

Theft on trial: Prosecution, conviction and sentencing patterns in colonial Victoria and Western Australia

Abstract: From Ned Kelly to *Waltzing Matilda*, tales of thievery dominate Australia's colonial history. Yet while theft represents one of the most pervasive forms of criminal activity, it remains an under-researched area in Australian historical scholarship. This article draws on detailed inter-jurisdictional research from Victoria and Western Australia to elaborate trends in the prosecution, conviction and sentencing of theft in colonial Australia. In particular, we use these patterns to explore courtroom attitudes towards different forms of theft by situating such statistics within the context of contemporary commentaries. We examine the way responses to theft and the protection of property were affected by colonial conditions, and consider the influence of a variety of factors on the outcomes of theft trials.

While writing his reminiscences in 1897, William Manwaring recalled a humbling event in his early career in which a suspected thief escaped from custody. Manwaring commented that he was told that the misadventure was a necessary episode 'for every new arrival needed to suffer injustice and loss to get assimilated to the selfishness of colonial life' (Manwaring, 1897, p. 21). Injustice and loss come in many forms, but Manwaring, who following his arrival from England in 1857 worked as a Victorian police detective until 1880, was likely thinking particularly in terms of criminal justice and property loss.

Theft dominates Manwaring's entire memoir. Like many others, the detective was convinced that colonial conditions, in particular the transportation system, had created a criminal class for whom stealing was a way of life. Following the style typical of police memoirs published in England during the period, Manwaring relates a series

of cases in which he appears as an indomitable figure correcting the injustices perpetrated by this dangerous underworld. He rarely concerns himself with the justice dispensed in the courtroom following a thief's apprehension.

Historical scholarship on the prosecution of theft in Australia is similarly sparse. It is largely limited to the convict era and early settlement, with a particular focus on bushranging (Elliott, 1995; Perkins & Thompson, 1998; West, 2009). Australian criminologists compiled some useful long-term statistics in the 1980s on a limited number of larcenous acts, but no attempt was made to place them in the context of a historical narrative (Mukherjee, Jacobsen & Walker, 1989). This lacuna is particularly surprising, given the relevance of theft statistics to the continuing discussion of the legacy that convictism left in the colonies (Braithwaite, 2001). Theft has received more attention in England, where foundational studies of property crime are complemented by recent scholarship on specific types of stealing (Tobias, 1972; Emsley, 1996; Meier, 2011; Godfrey & Cox, 2013). However, the extent to which observations about property crime in England equate with Australian conditions, as well as the accuracy of the observations of colonial contemporaries like Manwaring, remains unknown.

In this paper we aim to address this gap with an inter-jurisdictional comparison of prosecution, conviction and sentencing patterns in Victoria and Western Australia between 1861 and 1901. Both specific stealing offences and the overall rate of theft is analysed to test colonial commentators' claims regarding property crime, and compare the statistics in these jurisdictions to what is known about crime in England. We are especially interested in using this data to identify variations between prosecutions of thefts and other offences, in order to understand how judges, juries and the community at large responded to theft in the courtroom. Three key issues are examined: the frequency and range of offences tried before the superior courts of Victoria and Western

Australia; conviction rates and what these suggest about jury attitudes; and the insights sentencing patterns offer into judicial outlooks.

Methodology and Background

A comparison of Victoria and Western Australia allows us to consider how general colonial conditions, as well as factors unique to particular colonies, affected legal outcomes. Variation in the demographic characteristics and the historical development of Victoria and Western Australia, in conjunction with some notable similarities in their criminal justice systems, supports this comparative study. European colonists first settled in Victoria, then known as the Port Phillip District, in 1803; however, their numbers were so low that a system of local justice was not instituted until 1836 when a Court of Petty Sessions was established in Melbourne to hear minor criminal matters. In contrast, when the Swan River Colony of Western Australia was founded in 1829, a Court of Quarter Sessions was almost immediately established with the powers to adjudicate the most serious crimes.

The isolation of Western Australia, and the gold rushes at Bendigo and Ballarat in the 1850s, meant Victoria thereafter developed more quickly. In 1851 it separated from New South Wales, and established its own Supreme Court. Western Australia did not establish a Supreme Court until 1861. Western Australia's slower economic development and far greater physical size resulted in a sparsely populated colony with fewer urban centres than Victoria. This in turn created a more severe sex imbalance, with women still constituting just 39 per cent of the Western Australian population by 1901, whereas in Victoria they had reached near parity (ABS, 2006). While the west had a smaller female presence, it had a stronger indigenous one, a factor apparent from the colony's criminal records. The arrival of large numbers of Chinese on Victoria's

goldfields (there were around 24,544 on the various diggings by December 1861) is likewise evidenced in the court registers (Serle, 1963).

