

# Resistance and Reform: Shared Relationships and Common Interests Among the Subjects of Criminal Law in Colonial New South Wales

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*Convict history, labour history and Indigenous history provide colonial historians with abundant evidence for charting and analysing the development of both Australian democracy and the coercive Australian state. These histories often focus on one or two subaltern social groups, to the exclusion of others, or, in some cases, on the conflicts between them. This article examines this historiography before introducing a new approach to the study of Australian colonial legal history which explores the commonalities shared by marginalised peoples, arising from a combination of class and 'race' dynamics. It does so specifically by analysing the social processes and patterns of resistance involved in the emergence of democratic majoritarian reform to criminal law throughout the period 1788 to 1861 — a subject of recent legal historical scholarship. Explored here is the notion of shared relationships and common interests as a theoretical device that deepens existing postcolonial understandings of who comprised the major subjects of colonial criminal law and the role they played in challenging and reforming it.*

Keywords: Shared relationships, class, race, colonialism, indigeneity, labour, convicts, coercive law

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In New South Wales between 1788 and 1861, the criminal law was a significant site of political contestation. It reflected and influenced the prevailing social relations of the period. In particular, criminal law was an arena through which a dominant minority of military men, lawyers and agrarian and mercantile capitalists sought to maintain and advance their

\* This research is drawn from the author's current research exploring the evolution of fair trial rights and criminal process in colonial New South Wales.

privilege at the expense of the majority of the early colony's inhabitants: convicts, Aboriginal people and free settlers. However, by 1861, a majority of the colony's (male) voters had elected several politicians who assisted the passage of legislation to improve or humanise criminal process by securing a range of basic fair trial rights. This was a democratic advancement that depended on reforming the magistracy and significantly limiting the severity of punishment. The evolution of fair trial rights was reformed through challenge and resistance by members of the colonial majority in NSW. The struggles involved in this historical development were crucial to advancing the majority's legitimate entitlement to challenge and resist the minority's control over legal power. It was a coalition of working-class and colonised peoples who ignited the fuse that sparked socially progressive reform to criminal law in colonial NSW, by demanding civil and political rights and resisting various coercive legal practices.<sup>1</sup>

Fundamental to these political struggles were the social relations of those who challenged legal power and the administration of criminal law in colonial NSW. This article identifies and analyses a new historiographic configuration of social relations characterising those who formed the marginalised majority that resisted and changed criminal law from the bottom up. Central to this configuration were shared relationships and common interests between colonised and working-class peoples. Throughout this period, working-class and colonised peoples constituted the subjects of criminal law. They were predominantly proletarian convicts, Aboriginal people and free labourers. Certainly, there were significant differences between them. Yet, they also shared distinct commonalities which played a critical role in the strength of the resistance to the barbarities and dehumanisation of the colonial criminal law's

<sup>1</sup> Eugene Schofield-Georgeson, *By What Authority? Criminal Law in Colonial NSW, 1788–1861* (Melbourne: Australian Scholarly Publishing, 2018); see also Eugene Schofield-Georgeson, "'Mad" Edwin Withers and the Struggle for Fair Trial Rights in Colonial New South Wales,' *law&history* 3 (2016): 78-103; Eugene Schofield-Georgeson, 'Customs in Common Across the Seven Seas,' *law&history* 2 (2015): 202-211; Eugene Schofield-Georgeson, 'A Brief History of the Right to Silence in NSW,' paper presented at the annual conference of the Australia & New Zealand Law and History Society, Dunedin, New Zealand, 26 November 2013; Eugene Schofield-Georgeson, 'Criminal Procedure in NSW: 1788–1861,' public lecture given at the Sir Francis Forbes Society NSW Bar Association, Sydney, 11 February 2014.

administration, and in its reform. Specifically, colonised and working-class peoples shared relationships to land, labour and coercive law.

A key purpose of this article is to explain the term ‘shared relationships and common interests’ in this specific context and to illustrate its operationalisation in the making of the subjects of colonial criminal law in NSW and in their resistance to it. In demonstrating popular majoritarian resistance to legal governance, this article does not pinpoint any one struggle or singular episode that was ‘determinative’ of any single law reform throughout the period. Rather, it seeks to describe how social patterns — in this case, of solidarity and resistance between diverse social groups — created the impetus for law reform.

Emphatically, this argument does not seek to challenge the specificity of the colonised relationship of Indigenous Australians, or Australia’s First People, to European invaders, nor the legitimacy of claims to land and social recognition based on this relationship. Clearly, while Indigenous Australians shared much in common with their non-Indigenous counterparts vis-a-vis the dominant colonial class, they also experienced a particular relationship to colonisation that many have suggested distinguishes relations of class from those of race and, more specifically, ‘indigeneity’.<sup>2</sup> At the heart of this distinction in Australia were state policies of territorial dispossession, confinement, segregation, assimilation and removal — all applied exclusively to Indigenous people. These were central to white Australian nationalism and the birth of the Australian nation state.<sup>3</sup> This makes ‘race’ an important, defining feature of the relationships between Europeans and Indigenous peoples. But these relationships were complex, and race was not their only structural feature. Accordingly, the analysis offered here focuses predominantly on *class* commonalities between colonised and working-class peoples, rather than racial differences. Such an approach writes Aboriginal people into Australian class history. It does not seek to ‘whitewash’ Aboriginal experience and histories of race. As argued in this article in relation to the law and criminal process in colonial NSW, Aboriginal and proletarianised Australians experienced much in common as they became subjects of the

<sup>2</sup> See, for instance, Patrick Wolfe, *Traces of History: Elementary Structures of Race* (New York: Verso, 2016); Geoffrey Stokes, ‘Citizenship and Aboriginality: Two Conceptions of Identity in Aboriginal Political Thought,’ in *The Politics of Identity in Australia*, ed. Geoffrey Stokes (Cambridge: Cambridge University Press, 1997), 158-74.

<sup>3</sup> Wolfe, *Traces of History*, 113.

criminal law. Indeed, the severity of coercive colonial law in NSW was directly related to 'shared relationships and common interests' between working-class and colonised peoples. Before discussing these relationships and interests in more detail, however, the following considers other historical and theoretical contributions to understanding resistance and law reform in colonial NSW.

### **Resistance and Law Reform in Colonial NSW**

Foremost among the contributions to Australian accounts of colonial resistance and reform is that of 'radical' historian Terry Irving, for whom class differentiation and conflict formed the bedrock of struggle for representative democracy in NSW in 1857.<sup>4</sup> For Irving, universal manhood suffrage was enacted through what he has described as 'reformist radicalism', which took three forms: constitutional, civic and plebeian.<sup>5</sup> Together, these radicalisms constituted a collective social movement and dynamic that sought to abolish the prevailing mode of rule and governance in colonial NSW and to replace it with one that gave voice to the majority. While this movement was united to the extent that it centred on establishing a more democratic rule of law and governance, it was also differentiated insofar as it operated around the three main 'nodes' of reforming practice; that is, constitutional, civic and plebeian. Despite these differentiations, all were unanimous in their mission to 'root out' the old and replace it with the new; hence their common cause as 'radicals'. Central to the argument developed in this article is that the last group identified by Irving — 'plebeian radicals' — was especially important in the reform of criminal law in colonial NSW. Such radicalism was so well developed that, by mid century, in Maitland, west of Newcastle, an Aboriginal farmhand stood up to the local constable, refusing arrest, 'threatening' the 'constable with action for false

<sup>4</sup> 'Radical history' is a relatively recent field that has evolved from the labour and social history movements between the 1960s and 1990s in Britain, North America, Europe and Australia. Radical history recognises and maps the life and culture of subaltern and class resistance to dominant social structures and, in Australia, taps into a large colonial historiography. Yet, rather than focusing exclusively on history from below, as social history has done, radical history seeks to identify specifically *political* interventions by radicals of *all* social classes: Terry Irving and Raewyn Connell, 'Scholars and Radicals: Class Structure in Australian History Revisited,' keynote address at the Historical Materialism Conference, Sydney, 2015.

