

'Mad' Edwin Withers and the Struggle for Fair Trial Rights in Colonial New South Wales

Eugene Schofield-Georgeson *

Since the 1980s, a number of fair trial rights and civil liberties have been eroded in Australia, particularly in respect to summary justice and police powers. This article traces the 'bottom-up' origins of some of those rights and liberties in colonial New South Wales. It focuses on the activist Edwin Withers and his interactions with the Parramatta magistracy in the mid 1840s. The Withers example enables us to see how some fair trial rights and civil liberties resulted from community-based social activism, which relied upon the legislature and higher court authority to become law. The importance of these rights — for example, the right to counsel, the right to a fair and impartial tribunal and protection against arbitrary detention — is demonstrated by the very fact that they issued from the working and middle classes and are implicated within wider class relationships involving residents of a local community. Using archival research and qualitative analysis, this article has important implications for Australian legal history in relation to the adoption of the Jervis Acts 1848 (UK), some of the first summary procedure legislation enacted within colonial NSW. The article demonstrates how the fair trial rights campaign at Parramatta resulted in amendment to the adopted Acts in the colony.

Edwin Augustus Withers was a colonial intellectual and an eccentric. He was the proprietor of the Temperance Coffee-House at the settlement of Parramatta in colonial New South Wales during the 1840s. Little else is known about him. From the day he protested against his illegal conviction for a misdescribed charge to the day he was released from Tarban Creek

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Lunatic Asylum by writ of *habeas corpus*, Withers wagered his life, sanity and liberty for the advancement of fair trial rights in NSW. He consistently battled the magistracy and advocated on behalf of working-class 'prisoners of the Crown'.¹ Such was the vigour of Withers' activism — frequently marked by outraged outbursts — that he regularly attracted coverage in Edward Mason's *The Parramatta Chronicle*.² In 1843 Mason, too, vowed to protect 'the prisoners of the crown from all oppression' and 'the labouring poor against the tyranny of the monnied interest [sic]'.³ Withers' impassioned protest, however, was not simply the subject of early colonial newspaper reportage. It influenced major changes to court procedure, particularly at the level of magistrates and quarter sessions courts. More importantly, his specific demands shaped key amendments to the adoption in the colony of the *Jervis Acts* 1848, three separate pieces of legislation passed together by the British Parliament. They codified a range of common law summary criminal process and trial procedures — including warrants, court venues, jurisdiction, time limits, rules of evidence, manner and form of evidence, depositions, cost of proceedings, right to counsel and standard forms — and were one of the most significant procedural reforms to criminal law throughout the nineteenth century.⁴

This article shows how the idealism and social activism of one eccentric and determined man, Edwin Withers, gained momentum within a local community and subsequently earned the support of reformist politicians and lawmakers. The result was the implementation of a range of procedural or 'fair trial' rights that protected the liberty of the subject from a harsh and punitive colonial state. The story of Withers and his activism in respect to procedural law is one of many that have emerged in exploring criminal procedure and colonialism in NSW. Other examples include the efforts of the prisoners of the convict hulk *The Phoenix* to free themselves by writ of *habeas corpus*, which they issued to the NSW Supreme Court after the expiry of their sentence; and the struggle by workingmen of the Mechanics School of Arts to decriminalise Master and

¹ *The Parramatta Chronicle* (hereafter *TPC*), 14 July 1843, unpaginated.

² Mason's approach to newspaper editing is discussed in T. Irving, *The Southern Tree of Liberty: The Democratic Movement in New South Wales Before 1850* (Sydney: The Federation Press, 2006), 145.

³ *TPC*, 14 July 1843, unpaginated.

⁴ *Jervis Acts* 11 and 12 Vict. cc 42 and 44 (1848) (UK).

Servant law and petition for a stipendiary magistracy to replace honorary justices of the peace.⁵ Withers was just one of several people who called from the 'bottom up' for reform to the rule of law. His story reveals how democratic resistance and dissent were enmeshed within law reform in NSW in the mid nineteenth century.

Consideration of law reform from the bottom up has received scant attention from legal and social historians alike. This article draws on a combination of both legal and social historical sources and extensive analysis of court records, newspaper reports and *Hansard*. It is acknowledged that journalism throughout the nineteenth century was notorious for its hyperbole. Caution should be exercised when relying on particular claims by a single newspaper as an entirely accurate assertion of every fact in every case. In many cases, however, these records are the only remaining verification of important historical events. The method used here represents an interdisciplinary integration of legal history and social history, demonstrating that experiences of the criminal law among colonised peoples involved significant active engagement, not merely passive resignation (although the latter also occurred).⁶ In other words, the criminal law was not always coercive; its subjects not always passive. Rather, as Terry Irving has shown in respect to the making of liberal democracy in colonial NSW, coalitions of working-class people, middle-class radicals and constitutional reformers sometimes united in protest against ruling-class hegemony. Their struggles often evolved into legal rights and law reform.⁷

⁵ For *The Phoenix* case, see *R. v. Muldoon, Bolton, McKoldrick, McMoren and Horan* [1828] NSWSupC 62, *The Australian*, 22 August 1828. See the *Australasian Chronicle*, 29 September 1840, for a recount of proceedings at the Sydney Mechanics School of Arts.

⁶ See the positivist legal history approach in John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003). For critique of this approach, see Peter Linebaugh, '(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein,' *New York University Law Review* 60.2 (1985): 212-43. For the social history approach, see, for instance, Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (London: Verso, 2006). As a student of E.P. Thompson at Warwick University in the 1970s, Linebaugh co-authored the classic social history critique of British criminal law: Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, Cal Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon, 1975).

⁷ Irving, *The Southern Tree of Liberty*, 127-150.

By examining specific episodes of resistance within the courtroom, it becomes clear that the subjects of criminal law were not prepared to accept the repression imposed upon them by various forms of procedural law. Rather, they asserted a sense of entitlement to fairness and justice (or fair trial rights), which they saw as seriously compromised by various practices of courtroom administration.⁸ Many middle-class and 'plebeian radicals' were undaunted by the spectacle of criminal process, described by historian Douglas Hay as the 'visible and elaborate manifestation of state power'.⁹ As Australian colonial historian Alan Atkinson has suggested, some of those disciplined by ruling-class authority rebelled and sought to change their lot in a variety of ways. For those who did so by appealing to the authority of the law, the courtroom 'occupied a sacred place' because it gave voice to a vision of liberty and fairness expressed socially.¹⁰ Inside the court, legal 'rights were not an expression of authority, but of community and were tied to common tradition and circumstances'.¹¹ British historian J.A. Sharpe has made similar findings in respect to the experience of working-class litigants in nineteenth century industrialising England, who 'were aware they were acting within a context of some sort of community of social values and were concerned that their conduct should be, and should be seen to be broadly in accord with those values'.¹² Operation within a political community was a means to obtain individual justice for shared experiences of *injustice* on a daily basis.

⁸ This is a condensed version of the definition of 'fair trial rights' presented in Jeremy Gans, Terese Henning, Jill Hunter and Kate Warner, *Criminal Process and Human Rights* (Sydney: The Federation Press, 2011), 32-51. See also *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*, ed. Paul Roberts and Jill Hunter (Oxford: Hart Publishing, 2012).

⁹ Irving, *The Southern Tree of Liberty*, 143-150; Hay et al., *Albion's Fatal Tree*, 27.

