Gazette*, January 8, 1842.

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he reflected on the "absurdity" of the law regarding Aboriginal people. Nothing, he wrote, could be "more anomalous and perplexing than the position of the Aborigines as British subjects."[36] The heart of the problem, as he saw it, lay in the "morbid sentimentality" of the Colonial Office in shrinking "from the responsibility of having sanctioned conquest over a nation of miserable savages," and then applying the pretence that they came within the British criminal code. Rather than make a "mockery and gross absurdity" of the judicial system, he stated, the honest thing would have been to apply military law in a colony established by "right of power."[37] This frank assessment that Australia was conquered by force of arms rather than settled by law might here have been reserved for a personal memoir, but in future years, when serving as defense counsel for settlers on trial for violent offenses against Aboriginal people, Landor continued to express fundamental disagreement with the idea that there could be "perfect equality between an English gentleman … and a wild savage."[38]

William Henry Mackie, the colony's first advocate general and chairman of the Quarter Sessions, also expressed some reservation about the law's applicability to Aboriginal people, but was obliged to endorse the principle in his court.[39] As the number and expense of Aboriginal defendants grew over the 1840s, Mackie worried about what he called a "most absurd system of viewing alike both white and native," but was duty bound to honor the principle "that all [British] subjects must be treated alike."[40] Mackie's successor Alfred McFarland was more emphatic about the court's obligations to honor Aboriginal equality under British law. At the July Quarter Sessions of 1858, he noted that all the defendants before the present session were Aboriginal; but by virtue of his own laws being "superseded," the "life of the native, whether he be the sufferer or the accused," is "equally entitled to the guardianship of our law, as that of a white man would be." All the "assistance and safeguards" of British law, in short, must be afforded to Aboriginal as equally as to white subjects of the Crown, because "our oaths enjoin it, and our consciences require it."[41]

36. Edward W. Landor, *The Bushman: Life in a New Country* (London: Richard Bentley, 1847), 187.

37. Ibid., 194–195.

38. Answer of Landor to charges brought against him, June 17, 1873, *Despatches and Other Papers Relating to Transactions Arising out of the Homicide of and Other Alleged Outrages on Aboriginal Natives* (Perth: Government Printer, 1873), no 53, encl. 7, 13.

39. For example, Mackie's address to the jury, Quarter Sessions October 1837, *Perth Gazette*, October 7, 1837.

40. Quarter Sessions January 1848, *Perth Gazette*, January 8, 1848.

41. Quarter Sessions July 1858, *Perth Gazette*, July 16,1858.

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What did such affirmations of the court's duty to treat black and white equally mean in practice? Across Australia's settler frontiers, the difficulties of establishing effective administration in frontier districts often meant that investigations against settlers for crimes against Aborigines never led to prosecution and hence to court.[42] Colonial Western Australia's relative success in bringing settler offenses to trial is especially notable in per capita terms, given that the concentration of settlement in Western Australia advanced less rapidly than was the case elsewhere.[43] Initially, with a dearth of free labor and the inducement of Aboriginal people into working for settlers, a more permeable settler frontier was earlier established than in other colonies.[44] Ultimately, however, even though 21 of the 29 Europeans tried for violent offenses against Aboriginal people up to 1886 were found guilty and awarded a sentence of some sort, only one was convicted of murder and suffered the death penalty. Over the same period, Western Australia executed 25 Aboriginal people for the murder of Europeans.[45] This manifest difference between the fate of Aborigines and that of Europeans who were tried for violent offenses against each other begs more detailed analysis of why, when settler offenses against Aborigines actually reached the courts, their sentences did not reflect the officially upheld principle of equal justice.

A closer examination of this particular case history shows several trends that help explain the law's failure to adequately address settler violence. First, arguments of provocation or defense of self or property were successfully enlisted in many cases to minimize judicial punishment for Aboriginal deaths, demonstrating how readily settler violence could be attenuated by the law. This is a similar pattern seen across other colonies when settler crime against Aborigines reached the prosecution stage.[46]

42. See note 4.

43. On the still thin spread of pastoral settlement by 1870 see H. Vanden Driesen, "The Evolution of the Trade Union Movement in Western Australia," in *A New History of Western Australia*, ed. C. T. Stannage (Perth: University of Western Australia Press, 1981), 352. On the consequences of decentralized settlement for law enforcement in colonial Queensland see Mark Finnane, "The Varieties of Policing: Colonial Queensland 1860–1900," in *Policing the Empire: Government, Authority and Control 1830–1940*, eds. David Anderson and David Killingray (Manchester: Manchester University Press, 1991), 33.

44. On early relations between settlers and Aborigines in Western Australia see Robert H.W. Reece and Tom Stannage, eds, *European–Aboriginal Relations in Western Australian History*, eds. (Perth: Studies in Western Australian History, 1984); and Neville Green, *Broken Spears: Aborigines and Europeans in the Southwest of Australia* (Perth: Focus, 1984).

45. Purdue, *Legal Executions in Western Australia*, 79 (table).

46. In her comparative study of NSW and Georgia up to 1836, Lisa Ford examines the ways in which settlers used the judicial system to make their "lawlessness lawful" (Ford, *Settler Sovereignty Jurisdiction,* 107). Such justifications were also enlisted in Australia's

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Further, the ways in which judicial punishment was mitigated in these cases reveals much about the assumed hierarchies of colonial society. As many cases involved the deaths of Aborigines at the hands of Europeans whom they already knew and sometimes for whom they worked, they provide a glimpse into how the law helped to justify the everyday kinds of violence Aboriginal people faced in their dealings with settlers. And as white laborers and (later) ex-convicts incurred heavier penalties for such offenses than did landowners, they also demonstrate the law's investment in maintaining existing "institutions and social relationships."[47] Second, many of these cases show that despite the legal admissibility of Aboriginal evidence earlier in Western Australia than anywhere else in colonial Australia, judicial punishment of settler crimes was limited by the readiness of settler juries, magistrates, and police to dismiss its reliability, at least when it incriminated settlers. Third and more broadly, as a snapshot of the workings of colonial law, Western Australia's colonial history of settlers on trial reveals the extent of the indifference that existed within legal networks in fulfilling an official duty of Aboriginal protection, as that duty was vested not just in juries but also remotely located magistrates, police, and justices of the peace. Over the course of decades, this was a situation occasionally queried but ultimately tolerated by the government.

In the end, these patterns make Western Australia's colonial judicial history little different from that of Australia's other colonies, where settler prosecutions took place with less frequency. The fact that Western Australia tried such a considerable number of settlers for crimes against Aborigines, yet still failed to achieve Aboriginal protection through the law, illuminates just how little settler prosecution worked as a means of regulating violence in colonial Australia. Ironically, however, the very fact that settler prosecutions took place with some regularity, helped create a perception in the settler community that the law too vigorously favored a policy of Aboriginal protection.[48] The ironies of this public discourse were not just that it failed to mirror the actual workings of the law, but that as the nineteenth century progressed, it expressed grievance against a perceived humanitarian priority in colonial legal policy that in practice had ceased to exist.

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colonies after Aboriginal people were deemed to be under the law's protection as British subjects. See Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400–1900* (Cambridge: Cambridge University Press, 2002).

47. Lorraine Barlow, "A Strictly Temporal Office: NSW Police Magistrates 1830–1860," *Law and History* 3 (1987): 51.

48. For example, *Perth Gazette*, October 14, 1864, p2, January 13, 1871, p2, and December 20, 1872, p3.

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"Mitigation of Punishment"

In her comparative study of how settler sovereignty was consolidated in NSW and Georgia in the early nineteenth century, Lisa Ford makes the astute point that few settlers were "merely lawless"; rather, they made good use of the "discourses and the politics of settler jurisdiction" to clothe their violent acts in the legally acceptable terms of provocation, self-defense, and justifiable homicide.[49] Ford's study ends in 1836, just before the emergence of the protectionist era in colonial policy. By the time Western Australia first prosecuted a settler for Aboriginal injury in the early 1840s, Aboriginal people had not only become equal under the law as British subjects, but their capacity to continue living in what Ford calls "a largely separate jurisdictional order from settlers" was becoming limited, at least within the settled districts.[50]

These circumstances were influential in the case that came before William Henry Mackie in July 1842 when Charles Bussell, one of the brothers of a prominent settler family in the Vasse, was tried for manslaughter over the shooting death of a 7-year-old Aboriginal child.[51] Suspecting the girl of having stolen some flour, Charles Bussell pointed a gun at her in order to exhort her confession. Falsely believing the gun to be unloaded, he pulled the trigger to intimidate her, killing her instantly.[52] Bussell's defense counsel was Edward Landor, who 5 months earlier had queried the court's jurisdiction to try Wi-war. In Bussell's case, Landor's defense rested on the argument that the accused had been the victim of Aboriginal robbery, and had a right to defend his property. Bussell was a respected settler and the girl's death had been "purely accidental," he argued, and although reason demanded that Bussell be acquitted, the court would be justified "in inflicting a nominal fine." Mackie concurred, adding that the Crown was obliged to pursue the case because "the government was determined to enforce the principle that the natives should be treated in every way as British subjects, and that as they were liable to punishment, so they had a right to protection."[53] Having been seen to have enforced that principle, the court fined Bussell 10 s., and he was discharged.

