

‘Keep the magistrates straight’: Magistrates and Aboriginal ‘management’ on Australia’s north-west frontiers, 1883–1905

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Between July and September of 1887, a disagreement unfolded between Western Australia’s Attorney General Charles Warton and one of the magistrates who represented the face of the law in the colony’s north. As an assurance of the law’s even-handed operations at the colony’s peripheries, the Attorney General regularly reviewed the case reports of Aboriginal people summarily tried and convicted by regional magistrates. In the latest reports forwarded by Roebourne’s Resident Magistrate Colonel Edward Angelo, Warton noticed that an Aboriginal man had been sentenced to imprisonment with hard labour without evidence that an offence in any legal sense had actually been committed. When Warton called Angelo’s attention to his ‘slipshod’ approach to the matter of evidence, the magistrate was dismissive, and set out to enlighten Warton about the law’s value in his district. As a magistrate, he argued, he was bound to protect not only Aborigines but also settlers. Although the “‘legal assumptions” no doubt are that the native has been *punished*’, his imprisonment was ‘nominal’ compared to ‘the real punishment’ suffered by the settler whose rights and property were threatened. In short, when Aboriginal people behaved to the ‘obvious detriment’ of settlers, ‘they must be taught they cannot do so’. On receiving this reply the Attorney General complained to the Colonial Secretary that ‘I do what I can to keep Magistrates straight though I could easily save myself much time and trouble by making no remarks’, but ultimately he decided ‘it is utterly hopeless to attempt to instil into the mind of Col. Angelo the simple idea of the laws of evidence’.¹

This exchange may have been striking in its tone but was by no means exceptional; rather it reflects the irregularities that frequently marked the law’s dealings with Aboriginal people and served to protect settlers’ property investments in colonial Australia.² This was not the first time the Attorney General had called attention to this magistrate’s disregard of legal procedure when the government’s claim to treat Aboriginal people as equal subjects of the Crown clashed with settler interests: the previous year Angelo had been questioned for declining to pursue a

1 Warton to the Colonial Secretary, 20 July, Angelo to the Colonial Secretary, 2 September, Warton to the Colonial Secretary, 14 September 1887, Cons 527/1887/2619, State Records Office of Western Australia (SROWA).

2 For recent work addressing specific jurisdictions see, for instance, Ford 2010; Pope 2011; Hunter 2012; Douglas and Finnane 2012.

murder investigation against a station worker who had shot an Aboriginal man.³ Like many of his fellow magistrates, Angelo had no legal training: he was a former military officer who had served in India, the Crimea and Tasmania, and from this career came to the role of Resident Magistrate. Also like other colonial magistrates, he was closely enmeshed within the social and economic interests of the settler community. In later years he would embark upon a political career in Western Australia's Legislative Assembly as an advocate for the economic development of the north-west.⁴ Supported by military, social or political standing rather than detailed familiarity with the law, colonial magistrates nonetheless held wide scope to shape the evolution of colonial legal culture.⁵ From the early decades of the nineteenth century, they had held a critical role in the regulation of social and economic order in Australia's colonies, and particularly in rural districts where they carried considerable power as the representatives of government, there were few areas of life they did not influence.⁶ But while a valuable body of scholarship has examined the importance of Australia's colonial magistrates in shoring up the authority of the settler state, particularly in the management of convict labour, less attention has been drawn to the everyday ways in which they directly shaped the legal management of Aboriginal people on Australia's frontiers and the law's responses to Aboriginal/settler encounters.⁷

This paper will examine the gap between the legal obligations and the everyday practices of the magistrates and justices of the peace appointed during the last decades of the nineteenth century to Australia's north-west, in order to explore the significance of their role in interpreting and applying the law as a means of Aboriginal 'management'. Opening to settlement only from the 1870s, the north-west is important in highlighting the longevity of Australia's frontiers. But more particularly, it is significant in illuminating the troubled character of Australia's frontiers even when equipped with a ground-level presence of law and government. The rapid expansion of economic investment that took place in that region in the years between the *Aborigines Offenders Act 1883* (WA) and *Aborigines Act 1905* (WA) were accompanied by a high level of Aboriginal resistance and aggressive policing.⁸ During these years, the treatment of Aboriginal people produced repeated public controversy, and was subject to several government inquiries.⁹ Scholars have examined how administrative

3 Acting Attorney General Septimus Burt to Colonial Secretary, 8 May 1886, Cons 388, 3675/1886, SROWA.

4 Bolton 1979.

5 Benton and Ford 2013.

6 Castles 1982: 68–70; Neal 1991: 116–140. See also Golder 1991; Quinlan 2004; Rangelov 2005.

7 Evans 2004, Ward 2003 and Hunter 2012 examine magisterial powers in extending British jurisdiction over Aboriginal people, but their focus is on legal authority rather than everyday practice. On practices of rural magistrates in South Australia see Nettelbeck and Foster 2010.

8 The 'north-west' region of Australia is used broadly here to apply to a series of Western Australian frontier districts that unfolded in turn: the mid north-west and the more northern West and East Kimberley. On policing strategies and Aboriginal resistance on these frontiers see Gill 1977; Ross and Bray 1989; Pedersen and Woorunmurra 1995; Owen 2003. For an administrative history of this period see Marchant 1981.

9 Legislative Council Reports of 1882 and 1885; Correspondence on the Gribble Case, 1884–1887, Cons 388, AN1/1, Box 1, items 3–32, SROWA; the Roth Report 1905.

efforts to govern Aboriginal people during this period produced a paramilitary style of policing that exceeded the rule of law, while still justifying its excesses within the terms of the law.¹⁰ Although they have not earned the same attention, magistrates and justices of the peace formed an essential part of this frontier legal network, and share an equal place in explaining both the extent and the limits of government attempts to regulate Aboriginal people through legal measures. As the personification of government, magistrates and justices of the peace were charged with providing justice to settlers and Aborigines alike, but in practice their primary role — like that of police — was to protect settler investments as the cornerstone of economic development. Together these frontier officials oversaw the prosecution of stock theft as the most legally pursued form of Aboriginal crime in the north-west throughout the 1880s and 1890s.

