

A Politics of Prosecution: The Conviction of Wonnerwerry and the Exoneration of Jerry Durack in Western Australia 1898

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In 1901 one of the pioneering Durack family was killed on the verandah of his cattle station homestead in the East Kimberley region of Western Australia. In a subsequent trial two young Aboriginal men were tried for his murder. Three years earlier the murdered man had himself been charged, though never tried, with the murder of an Aboriginal man. Connecting these two homicides was work best avoided when writing the pioneer legend of Australian history, but is inescapable when seeking to appreciate the ambition and limits of criminal law in a colonial society, the task of this article. At the same time, the evidentiary demands of historical reconstruction prove as challenging as those of legal proof when faced with the task of understanding what was in the minds of those actors, settlers and Indigenous, more than a century ago.

I INTRODUCTION

It is notorious that the criminal prosecution of settlers for violence against Aboriginal people in colonial Australia was rare, and rarely resolute.¹ Much importance attaches therefore to sustained inquiry into those cases where police and prosecutors embarked on such a path. The rules of evidence and the forms of procedure demanded of criminal jurisdiction limit law's reference to the externalities that bring a case to court. Historical inquiry offers the possibility in exemplary cases of analysing the preferences and decisions that brought a defendant before a judge and jury. Equally, it may bring to light a contest of authority, the origin of actions that have social explanations but are rendered criminal by the exercise of sovereign

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1 Reece, *Aborigines and Colonists: Aborigines and Colonial Society in New South Wales* (Sydney University Press, 1974); Jan Critchett, *A 'Distant field of Murder': Western District Frontiers, 1834-1848* (Melbourne University Press, 1990); Amanda Nettelbeck and Robert Foster, *In the Name of the Law: William Willshire and the Policing of the Australian Frontier* (Wakefield Press, 2007); Mark Finnane and Jonathan Richards, "You'll Get Nothing out of It?": The Inquest, Police and Aboriginal Deaths in Colonial Queensland' (2004) 35 *Australian Historical Studies* 84; Angela Woollacott, 'Frontier Violence and Settler Manhood' (2009) 6 *History Australia* 11.1; Amanda Nettelbeck, "Equals of the White Man": Prosecution of Settlers for Violence Against Aboriginal Subjects of the Crown, Colonial Western Australia' (2013) 31 *Law and History Review* 355.

power. One task of legal history is to allow us retrospectively to consider those externalities, the social relations and practices, even the force of other jurisdictions, that the criminal law commonly ignores in its narrowing attention to what is justiciable. Already this formulation will suggest a task for legal history that is different from other projects, for instance, of legal history as a history of legal concepts or doctrines, or even as a contextual history of such concepts or doctrines.

What I address here lies in a line of historical inquiry of the last 30 years or so which has been primarily interested in law and social order as mutually constitutive. In a recent study of the modes of law in 18th century Suriname, one of the discipline's best practitioners, Natalie Zemon Davis, has shown how even in a slave plantation society the law of the plantation owners was only one of the legal orders in place.² The compelling lesson of numerous studies of law's empire during the age of empires has been the necessity of us being alert to the evidence of legal orders jostling for recognition and authority.³ Those lessons are well taught through the stories of law in societies like colonial Australia.

With Heather Douglas I have recently completed a study of the long history of criminal law's encounter with Indigenous lives in Australia.⁴ We identify the continuing history of criminal law's discomfort when asked to judge Indigenous offending. In taking on such a subject we have addressed questions that have been less often asked than those other ones – about the injustices and inequalities of race relations in Australia – that have understandably preoccupied social scientists since the 1960s. Our research sought out instead those encounters between Aboriginal people that resulted in criminal charges being laid, with the consequent stories of trial, judgment and punishment. It has long been known that the great majority of Aboriginal prisoners have been incarcerated following offences that are, as the law says, *inter se*.⁵ We argue that the scale and meaning

2 NZ Davis, 'Judges, Masters, Diviners: Slaves' Experience of Criminal Justice in Colonial Suriname' (2011) 29 *Law and History Review* 925.

3 Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press, 1985); Samera Esmeir, *The Work of Law in the Age of Empire: Production of Humanity in Colonial Egypt* (New York University, 2005); Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788-1836* (Harvard University Press, 2010); Paul G McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2004); Sally Engle Merry, 'Law and Colonialism' (1991) 25 *Law & Society Review* 889; Sally Engle Merry, *Colonizing Hawai'i* (Princeton University Press, 2000); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge University Press, 1st ed, 2009).

4 Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law: White Sovereignty after Empire* (Palgrave Macmillan, 2012).

5 Roderic Broadhurst, 'Crime and Indigenous People', in Adam Graycar and Peter Grabosky (eds), *The Cambridge Handbook of Australian Criminology* (Cambridge University Press, 2002) 256; Elizabeth Moulton Eggleston, *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* (Australian National University Press, 1976); AP Elkin, 'Aboriginal Evidence and Justice in North Australia' (1947) 17 *Oceania* 173.

of this phenomenon have been too little appreciated in the scholarship of law, criminology or history.

