

THE KILLING TIME: A HISTORY OF ABORIGINAL RESISTANCE IN COLONIAL AUSTRALIA

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The traditional legal history of Aboriginal Australia is the history of a racist doctrine of terra nullius, of an empty land where Aboriginal people had no legal right to their lands and, indeed, few legal rights as human beings. There is, however, another way to construct Aboriginal legal history, raised by the Australian Supreme Court in Mabo v. Queensland. This requires drawing out an understanding of the legal meaning of the absence of law, or of the choice of the state to use non-legal means to accomplish policy ends. The argument follows that we can discover legal meaning in the actions of Aboriginal peoples and that this legal meaning must be incorporated into the common law of Aboriginal rights because other avenues of access to the common law were closed to Aboriginal peoples up to, and even including, the late twentieth century. The opposite position, reflected in a traditional common law interpretive framework, limits the scope of the common law to narrow and racist opinions of nineteenth century judges, and restricts modern common law judges to a one-sided and colonial common law that is incompatible with a modern view of human rights and a pluralist view of the place of Aboriginal people and their history in twentieth century nations. This article attempts to make this argument relative to the legal conflict over the ownership of pastoral lands in Australia by analyzing both the legal meaning of the violent conflict between Aboriginal tribes and colonial settlers in the mid-nineteenth century, and the various attempts of Australian legal authorities of the time to place these events within a common law legal framework.

L'histoire traditionnelle du droit qui a régi les Autochtones d'Australie est l'histoire d'une doctrine raciste de terra nullius, d'un territoire vacant où les Autochtones n'avaient aucun droit légal de posséder leurs terres et, à vrai dire, peu de droits légaux en tant qu'êtres humains. Il y a cependant une autre approche interprétative de l'histoire du droit autochtone, qui a été invoquée par la Cour suprême de l'Australie dans l'affaire Mabo c. Queensland. Cette approche exige qu'on en vienne à comprendre la signification juridique de l'absence du droit ou celle du choix opéré par l'État qui a décidé d'utiliser des moyens non juridiques pour atteindre les objectifs de ses politiques. Il s'ensuit qu'on peut avancer qu'il est possible de découvrir la signification juridique des actes des Autochtones et que cette signification juridique doit être intégrée à la common law relative aux droits des Autochtones, parce que les autres voies d'accès à la common law ont été fermées aux Autochtones jusqu'à la fin, et même pendant la fin, du vingtième siècle. La position contraire, que reflète un cadre traditionnel d'interprétation de la common law, limite la portée de la common law aux opinions étroites et racistes des juges du dix-neuvième siècle et confine les juges qui appliquent la common law aujourd'hui dans une common law partielle et coloniale qui est incompatible avec une vision moderne des droits de la personne et une vision pluraliste de la place que devraient occuper les nations Autochtones et leur histoire au sein des nations du vingtième siècle. Cet article essaie d'appliquer cet argument au conflit juridique touchant la propriété de pâturages en Australie. L'article analyse aussi bien la signification juridique du conflit violent qui a eu lieu entre les tribus autochtones et les colons au milieu du dix-neuvième siècle, que les diverses tentatives des autorités juridiques australiennes de l'époque visant à situer ces événements dans le cadre juridique de la common law.

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I. INTRODUCTION

The place of native people in the history of Australia is being rewritten in all areas and clearly includes redefining their legal position. A traditional view, that Aborigines peacefully stepped aside, ceding their lands as *terra nullius* to British settlers, is now discredited, but still looms large in Australian history and political and legal consciousness. "The aborigines were known to attack isolated herdsmen....In general, however, they were peaceable and did not greatly impede the activities of settlers, although they aroused their concern."¹ Recent historical writing has produced a massive literature documenting Aboriginal resistance to the imposition of a white colonial legal order on Australia, as hundreds, perhaps more than a thousand whites were speared or clubbed by Aborigines in defense of their lands and their cultures.² A figure of 20,000 violent Aboriginal deaths at the hands of whites has been advanced by Henry Reynolds, with data to support it.³

This resistance has a much broader meaning than is within the scope of traditional legal history, but, nevertheless, its core was a legal conflict, manifested in hundreds of cases in the Australian courts and thousands of official actions by officials acting under colour of law. In the Melbourne Supreme Court in 1841 Sandford Bolden, a Port Fairy District settler, was charged with "whipping and shooting blacks to drive them off his station." While mustering his stock, Bolden had come upon a native man, with his wife and child. Suspecting that they had either stolen some of his stock or intended to do so, Bolden fired a shot at the man, who fled, wounded, toward a waterhole. Bolden returned home, secured a pistol, returned to the waterhole and fired again at the man, whose body rolled under the water and was never recovered.⁴ Mr. Justice Willis upheld Bolden's legal right to defend his property: "If a party receives a license from Government to occupy a run, and any person white or black come on [the] run for the purpose of stealing my property, I have a right to drive them off by every lawful means....The blacks have no right to trespass unless there is a special clause in the license from the Government."⁵

¹ B.H. Fletcher, *Landed Enterprise and Penal Society: A History of Farming and Grazing in New South Wales Before 1821* (Sydney: Sydney University Press, 1976) at 180. This is one of only two references to "aborigines" in this leading history of early agriculture in New South Wales, a land that was entirely Aboriginal at the outset of this study. The other reference, at 157, is to substantially the same effect, a colonial officer's representation that Aborigines in the Newcastle area were "unlikely to prove troublesome".

² H. Reynolds, *The Other Side of the Frontier* (Ringwood, Victoria: Penguin Books, 1982) and C.D. Rowley, *The Destruction of Aboriginal Society* (Ringwood, Victoria: Penguin Books, 1972) are the best known of these works. Others include G. Reid, *A Nest of Hornets* (Melbourne: Oxford University Press, 1982); R. Evans, K. Saunders & K. Cronin, *Exclusion, Exploitation and Extermination: Race Relations in Colonial Queensland* (Sydney: Australia and New Zealand Book Co., 1975); N. Loos, *Invasion and Resistance* (Canberra, Australia: Australian National University Press, 1982); J. Critchett, *A 'Distant Field of Murder'* (Carlton, Victoria: Melbourne University Press, 1990); A. Markus, *From the Barrel of a Gun: The Oppression of the Aborigines, 1860-1900* (Melbourne: Victorian Historical Association, 1974); B. Nance, "The Level of Violence: Europeans and Aborigines in Port Phillip, 1835-1850" (1980-1981) 19 *Historical Studies* 532; C. Turnbull, *Black War: The Extermination of the Tasmanian Aborigines* (Melbourne: Sun Books, 1965).

³ H. Reynolds, *Frontier: Aborigines, Settlers and Land* (Sydney: Allen & Unwin, 1987) at 53.

⁴ H.F. Behan, *Mr. Justice Willis* (Glen Iris, Victoria: privately printed, 1979) at 116-18.

⁵ *Frontier*, *supra* note 3 at 150.

Within a few generations, virtually all the land in Australia had been leased out to settlers in huge grants by colonial authorities acting under the colour of Australian and British law, with no regard for Aboriginal land rights.⁶

The legal meaning of this forcible occupation of Aboriginal lands is still the subject of dispute, most recently in *Mabo v. Queensland*.⁷ There the High Court explicitly grappled with two kinds of legal history: first the history of the positive law of Australia on the rights of Aboriginals, but, perhaps equally important, the Court was forced to address the legal meaning of an absence of law, the silence of the positive law on most matters of Aboriginal rights in Australia.⁸ For six judges, no legal meaning could be deduced from the failure of nineteenth century Australia to provide directly some legal scheme for the alienation of Aboriginal land.⁹ For one judge, the direct action of British and Australian officials in legalizing the occupation of virtually all of Australia by whites was an assertion of Crown sovereignty inconsistent with any Aboriginal land rights whatever.¹⁰ Similarly, the Royal Commission on Aboriginal Deaths in Custody repeatedly returned to historical factors, including the denial of self government and sovereignty, and the forcible deprivation of their lands, as root causes of Aboriginal poverty, depression, and violence, thus underlying the contemporary problem of deaths in custody.¹¹

The now reputed doctrine of *terra nullius*, the idea that Australia was an empty land that became the property of its discoverer, has its equivalency in Australian legal history, a kind of empty legal history of native rights in nineteenth century Australian law. A re-examination of that legal history, however, shows a very different picture, one of substantial legal activity. This article begins with an examination of existing scholarly work on the legal history of native people in nineteenth century Australia. It then moves on to analyze the legal position of Aborigines in the nineteenth century, first through a

⁶ Fletcher, *supra* note 1.

⁷ (1992), 175 C.L.R. 1, 107 A.L.R. 1 [hereinafter *Mabo* cited to A.L.R.]. An annotated version of the opinion is R. Bartlett, *The Mabo Decision and the full text of the decision in Mabo and Ors v. Queensland, with commentary by Richard Bartlett* (Sydney: Butterworths, 1993).

⁸ For a discussion of the context of the case see M. Manwaring, "A Small Step or a Giant Leap? The Implications of Australia's First Judicial Recognition of Indigenous Land Rights" (1993) 34 Harv. Int'l L.J. 177. See also M. Goot and T. Rowse, *Make a Better Offer: The Politics of Mabo* (Leichhard, N.S.W.: Pluto Press, 1994) and M.A. Stephenson and S. Ratnapala, *Mabo: A Judicial Revolution* (St. Lucia: University of Queensland Press, 1993). A special issue on *Mabo* was published in (1993) 15 Sydney L. Rev. at 121-223.

⁹ See e.g. the concurring opinion of Deane and Gaudron in *Mabo*, *supra* note 7 at 94: "The practical inability of the native inhabitants of a British Colony to vindicate any common law title by legal action in the event of threatened or actual wrongful conduct on the part of the Crown or its agents did not, however, mean that the common law's recognition of that title was unimportant from the practical point of view."

¹⁰ See the dissenting opinion of Dawson J., *ibid.* at 138: "The extinction of aboriginal title does not, therefore, require specific legislation....there is no reason in principle or logic why it should not be inferred from the course taken by the Crown in the exercise of its powers...."

¹¹ The Royal Commission into Aboriginal Deaths in Custody produced more than a hundred reports of several types. Many are formal reports of specific deaths, often including historical factors. Others are various technical papers, done by outside experts. The letters patent of the Commission included a mandate to investigate the "root causes" of Aboriginal deaths in custody. See Australia, The Royal Commission into Aboriginal Deaths in Custody, *Final Report* (Canberra: Australian Government Publishing Service, 1992).

consideration of the case law, then through the evolution of the law of evidence, and finally bringing these themes together with the consideration of one important unreported case that illustrates both the problems and opportunities of a reinterpretation of the legal history of Aborigines in Australia.

II. ABORIGINES IN AUSTRALIAN LEGAL HISTORY

These two opposing views raise a number of questions about the meaning of Aborigines in Australian legal history. There is a substantial body of literature in this field, but it is unsatisfactory. By and large it is still hardly more than descriptive of the obvious: native Australians were murdered by whites acting either under the law, or outside of the law, with the law making little difference and providing little protection for native rights.

For Henry Reynolds, the foremost scholar of the dispossession of native people in Australia, "throughout 60 or 70 years of murderous dispossession the law was impotent". This "impotence" is best measured, in Reynold's analysis, in inactivity. "[N]o colonial court ever defended the Aboriginal right of occupancy. Without enforcement there was no litigation. Without litigation there were no judicial attempts to define Aboriginal rights; no dicta; no precedents; no case law."¹² Surely no one can deny the evidentiary base of Reynold's inference. It has made its way into twentieth century Australian legal doctrine in *Milirrpum v. Nabalco Pty. Ltd.*, through the most base of judicial inferences: since no case law on Aboriginal rights was created during this period, the court held that these rights had been extinguished.¹³ The relative lack of nineteenth century cases on Aboriginal legal rights does, in fact, characterize Australian law, distinguishing it from the legal development of the United States, Canada, New Zealand, and South Africa, the other colonial-settler societies.¹⁴

The inactivity of the law, however, can be interpreted in other ways besides "impotence". Alex Castles, among Australia's leading legal historians and author of the standard work on Australian legal history, used the term "ambivalence" rather than "impotent" to describe Australian law on the status of Aborigines.¹⁵ This is a different way of seeing the law in the shaping of Aboriginal/white relations, for "ambivalence" involves a legal order that is "potent" but not being used in a consistent and instrumental way to effect legal outcomes. This could reflect a powerful legal order, for example, in the hands of opposing political forces, or of judges and lawmakers divided by inconsistent legal approaches to issues. Castles himself acknowledges this, stating that

¹² *Frontier*, *supra* note 3 at 156.

¹³ (1971), 17 F.L.R. 141, [1972-1973] A.L.R. 65 [hereinafter *Milirrpum* cited to F.L.R.]. This argument is Reynold's in *Frontier*, *ibid.*

¹⁴ The United States has nearly 1,000 reported cases on Indian rights before 1900, covering the full spectrum of substantive areas of law. Canada, nearer in population to Australia, has more than 100, 52 in Ontario alone. Even though this number is much smaller, again the full spectrum of substantive areas of law is represented. See S. Haring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994); and "'The Liberal Treatment of Indians': Native People in Nineteenth Century Ontario Law" (1992) 56 Sask. L. Rev. 297.

¹⁵ A.C. Castles, *An Australian Legal History* (Sydney: Law Book Company, 1982) at 522.

“for many years the situation of the Aborigines in relation to European law seems to have been largely a matter of chance.”¹⁶

Enid Russell took a more concrete position not far from this “ambivalence” view by positing that “the legal position of aboriginal natives in Western Australia varied depending upon which of two approaches was uppermost at any given moment.” These two approaches juxtaposed that of the Home Office and “humanitarians”, favouring the legal position that Aborigines were full legal citizens under the law, entitled to all the rights of Englishmen, with the “average settler”, who preferred to keep the Aboriginal outside of the law in matters of “rights”, but was willing to apply the “disadvantages” of law to native people when it came to criminal punishment and the expropriation of land.¹⁷ This view makes legal policy a matter of choice, reflecting the legal positions of two distinct sets of political and economic interests.

David Neal, whose *Rule of Law in a Penal Colony* is the most detailed legal history of early New South Wales, gives the law more credibility and power, and sees greater complexity in the relationship between colonial law and Aborigines. The law “stood behind [the] forceful dispossession” of native people, while, at the same time, providing legal protections for their rights that were “largely illusory”.¹⁸ “Largely” is, of course, a slippery adverb meaning that the law was not *entirely* illusory nor, when used by Castles, meaning European law was not applied to Aborigines *entirely* by chance. This recognition sets the stage for a study of the processes through which law mattered in structuring Aboriginal/white relations in New South Wales, and Australia generally.

