

‘The Same Measure of Justice’: Aboriginal Convicts in the Australian Penal Colonies

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During the first half of the nineteenth century, one of the uses Britain made of its Australian penal colonies was as a repository for incorrigible indigenes from its various colonies. Included amongst this largely forgotten cohort were several dozen Aboriginal men transported from New South Wales. Sent to such far-flung places as Van Diemen’s Land and Norfolk Island, Aboriginal captives were incorporated into the system and worked as convicts. Factors that set them apart from other convicts include their different pathways into captivity, their different understandings of and responses to imprisonment, and the different rationale informing the punishment meted out to them by the colonial authorities.

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In the middle of winter 1848, three men fled into the bush surrounding Parsons’ Pass, a cutting through the hills to the north east of Hobart in Van Diemen’s Land.¹ All three were convicts absconding from a hiring depot located there. One of the men, Thomas Jones, was an Englishman with a lengthy history of offences.² Another, Billy Roberts from New South Wales, had already been disciplined the previous year for ‘breaking out of barracks at night’.³ The third man, Jemmy Warrigle, also from New South Wales, was yet to have any offences recorded against him.⁴ Absconding from captivity was not in itself unusual. What sets this incident apart is the fact that Roberts and Warrigle were not part of the usual cohort of secondary offenders transported south from New South Wales for further punishment, but were instead ‘Aboriginal natives’ of that colony. This escapade illustrates three significant points: that Aboriginal men were taken into captivity by the colonial authorities; that the mode of captivity was the convict system; and that

such captivity saw Aboriginal men removed from their cultural and geographic contexts often never to return home.

Roberts, also known as Jimboy or Samboy, arrived in Van Diemen's Land from New South Wales on 18 April 1847 on board the *Waterlily* after being sentenced to transportation for life. This sentence was imposed on him in the Central Criminal Court in Sydney where he had been found guilty of having assaulted 'one Fanny Hasselton, by striking her on the head with a tomahawk'.⁵ Warrigle, whose Aboriginal name was recorded as Keetnurnin, was sentenced to transportation for life in the Melbourne Supreme Court on 17 October 1846 where he had faced five charges related to spearing a shepherd. The incident had taken place at the Lower Loddon in the Port Phillip District (the present day state of Victoria) several months earlier, on 28 July. He arrived in Van Diemen's Land on board the *Flying Fish* on 10 May 1847.⁶ The relatively brief period of time that had elapsed between their respective arrivals in Van Diemen's Land is reflected in the convict numbers they were allocated, 864 in Roberts' case while Warrigle was given the number 912.⁷

Like other new convicts, both Roberts and Warrigle were subjected to an inspection and interrogation on their arrival in Hobart. A government scribe recorded the dates and places of their trials, and also took down detailed descriptions of their physical appearances. Roberts was estimated to be the older and taller of the two men. His age was recorded as 30 and height as five feet and nine inches, whereas Warrigle's age was guessed at about 27 while he stood five feet and five inches tall. Both men were noted as having 'black' complexions and large heads, while Roberts' hair was not only recorded as being 'black', but also 'woolly'. Their facial features were then described in some detail. Colonial attention was also focused on any distinguishing features or marks that might set the convicts apart from their fellow prisoners. Knowledge of such identifiers could prove useful if, later on, a convict absconded and needed to be accurately identified on being recaptured. In Warrigle's case, he was simply stated to have been 'stout made'. Roberts, though, sported a number of unusual distinguishing marks. Not only did he have a 'lost tooth upper jaw', but he also sported a 'scar centre of forehead' as well as other facial scarring. Such marks may not have held any particular meaning within the context of the convict system, but within Roberts' own socio-cultural context they probably

denoted that he had been through the rites and ceremonies considered necessary to become an initiated man.⁸

As part of the interrogation process, each new convict was asked to state why they had been transported to Van Diemen's Land. In Roberts' case, his convict record states in the section reserved for 'transported for':

Assault with intent to do grievous bodily harm states this offence. I was servant to a woman for 2 years I do not know her name she would not pay me my wages and I knocked her down with a tommyhawk.⁹

Warrigle's record reads 'wounding with intent to do some grievous bodily harm stated this offence'.¹⁰ The phrase 'stated this offence' is an important signifier. The impost on all newly arrived convicts to state their offence functioned as a measure by which colonial authorities could gauge their propensity for telling the truth. The authorities had no need to take the convict's own word as to why they had been shipped to the colony. They had already been furnished with a register of all the convicts carried on board a vessel together with details of the date and place of trial, the crime for which the convict had been transported, and the length of the person's sentence. In addition to having measured their height, cross-matching the convicts' accounts of themselves with the details provided from their places of origin allowed the colonial authorities to take their measure of the person's character as well.