Both Victoria and Western Australia were affected by the penal transportation system, but have not received the same attention from historians as the main penal colonies of New South Wales and Van Diemen's Land (Tasmania). Western Australia did not begin receiving British convicts until 1850, but received almost 10,000 male transportees before transportation finally ceased in 1868. These men had been needed to meet a severe labour shortage in the colony, but this did not stop the convicts being the subject of suspicion and resentment. The belief that a convict remnant contributed to the local crime rate endured for decades afterwards (Russell, 1980). Victoria meanwhile was never technically a penal colony, although during the early 1840s it did receive around 1,700 men with conditional pardons sent directly from Britain (Shaw, 1966). However, a far greater number of convicts, in some estimates as many as 20,000 to 35,000, arrived via other colonies, in particular Van Diemen's Land. These 'Vandemonians' were reviled as the chief perpetrators of crime in Victoria, leading to the enactment of 'anti-convict' statutes in the 1850s (Petrow, 2012). Convictism therefore affected how theft was regarded in both colonies.

The petty nature of much property offending meant the majority of thefts during the late nineteenth century were dealt with by the lower courts. . According to the 1901 judicial statistics presented to parliament, 2,244 of 2,634 theft cases were tried by summary jurisdiction in Victoria, and 1,466 of 1,615 in Western Australia. Similarly, in England and Wales, 56,073 of 61,892 prosecutions for theft offences occurred at summary level.

However, the higher court records are more useful for examining the issues we seek to address in this paper. The superior courts were the forum in which the more

serious thefts were heard. These were the cases that alarmed the community and were written about by contemporaries like Manwaring. Verdicts delivered by juries also present a better barometer for popular attitudes than those handed down through summary justice. The wider range of sentences available in the upper tier of justice likewise offers greater insights into the seriousness with which different types of theft were regarded.

In compiling a sample of criminal trials from Victoria and Western Australia from 1861 to 1901 we employ data from The Prosecution Project database. The Prosecution Project is currently digitising the Supreme Court registers of criminal indictments for each Australian jurisdiction across a period roughly covering 1850 to 1960. The details recorded in these registers vary according to jurisdiction, but typically include such particulars as name of the accused, offence, plea, verdict and sentence.

For this paper, we sampled defendants committed for trial for Victoria and Western Australia for every five years from 1861 to 1901. The Western Australian sample includes every trial in the selected year. In Victoria, only criminal cases scheduled for the months of February, July and October for the sample years were available for analysis. This has not created any great disparity between the samples because the Victorian Supreme Court's caseload was much greater. The final samples were $n= 2,404$ (Victoria) and $n= 636$ (Western Australia).

This paper also makes use of statistical data from England, in particular from London's Old Bailey court, the records of which are available online. Judicial statistics to Parliament for England and Wales are drawn upon as well. However, in general the use of the Old Bailey statistics are preferred as a more accurate point of comparison, given the tendency in the parliamentary statistics to conflate jurisdictional levels and legal outcomes. The Old Bailey had the jurisdiction to hear the same types of offences

as those that appeared before the colonial Supreme Courts. The Old Bailey online records can be counted by defendant, rather than by charge, in the same manner that data from the Prosecution Project is measured. The Old Bailey moreover distinguishes between defendants who were found guilty by a jury, and those who pled guilty, a distinction important to the latter part of this paper. Occasional comparison between this data and the Victorian and Western Australian data serves to contextualise the commentaries by Manwaring and fellow contemporaries with regards to the peculiarities of colonial offending and justice.

Incidence and range of theft trials

The most basic question a historian might look to statistics to answer relates to the simple extent of different types of stealing in the colonies. This point fascinated contemporary commentators, but the conclusions they reached were inevitably inflected by their own agendas. In his eagerness to champion local police ingenuity, Manwaring declared that colonial crime ‘was tenfold more than in England and was of a far more devious character’ (Manwaring, 1897, p. 11). This contradicted fellow English immigrant John Freeman, who in 1888 wrote that:

Our thieves are far behind their London brethren in intelligence and digital dexterity...Few of them have “forks” sufficiently deft to dive into the inmost recesses of our pockets while we are quietly walking along the street...Our burglars and housebreakers operate less skilfully than the Londoners do; we hear of no cleverly got-up affairs here such as occasionally startle the British public; but when a “crib” is “cracked” here it is done in a rude and primitive fashion...
(Freeman, 1888, p. 8-9)

Historians of the early colonial period have suggested that it was perhaps not the incidence of theft that was high in the colonies, but the rate of prosecutions. In her study of early-nineteenth-century New South Wales, Paula Byrne contends that the colonial populace may have been more willing to prosecute thefts due to a particular sensitivity

over personal property arising from the relative scarceness of manufactured goods and the importance of these items under the prevailing barter system (Byrne, 1993). Other scholars suggest that the strict surveillance exerted over former convicts as well as unease surrounding colonial class mobility, conspicuous through the display of goods indicating personal wealth, were added inducements to the policing of theft (Sturma, 1983; Elliot, 1995).