Barry Bridges, whose work on the early legal history of New South Wales offers the most detailed analysis of the place of native people in colonial law, holds that little thought was given to the place of natives in the colony. Therefore, law evolved in a reactive way to meet the exigencies of frontier conflict almost on a case by case basis, at least until the late 1830s when a clear policy emerged.¹⁹ Like Neal’s work, this model posits colonial law as a powerful instrument in the structuring of native/white relations. This view is also held by John McCorquodale, in his encyclopedic, but analytically disappointing dissertation, “Aborigines: A History of Law and Injustice, 1829-1985”. The nineteenth century analysis is not developed in any depth, beyond proving the major theme that Australian law was unjust to Aborigines and a significant instrument in the exploitation and domination of Aboriginal people.²⁰

It is important to see that “law” as applied to native people is not a monolithic construct. Rather, specific kinds of law were applied (or ignored) in a wide variety of different contexts. The most basic distinction that can be made is between the application

¹⁶ *Ibid.* at 520.

¹⁷ E. Russell, *A History of the Law in Western Australia and Its Development from 1829 to 1979* (Nedlands, Western Australia: University of Western Australia Press, 1980) at 313.

¹⁸ D. Neal, *The Rule of Law in a Penal Colony* (Melbourne: Cambridge University Press, 1991) at 78.

¹⁹ B. Bridges, “The Aborigines and the Law: New South Wales, 1788-1855” (1970) 4 *Teaching History* 40 [hereinafter “Aborigines and the Law”]; “The Extension of English Law to the Aborigines for Offences Committed Inter Se, 1829-1842” (1974) 59 *Journal of the Royal Australian Historical Society* 264 [hereinafter “Extension of English Law”]; “The Aborigines and the Land Question: New South Wales in the Period of Imperial Responsibility” (1971) 56 *Journal of the Royal Australian Historical Society* 92; “Sir George Gipps and William Lee’s Squatting Licence, 1842” (1969) 3 *Teaching History* 32.

²⁰ J. McCorquodale (Ph.D. Dissertation, University of New England, 1985).

of British criminal law and civil law to natives: British authorities were applying British criminal law to natives without specific authority to do so, even in the late eighteenth century, and in the face of strong disagreement among British officials of both the legality and appropriateness of doing so.²¹ At the same time, the obvious logic that if Aborigines were British subjects for purposes of the penal law, they must have full civil rights also, including some title to their lands, was not applied anywhere in Australia, although it was too obvious an idea to be ignored by contemporary Australians.²² Paul Hasluck captured the essence of this contradiction as “still Black, though British”: although the rights of Aborigines as “British subjects” were acknowledged this had no meaning as a general proposition in law.²³ Rather, it had to be applied, on a case by case basis, the myriad range of specific disputes that came before the courts, or specific policy issues that came to the attention of colonial officials. There can be no question that the outcomes of those decision making processes were inconsistent with the abstract idea that Black Australians were entitled to the full legal rights of the British.

Once we recognize that law, in fact, existed as a powerful force in structuring colonial society in nineteenth century New South Wales, the “impotence” and “ambivalence” of law take on new meaning. Such outcomes reflect legal choices, or the choice of colonial officials not to use law in circumstances involving Aboriginal rights, situations where they might have done otherwise. Put more crudely, legal history involves both “law” and “outlaw”, with choices to remain outside of the law (or to refrain from resorting to the law) being legal choices nevertheless, the subject matter of legal history.

The matter of greatest difficulty in discussing the emergence of a coherent nineteenth century law and legal policy applying to native people is in constructing the roles of the natives themselves in making that law. The nineteenth century sources are replete with acknowledgement of the fact that the Aborigines had their own systems of legal norms, and were using this law to resolve disputes with whites. There can be no doubt that Aboriginal law shaped the Australian law of native rights. Yet, because of the diverse range of Aboriginal cultures and social systems, and because of the lack of the parallel records of Aboriginal legal activity that exist for white legal activity, it is not a simple matter to write about Aboriginal law.

The analysis which follows attempts to outline an approach to understanding the legal history of Aborigines under British and Australian (hereafter called simply “Australian”) law. This legal history can no longer be dismissed as not “significant except as curiosities of Australian legal history,” as it was by Justice Blackburn in *Milirrpum*.²⁴ Rather, as both the legal discourse in *Milirrpum* and *Mabo*, and the political debate about Aboriginal rights makes clear, the legal history of Aboriginal people in Australia has important implications for present legal policy. This legal history, in turn, runs distinct, but interrelated courses through specific policy areas.

²¹ This issue is discussed *infra* note 22.

²² H. Reynolds, *The Law of the Land* (Ringwood, Victoria: Penguin Books, 1987) is the best discussion of nineteenth century Australian controversy over Aboriginal land rights.

²³ P. Hasluck, *Black Australians: A Survey of Native Policy in Western Australia, 1829-1897* (Carlton, Victoria: Melbourne University Press, 1970).

²⁴ *Milirrpum*, *supra* note 13 at 262.

The single most important legal policy area in nineteenth century Aboriginal/white relations was the control of interracial violence, reflected in an important debate about the place of Aboriginals in Australian criminal law. This debate, with related legal issues such as the extension of British criminal law to intra-aboriginal offenses, the proper scope of the law of self-defense in the context of frontier violence, and the law regulating the giving of evidence by Aborigines, pre-empted the legal discussion of Aboriginal land rights. It was clearly related to the land question because so much of the violence, perhaps virtually all of it, stemmed from the white intrusion on Aboriginal lands, an intrusion that was both a violation of Aboriginal law and, often, a violation of Australian law. Even when this intrusion was “legal” under Australian law, the means of carrying it out often exceeded the bounds of the law.

Given the violence of the first fifty years of contact, the importance of the criminal law in structuring Aboriginal/white Australian relations cannot be underestimated. Both the case law and policy discussion make it clear that the issues of native criminal responsibility under British law dominated the legal discourse of nineteenth century native rights, to the exclusion of land rights issues. This choice is not an accident, but reflects both the political and economic foundations of the white Australian law of native rights.

Much of the confusion in the interpretation of the early meaning of Australian law as applied to Aborigines stems from criminal cases. The legal authorities in Australia in the period before the 1840s attempted every kind of legal policy toward the criminal legal responsibility of natives that was used anywhere in the British Empire, a chaotic legal free-for-all. Yet this was done in the context of a rigid legal hierarchy, tightly controlled by Governors who exercised near dictatorial powers and paid close attention to legal matters. These colonies were, after all, frontier penal colonies and matters of “law and order” were of the highest political importance.²⁵ While most of the formalities of British law were extended to these colonies, the Governor was put in charge of an abbreviated, efficient legal apparatus, capable of the large number of quick trials necessary to punish convict lawbreakers. Large numbers of death sentences were handed out, and court-ordered whippings were so frequent that the number of lashes is staggering: 344,000 in one year. It was a brutal legal order.²⁶ Too much can be made of the “convict society” theme and its legal meaning, but it is important to locate the search for a legal model for the incorporation of Aborigines into Australian society in the context of this unique colonial-settler society. For example, from the beginning British authorities found the convicts, loose of prison bonds in a very large land, were difficult to control, often beyond the reach of the law.²⁷

All legal historians of colonial New South Wales cite Governor Arthur Phillip’s instructions on the treatment of Aborigines: native people were to be protected in their persons and customs.²⁸ Phillip, to his credit, lived up to this model by ordering his troops

²⁵ Neal, *supra* note 18.

²⁶ R. Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868* (London: Collins Harvill, 1987).

²⁷ J.B. Hirst, *Convict Society and Its Enemies: A History of Early New South Wales* (Sydney: Allen & Unwin, 1983). Hirst’s thesis is that the “convict society” created in Australia contained within it great contradictions that ultimately lead to its democratization. This theme is elaborated in *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Sydney: Allen & Unwin, 1988).

²⁸ *Historical Records of Australia* (Sydney: Government Printer) at i, 1, 48 [hereinafter *H.R.A.*].

to refrain from pursuing Aborigines who committed assaults and property offenses against whites, even resisting reprisal when he was speared in the shoulder.²⁹ Little thought had been given to the place of the native inhabitants of Australia. Partly, it seems, this was due to bad British intelligence, their belief in the fiction of *terra nullius*, the idea that there was only a small native population which would disappear into the vast land.

To the extent that there was a policy based on British experience, it was based on British experience with Indians in the United States and Canada. While, previous to the governorship of Sir George Gipps (1837-1845), this did not mean a serious attempt at direct exportation of policy, there can be no question that the officials in the Colonial Office who handed down general instructions on native policy were primarily informed by Britain's extensive North American colonial experience: Britain in the late eighteenth century essentially had only colonial experience in North America, the Carribean, the Cape Colony, Guyana and India.³⁰ Canadian Indian policy was essentially one of a controlled frontier, minimizing white-Indian conflict by holding whites strictly accountable to the rule of law, and, at the same time, primarily through economic mechanisms, gradually incorporating the Indians into colonial society.³¹

The legal framework for such a model begins with effective legal control of the white population, a legal framework that has nothing to do with native people. There can be no question that British authorities in Australia failed to gain effective legal control of frontier whites, thereby setting up an interactive process of white attacks on Aborigines and their reprisals, directed according to customary law. This was recognized at the time, with commentators noting that Aboriginal violence was almost entirely due to white attacks on them, white kidnappings of Aboriginal women, and white seizure of Aboriginal land that left tribes at the point of starvation.³² While the complete motivation for native actions cannot be known, their legal history can be written by inference from the patterns of their resistance.

The confusion of colonial white legal models reflected, not the lack of seriousness about the rule of law of colonial policy makers, but the failure of colonial authorities to ever gain effective control of frontier whites. This pervades nineteenth century Australian law, finding embodiment in the bush rangers, recurrent trouble over the rights of "squatters", the failure to incorporate native people into the frontier social order, and continuing frontier violence.

Native legal rights in late nineteenth century Australia were substantially reduced from earlier in the century. Through the 1830s, approaching fifty years after first settlement, the various models of native rights were openly debated, with legal policy

²⁹ *Frontier*, *supra* note 3 at 32-38; G.B. Barton, *History of New South Wales*, vol. I (Sydney: Government Printer, 1889) at 124.

³⁰ *Irish University Press Series of British Parliamentary Papers: Anthropology/Aborigines*, vol. I (Shannon: Irish University Press, 1982) contains a number of 1836 reports on "Aborigines" in the colonies. These reports refer largely to Canada, Cape Colony, the United States, Guyana and Australia. They were gathered in the process of fact-finding by the UK, Select Committee on Aborigines (British Settlements) of the House of Commons and used as the basis for its *Report*, 26 June 1837 [hereinafter "Select Committee"].

³¹ J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989).

³² This is clearly the view of Governor Phillip, repeatedly expressed from his first year in Australia cited in *H.R.A.*, *supra* note 28 at i, 1, 48, 62, 96, and 145.

makers taking the full range of positions that characterize nineteenth century common law thought on native rights. Thus, native civil rights, even land rights, are subject to some measure of recognition. By the decade of the 1840s, this discussion has changed and Aborigines are left substantially deprived of their legal rights, the mere objects of law. The following analysis will examine the pre-1840s law, arguably a foundation for current law, primarily in New South Wales, but also considering the rest of Australia.

III. BRITISH CRIMINAL LAW, ABORIGINES, AND WHITE SETTLEMENT

Perhaps the clearest way to show both the seriousness of the attempt to impose a legal framework on Aboriginal/white relations and the failure of that model is to look at the criminal law, the best documented area of the legal history of Australian relations with native people. Three distinct legal relationships are intertwined in this process: the accountability of white settlers to British law for offenses committed against Aborigines; the accountability of Aborigines for offenses against whites; and *inter se* offenses between Aborigines. The law embodying these issues was subject to a considerable amount of discussion in colonial Australia with it being understood that existing law was not effective in resolving problems of colonial violence.

A. *The Legal Control of White Settler and Convict Violence Against Aborigines*

The legal issues underlying the accountability of whites for offenses against Aborigines are the simplest: there is no question British law had such authority over white colonists, nor any question that those to whom the law applied were cognizant of the scope of the law. Governor Phillip's first pronouncement of legal policy on these issues was clear: Aborigines were under the full protection of British law and white settlers were required to respect Aboriginal life and property. The public policy reason for this was clear: the government wanted to avoid frontier conflict provoked by white mistreatment of natives.³³

Although the basic integrity of Governor Arthur Phillip's administration in enforcing this law has been questioned, it seems, on balance, that the government was serious about enforcing it.³⁴ There are early reports of whippings ordered on convicts who stole native personal property: canoes, fishing equipment, and the like.³⁵ Although an efficient form

³³ *Historical Records of New South Wales* (Sydney: Government Printer, 1896) at i, II, 89 and ii, 230 [hereinafter *H.R.N.S.W.*]. A full discussion of Phillip's early native policy is in K. Willey, *When the Sky Fell Down: The Destruction of the Tribes of the Sydney Region, 1788-1850's* (Sydney: Collins, 1979).

³⁴ *Frontier*, *supra* note 3 at 35. Here it must be conceded that it cannot be proven that Reynolds is wrong in his view that Phillip was not serious about enforcing British law to protect Aboriginal rights. Rather, it is a question of making inferences from (a) Phillip's actual failure to protect Aborigines; and (b) severe attacks against Aborigines that Phillip himself ordered. It seems clear that Phillip could not even protect his own storehouses from convicts, losing "twelve thousand in weight" and eventually hanging six convicts who "had the key" and robbed the main storehouse every night for months. See *H.R.A.*, *supra* note 28 at i, I, 144. Regarding his own attacks on Aborigines, there is no question that he, in common with all British governors everywhere, viewed the state's monopoly on violence as legitimate, justifying official attacks on Aborigines, at the same time criminalizing the attacks of individual settlers.

³⁵ *H.R.A.*, *ibid.*

of British law was provided for at the very first stages of settlement with a hybrid system of military courts for convict discipline, it did not reach very far into the settler's social order, and settlers, particularly convicts, were able to engage in a great amount of criminal activity directed at Aborigines without being apprehended and punished.³⁶ The very essence of the convict society was maintaining a self-preserving set of norms independent of the law, most often secretly. Therefore, the convicts built a social order of their own, invisible to the authorities who were distrusted, emphasizing the maximization of whatever benefits the poor colony offered.³⁷ Even food rations were often scarce, so the procurement of aboriginal hunting and fishing bounties was important.³⁸ A pattern of theft, kidnapping of women, and assaults on Aborigines who "got in the way" led to the dynamic pattern of injury and reprisal that characterized black-white relations in nineteenth century Australia: the killing time.³⁹

The essence of the problem of white killings of Aborigines and the law is that convict society was largely beyond the reach of the law, protected by both distance and a code of silence. Phillip reported this as early as July of 1788, describing the spearing of a convict "searching for vegetables", who witnessed another convict speared in the head and carried off. Although stating that the convict "denied giving the natives any provocation" his contemporary writings make it clear that he believed these attacks were caused by convict mistreatment of Aborigines.⁴⁰ By the time of the Hawkesbury killings of 1799, the brutal murder by settlers of "two native boys" eleven years after first colonization, it was already clear that settlers were beyond the reach of the law in their predatory behaviour against Aborigines. The Hawkesbury killings were the first white murders of natives subject to the full process of colonial law and illustrate the law's impotence in protecting Aborigines from white killers.