¹⁰ Alan Atkinson, *The Europeans in Australia: A History, Vol. II – Democracy* (Oxford: Oxford University Press, 2004), 4. Atkinson has found that 'appeals to [the] authority' of the judiciary and the law were one of the four central mechanisms of 'convict resistance': Alan Atkinson, 'Four Patterns of Convict Protest,' *Labour History*, 37 (1979): 28-51, 30.

¹¹ Alan Atkinson, 'The Freeborn Englishman Transported: Convict Rights as a Measure of Eighteenth-Century Empire,' *Past and Present* 144 (1994): 90.

¹² J.A. Sharpe, "'Such Disagreement betwix Neighbours': Litigation and Human Relations in Early Modern England,' in *Disputes and Settlements: Law and Human Relations in the West*, ed. John Bossy (Cambridge and New York: Cambridge University Press, 1983), 167-68.

To date, historical investigation of procedural law has disclosed little, if any, relationship between criminal process and the role it has played in the development of normative fair trial rights, civil liberties and social equality.¹³ This article proposes, however, that there is a historical relationship between procedural law and the advancement of both normative and materialist rights. A detailed critical understanding of the relationship between process and rights is important on two levels. It not only reviews existing historical interpretations of colonial legal procedure, it also has contemporary resonance. The relationship between process and rights is particularly important in a contemporary Australian context, in which both state and federal legislatures have, since the 1990s, continued to prune back basic fair trial rights and civil liberties in the interest of 'law and order politics'.¹⁴ Such attacks on normative rights have served only to further disenfranchise the most vulnerable defendants within the criminal justice system.¹⁵ This is the story of the emergence of some of those rights that were asserted for the first time in Australian legal history in the working-class heartland of Parramatta in mid nineteenth century NSW.

¹³ Recent jurisprudence in the UK has made some acknowledgment of this relationship but does not strictly engage with the fields of legal or social history. See, for instance, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Law*, ed. Antony Duff, Lindsay Farmer, Sandra Marshall, Victor Tadros (London: Hart Publishing, 2007).

¹⁴ See, for example, recent restrictions on the 'privilege against self-incrimination' and the erosion of the 'presumption against adverse inference', as well as increased police powers and continuous funding cuts to community legal aid services in NSW. See Tom Bucke and David Brown, 'In Police Custody: Police Powers and Suspects', Rights under the Revised PACE Codes of Practice,' *Home Office Research Study 174* (London: Great Britain Home Office Research Development and Statistics Directorate, 1997), viii; 'The Right to Silence,' Report 95 (Sydney: NSW Law Reform Commission, 2000), 41-42; David Hamer and Gary Edmond, 'When You Say Nothing At All: NSW and the Right to Silence,' *The Conversation*, 22 March (2013), <http://theconversation.com/when-you-say-nothing-at-all-nsw-and-the-right-to-silence-12962> (last accessed 4 March 2013).

¹⁵ See Chris Devery, 'Disadvantage and Crime in New South Wales,' (Bureau of Crime Statistics and Research, [BOSCAR], 1991). For recent confirmation of these findings, see 'New South Wales Criminal Court Statistics 2012' (BOSCAR, 2013), 3-15; Legal Aid NSW, *Annual Report 2011-2012* (2012), 12, 135; Aboriginal Legal Service NSW, *Annual Report 2011-2012* (2012), 29. A comparison of the above statistics shows that only about sixty-five per cent of criminal defendants are legally represented in New South Wales Courts, while about just over sixty per cent of these defendants are legally aided or represented on a pro bono basis.

The story of Edwin Withers falls into three parts. First, we meet Withers amid his protests for fair trial rights at the Parramatta Courthouse. Second, we find Withers conducting what can only be described as a layperson's or *civic* legal aid service between the police cells and the Parramatta Courthouse. Third, we witness Withers' political persecution, as he is seized and taken to the Tarban Creek Lunatic Asylum on the orders of the justices at the Parramatta Quarter Sessions. Each of these parts represent a significant development in the history of criminal procedure in colonial NSW, demonstrating a popular engagement with the criminal law that attempted to democratise its effects upon its working-class and colonised subjects.

Policing and Summary Procedure at Parramatta

Police brutality and corruption were endemic to policing and summary procedure in the colony in the early to mid nineteenth century. Policing was conducted by both the military and the local constabulary, both skilled in a peculiarly colonial method of law enforcement that combined rationalist procedural administration with barbaric brutality.¹⁶ Summary justice was dispensed by both stipendiary magistrates and honorary justices of the peace. 'Justices', as they were known, were predominantly appointed on the basis of existing wealth and power, as they had been in the feudal administration of Britain since the Middle Ages.¹⁷ Local residents of Parramatta were unimpressed by this system. They voiced their rage and frustration with the police force in letters to the editor of the district newspapers, *The Parramatta Chronicle* and *The Star and*

¹⁶ See, for instance, Paula Jane Byrne, *Criminal Law and Colonial Subject: New South Wales 1810–1830* (Cambridge: Cambridge University Press, 1993); *Policing in Australia: Historical Perspectives*, ed. Mark Finnane (Kensington: New South Wales University Press, 1987); Alastair Davidson, *The Invisible State: The Formation of the Australian State 1788–1901* (Cambridge: Cambridge University Press, 1991); David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge: Cambridge University Press, 1993). As various Royal Commissions have demonstrated since the 1970s, police corruption and brutality continue to be an institutional problem in NSW.

¹⁷ See Hilary Golder, *High and Responsible Office: A History of the NSW Magistracy* (Sydney and Melbourne: Sydney University Press and Oxford University Press, 1991), 3; R.W. Connell and Terry H. Irving, *Class Structure in Australian History: Documents, Narrative and Argument* (Melbourne: Longman Cheshire, 1980), 33–34; and, more broadly, John Kennedy McLaughlin, 'The Magistracy in NSW, 1788–1850,' (LLM. thesis, University of Sydney, 1973); *Masters, Servants and Magistrates in Britain and the Empire, 1562–1955*, ed. Douglas Hay and Peter Craven (Chapel Hill: University of North Carolina Press, 2004).

Working Man's Guardian.¹⁸ Edward Mason was editor of both newspapers. Examples of letters to the editor and reportage on outbursts by defendants in court regarding police conduct appear in numerous editions of *The Parramatta Chronicle* from 30 December 1843 to 27 December 1845. One letter-writer called the police 'harpies of the law'; another, 'unprincipled wretches'.¹⁹ One ticket-of-leave holder called the police 'a set of rascals' and, when they asked him his name, told them to 'go to hell and find out'. He further stated that he could 'bring forth three credible witnesses' to prove he was legally at liberty.²⁰ In turn, newspaper editorials reflected the people's grievances.²¹ Some editions told of 'police irregularities' and 'police brutality' but also spoke of these misdeeds in a climate of resistance — 'an assembled multitude who cried shame on the unmanly ruffians [the police]'.²² At times, the editors went as far as referring to the Parramatta Chief Constable as 'that sly old fellow Fox who is always running after the women and interrupting their innocent amusements'.²³ Between 1843 and 1845, the legal column of local papers protested the plight of criminal defendants in respect to what it labelled 'Police Jurisprudence' in the streets of Parramatta.²⁴ Withers became part of this campaign.

Through *The Parramatta Chronicle*, Mason advocated for fair trial rights and published weekly accounts of police misconduct, popular unrest and proceedings from the Parramatta Courthouse. In a case of 'assault police' in which 'the prisoner stoutly denied the charge', the paper tells us that 'no less than three constables belaboured him unmercifully with their staves without any occasion'.²⁵ On the same day, another man who faced similar charges arising from a separate incident asserted 'self-defence' after he was 'attacked by the military and beaten severely'.²⁶ Far from

¹⁸ See *TPC; The Working Man's Guardian*, State Library of New South Wales, Sydney, microfilm, 1843-1845.

