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EDITORIAL POLICY

law&history is a fully refereed journal of original research and contribution to scholarship that is published twice a year. The Editors welcome submissions on any law and history-related topic but are particularly keen to publish material on Australia, New Zealand and the Pacific and expect to receive papers presented at the annual Australian and New Zealand Law and History Society Conference for consideration.

At all times, the Journal will maintain the highest standards of academic integrity. Articles undergo a rigorous double-blind reviewing process.

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CONTENTS

Editorial: A new era for *law&history* vii

Focus: Sir Francis Forbes Society for Australian Legal History Prize

Bridget Andresen
The Imagined Rapist in the Queensland Courtroom, 1945–1955 1

Articles

Shannon Ross
Parental Advocacy and Child Sexual Abuse in Australian Institutions, 1940–1980 25

Laura L. Dawes
Communicating and Constituting the Law: Rhetoric and the Plain Language Movement in Australia 50

Emily Lanman
'A Convict in Her Own Right': Rethinking Prisoner Classification in Western Australia, 1829–1868 81

Delwyn Blondell
Beyond Baby Farming: Prosecuting Paid Child Care in Liberal-Era New Zealand 108

Liz Rushen
John Marshall and *Lloyd's Register of Shipping* 135

Book Reviews

Dean Ashenden, *Telling Tennant's Story: The Strange Career of the Great Australian Silence* (Ben Silverstein) 154

Jared Davidson, *Blood and Dirt: Prison Labour and the Making of New Zealand* (Matthew Cunneen) 156

David Collins, *Fragile Foundations: The Application of English Criminal Law to Crimes Committed in Aotearoa New Zealand Between 1826 and 1907* (Kristyn Harman) 159

Alecia Simmonds, *Courting: An Intimate History of Love and the Law* (Philippa Moore) 161

Editorial

A new era for *law&history*

As the incoming Editors of *law&history*, we thank the outgoing Editors, Lisa Featherstone and Sue Milne, and the indefatigable Editor-in-Chief, Diane Kirkby, for their collective efforts in producing the journal over the past few years. Curating and producing an academic journal of quality in the current university sector is challenging and demanding, and it represents important intellectual labour that should be recognised as a major contribution to knowledge. We thank Lisa, Sue and Diane for their wit and insight and for their assistance as we have transitioned into our new roles as Editors of the journal. This issue also represents the final stages of their work on the journal.

As we pause to reflect on the future of law and history research, we feel fortunate. In our midst are emerging scholars with enormous skill and potential. We have been impressed by the quality of submissions for the Sir Francis Forbes Society for Australian Legal History Prize, as well as by the overall shape of the field. This issue includes the article by Bridget Andresen that was awarded the Sir Francis Forbes Society prize for 2024. Andresen's article is a powerful case study of the figure of the rapist in the mid-twentieth-century Queensland courtroom. Using deposition and Supreme Court trial transcript material from fifty-four rape and attempted rape cases involving adult victims over ten years (1945–1955), the article both presents and analyses the imagined figure of the rapist as understood by contemporaries and viewed through the prism of the criminal justice system. We congratulate Andresen on this excellent piece and on her prize. Future issues will also feature award-winning articles by early-career researchers.

Since the previous issue of the journal in 2024, we have consolidated and refreshed the membership of our Editorial Board, with the current confirmed Board listed in our front pages. We appreciate the contributions of all former Board members over the life of the journal, and we aim to engage our Board more deliberately as we move ahead with new approaches to journal content and special thematic focus areas.

This issue includes pieces of research that span diverse areas, covering the social histories of gender, sex, and violence; the story of New Zealand's most infamous baby farmer; convict histories; shipping intelligence; and the rise of the plain language movement in Australian legislative drafting.

We are especially pleased to share four book reviews in this issue, and we thank our Book Reviews Editor, Kristyn Harman, for her work to keep book review content current and relevant for our readership.

We look forward to growing our Society's journal and audience in the coming years.

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University of Newcastle

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Australian National University

The Imagined Rapist in the Queensland Courtroom, 1945–1955

Bridget Andresen*

Just as understandings of sexual violence have changed over time, so have understandings of who commits sexual offences. Historically, the figure of the rapist has incited fear, for it was commonly believed that he would be a stranger to his victim and that his attack would be brutally violent. In recent decades, discourse on sexual violence has shifted to reveal the ongoing structural and institutional use of rape and that most offenders victimise someone known to them. Before this reform, prosecutorial discretion in the selection of cases that proceeded to trial ultimately shaped perceptions of believable rapists. This article takes the mid-twentieth-century Queensland courtroom as a case study to deconstruct who the imagined figure of the rapist was, as understood through the lens of the criminal justice system. It uses deposition and Supreme Court trial transcript material from fifty-four rape and attempted rape cases involving adult victims over ten years, 1945–1955. Although public discourse would suggest that there was a 'typical' or 'distinctive' figure of a sexual offender, within the courtroom, tension between broader stereotypes about sexual violence and social markers reveal the malleability of this figure. Indeed, it becomes apparent that there is no clear figure of a rapist, but rather an intricate web of overlapping, and at times contradicting, factors that contribute to an overarching narrative.

Keywords: rape, attempted rape, rapist, Queensland, trials, court, victim-survivor

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* Sir Francis Forbes Society for Australian Legal History Prize winner for 2024.

In 1953, Clive raped seventy-six-year-old Geraldine when she was on her way home from a night out with friends in Brisbane, Queensland.[1] Geraldine had accidentally missed her tram stop and asked Clive, a seemingly approachable stranger nearby, to help her call a taxi. Clive said that he himself would drive her to where she needed to go, but instead he grasped her by the arm and dragged her to a nearby park, where he heavily beat and raped her. Geraldine's screams eventually attracted the attention of three men passing by, who stopped to help and called the police. After trial in the Supreme Court, Clive was found guilty of rape. When sentencing him to a severe ten years' imprisonment with hard labour, Justice Townley remarked:

> The crime you committed is a revolting one, the rape of a woman old enough to be your grandmother, and one who, it must have been quite apparent, was old and somewhat enfeebled … There is nothing in the case, apart from the nature of the crime itself, to suggest that your mental condition is such that you are unable to exercise proper control, or incapable of exercising proper control over your sexual instincts.[2]

Justice Townley's evocative remarks point to broader ideas that existed in Queensland, and in the criminal justice system, about who a rapist was believed to be. It is evident from his comments that not only was rape viewed as a particularly serious offence, it was one fuelled by male desire and committed by a man who had elected to act on such desires, seemingly regardless of whether the other person was consenting or not. The imagined figure of the rapist is one that has changed over time in response to social understandings of sexual violence, criminality, gender, and sexuality.[3] Indeed, it was not until 1883 that the term 'rapist' existed, highlighting not only that the language around this issue is a rather

1 This research was approved by the Human Research Ethics Unit Coordinator at the University of Queensland (project number 2021/HE001387). In accordance with this, the names of non-professional witnesses have been anonymised. To maintain this anonymity, archival references for associated court documents have not been listed but may be made available upon contacting the author.

2 *R v Riley* (1953), Queensland State Archives [QSA].

3 Jill Bavin-Mizzi, *Ravished: Sexual Violence in Victorian Australia* (Sydney: University of New South Wales Press, 1995), 17; David P. Bryden and Sonja Lengnick, 'Rape in the Criminal Justice System,' *The Journal of Criminal Law and Criminology* 87 (1997): 1218.

modern invention, but that so too is the 'figure'.[4] This article takes the mid-twentieth-century Queensland courtroom as a case study and uses court material, in the form of depositions and trial transcripts, to understand who the rapist was imagined to be, and to examine the impact that these ideas had on trials of rape and attempted rape.

This article adds to a growing body of literature that seeks to place historical cases of sexual violence in the social context in which they occurred, and to deconstruct broader attitudes towards the issue.[5] Interdisciplinary researchers have attempted to explain why men would commit rape: some have argued that rape was a man's biological urge to impregnate, a sexual 'instinct', a weapon of war, or a tool to assert masculine dominance.[6] Although some of these theories are ungrounded (notably the idea of rape as a 'biological urge'), others have been true in specific contexts. For example, the feminist scholar Angela Y. Davis argued how, in the context of American slavery, the sexual abuse of Black women by their white slaveowners was an 'essential dimension' of the power dynamic to maintain the ongoing oppression of Black bodies, and rape was routinely used as a weapon of war against Aboriginal people during the colonisation of Australia.[7] Recognition of the ongoing structural and

4 Joanna Bourke, 'Sexual Violence, Bodily Pain, and Trauma: A History,' *Theory, Culture & Society* 29, no. 3 (2012): 42.

5 See, for example, Lisa Featherstone and Andy Kaladelfos, *Sex Crimes in the Fifties* (Melbourne: Melbourne University Publishing, 2016); Bavin-Mizzi, *Ravished*; Judith A. Allen, *Sex and Secrets: Crimes Involving Australian Women Since 1800* (Melbourne: Oxford University Press, 1990); Joanna Bourke, *Disgrace: Global Reflections on Sexual Violence* (London: Reaktion Books, 2022); Lisa Featherstone, *Sexual Violence in Australia, 1970s–1980s: Rape and Child Sexual Abuse* (Cham: Palgrave Macmillan, 2021); Joanna Bourke, *Rape: A History From 1860 to the Present* (London: Virago Press, 2007).

6 Joanna Bourke, 'Who is "the Rapist"?: Crimes of Sexual Violence and Theories of Evolution,' in *Problems of Crime and Violence in Europe, 1780-2000*, ed. Efi Avdela, Shani D'Cruze and Judith Rowbotham (Lewiston, NY: The Edwin Meller Press, 2010), 311-36; Katharine K. Baker, 'What Rape Is and What It Ought Not To Be,' *American Bar Association* 39, no. 3 (1999): 238-39.

7 Angela Y. Davis, *Women, Race & Class* (London: The Women's Press Ltd, 1982), 175; Libby Connors, 'Uncovering the Shameful: Sexual Violence on an Australian Colonial Frontier,' in *Legacies of Violence: Rendering the Unspeakable Past in Modern Australia*, ed. Robert Mason (New York: Berghan Books, 2016), 45; Ann Laura Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley: University of California Press, 2010), 45; Heather Goodall and Jackie Huggins, 'Aboriginal Women are Everywhere: Contemporary Struggles,' in *Gender Relations in Australia: Domination and Negotiation*, ed. Kay Saunders and Raymond Evans (Sydney: Harcourt

institutionalised use of rape is relatively recent. In 1975, it was the infamous American radical feminist Susan Brownmiller who argued that rape was a 'conscious process of intimidation by which *all men* keep *all women* in a state of fear'.[8] Like many other feminists in this period, Brownmiller's argument was a piece of powerful political rhetoric that embodied a distinct shift in broad social understandings of sexual violence to being an issue of power imbalance and abuse. Before this, rape was understood primarily as a sexual act, as will be detailed in this article.

Historians have begun to trace Australia's long history of sexual violence. Rape as a tool of warfare has been increasingly discussed in relation to frontier and colonial violence, as a way for colonialists to control and subjugate Aboriginal and Torres Strait Islander populations.[9] Of significance are works by historians Lisa Featherstone and Andy Kaladelfos, particularly their book *Sex Crimes in the Fifties*, although many of their other publications have also been critical.[10] To date, *Sex Crimes in the Fifties* offers perhaps the most comprehensive investigation into sex crimes in Australia, using 787 charges heard in the Supreme Court of New South Wales in the 1950s.[11] Rape trials comprised approximately one-

Brace Jovanovich Group, 1992), 415; Claudia Card, 'Rape as a Weapon of War,' *Hypatia* 11, no. 4 (1996): 7.

8 Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975), 15.

9 Judy Atkinson, *Trauma Trails, Recreating Song Lines: The Transgenerational Effects of Trauma in Indigenous Australia* (Melbourne: Spinifex Press, 2002); Ann McGrath, *'Born in the Cattle': Aborigines in Cattle Country* (Sydney: Allen & Unwin, 1987); Connors, 'Uncovering the Shameful,' 33-52; Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (New York: Routledge, 1995); Stoler, *Carnal Knowledge and Imperial Power*.

10 Featherstone and Kaladelfos, *Sex Crimes in the Fifties*. See also Lisa Featherstone and Andy Kaladelfos, 'Hierarchies of Harm and Violence,' *Australian Feminist Studies* 29, no. 81 (2014): 306-24; Andy Kaladelfos and Lisa Featherstone, 'Race and Ethnicity in Sex Crimes Trials from 1950s Australia,' in *Legacies of Violence: Rendering the Unspeakable Past in Modern Australia*, ed. Robert Mason (New York: Berghahn Books, 2017), 217-32; Lisa Featherstone, '"That's What Being A Woman is For": Opposition to Marital Rape Law Reform in Late Twentieth-Century Australia,' *Gender & History* 29, no. 1 (2017): 87-103; Featherstone, *Sexual Violence in Australia*; Andy Kaladelfos, 'Gender, Victimisation and Prosecutorial Discretion in the Attrition of Sexual Offences,' *law&history* 5, no. 2 (2018): 86-110; Nina Westera, Sarah Zydervelt, Andy Kaladelfos, Rachel Zajac, 'Sexual Assault Complainants on the Stand: A Historical Comparison of Courtroom Questioning,' *Psychology, Crime and Law* 23, no. 1 (2017): 15-31.

11 Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, 10.

quarter of all charges heard in their work.[12] Through a systematic analysis of each charge and trial, they showed that the experience within the courtroom was a direct reflection of gendered expectations of women's behaviour, both generally and regarding sexual morality. A crucial finding from their work was that '[t]he similarities in rape prosecutions were more than a coincidence: they indicate pretrial selection in determining what cases would proceed to a rape trial'.[13] Indeed, as will be seen in this article, the distinct similarities that contribute to a clear figure of a believable rapist in mid-twentieth-century Queensland point to prosecutorial discretion in case selection.

Historically, and not unique to the Queensland experience, the rapist was understood within a fundamentally sexualised framework, where motives and excuses for their offences were grounded in reductive ideas about male sexuality. This positioned the rapist as an ordinary man who chose to act on his sexual desires, distinguished the offence as an act of sex, and did not acknowledge the structural or institutionalised use of rape. An examination of the social backgrounds of the defendants in this sample, as told through the lens of court material, showed a largely homogeneous group and an apparently distinctive figure of a rapist. This can be attributed to widespread rape myths, defined by the American researcher Martha Burt in 1980 as 'prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists', which imagined the rapist as a young man of the lower or working classes, who was likely to be of Indigenous heritage.[14] Yet, in the courtroom, and throughout trial proceedings, this figure becomes less clear. The way in which the offence occurred, coupled at times with specific social factors, such as the race of the defendant or their affiliation with the defence forces, shifted how they were understood in the criminal justice system. These ideas had the potential dual capacity of rendering the crime unbelievable or being an incriminating factor. This reveals the malleability of these seemingly rigid rape myths, as well as tension between such myths and broader ideas about criminality.

12 Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, 20.

13 Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, 26.

14 Martha R. Burt, 'Cultural Myths and Supports for Rape,' *Journal of Personality and Social Psychology* 38, no. 2 (1980): 217.

Sample and Sources

Across the decade 1945–1955, there were 113 rape and attempted rape charges heard before the Supreme Court of Queensland. Of this ostensibly low number of cases, forty-five trials involved child victims and were thus excluded from this investigation. The remaining sixty-eight trials involved victims aged eighteen years or older. In the Queensland State Archives, it was possible to find the deposition and/or Supreme Court trial transcript material relating to fifty-four of these cases. This is representative of an eighty per cent sample.

Deposition bundles in the Queensland State Archives included, alongside the depositions themselves, indictments, witness summons, bail documents, written statements and, on rare occasions, correspondence between courts and lawyers. The depositions are 'administrative synopses' of the hearings and are the only sources (aside from some newspaper articles) that detail the evidence provided for the case and the conversations that occurred in the courtroom.[15] These documents appear to be heavily edited, likely by the court scribe, and vary in nature: where some read clearly, with questions and answers listed, others appear to have the questions moulded into the answers to create an almost story-like summation of the testimony. Despite this, it is still possible to discern what was said and the general proceedings of the case.

Supreme Court trial transcripts, often hundreds of pages long, provided the most in-depth insight into the experience and treatment of witnesses in the courtroom. In Queensland, surviving transcripts are rare: most exist only in shorthand form and are therefore not able to be translated, or were not located in the Queensland State Archives, even after considerable searching. The seventeen located in relation to the cases in this sample are therefore a significant find and offer depth to this research that depositions alone could not. Of course, as noted by Featherstone and Kaladelfos, these 'flattened documents' do little to tell us of emotions, vocal tone or body language, and it is still possible that errors were made during the transcription process, or that a level of editing was done by the court scribe.[16]

15 Yorick Smaal, 'On the "Homo-front": Homosexuality, Gender, and the Creation of Sexuality in World War II Queensland, 1939-1948' (PhD diss., University of Queensland, 2008), 6.

16 Featherstone and Kaladelfos, 'Hierarchies of Harm and Violence,' 309.

Other documents that proved critical to understanding the social backgrounds of the defendants in this sample were the character reports compiled by the investigating officers. Although brief, these forms provided crucial insight into the personal lives of defendants, through factors determined important to criminal proceedings. These standardised forms were divided into twelve questions and gave an overview of the defendant's personal and early life, previous character (including while at school, depending on their age, and if they served in the defence forces), criminal history and any extenuating and aggravating circumstances of their charge/s. As only twenty police reports could be located, the same data were ascertained through other court documents, police gazettes, and newspaper reports. Court reports in newspapers in this period often included personal information about the defendants, unless a rare special order was requested to suppress it, and, as such, they proved to be valuable sources in the absence of archival material.

Queensland media reporting on rape trials ranged from basic courtroom reports (the most common finding) to half-page exposés with intimate case details and photographs of witnesses. Perhaps unsurprisingly, the notorious scandal-rag *Truth* magazine seemed most inclined to favour the latter. When reporting on the rape of Geraldine (detailed in the opening story), the quarter-page spread on the case drew readers in with the promise of drama: 'I Went To Her Assistance—And She Blamed Me…' read the headline, a quote from the defendant. The article that followed included a full-body photograph of the accused, as well as direct quotations from the victim's testimony in court and graphic details of the violence.[17] Other reports on this case found in daily newspapers such as the *Courier Mail* and the *Brisbane Telegraph* emphasised the horror associated with the assault of an elderly woman, though notably to a lesser extent, and seemed less inclined to engage in a tone of gossip. At times, reports were found buried deep among miscellaneous advertisements and opinion pieces, whereas others were on the front page.[18] In this case, as the victim was an elderly woman (and therefore considered more vulnerable), the story of the attack and subsequent sentencing was reported widely across the state, from larger metropolitan newspapers such as the *Brisbane Telegraph* to local papers such as *The Charleville*

17 *Truth* (Brisbane), 8 February 1953, 39.

18 *Courier Mail* (Brisbane), 26 March 1953, 6; *Daily Mercury* (Mackay), 27 March 1953, 1.

Times and Mackay's *Daily Mercury*.[19] The focus placed on violent cases taking place in a postwar society anxious to settle into domestic bliss painted a terrifying picture of sex.[20] Additionally, although reporting in newspapers ultimately worked to bring more attention to an offence that was largely hidden, the graphic storytelling simultaneously worked to create a strict idea of what a 'real' rape entailed, who a rapist was, and who the ideal victim could be.[21]

Deconstructing the Demographic

To understand who the figure of the rapist was in Queensland society, it is first necessary to deconstruct the demographic of the offenders who were brought before the courts under these charges. Based on the data available in the court material and police reports, the following analysis largely involves the social markers of age, profession, and race. Despite such categories being used for this analysis, this is only because of the information made available in court material and should be seen as a further indication of how rapists were understood through the lens of the criminal justice system, as opposed to the most appropriate way to analyse a criminal population.

In this sample of fifty-four cases, sixty-seven different men were brought before the courts. The difference between the number of cases and defendants is because, with one exception, in all cases where there was more than one assailant, they were tried together as co-accused, rather than separately. This matter is discussed further below. The average age of the defendants was twenty-six years—the eldest was forty-eight years, and the youngest only sixteen years.[22] As only twenty police reports were available, and because the education history of defendants went largely

19 *Brisbane Telegraph*, 26 March 1953, 3; *The Charleville Times*, 2 April 1953, 12.

20 Frank Bongiorno, *The Sex Lives of Australians: a History* (Melbourne: Black Inc, 2015), 203; Lisa Featherstone, '"The One Single Primary Cause": Divorce, the Family and Heterosexual Pleasure in Postwar Australia,' *Journal of Australian Studies* 37 (2013): 354; Jill Julius Matthews, *Good and Mad Women: The Historical Construction of Femininity in Twentieth-Century Australia*, 3rd edition (Sydney: Allen & Unwin, 1984), 80.

21 Paul Wilson, *The Other Side of Rape* (Brisbane: University of Queensland Press, 1978), 1; Bongiorno, *The Sex Lives of Australians*, 204.

22 The sixteen-year-old defendant was one of three co-accused in a 1952 trial, and the other defendants were adults. His case was heard separately from the other assailants in the lower courts, but they were tried together in the Supreme Court, and for this reason I elected to keep this case in my sample.

unreported in newspapers, it is not possible to provide an accurate or comprehensive overview of the defendants' education. Further, variations in *how* the police reports described the defendants' education level meant that it was not possible to determine their average education, as some reports would give the age they left school, and others the grade they had completed. From the twenty reports available, however, only one defendant received his completion of high school certificate, whereas the others left school in their early to mid-teens to take up work. This was a common trend across Australia because of the need for labour during the war years and because school was only mandatory until the age of fourteen years in Queensland.[23] The defendants overwhelmingly worked in manual labour careers, such as cane cutters and welders, and in trades such as plumbing and carpentry: forty-five men (sixty-seven per cent of the sample) worked in these careers. Based on their job descriptions, it is likely that these men were of the working class.

In considering the race of the defendants, it becomes evident that there was a considerable over-representation of Aboriginal and Torres Strait Islander men. Five of these defendants were co-accused in a case in 1955, which likely contributed to this over-representation.[24] In this sample, Aboriginal and Torres Strait Islander men comprised nineteen per cent of all defendants: a statistic disproportionate to their population in Queensland at this time. Although it has been acknowledged that accurately determining the Aboriginal and Torres Strait Islander population before their first official counting in the 1971 national census is a somewhat impossible feat, and that earlier reporting was inconsistent and unreliable, it is clear that they constituted only a small proportion of Queensland's total population. The Australian Bureau of Statistics reported that, in the 1966 census, there were 10,201 'Full-Blood Aborigines' and 19,003 people who identified as being at least '50 per cent Aboriginal or simply "Aboriginal"' in Queensland.[25] Taking into consideration that the 1954 census counted the state's population as 1,318,259, it becomes evident that the thirteen Aboriginal and Torres

23 Sue Fabien and Morag Loh, *Children in Australia: An Outline History* (Melbourne: Oxford University Press, 1980), 152-61.

24 *R v Lloyd, Harrison, Harrison, Irving, and Jennings* (1955), QSA.

25 Robin J. Pryor, 'The Aboriginal Population of North Queensland: A Demographic Profile,' *Oceania* 45, no. 1 (1974): 28.

Strait Islander offenders in this sample are a vast over-representation.[26] This has been an enduring issue in Queensland, and indeed in Australia more broadly. As the criminologist Ross Barber argued in his study of sex offences in Queensland in 1957–1967, the proportion of Aboriginal and Torres Strait Islander defendants was 'much higher than would have been expected on a population basis', finding that sixteen per cent of all defendants charged with rape (including against children) were Aboriginal and Torres Strait Islander men.[27]

This breakdown of social markers seemingly points to a distinctive figure of a rapist in Queensland. He was a man aged in his twenties, of average intelligence and very likely an Aboriginal and/or Torres Strait Islander man. From what can be ascertained from the defendants' employment history and status, it is also very likely that he came from a working-class background. The largely homogeneous nature of this demographic analysis should not be understood to be an accurate representation of who a sexual offender was or the 'type' of person likely to commit sexual crimes, but rather as an indication of who was more likely to be *believed* to be an offender. This is reflective of what American lawyer Susan Estrich termed the 'silent power' of police, who decided whether a victim's complaint was founded or unfounded, how much to investigate the case, and ultimately whether or not to place charges.[28] Additionally, it is likely that Crown prosecutors, who would accept cases that they deemed more probable to end in conviction, took the identity of the offender into strong consideration when making this decision. This ultimately speaks to the power of rape myths on the criminal justice system, for it is evident that such ideas were at work before the case had made its way to trial.

The Rapist as Acting on Desire

Rape as an extension of male desire remained at the core of understandings of sexual violence in the Queensland courtroom of the mid-twentieth century. Although the 'excuse' of male sexuality was articulated in various forms, and in many ways worked to trivialise the

26 Australian Bureau of Statistics, *Census of the Commonwealth of Australia, 30th June, 1954, Part I.—Analysis of Population in Local Government Areas, etc.* (Canberra: Australian Government Publishing Service, 1954), 6.

27 Ross Noel Barber, 'Rape and Other Sexual Offences in Queensland: An Historical and Behavioural Analysis' (Masters thesis, University of Queensland, 1970), 152.

28 Susan Estrich, *Real Rape* (Cambridge: Harvard University Press, 1987), 15.

offence while shifting blame to the victim, it was rarely understood to be a reasonable excuse *on its own* to acquit the defendant. As such, the application of these ideas in trials can be read as deliberate articulations of understandings of male sexuality, its perceived role in rape, and how this played a part in developing an imagined figure of a rapist. It was believed that men who committed sexual offences had not controlled their desire and instead 'gave in' to their 'urges', irrespective of whether the other person was consenting. When Justice Sheehy sentenced one man to three years' imprisonment with hard labour for his assault to commit rape in 1954, he said, 'You savagely attacked this woman, a complete stranger to you, along a road, armed yourself with a weapon in order to render her powerless so that you could satiate your lust on her'.[29] As asserted by criminologist Gail Mason, it is evident here that rape was understood as an 'inevitable manifestation of male sexual urges', and in this way the offence was characterised as an act of sex and desire, rather than an act of violence.[30]

Sexuality in postwar Queensland existed in a complicated 'interregnum between the relative openness of the war years and the sixties "sexual revolution"'.[31] Although the war years did see some relaxation of strict moral ideas, which then caused a shift in dating and sexual culture, Featherstone has argued that the postwar period 'only served to highlight older, omnipresent fears about sexuality and bodies', as many attempted to move beyond the relative chaos of war and, as coined by historian John D'Emilio, 'retreat to respectability'.[32] Significant emphasis was placed on being 'appropriately' masculine and feminine, and this was considered part of the path to stability after the war years, particularly following the tumultuous American presence in Queensland.[33] The white, middle-class

29 *R v Murphy* (1954), QSA.

30 Gail Mason, 'Reforming the Law of Rape: Incursions into the Masculinist Sanctum,' in *Sex, Power and Justice: Historical Perspectives on Law in Australia*, ed. Diane Kirkby (Melbourne: Oxford University Press, 1995), 56.

31 Bongiorno, *The Sex Lives of Australians*, 186.

32 Lisa Featherstone, *Let's Talk About Sex: Histories of Sexuality in Australia from Federation to the Pill* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2011), 206; John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940–1970* (Chicago: University of Chicago Press, 1983), 75-91.

33 Ann Game and Rosemary Pringle, 'Sexuality and the Suburban Dream,' *The Australian and New Zealand Journal of Sociology* 15, no. 2 (1979): 4; Yorick Smaal, *Sex, Soldiers and the South Pacific, 1939–45: Queer Identities in the Second World War* (New York: Palgrave

expectations that demanded control of sexual desire were another contributing factor to this desired stability.[34] After the degree of freedom experienced by some in the war years, this meant that sex was once again relegated to the heterosexual marriage bed.[35]

Understandings of male sexuality, in particular, were complex and at times contradictory in nature. Despite some progression in how sexuality was conceptualised in the early decades of the twentieth century, remnants of Victorian ideologies were still present, with male sexuality widely accepted as being 'active' and 'hydraulic' and, in some cases, even forceful and aggressive.[36] In this framework, Featherstone argued that male sexuality could also be understood as 'fragile', for it was susceptible to temptation.[37] As argued by historian Stephen Garton, ideal masculinity thus 'involved the mastery of desire and self-restraint', a standard largely created by the middle classes as a way to define themselves against the lower classes.[38] Yet, despite being in direct opposition to wider moral standards, male sexual desire beyond the marriage bed was accepted and somewhat normalised; a privilege that was not afforded to women. For this reason, premarital sex, extramarital sex, masturbation and, to a much lesser extent, engagement with sex workers were considered as various acceptable sexual outlets for men (though they did not occur without criticism).[39] It is evident then that, despite the ongoing demand for control, male sexual privilege was upheld.

If the rapist was understood as a sexual figure, a crucial distinction was made between men who were *incapable* of controlling their desires and men who simply did not. The inability to control sexual desire was

Macmillan, 2015), 149; Michael Sturma, 'Loving the Alien: The Underside of Relations Between American Servicemen and Australian Women in Queensland, 1942–1945,' *Journal of Australian Studies* 13, no. 24 (1989): 8.

34 Lisa Featherstone, 'Pathologising White Male Sexuality in late Nineteenth-Century Australia through the Medical Prism of Excess and Constraint,' *Australian Historical Studies* 41 (2010): 340.

35 Bongiorno, *The Sex Lives of Australians*, 202.

36 Featherstone, *Let's Talk About Sex*, 45; Stephen Garton, *Histories of Sexuality: Antiquity to Sexual Revolution* (London: Equinox Publishing Ltd, 2004), 116.

37 Featherstone, 'Pathologising White Male Sexuality in late Nineteenth-Century Australia through the Medical Prism of Excess and Constraint,' 338.