49. Ford, *Settler Sovereignty Jurisdiction,* 85.

50. Ibid., 79.

51. In 1835, John Mackail was committed on a charge of shooting Goggalee, who died of his wounds, but the case did not go to trial. Mackail received a conditional pardon after Goggalee's relatives were induced to accept compensation in the form of flour and blankets. Quarter Sessions, *Perth Gazette*, July 1, 1835, p526.

52. Court Records Indictment Files, series 122, cons. 3472, case 271, SROWA.

53. Quarter Sessions July 1842, *Perth Gazette*, July 13, 1842.

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As Western Australia's precedent in prosecuting settler violence, Bussell's case is notable for establishing a defense of mitigating circumstances for the kind of normalized violence that could attend relationships between Aboriginal people and the settlers with whom they were compelled to live in close proximity. The crime of manslaughter to which Bussell pleaded guilty was not a frontier encounter of the kind that had caused controversial debate about the limits of legal jurisdiction in 1820s and 1830s NSW.[54] Rather, it was a crime arising from uneasy cross-cultural intimacy. The child whom Charles Bussell killed was familiar enough to the family for Charles to suspect her, interrogate and intimidate her, and ultimately shoot her in his own kitchen.

The defense and outcome of Bussell's trial were mirrored in many respects in the case 6 years later against respected settler George Guerrier. As a disciplinary measure, Guerrier had tied a pregnant Aboriginal woman in his employ to his verandah for 3 days, and she subsequently died. In July 1848, a charge of manslaughter against Guerrier was rejected for want of sufficient evidence, and he was charged in October for aggravated assault. Guerrier's case was heard at the Criminal Sittings on January 3, 1849. As defense counsel, Advocate General Richard West Nash presented the court with certificates of Guerrier's good character, and in "mitigation of punishment" the court fined Guerrier £5.[55] Prominent settler and magistrate Marshall Waller Clifton queried the judicial proceedings in this case. In a letter to *The Inquirer*, he questioned why the manslaughter charge had been ignored, and stated that the jury had failed in their duty to punish "the criminality of persons ill-treating the natives."[56] As defense counsel, Nash angrily responded that Guerrier had "the highest written testimony" on his good character; that there was no proof the woman's detention had caused her death; and that she had provoked her employer by having absconded from service, an offense that merited a more severe punishment than Guerrier had given her by confining her "for two or three days." In short, Guerrier had the most cause for grievance, and had further suffered from the expense and loss of time in having had to journey from his property to stand trial.[57]

54. See notes 9–12 above.

55. The same fine was awarded to William R. Steel in 1844 when he shot at and wounded Elup, an Aboriginal woman he had seen "running away" after oil was stolen from his vat. The idea of mitigating circumstances was applied in Steel's defense, even though he did not see who had taken the oil, by the argument that Elup been "warned off" in the past for "petty theft". Quarter Sessions, *Perth Gazette*, January 6, 1844, p2.

56. M. Waller Chifton, Letter to the Editor, *The Inquirer*, August 2, 1848, p2.

57. R.W. Nash, Letter to the Editor, *The Inquirer*, August 16, 1848, p4.

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Guerrier's case was telling not only for the defense counsel's successful argument that Aboriginal provocation warranted "mitigation of punishment," as in Bussell's case, but also for providing insight into the law's justification of a landowning settler's treatment of his Aboriginal servant. Many settlers readily regarded Aboriginal people as a naturally subservient source of labor.[58] Likewise, the master and servant legislation that operated with some variations across the Australian colonies supported a labor relationship that was essentially bound, as Rob McQueen has argued, to an assumption "of substantive inequality."[59] Michael Quinlan has similarly examined how embedded expectations of "worker deference" provided the law with "sweeping powers to aggrieved employers and scant redress to servants."[60] Although organized protest against the harshness of master and servant acts grew from the 1840s, Aboriginal workers had no such organized support.[61] Not only did they have little leverage with the judicial system, but they were also further burdened by an embedded ethic in colonial policy that their labor for settlers would serve as a beneficial step toward their "civilisation and Christianisation." Although Aboriginal people were ostensibly subject to master and servant legislation, there is little evidence in colonial Australia of civil litigation involving Aboriginal workers.[62] A case notable for its rarity occurred in Western Australia in 1843 when Mooyan obtained a summons against William Lemington for failure to pay promised wages, and won his case in the Court of Requests.[63]

Overall, however, in the spirit of "paternalism and punishment" that defined the relationship between masters and servants, there can be little doubt that over the course of decades magistrates treated settler abuses of Aboriginal employees with a light hand, and supported settler-masters'

58. For example, Ann McGrath, *Born in the Cattle* (Sydney: Allen and Unwin, 1987); Dawn May, *Aboriginal Labour and the Cattle Industry* (Melbourne: Cambridge University Press, 1994); and Christopher Lloyd, "The Emergence of Australian Settler Capitalism in the 19th Century and the Disintegration/Integration of Aboriginal Societies," in *Indigenous Participation in Australian Economies*, ed. Ian Keen (Canberra: ANU Press, 2010).

59. Rob McQueen, "Master and Servant Legislation in 19th Century Australia", *Law and History* 4 (1987): 80.

60. Michael Quinlan, "Australia 1788–1902: A Working Man"s Paradise?" in *Masters, Servants and Magistrates in Britain and the Empire 1562–1955*, eds. Douglas Hay and Paul Craven (Chapel Hill and London: University of North Carolina Press, 2004), 225.

61. McQueen, "Master and Servant Legislation," 82–83.

62. Quinlan, "Australia 1788–1902," 229.

63. Court of Requests, *The Inquirer*, April 5, 1843, p2. Brent Salter identifies this as the first case of civil action by an Aboriginal person in Western Australia (Australasian Legal History Digital Library project, in progress).

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assumed rights over the lives of Aboriginal employees.[64] From 1873, Aboriginal employment in the pearling industry in the colony's north was regulated under the Pearl Shell Fishery Act, but there was little sign such legislation worked to protect Aboriginal workers. In 1884, the Governor queried the "light" punishments that Roebourne's Resident Magistrate E.H. Laurence reported having imposed on pearlers over the last season for abuses of Aboriginal employees. For acts such as corporeal punishment or tying Aboriginal divers up with rope if they did not collect enough shell, the resident magistrate awarded minor fines or cautions. Having read the magistrate's reports, the governor reminded him that Aboriginal employees deserved the law's protection as equally as did white men, earning the magistrate's reply that to deal with such cases more severely "would I fear deter anyone from pearling."[65] The magistrate's response gave voice to the reality that those who served the economic development of the colony were unlikely to face more than a nominal fine for crimes of violence against Aboriginal people, and Aboriginal employees held little chance of redress through the legal system that ostensibly served to provide them with equal protection.

As Bussell's and Guerrier's trials also indicated, being a gentleman of "good character" was in itself likely to serve as a successful defense. In 1886, two "respectably connected" young men, William Bradshaw and William Inkpen, were tried on a charge of manslaughter over the death of Wyngell, alias Dickey, at York. The young men had followed Wyngell and his wife Minnie, attempting to lure Minnie "into the bush." Wyngell repeatedly told them to leave, at one point picking up a stick and threatening to strike the white men "if they did not clear off." Assisted by Inkpen, Bradshaw attacked him with such force that he died the following day. Despite the defense counsel's attempt to argue that Bradshaw had been "attacked by the black fellow with a stick" and was "justified in defending himself," the jury saw no case for provocation, and returned a guilty verdict. However, they moderated this verdict with a strong recommendation to mercy, supported by the opinion of Chief Justice Alexander Onslow that although the young men had "brought

64. Kercher, *An Unruly Child*, 111; McQueen, "Master and Servant Legislation," 79–80. Magisterial powers were extended when an act to allow for Aboriginal summary punishment in non-capital cases, of the kind rejected by the Imperial Parliament in 1840, received assent and came into effect in 1849. On the discriminatory practice of this Act, see Julie Evans, "The Formulation of Privilege and Exclusion in Settler States," in *Honour Among Nations,* eds. Marcia Langton, Lisa Palmer, Maureen Tehan, and Kathryn Shain (Melbourne: Melbourne University Press, 2004), 69–82.