This appears to be borne out by the statistical data, particularly for the early part of the period. In 1861 the rate of persons tried for theft before the higher courts within every 100,000 members of their respective populations were 102.35 and 484.35 in Victoria and Western Australia. This far exceeds estimates of rates in England (Williams, 2000). According to the government's annual return for 1861 there were around 71.51 theft indictments at the Assizes and Quarter Sessions Courts for every 100,000 persons in England and Wales. By 1901, the rate of theft prosecutions had dropped for all three jurisdictions, but remained higher in the Australian colonies.

Equally illuminating in terms of internal shifts in the colonies and contemporary assumptions about the rise and decline of property offending is the proportion that theft constituted of the amount of crime prosecuted overall. Thefts composed 66.7 per cent and 63.4 per cent of all sampled defendants in Western Australia and Victoria. The level of theft offences appears to be highest during periods of sudden population growth. Victoria thus witnesses a high point in 1861 after an influx of immigration to the goldfields during the 1850s, seemingly confirming contemporary fears about the thieving propensities of the new arrivals, generally derided as criminals and ne'er-do-wells (Serle, 1963). The proportion of theft prosecutions rises again following another population boom in the 1880s, and is particularly high in 1891 as Victoria underwent an economic depression, a period contemporaries later recalled for the great public anxiety

about violent thefts (O'Donnell, 1924a). In Western Australia the level of theft prosecutions is likewise high in 1861 following ten years of convict transportation augmenting the local populace, then declines until 1891 when it rises again during the western goldrush. This supports observations that the goldfields of both colonies were more plagued by crimes of theft than violence (Serle, 1963; Bolton, 2008).

Table 1. Trials by year.

Year	Victoria		Western Australia	
	Theft defendants	Other defendants	Theft defendants	Other defendants
1861	320	178	59	17
1866	200	126	34	13
1871	122	109	52	27
1876	120	88	40	30
1881	122	87	30	14
1886	178	56	27	20
1891	214	53	22	13
1896	150	94	70	39
1901	99	88	90	39
TOTAL	1525 (63.4%)	879 (36.6%)	424 (66.7%)	212 (33.3%)

These findings must naturally be treated with circumspection, given the dark figure of unreported, as well as unprosecuted, offences. Further, the high proportion of theft prosecutions might in part reflect greater impediments to policing offences against the person. Domestic and sexual violence in particular were likely to have gone unreported in the male-dominated culture of the nineteenth century (Allen, 1990). Other victims of non-lethal violence too may have avoided treating such episodes as criminal matters. Barry Godfrey (2003) proposes that the decline in assault prosecutions witnessed across Australia, New Zealand and England in this period was not the result of an actual decrease in violence, but a tendency to settle such grievances out of court.

Then again, it is likely that theft also suffered from a dark figure. Peter King (2006) demonstrates that into the nineteenth century a great deal of theft went unreported or unprosecuted due to the onus placed upon victims to institute proceedings. Many were reluctant to bear the legal and financial responsibilities of

prosecution, not to mention the moral responsibility involved prior to the 1823 relaxation of the 'Bloody Code' mandating the death penalty for most property offences (Sharpe, 1990). With the decline of capital punishment and the establishment of a regular police and prosecutorial body in England and the colonies by the late nineteenth century, the State replaced victims as the 'active force' behind prosecutions.

Yet victims still needed to report a crime and agree to give evidence for a prosecution to result. As Clive Emsley (1996) points out, victims were reluctant to report thefts for a variety of reasons, from fear of retaliation to the inconvenience of having to appear in court. As with crimes of violence, some preferred to settle matters personally by simply accepting restitution from thieves. Manwaring (1897), for instance, recounts a tale in which an ex-convict named Tipper paid a man his wife had robbed to drop the charges against her. Private responses to theft could also be more violent in nature: there was considerable concern about outbreaks of 'lynch-law' being directed against thieves on the goldfields. Some of the punishments reputedly inflicted on gold thieves by miners included being chained in the bush, flogged or branded with hot irons (Serle, 1963). On the other hand, the mobile nature of these communities, and the colonies more generally, may have acted as an inducement to victims to address their grievances through the legal system, rather than rely on their ability to negotiate reparations from thieves over time (Fairburn, 1989).

While such reservations must be borne in mind, prosecution statistics do provide a sense of the range and comparative levels of different theft offences. For the purposes of our analysis we collapsed these into nine different theft categories: larceny; larceny from the person (pickpocketing); larceny in specific places; theft in a position of trust; robbery; receiving; stock theft; fraud; and burglary or breaking and entering.

Table 2. Offences for which defendants tried.

Offence	Victoria	Western Australia
Larceny	274	117
Larceny from the person	146	34
Larceny in specific places	126	21
Theft in position of trust	106	28
Robbery	184	25
Receiving	34	9
Stock theft	162	44
Fraud	228	94
Burglary	271	52
Homicide	156	91
Sexual assault	189	35
Assault	199	49
Property damage	84	5
Miscellaneous offences	245	32
Total	2404	636

Simple larceny was the most common offence in the Australian colonies, as in England and Wales, where it comprised 34.9 per cent of committals to the Assizes and Quarter Sessions, although it was responsible for only 9.17 per cent of Old Bailey defendants. Larceny was the head charge against 11.4 per cent of superior court defendants in Victoria and 18.4 per cent in Western Australia. The ubiquity of this offence category indicates its versatility in covering a wide range of situations and scale of offences, from the theft of nominal sums to substantial amounts. The relatively high number of women indicted for simple larceny denotes its use in particular in dealing with shoplifting cases (Sturma, 1983).