¹⁹ *TPC*, 20 January 1844, 3

²⁰ *TPC*, 17 February 1844, 2.

²¹ See both *TPC* and *The Working Man's Guardian*, 1843-1845.

²² *TPC*, 30 December 1843, 2; *TPC*, 6 January 1844, 3; *TPC*, 27 January 1844, 4.

²³ *TPC*, 20 January 1844, 4.

²⁴ *TPC*, 17 February 1844, 1.

²⁵ *TPC*, 30 December 1843, 2.

²⁶ *TPC*, 30 December 1843, 2.

receiving this treatment passively, the lock-up opposite the court erupted. According to *The Parramatta Chronicle*, there were 'regular riots there with the soldiers'.²⁷ Another column told the story of an inquest into the death 'of an unfortunate man named Rogers, who lost his life through the brutality of a constable named Barry, of the Sydney Police, who thrust his stick into the man's eye when confined in the watch-house one day last week'.²⁸

The paper retaliated, vowing to 'fearlessly uphold liberty' in the face of 'the Parramatta Police', led by the reviled 'Chief Constable Fox and his men'.²⁹ 'The ruffians', as the paper labelled the police, beat a suspect in front of a crowd of local people.³⁰ On 17 February 1844, *The Parramatta Chronicle* claimed to have commenced 'warfare with the Parramatta Police'.³¹ In the same edition, the editor drafted an open letter to the police, proposing a list or charter of fair trial rights and police procedure.³² It called on the local magistrate and police to ensure the following procedures:

- (i) Court to open at one particular hour every day ...
- (ii) Transact all police business in public ...
- (iii) Public Magistrate [to] come to the adjudication of every case without an intimate knowledge of all its details, as derived from ex-parte statements made in the private room ...
- (iv) The Police Magistrate never, in any case in which he intends to give evidence, to sit as judge ...
- (v) The unpaid Magistrates ... never to undertake a case singly, without possessing at least a competent knowledge of the common law of evidence ...
- (vi) To guard against professional prejudices ...

²⁷ *TPC*, 30 December 1843, 2.

²⁸ *TPC*, 13 January 1844, 4.

²⁹ *TPC*, 20 January 1844, 1; *TPC*, 27 January 1844, 1.

³⁰ *TPC*, 17 February 1844, 3.

³¹ *TPC*, 17 February 1844, 3.

³² The list proposed eleven major reforms to police conduct in the district under the banner, 'Police Jurisprudence,' *TPC*, 17 February 1844, 1.

(vii) That an accused party is protected by the testimony of three credible and respectable ... witnesses against the 'hard-swearing' of two interested informers, or ... the police ...

(viii) An Impartial and Intelligent judge ...

(ix) To refrain from hunting-up cases ... with the aid of disguised informers ... for the purpose of sharing in fines and penalties obtained on conviction by the hard-swearing of their constables.³³

In doing so, the editorial reflected recurrent and common complaints about summary justice at this time. Mason further identified other problems at the local court, including judicial bias toward the police by the police magistrate, disregard for the presumption of innocence and the concoction of evidence ('hard-swearing') by police constables, as well as calling for the abolition of the reward system for police constables — a system which effectively spurred zealous law enforcement, leading to corrupt policing.³⁴ *The Parramatta Chronicle* demonstrated that these concerns were shared by local Parramatta residents who, as the newspaper reported, reasserted them week after week as criminal defendants at the Parramatta Magistrates Court throughout the mid 1840s. In so doing, the newspaper fanned the flames of community anger toward the administration of summary criminal process. It was amid this storm of repression and popular resistance to the criminal law in the satellite town of Parramatta that Mr Edwin Withers first came to the attention of the local authorities.

Withers' Protests for Fair Trial Rights

Withers was an educated middle-class man in his mid thirties. With his wife and three daughters, he arrived in Sydney aboard a commercial vessel from London in 1840.³⁵ He cut an unremarkable figure, being a man of 'slight build', 'brown eyes', 'sallow complexion' and 'brown hair'.³⁶ In May 1845, he bowed and entered the courtroom at Parramatta Police

³³ *TPC*, 17 February 1844, 1. (Original emphasis retained.)

³⁴ *TPC*, 17 February 1844, 1.

³⁵ Barque of Arrival: 'Mary Catherine,' *Vessels Arrived*, 11 October 1840, State Records New South Wales [SRNSW], COD40. Note that Withers had purchased cabins for his entire family; they were not 'steerage' passengers.

³⁶ *Parramatta Gaol Entrance Books*, 1844, SRNSW, 4/6554.

Magistrate's Court, and sat toward the rear. Within minutes, however, he was up on his feet protesting about improper courtroom practice and police procedure that had led to a number of recent convictions. Police Magistrate Elliot halted proceedings. He summoned the protester to the bar and asked Withers about his connection with proceedings before the court. Withers replied, 'my connection is the administration of justice'.³⁷ At this, the magistrate threatened Withers with imprisonment and ejected him from the courthouse.

Withers resumed his courtroom protests twice more that week.³⁸ The following Monday, he was at it again. Once more, the magistrate ordered Withers' removal. Once again, Withers marched back into court to continue his noisy 'sit-in'. The magistrate ordered his arrest. According to *The Parramatta Chronicle*, Withers resisted, 'boxing with a Constable in the dock', while demanding to know, 'in a loud voice ... the charge against him'.³⁹ A charge of 'disorder in the Court' was muttered from bench to bar, and Chief Constable Fox quickly prepared and read it on to the record. From the dock, Withers chimed, 'and don't go too fast, I need to write this down'.⁴⁰ Withers' claims for fair trial rights did not stop there. He demanded 'an hour's time' to prepare, 'and pen, ink and paper' so that he might properly answer the charges against him.⁴¹

Withers' claims here are significant proof of popular grassroots support for the codification of fair trial rights in the colony: a project that was well underway in the metropole, resulting in the passing of the *Jervis Acts* 1848. The Acts were primarily designed to protect magistrates from appeal and prosecution by wrongly convicted defendants.⁴² They did not operate in

³⁷ TPC, 31 May 1845, 2.

³⁸ TPC, 31 May 1845, 2.

³⁹ TPC, 7 June 1845, 2.

⁴⁰ TPC, 7 June 1845, 2.

⁴¹ TPC, 7 June 1845, 2.