65. Colonial Secretary to Laurence, May 16, 1884, and Laurence to the Colonial Secretary, July 3, 1884, Acc 388, 2815/84, SROWA.

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themselves into disgrace," they had not "really meant mischief."[66] Bradshaw was sentenced to 6 months' imprisonment and Inkpen to 3. Given that no witnesses had appeared for the defense, only their "respectable" backgrounds appear to have justified their light sentences, as one correspondent to the press implied.[67]

If the prosecution of "respectably connected" settlers for crimes against Aboriginal subjects was one test of the rule of law—a test it only superficially fulfilled—the prosecution of public officials was another. In 1866, the assistant superintendent of Rottnest Prison R.W. Vincent was tried for aggravated assault on an Aboriginal prisoner who subsequently died, and was sentenced to 3 months' imprisonment. Although he was found guilty as charged, Vincent's light sentence might be explained by the mitigating argument urged by defense counsel Edward Landor that it was the duty of a prison warden to maintain discipline and keep order amongst his charges.[68] Some years later in 1879, police constable Edward McComish was tried for manslaughter after having struck his Aboriginal police assistant Toby over the head with a revolver with such force as to kill him. Although the jury found that he had used "unnecessary violence," mitigating circumstances were accepted with his claim that he was attempting to arrest Toby for trying to abscond from police duties before the expiration of his contract. With the jury's recommendation to mercy, McComish was sentenced to 3 months' imprisonment and dismissed from the force.[69] If the rule of law worked sufficiently well to bring these public officials to trial and even to find them guilty, it did not do more than impose minimal sentences upon them.

European laborers who were tried for violent crimes against Aboriginal people were more likely than their employers to incur a heavier sentence; however, an argument of provocation, self defense, or defense of property still worked to offset a verdict of murder, particularly as the settler frontier expanded and minimal police support was at hand. Such was the defense that Edward Landor brought to the trial of stockkeepers Edward Lee and

66. Supreme Court Criminal Sittings July 8, 1886, *West Australian*, July 9, 1886.

67. Adelphi, The York Native Case, *The Inquirer*, July 14, 1886, p3.

68. Supreme Court, *Perth Gazette,* January 5, 1866, p3.

69. Series 122, cons 3472, case 889, SROWA. The prosecution of policemen for Aboriginal murder was not unknown in nineteenth century Australia. The precedent in 1827 was the trial and acquittal in NSW of Lieutenant Nathaniel Lowe for the murder of Jackey Jackey. For recent discussion of this case see Ford, *Settler Sovereignty Jurisdiction,* 120–28. In 1891 in South Australia, Mounted Constable William Willshire was tried and acquitted for the murder of Donkey and Roger. For recent discussion of this case, see Amanda Nettelbeck and Robert Foster, *In the Name of the Law: William Willshire and the Policing of the Australian Frontier* (Adelaide: Wakefield Press, 2007).

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James Wilkinson in 1863 for the murder of Coomberry. Suspecting Coomberry and Narrogin of stealing their flour, the men took it upon themselves to "arrest" the two, tying them up and beating them with a gun. The accused and two other station workers later deposed that Wilkinson's gun had discharged "accidentally," killing Coomberry instantly.[70] When the case came to trial, Landor argued, as he had in Bussell's case, that the accused had been provoked by Aboriginal criminality: their hut had been robbed, there was no police assistance to hand, and in "arresting" the Aboriginal culprits they considered themselves to be "doing a lawful act" to protect their master's property.[71] Justice Burt reminded the jury that as neither the accused nor the witnesses who testified for the defense could prove that Coomberry and Narrogin had stolen the flour, the "arrest" of them was an illegal act. In the event, Lee and Wilkinson, the latter a former convict, were found guilty. The evidence could hardly have allowed otherwise. However, Landor's defence seems to have held sway, because the jury found not for the actual charge of murder but for the lesser crime of manslaughter. Both men were sentenced to 5 years' imprisonment.

If provocation was a familiar argument though which European responsibility for violent crimes against Aboriginal people could be mitigated, self-defense was another. In April 1844, James Stoodley, an employee of pastoralist William Brockman in the Swan River District, came before the court on a charge of manslaughter for the death of Wabbemurra, whom he had killed at Brockman's station with blows about the head with a whip.[72] In his quarterly report, Aboriginal protector Charles Symmons was gratified to observe that Stoodley's indictment had convinced Aboriginal people "of our intention to see them righted" through British law.[73] This belief was hardly warranted. Although Stoodley's case went to trial, defense counsel John Schoales successfully argued that Stoodley had used the whip only to "drive away" an Aboriginal group from the station, and that as Wabbemurra held a dowak or throwing stick, "it might properly be inferred" that Stoodley "was under the impression" he might be attacked. The jury returned a verdict of not guilty and Stoodley was discharged.

No other case in the colony's history captured the settler defense of mitigating circumstances more controversially than the 1872 case against respected settler and Justice of the Peace Cleve Lockier Burges, which

70. Indictment files, series 122, cons. 3472, case 79, SROWA.

71. Supreme Court Criminal Sittings April 1, 1863, *The Inquirer*, April 8, 1863.

72. Quarter Sessions April 1844, *The Inquirer,* April 10, 1844.

73. Quarterly Report of Charles Symmons, *Perth Gazette*, April 13, 1844, p4.

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challenged the perceived right of settlers to take the law into their own hands when beyond the law's ordinary reach.[74] In February 1872, word reached Perth that Burges, provoked by the theft of his saddle, had shot and killed an unidentified Aboriginal man during an overland expedition near Nickol Bay some months earlier.[75] Governor Frederick Weld was adamant that as Aboriginal defendants were increasingly appearing in the courts on capital charges, it "is my duty to see impartial justice done to both races of Her Majesty's subjects."[76] In his view, this case would prove to be an exemplar of the policy of equal justice.

When Edward Landor (now Police Magistrate) and a bench of magistrates heard the witness statements, they considered the key evidence of Burges' Aboriginal assistant Chum Chum to be too "doubtful" to warrant a murder charge, although sufficient to charge Burges with intent to do bodily harm. Governor Weld was suspicious of the magistrates' willingness to consider the evidence against a respected pastoralist reliable for the lesser charge but not for the capital charge, and when Landor would not concede an inconsistency in this, Weld suspended him from office.[77] Forwarding all papers on to the case to the secretary of state, the Earl of Kimberley, he recalled how Sir George Gipps had "fought the same battle for justice . . . against the whole force of a powerful squatter aristocracy"—a reference to the conviction of seven white men for the Myall Creek massacre in 1838—and reiterated that his own efforts in this case would "promote equal justice for all classes of Her Majesty's subjects".[78]

In comparing his treatment of the Burges case to Gipps' treatment of the Myall Creek case, Weld was appealing to an era when humanitarian discourse had driven colonial policy. In 1839, in the aftermath of the Myall Creek massacre trial, Secretary of State Lord Russell had stressed the Crown's determination to provide Aboriginal people with "protection against injustice," and promised NSW's Governor Gipps the imperial

74. The same challenge had been raised by the prosecution of Lowe in NSW in 1827 (note 70 above). As Lowe's trial took place before and Burges' some decades after Aboriginal people were clearly considered amenable to British law, Burges' case helps to indicate the protracted extent of debate about limitations of the law's jurisdiction in Australia's colonies.

75. Piesse to Superintendent of Police, February 1, 1872, *Despatches* (1873), no 53, encl 1, 7. For discussion of the Burges case see, for example, Russell, *A History of the Law in Western Australia,* 318–19; Jeanine Williams, "Governor Weld and the Landor–Burges Affair," *Anthropological Forum* 3 (1972), 157–179; and Geoffrey Bolton and Geraldine Byrne, *May it Please Your Honour: A History of the Supreme Court of WA* (Perth: Supreme Court of WA, 2005).