The original Sydney settlement had access to little agricultural land, a disadvantage leading to poor diets and hunger in the early days of the colony.⁴¹ The valley of the

³⁶ On the early legal system of New South Wales see L.A. Whitfeld, *Founders of the Law in Australia* (Sydney: Butterworths, 1971) at 3-22; H. Golder, *High and Responsible Office: A History of the NSW Magistracy* (Sydney: University of Sydney Press, 1991).

³⁷ This is the thesis of Hirst in *Convict Society and Its Enemies*, *supra* note 27.

³⁸ In fact, the initial reason for the British loss of control of the convicts was the necessity of sending the convicts into the bush to forage for food, the single most provocative action the government took that inherently led to conflict with Aborigines, conflict completely beyond the control of the authorities. As early as July, 1788, scarcely five months after the founding of the penal colony, Phillip wrote that a convict had been killed by natives, but had been seen earlier in the possession of a native canoe, which he presumably had stolen. Thus, for Phillip, "the natives were not the aggressors". See *H.R.A.*, *supra* note 28 at i, I, 48. Three months later, in October of 1788, Phillip reported the problem of convict theft of native hunting and fishing equipment that was sold on the boats as souvenirs. In spite of the prospect of punishment for "receiving stolen goods" the practice continued unabated. See *H.R.A.*, *supra* note 28 at i, I, 96.

³⁹ J. Cribbin, *The Killing Times* (Sydney: Fontana Books, 1984). While Cribbin uses the phrase, "the killing times" narrowly to refer to the Coniston massacre, it more appropriately refers to the initial period of black/white contact, whenever it occurred. See D.S. Trigger, *Whitefella Comin': Aboriginal Responses to Colonialism in Northern Australia* (Oakleigh, Victoria: Cambridge University Press, 1992). Trigger calls the period the 'Wild Time'. See c. 2, "'Wild Time': A History of Coercion and Resistance".

⁴⁰ See *supra* notes 28 and 29. By this time, twelve convicts had disappeared. Other than by disappearing into the ocean, these people, eleven men and one woman, could only have disappeared into Aboriginal lands.

⁴¹ Hughes, *supra* note 26 at c. 4 "The Starvation Years" at 84-128.

Hawkesbury River, twenty miles north of Sydney, was a rich plain, suited to all forms of agriculture. It was thickly settled by Aborigines who resented white intrusion and there were immediately conflicts.⁴² In 1796 Governor William Hunter (who had succeeded Phillip) instructed farmers to gather to protect themselves against natives, but threatened murder prosecutions for any attempts to shoot Aborigines “without provocation” beyond, apparently, the common law of self-defense.⁴³ Military parties were dispatched to Hawkesbury in 1795 to protect the settlement of four hundred whites and also to protect the government’s monopoly on violence, denying the convicts and settlers any right to take matters into their own hands.⁴⁴ The dispatches ordering this military action are very clear: although the authorities recognized that whites had provoked the Aboriginal actions by inflicting cruelties on native people, the government could not afford the abandonment of the agricultural lands there. After five whites were killed or injured, sixty privates and two officers were ordered to secure the valley.⁴⁵ The intent was both to stop further white attacks on Aborigines as well as to prevent native violence against whites, the Canadian model of the policed frontier.

The bodies of two native boys, the youngest about thirteen years old, were found by the road between Paramatta and Hawkesbury in September 1799. The hands of both were tied behind their backs. They had been killed by being hacked by swords, one beheaded. Five settlers readily admitted the killing, claiming that they acted under general orders permitting such retaliation.⁴⁶ The boys, together with other natives, had come among the farms, offering no resistance at all, but one of their group carried a musket that had been taken in a previous attack on whites. Thus, the case was one of pure retaliation, not of self-defense. Although the court rejected this defense and found the men guilty, the seven military officers making up the court could not agree on a sentence, dividing over the appropriateness of the death penalty. The court granted bail, sending the men back to their farms, while Governor Hunter wrote to England for instructions.⁴⁷

The governor acknowledged that he had the power to deny bail to the defendants, but was concerned about creating an appearance of a division between the administrative and judicial branches. The broader issue was one of legal policy for the punishment of white killers of Aborigines. Referring to “this horrid practice of wantonly destroying the natives,” Governor Hunter reminded the Colonial Office of his duty to protect Aborigines, repeating his allegation that the Aborigines had been “too often provoked” by cruel treatment of whites. Although there had been an unknown number of such killings, this

⁴² R. Milliss, *Waterloo Creek* (Ringwood, Victoria: McPhee Gribble, 1991) at 48.

⁴³ *H.R.N.S.W.*, *supra* note 33 at iii, 25.

⁴⁴ *Frontier*, *supra* note 3 at 37.

⁴⁵ Captain Paterson, a colonial military officer put the matter clearly: “It gives me concern to have been forced to destroy any of these people, particularly as I have no doubt of their having been cruelly treated by some of the first settlers who went out there; however, had I not taken this step, every prospect of advantage which the colony may expect to derive from a settlement formed on the banks of so fine a river....would be at an end.” See *H.R.A.*, *supra* note 28 at i, I, 500.

⁴⁶ *H.R.A.*, *supra* note 28 at i, II, 401-22 contains a substantially complete transcript of the trial. The basis of the settler’s claim that they believed they were legally empowered to engage in retaliatory killings against Aborigines is that the military regularly did it and that, when settlers had previously turned Aborigines suspected of killing whites over to the military, military officers had informed them that they would have to release them because they lacked evidence to prosecute them, but, that natives should be “punished on the spot where taken” (at 5).

⁴⁷ *H.R.A.*, *ibid.* at 2.

was only the second criminal prosecution brought.⁴⁸ Hunter got no assistance from the Colonial Office: two years later the offenders were pardoned because of "exceptional circumstances".⁴⁹ But there were no "exceptional circumstances"; these were routine frontier killings that either had to be accountable under colonial law or not. Finding the men "guilty" but pardoning them did not neatly straddle a difficult issue; although preserving the law's jurisdiction over such killings, it rendered it impotent. Moreover, given the difficulty in gathering evidence from frontiersmen in such cases, this was a rare case where the court had sufficient evidence to convict settlers of the murder of Aborigines. It was the Myall Creek massacre trials of 1838 before murder convictions were secured against white settlers for the killing of Aborigines.

This failure of British criminal law to punish whites for criminal attacks on Aborigines was also true in Tasmania and Western Australia. The famous 1828 notice-board of Governor George Arthur representing graphically the hanging of whites for killing Aborigines and Aborigines for killing whites was an abstract statement of legal principle, symbolic in meaning. The Tasmanian authorities failed to proceed with murder charges against Sweetling, a young man who killed an Aboriginal woman during a chase.⁵⁰ Two reported Western Australian cases ended the same way. John Thompson shot a native near Albany in 1850. Although the man had thrown one spear and was preparing to throw another, he was indicted for manslaughter because he had provoked the incident by mistreatment of native women. The Advocate-General dropped the charges. Another white man, worried by natives robbing his hut, mixed strychnine with meal. A child died from cakes made from the meal. The man, charged with murder, was acquitted by a jury.⁵¹

By the time of the increased levels of violence of the 1830s and 1840s, the threat of criminal prosecution of whites for killing Aborigines was by no means a dead letter. Bridge's data shows that sixty-eight whites were committed for prosecution for murder of Aborigines and fifty-nine were actually tried. Only eighteen were convicted, leading to a mandatory death sentence, and only nine were actually hanged. Of these, seven were hanged for their roles in the Myall Creek massacre, so the data are distorted by only one trial. Furthermore, the fifty-nine put on trial includes two trials for seven of the Myall Creek defendants.⁵² These data show that the legal system took jurisdiction over a large number of killings (although obviously only a fraction of the total white killings of Aborigines), but was unable to effectively prosecute them and could not win convictions.

This failure of prosecution occurred in a context of increasing attention to the formalities of the rule of law, and an increasing capacity of legal institutions. For example, convicts gained increasing legal protections throughout this period.⁵³ The

⁴⁸ The first is not referred to in either *H.R.A.*, *supra* note 28 or *H.R.N.S.W.*, *supra* note 33. It was tried on October 20, 1797. See "Aborigines and the Law", *supra* note 19 at 45. Although Bridges gives no disposition, it could not have led to a conviction, however, and been grouped with the Hawkesbury killings in Governor Hunter's appeal to London for policy guidance on the future prosecution of whites for killing Aborigines.

⁴⁹ *H.R.N.S.W.*, *supra* note 33 at IV, 7.

⁵⁰ M.C.I. Levy, *Governor George Arthur, A Colonial Benevolent Despot* (Melbourne: Georgian House, 1953) at 97-102. This notice board has been reprinted in numerous publications. See Hughes, *supra* note 26 at 450.

⁵¹ Hasluck, *supra* note 23 at 144.

⁵² "Aborigines and the Law", *supra* note 19 at 47.

⁵³ Neal, *supra* note 18 at c. 3 and 4.

Myall Creek trials (and hangings) prove that the legal authorities had the capacity to effectively prosecute frontier killings of Aborigines by whites. There, convict squatters sworn to a conspiracy of silence were turned on each other by the relentless examination of a competent magistrate.⁵⁴ Rather, it seems that the explanation of H.V. Evatt that, absent any political framework for the articulation of the settler's views, the courts became their only arena of resistance to autocratic colonial government.⁵⁵ The nullification of criminal prosecutions was one form of objection to the lack of effective governmental protection of the squatters interests in an ever expanding pastoral frontier. This is not merely an inference drawn from such a high level of legal inaction. The Hawkesbury killings led to a specific exchange about government policy, balancing the need for strong law enforcement to structure frontier violence, against a legal culture that excused such violence as due to "extenuating circumstances". The policy of vigorous criminal prosecution to structure frontier violence was directly presented to the Colonial Office. It was rejected in a context where the level of uncontrolled frontier violence was known to be very high, a fact indicated repeatedly in the dispatches.

B. *The Legal Control of Aboriginal Violence Against Whites*

Different legal issues emerge from the extension of British law to Aborigine violence against whites. While there is no question that British settlers and convicts brought an awareness of British law with them, it was conceded by all parties that Aborigines had no knowledge of British law, and also that Aborigines had their own legal norms, very different from white laws. Together, these issues raised difficult legal problems in the prosecution of Aborigines for offenses against whites.

The earliest state violence officially directed against Aborigines was in the form of terror-ridden retaliatory attacks, ordered by Governor Phillip within the first year of the founding of the colony. Not only were troops ordered to open fire indiscriminately against Aborigines for punitive purposes, unconnected to the apprehension of individual offenders, but Phillip sent out retaliatory expeditions that he equipped with head baskets, ordering the killing of ten Aborigines for every white.⁵⁶ Just as killings of natives in the United States and Canada were political acts, beyond the scope of legal authorities, these actions were extra-legal, beyond even the law of martial law.⁵⁷

Deputy Judge Advocate Atkins (who had convicted the Hawkesbury defendants, then favoured reserving sentencing until an inquiry could be forwarded to colonial authorities) was officially requested to issue a legal opinion on the status of Aborigines in the Hawkesbury violence. Atkins' memo is a bizarre mixture of law and policy. Concluding that Aborigines were within the "pale" of British law, he raised clear issues

⁵⁴ Milliss, *supra* note 42 at c. 11 "An Inquiry on the Big River" at 322-71.

⁵⁵ H.V. Evatt, *Rum Rebellion* (Sydney: Angus & Robertson, 1955).

⁵⁶ *Frontier*, *supra* note 3 at 33-35. These killings of course were the basis for the defense of the Hawkesbury killers. W.E.H. Stanner, "The History of Indifference Thus Begins" (1977) 1 *Aboriginal History* 3 and J. Miller, *Koori: A Will to Win* (Sydney: Angus & Robertson, 1985) at 15-41 present an idea of what this process might have looked like from the standpoint of Aboriginal custom.

⁵⁷ The hundred or more Indian Wars in the US were similarly anomalous: they were never declared "wars" by Act of Congress, as the Constitution requires, but were held military actions, beyond the scope of the courts. Thus, they were not subject to either the law of warfare or civil law. See F. Cohen, *Handbook of Federal Indian Law* (Washington: U.S. Government Printing Office, 1942) at 39.

of criminal responsibility that made it impossible to try Aborigines. How could a native plead to an indictment with no idea of its meaning? How could they give evidence?⁵⁸

Atkins then went into a defense of the Hawkesbury River settlers, continuously subjected to the depredations of Aborigines, against whom "lenient measures" had failed. Arguing that it would make a "mocking of judicial proceedings" to criminally prosecute natives, Atkins held that "the only mode at present, when they deserve it, is to pursue and inflict such punishment as they may merit".⁵⁹ In effect, this meant lawless retaliation, not even martial law, for military law had rules. This, of course, is precisely what Australian settlers did for more than a hundred years, eventually killing perhaps 20,000 natives.

Atkins' opinion, as clear as it is, can be read in several ways. It is "his opinion" and never had binding legal force. No Governor ever expressly adopted it, and the documents clearly state the opposite: that massive retaliation against tribes of Aborigines was illegal and should not be employed.⁶⁰ Atkins' opinion, on its narrowest foundation, was intended to justify a legal stand that he and other military officers had personally taken in the Hawkesbury trials, a stand that had put him against the Governor. On broader grounds, there is considerable inferential evidence to suggest that the Governor's repeated documents refusing to sanction such a policy of general retaliation were for official consumption by the Colonial Office, trying to straddle a fine line between the legal niceties expected by British officials and the political demands of frontier settlers.⁶¹

The idea that some form of military law was appropriate in such situations clearly was present in Australia through the first half of the nineteenth century. The Coorong Massacre of 1840 involved this issue, with Judge Charles Cooper of the South Australian Supreme Court ruling that British law did not apply to "wild and savage tribes" whose lands had never been occupied by settlers. In that case, twenty-six passengers on an Australian ship were killed by Aborigines after being shipwrecked on the coast of South Australia. Although within the jurisdictional limits of the colony, the tribe in question had no known relationship with Australian authority, and thus acted without any knowledge whatever of Australian law. From the standpoint of the criminal law, the authorities had no way to bring formal charges against any members of the tribe in question, for none of the formal requirements of proof could be met. There was no legal action that could be taken.⁶²

Members of the Milmenrura tribe were rounded up for questioning and articles taken from the ship were found. Through interpreters a short "trial" was held, conducted by the police without regard to the formalities of British law, although evidence was taken. Two Aborigines were sentenced to hang. A crude gallows was constructed the next day, and the hangings took place. The hangings were botched, with the drop failing

⁵⁸ *H.R.A.*, *supra* note 28 at 503.