Estimating a convict's character was considered necessary in determining their immediate future within a convict system structured around extracting their labour. As Hamish Maxwell-Stewart has pointed out, convicts constituted an 'unfree workforce' that was 'induced or forced to participate in the work process'.¹¹ Of pressing administrative concern, then, on each convict's arrival in the colony was the need to determine their suitability for the work that was available. Towards this end, a convict's occupation was recorded in their record. On both Roberts' and Warrigle's convict records, their trade is stated as labourer. Literacy levels were also a consideration for an administration whose lower echelons were partially staffed by convict workers. While it was recorded that Roberts 'can speak English well', Warrigle's record, by way of contrast, carries the

annotation 'cannot speak English'. Despite their religious affiliations (Roberts is noted to have been a Protestant and Warrigle a Roman Catholic), neither man had learned to read or write.¹²

During the period that Roberts and Warrigle were transported to Van Diemen's Land, newly arrived convicts were assigned to work gangs to serve a probationary period. Such gangs usually contained between 250 and 300 workers.¹³ The length of the probationary period was directly related to the severity of the convict's sentence. According to the official scale, those sentenced to life transportation were initially required to serve a four-year period of probation.¹⁴ However, both Roberts and Warrigle were allotted shorter stints in the work gangs. Roberts was bound to a thirty-month period of labour, while Warrigle was ordered to serve a probationary period of three years. Both men would have been issued with either yellow or parti-coloured convict clothing from the government stores before being sent to join a convict gang at Lymington, south of Hobart, where 155 male convicts worked clearing and cultivating the land.¹⁵

Life within the convict system did not suit Roberts. Throughout his first year in captivity, he engaged in a variety of acts that were listed on his convict conduct record as offences. 'Breaking out of barracks at night' saw him found guilty of 'gross misconduct' and sentenced to hard labour in chains. 'Resisting a watchman in the course of his duty' resulted in Roberts serving fourteen days in solitary confinement, the first of two such fortnightly periods spent in enforced isolation. Various other misdemeanours were recorded against him, suggesting that he had become susceptible to increased official scrutiny. The punishments inflicted on him no doubt took a toll on his health as he also underwent three admissions to hospital during the course of 1847. It is probable that he first crossed paths with Warrigle sometime between the latter's arrival at Lymington on 20 May 1847 and his own removal to the Coal Mines at Tasman Peninsula in July of that year. As its name suggests, convict workers at the Coal Mines were employed in mining coal for sale. Some were also required to construct and maintain buildings at the site, while others took care of the gardens from which the convicts and their overseers were fed.¹⁶

Over the first few months of 1848, the three captives who conspired to abscond from Parsons' Pass arrived separately to join the convict workforce stationed at the hiring

depot there. Jones, a carpenter who was sentenced to fifteen years transportation at Shropshire, England, in 1842 for ‘robbery with violence’ and whose gaol report described him as a ‘bad character’, was the first to be sent there on 16 February. During his first six years captivity in Van Diemen’s Land, the man who had been allocated convict number 8039 had amassed a lengthy list of offences on his conduct record.¹⁷ Next to join the jobbing gang at Parsons’ Pass was Roberts who was sent to the hiring depot on 24 March 1848.¹⁸ The following month, on 13 April 1848, Warrigle joined them.¹⁹ The men formed part of a ninety-man strong jobbing party that was put to work clearing land for a local property owner who paid 6d per day for each convict worker’s labour.²⁰ This work would have required a great deal of physical exertion. The steepness of the terrain is indicted by the descriptive names of the adjacent hills, Bust-Me-Gall Hill and Break-Me-Neck Hill.

Within days of their 22 June 1848 escape, the Convict Department included the men’s trial and arrival details and physical descriptions in a column in *The Hobart Town Gazette*. In its 27 June advertisement, the Department also advertised a reward for their return to captivity:

From the Parsons’ Pass Party on the 22nd instant

8039 Thomas Jones, per Triton, tried at Salop Assizes, 18th March 1842, 15 years, carpenter, 5 feet 4½, age 24, complexion sallow, hair dark brown, eyes hazel, native place Tidaker, Brecon, scar on left arm near elbow, scar on forefinger left hand. Reward 2l., or such lesser sum as may be determined upon by the convicting Magistrate.

864 Billy Roberts, alias Tomboy, per Waterlily, tried at Sydney Criminal Court, 28th December 1846, life, labourer, 5 feet 9, age 31, complexion black, hair black woolly, eyes black, native place Goulburn, lost front tooth upper jaw, scar centre of forehead, scar over right eyebrow, scar over right cheek-bone. Reward 2l., or such lesser sum as may be determined upon by the convicting Magistrate.