The professionalisation of the magistracy as trained judicial officers that occurred across Australia's settled colonies over the late nineteenth century was certainly less true of Western Australia's north-west, where magistrates and justices appointed on the basis of landed interests continued to serve as the backbone of government well into the twentieth century.¹¹ Yet as had been the case in the evolution of Australia's earlier legal culture, these personnel did not operate independently: they were always subject to the supervisory eye of the central government.¹² Despite the Attorney General's oversight, however, magistrates routinely avoided or subverted legal procedures in cases relating to Aboriginal people. This equivocal relationship between representing and deflecting the law reflects more than the personal investments of the officials who served as the law's embodiment in districts far from the seat of government. In a larger sense, it indicates the degree to which governments continued to struggle to secure jurisdiction on new frontiers of settlement, even at the close of the nineteenth century.

'Facilitating justice': the scope and limits of magisterial powers

The practical difficulties of bringing Aboriginal people within British jurisdiction had underpinned the history of Australian colonial settlement throughout the nineteenth century, but the evolution of the north-west was influenced by some particular features which enhanced the capacity of rural magistrates to play a more central role in Aboriginal governance than had been the case in Australia's eastern colonies. From the mid nineteenth century, the authority to try minor offences summarily in district courts had been held by magistrates and justices across Australia's colonies,¹³ yet this authority had limited value in frontier settings. For instance, in the neighbouring colony of South Australia, the obligation on magistrates to remand Aboriginal offenders to higher courts except in cases of minor theft entailed considerable resources in sending prisoners

10 Gill 1977; Choo and Owen 2003; Owen 2003.

11 Castles 1982: 327, 374.

12 Castles 1982: 75–76; Neal 1991: 108–109.

13 Castles 1982: 214; Golder 1991: 75–76.

long distances for trial and, as Alan Pope has argued, did little to encourage 'legal remedies' to frontier problems.¹⁴ In comparison, Western Australia's rural magistracy was supported by unusual powers of summary jurisdiction designed to regulate Aboriginal crime and encourage settlers' belief in the law's capacity to protect their investments. The Ordinance to provide for the Summary Trial and Punishment of Aboriginal Native Offenders approved in 1849 enabled local magistrates, sitting with at least one justice of the peace, to award punishments of up to two dozen lashes and a six-month term of imprisonment for most non-capital offences. Thereafter, as Ann Hunter has shown, Aboriginal people were effectively created as a 'different kind' of legal subject.¹⁵

Western Australia's distinctive approach to the legal punishment of Aboriginal people was initially conceived under Governor Hutt's administration in terms of a protective logic, for it was imagined that robust magisterial powers to administer justice locally would not only bring Aboriginal people within British jurisdiction, but would thereby prevent settlers from adopting 'violent and improper means [of] redress'.¹⁶ A related humanitarian justification for devolving Aboriginal punishment to the local magistracy — one that neatly dovetailed with economy — was that it would avoid bringing Aboriginal prisoners far from their own country and holding them in custody for up to several months before a trial. Even the Protector of Aborigines Charles Symmons considered that the summary jurisdiction of magistrates and justices to try and sentence Aboriginal offenders locally would constitute a 'more lenient' approach to the management of Aboriginal crime, and be beneficial in 'facilitating justice'.¹⁷

Magisterial powers to punish Aboriginal offenders varied over the next decades but were significantly broadened from the 1880s with the extension of investment into the north-west. Under the terms of the *Aboriginal Offenders Act 1883*, magistrates sitting with an honorary justice of the peace could convict Aboriginal offenders to imprisonment with hard labour for up to two years; if no other magistrate was resident within 20 miles, magistrates and honorary justices acting alone could impose sentences of a year. These powers were considerably higher than those held by magistrates and justices in neighbouring colonies, as the Colonial Secretary found when he wrote to his counterparts to gauge the nature of practices elsewhere. Replies from Queensland and South Australia clarified that in those jurisdictions, magistrates (or their equivalence in two justices, who could never act alone) were only able to award maximum sentences of one year for non-capital offences under particular circumstances.¹⁸ Magisterial powers were further extended in Western Australia with an 1892 amendment to the 1883 Act, which reintroduced flogging and gave honorary justices the same authority as a Bench including a Resident Magistrate. With another amendment in 1893, an earlier safeguard which had prevented justices

14 Pope 2011: 162.

15 Hunter 2012: 197–210. See also Hasluck 1970: 140–142; Evans 2004: 70.

16 Governor Hutt to Lord Russell, 20 January 1842, British Parliamentary Papers, no 627, 400.

17 Protector of Aborigines Report, 16 January 1851, *Perth Gazette*, 7 February 1851.

18 Western Australia, Legislative Council, Minutes, 2nd Session 1883, A10.

from trying cases relating to theft of their own property was removed, and the term of imprisonment awardable to Aboriginal offenders was increased to three years, or five for re-offenders.¹⁹

These legislative moves to facilitate more effective legal reach over Aboriginal people were eased in Western Australia by a more porous frontier culture than was experienced elsewhere. As historians have argued, on Australia's northern frontiers to the east, Aboriginal people's labour was not extensively sought by settlers until their resistance to settler occupation had been subjugated by punitive policing and their lands effectively secured for pastoral development; until that time, Aboriginal people remained largely beyond the jurisdiction of British law in practice, if not in theory.²⁰ Yet in Western Australia this trajectory was less clear. From the colony's earliest years, a protracted dearth of white labour had encouraged the entry of Aboriginal people into colonial economies, and from the 1870s magisterial powers to award Aboriginal punishment were enhanced under the umbrella of policy to regulate Aboriginal labour.²¹ In theory this provided for the protection of Aboriginal people engaged in colonial industries, but it also brought them within the magistrates' purview of punishment for transgressions against settler masters.