⁵⁹ *Ibid.* at 504.

⁶⁰ *Ibid.*

⁶¹ *Frontier*, *supra* note 3. Reynolds is most consistent and convincing on this point. There were simply too many retaliatory killings, over too wide a front, without official reaction, to be consistent with an official policy of preventing them. Even the Myall Creek trials are not inconsistent with this. Rather, they may simply reflect an official response to what was viewed as widely excessive frontier violence, unjustified under any circumstances.

⁶² S.D. Lendrum, "The 'Coorong Massacre': Martial Law and the Aborigines at First Settlement" (1977) 6 *Adelaide L. Rev.* 26.

to break the necks of the prisoners, who suffered terribly until a sailor re-hoisted them and dropped them again. The Commissioner of Police, Major O'Halloran, then made a speech to the remaining Aborigines on their need to respect English law, and the tribe was allowed to leave.⁶³

The public discussion of the event led to sharp criticism of the hangings, as well as attempts at a defense of their legality. *The South Australian Register* thought the hangings illegal, although morally justified on a self-defense theory.⁶⁴ Advocate-General Smillie, chief legal officer of the colony, argued the actions were legal on two theories. First, that the Aborigines were not British subjects, therefore not entitled to a British trial; second, the tribe was a separate nation attacking a British colony, thereby the colony was entitled to protect itself under international law, a proposition for which Smillie cited Vattel.⁶⁵

The idea that the Aborigines of South Australia were British subjects, thus entitled to the full protection of British law, was not an abstract statement of moral principle, but was fundamental to the founding principles of the colony. Upon settlement in 1836, the government had proclaimed Aborigines in the colony to be British subjects. Still, the meaning of this action was disputed: did it refer to all Aborigines anywhere within the boundaries of the colony, or only Aborigines who had been brought into contact with whites? This was a parallel argument to that raised by the cases involving *inter se* crimes among Aborigines.

The idea of martial law in this case raised more questions than it answered, but seems to have been beyond the legal power of the Governor. Martial law might permit limited military government of a civilian population, but not the execution of civilians in military custody. Military action, a distinct legal process from martial law, might permit the killing of combatants, but again, not of prisoners in military custody.⁶⁶ The matter was settled conclusively when the Colonial Office sought a legal opinion on the matter from the Law Officers of the Crown. The summary execution of the Aborigines was contrary to law. Rather, they should have been brought to trial in the ordinary legal tribunals of South Australia.⁶⁷

In addition to extra-legal punishment of natives, as early as the 1820s there were also occasional trials of Aborigines under British criminal law for offenses against whites. There was no specific legal authorization for such trials. Rather, colonial officials, generally attorney generals and judges, simply decided that colonial courts had criminal jurisdiction over natives, just as they had jurisdiction over all other persons in the colony. Bob Barrett was tried in Sydney in 1829, and transported for murder.⁶⁸ Musquito was tried for murder in Sydney in the early 1820s, transported to Tasmania, where he broke

⁶³ *Ibid.* at 27-28.

⁶⁴ The idea that an act might be illegal, though morally justified, stems from the jurisprudence of natural law. Colonists everywhere in the English speaking world often used natural law arguments when British law was opposed to local interests.

⁶⁵ Lendrum, *supra* note 62 at 28-30. E. de Vattel, *The Law of Nations or Principles of Natural Law*, first published in 1758, was the nineteenth century's most cited treatise in international law.

⁶⁶ Lendrum, *ibid.* at 36-42.

⁶⁷ *Ibid.* at 42-43.

⁶⁸ Unreported case, briefly discussed in J. McCorquodale, *Aborigines and the Law: A Digest* (Canberra: Aboriginal Studies Press, 1987) at 373.

away from his captors, fled to the bush, and led Aborigines in raids on whites. He was captured, tried again, and hanged in 1826.⁶⁹

The elimination of any options of extra-legal punishment of Aborigines, or of any special legal process including military process, still left serious legal questions as well as practical questions of evidence. These issues involved difficulties, but problems that were not insurmountable as evidenced by the regular prosecution of Aborigines in Australian courts after the 1840s. For example, of twenty-six murder trials heard in the Melbourne Supreme Court between 1841 and September of 1851, seven involved Aborigine defendants, charged with killing whites in five cases and fellow Aborigines in two. Five defendants charged in three of these cases were executed. Three defendants in two cases were discharged, under the common law rule that they were unable to understand the proceedings against them, thus unable to defend themselves. Two were found not guilty; one was convicted but transported.⁷⁰ Similar data exist for Sydney: of forty-four Aborigines committed for trial for murder before 1855, twenty-eight were convicted and seventeen of those executed, a slightly higher conviction and execution rate than Port Phillip but a difference that is based on so few cases that no meaning can be generalized from it.⁷¹ Comparable data for South Australia reveal a consistent pattern: twenty Aborigines were executed for murdering whites before 1900, twenty Aborigines had their death sentences for murder commuted during the same period.⁷² These data indicate that the common law criminal trial process was operating in relationship to Aborigines by the 1840s, leading to acquittals (or at least the absence of a criminal conviction) in half of all capital cases, a lower conviction rate than one now finds in Australia.⁷³

But this is only half of the story. Victoria, New South Wales, and South Australia also hanged a large number of Aborigines for crimes against whites as part of a deliberate strategy of terror, designed to use the horror of the gallows to both deter Aborigines from committing crimes against whites, and also, to convince frontier whites that colonial officials were prepared to use the death penalty to protect the settler's interests. This was an unsatisfactory legal process because the colonial authorities were not able to control frontier violence until the twentieth century.

C. *Prosecution of Inter Se Offenses Between Aborigines*

Once the theoretical idea that Australian natives were British subjects, fully under British law, was developed in cases of native/white violence, the principle logically included *inter se* offenses, "crimes" as defined by British law, occurring between Aborigines. This logic aside, the principle did not follow without some difficulty. Much of this difficulty has been approached on the level of administration: simple problems

⁶⁹ Levy, *supra* note 50 at 101.

⁷⁰ S. Davies, "Aborigines, Murder, and the Criminal Law in Early Port Phillip, 1841-1851" (1987) 22 *Historical Studies* 313 at 333-35.

⁷¹ "Aborigines and the Law", *supra* note 19 at 47.

⁷² A.R.G. Griffiths, "Capital Punishment in South Australia, 1836-1964" (1970) 3 *Australian & New Zealand J. of Criminology* 214.

⁷³ Conviction rates in western societies now routinely run above 90%, higher than in the nineteenth century, because of a higher level of professionalization in the law enforcement apparatus and the bureaucratization of the criminal trial process.

of proof when Aborigines either would not nor did not give evidence. There was a broader theoretical issue here, recognized in 1830s Australian law: such an imposition of British law both (1) interfered with the operation of tribal law and internal tribal affairs, an arena many colonial officials did not want to enter or did so with great reluctance; and (2) posed unique administrative and legal difficulties that might not be worth the cost. In these cases British law first legally came to terms with tribal sovereignty and Aboriginal self-government.

The first cases are well-known and in conflict. A Sydney case, *R. v. Congo Jack Murrell*,⁷⁴ and a Port Phillip case, *R. v. Bon Jon*⁷⁵ were in conflict on the law, a difference not resolved until the 1840s. This conflict shows that two sets of legal theories on the question of Aboriginal criminal responsibility were competing in Australia in the 1840s.

Congo Jack Murrell was charged in December 1835 with killing Definger in a drunken rage.⁷⁶ Along with a companion case, *Murrell* was set for trial before Chief Justice Frances Forbes and Justices Dowling and Burton in February, 1836.⁷⁷ While Aboriginal sovereignty had doubtlessly been argued before as a defense in New South Wales courts, it had never been argued with so much preparation, before three judges in a highly publicized case, recognized as a test case by all involved.⁷⁸

Congo Jack Murrell is not remarkable as legal doctrine. The two page opinion ends with a straightforward holding that there is no distinction between offenses between Aborigines and those between Aborigines and whites, which, the court stated, was answerable under British law according to "all hands".⁷⁹ Beneath this simple holding there were more complex issues of Aboriginal sovereignty that concerned the court, issues that were open legal questions at the time. Both sides argued issues of international law, inherently attributing some measure of national sovereignty to native people. Alfred Stephen, for the defense, attacked the *terra nullius* theory of British occupation of Australia, arguing that it was a conquered land and, accordingly, local law applied to its inhabitants until it was specifically replaced.⁸⁰ In addition, another argument stemmed from the conflict of laws. It was undisputed that Murrell was still subject to Aboriginal law, no matter what the British court held. Accordingly, he was subject to being tried twice for the same offense, with double jeopardy an obvious injustice incompatible with the common law.⁸¹ This issue squarely put both the existence and vitality of Aboriginal law before the court.

The court's holding directly addressed Aboriginal sovereignty, equivocating in a pragmatic way, rather than neatly defining a legal resolution of the issue. For Justice

⁷⁴ (1836) 1 Legge 72 [hereinafter *Murrell*].

⁷⁵ This case is unreported, but the decision is published in detail in the *Port Phillip Patriot*, September 20, 1841.

⁷⁶ "The Extension of English Law", *supra* note 19. Bridges, for reasons that are unclear, gives the victim as Bill Jabenguy (at 264). I have followed the official report of the case.

⁷⁷ *Ibid.* The case is only briefly discussed in Forbes' otherwise detailed biography, C.H. Currey, *Sir Frances Forbes* (Sydney: Angus & Robertson, 1968) at 470-71.

⁷⁸ *Ibid.* at 268-69. In an unreported 1826 case involving an Aborigine charged with attempted murder of a white man in the Hunter Valley, the court decided that Aborigines were not amenable to British law. This case is anomalous: Australian courts clearly held the other way, and had tried and executed Aborigines for murder of whites.

⁷⁹ *Murrell*, *supra* note 74 at 73.

⁸⁰ "Extension of English Law", *supra* note 19 at 264-65.

⁸¹ *Ibid.* at 265.

Burton, "although it might be granted that on the first taking possession of the Colony, the [A]borigines were entitled to be recognized as free and independent, yet they were not in such a position with regard to strength as to be considered free and independent tribes. They had no sovereignty."⁸² These two sentences, the first sentences of the holding, are internally inconsistent: if Aborigines were "entitled to be recognized as free and independent" what difference did their strength make? The Court's holding adopts a relativistic view of tribal societies that distinguishes Aborigines from Indians in North America: the difference between the "free and independent" status of Aborigines "on possession of the Colony" and the position of "no sovereignty" in 1836 is nothing less than "they were not in such a position with regard to strength as to be considered free and independent tribes." In order to have any right to tribal sovereignty, the Aboriginal tribes needed to be stronger. However, the opinion was premised on the idea of tribal sovereignty holding that, at least at some prior time in Australian colonial history, "the [A]borigines were entitled to be recognized as free and independent".⁸³

The last part of the court's holding (its clauses conveniently numbered 1 through 5) goes a long way toward explaining this conditional view of Aboriginal sovereignty. The court interjects a straightforward policy analysis: "Serious causes might arise if these people were allowed to murder one another with impunity, our laws would be no sanctuary to them."⁸⁴ This statement has nothing to do with either British law or tribal sovereignty. Rather, it is an obvious policy judgment, yet still begs the original question of tribal sovereignty. General language in the same paragraph that "the court could see no difference" between this offense and one committed on a white avoids the same question: the difference was tribal sovereignty, an issue raised by Murrell's attorney, and recognized by the court, at least as an issue, in its own discussion of tribal sovereignty at the beginning of the opinion.

This language does not prove that Aborigines are entitled to recognition of their sovereignty through a reinterpretation of the *Murrell* case. Rather, it proves that the issue of Aboriginal sovereignty and the recognition of Aboriginal law were a part of the discourse of Aboriginal status of 1830s and 1840s Australia. The court's brushing off of these issues in relation to criminal jurisdiction was consistent with British practice everywhere in its early nineteenth century colonies, probably influenced by its disregard of the tribal laws of Canadian Indians in parallel homicide cases in the Canadian colonies.⁸⁵ In the end, the case went nowhere. The Colony could not carry its burden of proof in *Murrell*, leading to a "not guilty" verdict.⁸⁶

⁸² *Murrell*, *supra* note 74 at 73.

⁸³ Castles, *supra* note 15 at 528 argues, citing Bridges, that *Murrell* is a more uncertain case than it is commonly cited as.

⁸⁴ *Murrell*, *supra* note 74 at 73.

⁸⁵ S.L. Haring, "The Liberal Treatment of Indians: Native People in Nineteenth Century Ontario Law" (1993) 57 Sask. L. Rev. 297.

⁸⁶ The charges in *Bummary*, subject to similar problems, were dropped. Two years later the first Aborigine was convicted under the general holding of *Murrell*. Long Jack was convicted, also by Judge Burton, of killing his wife Mary, in a drunken stupor. Burton convicted Jack, but recommended transportation for life as a means of reconciling the harsh demands of colonial law with the reality of serious jurisdictional and moral problems of holding natives accountable for crimes under British justice.

A British House of Commons report, tabled on June 26, 1837, responded to these same legal issues, and clearly was influenced by the *Murrell* case.⁸⁷ The thrust of this report recognized both the integrity of customary law, and also the practical necessity of permitting it to continue functioning under British protection. The report then equivocated on this position for two reasons. First, the Report was concerned that British law not sanction “barbarous” native actions. Second, the impact on colonial settlers of any appearance that natives were beyond the pale of British law, was noted. It could only bring one consequence: forcing settlers to abandon the law and adopt other means of self-defense.⁸⁸

There is no easy way out of this dilemma; it follows from colonialism, from the destruction of the customary legal orders of native people. Ultimately, the Report recommended making individual treaties with “the independent tribes” defining “what acts should be considered as penal, by what penalties they should be visited, and in what form of procedure those penalties should be enforced.”⁸⁹ This recommendation is remarkable: it recognizes a substantial measure of sovereignty in native tribes, and directly puts the matter of both the substantive criminal law and procedure up for negotiating in a treaty-making process. This clearly meant that British criminal law and procedure did not automatically apply to native people in the colonies, but required some additional political process involving native people as political actors.