<sup>5</sup> Terry Irving, *The Southern Tree of Liberty: The Democratic Movement in New South Wales before 1856* (Sydney: The Federation Press, 2006), 127-50.

imprisonment' and complaining of his treatment to his local member. The local member, himself a radical, told the Legislative Council that 'the aboriginal natives' showed 'perfect acquaintance with the laws and customs of the colony'.<sup>6</sup>

Accounts of colonial resistance, grounded in radical social history, have attracted vigorous criticism. One such critic, Australian historian Humphrey McQueen, has opposed the idea that any colonial social resistance beyond Marxist 'class struggle' actually generated any significant change in colonial social organisation and political relations in colonial NSW. He has dismissed the idea that struggles by particular groups outside the organised, industrial working class can be understood as social resistance, able to contribute to the advancement of democracy. From McQueen's perspective, convict challenges to prevailing governance in colonial NSW amounted to no more than 'surly defiance, dumb insolence and even impudent mockery'.<sup>7</sup> For McQueen, convicts had a 'lumpen-proletarian or petty bourgeois ... ideology' which predated the 'class consciousness' formed during the 'making of the English working class' between 1780 and 1832.<sup>8</sup>

McQueen's approach, however, preceded the scholarship of Thompsonite historians, whose work on the seventeenth and eighteenth century 'mob' in England and 'the deep-sea proletariat' (transatlantic maritime workers and slaves) showed the efficacy of resistance — and even class solidarity — against exploitative and oppressive practices by a merchant class and aristocracy, well before the advent of Marx's industrial working class.<sup>9</sup> These historians showed how so-called primitive, pre-class-conscious workers, slaves and commoners 'of all nations' sowed the seeds of revolution and social change, particularly in England, the United States and France.<sup>10</sup> Although the end result in each case was liberalism, social historians Peter Linebaugh and Marcus Rediker have demonstrated that, while these struggles ignited spontaneously around a utopian goal, they

<sup>6</sup> *Maitland Mercury*, 19 June 1847, 3, and *Sydney Morning Herald*, 19 June 1847, 3.

<sup>7</sup> Humphrey McQueen, 'Convicts and Rebels,' *Labour History* 15(3) (1968): 13.

<sup>8</sup> McQueen, 'Convicts and Rebels,' 25; E. P. Thompson, *The Making of the English Working-Class* (London: Penguin, 1963).

<sup>9</sup> See, for instance, Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners and the Hidden History of the Revolutionary Atlantic* (Boston: Beacon Press, 2000), 36-70, 211.

<sup>10</sup> Linebaugh and Rediker, *The Many-Headed Hydra*, 158, 164.

were fuelled by suffering from the bottom up and eventually resulted in social change.<sup>11</sup> From their perspective, Marxist concepts such as ‘false consciousness’ and ‘primitive rebellion’ seem altogether unnecessary, if not anachronistic.<sup>12</sup> In Australia, scholarship by colonial historians, such as Alan Atkinson and Ian Duffield and, more recently, Emma Christopher, Grace Karskens and Erin Ihde, has drawn on the work of these Thompsonite scholars. They have explained how diverse forms of social resistance were critical to consolidating nascent working-class identity in colonial Australia in relation to ruling class power.<sup>13</sup>

Missing from the historical picture of resistance and reform in early colonial NSW, however, is what happened in the domain of law and its administration. Australian legal historians have certainly documented the development of criminal law and administration in considerable scholarly detail. Yet, like their counterparts in Britain and North America, much of it projects a view divorced from social history. Key Australian proponents of this approach include C. H. Currey, J. M. Bennett, Alex Castles and G. D. Wood.<sup>14</sup> Currey and Bennett, writing in the 1960s, paint a view of the law as the work of great British men whose personal brilliance and professionalism led to a triumph of ideas and legal practices that were sometimes progressive. Although Castles, in the 1980s, and Wood, in the

<sup>11</sup> Linebaugh and Rediker, *The Many-Headed Hydra*, 158, 164.

<sup>12</sup> Ian Duffield, “‘Haul Away the Anchor Girls’: Charlotte Badger, Tall Stories and The Pirates of ‘The Bad Ship Venus’,” *Journal of Australian Colonial History* 7 (2005): 45. For histories of ‘primitive rebellion’ premised on class consciousness, see E. J. Hobsbawm, *Primitive Rebels: Studies in Archaic Forms of Social Movement in the 19<sup>th</sup> and 20<sup>th</sup> Centuries* (Manchester: Manchester University Press, 1965); and E. J. Hobsbawm, *Bandits* (Middlesex: Pelican, 1969).

<sup>13</sup> Alan Atkinson, ‘Four Patterns of Convict Protest,’ *Labour History* 37 (1979): 28-51; Alan Atkinson, *The Europeans in Australia, Volumes I–II* (Oxford: Oxford University Press, 1997); Alan Atkinson, *The Europeans in Australia, Volume III* (Sydney: UNSW Press, 2014); Grace Karskens, *The Colony* (Sydney: Allen & Unwin, 2010); Erin Ihde, ‘Pirates of the Pacific: The Convict Seizure of The Wellington,’ *The Great Circle* 30(1) (2008): 7; Duffield, “‘Haul Away the Anchor Girls’”; Emma Christopher, “‘Ten Thousand Times Worse than the Convicts’: Rebellious Sailors, Convict Transportation and the Struggle for Freedom,’ *Journal of Australian Colonial History* 5 (2004): 30-46.

<sup>14</sup> C. H. Currey, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of New South Wales* (Sydney: Angus & Robertson, 1968); J. M. Bennett, *A History of the New South Wales Bar* (Sydney: Law Book Company, 1969); Alex C. Castles, *An Australian Legal History* (Sydney: Law Book Company, 1982); G. D. Wood, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Sydney: The Federation Press, 2002).

early 2000s, chose not to aggrandise lawyers, their accounts of criminal law in the colonial period are generally populist in their ‘factualism’ and relatively detached from the material conditions under which the law was made. Their technocratic accounts of procedure emphasise the judgments and oratory of great men of the law, often at the expense of the defendant, whose ‘unfortunate’ plight at the end of a rope or ‘cat’ is usually — like their presence in the courtroom — an afterthought.<sup>15</sup> Legal history has generally neglected to examine and explain the relationship between the criminal law and process and the social divisions and conflicts within which it is located and operates.<sup>16</sup>

This is not the case with the socially engaged Australian legal histories of Bruce Kercher, Paula Byrne, David Neal and Alastair Davidson, all of whom have maintained largely separate lives and trajectories from their Whig comparators within the academy.<sup>17</sup> Kercher, Byrne, Neal and Davidson describe a set of legal relations that are socially and politically contingent. Neal, in 1991, and Kercher, in 1995, each begin with political history. They craft a nuanced narrative drawing on a combination of political philosophy from the period and social history to explain the development of the judiciary and executive in colonial NSW. Kercher’s history extends beyond the colonial period, plotting the course of the rule of law throughout the ensuing century. Davidson, in 1991, and Byrne, in 1993, can be distinguished from the generalist histories of Neal and Kercher. They deploy specialised frameworks of political analysis to their respective histories of law in colonial NSW. Davidson invokes structural

<sup>15</sup> See, for instance, John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2005); James Q. Whitman, *The Origins of Reasonable Doubt* (New Haven: Yale University Press, 2008); John Hostettler, *The Politics of Criminal Law: Reform in the Nineteenth Century* (Chichester: Barry Rose Law Publishers, 1992); J. M. Beattie, *Crime and the Courts in England, 1600–1800* (Oxford: Oxford University Press, 1986).

<sup>16</sup> Peter Linebaugh, ‘(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein,’ *NYU Law Review* 60 (1985): 212-43. The concept of political ‘hegemony’ was coined by Antonio Gramsci in *The Prison Notebooks, Vol. III (Sixth Notebook)* (New York: Columbia University Press, 2007/1932), 64-65.

<sup>17</sup> Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Sydney: Allen & Unwin, 1995); Paula J. Byrne, *Criminal Law and Colonial Subject: New South Wales, 1810–1830* (Cambridge: Cambridge University Press, 1993); David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge: Cambridge University Press, 1991); Alastair Davidson, *The Invisible State: The Formation of the Australian State 1788–1901* (Cambridge: Cambridge University Press, 1991).

Marxism to describe the formation of the Australian state (including the judiciary) throughout the nineteenth century, while Byrne uses Thompsonite social history to discuss a range of lower court cases across a narrower time span during the 1820s and 1830s.

Despite these approaches, Australian legal history has largely relinquished scholarly investigation into its wider social origins and impacts, leaving to social historians the histories of marginalised and colonised peoples' voices and actions, as well as their contributions to civil society through law reform. For example, the major works produced by socially engaged legal historians, outlined above, have largely neglected the relationship between law and Indigenous peoples — although Kercher has compiled an extensive body of work in respect to Aboriginal peoples and colonial law.<sup>18</sup> More recently, scholarship by Lisa Ford, Kristyn Harman and Libby Connors has been exclusively devoted to the relationship between Aboriginal peoples and the colonial law.<sup>19</sup> Nevertheless, these legal histories of Indigenous peoples do not — nor do they intend to — examine the relationship between Indigenous resistance to the law and the resistance enacted by working-class Europeans in the reform of colonial criminal law and process. Indeed, some Australian labour historians, such as Michael Quinlan and John McCorquodale, have distanced the relationship between working-class Europeans and Aboriginal people throughout the colonial period.<sup>20</sup>

More recent historiography, however, suggests that, despite their different and conflicting interests, colonised and European working-class

<sup>18</sup> Kercher, *An Unruly Child*, 1-17; *The Kercher Reports, 1788–1827*, ed. Bruce Kercher and Brent Salter (Sydney: The Federation Press, 2009). See also Kercher's extensive database of colonial Australian case law, in which he has retrieved and catalogued most known colonial case law relating to Australian Indigenous people: 'Decisions of the Superior Courts of New South Wales, 1788–1899,' [http://law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/subject\\_index/](http://law.mq.edu.au/research/colonial_case_law/nsw/cases/subject_index/) (last accessed 19 September 2017).