Nonetheless, the vast size and sparsely settled character of the north meant that significant Aboriginal populations remained outside the colonial economy, and beyond the effective jurisdiction of government.²² In this environment, the extensive legal powers held by magistrates and justices to punish Aboriginal crime did not in themselves prove sufficient in diminishing attacks on settlers' livestock. From the mid 1880s, mounted police brought an unrelenting cycle of Aboriginal people charged with killing settlers' sheep and cattle to be tried before rural magistrates and justices of the peace, but achieving their conviction within the law's requirements was another matter. The unreliability of magistrates' legal expertise was only part of the difficulty in meeting these requirements, for the sheer scale of stock theft and the virtual impossibility of establishing evidence in individual cases undermined the rule of law on an almost daily basis. These problems revealed the magistracy's limits either in regulating the pastoral frontier, or in achieving secure jurisdiction over Aboriginal people. At the eve of Federation, then, the north-west reflected what Julie Evans has called a 'discretionary space in law, wherein national sovereignty must be produced (and constantly reproduced) in response to various conditions on the ground'.²³

19 *Aboriginal Offenders Act (Amendment) 1892* (55 Vict. No. 18) and *Aboriginal Offenders Act (Amendment) 1893* (56 Vict. No. 15).

20 McGregor 1993: 64–65; Douglas and Finnane 2012.

21 *Pearl Shell Fishing Regulation Act 1873*(WA) (37 Vict. No. 11); *Aborigines Protection Act 1886* (WA) (50 Vict. No. 25).

22 Douglas and Finnane 2012: 66. Cathie Clement calculates that at the turn of the century Aboriginal people outnumbered settlers in the East Kimberley at the ratio of almost six to one. Clement 1989: 93.

23 Evans 2009: 5.

'A very haphazard manner': the nature of locally administered justice

Sheep and cattle constituted one of the most valuable resources in the settler economy, and because they were readily driven from open country and policing surveillance was difficult to maintain, they constituted the form of property most vulnerable to theft. Although stock theft was practised within settler communities, the extent to which colonised peoples 'got away' with it worried administrators around the Empire as a potential threat to the sovereignty of the colonial state. Across different settings, authorities applied strategies to suppress it with varying degrees of compromise and severity. In the context of British India, for instance, David Gilmartin has examined how colonial officials relied reluctantly upon traditional Indian systems of local brokerage for the return of stolen cattle, in face of the incapacities of British law to repress the crime.²⁴ On Canada's western prairies, where Aboriginal theft of settlers' free-ranging cattle became a policing priority during the 1880s and 1890s, police cooperated with Indian Agents in applying the extralegal measure of returning Aboriginal people to reserves unless they held a pass.²⁵ In British Kenya, as David Anderson has shown, authorities tried with limited success to deter African stock theft through particularly heavy terms of imprisonment in addition to fines levied against the offender's whole community.²⁶

On Australia's pastoral frontiers, Aboriginal stock theft was met with a mixed strategy of hard policing and penal measures, yet still it remained endemic. Colonial officials and settlers alike were aware that the decline of traditional foods produced by pastoral occupation created a pattern of Aboriginal deprivation and consequent stock theft that no amount of policing and prosecution could eradicate.²⁷ Officials were also alert to the possibility that when Aboriginal people drove off large numbers of sheep and cattle, stock theft constituted an act of economic warfare that in turn incited settler demands for war-like retribution.²⁸ Such practical realities established a set of cyclical difficulties that lay beyond the scope of the law to resolve, and that invited a discretionary approach by those officials who represented it on the ground.

At the heart of these cyclical difficulties was the problem of evidence. In theory, when settlers lost sheep or cattle they were obliged to report individual suspects whom the mounted police would pursue under warrant, then arrest and escort to the nearest magistrate for trial. Despite the power of magistrates and justices to try Aboriginal prisoners locally, constant problems arose in meeting the laws of evidence in an environment where the disappearance of livestock was unwitnessed, and the distances between pastoral station, police post and magistrate were considerable. As everyone knew, it was almost impossible to catch Aboriginal people 'in the act of committing a depredation', and 'by the time

24 Gilmartin 2003: 39–43.

25 Smith 2009: 68–73.

26 Anderson 1986: 404–410.

27 For instance *Western Mail*, 9 April 1892: 35.

28 Slack 2002: 80–81.

the constable is out the blacks are away'.²⁹ Moreover, while settlers constantly demanded more police action in eradicating Aboriginal stock theft, they often refused to commit their own time or that of their station workers to bear witness at trials, increasing the difficulties of building a case against any suspect.³⁰ When Aboriginal prisoners came to trial, other difficulties further weakened the chain of evidence. In principle, interpreters were to be made available if required, but in reality their presence at trials was *ad hoc*, and the likeliest interpreter was the police tracker who had helped capture the prisoners.³¹ As officials were also aware, Aboriginal people drawn into an unfamiliar legal setting would make admissions of guilt if led to do so: in 1887 the Chief Justice Alexander Onslow stated that 'if you ask [natives] whether they are guilty they always admit it'.³²

Mounted police represented the first point of intervention in quelling Aboriginal stock theft, and they were well aware of the problems in acquiring sufficient evidence to prosecute it. In face of limited manpower and constant settler complaints about the inadequacy of police protection, their practical approach was to track 'suspects' in districts where sheep or cattle killing was considered rife, raid Aboriginal camps, and arrest whomever failed to escape. This was an approach that implicitly relied upon latitude in police use of force. In 1888, accusations of police violence against Aboriginal people by the Reverend John Brown Gribble led the government to review the regulations on police use of firearms. The Attorney General Charles Warton cautioned that under the regulations' current wording, 'there is great danger of the Police forgetting that they are essentially a civil not a military body'. He advised that 'it may be right to arm the police but it is not right to form rules as if it was a natural or constitutional or normal condition of a policeman to be armed to the teeth'.³³ Yet although direct references to police powers to 'kill' were replaced with modified wording, the redrafted regulations still retained wide licence for lethal force, including the provision that when the necessity for force arose, the police 'must do their duty and the law will protect them'.³⁴ When cases of Aboriginal people shot during the course of police patrols were reported to local magistrates, as they sometimes were, they were framed within the legally admissible boundaries of self-defence or last resort, and were almost always accepted.³⁵ Nonetheless, police actions exceeding the law still needed to be justified within the framework of law. As Russell McGregor has argued, while in Queensland the Native Police were known to be an effective instrument of Aboriginal 'dispersal' precisely because they operated largely unmonitored by administrative oversight, in Western Australia's north the network of police, magistrates, courts and prisons was the primary means of regulating Aboriginal movement and behaviour.³⁶

29 Report of Corporal Sunter, 13 September 1901, Cons 430, 1901/2157, SROWA.

30 Sergeant Cunningham to Commissioner of Police, 27 April 1888, Cons 430, 1888/932, SROWA.

31 Roth Report 1905, 15.

32 *Western Mail*, 28 May 1887.