⁴² The long title of the Act was: '*An Act to adopt and apply certain Acts of Parliament passed for facilitating the performance of the Duties of Justices of the Peace and for protecting them from vexatious actions and to prevent persons convicted of offences from taking undue advantage of mere defects or errors in form [2nd October, 1850]*' (14 Vict. No. 43). The preamble to the Act noted that 'the adoption of these several Acts ... would not only tend greatly to the ease of Magistrates ... but to the advancement of Justice in respect of all proceedings by and before them out of sessions' (14 Vict. No. 43) (hereafter *The Jervis Acts - Summary Act*).

this way in NSW, however, mostly due to law reform campaigning by grassroots radicals like Withers and their high-powered allies, such as Robert Nichols, the constitutional radical, lawyer and local member for the predominantly working-class electorate of Northumberland Boroughs (which included Parramatta).⁴³ In NSW, the *Jervis Acts* succeeded in recognising the fair trial rights of criminal defendants more effectively than in Britain. As labour historians Adrienne Merritt and Rob McQueen demonstrate, in the period following the enactment of the Acts, workers flocked to the courts to negotiate their grievances and defend themselves from criminal prosecution.⁴⁴ Likewise, historian Hilary Golder has argued that the Acts assisted criminal defendants by increasing the powers of legally qualified stipendiary magistrates. For instance, the Acts allowed ‘stipendiaries’ to act alone, handing them more power than their ‘honorary’ counterparts who were required to act on benches of no less than two justices.⁴⁵ Building upon these studies, my own findings demonstrate that working-class criminal defendants consistently referred to ‘fair rules’ of procedure in court. These defendants reminded magistrates about ‘hearsay’ and corroborative evidence, railed against the hard-swearing of police constables and performed short but effective pleas in mitigation.⁴⁶

The *Jervis Acts* also enforced strict descriptions of ‘property’ for all theft charges.⁴⁷ They officially sanctioned the common law rule discharging a

⁴³ The difference between the operation of the *Jervis Acts* in NSW and Great Britain is supported by the work of A.S. Merritt, ‘The Development and Application of Masters and Servants Legislation in New South Wales – 1845 to 1930,’ (PhD diss., Australian National University, 1981); and Rob McQueen, ‘Master and Servant Legislation as “Social Control”: The Role of Law in Labour Relations on the Darling Downs 1860–1870,’ *Law in Context*, 10.1 (1992): 123–39.

⁴⁴ Merritt, ‘Masters and Servants Legislation’; McQueen, ‘Master and Servants Legislation as “Social Control”’.

⁴⁵ See Golder, *High and Responsible Office*, 65, 75, particularly following the *Justices Act Amendment Act 1853* (17 Vict. No. 39).

⁴⁶ For an example of the use of the hearsay rule by a convict, see the trial of John Hall, 21 September 1829, Bench Books [Picton Court of Petty Sessions] 1829–33, SRNSW, Series 3315, Reel 671. See also the plea of Catherine Hudgy, reported in *TPC*, 13 January 1844 and 20 January 1844. For an example of cross-examination by an accused bushranger of a police witness and exposure of lies, corroboration of lies and the manufacture of forensic evidence, see *R v Fowler and others* [1835] NSWSupC 42, *Sydney Herald*, 18 May 1835.

⁴⁷ *The Jervis Acts – Summary Act*, cl. 4.

defendant upon non-appearance of prosecution witnesses.⁴⁸ Prosecutors were not permitted to rely on evidence of the defendant's character during a hearing.⁴⁹ A prosecutor could be sued if the information was dismissed.⁵⁰ Amending legislation in 1849 required petty sessions to be held in 'fit and proper places', preventing justices from convening courts in public houses and the private estates of country squatters.⁵¹ In Withers' quotes referred to above, we see a reference to some of the key provisions of the *Jervis Acts*: the right to depositions when faced with offences requiring bail or imprisonment, and the right of the accused to an adjournment or reasonable preparation time to meet the case against them.⁵²

The summary hearing in Withers' case commenced on an afternoon in early June 1845, the same day as his arrest. The magistrate questioned Withers as to his defence. In reply, Withers 'leaned over the Bar', giving the impression 'that he was about to jump from the box to the bench' and 'told the Police Magistrate he was unfit [to hear the case] and ought not to be on the Bench'.⁵³ Withers was fined £80. Unable to pay, he was immediately sent to gaol. A month later, Withers had served his sentence. In July 1845, he agitated about his conviction before 'nearly all the Magistrates of the District' at the monthly Sydney Quarter Sessions in Parramatta.⁵⁴ But at Withers' first interruption, the Chairman (of Quarter Sessions) accused him of committing a crime. Withers interrupted twice more, *The Parramatta Chronicle* recalls, 'asserting that he had committed none' and that if he had, 'he desired to be put on trial'.⁵⁵ Withers was ejected from the court and refused further entry.

⁴⁸ *The Jervis Acts – Summary Act*, cl. 13.

⁴⁹ *The Jervis Acts – Summary Act*, cl. 14.

⁵⁰ *The Jervis Acts – Summary Act*, cl. 26

⁵¹ *Petty Sessions Act* 12 and 13 Vict. c 18 (1849).

⁵² *The Jervis Acts – Summary Act*, cl. 27 and 3; *The Jervis Acts – Summary Act*, cl. 13 (following the 1853 amendment).

⁵³ *TPC*, 7 June 1845, 2.

⁵⁴ *TPC*, 5 July 1845, 3.

⁵⁵ *TPC*, 5 July 1845, 3.

Withers' Experiments with 'Community Legal Aid'

In August 1845, a local man, Peter Rooney, was charged and tried for the offence of 'assaulting a Constable in the execution of his duty'.⁵⁶ The accused claimed police had 'rough-handled him' following an argument.⁵⁷ Rooney asserted self-defence. Rooney's wife was the only eyewitness, but she was prohibited from giving evidence because the court assumed she would only corroborate Rooney's story.⁵⁸ The following day, Rooney was escorted from the police watch-house to the courthouse to commence proceedings. On the way, he came across Withers. According to police, Withers 'enquired of him if he wanted a lawyer, and whether he would have either Mr Charles Lyons or Mr Lambton', two reputable local counsel.⁵⁹ After a short conversation, Withers advised Rooney to go with Lambton and, according to police, 'ran off to that gentleman's office', while 'ordering Rooney, by no means, to stir until he brought Mr L. to him'.⁶⁰ In other words, Withers advised Rooney, first of all, of his right to counsel and, second, of his right to silence. At this, police reported that 'Rooney ... got very violent and was unwilling to come on' into court.⁶¹ Later that afternoon, Withers shared a court cell with Rooney.

Withers was charged with 'inciting a prisoner in custody of Police to resist them in the execution of their duty'.⁶² He pleaded 'not guilty' and objected to the jurisdiction of the court, presumably on the basis that the prosecutor and possibly even the bench were witnesses in the prosecution case and held a conflict of interest. Withers suggested that there were other police magistrates in nearby districts who could just as easily have heard the matter.⁶³ But Magistrate Elliot decided that the case could 'only be adjudged by the Police Magistrate ... under the Town Police Act'. Withers retorted, 'it is not delicate of you to sit, Sir'.⁶⁴ During his hearing,

⁵⁶ *TPC*, 23 August 1845, 3.

⁵⁷ *TPC*, 23 August 1845, 3.

⁵⁸ *TPC*, 23 August 1845, 3.

⁵⁹ *TPC*, 23 August 1845, 3.

⁶⁰ *TPC*, 23 August 1845, 3.

⁶¹ *TPC*, 23 August 1845, 3.

⁶² *TPC*, 23 August 1845, 3.

⁶³ *TPC*, 23 August 1845, 3.

⁶⁴ *TPC*, 23 August 1845, 3.