This was not yet the end of the issue. Bon Jon was charged with killing Yamer Ween in Geelong in 1841. Charged before Justice John W. Willis in the Supreme Court in Melbourne, Willis refused to follow *Murrell*, setting the whole issue for argument.⁹⁰ The sovereignty issues of *Murrell* were reargued, but with more emphasis on the fact that Aborigines had their own laws, as well as the view that no express law applied British law to natives. Willis took a more pragmatic position than Burton, holding that while Aborigines might be British subjects for some purposes, no express law extended criminal jurisdiction to Aborigines. He also was concerned with the jurisdictional void being created in not recognizing Aboriginal law, while at the same time British law could not effectively reach native tribes. In the end he disposed of the case on a simple common law basis related to his general views. Willis held that Bon Jon was unable to appreciate the charge against him, or was of insufficient intelligence to plead, and therefore discharged him without trial.⁹¹

While Judge Willis wanted the matter referred to the Colonial Office or to British officials for a legal opinion, Governor Gipps referred the matter only to Chief Justice

⁸⁷ “Select Committee”, *supra* note 30 reprinted in “Aborigines of Port Phillip, 1835-1839” *Historical Records of Victoria*, vol. 2A (Melbourne: Government Printing Office, 1982) 61 at 65-66 [hereinafter *H.R.V.*]. There is no direct evidence that this committee knew of the *Murrell* case, but it may be reasonably inferred from the fact that destruction of Aborigines in Australia was the primary motivation for the creation of the Committee, although disturbing events in other colonies were also at issue. Assuming this interest in Australia, any close following of legal events relating to Aborigines during 1835 and 1836 would have focused attention on the *Murrell* case, which was decided while the Committee was in session, but sixteen months before the Committee stopped taking evidence.

⁸⁸ *Ibid.* at 65.

⁸⁹ *Ibid.* at 66.

⁹⁰ “Extension of English Law”, *supra* note 19 at 267. Judge Willis undoubtedly was aware of the House of Commons Committee Report, perhaps taking it as an incentive to attempt a judicial reframing of the law of Aboriginal rights in Australia.

⁹¹ *Ibid.*

Dowling. Dowling, not unexpectedly, took the position that there was no issue because the matter was *stare decisis*, having already been decided by a full three judge panel in *Murrell*.⁹² As a jurisdictional issue, the question of Aboriginal sovereignty, the tribes right to their own laws, went no further. In the end, however, Willis was right: British law was incapable of intervening in native customary life, yet Aboriginal customary law was undermined by these rulings. Bon Jon returned to his own people and was killed for reasons unknown. It was quite possibly a legal execution under tribal law, punishment for his killing of Yamer Ween.⁹³ South Australia appears to have deferred to Willis' reasoning, apparently dismissing several charges against Aborigines for *inter se* crimes in the 1840s and 1850s.⁹⁴ It was 1873 before an Aborigine was convicted of killing another native there.⁹⁵

IV. THE ABORIGINE IN NINETEENTH CENTURY AUSTRALIAN LAW

Congo Jack Murrell and *Bon Jon* did not resolve the problems of denying native sovereignty and holding Aborigines fully accountable, as British subjects, under Australian law. It took thirty-two nineteenth century cases to deal with the broad range of complicated legal questions left unanswered.⁹⁶ These thirty-two reported cases, in turn, distort the reality of the reach of Australian law in two ways. First, relatively few cases involving Aborigines made it to the courts. Second, virtually all of the reported cases, twenty-eight out of thirty-two, are criminal cases, indicating both that the participation of Aborigines in Australian society as "British subjects" was a legal fiction, completely without legal effect, and also that this participation was structured by uncontrolled violence. This is the primary problem in the twentieth century Australian legal history of native people and their rights.

A. *Criminal Cases*

Murrell and *Bon Jon* communicate an active judiciary, capable of engaging in a dynamic legal dialogue about Aboriginal rights. This, together with the political dialogue of Aboriginal rights that was on-going in Parliament and in the New South Wales government under Governor Gipps, shows that there was a foundation for the creation of a substantial system of native rights in Australia in the 1840s. The cases which followed failed to develop such rights.

The cases following *Murrell* and *Bon Jon* involve the court's tentative attempts to apply the doctrine of *Murrell* to the range of native criminal cases brought before them, mostly homicide cases. There were two lines of legal debate. It took twenty years before lawyers stopped raising the issue that Aborigines were a sovereign people and therefore

⁹² *Ibid.*

⁹³ *Ibid.* Behan, *supra* note 4, the only biography of Willis, discusses this case at 95-96.

⁹⁴ Castles, *supra* note 15 at 331.

⁹⁵ Griffiths, *supra* note 72 at 220.

⁹⁶ McCorquodale, *supra* note 68 at 225 lists thirty nineteenth century cases involving Aborigines or their rights. While most of these cases are reported, a few pre-existed the reporting systems and were taken from newspapers or government documents. I rechecked the official reporters for all Australian reporters and found McCorquodale's listing complete, except for two reported Queensland cases, which I added to the list, making thirty-two reported cases. Obviously, there were hundreds of unreported criminal cases: one for every criminal charge brought against an Aborigine.

not subject to British law. A number of challenges were made to the basic holding of *Murrell*, still arguing that Aborigines were subject to their own laws, not to the laws of colonial Australia. For example, in *R. v. Peter*, decided in Victoria in 1860, twenty-four years after *Murrell*, a half-caste Aborigine argued that he was amenable to customary law and not British law. The court simply restated *Murrell*.⁹⁷ Three months later, in *R. v. Jemmy* another Aborigine, charged with manslaughter for killing a woman, argued that neither had “become civilized” or “had changed their habits and modes of life” to have voluntarily subjected themselves to colonial law.⁹⁸

The second line of debate turned not over the question of British jurisdiction over Aborigines, but over the injustice of its full application: strict application of British principles obviously led to manifest injustice when Aborigines had no idea of British law, nor comprehended British criminal procedure. This had been Judge Willis’ disposition of Bon Jon’s murder charge, dismissed because Bon Jon had no idea of the proceedings against him, and no capacity to participate in his defense, a traditional common law defense. Few other Aboriginal defendants fared so well. Like *Murrell* most of the defendants were given sentences of transportation, rather than the death penalty. Jacky Jacky was transported to Norfolk Island for the murder of another Aborigine, Tommy, in 1844.⁹⁹

While short terms of transportation might be moderate sentences for homicides, they were also imposed for property offenses. The judges knew, however, that these sentences were the equivalent of death sentences. Yanem Goora was sentenced in 1845 in Port Phillip to ten years transportation for killing sheep. After surviving two years on Norfolk Island, he was transferred to Tasmania where he died.¹⁰⁰ Kunnim Kooruba Kowan received seven years transportation for housebreaking and presenting a loaded firearm, also dying in captivity.¹⁰¹

Legal questions relating to evidentiary matters were second to questions of native jurisdiction in this thirty year legal debate over the scope of British law over Aboriginal people. This judicial effort is important because it is the only area of Aboriginal law that was both a legislative and judicial concern in the nineteenth century: legislative efforts to admit Aboriginal evidence paralleled judicial efforts to strike a reasonable accommodation to secure the evidence of Aborigines, who were often the only witnesses to crime. In contrast to legislative refusal to pass laws to admit Aboriginal evidence, judges went to great lengths to do so, perhaps the clearest area of judicial creativity in Aboriginal law after Willis’ refusal to extend British law to Aborigines.

Although the law was well settled that no one could give evidence in a British court but upon oath unless he believed in a future state of punishment and reward, this rule left a great deal to local courts as questions of fact, to be put to the witnesses.¹⁰² Courts were prepared to follow this rule, even to the extent of quashing the conviction of Paddy, a convicted murderer.¹⁰³ Courts were often willing to interpret the facts in such a way that

⁹⁷ Briefly reported in *ibid.* at 427.

⁹⁸ *Ibid.* at 401. In all, seven out of thirty-two reported nineteenth century cases concerned matters of British jurisdiction over Aboriginal people.

⁹⁹ *Ibid.* at 399. Unreported case of the Supreme Court Criminal Sessions, Port Phillip, 1844.

¹⁰⁰ *Ibid.* at 446.

¹⁰¹ *Ibid.* at 408.

¹⁰² *Ochimund v. Barker* (1744) Willes 538 [hereinafter *Ochimund*].

¹⁰³ *The Queen v. Paddy* (1876) 14 S.C.R. (N.S.W) (L.) 440 [hereinafter *Paddy*].

concluded individual Aborigines did have such a fear of punishment in the afterlife, and thereby admit the evidence. In *R. v. Smith* the trial judge interrogated an Aboriginal boy of fifteen or sixteen years, who, although he spoke English, had no formal schooling or religious training whatever. The boy spoke in very general terms about having heard of hell and of being punished there if bad, and the judge held that he was competent to take an oath. On appeal, the resulting conviction for cattle stealing was affirmed.¹⁰⁴ In all, of five criminal convictions raising issues of the inadmissibility of Aboriginal evidence, four were upheld, indicating that courts were more reluctant than the legislature to let evidentiary issues stand in the way of criminal convictions. This also reflects the reality of Aboriginal trials: local magistrates, knowing appeals of native convictions unlikely, simply relaxed the rules of evidence to permit the conviction of natives on illegal evidence.

Basic procedural protections afforded criminal defendants are the source of only a handful of Aboriginal criminal appeals, although, judging from the state of local justice for Aborigines in general, violations of procedural due process must have been very frequent. Nammy, a Northern Territory Aborigine sentenced to death for the murder of Harry Hanschildt in the Daley River killings, had his conviction reversed on the grounds of double jeopardy.¹⁰⁵ In the Territory's haste to prosecute Aboriginal killers, they had prosecuted Nammy in a magistrate's court that lacked jurisdiction in capital cases. In response to Nammy's defense of double-jeopardy when he was re-tried for the same murder, the Crown argued that, since the first court lacked jurisdiction, it had not been a legal trial, therefore Nammy was never in jeopardy twice.¹⁰⁶

Nammy was the only native whose reported conviction was reversed on procedural grounds. In *R. v. Many, Many and Others*, six Pacific Islanders were interrogated without caution, each making incriminating statements.¹⁰⁷ The court held that such cautions were unnecessary as long as the statements were made without threats or promises.¹⁰⁸ Jack, a Queensland Aboriginal convicted of attempted rape, argued that his conviction was procedurally defective because no prosecution had been commenced within two months of the offense as prescribed by statute.¹⁰⁹ The court held, somewhat incredibly, that the term "prosecution" was not a "term of art with a technical meaning" but could be taken simply to mean Jack's initial arrest, which had occurred within the two month limit, although he was not charged until much later. This interpretation of the law, especially in view of Jack's protestation that the officer had not even informed him of what charges would be brought against him, is not consistent with the common law rule requiring strict construction of a penal statute.¹¹⁰

Two other cases involved substantive criminal law and the application of common law principles to Aboriginal criminal responsibility. In *The Queen v. Black Bob* two Aborigines attempted to have sexual intercourse with a white woman, but stopped without engaging in the act, at least in part due to her resistance.¹¹¹ Their defense, one

¹⁰⁴ (1872) 11 S.C.R. (N.S.W.) (L.) 69.

¹⁰⁵ *R. v. Nammy Otherwise Jacky* (1886) 20 S.A.L.R. 65.

¹⁰⁶ *Ibid.* at 67-73.

¹⁰⁷ *R. v. Many, Many and Others* (1895) 6 Q.L.J. 224.

¹⁰⁸ *Ibid.* at 226.

¹⁰⁹ *R. v. Jack* (1894) 6 Q.L.J. 60.

¹¹⁰ *Ibid.* at 62.

¹¹¹ (1867) 7 S.C.R. (N.S.W.) (L.) 120.

of abandoning their criminal purpose, was rejected by both the jury and the appellate court. *Queen v. Charlie Combo* raised exactly the same issue, but on much more benign facts.¹¹² Combo, wearing only a shirt, had crawled into bed beside a white woman sleeping on her verandah on a hot night. Feeling a hand on her bare right shoulder, she awoke, found Combo, and screamed. He ran off into the night, but was found lying behind a log. On these facts, Combo was convicted by a jury of assault with intent to ravish. The conviction was reversed on appeal. Although Combo had no representation, the Crown conceded that the conviction could not be supported on this evidence. The court agreed, finding that no *mens rea* whatever had been established.¹¹³

These two cases cannot stand much generalization, but several issues stand out. First, like homicide, a large number of sexual attacks led to only two appeals. This indicates that Aboriginal defendants did not often bring appeals. At the same time, both the actions of the court and the prosecutor in *Charlie Combo*, in a context where the accused had no representation, can only indicate that some sense of fairness prevailed: it would have been a simple matter to uphold the conviction on the ground that the jury had properly inferred criminal *mens rea* from Combo's action. This is perhaps especially important given the symbolic meaning of black sexual attacks on white women, a sensational issue in colonial societies.¹¹⁴ *Combo*, in fact, is one of only two reported reversals of Aboriginal criminal convictions in nineteenth century Australia, and the only one involving a white victim.¹¹⁵

B. Civil Cases

The relative absence of civil cases involving Aboriginals is among the clearest statements of Aborigine citizens' lack of access to Australian law, and proof of the failure of Australian law to address the needs of Aborigines. While criminal law was in the hands of the state, civil law was in the hands of private individuals, who could choose whether a particular matter was worth pursuing at law or not. The fact that virtually everyone involved, black or white, chose not to bother to use the law in these matters speaks to the nature of law in structuring civil relationships between Aborigines and whites: it was irrelevant.

Perhaps the clearest civil case that shows this is the leading case on the legality of Aboriginal marriages, *R. v. Cobby*.¹¹⁶ At the outset, the fact that the legality of Aboriginal marriages was not judicially decided until late in the nineteenth century itself speaks to the legal irrelevancy of the matter. Even then, the matter arose in a criminal case, when an Aborigine charged with manslaughter tried to exclude the evidence of a woman on the ground that she was his wife. The trial court, with no precedent on the matter, deferred the question to the appellate court. The Supreme Court of New South Wales was

¹¹² (1877) 1 S.C.R. (N.S.W.) (L.) 91.

¹¹³ *Ibid.* at 92.

¹¹⁴ C. Harris, "The Terror of the Law as Applied to Black Rapists in Colonial Queensland" (1982) 8 *Hecate* 22. R. Barber, "Rape as a Capital Offence in Nineteenth Century Queensland" (1975) 21 *Australian J. of Pol. & Hist.* 31.

¹¹⁵ This is based on my own count of the cases reported in McCorquodale, *supra* note 68. The other reversal is the murder conviction of Paddy, accused of killing an Aborigine. See *Paddy*, *supra* note 103 at 440.