33 Attorney General to the Colonial Secretary, 4 October 1888, Cons 527, 2833/1888, SROWA.

34 'Use of Arms by Police', Cons 527, 2833/1888, SROWA.

35 For instance Cons 430, 1904/2163; Cons 430, 1904/3739; Cons 430, 1904/4337, SROWA.

36 McGregor 1993: 74.

The roles of police and magistrates in moving Aboriginal people away from settlers' stock and into gaol, then, were closely interwoven.³⁷ In practice, a close collaboration was particularly important in the prosecution of Aboriginal stock theft because the cases that came before magistrates and justices most frequently relied upon the evidence of the arresting police. This did in fact raise periodic concern amongst authorities that the evidence on which Aboriginal prosecutions proceeded was likely to be unreliable. In 1890, commenting upon the reports forwarded by justices of the peace E. F. Darlot and H. N. Walsh, the Attorney General questioned the justices' 'loose procedure' of deciding Aboriginal convictions on a police statement of guilt, and allowing such a statement to 'take the place of [a prisoner's] admission to the Bench'.³⁸ In part, administrators' concerns were financial, since the daily ration expense police received for each person taken into custody led the government to suspect that Aboriginal prisoners were held 'for the purpose of making profit of the rationing'.³⁹ The voicing of such concerns, however, did not lead to change in the manner in which police and magistrates proceeded with Aboriginal prosecutions, even into the twentieth century. In 1905 Dr E. J. Gurdon wrote to the government to state that in the local trials he had observed, Aboriginal people were convicted on 'unreliable' police evidence, and that the accused were not made aware of the nature of the charges against them. Invited to respond, the Commissioner of Police smoothed over Gurdon's claim with the circular logic that if the evidence were insufficient, the magistrate would be obliged to dismiss the case.⁴⁰ Yet as the exchange in 1887 between Roebourne's Resident Magistrate and the Attorney General indicated, magistrates and justices did convict Aboriginal people on 'slipshod' evidence, and were ultimately given considerable discretion in doing so.

'Not a satisfactory conviction': irregularities in Aboriginal prosecutions

The flexibility with which the local magistracy approached legal requirements was apparent more generally in how they completed reports of Aboriginal trials and convictions. As a matter of course, reports for each case required a record of the words in which the accused admitted guilt and all important points of the evidence. Given the practical limitations on evidence, in practice this habitually amounted to recording the testimony of a police constable, a station owner or one of his employees, accompanied by a generic statement that the accused admitted to the charge.⁴¹ Whereas the formalities of reporting required an exact

37 In the early years of Australia's colonies the roles of police and magistrates in establishing law and order had been closely entwined with the appointment of police magistrates to manage local constabularies. For instance Palmer 1994.

38 Attorney General to Colonial Secretary, 17 July 1890, Cons 527, 1890/1723, SROWA.

39 Governor Broome to Colonial Secretary, 28 October 1884, Cons 527, 1884/6112, SROWA; Roth Report 1905, 14–15.

40 Commissioner of Police to the Under Secretary, 20 November 1905, Cons 430, 1905/4476, SROWA.

41 For instance Cons 527, 1884/1205; Cons 527, 1885/3947; Cons 527, 1885/2451, SROWA.

record of the testimony of each individual accused, the numbers of Aboriginal prisoners brought before them were such that magistrates and justices often simply recorded a communal admission of guilt. From the mid 1880s, group convictions of Aboriginal prisoners accused of stock theft ranged from half a dozen to more than 40 people at a time.⁴² Group trials were sometimes so large that, as the press reported from Carnarvon in 1886, 'the Court was obliged to be held on the verandah'.⁴³

What is notable about this pattern is not just the predictable fact that ill-trained magistrates and justices convicted Aboriginal people on uncertain evidence, but the fact that their reports were so often questioned from the office of the Attorney General with so little effect or consequence. In 1887, the Attorney General voiced disapproval of the inadequate proof of individual guilt in reports of Aboriginal conviction sent in from the northern districts. After reading the reports forwarded by Resident Magistrate C. D. Foss at Carnarvon, in which the single refrain 'we killed these sheep and eat them' sufficed for the conviction of four Aboriginal prisoners, Warton issued the reminder that 'when two or more prisoners are before a magistrate each should be separately asked if he pleads guilty or not guilty and each prisoner's words in answer should be taken down. Prisoners (in the plural) can't make an admission'.⁴⁴ The convicting magistrate Mr Foss, he added, was 'often irregular' in regard to meeting such legal requirements. In reply Foss complained: 'I have sent these forms down for the last four years, and this is the first time that I have been informed that I have acted irregularly with regard to sending down the evidence'.⁴⁵

Foss' response was understandable. Although all regional reports of Aboriginal convictions were forwarded to the Attorney General's office, and he periodically made comment on the irregularities they contained, magistrates and justices on the pastoral frontier were usually allowed discretionary authority to conduct Aboriginal prosecutions as they saw fit. In 1884 the Attorney General – Worton's predecessor Alfred Hensman – noted on Foss' latest reports that in addition to the magistrate's failure to write up Aboriginal convictions 'in proper form', the 'evidence in these cases is very light'. He did not seek to question the convictions, however, but allowed that it was 'open to the magistrate to convict upon [the evidence] if he was satisfied that it was reliable'.⁴⁶

This latitude extended to cases where it was even questionable that a crime had taken place. In 1885, the Attorney General expressed doubt about the conviction of 'Georgy' by Angelo's predecessor, Roebourne's Resident Magistrate Edward Laurence, because the settler whose sheep Georgy had allegedly stolen had not complained of losing any stock, and moreover declined to press a charge. Yet although the Attorney General noted that Georgy's 'was not a satisfactory

42 In 1887, a single group of 42 Aboriginal prisoners was convicted for sheep stealing to terms of imprisonment ranging between six months and two years. Cons 527, 1887/4170, SROWA.