Withers continued his protest against the perceived conflict of interest, objecting to being cross-examined by Chief Constable Fox. He also objected to the Clerk of the Court being called as a prosecution witness, asserting that he was 'not receiving a fair trial' and that neither had Rooney. He continued, 'if others were of the same opinion as him, Rooney should not go to the watch-house'.⁶⁵

For his final act that day, Withers closely studied the charges against him (which he had carefully written down with 'ink, pen and paper') and discovered an error that proved fatal to the prosecution case. The offence was alleged to have been committed in Church Street, rather than outside the court on George Street — where the Parramatta Local Court remains to this day.⁶⁶ The magistrate specifically instructed the constables to refuse Withers 'any future admissions into the Court House'.⁶⁷ In his acquittal, Withers paid homage to the rules of strict pleading, a respect for the power and importance of the rule of law to democratic ideals, which favoured the liberty of the subject. As nineteenth-century jurist James Stephen commented, rules of strict pleading and technicality 'were ... popular, as they did mitigate, though in an irrational, capricious manner, the excessive severity of the old criminal law'.⁶⁸

From the 1820s to the 1840s in Britain, English Chartists and trade unionists developed a practice of petitioning and protesting individual magistrates in superior courts.⁶⁹ As social historian Christopher Frank argues, procedural law and technicality were the cornerstone of this legal resistance, and represented a significant political challenge to the class power of employers and their fellow magistrates.⁷⁰ Like Frank, social historian Paula-Jane Byrne concludes that for solicitors in colonial NSW,

⁶⁵ TPC, 23 August 1845, 3.

⁶⁶ The Parramatta Magistrate's Court has existed in five separate buildings in Parramatta since 1826. Four of those buildings, including the 1826 Courthouse, were located within two blocks of each other on George Street.

⁶⁷ TPC, 23 August 1845, 3.

⁶⁸ James Fitzjames Stephen, *A History of the Criminal Law of England, Vol. 1* (Cambridge: Cambridge University Press, 1883/2014), 284. See also John Hostetter, *The Politics of Criminal Law Reform in the 19th Century* (Chichester: Barry Rose Law Publishing, 1992), 150.

⁶⁹ Christopher Frank, *Master and Servant Law* (Burlington: Ashgate, 2010), 44, 47.

⁷⁰ Frank, *Master and Servant Law*, 44, 47.

'legal technicalities were the prime mode of defending cases'.⁷¹ My research reveals that legal victories by criminal defendants (and their representatives) primarily involved challenging the *form* of information. This method involved finding errors or omissions in the description of offences, jurisdiction, warrant or summons, or proving that an arresting official or employer had broken a procedural or contractual rule. Even if conviction ensued, evidence of technical flaws in the prosecution case could mitigate a sentence of imprisonment toward a non-custodial outcome, such as a fine.⁷² Other uses of procedure by working-class defendants included issuing writs of *habeas corpus* or *certiorari* to the Supreme Court to appeal inferior court decisions. Appeals to higher courts had two main effects. They immediately disciplined magistrates for procedural impropriety and exposed them to costs for false imprisonment claims. In the long-term, appeals meant that defendants were able to change the law at summary level to address social problems.

Assertions of procedural technicality were assisted by a doctrine of strict legalism, enforced by statute and insisted upon by many lawyers and judges.⁷³ It should be noted that the lawyers and judges who conformed to strict legalism had a politics of their own, which often reflected popular tenets of constitutional or Tory Radicalism.⁷⁴ According to some commentators, when applied in the courtroom, strict legalism could mean that technical rules governing indictments, for instance, were 'convoluted and little short of Byzantine'.⁷⁵ Indeed, in some English cases, it was not uncommon for prosecutors to take up to two days to read a single indictment, after having drafted up to seventy alternative counts in respect to a single crime to ensure that every conceivable version of events was provided for.⁷⁶ In NSW, defendants were sometimes acquitted

⁷¹ Byrne, *Criminal Law and Colonial Subject*, 269.

⁷² See, for example, *R v Clarke and others* [1821] NSWKR 3; [1821] NSWSupC 3; *R v O'Hara, R v Coulton, R v Read*, in the *Sydney Gazette*, 17 February 1821.

⁷³ See Letters of Patent pursuant to the Act 4 Geo. IV, c.96 (New South Wales Act), 'The Third' *Charter of Justice 1823 (UK)*.

⁷⁴ For analysis of Tory Radicalism, see E.P. Thompson, *The Making of the English Working Class* (London: Victor Gollancz Ltd, 1963), 90.

⁷⁵ David Plater, 'The Development of the Role of the Prosecuting Lawyer in the Criminal Process: "Partisan Persecutor" or "Minister of Justice"?', *ANZLH E-Journal* (2006): 36.

⁷⁶ See, for instance, *R v Grace* (1846) 2 Cox CC 101, cited in Stephen, *A History of the Criminal Law of England*, 287.

when their name was misspelt or innocently miscommunicated in an indictment.⁷⁷ For Whig legal historians such as Sir James Fitzjames Stephen, these rules created an 'irrational system', which meant that 'the law relating to indictments was much as if some small proportion of prisoners convicted had been allowed to toss up for their liberty'.⁷⁸ Indeed they had. Fifty years earlier, many reformers used technicality to humanise a barbaric procedural system in which 'too much truth meant too much death'.⁷⁹ As Withers realised in the 1840s, technicality was the only fair and strategic legal response to arbitrary imprisonment.

Two days after protesting Rooney's case, Withers continued his protest in the street outside the courthouse. Chief Constable Fox arrested him and dragged him into the courtroom. Curiously, Withers stood charged not with a public order offence, but with 'perjury', a serious offence arising from an alleged misuse of courtroom procedure in Rooney's case. Committal proceedings were commenced against Withers immediately. The Chief Constable recalled Rooney's victim (a police constable) to give evidence. In the witness box, the constable swore that Mr Withers had 'behaved in a very violent and disrespectful manner'.⁸⁰ This was enough to satisfy the magistrate that there was a case to answer. Withers was committed to stand trial for perjury at the next quarter sessions. At this, Withers 'sneered and stamped' in court.⁸¹ Withers was obviously indignant about being committed to trial on evidence from a constable about behaviour that did not even resemble perjury. Magistrate Elliot responded by remanding Withers at Parramatta Gaol until the sitting of the next quarter sessions (a fortnight). Bail was set at £80, roughly four times the average yearly income.⁸² It is not clear how this incident was

⁷⁷ See *R v Guyse* [1828] NSWSupC 29, *The Australian*, 9 May 1829.

⁷⁸ Stephen, *A History of the Criminal Law of England*, 284.

⁷⁹ Langbein, *The Origins of Adversary Criminal Trial*, 6.

⁸⁰ *TPC*, 23 August 1845, 3.

⁸¹ *TPC*, 23 August 1845, 3.

⁸² *TPC*, 23 August 1845, 3. A note on average earnings: in 1838, the composers' union achieved an annual yearly salary of 5s 5d for its workers. This work was skilled labour, however, and likely reflects a significantly higher annual income than in unskilled industries such as the pastoral industry, in which the bulk of the colony's workforce were employed. Connell and Irving estimate that a rate of £20 per year, plus rations, could be regarded as a typical rate for pastoral workers in the 1820s and 1830s: Connell and Irving, *Class Structure in Australian History*, 42-43.

resolved, but given that the next quarter sessions were two weeks later, it is safe to assume that Withers served at least two weeks' imprisonment — possibly longer — for his civic activism.

Withers Tried for 'Dangerous Lunacy'

Withers reappeared in Parramatta Court on 15 November 1845 to complain about the behaviour of Constable Ryan of the Parramatta Police. As usual, he was ejected from the court. *The Parramatta Chronicle* noted that 'Mr Withers ... submitted to the expulsion [from court] with the air of a patriotic martyr'.⁸³ At this stage, Withers had evolved into something of a local hero. This was also a time when 'Captain Swing' was in full flight in the suburbs of Sydney.⁸⁴ In the same week, Timothy Horrigan from Canada Bay — possibly one of the Canadian rebels expelled by the English in 1837 — was accused of setting fire to a hayrick at a farm in Five Dock.⁸⁵ Horrigan had been dismissed from employment at the farm the night before.⁸⁶ *The Parramatta Chronicle* conjoined the stories of Withers and Horrigan in the same editorial.⁸⁷ This set the stage for Withers' final incendiary showdown with the justices of Parramatta, in the name of fairness and liberty.