¹¹⁶ (1883) 4 N.S.W.L.R. (L.) 355.

dismissive. Starting from a common law rule that recognized customary marriages based on local traditions in different parts of the Empire, the Court refused to extend that principle to Aborigines:

But to extend that law to the aborigines of this colony, or to take the statement of their customs from one of themselves, is to go too far. We may recognize a marriage in a civilized country, but we can hardly do the same in the case of the marriages of these aborigines, who have no laws of which we can take cognizance.¹¹⁷

This ruling is completely devoid of reasoning: as long as Aborigines are not civilized people, British law cannot apply. It is unique to the common law world: native customary marriages were legally recognized everywhere else under the common law.¹¹⁸

In *ex parte West* a writ of habeas corpus was issued against a squatter to produce Tommy, an Aboriginal boy, in court.¹¹⁹ The writ was issued on the application of another white settler, who had heard the man say that he had stolen the boy from his tribe. In his return of the writ Alexander Collins, holder of the boy, claimed that he held the boy with the consent of his natural father. Producing the boy in court, Collins refused to give further explanation, or to answer questions of the court, on the advice of counsel. The court not only turned the boy over to the custody of the Colonial Secretary, but used strong language to rebuke the conduct of Collins:

It was a moral wrong—an outrage—an act of gross cruelty which no man of common feeling could hear described without an expression of strong indignation...These people were British subjects, and if held responsible for crime on the one hand, should be protected from outrage on the other.¹²⁰

The court went on to point out that a cycle of vengeance and retaliation could be expected to follow such actions. Collins was apparently not prosecuted for kidnapping and perjury in making his false return. It is not clear what the Colonial Secretary ultimately did with the boy.

C. *Aboriginal Right to their Land*

The case law is not dispositive on issues of Aboriginal title to land. Three reported nineteenth century cases deal with land rights in general. Yet, these cases are not, within any stretch of the imagination, Aboriginal cases, for no Aboriginal people were parties, and the direct question of Aboriginal land rights was never before the court. *M'Hugh v. Robertson* is illustrative of cases of this type.¹²¹ The issue involved a challenge to a Sunday closing law. British law presumably applied if the law was reasonably capable

¹¹⁷ *Ibid.* at 356.

¹¹⁸ For example, the two Canadian cases on the legality of Indian customary law both involved white marriages to Indians under tribal law. The courts conceded that such marriages between Indians were obviously legal. *Connolly v. Woolrich* (1867), 11 L.C.Jur. 197 (S.R.); *Robb v. Robb* (1891), 20 O.R. 591 (Common Pleas Div.). For a discussion of this issue see C. Backhouse, *Petticoats and Prejudice: Women and the Law in Nineteenth Century Canada* (Toronto: Women's Press, 1991) at 9.

¹¹⁹ (1861) 2 Legge 1475.

¹²⁰ *Ibid.* at 1476.

¹²¹ (1885) 11 V.L.R. 410.

of being applied in New South Wales in 1828, a simple test for the general reception of British law in Australia. In order for the court to determine whether this law was, in fact, capable of application, it had to carefully examine the circumstances of the colony in 1828. Judge Holyroyd, of the Supreme Court of Victoria, stated that in conducting this examination, Aboriginal inhabitants were “altogether put out of mind” as British authorities treated Australia as an uninhabited desert country.¹²²

Cooper v. Stuart dealt with a question of the rule against perpetuities in Australia.¹²³ It held that, since Australia was an uninhabited country, all English laws were therefore in force, but did not directly rule on any question of Aboriginal title. Only *Attorney General v. Brown* specifically holds that “the waste lands of this colony” are the property of the Crown, a direct statement of Crown ownership of the land, but not without qualification.¹²⁴ Thus, Australian judges never directly passed on the question of Aboriginal land tenure. Among the reasons for this included the fact that Aborigines, in spite of being juridical British citizens, did not become legal actors within the colonial legal framework.

The jurisprudence of Australian judges, like colonial judges generally, was conservative. The reported cases show competent judicial work, including some willingness to intervene on behalf of Aboriginal defendants. Lacking is any sense of judicial initiative to protect native rights, an initiative running through to *Mabo* in Australian law.

V. THE ADMISSION OF ABORIGINAL EVIDENCE

A major legal issue concerning native people in nineteenth century Australia is the admission of Aboriginal testimony in court. This question raises a number of practical and theoretical considerations, involving trials, legal magistrates and judges, appellate courts, the legislature, and the Colonial Office. Not only were the rights of Aborigines as citizens at stake, but also was the capacity of local government to try cases where Aborigines were witnesses, whether against whites or Aborigines. So, a wide variety of issues and interests were tied up in the narrow question of the admissibility of Aboriginal testimony in Australian courts.¹²⁵ As important as this issue was, it was beyond the scope of the formal workings of Australian law making; all measures to permit the admission of Aboriginal evidence were rejected in New South Wales until 1876, and then only after the issue became the admission of the evidence of atheists.

Given that Aborigines became British citizens with settlement, it should have followed that their testimony would automatically have been accepted in British courts. In the way, however, was a racist and ethnocentric 1744 Indian case, *Ochimund v. Barker*, holding that “nothing but a belief in God and that he will reward and punish us according to our deserts is necessary to qualify a man to take the oath....Infidels cannot be a witness.”¹²⁶ Although Aborigines were British citizens, they needed to have some recognized belief in a particular kind of god; only a god who would reward and punish.

¹²² *Ibid.*

¹²³ (1889) 10 N.S.W.L.R. (Eq.) 173.

¹²⁴ (1847) 1 Legge 312 [hereinafter *Brown*].

¹²⁵ D. Kotthoff, *The History of the Admission of Aboriginal-Evidence into the Courts of New South Wales, 1788-1876* (LL.B. Thesis, Australian National University, 1974).

¹²⁶ *Ochimund*, *supra* note 102 at 549.

Without much inquiry, Australian courts held that Aboriginal religion was not adequate to this test, although some non-Christian religious belief was.¹²⁷

Beyond this was a much more pragmatic problem; with so many Aboriginal languages and dialects, it could be all but impossible to find an interpreter.¹²⁸ The implications of this fact went well beyond the simple provision of testimony; it made Aborigines untriable in British courts because they could not understand the proceedings against them and provide any defense.¹²⁹

As early as the 1820s colonial officials were urging legal measures to reform this unjust situation. The primary impetus behind this was as much the practical needs of procuring convictions in ordinary criminal cases as it was the belief that Aborigines needed to be equally treated in Australian courts, but issues of both law and humanity were involved. The colonial dispatches of the 1820s, 1830s and 1840s contain dozens of references to the need for legal measures to secure the admission of Aboriginal evidence. These measures accompany the earliest application of British law to Aborigines. Any person aware of the practical significance of the extension of colonial law to Aborigines knew that this juridical equality was a farce in practice: evidence became symbolic of the entire problem; if an Aborigine could not give evidence, he could not seek legal redress for a crime committed against him either. For liberal colonists, who hoped to use the law as a mechanism to integrate Aborigines into Australian society, providing Aborigines with access to the law was a foundation of their strategy of peaceful accommodation.

The legal history of the measures to legalize Aboriginal evidence is not complex. The New South Wales Legislative Assembly, the law making body of the colony, passed a law admitting Aboriginal evidence in 1839 after considerable debate. The negative views turned mostly on the legality of the act under British law. The government of the colony was solidly behind the measure, both because of the practical necessity of admitting native evidence, in order to have an effective system of criminal law, but also because simple equality and justice for Aboriginal people demanded it.¹³⁰ Governor Gipps, in control of the Legislative Assembly, brought the measure to the floor in the wake of the Myall Creek trials; no Aboriginal could testify in the trial of seven whites charged with the massacre of unknown dozens of natives. The massacre and trial were an embarrassment to the colonial government; Gipps was making an effort to assert legal control over the pastoral frontier.¹³¹ Still, the measure was a conservative one, not giving Aboriginal testimony the same weight as whites; it was restricted to criminal cases, and required corroboration.¹³²

¹²⁷ *R. v. Billy*, November 27, 1840 (unreported) in Parliamentary Papers (P.P.) 1844 (627) XXXIV at 82-83.

¹²⁸ William Saxe-Bannister, former Attorney General of New South Wales, so testified before a Select Committee of the House of Commons. See "Minutes of Evidence to the Report of the Select Committee on Aborigines (British Settlements)" in P.P. 1837 (425) LVII at 17. R. Millis, *supra* note 42, recounts the case of a convict who escaped to the Aborigines, who, on his return was pardoned so that he could be put to work as a police interpreter. Still, such interpreters only understood some of the broad range of Aboriginal dialects.

¹²⁹ These are the grounds of Judge Willis' dismissal of the capital murder charges against Bon Jon. There should have been many more dismissals on these grounds but none are recorded.

¹³⁰ *Brown*, *supra* note 124 at 35-40.

¹³¹ Millis, *supra* note 42.

¹³² *Brown*, *supra* note 124 at 54-55.

Debate over the bill took explicitly racist terms, with many whites seeing the bill as designed to prosecute whites for “defending” themselves against blacks. The Gipps government argued that the bill was racially neutral, and would help prosecute blacks for offenses against whites as well. This racism underlay the *Sydney Herald*’s rhetorical question, “How could [the Gipps government] introduce a bill legalizing the evidence of savages in a Court of Law?”¹³³

The whole matter, however, turned out to be a dead letter. Crown law officers refused to recommend Royal assent, and the bill was not approved by the colonial office because it was “contrary to the principles of British justice”.¹³⁴ Legally, the Colony of New South Wales could adopt rules of evidence distinct from those of England, and the Colony had done so, for example, by admitting the evidence of convicts because it was a necessity under local conditions. The failure of Royal assent is not difficult to explain: it was the product of conservative Crown lawyers, unversed in colonial conditions.¹³⁵

Parliament in 1843, supporting the view of the Colonial Office that the extension of legal protection to native people in the colonies required the admission of native evidence, passed, without debate, a measure permitting the colonies to pass laws to admit unsworn evidence in both civil and criminal cases.¹³⁶ This *Act* left the Legislative Council of New South Wales free to re-enact their 1839 bill admitting Aboriginal evidence. The Australians who supported the measure pressed forward for a new bill, still motivated by their belief that native people could not receive justice in the courts without their evidence being admitted. *Murrell*, now an official position extending British law to crimes between Aborigines, created an impossible legal situation if Aborigines could not testify: how could Aborigines be prosecuted for offenses among themselves without any access to native evidence?¹³⁷

Since 1842, however, political changes had occurred that had put twenty-four elected members on the Legislative Council, along with the twelve members nominated by the Governor. Since the franchise was based on property, those elected represented propertied interests. These people opposed any extension of legal rights to Aborigines. Conservative interests opposed any modification of English legal traditions. This debate, merging the lofty ideals of the common law with racist drivel, characterized Australian law during the nineteenth century. It was in this debate, for example, that it was argued by William Wentworth, a wealthy landowner, that: “[I]t would be quite as defensible to receive as evidence in a court of Justice the chatterings of the ourang-outang as of this savage race.”¹³⁸ For Wentworth, and his allies, any extension of legal rights to Aborigines restricted the rights of settlers to defend their property against Aborigines. Settlers’ resentment of the Myall Creek trials and executions played a large role in these feelings. The bill went down to defeat, fourteen votes to ten.¹³⁹ An attempt to pass a more restrictive bill, limiting Aboriginal testimony to criminal cases and

¹³³ *Sydney Herald*, 23 September 1839. Cited in *Brown, ibid.* at 49.

¹³⁴ *H.R.A., supra* note 28 at i, XX, 756.

¹³⁵ *Brown, supra* note 124 at 53.

¹³⁶ 6 & 7 Vict. 22 (1843). *Brown, ibid.* note 124 at 55-56.

¹³⁷ *Brown, ibid.* at 57-63.

¹³⁸ *Ibid.* at 72.

¹³⁹ *Ibid.* at 74-76.

requiring corroboration, failed in 1849, ten votes to nine. The debate followed the same racist lines as in 1844.¹⁴⁰

The Legislative Council of New South Wales never directly returned to the matter of Aboriginal evidence again. Under responsible government any extension of legal and political rights to Aborigines was politically impossible because of the racist politics of landowners and their allies. Aboriginal evidence finally came to be admitted in 1876 as an unintended consequence of liberal reform on another front; atheists and other non-believers had their testimony admitted as evidence in England, and there was pressure to do the same in Australia. While conservatives, citing the importance of belief in God to the English way of life, opposed the measure, it passed anyway. Although native evidence was obviously included in the bill, the issue never came up in the legislature debate.¹⁴¹

The failure of either the colonial government, or the Legislative Assembly under responsible government, to provide for Aboriginal evidence to be admitted in court, is inconsistent with any view that Aborigines were British citizens. It also is obvious that there was no way that Australian law could provide a framework to structure black-white relations without Aboriginal access to the courts and other legal institutions. This failure is compounded when it is seen as symbolic; it would have been a simple matter, for example, to admit the testimony of Aborigines on the theory that local white judges and juries would ignore it. This, of course, was the normal practice in other colonial legal settings. It had the advantage of giving the government the benefit of the pretension of law, yet the flexibility to deny native people justice on evidentiary grounds, on a case by case basis. New South Wales settlers, probably influenced by their convict backgrounds and the Myall Creek trials, were more distrustful of the law, and of their capacity to control it.

There were other ways of avoiding problems of native evidence. No less a legal formalist than Chief Justice Francis Forbes found one of them. Faced with a homicide charge in which the only direct evidence of whether provocation was present was Bullwaddy, an Aborigine, Forbes convicted the defendant of murder and sentenced him to death. Forbes wrote the Governor a lengthy note, pointing out that when he considered the convicted murderer's appeal for clemency, he was free of the strict rules of evidence, hence could personally examine Bullwaddy and decide on the veracity of his evidence.¹⁴² Similarly, police and magistrates in their investigatory functions were free to use Aboriginal evidence both to locate the accused and witnesses to cases, and also to decide what charges ought to be brought.

Where the Colonial Office continued to directly administer the colony, Aboriginal evidence was admitted after the 1840s. Aboriginal evidence was first admitted in Western Australia in 1840.¹⁴³ This *Act* was extended and procedurally elaborated in 1841. It provided that a native could give a signed statement without oath to a justice of the peace, who could admit that statement at trial. It would be given whatever weight the court thought appropriate.¹⁴⁴

¹⁴⁰ *Ibid.* at 77-97.

¹⁴¹ Act No. 8, 40 Vict. 14 (1876). *Ibid.* at 98-113.

¹⁴² Currey, *supra* note 77 at 103.

¹⁴³ 4 Vict. 8 (1840).

¹⁴⁴ 4 and 5 Vict. 22 (1841).