43 *Western Mail*, 13 February 1886: 9.

44 Attorney General to Colonial Secretary, 15 April 1887, Cons 527, 1887/1579, SROWA.

45 Government Resident Foss to Colonial Secretary, 31 May 1887, Cons 527, 1887/1579, SROWA.

46 Attorney General to Colonial Secretary, 11 June 1884, Cons 527, 1884/2938, SROWA.

conviction by any means', he would not 'go so far as to advise that the conviction was illegal'.⁴⁷ Similar concerns were raised about reports of Aboriginal convictions from justice of the peace E. F. Darlot, who conducted Aboriginal trials alone in the absence of any other magistrate or justice within 20 miles. Hensman again issued the reminder that 'it is very desirable in all cases of convictions of natives for stealing sheep ... to have clear evidence that the sheep have been missed from the flock', but he did not recommend that the sentences be reviewed.⁴⁸ An unusual case was that of Aboriginal shepherd Coogin, alias Frank, whose sentence on a charge of sheep stealing was only remitted when his employers undertook to prove his innocence. By the time the prisoner was released, almost half his sentence had been served.⁴⁹ Coogin's case not only reflected a general neglect of the laws of evidence in Aboriginal prosecutions, but also pointed to the vagaries of Aboriginal people's legal position when employed in colonial economies. In this instance, a settler intervened to overturn the unwarranted conviction of his Aboriginal employee, yet in other instances, settlers who were abusive to their Aboriginal employees had little reason to fear the law's intervention.⁵⁰

The unevenness of the sentences that magistrates and justices awarded to Aboriginal prisoners was another point raised but rarely pursued by administrators at the seat of government. With regard to Darlot's reports, Attorney General Hensman noted that the justice had provided no clarification as to 'why some of the natives received 12 and others 6 months'. Having noted the inconsistency, however, he allowed for it by concluding that it 'may be that the previous character of some was worse than the others'.⁵¹ With regard to Foss' reports, Hensman's successor Charles Warton also observed that there was 'rather a disproportion' between the sentences awarded, but conceded that the magistrate had discretion to determine the sentences as the person best acquainted 'with the characters of the prisoners'.⁵² Indeed, there was little in the reports to explain the relatively wide range of prison terms awarded by local magistrates and justices to Aboriginal prisoners, a circumstance sometimes noted by the Attorney General but rarely directly challenged.

An exception arose in 1887 when the Superintendent of Rottnest Prison, William Timperley, drew the government's attention to the fact that a year earlier Resident Magistrate Foss, together with justice of the peace John Brockman, had sentenced 26 Aboriginal prisoners on stock theft charges to two years' imprisonment with hard labour at Rottnest, and that another group of 25 prisoners tried by the same magistrate on the same charges had recently arrived under sentences of one year. For the first group of convicted men, he wrote, 'what will no doubt astonish them, and confuse their ideas of justice, will be the fact that a large number of their

47 Report of Resident Magistrate Laurence, 18 February 1885; Attorney General to Colonial Secretary, 19 March and 22 May 1885, Cons 527, 1885/969, SROWA.

48 Attorney General to Colonial Secretary, 24 November 1885, Cons 527, 1885/4614, SROWA.

49 Cons 527, 1891/1665, SROWA.

50 Nettelbeck 2013: 368–369.

51 Attorney General to Colonial Secretary, 24 November 1885, Cons 527, 1885/4614, SROWA.

52 Attorney General to Colonial Secretary, 19 March 1884, Cons 527, 1888/1349, SROWA.

friends, who had been convicted of *exactly the same crimes*, arrived at Rottneest Prison *after* them, and were sent back to their own homes long *before* them'. For the sake of good order at the prison, he recommended that the remainder of their two-year sentences be remitted, a recommendation the governor approved in consideration of the overcrowded state at Rottneest.⁵³

On other occasions the Attorney General pointed to the myriad ways in which reports of Aboriginal convictions sent in by regional magistrates and justices failed to meet requirements, but other than regretting 'that more care is not taken' with the paperwork, or issuing a reminder that a magistrate 'should be informed of his duty', it was rare for further steps to be taken in directing the magistracy's approach to the local prosecution and conviction of Aboriginal people.⁵⁴ Faced with a constant tension between the rule of law and the practical difficulties of governing the frontier, the position of central authorities was to fall back on the legal fiction that the government's provisions for the equitable treatment of Aboriginal people were 'satisfactory'.⁵⁵

'Deterrent effect' or 'mistaken leniency': the ambiguities of Aboriginal management

The difficulties of achieving effective control over Aboriginal attacks on settler property not only revealed the fractures in the law's capacity to regulate the pastoral frontier, but they also brought forward doubts about the value of prosecution and incarceration as means of Aboriginal management. Magistrates sometimes dismissed Aboriginal cases because of insufficient evidence, but they also awarded maximum terms of imprisonment in the opinion that these would at least 'have a deterrent effect and prevent cattle stealing in the future'.⁵⁶ Other magistrates openly doubted that imprisonment had a deterrent effect, but regarded the penal system as yielding other pragmatic advantages. The view of Resident Magistrate Colonel Angelo was that 'the native gets food and clothing from Govt while in prison', while for the term of his incarceration, the government got the prisoner's labour which was 'worth more than his food and clothing'.⁵⁷ Aboriginal imprisonment, he stated on another occasion when reporting the conviction of 42 prisoners in one sitting, had little to do with justice but effectively amounted to an exchange of labour for rations.⁵⁸

While some magistrates were of the view that the legal system delivered other benefits towards the goal of Aboriginal management than those of justice, the

53 Superintendent Timperley to Colonial Secretary, 21 February 1887; Governor Broome to Colonial Secretary, 12 April 1887, Cons 527, 1887/746, SROWA.