<sup>19</sup> Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge, Mass: Harvard University Press, 2010); Kristyn Harman, *Aboriginal Convicts: Australia, Khoisan and Maori Exiles* (Sydney: UNSW Press, 2012); Libby Connors, *Warrior: A Legendary Leader's Dramatic Life and Violent Death on the Colonial Frontier* (Sydney: Allen & Unwin, 2015).

<sup>20</sup> Constance Lever-Tracy and Michael Quinlan, *A Divided Working Class* (London: Routledge & Kegan Paul, 1988), 163; John McCorquodale, 'The Myth of Mateship: Aborigines and Employment,' *Journal of Industrial Relations* 27(1) (1985): 8.



peoples also shared certain interests as European imperialism and colonisation spread and dominated the globe. Lauren Benton and Lisa Ford have found that, although colonial legal power across the empire may have been penned by ‘dull bureaucrats’, it was shaped in no small part by the efforts of Indigenous peoples, slaves and sailors.<sup>21</sup> A more thorough exploration of this idea was conducted by US historians Linebaugh and Rediker in their studies of ‘slaves, sailors and commoners’, in which they depict a plurality of European and colonised peoples collectively ensnared by conquest, dispossession, domination and exploitation.<sup>22</sup> Indeed, in NSW, colonial society was multiethnic, with at least twelve ethnicities represented on the First Fleet.<sup>23</sup> In the historical accounts of Linebaugh and Rediker, a diversity of actors jostle alongside each other in their differentiated but shared subordination and marginalisation: those who performed the labour of empire or competed for it (such as the ‘hewers of wood and drawers of water’), dispossessed fringe-dwellers and beggars, the ‘rabble’, the ‘motley’, the ‘vulgar’, the ‘coarse’ and the ‘plebeian’ of the empire.<sup>24</sup> This approach has been echoed by Australian colonial historians Karskens and Christopher.<sup>25</sup> Yet, such accounts leave largely unexamined and unexplained questions of how the common features of this plurality were established and mobilised as resistance to dominant interests and minority rule. It is suggested that the idea of shared relationships and common interests is an analytical foundation for understanding bottom-up resistance by a combination of colonised and plebeian peoples in relation to criminal law and process in colonial NSW. Such an idea draws on E. P. Thompson’s history of the making of the English working class.

For Thompson, ‘class happens when some men [sic], as a result of common experiences (inherited or shared), feel and articulate the identity of their interests as between themselves, and as against other men [sic] whose interests are different from (and usually opposed to) theirs’.<sup>26</sup> It is Thompson’s idea of common interests and experiences directly generated by their shared relation to the opposed interests of others that is crucial

<sup>21</sup> Lauren Benton and Lisa Ford, *The Rage to Order* (Cambridge, Mass: Harvard University Press, 2016), 15-24.

<sup>22</sup> Linebaugh and Rediker, *The Many-Headed Hydra*, 36-70, 211.

<sup>23</sup> Cassandra Pybus, *Black Founders* (Sydney: UNSW Press, 2006).

<sup>24</sup> Linebaugh and Rediker, *The Many-Headed Hydra*, 56.

<sup>25</sup> Karskens, *The Colony*; Christopher, “‘Ten Thousand Times Worse than the Convicts’”.

<sup>26</sup> Thompson, *The Making of the English Working Class*, 8.

here in understanding resistance. This article adopts such an approach in arguing that reform of criminal law and process in colonial NSW involved sustained resistance by both colonised and British working-class peoples in response to their shared relationships and common interests forged by their experiences of colonial criminal law.<sup>27</sup>

Despite their common interests, social relations among those who shared relationships in colonial NSW were far from harmonious. Just as the ruling class in colonial NSW was riven by infighting between 'exclusives' (free settlers and traders) and 'emancipists' (former convicts), the shared relationships between colonised and working-class peoples were frequently divided by racism and sectarianism. The manual labour of genocide and dispossession against Aboriginal people, for instance, was carried out largely by working-class soldiers, agrarian workers and rival groups of Aboriginal people (as trackers and bush policemen).<sup>28</sup> However, as colonial historian Andrew Markus has found, less discrimination existed between Aboriginal and European workers than between Europeans and other non-European workers.<sup>29</sup> Yet, despite sectarian schisms and tensions between groups of colonised peoples, the colonised shared wider, dynamic and enduring material interests.

The concept of shared relationships refers to a specific historical and collective identity that transcends ethnic characteristics. Central to the conceptual formulation of shared relationships are three particular relationships in which the subjects of criminal law were forced to participate across the empire: (1) to land, in that they had been driven from it and were rendered homeless, itinerant or ghettoised; (2) to labour, in that they were either rendered unemployed or coerced to perform

<sup>27</sup> Australian sociologist and historian Claire Williams has recognised that both Indigenous and working-class peoples in early Australia experienced a relationship of exploitation and subordination in relation to the organisation of labour. Yet, her work does not explore this shared relationship in terms of the concept of common interests and the possibility of combined resistance. See: Claire Williams, *Beyond Industrial Sociology* (Sydney: Allen & Unwin, 1992).

<sup>28</sup> Marie H. Fels, *Good Men and True: The Aboriginal Police of the Port Phillip District 1837–1853* (Melbourne: Melbourne University Publishing, 1988); Jonathon Richards, *The Secret War: A True History of Queensland's Native Police* (Brisbane: University of Queensland Press, 2008); James Boyce, *The Vandemonian War* (Melbourne: Hardie Grant Books, 2017).

<sup>29</sup> Andrew Markus, 'Talka Longa Mouth: Aborigines and the Labour Movement, 1890–1970,' *Labour History* 35 (1978): 138–39.

labour for the benefit of others; and (3) to coercion by the state, predominantly as subjects of criminal process and sometimes genocide or war. In colonial NSW, those who shared these relationships were proletarian convicts, Aboriginal people and free labourers, who often shared interests and cultures as a polyglot of peoples who became 'the mob'.<sup>30</sup> They are referred to collectively throughout this article as colonised and working-class peoples.

Emphatically, working-class free labourers were *not* colonised peoples. While they shared relationships to land, labour and coercive law with the colonised, they did not experience categorisation by race — as did Aboriginal people and, to a lesser degree, convict and Celtic peoples in colonial NSW. As Ann Curthoys has recently explained, whereas all Europeans were enfranchised and encouraged to participate in electoral democracy in NSW in 1856, Aboriginal peoples were not enfranchised to the same extent and remained colonised peoples.<sup>31</sup> Further, the advent of electoral democracy, together with the end of transportation in 1840, led to the decolonisation of formerly colonised Europeans in NSW; although a complete description of this process is beyond the theorisation of this article.

### **Shared Relationships to Land**

A great many of the English, Irish, Scottish and Welsh working-class convicts and soldiers were commoners. They were proletarianised after being forced from their commons by colonising processes of enclosure. In many cases, these processes had occurred generations earlier, between the sixteenth and eighteenth centuries.<sup>32</sup> As English and Australian social historians have shown, the culture of peoples from predominantly

<sup>30</sup> Thompson, *The Making of the English Working Class*, 8.

<sup>31</sup> Ann Curthoys, 'The Many Transformations of Australian History: A Personal Account,' keynote address at the Australia & New Zealand Law and History Conference, Perth, 2016. While Aboriginal men were enfranchised, very few turned out to vote.

<sup>32</sup> J. R. Wordie, 'The Chronology of English Enclosure, 1500–1914,' *The Economic History Review* 36(4) (1983): 483-505; J. M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700–1820* (Cambridge: Cambridge University Press, 1993); Iain Fraser Grigor, *Highland Resistance: The Radical Tradition in the Scottish North* (Luton: Andrews UK, 2014); Roger J. P. Kain, John Chapman, Richard R. Oliver, *The Enclosure Maps of England and Wales 1595–1918: A Cartographic Analysis* (Cambridge: Cambridge University Press, 2004); James Boyce, *Van Diemen's Land: A History* (Melbourne: Black Inc., 2010).

collective and subsistence-based societies translated into shared moral economies, common customs and freeborn assertions of rights, transmitted intergenerationally.<sup>33</sup> The Irish chapter of this story, for instance, persisted well into the period under discussion and overlapped with the Australian Aboriginal experience. As settlers and the colonial state invaded and enclosed Aboriginal land, Aboriginal peoples resisted.<sup>34</sup> But they were, over time, dispossessed, displaced, removed from their common land and forced to 'come in' to the fringes of white settlements and towns.<sup>35</sup> Just like the Scots, the English commoners, the Welsh, the Irish and many other First Peoples across the empire, Aboriginal peoples were driven from their land, away from access to shared common resources and into urban spaces where they were proletarianised.<sup>36</sup> Proletarianised Aboriginal people on the urban fringe mingled with the outcasts of white society. It was through the processes of settler colonialism and urbanisation that groups as diverse as the Irish and Aboriginal peoples came into contact with each other and formed a 'motley' proletariat of 'all nations'.<sup>37</sup>

<sup>33</sup> E. P. Thompson, *Customs In Common* (London: Merlin Press, 1991); Alan Atkinson, 'The Freeborn Englishman Transported: Convict Rights as a Measure of Eighteenth-Century Empire,' *Past and Present* 144(1) (1994): 88-115; Karskens, *The Colony*; Schofield-Georgeson, *By What Authority?*

<sup>34</sup> Henry Reynolds, *The Other Side of the Frontier: An Interpretation of the Aboriginal Responses to the Invasion and Settlement of Australia* (Melbourne: Penguin, 1982).