912 Jemmy Warrigah [sic], per Flying Fish, tried at Melbourne Supreme Court, 17th October 1846, life, labourer, 5 feet 5, age about 28, complexion black, hair black, eyes black, native place Port Phillip, stout

made. Reward 2l., or such lesser sum as may be determined upon by the convicting Magistrate.²¹

The nominal rewards offered for each man were the same. Just a week after the advertisement, on 4 July 1848, Warrigle was recaptured and returned to captivity in Longford Gaol, north west of Parsons' Pass. After several days he was transferred north to Launceston, the closest major settlement, before being moved again on 9 August 1848 to one of Van Diemen's Land's harshest penal stations, Port Arthur.²² While being held in captivity at Port Arthur, the Aboriginal convict would have received a daily ration comprising $\frac{3}{4}$ lb. of meat, $1\frac{3}{4}$ lb. of flour or bread in proportion, $\frac{3}{4}$ lb. of vegetables, $\frac{1}{2}$ oz. of soap, and $\frac{1}{2}$ oz. of salt. Once every six months, clothing including a jacket, waistcoat, trousers, one shirt, a pair of boots, and a cap would have been issued to him from the stores. He would also have been provided with a blanket, a rug, and a bed tick, items that were only replaced when they were worn out or otherwise destroyed.²³

Provided that convicts fulfilled their probationary requirements, they eventually became eligible to work for private employers.²⁴ In due course Warrigle became a pass holder. This meant that he could enter private service and earn wages, but would also become responsible for his own upkeep. Once pass holders had spent some time in private service (twelve months in Warrigle's case) and had served more than half of their sentence, they became eligible to apply for a ticket-of-leave. Such an indulgence was not granted automatically, and could be rescinded if the recipient committed any further offences. Well-behaved ticket-of-leave men and women could, however, look forward to eventually receiving a conditional pardon that would simply restrict them to remaining in the colony, or even a certificate of freedom that would see them unfettered. A letter from the Colonial Secretary in Victoria (formerly the Port Phillip District) dated 13 April 1854 confirmed a reduction in Warrigle's sentence from life to a period of twelve years transportation from the date of his conviction. Having already completed more than six years in captivity, the last hurdle standing in the way of Warrigle's ticket-of-leave was overcome. He was granted his ticket-of-leave on 9 May 1854. Although he had made considerable progress towards obtaining his freedom, Warrigle did not live long enough to receive a pardon. He died in hospital in Hobart Town on 30 June 1858.²⁵

In the meantime, neither Jones nor Roberts had managed to elude the authorities for long. Jones was back in captivity by 11 July 1848, less than a fortnight after absconding from Parsons' Pass. He, too, was sent to Port Arthur but was afterwards shipped to the probation station at Norfolk Island on 6 October 1848.²⁶ A week after Jones' apprehension, Roberts was also back in captivity and, like his fellow absconders, was sent to Port Arthur. Like Warrigle, he was lent out to private employers. He did not, however, earn his ticket of leave. Instead, Roberts continued to have offences recorded against him and spent several more periods in solitary confinement before eventually being shipped to Norfolk Island on 7 March 1850. Just over four months later, on 23 July 1850, Roberts died in custody.²⁷ Whether or not the colonial authorities had intended it, both Roberts and Warrigle had in effect served a life sentence.

Roberts and Warrigal were two of at least sixty Aboriginal men from New South Wales who were incorporated into the convict system in the Australian colonies during the first half of the nineteenth century.²⁸ Transported to places as diverse as Van Diemen's Land, Norfolk Island, and the Port Jackson penal islands of Goat Island and Cockatoo Island, Aboriginal convicts were put to work alongside other convicts clearing land, breaking rocks, and building roads.²⁹ They laboured to help build the infrastructure of the colonial society that contained them. For the most part, Aboriginal convicts were treated the same as the majority of other convicts whilst in captivity. They were expected to participate in the government labour force, to receive the same rations from the government stores as other convict workers, and to be punished in the same way for any acts considered to be offences. It was their different pathways into captivity, their different understandings of and responses to imprisonment, and the different rationale informing the punishment meted out to them that set them apart from other convicts.

The pathways through which Aboriginal men entered the convict system varied, changing over time as the fledgling colony's systems of governance matured. Surviving records from the early decades of colonial contact, between 1788 and 1820, demonstrate that a small number of Aboriginal men were treated as convicts after being banished to penal stations at Norfolk Island and Van Diemen's Land by the colonial governor. None

of this early cohort ever stood trial. When the first of the Aboriginal men to become incorporated into the convict system, Musquito and Bull Dog, were taken into custody in 1805, Governor King sought a legal opinion as to whether he might put the two Aboriginal prisoners on trial. Judge-Advocate Atkins told King that as Aboriginal people were 'not bound by any moral or religious Tye', their evidence could not be accepted as being legal.³⁰ He concluded that:

The Natives of this Country (generally speaking) are at present incapable of being brought before a Criminal Court, either as Criminals or as Evidences; that it would be a mocking of Judicial Proceedings, and a Solecism in Law; and that the only mode at present, when they deserve it, is to pursue and inflict such punishment as they may merit.³¹

The Governor responded by exiling Musquito and Bull Dog, 'principals in their [local Aborigines] late Outrages' against colonists, to Norfolk Island to be worked as convict labourers and to be 'victualled from the Stores'.³² The men spent more than seven years there relegated to the lowest ranks of the labouring prisoners, working as assistants to the charcoal burners.³³ Bull Dog's fate is unclear.³⁴ Musquito was later sent to Van Diemen's Land in 1813 where he worked as an assigned convict servant and as a blacktracker before eventually being hanged for murder in Hobart Town on 25 February 1825.³⁵ By the time Musquito was put on trial in Van Diemen's Land, the colonial judiciary had found ways to circumvent issues relating to Aboriginal incapacity to stand trial. As the century progressed, increasing numbers of Aboriginal defendants were tried in the colonial law courts of New South Wales. Indeed, from the early 1830s until the 1860s the courts became the conduit through which dozens of Aboriginal men passed on their way into the convict system.