While the incidence of simple larceny signals similarities between the crime scene in Australia and Britain, both historians and contemporary commentators have maintained that the peculiarities of the colonial environment encouraged distinctive forms of theft (Kercher, 1995). The most obvious was bushranging, the association of this crime with national conditions contributing to the greater attention it has received in historical scholarship than other theft types. Such analysis has demonstrated its connections to English highway robbery and to the more general phenomena referred to as social banditry (West, 2009; Hobsbawm, 1969). Nevertheless, many historians

continue to agree with the evaluations of colonial commentators who proclaimed bushranging ‘an indigenous growth peculiar to Australia’ (Manwaring, 1865, p. 1).

Bushranging did not constitute its own offence category, but its effect on crime statistics is to be expected in the offences most commonly associated with it, namely robbery and stock theft. For Victoria these constituted 7.7 per cent and 6.7 per cent of all offences for which defendants were tried. In Western Australia, which witnessed some bushranging activity by escaped convicts such as the infamous Moondyne Joe but never to the same extent as Victoria (Bolton, 2008), the rate of robbery was only 3.9 per cent, while stock theft was comparable at 6.9 per cent. At the Old Bailey across the same period, robbery and animal theft were responsible for 8.32 and 1.3 per cent of all defendants.

Naturally, colonial robbery rates were not entirely due to bushranging, often involving crimes that mirrored British depredations. Manwaring (1897, p. 10) described ‘bughunting’, a cant English term for the robbing of drunk men, as common practice. Meanwhile the low rate of animal theft at the Old Bailey is perhaps to be expected for an urban court, although Emsley (1996) maintains that a ready market for stolen meat in London encouraged some gangs to specialise in such crime. However, judicial statistics also show that animal theft was responsible for only about 1.3 per cent of cases brought before the Assizes and Quarter Sessions of England and Wales. Interestingly too, stock theft does not appear to have been a purely rural enterprise in the colonies either. Stock offences accounted for 2.7 per cent of committals from Melbourne, mostly the result of horse stealing or illegal use of a horse, effectively the colonial equivalents of motor vehicle theft and joyriding. Manwaring (1897, p. 10) believed that horse stealing was an offence ‘almost unknown’ in England by this period

but quickly learned in the colonies; cattle-stealing he likewise considered ‘indigenous to Australia’.

The levels of other theft offences were reputedly enhanced in the colonies by the presence of former convicts skilled in specific illicit occupations. Manwaring recorded that many of the Tasmanian ex-convicts about Melbourne were ‘expert forgers’ (1897, p. 10). When Western Australian policeman Eli Wansborough (1874) heard a forgery had been committed in 1874 he was likewise quick to attribute it to the work of a ‘ticketholder’. Theft by fraud or forgery was indeed the second most common theft offence in Western Australian (14.8 per cent of all defendants tried), and the third most common in Victoria (9.5 per cent). Conversely, the second most common theft offence in Victoria was burglary (11.3 per cent), which was the third most common in Western Australia (8.2 per cent).

Manwaring believed that forgery, as well as burglary, had declined in Victoria by the 1880s as the convict class died out. He told the Royal Commission on Police in 1883 that the ‘best specimens’ of burglaries seen in Victoria most recently were those by former Western Australian convicts (p. 118-119). However, the patterns across time do not support the attribution of these offences to remnants of the transportation system. Bucking overall crime trends, burglaries were on the increase in England in the Victorian period. Emsley (1996) suggests this was because the introduction of police meant thefts were planned more carefully than the opportunistic crimes of the early nineteenth century. Despite émigré John Freeman’s dismissive comments on colonial burglars, a generally rising trend is also evident locally. Burglaries went from

constituting 5.8 per cent and 3.9 per cent of all offences in Victoria and Western Australia in 1861, to 10.2 per cent and 8.5 per cent in 1901.

Victorian policeman David O'Donnell later recalled 1891 in particular producing a spate of burglaries in Melbourne following the release of a number of offenders from Pentridge (1924a). This is borne out by statistics, with burglaries rising from 11.1 per cent of all prosecutions in 1886 to 19.5 per cent in 1891. Bank clerk George Meudell (1929, p. 24-25) recalled in his memoirs that there were also a number of forgeries on banks in this period that were 'kept quiet' to avoid a loss of public confidence. If forgeries did add considerably to the dark figure of crime in the early 1890s then theft by fraud was responsible for a considerable proportion of offences, as it accounted for 19.9 per cent of Victorian prosecutions in 1891. This suggests Manwaring was wrong to believe that skilled crime had declined with the disappearance of convicts; if anything it increased across the period.