Withers reappeared at the quarter sessions the following month. No sooner had he bowed and entered the courtroom than two of the honorary magistrates, George Forbes Esq. and Dr Anderson, ordered Withers to be arrested. They signed a warrant committing him to Parramatta Gaol to await proceedings under the new *Dangerous Lunatics Act* 1843, to be certified as insane and detained indefinitely.⁸⁸ Chief Justice Stephen would decide whether Withers was a 'dangerous lunatic' in accordance with the provisions of the Act. Section 1 prescribed involuntary detention of a

⁸³ *TPC*, 15 November 1845, 3.

⁸⁴ 'Captain Swing' was the anonymous name penned to a series of threatening letters sent to employers by aggrieved agricultural workers during the English 'Swing Riots' in the 1830s. Arson (targeting hayricks and barns) was the primary weapon used by labourers against their masters. See Eric Hobsbawm and George Rude, *Captain Swing* (New York: Pantheon Books, 1968).

⁸⁵ For an account of the Canadian rebels in Canada Bay, see Tony Moore, *Death or Liberty: Rebel Exiles in Australia, 1788–1868* (Sydney: Allen & Unwin, 2010), vi, 435–36.

⁸⁶ *TPC*, 15 November 1845, 3; *TPC*, 29 November 1845, 3.

⁸⁷ *TPC*, 15 November 1845, 3.

⁸⁸ *The Australian*, 20 December 1845, 4.

person who was arrested 'under circumstances denoting a derangement of mind and a purpose of committing suicide or some crime'.⁸⁹ In order to commit the person to an asylum, the Act required that two justices hear evidence from two medical practitioners that the person 'is a dangerous idiot or dangerous lunatic'.⁹⁰ The person was then to be confined in strict custody until discharged on the order of two justices or a Supreme Court judge, or removed to a public asylum.⁹¹

The *Dangerous Lunatics Act* connected the medical and legal professions through the criminal law in a way not seen since the Tyburn surgeons.⁹² In the 1840s it was the asylum, rather than the gallows, that conjoined the professions in their ordering of colonial society. As cultural historian Stephen Garton has found in *Medicine and Madness*, the asylum was part of a shift toward 'regularising' the colonial population at a time when the professional medical class preached 'moral reform' of those minds (not bodies) that threatened Victorian social order.⁹³ Back in the metropole, the political class was rocked by *McNaughton's Case*.⁹⁴ In January 1843, Scottish wood turner Daniel McNaughton shot and killed the Prime Minister's personal secretary. At McNaughton's murder trial, a number of eminent psychiatrists gave evidence that McNaughton suffered paranoid delusions. He was acquitted. Queen Victoria herself ordered the Law Lords to re-examine the findings.⁹⁵ They did, and extrapolated on Coke's longstanding doctrine of '*non compos mentis*' to structure and develop 'insanity' as a modern criminal defence to murder.⁹⁶ McNaughton was confined to Broadmoor Lunatic Asylum. The following year, asylum

⁸⁹ *Dangerous Lunatics Act* 7 Vict. No. 14 (1843) (NSW).

⁹⁰ *Dangerous Lunatics Act*.

⁹¹ See Philip Powell, *The Origins and Development of the Protective Jurisdiction of the Supreme Court of New South Wales* (Sydney: The Federation Press, 2004), 15.

⁹² The 'Tyburn surgeons' were members of the Royal College of Physicians who employed 'body-snatchers' to take the bodies of the condemned, hanged at Tyburn in London, for anatomical dissection. See Hay et al., *Albion's Fatal Tree*, 65-118.

⁹³ Stephen Garton, *Medicine and Madness: A Social History of Insanity in New South Wales 1880-1940* (Sydney: New South Wales University Press, 1988), 11-17.

⁹⁴ *M'Naghten's case* [1843] 10 C and F 200.

⁹⁵ Richard D. Schneider, *The Lunatic and the Lords* (Toronto: Irwin Law, 2009), 89.

⁹⁶ *M'Naghten's case* [1843] UKHL J16 (19 June 1843). See also Sir Edward Coke, *The Reports of Sir Edward Coke: In Thirteen Parts, Vol. 2* (London: J. Butterworth and Son, 1572-1579/1826), 573.

numbers in Britain increased sixfold.⁹⁷ As Garton and Mark Finnane have found, the 1843 legislation was primarily concerned with ‘dangerousness’.⁹⁸ Mental illness had not yet entered the discourse.⁹⁹ If those rendered ‘mad’ were dangerous, one of the ultimate consequences of institutionalisation in this period was permanent or long-term ‘incapacitation’.¹⁰⁰ NSW asylums were places of constant surveillance, brutality and privation. As the Catholic Bishop of Hobart, Dr R.W. Wilson, said of one of the earliest asylums in New South Wales — the Tarban Creek facility on the Parramatta River — it ‘contravened every tenet of human treatment’.¹⁰¹ The asylum was a prison for the mad.

At Withers’ ‘insanity’ hearing, more than forty witnesses were called to give evidence on both sides. Every policeman and magistrate in the district swore that Withers was of ‘unsound mind’.¹⁰² Of the ten medical witnesses, six doctors agreed with their fellow gentlemen on the bench that Mr Withers was, in fact, ‘mad’.¹⁰³ Two doctors positively stated that Withers was sane. The remaining two could not positively provide a diagnosis. According to *The Australian* — which began covering the case once it entered the superior jurisdiction of the Supreme Court:

no two of them [medical experts] agreed in their opinion as to the phase his insanity had assumed. Scarcely one of them could define the class of insanity which he attributed, and all supported their different opinions, by theories equally unintelligible and inconsistent.¹⁰⁴

To make matters worse, Withers was prevented from cross-examining the prosecution witnesses.¹⁰⁵

⁹⁷ Garton, *Medicine and Madness*, 16.

⁹⁸ Garton, *Medicine and Madness*, 16; Mark Finnane, ‘From Dangerous Lunatic to Human Rights,’ in *Madness in Australia: Histories, Heritage and the Asylum*, ed. Catherine Coleborne and Dolly MacKinnon (St Lucia: University of Queensland Press, 2003), 23-33.

⁹⁹ Finnane, ‘From Dangerous Lunatic to Human Rights,’ 26-27.

¹⁰⁰ Finnane, ‘From Dangerous Lunatic to Human Rights,’ 24.

¹⁰¹ Garton, *Medicine and Madness*, 21.

¹⁰² *TPC*, 20 December 1845, 2.

¹⁰³ *TPC*, 20 December 1845, 2.

¹⁰⁴ *The Australian*, 20 December 1845, 4.

¹⁰⁵ *The Australian*, 20 December 1845, 4.