Neither law nor history however satisfies our hopes for clarity of boundaries. The stories I address here arise from an intersection of intra-racial (*inter se*) and inter-racial encounters. We might consider that this intersection provides a metaphor of Australian colonisation and its legacy. This intersection also embraces the set of relationships and actions that produced the criminal trials that I will address here.

II KEEP HIM MY COUNTRY

In a lifetime of prolific writing, Mary Durack produced accounts of Australian history that captured the imagination of settler Australians. *Kings in Grass Castles*, first published in 1959, remains a much-read and captivating account of Irish migration and settlement stretching from the southern highlands of New South Wales, through western Queensland and the Northern Territory to an ultimate destination in the Kimberley. Its successor volume, *Sons in the Saddle*, published in 1983, remains a volume equally worthy in any collection of Australian histories of settlement. From it we learn that today's mining bonanza rests on much older foundations of dispossession in the service of an export industry. The central figure in *Sons in the Saddle* is Michael Patrick Durack, or MP, an entrepreneur who sold not iron ore but cattle to Asian markets, in his case the Philippines. Among the small cast of settlers who claimed the Kimberley for white settlement were other scions of Western Australia, among them the many brothers Forrest, from whom descends a recent miner of fabulous fortune. The lines connecting *this* settler past and our present are remarkably intact.⁶

By 1900 the Duracks had established themselves as a force to be reckoned with in the north. Their fortunes depended on their successfully installing themselves on Aboriginal land and using Aboriginal labour. Their legacy included children that some of them fathered through Aboriginal women. Some of these would become figures in the Aboriginal renaissance of the late 20th century, claiming rights that had been ignored by their fathers. Elements of this legacy were illuminated on a famous battleground of rights over land and mining that took place at Noonkanbah in the Kimberley in 1979. In a film made at this time, *On Sacred Ground*, a Film Australia documentary, a young Aboriginal man, Rybigna Green eloquently disclosed a history that made him a descendant of *both* sides of the colonisation of the north.⁷

6 Mary Durack, *Kings in Grass Castles* (Constable and Company, 1959); Mary Durack, *Sons in the Saddle* (Constable, 1983). For the significance of the Duracks, the Forrests and the history of the Kimberley, see most recently Geoffrey Bolton, *Land of Vision and Mirage: Western Australia since 1826* (UWA Press, 2008); Brenda Niall, *True North: The Story of Mary and Elizabeth Durack* (Text Publishing, 2012).

7 *On Sacred Ground*, directed by Oliver Howes (c 1980).

Long after the episodes discussed in this article, down to the 1960s, the northern cattle domains remained places where two peoples lived in uneasy accommodation. In recent years the entanglements of Indigenous and settler histories have been strikingly recalled in stories and memoirs told by Indigenous people, like the Aboriginal stockman Jack Sullivan, or the Indigenous leader Patrick Dodson, or the writer Stephen Kinnane in whose *Shadowlines* is disclosed the story of his grandmother's possible paternity in the figure of MP Durack.⁸ Writing not long after the 1983 publication of *Banggaiyerri*, Tim Rowse discerned in Sullivan's vivid memories of living and working on the Durack properties the figure of the Aboriginal 'insider', one whose life and perspectives expressed the accommodation that was achieved on pastoral properties of the north.⁹ The stories that follow later might be usefully imagined along such lines, tragically, with Aboriginal insiders compelled to act in one case against Aboriginal 'outsiders' while in another turning against their white bosses.

Mary Durack did not ignore the contributions of Aboriginal peoples to the founding and maintenance of her family's fortunes and estates.¹⁰ Her first book (if we ignore her poetry collection published at the age of 10) was an account of the 'black community of Argyle station'; her first and only novel was a tale that alluded in its title (*Keep Him My Country*) to the insecure hold of the pastoralists on Aboriginal land (it was dedicated to her friend Phyllis Kaberry, anthropologist of Aboriginal women's lives and beliefs). Durack's histories of the family were distinguished by their recognition of Aboriginal lives and (occasionally) perspectives, as Rowse traces in an account of the purposeful construction of a 'Pax Durackia'.¹¹ This record cannot displace her unapologetic approach to recording her family's history, and a forgetfulness when it came to dealing with one of the darkest moments of the family saga.