The key factor that facilitated Aboriginal men being sent into captivity was the notion that they were to be treated as British subjects. This status was by no means unequivocal prior to 1837 (at which time the British Government instructed the colonial administration that Aboriginal people were British subjects), but was nevertheless deployed long before that date to justify bringing Aboriginal people under the auspices of

the colonists' laws.³⁶ Fundamentally, it was held that as British subjects Aboriginal people were entitled to the same protection under the law as the colonists. The corollary of this was that Aboriginal people were also considered to be answerable under the colonists' laws. This position was neatly summarised by Justice Alfred Stephen who, when faced with seven Aboriginal defendants during the September 1843 Maitland circuit court, told the court that 'the same measure of justice, and in the same scales' applied to all alike 'whatever the offender's colour'.³⁷ This argument, which was central to Aboriginal captives being sent into the convict system through the law courts of New South Wales, was specious. Few Aboriginal people at the frontier were sufficiently *au fait* with the colony's administrative and judicial systems to avail themselves of the law's protection. In any case, most frontier skirmishes occurred beyond the reach of the law. In return for the apparent benefits afforded by such protection, Aboriginal people were expected to obey laws that were generally outside their ambit of experience.

Despite the colonial judiciary's claim to Aboriginal sameness in the eyes of the law, Aboriginal difference was tacitly acknowledged within the courtroom in several different ways. The most visible of these was through the provision of an interpreter. Setting cultural differences aside, almost all of the Aboriginal defendants brought before the colonial judges during the first half of the nineteenth century were not considered sufficiently competent speakers of English to understand the charges being put to them. As the century wore on, increasing numbers of colonists became adequately versed in Aboriginal dialects to convince the law courts of their competence to interpret for Aboriginal prisoners. For example, when on 4 November 1840 an Aboriginal man known to colonists as Billy, *alias* Neville's Billy, was put on trial before Chief Justice Dowling in the Supreme Court of New South Wales, an umbrella maker from Sussex Street, Sydney was sworn as the interpreter. This man, William Jones, was a former convict who had spent about eight years living near the banks of the Castlereagh River three hundred miles away from Sydney where he claimed to have learned some of Billy's language.³⁸ On other occasions, the missionary and linguist Reverend Launcelot Threlkeld was a familiar sight at the courthouse in Sydney where he, too, performed the function of sworn interpreter in several cases involving Aboriginal defendants. More often than not, though, Threlkeld relied on well-known Sydney identity Bungaree and, later, on his informant

and companion Biraban to do the actual translating.³⁹ Such was the importance of the state-provided interpreter to upholding the notion that trials of Aboriginal defendants were fair and just that in instances when nobody could be found to perform this role, trials were simply abandoned.⁴⁰

As well as having difficulties comprehending court proceedings, Aboriginal defendants were significantly disadvantaged in other ways because of their perceived difference. One facet of such disadvantage was eloquently demonstrated to the court by George Nichols in his capacity as the court-appointed defence lawyer for Jackey, an Aboriginal defendant who appeared before the Supreme Court of New South Wales in Sydney on 8 August 1834 and who was subsequently transported to Van Diemen's Land. In response to an enquiry from the Solicitor-General about the absence of any witnesses for the defence, Nichols called Biraban to the witness stand. While the latter had no material knowledge pertinent to the case, Nichols' point was that Biraban – like any other Aboriginal people that might be called as witnesses – was excluded from giving evidence in court. Because Aboriginal people were considered by the colonists to be pagans, they were not permitted to swear the oath required to fulfil the functions of witness or interpreter in a colonial court of law.⁴¹

Colonial perceptions of Aboriginal difference also disadvantaged Aboriginal defendants who faced trial by jury. At the sitting of the Maitland circuit court at which Stephen emphasised their sameness before the law, the seven Aboriginal defendants appeared before a jury comprised entirely of colonists as was the usual practice. The jurymen were drawn from amongst the landowners of the district, men that considered their persons and their property to be under threat from Aboriginal people with whom they considered themselves to have been in a state of open warfare.⁴² It had even been intended that the jury would include a local identity upon whose station two of the Aboriginal defendants were alleged to have committed a crime, and from whose pocket a reward had been promised for the capture of the wanted men.⁴³ In the colonial courtroom, the continuing emphasis placed on overlooking the colour of Aboriginal defendants as they stood before the bench indicted with the murder of white people belies the very impossibility of doing so. The bias at the September 1843 Maitland circuit court was evident in the final outcome. All seven Aboriginal defendants were found guilty and

sentenced to death, whereas only forty per cent of the other defendants received a guilty verdict from the jurymen. Four of the Aboriginal defendants later had their death sentences overturned by the colonial governor and were transported instead.⁴⁴ Being reprieved from a sentence of death became another pathway through which Aboriginal men entered the convict system.