<sup>35</sup> Henry Reynolds, *Dispossession: Black Australian and White Invaders* (Melbourne: Penguin, 1989), 124. The paintings of Augustus Earle recall vivid depictions of such scenes. See, for instance, 'Natives of N.S. Wales as seen in the streets of Sydney', 1830.

<sup>36</sup> Penelope Edmonds, *Urbanizing Frontiers: Indigenous Peoples and Settlers in 19<sup>th</sup> Century Pacific Rim Cities* (Vancouver: University of British Columbia Press, 2010).

<sup>37</sup> Edmonds, *Urbanizing Frontiers*. Phrases like 'motley' and 'all nations' are self-describing terms discovered by Thompsonite historians (namely Rediker, Linebaugh, Karskens and Ihde) that refer to the multicultural, diverse and generally squalid conditions of proletarians effected by colonisation throughout the eighteenth and early nineteenth centuries. Motley was a term typically used by sailors, whose forms of organic egalitarianism, particularly during mutinies and aboard pirate ships (often in response to the practice of 'impressment'), found their way into working-class language and culture more generally. One synonym for motley was the phrase 'All Nations', another self-descriptor referring to a common alcoholic drink of the late eighteenth century — a cheap and rude concoction of all the dregs from various spirit bottles left on the shelf in the tavern. See Linebaugh and Rediker, *The Many-Headed Hydra*, 27-28.

Nevertheless, much of the culture and precolonial lore of these European colonised peoples, particularly in respect to property and the socialisation of people, remained intact. While specific modes of colonial exploitation affected different colonised groups in different ways, colonised peoples nevertheless shared many ‘customs in common’<sup>38</sup> — arguably more than they did with the dominant culture and its criminal law. Accordingly, colonised peoples shared a collective opposition to the dominant class, against whom they sometimes realised their shared interests by making collective claims and, as argued here, asserting rights in ways that reformed criminal process.<sup>39</sup>

### **Shared Relationships to Labour**

Throughout the eighteenth and nineteenth centuries, people from a plurality of subjugated groups were employed at the lowest rungs of a labour hierarchy, the apex of which was occupied by an ‘aristocracy of labour’.<sup>40</sup> Aboriginal proletarians were beggars, prostitutes, timber getters and domestic helpers — of the same caste as those Irish and English ‘criminal class’ convicts who became ‘the hewers of wood and drawers of water’ in colonial NSW.<sup>41</sup> Aboriginal women became domestic workers — often as the wives and companions of white sealers and pastoral workers — whose ‘half-caste’ children became farmhands, deckhands and rouseabouts, mixed in ‘race’ as well as a hard pre-

<sup>38</sup> Thompson, *Customs in Common*.

<sup>39</sup> At various times, as the prison camp of empire, NSW housed a wide range of political dissidents from the following resistance movements: the Irish Defenders (1794), the United Irishmen (1800), the Caravets, Carders, Whiteboys, Rightboys, Hearts of Steel and Ribbon Men (1815–1840), the Scottish Martyrs (1794), the Radical Weavers (1820), the Luddites (1812), the East Anglian food rioters (1816), those involved in the Pentrich Rising (1817), the Cato Street conspirators (1820), the Yorkshire Radical Weavers (1821), the Bristol rioters (1831), the Welsh rioters (1835), the Swing rioters and machine breakers (1830), the Tolpuddle Martyrs (1834) and many Chartists (1839–1848). There were numerous South African black people who resisted early apartheid law between 1828 and 1834, as well as Maoris who fought the British before Waitangi, and 153 Canadian and US republicans.

<sup>40</sup> The phrase ‘aristocracy of labour’ was coined by Karl Kautsky in response to Leninist socialism in ‘Trades Unions and Socialism,’ *International Socialist Review* 1(10) (1901), <https://www.marxists.org/archive/kautsky/1901/04/unions.htm> (last accessed 28 July 2016).

<sup>41</sup> Robert Castle and Jim Hagan, ‘Settlers and the State: The Creation of an Aboriginal Workforce in Australia,’ *Aboriginal History* 22 (1988): 24, 26.

industrial working-class culture.<sup>42</sup> As colonial historians Curthoys and Clive Moore have explained, in these occupations, ‘Aboriginal workers were never slaves in the strict sense, but neither were they free’.<sup>43</sup> Rather, they inhabited an industrial grey zone, working for rations, not wages.<sup>44</sup> This was a system of serfdom that resembled indenture or bonded labour. Many Aboriginal workers shared the working conditions of indentured convict labourers.<sup>45</sup> Meanwhile, all working-class labourers in NSW — free, indentured and bonded — shared the same work.

As mentioned previously, labour historian John McCorquodale has disputed a connection between Aboriginal and European indentured workers, citing colonial Western Australian legislation as actively constitutive of this disconnection. The *Breach of Contract Act 1842* and the *Aboriginal Native Offenders Act 1849* imposed indentured working conditions upon free Aboriginal workers, whereby breaches of work discipline were punishable by ‘whipping of up to two dozen lashes in lieu of or in addition to imprisonment’.<sup>46</sup> Yet, these conditions of labour were shared by European indentured convict workers in WA at the very same time. WA retained a system of transportation and convict indenture from Britain until 1868. In NSW, until 1840, free Aboriginal workers were not subject to legal floggings in the same way as their indentured convict counterparts (some of whom were also Aboriginal). Nevertheless, both groups of indentured and Aboriginal workers sometimes went unpaid. On the other hand, Aboriginal and European indentured workers did

<sup>42</sup> Lyndall Ryan, *The Aboriginal Tasmanians* (Brisbane: University of Queensland Press, 1981), 66-71; Ann McGrath, *Born in the Cattle: Aborigines in Cattle Country* (Sydney: Allen & Unwin, 1987); Dawn May, *From Bush to Station: Aboriginal Labour in the North Queensland Pastoral Industry 1861–1897* (Townsville: James Cook University Press, 1983).

<sup>43</sup> Ann Curthoys and Clive Moore, ‘Working for the White People: an Historiographic Essay on Aboriginal and Torres Strait Islander Labour,’ *Labour History* 69 (1995): 1, 4, 8.

<sup>44</sup> Penelope Heatherington, *Settlers, Servants & Slaves: Aboriginal and European Children in the Nineteenth Century in Western Australia* (Perth: University of Western Australia Press, 2002), 26-29; Tim Rowse, *White Flour, White Power: From Rations to Citizenship in Central Australia* (Cambridge: Cambridge University Press, 1998); Senate Standing Committee on Legal and Constitutional Affairs, ‘Unfinished Business: Indigenous Stolen Wages,’ December 2006, <http://www.qld.gov.au/atsi/documents/having-your-say/stolen-wages-reparations-scheme/stolen-wages-taskforce-report-web.pdf> (last accessed 20 September 2016).

<sup>45</sup> Shirleene Robinson, *Something Like Slavery?: Queensland’s Aboriginal Child Workers, 1842–1945* (Melbourne: Australian Scholarly Publishing, 2008).

<sup>46</sup> McCorquodale, ‘The Myth of Mateship’.

experience a major difference insofar as indentured labour always had an expiry date, whereas Indigenous labourers endured interminably and unremittingly harsh conditions. The similarities and differences between working-class and colonised peoples demonstrate that they were not identical in status or in their suffering in the workplace. Nevertheless, they were both subjected to relationships as workers that established shared relationships of domination and exploitation.

As the colony grew in size and pastoralism spread across the continent, Aboriginal workers became more prominent in other areas of colonial production, including the pastoral, mining, rainforest and maritime economies.<sup>47</sup> Aboriginal labour increased dramatically, particularly during times of labour scarcity, such as during the settler boom in the 1840s and the gold rush in the 1850s, and Aboriginal people began to join the labour aristocracy. They shared occupations with European workers, as shearers, sealers, whalers, seamen, pearlers, tanners, blacksmiths, joiners, gardeners, labourers, guides, shepherds, stockmen, drovers, bullock drivers, reapers, ferrymen, police and postal workers.<sup>48</sup> Skilled labour, such as blacksmithing, droving and police work, saw some Aboriginal workers share the status of their European, respectable, working-class counterparts, outfitted with uniforms, horses and guns. But working peoples in colonial NSW began to share more than just their work for a common master.