Jeremiah Durack figured briefly in *Kings in Grass Castles* as 'the wild Irishman of the family'. Known familiarly as 'Galway Jerry', he was the youngest of his large family, the only child born in Australia of his Irish emigrant parents, brother to the founder of the pastoral dynasty and grandfather of a later Attorney-General of the Commonwealth. In stories told to Mary he 'was a wonderful mimic ... a natural born comedian', who also used 'to hit the grog a bit and then the game'd be on'. In this first volume of the family saga, Jerry's violent end is signalled in the 'family tree' with the words 'shot by native'. In *Sons in the Saddle*, published in 1983, this detail is omitted from the lineage, perhaps reflecting the changing sentiments of an intervening quarter-century since the publication

8 Kevin Keeffe, *Paddy's Road: Life Stories of Patrick Dodson* (Aboriginal Studies Press, 2003); Stephen Kinnane, *Shadow Lines* (Fremantle Press, 2003); Jack Sullivan and Bruce Shaw, *Banggaiyerri: The Story of Jack Sullivan* (Australian Institute of Aboriginal Studies, 1983).

9 Tim Rowse, "Were You Ever Savages?" Aboriginal Insiders and Pastoralists' Patronage' (1987) 58 *Oceania* 81.

10 Niall, above n 6.

11 Rowse, above n 9, 96.

of the earlier book. But Jerry's death features prominently in an early chapter of this book. Mary Durack's father, MP, was close to his uncle Jerry. Presciently he told a brother at New Year in 1901 that '[p]oor old Uncle Jerry' was having a hard time of it on his cattle station on the Dunham River, north-west of the Argyle station that was the heart of the Durack empire. MP regarded the country on the Dunham as poor in quality, good enough only for an outstation; he was contemplating making Jerry an offer for the land. Indeed Jerry's father had earlier declared that Jerry needed to have his head read for taking up 'an inferior lump of country on the Dunham River'.¹²

Late in February 1901, MP was called from Wyndham to an outstation where 'he found his cousin Patsy in an exhausted condition, having ridden bareback from the Dunham – a distance of about seventy miles – with a bullet wound in his forehead and the news that his father had been killed'.¹³

MP led a party to the Dunham station where they found his uncle with a gaping bullet wound in *his* forehead. With two of his cousins and others of the party, acting himself as coroner, MP held an inquest, finding a verdict of 'wilful murder at hands of some person or persons unknown'.

In succeeding pages, Mary Durack went on to describe the early apprehension by a police party of two Aboriginal men, 'station blacks, of whom there were only five [on Dunham]'. One of them was charged with Jerry's murder. This was Banjo Amaranga, said to have been reared on the Dunham station. He had grown up with young Patsy and for two years had been trusted with a Winchester rifle. The other was an older man, Rochie or Roger, charged with wounding Patsy. The only witnesses were other Aborigines, two women said by Mary Durack to be Daisy and Alice and a 12-year-old boy, Monday.

Mary Durack's account of the later trials drew on newspaper reports, some of them uncomplimentary to the character of Jerry, insofar as they alluded to the common charge that Aboriginal killing of white men usually followed the abuse or appropriation of Aboriginal women. Durack claimed that this was rare in the Kimberley. Instead she suggested that the mundane motive was simply to 'make off with the station stores'. For a work that emphasised the absence of treachery among Aboriginal employees this seemed an unsatisfactory explanation. But it also reflected the flabbiness of the prosecution case, which resulted in Banjo's acquittal. Durack's account of Roger's fate was even more erratic – rather than being *acquitted* as Durack claimed,¹⁴ Roger was indeed *convicted* of wounding with intent and even sentenced to death. The jury however recommended mercy on account of his youth, his 'previous faithful service' and the 'probable failure to realise the enormity of his offence'. The death sentence was

12 Durack, *Kings in Grass Castles*, above n 6, 366; Durack, *Sons in the Saddle*, above n 6, 78. In recent editions of *Kings in Grass Castles* the words 'shot by native' are deleted from the family tree.

13 Durack, *Sons in the Saddle*, above n 6, 79.

14 *Ibid.*, 81.

commuted, and in 1903 Roger was released into police service possibly as a tracker, a career also enjoyed by Banjo.¹⁵

By itself, the killing of Jerry Durack would demand its own re-telling, one that filled out a narrative that is so unsatisfactory.¹⁶ But the most striking absence from Mary Durack's story of a pioneer inexplicably struck down is the fact that just three years earlier Jerry Durack had been charged with complicity in shooting two Aboriginal men, one fatally, on this same cattle run.¹⁷ In reconstructing a narrative of legal history that connects what happens in the courtroom with what happens beyond it in time and space, the arrest and prosecution of Jerry Durack in 1898 demands our attention.