54 For instance Cons 527, 1888/2361; Cons 527, 1890/1327; Cons 968, 1909/958, SROWA.

55 'How we treat the blacks', *Western Mail*, 21 January 1898: 46.

56 Resident Magistrate Foss' report for the Gascoyne district, 17 March 1887, Cons 527, 1887/746, SROWA.

57 Government Resident Angelo to Colonial Secretary, 2 September 1887, Cons 527, 1887/2619, SROWA.

58 Angelo to Colonial Secretary, 5 October 1887, Cons 527, 1887/4170, SROWA.

view of Robert Bush JP was that the law was simply not an effective instrument for achieving governance over Aboriginal people. In his opinion, the law's primary limitation arose from the 'ill advised' principle that it served equally to protect Aboriginal people as to punish them. Bush, who claimed to have 'more natives brought before me for sheep stealing than any other magistrate in the colony', was also owner of the Clifton Downs station on the Gascoyne. As a pastoralist, he was unambiguous in stating that the rule of law should serve less to ensure justice than to secure 'the settlement and improvement of these splendid Northern Districts'. Yet to the degree that it failed to protect settler property, he argued, the rule of law did little more than provide gaoled Aboriginal prisoners with free access to the government's rations; worse, this 'mistaken leniency' rendered the settler 'powerless', for the law did 'not let him punish these natives himself, and there is no one else to punish them'.⁵⁹

As this justice of the peace complained, there was no officially approved alternative to the rule of law. Regardless of whether Aboriginal imprisonment was regarded as a future deterrent, a pragmatic arrangement for the supply of cheap labour, or a form of 'leniency' that failed the requirements of settler protection, the principle could not be dispensed with that in the eyes of the law Aboriginal people were subjects of the Crown. In 1887, Wyndham's Resident Magistrate was a keen supporter of local settlers in their petition to the government to establish a Native Police Force on the Queensland model, and in urging forward the petition he reminded authorities that the European police were 'not the slightest use in this country'.⁶⁰ The Superintendent of Police, however, was obliged to distance himself from the local magistrate's position on grounds that such a policing model would openly flout the principle that the police were also available 'for the protection of the aboriginals'.⁶¹ In face of daily settler demands for protection of their property, frontier officials had little option but to administer a monotonous cycle of Aboriginal arrests, convictions and incarcerations year after year. Cathie Clement has calculated that in the east Kimberley alone between 1886 and 1908, Aboriginal people were imprisoned at the ratio of ten to 12 men per head of cattle lost.⁶²

On rare occasions, the inherent failures — and perhaps the inherent harshness — of the legal system of Aboriginal management triggered a break in the chain. In 1895 Constable McGinnis refused the order of justice of the peace H. B. Walsh to inflict a flogging sentence on an Aboriginal prisoner for sheep stealing. The constable 'said he would do no more flogging', Walsh complained to the Commissioner of Police, and if 'he won't do it, who should?'⁶³ Similarly, in 1904 the Resident Magistrate at Derby R. H. Wace, perhaps tired of hearing Aboriginal cases based on insufficient evidence, declared he would henceforth

59 'Native depredations in the northern districts', *Western Mail*, 26 December 1891: 15.

60 Government Resident Wyndham to Colonial Secretary, 4 January 1887, Cons 527, 1887/0677, SROWA.

61 Superintendent of Police to Colonial Secretary, 28 February 1887, Cons 527, 1887/0677, SROWA.

62 Clement 1989: 93.

63 HB Walsh JP to the Commissioner of Police, 17 April 1895, Cons 430, 1895/905, SROWA.

discharge all Aboriginal prisoners brought before him for stock theft on the word of police, unless station owners or their representatives were prepared to appear at trials to give evidence. The Under Secretary of Law H. G. Hampton took up the magistrate's point as an opportunity to challenge the system, writing to the Minister for Justice and the Crown Solicitor that Aboriginal trials were prosecuted 'in a very haphazard manner'. Convictions were 'decided on the flimsiest of evidence, which consists in most cases simply of a Constable's testimony, and that perhaps of a native [witness]', when 'it goes without saying that beyond the fact that the cattle are killed it must of necessity remain almost impossible to obtain reliable evidence'.⁶⁴ In this instance, the police responded with consternation. There would be 'serious trouble' if the Resident Magistrate was allowed to implement his intention, the Commissioner warned, for 'the natives will take advantage of the fact of their being discharged without trial'. Bound as he was to the imperfect system of law as it operated, the Crown Solicitor overrode the Under Secretary's arguments.⁶⁵

In addition to threatening to discharge Aboriginal cases brought on police evidence, Resident Magistrate Wace criticised the legal system he represented in testimony to Walter Edmund Roth, then conducting the Royal Commission of Inquiry into the treatment of Aboriginal people in the north.⁶⁶ Overall, Roth's findings were a scathing indictment on the legal network of police, magistrates and justices that oversaw Aboriginal prosecutions. Stock theft comprised 90 per cent of Aboriginal cases to come within the ambit of this legal network, he reported, and it functioned with a degree of 'carelessness almost amounting to criminality'. Police and trackers went forth and arrested whole Aboriginal camps without warrants on little if any evidence; in securing convictions, Aboriginal prisoners were coerced into admissions of guilt and little effort was made to ensure they understood the charges against them; some magistrates convicted children as young as ten; and the capacity of magistrates and justices of the peace to adjudicate their own or their neighbours' grievances gave them a 'terrible power' over Aboriginal people.⁶⁷

Even before Roth's investigations, the status of magistrates and justices of the peace as local landowners had raised questions about the extent to which their legal authority could be abused. This was debated in the press in late 1898 and early 1899 when three separate cases arose of justices of the peace charged with Aboriginal assault.⁶⁸ Each of these cases was settled by neighbouring magistrates with inconsequential fines, but their quick succession focused public attention on the wide-ranging powers held by honorary justices of the peace to adjudicate

64 Under Secretary of Law to the Minister for Justice, 22 December 1904, and the Crown Solicitor, 26 January 1905, Cons 430, 1905/1330, SROWA.