The cultures of the English working class, Irish rebels and Aboriginal peoples melded into a culturally diverse polyglot of common interests — a pluralised communality.<sup>49</sup> Historian of Indigenous labour Richard Broome surmised that ‘Aboriginal workers who dressed like white workers, and took many of their on-the-job cues from observing fellow workers, probably learned work patterns from white workers as well as from their customary ideas’.<sup>50</sup> Conversely, Russel Ward appreciated the

<sup>47</sup> Noel Loos, *Invasion and Resistance: Aboriginal–European Relations on the North Queensland Frontier, 1861–1897* (Canberra: ANU Press, 1982).

<sup>48</sup> Richard Broome, ‘Aboriginal Workers on South-Eastern Frontiers,’ *Australian Historical Studies* 26(103) (1994): 202-220.

<sup>49</sup> Inga Clendinnen, *Dancing with Strangers: Europeans and Australians at First Contact* (Cambridge: Cambridge University Press, 2005); Karskens, *The Colony*, 33-61, 117-156.

<sup>50</sup> Broome, ‘Aboriginal Workers on South-Eastern Frontiers’, 219; see also Kristyn Harman, ‘The Art of Cutting Stone ...,’ in *Indigenous Participation in Australian Economies II*, ed. Natasha Fijn, Ian Keen, Christopher Lloyd, Michael Pickering (Canberra: ANU Press, 2012).

roving independence and egalitarian attitude of Aboriginal workers, transmitted to many Australian pastoral workers through shared labour between agrarian workers since colonisation.<sup>51</sup> This is not to conclude, as Ward did, that Aboriginal workers were lazy.<sup>52</sup> Rather, work occupied a sacred place within Aboriginal society, demonstrated by the re-enactment of hunting and gathering and the use of weapons and tools in traditional ceremony, in a similar manner to European guilds and artisans who sanctified work through antinomian Protestant and Methodist ritual and tradition.<sup>53</sup> Perhaps the most important commonality between Aboriginal and European workers for present purposes was, as Bain Attwood discovered, that Aboriginal workers 'began to speak the language ... of the working class and trade unionism, demanding fair wages, bonuses and shorter hours'.<sup>54</sup> The articulation of rights and interests translated into demands for fairness from authority in criminal procedure. This process was also fuelled by a literary 'diet of printer's ink and paper', prepared by radical newspapermen for voracious consumption by colonial 'readers who were open, outward-looking citizens of the world'.<sup>55</sup> As shared interests developed among racial groups within the working class, workers and colonised people became agents of social change. They made their own history and helped shape for themselves many reforms to criminal process that made the law fairer.

<sup>51</sup> Russel Ward, *The Australian Legend* (Oxford: Oxford University Press, 1958), 207-262.

<sup>52</sup> Curthoys and Moore, 'Working for the White People,' 2-3; Russell Ward, 'Aboriginal Communists,' *Labour History* 55(1) (1988): 3. Ward claimed that Aboriginal people have 'certain basic assumptions about the nature of human life, assumptions very different from those held by most white Australians', such as valuing leisure over work.

<sup>53</sup> For a description of Aboriginal ceremonies and the use of ceremonial objects in the Sydney area, see Val Attenbrow, *Sydney's Aboriginal Past: Investigating the Archaeological and Historical Records* (Sydney: UNSW Press, 2010), 112-126. For the connection between labour and protestant religion, see Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Chelmsford, Mass: Kluwer, 2012/1905), 109-110; and Thompson, *The Making of the English Working Class*, 37-83.

<sup>54</sup> Bain Attwood, *The Making of the Aborigines* (Sydney: Allen & Unwin, 1989), 65.

<sup>55</sup> Paul A. Pickering, 'Was the Southern Tree of Liberty an Oak?,' *Labour History* 92 (2007): 139-41. See also Raymond Williams, *The Long Revolution* (London: Pelican Books, 1961), 200-236.



## Shared Relationships to Coercive Law

Colonised and working-class peoples shared an interest in resisting legal governance and harsh criminal sanctions that applied to both groups. Described here are some discrete patterns of resistance to colonial law by these groups. Importantly, these examples of resistance rarely resulted in direct ‘cause and effect’ law reform. The history of social change is profoundly more complex, although a systematic analysis of patterns of protest and resistance leading to law reform throughout the period 1788–1861 has been tabled as part of a wider study.<sup>56</sup> From such a perspective, patterns of resistance represented a collective — albeit disorganised — challenge to the power and authority of coercive law. Patterns of escape, suicide, bushranging, attacks on police, revenge against masters, piracy and ‘excarceration’ (prison-breaking) were largely generated by colonial criminal processes.<sup>57</sup> Accordingly, when colonised and working-class peoples committed offences within these patterns, they often did so as explicit acts of resistance to what they saw as oppressive and coercive law and the denial of their ‘rights’.

The emergence of shared relationships between working-class and colonised peoples in respect to their legal governance was obvious to observers in the late eighteenth century. As trans-Atlantic revolutionary Thomas Paine observed in 1791, there emerged ‘a large class of peoples ... which in England is called the “mob”, who expressed their interests in ways that were often resistant and rebellious.<sup>58</sup> Paine also witnessed the brutal reciprocity of class relations, saying that the mob ‘have sense enough to feel they are the objects aimed at; and they inflict (it) in ... turn’.<sup>59</sup> He observed that ‘it is over the lowest class of mankind that government terror is intended to operate, and it is on them that it operates to the worst effect’.<sup>60</sup> During Paine’s time, criminal process was the organ of state terror and its effects defined a transnational proletariat: a working-class, a ‘race of deviants’, rabble, a caste of untouchables and

<sup>56</sup> Schofield-Georgeson, ‘By What Authority? Criminal Law Reform in Colonial NSW’ (PhD diss., Macquarie University, 2017), 332-241; Schofield-Georgeson, *By What Authority?*

<sup>57</sup> Peter Linebaugh, *The London Hanged: Crime & Civil Society in the Eighteenth Century* (New York: Verso, 1991), xxvi, 3, 361-2.

<sup>58</sup> Thomas Paine, ‘The Rights of Man,’ in *The Rights of Man and Common Sense: Peter Linebaugh Presents Thomas Paine* (New York: Verso, 2009/1791), 86.

<sup>59</sup> Paine, ‘The Rights of Man,’ 86.

<sup>60</sup> Paine, ‘The Rights of Man,’ 86.

First Peoples from the South Pacific to the North Atlantic. Their shared experiences of colonisation led one young military officer (turned colonial prison guard), Watkin Tench, to reflect that ‘untaught unaccommodated man, is the same in Pall Mall as in the wilderness of New South Wales’.<sup>61</sup> Meanwhile, the transportation commissioner, John Bigge, found any racial and ethnic difference in ‘the rabble’ indecipherable, reporting to the metropolitan ruling class that the colony was ‘chiefly inhabited by the most profligate and depraved part of the population’.<sup>62</sup> As a former Chief Justice of the slave-owning colony of Trinidad, who had arrived in NSW with the intention of making the colony the ‘object of real terror’, Bigge was planted squarely within the camp of the dominant minority in the colony. His comments here perfectly illustrate the idea of shared experiences and common interests constituted *relationally* — that is, as against others; in this case, the colonial ruling class.<sup>63</sup>

As criminal process rolled out across the colonial frontier of NSW, it shaped the experience of colonisation and laid the basis for an aggressive mode of agrarian capitalist production in NSW during the period 1788–1861.<sup>64</sup> Criminal justice was administered mostly by justices of the peace or magistrates — an office which, as class historians Raewyn Connell and Terry Irving have explained, vested state power exclusively in the hands of a dominant minority of ruling class ‘exclusives’, or free settlers.<sup>65</sup> As land owners and entrepreneurs, these men were prestigious, wealthy, private individuals who acted in an honorary capacity.<sup>66</sup> Criminal law and procedure became a central technique of social control and coercion applied by this dominant coalition of British colonisers in NSW.<sup>67</sup> The risk

<sup>61</sup> Watkin Tench, ‘An Account of the Settlement at Port Jackson,’ in Tim Flannery, *Watkin Tench’s 1788* (Melbourne: Text Publishing, 2011/1793), 268.

<sup>62</sup> British Parliament, House of Commons (Commissioner John Thomas Bigge), ‘Report of the Commissioner of Inquiry on the Judicial Establishments of New South Wales and Van Dieman’s Land,’ 1823, 78.

<sup>63</sup> Thompson, *The Making of the English Working Class*, 8.

<sup>64</sup> R. W. Connell and Terry Irving, *Class Structure in Australian History: Poverty and Progress* (Melbourne: Longman Cheshire, 1992), 31-66.

<sup>65</sup> Connell and Irving, *Class Structure in Australian History*, 33-36.

<sup>66</sup> David Neal, ‘Law and Authority: The Magistracy in New South Wales: 1788–1840,’ *Law in Context* 3 (1985): 45.