76. Minute by Governor Weld, February 6, 1872, *Despatches* (1873), no 53, encl 1, 7–8.

77. Colonial Secretary to Landor, June 6, 1872, *Despatches* (1873), no 53, encl 3, 9.

78. Weld to Kimberley, July 18, 1872, *Despatches* (1873), no 60, 27.

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government's every support in securing it.[79] In the decades between, however, that commitment had significantly fallen away. If Governor Weld expected the Colonial Office to support him as it had supported Gipps more than three decades earlier, he would be disappointed. The secretary of state did not endorse Weld's action "in interfering with magistrates in the honest exercise of the discretion with which they are invested by law," and requested Landor's reinstatement.[80]

When Burges' case came before Justice Archibald Burt and a common jury in the Supreme Court, Attorney General Robert Walcott attempted for the prosecution to stress the equality of Aboriginal people before the law. In summing up, Justice Burt also reminded the jury that the law must apply "for black and white alike."[81] However, although the attorney general considered "the evidence would have justified and sustained a verdict of murder," the jury found Burges guilty only of manslaughter and sentenced him to 5 years' imprisonment. Appeals on his behalf were sent to the secretary of state, who again showed how far Colonial Office policy had drifted from its insistence a generation earlier on equal justice for Aboriginal people. Kimberley recommended that a year's imprisonment would provide sufficient punishment "to exercise a sufficiently deterrent effect on … similar offences," and Burges' sentence was duly remitted from 5 years to 1.[82]

"Principles of Conscience and Truth"

A key aspect of the controversy in Burges' case was that it relied significantly upon the eyewitness testimony of Burges' Aboriginal assistant, whose evidence Landor and his fellow magistrates considered too unreliable to sustain a murder charge, yet sufficient for a lesser one.[83] In NSW and its jurisdictions, the inadmissibility of Aboriginal evidence until 1876 concerned many colonial administrators, as well as London's Aborigines Protection Society.[84] Through the 1840s, bills to admit Aboriginal evidence in courts of law were proposed and rejected for

79. Lord Russell to Gipps, December 21, 1839, HCPP 627, 25.

80. Kimberley to Weld, September 5, 1872, *Despatches* (1873), no 39, 33.

81. Supreme Court Criminal Sittings September 4, 1872, *Perth Gazette,* September 13, 1872.

82. Kimberley to Weld, December 27, 1872, *Despatches* (1873), no 71, 43–44.

83. Charges preferred by His Excellency the Governor in Executive Council against Edward Wilson Landor, and answer of E.W. Landor to charges brought against him, June 17, 1887, *Despatches* (1873), no 53, encl 4(H) and encl 7, 10–13.

84. For example, Reece, *Aborigines and Colonists*, 179–82, Castles, *An Australian Legal History,* 533–34.

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NSW and its jurisdictions, because of the perceived legal obstacle of Aboriginal ignorance about the nature of an oath, an outcome that frustrated Governor Gipps both because it allowed settlers to escape judicial punishment for injury to Aborigines and because, in his view, it allowed Aborigines to escape judicial punishment for their crimes, and, therefore, encouraged settlers to "take the law into their own hands."[85] As Barry Patton has argued in relation to the Port Phillip District, the continuing inadmissibility of Aboriginal evidence in the courts was understood to be a primary cause for settlers getting away with murder. Protector George Augustus Robinson complained in 1845 that by virtue of this "incapacity." Aboriginal people would inevitably bear the brunt of "unequal justice."[86]

In contrast, Western Australia was distinctive for being the first Australian colony to admit Aboriginal testimony without the sanction of an oath in criminal cases concerning both Aborigines and Europeans.[87] However, in coming years, a continuing difficulty when Europeans were prosecuted for violent offences against Aborigines was that juries and other legal officials remained ready to disregard Aboriginal evidence, despite its legal status.[88] When the draft of the 1841 Aborigines Evidence Act had come before the Executive Council, Advocate General Richard Nash recorded his disapproval of admitting into courts the unsworn testimony of "infidel savages" who were "devoid of the principles of conscience and truth," not just because it ran counter to "the principles of evidence," but, more specifically, because it might prove to be "dangerous to the lives, properties, and reputation of British citizens." In his view, whereas Aboriginal people's "random assertions" might be applied to each other, they should not be allowed to affect "the life or liberty of a civilized man."[89] Although Nash's objections did not hold officially, in subsequent years such sentiments still seeped into the courts. Moreover, they were given legal latitude by the discretionary scope provided within the Act for justices and juries to determine the degree of credibility attaching to Aboriginal evidence.[90]

The bias against Aboriginal evidence when it incriminated settlers was at the heart of *The Inquirer's* protest about the outcome of John Jones' trial in

85. Smandych "Contemplating the Testimony of Others," 254–55.

86. cited in Patton, "Unequal Justice," 13.

87. On the ambiguities of this see note 34 above.

88. A similar pattern was evident in South Australia, which with Western Australia was the only other colony to admit Aboriginal testimony in courts of law in the 1840s. See Nettelbeck and Foster, "Colonial Judiciaries," 331–33.

89. *The Inquirer*, December 8, 1841, p3.

90. Russell, *A History of the Law,* 319; Hunter, "The Origin and Debate," 139.

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1853, which was dependent upon Aboriginal eyewitness testimony. If the evidence was considered insufficient when "the result will be hanging," the editor asked, how was it found sufficient "when it only tends to cause a man to be imprisoned"? Despite the clarity of the evidence, he pointed out, the jury returned a verdict of manslaughter rather than murder because they would not abide by the principle that the "testimony of natives should affect the life of a white man." In "common justice," Aboriginal evidence should be either accepted or rejected altogether, and if it was not considered reliable when it incriminated white defendants, it should not be considered reliable when it incriminated Aborigines.[91]

The duplicity neatly identified by *The Inquirer's* editor pertained in the courts over the course of decades. In the early 1850s, for example, two cases of grievous bodily harm in which Aboriginal men had been shot and wounded by settlers, came before the court. The prosecutions relied solely upon Aboriginal witness testimony, and in both cases the accused were acquitted.[92] In 1865, Edward Landor defended station worker David Reader, who was on trial for the murder of an Aboriginal man, Denny. The witness testimony was provided by two Aboriginal people, Sammy and Scarron, who stated through an interpreter that Reader had come into the camp where Denny was resting, and, without provocation, had beaten him with such force as to kill him. Landor cautioned the jury that "there was but little dependence to be placed upon native evidence," and urged them "not to be carried away by too eager a desire for equal justice between white and black."[93] However, in addition to the Aboriginal evidence, the prosecution was supported by the testimony of the colonial surgeon, who verified that Denny had died from kicks delivered "with considerable violence" to his stomach, liver, and spleen. With the backing of the medical evidence, the jury found Reader guilty, not of murder but of the lesser crime of manslaughter, and sentenced him to 3 years' imprisonment with hard labor, although he served less than 2.

91. The Quarter Sessions, *The Inquirer*, October 12, 1853, p2.

92. In 1850, station owner Denzil Onslow was tried for shooting Marrin with intent to do grievous bodily harm. The case relied on Marrin's testimony, and Onslow was acquitted (series 122, cons. 3472, case 478, SROWA). In 1852, Francis Whitfield was tried on Aboriginal witness testimony for shooting Mordecai with intent to do grievous bodily harm, and also acquitted (series 122, cons. 3472, case 535, SROWA).

93. Supreme Court Criminal Sittings January 4, 1865, *Perth Gazette*, January 6, 1865. When defending Lee and Wilkinson in 1863 for the murder of Coomberry, Landor similarly cautioned the jury "not to attach too much importance" to the eyewitness testimony of Narrogin and Corrubung, arguing that whereas Aboriginal evidence was "receivable" in court, it "ought not to outweigh" that of the white witnesses. Supreme Court Criminal Sittings April 1, 1863, *The Inquirer*, April 8, 1863.

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These cases at least reached the court, even if a disregard for Aboriginal evidence unsupported by white witnesses resulted in minimal,, if any judicial punishment.[94] Other cases never reached the prosecution stage because the officials charged with investigating such cases were also unwilling to rely upon Aboriginal evidence unsupported by white witness testimony. When warrants were issued for Eucla station owners William Stewart McGill and William Kennedy for an alleged murder of an Aboriginal man near Albany in 1882, the Attorney General acknowledged that a difficulty in prosecuting the case was that "there is no evidence against the suspects except the evidence of aboriginals. Such evidence is as likely as not to break down before a Jury if unconfirmed."[95] The case did not proceed, and the men did not go to trial.