Other crimes one might expect to find in communities suffering from the so-called 'convict stain' do not appear particularly over-represented. Freeman wrote disparagingly of the skill of colonial pickpockets, although French visitor Oscar Commetant (1980) thought this a harsh assessment, having himself been their victim at the Melbourne races. Pickpocketing accounted for 3.6 per cent of defendants at the Old Bailey, and for around 8.1 per cent of those tried in England and Wales overall. This did not differ dramatically from colonial rates, at 6.1 per cent and 5.3 per cent in Victoria and Western Australia. The opportunities afforded to pickpocketing by prostitution meant it was another crime with a high representation of female defendants, especially in Victoria.

Receiving was also associated both with female offenders and the existence of a 'criminal class'. It comprised comparatively few male or female defendants in our

dataset, although this is perhaps due to our method of calculating offence category based on the most serious offence of which a defendant was found guilty or charged. Of defendants facing multiple charges in Western Australia and Victoria, 46.43 per cent and 32.76 per cent were indicted for at least one count of receiving.

There was greater consistency between the colonies and England when it came to theft in a position of trust. These offences comprised 5.8 per cent of defendants tried at the Old Bailey, 6.3 per cent at the English and Welsh Assizes and Quarter Sessions, and 4.4 per cent of defendants tried in both Victoria and Western Australia. The more generous employment conditions said to prevail in the colonies, particularly in relation to domestic servants, thus do not appear to have greatly affected the rate of thefts from employers (Clarke, 1886).

The data drawn from the indictment registers can also be used to test claims about the groups said to have committed offences, such as ex-convicts. Property offenders constituted the majority of transportees to all Australian penal colonies, including Western Australia (Taylor, 1981). The issue of how well convicts were able to desist from offending and integrate into colonial communities was one that preoccupied colonists, and is of ongoing interest to historians (Garton, 1991; Braithwaite, 1991). Notations of convict numbers in the Western Australian registers allow us to track convict recidivism. Previous scholarship on Western Australian convict records suggested that transportees frequently re-offended by committing low-level public order offences, but that only a small number committed offences that brought them before the superior courts (Godfrey & Cox, 2008). We found that convicts accounted for 30.5 per cent of the defendants tried in the Supreme Court across all offence categories, and 36.3 per cent of those tried for theft offences.

While this implies that convicts were responsible for a high proportion of crime,

they also formed a large part of the colony's population. By 1868, when transportation ceased, Western Australia's population numbered 24,000 Europeans, including around 9,700 convict arrivals. That 79.4 per cent of convict defendants were tried for theft compared to 61.1 per cent of non-convict defendants perhaps speaks to the low status convicts occupied, rendering them members of the socio-economic group most likely to commit thefts anyway, rather than to any innate propensity for stealing (Godfrey & Cox, 2008). Given that the employment conditions and low marriage rate among convicts encouraged many to pursue an itinerant lifestyle, and Western Australia's high proportion of youthful transportees meant many arrived at peak offending age, it is perhaps to be wondered that the rate of convict offending was not even higher (Trinca, 2006; Taylor, 1981).

The offences for which convicts were prosecuted contrast sharply with the figures evident in relation to Aboriginal defendants recorded in the Western Australian registers. While homicide was one of the least common offences for which convicts were tried, resulting in the prosecution of only 3.6 per cent of convict defendants compared to 19 per cent of defendants from the rest of population, it was by far the most common offence for which Aboriginal defendants were prosecuted. Aboriginal defendants comprised 7.1 per cent of the sample of Western Australian defendants, with 88.9 per cent of these appearing on homicide charges.

The lack of theft trials among Aboriginal defendants in Western Australia contrasts with our analysis of the prosecution of Asian defendants in Victoria. Using name to determine ethnicity suggests 3.7 per cent of Victorian defendants were Asian; of these, 76.7 per cent were tried for theft offences, compared to 63.1 per cent of European defendants. Prosecutions of Asian defendants for theft may have bolstered, or even been influenced by, prevailing prejudices against Chinese immigrants, particularly

constructions of them as greedy and cunning figures constantly trying to appropriate the wealth of the colony (Inglis, 1880). Such resentments and fears would obviously have been an issue in the jury box; however, a variety of other historically-specific attitudes and factors also impacted the conviction rates of colonial courts.

Conviction rates and the sympathetic jury

In many ways, the late nineteenth century can be considered the age of the jury trial (Farmer, 2007). The dominance of jury adjudications prior to the twentieth-century increase in summary offences and rise in guilty pleas meant that conviction rates were particularly liable to be influenced by public attitudes towards different offences.

Colonial residents, especially emancipated convicts and their descendants, fought hard for the introduction of the jury trial to New South Wales in 1833, declaring it an English ‘birthright’ (Chesterman, 1999).