III TWO LAWS: THE TRIALS OF NIPPER AND GALWAY JERRY

In 1897, Police Constable Osborne Ritchie of the Western Australia Police was based in Wyndham. A complaint to the Wyndham magistrate from Jerry Durack about loss of cattle had resulted in Ritchie being required to embark on patrol in November. He was armed with warrants for the arrest of Jacky, Monday and a number of other Aborigines alleged by Durack to have killed cattle on his Dunham River station, south of Wyndham. Nearing that country Ritchie heard the disturbing news that the suspect cattle thieves had in fact been shot, and that Jacky had died. Some days later, Ritchie was led to Jacky's remains by Aboriginal women, among them witnesses of the event. From them he learned that Jacky and Monday had been shot by Nipper, one of Jerry Durack's workers. The man Jacky (known as Timboine) had died. Ritchie proceeded to the Dunham River station. Questioning Nipper, he was soon alerted to another story, one that led him to give Nipper a police caution. Nipper, his age unknown, broke down in tears as he alleged that he had been ordered by Jerry Durack to take Jacky and Monday over the hills and shoot them.

Ritchie had a reputation for hostility to pastoralists. A decade before these events he had opposed the swearing in of station owners as special constables and resisted them joining police patrols. In 1888 he had also

15 Calendar of Prisoners Tried at Supreme Court, 1901 (p 105), WASRO. The trial judge was Pennefather J.

16 Penny Van Toorn, 'Indigenous Australian Life-Writing: Tactics and Transformations', in Bain Attwood and Fiona Magowan (eds), *Telling Stories: Indigenous History and Memory in Australia and New Zealand* (Allen & Unwin, 2001). Van Toorn makes use of official public records, including material discussed below, to register the telling of Indigenous stories within the archives of settler society. See also Wayne Martino et al, *First Australians New Australians* (Fremantle Arts Centre Press, 1997) 64.

17 Although Jerry Durack's 1898 story has been noted by historians it has received little attention, but see Neville Green, *The Forrest River Massacres* (Fremantle Arts Centre Press, 1995), 68-70; Christine Halse, *A Terribly Wild Man* (Allen & Unwin, 2002); Chris Owen, "'The Police Appear to Be a Useless Lot up There": Law and Order in the East Kimberley 1884-1905' (2003) 27 *Aboriginal History* 105; Van Toorn, 'Indigenous Australian Life-Writing: Tactics and Transformations', above n 16.

joined his fellow officer in the Kimberley in criticising station owner attitudes to the Aborigines, who were constantly blamed for stock losses.¹⁸ Nipper's allegation was thus made to a policeman who was disposed to believe him.

Dunham Station in 1897 was a difficult concern, poor country for breeding cattle.¹⁹ Its owner had a reputation as a 'wild man' and disagreed strongly with his father's denunciation of the increased powers of police against Aborigines and the flogging of cattle spearkers.²⁰ Some of the Duracks, MP among them, were implicated in the raids and killings of Aboriginal people by police and settler patrols just three years before.²¹ If Ritchie knew these things, as he likely did, given the length of his service in the region, the possibility that Galway Jerry may have ordered such a drastic response to a cattle theft was not beyond imagining. After Ritchie spoke to other Aborigines in the area he determined that Durack should be arrested and charged.

At Wyndham, the small port servicing the East Kimberley (the location of the main business serving the region, the Connor and Doherty shipping agency which was now joined with the Duracks' enterprises) both Nipper and Jeremiah Durack were committed for trial to take place at Perth. Nipper was to face the capital charge of murder, with Durack charged with complicity in having ordered Nipper to shoot the two men.

These events were absent from Mary Durack's recounting of the family stories, with all their hardships as well as their triumphs. So too was the subsequent trial of Nipper in court, with its compromising evidence about the actions of Jerry. Neither was there any mention of the steps taken in Jerry's defence by his nephew, MP, and the assistance lent him by the leaders of the Kimberley settlers. In crafting her generous histories of the pioneering Duracks, the shame cast on Jerry's reputation by his suspected complicity in what *appeared* to be an Aboriginal *inter se* murder, seems to have rendered Mary speechless. Her silence was made possible by the construction of two legal narratives, one making the black man guilty, and the other rendering the white man innocent.

We may examine these proceedings as a story of justice and injustice. But we can also remember that this story is made possible in the archival record through the lens of what Dorsett and McVeigh have called a 'technology of jurisdiction'.²² For making law work in remote places meant co-ordinating the actions of police, magistrates, counsel and judges, through communications that were still fragile and commonly arduous. What is left to us is much more than the newspaper reports and the

18 Mollie Bentley, *Grandfather Was a Policeman: The Western Australia Police Force 1829-1889* (Hesperian Press, 1993) 139-140. See also Western Australia Legislative Council, *Votes & Proceedings* 1888: 485-488.

19 Dunham Station's later history confirmed this; the land was purchased by an Aboriginal community in 1974.

20 Sullivan and Shaw, *Banggaiyerri*, above n 8, 223; Durack, *Kings in Grass Castles*, above n 6, 325.

21 Owen, above n 17.

22 Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* (Routledge-Cavendish, 2007).

personal diaries and family letters that colour Mary Durack's recording of Jerry's later death. In a very material way, criminal justice was, and is, put into effect through paper – the warrant, the deposition, the writ, the transcript, the record of judgment, the communications of counsel with defendants, or of family with counsel, or of defence counsel and crown solicitor. Mary Durack forgot, or was never told, or covered over the fact that Jerry's *virtual* appearance as the body at the heart of the 1901 murder trial was not his first encounter with a murder trial.