<sup>67</sup> The term ‘colonisers’ and related terms, such as ‘colonial order’, have tended to be used exclusively by feminist postcolonial historians, including Ann Laura Stoler, in *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley:

of challenge to the political order and property rights demanded brutal methods of state terror. In respect to Aboriginal peoples, coercive law was predominantly administered in the form of genocide and frontier warfare until 1837,<sup>68</sup> when *all* Aboriginal peoples officially became the subjects of British law.<sup>69</sup>

Nevertheless, many Indigenous people in the cities and towns of colonial NSW became subject to criminal law throughout this period, through processes of urbanisation.<sup>70</sup> Dispossessed Indigenous people on the fringes of cities and towns shared the urban frontier with their colonisers. They were adept at taking oaths in courtrooms and understanding British law and were regularly subject to criminal law.<sup>71</sup> They understood and used the law of theft to their advantage in courtrooms, condemned the brutality of flogging and corroborated the evidence of white and black resisters in court.<sup>72</sup> During the same period, traditional Indigenous men sometimes became resistance fighters and bushrangers and, although not subject to formal criminal law (due to a lack of familiarity with European culture), were subjected to criminal procedure such as arrest, detention and lengthy forms of imprisonment with hard labour at places of secondary transportation.<sup>73</sup> Meanwhile, convicts and working-class people regularly interacted with the law, as both its subjects and defendants, as well as by protesting various forms of coercive legal process.<sup>74</sup>

University of California Press, 2002), and legal pluralists, such as Lauren Benton, in *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002). Both refer to a ruling class within the metropolises of the global north who enacted globalising historical processes such as ‘colonisation’.

<sup>68</sup> Patrick Wolfe, *Settler Colonialism* (London: Bloomsbury, 1999).

<sup>69</sup> See *R v Wombarty, 1837, Sydney Gazette*, 19 August 1837. See also Lord Glenelg to Governor Bourke, 26 July 1837, *Historical Records of Australia, Ser. I*, vol. XIX, 48. This case and correspondence are commonly confused with the proposition that Aboriginal people first became subject to British law in relation to *inter se* murder in *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSWSupC 35.

<sup>70</sup> Edmonds, *Urbanizing Frontiers*, 14-17, 46-70, 113-120; Faye Gale, *Urban Aborigines* (Canberra: ANU Press, 1972).

<sup>71</sup> Schofield-Georgeson, *By What Authority?*, 103, 116, 126-127.

<sup>72</sup> Schofield-Georgeson, *By What Authority?*, 95-96, 102, 138.

<sup>73</sup> Schofield-Georgeson, *By What Authority?*; Harman, *Aboriginal Convicts*.

<sup>74</sup> Byrne, *Criminal Law and Colonial Subject*; Atkinson, ‘Four Patterns of Convict Protest’; Schofield-Georgeson, *By What Authority?*

In his classic piece ‘Four Patterns of Convict Protest’, Alan Atkinson explains how, in NSW between 1824 and 1838, convicts protested their treatment through: i) attack (physical and verbal); ii) appeals to authority (such as convict regulations and ‘freeborn rights’); iii) refusal to work; and iv) retribution (revenge, such as hay rick-burning). As Atkinson pointed out, only the first of these forms of protest sought to destroy the existing order. All other forms of resistance operated *within* and appealed to a hegemonic rule of law.<sup>75</sup> They sought squarely to achieve reform. More recently, Christopher has identified further sites of working-class resistance to colonisation in colonial NSW. She has studied patterns of solidarity between sailors and convicts on transport ships and documented episodes of resistance to flogging, incarceration and discipline.<sup>76</sup> Echoing the findings of Linebaugh and Rediker,<sup>77</sup> Christopher reports that sailors and convicts in NSW confronted colonising authority through protest, refusal to work, solidarity, escape, desertion, suicide and claims against ‘poor usage’ through the assertion of ‘rights’, ‘liberty’ and ‘a fair wind for France’. As early as 1818, Indigenous sailors shared in this culture aboard sealing and whaling vessels between Hobart and Sydney.<sup>78</sup> Inga Clendinnen has demonstrated similar patterns of resistance in the late eighteenth century by traditional Eora people against the overfishing of Sydney Harbour by the colonial penal regime and the spoliation of traditional means of subsistence.<sup>79</sup> Clendinnen presents further evidence of Indigenous protest to the spectacle of flogging — even when Indigenous people themselves had fallen victim to the very criminality (by European convicts) that had occasioned the punishment.<sup>80</sup> Escape, attacks against authority, strikes, riots and coordinated Aboriginal attack demonstrate that, although diverse and predominantly disorganised, in aggregate, these episodes represented a *collective* challenge to coercive law.

Indeed, colonised and working-class peoples shared methods of resistance to colonisation. For instance, the earliest recorded case of arson, used against squatters in colonial Australia, was by Indigenous

<sup>75</sup> Atkinson, ‘Four Patterns of Convict Protest,’ 43.

<sup>76</sup> Christopher, “‘Ten Thousand Times Worse than the Convicts’,” 30-46.

<sup>77</sup> Linebaugh and Rediker, *The Many-Headed Hydra*.

<sup>78</sup> Harman, *Aboriginal Convicts*.

<sup>79</sup> Clendinnen, *Dancing with Strangers*.

<sup>80</sup> Clendinnen, *Dancing with Strangers*.

people. It involved the Aboriginal rebel leader Musquito at Portland Head (in the Hawkesbury region of northern Sydney) in 1805.<sup>81</sup> No sooner had squatter Abraham Young settled on Dharug land earlier that year than he was met with fierce resistance by local Dharug people, who enacted economic sabotage against his agricultural ventures. Young used his convicts to fence in Dharug land, but the Dharug people asserted their rights to Country by jumping the fences and burning Young's 'Barn and Stacks' to the ground.<sup>82</sup> Clearly, the Dharug did not care for Young's assertion of settler sovereignty and the coercive legality that it imposed across the landscape. As Kristyn Harman, a historian of Indigenous imprisonment, points out, Dharug strategy here represented a shift away from traditional methods of warfare employed by Aboriginal people, using spears, stones and boomerangs, towards the use of European methods of warfare, like fire.<sup>83</sup> Australian prehistorian Bill Gammage has discovered that Indigenous peoples across the continent had been using fire to manage the land for many thousands of years.<sup>84</sup> In this sense, when Europeans blighted the Aboriginal landscape by occupying it, fire must have seemed to Indigenous people an obvious tool to protest the colonisation of their Country.

Arson and, more specifically, rick burning did not catch on as a widespread form of political revenge and sabotage in England until the 1830s, when it became known as 'Captain Swing' and was performed en masse by Chartists and rural labourers. British historians provide isolated examples of the practice in East Anglia between 1815 and 1817, as agricultural workers struck back at employers with respect to working conditions and pay.<sup>85</sup> Similarly, in NSW in 1825, Dennis Kieffe was charged with

<sup>81</sup> The case of *R v Pawson* [1795] NSWKR 2; [1795] NSWSupC 2, CC], Minutes of Proceedings, 1796 to 1797 Apr 1795 – Dec 1797, State Records NSW [hereafter SRNSW], 5/1147B, is the earliest recorded instance of arson in the colony. Arson was used as revenge by the wife of one settler against the wife of a neighbouring settler.

<sup>82</sup> Harman, *Aboriginal Convicts*, 12.

<sup>83</sup> Harman, *Aboriginal Convicts*, 12.

<sup>84</sup> Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Sydney: Allen & Unwin, 2011), 13-16. Gammage has warned, however, that the use of fire by Aboriginal people to maintain their Country was sometimes misinterpreted by settlers as a form of attack: Bill Gammage, 'How Aborigines Made Australia,' public lecture at UTS, 17 June 2015.

<sup>85</sup> J. L. and Barbara Hammond, *The Village Labourer, 1760–1832: A Study in the Government of England Before the Reform Bill* (London: Longmans, Green & Co, 1911).

destroying the ricks of Masters Berry and Wollstonecraft at Shoalhaven, among a series of 'depredations' by local bushrangers.<sup>86</sup> The following year, four convicts at Stonequarry complained to the local magistrate that they were underfed and mistreated by their master, William Elyard. The matter was referred to the Attorney General, but no action was taken. By April, Elyard's barn was burned to the ground. The men were charged and tried on strong evidence before the same local magistrate, and their case was dismissed. Atkinson suggests that this case reflects widespread recognition of the 'moral economy' at work in the field and, on occasion, by stipendiary magistrates (as in this case) in the courtroom.<sup>87</sup>

Bushranging or social banditry is a well-worn area of social history, particularly in a colonial Australian context.<sup>88</sup> Unlike their British counterparts (highwaymen), who stole exclusively from private individuals, Australian bandits attacked and robbed both colonial authorities and wealthy squatters or landowners. In colonial NSW, working-class freemen and Indigenous men alike turned to bushranging. Bushrangers, however, were predominantly escapees from convict indenture and prison bondage. The infamous colonial bushrangers Black John Caesar, Jack Donohoe ('the wild colonial boy'), Captain Moonlight, William Geary, the Gang of Six, the McNamara Gang and the John Armstrong Gang were all either escapees or spent their lives running from police, until they were shot dead by police or captured and hanged by the

<sup>86</sup> Byrne, *Criminal Law and Colonial Subject*, 64.