38 Garton, *Histories of Sexuality*, 116.

39 Featherstone, *Let's Talk About Sex*, 344; Allen, *Sex and Secrets*, 227.

understood within a medical model and was part of the shift towards the pathologisation of sex and sexualities in the nineteenth and early twentieth centuries.[40] Internationally, doctors used these ideas to 'diagnose' sexual offenders, believing that the lack of sexual control exhibited in these cases was linked to a mental 'deficiency' or 'feeblemindedness'.[41] This imagined the diagnosed offender not just as a man who had not been able to control his desire, but instead as a man who was not physically capable of doing so. Such ideas were particularly influential in the United States, where psychiatrists diagnosed and treated 'sexual psychopaths', men believed to have had previous sexual trauma or developmental problems that 'left him with neither adult control nor adult sexual desires'.[42]

Although Queensland's legislation never included the diagnosis of a sexual psychopath or similar, the *Criminal Law Amendment Act 1945* outlined somewhat comparable ideas by extending psychiatric treatment for criminals to include repeat child sex offenders, whereas previously this was only available in cases of mental illness or insanity.[43] An important distinction, however, was that Queensland's law only applied to offenders with three convictions for offences against children, in juxtaposition to some states in the US, which extended this legislation to a variety of sexual crimes, including rape, sodomy, child molestation, and indecent exposure.[44] This difference not only highlights the severity with which child sexual offences were understood in Australia but is also indicative of the slower uptake of psychiatric influence in Australian courtrooms. Although Featherstone and Kaladelfos showed that psychiatrists were consulted in sentencing matters in child sex abuse trials in New South Wales in the 1950s, they argued that most judges were hesitant to rely on their input, and in fact psychiatrists rarely gave evidence in the trial

40 Garton, *Histories of Sexuality*, 169-88.

41 Estelle B. Freedman, '"Uncontrolled Desires": The Response to the Sexual Psychopath, 1920–1960,' *The Journal of American History* 74, no. 1 (1987): 88; George Chauncey, 'The Postwar Sex Crime Panic,' in *True Stories from the American Past*, ed. William Graebner (New York: McGraw-Hill, 1993), 165.

42 Stephen Robertson, 'Separating the Men from the Boys: Masculinity, Psychosexual Development, and Sex Crime in the United States, 1930s–1960s,' *Journal of the History of Medicine and Allied Sciences* 56, no. 1 (2001): 4.

43 *Criminal Law Amendment Act 1945* (Qld), s. IV(18)(1).

44 Freedman, '"Uncontrolled Desires",' 83-84.

itself.[45] In Queensland, there were only six practising psychiatric consultants for most of the 1940s, and there is no evidence to suggest that they were consulted in adult rape cases in any capacity.[46]

In Queensland, then, adult rapists were not understood as being incapable of controlling their sexual desire, but as men who simply did not, and instead chose to act on it. As seen in the opening story with Geraldine and Clive, Justice Sheehy's remarks pointed to the inherently sexualised understanding of the crime. Additionally, as the ideal presentation of masculine sexuality was one of restraint, adult rapists were in direct opposition to this expectation. This was often articulated by judges in sentencing. For example, when Justice Matthew sentenced one man to fourteen years' imprisonment with hard labour for attempted rape, he drew on wider social discourse on morality to justify his sentence:

> You are a man who can understand the rights and wrongs of things and apparently on this occasion, you were prepared to try and ruin the life of an otherwise innocent female, just to gratify your lust. I cannot have much sympathy for you.[47]

Defendants themselves also largely understood their offences as sexually motivated. Although the defendants offered a variety of excuses, namely their drunken state or their perception of the victim's 'loose' moral character, in an attempt to explain or justify their actions, at the core of such ideas was their own sexual desire. A representative example of this can be found in the case against Alexander in 1946. When Detective Sergeant Cook questioned Alexander about the offence, he said:

> I had a lot of drink today and I went back to the hotel to lay down. When I got upstairs everything was quiet so I decided to have a look around. A door was not quite closed, I pushed it open and had a look inside. I saw her lying on the bed, I felt a bit fresh so I lifted her clothes and tried to have a go at her.[48]

In his own terms, Alexander established the opportunistic nature of the offence and the apparent sexual motive to his actions. Ultimately, defendants were able to wield understandings of sexuality and desire as

45 Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, 191-212.

46 Smaal, *Sex, Soldiers and the South Pacific*, 169.

47 *R v Reynolds* (1955), QSA.

48 *R v Robertson* (1946), QSA.

an excuse for their actions and, in doing so, positioned the offence as inherently sexual in nature.

Complicating Factors

If the demographic analysis showed a rigid idea about who the figure of the rapist was in Queensland, and therefore a harmful stereotype of who a 'real rapist' was assumed to be, these ideas became malleable in the courtroom, and it becomes evident that there was significant tension between social markers and predetermined social stereotypes about sexual violence. Whereas sexuality and desire established the framework in which sexual offences were understood, there were four elements that were most influential in changing this 'figure': if the offence occurred on a date or in a date-like setting; the race of the defendant; if the defendant was affiliated with the armed forces; and if there were multiple assailants in one offence. Each of these factors had the potential impact of making the offence more or less believable, because of who the defendant was understood to be, and was considered an indicator of their character. This highlights that, despite social discourse on this matter, there was no distinct figure of a rapist, and, in the courtroom, these ideas became somewhat flexible.

Date Rape

The figure of the 'date rapist' has come to the forefront of sexual violence activism in recent years, and modern discourse on the issue has highlighted the difficulty in convicting a defendant accused of a rape that occurred on a date or in a date-like setting.[49] In this sample, overwhelmingly the victims and offenders had no prior relationship, with only three providing evidence of a meaningful friendship or relationship before the assault: one victim was raped by an in-law, another by her friend of six months, and another by her friend of two years. None reported a previous or ongoing romantic or sexual relationship. In line with these findings, only four of the cases in this sample can be described as occurring on a date or in a date-like setting, and all could be considered first dates. Notably, none of these cases concluded with the defendant being found guilty as charged: two were found guilty of unlawful and indecent assault, and two were found not guilty of any crime.

49 See, for example, Estrich, *Real Rape*; Bourke, *Rape*.

The case of *R v Ridley* (1950) is a representative example of the difficulties in convicting a defendant of a rape that occurred in a setting that could be perceived as romantic. The accused, Kevin, was a twenty-year-old labourer who had met the victim, twenty-three-year-old Kate, at a barbecue on 4 August 1950. There, the two had consumed some food and beer, and on the bus home afterwards, they kissed. On 15 August, Kevin called Kate, and they agreed to go to the theatre together two nights later. After spending the evening together, Kevin offered to accompany Kate home. As they walked from the taxi, they kissed again, and Kate explained that once Kevin started to touch her breasts, she objected and told him to 'keep his hands to himself'. Despite her verbal and then physical resistance, Kevin forced Kate to the ground and raped her, and threatened to kill her if she continued to scream. Her screaming had attracted the attention of a passer-by, who stopped to help, and Kevin retreated. The eyewitness told the court that he had heard the victim calling for help and that, when he found her, she was distressed and told him that she had been raped. Critical medical evidence from the government medical officer confirmed that Kate's hymen had been ruptured some time before the offence, and therefore he could not determine whether recent intercourse had taken place; however, he was able to confirm physical violence by describing a bruise on her upper eyelid, an abrasion on her left arm and scratches on her leg. The bacteriologist confirmed the presence of spermatozoa from Kate's internal smear and on her underclothes: crucial evidence that pointed to recent vaginal penetration.[50]

Kevin was found not guilty of any crime and was dismissed by the courts. Given the strength of evidence provided by the prosecution, particularly the confirmed presence of spermatozoa by the bacteriologist, in combination with eyewitness testimony and medical evidence, this was a surprising outcome. As such, it is necessary to look at aspects beyond the details of the crime itself to understand why the jury considered the case unbelievable. Aspects such as the location (in a public space, in the bushes) and the time of the offence (around midnight) should have indicated to the jury the non-consensual nature of the offence, in line with broader social stereotypes about what a 'real rape' looked like.[51] Given

50 *R v Ridley* (1950), QSA.

51 Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (Oakland: University of California Press, 2020), 126; Estelle Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge: Harvard University Press, 2013), 275, 284; Estrich, *Real Rape*, 8-26.

this, it is evident that the nature of Kate and Kevin's relationship, in the very early stages of courtship, and having already shared intimate moments by kissing, played a role in their verdict. Indeed, in cross-examination at the Brisbane Court of Petty Sessions, the defence concentrated on Kate's decision to accompany Kevin to the theatre. She explained, 'As far as I was concerned there was nothing wrong with him, he appeared to be an ordinary decent type of fellow'. Further questioning worked to determine why she did not object to kissing him.[52] In focusing on what Kate had already consented to, the defence was blurring the lines of her non-consent, despite such behaviour being normalised in ordinary courtship. Kevin's acquittal ultimately speaks to the influence of the victim–offender relationship on the believability of a victim's non-consent, and in particular the way in which a man on a date with a woman was not viewed as a potential rapist.

Race

The over-representation of Indigenous defendants in this sample is indicative of how Black men were more readily believed to be sexual offenders than men of other races. Historians have found this to be true across time and different locations and have convincingly argued that the courtroom was yet another place of racial discrimination against Black men, regardless of the crime.[53] Instances of high-profile cases and 'rape scares' saw the development of the myth of the 'monstrous black rapist', characterised as 'inherently sexually sadistic and uncontrollable'.[54] As noted by historian Raymond Evans, in Australia, the 'spectre of the renegade Aboriginal rapist periodically terrorised local white populations' throughout the nineteenth century.[55] This was distinct from the white rapist who *chose* not to control his sexual desires and is reflective of earlier white understandings of Black sexuality, which positioned Black men as hypersexualised and with 'irrepressible rape instincts'.[56] As Featherstone argues, Indigenous defendants (and victims)

52 *R v Ridley* (1950), QSA.

53 See, for example, Ashley Noel Mack and Bryan J. McCann, '"Harvey Weinstein, Monster": Antiblackness and the Myth of the Monstrous Rapist,' *Communication and Critical/Cultural Studies* 18, no. 2 (2021): 103-20; Davis, *Women, Race & Class*, 172-201.

54 Mack and McCann, '"Harvey Weinstein, monster",' 106.

55 Raymond Evans, '"Don't You Remember Black Alice, Sam Holt?": Aboriginal Women in Queensland History,' *Hecate* 8, no. 2 (1982): 11.

56 Davis, *Women, Race & Class*, 185.

were 'imagined in stereotypes of abuse, alcoholism, and sexual impropriety'.[57]

The way in which Indigenous men were discussed in the courtroom, by members of the court and by the victims themselves, reveals the prevalence of racial discrimination and the impact it had on trials. Racialised ideas were weaponised by victims, prosecutors, and public defenders to further their cases. For example, in one strange case from 1945, the offence had occurred in Kingaroy in 1942, yet the police could not locate the assailant for three years, eventually finding him in Townsville. When the victim was asked how she was able to identify her attacker, she told the jury that she was able to 'conclude he was black by the smell', a statement that went unquestioned in the court and was even accepted as evidence to prove his identity (although it did not convince the jury).[58] In another case from 1955, the defendant's indigeneity in juxtaposition to the victim's whiteness was listed as an aggravating factor on the police report.[59]

The rate of conviction of Indigenous defendants in this sample is a further indication of how they were more readily believed to be sexual offenders. Of the thirteen Indigenous men on charges of rape and attempted rape, eight were found guilty as charged, three were found guilty of a lesser offence, and only two (fifteen per cent) were acquitted. However, of the eight men who were found guilty as charged, five were co-accused in one trial, and the nature of gang rape as more broadly believable in the courtroom (as argued below) was also an influential factor in their conviction. In stark juxtaposition, twenty-eight per cent of white defendants were found not guilty of any crime, which suggests a link between race and acquittal. The two cases in which the Indigenous defendants were found not guilty reflect the weaknesses of the prosecution's cases, as opposed to the strength of the defences offered. For example, as mentioned above, it took police three years to find the assailant who had allegedly raped a woman in Kingaroy in 1942, and the jury was ultimately not convinced that the right man was charged.[60] In the other case from 1955, it was the startling lack of medical evidence from

57 Featherstone, *Sexual Violence in Australia*, 58.

58 *R v Thomas* (1945), QSA.

59 *R v Gibson* (1955), QSA.

60 *R v Thomas* (1945), QSA.

the body of the victim to confirm physical injury or intercourse that rendered her story of the offender's break-in and rape unbelievable to the jury.[61]

Affiliation with Armed Forces

In the interwar period and after World War II, the Australian public was encouraged to be sympathetic to returned soldiers and to aid them in their repatriation efforts.[62] The prevalence and impact of such attitudes are evidenced by the lenient sentences and verdicts offered to some returned soldiers in the criminal courts. In historian Elizabeth Nelson's examination of domestic violence cases in interwar Australia, she argued that it was the veteran's injuries which 'had a far greater cultural value than those of their wives', and that, even in cases of extreme violence, returned-soldier defendants were met with 'pity rather than righteous condemnation'.[63] Working in tandem with this sympathy was the level of respectability attributed to the defence forces and, more generally, and particularly in the postwar period, the appreciation for their services. Historian Joy Damousi examined the impact of returned soldiers' trauma on their wives in the postwar era and argued that many women stayed with their husbands, despite evidence of abuse, because of a sense of 'guilt' and an 'overwhelming burden of responsibility' for their survival and repatriation.[64]

These same ideas permeated trials of rape. Of the sixty-seven defendants in this sample, ten were affiliated with the defence forces, as either current or previously serving members. Of these ten, six were found guilty of a lesser offence or acquitted, and the circumstances in these cases indicate some level of leniency, likely because of the defendant's affiliation with the defence forces. In the 1945 case against Michael, for example, it is unclear why he was found not guilty of attempted rape and only guilty of assault occasioning grievous bodily harm. The case was particularly violent, with the victim suffering a broken jaw and receiving specialist treatment in hospital for some weeks afterwards. Evidence from eyewitnesses

61 *R v Gibson* (1955), QSA.

62 Elizabeth Nelson, *Homefront Hostilities: The First World War and Domestic Violence* (Melbourne: Australian Scholarly Publishing, 2014), 121.

63 Nelson, *Homefront Hostilities*, 115.

64 Joy Damousi, *Living With the Aftermath: Trauma, Nostalgia and Grief in Post-War Australia* (Cambridge: Cambridge University Press, 2001), 118.

confirmed the identity of the defendant. Although medical evidence was not required to prove vaginal penetration, given that the complaint was one of attempted rape, the victim provided evidence which indicated Michael's intent, notably the way in which he touched her breasts and genital area. In the judge's sentencing remarks, he said that he had 'little doubt that McDonald made improper overtures' and when the woman resented them and ran away, he pursued and 'collared her like a footballer would tackle an opposing player', suggesting that he also believed the offence had indecent intent.[65] Despite this, Michael was only found guilty of a lesser offence. In a similar case from 1953, Adam was charged with the rape of Margaret, yet he was found not guilty of any crime, despite multiple medical practitioners providing crucial evidence confirming the recent rupture of her hymen.[66] In cases such as these, where there was considerable evidence which should have indicated that the charged offence had occurred, it is evident that overarching ideas regarding leniency towards servicemen were more influential.

Servicemen were found guilty as charged in four cases, which can largely be attributed to other extreme aggravating factors of the offence, as well as evidence of their previous poor character, both of which worked to destabilise their images as respectable members of the defence forces. For example, in the case of *R v Turner* (1947), where the defendant was charged with raping his daughter's friend, his own wife provided evidence for the prosecution of how he had been physically abusive towards her, particularly when he was drunk, and police interviews with their children further detailed his abuse.[67] In *R v Robertson* (1946), outlined above, the victim's husband caught Alexander committing the offence. It was also found that, while he was in the army, Alexander was charged for being away without official leave seven times.[68] As such, despite their socially respected status as veterans, the specific circumstances of their offences and evidence of their previous character unwound this credibility, and they were found guilty as charged.

65 *Truth*, 3 June 1945, 17.

66 *R v Evans* (1953), QSA.

67 *R v Turner* (1947), QSA.

68 *R v Robertson* (1946), QSA.

Multiple Assailants

In other cases, it was the way in which the offence was committed that changed how the defendants were understood. The crime of gang rape, or multiple assailant rape, has always been viewed as a particularly serious matter by the courts. As articulated by Justice Townley in the sentencing of one case in 1954, 'If there is one type of rape which is more abhorrent than others it is the one which is committed by a number of men in company'.[69] In this sample, there were five cases with multiple assailants, and all except one ended in conviction. Only in the case of *R v Robinson and Judd* (1954) were the defendants acquitted; however, this can largely be attributed to significant weaknesses in the medical evidence provided by the government medical officer.[70] In the remaining four cases, the assailants were understood in a way that was distinct to a rape involving only one defendant: this was within a framework that acknowledged the power dynamics between the defendants, rather than as a purely sexual offence (though, crucially, this element was not lost). In the case of *R v Marshall, Nichols and Stevens* (1951), these ideas were particularly pertinent because of the difference in the defendants' ages: Sebastian was twenty, Bradley was eighteen, and Andrew only sixteen years old. Because of Andrew's youth, he was at first charged separately in the Court of Petty Sessions, but the three defendants ultimately had a combined trial in the Supreme Court. In a rare outcome, Justice Stanley sentenced each of the offenders separately, and each received a different sentence based on their perceived role in the offence. This occurred in no other case of multiple assailant rape in this sample. Significantly, when sentencing Sebastian to eight years' imprisonment with hard labour, a sentence markedly more severe than Bradley's five years' suspended imprisonment and Andrew's good behaviour bond, Justice Stanley attributed this to Sebastian's age and role as the 'ring-leader' in the offence. In juxtaposition, he told Andrew that he was 'under the influence of stronger personalities', which affected his role in the offence, and described Bradley as a 'weak type', in this way minimising their role in the rape and their agency in committing the offence.[71]

69 *R v Elliot, Baker, and Ellison* (1954), QSA.

70 *R v Robinson and Judd* (1954), QSA.

71 *R v Marshall, Nichols, and Stevens* (1951), QSA.

Literature has shown how gang rape was historically understood as a crime committed by juveniles, a cyclical idea which both affected and was moulded by the convicted offenders. In a study conducted by criminologists in Victoria in 1972, the average age of multiple offenders was twenty years and seven months, some six years younger than the average age of single offenders.[72] Similarly, in Barber's investigation of sexual offences in Queensland, eighty per cent of 'pack offenders' (defined as an offence with three or more assailants) were under the age of twenty-one years.[73] Because of the youth of the offenders, some have argued that group rape was a 'bonding' activity between men, or a way to perform their masculinity.[74] However, to understand this offence in this way is to ignore the overarching sexualised framework in which sexual violence existed. As discussed above, many of the offenders still saw themselves as committing an act of sex, and this extended to men who committed rape in a group setting. For example, when defendant Sebastian was questioned by police, he explained how the three defendants had 'made up [their] minds that [they] wanted a root and she was the first sheila that [they] saw'.[75] Similarly, in the case of *R v Robinson and Judd* (1954), defendant Max allegedly asked the victim during the offence, 'what are you lying like a log for[?] [Y]ou are enjoying this as much as I am', thus attempting to position the offence as consensual and, in fact, an act of pleasure.[76] As such, although it is clear that the relationship and dynamic between co-accused rapists certainly affected how they were understood more broadly, the sexual element of their offence remained.

It is also worth noting here some of the complexities surrounding criminal trials involving multiple assailants that are seen not only in cases of rape. Legal academics have argued that a trial involving co-defendants is likely to unfairly benefit the prosecution in several ways, including complicating the case in ways that make it difficult for the jury to distinguish the evidence between the assailants and by encouraging defendants to

72 E. J. Hodgens, I. H. McFadyen, R. J. Failla, F. M. Daly, 'The Offence of Rape in Victoria,' *Australian and New Zealand Journal of Criminology* 5, no. 4 (1972): 226.

73 Ross Barber, 'An Investigation into Rape and Attempted Rape Cases in Queensland,' *Australian and New Zealand Journal of Criminology* 6, no. 4 (1973): 239.

74 Baker, 'What Rape Is and What It Ought Not To Be,' 239.

75 *R v Marshall, Nichols, and Stevens* (1951), QSA.

76 *R v Robinson and Judd* (1954), QSA.

implicate each other.[77] In their examination of co-accused criminal trials in the Victorian Supreme Court between 1861 and 1961, historian Alana Piper and criminologist Lauren Vogel found that co-accused defendants in the twentieth century were more likely to be found guilty than solo offenders.[78] Crucially, however, they found that the relationship between co-accused status and conviction was not as strong as they expected, and instead argued that there was basis to the 'guilt by association effect', where if one of the assailants was believed to be guilty, it was more likely that the others would be too.[79] As such, although the high conviction rate of gang rapists in this sample can largely be attributed to the perceived severity of the offence, it is also possible that some offenders were found guilty by association.

Conclusion

This article has taken the postwar Queensland courtroom as a case study to examine how the figure of the rapist was imagined in the criminal justice system. Through the use of depositions, trial transcripts, and other court documents, it has been possible to trace ideas through the prosecutorial process, establish how and when these ideas changed, and why. In doing so, it has been possible to locate and highlight discrepancies and tension between rape myths and the reality of criminal proceedings.

An examination of the social backgrounds of defendants, as established through the examination of police documents, seemingly pointed to distinct characteristics of a rapist. This analysis showed an over-representation of Indigenous defendants, as well as men of the lower and working classes, in the overall charges. Although it cannot be definitively known, it is likely that this over-representation was caused by police and public prosecutors only proceeding with charges and cases that they deemed to be most believable. Yet, once the case proceeded through trial, it becomes apparent that such ideas were not so rigid. Other social factors had the potential to destabilise or strengthen stereotypes about who a real rapist was, as did the nature of the offence itself. It is evident that, although

77 Alana Piper and Lauren Vogel, 'Co-offenders Before the Court: The Joinder Effect in Victoria, 1861–1961,' *law&history* 5, no. 2 (2018): 112.

78 Piper and Vogel, 'Co-offenders Before the Court,' 116.

79 Piper and Vogel, 'Co-offenders Before the Court,' 122.

broader social ideas would suggest there was a certain 'type' of person who was a rapist, this figure is seemingly unclear in the courtroom itself.

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Parental Advocacy and Child Sexual Abuse in Australian Institutions, 1940–1980

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The release of the Royal Commission into Institutional Responses to Child Sexual Abuse report in 2017 had a dramatic impact on social and academic understandings of the crime of child sexual abuse and the history of childhood and institutions in Australia. Throughout the twentieth century, historical perceptions of the role of children in society, combined with the asymmetrical power dynamics within children's institutions, bred the perfect conditions for their sexual exploitation. This article explores how the act of disclosing abuse was received, and how this reception affected the lives of those who were abused, through the lens of parental advocacy. It addresses how instances of abuse were not comparable between European Australians and First Nations Australians. This article argues that parental advocacy plays a unique and crucial role in a victim's understanding of and reactions to sexual abuse, but that it is ultimately up to an institution to prevent child sexual abuse.

Keywords: child sexual abuse, institution, parental advocacy, Indigenous Australians, trauma, Royal Commission

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The sexual abuse of a child is a crime that can leave a profound and devastating mark on a victim, as well as those who know them. This abuse takes many forms, including sexual grooming, coercion, exploitation, and physical sexual acts.[1] Statistics show that perpetrators of sexual abuse are most often known to their victims, through either social connections or

* I would like to thank my supervisor, Lisa Featherstone, for all her help and support in the creation of the thesis from which this work is drawn.

1 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report, Volume 2, Nature and Cause* 2017), 9.

familial relations, and commonly hold some position of authority or coercion over them. Such offenders typically commit these crimes within an environment that facilitates their control and influence over a victim.[2] The twentieth century was a time in which child welfare in Australia was characterised by child removal and relocation, rather than support and reform. Thus, institutions dominated many aspects of child supervision and wellbeing during this period.[3] These institutions took many forms, including religious organisations, youth detention centres, orphanages, schools, out-of-home care facilities, and sporting clubs. The common thread between all these establishments was the overwhelming presence of authority figures, quite often in an environment separate from a child's parents or guardians. As such, children (particularly those who were in care institutions) were frequently placed in situations in which child sexual abuse could be privately and easily perpetrated. Further, during a period in which child sexual abuse and child safety were not well understood or well legislated, offenders were often able to commit such abuse with little fear of repercussions or retribution.[4] In many cases, the true ramifications of these institutional environments remained hidden for decades.

In a federal Cabinet meeting on 12 November 2012, then Prime Minister Julia Gillard announced the decision to establish a national royal commission in response to the increasing reports of historical child sexual abuse that had been emerging since the 1990s.[5] The Royal Commission into Institutional Responses to Child Sexual Abuse (hereafter the Royal Commission) was formally established in January 2013 and sought to evaluate the reactions of institutions that were confronted with allegations of abuse, as well as to understand the factors that led to such abuse, to avoid future occurrences. Spanning just shy of five years, the Royal Commission was one of the largest in Australian history in terms of duration, financial investment, witness and evidence volume, and appointment of commissioners.[6] Its impact has been profound, spurring

2 Royal Commission, *Final Report, Volume 2*, 11-12.

3 Shurlee Swain, *History of Child Protection Legislation* (Sydney: Australian Catholic University, 2014), 2-4.

4 Swain, *History of Child Protection Legislation*, 5-14.

5 Australian Government Royal Commissions, 'Institutional Responses to Child Sexual Abuse,' https://www.royalcommission.gov.au/child-abuse (last accessed 9 April 2025).

6 Kathleen McPhillips, Shurlee Swain and Katie Wright, 'The Australian Royal Commission into Institutional Responses to Child Sexual Abuse,' *Child Abuse & Neglect* 74 (2017): 1.

the implementation of the National Redress Scheme and legislative reforms within the federal Department of Social Services, as well as drawing critical attention to the structure and nature of abusive institutions and the perpetrators, both past and present, they house.[7] The Royal Commission uncovered numerous instances in which abuse had been covered up, misreported, denied, or blatantly ignored, usually by officials within or related to the institution in question, although parents and guardians sometimes played a part too.

This article investigates the significance of parental advocacy and institutional influence in instances of child sexual abuse, drawing on case studies from the Royal Commission. It argues that parental advocacy played a unique and crucial role in a victim's understanding of and reactions to sexual abuse, while also arguing that parental advocacy had its limitations; namely, it was ultimately up to an institution to prevent child sexual abuse. In line with the period on which the Royal Commission focused, and for comprehensibility, this article refers to instances of abuse that occurred between 1940 and 1980. Further, for the sake of clarity, advocacy is here defined as any action that provides favour, defends or supports, or argues a cause for the aid of another person; and the term 'parent' generally refers to a child's biological guardian but can in some instances refer to a relative or other guardian providing care to the child.

The Royal Commission itself focused on the collection of oral and written testimony from survivors of institutional abuse, ultimately leading it to highlight instances that occurred from the mid- to the late twentieth century. Australia at this time was undergoing several prominent cultural, social, and legal shifts, many of which had a significant impact on public perceptions of sexual violence. As a direct result of second-wave feminism emerging rapidly throughout the Western world, the 1970s and 1980s saw an influx of information and public awareness regarding sexual violence and its criminality, subsequently leading to legislative changes that transformed the landscape of sexual understanding and awareness in Australia.[8] In particular, the rape law reforms of this period brought to the forefront the ubiquitous nature of sexual crimes, in relation to both adults

7 McPhillips, Swain and Wright, 'The Australian Royal Commission,' 1-2.

8 Mary Spongberg, 'Australian Women's History,' *Women's History Review* 8 (1999): 380; Lisa Featherstone, *Sexual Violence in Australia, 1970s–1980s: Rape and Child Sexual Abuse* (Brisbane: Palgrave Macmillan, 2021), 15.

and children.[9] Previously, such crimes pertaining to children were considered unusual, perpetrated only by disturbed individuals, most often deviant men. By this time, it was becoming apparent that such crimes were indicative of wider community issues that required broader social changes to overcome.[10]

Children and Institutionalisation

The history of children in Australian institutional settings dates back to the early days of colonisation, specifically around the mid-nineteenth century. Before the 1850s, women and children made up a far smaller proportion of the settler population and thus were largely ignored in terms of legislation.[11] Following the influx of immigrants and settlers looking for fortune in the goldfields, the numbers of women and children increased, and problems pertaining to child neglect and welfare became more apparent. Legislation aiming to remove children from 'polluting' environments therefore began to be enforced.[12] Such ideas stemmed from changing perceptions of childhood, which were notably becoming quite romanticised and sentimentalised.[13] However, this early welfare system was positioned with the view that these children were in need of control rather than care, and if appropriate institutions (such as orphanages or care homes) were not available, it was not uncommon for young Australians without traditional family care to find themselves placed in adult asylums or prisons, in line with vagrancy laws that persisted well into the twentieth century.[14] As noted, institutions take many forms, and here they are most often defined as out-of-home care facilities, schools, sporting and leisure clubs, and orphanages.

Children's experiences with institutional care in twentieth-century Australia varied, depending on why they came to be in such places. Some were present in institutions temporarily or on a scheduled basis, such as

9 Yorick Smaal, 'Historical Perspectives on Child Sexual Abuse, Part 1,' *History Compass* 11 (2013): 704; Featherstone, *Sexual Violence in Australia*, 32.

10 Featherstone, *Sexual Violence in Australia*, 15.

11 Swain, *History of Child Protection Legislation*, 5.

12 Swain, *History of Child Protection Legislation*, 6.

13 Jan Kociumbas, *Australian Childhood: A History* (Sydney: Allen & Unwin, 1997), unpaginated.

14 Swain, *History of Child Protection Legislation*, 6.

for education, leisure, or short-term care. In these instances, it was likely that the children had access to their parents or guardians on a regular basis. Others were present in institutions for longer periods, particularly those in long-term care, educational boarding, or detention facilities. Here, they were less likely to have regular access to their parents or guardians, if at all, in part due to the nature of such institutions. Several factors could play into a child's presence in these establishments, including financial status, religious status, class, and race, particularly in the first half of the twentieth century. Given the parameters of this article, race is the main focus here; for further simplification, only cases involving positive parental advocacy are used as examples.