Similarly, in 1886 when station overseer John Pollett reported to the local Roebourne magistrate that his gun had accidentally discharged, killing Jenaquorie, the case was decided at a coronial inquest as one of excusable homicide because both the magistrate and the investigating police proved unwilling to rely on the Aboriginal witness statements that Pollett had put his gun to the shoulder and fired deliberately.[96] When the paperwork was forwarded to his office, Acting Attorney General Septimus Burt asked for a re-investigation, arguing that the Aboriginal eyewitness testimony "disclose[s] a clear case of wilful murder and nothing less."[97] "I am aware" he wrote, "that it is extremely difficult to get the whole truth in a matter like this" and the police felt "that full reliance cannot be put upon [Aboriginal] evidence," but he was "strongly impressed" by the consistency of Aboriginal testimony in this case. As it transpired, the outcome of the second investigation by two magistrates was little different from the first: following police opinion, they agreed that the

94. In two cases from the 1840s in which settlers were tried for violent crimes against Aborigines, the influence of European witness testimony also resulted in guilty verdicts, although the sentences awarded were not heavy. In 1846, laborer Robert Connacher was found guilty for the manslaughter of Wunergun, an Aboriginal woman whom he had shot in the face and who died of her wounds. Two fellow workers testified against him. On their evidence he was found guilty and sentenced to 1 year's imprisonment with hard labor (Indictment files, series 122, cons 3472, case 359, SROWA). In 1848, station employees John Gale and James Eagan were sentenced to 3 years' imprisonment for stabbing and wounding Baudit on suspicion of sheep stealing at Albany. Although they did not kill him, the attack was so violent that the details were considered unfit for publication. In all likelihood, the prosecution was successful because European eyewitnesses testified against the men (Quarter Sessions, *The Inquirer*, January 12, 1848, p3).

95. Acc 430, 33/49, SROWA.

96. Acc 388, 3675/86, SWOWA.

97. Ibid.

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Aboriginal evidence in this case was not reliable, and that Pollett was liable for assault. To this lesser charge Pollett pleaded guilty and was fined £5.

It was notable that when uncorroborated Aboriginal evidence was required to find a guilty verdict in cases of Aboriginal violence against Europeans, juries were ready to accept it no matter how tenuous it might be. At the same Criminal Sittings in which David Reader was tried, five Aboriginal men were tried for the murder of station worker Thomas Botts near Champion Bay. The men had been arrested on the word of an Aboriginal interpreter who was not present at the trial, and the evidence had to pass through another three interpreters to be understood.[98] Four of the five men were found guilty and hanged at the scene of the crime. Likewise in October 1863, Tellup was tried for the murder of shepherd Charles Story 2 years earlier near Albany. Tellup was the fourth Aboriginal man to be tried for this crime, three others having been tried, convicted, and executed the previous year.[99] At Tellup's trial, interpreter Francis Armstrong could not understand the Aboriginal testimony "satisfactorily to himself." One witness, Barbelan, "told a long unintelligible story," and another Aboriginal witness was "only a degree less unintelligible" to the court. "The whole proceeding," wrote the court reporter, "had the appearance of a mockery of English forms of criminal justice."[100] Nonetheless, Tellup was found guilty and hanged at the scene of the crime.

The flaws in the principle of equal justice created by the unwillingness of juries, magistrates, or investigating police to rely upon Aboriginal evidence alone, were no doubt compounded by the fact that Aboriginal people themselves had every reason to avoid police or other entanglements in the British legal system. When in 1886 Corporal Edward Smith investigated the shooting of an Aboriginal man by a station worker on the Gascoyne, he was unable to gather any evidence other than a corroborating statement from the man's coworker that he had shot in "self defence." Aboriginal people themselves could not be induced to yield information because, Corporal Smith supposed, "they thought we wanted to catch them."[101]

From the 1870s, as the pastoral, mining, and pearling industries established themselves in the colony's far north, the difficulties of successfully prosecuting cases against settlers on the basis of Aboriginal evidence were compounded by distance, as well as by the investment of local magistrates or justices of the peace in the local economy. In one instance, police

98. Supreme Court Criminal Sittings January 4, 1865, *Perth Gazette*, January 6, 1865.

99. Criminal Sittings Register 1830–1887, Acc 3422/1, SROWA.

100. Supreme Court Criminal Sittings October 8, 1863, *West Australian*, October 15, 1863.

101. Acc 388, 3673/86, SROWA.

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sergeant Christopher Payne tried hard to have a case against pearler John Wells properly tried, as Governor Weld had done in Burges' case. Sergeant Payne investigated Wells for having flogged Aboriginal diver Charlie to death 2 years earlier. Payne gathered statements from six Aboriginal witnesses "which corroborate each other in nearly every particular" but, he reported, it "is almost impossible to get any white evidence in these cases." He saw sufficient grounds for charging Wells with manslaughter, but understanding the limitations of a case built solely upon Aboriginal testimony, he persisted in finding European witnesses. Finally he gathered statements from two of Wells' pearling coworkers, about which he entertained considerable doubt. The witness statement of Duncan McRae he considered warranted "very little reliability," as McRae was clearly "an interested party … almost an accessory." As well as expressing his lack of faith in the white witness testimony, Payne expressed his lack of confidence in the local justices of the peace, as they were all "very deeply interested" in the pearling industry. Predicting that "if any Justices sit with the Govt Resident it is impossible to get a conviction," Payne recommended "that this case be tried at Perth as Justice can never be got here."[102] Despite Payne's efforts, Wells' case did not go to Perth, but was tried at the Roebourne District Court. The charge went forward not as manslaughter but as assault causing actual bodily harm. McRae, whom Payne considered to be "almost an accessory" to the crime, served as witness for the defense. As Payne had predicted, the jury returned a verdict of not guilty and Wells was discharged.[103]

"I Do Not See That Anything Can Be Done"

As cases such as John Pollett's and John Wells' indicated, it could be more a matter of individual discretion than legal obligation whether local magistrates pursued a duty to ensure Aboriginal legal protection. Australia's colonial magistracy, as it had functioned since the 1820s, was largely composed of settlers who mostly had no formal legal training, but who represented landed gentleman or the "local oligarchy."[104] Hilary Golder has discussed the essentially incompatible responsibilities of these functionaries in NSW over the 1840s, the decade when frontier expansion

102. Acc 430, 1887/26, SROWA.

103. Acc 430, 1887/790, SROWA.

104. Barlow, "A Strictly Temporal Office," 50–51; and Hilary Golder, *High and Responsible Office: A History of the NSW Magistracy* (Sydney: Sydney University Press, 1991), 52.

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coincided with the shift in imperial policy to Aboriginal protection. As she puts it, the magistracy "was supposed to secure the orderly advance of the pastoral industry while acting as a 'protector' of Aborigines," but in practice, the essential incompatibility of these roles could manifest in magistrates turning a "blind eye" to settler vigilantism.[105]

Resident or stipendiary magistrates, along with honorary justices of the peace, were appointed to Western Australia's outlying districts as they opened up. As these officials were primarily appointed from within the local landowning body, the task of Aboriginal legal protection in distant districts sometimes fell to curiously inappropriate hands. An irony of a forgetful administration is that some years after Eucla sheep station owner William Stewart McGill was investigated for Aboriginal murder in 1882, he was appointed local justice of the peace and sub-protector of Aborigines. In this role, he continued to be enveloped in controversy about his handling of Aboriginal matters.[106]

Although a bias among settler juries may have made it difficult to secure meaningful penalties against Europeans tried for offenses against Aborigines, at least in the colony's earlier decades, most such cases arose from circumstances in which the victims and perpetrators were known to each other, and were readily captured in the law's net.[107] However, with increasing distances between the center of government and new districts of settlement, it was no simple matter for central authorities to always scrutinize the activities of the regional magistracy tasked with Aboriginal legal protection.[108] In 1873, in the wake of Burges' trial, Governor Weld asked the Attorney General H.H. Hocking to review the cases of outrage against Aboriginal people that had come to the government's notice in the northern districts over recent years, and report on "the efforts that have been made to investigate them and to apprehend and punish the offenders."[109] Hocking's report was a depressing account of a tolerated culture of settler violence and the difficulties of investigating it, not least because of the indifference of local magistrates. Hocking closed

105. Golder, *High and Responsible Office,* 60.

106. Acc 1496, 1900/1729, SROWA.

107. For example, in 1865, Francis Badcock was tried over the death of his de facto Aboriginal wife Emma and sentenced to 12 years' imprisonment, although he served only 5. It is possible that his heavy sentence resulted from the facts that the crime was particularly violent and it occurred in the presence of white eyewitnesses. Supreme Court, *Perth Gazette*, April 7, 1865, p3.