The steps to trial were many and challenging for any defendant, though it was unlikely for white defendants to be hobbled by chains as were Aboriginal defendants and even witnesses.²³ Even for the pastoralist Durack, committal in Wyndham was followed by a 2000 km journey by boat, the *SS Albany*, to Perth. Jerry's fate was tied to proceedings against Nipper, also known to the record as Wonnerwerry. But from the moment he stepped off the boat in Fremantle, Durack's path departed from that of Wonnerwerry. Almost immediately a writ for habeas corpus was served on the Fremantle gaoler, and a bail order granted. 'The accused', reads the application, 'is a station owner and has large interests in the Colony of Western Australia and is not likely to abscond from his bail'. The release was granted by Acting Justice James, though the bonds were high: two thousand pounds from Durack himself, and two thousand each from two of the colony's leading northern figures.²⁴ These guarantors were parliamentarian Francis Connor, a co-owner of the principal East Kimberley pastoral company and shipping agency (Connor, Doherty and Durack Ltd); and Alexander Forrest, Lord Mayor of Perth, Kimberley land-holder, and brother of the Premier and Federationist, John Forrest.²⁵

Well before Jerry's release on bail in Perth, his relatives in the north were agitating his case. JW Durack was another pastoralist – his telegram to Francis Connor MLA spelled out the anxiety of Jerry's family and urged him to act together with their business partner Doherty to approach the Crown Solicitor and the Attorney-General. Scuttlebut over the actions of Constable Ritchie was soon in play. One settler at Wyndham signed an affidavit alleging that Ritchie had promised Nipper that he would be made a 'police boy' (tracker) if 'you talk straightfellow longa Jerry Durack'; while Police Sergeant Evans swore an affidavit that Nipper had told him a different story about the killing. Less subtle was an intimation from the Durack family that Ritchie's reputation would be dragged in the mud. A note from JW reminded MP: 'use your own discretion as to whether you bring out about his [Ritchie's] having connection [with] these gins. He is a

23 For chaining, a practice that lasted into the 1930s, see Jane Lydon, *The Flash of Recognition: Photography and the Emergence of Indigenous Rights* (University of New South Wales Press, 2012), ch 2; Douglas and Finnane, above n 4, 101-102; Peter Biskup, *Not Slaves, Not Citizens: The Aboriginal Problem in Western Australia, 1898-1954* (University of Queensland Press, 1973) 81, 99.

24 See telegram JW Durack to Connor MLA, 9 Feb 1898, WASRO Cons 255 1901/137.

25 WASRO Cons 3473 Item 208 case 2796 (Durack) No 43 of 1898 (Wonnerwerry al 'Nipper'). The bail bonds were misreported in the local press as one thousand pounds from Connor and Forrest.

married man his wife deserves all respect possible'. Did JW mean that this allegation should or should not be deployed? It scarcely mattered, given that these bits of paper made their way into the Crown Solicitor's office as they must have, throwing doubt on the integrity of the police officer at the heart of the investigation.²⁶

Most weighty of all in Jerry's defence was his nephew, MP, the central figure in Mary Durack's family saga. A nine page letter addressed to 'Jerry Durack's Lawyers' was drafted by MP in Wyndham on the day Jerry arrived at Fremantle. In this letter, MP canvasses every possible stratum and loophole that might be exploited in his brother's defence against the charge. Were the warrants correct in form? Had Jacky's remains been positively identified? Was an alibi available, insofar as the dates of the shooting remained unclear? He also appeared to have put pressure on Ritchie to testify as to the unreliability of Aboriginal testimony.²⁷

The search for an alibi seemed a lost cause since Jerry's statements to the police were already consistent with much of the Aboriginal evidence. On his own telling, Jerry had been droving cattle into Wyndham for sale, accompanied by Nipper and two other Aborigines, as well as his three sons. The party had set off at different times, planning to meet at a waterhole at Wheelbarrow Creek about 8 miles north of the Dunham homestead. Along the way they encountered Monday and Jacky, who were accompanied by two Aboriginal women, whom Ritchie later detained as witnesses. Jerry said that he told Nipper to warn Monday and Jacky they had no business there as 'they were frightening the cattle'. They denied killing any cattle. Jerry's statement continued: 'I told Nipper to tell them not "to come back again or else they would get shot". I told him to make them as frightened as he could, and to take them over the hill where they were accustomed to be'. He said Nipper had been frightened, and so Jerry had broken the men's spears (an incident reported by all the witnesses and Nipper). The women had then started to walk away, but Monday and Jacky stayed: 'I then told Nipper to come down to the pack horses a hundred or so yards away, and I would give him a revolver ... When I gave Nipper the revolver he rode up to Jacky & Monday, and they turned and walked in front of him after the gins'. Durack denied that he knew anything about the shooting, although his evidence showed clearly enough that he had been aware that something had happened. As he said, evidently in response to a question from Ritchie, 'I believe the three black boys had some talk about the matter next morning and I may then have said to Nipper "you need not report this / now that you did not shoot them"'. Pressed further on Ritchie's testimony gathered from Nipper and the Aboriginal witnesses