It is important to note that the institutional experiences and legislation pertaining to certain institutions differ greatly between Indigenous and non-Indigenous children, as will be seen through the case studies presented in this article. For Indigenous children, institutionalisation was most often used as a means of fragmenting traditional kinship structures, with the hope of either eradicating Indigenous groups or assimilating them into white society.[15] Institutions played an important role in what would become known as the Stolen Generations, including the forcible removal of children from families and communities well into the 1970s.[16] Thus, orphanages, youth detention facilities, and out-of-home care organisations were characteristic of the Indigenous child institutionalisation experience at this time. It was common for children in these institutions to be 'utilised' rather than simply cared for, with a large proportion of children being forcibly trained for domestic servitude and manual labour.[17] Further, numerous children were sent to reformatory institutions to correct 'poor' behaviour or were exploited for labour by the institutions themselves.[18] Evidently, Indigenous children institutionalised throughout most of the twentieth century were more often exploited than legitimately cared for.

15 Royal Commission, *Final Report, Volume* 2, 233.

16 Australian Institute of Aboriginal and Torres Strait Islander Studies, 'The Stolen Generations,' https://aiatsis.gov.au/explore/stolen-generations (last accessed 9 April 2025).

17 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Sydney: HREOC, 1997), 37, 88-89.

18 HREOC, *Bringing Them Home*, 51.

For non-Indigenous children in this period, institutionalisation came in various other forms, including casual, day, or live-in experiences. Although it was somewhat less common for these children to experience institutionalisation as a result of removal from their parents or guardians, this did occur. Orphanages and out-of-home care facilities were the typical destinations for children who were removed, particularly as a result of parental death, neglect, abandonment, or abuse.[19] For others, institutional environments in which abuse occurred were often schools (public or private), sporting associations, social clubs, religious organisations, and extracurricular activities, such as Scouts groups and music lessons.

Concerns surrounding the nature of relationships between children and adults in authoritative positions, specifically regarding the potential for immoral behaviour, have existed for some time in Australia, particularly from the late nineteenth century and initially more so in educational settings.[20] Various state and federal laws regarding such conduct in educational institutions also emerged during this period in an effort to prevent it. Although there have been notable Australian cases that demonstrate the ability of the justice system to inflict harsh punishments for crimes committed against children, there have been far more that show how systematic complexities can often benefit abusers.[21] Differing ages of consent, confusion between physical abuse and child sexual assault, and the burden of proof were just some of the factors that hindered the prosecution of offenders.[22] Unfortunately, it was common for misconduct to be dealt with internally by an institution rather than escalated to appropriate authorities.[23] The Royal Commission suggested that particular institutions, such as schools, youth facilities, and religious organisations, have more prominent rates of child sexual abuse because of the innate structure of such institutions.[24] These organisations often protect or enable abusers by making abuse difficult to report, by not educating other members of the organisation on what abuse may look like,

19 Swain, *History of Child Protection Legislation*, 7.

20 *The Sexual Abuse of Children: Recognition and Redress*, ed. Yorick Smaal, Andy Kaladelfos and Mark Finnane (Melbourne: Monash University Publishing, 2016), 24.

21 *The Sexual Abuse of Children*, ed. Smaal, Kaladelfos and Finnane, 21.

22 *The Sexual Abuse of Children*, ed. Smaal, Kaladelfos and Finnane, 25-27.

23 *The Sexual Abuse of Children*, ed. Smaal, Kaladelfos and Finnane, 25.

24 Carol Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature* (Huntington: Hofstra University and Interactive, 2004), 30-31.

or by failing to have appropriate measures to prevent abusers entering their community. Certain institutions, such as elite schools and larger religious organisations, often exist in areas where the community is more inclined to respect authority without hesitation or question.[25] Further, some victims of abuse stated that they did not report the abuse they were suffering because they genuinely thought that such occurrences were normal; this was usually a result of being physically and mentally groomed or because victims were too young to be capable of understanding otherwise.[26] In all cases, authority is clearly a defining factor in the occurrence of institutional child sexual abuse.

Parental Advocacy

Although there are countless factors that can contribute to the development and aftermath of cases of institutional child sexual abuse, some are more powerful than others. Parental support and advocacy during the different stages of a child's growth and development are often a key factor in determining the trajectory of a child's life once they reach adulthood.[27] With some exceptions, this is particularly the case for children facing trauma and hardship during these crucial years. Positive parental advocacy can be a defining factor in cases of child sexual abuse, as children often do not fully understand what they are going through or are not aware of the correct avenues to stop or prevent abuse. Similarly, the absence of parental advocacy can play a crucial role in a child's understanding of and reaction to their abuse, and this lack of advocacy results in negative outcomes more often than in cases that feature positive parental advocacy. It is important to note that there is a great difference between parents who are themselves abusers and parents who do not advocate for their child who is being abused by a third party.[28]

The importance of parental advocacy is particularly relevant during the period this article examines, when a shift towards understanding and

25 Royal Commission, *Final Report, Volume* 2, 16.

26 Royal Commission, *Final Report, Volume* 2, 12-13.

27 Connie N. Carnes and Ann N. Elliot, 'Reactions of Nonoffending Parents to the Sexual Abuse of their Child: A Review of the Literature,' *Child Maltreatment* 6 (2001): 320.

28 Jessica L. Borelli, Chloe Cohen, Corey Pettit, Lina Normandin, Mary Target, Peter Fonagy, Karin Ensink, 'Maternal and Child Sexual Abuse History: An Intergenerational Exploration of Children's Adjustment and Maternal Trauma-Reflective Functioning,' *Frontiers in Psycholo*gy 10, no. 1062 (2019): 5-6.

surveying instances of child sexual abuse began.[29] This change did not come without its complications, however, and while there was certainly an increase in public awareness and condemnation of child sexual abuse, there was a vast difference between this open acknowledgement and the realities of addressing the problem. As historian Lisa Featherstone asserted in her work on child abuse in the 1980s, '[understanding abuse] seems to have become more complicated when the victim was no longer theoretical, faceless or anonymous'.[30] Further, Featherstone shows that even experts in the field, including doctors and social workers, failed to report abuse to which they were privy. It is here that the absence of parental advocacy most often occurs. Similarly, I argue that the reality of the situation confronting a parent whose child was suffering institutional abuse was often so horrific and surreal that it became incomprehensible. Although children can be resilient and progressive of their own accord, support and guidance from parental figures is often necessary to aid them through such a key period of their development, including helping them understand external events that influence their lives.

For children who are sexually abused in institutions, particularly those that permeate numerous aspects of their lives, parental figures are often the only resources available to them to combat their abuse. When parents choose not to advocate for their child, for whatever reason, they often leave them to fight a battle for which they are not mentally, emotionally, or physically prepared at such a young age. Advocating for a positive and progressive outcome in the face of a powerful institution that houses abuse can be difficult for an adult, let alone for a child who is suffering the torment of sexual abuse. It is also abundantly clear that although some institutions did not address abuse (either at the time it was occurring or after the fact) due to a fundamental inability to comprehend such crimes, many chose to suppress abuse to maintain their carefully crafted and well-established facade of propriety and stature.

The complex nature of the situations in which abused children find themselves, and the additionally complicated environment that abusive institutions create, are not the only factors that must be considered in cases involving parental advocacy; there are certain conditions that must be present to facilitate this advocacy in the first place. First, access to one's

29 Lisa Featherstone, 'Look the Other Way: Dealing with Child Sexual Abuse Outside of Institutions in 1980s Australia,' *Australian Historical Studies* 49 (2018): 292.

30 Featherstone, 'Look the Other Way,' 294.

children is a crucial factor, as in some cases (particularly those involving First Nations children and their families in the twentieth century), advocacy is only truly effective if a parent has any control over and access to their child who is facing abuse. For parents who had no legal custody or even visitation rights for their children, their desire to help was often not enough. Second, parental advocacy relies on the assumption that the parents themselves are not sexually abusive towards their children, as some children may be sent to institutions to escape from, or as a result of, abuse in the home (e.g., a young girl sent to a mothers' home as a result of being impregnated by her abusive father).[31] Third, advocacy could be conditional on the type of abuse being inflicted. At a time when homophobia was socially and culturally pervasive, a parent may have been willing to advocate for their child until they discovered that the abuse was 'homosexual' in nature or otherwise went against ideals of normalcy and propriety.[32] Finally, only if parents themselves are in no danger of harm or other repercussions can they advocate for their abused children. In cases where there were possible ramifications, such as where a religious organisation fundamental to a family's faith was involved, or where the livelihood of the parents was at risk if abuse was reported, it was sometimes simply not practical or advisable to report the abuse.[33]

The ease with which parents could actually disclose the abuse varied, depending on these factors and on the nature of the institution to which they were reporting, and their relationship to it. Indigenous families whose children were abused in 'care' homes after forcible removal would almost certainly have found it far more difficult to report on abuse and advocate for their children than would a white family whose child was being abused in a school they voluntarily attended. Similarly, however, the outcomes of both reports would have, at least in part, depended on the receptivity and transparency of the institutions housing the abusers.

Institutional Experiences of Indigenous Australian Children

The institutional experiences of Indigenous Australians often varied greatly from those of non-Indigenous Australians, as a result of both

31 Dorothy Scott and Shurlee Swain, *Confronting Cruelty: Historical Perspectives on Child Protection in Australia* (Melbourne: Melbourne University Press, 2002), 41-42, 71.

32 Florence Rush, *The Best Kept Secret: Sexual Abuse of Children* (New York: McGraw-Hill, 1980), 173-82; Royal Commission, *Final Report Volume 4*, 93.

33 *Royal Commission, Final Report Volume 4*, 88.

modern and deep-rooted historical factors. It is imperative to note these historical factors in discussions pertaining to the institutional sexual abuse of Indigenous children, as their effect on the experiences of these children in Australian institutions in the twentieth century is so profound. Under legislation across Australia in the twentieth century, the Chief Protector was the sole legal guardian of every Aboriginal child, regardless of their lineage or the presence of a living parent, relative or other guardian, until the child came of legal age.[34] As such, the Chief Protector could, at any time and for any reason, take a child into his custody without warning or the consent of the parent or current guardian.[35] Separation from the family and community was seen as a necessary measure, as demonstrated by the Northern Territory Administrator's report of 1912, which noted that, 'when the child is very young, it must of necessity be accompanied by its mother, but in other cases, even though it may seem cruel to separate the mother and child, it is better to do so'.[36] The policies and regulations regarding the custody of Indigenous children outlined in legislative documents, such as the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897*, were a precursor, and indeed a contributing factor, to arguably the darkest event in postcolonial Australian history. As a result of the rapid and devastating Indigenous population decline following European contact in the late eighteenth century, the settlers assumed that Indigenous Australians could not survive colonisation and would soon cease to exist.[37] For so-called half-caste children, integration into white society was purported to be their saving grace; however, it was

34 The Chief Protector was a public servant position, known by various names across the states and territories of Australia; see, for example, the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) (hereafter *Protection Act 1897*) and *The Aborigines Act 1911* (SA); Barbara Cummings, *Take This Child …: From Kahlin Compound to the Retta Dixon Children's Home* (Canberra: Aboriginal Studies Press, 1990), 17.

35 *Aboriginals Ordinance (No. 9) 1918* (NT), s. 6(1); *Protection Act 1897*, s. 31(6).

36 Northern Territory of Australia, *Annual Report of the Administrator for the Year 1912* (Darwin, October 1913), 47; Cummings, *Take This Child …*, 17.

37 Australian Bureau of Statistics, '1301.0 - Year Book Australia, 2002' (Canberra: ABS, 25 January 2002), https://www.abs.gov.au/AUSSTATS/ABS@.NSF/2f762f95845417aeca25706c00834efa/bfc28642d31c215cca256b350010b3f4!OpenDocument (last accessed 9 April 2025); Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880–1939* (Melbourne: Melbourne University Press, 1997), ix.

far more common that such children were exploited as farm labourers and domestic workers for white households.[38]

Government entities all across Australia soon began implementing strategies that saw the mass removal of Indigenous children from their parents and guardians, prompting the start of what is now referred to as the Stolen Generations.[39] The reasons given for child removal varied greatly; while it was often argued that removal was in the best interests of a child's health and welfare, there are examples where blatant racism and discrimination were the obvious motive for such acts, with some reasons documented as 'for being Aboriginal', 'to send to work' and '[for] being in receipt of rations and clothes'.[40] Many of the reasons given for Indigenous child separation, even those that claimed to be in the best interests of the child, often had little to do with protecting children from real and tangible threats of abuse and neglect. Rather, they were intended to fragment Aboriginal families and communities to accelerate the process of their absorption into white society, or their 'inevitable' extinction.[41] As the *Bringing Them Home* report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families showed in 1999, removal had profound effects.[42] The report emphasised that, 'In contrast with the removal of non-Indigenous children, proof of "neglect" was not always required before an Indigenous child could be removed. Their Aboriginality would suffice'.[43] As a result of removal, a large proportion of Stolen Generations children reported being deeply scarred by their ordeal.

The effects of removal could span generations, with those who were removed and placed in care in the latter half of the twentieth century often being the children and grandchildren of Indigenous Australians who themselves were forcibly removed from the care of their families.[44] It is

38 HREOC, *Bringing Them Home*, 88-89.

39 The Stolen Generations occurred primarily between 1910 and 1970, though there is evidence of forcible child removal both before and after this period.

40 Tikka Jan Wilson and Link-Up Aboriginal Corporation, *In the Best Interest of the Child? Stolen Children: Aboriginal Pain, White Shame* (Canberra: Aboriginal History, 1997), 68.

41 Wilson and Link-Up, *In the Best Interest of the Child?*, 68.

42 HREOC, *Bringing Them Home*, 3-4.

43 HREOC, *Bringing Them Home*, 9.

44 HREOC, *Bringing Them Home*, 31.

here that it becomes evident that Indigenous Australians in the nineteenth and twentieth centuries were continually denied even the most basic levels of autonomy. This lack of autonomy over themselves and their children is a vital element that must be considered when discussing the roles and responses of parents in cases of institutional abuse, as it is essential to understand that Indigenous parents and families often struggled to advocate for their own rights at this time, let alone for the rights of their children who were forcibly taken from them.[45] The following story, taken from Case Study Seventeen of the Royal Commission, serves to contextualise the mixture of information regarding the Royal Commission, the institutional experiences of Indigenous Australian children, and the concept of parental advocacy pertaining to cases of institutional child sexual abuse.

Case Study: Sandra Kitching

The Retta Dixon Home, located on the Bagot Aboriginal Reserve in Darwin, was instituted in 1946 by members of the Aborigines Inland Mission.[46] Named for the evangelical missionary Margaret 'Retta' Long, née Dixon (1878–1956), the primary purpose of this establishment, as described by the Commonwealth Department of the Interior, was to 'care for [the] half-caste wards and train them to become worthy and responsible citizens'.[47] It was open only to Indigenous children no longer under the care of their families, as well as to a select number of Indigenous adults, most often the mothers of children in the home.[48] The number of residents in the Retta Dixon Home steadily increased over the years, with overcrowding on its original location becoming a pressing issue around 1951.[49] The early 1960s saw a new cottage-style site constructed a short distance away, in response to the reported overcrowding, with the transfer of residents being made around 1961–1962. Over a decade later, in the devastation of

45 H. C. Coombs, *Aboriginal Autonomy: Issues and Strategies* (Maryborough, Vic: Australian Print Group, 1994), 6.

46 Cummings, *Take This Child …*, 75.

47 Letter from A. R. Driver, NT Administrator, to Secretary of the Department of Interior, 16 September 1947, Royal Commission, 1, https://www.childabuseroyalcommission.gov.au/sites/default/files/AG.RDH.02.0001.0106.pdf (last accessed 9 April 2025).

48 Cummings, *Take This Child …*, 79-81.

49 Cummings, *Take This Child …*, 76-77.

Cyclone Tracy, five of the eight Retta Dixon cottages were destroyed, forcing residents to be moved interstate temporarily. However, due to financial and social circumstances, many of them would never return to the home, and the institution was officially closed in 1980, although several private arrangements saw some children still under the care of Retta Dixon custodians until 1982.[50]

Although there are some positive reports of 'kind' and 'loving' caregivers in the Retta Dixon Home, there were many more complaints about abusive, neglectful, and violent behaviour towards Indigenous residents, particularly young children.[51] Former residents reported a variety of physically, verbally, mentally and sexually abusive behaviour, including violent beatings, force-feeding, solitary confinement, molestation, rape, harassment, and verbal degradation.[52] In the early 1950s, the Acting Director of Native Affairs, R. K. McCaffrey, stated that staff at the home were 'quite unfitted to undertake the care of these children' and reported that, on at least one occasion, he had intervened in the excessive punishment of young wards.[53] Additionally, several residents reported that they felt they were being punished years after instances of misbehaviour or altercations with houseparents through the 'discouragement' of relationships they were pursuing or the denial of applications for further education.[54] As described by the religious organisations responsible for them, these cottage-style group homes were designed to mimic family units, being overseen by houseparents of 'good moral standing'; however, they were often poorly funded, resulting in 'high staff turnover that was at odds with the cottage principle of stable

50 Find & Connect, 'Retta Dixon Home,' https://www.findandconnect.gov.au/guide/nt/YE00023 (last accessed 9 April 2025).

51 Find & Connect, 'Retta Dixon Home'.

52 Royal Commission, 'Exhibits for Case Study 17,' https://www.childabuseroyalcommission.gov.au/exhibits-case-study-17 (last accessed 9 April 2025).

53 Cummings, *Take This Child …*, 81; Letter from R. K. McCaffery, NT Acting Director of Native Affairs, to NT Administrator, 28 July 1954, Royal Commission, 1-2, https://www.childabuseroyalcommission.gov.au/sites/default/files/AG.RDH.01.0019.0020_R.pdf (last accessed 9 April 2025).

54 Cummings, *Take This Child …*, 83-84.

parental figures supervising the homes', thus resulting in frequent instances of abuse.[55]

As a direct result of poor staffing in the home, many residents reported their feelings of segregation, not just from the outside world and 'white' society but from their own families. As one resident remembered:

> Many of these people were our countrymen, our grandmothers, cousins, brothers and sisters; some of whom came into the Home to work in the laundry or even chop wood. They were our kin and yet we were prevented from even talking to them.[56]

In some cases, these feelings of isolation came as a by-product of the neglect inflicted upon the children by their houseparents, with young wards often unable to connect with or find out basic information about their real family. Some children, however, were purposely lied to, being told that their parents and family members did not want them, were no longer contactable or were deceased; these were common strategies in dealing with Stolen Generations, designed to cut familial and community ties.[57] Additionally, children in the home were indoctrinated with the Christian beliefs of the Aborigines Inland Mission at a young age, which often led to confusion as they grew older and learned more about their heritage.[58] These factors, particularly the lasting psychological effects of abuse, neglect and isolation, and the conditions that brought them about, are critical when examining parental advocacy, or lack thereof, relating to children living in institutional care.

In the case of Sandra Kitching, active parental advocacy was an imperative and defining feature of her experience in the Retta Dixon Home. Sandra's recollection of her time in state care is a positive example of parental advocacy, primarily demonstrating the importance of such support and highlighting the ways in which the aforementioned factors contributed to her childhood under institutional supervision. Sandra was born on 27 March 1953 in Alice Springs and was the fourth of eleven children. Her

55 Forde Inquiry, *Commission of Inquiry into Abuse of Children in Queensland Institutions* (Brisbane: Government Printer, 1999), 38.

56 Cummings, *Take This Child …*, 84.

57 *Surviving Care: Achieving Justice and Healing for the Forgotten Australians*, ed. Elizabeth Branigan and Richard Hil (Robina: Bond University Press, 2010), 82.

58 Cummings, *Take This Child …*, 84.

mother, Nellie Numbajina Kelly, was a Gurindji woman from Wave Hill in the Northern Territory, and her father (with whom she had no contact) was German-born Peter Kitching.[59] Nellie had herself been raised in an institution, having spent much of her childhood in the Kahlin Compound and Half-Caste Home in Myilly Point near Darwin.[60] Sandra reported that her own institutional experience began when she was removed from her mother's custody at the age of two years, along with several of her siblings. Officials claimed that Sandra was to be made a ward of the state under the *Welfare Ordinance 1953* (NT) because Nellie was an Aboriginal Australian without a job.[61] Nellie did not consent to her children being taken and objected to the Act. However, as legislation such as the *Aboriginals Ordinance 1911* (NT) and the *Aboriginals Ordinance Act 1918* (NT) required her to be able to provide for her children to a specific, often unreasonable, standard, and she was unemployed and ineligible for government welfare, there was little she could do.[62] Sandra and her siblings were taken almost 1,500 kilometres north to the Bagot Aboriginal Reserve, where they were split up. Until she was twelve years of age, Sandra lived with other children like herself on the general reserve, after which she was relocated to the new cottages of the Retta Dixon Home.

After the children were taken, Nellie chose to relocate from Alice Springs to what Sandra described as a 'little ghetto' just outside the reserve, known as Stuart Park.[63] It was reported that many other mothers in the same situation also resided there, often taking up domestic work on the reserve or in the general locality. While living there, Nellie was at times allowed to visit and go on outings with her children, but only with specific

59 University of Freiburg, 'Eddie Janama Kitching,' 2013, http://www.project-open-art.org/permanent/australia/eddie.janama.kitching.index.html (last accessed 31 October 2021).

60 David Rutledge, '"The Soul of Darwin": the Story of the Kahlin Compound,' Australian Broadcasting Corporation, 7 July 2015, https://www.abc.net.au/radionational/programs/earshot/kahlin-compound/6538842 (last accessed 9 April 2025).

61 Royal Commission, 'Case Study 17 Transcript (Day C045), 22 September 2014,' 4827, https://www.childabuseroyalcommission.gov.au/case-studies/case-study-17-retta-dixon-home (last accessed 9 April 2025).

62 Australian Bureau of Statistics, '1301.0 – Year Book Australia, 1988,' (Canberra: ABS, 1 January 1988), https://www.abs.gov.au/AUSSTATS/abs@.nsf/3d68c56307742d8fca257090002029cd/8e72c4526a94aaedca2569de00296978!OpenDocument (last accessed 9 April 2025).

63 Royal Commission, 'Case Study 17 Transcript,' 4829.

approval from the institution's superintendent, Miss Shankelton.[64] As Sandra recalled, 'Mum would take us to places that the stupid missionaries wouldn't. We learnt from mum that you had to shop for your food, and she taught us about money, because we never had money'.[65]

Despite her limited access to her children, Sandra's mother was an active agent in preventing abuse. Sandra remembered an incident that occurred during a visit with her mother when Sandra was about eight years of age, which she credits as one of the reasons she was able to resist much of the abuse that was attempted against her in the Retta Dixon Home:

> One day, [REDACTED] came to us … He put his arm around us and he was smooching and trying to kiss us. We ran over to my mum and I said, 'Mum, [REDACTED] is trying to kiss us' … mum got straight up, went over to him and said, 'You listen here, you. Do not touch my children.' So eight years old, I learned that that's not acceptable.[66]

During her time in the Retta Dixon Home, Sandra reported various instances of abuse, ranging from verbal to physical and sexual, most often at the hands of the home's staff. She recalled being 'caned' often, usually for minor incidents, such as returning inside late or speaking back to a houseparent. The children would often be forced to do hours of chores, such as scrubbing floors and doing laundry, before and after school, and they would be chained up and forced to sit undressed if they refused to comply with demands.[67] Sandra recalled one houseparent, Mr. Pounder, being particularly cruel. He was more verbally and physically abusive than other houseparents and, on one occasion, force-fed a young child with such aggression that she passed out and had to be taken away for care. Sandra stated that the girl died very shortly after and, although they were informed that it was not related to the feeding incident, Sandra and the other residents strongly believed that she had been killed by Mr. Pounder.[68] Sandra also stated that Mr. Pounder used to touch girls inappropriately during shower time and on car rides to school.

64 Royal Commission, 'Case Study 17 Transcript,' 4828.

65 Royal Commission, 'Case Study 17 Transcript,' 4829.

66 Royal Commission, 'Case Study 17 Transcript,' 4840.

67 Royal Commission, 'Case Study 17 Transcript,' 4830.

68 Royal Commission, 'Case Study 17 Transcript,' 4830-32.

When she was about fifteen years old, Sandra ran away from the home and returned to her mother, who resided in Darwin with her new husband and their three children. Their living situation was described as somewhat difficult, with money being tight in the family. However, Sandra remembered this experience positively: 'I had to share a bed with one of my sisters, but it was absolutely beautiful. I would rather that than anything'.[69] Officials from the home came looking for Sandra on two occasions, but in both instances Nellie helped hide her daughter and lied about her whereabouts. In the final lines of her witness statement, Sandra expressed her confusion and discontent at the government's decision to keep her and her siblings institutionalised, despite there being clear evidence of Nellie living a stable life and being able to provide for her children. She stated:

> There is a strong view with … Aboriginal families … that you can never do anything to get your kids back. Families need to know that if they work hard they can get their kids back.[70]

Unfortunately for both Nellie and Sandra, the welfare system relating to Indigenous families was already established to never be in their favour. Therefore, as a mother, all Nellie could do for her daughter and her other children was provide them with love, support, and what little semblance of family normalcy she could create during her brief visits and outings. Upon Sandra's return to her mother's care, Nellie worked hard to ensure that her daughter was not removed from her again, and although she did not have the most appropriate resources to care for her, she did her best to make Sandra feel comfortable, safe, and loved in her home. Parental advocacy can take many forms, and for those who may not have the knowledge, resources, or even the rights to care for their children as they wish, sometimes all parental advocacy needs to be is an understanding that a parent is there to support a child in their time of need. Although it is unclear whether Nellie was aware of the physical and sexual abuse that happened to Sandra or any of the other children at the Retta Dixon Home, Sandra's testimony shows clearly that she was aware her mother did not send her away, that Nellie wanted Sandra and her siblings in her life, and that her mother loved her. In turn, Sandra used this knowledge to motivate her through the hardship and abuse of her time in the Retta Dixon Home and through the trauma that remained with her in the

69 Royal Commission, 'Case Study 17 Transcript,' 4833.

70 Royal Commission, 'Case Study 17 Transcript,' 4835.

decades after her escape. The case of Sandra serves as an excellent example of the positive impact that parental advocacy can have on a child who is experiencing abuse in an institutional setting.

As is evident in Sandra's case, parental advocacy relating to the institutional sexual abuse of Indigenous children is complex. Indigenous Australians have faced more than two centuries of dispossession, racism, segregation, violence, and degradation that have created waves of trauma. The twentieth century was an era characterised by deep anguish for First Nations Peoples in Australia, with institutionalisation and sexual abuse just some of the hallmarks of their experience. As reported by law academic and Noongar woman Hannah McGlade, any attempts to address the situation in this period were largely ineffective because they were made by non-Indigenous parties, who often literally personified the discrimination and trauma of the era. The solution to Indigenous child sexual abuse lay within 'Aboriginal self-determination', but, as exemplified by Sandra's mother, this often simply was not an option.[71] Compounding social and legal factors, intergenerational trauma, deep-rooted institutional power, and an endless lack of autonomy were ultimately the crucial factors in Sandra's case, not parental advocacy. This is not to say that advocacy was not important, as it is evident that such advocacy can make a difference to the understanding and mindset of a child being sexually abused in an institution. However, advocacy evidently played a smaller role in this case than in those of non-Indigenous children. The social, economic and political marginalisation of Indigenous people made it difficult for parents to act as agents or advocates for their children, especially those in the so-called care of state and religious authorities.

Case Study: BKL

The case of Sandra Kitching and her experience with institutionalisation, sexual abuse, and parental advocacy is undoubtedly compelling on its own, but it would be remiss to exclude a further case study from the Royal Commission that provides a comparison between the experiences of Indigenous Australian children and their families and those of white children and their families. This story comes from Case Study Thirty-Two of the Royal Commission and, as well as serving as a contrast to Sandra's case, is a depiction of the experiences of white children in abusive

71 Hannah McGlade, *Looking Forward: Aboriginal Victims at the Centre* (Canberra: Aboriginal Studies Press, 2012), 193-94.

institutions. It demonstrates the differences between institutions such as orphanages or Indigenous care homes and those such as private schools, sporting clubs, or other private organisations.

Unlike Sandra's forcible removal and residence in the Retta Dixon home, this case took place in a respectable and highly esteemed private school, Geelong Grammar School. The school was founded by the Church of England in 1855 and is an independent Anglican school situated on the northern outskirts of the city of Geelong, Victoria, currently catering to about 1,500 students.[72] Over the course of its 166-year history, the school has faced many challenges, including several location changes, the transition from male-only enrolments to co-education, the impact of two World Wars and even a short closure in the 1860s as a result of financial hardship.[73] Geelong Grammar is now considered one of Australia's most prestigious educational facilities; it boasts several notable former students, including Britain's King Charles, and it has on several occasions been named Australia's most expensive and elite private school.[74] As such, former students have often reported the culture of the school to be pretentious and merciless.[75] Further, despite its elite status, the Royal Commission stated that victims of abuse felt that 'there was a culture at Geelong Grammar that was authoritarian, disciplined and "devoid of pastoral care"'.[76] It is reported that, before 1994, there were no explicit procedures or policies regarding child sexual abuse, the handling of abusers, or the prevention of abuse within the school system.[77] Mandatory

72 Geelong Grammar School, 'Campuses,' https://www.ggs.vic.edu.au/learning/campuses/ (last accessed 26 May 2025).

73 Geelong Grammar School, 'History and Heritage,' https://www.ggs.vic.edu.au/explore/history-and-heritage-2/ (last accessed 26 May 2025).

74 Geelong Grammar, 'History and Heritage'.

75 Australian Associated Press, 'Royal Commission: Geelong Grammar Wanted to Avoid a "Scandal" After Reports of Abuse,' *Geelong Advertiser*, 2 September 2015, https://www.geelongadvertiser.com.au/news/crime-court/royal-commission-geelong-grammar-wanted-to-avoid-a-scandal-after-reports-of-abuse/news-story/113f85730f3397bf1277da48b20b3bda (last accessed 21 May 2025).