Captivity was not prevalent in pre-contact Aboriginal societies. Instead, Aboriginal justice systems provided for what could be understood as tribunals followed by swiftly administered retributive punishments. Such chastisements may, for example, have included being speared by close relatives of someone who had been harmed or offended. In other instances, public shaming such as naming and berating was used to restore and maintain the social order.⁴⁵ Aboriginal men, then, were not accustomed to incarceration. Being held in local lock ups and conveyed to city gaols to await their trials was therefore an entirely foreign experience for Aboriginal men. Evidence suggests, though, that Aboriginal captives were both adaptive and inventive in negotiating this facet of the colonial experience.

In July 1805 Tedbury, son of the well-known Aboriginal leader Pemulwuy, and some of his compatriots were being held in Parramatta Gaol, Sydney, on the suspicion that they had been involved in taking action against colonists at the Hawkesbury River.⁴⁶ On 1 July, a group of these Aboriginal prisoners was released from captivity on the strength of their promise to capture Musquito, the man that the authorities considered to be a major instigator of what they termed ‘outrages’. Five days later, the freed prisoners turned over Musquito and Bull Dog to the colonial authorities. This act gave them the leverage to negotiate Tedbury’s release from custody.⁴⁷ These circumstances can best be understood through appreciating that while Musquito and probably Bull Dog were Gai-Maraigal men of the Kurringgai language group, Tedbury was a Bediagal man from the Darug language group.⁴⁸ Even if they were not at enmity with Kurringgai, Darug people would have had greater loyalty to one of their leaders rather than to people outside their immediate group. The former prisoners therefore made skilful use of diplomacy to free both themselves and one of their leaders from captivity.

After being taken captive, Musquito and Bull Dog did not simply languish inside Parramatta Gaol awaiting whatever fate had in store for them. Instead, they sought to escape from within the four walls that contained them and to exact retribution. The two men 'ingeniously contrived to loosen some of the stone work by the help of a spike nail' and were overheard threatening to burn the Gaol and all the white men within it.⁴⁹ A fellow inmate reported their plans to the turnkey on 5 August. This cost the informant an attack at the hands of the thwarted men, but also earned him a pardon as the local magistrate was impressed with the man's good conduct in preventing Musquito and Bull Dog from breaking out of custody.⁵⁰

The propensity for Aboriginal men to escape from custody was bemoaned by a local magistrate, Jonathon Warner, in relation to an incident in the Brisbane Water District north of Sydney in 1835.⁵¹ In November and December 1834, the Government had gazetted a reward of £10 per Aboriginal 'ringleader' in the 'various Robberies and other Outrages' committed in the Brisbane Water district.⁵² A group comprising several hundred Aboriginal men from different 'tribes' had been attacking colonists in the area.⁵³ In January 1835, a constable accompanied by three colonists trapped six of the fugitives in a wooden hut. During the ensuing affray, one of the wanted men, Jack Jones, was shot in the neck while three other fugitives escaped. The wounded man and two others, Jago and Nimbo, were taken to the lockup at Brisbane Water.⁵⁴ Jago and Nimbo, who were handcuffed together, seized the local constable as he brought water to their cell. Jones then struck the constable a blow to the head. Jago and Nimbo struggled with the policeman for about twenty minutes, allowing Jones to make his escape.⁵⁵ Warner blamed the escape on the fact that no leg irons were available with which to restrain the captives. Instead, the leg irons were already being used on three other Aboriginal prisoners *en route* to Sydney. Aboriginal prisoners, according to Warner, 'are very determined and consequently require more caution to be looked after than white prisoners'.⁵⁶ He could have added that Aboriginal people were not used to incarceration as a form of punishment; they had not been socialised into accepting it as a valid means of maintaining social control.

Leg irons were commonly used on Aboriginal prisoners as a form of restraint. However, such mechanisms were not always effective in preventing their escape. In

January 1841, nine Aboriginal prisoners were put on board the cutter *Victoria* to be taken out to the brig *Vesper*. The brig was to convey the men to Sydney where, following their sentences to ten years transportation in the Melbourne Supreme Court, they were to join another cohort of Aboriginal convicts on Cockatoo Island. A series of events then transpired that, according to the *Geelong Advertiser*, would ‘verily immortalize ... the authorities of Melbourne’ in relation to their ‘management of the blacks’.⁵⁷ While thirteen white male convicts and one female convict were placed in the hold of the *Victoria*, the nine Aboriginal convicts remained on deck, still wearing leg irons but with their handcuffs removed. The newspaper reported that ‘on their way down the river the people on board the cutter amused themselves by terrifying the blacks, telling them that they would be hanged on their arrival at Sydney’.⁵⁸ When the vessel tacked within a short distance of land, the ironed Aboriginal men leapt overboard. The guards opened fire following which ‘two were seen to sink to rise no more’.⁵⁹ One of the prisoners, Tarrokenunnin, was wounded and recaptured. He later corroborated the newspaper’s version of the events, confirming that the Aboriginal captives were willing to take their chances in the water rather than to risk the hangman’s noose in Sydney.⁶⁰