26 Cons 255 1901/137, SROWA. These records of the 1898 trials are in the Chief Protector files relating to the murder of Jerry Durack in 1901. The Chief Protector (appointed to administer the *Aborigines Act 1897* (WA)) was in constant consultation with the Crown Solicitor over the preparation of the defence case for Nipper. The Crown Solicitor's office, of course, also prepared the prosecution.

27 MP Durack to 'Jerry Durack's Lawyers', 17 March 1898, Cons 255 1901/137, SROWA.

Durack prevaricated: 'I did not tell him to shoot them, but I will not say positively that I did not say to him "if they go to kill you shoot them". I may have said this since he seemed to be afraid to take them away'.

In spite of his denial of any knowledge of the shooting his own evidence already suggested the possible outcome. Unlike Nipper, who told Ritchie that he had fired in response to the men throwing stones at him, Durack's initial deposition made no reference to such a provocation. Instead, he passed off the killing as the outcome of a quarrel between blacks over Aboriginal women.²⁸

Three weeks after Durack's release on bail in Perth, the stakes seemed to be raised much higher. In a move that attracted later suspicion, and without any published reason, the Attorney-General altered the charge against Durack to a count of 'murder'. Was he swayed by a recent decision of a jury in a shocking case in which the white defendant (charged with the murder of three Aboriginal workers by flogging) had been saved from a capital conviction by a jury reluctant to send a fellow settler to the gallows? The jury had acted against the clear direction of the Chief Justice that a defence of manslaughter was not justified in what he described as a 'particularly hideous and atrocious case'.²⁹ The announcement of the case list for the April criminal sessions still placed Wonnerwerry alias Nipper at the top of the list.³⁰ The trial commenced on 13 April before a jury of 12 settlers. Assigned an experienced defence counsel (RS Haynes) by the court, Nipper had some right to expect a fair hearing. In fact the prosecution, conducted by the Crown Solicitor (and later judge of the Supreme Court) RS Burnside, did little to press the murder charge. His opening remarks already invited the jury to consider the homicide somewhat less important than it might be, since Aborigines were 'not conscious of the result of killing each other'.³¹

28 'Statement of JJ Durack', p 4, Cons 255 137 1901, WASRO.

29 This was the 'Bendhu case' in which the owner of a Pilbara district cattle station, Ernest Anderson and his brother (Alexander, who died of typhoid fever while in Fremantle Prison awaiting trial) flogged six natives during their forcible capture and return to the Bendhu station where they were employed. The Chief Justice was dismayed by the verdict for manslaughter rather than murder and responded by sentencing Anderson to life imprisonment, a unique sentence in a manslaughter case at this time (analysis of contemporary criminal registers suggests that the worst manslaughter cases got no more than 10 years imprisonment: Registers of criminal indictments, Cons 3422/2, WASRO). *West Australian* (Perth), 22 December 1897, 3. Subsequently, the Chief Justice and the Colonial Secretary engaged in a public debate over prosecution policy and the role of juries: see *Western Mail*, 14 January 1898, 9. Anderson was released from prison after serving only five years of his sentence: *Western Australia Police Gazette* 1903, p 251 (cited in Brian Purdue, *An Index to Violent Indictable Crime in Western Australia Where a Conviction Was Recorded* (B Purdue, 2002) 139).

30 *West Australian* (Perth), 6 April 1898, 3.

31 Burnside, Notes of trial (fol 1), 'The Crown versus Pompey, alias Nipper. Fee for defending prisoner', Cons 255 118/1898, SROWA. The original file name appears to be a clerical error of the time – Pompey, one of Jerry Durack's workers, was a witness in the case who gave depositions in Wyndham but was too ill to give evidence at the trial in Perth.

Most telling in the prosecution case was the avoidance of implicating Durack, whose trial was yet to come. Burnside constructed Nipper as the killer, with no hint of Nipper responding to Durack's direction. That evidence nevertheless emerged in examination of the witnesses, most of whose depositions generally implicated Durack in the events leading up to the shooting. The exception was Sambo (Mingaring, who said he was from the Fletcher River), a long-standing employee of Durack. Under cross-examination, Sambo said he had told a lie when he told Constable Ritchie that he saw Nipper shoot Jacky – in court he claimed that he heard of the event only from Durack. Under Haynes' questioning, Sambo brought into court Durack's story that the shooting was motivated by a quarrel over Aboriginal women.