Meanwhile, eighteen lay witnesses — all Parramatta locals — were 'unanimously of the opinion that he was of sound mind, and had been ill-treated by the Police'.¹⁰⁶ Some of their insights into Withers' disposition are telling. Under examination by Withers, one said, 'your ill-treatment was common talk ... I do not think that every obstinate man is mad'.¹⁰⁷ This was corroborated by another witness who said that he 'saw [Withers] handled more like a felon [by Police] than any other'.¹⁰⁸ Another stated that Withers was 'a very clever, shrewd intellectual man, never saw him violent, don't think him mad, he is eccentric, puts himself in curious ways and laughs, is very off-handed'.¹⁰⁹ Yet another identified Withers as an activist, saying he is 'sometimes cranky and attends meetings'.¹¹⁰ A further witness found Withers to be a 'sober, industrious man, perfectly rational'.¹¹¹ One witness recognised that Withers was on trial for his political activism, observing that Withers was 'very much of the French disposition, if he is mad, almost every French-man is mad'.¹¹²

As to Withers' sanity, no lesser counsel than the Solicitor-General William Manning told the court that he did 'not consider him more mad than I am' and that the "ill-treatment he saw by Police would make any man insane".¹¹³ Manning noted that Withers had been 'pulled and dragged about as no man ought to be ... pushed off the Portico and down the steps, advised to be quiet'. While Manning conceded that 'he is such an irritable sort of man', he nevertheless empathised with Withers' struggle against police corruption and feckless summary procedure. As Manning told the court, 'what we see one day and is sworn the next [by the police] is almost disgusting for any honest man to sit and hear it [and] I have addressed Mr Elliot myself [on this point]'.¹¹⁴

¹⁰⁶ *TPC*, 20 December 1845, 2.

¹⁰⁷ *TPC*, 20 December 1845, 2.

¹⁰⁸ *TPC*, 20 December 1845, 2.

¹⁰⁹ *TPC*, 20 December 1845, 2.

¹¹⁰ *TPC*, 20 December 1845, 2.

¹¹¹ *TPC*, 20 December 1845, 2.

¹¹² *TPC*, 20 December 1845, 2.

¹¹³ *TPC*, 20 December 1845, 2.

¹¹⁴ *TPC*, 20 December 1845, 2.

The Chaplain of the Parramatta Gaol told the court that Withers had said, ‘they’ve sent me here as a madman’ and that ‘the Church was too high for him and he confined himself to reading for four months’.¹¹⁵ But it was nevertheless the view of the clergyman that ‘they were unacquainted with a radical in Parramatta and wondered why Dan O’Connell [the Irish Rebel leader] was not confined’, too.¹¹⁶

Finally, Withers addressed the bench by stating that he ‘had done so much good in Parramatta that the Magistrates sat to empty benches’.¹¹⁷ Chief Justice Stephen and Justice Dickinson summed up the evidence. According to *The Australian*, the Chief Justice formed ‘his opinion that Mr Withers was [in fact] sane’ but deferred to the opinion of the medical men.¹¹⁸ The Supreme Court committed Withers to the Tarban Creek Lunatic Asylum at Gladesville, indefinitely. The admissions register at the asylum claims that Withers entered the institution suffering ‘partial intellectual mania’.¹¹⁹

By this time, however, ‘the Lunacy Case’ — as it had become known in the mainstream press — had caught the attention of some of the colony’s highest ranking law men.¹²⁰ The following week, Robert Nichols applied to the Supreme Court for a writ of *habeas corpus* to have Withers released from Tarban Creek. Nichols pointed out to Justice A’Beckett that an application could be made for release under the new Act if signed by two legal practitioners.¹²¹ Nichols visited Withers at the asylum. Unsurprisingly, Withers had already synthesised his grounds of appeal. As he told Nichols, the justices at Parramatta had detained him pursuant to a mere *order*, not by *warrant* complete with a certificate, signed and sealed by each justice. Nor did the justices find Withers to be a ‘dangerous lunatic, or dangerous idiot’ in accordance with Section 1 of the Act. The warrant did, however, state that Withers was of ‘unsound mind and not safe to go

¹¹⁵ *TPC*, 20 December 1845, 2.

¹¹⁶ *TPC*, 20 December 1845, 2.

¹¹⁷ *TPC*, 20 December 1845, 2.

¹¹⁸ *The Australian*, 20 December 1845, 4.

¹¹⁹ Tarban Creek Lunatic Asylum Admissions Register, 1 October to 31 December 1845, SRNSW, Series 4/2689.2, COD45/9386. I am grateful for the assistance of archivist Angela Kavuzlu in locating this reference.

¹²⁰ *The Australian*, 20 December 1845, 4.

¹²¹ *TPC*, 27 December 1845, 3.

at large'.¹²² Incidentally, the requirement that magistrates document all cases of imprisonment and the movement of prisoners by warrant was a further procedural right to emerge from the implementation of the *Jervis Acts* in NSW by Robert Nichols, some years later.¹²³ Other procedural errors in the document included a failure to note: i) who committed Withers; ii) *how* he was proved insane; and iii) the signature of two qualified medical practitioners.

These grounds were agitated before Justice A'Beckett of the NSW Supreme Court the following week. A'Beckett found that 'the whole thing appeared to be as illegal as it possibly could be'.¹²⁴ After consulting with two other judges of the court, Chief Justice Stephen and Justice Dickinson, A'Beckett quashed the warrant of commitment. Withers was discharged on 22 December 1845. *The Sydney Morning Herald* was moved to write, 'we ... award our humble meed of praise to the Judges, who, particularly investigated this extra-ordinary transaction and would not allow themselves to be duped by the crude sophisms and unsupported theories of men nicknamed "medical"'.¹²⁵

The conventionally conservative *Sydney Morning Herald* celebrated Withers' radical triumph beneath the banner, 'Sworn to no master, of no sect am I'.¹²⁶ Following the incident, the *Cumberland Times* reported that the committing justices 'attempted to absolve themselves from blame respecting the missing warrant', and the Crown prosecutor at the Supreme Court proceedings resigned from his office.¹²⁷

This incident did not deter Withers from his civic activism campaign for fair trial rights in Parramatta. Days after his release from Tarban Creek, he was arrested yet again while monitoring police procedure outside Parramatta Courthouse and advising criminal defendants of their rights to due process.¹²⁸ By this time, however, his activism was catching on,

¹²² *The Sydney Morning Herald* (hereafter *SMH*), 23 December 1845, 3.

¹²³ *The Jervis Acts – Summary Act*, cl. 24.

¹²⁴ *SMH*, 23 December 1845, 2.

¹²⁵ *SMH*, 23 December 1845, 3. See also *Bell's Life in Sydney and Sporting Reviewer*, 27 December 1845, 2.

¹²⁶ *SMH*, 23 December 1845, 2.

¹²⁷ *The Cumberland Times*, 17 January 1846, 2.