During the first half of the nineteenth century, the colony of New South Wales took in a much larger tract of land than the state of New South Wales does today. As settlement gradually spread inland and along the coasts from the beachhead township at Sydney Cove, a pattern is evident in relation to the arrests of the Aboriginal men who became convicts. The first of the Aboriginal convicts came from around the greater Sydney area. Those who followed in the 1830s came from the then newly-settled area to the north of Sydney, the Brisbane Water District, while the men transported from the 1840s onwards came from areas further afield, including the Hunter Valley to the north west of Sydney and the Port Phillip District to the south. Significantly, most were apprehended during the decade following initial contact in their respective districts. This coincided with a greater influx of colonial intruders into so-called ‘newly opened up’ areas of settlement, a phenomenon that resulted in increased conflict over land use practices. Tellingly, despite the capacity to house Aboriginal women in convict

establishments that catered specifically for females, all the Aboriginal convicts so far identified for whom records have survived were males of fighting age. This phenomenon derives from the fact that frontier conflict provided the backdrop to the specific encounters that led to those Aboriginal men who were not killed in skirmishes being taken into captivity.⁶¹

Because Britain had never officially declared war on the Aboriginal inhabitants of its Australian colonies, those men taken captive at the frontier by the military or the police were destined to face criminal charges rather than be treated as prisoners of war. Yet the context within which their arrests had taken place informed the rationale that underpinned their punishment. When the three hundred colonists living in the Brisbane Water District came under attack from a confederation of Aboriginal tribes in the early 1830s, eighteen Aboriginal captives eventually stood trial in Sydney. Because of difficulties in correctly identifying some of them, not all were found guilty. However, one man known as Mickey was sentenced to be hanged. Nine of his compatriots being held in gaol pending their transfer to be worked as convicts on Cockatoo Island were made to watch his execution.⁶² Threlkeld, who was present at the event, described the Aboriginal onlookers as having ‘pale visages’.⁶³ Their ‘trembling muscles’, he said, ‘indicated the nervous excitement under which they laboured at the melancholy sight’.⁶⁴ Biraban, who had accompanied Threlkeld, exclaimed “‘When the drop fell, I thought he should shed his skin!’” (like a snake).⁶⁵ Threlkeld suggested to the colonial authorities that any Aborigines under confinement when executions were being carried out ought to be made to watch. It was considered that such an example would be a deterrent to Aboriginal men who were otherwise intent on resisting the colonial intrusion onto their lands.

Billy Roberts’ captivity, as detailed earlier, resulted from a breakdown in communications over an arrangement involving labour and from his having taken the law into his own hands. He had enticed his former employer, Hasselton, from her home with the promise of showing her a nearby swarm of bees. The woman had, according to Roberts, employed him for two years and had failed to pay his wages. Together with her children, Hasselton had accompanied Roberts to a decayed tree. The next thing she remembered was waking up bed with several head wounds and finding that her house had been robbed. In court, Roberts admitted that he had carried out the attack, yet claimed

that if Hasselton's husband had been at home he would have 'bailed him up' instead.⁶⁶ He also told the court that Hasselton's was 'the first white-fellow's blood he had ever shed'.⁶⁷ The circumstances surrounding this event are not the classic example of frontier conflict that most of the other cases involving Aboriginal convicts provide. Nevertheless, the remarks Roberts made during the course of the trial demonstrated an awareness of frontier politics and the expedience of representing himself as a man who was not in the habit of attacking white people and who would rather not have assaulted a woman.

Jemmy Warrigle was arrested following a spate of violent encounters between shepherds and Aboriginal men over the preceding eighteen months. The spearing with which he was charged occurred on the station of a man known as Cooper or Cowper whose shepherds had gained notoriety for misusing Aboriginal women.⁶⁸ In February 1846, a detachment of Aboriginal police (employed for their bush skills and generally used against Aboriginal people from districts other than their own) and their white overseer, William Dana, had been sent to 'pacify' the area. They sought to achieve this by opening fire on local Aboriginal men, discharging 'one hundred rounds of ball cartridge' that killed several men and wounded others.⁶⁹ In August 1846, a detachment of Border Police sent to the troubled area located and arrested Warrigle who was said in the previous month to have thrown two spears at a shepherd, grazing the man's body, and to have been involved in driving off forty of Cooper's sheep.⁷⁰ Despite some colonial officials seeking a mitigation of his sentence to transportation for life, Warrigle's punishment stood. The Resident Judge justified upholding the sentence on the basis that he had intended it to be exemplary. If the sentence was overturned, Warrigle's compatriots might be further encouraged in their attacks and counter-attacks against colonists.⁷¹ At the same time, imposing exemplary sentences was as much about convincing the white population of the efficacy of forwarding troublesome Aborigines to the law courts to be dealt with as it was about curbing the actions of Aboriginal people. The colonial judiciary feared that if it was not seen to be effective, those at the frontier would be more inclined to deliver 'summary justice' to Aborigines.⁷²