76 Royal Commission, *Report of Case Study No. 32: The Response of Geelong Grammar School to Allegations of Child Sexual Abuse of Former Students* (Canberra: Commonwealth of Australia, December 2016), 9, https://www.childabuseroyalcommission.gov.au/case-studies/case-study-32-geelong-grammar-school (last accessed 21 May 2025).

77 Royal Commission, *Report of Case Study No. 32*, 16.

reporting of child sexual abuse in Victorian schools was not fully enforced until 2014.[78]

Law researcher Ben Mathews stated in a 2017 publication that five distinct and interconnected factors consistently define institutions that harbour abuse, as well as their responses to such abuse: organisational culture, internal rules and dominance, protection of reputation, authoritarian governance, and sexual dysfunction or distortion.[79] This claim is further bolstered by legal scholar Kate Gleeson, who asserts that many powerful institutions have, over time, structured and reinforced themselves in a manner that allows them to conduct wrongdoing privately and without hindrance, subsequently allowing them to avoid lawful retribution in the event they are exposed.[80] Geelong Grammar, as this case study demonstrates, exemplifies these criteria throughout the time frame in which abuse occurred at the school. Namely, for more than 100 years, the school catered only to boys, creating an environment rife with sexual misunderstanding and dysfunction, and the school's elitist and deeply hierarchical structure allowed the school to manifest a toxic authoritarian culture. An abundance of cases presented by the Royal Commission, as well as in other reports, exemplify this abhorrent behaviour from the school. In several instances, it was reported that abusers, once accused or caught, would be transferred to another campus or faculty within the school rather than being punished or terminated, so as to pacify victims and their families (who were often unaware that these transfers occurred) and to prevent unwanted attention being drawn to the school. Additionally, the Royal Commission revealed that, over long periods, the school rarely (if ever) conclusively addressed the recurring problem of child sexual abuse in its community, which almost certainly enabled the abusers it harboured to gain exponentially more victims through the years.

78 Victorian Department of Justice and Community Safety, 'Failure to disclose offence,' https://www.justice.vic.gov.au/safer-communities/protecting-children-and-families/failure-to-disclose-offence (last accessed 21 May 2025); Victorian Department of Education, 'School Operations: Protecting Children – Reporting and Other Legal Obligations,' https://www2.education.vic.gov.au/pal/protecting-children/policy (last accessed 21 May 2025).

79 Ben Mathews, 'Optimising Implementation of Reforms to Better Prevent and Respond to Child Sexual Abuse in Institutions: Insights from Public Health, Regulatory Theory, and Australia's Royal Commission,' *Child Abuse & Neglect* 74 (2017): 88.

80 Kate Gleeson, 'Exceptional Sexual Harms: The Catholic Church and Child Sexual Abuse Claims in Australia,' *Social & Legal Studies* 27 (2017): 740.

BKL, as dubbed by the Royal Commission, was born in 1964 and is the middle of five children. She reported that her family was rather wealthy and that her parents both travelled often, meaning that she and her siblings spent parts of their childhood as boarding school residents or in the care of private nannies. BKL excelled at school and was accelerated two grades while she was a young student at the Geelong Church of England Girls' Grammar School, The Hermitage.[81] She reported frequently feeling 'alone and terrified' as a child, given the age difference between her and her peers.[82] Regardless, BKL continued to do well in school and, in 1975, she was included in a trial group that saw girls from The Hermitage attend Geelong Grammar. By 1976, The Hermitage was absorbed by Geelong Grammar, at which point it became a co-educational facility.[83] It was after this transition that BKL stated she began to be abused by a male staff member, Max Guzelian.[84] From the age of ten years, BKL recalled Guzelian making uncomfortable remarks about her body, such as telling her she had the 'wrong mouth' to play flute, forcing her instead to play the clarinet, for which he was the teacher.[85] Within a very short period, Guzelian's behaviour progressed from these remarks to inappropriate touching, eventually escalating to him violating BKL's genitals with his finger during class, and later in private lessons he created purposely to abuse her.[86] BKL could not remember exactly when this abuse started or how often it happened, but she did recall that it was a frequent occurrence. At age thirteen, BKL gathered enough courage to report the abuse to her mother. Based on her testimony, it does not appear that BKL had an exceptionally close relationship with her mother, or that her mother was her first choice to disclose this information to, but she did cite a lack of other support avenues available to her, both through the school and personally. She stated that her mother had several personal connections within the school, particularly with certain teachers, and as such she was

81 Old Geelong Grammarians, 'History of the Hermitage,' 2021, https://www.ggs.vic.edu.au/Alumni/HOGA/History-of-The-Hermitage (last accessed 31 October 2021).

82 Royal Commission, 'Case Study 32: Transcript (Day C097), 2 September 2015,' 10069-70, https://www.childabuseroyalcommission.gov.au/case-studies/case-study-32-geelong-grammar-school (last accessed 21 May 2025).

83 Geelong Grammar, 'History and Heritage'.

84 Royal Commission, 'Case Study 32 Transcript,' 10071.

85 Royal Commission, 'Case Study 32 Transcript,' 10071.

86 Royal Commission, 'Case Study 32 Transcript,' 10071-72.

doubtful that her claims would be believed.[87] In spite of these fears, her mother reported the allegations to the school, and a meeting was arranged with the head of the music department, Malcolm John. BKL reported that John informed her that Guzelian had been removed from his position, but also that she was partly at fault for the abuse and thus was no longer permitted to take part in any of the music department's activities. This came as a harsh blow to BKL, who nonetheless stated that she 'felt relieved and free' following her revelation.[88]

Without the intervention of her mother, it is unlikely that BKL would have been granted an opportunity to speak out against her abuser. After her ordeal, BKL worked hard to move on, but she felt it was entirely her responsibility to heal, as 'the school had no idea about girls, how to treat them or how to care for them'.[89] As can be seen in John's blatant victim blaming, it is clear that no child would be able to advocate for themselves in the environment and culture of Geelong Grammar, so they must rely heavily on others, such as their parents, to advocate on their behalf. However, in an environment such as this, even parental advocacy can only go so far. Despite BKL's ordeal and her mother's quick intervention, the school worked tirelessly to keep this information under wraps, and in 1980, BKL was once again subjected to aggressive sexual abuse by a staff member.[90] This time, however, the memory of the school's previous reaction was at the forefront of her mind, so she did not report her abuse to anyone, fearing she would face expulsion and ostracisation. Here it is obvious that, in such instances of abuse, it is not always enough for a child to know they have the support and advocacy of a parent, as there are often additional and complex factors that need to be considered. Recent articles have shown that perhaps the most crucial part of active and successful parental advocacy is parent–teacher or parent–organisation relations.[91] Thus, for children like BKL attending schools like Geelong Grammar, the outcome of their abuse disclosure does not necessarily correlate with

87 Royal Commission, 'Case Study 32 Transcript,' 10072.

88 Royal Commission, 'Case Study 32 Transcript,' 10072.

89 Royal Commission, 'Case Study 32 Transcript,' 10073.

90 Royal Commission, 'Case Study 32 Transcript,' 10073-74.

91 Jessica Cocks, 'Peer Parent and Family Advocacy in Child Protection: A Pathway to Better Outcomes for Kids,' *Policy Futures: A Reform Agenda* No. 1 (2021): 12-16, https://stories.uq.edu.au/policy-futures/2021/peer-parent-and-family-advocacy-in-child-protection/index.html (last accessed 21 May 2025).

their parent's willingness to advocate on their behalf, but on other factors, such as the institution's willingness to accept claims of abuse. Unfortunately for children like BKL, abuse in private schooling institutions was all too common in Australia at this time and, despite these two cases of abuse occurring on separate occasions in separate places, the similarities can be eerie.

Comparisons and Similarities

The experiences of both Sandra Kitching and BKL highlight the ways in which parental advocacy can make a difference in the life of a child experiencing sexual abuse in an institutional setting. In both instances, the positive parental advocacy that the children received aided them in some form: emotionally in the case of Sandra, and practically in the case of BKL. Although the effects of the abuse were profound for both victims, it is clear they found value and solace in even the smallest acts of advocacy from a parental figure in their time of need, regardless of later outcomes.

The greatest difference between the cases of Sandra and BKL lay in their fundamental societal status, based on their race. It is evident that much of the abuse that Sandra faced was based on her increased vulnerability as an unprotected Indigenous child in an institution that fundamentally saw her as 'less than' and merely an unwanted link in the chain to racial homogeneity, to be 'bred-out'.[92] Access to one's children is chief among the distinct conditions that allow for parental advocacy and ensure its efficacy. This was something simply not afforded to Sandra's mother Nellie, although she tried her best to maintain some semblance of presence and authority, in spite of the constraints against her.

BKL's abuse, although also based on her vulnerability, came about not because of her race but as a result of her minority status as a young female in a predominantly male institution that was notable for its misogynistic and ostentatious environment. Her family had consistent access to her and relative control over her welfare, in addition to some small connection to the institution in which she was abused—all factors that were not present in the case of Sandra. However, as seen in BKL's case, this did not necessarily do as much for BKL as Sandra's mother's advocacy did for Sandra. This in and of itself demonstrates the often unpredictable nature of parental advocacy and its ability to stop and prevent institutional child

92 Royal Commission, 'Case Study 17 Transcript,' 4828.

sexual abuse, as well as the ultimate power of the abusive institutions in controlling the narrative of abuse.

Conclusion

As is evident in the Royal Commission, institutions featured heavily in the lives of Australian children throughout the twentieth century, particularly Indigenous children who were forcibly removed from their families as part of the Stolen Generations. Figures of authority were an integral part of the function of institutions and had great influence on children who were still developing socially, physically, and emotionally. Although such places and people were often intended to provide care, support, education, community, and wellness to young children, all too often positions of power were abused, turning these institutions into breeding grounds for manipulation, coercion, secrecy and, ultimately, abuse. These behaviours were often reinforced by the social, cultural, and political environment of the time, which prominently featured toxic masculinity, blatant homophobia, racial and ethnic discrimination, and classist ideals, among other things. Further, public perceptions and understandings of the realities and implications of child sexual abuse were only just beginning to develop, and it is evident that many people were unwilling or unable to deal with such matters. As has been the case for much of human civilisation, parental influence played a crucial role in the development of children in almost all aspects of their lives, including for aiding in their understanding of traumatic events such as sexual abuse.

By combining an understanding of all these factors, as well as reading into the individual cases presented by the Royal Commission, such as those of Sandra Kitching and BKL, the conclusion is seemingly simple: parental advocacy (or a lack thereof) has a profound impact on a child's understanding of sexual abuse they are experiencing, and often on the path that they choose to take in the years after their ordeal. Even for children who did not have good relationships with their parents, it seemed almost instinctual that they turned to them for support during hardship, as they understood that this is the role that parents were intended to play. While some children were able to navigate their situation independent of parental advocacy, it was far more common for such advocacy to be a heavily contributing factor in the choices that abused children made. However, with deeper consideration of the relationship between advocacy and the institutions themselves, it is apparent that the answer is not so simple. Although parental advocacy is a significant factor in cases

of institutional child sexual abuse, more often the outcome of the abuse and the problem of institutional abuse in a broader sense was, for much of this period, left almost entirely in the hands of the institutions. Parents, no matter their status, wealth, or influence, were often no match for large institutional powers with deep community roots (and often deeper pockets). As is evident in the existence of the Royal Commission, it was only after abuse victims began to speak out about their experiences in droves that institutions that housed historical abuse were finally overpowered and exposed. Before this, many institutions took advantage of the fear, shame, and misunderstanding that permeated the social and cultural climate of the period, as well as their own prestige, image, or stature, to intimidate or suppress victims. Parental advocacy plays a unique and crucial role in a victim's understanding of and reactions to sexual abuse, but it is ultimately up to an institution to prevent child sexual abuse.

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Communicating and Constituting the Law: Rhetoric and the Plain Language Movement in Australia

Laura L. Dawes

In the 1980s and early 1990s, senior figures within the Australian judiciary, academia and legislative drafting advocated that legal writers use a 'plain language' style for judicial opinion, legal documents, and legislation. This meant writing in 'plain, straightforward English' rather than legalese. This article argues that the plain English movement drew on ancient rhetorical traditions as well as modern prescriptions about good writing. It uses legal scholar James Boyd White's theory of 'constitutive rhetoric' to suggest that the movement sought to constitute the law as accessible, egalitarian, and public-oriented. However, although the movement's tenets were adopted by the executive and incorporated in legislative drafting guidelines, it had little impact within the judiciary. Further, its heyday was coterminous with increasing complexity of legislation and growing restriction in access to legal services, counter to the movement's democratic ideals. This episode in legal history therefore illustrates tensions between the intentions and views of the various branches of government and participants in our nation's legal life.

Keywords: plain language movement, plain English movement, legislative drafting, legal writing

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I'm the Parliamentary Draftsman,
And my sentences are long;
They are full of inconsistencies
Grammatically wrong.
I put Parliamentary wishes
Into language of my own,
And though no one understands them
They're expected to be known.

> I compose in a tradition
> Which was founded in the past,
> And I'm frankly rather puzzled
> As to how it came to last.
> But the Civil Service use it,
> And they like it at the Bar,
> For it helps to show the laity
> What clever chaps they are.[1]

In the 1980s, a coterie of senior men across the Australian judiciary, academia and legislative drafting advocated that legal writers use a 'plain language' style for judicial opinion, legal documents, and legislation.[2] This meant writing in a simple, understandable way—'plain, straightforward English'—as opposed to the traditional 'legalese' lampooned in the poem above, written by an unnamed wag in the New South Wales Parliamentary Counsel's Office.[3] These particular men, heading attorney generals' departments and parliamentary drafting offices, were in positions to impose this new approach. Plain language was to stand—stripped and stark—in contrast to legalese, with its verbosity, undue use of technical or archaic or foreign words, long sentences, and complex grammar. Legal documents should not, so the argument of the plain language movement went, be written in a cabalistic language spoken only by lawyers.[4]

Advocates argued that plain language had practical benefits, being quick to read, easy, and efficient, but also had ideological or political benefit, variously serving the interests of social justice and democratic participation or stoking respect for legal institutions and ensuring compliance with the law. Detractors, however, saw a dangerous loss of precision and the debasement of law's traditional dignified language. After

1 New South Wales Parliamentary Counsel's Office, *NSW Parliamentary Counsel's Office 120th Anniversary 1878–1998* (Sydney: NSW Parliamentary Counsel's Office, 1998), 12.

2 Law Reform Commission of Victoria, *Plain English and the Law* (Melbourne: Law Reform Commission of Victoria, 1986); Law Reform Commission of Victoria, *Legislation, Legal Rights and Plain English* (Melbourne: Law Reform Commission of Victoria, 1987); I. M. L. Turnbull, 'Clear Legislative Drafting: New Approaches in Australia,' *Statute Law Review* 11 (1990): 161-83.

3 Law Reform Commission of Victoria, *Plain English and the Law*, 57. Parliamentary counsel's offices, which are at both state and federal levels, are the bodies within the public service responsible for drafting legislation.

4 Law Reform Commission of Victoria, *Legislation, Legal Rights and Plain English*, 1.

a brief flourishing in the 1980s and early 1990s, the overt enthusiasm of the plain language movement in law subsided in Australia, but persisted in legislative drafting guidelines, which adopted the tenets of the movement as axiomatic. More recently, the push for plainness in legal writing has found a new reservoir of interest in the world of artificial intelligence (AI)-generated legal documents.

In this article, I trace the emergence of the plain language movement in Australia and the subsequent incorporation of its principles into practice, particularly in legislative drafting. First, to place the movement in its wider context with respect to the humanities and writing instruction, I consider ancient rhetorical traditions and modern prescriptions about simple writing. I argue that the plain language movement in Australian law borrowed from these rhetorical traditions, which saw benefit in simple expression, and married them with more insistent modern prescriptions about good writing. I particularly emphasise how much of this guidance considered plain language to be the rhetorical style best suited to a democratic project. In this respect, I suggest that the plain language movement was reflecting a broader culturally sanctioned aesthetic — and one that linked style with politics.

Second, in interpreting the significance, impact, and practical effect of the plain language movement, I marry historical analysis with the work of linguistic and legal scholar James Boyd White. White suggests that we should consider legal writing and legal speech not just as expressions of a system of rules, but also as 'a branch of rhetoric', by which he means an 'art by which community and culture are established, maintained, and transformed'.[5] White calls this function of language 'constitutive rhetoric'.[6] His position is that language choice creates 'a particular way of seeing our world and imagining the scope of our constitutional community'.[7] Applying White's theory, I argue that the advocates of plain language in the law were also responding to progressive developments in Australian legal practice in the 1970s and, by their choice of language, were constituting the law as accessible, egalitarian, and public-oriented.[8]

5 James Boyd White, 'Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life,' *The University of Chicago Law Review* 52 (1985): 684.

6 White, 'Law as Rhetoric,' 688.

7 James Boyd White, quoted in Katie L. Gibson, *Ruth Bader Ginsburg's Legacy of Dissent: Feminist Rhetoric and the Law* (Tuscaloosa: University of Alabama Press, 2018), 2-3.

8 Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in*

In contrast, the traditional legal style, which advocates were arguing against, was considered to constitute the law as comprised of magisterial institutions and practised by elite professionals. The plain language movement in Australia was therefore not just an aesthetic or practical choice but one with a political motivation—using language to embed the law within wider society and encourage democratic ownership.

However, as feminist scholars (as well as White) have noted, a rhetorical style that implies, say, egalitarianism and universality does not necessarily mean the law really *is* egalitarian or universal.[9] Rhetoric involves the adoption of a certain character or *ethos*, one of the trio of basic tools the writer or speaker uses to persuade the listener. (The other two are *pathos*—an appeal to emotion—and *logos*—an argument based on facts.[10]) As the Sophists well knew, *ethos* can be merely a linguistic construction, with little relation to actuality—hence the term 'sophistry'.[11] Feminist scholars, for example, have noted that, despite its rhetorical claims to universality and objectivity, the law can operate to exclude women and women's experiences.[12] It is therefore appropriate to ask whether the push for using plain language, which presented the law as accessible and public-oriented, really did reflect or create accessible and public-oriented law.

In this instance, first, the movement in Australia was notably concentrated in legislative drafting, with only moderate indications of it percolating through other branches of legal activity. Second, the waning of the plain English movement shaded into a period of reduced Commonwealth support for legal aid services and a sense of substantial unmet need for

Australia (Brisbane: University of Queensland Press, 1987).

9 See, for example, Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law,' *The American Journal of International Law* 85 (1991): 613-45; Gibson, *Ruth Bader Ginsburg's Legacy of Dissent*.

10 R. E. Houser, 'The Three Rhetorical Appeals,' in *Logic as a Liberal Art* (Washington, DC: Catholic University of America Press, 2020), 35-49.

11 The sophists were a school of rhetoric, centred on Athens, circa 400–450 BCE. Their particular teachings instructed speakers in how to present either side of an argument with equal forcefulness and skill, regardless of the speaker's own belief of what was actually right or good. See, for example, James A. Herrick, *The History and Theory of Rhetoric* (New York: Routledge, 2021), 32-62.

12 Charlesworth et al, 'Feminist Approaches to International Law'; Gibson, *Ruth Bader Ginsburg's Legacy of Dissent*, 3.

legal services in the late 1980s onwards, with increased burdens taken on by community legal centres and pro bono work.[13] I argue, therefore, that the plain language movement was additionally both an extension of progressive developments in legal service provision in the 1970s and a defensive manoeuvre, protecting the law's authority by rhetorically constituting it as publicly owned and accessible, despite the practical reality being increasingly at odds with this portrayal.[14]

The plain language movement declined after the 1990s, with its champions retiring from the field. Prescriptions for plainness in writing persisted in certain legislative drafting guidelines, but without the element of progressive advocacy of its heyday. However, plainness has in recent times found a new niche in AI-generated legal services.[15] Whereas the bulk of the plain language movement sought, as suggested above, to portray the law as democratic and accessible while the reality was diverging from this vision, the adoption of plain language by AI legal services is, once again, deploying plainness in writing style to claim accessibility for the law.

This analysis of the plain language movement in Australia therefore seeks to use law's rhetoric and rhetorical theory to uncover and illustrate the

13 Senate Standing Committee on Legal and Constitutional Affairs*, Inquiry into the Australian Legal Aid System: Third Report* (Canberra: Parliament of the Commonwealth of Australia, 1998); Senate Standing Committee on Legal and Constitutional Affairs*, Inquiry into Legal Aid and Access to Justice* (Canberra: Commonwealth of Australia, 2004); Ian Basten, 'Legal Services: Looking into the 1980s,' *Legal Service Bulletin* 5 (1980): 282-85; Michael Kirby, 'Changes in the Delivery of Legal Services in Australia,' *28th Australian Legal Convention* 1 (1993): 75-91; S. Rice, 'Community Legal Centres, Steam Trains and Bourgeois Management,' *Alternative Law Journal* 18 (1993): 86-97; D. Robertson, 'Pro Bono as a Professional Legacy,' in *For the Public Good: Pro Bono and the Legal Profession in Australia,* ed. C. Arup and K. Laster (Sydney: Federation Press, 2001).

14 John Chesterman, 'The Making of the Australian New Left Lawyer,' *Australian Journal of Legal History* 1 (1995): 37-50; Don Fleming and Francis Regan, 'Re-Visiting the Origins, Rise and Demise of the Australian Legal Aid Office,' *International Journal of the Legal Profession* 13 (2006): 69-98; Susan Armstrong, 'What Has Happened to Legal Aid?,' *University of Western Sydney Law Review* 5 (2001): 91-110; Christine Coumarelos, Deborah Macourt, Julie People, Hugh M. McDonald, Zhigang Wei, Reiny Iriana, Stephanie Ramsey, *Legal Australia-Wide Survey: Legal Need in Australia* (Sydney: Law and Justice Foundation of New South Wales, 2012).

15 Richard Susskind, *The Future of Professions: How Technology Will Transform the Work of Human Experts* (Oxford: Oxford University Press, 2015); Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford: Oxford University Press, 2013).

conflicting forces historically operating within Australian legal and legislative practice. It graphically shows that words and practice do not always pull in the same direction.

Historical Foundations of Plainness

Legal writing, although specialised, does not exist separate from other written or spoken communication traditions. The plain language movement of the 1980s and 1990s drew from the ancient tradition of rhetoric, in which there has always been a strand of view advocating plainness as desirable—at least in certain contexts. Classical rhetoric, as originated, taught, and practised in ancient Greece and then ancient Rome, held that there were three levels of style: low or plain (*attenuata*, *subtile*), middle (*mediocris*, *robusta*) and high or florid (*gravis*, *florida*).[16] These styles were characterised by word choice, phrasing, and the use of embellishments such as figures of speech—for example, alliteration, tricolon, and zeugma—the so-called flowers of rhetoric. As the style rose, so did the level of elaboration.

Ancient authorities on oratory recommended that style be chosen to suit the occasion, the material, the speaker, and the audience.[17] Quintilian, the first-century CE Roman lawyer and orator whose extant work the *Institutio Oratoria* directly addressed the use of rhetoric in legal contexts, further suggested that particular styles suited particular intents—plain style to instruct, middle style to move the listener and high style to charm one's audience.[18] A skilled orator might move between levels in any one address, using different styles as he dealt with different arguments and appeals, and so shape his speech into a persuasive whole.

16 Edward P. Corbett and Robert J. Connors, *Classical Rhetoric for the Modern Student* (Oxford: Oxford University Press, 1999), 21.

17 See, for example, Aristotle, *The Art of Rhetoric*, transl. H. C. Lawson-Tancred (New York: Penguin Books, 1991), 1404b, 218; Quintilian, *Institutio Oratoria*, transl. H. E. Butler (Cambridge: Harvard University Press, 1920), Book XI, 157; Cicero, *De Oratore (On the Orator)*, transl. E. W. Sutton and H. Rackham (Cambridge: Loeb Classical Library, 1942), Book III, 5.

18 Corbett and Connors, *Classical Rhetoric*, 21; Quintilian, *Institutio Oratoria*, 202-24. See also Douglas Hassall, 'Quintilian and the Public Attainment of Justice,' in *Re-Discovering Rhetoric: Law, Language and the Practice of Persuasion*, ed. Justin Gleeson and Ruth Higgins (Sydney: Federation Press, 2008), 87.

Although stylistic levels were tools available to the orator, *good* style, in Quintilian's opinion, should support the connection between orator and audience: 'nothing should be done for the sake of words only'.[19] He expressed a preference for style at the plainer end of the spectrum:

> For my own part, I regard clearness as the first essential of a good style: there must be propriety in our words, their order must be straightforward, the conclusion of the period must not be long postponed … Thus our language will be approved by the learned and clear to the uneducated.[20]

Specific things to avoid, Quintilian counselled, were the use of obscure, obsolete, locally relevant or technical words:

> such as the wind called "Atabalus," or a "sack-ship," or *in malo cosanum*. Such expressions should be avoided if we are pleading before a judge who is ignorant of their meaning, or, if used, should be explained.[21]

Indeed, these examples were sufficiently obscure that modern translators have had difficulty with them. 'Atabalus' appears to have been a local word for a vigorous wind, and 'sack-ship' may have been a type of merchant vessel, but '*in malo cosanum*' has entirely defeated translators. Plain, everyday words were to be preferred:

> those words are best which are least far-fetched and give the impression of simplicity and reality. For those words which are obviously the result of careful search and even seem to parade their self-conscious art, fail to attain the grace at which they aim and lose all appearance of sincerity because they darken the sense and choke the good seed by their own luxuriant overgrowth.[22]

Quintilian also advised against long sentences (a sentence 'should never be so long that it is impossible to follow its drift') and complex grammar, such as the use of transposition, hyperbaton, or parenthesis.[23] Simple,

19 Quintilian, *Institutio Oratoria*, 196.

20 Quintilian, *Institutio Oratoria*, 210.

21 Quintilian, *Institutio Oratoria*, 204-5.

22 Quintilian, *Institutio Oratoria*, 189.

23 Quintilian, *Institutio Oratoria*, 205.

plain language was particularly appropriate in a legal setting because 'it would be approved by the learned and clear to the uneducated'.[24] As Roman legal procedures could involve decision-makers who were legally trained or laypersons, potentially one's 'judge' could fall into either of those categories!

Similarly, Aristotle's foundational treatise on *The Art of Rhetoric*, from the fourth century BCE in Greece, argued that 'the virtue of style is to be clear … (if [style] does not indicate clearly it will not be performing its function)'.[25] Aristotle suggested specific techniques that would help achieve this, such as using primarily nouns and verbs and eschewing the 'other words' (adjectives and adverbs) that would make the speech more ornate. Overly poetic figures should be omitted.[26]

For Aristotle, word choice, again, was a determining element of the simple style: 'We should make little use and in few places of exotic, compound and artificial' words, choosing instead the everyday and familiar words, to 'give the impression of speaking not artificially but naturally (for the latter is persuasive, the former the reverse)'.[27] Aristotle also advised using parataxis—evocatively described as 'farmer's English' by grammarian Mark Forsyth—where simple, linear statements follow one after the other, with 'a beginning and an end in itself and an easily surveyed magnitude'.[28] (More modern commentators have described parataxis as 'a style little more sophisticated than "Dick likes Jane" and "See Spot run"').[29] This style, Aristotle claimed, allowed the listener to easily follow the straightforward sentences and was simple for the speaker to memorise and deliver.[30]

Although there are clearly similarities between these paradigmatic ancient texts on rhetoric and the modern plain English prescription—linear sentences, common word choice, reining in description—these

24 Quintilian, *Institutio Oratoria*, 204-5.

25 Aristotle, *Art of Rhetoric*, 218.

26 Aristotle, *Art of Rhetoric*, 218, 219, 222, 224.

27 Aristotle, *Art of Rhetoric*, 218-19.

28 Mark Forsyth, *The Elements of Eloquence* (London: Icon Books, 2013), 51; Aristotle, *Art of Rhetoric*, 232.

29 William Zinsser, *On Writing Well* (New York: Harper Collins, 1976), 17.

30 Zinsser, *On Writing Well,* 17.

authorities also recognised that workmanlike language was unlikely to delight the listener: 'a speaker wins but trifling praise if he does no more than speak with correctness and lucidity'.[31] The controlled addition of complexity and ornament in language raised speech from mere communication into the higher realm of persuasion. A speaker who could do this 'fights not merely with effective, but with flashing weapons'.[32]

For ancient rhetoricians then, plainness in speech was a rhetorical choice to be selectively deployed, with deliberate intention. It was to be used in combination and in contrast with more elevated speech to pull all persuasive levers, the heart and gut as well as the mind (*pathos* and *ethos*, as well as *logos*). It is worth bearing in mind that the contexts for rhetoric in the ancient world (classified as deliberative, judicial or epideictic speech) were situations in which the audience needed to be persuaded. Indeed, Plato, who is believed to have coined the term 'rhetoric' circa 385 BCE, referred to it as persuasive speech in a public forum—'discourse designed to win the soul'—not merely advising someone of facts.[33] This distinction is something we should note when moving from classical rhetorical advice (even that relating to judicial oratory) to modern legal writing.

So, to summarise, in the classical rhetorical tradition, adopting a plain style involved using certain practical techniques regarding word choice and sentence construction but also marked a particular commitment to communication. The intent of a plain style was to convey factual meaning to the listener or reader and to build one's *ethos* or authority as a speaker by suggesting that you were a person who rejected artifice and were therefore honest and believable. But plain speech would not impress the audience, nor delight nor persuade them—these were functions of more elaborate styles. The effective orator was advised to use low style selectively, along with other rhetorical choices, as appropriate to the speaker, audience, subject matter, and strategic intent.

Authorities on rhetoric have spoken approvingly about simple expression for a very long time, but this approval reached such a height by the late

31 Quintilian, *Institutio Oratoria*, 213.

32 Quintilian, *Institutio Oratoria*, 213.

33 James L. Golden, 'Plato Revisited: A Theory of Discourse for All Seasons,' in *Essays on Classical and Modern Discourse*, ed. Robert J. Connors, Lisa S. Ede and Andrea A. Lunsford (Chicago: Southern Illinois University Press, 1984), 16, 18.

twentieth century, when the plain language movement adopted it, that 'simple writing is good writing' was almost axiomatic. Since the mid-twentieth century, the preference for plainness in language has become far more strident—less of a strategic choice to be deployed when appropriate and more of a constant edict.