Free settlers were more resistant to the idea of juries, potentially comprised of former convicts, hearing criminal matters (Neal, 1991). Although some transportees had risen to positions that enabled them to meet the property qualifications needed to sit on juries, there was considerable trepidation about the convict taint producing juries biased in favour of defendants. Justice Dowling defended the local jury system in 1836, declaring it would ‘not bear a very disadvantageous comparison with that in the Mother Country’ (*Sydney Herald*, 1836). Justice Burton was more apprehensive about the ‘improper prejudice’ juries displayed in favour of the accused, citing several instances of jury nullification (*The Colonist*, 1836).

Anxiety about the potentially subversive effect of juries on the cause of justice were still being voiced years later. Detective O’Donnell asserted that ‘one criminally inclined, stupid, or ignorant man’ on a jury was frequently able to secure the acquittal of

an accused (1924b). He also claimed that, contrary to the law, he had sometimes seen former felons sitting on Melbourne juries in the 1880s and 1890s. A more general sympathy for defendants among colonists was also a concern. In an article entitled ‘The Sentimental Jury’ published in *The Australasian* (1890), the ‘sentimental jurymen’ seeking to ‘spare the scoundrel in the dock as far as possible’ was said to have become ‘a recognised power in the law courts’. In contrast to earlier fears, the problem was declared to be more evident in England than in the hard-nosed Australian colonies.

Table 3. Trial outcomes, theft and non-theft offences.

	Offence type	Not guilty	Found Guilty	Plead guilty	Jury disagreed	Nolle prosequi	Other (postponed etc.)	Verdict unknown
Victoria	Theft	387	656	254	8	75	129	14
	Other offences	147	324	66	30	72	122	13
Western Australia	Theft	118	175	102	10	14	3	2
	Other offences	45	128	20	6	8	3	1

Godfrey’s research indicates that Australian jurisdictions were more likely than English or New Zealand courts to convict in cases of violent or public order offences during the late nineteenth century (Godfrey, 2003). Jury acquittal rates for theft offences do appear to be slightly higher in Victoria and Western Australia, 26.3 per cent and 26.9 per cent, compared to 21.21 per cent at the Old Bailey. However, the colonial acquittal rates for theft offences declined across the period, from 26.3 per cent in Victoria and 37.3 per cent in Western Australia in 1861, to 18.2 per cent and 24.4 per cent in 1901. Acquittals appear to follow a hierarchical pattern in Western Australia with the most serious theft offences, such as burglary and robbery, having the lowest rates of acquittal. Juries may have felt especially constrained to convict in order to deter such crimes. This pattern was not evident in Victoria though, where robbery was one of the offences most

likely to result in acquittal. There was also jurisdictional variation in the comparative acquittal rates of theft defendants and those charged with other crimes. In Victoria, acquittal rates were similar for theft and non-theft offences. In Western Australia, acquittal rates were lower for non-theft offences, possibly due to its higher homicide rate, which carried a lower probability of acquittal. A variety of factors influenced jury decision-making regarding verdicts, not least of which was the actual sufficiency of the evidence presented. The primary proofs offered in theft cases during the colonial period were the identification of stolen property, and the identification of defendants themselves. In English courts, juries were notoriously reluctant to convict in cases where a positive identification of stolen goods traced to the defendant's possession was not offered (Smith, 2005). As in England, there is evidence of colonial individuals taking measures to ensure that they were able to identify their property if stolen, by marking clothes, branding stock and lumber, and memorising the issue numbers of bank notes.

Identification of defendants, however, suffered much the same handicaps as today. After observing the equivocating testimony of several witnesses to a robbery in 1856, John Castieau (1856), governor of the Melbourne Gaol, declared in his diary 'had I taken ten ordinary prisoners whom I knew to be locked up at the time the robbery took place, some of them would have been as nearly sworn to as the men paraded today'. Sometimes identifications were rendered suspect by imputations the victim had been too intoxicated to remember events well. The frequency with which such claims appeared lends credence to the assertions of contemporaries concerning the colonists' propensity for drunkenness. Four men accused of robbery with violence were thus acquitted in Western Australia in 1881 after it was urged that 'all parties concerned were so much the worse for liquor no reliance could be placed upon any of them' (Supreme Court

Criminal Sittings, *The West Australian*, 1881).

Jury decision-making in colonial theft trials indicates that the phenomenon of ‘victim-blaming’ was never limited to crimes against the person. Castieau (1870, p. 373) described a case in which the jury recommended to mercy a man charged with embezzling twenty thousand pounds, blaming the bank’s ‘lax discipline’ for giving him the opportunity to commit the theft. Following the trial of two women for robbing a man in a brothel, he similarly noted that while there was ‘no doubt’ of their guilt, they were acquitted after the judge, who ‘seemed to think it served the loser right’, summed up in the prisoners’ favour (Castieau, 1874, p. 971). Such attitudes perhaps contributed to the particularly high acquittal rates that prevailed among female pickpockets in Victoria.

Table 4. Theft trial outcomes by gender.