Court hearings involving Aboriginal defendants were at times controversial and attracted considerable comment from the media and the public. The trials of Aboriginal men involved in actions against the Brisbane Waters colonists caused a 'great sensation

over the whole territory'.⁷³ Commenting on the proceedings, the *Sydney Gazette* concluded that 'the prisoners being as ignorant as beasts, it was almost a mockery to bring them to the unintelligible formality of a trial'.⁷⁴ In the aftermath of the court hearings, public debate intensified over the justice of trying Aboriginal defendants in accordance with the colonists' law and about the punishments meted out to those found guilty. Drawing on remarks made by Justice Burton, the *Australian* proposed that:

it is not the forms of the trial that form the impression – it is their removal from their tribe for ever, and the idea that will prevail amongst them that they have been put to death; their execution at Brisbane Water could scarcely have a greater effect upon their minds than the dim uncertainty of their fate, which will, perhaps, preserve the circumstances as a tradition, long after the lives of the present generation.⁷⁵

Despite nineteenth-century speculation that the circumstances surrounding the removal of Aboriginal men from their communities might be preserved as a tradition, their very existence within the convict system has, until now, been forgotten. Many convicts were buried in unmarked graves. A similar fate may have befallen Jemmy Warrigle and Billy Roberts, although a colonial fascination with Aboriginal remains may have resulted in their bodies being dissected. Whatever the final outcome, Jemmy Warrigle and Billy Roberts were indeed removed from their tribes forever.

NOTES

¹ Van Diemen's Land has since been renamed Tasmania, while Parsons' Pass is now known as Black Charlie's Opening. Not only were Aboriginal place names largely overwritten by colonial appellations, but many place names associated with the convict era were later erased when transportation to Van Diemen's Land ceased.

² CON 33/33, p. 8039, AOT.

³ CON 37/3, p. 864, AOT.

⁴ CON37/3, p. 912, AOT.

⁵ CON 37/3, p. 864, AOT.

⁶ CON37/3, p. 912, AOT.

⁷ CON 37/3, p. 864, AOT; CON37/3, p. 912, AOT.

⁸ *Ibid.*

⁹ CON 37/3, p. 864, AOT.

¹⁰ CON37/3, p. 912, AOT.

¹¹ Hamish Maxwell-Stewart, 'Life at Macquarie Harbour', in Ian Duffield and James Bradley, *Representing Convicts: New Perspectives on Convict Forced Labour* (London: Leicester University Press, 1997), p. 144.

¹² CON 37/3, p. 864, AOT; CON37/3, p. 912, AOT.

¹³ James Moore, *The Convicts of Van Diemen's Land 1840-1853* (Hobart: Cat & Fiddle Press, 1976), p. 36.

¹⁴ Moore, p. 37.

¹⁵ Ian Brand, *The Convict Probation System: Van Diemen's Land 1839-1854* (Hobart: Blubber Head Press, 1990), p. 89.

¹⁶ CON 37/3, p. 864, AOT; Brand, p. 88.

¹⁷ CON 33/33, p. 8039, AOT.

¹⁸ CON 37/3, p. 864, AOT.

¹⁹ CON37/3, p. 912, AOT.

²⁰ Brand, p. 86.

²¹ *The Hobart Town Gazette*, 27 June 1848, p. 568.

²² CON37/3, p. 912, AOT.

²³ *Regulations for the Penal Settlement at Port Arthur* (Hobart Town: William Pratt, first edition undated, second edition 1858. Melbourne: Hawthorn Press, 1966, reprint), p. 20.

²⁴ Alan Shaw, *Convicts and the Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire* (London: Faber and Faber), p. 73.

²⁵ CON37/3, p. 912, AOT.

²⁶ CON 33/33, p. 8039, AOT.

²⁷ CON 37/3, p. 864, AOT.

²⁸ Kristyn Harman, *Aboriginal Convicts: Race, Law, and Transportation in Colonial New South Wales* (Hobart: University of Tasmanian PhD Thesis, 2008).

²⁹ *Ibid.*

³⁰ ‘Atkins’ Opinion on the Treatment of Natives’, *Historical Records of Australia* [hereafter *HRA*], Series I, Volume V, p. 502.

³¹ Atkins, *HRA*, p. 504.

³² King to John Piper, 8 August 1805, *New South Wales’ Colonial Secretary’s Office Correspondence*, Reel 6040, p. 41, AOT.

³³ Raymond Nobbs, *Norfolk Island and its First Settlement, 1788-1814* (North Sydney: Library of Australian History, 1988), pp. 192, 198.

³⁴ Bull Dog may have died on Norfolk Island sometime after August 1812, but could have been shipped back to Port Jackson along with other evacuated convicts. See Nobbs, p. 192; James Walker. *Early Tasmania: Papers Read Before the Royal Society of Tasmania During the Years 1888 to 1899*, (Hobart: Government Printer, 1989), p. 166.

³⁵ Nobbs, p. 198; *Musquito Correspondence File*, AOT; N J B Plomley (ed.), *Jorgen Jorgenson and the Aborigines of Van Diemen’s Land*, (Hobart: Blubber Head Press, 1991), p. 74; *Hobart Town Gazette*, 3 December 1824, p. 3.