<sup>87</sup> Atkinson cites another case of rick burning where an accused was convicted but not hanged for this capital offence due to the sympathies aroused through the operation of the moral economy in the courtroom: Atkinson, 'Four Patterns of Convict Protest,' 42.

<sup>88</sup> There are scores of books on the subject. Some of the more notable titles include: Peter Carey, *True History of the Kelly Gang* (Brisbane: University of Queensland Press, 2000) (a work of fiction); Robert Sands Frearson, *The History of Bushranging in Australia: From the Earliest Times* (Sydney: Australian History Promotions, 2004); Evan McHugh, *Bushrangers: Australia's Greatest Self-Made Heroes* (Sydney: Allen & Unwin, 2012); Pat Studdy-Clift, *The Lady Bushranger* (Carlisle: Hesperian Press, 1996); Bill Scott, *Australian Bushrangers* (Sydney: Child & Associates, 2000); Colin Kerr and Margaret Goyder Kerr, *Australian Bushrangers* (Melbourne: Rigby, 1978); Carlo Cantani, 'The Origins of Australian Social Banditry: Bushranging in Van Diemens Land, 1805–1818' (PhD diss., Oxford University, 1973); George Boxall, *History of the Australian Bushrangers, Volumes I-II* (Melbourne: Cornstalk Publishing, 1924). Note that the bushranger Jack Donahoe has been memorialised in folklore using a number of different spellings (e.g. Donahue, Donahugh, Donahoe).

state.<sup>89</sup> The bushranger William Westwood was incarcerated at Cockatoo Island, Port Arthur and Norfolk Island prisons until he participated in the rebellion at Norfolk Island and was eventually hanged. (Many Indigenous convicts were incarcerated here too, including Indigenous bushranger Musquito.) These bushrangers' attacks focused primarily on the colony's rulers and its overseers of criminal process. One Indigenous bushranger, William White, had the power to unite 'nearly every settler' in the district of Wollombi against the corrupt and harsh treatment meted out by police on residents throughout the 1850s and 1860s.<sup>90</sup> European bushrangers in NSW signified their participation in an anti-authoritarian tradition of banditry inherited from Britain and Ireland by blackening their faces or wearing flamboyant clothes, masks and elaborate disguises.<sup>91</sup> Sometimes during armed hold-ups, when bushrangers recognised their victims as being magistrates or constables, they convened court by the roadside and sentenced their 'accused' to brutal 'on-the-spot' floggings.<sup>92</sup> Such acts may be thought of as guerrilla rights of reply to criminal process. In some cases, where bushrangers recognised their victims as good masters, they promptly 'let them off'. In this way, bushrangers performed justice derived from a popular conception of 'fair and foul' — the moral economy of the poor.<sup>93</sup>

As historian Michael Flynn explains, ruling-class fears of attack by Irish Rebels and Aboriginal warriors were often expressed in similar terms — as 'outrages' dehumanised in similarly racist and demeaning language.<sup>94</sup> The enemy of the colonial elite was defined as an enemy of society, a collective threat, a rabble or 'many-headed hydra'. As various spatial histories have shown, military and judicial policy responses to such

<sup>89</sup> Chris Cunneen and Mollie Gillen, 'Caesar, John Black (1763–1796),' *Australian Dictionary of Biography* (Canberra: Australian National University, 2005).

<sup>90</sup> Stephan Williams, *William White alias Yellow Billy, Hunter Valley 1863, 1865–6 / compiled from contemporary newspaper reports and other published sources in the collection of Stephan Williams* (Canberra: Popinjay Publications, 1993).

<sup>91</sup> E. P. Thompson, *Whigs and Hunters: The Origin of the Black Acts* (New York: Pantheon, 1975), 21.

<sup>92</sup> See, for instance, the facts in cases such as *R v William Dalton* SCCJ 22 and 25 June 1830, SRNSW, 13477 [T31] 30/174, 166-7; and *R v Tennant, Ricks, Cane and Murphy* [1828] NSWSupC 40, *Sydney Gazette*, 2 and 6 June 1828.

<sup>93</sup> Byrne, *Criminal Law and Colonial Subject*, 129-51.

<sup>94</sup> Michael Flynn, *Holroyd History and the Silent Boundary Project: A Research Report* (Sydney: Holroyd City Council, 1997), 49.

threats shared many similarities across the empire.<sup>95</sup> For instance, after the uprising in Ireland in 1798, Governor King followed the same English model of suppressing agrarian rebellion in respect to Aboriginal resistance fighters and sought to ‘identify and remove the leaders’.<sup>96</sup> Meanwhile, both Irish and Aboriginal resistance shared common goals. Underpinning both forms of anticolonial struggle was an assertion of land rights or ‘commoning’, such as rights to farm, hunt, fish, collect wood and subsist. Since 1500, commoners of Britain had been aware that ‘the law locks up the man and woman who steals the goose from off the common, but leaves the greater villain loose who steals the common from the goose’.<sup>97</sup> In NSW, commoners put into practice the lesser known concluding couplet in that poem, that ‘geese will still a common lack, until they go and steal it back’.<sup>98</sup> In 1834 at Brisbane Water, Aboriginal resistance fighters raided settlements to steal cattle and crops grown on their land. They taunted local settlers in similar tones to the fiery language of British commoners, inverting the language of colonialism to justify their cause and assert their lore. ‘Black fellow was best fellow’, they said. ‘Black fellow master now rob every body — white fellow eat bandicoots and black snakes now’, they continued.<sup>99</sup> During an attack in 1843, another Aboriginal warrior, Melville, justified the rape of a settler’s wife by saying that white fellows ‘take all land, and give nothing for it’. He continued, ‘white fellows have black gins, and now black fellows have white gins’.<sup>100</sup> As the attack continued, he screamed, ‘you bl ... dy white b ... s hang Black fellows now’.<sup>101</sup> With the onset of the

<sup>95</sup> Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002); *Legal Pluralism and Empires, 1500–1850*, ed. Lauren Benton and Richard J. Ross (New York: New York University Press, 2013); Christopher L. Tomlins, Bruce H. Mann, *The Many Legalities of Early America* (Chapel Hill: University of North Carolina Press, 2001).

<sup>96</sup> Roger H. Hull, *The Irish Triangle: Conflict in Northern Ireland* (Princeton: Princeton University Press, 2015), 82.

<sup>97</sup> Cited in Peter Linebaugh, *Stop, Thief!: The Commons, Enclosures, and Resistance* (Oakland: PM Press, 2014), 1.

<sup>98</sup> Cited in David Bollier, *Silent Theft: The Private Plunder of Our Common Wealth* (Oxford: Oxford University Press, 2013), i.

<sup>99</sup> John Connor, *The Australian Frontier Wars, 1788–1838* (Sydney: UNSW Press, 2002), 16; *R v Monkey and Others* [1835] NSWSupC 6, *Sydney Herald*, 12 February 1835; *The Australian*, 13 and 17 February 1835.

<sup>100</sup> Harman, *Aboriginal Convicts*, 82.

<sup>101</sup> Harman, *Aboriginal Convicts*, 83.



'Black Wars', Aboriginal people on the Hawkesbury told settlers they would 'kill all the white men they meet'.<sup>102</sup>

As subjects of criminal law, colonised and working-class peoples did not resort only to violence and escape to resist coercive law. As Byrne explains, 'between 1810 and 1830 the colonial population shaped and modified what it understood to be criminal law' and 'it made use of some regulations and ignored others'.<sup>103</sup> Byrne's study focuses on the popular use of criminal law to regulate social relations. In examining the use of law by working-class people, Byrne's study mainly examines the way in which the working class used the law to *prosecute* each other through a culture of accusation and defence. A significant outcome, she concludes, was the centrality of working-class interests in shaping the development of the law. As Byrne comments, however, 'these interests may have had little in common with preserving good relations or with the intentions of the law'.<sup>104</sup> Indeed, one of the main uses of the law by colonised and working-class peoples was to *resist* their masters — a purpose inimical to the dominant 'intentions' of the law but one that operated counter-hegemonically in shaping and directing criminal process. Byrne's work, as well as this author's, has located numerous incidents involving the use of law and appeals to rights by colonised and working-class peoples in sophisticated ways that demonstrated an understanding of complex trial procedure, such as cross-examination, criminal defences, character and credibility evidence, as well as the initiation of legal complaints against masters and police and an understanding of the sentencing and ticket-of-leave process.<sup>105</sup>

Some prisoners, for example, complained when fair trial procedure was not being followed.<sup>106</sup> In *Hughes and Donnelly* [1828], the co-accused were accused of stealing.<sup>107</sup> They complained to the Supreme Court that the

<sup>102</sup> Karskens, *The Colony*, 478.