108. Golder, *High and Responsible Office,* 30. On the difficulties of maintaining administrative oversight of local magistrates in colonial South Australia, see Nettelbeck and Foster, "Colonial Judiciaries".

109. Report of Hocking to Weld, July 15, 1873, *Despatches* (1873) Part V, 94.

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his report with the observation that despite the government's stated goal to legally punish injury to Aboriginal people, such efforts "have not been attended with the success that might have been wished."[110]

At times, government authorities intervened when reports from local magistrates indicated a failure to adequately pursue or punish settler crimes against Aboriginal people, particularly in the remote north.[111] In 1885, the attorney general and colonial secretary queried a report from the resident magistrate at Carnarvon, C.D. Foss, in which he accepted without investigation a statement from the Davis brothers that their party had shot an Aboriginal man in self-defense while out near Mount Clere. The magistrate had known the Messrs Davises "for some years" and felt no reason to doubt their report; and given the distance and the time that had elapsed, he saw no reason for further inquiry.[112] When the magistrate's report reached Perth, the colonial secretary noted: "the Resident Magistrate does not appear to regard this as anything out of the way—a lesson in a civilising school!" Foss was reminded of his duty to initiate an investigation into such cases; however, this case went no further when the magistrate restated that "I do not see that anything can be done in this matter."[113]

Some magistrates openly resented any intervention from the seat of government. When the attorney general requested a re-investigation of the case against John Pollett in 1886, local Resident Magistrate Edward Angelo felt justified in arguing for his magisterial independence. The government's attempt to bring a charge of murder "against a settler bearing a good character in the district," he reported back, had "acted prejudicially" in the minds of local settlers, even though in the end the re-investigation made little difference to the original findings.[114] At other times, the disinclination of remote magistrates to pursue investigations or coronial inquests in cases of Aboriginal deaths received no government comment at all, such as when mounted police reported Aboriginal fatalities as a "last resort" in the course of patrols.[115]

110. *Despatches* Part V, 97.

111. For example, Roebourne's Resident Magistrate E.H. Laurence was questioned in 1884 over his handling of a case of Aboriginal assault. Two young boys who worked for pastoralist Guy Thomson had run away, and in punishment he flogged them until they were reportedly "nearly dead." Thomson admitted the flogging, and the magistrate fined him £1 for the less severe assault and £5 for the worse. Although the attorney general suggested that "a much severer punishment, I should say imprisonment for some term, was the proper sentence," the case was left with the observation that the magistrate had "committed an error of judgement" (Acc 388, 3296/85, SROWA).

112. March 4, 1885, Acc 388, item 7, SROWA.

113. April 13, 1883, Acc 388, item 7, SROWA

114. Acc 388, 3675/86, SWOWA.

115. For example, Acc 527, file 1886/3922, SROWA.

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However, the everyday difficulties of law enforcement were a measure of how hard it could be to achieve convictions for settler violence, even when cases were prosecuted. Delays in police investigation, degrees of magisterial indifference, and settler unwillingness to come forward were all symptoms in the 1861 case against John Death and Joshua Edwards, which ultimately led to an acquittal. In September 1860, police sergeant William Piesse went to the hut of Death, stockkeeper on Edwards' cattle station near the Swan, in order to arrest him on a charge of cattle stealing. In the hut he found strychnine-laced flour, which Death told the policeman he kept for eradicating native dogs. Piesse may have thought no more about it, except that he was in the district not just to arrest Death for cattle stealing but also "to catch natives" for the same reason. While the sergeant was out on this business, Aboriginal people showed him the grave of 2-year-old boy Bulbaroo, and told him the child had died some time earlier after eating poisoned flour left by Death. Piesse reported this to the local magistrate, who called an investigation. Two fellow workers of Death's, William Bandy and John Sims, deposed that Edwards had instructed Death to mix the strychnine in the flour "for the natives," and that Death had "a trap laid for them."[116] Death and Edwards were tried for the murder of the child in January 1861. Although Bandy and Sims both appeared as witnesses for the prosecution, neither inspired confidence in the likelihood of settlers serving in that role. When asked why they had not earlier come forward when they knew of the planned "trap" and the child's death, Bandy replied that he considered it "none of his business," and Sims that he had no idea to "caution the natives nor tell the police."[117] Moreover, the magistrate did not think to arrange exhumation of the child's body or to investigate further than taking Bandy's and Sims' depositions. Although medical advice to the court was that the child's symptoms sounded consistent with the effects of strychnine, without examining a body, and with no further evidence to hand, it was impossible to judge with certainty. In the absence of harder evidence the accused were acquitted.

A case from the far north that revealed much about the levels of inertia embedded in the law's official role to protect Aboriginal people was that of Charles Clifford, a pastoral worker identified as "creole," who was tried in early 1884 for the manslaughter of Thackabiddy in the northern district of the Gascoyne. The court heard that in May 1883, pastoralist George Gooch took it upon himself without warrant or authority to "arrest" Thackabiddy for being within the vicinity of his sheep. Gooch decided to take him to the

116. Indictment files, series 122, cons. 3472, case 851, SROWA.
117. Quarter Sessions, *Perth Gazette*, January 11, 1861, p2.

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police station in Carnarvon with the aid of his station worker Clifford. Before setting out, he left Thackabiddy in the "custody" of a Mr Keane, who shot and wounded the prisoner in the neck, chin, and arm. Considering the wounds "slight," Gooch embarked on the journey with Clifford, the prisoner chained by the neck to Clifford's horse. Three days later, they fell in with another settler, travelling with a 16-year-old boy, Roach. While Messrs. Gooch and Gale continued ahead, Clifford and Roach followed with the wounded prisoner, and sometime during the journey Roach shot Thackabiddy again, wounding him in the ankle. Although "hardly able" to walk, Thackabiddy was obliged to trail the horse in chains until he "tumbled down." Clifford dragged the prisoner by the neck chain behind his horse for another mile or thereabouts before securing him to a tree. There he was left without food or water while Clifford and Roach continued the last 40 miles into Carnarvon, where they directed Constable Turner on how to find him.[118]

When Constable Turner arrived at the spot, he found Thackabiddy dead, still chained to the tree, with the bullet wounds on his body and the tracks from where he had been dragged behind the horse in clear view. Nonetheless, it was a month before the police thought to make any arrests in this case. On cross-examination, Constable Turner pointed out that there was "nothing unusual in escorting a native chained round the neck to a horse: that is how the police escort them." Of those involved in this tortuous journey, from Thackabiddy's unwarranted detention on May 24 to his death on May 29, it was only the "creole" station worker Clifford who was charged with manslaughter. Clifford's defense counsel Stephen Henry Parker, who had acted as Burges' defense counsel in 1872, did not attempt to argue other than that "this native was, so to speak, done to death," but rested his defense on the grounds that the "immediate" cause of death was impossible to calculate. In this, he was supported by the medical opinion of Dr Edward Scott that, although being dragged by neck chains behind a horse while wounded by bullets was not "judicious treatment," it could not be confirmed as the direct cause of death. The jury took 10 minutes' consideration to acquit Clifford. The case generated discussion in the colonial press and reached the notice of the secretary of state, Kimberley's successor the Earl of Derby, who queried whether any further attempt could be made to prosecute the others involved in the affair.[119] The governor and attorney general examined the possibility, but concluded that sufficient evidence could not be produced. Discussions continued for months, but petered

118. Supreme Court Criminal Sittings January 10, 1884, *West Australian*, January 12, 1884.

119. Derby to Broome, March 11, 1884, Acc 388/575/84, SROWA.

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out with the conclusion that although the jury had taken a "prejudiced" view, the fact that "nobody was punished was no fault of the Government."[120] By the end of the decade, George Gooch had been recommended to the local position of justice of the peace and sub-protector of Aborigines.[121]

Only once in the colony's history was a European convicted and executed for the murder of an Aboriginal. In October 1859, Richard Bibbey was tried for the murder of Billamarra. Bibbey was an expiree who had been originally transported for robbery with violence, and was now working as a hutkeeper at Champion Bay. Shepherd Edward Cornely testified that he had seen Bibbey shoot Billamarra in cold blood without provocation. Although Bibbey alleged he had shot in self-defense while recovering stolen sheep, the shepherd testified that he "never missed any" sheep, and no witnesses were called for the defense.[122] Bibbey was hanged on October 17, 1859. His case was heard before Alfred McFarland, who the previous year had insisted that "our oaths enjoin ... and our consciences require" equal justice to Aboriginal people. Overall, however, there was little proof that this view was much shared by the judges, juries, and magistrates who oversaw cases of Europeans charged with violence to Aborigines.[123]