		Not guilty	Found Guilty	Plead guilty	Jury disagreed	Nolle prosequi	Other (postponed etc.)	Verdict unknown
Victoria	Male	346	595	250	8	67	108	14
	Female	41	61	4	0	8	21	0
Western Australia	Male	109	170	101	8	14	3	2
	Female	9	5	1	2	0	0	0

The acquittal rates for Western Australia and Victoria demonstrate that factors other than just the evidence at trial were likely to influence jury verdicts. In line with existing research on both historical and contemporary courtrooms, women were more likely than men to be acquitted of theft offences in both colonies, with the difference in Western Australia particularly extreme. This was likely due to the colony’s more severe sex imbalance. At the most basic level, this meant a lower and less representative sample of female defendants. However, this sex imbalance may also have heightened the attitudes that made all-male juries acquit women at higher rates in the first place,

whether out of 'chivalry' or the belief that women lacked the necessary physicality, mental powers or agency to commit crimes (Laster, 1994). Contemporaries suggested women fared better in court due to the willingness of juries to believe their actions had been prompted by a male confederate (Furniss, 1923). Awareness of the better odds they stood of acquittal may have affected female defendants' pleas, with women far less likely to plead guilty to theft offences than men across both jurisdictions.

While the all-male nature of juries influenced verdicts against women, their all-European composition likely affected verdicts towards non-European defendants. The effect of racial prejudice on jury sympathies in the period is evident in a lower acquittal rate of aboriginal defendants in Western Australia, and higher conviction rate of Asian defendants in Victoria. Foreign defendants in this period could request a jury half comprised of alien nationals. However, the difficulties of using this clause to ensure a fairer trial are revealed by a story related by Manwaring, in which the barrister for a European man accused of larceny asked that a half alien jury be empanelled to hear his non-English speaking client. The policeman in charge of the case promptly dragged half-a-dozen Chinese men off the street who, at first believing that they themselves were under arrest, returned a guilty verdict after 'short consideration' (Manwaring, 1897, p. 123).

It is notable that defendants facing theft charges who appeared beside co-accused had a higher likelihood of acquittal than solo defendants: in Victoria, 21.8 per cent compared to 30.3 per cent, and in Western Australia 22.6 per cent to 37.8 per cent. The co-operative nature of many forms of stealing also meant that group trials were more likely in theft cases than in other offence categories. However, as Miles Fairburn points out in reference to New Zealand, the rate of colonial co-offending was not particularly frequent when compared to other jurisdictions and time periods, which may

cast doubt on the centrality of ‘mateship’ in colonial life, or at least in the lives of offenders (1989).

Moreover, while examples exist of defendants refusing to incriminate their ‘mates’ (Dyrenfurth, 2015), some individuals in multi-defendant trials stood a better chance of acquittal because they were able to shift the blame onto one of their co-accused. Freeman was as condescending about the ethics of colonial thieves as he was about their skills, declaring that they were not ‘knit together by so strong a sense of honour as they are in England’ (1888, p. 9). Juries presented with multiple defendants were potentially also more reluctant to convict due to the genuine possibility this raised that responsibility for the theft lay with only one of them. In an 1861 case in Perth the victim appears to have prevailed on police simply to arrest everyone who had any opportunity to have robbed him while he was on a drinking binge, including his housekeeper and five of his neighbours (Supreme Court Criminal Side, *Inquirer and Commercial News*, 1861).

Table 5. Theft trial outcomes, single and multiple defendants.

		Not guilty	Found Guilty	Plead guilty	Jury disagreed	Nolle prosequi	Other (postponed etc.)	Verdict unknown
Victoria	Single	211	384	196	6	45	94	12
	Multiple	178	272	58	2	30	35	2
Western Australia	Single	73	127	91	5	4	3	2
	Multiple	45	48	11	5	10	0	0

Jury decision-making was subject to the influence of other actors in the courtroom. The eighteenth century had seen the development of the English adversarial trial in which hearings increasingly became a contest between opposing counsel (Langbein, 2003). According to Manwaring (1897) there was no shortage of lawyers able to defend accused persons by the late colonial period. However, the lack of legal

aid to impecunious defendants meant that the contest of evidence was often conducted between the Crown and an unrepresented defendant. The presence of a defense attorney was noted in the Victorian court registers, revealing that only a minority of defendants had legal representation. Theft defendants were even less likely to be defended than other offenders. Yet while the chance of acquittal improved dramatically for all accused persons with legal representation, this was especially apparent among theft defendants, of whom 45.7 per cent were found not guilty, compared to only 22.9 per cent of undefended thieves.

Finally, it is worth observing that defendants tried for theft were more likely to plead guilty than those arraigned for other offences. This perhaps suggests that thieves, particularly recidivist offenders, were more pragmatic about their odds of acquittal. However, it probably also reflects the possibility of execution those convicted of homicide or rape faced at this time.

Punishing thieves and judicial discretion

As in other areas of the law, colonial courts were guided in their sentencing provisions by the English legal system. For instance, the continued use of corporal punishment was advocated in Western Australia in the late 1890s on the grounds of its alleged usefulness in reducing the crime of robbery by garrotting in Great Britain (Prevention of Crimes Bill, *The West Australian*, 1898). However, while the penalties set down for most theft offences remained the same as in England, judges had a great deal of discretion as to how they implemented the scale of possible punishments.