Other Aboriginal witnesses included Chungi (or Jungi, of the Denham River) and Wya (also of Denham River), reported in one newspaper as the mother of the dead man Jacky. Together with the elderly man, Monday (Ur-r-rmaring, of the 'Denham country'), who had been also shot and wounded by Nipper, they told the story of Durack's direction to Nipper to shoot. But the credibility of their evidence was shredded in Haynes' cross-examination. Haynes showed that they could not have *heard* Durack give a direction since they were too far away from the events and did not understand English. Monday proved unable to respond to Haynes' invitation to him to repeat in English what Durack had said to Nipper. Monday's evidence proved even more vulnerable to a standard defence attack on his credibility. He had recently been convicted of cattle killing and sentenced to gaol: in Haynes' words, Monday's evidence was that of 'a convicted criminal and ... one given with a desire for revenge'.³²

Haynes' defence was an exoneration of Durack as much as a reading down of the charge of murder to one of manslaughter. When it came to summing up, Burnside did no more than assert that there was clear evidence of Nipper's shooting. Haynes admitted the shooting, but rightly questioned the 'theory of the Crown', since there had been no substantial case for murder. The judge's summing up was virtually to direct the jury to a lesser verdict. Can one hear a sigh of relief, less for Nipper than for Durack, when the jury dutifully responded with a verdict for manslaughter and recommendation to mercy? Wonnerwerry was sentenced to five years, which he appears to have served at Rottnest – though he may have been discharged within a year to become a police tracker.³³

Jerry Durack did not have long to wait until the hearing of his own case, listed for the same sessions. He did not even have to endure the ignominy of being brought to face the charge of murder, which the Attorney-General had determined a week earlier. The defence brief is signed off with a 'nolle

32 Haynes cross-examination, Notes of trial (fols 7-8), 'The Crown versus Pompey, alias Nipper. Fee for defending prisoner', Cons 255 118/1898, WASRO.

33 *West Australian* (Perth), 22 April 1898, 15; *Western Mail*, 22 April 1898, 51; Green, *The Forrest River Massacres*; Neville Green and Susan Moon, *Far from Home, Aboriginal Prisoners of Rottnest Island 1838-1931* (University of Western Australia Press, 1997) 294.

prosequi'. Brief press reports in the Perth media described the proceeding. When the case came up for mention, the Crown Solicitor, Robert Burnside, announced that after consultation with the Attorney-General he proposed to withdraw the case, in view of the verdict of manslaughter in the case of Nipper. Nipper's further charge of wounding with intent (the shooting of Monday) was also withdrawn.³⁴

The Perth papers reported the Durack exoneration discreetly,³⁵ but a less restrained account was published outside Perth, in a newspaper about as distant from the Kimberley as one could find. The *Albany Advertiser* reported on 23 April the *nolle prosequi* and its legal rationale, that the case against Durack would fail in the light of the outcome in Nipper's case. 'But', continued 'our own correspondent', 'some cynical people will be found who will ask, "Suppose the position had been reversed, and Durack tried first, would he have been found guilty of manslaughter and "Nipper" got the benefit of the *nolle prosequi*?"' Indeed, the paper continued, in aspersions on the entire proceeding: 'As soon as Durack obtained bail he returned to his station, and gave instructions for various improvements to be made, feeling assured that he would be acquitted, and his confidence, it seems, has been fully justified'.³⁶

Durack's confidence in the future would prove to be a mirage.³⁷

IV TWO LAWS

At one level, this history can be recounted as a moral tale about the politics of prosecution, its tropes largely consistent with the sorry history of Australian criminal justice when it deals with Indigenous people, as defendants or victims, or as both. Two decisions were critical to the outcome of the proceeding. The first was the upgrading of Durack's charge from inciting to one of murder, a capital charge in a colony still using the death penalty. This placed a high burden on the prosecution, as well as adding to the problems of getting a jury to convict a fellow settler, a rare event in capital trials in the Australian colonies, though more common in Western Australia, and one which had occurred very recently in Western Australia in the Bendhu case.³⁸ The second critical decision, as the *Albany*

34 Contra Green's account (Green, *The Forrest River Massacres*, 68), the proceedings make clear that charges against Durack were dropped after the verdict in Nipper's trial, not after Monday's death from influenza.

35 *West Australian* (Perth), 19 April 1898, 4; *Western Mail*, 22 April 1898, 36.

36 *Albany Advertiser* (Albany), 23 April 1898, 4.

37 When his nephew MP saw him a few months later, 'he was shocked to find his uncle, habitually full of banter and good cheer, looking drawn and ill'. The Dunham River Duracks also buried two of their children in this same year, casualties of a 'fever': Durack, *Sons in the Saddle*, above n 6, 38; Durack, *Kings in Grass Castles*, above n 6, 382.