After the establishment of a centralized Aborigines Protection Board in 1886, there was also little sign that the promise of Aboriginal equality and protection under the law had any more reality than it had over the colony's first 50 years, despite periodic enquires into charges of abuse against the Crown's Aboriginal subjects.[124] Throughout 1886, Governor Frederick Napier Broome instigated police investigations into the Reverend Joh Brown. Gribble's charges of Aboriginal abuse in the northwest following their extensive serialisation in the press, but with little effect.[125] When

120. Acting Attorney General Leake to colonial secretary, October 19, 1884, Acc 388, 575/84, SROWA.

121. Acc 527, 1888/2446, SROWA.

122. Quarter Sessions October 1859, *Perth Gazette*, October 7, 1859.

123. When stockkeeper William Richardson was tried for the murder of Aboriginal woman Jinny in 1880, Chief Justice Henry Wrenfordsley reminded the jury of a need for the "just and equitable application of the law," but appeared to offer this more as a matter of personal judgement than legal obligation by adding that he "did not know whether this was owing to the tendency of his mind, or not." In this case Richardson was acquitted. Supreme Court, *West Australian*, June 8, 1880, p3.

124. *Instructions to and Reports from the Resident Magistrate Despatched by Direction of His Excellency on Special Duty to the Murchison and Gascoyne Districts* (Perth: Government Printer, 1882), known as the "Fairbain report"; and *Report of the Royal Commission on the Condition of the Natives* (Perth: Government Printer, 1905), known as the "Roth report."

125. Acc 388, items 6–32, SROWA. These charges were published as J.B. Gribble, *Dark Deeds in a Sunny Land* (1905; rpt. Perth: University of Western Australia Press, 1987). For

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Gribble appealed directly to the secretary of state about the government's failure to "remove" such abuses, the governor responded with underwhelming assurance that each case which came "to the knowledge" of the government was investigated, and although such cases occurred "from time to time," he believed Aboriginal people "enjoy as full a measure of protection as can at present be given to them."[126] Into the twentieth century, occasional complaints about violence against Aboriginal people in the northwest received short notice.[127] One Wyndham resident, who in 1917 tried and failed to achieve a neutral inquiry into the police shooting of an Aboriginal man, stated that it was "useless bringing the matter before the government or Police as they only send to the accused man for a report and accept it."[128] As "the natives can be shot down with impunity," he concluded, it "is no use continuing the farce [of the law] any longer."

"Sympathy for the Poor Blacks"

Although the trials of Europeans responsible for Aboriginal deaths only led to the death penalty once in the colony's history, the prosecution of such cases seemed to arise often enough to fuel an aggressive public discourse of settlers' disability and Aborigines' advantage before the law. This kind of sentiment was visible across Australia's colonies whenever Europeans were pulled into the courts as defendants. After NSW's Myall Creek murder trials in 1838, the colonial press without apparent irony lamented the absence of "equal laws and equal justice" for whites who did no more than protect themselves from Aboriginal aggressions.[129] As Reece describes it, settler grievance about the trial ultimately served less to discourage violent vigilantism than to encourage the secrecy that surrounded it.[130] Similar

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discussion of Gribble's efforts, see Henry Reynolds, *This Whispering in our Hearts* (Sydney: Allen and Unwin, 1998).

126. Reverend John Brown Gribble to Secretary of State Edward Stanhope, November 30, 1886 and Governor Frederick Broome to Secretary of State Edward Stanhope, December 20, 1886, Acc 388, item 6, SROWA.

127. Andrew Gill, "Aborigines, Settlers and Police in the Kimberleys 1887–1905," *Studies in Western Australian History* 1 (1977): 1–28; Chris Owen, "'The Police Appear to be a Useless Lot up There': Law and Order in the East Kimberley 1884–1905," *Aboriginal History* 27 (2003): 105–30.

128. James Maloney to Chief Protector A.O. Neville, June 16, 1917, Acc 653, 1917/23, SROWA.

129. cited in Kercher, *An Unruly Child*, 13.

130. Reece, *Aborigines and Colonists*, 162.

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grievance about the prosecution of settlers for Aboriginal murder was expressed in other colonies.[131] In Western Australia, however, where the prosecution of settlers for violence against Aborigines took place with more consistent regularity, such public sentiment built steadily over the decades, fueled by a belief that from the beginning, Western Australia had treated Aboriginal people to the law's protection.

This feeling was evident from the colony's earliest settler prosecution in 1842, and was tied to settler complaints about the lack of adequate government support of pastoral security in outlying districts. The government afforded "scarcely one tittle of assistance to the unfortunate settler," wrote one correspondent, whereas Aboriginal offenders were routinely acquitted of their crimes.[132] At the time this correspondent penned his letter, settlers would have regularly observed the acquittal of Aboriginal defendants in inter se cases. However, even as the decades passed and Aboriginal people were overwhelmingly prosecuted and sentenced as defendants in the courts, complaints continued to appear regularly in the colonial press that settlers received none of the law's benefits, whereas Aborigines received all of its clemency.[133]

The prosecution of landowner and Justice of the Peace Cleve Lockier Burges in 1872 particularly served to excite such feelings, voiced in the colonial press as a perception that the law "protects the Blacks from the oppression of the whites, but affords no protection to the latter from the aggressions and depredations of the natives."[134] Such sentiments, however, were not confined to any one case; they were more protractedly tied to the continuing evolution of a volatile settler frontier in Western Australia's north, decades after Aboriginal people across Australia's colonies were officially considered amenable to British law. An "erroneous policy" pertained in the colony, complained another correspondent in the 1860s,

131. For example, Ford, *Settler Sovereignty Jurisdiction,* 121; and Nettelbeck and Foster, "Colonial Judiciaries," 332–33.

132. *The Inquirer*, July 13, 1842, p2.

133. For example, one correspondent complained that "the Laws are so strictly administered in this colony ... that if the settlers, to whom no sufficient protection is afforded, should take the law into their own hands and avenge attacks upon their property by summary punishment they would be held guilty of murder." *Perth Gazette*, November 4, 1864, p4.

134. *Perth Gazette* October 11, 1872, p2. A telling back story to the Burges case is that almost 40 years after his trial, Burges published a memoir of his young pioneering days in the colony. In these memoirs he was quite direct about his "rough and tumble with the natives" during a 1864 expedition to Roebuck Bay with a party that included magistrate Maitland Brown. Each of their party, he writes, was "heavily armed" with a six-chambered revolver and a double-barrelled shotgun, "giving us each 44 shots without reloading" and making "things hot for the blacks." Cleve Lockier Burges, *Pioneers of Nor'-West Australia* (1911; rpt. Perth: Hesperian Press, 2008), 114–15.

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which "spared" Aboriginal offenders to the degree of encouraging them to believe they could "kill the whites, and they will not be hung for it."[135] What is particularly notable about such settler sentiment of the law's bias in favor of Aboriginal people is that it continued to pour scorn on a perceived overzealous "doctrine of Protection" well after the humanitarian policies of the 1840s had waned, and a dedicated Aboriginal protectorate had ceased to exist.[136] The government's enthusiasm for Aboriginal legal protection worked so far against settlers' interests, claimed one correspondent in 1882, as to give credibility to the idea that "the Governor would let the natives shoot us!"[137]

The actual imbalances within the law were not lost on some correspondents to the press. Despite the official claim of legal equality, wrote one, "no such equality exists … our superiority is but one of force [which is] at variance with the true principles of justice."[138] Another correspondent suggested that the only benefits to Aborigines of being stamped with "the dignity of British subjects" is that they have "free quarters in our jails, and are duly hanged … with all the solemnities of the law."[139] Such views, however, were considerably less common than the circulating sentiment, particularly in the north, that the government encouraged settlers "to take up lands," left them without resources to manage "as best they can," then stepped forward "ret hot with sympathy for the poor blacks."[140] In 1889, brothers Arthur and Gordon Shaw, station owners on the Murchison River, and their foreman Thomas Mead, were fined for various cases of Aboriginal assault and charged with two counts of Aboriginal murder.[141] Although they were all discharged, local settlers still held a public meeting to record their disapproval at the "unwarranted manner in which they have been dealt with" by the law and its "undue severity in treating the whites in connection with the natives."[142] Ultimately, it seemed that resentment arose from the officially held principle that the law would punish settler crimes against Aboriginal people, despite the practical reality that meaningfully it did not.