The legal meaning of the admission of Aboriginal evidence is multi-faceted. On the one hand, the failure to admit Aboriginal evidence clearly recognized the completely separate nature of the two social and legal orders; if Aborigines are excluded from bringing their complaints to colonial courts, it must follow that their own legal forums are the only appropriate place for those stories. On the other hand, it was clearly a racist denial of their humanity and the idea of native testimony as the “chatterings of ourang-outangs” must have been thought, if not stated, by a large number of white Australians. All elements of Australian law, however, that contributed to the perpetuation of two parallel legal orders, implicitly deferred to Aboriginal sovereignty. It was not Aboriginal people who chose to bring their disputes to colonial courts but, rather, colonial authorities who sought to impose Australian law on native people.

VI. POPULAR JUSTICE: SELF-DEFENSE IN FACT AND LAW

If the legislative debate over the law of evidence shows the limits of the capacity of law to structure Aboriginal/white relations in Australia, the popular justice of colonial society created another limit on the law. This was an expansive concept of self-defense, the idea that whites, as a group, were acting in self-defense when they attacked blacks who, they perceived, posed a threat to their lives or property. This view provided the legal justification for white attacks on blacks in Australia until well into the twentieth century.

While the jurisprudence of popular justice can be analyzed in a number of areas of substantive law, the law of self-defense is particularly subject to populist social and political pressure because it turns on the objective reasonableness of an individual's exercise of self-defense in one particular fact-specific context as determined by a jury.¹⁴⁵ While, under British law, the trial judge exercised a great deal of power over this process through what were often very narrow and technical jury instructions, common law juries were always free to apply their own judgment. The social construction of “facts” in frontier killings were also fluid, subject to a wide range of interpretations. Finally, for a number of reasons, a defense of self-defense was the most common frontier white defense to murder charges; it was often the only available defense when confronted with an obvious killing and, in addition, its fact-specific nature made it relatively easy to raise successfully, especially with a sympathetic jury. Since murder convictions carried a mandatory death penalty under British law, the justification of self-defense was commonly raised by those accused of murder in any context where an interpersonal altercation might suggest some kind of threatening act by the victim.¹⁴⁶ Almost any confrontation between an Aborigine and a white on the frontier fell within the scope of this defense given the colonial settler mythology of dangerous natives.

While there are no statistics on the number of self-defense claims raised in murder trials of whites charged with killing Aborigines, because most of these trials led to verdicts of acquittal and even many of the convictions are not reported, a conservative estimate is that there were over a hundred nineteenth century Australian trials of whites

¹⁴⁵ G.P. Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (New York: Free Press, 1988). The jurisprudence of self-defense is discussed in chapters 2 and 3.

¹⁴⁶ Even a failed defense of self-defense often saved the accused's life, since a mistaken (or excessive) self-defense lowers a murder to a manslaughter at common law because it partially excuses the *mens rea* of specific intent to kill. See G. Williams, *Textbook of Criminal Law* (London: Stevens & Sons, 1978).

who used the self-defense defense against a charge of murdering a native. For only a few of these trials is there sufficient information to reconstruct both the underlying facts of the case, as well as the social and legal context of the trial. The 1872 trial, manslaughter conviction, and imprisonment of Lockier Clere Burges, a grazier and justice of the peace in northwestern Western Australia, for the killing of an unnamed Aborigine produced an elaborate record, including numerous submissions to the Colonial Office.

The case, like many other killings of native people, would never have come to court but for the fact that Burges mistreated James Murphy, a teamster who worked for him, by striking him with a whip because he was driving his horses too fast, and Murphy, nursing a grudge, reported Burges' killing of a native to the authorities in Perth. Murphy's claim, based on hearsay because the witnesses to the killing were natives, was that Burges had pursued and shot in the back an Aborigine who had stolen a saddle from the grazier's camp. The only witnesses to the killing were two natives that Burges had also apprehended for stealing the saddle, and who had run away, and Chum Chum, an Aborigine who worked for Burges as a shepherd.¹⁴⁷

Murphy's evidence came before E. W. Landor, Police Magistrate of Perth, on April 29, 1872, nearly nine months after the October 7, 1871 killing. Although there is some confusion about the extent of Landor's investigation of the report, Landor eventually charged Burges with "wounding with intent to murder".¹⁴⁸ This minor charge was no less than nonsense: the native that Burges had wounded was, in all accounts of the event, dead, and the same evidence that would prove the former charge would prove the greater charge. Governor Frederick Weld, citing his duty "to especially take care and to protect the native inhabitants....and prevent and restrain all violence and injustice which may in any manner be practiced or attempted against them," suspended Landor for refusing to commit Burges on a capital charge, while committing him on a minor charge on the same evidence.¹⁴⁹ While Landor vigorously (and successfully) challenged his suspension, Burges was re-indicted for murder. The Attorney General personally appeared before Chief Justice Archibald Burt and filed an information against Burges, containing nine counts, including intentional murder. The Chief Justice issued an arrest warrant. Burges was "shortly arrested", brought to Court, denied bail, and committed to jail.¹⁵⁰

Without the intervention of Murphy and Governor Weld, Burges' case would never have been brought to trial. Weld's motivations are not known, but they are not difficult to surmise. Just like Governor Gipps after the Myall Creek massacre trials, Governor Weld saw the case through the lens of British justice.¹⁵¹ He clearly did have a legal responsibility to see to it that some measure of equal justice prevailed in Western Australia, and that meant that all killings of Aborigines by whites had to be prosecuted to the full extent of the law. This idea of equal justice for natives and whites, or the idea

¹⁴⁷ Enclosure no. 3, "Regina Against Lockier Clere Burges, Copy Depositions, etc." in *Dispatches and Other Papers Relating to Transactions Arising Out of the Homicide and Other Alleged Outrages on Aboriginal Natives* (Perth: Government Printer, 1873) at 14. The following account of the Burges trial is taken from this report.

¹⁴⁸ *Ibid.* at 9.

¹⁴⁹ *Ibid.* at 5.

¹⁵⁰ *Ibid.* at 12-13. Answer of Mr. E.W. Landor, Police Magistrate, Perth, Western Australia, to the charges brought against him by His Excellence The Governor, 11th June, 1872. *Ibid.* at 17. Report of the issue of a warrant by the Chief Justice on the application of the Attorney General, for the arrest of Mr. Burges, taken from the *Perth Gazette* newspaper for 7 June 1872.

¹⁵¹ Milliss, *supra* note 42.

that native killings of whites were often in reprisal for white killings of natives were hardly radical propositions even in the terms of British colonial administration, yet few colonial governors intervened in individual cases. Governor Weld's personal influence is clear even in the earliest minutes on the case. On February 6, he responded to a concern of the Attorney General that the case was weak by responding that questions of credibility should be submitted to the jury.¹⁵² His initial report of the case to the Colonial Secretary stressed his personal disdain for the racism of Western Australian justice: "I am told that it is openly said that no evidence, however strong, will induce a jury to convict a white man of a capital offense for killing a native; I take leave to demur to so sweeping an assertion and one so little creditable to this Colony."¹⁵³

The Colonial Office took an interest in the case, apparently as a result of communications from local officials seeking the intervention of London. As early as April 30, the Superintendent of Police had submitted documents directly to the Colonial Secretary, suggesting that some officials were using the Colonial Office to make sure that the case was moved forward and not buried.¹⁵⁴ Concerns of abuses against Aborigines, at both the local level and in the Colonial Office, influenced the investigation. There was also a concern that the violent actions of individual whites created an endless cycle of retaliation that endangered frontier stability. Inspector Piesse's initial report of the incident feared that "it will be dangerous for persons coming overland from Nichol Bay, as they will have revenge on the Europeans and kill the first one they can get at."¹⁵⁵

The central difficulty in prosecuting Burges lay in the fact that Chum Chum, the only witness, was an Aborigine. In 1872 Aborigines were competent witnesses in Western Australia, so all legal barriers to his testimony had been removed.¹⁵⁶ But for Inspector Piesse, the fact that Chum Chum lived with Burges meant that he was under Burges' influence and would say anything Burges wanted. For Piesse the solution to this problem was simple, but raised problems of its own; if Chum Chum were removed from the influence of Burges, he would be willing to testify against him, but then there was the danger that Chum Chum was only testifying that way to please the police, his new master.¹⁵⁷ Chum Chum's credibility posed an insoluble problem for Piesse, and he requested guidance on how to proceed. Governor Weld dismissed these concerns, believing that the whole matter of credibility was for the jury.

Chum Chum, when interrogated by Police Magistrate Landor, gave an account of the killing that must have been strikingly like thousands of other killings of natives in colonial Australia. Burges, with a party of six whites and a similar number of Aborigines, was bringing a flock of sheep from Nichol Bay to Champion Bay. Seven natives of a tribe Chum Chum did not know followed the flock for ten or eleven miles. While Burges had given strict orders to keep natives out of the camp, they came in one evening, bringing a sheep dog that the party had lost. Over night, a saddle and some clothing disappeared. In the morning Burges went to look for the saddle, but could not find it. Later, one of his native servants found the saddle, and Burges rode off alone to find the natives who took it. Chum Chum went after Burges, intending to find him.

¹⁵² Currey, *supra* note 77 at 7.

¹⁵³ *Ibid.* at 3.

¹⁵⁴ *Ibid.* at 8.

¹⁵⁵ *Ibid.* at 7.

¹⁵⁶ 4 Vict. 8 (1840); 4 and 5 Vict. 22 (1841).

¹⁵⁷ Currey, *supra* note 77 at 7.

Burges was returning toward the flock. Chum Chum saw five natives running away. Burges told Chum Chum to hold two of them, and rode after a third native, beating him on the head with a pistol. Burges then returned to Chum Chum, saying that they would take the two back to the flock and flog them. One of the two, afraid to go back to the flock, ran away. Burges pursued him on horseback and, from a distance of three or four yards fired one shot at the man's back. He tumbled to the ground and lay still, face down, and did not move. Burges did not approach him to see if he was dead, but returned to Chum Chum and they took the remaining native back to the camp. Burges told the men in camp that he had shot a native.¹⁵⁸

Because of the notoriety of the case, and the fact that Chum Chum was the only witness, local authorities dispatched a police investigator over a thousand miles to search for evidence of the case, a journey that took almost two months. Such an investigation a year after a murder could produce only one piece of evidence, the remains of an unknown Aboriginal male, dead of a bullet wound. On July 11 Chum Chum lead the investigators to the exact spot in the desert where Burges had shot the man. A number of bones and a skull were there, on a spot four feet long, the earth covered by dried blood. One of the shoulder blade bones had a hole in it; the other had been taken away by dogs. No weapons of any kind were found. The tracks of one horse followed the body to a distance of fourteen yards, then abruptly stopped, as though the horse were pulled back.¹⁵⁹ Other than Chum Chum's error in estimating the distance between Burges and the man he shot, every piece of evidence that Chum Chum gave was corroborated. Piesse, with the aid of native trackers, found out that white men driving sheep had shot and killed a native named Muekellwellyer on the other side of Hooley's Well because he stole something.¹⁶⁰

Burges, arrested by William Timperly, Inspector of Police, admitted the shooting, but was unflappable in offering his defense. "I never did, and never will, deny that I shot that native, but I did not expect to be charged with murder." He was pursuing the men intending to take them back to his camp. The first man, the one that he had hit with his revolver, had attempted to take his leg and throw him off his horse. The man who was shot, threw a stone and ran, and Burges had pursued him. The native turned, and attacked Burges, who shot him in self-defense. By way of his own corroboration, Burges had written this account in his diary. However, he had never mentioned the attack in telling the story to his men, saying simply that he had shot a native.¹⁶¹

At trial on September 4, 1872, it seems that no one involved with the case believed Burges' statement about the attack, and that his killing of Muekellwellyer was a cold-blooded murder, running down and shooting in the back one member of a small band of natives suspected of petty theft, the kind of murder of natives that was common in nineteenth century Australia. Burges, amazed at the investigation against him, had ample opportunity to fabricate a story but did not put on a significant defense. He did not take the stand himself, a necessity in a self-defense claim, but relied on his lawyer's attack on the credibility of the witnesses against him.

¹⁵⁸ *Ibid.* at 8-9.

¹⁵⁹ *Ibid.* at 35-36.

¹⁶⁰ *Ibid.* at 36-37.

¹⁶¹ *Ibid.* at 38.

The trial took two days with Chum Chum the lead witness. While Chum Chum's testimony differed in slight detail from his deposition, the core of the cross examination by Mr. Parker, Burges' attorney, was on the general credibility of Chum Chum as a witness. Chum Chum was now a police constable and his loyalty to his new employer at the expense of his former employer was an issue. During his deposition he had said "Governor will be pleased if I tell the truth, Mr. Burges, no," with Parker drawing the inference that Chum Chum was testifying for his new master, a white stereotype of Aboriginal reliability as witnesses. Parker further got Chum Chum to admit that he had been fined for drinking.¹⁶²

Murphy testified that Burges returned to camp stating that he had shot a native, "I dropped one of them and he never kicked." On cross examination, Parker focused both on Murphy's dispute with Burges, as well as his alleged bragging in a Perth tavern that "that bloody swine has bested me and I will best him, I will swear his life away." Re-examined by the Attorney General, Murphy admitted that he had been drunk in many Perth taverns and had freely talked about the case, but he further testified that Burges had claimed that he had shot down the native "like a dog". Ironically, Murphy seems to have held up well as a witness, appearing exactly as he was: a hard drinking teamster full of anger towards Burges for whipping him, but his evidence was straightforward, and corroborated both Burges' statement to the police and Chum Chum's testimony.¹⁶³

Police Inspector Timperly testified to the statements that Burges had made to him, admitting that he shot a native, but claiming self-defense. Through Timperly, defense attorneys introduced Burges' diary, in which Burges had written "he tried to throw his dowark at me, but I fired at him and shot him." Sub-inspector Piesse testified to finding the body at Hooley's Well. Charles Bompas, a surgeon, testified that the body Piesse had found was an adult Aborigine male, and had been there less than twelve months. The hole in the shoulder blade of the body was caused by a bullet passing through the body of a man standing, holding his hand up slightly. The hand was also fractured, either by a bullet or by a sharp blow.¹⁶⁴ This testimony closed the Crown's case.

The next day the defense's case took only a few hours, a strange abdication that may indicate overconfidence. Jacob, a native who was with Burges and now lived with his brother, was called and testified that Chum Chum had told him that the native was attacking Burges and was going to throw a dowark, and that if Chum Chum had not been there Burges would have been killed.¹⁶⁵ Alfred Smith, a servant of Burges, testified that Murphy had threatened Burges, and that the natives had "dowarks, about two feet long, and thick as my wrist", but gave no evidence on the shooting. Michael Carpenter, a prisoner, was called to say that he had met Murphy "sober" in a tavern in Perth and that Murphy had said that he was going to "make the bloody bugger pay for it, and swear away his life, right or wrong."