65 Crown Solicitor to the Under Secretary of Law, 27 January 1905, Cons 430, 1905/1330, SROWA.

66 Roth Report 1905, 17.

67 Roth Report 1905, 13–21.

68 'Ill-treating a native: a magistrate fined', *Western Mail*, 10 February 1899; 'Ill-treatment of natives', *Western Mail*, 3 March 1899.

Aboriginal matters.⁶⁹ However, like the series of queries issued by the Attorney General's office about magistrates' haphazard paperwork, irregular patterns of sentencing and acceptance of doubtful evidence, these cases of justices on trial for Aboriginal assault did little to alter the discretion allowed to the local magistracy to interpret how the law would be applied to Aboriginal people. Indeed, just months earlier in May 1898, a circular was issued to all magistrates and police stating that the role of Aboriginal protector would henceforth be considered part of their 'ordinary duties'.⁷⁰

Undoubtedly some magistrates and justices were personally unsuited to their role's responsibilities, but the legal breaches that marked their daily dealings with Aboriginal people went well beyond questions of personal disposition. More fundamentally, they arose from the difficulties of governing the pastoral frontier through an assumed legal jurisdiction that in reality was far from secure. However, one of the outcomes of Roth's report was a recommendation that the legal authority to control 'the welfare and protection of the natives' be clarified under the office of the Chief Protector. This recommendation was incorporated into the *Aborigines Act 1905*, which would usher in a new era of restraint on Aboriginal lives in the name of protection.⁷¹ Over the coming years, pastoralist complaints about Aboriginal 'depredations' would fade as Aboriginal people became more essential to the pastoral economy, but also more subject to the overseeing eye of the Aborigines Department.

Conclusion

Mark Finnane and John McGuire have noted that the pacification of Australia's frontiers entailed a 'transitional period', during which an earlier absence of an effective infrastructure of law and government gradually gave way to a criminal justice network represented by police, courts and prisons that brought Aboriginal people within a 'new locus of regulation'.⁷² In Australia's north-west, these phases were made less distinct through the appointment of a widespread regional magistracy with broader powers to award Aboriginal punishment than pertained elsewhere in Australia. Alongside the mounted police, the magistracy was intended to provide the colony's newly opening districts with a legal framework that would facilitate the management of Aboriginal people through the administration of justice at the local level. Not only would jurisdiction be ensured over the remotest frontier, it was envisaged, but a system of reporting and central administrative oversight would safeguard the impartial and just operation of the law.

69 Similar questions had been raised decades earlier in New South Wales about the discretionary power magistrates held over convict labourers. Neal 1991: 116.

70 Circular from John Forrest to Resident Magistrates, Resident Medical Officers and Police Officers, 1 May 1898, Cons 255, 1898/53, SROWA.

71 Roth Report 1905, 1–2; Haebich 1988.

72 Finnane and McGuire 2001: 280.

In reality, the relationship of Aboriginal people to the settler state remained indeterminate, and the problems of quelling Aboriginal attacks on settler property remained difficult to resolve on frontiers where the conflicting interests of incoming settlers and dispossessed Aboriginal people presented constant challenges to the law's terms. To some degree, the failures of legal order arose from a magistracy comprised of land owners with limited legal training and economic investments in the very districts where they represented the face of government. That this was likely to produce an abuse of authority was a well-known story in the history of the colonial magistracy.⁷³ Yet the larger, less personal obstacle to the establishment of legal order in Australia's north-west lay in the inherent conditions of a volatile frontier, where 'government had constantly to be reinvented' in response to local conditions.⁷⁴

The expressed view of some magistrates — one widely reflected in the magistracy's everyday practices — was that their role had more to do with the pragmatic need to pacify an Aboriginal population over which jurisdiction remained uncertain than with a legal duty to deliver justice. In pursuing this course they were allowed considerable discretion by the central government in determining how the punitive function of the law would be applied to Aboriginal people, so long as their legal imperfections could be smoothed over within the framework of law. In so far as this system of Aboriginal management failed to regulate a protractedly unsettled frontier, the result was that few observers believed in the law's efficacy: this included settlers who complained that sending Aboriginal people to gaol had no effect in protecting their property;⁷⁵ and officials like the police constable who refused to do any more flogging, or the magistrate who declared he would no longer prosecute Aboriginal cases. One witness to Roth's inquiry commented that the terms on which Aboriginal people were prosecuted and convicted were a 'perfect farce', and the only way to remedy this legal masquerade was to stop bringing them to trial.⁷⁶ Yet unable to dispense either with the rule of law or with the claim to jurisdiction over Aboriginal people, there was perhaps little scope but for government authorities to tolerate the gap between the principle and the reality of 'what is called British justice'.⁷⁷

References

Official printed sources

1884 British Parliamentary Papers, No. 627, Despatches of the Governors of the Australian Colonies, with the Reports of the Protectors of Aborigines.

73 Neal 1991: 134.

74 Douglas and Finnane 2012: 66.

75 For instance 'The native question', *Western Mail*, 9 April 1892: 35.

76 'Dr Roth's investigations: prosecution of Aborigines', *The West Australian*, 14 February 1905: 2-3.

77 'Dr Roth's investigations: prosecution of Aborigines', *The West Australian*, 14 February 1905: 2-3.

1882 Western Australia, Legislative Council, Instructions to and Reports from the Resident Magistrate Despatched by Direction of his Excellency on Special Duty to the Murchison and Gascoyne Districts (Fairbain Report), Government Printer, Perth.

1883 Western Australia, Legislative Council Minutes, 2nd Session, A 10, 'Telegrams from South Australia and Queensland as to the Powers of Justices or Resident Magistrates to Pass Sentences upon Aboriginal Natives', Government Printer, Perth.

1885 Western Australia, Legislative Report of the Select Committee of the Legislative Council to Consider and Report upon Questions Connected with the Treatment and Condition of the Aboriginal Natives of the Colony, Government Printer, Perth.

1905 Western Australia, Report of the Royal Commission of the Condition of the Natives (Roth Report), Government Printer, Perth.

Pearl Shell Fishing Regulation Act 1873 (WA) (37 Vict. No. 11).

Aborigines Protection Act 1886 (WA) (50 Vict. No. 25).