38 See above n 29, in which Ernest Anderson benefited from the partial verdict of manslaughter, a typical outcome of the 19th century homicide trials in which Europeans had been convicted for killing an Indigenous person: see Nettelbeck, above n 1, 389.

Advertiser raised, was the listing of cases in the criminal sessions of April 1898, with Durack's following that of Nipper. That listing opened up the space through which the Crown Solicitor could too readily withdraw the charge against Durack, once Nipper's conviction was secured.

Yet no account of the killing of Jacky and the later killing of Durack, and the prosecutions that followed each event, can rest content with these as stories of criminal law, its rules, procedures, decisions and its imperfections. Instead, we must consider what they might tell us about how to contextualise criminal law and its function in a settler society that had yet to displace the authority and claims of other kinds of law, Indigenous law however it might be imagined.

Let us approach this matter elliptically. In the police statements, and again in court, various kinds of stories were told about the killing of Jacky in 1897. It was the task of the prosecutor Burnside to construct a tale that would convince a jury, and of defence counsel Haynes, to break that down. In the judicial summing up the elements of those tales were arrayed along lines of probability as to truth or falsehood. Yet what if all the elements in fact were true, varying only in the meaning that was available to be read into them? What if it were true that Durack told Nipper that he should shoot Jacky and Monday if they troubled him; that Nipper shot them when they started to throw stones at him (more than one witness described him limping, after the encounter); that the reason for Jacky and Monday's hostility to Nipper was his relationship with one or more of the women; and that Ritchie's involvement was not innocent and naïve, but the actions of one who was actively engaged in exchange of women between the Aboriginal men of the story, and even himself implicated in the social relations that flowed from such exchanges? And what was to be made of the exchange recorded in all the Aboriginal witness statements in which Sambo gave Jacky a possum at some point prior to Jerry Durack's intervention, before Jerry broke the spears and woomeras and handed Nipper a revolver? Such an exchange, the gift of the possum, bearing a meaning beyond the concerns of the prosecution or defence, was left outside the courtroom.

Absent from the trials in both 1898 and 1901 were sustained attempts to establish motivation, to construct a story that would make intelligible otherwise opaque events. The inter-cultural context of the trials resisted the construction of a story that made sense, or became the occasion for avoiding such. In the practice of defence, criminal law dismantles stories told by witnesses in order to save a defendant, or limit the harm done by a verdict. In the trial of Nipper and in the contemplation of Durack's prospects, the defence came to focus less on Aboriginal ways than on Aboriginal language. Aboriginal witnesses and their interpreters faced not only the hurdle of English, but settler scepticism of their reliability if not their truthfulness. When MP advised the lawyers of the crucial fact of Ritchie's willingness to testify as to the characteristics of blacks – 'who will say *Yes* to any question and who speak of what they tell each

other as if they were the direct authors³⁹ – he alluded to an insuperable barrier to a fair prosecution. Just so, Ritchie was in due course asked by Haynes to characterise Aboriginal speech. To this invitation the policeman responded with the seemingly pejorative description that it had a ‘barrenness of expression’. What he may have meant (claiming to know some Aboriginal language) was something like what a later interlocutor characterised as ‘economy of expression’.⁴⁰ In the real circumstance of a murder trial, counsel’s attention to language turned out to be less about Nipper’s culpability than about undermining the credibility of Aboriginal stories about Jerry Durack.

In the stories like these that come to us from a colonial history we see two laws at work, or indeed multiple laws, inflected by what economists term ‘externalities’. The two laws may be thought colloquially, one for rich, one for poor, one for white, one for black. But there is also another dimension – the separate laws of two cultures, Indigenous and settler, each in transformation. In Mary Durack’s failure to tell the full story of Jerry Durack we see a sign of settler discomfort, and of criminal jurisdiction’s potential at that moment to be deployed in the adjudication of Aboriginal interests, more than those of settlers. What remains unresolved in the archive, but might become the stuff of another kind of narrative, is the connection between those events of 1898 in which Jerry Durack had incited, if not directed, Wonnerwerry to shoot two men, and those in 1901 in which Jerry and his son were the targets of Banjo and Rochie’s own assertion of their interests, whatever they might be.

39 See n 25 above. The ‘gratuitous concurrence’ of Aboriginal interviewees in police custody has been the subject of much analytic and policy attention since the 1970s, informing the development of the Anunga rules by Justice Forster in the Northern Territory in the 1970s, as well as later criticism of policing of Aboriginal detainees and defendants: see especially Diana Eades, *Courtroom Talk and Neocolonial Control* (Mouton de Gruyter, 2008) 91; John Coldrey, ‘Aboriginals and the Criminal Courts’ in Kayleen Hazelhurst (ed), *Ivory Scales* (NSW University Press, 1987) 81.

40 Grant Ngabidj and Bruce Shaw, *My Country of the Pelican Dreaming* (Australian Institute of Aboriginal Studies, 1981) 4.