For example, Strunk and White, in their influential *Elements of Style*, first published in 1957 and continuously in print, command writers to '[o]mit needless words!'.[34] (An English professor at Cornell University, Strunk apparently followed his own advice: his lectures on writing were in danger of running short of the allocated time. To avoid this, he would repeat his edicts three times: 'Omit needless words! Omit needless words! Omit needless words!'.[35] The irony clearly escaped him.) Strunk and White also outlined particular techniques a writer could use to obtain this desired simplicity. That advice is closely allied to the tips that classical authors recommended when adopting a low style — 'write with nouns and verbs', 'avoid fancy words', 'use figures of speech sparingly' or 'avoid foreign languages and prefer the standard to the offbeat'.[36]

Similarly, by far the most famous—and most plagiarised—modern stylistic advice is that of Arthur Quiller-Couch, a writer and literary critic who delivered a lecture series *On the Art of Writing* at Cambridge University: 'Whenever you feel an impulse to perpetrate a piece of exceptionally fine writing, obey it—whole-heartedly—and delete it before sending your manuscript to press. *Murder your darlings*.'[37]

William Zinsser, too, in his seminal text, *On Writing Well*, disclosed that 'the secret of good writing is to strip every sentence to its cleanest components … Simplify, simplify'.[38] 'Look for the clutter in your writing and prune it ruthlessly. Be grateful for everything you can throw away …

34 William Strunk and E. B. White, *The Elements of Style*, fourth edition (New York: Penguin Books, 2000), 23.

35 Strunk and White, *Elements of Style*, xiv.

36 Strunk and White, *Elements of Style*, xiv.

37 Arthur Quiller-Couch, 'On Style,' in *On the Art of Writing: Lectures Delivered in the University of Cambridge 1913-1914* (Cambridge: Cambridge University Press, 1916). The phrase is sometimes expressed as 'kill your darlings' and has been erroneously attributed to Oscar Wilde, William Faulkner, Anton Chekhov, G. K. Chesterton and Stephen King.

38 Zinsser, *On Writing Well*, 6-7.

Are you hanging on to something useless just because you think it's beautiful?'[39]

However, Zinsser's advice gestures towards a niggling concern over ruthlessly pruned writing: lush language can be beautiful. Or, as the ancient rhetoric texts advised, more elaborate language was needed to go beyond mere factual appeal to engage the audience's intellect and emotion. So, complexity in language could be both beautiful and, relatedly, effective in connecting with the reader, persuading them to the writer's view or provoking them to action.

Even these most ardent advocates of simple writing in modern times acknowledged there is 'no infallible guide to style'.[40] Rather, once a writer had achieved sufficient mastery to write simply, their own mature, characteristic (and likely more complex) style could evolve out of the plainness. (How exactly that happened was 'something of a mystery'.[41]) Plain English was therefore not an end, but a learning process and a step on the way to a fully developed, writerly style. Zinsser, for example, advocated learning to write simply to gain an understanding of the structure of language; then a mature writerly style could emerge when the writer was relaxed and confidently in command of their skill.[42] The ancient rhetorical advice and more modern prescriptions are therefore somewhat in accord—simple language can be a good thing and a writer or speaker should learn how to do this; but, for a skilled orator or writer, simplicity will be just one tool of many at their disposal, which they will use with thoughtful intent.

In contrast, the modern plain language movement misses the nuance of these recommendations about the uses and effect of simple writing, severing them at 'murder your darlings'.

The Politics of Plain Language

Ancient orators advised that plainness in speech first helped the audience understand the content of the speech but also gave the impression of naturalness and lack of artifice and therefore helped an orator in building

39 Zinsser, *On Writing Well*, 16.

40 Strunk and White, *Elements of Style*, 97-98.

41 Strunk and White, *Elements of Style*, 97-98.

42 Zinsser, *On Writing Well*, 19.

their *ethos* or authority to speak. In the twentieth century, not only was simplicity elevated from being one choice among many worthy styles to being 'the best' way to write, but plainness in rhetoric also took on a more political aspect.

Consider the high priest of plainness in writing, George Orwell. Orwell's 1946 essays on *Politics and the English Language* and *Why I Write* argued that, in his earlier writing, 'where I lacked a *political* purpose … I wrote lifeless books and was betrayed into purple passages, sentences without meaning, decorative adjectives and humbug generally'.[43] Elaborate verbiage was a sign of essentially hollow communication. In contrast, he said, his famously spare language was an attempt to develop a writerly style that supported and promoted his political ends 'against Totalitarianism and *for* democratic socialism'.[44] Clear, clean writing was, in Orwell's opinion, 'a necessary first step toward political regeneration'.[45] Simplicity in writing marked a commitment to democracy by engaging the audience in language they could understand, not bamboozling them with 'purple passages'.

To this end, Orwell developed six rules for good writing, five of which are often repeated in writing classes and instructions to this day: use short words; cut out any words that can be cut out; use active voice; use everyday English in preference to foreign, scientific or jargon words; and avoid hackneyed phrases ('never use a metaphor, simile or other figure of speech which you are used to seeing in print').[46] However, even Orwell, with his prescription for 'scrupulous writers', saw a need for language to be beautiful or appealing (and it is this rule that writing guides and modern educators often leave out): 'break any of these rules sooner than say anything outright barbarous'.[47]

For Orwell, then, plainness was intimately tied with a political purpose: advancing democratic socialism. To serve democratic ends, language should be used 'for expression and not for concealing'.[48] Plainness was the

43 George Orwell, *Why I Write* (London: Penguin, 1946), 9.

44 Orwell, *Why I Write*, 8.

45 Orwell, *Why I Write*, 103.

46 Orwell, *Why I Write*, 119.

47 Orwell, *Why I Write*, 113, 119.

48 Orwell, *Why I Write*, 120.

stylistic choice best suited to egalitarian connection. However, not everyone considered Orwell's extreme pruning to produce excellent writing—one critic, for example, accused Orwell of turning 'what might have been a good book into journalism', so plain and simple was its language.[49]

Orwell was, in part, also reacting to a sense that officialdom was especially prone to wrapping itself in convoluted prose. British civil servant Ernest Gowers (1880–1966) concurred with this sentiment, publishing a booklet on plain English usage for the civil service in 1948, called *Plain Words*. The booklet was subsequently made publicly available by Her Majesty's Stationery Office (HMSO), the government publisher. So successful was the booklet, both within the government and with the general public, that it ran to eight editions in its first year of publication. Gowers subsequently published two more books, *The ABC of Plain Words* (1951) and *The Complete Plain Words* (1954), again, both with the imprimatur of approval of the HMSO.

The goal of the books, Gowers wrote, was to 'help officials in their use of written English as a tool of their trade', which, he went on to explain, involved 'conveying ideas from one mind to another' by 'writ[ing] for plain men, not experts'.[50] The problems Gowers identified with obscure writing were that 'it is inefficient. It wastes time: the reader's time because he has to puzzle over what should be plain, and the writer's time because he may have to write again to explain his meaning'.[51]

Beyond inefficiency, however, there was a more pressing concern owing to the official context of this writing. Gowers, quoting Robert Louis Stevenson, said that 'the difficulty is not to write, but to write what you mean, not to affect your reader, but to *affect him precisely as you wish*'.[52] He repeatedly underscored this last part: the role of official writing was to get people to do and understand what was required of them. Gowers gave examples of informing citizens about how much income tax they had to

49 Orwell, *Why I Write*, 9.

50 Ernest Gowers, *The Complete Plain Words* (London: Her Majesty's Stationery Office, 1954), 2.

51 Gowers, *Complete Plain Words*, 2.

52 Gowers, *Complete Plain Words*, 1.

pay, or receiving a pension, or instructing a fellow official to hire labourers for a works program.

For Gowers, then, official writing was a form of communication in which instructions were issued from the centre to the periphery—either other officials or members of the public. Simplicity in language was the best tool to make sure those receiving the message heard it correctly and were 'affected precisely as [the writer] wished'. Unlike Orwell, Gowers did not see plain language as supporting a flourishing participatory government, but as a tool for an efficient, highly centralised bureaucracy. Both authors, however, recommended plainness as the style that best served their particular political vision.

Gowers notably argued that the law, however, was one area that should be exempt from using plain language. Legal documents, such as legislation, were authoritative texts that had to withstand 'every conceivable misinterpretation that might be put on them'.[53] Extreme precision may well require verbose definitions 'amplified with a string of near-synonyms', while also bearing in mind rules of legal interpretation and case law which may have interpreted certain words.[54] 'No one can expect pretty writing from anyone thus burdened.'[55] 'Legal draftsmen', therefore, 'must not be judged by the same [plain English] standards as officials'.[56]

Legal documents, Gowers argued, had to be written defensively, and this concern to close all loopholes in interpretation would require elaborate, extensive language. Gowers here evokes an essential quality of legal writing that is different from the literary activities that Orwell had in mind and from the public persuasive oratory which ancient rhetoricians were teaching: legal writing is eminently practical and must be precise and unambiguous. It is not meant to evoke an emotional response in its readers (although this has been strongly disputed by some commentators who see a role for beauty in legal expression).[57]

53 Gowers, *Complete Plain Words*, 9.

54 Gowers, *Complete Plain Words*, 9.

55 Gowers, *Complete Plain Words*, 9.

56 Gowers, *Complete Plain Words*, 12.

57 See, for example, Alfred Phillips, *Lawyers' Language: The Distinctiveness of Legal Language* (London: Routledge, 2002); Thomas J. Moyer, 'Beauty of Law,' *University of Baltimore Law Review* 38 (2008): 5-10; K. N. Llewellyn, 'On the Good, the True, the Beautiful, in Law,' *University of Chicago Law Review* 9 (1942): 224-65.

The plain language movement in law was therefore seeded into well-prepared ground. The value of plainness ran as a vein through classical rhetorical practice, in literary aesthetics, and increasingly in twentieth-century writing advice. However, it was more than just a preferred aesthetic or a practical measure for clear communication: plainness was also connected with a particular political vision or values of democratic civic participation. The late twentieth-century plain language movement in law can therefore be seen as the application of existing rhetorical values to a particular field.

The Plain Language Movement in Australian Law

Globally, the plain language movement started in the United States, connected with the 1970s consumer movement, and extended tendrils into various fields, including the law, but also medicine, science, and finance.[58] Separately, in the United Kingdom, solicitor John Walton complained about archaic legal writing in a letter published in the *Law Society Gazette* and called for lawyers to join with him in countering the wordage plague. Twenty-eight lawyers responded and, together, in 1983 founded Clarity, an international organisation promoting plain language in the law.[59] Slightly pre-dating this, in legislative drafting in the UK, the 1975 Renton Committee on the Preparation of Legislation had made 121 recommendations 'with a view to achieving greater simplicity and clarity in statute law', directed at 'considering the public as the ultimate user over the priorities of legislators'.[60]

In Australian law, the plain language movement did not have grassroots beginnings among consumer advocates, jobbing lawyers, or civil society activists. Rather, it was headed by senior individuals in the judiciary, legislative drafting and academia: Victoria's Attorney General, Jim Kennan

58 Mark Adler, 'The Plain Language Movement,' in *The Oxford Handbook of Language and the Law*, ed. Lawrence M. Solan and Peter M. Tiersma (Oxford: Oxford University Press, 2012), 67-83.

59 Peter Butt and Richard Castle, *Modern Legal Drafting*, second edition (Cambridge: Cambridge University Press, 2006); 'Clarity – The International Association Promoting Plain Legal Language,' http://www.clarity-international.org/ (last accessed 12 January 2024).

60 David Renton and the Committee on the Preparation of Legislation, *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (London: Her Majesty's Stationery Office, 1975); Lord Simon, 'The Renton Report—Ten Years On,' *Statute Law Review* 6 (1985): 134.

(1983–1987, 1990–1992); chair of the Victorian Law Reform Commission, David St. Leger Kelly (1985–1992); academics Robert Eagleson and Peter Butt, founders of the Centre for Plain Legal Language at the University of Sydney (1990–1997); Ian Turnbull, First Parliamentary Counsel (1986–1993); and prominent progressive jurist Michael Kirby, then a justice on the Federal Court of Australia (1983–1984) and subsequently President of the NSW Court of Appeal (1984–1996) and a justice of the High Court of Australia (1996–2009).

These men were all personally and professionally interested in legal language choices—for example, Justice Kirby said he became interested in simplifying legal language when working with David St. Leger Kelly on the Law Reform Commission in 1975, examining impenetrable insurance policies.[61] Kirby continued his interest, writing on the subject, advocating for it and subsequently serving as patron of Clarity.[62]

From these origins, Victoria emerged as the principal centre for the plain English movement, and specifically in legislative drafting. This interest first arose in the late 1970s, with the Plain English Committee under the Victorian Department of the Premier issuing a thirty-two-page pamphlet as a guide to improving the writing in government documents. This little guide was written by Frank Eyre, a significant figure in the publishing industry and long-term general manager (1952–1975) of the Australian branch of Oxford University Press, based in Melbourne.[63] Eyre had earlier compiled the federal government's 1966 *Style Manual for Authors, Editors and Printers* and was offering private editorial consultancy services at the time of his chairmanship of the Victorian Plain English Committee.

61 Kathryn O'Brien, 'Interview of Justice Michael Kirby, High Court of Australia: Judicial Attitudes to Plain Language and the Law,' 1 November 2006, https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_1nov06.pdf (last accessed 1 May 2025).

62 O'Brien, 'Interview of Justice Michael Kirby'; Michael Kirby, 'Is Law Poorly Written? Plain Legal Language,' *Australian Law Journal*, https://www.michaelkirby.com.au/images/stories/speeches/1990s/vol31/1091-ALJ_-_Is_Law_Poorly_Written.pdf (last accessed 12 January 2023); Michael Kirby, 'Review: "Lifting the Fog of Legalese: Essays on Plain Language" by Joseph Kimble,' *Australian Law Journal* 80 (2006): 623.

63 David F. Elder, 'Eyre, Frank (1910–1988),' in *Australian Dictionary of Biography* (Canberra: National Centre of Biography, Australian National University, 2007), https://adb.anu.edu.au/biography/eyre-frank-12471/text22431 (last accessed 1 May 2025).

Victorian Attorney General Jim Kennan knew of the Eyre manual and said he became more interested in language use in legal writing in 1984 when revising the *Coroners Act 1958* (Vic). This Act was replete with archaic legal language, such as 'the like', 'the said', 'forthwith', 'aforesaid', 'thereat' and 'hereafter', along with the occasional Latinate phrase, such as '*felo de se*' (a verdict of suicide).[64] In the revision, verbose passages could be reduced by following plain English principles—such as revising

> Every coroner shall have jurisdiction, subject the next succeeding sub-section to hold an inquest into the cause and origin of any fire whereby any building ship or merchandise or any stack of corn pulse or hay or any growing crop or any firewood made up into bundles stacks cords or loads or cut up in the manner in which it is usual to cut firewood for burning or any trees timber sleepers posts rails charcoal bark or grass within such district has or have been destroyed or damaged …[65]

to 'A coroner has jurisdiction to investigate a fire if the fire occurred in or partly in Victoria …'.[66]

The following year, Kennan charged the then Law Reform Commission of Victoria (subsequently the Victorian Law Reform Commission) '[t]o inquire into and review current techniques, principles and practices of drafting legislation, legal agreements and those Government forms which affect legal rights and obligations, in order to recommend what steps should be taken to adopt a plain English drafting style'.[67] David St. Leger Kelly was chairman of the inquiry, with Professor Robert Eagleson from the University of Sydney's Law School serving as the commissioner.

The commission released a discussion paper and then its final report in 1987, along with a manual for legislative drafting in a plain style. In its general conclusions, the commission stated that there were various benefits to using plain English in legislation: 'it helps members of the public to comply with their legal obligations and to obtain benefits to which they are entitled', 'it saves money' in terms of the time required to

64 *Coroner's Act 1958* (Vic).

65 *Coroner's Act*, s. 6(b).

66 *Coroner's Act*, s. 31(1).

67 Law Reform Commission of Victoria, *Plain English and the Law*, 1.

understand the legislation or employing a lawyer to interpret it, and, beyond legislation, '[p]oorly drafted private documents … and government forms' also imposed costs by wasting time, 'producing inaccurate and incomplete responses' or needing to fix information.[68] Again, we see the combination here of an ideological benefit—the governed understanding and being able to use the laws that apply to them—as well as practical benefits in costs and efficiency. The subsequent recommendations were adopted in legislative drafting.[69]

At the federal level, Parliamentary Counsel Ian Turnbull suggested that the *Australia Acts* of 1986, which untied the constitutional apron strings between the UK and Australia, also had the effect of freeing Australia from arcane British traditions of legislative drafting.[70] This, however, is perhaps claiming too much originality for Australian drafters—the Privy Council's Renton Report of 1975 on how to 'achieve greater simplicity and clarity in statute law' had already moved legislative drafting in the UK to a plainer style.[71] In Australia, although not called as such, the Parliamentary Counsel's office had already, by 1973, adopted plain English practices, such as including a table at the start of long Bills, modernising dates ('the first day of March One thousand nine hundred and twenty-three' was dropped for the form '1 March 1923') and reducing unnecessary phrases. In 1993—the year of his retirement as First Parliamentary Counsel—Turnbull's office issued a manual of drafting directions that made plain English ambitions mandatory, suggesting that Turnbull's work and advocacy of plain English had been adopted as day-to-day practice.[72]

Although Victoria, through the actions of Kennan and the Law Reform Commission, was a centre for the plain English movement in Australia, the movement was interlinked, with these noted individuals working together in professional forums and organisations, such as the Parliamentary Counsel Commission.[73] These forums helped transfer plain English practices across state and federal jurisdictions.

68 Law Reform Commission of Victoria, *Plain English and the Law*, ix.

69 Law Reform Commission of Victoria, *Legislation, Legal Rights and Plain English*.

70 Turnbull, 'Clear Legislative Drafting,' 161-83.

71 Renton et al, *The Preparation of Legislation;* Simon, 'Renton Report,' 133.

72 Office of Parliamentary Counsel, *Plain English Manual* (Canberra: Australian Government, 1993.)

73 See, for example, Kirby, 'Is Law Poorly Written?'.

NSW, for example, in its Parliamentary Counsel's office, instituted plain English legislative drafting policies in the late 1980s and early 1990s, seeking a 'more user-friendly result that is in keeping with the Office's interest in furthering the use of plain language'.[74] At the federal level, the Tax Law Improvement Project, carried out by the Office of Regulation Review from 1993 to 1995, had the goal of 'rewrit[ing] the taxation law in a clearer form' by rewording and restructuring the *Income Tax Assessment Act 1936*.[75] (This was intended to revise only the language and formatting and not change the content of the Act.) This Act was a massive document that had burgeoned from 126 pages in 1936 to well over 5000 by the 1990s.[76] The rewrite—the *Income Tax Assessment Act 1997*—was an impressively (relatively!) short 421 pages, but some commentators felt the revision was not a great improvement on the old. Some sections had been substantially simplified to be understood by the lay public, whereas others had a light prune and were intended for the tax professional.[77] Amendments to the new Act proceeded immediately after its ascension, and the Tax Office continued to pursue new drafting approaches, supporting the suggestion that this first attempt had not been completely successful.[78]

In the academic realm, Peter Butt and Robert Eagleson were co-founding Directors of the Centre for Plain Legal Language at the University of Sydney's Law School. The centre was funded in part by the Law and Justice Foundation of NSW and ran from 1993 to 1997, issuing a newsletter, *Explain*, and a short-lived journal, *Words and Phrases*. Their efforts to have plain English writing included in the Law School curriculum did not come to pass; however, both men published substantially on plain English in the law, consulted on various law reform efforts in public and private spheres and were awarded honours by Plain and Clarity (the international

74 NSW Parliamentary Counsel's Office, *NSW Parliamentary Counsel's Office 120th Anniversary*, 7.

75 See, for example, NSW Parliamentary Counsel's Office, *DP2: PCO Plain Language Policy* (Sydney: NSW Government, 2017); Office of Parliamentary Counsel, *Plain English Manual*.

76 Mark Burton and Michael Dirkis, 'Defining Legislative Complexity. A Case Study: The Tax Law Improvement Project,' *University of Tasmania Law Review* 14 (1995): 199.

77 Burton and Dirkis, 'Defining Legislative Complexity'.

78 See, for example, Greg Pinder, 'The Coherent Principles Approach to Tax Law Design,' *Economic Round Up* Autumn (2005): 75-90.

organisations promoting plain language use) for their services and advocacy.[79]

Within the judiciary, other than Justice Kirby, judges did not tend to explicitly engage with the plain language movement and its recommendations for legal writing. Judges of the 1980s and 1990s did not, for example, write style guides for their peers on the bench, although this did happen after the period this article considers.[80] In the 1990s, some judges did, however, consider the question of appropriate language for judicial writing, but as a corollary to the purpose of delivering judgments.[81] For example, a paper delivered in the 1970s by Justice Kitto of the High Court to the annual Judges Conference was republished in the 1990s. Justice Kitto's aim in the paper had been to argue for written, rather than oral, judgments on the basis that the act of writing allowed the judge to work through his or her reasoning and to set it out in a disciplined, carefully developed manner. Considerations of style appeared as a corollary to clear reasoning. 'Prolix, fluffy and meandering' expression was, in Justice Kitto's opinion, a sign that the judge had not sufficiently worked through his or her thinking, and this was something to which oral judgments, or those dictated, were particularly prone.[82]

> The menace of prolixity, irrelevant wandering and imprecision is terribly real. They make for both

79 O'Brien, 'Interview of Justice Michael Kirby'; Eagleson, for example, advised premier law firm Malleson Stephen Jacques on plain legal writing from 1987 to 2000: 'Clarity: Robert Eagleson,' https://www.clarity-international.org/profile/__robert-eagleson/ (last accessed 12 January 2024).

80 See, for example, David Tedhams and Kristin Walker, *Judgment Writing Guide* (Melbourne: Judicial College of Victoria, 2024), https://judicialcollege.vic.edu.au/resources/judgment-writing (last accessed 1 May 2025).

81 Frank Kitto, 'Why Write Judgments?,' *Australian Law Journal* 66 (1992): 787-99 (from a speech delivered in 1973; Justice Kitto was a justice of the High Court from 1950 to 1970); Harry Gibbs, 'Judgment Writing,' *Australian Law Journal* 67 (1993): 494-502 (Chief Justice Gibbs was a justice of the High Court from 1970 to 1981 and then Chief Justice from 1981 to 1987); John Doyle, 'Judgment Writing: Are There Needs for Change?,' *Australian Law Journal* 73 (1999): 737-42 (Chief Justice Doyle was Chief Justice of the South Australian Supreme Court from 1995 to 2012 and previously Solicitor General of South Australia from 1986 to 1995); Brian Beaumont, 'Contemporary Judgment Writing: The Problem Restated,' *Australian Law Journal* 73 (1999): 743-48 (Justice Beaumont was a Federal Court judge from 1983 to 2005).

82 Kitto, 'Why Write Judgments?,' 795.

> misapprehension and non-apprehension, creating boredom and distraction from the points that matter.[83]

Justice Kitto spoke favourably of the use of the 'blue pencil' (traditionally the tool that a newspaper or book editor would use to mark up manuscripts), suggesting that concision and clarity were important stylistic elements.[84]

Similarly, Justice Harry Gibbs, then a retired Chief Justice of the High Court, spoke to the Judges Conference in 1993, considering questions of who the audience of a judgment is and what elements it needed to contain, and giving more explicit opinions on stylistic choices. In Chief Justice Gibbs's argument, 'lucidity, accuracy and economy of the language' were the ideal.[85] This, he suggested, could be achieved through specific techniques, such as avoiding including substantive matter in the footnotes and avoiding foreign languages, although he considered Latinate phrases to be useful for succinctly capturing concepts, and 'their meaning should be known to any lawyer'.[86] The 'novel' stylistic form of avoiding sexually discriminatory language was also to be desired because 'some people tend to become immoderately annoyed when a hypothetical judge is referred to as "he"'.[87]

Throughout these judicial musings, it is possible to see certain judges considering the role of style and advocating for certain elements of the plain language prescription. However, they did not use the phrase 'plain language' or 'plain English' and nor did they consider judicial writing style and structure systematically. So, it would be drawing too long a bow to say that the Australian judiciary engaged with the plain language movement as rigorously as did the executive. Chief Justice Gibbs's observation that Latin phrases were an acceptable stylistic tool because lawyers knew what they meant suggests one reason why this may have been so: there is a strong implication that judgments are directed at a specialist audience—lawyers and courts—and were not meant to be read and understood by affected parties or the general public, who may have needed a simpler style.

83 Kitto, 'Why Write Judgments?,' 795.

84 Kitto, 'Why Write Judgments?,' 795.

85 Gibbs, 'Judgment Writing,' 500.

86 Gibbs, 'Judgment Writing,' 500.

87 Gibbs, 'Judgment Writing,' 500.

Justice Kirby was a lone voice who directly advocated for plainness in judicial writing through his own writing and as patron of Clarity.[88] However, although his own judgments were plainly expressed, they did tend to be long.[89] Indeed, Chief Justice Doyle of the South Australian Supreme Court, when arguing that judgment writing was increasingly burdensome on judges, offered statistics: judgments had tripled in length since the 1930s.[90] Legal scholars Groves and Smyth have extended that analysis to all High Court decisions during the twentieth century and found a great increase in both the length of judgments and the elaboration of referencing, with a sharp rise from the 1990s.[91] Had the plain language movement made greater inroads into judicial writing, this trend should have been slowed or even reversed. The judiciary therefore had a more tenuous and patchy engagement with the movement. For one, courts lagged behind the executive's earlier uptake of interest in written style in the 1980s. For another, judges responded only tangentially to the movement's principles, adopting its goal of clarity but not the more expansive vision of brevity, simplicity, and public accessibility.

Plainness in Practice: Interpreting the Impact and Significance of the Plain Language Movement

Advocates of plain legal language in Australia suggested it had many practical benefits, but they also claimed—both explicitly and impliedly—that it would better serve and facilitate legal values and principles. So … beyond all the words, what did the movement actually achieve in practice and in principle?

In this section, I consider the movement's claims and whether these were realised in practice. Plainness had become so canonical a virtue in modern

88 See, for example, Michael Kirby, 'On the Writing of Judgements,' *Australian Journal of Forensic Sciences* 22 (1990): 104-24; Kirby, 'Is Law Poorly Written?'.

89 The length was partly because Justice Kirby, when on the High Court bench, was often in dissent and was therefore setting out a counterargument to the majority or plurality position. See, for example, Sir Anthony Mason, 'Appealing to the Future: Michael Kirby and His Legacy,' *Bar News* Winter (2009): 89-92; Ian R. Freckleton and Hugh Selby, *Appealing to the Future: Michael Kirby and His Legacy* (Sydney: Lawbook Co, 2009); A. J. Brown, *Michael Kirby: Paradoxes and Principles* (Sydney: Federation Press, 2011).

90 Doyle, 'Judgment Writing'. Here Justice Doyle was referring to the Commonwealth Law Reports (the judgments of the High Court) and the South Australian Supreme Court.

91 Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001,' *Federal Law Review* 32 (2004): 255.

writing that it was rare to find anyone speaking against it. Further, the plain language advocates were in senior and influential positions, able to impose their interests on the functions of their offices. Nonetheless, there were detractors, whose views are useful to consider when evaluating the practical impact and significance of the movement.

To assess the movement's claims that plain language facilitated legal values, I draw on the theories of linguistic and legal scholar James Boyd White. White argues that language is constitutive: rhetoric 'establish[es], maintain[s] and transform[s] … community and culture'.[92] Hence, White suggests legal language *communicates* the law and also *constitutes* law as a field, a practice, and an element of society. What, then, was the vision of the law that the plain language movement's rhetoric constituted?[93]

Social Justice and Rule of Law

The fundamental benefit that advocates of plain legal English claimed was that it served social justice and supported the rule of law by making laws intelligible: as was described in the UK's Renton Report, and its sentiments echoed by the Chair of the Victorian Law Reform Commission, 'People who live under the Rule of Law are entitled to claim that the law shall be intelligible. A society whose regulations are incomprehensible lives with the Rule of Lottery, not of Law'.[94] This is closely aligned with Gowers' view about official writing: that it has to clearly tell people what they have to do.

In practice it was, however, rare for a defendant to claim impenetrable legalese as an excuse for not following the law. One exception was *Houlahan v Australia and NZ Banking Group*. This 1992 case was originally heard in the Supreme Court of the Australian Capital Territory and then on appeal to the Federal Court. The defendant claimed he could not fulfil his banking contract because it was so elaborately written. The court invited the bank manager to explain the contract; he could not. The court

92 James Boyd White, 'Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life,' *The University of Chicago Law Review* 52 (1985): 684.

93 White, 'Law as Rhetoric, Rhetoric as Law'.

94 Simon, 'Renton Report,' 133; Law Reform Commission of Victoria, *Plain English and the Law*, v.

found in favour of the defendant, describing the contract as 'incomprehensible legal gobbledegook'.[95]

Given the rarity of actual cases claiming the law was too arcane to follow, the sentiment that laws should be understandable by those they govern more relates to White's '*imagin[ed*] scope of our constitutional community'. Plainness reflected an *imagined* scope of the law as directed to the entire community. This contrasts with a conception of the law as directed to experts—whether they be lawyers or, say, tax professionals.

In practice, however, as the reform of the *Income Tax Assessment Act* demonstrated, such broad imagining of the law's audience was not always shared by all the drafters working on a piece of legislation. Indeed, some of the detractors of the plain English movement suggested that legislation or legal documents were never intended to be read by ordinary people, and therefore 'the development and maintenance of the law's special language can be justified'.[96] If ordinary people need to understand the law, so this argument went, they could hire a lawyer to advise them.[97] This, of course, assumed that everyone had the means to hire a lawyer—an assumption which has not been valid at any point in history.