³⁶ Bruce Kercher, *Outsiders: Tales from the Supreme Court of NSW, 1824-1836* (North Melbourne: Australian Scholarly Publishing Limited, 2006), p. 51.

³⁷ *The Maitland Mercury*, 16 September 1843, p.2.

³⁸ R v Billy 1840, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 June 2007 at <<http://www.law.mq.edu.au/scnsw/cases1840-41/RvBilly,1840.htm>>

³⁹ Harman, 2008.

⁴⁰ The best-known example of such an outcome is probably the case involving Port Phillip District personality Koort Kirrup. Arrested by Henry Dana and his Native Police on 31 August 1844, Kirrup was held in gaol for sixteen months before finally being released from captivity as his trial could not proceed for want of an interpreter. See 46/2561 4/2724 SRNSW. See also Protector William Thomas to the Resident Judge Roger Therry, 14 May 1845, 46/2561 4/2742, SRNSW, in which a number of cases brought before the Supreme Courts in Sydney and Melbourne where Aboriginal defendants were discharged because of the lack of an interpreter are also mentioned.

⁴¹ R v Jackey 1834, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 October 2005 at <http://www.law.mq.edu.au/scnsw/Cases1834/html/r_v_jackey__1834.htm>

⁴² Roderick Flanagan. *The Aborigines of Australia* (Sydney: Edward F. Flanagan and George Robertson and Company, 1888), p. 130.

⁴³ *Sydney Morning Herald*, 19 September 1843, p. 2.

⁴⁴ Harman, 2008.

⁴⁵ William Edwards, *An Introduction to Aboriginal Societies* (Victoria: Thomson Social Science Press, second edition, 2004), pp. 72-76.

⁴⁶ *Sydney Gazette*, 19 May 1805, p. 2.

⁴⁷ King to Camden, 20 July 1805, *HRA*, Series I, Volume V, p. 497.

⁴⁸ Musquito was identified as probably belonging to the Gai-Maraigal people by his descendent Dennis Foley as cited in Naomi Parry, 'Musquito (c. 1780 - 1825)', *Australian Dictionary of Biography*, Supplementary Volume, Melbourne University Press, 2005, p. 299; Tedbury's father Pemulwuy was known to be a member of the Bediagal clan of the Darug tribe because of the designs on the spear that he carried. See James Kohen, 'Tedbury (- 1810)', *Australian Dictionary of Biography*, Supplementary Volume, Melbourne University Press, 2005, pp 318-19.

⁴⁹ *Sydney Gazette*, 11 August 1805, p. 2.

⁵⁰ *Ibid.*

⁵¹ Charles Swancott, *The Brisbane Water Story Parts 1 to 4* (Booker Bay: Brisbane Water Historical Society, 1953-61), Part 1, p., pp. 24-5.

⁵² *New South Wales Government Gazette*, 19 November 1834, p. 811; *New South Wale Government Gazette*, 26 November 1834, p. 825; *New South Wales Government Gazette*, 17 December 1834, p. 881.

⁵³ *R v Monkey and Others 1835, Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 October 2005 at <http://www.law.mq.edu.au/scnsw/cases1835-36/html/r_v_monkey__1835.htm>; Harman, 2008.

⁵⁴ Swancott, Part 1, p. 24.

⁵⁵ *R v Long Dick, Jack Jones, Abraham, and Gibber Paddy 1835, Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 October 2005 at <http://www.law.mq.edu.au/scnsw/cases1835-36/html/r_v_long_dick__1835.htm>; Harman, 2008.

⁵⁶ Swancott, Part 1, pp. 24-5.

⁵⁷ *Geelong Advertiser*, 23 January 1841, p. 3.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Ian Clark (ed.), *The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate, Volume Two: 1 October 1840 - 31 August 1841* (Clarendon: Heritage Matters, 1998), p.59.

⁶¹ Harman, 2008.

⁶² *Ibid.*

⁶³ Niel Gunson (ed.), *Australian Reminiscences & Papers of L. E. Threlkeld: Missionary to the Aborigines 1824-1859, Volumes I & II* (Canberra: Australian Institute of Aboriginal Studies, 1974), p. 122.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Sydney Morning Herald*, 29 December 1846, p. 2; *Atlas*, 2 January 1847, pp. 8-9.

⁶⁷ *Ibid.*

⁶⁸ Michael Cannon, *Black Land, White Land* (Port Melbourne: Minerva, 1993), p. 221.

⁶⁹ Cannon, p. 222.

⁷⁰ *Maitland Mercury*, 24 October 1846, p. 1.

⁷¹ Parker to Robinson, 12 December 1846, 46/1896 4/2779.3, SRNSW; Robinson to Lonsdale, 28 December 1846, 46/1896 4/2779.3, SRNSW; à Beckett to Lonsdale, 6 January 1847, 47/28 4/2779.3, SRNSW.

⁷² Harman, 2008.

⁷³ *Sydney Gazette*, 27 June 1835, p. 2.

⁷⁴ *Ibid.*

⁷⁵ *Australian*, 17 February 1835, p. 2.