<sup>103</sup> Byrne, *Criminal Law and Colonial Subject*, 208.

<sup>104</sup> Byrne, *Criminal Law and Colonial Subject*, 239.

<sup>105</sup> Byrne, *Criminal Law and Colonial Subject*, 239; Schofield-Georgeson, *By What Authority?*, 45-120.

<sup>106</sup> 'Fair trial procedure' refers to that body of law discussed in detail in Schofield-Georgeson, *By What Authority?*, chapters 6 and 7. A pertinent example is the case of *R v Peckham* [1841] NSWSupC 29, *Sydney Herald*, 18 February 1841, in which the accused was a convict at Newcastle who appealed his conviction to the Supreme Court in 1841, unassisted by counsel.

<sup>107</sup> NSWSupC 43, *The Australian*, 13 June 1828; *Sydney Gazette*, 13 June 1828.

matter had proceeded to Quarter Sessions without a committal hearing and demanded to know the case against them. The complaint caught the attention of Justice Dowling, who supported the co-accused and found that 'in all cases a prisoner had a right to hear the depositions given against him, and to be confronted with his accusers'.<sup>108</sup> He rebuked the local magistrates, who had failed to follow correct procedure in this respect, but allowed the case to proceed. The prisoners were found guilty and sentenced to death. Due to their advocacy, however, their sentences were commuted to secondary transportation. Reporting the case, *The Australian* supported the accused, advocating the right of prisoners to be present when witnesses made their statements and depositions. It lamented that this was a 'rule of law ... which has been very frequently departed from here' in the colony.<sup>109</sup>

Warrigal Jemmy was an Indigenous man from the 'Loddon River' in the Port Phillip District. In 1846, he was arraigned before the Supreme Court, standing accused of an array of charges relating to attacking a shepherd and stealing his sheep.<sup>110</sup> 'Borac me do it; nother black fellow [sic]', he responded, defending himself through plausible legal argument.<sup>111</sup> Jemmy simultaneously offered an alternative explanation for the offending and questioned the ability of the prosecution to identify him as the offender. He suggested that the offence could have been committed by '(an)other black fellow'. A jury convicted Jemmy in respect of only a handful of the charges laid against him. But, as one Protector of Aborigines later commented, Jemmy was 'convicted on the evidence of one man who had been speared through the leg with his back turned'.<sup>112</sup> Jemmy was sentenced to transportation to 'Old Man Cruel', where, after repeated escape attempts, he died without seeing his Country again. He was thirty-five years old.<sup>113</sup> Although this case was something of a pyrrhic victory for

<sup>108</sup> Hughes and Donnelly [1828] NSWSupC 43, *The Australian*, 13 June 1828; *Sydney Gazette*, 13 June 1828.

<sup>109</sup> Hughes and Donnelly [1828] NSWSupC 43, *The Australian*, 20 June 1828.

<sup>110</sup> *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSWSupC 35.

<sup>111</sup> *R v Warrigal Jemmy* 1846, Public Records Office of Victoria, VPRS 30/P/O, Unit 5, File 1-28-8; *Melbourne Argus*, 22 September 1846, 2; *Melbourne Argus*, 20 October 1846, 3.

<sup>112</sup> Assistant Protector Edward Parker to Chief Protector Robinson, 12 December 1846, SRNSW, 46/1896 and 4/2779.3.

<sup>113</sup> Harman, *Aboriginal Convicts*, 118-23.

Jemmy, it shows how Indigenous subjects of criminal law attempted to use criminal process to defend themselves in colonial courtrooms.

## Conclusion

For colonised Europeans, the lash and the gallows, designed in England on the principle of spectacle, operated regularly in colonial NSW.<sup>114</sup> Their regularity owed to a colonial ruling class who were as outnumbered by a majority of their colonised subjects as they were distant from their colonial metropole in London. By 1828, a proletarian class of convicts and their children comprised eighty-seven per cent of the European population in the colony.<sup>115</sup> It is also possible that, by mid century, Aboriginal people accounted for more than one in three people, even after a drastic decline in numbers due to disease and genocide throughout the nineteenth century.<sup>116</sup> By 1861, many of these people and their children came to comprise much of the democratic majority that participated in changing social relations towards their own interests.<sup>117</sup> The years between 1830 and 1861 were a time of marked social and legal change in NSW. The effect of the *Prisoners' Counsel Act*, the Jervis Acts, the end of transportation, the abolition of the 'bloody code' and reform to master and servant law softened the impact of colonialism for many working-class

<sup>114</sup> Robert Hughes, *The Fatal Shore: A History of The Transportation of Convicts to Australia, 1787-1868* (London: Harvill, 1986).

<sup>115</sup> Manning Clarke, *A History of Australia* (Melbourne: Melbourne University Press, 1973), 406.

<sup>116</sup> The figure of 'one in two' is calculated as follows: the total population of Australia in 1861 was 405,356 (see Australian Bureau of Statistics, 'Australian Demographic Statistics', Sep 2009, Cat. no. 3101.0, Canberra, <http://www.abs.gov.au>, last accessed 25 March 2013). The total Indigenous population of Australia in 1861 is not known. However, in 1788, the total Indigenous population totalled between 318,000 and 1,000,000 (an average of 659,000). By 1900, on the eastern seaboard (not necessarily the interior or western half of the continent), the Indigenous population numbered 90,000 (Australian Bureau of Statistics, 'Aboriginal and Torres Strait Islander Population,' Feb 2008, 1301.0 *Year Book Australia*, 2008, <http://www.abs.gov.au>, last accessed 9 April 2014). The figure of 'one in three' quoted above is an estimate based on an average of the 1788 population estimates (659,000) and a concomitant rate of population decline of 5,080 people per year between 1788 and 1850; this leaves 254,040 Indigenous people in 1850.

<sup>117</sup> Although few Aboriginal men were enrolled to vote in 1857, it is clear that Aboriginal resistance to criminal law occurred in other ways throughout the period, including frontier warfare and courtroom protest: Schofield-Georgeson, *By What Authority?*, 42-146.

and colonised peoples, who, it must be noted, played a significant role in political struggles that forced the hand of their colonial rulers to reform coercive law in these ways.<sup>118</sup> Such legal change occurred after a large accretion of majoritarian resistance over time. In this sense, the connection between patterns of resistance and legal change is not an empirical nor a positivist one. Rather, such a finding reflects observable social patterns which show that the colonial majority shared relationships and common interests with each other, against oppressive forms of legal governance and in support of their emancipation from it. The results of such struggles were abstract in their success but nevertheless formative of legal change over time.

More concretely, with the abolition of the property qualification on adult male voting and the establishment of a NSW legislative assembly between 1856 and 1858, elections between 1858 and 1860 saw reformist radical Chartist representatives, such as David Buchanan and Henry Parkes, take political office. They owed their election to working-class people, many of whom were the subjects of coercive law that the reformers promised to change. Accordingly, the efforts of the reformers in parliament yielded a quick succession of parliamentary inquiries into a range of social conditions and coercive laws, including summary criminal procedure, master and servant law and the administration of law by honorary magistrates. The picture of the honorary magistracy that emerged from these inquiries was not pretty. Accordingly, in March 1861, Buchanan introduced the Magistrates' Powers Limitation Bill to NSW Parliament. The Bill sought 'to limit the power of Police Magistrates and Justices of the Peace, from inflicting a longer term of punishment than six months imprisonment'.<sup>119</sup> It divided the House but eventually passed by majority.<sup>120</sup> By 1861, the radical parliamentary democrats had managed to secure a decrease in maximum summary sentences that would not be significantly increased until the twentieth century. This represents one of the most radical reforms to criminal law in Australian legal history. The Act further ensured that stipendiary magistrates became the norm in

<sup>118</sup> Schofield-Georgeson, *By What Authority?*, 227-323, 332-342.

<sup>119</sup> 'Votes and Proceedings of NSW Legislative Assembly,' 27 March 1861, 233.

<sup>120</sup> The Bill passed the Legislative Council on 9 May 1861 as 'An Act to limit the power of Justices of the Peace in certain cases'. 'Votes and Proceedings of NSW Legislative Assembly,' 9 May 1861, 423.

NSW, and their powers were restricted in accordance with the summary nature and class prejudice of their power.<sup>121</sup>

While working-class and colonised peoples retained separate cultural identities and interests, they shared patterns of oppression and resistance. Together they comprised the prison population and were rendered the principal subjects of criminal law in colonial NSW. Without conflating the separate interests of each social group that shared relationships of exploitation and domination in colonial NSW, the concept of shared relationships and common interests is necessary to establishing a method of colonial legal history that understands social progress in the law as a result of common struggle against a powerful minority. The demands and resistance of this majority (including those of Indigenous peoples) hold significant explanatory and analytical power in understanding legal change over time.

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<sup>121</sup> *Justices Powers Limitation Act 1861* (NSW) (24 Vic No 25).