In more recent decades than the heyday of the movement, advocates have also relatedly suggested that plain language contributes to respect for the law and legal institutions. Conversely, legalistic writing was seen as 'annoying', 'elitist' and 'showing lack of respect for the reader and protectionism by a profession'.[98] (The opening poem also says that barristers like complex language 'for it helps to show the laity what clever chaps they are'.[99]) The argument was that when people cannot understand the law, this contributes to disrespect for and cynicism about legal institutions.[100] Making information easily understandable was

95 *Houlahan and Houlahan v Australian and New Zealand Banking Group LTD* (unreported), Supreme Court of the Australian Capital Territory, 16 October 1992, per Higgins J, 6-9; *Houlahan v Australia and NZ Banking Group Ltd* (1992) 110 FLR 259.

96 Phillips, *Lawyers' Language,* i, 31-32.

97 Phillips, *Lawyers' Language.*

98 Christopher R. Trudeau and Christine Cawthorne, 'The Public Speaks, Again: An International Study of Legal Communication,' *University of Arkansas at Little Rock Law Review* 40 (2017): 249-82.

99 NSW Parliamentary Counsel's Office, *NSW Parliamentary Counsel's Office 120th Anniversary,* 12.

100 Christopher Trudeau, 'The Public Speaks: An Empirical Study of Legal Communication,'

therefore presented as contributing to a healthy democracy, in much the same way that Orwell suggested plain language supported democratic socialism.

In these arguments for and against, rhetorical choice was allied to different visions of the law: plainness evoked a vision of the law as owned by all citizens and situated within the public sphere; complexity in language evoked a vision of a closed professional practice, fundamentally alien to the citizenry.

Efficiency and Cost

In its 1987 report, the Victorian Law Reform Commission cited research which found that lawyers took half as long to read a document in plain English than when it was written in legalese.[101] Plain English was therefore considered more efficient to consume and saved costs. Butt additionally claimed that writing in plain English took no longer than writing in legalese (although the document itself may be longer if it needs to explain concepts or words).[102]

However, this opinion that *producing* plain English is time-efficient was strongly contested. The Victorian Law Reform Commission, for one, recognised that achieving simplicity required considerable effort.[103] This is also well supported by evidence from literature: for example, Ernest Hemingway's lean, 'iceberg' style, so influential on modern writing aesthetics in the latter twentieth century, was famously the result of extensive editing. He edited up to thirty-nine times.[104] It is time-consuming to create plain English, whether in literature or in legal writing. The NSW Parliamentary Counsel's Office, for example, noted that its ambition to put all legislation into plain language was a long-term one.[105]

Scribes Journal of Legal Writing 14 (2011): 121-42. See also Law Reform Commission of Victoria, *Plain English and the Law*, preface.

101 Law Reform Commission of Victoria, *Plain English and the* Law, 101.

102 Peter Butt, 'Legalese versus Plain Language,' *Amicus Curiae* 35 (2001): 28.

103 See, for example, NSW Parliamentary Counsel's Office, *PCO Plain Language Policy*, 3.

104 Zoe Trodd, 'Hemingway's Camera Eye: The Problems of Language and an Interwar Politics of Form,' *The Hemingway Review* 26 (2007): 7-21.

105 NSW Parliamentary Counsel's Office, *PCO Plain Language Policy*, 3.

Disadvantages of Plain Language

Judges' Objections and Loss of Precision

Although a proponent himself, Justice Michael Kirby felt that the majority of his colleagues on the bench were 'psychologically resistant to any talk of … "plain English"'.[106] Indeed, he suggested that a major objection to plain language was a sense that judges did not like it. There was evidence both for and against this. On the one hand, for example, Joseph Kimble, the president of Clarity, found that eighty-five per cent of American judges preferred plain English.[107] On the other hand, there were instances of Australian judges describing plain language legislation as 'being written in the language of pop songs' and full of 'confused thought and split infinitives'.[108] It was questionable, however, how much these criticisms, with their reference to 'pop songs' and 'split infinitives', were a significant objection or merely the harrumphing of an old guard.[109]

In Australia, a more significant case reflecting on judicial attitudes to plain language was that of *R v O'Connor*.[110] This was significant for being a Victorian matter (in the heartland of the plain English movement) and at the movement's height (in 1987). In this case, the Supreme Court of Victoria considered the *Penalties and Sentences Act 1985* (Vic), which had been drafted following plain English prescriptions. The court was critical of the Act on the grounds that precision had been sacrificed in the interests of simple language:

> No doubt such drafting is often prompted by a desire to simplify legislation. Unfortunately attempts to do so usually leave a number of questions unanswered. They also very often leave the courts without guidance as to how the questions should be answered and when dealing with legislation the

106 O'Brien, 'Interview of Justice Michael Kirby'.

107 Joseph Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (Durham: Carolina Academic Press, 2005).

108 *GM & AM Pearce and Co Pty Ltd v RGM Australia Pty Ltd* (1998) 116 ACLC 429 at 432 (Callaway JA); *NRMA Insurance Ltd v Collier* (1996) 9 ANZ Insurance Cases 76,717 at 76,721 (Meagher JA).

109 See, for example, Butt, 'Legalese versus Plain Language'.

110 *R v O'Connor* [1987] VR 496.

> court's only task is to interpret and apply the law laid down by the Parliament. The courts cannot be legislators.[111]

The judges here did not approve of the plain English revisions, but it is not clear whether their objections were to plain English being fundamentally incapable of achieving the required precision or merely a specific instance of vague drafting.

The issue of precision was a critical one. The law is unusual because words matter to a degree that is not the case in other fields: 'For the lawyer, the words of the document are authoritative as words … the document matters'.[112] Precision is of paramount importance.[113] So important is precision in the law that even Ernest Gowers, that 'patron saint of sensible writing' in government, allowed lawyers and legislative drafters a free pass.[114]

It is perhaps striking, then, that key leaders of the plain English movement in Australia were in the executive branch of government, in positions responsible for drafting legislation. White's argument would say that theirs was a vision of the law as serving the public and their political representatives in parliament and therefore needing to be understood by these primary constituencies. Public orientation of the law was, for these public servants, paramount. This was contrasted with the judiciary, who wrote judgments with a legal audience in mind and hence did not embrace the movement to such an extent. The general public did not need to understand a judgment: their lawyer or the media would interpret it in sufficient detail for them.

Additionally, other developments in statutory interpretation may have operated indirectly to support the plain language movement in the executive sphere. Amendments to interpretation Acts (which instruct judges as to how to interpret all legislation) in the 1980s required judges to interpret wording to 'best achieve the purpose or object' of an Act and use extrinsic material to clarify ambiguous provisions.[115] Courts could

111 *R v O'Connor* [1987] VR 496.

112 Gowers, *Complete Plain Words*, 9.

113 Turnbull, 'Clear Legislative Drafting,' 161.

114 Robert Eagleson, quoted in Law Reform Commission of Victoria, *Plain English and the Law*, 63; Gowers, 'A Digression on Legal English,' in *Complete Plain Words*, chapter 2.

115 See, for example, *Acts Interpretation Act 1901* (Cth), s. 15AA and s. 15AB. These amendments were passed in 1981.

therefore refer to parliament's commentary or discussion on legislation to help interpret its provisions in a way that achieved parliament's purpose. These changes allowed for an Act's purpose to be given in general terms (so-called fuzzy law) and then rely on overarching principles of statutory interpretation, rather than specifying every Act in minute detail.[116] Legislation therefore would be read in conjunction with the supportive scaffolding of the interpretation Acts, reducing the need for each piece of legislation to replicate these interpretive rules.

However, running counter to this, legal scholars, and the government itself, have noted an increasing complexity in legislation, particularly since the 1980s.[117] The number of pieces of legislation, their length, their structure and language, and how rapidly they are amended are all factors identified as contributing to increasing complexity. Turnbull and Kirby, for example, suggest that the growth in complexity was in part due to parliamentarians wanting to narrow scope for judicial leeway in interpretation.[118] This growth in complexity overlapped the height of the plain language movement, suggesting that the rhetoric about plainness was at odds with the trend in actual legislative practice. In judicial writing—never a great heartland of plain language in any case—length and elaboration even increased.[119]

Debasement of Language

Since antiquity, writers and rhetoricians have understood that lush language delights both writer and reader: 'detailed descriptions, arresting similes, purple passages … sent shivers down my spine' confessed even

116 James Duffy and John O'Brien, 'When Interpretation Acts Require Interpretation,' *UNSW Law Journal* 40 (2017): 952-75; Turnbull, 'Clear Legislative Drafting'.

117 See, for example, Lisa Burton Crawford, Elma Akand, Steefan Contractor and Scott Sisson, 'Legislative Complexity: What Is It, How Do We Measure It, and Why Does It Matter?,' *AusPubLaw*, 23 November 2022, https://auspublaw.org/blog/2022/11/legislative-complexity-what-is-it-how-do-we-measure-it-and-why-does-it-matter (last accessed 1 May 2025); Attorney-General's Department, *Causes of Complex Legislation and Strategies to Address Them* (Canberra: Australian Government, 2011); Australian Law Reform Commission, 'Measuring Legislative Complexity,' 12 December 2022, https://www.alrc.gov.au/datahub/legislative-complexity-and-law-design/measuring-legislative-complexity/ (last accessed 1 May 2025).

118 See, for example, Simon, 'Renton Report,' 135.

119 Vicki Waye, 'Who Are Judges Writing For?,' *University of Western Australia Law Review* 34 (2009): 274-99.

George Orwell, master of the spare, journalistic style.[120] Critics of plain language argued that it debased our language and demeaned its heritage.[121] Whereas plain language adherents saw plainness as provoking respect for the law, opponents felt more elevated language made the law suitably and appropriately impressive. There is a direct parallel here with arguments about the wearing of robes and wigs in legal practice—that such unusual attire sets the law apart from the everyday, visually stating that lawyers and judges are not ordinary people but officers of the court, and their instructions should be followed and respected.[122] The symbols of law, these arguments run, are a demonstration of state power and support the smooth operation and general acceptance of the law. (Michel Foucault argued similarly that public executions also served the function of demonstrating state power and shoring up legal compliance.[123] Wig-wearing and arcane language can be seen as the persistence of this same impulse into modern times, with less appetite for state violence.) If the law descends into the everyday, if judges take off their robes and wigs, or if legal language becomes that of 'pop songs', then people will no longer respect it and do what they are required to do, so the argument ran. This is, as per White, a very different vision of the law, not as democratically constituted or participated in by the citizenry, but as an expression of state power imposed upon the populace and requiring their awe and obedience (but not necessarily their understanding).

The success of the plain language movement over arcane language is therefore also the success of its vision of progressive, participatory democracy over a more rigid, hierarchical, imposed law. A country more interested in manifesting state power, perhaps in response to greater social unrest and instability than in Australia, may have made a different rhetorical choice.

Conclusion

The plain English movement in Australia had its high-water mark in legislative drafting from Victoria's plain English report in 1987 through to

120 Orwell, *Why I Write*, 4.

121 See, for example, Forsyth, *Elements of Eloquence*, 4, 201.

122 James G. McLaren, 'A Brief History of Wigs in the Legal Profession,' *International Journal of the Legal Profession* 6 (1999): 241-50; Charles M. Yablon, 'Judicial Drag: An Essay on Wigs, Robes and Legal Change,' *Wisconsin Law Review* 5 (1995): 1129-54.

123 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon Books, 1977).

the late 1990s. Although Butt and Eagleson continued to advocate and offer training through seminars and professional development courses after this time, and judges occasionally mused about writing judgments, institutional interest declined from its peak of enthusiasm, discussion, and advocacy. Instead, in legislative drafting, parliamentary counsel's offices subsumed plain English prescriptions as part of drafting guidelines.[124] Plain English became normal practice—at least on paper.

Legal scholar James Boyd White suggested that legal language is 'constitutive rhetoric', creating both the law and its intended audience.[125] Plain language and traditional language advocates offered different visions of how the law should be written, but they were also offering different visions of what the law *is* and *who* it is for. Within the executive branch, the plain language movement's emphasis on accessibility and general understanding sought to constitute the law as egalitarian and public-oriented, responding to and extending the progressive developments in law of the 1970s.

However, by the declining years of the plain language movement, legislation was becoming increasingly voluminous and complex. The developments in legal aid in the 1970s plateaued, with the Commonwealth reducing its funding and state funding remaining static. Community legal centres and pro bono work increased but only partially addressed the ongoing unmet need in legal services. Although plain English was intended to facilitate public engagement with and ownership of the law, it did not do away with the need for legal services if a citizen wanted to exercise their legal rights; but the plain language movement was not accompanied by a corresponding expansion in opportunities to do so. The victory of plain English in becoming normal practice in drafting guidelines was coterminous with an increasing lack of access to legal services and rapidly increasing length and elaboration in judicial writing.[126] Absent more practical means to use the law, recasting legislation in understandable language is just 'words, words, words'.

124 Turnbull, 'Clear Legislative Drafting'.

125 White, 'Law as Rhetoric, Rhetoric as Law,' 688, 691.

126 Coumarelos et al, *Legal Australia-Wide Survey*, xiv; Benjamin H. Barton and Deborah L. Rhode, 'Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators,' *Hastings Law Journal* 70 (2019): 987-88; Waye, 'Who Are Judges Writing For?'.

This examination of the fortunes of the plain language movement in legal practice—mainly legislative drafting—demonstrates the cross-currents that operate in the law. The law's rhetoric illustrates the occasional tensions between the intentions and views of the various branches of government and participants in a nation's legal life. Words and practice do not always align.

While institutional interest in plain English is now no longer at the level of enthusiasm as at the height of the movement, a new haven for plain legal language has emerged: online, automated legal services.[127] These are AI-driven services that use a chatbot or questionnaire to interview the client online and then give limited legal advice. This can include drafting a legal letter with drop-in text based on the client's responses. Some of these are online-only companies, whereas others are an online arm of a full-service legal firm, but all aim to service the 'missing middle' — the client who does not qualify for government or philanthropic legal assistance but who cannot afford a flesh-and-blood lawyer's fees.[128] The rhetoric that automated legal services adopt is once more about understandable language that clients do not need a lawyer to interpret for them, and about accessibility to the law.[129] The plain English movement lives on online, finding a new platform to transform the law into its rhetorical vision.

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[127] Judith Bennett, Julian Webb, Rachelle Bosua, Adam Lodders and Scott Chamberlin, *Current State of Automated Legal Advice Tools*: *Networked Society Institution Discussion Paper 1* (Melbourne: University of Melbourne, 2018); John O. McGinnis and Russell G. Pearce, 'The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services Colloquium: The Legal Profession's Monopoly on the Practice of Law,' *Fordham Law Review* 82 (2014): 3041-66. For examples of automated legal services, see 'Australian Legal Documents Online - Cleardocs,' https://www.cleardocs.com (last accessed 12 January 2024); Bill Doogue and Andrew George, 'Robot Lawyers,' https://www.robot-lawyers.com.au/ (last accessed 12 January 2024); Claudia King, '5 Lawyer Bots You Can Try Now,' *Automio*, https://autom.io/blog/5-lawyer-bots-you-can-try-now (last accessed 9 August 2021).

[128] Jacoba Brasch, 'Access to Justice: Meeting the Need of "Missing Middle"' (speech delivered at the Annual Gold Coast Legal Conference, Gold Coast, Queensland, 2021).

[129] Barton and Rhode, 'Access to Justice and Routine Legal Services'; Andrea Perry-Petersen, 'Technology and Access to Justice: Will It Provide the Answers?,' *The Proctor* 39 (2021): 26-28.

‘A Convict in Her Own Right’: Rethinking Prisoner Classification in Western Australia, 1829–1868

Emily Lanman*

Criminal offenders in colonial Western Australia are categorised as either prisoners or imperial convicts, with the latter featuring more heavily in academic research. As a result, the language used to discuss convictism has dominated the study of crime in WA between 1829 and 1868. This is problematic for two reasons. First, it continues to centre white British men in the narratives surrounding colonial crime in WA. Second, it places offenders into an uneasy binary, whereas the reality is far more complex than what is presented in the literature. This article is based on research that introduces a framework with five categories of offenders—imperial convicts, colonial convicts, transitional convicts, local prisoners, and prisoners of war—to dismantle the convict–prisoner binary. Analysing offenders through this framework makes it possible to create a more nuanced picture of offenders in colonial WA between 1829 and 1868.

Keywords: prisoner classification, convictism, Western Australia, colonialism, prisoners-of-war, gender

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The arrival of the *Parmelia* in June 1829 off the coast of what is now called Western Australia marked the beginning of the Swan River Colony. It was also the first criminal act: the theft and illegal occupation of Noongar boodja (country), specifically the lands of the Whadjuk people. This was a continuance of the establishment of British sovereignty over the western third of the Australian continent, which had begun with the military

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outpost on Menang land in the south of Noongar country.[1] As British occupation expanded throughout the nineteenth century, this affected the people of Yamatji, Kimberley, and Wongki countries.[2] The British implemented their sovereignty, jurisdiction, and legal tradition in an attempt to override the sovereignty, kinship systems and lore that had been used to care for people and country for at least 50,000 years.[3] This was not unique to WA, as the convict colonial governments of New South Wales (1788) and Van Diemen's Land (1803) were also complicit in the illegal invasion and occupation of Aboriginal land in the east of the Australian continent.[4] Where WA differed was its status as a 'free' non-convict colony, at least until the introduction of imperial convicts in 1850.[5]

WA's position as a non-convict colony at its inception has entrenched specific parameters relating to its history of colonial crime. From June 1829, the colony was to prosper from the exertions of enterprising settlers.[6] However, when this failed due to severe labour shortages and economic depression, the colony turned to convict labour, which saw

1 Deborah Gare, 'In the Beginning: Empire, Faith and Conflict in Fremantle,' *Studies in Western Australian History* 31 (2016): 9; Nancy Cushing, *A History of Crime in Australia: Australia Underworlds* (Abingdon: Routledge, 2023), 1; Georgina Arnott, Zoe Laidlaw and Jane Lydon, 'Introduction,' *Australian Journal of Biography and History* 6 (2022): 8; Denise Young, 'Convict Builders of Frederick's Town: Outpost Convict Experience, King George's Sound, Western Australia, 1826-1831,' *Studies in Western Australian History* 33 (2020): 84-85.

2 Rosemary van den Berg, *Nyoongar People of Australia: Perspectives on Racism and Multiculturalism* (Leiden: Brill, 2002), 7; Neville Green, *Broken Spears: Aboriginals and Europeans in the Southwest of Australia* (Perth: Focus Education Services, 1984), 148.

3 Ann Hunter, *A Different Kind of 'Subject': Colonial Law in Aboriginal–European Relations in Nineteenth-Century Western Australia 1829–61* (Melbourne: Australian Scholarly Publishing, 2012), xix; Francesca Robertson, Glen Stasiuk, Noel Nannup and Stephen D. Hopper, 'Ngalak Koora Koora Djinang (Looking Back Together): A Nyoongar and Scientific Collaborative History of Ancient Nyoongar Boodja,' *Australian Aboriginal Studies* no. 1 (2016): 43, 46; Green, *Broken Spears*, 21.

4 Hilary M. Carey, *Empire of Hell: Religion and the Campaign to End Convict Transportation in the British Empire, 1788–1875* (Cambridge: Cambridge University Press, 2019), 11.

5 Ann Curthoys, 'The Beginnings of Transportation in Western Australia: Banishment, Forced Labour, and Punishment at the Aboriginal Prison on Rottnest Island before 1850,' *Studies in Western Australian History* 34 (2020): 59.

6 Pamela Statham, 'Contrasting Colonies, or a Tale of Three Colonies,' in *Beyond Convict Colonies*, ed. Barrie Dyster (Sydney: Department of Economic History University of New South Wales, 1996), 34.

nearly 10,000 men from the metropole and across the empire transported to the colony.[7] In turn, convict history has received much of the focus in scholarly research, to the detriment of colonial crime. This includes the amalgamation of the imperial and colonial carceral systems in 1858, which saw colonial offenders transferred to imperial control. Despite being under imperial control, the colonial government was still required to pay one shilling per day for each colonial prisoner.[8] As a result of the rigid binary structure in WA, the literature does not reflect the complexities of colonial society and restricts the language available for discussing offenders between 1829 and 1868. This article argues that the free–penal binary is no longer a relevant way to discuss WA's early colonial history and that it creates a secondary binary of prisoner and convict, which does not accurately capture the range of offenders present in colonial society. To remedy this, I present a framework for categorising offenders that expands beyond this binary. This is important for uncovering the extent and intricacies of the people who offended in the early colonial period and their status in the colony; for example, despite common assumptions, WA did have female convicts. Although WA has been used as a case study, this framework has applicability in other colonial contexts.

Contextual Background

The classification framework presented in this article has been developed through extensive archival research, using the colonial secretary's correspondence files held by the State Records Office of Western Australia. This research involved the analysis of 600 volumes of correspondence between 1829 and 1868.[9] This source material was selected to capture a more realistic overview of prisoner management in the colonial period, as opposed to the idealised representation seen in the regulations and legislation surrounding the gaols. In particular, the date

7 Nicholas Meinzer, 'The Western Australian Convicts,' *Australian Economic History Review* 55, no. 2 (2015): 164; Bevan Carter and Jennie Carter, '"For their Country's Good": Ending Transportation and the Last Convict Ship,' *Early Days* 102 (2018): 82.

8 Louise Bavin-Steding, 'The Punishment Administered: Archaeology and Penal Institutions in the Swan River Colony, Western Australia' (PhD diss., University of Western Australia, 1994), 96, 107.

9 Colonial Secretary's Office, Correspondence – Inwards, State Records Office of Western Australia [SROWA], AU WA S2941 cons36; Colonial Secretary's Office, Letters (Outwards Correspondence) [Main Series], SROWA, AU WA S2755 cons49.

range selected, 1829–1868, represents a period with the most diverse range of prisoner and conviction types.

This framework builds on previous research into the classification of offenders in colonial WA. Research in this area has primarily focused on imperial convicts and Aboriginal offenders. Notable work by Peter Millett has examined the use of the Convict Establishment's classification systems and how this affected the convicts incarcerated in the system.[10] Other works by Louis Marshall, Martin Gibbs, and Sean Winter have portrayed how the system operated using these categories.[11] Aboriginal offenders have arguably received more scholarly focus. Most often, academics such as Katherine Roscoe, Kristyn Harman, and Ann Curthoys have argued that they were convicts.[12] However, historians, such as Tom Austen, and Noongar academics, such as Len Collard and Glen Stasiuk, have put forward counterarguments. These works contend that Aboriginal offenders should be considered prisoners of war.[13] However, little consideration has been given to other types of offenders, such as the Parkhurst apprentices, who do not conform to the well-established convict–prisoner binary. The framework presented in this article offers a method for rectifying this issue.

10 Peter Millett, '[A] Mild but Firm System of Discipline: British Convicts and their Punishment in Western Australia, 1850–1868' (PhD diss., University of Western Australia, 2003); Peter Millett, 'The Distribution of an Offensive Population: Classification and Convicts in Fremantle Prison, 1850-1865,' *Studies in Western Australian History* 25 (2007): 40, 56.

11 Louis Marshall, 'The Ticketer's Plight: Living Standards and Morality among Ticket-of-Leave Convicts in Western Australia, 1850–1877,' *Studies in Western Australian History* 34 (2020): 97-121; Martin Gibbs, 'The Archaeology of the Convict System in Western Australia,' *Australasian Historical Archaeology* 19 (2001): 60-72; Sean Winter, *Transforming the Colony: The Archaeology of Convictism in Western Australia* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2017).

12 Katherine Roscoe, 'Work on Wadjemup: Entanglements Between Aboriginal Prison Labour and the Imperial Convict System in Western Australia,' *Studies in Western Australian History* 34 (2020): 79-95; Kristyn Harman, *Aboriginal Convicts: Australian, Khoisan and Māori Exiles* (Sydney: NewSouth Publishing, 2012); Curthoys, 'The Beginnings of Transportation in Western Australia'.

13 Sean Murphy, 'Rottnest Island's Aboriginal Prisoners are Australia's Forgotten Patriots, Elder Says,' *ABC*, 11 November 2017; Glen Stasiuk, 'Wadjemup: Rottnest Island as Black Prison and White Playground' (PhD diss., Murdoch University, 2015), 65-66; Tom Austen, *A Cry in the Wind: Conflict in Western Australia 1829–1929* (Perth: Darlington Publishing Group, 1998), 32.

Deconstructing the Free–Penal Binary

The free–penal binary has long been used to structure the early history of WA; however, this categorisation does not accurately capture the nuances of the period. This presents three overarching issues: the period of 1829–1850 being termed 'free', defining 1849 as the beginning of convictism, and classifying WA as a penal colony.

WA's invasion is traditionally considered a passive event marked by the foundation of a settlement by free settlers, before later turning to convict labour by the mid-nineteenth century.[14] In this version of history, Aboriginal people are also spoken of passively. Their history is discussed in terms of a few violent events against settlers, which were reciprocated, before becoming subservient and reliant on the colonial government or missions.[15] This is unequivocally untrue and, although recent works have challenged this myth, the misnomer of the 'free' colony remains. The colony that became WA cannot be considered free, as it was colonised through invasion, resulting in the displacement and subjugation of Aboriginal people, despite their resistance.[16] This was not a free society, especially when considering the other forms of forced, coerced, and indentured labour used before 1850.[17]

Defining the start of convictism in WA based on the passing of the 1849 *Convicts, Custody and Discipline Act* (WA) and the arrival of the *Scindian* in 1850 is also problematic.[18] This is partly because it does not consider

14 Statham, 'Contrasting Colonies, or a Tale of Three Australian Colonies,' 34.

15 Richard Broome, 'The Struggle for Australia: Aboriginal–European Warfare, 1770–1930,' in *Australia: Two Centuries of War and Peace*, ed. M. McKernan and M. Browne (Canberra: Allen & Unwin, 1988), 130; Green, *Broken Spears*, 81; Bill Bunbury and Jenny Bunbury, *Many Maps: Charting Two Cultures, First Nations and Europeans in Western Australia* (Perth: UWA Press, 2020), 116; Jeremy Martens, '"In a State of War": Governor James Stirling, Extrajudicial Violence and the Conquest of Western Australia's Avon Valley, 1830–1840,' *History Australia* 19 (2022): 672.

16 Ann Curthoys and Shino Konishi, 'The Pinjarra Massacre in the Age of the Statue Wars,' *Journal of Genocide Research* 24 (2022): 511.

17 Kellie Moss, 'The Swan River Experiment: Coerced Labour in Western Australia 1829-1868,' *Studies in Western Australian History* 34 (2020): 23; Jillian Barteaux, 'Urban Planning as Colonial Marketing Strategy for the Swan River Settlement, Western Australia,' *Australasian Society for Historical Archaeology* 34 (2016): 22.

18 *Convicts, Custody and Discipline Act* 13 Vict. No. 1 (1849) (WA), preamble; J. E. Thomas and Alex Stewart, *Imprisonment in Western Australia: Evolution, Theory and Practice* (Perth: University of Western Australia Press, 1978), 21.

those sentenced to transportation within the colony and sent to a penal colony, such as Van Diemen's Land. For example, Stephen Hawker was sentenced to seven years' transportation at the 1834 April Quarter Sessions in Fremantle for theft of a chest from the home of James Gillespie. The severity of the sentence was attributed to his habitual criminality.[19] It also overlooks the Parkhurst Apprenticeship Scheme, which, from 1842 to 1849, sent male juvenile criminals from the United Kingdom to be apprenticed as labourers, to alleviate the labour shortage and in an attempt to prevent the introduction of imperial convicts.[20] The colonial government avoided calling the apprentices 'convicts' because they received a conditional pardon before leaving for the colony.[21] Defining 1849 as the beginning of convictism also ignores the practice of sentencing Aboriginal men to 'transportation' from 1837. These men were sent to Wadjemup (renamed Rottnest Island) from 1838, which has been argued to be a system of intracolonial transportation.[22] However, given the extent of the frontier wars, this use of Wadjemup could also be claimed to be comparable to a prisoner-of-war camp.

The final issue with the free–penal binary is the classification of WA itself as a 'penal colony'. Such colonies are usually defined as isolated communities where transported convicts would be sent to serve their sentences and be put to hard labour to create necessary infrastructure. Historical examples include the colonies of NSW, Van Diemen's Land, and Norfolk Island, which were established primarily for the reception of convicts.[23] WA does not conform to this model. First, it was not founded as a convict colony and only later accepted convicts for a specific purpose.[24] Second, the Convict Establishment (later known as Fremantle

19 'Quarter Sessions, Fremantle, Wednesday, April 2, 1834,' *The Perth Gazette and Western Australian Journal*, 12 April 1834.

20 John A. Stack, 'Deterrence and Reformation in Early Victorian Social Policy: The Case of Parkhurst Prison, 1838-1864,' *Historical Reflections* 6 (1979): 389-90.

21 Jeannie Duckworth, *Fagin's Children: Criminal Children in Victorian England* (London: Bloomsbury Publishing, 2003), 96.

22 Curthoys, 'The Beginnings of Transportation in Western Australia,' 59; Roscoe, 'Work on Wadjemup,' 79-80.

23 Robert M. Worley and Vidisha B. Worley, 'Penal Colonies,' in *The Encyclopedia of Criminology and Criminal Justice*, ed. Jay S. Albanese (Wiley: New York, 2014); 'Penal Colony,' in *Britannica Concise Encyclopedia* (Chicago: Britannica Digital Learning), 2017.

24 Pamela Statham, 'Why Convicts? Part I: An Economic Analysis of Colonial Attitudes to the Introduction of Convicts,' *Studies in Western Australian History* 4 (1981): 1; Hamish

Prison) was not isolated. Although there was significant distance from the convict's port of departure, the prison itself was not quarantined from the rest of society; the headquarters were based in the colony's main port town of Fremantle. Finally, convict work parties were used on projects in populated areas throughout the colony. That is to say, there was a degree of integration with society, especially once convicts received a ticket of leave or conditional pardon.[25] This is also visible through the different groups used on government works; for example, Shane Burke has shown that imperial convicts carried out the first convict projects in the Swan district, alongside free labourers, Aboriginal prisoners, and other local prisoners.[26] With this in mind, it appears unreasonable to refer to WA as a penal colony; instead, it should be considered a settler colony that later hosted a convict establishment.