¹²⁸ Letter from Charles Blakefield to Governor Gipps, 30 December 1845, Colonial Secretary's Correspondence, 1845, SRNSW, 4/2693.1, Item 7933.

particularly among the middle-class residents of Parramatta. The witnesses who supported Withers during his Supreme Court trial clearly show that he did not act alone. One Parramatta resident, Charles Blakefield, wrote to Governor Gipps to explain that the latest episode involving Withers was 'a case of unparalleled oppression'.¹²⁹ As importantly, Blakefield claimed support for Withers' activism among not only the working-class defendants of the Parramatta district but from 'the respectable portion of the inhabitants of Parramatta'. He reiterated the basic facts of the case, telling the Governor that Withers had 'this day again been incarcerated for merely attempting to go outside the courthouse'. Blakefield continued, 'I humbly suggest to your Excellency, the necessity of a judicial investigation as the respectable portion of the inhabitants of Parramatta are of opinion that he [Withers] is and has been previously, illegally confined'. The 'respectable' men and women of Parramatta were equally appalled by the irony that after fighting so hard for the legal rights and representation of the most vulnerable members of the Parramatta community, Withers himself was now 'not ... able to pay a barrister' to represent himself in the Supreme Court.¹³⁰ Governor Gipps took the complaint seriously. His comments on Blakefield's letter show that, while reluctant to interfere with judicial power, the Governor forwarded the letter to all three judges of the New South Wales Supreme Court in Sydney.¹³¹

Withers was released shortly after the letter had been circulated at the highest levels of colonial government. His struggle continued throughout the remainder of the decade. By 1846, his confrontations with authority had brought poverty upon his family. Not only was he unable to afford counsel, he was repeatedly imprisoned as a result of being unable to pay bail sureties.¹³² Between 1846 and 1847, he served numerous prison sentences in Parramatta Gaol. Upon his final admission to Parramatta Gaol in 1847, Withers staged a hunger strike for five to six weeks to protest his

¹²⁹ Letter from Charles Blakefield to Governor Gipps, 30 December 1845, SRNSW, 4/2693.1, Item 7933.

¹³⁰ Letter from Charles Blakefield to Governor Gipps, 30 December 1845, SRNSW, 4/2693.1, Item 7933.

¹³¹ Letter from Charles Blakefield to Governor Gipps, 30 December 1845, SRNSW, 4/2693.1, Item 7933. Gipps' notations on the letter stated: 'application should be made to the judges; cannot interfere in this matter; Forward to Supreme Court'.

¹³² Letter from Colonial Secretary to Attorney-General, 16 October 1846, Colonial Secretary's Correspondence 1846, SRNSW, 4/2717.3, Item 8412.

imprisonment in respect of his advocacy work.¹³³ News of the strike did not travel past the gaol walls, and authorities at the gaol appear to have used the strike to confirm Withers' 'madness'. He was once again transferred to Tarban Creek Lunatic Asylum, which would become his regular place of confinement following all court protests he staged thereafter.¹³⁴ 'Mad' Edwin Withers was last admitted to Tarban Creek in 1852 at the age of forty-four, as a 'pauper'.¹³⁵ The incidents at Parramatta clearly left Withers a broken man, and the details of the remainder of his life are unknown.

Withers' Impact on Legal Reform

Withers' case led to a public inquiry into the management of NSW public asylums. The 1846 Select Committee Inquiry into the Tarban Creek Lunatic Asylum condemned the brutality with which the institution was run and recommended the appointment of a medical superintendent to oversee the treatment of patients.¹³⁶ The post was formalised in 1848. Withers' case, however, was not limited to reforming the asylum system.

As discussed above, his case (and many like it) had wider implications for procedural reform to the criminal law in NSW. In July 1850, Robert Nichols voiced identical arguments to those of 'Mad' Mr Withers in the NSW Legislative Council. Upon implementation of the British *Jervis Acts* by Attorney-General John Plunkett, Nichols argued that the Acts should be amended to make copies of charges and information available to defendants for free, rather than for a fee of 3 and 1/2 pence for each folio of ninety words. He was outvoted eleven to one.¹³⁷ Nichols 'agreed in principle' with the adoption of the Acts 'but thought it inexpedient to resort to this wholesale system of legislation'.¹³⁸ Rather, Nichols contended that 'the adaptation of English law to local circumstances was the proper course'.¹³⁹ Nichols' objections forced Plunkett to redraft the

¹³³ Tarban Creek Lunatic Asylum Admissions Register, SRNSW, 4/7655, 325.

¹³⁴ Tarban Creek Lunatic Asylum Admissions Register, SRNSW, 4/7655, 325.

¹³⁵ Tarban Creek Lunatic Asylum Admissions Register, SRNSW, 4/10564, 333.

¹³⁶ Stephen Bottomley, 'Law and Psychiatry: Aspects of the Relationship in NSW,' *Australian Journal of Law and Society* 2.1 (1984), 57.

¹³⁷ *SMH*, 27 July 1850, 3.

¹³⁸ *SMH*, 27 July 1850, 3.

¹³⁹ *SMH*, 27 July 1850, 3.

certain provisions of the Bill protecting magistrates from prosecution by aggrieved litigants and defendants. Nichols did this in consultation with the Chief Justice, who gave 'his most laborious attention ... to adapt the English provisions to the circumstances of the colony'.¹⁴⁰ The resulting Bill was, in Plunkett's words, 'more efficient and more safe than the measures introduced by the members opposite'.¹⁴¹ Four days after the Act had come into force, Chief Justice Stephen described it as being 'of more importance, as affecting the administration of justice, than any other Statute passed by the Colonial Legislature'.¹⁴² The Chief Justice continued

the duties of a Justice of the Peace ... were clearly defined; *and while magistrates were protected from all vexatious actions, there were means provided by which all those who were affected by magisterial proceedings could protect themselves against error or injustice, by resorting to a most simple and inexpensive proceeding of a summary nature, by which the intervention of the Supreme Court would be obviated.*¹⁴³

Nichols argued to amend the *Jervis Acts* again in 1853, apparently with little consultation from the conservative members of the Legislative Council. In August, Nichols introduced a seemingly innocuous Bill into the Legislative Council, under the unsuspecting name of the Prohibition and Amendment Bill. Under this title, the Bill and its contents appear to have been hidden from the scrutiny of the Legislative Council and the conservative press. Upon the first reading of the Bill in parliament, Nichols omitted both short and long titles of the legislation. Obtusely, he noted that the Bill was intended 'to amend, the Act 11th Victoria No. 43'.¹⁴⁴ The second and third readings of the Bill occurred late in the evening between August and October 1853. Only upon the third reading did Nichols announce his intention to amend the name of the Act to the 'Justices Act Amendment Act'.¹⁴⁵ By this stage, it is unlikely that the other members of the Council would have seriously contemplated, much less read, the

¹⁴⁰ *SMH*, 27 July 1850, 3.

¹⁴¹ *SMH*, 27 July 1850, 3.

¹⁴² Chief Justice Sir Alfred Stephen, cited in McLaughlin, 'The Magistracy in NSW,' 368.

¹⁴³ McLaughlin, 'The Magistracy in NSW,' 366-69. (Emphasis theirs.)

¹⁴⁴ See *SMH*, 10 August 1853, 4.

¹⁴⁵ See *New South Wales Legislative Council 1825 – 1856: Votes and Proceedings*, 7 October 1853.

contents of the Act. No debate was had, nor questions put, and the amending Act was passed on 7 October 1853 as the *Justices Act Amendment Act* (17 Vict. No. 39). Once again, Nichols' arguments echoed the demands of Withers at the Parramatta Magistrates Court in 1845: time to prepare, enhanced appeal rights and diminished power for honorary justices all featured prominently.

Conclusion

The story of 'Mad' Edwin Withers illustrates that the criminal law was not merely an instrument of social control but part of a more complex hegemonic apparatus that could be reformed through democratic traditions of dissent. Many rights and freedoms in colonial NSW were created from the bottom up, often in the interests of predominantly working-class people, who were the objects of criminal law. They and their legal representatives worked within an overwhelmingly harsh and repressive criminal justice system to reform the law to protect the vulnerable from the powerful. Just as law was imposed from above, institutionalising, ordering and regularising a colonial population, so was it resisted from below, in the streets, courtrooms and colonial legislature. Civil liberties in the colony of NSW were hard-won and shaped by the resistance of the people; people like Withers.

University of Technology Sydney