The defense was inadequate and can only be explained by the lawyer's belief that no white man could be convicted on Chum Chum's evidence for the killing of a native. The trial judge, with the formalistic view of the law of self-defense common in British law of the day, took most of that problem away from the jury. He gave very detailed jury instructions, deciding most of the questions raised by the case against Burges. Since

¹⁶² *Ibid.*

¹⁶³ *Ibid.* at 38-39.

¹⁶⁴ *Ibid.* at 40.

¹⁶⁵ *Ibid.* at 63.

Burges did not have the legal right to detain or punish anyone, the narrow issue was whether Burges' arrest of the native was lawful. If it was not for a lawful purpose, then the native had a right to resist it, and Burges was not legally entitled to the claim of self-defense. "The Party slaying another under such necessity must himself be wholly without fault in bringing that necessity upon himself." Thus, the question of whether the man threatened Burges with a dowark was irrelevant. Although Burges had not admitted that he intended to flog the native, he had never claimed any legal purpose in his pursuit of the natives. Burges, the court instructed the jury, was legally obligated to promptly deliver Muekellwellyer to the nearest magistrate. Any other purpose amounted to an illegal arrest. That was the end of the case. The Perth jury followed the judge's instructions and convicted in fifty minutes. Burges was found guilty of manslaughter under the common law doctrine that mistaken self-defense reduces the *mens rea* of murder to manslaughter. The judge sentenced him to five years in Fremantle jail, very hard time for a grazier and former justice of the peace.¹⁶⁶

The conviction was immediately the matter of controversy, with many rushing to Burges' defense, demanding his release from prison. While some of the pleas were personal, coming from Burges' well connected family, others were legal, arguments about the nature of the law of self-defense between whites and natives in colonial Australia. Clearly, Chief Justice Burt's charge of the jury with a narrow and technical formulation of the law of self-defense that, by definition, left Burges guilty, was the easiest line of attack on the conviction. If Burges had any right at all to pursue the natives with the idea of locating his property, then he was acting "wholly without fault" and was entitled to have the reasonableness of his exercise of self-defense submitted to the jury. If the only legal purpose that Burges could have had in approaching a native was to effect a lawful arrest and transport his prisoner to the nearest justice of the peace, the law was demanding the impossible.¹⁶⁷ Burges had a flock of sheep and the nearest magistrate was 280 miles away. But, at the same time, the Chief Justice's formulation of the law was a bright line, absolutely giving native people the full protection of the law, and requiring whites to use the law in resolving their disputes with native people.

Much of the criticism of the decision, however, was cast in broader terms, taking in the entire nature of white-native relations in Australia. The most detailed social and political defense of Burges was a letter sent to the *Perth Inquirer* by Maitland Brown, the Justice of the Peace in Geraldton, and a council delegate from Geraldton. Ironically, if Burges had arrested Muekellwellyer and taken him before a Justice, the nearest Justice would have been Maitland Brown in Geraldton. Brown's position was editorially endorsed by the *Inquirer*, the leading newspaper of Western Australia.¹⁶⁸

Brown began his argument with the grazier's political position that when the colony "will not guarantee protection" to its citizens beyond the reach of the law, they have a broad moral right to act in their own defense. In this respect Brown emphasized that Burges had done nothing more than any police officer would do when investigating the theft of the saddle. This included pursuing the thief and using reasonable force to defend

¹⁶⁶ *Ibid.* at 42-43.

¹⁶⁷ *Ibid.* at 44-45.

¹⁶⁸ *Ibid.* at 54-60. "Petition, Correspondence, and Other Matter in the Case of Lockier Clere Burges, Jun., for Transmission to Her Majesty's Secretary of State for the Colonies: Perth, February 1873". This material was printed as a pamphlet and must have had wide distribution in Western Australia, a colony with a small population in 1872.

himself, indeed even to effect an arrest.¹⁶⁹ This recast the whole issue of the use of British law to structure white-native relations on the frontier, and denied the whole legitimacy of Governor Weld's attempt to use the law to ensure equality and fairness to natives on the frontiers of Western Australia. As long as Governor Weld was unable to extend British law to the frontiers to protect grazier's property rights, he was not morally entitled to extend it there to protect native rights.

Brown went far beyond this, attacking the central presumption in the Chief Justice's charge to the jury, that Burges' only legal right was to arrest Muekellwellyer and take him before a magistrate. According to Brown "no magistrate in Western Australia would have issued a warrant for the arrest of the natives who committed the depredation." In support of this, Brown cited Land Regulations proclaimed on March 20, 1872, stating "No protection or Governmental establishment in the North or East district will be guaranteed to the public until deemed expedient by the Government." Since the government guaranteed no protection in those districts, it followed that no magistrate would issue a warrant for an arrest in those districts because there were no police to go there to execute the warrants.¹⁷⁰

While Burges evidently intended to flog Muekellwellyer, these facts did not clearly come out at the trial, and Burges, himself, denied such intent. The law made express provision for a flogging of two dozen lashes in addition to imprisonment in such cases, asserted Brown, and Burges had only intended to inflict the lashes, a lesser punishment than the law provided. Moreover, for the native offense of carelessly lighting fire to the bush, the law provided for a punishment of fifty lashes.¹⁷¹ Brown defended Burges' right to flog the natives as doing no more than what the law allowed. Brown's assertion here, as a colonial magistrate, is that on the frontier, absent the legal protection of the Perth government, Burges was legally entitled to act as judge, jury, and executioner, exactly to the limit of Western Australia law. This legal opinion was obviously widespread in frontier Australia in the nineteenth century.

Nor was it fair to judge Burges' actions in using deadly force over the theft of a saddle in a context unfamiliar with the reality of the frontier. A saddle was not merely a piece of property of small value, but was absolutely necessary to make a horse useful in a sheep drive. The loss of a saddle endangered the life of the man who needed to ride the horse, and was a far more serious matter than an ordinary theft.

Sensing that many of his legal arguments were of doubtful quality, Brown argued that Burges' actions were not "morally wrong" even if they were legally wrong. Freely citing the deity as authority, Brown made a number of arguments based on natural law and the natural law right to self-defense.¹⁷²

Finally, Brown's argument turned on racism, the savage character of natives on the Australian frontier. Analogizing to the power of a "pensioner" posted as a guard over convicts who has the clear power to shoot them when they attempt to escape, he argued that it was unjust to imprison Burges for killing a savage in exactly the same position,

¹⁶⁹ *Ibid.* at 54.

¹⁷⁰ *Ibid.* at 55.

¹⁷¹ *Ibid.* Brown cited the action of the explorer Stanley Livingston, who had forcibly seized supplies from natives in Zanzibar. It logically followed that if Livingston had killed one of those natives in the course of effecting this seizure, he would not be guilty of murder because, since his seizure of the goods was legal, he had a right to defend himself while doing so.

¹⁷² *Ibid.*

an argument which ignores the fact that the guard is acting under the authority of law, while Burges was not. Brown himself had “more than once been brought into hostile collision with natives” and had been imputed “dark deeds which I thank God His power prevented me from committing.”¹⁷³ What happened to Burges, by this logic, could have happened to Brown, or any other white on the frontier.

While Governor Weld resisted this pressure, the Colonial Secretary did not, and Burges’ sentence was reduced to one year imprisonment.¹⁷⁴ This did not satisfy Burges’ defenders, who continued to argue that he deserved a pardon.¹⁷⁵ Nor did it satisfy Governor Weld who insisted, in a dispatch to the Colonial Secretary, that the evidence clearly showed that Burges had shot Muekellwellyer (still without using his name) in the back in cold blood, which made him guilty of murder rather than manslaughter. Weld believed that the jury had been lenient with Burges, in part out of fear of public retaliation against “marked men” for convicting a white of murder in the killing of an Aborigine.¹⁷⁶

The Burges trial provoked an interest on the part of the Colonial Office with the whole matter of justice in interracial killings in Western Australia. In the previous ten years there had been five prosecutions of whites for killing natives and three of natives for killing whites. Four of the whites had been convicted of manslaughter, with one acquitted by reason of insanity and under detention as criminally insane. All of the natives were convicted and hanged.¹⁷⁷

Colonial Australia produced a law of self-defense that was structured by white racism. At the outset, white killings of natives were reduced to manslaughter almost automatically, a province of the jury for any reason. The law of self-defense turned both on questions of fact that were, as seen in Burges’ case, highly subjective, often without corroboration, and an objective judgment about the level of force necessary to preserve white lives in ordinary frontier activities, such as stock-driving. Burges had driven a flock of sheep nearly a thousand miles with only friendly contacts with natives, but for whites it was a hostile environment, requiring vigilance—and potential violence, at every step.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.* at 43-44.

¹⁷⁵ *Ibid.* at 54.

¹⁷⁶ *Ibid.* at 61-63. Weld’s reading of the evidence is instructive: “Take this in connection with Murphy’s evidence that he was given a native prisoner and a gun, and ordered by L. C. Burges to “drop” (or shoot) the native if he attempted to escape; with Chum Chum’s evidence; with L. C. Burges’ entry in the journal; with his statement to Inspector Timperley about the native’s picking up a stone, which he would not have done had he had a dowark; with the presumption that he would have probably disarmed the native when first taken had he been armed; with the presumption that which L. C. Burges was alone, and with seven wild and “bloodthirsty” natives by him, whom he was endeavouring to drive to camp, they would have assailed him with those deadly weapons had they had any; with the presumption that after shooting the native, L. C. Burges would have carried away his dowark as a trophy, a memorial, or a proof, had there been a dowark to carry away; with the fact that after shooting the native he never even rode up to him but left him like a dog; with the expressions in evidence as used by him, “he dropped and never kicked”, “hardly worth while (not to avoid a possible blow, but) for the sake of thirty shillings”, “my friend screwed himself away from me”: all this mass or concurrent evidence, each part dovetailing into the other, leads to the belief that he was not firing in self-defence, but vindictively to kill a man, who was escaping, and who would not stop” (at 62).

¹⁷⁷ *Ibid.* at 5, 87 and 97.

VII. CONCLUSION

These isolated looks at distinct pieces of legal doctrine in nineteenth century Australia clearly show one thing at the outset; the legal history of Australia is far from a legal *terra nullius*. Aborigines were everywhere in Australia, and the structuring of white-native relations was a recurrent issue in nineteenth century Australian law. Resort to formal legal mechanisms ebbed and flowed with a broad range of political and social factors. The prosecution and conviction of Lockier Burges, like that of the men who committed the Myall Creek massacre, was partially a fortuity, but the legal mechanisms were in place for a number of such trials that ran into the hundreds.

Muekellwellyer was never named in any of the formal court documents in Burges' trial, even though Inspector Piesse identified him two months before the trial. Undoubtedly, thousands of his countrymen, also unnamed, were murdered much as he was; many more thousands flogged. There is an underlying legal structure here that it is transparent. Burges was tried, not because he murdered Muekellwellyer, but because he lost his temper and whipped James Murphy because he did not like the way Murphy drove his team. Murphy, a man of fewer means and less political power, got even with Burges the best way he knew how. Muekellwellyer's people fell back to the North to regroup and carry on their lives. They did not passively accept his death. They spread word of how he was killed up and down the coast of Northwestern Australia. Apparently, following their own law, they planned to avenge his death, and, in the belief of Governor Weld, may well have done so. Their land was contested land, not *terra nullius*; their legal norms were well enough known so that Inspector Piesse was sent to pacify them by assuring them that Burges was punished under British law. The theft of the saddle, for unknown reasons, may have been a legal act, unrecognized by Australian law.

Colonial justice was a delicate balancing act, involving some of the form of British justice, but with a popular character that the British Colonial Office deferred to. Lord Kimberley put this directly in his remission of Burges' sentence, while he recognized both that Weld had done his duty to secure equal justice for Aborigines, and respected the quality of the verdict and did not think there was any error in the trial, "in order that a healthy public opinion may prevail in the Colony on this subject, it is essential that there should be no ground for a feeling that extreme severity has been effected" against Burges.¹⁷⁸

All of this demolishes any pretext of a legal inference denying an Aboriginal right to land based on the failure of nineteenth century Australian law to recognize Aboriginal rights. In a *de facto* way, Australian law dealt with complex questions of Aboriginal rights in a wide variety of ways. While graziers, like Burges, had a range of legal rights to move their flocks across wide expanses of land, that right was only unlimited in the legal culture of the graziers, a legal culture represented by Maitland Brown and Lockier Burges. Muekellwellyer and Chum Chum had a legal culture as well. The legal culture of the former was aimed at maintaining an integrity of native rights on the frontier. The legal culture of the latter was more assimilationist, but it was to make sure that Muekellwellyer and his people got justice in the white man's court. Weld and Kimberley represented a third legal culture, one that tried to mediate the other two. Theirs imposed

¹⁷⁸ *Ibid.* at 43-44.

the formality of British law on two societies that did not want it. Because of this highly imperfect fit, and great local resistance, the formality of British law was always compromised with local political reality, as indeed it was in Britain.¹⁷⁹ Native interests were not represented in local politics. That, however, is a different question than whether native people had recognized sovereignty and land rights in nineteenth century Australia. They acted like they did, as sovereign people exercising political control over their lands; Australians treated them like they did, either staying off their lands, or only entering them with armed forces always on the alert for native attacks in defense of their land.

The legal history of Aboriginal rights in nineteenth century Australia is far from a legal *terra nullius*. It is a rich and complex history, only partially written. While the self defense trial of Lockier Burges is carefully recorded in Australian legal history because his people had a written legal order, the self defense cases of Muekellwellyer's people are not recorded in writing. If Muekellwellyer had killed Burges that day by managing to pick up a stone and knocking him off his horse as he drew aim to kill him, there would be no written record of the case. Rather, the case would have disappeared into the cycle of frontier violence and retaliation that characterizes the absence of law in Australian legal history. But the white choice to use or not to use law is a legal choice, and the history of that process is a legal history. Native people did not have those choices. It would have been impossible for any of Muekellwellyer's people to find a magistrate and prefer charges against Burges. That fell to James Murphy, one drunk and angry teamster, who bragged in every tavern in Perth that he would perjure himself and put Burges away – and still had more credibility and more access to British and Australian law than all of Muekellwellyer's people. They had their own law, however, and for most of nineteenth century Australia that was sufficient for them. Any re-thinking of the legal history of Aboriginal Australians needs to take account of Aborigine law and legal history, as well as its opposite, the legal structuring of white choices (and opportunities) to avoid colonial law, both central elements of the history of native rights in Australia.

¹⁷⁹ D. Hay, "Property, Authority, and the Criminal Law" in *Albion's Fatal Tree: Crime and Justice in Eighteenth Century England* (New York: Pantheon, 1975) at 17.