The concept of a penal colony in reference to WA, or attempts to expand this by redefining it as a 'carceral colony' from 1838, implies that imprisonment did not occur in the colony before this.[27] However, this implication overlooks that crime and incarceration are almost as old as the colony. Within six months, the colonial government was willing to incarcerate disobedient indentured servants on Ngooloormayup (Carnac Island). By the end of 1829, the wrecked *Marquis of Anglesea* became a prison hulk.[28] By January 1831, the colony had its first purpose-built place of incarceration, Fremantle Gaol, which was a colonial adaptation of Jeremy Bentham's panopticon model prison.[29] So, the notion that either

Maxwell-Stewart, 'Western Australia and Transportation in the British Empire 1615-1939,' *Studies in Western Australian History* 34 (2020): 7-9.

25 Bavin-Steding, 'The Punishment Administered,' 131, 134.

26 Shane Burke, '"Convicts" in the Swan District: The First Public Works Projects in the Colony of Western Australia, 1850–51,' *Studies in Western Australian History* 34 (2020): 178.

27 Jenny Gregory and Louis Marshall, 'Introduction: The Carceral Colony,' *Studies in Western Australian History* 34 (2020): 1-3.

28 Curthoys, 'The Beginnings of Transportation in Western Australia,' 59; Broun, Government Notice, 3 November 1829, SROWA, AU WA S2755 cons49 001, folio 176; Phil Maude, 'Treatment of Western Australia's Mentally Ill During the Early Colonial Period, 1826–1865,' *Australasian Psychiatry* 21 (2013): 398; Ann Curthoys, Shino Konishi and Alexandra Ludewig, *The Lives and Legacies of a Carceral Island: A Biographical History of Wadjemup/Rottnest Island* (Abingdon: Routledge, 2022), 3.

29 Emily Lanman, 'Establishing a Panoptic Prison: An Examination of Fremantle Gaol, 1831-1841,' *Revue d'études Benthamiennes*, 19 (2021): 8465.

the arrival of imperial convicts in 1850 or the colonial government's earlier decision to transport Aboriginal men in 1838 marks the beginning of carceral practices in WA is not true. This is important to highlight, as the earlier history of incarceration in WA before the introduction of imperial convicts has frequently been overlooked in the existing literature.

Prisoner Classification Framework

Dismantling the free–penal binary used to frame colonial WA means that the categories used to define offenders must be reappraised. Incarcerated people have traditionally been classified in the literature as either prisoners or convicts. The term 'convict' has been used in reference to men sent from Britain and Ireland after receiving a sentence of transportation or, after 1853, penal servitude. On the other hand, 'prisoner' has been used as a catch-all for other offenders.[30] However, this does not accurately capture the nuances and complexities surrounding those who were accused of crime in WA. To mitigate this, this article presents a framework that expands the convict–prisoner binary. This model comprises three convict categories—imperial, transitional, and colonial—and is complemented by two prisoner definitions—local and prisoners of war.

Imperial Convicts

Under this framework, imperial convicts are those who would typically be regarded as convicts in the Western Australian context, between their arrival in 1850 and the end of the transportation system in 1868. These convicts were sentenced to transportation, or later penal servitude, and would be sent 'beyond the seas' to a convict establishment for the entirety of their sentence.[31] Imperial convicts include those undergoing their initial sentence as probation prisoners, as well as those working on road parties and reconvicted ticket-of-leave holders.[32] Although most of the close to 10,000 convicts sent to WA were from Britain and Ireland, some originated from other places in the empire and Europe. In 1858, French-

30 Martin Gibbs, 'Criminal Nation?: An Archaeological View of the Australian Convict System,' *Teaching History* 52, no. 2 (2018): 20-24; Clare Anderson, *Convicts: A Global History* (Cambridge: Cambridge University Press, 2022), 64.12a.

31 Gibbs, 'Criminal Nation?,' 20-24; Phillip Harling, 'The Trouble with Convicts: From Transportation to Penal Servitude, 1840–67,' *Journal of British Studies* 53 (2014): 100.

32 Millet, '[A] Mild but Firm System of Discipline,' 148, 179.

born Aimable Duperouzel arrived on the *Lord Raglan* after being convicted in Guernsey, Channel Islands.[33] Joseph Manning Wilson was another of these European convicts; he was born in Denmark but convicted in Scotland.[34] Once within the imperial convict system, further classifications could be given based on the convict's behaviour, which would dictate luxuries such as their ability to write or receive letters and payments to which they were entitled.[35]

The colony accepted imperial convicts on two conditions. First, the convicts sent would be married, so as not to exacerbate the gender imbalance already present in the colony, while still providing the required labour force.[36] The extent of this imbalance can be seen in the 1848 census, which counted a settler population of 4,622, of whom 2,818 were men; this meant that for every hundred men, there were sixty-four women.[37] The second condition was that female convicts would not be accepted, after Governor Charles Fitzgerald and the Secretary of State for the Colonies, Earl Grey, discussed the matter before making the formal request for imperial convicts.[38] Despite this, in April 1848, acting Governor Frederick Chidley Irwin wrote to the Colonial Office requesting that a supply of female labour be sent to the colony because of the gender imbalance.[39]

With the introduction of convicts, women were desperately needed to be wives for the single male settlers and convicts, so as to populate the colony. Women also played a crucial moral role in society, as they were the core of the family unit, which both church and state platformed as the central pillar upon which a law-abiding society could rest.[40] There was

33 W. and F. J. Duperouzel, 'Aimable Ciril Duperouzel,' in *The Brand on His Coat: Biographies of Some Western Australian Convicts*, ed. Rica Erickson (Perth: University of Western Australia Press, 1983), 106-7.

34 Wilson to Kennedy, 30 October 1861, SROWA, AU WA S2941 cons36 469, folios 52-52A.

35 Millett, '[A] Mild but Firm System of Discipline,' 148-49, 209.

36 Joanne Hyland, '"The Vilest and Most Degraded of Human Beings": An Investigation into Why Female Convicts Were Not Transported to Western Australia,' *Studies in Western Australian History* 34 (2020): 150.

37 Winter, *Transforming the Colony*, 149.

38 Hyland, '"The Vilest and Most Degraded of Human Beings",' 150.

39 Pamela Statham, 'Why Convicts? Part II: The Decision to Introduce Convicts to Swan River,' *Studies in Western Australian History* no. 4 (1981): 13.

40 Caroline Ingram, 'Women in the Court: An Examination of Women's Trials Heard in the

also fear that such a large influx of men could lead to a spike in sexual violence and homosexuality.[41] A provision was made whereby the family members of married convicts could be sent out to the colony, paid for in part by public and privately sourced funds, including from the parish and benevolent funds. However, family members could not always be located and were not compelled to accept the offer, even if they could afford it.[42] Because of this, the question of female convicts arose twice during the 1850s.

In March 1854, Governor Fitzgerald was faced with the question of introducing female convicts; however, as his term was ending, he did not think an outgoing governor should answer such an important question without public comment.[43] To remedy this, public meetings to be held at Perth, Fremantle, and York were advertised in newspapers, as these towns had the greatest number of settlers. Those who attended the Perth and York meetings were vehemently against the proposal. However, those at the Fremantle meeting viewed it much more favourably. This is likely owing to the significant number of ticket-of-leave men voting, even though the governor did not believe they should be allowed to vote on such a matter.[44] Fitzgerald thought that if the British government sent young single women as part of an emigrant scheme, then the introduction of convict women would be obsolete.[45] No further action was taken until 1857, when additional public meetings were conducted at Fremantle, York, Bunbury, and Toodyay. Other people voiced their opinions in

Court of Quarter Sessions and the Supreme Court of Western Australia, 1830-1890' (PhD diss., University of Western Australia, 2023), 9; Hyland, '"The Vilest and Most Degraded of Human Beings",' 149.

41 Bruce Baskerville, 'Could Not Even be Named: Sodomites Transported to Western Australia between 1851 and 1863,' *Studies in Western Australian History* 34 (2020): 135; Hyland, '"The Vilest and Most Degraded of Human Beings",' 149.

42 Henderson to Yule, 16 April 1851, SROWA, AU WA S2941 cons36 215, folios 65-66; Hyland, '"The Vilest and Most Degraded of Human Beings",' 150.

43 Hyland, '"The Vilest and Most Degraded of Human Beings",' 153.

44 Richard Broun, 'Public Meeting,' *The Perth Gazette and Independent and Journal of Politics and News,* 2 June 1854; F. D. Wittenoom, 'To the High Sheriff of Western Australia,' *The Perth Gazette and Independent Journal of Politics and News*, 19 May 1854; 'York,' *Inquirer*, 17 May 1854; 'Public Meeting at Fremantle,' *The Perth Gazette and Independent Journal of Politics and News*, 9 June 1854.

45 Hyland, '"The Vilest and Most Degraded of Human Beings",' 153.

articles in the *Perth Gazette* and *The Inquirer*.[46] Once again, Fremantle was broadly in favour of introducing female convicts, but rural settlements were, as a whole, still more sceptical. However, only the responses from the York and Fremantle meetings were returned to the government before the decision was made to propose a trial of female convicts.[47] This time, the British government decided not to pursue the matter, as many settlers had sent memorials regarding their fears directly to the home government, and these vastly outweighed those in support of the introduction.[48] The fear of immoral women was far greater than the anxiety around the potential for 'unnatural' sexual behaviours on the part of the male convicts. This is because these women had failed in their duty to uphold 'domestic morality', thus they could not be expected to contribute to moral and respectable households.[49]

Transitional Convicts

The second convict category developed by this framework is the transitional convicts. These are so named because they are at a transitional point in their sentence, being deemed sufficiently reformed to not need constant supervision or the rigid structure of a carceral institution, but not enough to not require a level of oversight by the system.[50] Transitional convicts may have received transportation as part of their initial sentence, alongside other punishments such as apprenticeship. In these cases, they were usually pardoned upon their departure, and their end destination did not need to have an imperial convict establishment, as they were the responsibility of the colonial government. That is to say, it would be the colonial judicial and carceral system that would prosecute and punish any recidivism on the part of a

46 R. G. Meares, 'Classified Advertising,' *The Perth Gazette and Independent Journal of Politics and News*, 5 June 1857; George Eliot, 'Notice,' *The Inquirer and Commercial News*, 8 July 1857; A. B., 'To the Editor of the Inquirer and Commercial News,' *The Inquirer and Commercial News*, 5 August 1857.

47 Hyland, '"The Vilest and Most Degraded of Human Beings",' 159.

48 'The Inquirer & Commercial News,' *The Inquirer and Commercial News*, 26 May 1858; 'Local and Domestic Intelligence,' *The Inquirer and Commercial News,* 19 May 1858; Hyland, '"The Vilest and Most Degraded of Human Beings",' 162.

49 Hyland, '"The Vilest and Most Degraded of Human Beings",' 162; Baskerville, 'Could Not Even be Named,' 124.

50 Millett, 'The Distribution of an Offensive Population,' 52; Millet, '[A] Mild but Firm System of Discipline,' 103.

transitional convict.[51] The most notable example of an introduced transitional convict group would be those sent as part of the Parkhurst Apprenticeship Scheme. This scheme took male juvenile offenders who had been sentenced to transportation before undergoing a period of imprisonment in Parkhurst Prison on the Isle of Wight, where they were assessed and received an education in useful skills necessary for colonisation.[52] Once deemed sufficiently reformed, they could be sent to a colony to be apprenticed as labourers.[53] The Parkhurst apprentices did not count towards the convict population, thus they cannot be considered imperial convicts.[54] That is not to say that the apprentices did not suffer from the stigma of their previous criminal convictions once in the colony. For example, in July 1849, five apprentices wrote to the editor of *The Inquirer* to protest their characterisation as 'dangerous', when many settlers desperately required their labour.[55]

Ticket-of-leave holders can be defined as transitional convicts because they had transitioned out of either the imperial or colonial convict category but could not at that point be considered to be on the same social standing as a non-incarcerated settler. To this end, their position in society was discussed at length in a letter written by Comptroller General Henderson in 1853 to the colonial secretary in response to Perth police magistrate Thomas Yule's complaint that ticket-of-leave holders had a better standard of living than settlers.[56] Henderson countered this by highlighting that ticket-of-leave holders were restricted to one district and

51 Stack, 'Deterrence and Reformation in Early Victorian Social Policy,' 397; Moss, 'The Swan River Experiment,' 23; Thomas and Stewart, *Imprisonment in Western Australia*, 8-9; Phillips to Cooper, April 1842, SROWA, AU WA S2941 cons 36 110, folios 157-59; William Pearse to D. S. Murray, September 1842, SROWA, AU WA S2941 cons 36, folio 193.

52 Duckworth, *Fagin's Children*, 102.

53 Pamela Cox and Barry Godfrey, 'The "Great Decarceration": Historical Trends and Future Possibilities,' *The Howard Journal of Crime and Justice* 59 (2020): 267-68.

54 Andrew Gill, 'Forced Labour in the West: Parkhurst "Apprentices" in Western Australia, 1842-1852,' *Papers in Labour History* 6 (1990): 1-29; Penelope Hetherington, *Settlers, Servants & Slaves: Aboriginal and European Children in Nineteenth-Century Western Australia* (Perth: University of Western Australia Press, 2002), 38-43.

55 Terence M'Grath, William Porter, George Woods, John Boult, Henry Wilson, 'To the Editor of the Inquirer,' *The Perth Gazette and Independent Journal of Politics and News*, 6 July 1849.

56 Henderson to Sanford, 30 August 1853, SROWA, AU WA S2941 cons36 261, folios 205-212.

could not move about freely, nor be without employment, as they were required to repay their passage money.

However, ticket-of-leave holders present an anomaly in the transitional category, as a reconviction at this stage of their sentence would result in them being returned to the Convict Establishment.[57] This means it would be the imperial carceral system, not the colonial one, that would be responsible for handling their punishment. The separation was necessary, as issues arose in relation to the rations required for ticket-of-leave holders in cases where they were temporarily placed in a colonial gaol. This is because a ticket-of-leave holder's ration was to come from the imperial stores, not the colonial, leading to issues with the accounting.[58] What allows ticket-of-leave holders to be defined as transitional convicts is that the imperial system redefines them as reconvicted prisoners, which is evident in returns for the Convict Establishment.[59] These returns show the number of convicts held at the Convict Establishment and other institutions under the following categories: colonial, reconvicted, probation, and ticket-of-leave holders in hospital.[60] However, this practice evolved after amalgamation and was abolished entirely in the 1860s, as the cessation of transportation approached. Using these categories demonstrates that a ticket-of-leave holder, if reconvicted, did not re-enter the imperial system with the same label but was instead recategorised.

The transitional convict category also applies to imperial or colonial convicts who received a conditional pardon. This is because they were no longer incarcerated in an imperial or colonial prison and, therefore, not subjected to the rigid nature of imprisonment.[61] However, they were still

57 Millet, '[A] Mild but Firm System of Discipline,' 163; 'The Independent Journal,' *The Perth Gazette and Independent Journal of Politics and News*, 30 November 1855.

58 Cowan to Sanford, 19 January 1852, SROWA, AU WA S2941 cons36 280, folio 26; Mends to Sanford, 27 April 1852, SROWA, AU WA S2941 cons36 232, folios 105-106.

59 Henderson to Sanford, 30 August 1853, SROWA, AU WA S2941 cons 36 261, folio 205-12; 'The Independent Journal,' *The Perth Gazette and Independent Journal of Politics and News*, 20 May 1853.

60 Return of Prisoners of the Crown – Colonial, Reconvicted, Probation; and Tickets of Leave Holders in Hospital on the Above Establishment on the Case Date, 1 February 1854, SROWA, AU WA S2941 cons36 287, folio 13; Bavin-Steding, 'The Punishment Administered,' 97.

61 Millett, 'The Distribution of an Offensive Population,' 52; Millet, '[A] Mild but Firm System of Discipline,' 103.

restricted in some capacities that limited their freedom and so still had oversight over their lives. For example, they could still not leave the colony without permission after 1855, or altogether after 1865. People would remain as transitional convicts until they obtained their certificate of freedom as, at that point, they would be considered on par with free settlers.[62] Recidivism on the part of a conditional pardon holder would lead them to be classified as a colonial convict or dually defined as a local prisoner.[63]

With the exception of ticket-of-leave holders, for the reasons mentioned above, if a transitional convict reoffended, they could also be jointly categorised as a local prisoner. This is because the transitional convict label defines the parameters of their social standing in the colonial hierarchy at the time of their secondary offence.[64] By contrast, the classification of prisoner is related to their carceral status at that particular time after a second offence. For example, John Gavin, a Parkhurst apprentice, was sentenced to death in the colony for the murder of his employer's son. On his arrest, he can still be considered to have been a transitional convict because his position in the colony as a member of the Parkhurst Apprenticeship Scheme remained unchanged. But he was also a local prisoner because the murder was an offence committed in the colony.[65]

However, this only applies to sentences including imprisonment or corporal or capital punishment. In cases where a transitional convict received a colonial sentence of transportation or penal servitude, they are redefined as a colonial convict. This is because they are no longer at a transitional point in their sentence but at the start of a new one. Hence, there was the possibility of them becoming transitional convicts again. An example of an imperial convict reoffending as a transitional convict can be seen in the case of Edwin Gatehouse. He arrived in 1851 on the *Minden* after being sentenced by the Central Criminal Court in 1848 for an 'unnatural offence'. On landing in the colony, he received his ticket of

62 Millet, '[A] Mild but Firm System of Discipline,' 26, 163-64.

63 Millet, 'The Distribution of an Offensive Population,' 52-53.

64 *R v John Gavin*, Criminal Indictment Files, April 1844, SROWA, AU WA S122 cons3473 61 no. 304.

65 Singleton to Broun, 24 February 1844, SROWA, AU WA S2941 cons36 132, folio 3; 'Confession of the Murder of George Pollard,' *The Perth Gazette and Western Australian Journal*, 6 April 1844.

leave, so becoming a transitional convict, and in 1853, he obtained his conditional pardon. However, in 1854, he was reconvicted for sodomy by the colonial judicial system and given a new sentence of transportation for life. As a result of this, he became a colonial convict. Gatehouse eventually received a ticket of leave from this new sentence in 1862.[66] This is also applicable to Parkhurst apprentices, as in the case of Joseph Pickering, who arrived in the colony on the *Ameer* in February 1849. He was reconvicted in June of the same year for stealing a mare and received a sentence of fifteen years' transportation, thus becoming a colonial convict.[67] It should be noted that this treatment was not restricted to imperial or transitional convicts, as colonial convicts who reoffended while undergoing their period as transitional convicts would also be once again recategorised as colonial convicts.

Colonial Convicts

There were two ways in which someone could be classified as a colonial convict, both of which involved a conviction by the judicial system in a colony instead of the metropole. The first consists of a conviction and sentence being carried out in the colony where the offender resided, which is seen in the example of Obadiah Stevens, who was convicted of murder in WA and sentenced to penal servitude for life in 1855.[68] This classification includes military offenders, if brought before the Quarter Sessions, or later the Supreme Court, rather than a court-martial.[69] This form of transportation was more of a symbolic removal from colonial society, rather than a physical relocation that took offenders away from their established lives. Although their reintegration into colonial society

66 Rica Erickson and Gillian O'Mara, *Convicts in Western Australia 1850-1887: Dictionary of Western Australians Volume IX* (Perth: University of Western Australia Press, 1994), 206; Gatehouse to Fitzgerald, 5 August 1854, SROWA, AU WA S2941 cons36 291, folios 83-84; Edwin Gatehouse to Kennedy, 6 May 1857, SROWA, AU WA S2941 cons36 376, folios 247-50.

67 Rica Erickson, *The Bicentennial Dictionary of Western Australians Pre-1829–1888: Volume III K-Q* (Perth: University of Western Australian Press, 1987), 2484; 'General Sessions,' *The Perth Gazette and Independent Journal of Politics and News*, 29 June 1849.

68 'Quarter Sessions,' *Inquirer,* 11 April 1855; Erickson and O'Mara, *Convicts in Western Australia 1850-1887*, 526.

69 Carter and Carter, '"For their Country's Good",' 82-83; Millet, '[A] Mild but Firm System of Discipline,' 148.

upon their release with their ticket of leave would not be easy, they would still have a network of family or friends in the colony.[70]

The second way a person could be categorised as a colonial convict is through a conviction in one colony to either transportation or penal servitude, but being removed to a colony with a convict establishment. For example, in WA, before 1850, anyone sentenced to transportation would be sent to the penal colony of either NSW or Van Diemen's Land as a colonial convict.[71] This can be seen in the transportation of William Booker in 1833 and Anset Kemp in 1843.[72] A similar system was in place following the establishment of the convict institution in WA, as it would accept convicts convicted in other colonies. However, to be considered a colonial convict, this conviction could not have been handed down at a court-martial.[73] For example, both John Judge and Peter Quinn, convicted respectively of murder and rape in India, can be regarded as colonial convicts because they were convicted before a colonial court. At the same time, John Wilson, who was transported for striking an officer, cannot be considered a colonial convict because he was convicted through a court-martial.[74] It could be argued that convicts received from other colonies should be considered imperial convicts because they were maintained from imperial funds within WA.[75] Although this is a valid argument, it takes a narrow approach that overlooks the colonial contexts that would have shaped an offender's crime and sentence. Therefore, this article aligns itself with the belief that these offenders should be classified as colonial convicts.

Although WA did not accept female imperial convicts, using the above definition of colonial convicts and analysing archival evidence shows that

70 Henderson to Sanford, 16 January 1852, SROWA, AU WA S2941 cons36 234, folio 64; Henderson to Sanford, February 1852, SROWA, AU WA S2941 cons36 234, folio 97; Vince to Fitzgerald, 28 March 1854, SROWA, AU WA S2941 cons36 299, folio 78; Brakes to Kennedy, 10 July 1857, SROWA, AU WA S2941 cons36 371, folios 204-5.

71 Emily Lanman, 'Prisoners, Power and Panopticon: Investigating Fremantle Gaol, 1831-1841' (MPhil diss., University of Notre Dame Australia, 2021), 92-94.

72 'Escape of Two Prisoners from Fremantle Jail,' *The Perth Gazette and Western Australian Journal*, 5 January 1833; 'Quarter Sessions,' *The Perth Gazette and Western Australian Journal,* 8 April 1843.

73 Millet, '[A] Mild but Firm System of Discipline,' 163.

74 Erickson and O'Mara, *Convicts in Western Australia 1850-1887*, 309, 451, 605.

75 Millet, '[A] Mild but Firm System of Discipline,' 163, 209.

there were women in this category. The first of these was Keziah Lockyer. Her conviction stemmed from a statement she made in a civil court case between William Nairne Clark and William Temple Graham for 'criminal conversations'. For this, she received a sentence of seven years' transportation. However, she did not leave the colony as a convict because, nine days after her conviction, Governor Hutt pardoned her on the condition that she left the colony and never returned.[76] Arguably, Lockyer's punishment was affected by her departure from feminine morality. Keziah claimed to have been abandoned by her husband, Paul Lockyer, in the early 1830s and was compelled to work in service; however, some have claimed that she was a 'high-class whore to army officers'.[77] Their marital issues were made public in 1838 when Paul and Keziah each took out notices in the *Perth Gazette* to argue over their respective financial statuses. This would have reflected poorly on Keziah's ability to be the moral pillar of the family unit.[78] Although she did not leave the colony as a convict under transportation, she had been banished, and her conviction represents a significant milestone in the colony's legal history. This is because it was the first time such a punishment had been meted out to a woman, and she remained the only such case until after the introduction of imperial convicts.

The conviction of Mary Trubee in 1852 for arson proved difficult for the colony to manage. She received a sentence of fifteen years' transportation, yet the colonies of NSW and Van Diemen's Land were no longer options.[79] The *Ordinance for the Regulation of Gaols, Prisons, and Houses of Correction in the Colony of Western Australia*, passed in 1849, had a provision that would have allowed Trubee to be considered a local prisoner if her sentence was commuted to a term of imprisonment, which would have

76 Caroline Ingram, '"There Not Being any Place to Keep Her": Incarcerating Women in Nineteenth-Century Western Australia,' *Australian Historical Studies* 55 (2024): 169-70; *R v Keziah Lockyer,* Criminal Indictment Files, January 1839, SROWA, AU WA S122 cons3472, case 187.

77 Erickson, *The Bicentennial Dictionary of Western Australians*, 1888.

78 Ingram, 'Women in the Court,' 9; Hyland, '"The Vilest and Most Degraded of Human Beings",' 149; Paul Lockyer, 'Caution,' *The Perth Gazette and Western Australian Journal*, 21 April 1838, 62; Keziah Lockyer, 'Notice,' *The Perth Gazette and Western Australian Journal*, 31 March 1838, 49.

79 *R v Trubee*, 7 April 1852, Criminal Indictment Files, SROWA, AU WA S2941 cons3472 93, case 638; Marshall, 'The Ticketer's Plight,' 97.

resolved the problem of where to send her.[80] However, when considering William H. Mackie's response to Trubee's 1853 petition for her ticket of leave, in which he states that, given the severity of the crime, her sentence was already lenient, it is perhaps unlikely that the colony was willing to take advantage of this clause.[81] Instead, Trubee served her sentence in the colony. She was first sent to Meeandip (Garden Island), as there was no suitable accommodation on the mainland. Trubee was supervised by James Reid, a farmer on the island, before being sent to Perth.[82] Trubee remained incarcerated until 1855, when she was given her ticket of leave to join her husband and son in the Toodyay district, owing to the strain imprisonment had put on her health.[83] Trubee certainly considered herself to be a colonial convict, writing in a petition for her conditional pardon in 1860 that she was 'the only female who had ever been this unfortunate', and further acknowledging the peculiarity of her predicament by stating, 'it is not likely you will ever be troubled by another of my sex on a similar occasion'.[84]

Louisa Garrett was the first woman to receive a sentence of penal servitude. She arrived in the colony on the *Emma Eugenia* in 1858 as one of a hundred female assisted migrants.[85] Her sentence had been commuted from the death penalty for the attempted murder of her husband, Charles Garrett, in conspiracy with her lover, Charles Woolley, in 1861.[86] The case was reported in great detail in the newspapers covering the trial, with the letters sent between Louisa and Woolley being published.[87] After her conviction, she was imprisoned in Perth lock-up for

80 *Ordinance for the Regulations of Gaols, Prisons, and Houses of Correction in the Colony of Western Australia, and for Other Purposes Relating Thereto* 12 Vict. No. 7 (1849) (WA), XI.

81 Mackie to Sanford, 22 August 1853, SROWA, AU WA S2941 cons36 271, folio 64.

82 Broun to Sanford, 19 October 1852, SROWA, AU WA S2941 cons36 249, folio 331; Curthoys, Konishi and Ludewig, *The Lives and Legacies of a Carceral Island*, 3.

83 Ferguson to Sanford, 11 February 1855, SROWA, AU WA S2941 cons36 331, folio 150; Harris to Barlee, 4 December 1855, SROWA, AU WA S2941 cons36 341, folio 274.

84 Trubee to Kennedy, 16 December 1860, SROWA, AU WA S2941 cons36 464, folios 156-57.

85 'Local and Domestic Intelligence,' *The Inquirer and Commercial News*, 23 February 1859.

86 *R v Charles Woolley and Louisa Garrett,* Criminal Indictment Files, 12 March 1861, SROWA, AU WA S122 cons3472 136, case 880.

87 'Quarter Sessions,' *The Perth Gazette and Independent Journal of Politics and News,* 5 April 1861.

two years, before being released on a ticket of leave. Despite her previous attempt on his life, Charles Garrett took his wife back and, in 1865, Louisa gave birth to their daughter, Sarah Jane. Louisa was also mindful of her status as a female convict in her 1868 petition for a conditional pardon. She alleged that Charles was abusive, which drove her to attempt to poison him, and before her petition, she had appealed to Perth magistrate George Walpole Leake for permission to divorce. However, as this was not approved, she instead requested her conditional pardon so that she could leave the colony, to enable her daughter to grow up without the stigma of her mother's conviction.[88]

The extent to which the colonial government considered all these women to be convicts is not entirely clear. Given that Lockyer's sentence was commuted to banishment instead of transportation, it is probable that the government no longer labelled her as a convict.[89] Although Louisa Garrett's conviction received much attention in the newspapers, the significance of her sentence of penal servitude does not seem to have been considered by colonial officials or the wider public.[90] In comparison, Mary Trubee's status as a female convict was frequently mentioned. For example, one colonial official described her as 'a convict in her own right', and the police inquest into her death in 1880 described her as an expiree.[91] However, there was debate over who had authority over her. In July 1855, there was confusion between the resident magistrate of Toodyay and the comptroller general of the Convict Establishment, with the former believing that the latter was responsible for Trubee. Despite denial of this by the comptroller general, he still referred to Trubee as a female convict in his response. He attributed this confusion to the magistrate giving her a ticket of leave that was only intended for imperial convicts. In his opinion, she was under the sole authority of the colonial

88 Garrett to Manning, 26 March 1868, SROWA, AU WA cons36 610, folios 176-77; Manning to Wakeford, 8 April 1868, SROWA, AU WA S2941 cons36 610, folio 175.

89 'The Western Australian Journal,' *The Perth Gazette and Western Australian Journal*, 13 April 1839.

90 'Quarter Sessions,' *The Perth Gazette and Independent Journal of Politics and News,* 5 April 1861; 'General Intelligence,' *The Perth Gazette and Independent Journal of Politics and News,* 15 March 1861.