135. *Perth Gazette*, October 14, 1864, p2.

136. Ibid., December 20, 1872, p3.

137. West Australian, November 21, 1882, p3.

138. *Perth Gazette*, March 5, 1852, p2.

139. *West Australian*, March 10, 1864, p3.

140. *Perth Gazette,* March 7, 1873, p3.

141. Their case was heard and dismissed at the Supreme Court on October 10, 1889. Supremet Court, *West Australian,* October 11, 1889, p4.

142. Ibid., November 13, 1889, p3.

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Conclusion

Across Australia's colonies after the 1830s, the law's disciplinary and protective roles towardsAboriginal subjects of the Crown were intended to work as two sides of the same coin, but although Aboriginal people felt the full weight of the law's punishment, there was little fulfilment of its promise to protect them.[143] Although only a minority of settlers prosecuted for violent offences against Aborigines were actually acquitted in colonial Western Australia, the pattern of sentences awarded gave little force to the colony's founding promise that such crimes would be punished "as if the same had been committed against any other of His Majesty's subjects." Some were awarded a fine, and of those who received a term of imprisonment, John Jones' sentence of life transportation was unusual; most served a sentence that ranged from 3 months to 5 years.[144] Of the cases ini which respected settlers came before the court, only Cleve Lockier Burges served a sentence of 1 year's imprisonment, to the outrage of many in the colony.

That Western Australia proved to be little different from its sister colonies in failing to provide adequate legal redress to Aboriginal victims of settler violence is perhaps not surprising. What is more notable about the colony's judicial response to Aboriginal–settler conflict is that from its early years, it seemed to achieve a wider reach over the problem of settler violence than did other Australian colonies, demonstrated in the relatively high numbers of settlers tried and sentenced for crimes against Aborigines in the critical decades after foundation. This judicial reach might be explained by a mixture of circumstances. With South Australia, Western Australia was distinctive from NSW and its jurisdictions in being founded as a free colony relatively late in Australia's history of British settlement, at a time when the rise of Colonial Office concern for

143. See, for example, Greta Bird, *The Civilising Mission: Race and the Construction of Crime. Contemporary Legal Issues*, 4 (Bundorra: Monash University, 1987); Chris Cunneen, *Conflict, Politics and Crime* (Sydney: Allen and Unwin, 2001); and Julie Evans, Patricia Grimshaw, David Phillips, and Shurlee Swain, *Equal Subjects, Unequal Rights* (Manchester: Manchester University Press, 2003).

144. An exception is the case of Robert Rowland, who in 1868 was charged with murder, found guilty of manslaughter, and sentenced to 12 years. He and a group of others had forced "Chubbie" overboard from their vessel and then shot him while he attempted to swim to shore. After Burges' sentence was reduced from 5 years to 1, Rowland's friends attempted to have his sentence reduced; but Rowland was a former convict who had been transported to the colony for attempted murder, and although like Burges, his case was taken to the Secretary of State, no grounds were seen for clemency. See Supreme Court, *Perth Gazette*, August 14, 1868, p2; and *Despatches* (1873), 89–90. As noted above, Francis Badcock also received a 12 year sentence for manslaughter, a lesser verdict than the charge of murder, but only served 5 years.

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the status of Aboriginal peoples across Britain's Empire led to clearer obligations on colonial governments to extend to them the law's protection. However, less parallel to South Australia is the fact that Aboriginal people in Western Australia were earlier brought within the colonial economy, bringing their encounters with settlers also within judicial notice. As settlement spread into more dispersed frontiers, it was accompanied by an infrastructure of government in the form of resident magistrate offices and local courts, which again maintained the appearance of legal oversight.

Ultimately, this level of judicial reach did not ensure Aboriginal legal protection, but two conclusions emerge from the fact that it appeared to do so. First, the superficial sense that the law functioned to protect Aboriginal people seemed to serve in producing an enduring public discourse that settlers labored under a form of legal surveillance from which Aboriginal people routinely escaped. Quite possibly, this helped to create and maintain an aggressive "frontier mentality" that lasted well after settlement was secured, most especially in the north.[145] Second and most important, the capacity of the legal system to capture as many cases of violence against Aboriginal people as it did, yet not to award strong judicial punishment for them, suggests the practical limitations that shaped the colonial judicial network itself. Law in Britain's settler states, Paul McHugh has written, was subject to a "messy process of invention, reinvention and improvisation."[146] And as Lauren Benton has more recently argued, even after the jurisdiction of British law seemed officially settled, the opening of vast new settler frontiers later in the nineteenth century continued to entail flexible applications of the law, ones that "defied easy categorisation and seemed even to require the [law's] occasional suspension."[147]

Such flexibility of legal application is evident in the case of colonial Western Australia where settler violence was prosecuted with more regularity than elsewhere, yet was either moderated or accommodated in the courts. To the extent that the law's failure to regulate violence was a shared trend across Australia's colonies, the factors that enabled settlers to "get away" with Aboriginal murder were not just the settler lobby's strength, or the indifference of individual officials, or the problems of distance and silence that framed the settler frontier. More pointedly, they were symptomatic of how securely the law itself was bound to the maintenance and protection of settler sovereignty, to use Lisa Ford's term, as it became

145. See Godwin, "The Fluid Frontier," on the evolution of an aggressive frontier mentality in colonial Queensland.

146. Paul McHugh, *Aboriginal Societies and the Common Law* (Oxford: Oxford Univerisyt Press, 2004).

147. Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires 1400–1900* (Cambridge: Cambridge University Press, 2010), 227.

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consolidated in the decades after Aboriginal people were included as legal subjects of the Crown. Libby Connors has suggested that it is in the courts "that much of the social history of colonialism is revealed and the successful imposition of colonial rule through law imposed."[148] Insofar as this was so, the terrors of the law remained all too predictably the preserve of Aboriginal people, in colonial Western Australia as in its sister colonies. Although its courts of justice repeatedly reiterated the view that black and white shared the same law, they were not ultimately prepared to ensure, as *The Inquirer* put it in 1853, that they should "meet the same mercy, or share the same doom."

148. Libby Connors, "Witness to Frontier Violence: An Aboriginal Boy before the Supreme Court," *Australian Historical Studies* 42 (2011): 231.

Appendix. Europeans Indicted for Violent Crime Against Aborigines Until 1886

Year and Name	Charge	Verdict and Sentence	Aboriginal Fatality
1842 Charles Bussell	Manslaughter	Guilty, fined 10 shillings	yes
1844 Robert Stoodley	Manslaughter	Acquitted	yes
1844 William Steel	Assault	Guilty, fined £5	no
1846 Robert Connacher	Manslaughter	Guilty, 12 months hard labor	yes
1848 John Gale & James Egan	Grievous bodily harm	Guilty, 3 years hard labor	no
1848 George Guerrier	Assault (bill for manslaughter rejected)	Guilty, fined £5	yes
1850 Denzil Onslow	Grievous bodily harm	Acquitted	no
1852 Francis Whitfield	Grievous bodily harm	Acquitted	no
1853 John Jones	Murder	Guilty of manslaughter, transportation	yes
1859 Richard Bibby	Murder	Guilty, executed	yes

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Appendix. Continued

Year and Name	Charge	Verdict and Sentence	Aboriginal Fatality
1860–1 Joshua Edwards & John Death	Murder	Acquitted	yes
1863 Edward Lee & William Wilkinson	Murder	Guilty of manslaughter, 5 years	yes
1865 Francis Badcock	Murder	Guilty of manslaughter, 12 years (served 5)	yes
1865 David Reader	Murder	Guilty of manslaughter, 3 years	yes
1866 R.W. Vincent	Aggravated assault	Guilty, 3 months	yes
1868 Robert Rowland	Murder	Guilty of manslaughter, 12 years	yes
1869 George Penny	Murder	Acquitted	yes
1872 Cleve L. Burges	Manslaughter	Guilty, 5 years reduced to 1	yes
1877 Henry Hickey	Murder	Guilty of manslaughter, 5 years	yes
1877 Edward Chapman	Assault	Guilty, fined £2	yes
1879 Edward McComish	Manslaughter	Guilty with recommendation to mercy, 3 months	yes
1880 William Richardson	Murder	Acquitted	yes
1884 Charles Clifford	Manslaughter	Acquitted	yes
1886 William Bradshaw & William Inkpen	Assault	Guilty with recommendation to mercy, 6 months and 3 months respectively	yes
1886 John Pollett	Assault	Guilty, fined £5	yes

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