Writing in reference to the New Zealand justice system, John Pratt argues that geographical isolation and the material difficulties of immigration resulted in a prevailing reverence for property that meant stealing incurred particularly harsh

sentences (1992). Enid Russell suggests this observation also applied to Western Australia, particularly in relation to burglary and stock stealing (1980). Colonial contemporaries too believed local judges dispensed a tougher form of justice. Gilbert Parker, who emigrated in 1885 and travelled through several of the colonies, wrote that stealing was punished with 'the greatest rigour', and that a killer was likely 'to stand in better odour with the authorities than the thief' (1892, p. 84).

In giving evidence to the Royal Commission on penal and prison discipline in 1871, Sir Redmond Barry, the judge who infamously sentenced Ned Kelly to death, argued that colonial judges were less likely to be influenced by circumstances external to the facts of the case in sentencing defendants than their counterparts in Great Britain. He was quick to oppose any limitation to judicial discretion in sentencing. Common larcenies, he declared, could be 'considerably aggravated by attendant circumstances'. Such offences had to be deterred by exemplary punishment: he cited horse-stealing as an example of a crime whose frequency in previous years had meant it needed to be dealt with in 'a stern and resolute manner' (Royal Commission on Penal and Prison Discipline, 1871). The evidence suggests colonial justices were more severe. For instance, according to the annual judicial statistics for England and Wales, of those who received prison terms for burglary, 19.89 per cent received sentences of above 3 years, compared to 27.68 per cent in Victoria and 53.84 per cent in Western Australia.

The perception that particular forms of thefts were in need of greater deterrence is evident in sentencing practices. In Western Australia the toughest penalties in theft cases were reserved for burglary defendants of whom 2.4 per cent were sentenced to death, 4.8 per cent to 15-20 years imprisonment, and a further 26.2 per cent to 5-10 years. Robbery and stock theft were also harshly punished with 21.1 per cent of robbers sentenced to 10-15 years, and a further 21.1 per cent to 5-10 years; while 13.6 per cent

of stock thieves received 10-15 years, and 27.3 per cent received 5-10 years. The bulk of sexual offences attracted far lower sentences, with 26.9 per cent sentenced to 6-12 months and a further 38.5 per cent to 1-2 years. All assaults short of homicide likewise fell between sentences of less than a month to 5 years, with 92 per cent attracting sentences of 3 years or less.

Victoria appears to have been more moderate in its sentencing, with fewer cases of long-term sentences. For instance, in Western Australia of all those sentenced 11.7 per cent received terms of 5-10 years, 2.2 per cent received 10-15 years and 0.9 per cent received 15-20 years. In Victoria, the figures for the same groups were 6 per cent, 0.5 per cent and 0.1 per cent. The offences that attracted harsher sentences, however, tended to remain the same. Among those sentenced to 5-10 years in Victoria, 24.1 per cent were sentenced for robbery, 10.1 per cent for theft by fraud and 20.3 per cent for burglary, while burglary and stock theft each constituted 33.3 per cent of those sentenced to 10-15 years. Sexual offences were again on par with pickpocketing, with 1-2 years constituting the most frequent penalty for both crimes.

With the exception of the small proportion of death and life sentences, the more severe the sentence, the greater the proportion of those being sentenced for theft offences. Bonds and fines were more commonly used for non-theft offences across both jurisdictions. In Western Australia, of those sentenced to a month or less, 46.2 per cent were sentenced for theft offences and 53.8 per cent for other offences, while among those sentenced to 10-15 years, the ratio was 80 per cent to 20 per cent. Similarly, in Victoria of those sentenced to a month or less only 36.2 per cent committed theft offences while 63.8 per cent committed other offences. In the 10-15 year category, 83.3 per cent committed thefts and 16.7 per cent committed other offences. If the level of

punishment is an indication of the need felt by the community for deterrence, theft was thus a crime viewed seriously by the colonial populace and its judiciary.

Conclusion

This paper employs some early findings to show the value of statistical work on theft in exploring the history of court processes and colonial conditions. While the colonial legal system mirrored its English counterpart in the range of theft offences prosecuted and in many of its broad trends, there were also variations as a result of peculiarities in local circumstances. Contemporaries were able to sense some of these trends, although not always the factors influencing them. Their vision was hampered by the myopic perspective that develops from drawing on a single source: in this case, their own personal experiences (Gatrell & Hadden, 1972). We believe this research points to the importance of crime historians adopting a broad perspective by analysing quantitative and qualitative data in conjunction with each other, and by examining acquisitive crime not only in relation to other types of offences, but by breaking it down into discrete categories. In this way it will be possible to reconstruct the myriad of factors that exerted an influence on trial outcomes – from the background of defendants and the make-up of the court, to community expectations of evidence and attitudes towards particular forms of stealing.

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