Aboriginal Offenders Act (Amendment) 1892 (55 Vict. No. 18).

Aboriginal Offenders Act (Amendment) 1893 (56 Vict. No. 15).

Aborigines Act 1905 (WA) (5 Edw.VII. No. 14).

State Records Office of Western Australia (SROWA)

Consignment 255, Chief Protector of Aborigines Files.

Consignment 388, Aborigines Protection Board Files.

Consignment 527, Colonial Secretary's Office Files.

Consignment 430, Police Department General Files.

Consignment 968, Prisons Department Files.

Newspapers

The Perth Gazette

The West Australian

Western Mail

Published sources

- Anderson, David 1986, 'Stock theft and moral economy in colonial Kenya', *Africa* 56(4): 399–416.
- Benton, Lauren and Lisa Ford 2013, 'Magistrates in empire', in *Legal Pluralism and Empires 1500–1850*, Lauren Benton and Richard R. Ross (eds), New York University Press, New York.
- Bolton, GC 1979, 'Angelo, Edward Houghton (1870–1948)', *Australian Dictionary of Biography*, <http://adb.anu.edu.au/biography/angelo-edward-houghton-5029/text8371>.
- Castles, Alex 1982, *An Australian Legal History*, Law Book Co, Sydney.
- Choo, Christine and Chris Owen 2003, 'Deafening silences: understanding frontier relations and the discourse of police files through the Kimberley police records', *Studies in Western Australian History* 23: 129–156.
- Clement, Cathie 1989, 'Monotony, manhunts and malice: eastern Kimberley law enforcement 1886–1908', *Journal and Proceedings of the Royal Western Australian Historical Society* 10(1): 85–96.
- Douglas, Heather and Mark Finnane 2012, *Indigenous Crime & Settler Law*, Palgrave Macmillan, London.
- Evans, Julie 2004, 'The formulation of privilege and exclusion in settler states', in *Honour Among Nations*, Marcia Langton et al (eds), Melbourne University Press, Melbourne, 69–82.
- Evans, Julie 2009, 'Where lawlessness is law: the settler-colonial frontier as a legal space of violence', *Australian Feminist Law Journal* 30: 3–22.
- Finnane, Mark and John McGuire 2001, 'The uses of punishment and exile: Aborigines in colonial Australia', *Punishment and Society* 3(2): 279–298.
- Ford, Lisa 2010, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788–1936*, Harvard University Press, Cambridge, MA.
- Gill, Andrew 1977, 'Aborigines, settlers and police in the Kimberleys 1887–1905', *Studies in Western Australian History* 1: 1–28.
- Gilmartin, David 2003, 'Cattle, crime and colonialism', *Indian Economic Social History Review* 40(1): 33–56.
- Golder, Hilary 1991, *High and Responsible Office: A History of the NSW Magistracy*, Sydney University Press, Sydney.

- Haebich, Anna 1988, *For Their Own Good: Aborigines and Government in the Southwest of Western Australia*, University of Western Australia Press, Perth.
- Hasluck, Paul 1970, *Black Australians: A Survey of Native Policy in Western Australia 1829–1897*, 2nd edition, Melbourne University Press, Melbourne.
- Hunter, Ann 2012, *A Different Kind of Subject*. Australian Scholarly Publishing, Melbourne.
- McGregor, Russell 1993, 'Law enforcement or just force? Police action in two frontier districts', in *Race Relations in North Queensland*, Henry Reynolds (ed), University of Queensland Press, St Lucia: 63–82.
- Marchant, Leslie 1981, *Aboriginal Administration in Western Australia 1886–1905*, Australian Institute of Aboriginal Studies, Canberra.
- Neal, David 1991, *The Rule of Law in a Penal Colony*, Cambridge University Press, Melbourne.
- Nettelbeck, Amanda 2013, '"Equals of the white man": prosecution of settlers for violence against Aboriginal subjects of the Crown, colonial Western Australia', *Law and History Review* 31(2): 355–390.
- Nettelbeck, Amanda and Robert Foster 2010, 'Colonial judiciaries, Aboriginal protection and SA's policy of punishing with "exemplary severity"', *Australian Historical Studies* 41(3): 319–351.
- Owen, Chris 2003, '"The police appear to be a useless lot up there": law and order in the East Kimberley', *Aboriginal History* 27: 105–130.
- Palmer, Darren 1994, 'Magistrates, police and power in Port Phillip', in *A Nation of Rogues: Crime, Law and Punishment in Colonial Australia*, David Philips and Susanne Davies (eds), Melbourne University Press, Melbourne, 73–96.
- Pedersen, Howard and Banjo Woorunmurra 1995, *Jandamarra and the Bunaba Resistance*, Magabala Books, Broome.
- Pope, Alan 2011, *One Law for All? Aboriginal People & Criminal Law in Early South Australia*, Aboriginal Studies Press, Canberra.
- Quinlan, Michael 2004, 'Australia 1788–1902: a working man's paradise?', in *Masters, Servants & Magistrates in Britain & the Empire*, Douglas Hay and Paul Craven (eds), University of North Carolina Press, Chapel Hill, 219–250.
- Rangelov, Jamens 2005, 'The Port Phillip Magistrates 1835–1851', unpublished PhD thesis, Victoria University, Melbourne.

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- Ross, Helen and Eileen Bray 1989, *Impact Stories of the East Kimberley*, East Kimberley Assessment Project, Canberra.
- Slack, Michael 2002, 'The "plains of promise" revisited: reassessment of the frontier in north-west Queensland', *Journal of Australian Studies* 26: 71-83.
- Smith, Keith 2009, *Liberalism, Surveillance and Resistance: Indigenous Communities in Western Canada 1877-1927*, Athabasca University Press, Edmonton.
- Ward, Damen 2003, 'The Politics of Jurisdiction: "British" Law, Indigenous Peoples & Colonial Government in South Australia & New Zealand c 1834-60', unpublished PhD thesis, Oxford University, Oxford.

This text taken from *Aboriginal History*, Volume 38,
edited by Shino Konishi, published 2015 by
ANU Press, The Australian National University, Canberra, Australia.