91 Harris to Barlee, 4 December 1855, SROWA, AU WA S2941 cons36 341, folio 274; Payne, 'Northam – Report on death of Mary Trubee Exp.,' 10 November 1880, SROWA, AU WA S2126 cons430, folio 30/081.

government.[92] Most significant was how Trubee was portrayed to the broader public in the newspaper reports of her conviction and incarceration. Notably, she was often referred to by her convict status, including as a ticket-of-leave holder.[93]

Local Prisoners

Local prisoners, also styled as colonial prisoners, included anyone convicted and imprisoned under the colonial judicial system or, after the amalgamation with the imperial system in 1858, anyone who would have been incarcerated under the previous colonial system. The term also encompasses military prisoners, seamen, and temporary visitors to the colony.[94] Again, this excludes ticket-of-leave holders and imperial convicts who reoffended before reaching transitional status, as, although they were convicted in the colony, the Convict Establishment meted out their punishment.

Prisoners of War

Given the extent of the conflict that stemmed from invasion and colonisation, through the implementation of a foreign societal structure, this research takes the position that Aboriginal people cannot be included in the same categories as non-Indigenous offenders, despite how the colonial government would have recognised them.[95] Instead, this framework considers Aboriginal people who offended against British law to be prisoners of war because they did not accept the legitimacy of British law to override their own sovereign lore and cultural practices. That is to say, their opposition to the British invasion and subsequent engagement

92 Edmund Henderson to Frederick Barlee, 5 July 1855, SROWA, AU WA S2941 cons36 323, folio 37.

93 'Local and Domestic Intelligence,' *Inquirer*, 14 February 1855.

94 Millett, 'The Distribution of an Offensive Population,' 40-56; Louise Bavin-Steding, *Crime and Confinement: The Origins of Prisons in Western Australia* (Perth: Stone's Publishing, 1996), 82; 'Magistrate's Court, Fremantle,' *Perth Gazette and Western Australian Journal*, 13 April 1839; 'Bunbury,' *The Perth Gazette and Independent Journal of Politics and News*, 3 January 1851; Broun to Broun, January 1841, SROWA, AU WA S2941 cons36 99, folios 98-100; 'Quarter Sessions,' *Perth Gazette and Western Australian Journal,* 3 July 1841; Vincent to Leake, July 1834, SROWA, AU WA S2941 cons36 33, folio 41.

95 Charles Symmons, 'Report of the Protector of Natives,' *The Perth Gazette and Independent Journal of Politics and News,* 11 January 1850; 'Local Intelligence,' *The Perth Gazette and Independent Journal of Politics and News*, 21 September 1849; 'Rottnest Establishment,' *The Perth Gazette and Western Australian Journal*, 16 January 1841.

in frontier warfare and acts of resistance are what categorise them as prisoners of war.[96] Aboriginal women and children who offended against British law are also considered prisoners of war in this framework. The term 'prisoner of war', and not 'political prisoner', has been chosen because the latter implies that the British government would have respected the Aboriginal people as a legitimate political opponent.[97] This would not have been an option, as their invasion was predicated on the 'uncivilised' state of Aboriginal society.[98]

By defining Aboriginal offenders as prisoners of war, this part of the framework goes against recent scholarship by historians such as Curthoys and Roscoe, who define them as the colony's first form of convict labour, through the opening of the penal establishment for Aboriginal men on Wadjemup in 1838. Instead, this article argues that Aboriginal offenders should be considered prisoners of war, rather than convicts, because their incarceration was related to the resistance of British invasion. A counterargument could be made that Aboriginal prisoners of war transitioned to being convicts after their conviction, as had been common during the seventeenth and eighteenth centuries. For example, prisoners of war captured during the English Civil War and the suppression of Jacobite rebellions were transported to the American colonies as indentured servants.[99] There was also a precedent for European empires to transport Indigenous Americans; for example, the British sent Algonquin prisoners of war to Tangiers, and the Spanish used forced

96 Katherine Roscoe and Barry Godfrey, 'Postcolonial Churn and the Impact of the Criminal Justice on Aboriginal People in Western Australia, 1829–2020,' *Journal of Criminology* 55 (2022): 535, 537; Harold Mytum and Gilly Carr, 'Prisoner of War Archaeology,' in *Prisoners of War: Archaeology, Memory, and Heritage of 19th- and 20th-Century Mass Internment*, ed. Harold Mytum and Gilly Carr (New York: Springer, 2012), 3.

97 Claire Dwyer, 'Political Prisoners,' in *Dictionary of Prisons and Punishment*, ed. Yvonne Jewkes and Jamie Bennett (London: Willan Publishing, 2007).

98 Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge: Harvard University Press, 2010), 27; Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native,' *Journal of Genocide Research* 8 (2006): 390.

99 Gwenda Morgan and Peter Rushton, *The British and French in the Atlantic 1650–1800: Comparisons and Contrasts* (Abingdon: Routledge, 2019), 55; Margaret Sanskey, *Jacobite Prisoners of the 1715 Rebellion: Preventing and Punishing Insurrection in Early Hanoverian Britain* (Abingdon: Routledge, 2017), xiv; Carla Gardina Pestana, *The English Atlantic in an Age of Revolution, 1640–1661* (Cambridge: Harvard University Press, 2004), 183-89; Gwenda Morgan and Peter Rushton, *Banishment in the Early Atlantic World: Convicts, Rebels and Slaves* (London: Bloomsbury, 2013), 86-87.

Apache labour in the Caribbean.[100] However, despite this precedent of prisoners of war and Indigenous peoples becoming convicts, this does not apply to Aboriginal prisoners in WA because of the perception that they could not be equal with the settler population under British law.[101]

Using the eastern Australian colonies as an example, Harman has argued that Aboriginal men were not treated as prisoners of war, despite being imprisoned in the context of frontier warfare, because they were supposed to be treated and protected like any other non-Indigenous person and answerable to British law. Additionally, because of their status as British subjects, 'the colonial judiciary could not conceptualise on the part of Her Majesty's subjects being at war against another'.[102] This was not a simple concept, as demonstrated by Peter Prince's work, in which he argues that terms such as 'subject' and 'foreigner' were often misused in cases concerning Aboriginal people. Prince also contends that the legal system was often uncomfortable with the idea that Aboriginal people would have the same rights and legal status as a 'natural-born' subject.[103] To this end, Ben Hingley argues that Aboriginal people could be defined as 'enemy subjects' who were bound by British law but not protected by it.[104] In the case of WA, it is likely that legality and reality do not necessarily coexist comfortably. Certainly, across all facets of society, there was an understanding that the colony was, at the very least, in a warlike state with Aboriginal people, especially in the late 1830s.[105] In 1832, with the outlawing and imprisonment of Whadjuk men Yagan, Dommera, and Ningena on Carnac Island, settler Robert Lyon put forward that they should be treated as prisoners of war, as they were akin to captured

100 Margaret Ellen Newell, *Brethren by Nature: New England Indians, Colonists, and the Origins of American Slavery* (Ithaca: Cornell University Press, 2015), 54; Max L. Moorhead, 'Spanish Deportation of Hostile Apaches: The Policy and the Practice,' *Arizona and the West* 17, no. 3 (1975): 218.

101 Ann Hunter, 'The Origin and Debate Surrounding the Development of Aboriginal Evidence Acts in Western Australia in the Early 1840s,' *University of Notre Dame Australia Law Review 9* (2017): 128-30.

102 Harman, *Aboriginal Convicts*, 4.

103 Peter Prince, 'Aliens in their Own Land: "Alien" and the Rule of Law in Colonial and Post-Federation Australia' (PhD diss., Australian National University, 2015), 75-77.

104 Ben Hingley, 'Enemy Subjects: First Nations Women and the Law in 1820s New South Wales' (paper presented at the 2023 Australian and New Zealand Law and History Society Conference, Toowoomba, Queensland, 30 November – 2 December 2023).

105 Martens, '"In a State of War",' 668, 681.

soldiers. He argued his point by stating that their offending was not criminally motivated but was intended to protect their homeland. In the case of Yagan, Lyon compared him to the medieval Scottish patriot William Wallace.[106] Later, in 1837, Louis Giustiniani, a missionary sent to WA by the Western Australian Missionary Society the year before, believed that James Stirling's inaction on extrajudicial violence in York culminated in a sort of declaration of martial law, especially as Stirling increasingly described the occupation of land in terms of invasion 'or the conquest of a formidable enemy'.[107]

The decision to establish a prison on Carnac Island stemmed from the need for a secure prison in which to house offenders, as the 1837 Select Committee decreed that Aboriginal people must be dealt with via the rule of law and not warfare; this emphasis meant that WA would have to charge Aboriginal resistance criminally.[108] This sentiment was shared by settlers, such as George Fletcher Moore, who argued that Aboriginal people needed to be educated in British law before they could be expected to abide by it.[109] Confinement in the mainland gaols was seen as increasingly harmful to the health of Aboriginal offenders but also as too insecure, due to escapes effected by Aboriginal people.[110] Aboriginal women would still be kept in the gaols because of their lower rates of incarceration, but also, most likely, to keep them away from family members, significant cultural leaders, and warriors.[111]

[106] Austen, *A Cry in the Wind*, 8; Henry Reynolds, *This Whispering in Our Hearts* (Sydney: Allen & Unwin, 1998), 74; Green, *Broken Spears*, 79; Curthoys, 'The Beginnings of Transportation in Western Australia,' 63.

[107] James Stirling was the governor of the Swan River Colony between 1829 and 1839. See Pamela Statham-Drew, *James Stirling: Admiral and Founding Governor of Western Australia* (Perth: University of Western Australia Press, 2003), 137, 359, 371; Hunter, *A Different Kind of 'Subject*,' 61.

[108] Curthoys, 'The Beginnings of Transportation in Western Australia,' 59; Roscoe, 'Work on Wadjemup,' 79-81.

[109] Ann Hunter, 'The Boundaries of Colonial Criminal Law in Relation to Inter-Aboriginal Conflict ("Inter se Offences") in Western Australia in the 1830s-1840s,' *Australian Journal of Legal History* 8 (2004): 222-23.

[110] Katherine Roscoe, 'A Natural Hulk: Australia's Carceral Islands in the Colonial Period, 1788–1901,' *International Review of Social History* 63 (2018): 61.

[111] Ingram, 'Women in the Court,' 151; Neville Green and Susan Aguiar, *Far from Home: Aboriginal Prisoners of Rottnest Island 1838–1931* (Perth: Focus Education Services, 1997), 9; Roscoe, 'A Natural Hulk,' 62-63.

When the Wadjemup establishment was legislated in 1840, it proclaimed a 'humanitarian' prison where Aboriginal men could be held securely and educated in employable agricultural and construction skills necessary for European expansion, while allowing them to practise some aspects of their culture, such as hunting.[112] In reality, this caused intense emotional pain for these men, as observed by Henry Trigg, who stated he had watched the men sit on the beaches looking with immense sorrow across to the mainland, where they could see the campfires of their families.[113] The island was considered a forbidden place in Noongar lore, as it was 'winnaitch', or the place where the spirits go.[114] This benefited the colonial government because it acted as a deterrent for Aboriginal people.[115]

The prison established on Wadjemup has often been discussed as a prison for transported Aboriginal convicts; however, as this framework argues that they were instead prisoners of war, this institution should be considered a prisoner-of-war camp. This aligns with the position of Collard, Stasiuk, and Austen.[116] The prison can be viewed as a prisoner-of-war camp not only because of the status of the men sent there, but also because of how the colonial government treated it. Despite the prisoners receiving sentences of transportation and imprisonment, Wadjemup was scarcely discussed in the Blue Books sent annually to the home government. Although it was not uncommon for lock-ups to be omitted, it is interesting to note the under-reporting on the principal place of incarceration for Aboriginal men.[117] This is especially significant when considering that it was supposed to be a convict prison.[118] When

112 Roscoe, 'A Natural Hulk,' 61; *An Act to Constitute the Island of Rottnest a Legal Prison* Vict. 1 No. 1 (1840) (WA), preamble.

113 Green, *Broken Spears,* 172.

114 Curthoys, Konishi and Ludewig, *The Lives and Legacies of a Carceral Island*, 4.

115 Roscoe, 'A Natural Hulk,' 61-62; Blaze Kwaymullina, 'Wadjemup: Holiday Paradise or Prison Hell-Hole,' *Studies in Western Australian History* 22 (2001): 110.

116 Murphy, 'Rottnest Island's Aboriginal Prisoners are Australia's Forgotten Patriots'; Stasiuk, 'Wadjemup,' 65-66; Austen, *A Cry in the Wind*, 32.

117 Blue Book (Statistical Returns for the Swan River Colony), 1837, SROWA, AU WA S4148 cons1855 01, 170-71; Blue Book (Statistical Returns for the Swan River Colony), 1840, SROWA, AU WA S4148 cons1855 04, 194-95.

118 Symmons, 'Report of the Protector of Natives,' *The Perth Gazette and Independent Journal of Politics and News,* 11 January 1850; 'Rottnest Establishment,' *The Perth Gazette and Western Australian Journal*, 16 January 1841.

Wadjemup was detailed in the Blue Books, it was often just an approximate number of prisoners held and the revenue produced from their labour, despite the inclusion of forms that would allow for more accurate reporting. By stark contrast, institutions for European prisoners were documented in much greater detail, including exact secondary punishments and instances of sickness or death.[119] The lack of attention to detail regarding Wadjemup is noteworthy, as it indicates that the colonial government was reluctant to report on the conditions or treatment to which prisoners of war were subjected. This is further bolstered by the accusations of cruelty frequently made against Henry Vincent, the superintendent from 1839 to 1849 and again between 1855 and 1866.[120] Harman's work on Aboriginal convicts suggests that the under-reporting on Wadjemup was an anomaly when compared with institutions in the eastern states.[121]

The use of Wadjemup for sentences of both transportation and imprisonment also raises questions about its status as a convict establishment, namely because there was no distinction in terms of treatment between the two sentences once on the island. However, those sent to the island were considered convicts by the wider colony.[122] This is seen in the letters sent between government officials and in newspaper reports. As a result, settlers co-opted convict language to discuss Aboriginal prisoners. For example, in 1857, Edward Read Parker wrote to the colonial secretary to enquire as to whether Aboriginal prisoners were allowed out on a ticket of leave, as he wished to employ Yarran, who had been convicted of manslaughter for the death of

[119] Blue Book (Statistical Returns for the Swan River Colony), 1844, SROWA, AU WA S4148 cons1855 08, 153; Blue Book (Statistical Returns for the Swan River Colony), 1856, SROWA, AU WA S4148 cons 1855 21, 249; Blue Book (Statistical Returns for the Swan River Colony), 1861, SROWA, AU WA S4148 cons1855 26, 242-43.

[120] Curthoys, 'The Beginnings of Transportation,' 68; Symmons to Broun, 16 August 1846, SROWA, AU WA S2941 cons36 147, folio 102; Symmons to Barlee, 6 November 1866, SROWA, AU WA S2941 cons36 581, folio 20; Curthoys, Konishi, and Ludewig, *The Lives and Legacies of a Carceral Island*, 41-52, 74.

[121] Harman, *Aboriginal Convicts.*

[122] Symmons, 'Report of the Protector of Natives,' *The Perth Gazette and Independent Journal of Politics and News,* 11 January 1850; 'Local Intelligence,' *The Perth Gazette and Independent Journal of Politics and News*, 21 September 1849; 'Rottnest Establishment,' *The Perth Gazette and Western Australian Journal*, 16 January 1841.

Yoodjikan in 1856.[123] The advocate general also wrote in 1858 that a short ordinance should be introduced that placed Aboriginal people on the same footing as imperial convicts, concerning the summary jurisdiction of magistrates. This, he argued, would prevent settlers from taking the law into their own hands and avoid costly trials in Perth for minor offences.[124] Despite this, it is challenging to categorise Aboriginal prisoners as a form of convict labour, as the intended outcome for them and convicts, both imperial and colonial, were vastly different. Convicts were expected to be punished and reformed so they could reintegrate as productive members of society. On the other hand, Aboriginal people were to be punished and educated in skills that settlers could exploit—they could not expect to be accepted into colonial society.[125]

Although Wadjemup's primary purpose was as a prisoner-of-war camp for Aboriginal men, it was occasionally used for other purposes. For example, during 1849 and 1855, Aboriginal women were sent to the island under the supervision of either James Dempster or Edward Back.[126] At times, settlers were also incarcerated on the island, possibly for skilled labour or domestic service.[127] The petition written by the sons of Charles Gee in 1840 indicates that he spent time on the island, as a response was sent stating that his conduct while at Wadjemup had been good, according to the gaoler.[128] Convicts were also, at times, sent to the island. In 1849, Parkhurst apprentice Alfred Rudge was sent to the island under the authority of Henry Vincent and, following the arrival of imperial convicts, some were periodically sent there for short durations to complete work.[129] This does not diminish Wadjemup's position as a prisoner-of-war

123 Parker to Barlee, 7 March 1857, SROWA, AU WA S2941 cons36 417, folios 76-77; 'Quarter Sessions,' *The Perth Gazette and Independent Journal of Politics and News*, 8 October 1858.

124 Burnie to Barlee, 1 October 1858, SROWA, AU WA S2941 cons36 409, folios 169-70.

125 Roscoe, 'Work on Wadjemup,' 83; Green, *Broken Spears*, 114; Bavin-Steding, 'The Punishment Administered,' 466.

126 Dempster to Yule, 23 June 1857, SROWA, AU WA S2941 cons36 210, folios 233-34; Back to Symmons, 15 April 1854, SROWA, AU WA S2941 cons36 282, folio 52.

127 Ingram, '"There Not Being any Place to Keep Her",' 171; Roscoe, 'Work on Wadjemup,' 93.

128 Gee and Gee to Hutt, November 1840, SROWA, AU WA S2941 cons36 79, folio 142; Broun to Gee, 4 June 1840, SROWA, AU WA S2755 cons49 11, folio 350.

129 Vincent to Bland, 20 March 1849, SROWA, AU WA S2941 cons36 194, folio 7; Roscoe, 'Work on Wadjemup,' 93-94.

camp, as any non-Indigenous prisoner was sent there for a specific purpose and only for a limited period.

Conclusion

The complex interplay between the imposition of British sovereignty through an illegal occupation and Aboriginal lore means that the conceptualisation of Western Australian history as a free colony until 1850 and a penal colony until 1868 must be abolished. This is because viewing WA's colonial history through this lens ignores the circumstances around the invasion and subsequent colonisation that began on Noongar boodja, as well as the other forced and coerced labour schemes the colony tried to implement before turning to imperial convict labour. In turn, this created a secondary binary of convict and prisoner, which does not represent the nuances of colonial society. To address these limitations, this article has expanded on these two categories to create a framework that offers a more nuanced understanding of the diverse backgrounds of those accused of crimes in WA.

Defining convicts based on where they were convicted demonstrates that, although most imperial convicts were sent from Britain and Ireland, some arrived from places such as India. Through this, it is also possible to better understand colonial convicts. The misconception that WA did not have female convicts can be refuted by the convictions of Keziah Lockyer, Mary Trubee, and Louisa Garrett. Including a transitional convict category also allows a better insight into how colonial and imperial convicts were punished at different stages of their sentences. The framework allows for Aboriginal people who resisted British authority to be reframed as prisoners of war because they committed acts of warfare, rather than as criminal offenders. By acknowledging the need to expand the language and categories we use to define colonial offenders, we can see a more diverse picture of crime across factors such as age and race in WA between 1829 and 1868.

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Beyond Baby Farming: Prosecuting Paid Child Care in Liberal-Era New Zealand

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Before Minnie Dean became New Zealand's most infamous baby farmer, she was merely one of many people who provided paid child care. Other prosecutions that attracted the label of baby farming involved a range of child-care arrangements. Baby farming has received some attention from historians as a form of infanticide. Until recently, this focus has hidden a common practice that fulfilled a working-class need. Using newspaper accounts of court cases, as well as archival sources, this article explores the interactions of the police, the courts, and the carers who were providing a practical solution to the problem of illegitimate babies. The differing treatment of those providing paid child care underscores societal attitudes towards such arrangements, with newspapers fuelling moral panic, while the police and the courts negotiated legislation introduced to monitor foster and adoptive parents.

Keywords: baby farmer, *Infant Life Protection Act*, illegitimate, moral panic, infanticide, child neglect, foster care, adoption

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Minnie Dean is New Zealand's most notorious baby farmer and the only woman in the country's history to be executed for her crimes.[1] To supplement her husband's income, Minnie had taken in numerous children in return for lump sums or unreliable weekly payments. In May 1895, she was charged with the murder of one of these infants. Her infamy dominates New Zealand's understanding of what baby farming was and has served to reinforce the link between infanticide and the moral panic

1 Lynley Hood, *Minnie Dean: Her Life and Crimes* (Auckland: Penguin, 1994), 23-24; Richard S. Hill, *The Iron Hand in the Velvet Glove: The Modernisation of Policing in New Zealand, 1886–1917* (Palmerston North: Dunmore Press, 1995).

that led the Liberal government to enact legislation to prevent the death of infants in paid care.[2] The furore generated by cases like Minnie's also entangled others. In 1894, Charlotte Redmond, a caregiver for infants in Dunedin's North East Valley, faced an inquest after the death of a three-month-old boy in her care.[3] She had been looking after the child, Thomas Beath, on behalf of his father, having taken him in at the age of five weeks. Charlotte considered herself an experienced nurse, having raised five children of her own, as well as fostering at least twenty others. She had fed Thomas a mixture of water and milk with occasional Maizena supplements.[4] However, the doctor's testimony attributed many infant deaths to inadequate feeding, hinting at possible negligence. Charlotte was not condemned in court, and the derogatory term 'baby farmer' was not used to describe her. In contrast, Mary Ann Guy from Wellington faced harsh criticism from the populist newspaper *NZ Truth* in 1906. The stacked headline shouted 'Grievous Graveyard Guy. Foul Baby-Farmer Fixed. Found Guilty of Manslaughter. Infant Illegitimate's Awful Fate'.[5] The newspaper branded her a professional baby farmer, as she fostered five children. Mary Ann had registered her house under the *Infant Life Protection Act 1896*—an official recognition of her occupation—but had forfeited her registration in 1904. When charged with manslaughter related to the death of Nellie Smith due to starvation and opium-based medication, Mary Ann claimed ignorance of the legal restrictions on paid care for children. The resident magistrate referred the case to the Supreme Court, and Mary Ann was tried and convicted of manslaughter. Consequently, the newspaper painted her as both a guilty and a morally reprehensible figure. Although these cases all involved paid care of infants and potential negligence, the disparate treatment of these women by the courts and newspapers reflects how New Zealanders had accepted the term 'baby farming' as a descriptor for paid infant care. The pejorative label was used to interpret infant deaths in situations where carers lacked familial bonds to the child. Newspapers fed moral panic, while the state remained concerned about the deaths of children even when they were

2 James Belich, *Paradise Reforged: A History of the New Zealanders from the 1880s to the Year 2000* (Auckland: Allen Lane, Penguin Books, 2001), 184.

3 *Otago Daily Times* (*ODT*), 17 May 1894, 4.

4 Maizena was a type of corn flour.

5 *NZ Truth*, 8 December 1906, 4.

'unwanted' and in paid care. Legislation provided oversight of essential child-care alternatives, bringing a range of cases before the courts.

This article uses reports of court cases about private arrangements for the care of illegitimate children to explore how practices labelled baby farming reveal the dynamics of New Zealand's legal situation from the 1880s to the 1920s. The cases usually appeared before a local magistrate's court but could, if the evidence suggested neglect or deliberate abuse, be sent for trial at a Supreme Court sitting. Cases ranged from inquests before a jury, and breaches of the *Infant Life Protection Act*, to manslaughter and murder. My research found twelve court cases in the press that included a reference to baby farming but suggests that these are indicative of the larger practice of paid child care. Many other individuals and couples provided care, which is evident from the archival records of those who applied for licensing in the wake of the *Infant Life Protection Act 1894* and from trials and inquests under the Act. Taken together, reports of court cases offer insight into how magistrates, police, and child carers used the Liberal government's legislative provisions against the specific crime of infanticide to monitor, rather than eliminate, working-class child care. The influential, from magistrates to journalists, expressed noticeable variations in attitudes towards those providing care, as publicity about baby farming increased. It appears social reformers generated moral panic about this social problem but generally achieved little to address the underlying causes. When the cases came to court, newspaper reports show how police prosecuted and the judiciary judged paid child care, as concerns about infanticide and neglect led to legislative changes. The cases illustrate middle-class fears and concerns about the treatment of children and reveal the evolving cultural values of New Zealand society.

Defining and Redefining Baby Farming

In the 1870s, the English medical community reinterpreted and sensationalised the traditional practices of wet nursing and foster care as baby farming, a term which had previously been somewhat benign.[6] Influential members of the newly formed Infant Life Protection Society

6 Linda Gordon was the first to argue that baby farming started as babies being wet nursed or boarded out, with the traditional practices transformed by the *British Medical Journal*'s crusade decrying them as a commercial form of infanticide: Linda Gordon, *Heroes in Their Own Lives: The Politics and History of Family Violence, Boston 1880–1960* (New York: Viking, 1988), 43.

promoted a link between paid child care, neglect, and infanticide. Legislation allowing state intervention into the homes providing care followed.[7] Public outrage about infant deaths eventually spread to the British colonies, as cases of infanticide by foster parents were uncovered from the 1880s. Australian infanticide cases prompted the Australian Government to act to monitor paid child care, which depended on reimagining the baby farmer as distinct and different from a mother who killed her newborn child.[8] The Liberal government in New Zealand was quick to implement laws to control and compel, as they sought solutions to emerging social problems.[9] As in other places, the paid child-care market was largely driven by supply and demand within the working classes. Assimilating the international outcry, New Zealand newspapers applied the baby-farming label to working-class women and men in cases that included both infant nursing and paid adoptions. The focus on baby farming somehow excluded the more respectable practice of boarding out by institutions, such as the state-run industrial schools.

The rising rate of illegitimate births in Victorian New Zealand created an increasing demand for infant services. Both the number and the rate of these births increased as the general population stabilised.[10] Favourable comparisons to Australian and English figures led to perceptions of higher moral standards, which had to be maintained by legislation if necessary. However, they also represented an increasing number of children who needed care. Working-class girls and women needed to work to support themselves, including when a single woman became responsible for providing for a child. However, paid work rarely allowed for a baby to stay with its mother. The traditional practice was to place the child with its grandparents or an obliging neighbour or friend, who was then compensated for their services. However, businesslike foster carers were condemned by the respectable and often attracted the label of baby farmers.[11]

7 Margaret L. Arnot, 'Infant Death, Child Care and the State: The Baby-Farming Scandal and the First Infant Life Protection Legislation of 1872,' *Continuity and Change* 9, no. 2 (1994): 280.

8 Shurlee Swain and Renate Howe, *Single Mothers and Their Children: Disposal, Punishment and Survival in Australia* (Cambridge: Cambridge University Press, 1995), 100.

9 P. J. Gibbons, '"Turning Tramps into Taxpayers": the Department of Labour and the Casual Labourer in the 1890's' (PhD diss., Massey University, 1970), iii, 9.

10 From below 2.5 per cent in the 1880s, the rate had reached 3.5 per cent in 1891.

11 *Wanganui Herald*, 10 August 1897, 2.

The rhetoric about baby farming originated in England, so the historiography of baby farming has predominantly focused on British experiences. Academic interest in the topic began in the 1980s with a focus on the moral panic that grew around inquests into infant deaths in private paid care. However, historians are gradually reframing the connection with infanticide as being an aspect of the history of paid child care. Margaret Arnot has proven particularly influential and argued that publicity about baby farming deliberately fanned a moral panic that allowed a case to be made for state intervention in homes and businesses.[12] Ruth Homrighaus has suggested that the *British Medical Journal* was responsible for conflating the various services available to mothers of unwanted infants, a situation which helped to obscure paid foster care as a legitimate industry.[13] David Bentley has maintained that legislation did little to curb abuses, with scant sustained interest from cause-seekers in what was a necessary service industry.[14] Similarly, Daniel Grey has argued that the focus on the criminal element of baby farming was disproportionate to its prevalence, and the practice had largely ceased by 1920.[15] Jim Hinks connected the limited scholarship on paid foster care to baby farming's infanticide focus, which fitted into criminology rather than child welfare.[16] Joanne Pearman reinforced the argument that combating criminal baby farming allowed the state into the domestic sphere. She described an industry composed of three parts, beginning in midwives' facilities before moving to procurement of children, then foster care.[17] Joseph Stuart-Bennett viewed 'conventional and mundane' paid foster care as primarily about managing a woman's

12 Arnot, 'Infant Death,' 280.

13 Ruth Ellen Homrighaus, 'Wolves in Women's Clothing: Baby Farming and the British Medical Journal, 1860-1872,' *Journal of Family History* 26, no. 3 (2001): 357.

14 David Bentley, 'She-butchers: Baby-droppers, Baby-sweaters, and Baby-farmers,' in *Criminal Conversations: Victorian Crimes, Social Panic, and Moral Outrage*, ed. Judith Rowbotham and Kim Stevenson (Columbus: Ohio State University Press, 2005), 212.

15 Daniel Grey, 'Discourses of Infanticide in England, 1880-1922' (PhD diss., Roehampton University, 2008), 327.

16 Jim Hinks, 'Other People's Children: Representations of Paid Child-care in Britain, 1867-1908' (PhD diss., University of Liverpool, 2015), 12.

17 Joanne Pearman, 'Bastards, Baby Farmers, and Social Control in Victorian Britain' (PhD diss., University of Kent, 2017), 88, 94-95.

respectability—an attempt to avoid stigma and social exclusion—and downplayed any economic imperative.[18]

Although the literature has concentrated on baby farming in Britain, the practice was evident to a lesser extent in the United States and in Britain's colonies, including Australia, in the 1890s, and then New Zealand. Shurlee Swain's argument that paid child care was commonplace—an economic exchange fuelled by the needs of single mothers, a surfeit of unplanned children and the desperate hopefulness of poor women trying to eke out an income—applied in New Zealand just as much as in Australia.[19] It can be seen as a functional working-class solution to a perpetual problem. The issue was more that the care provided varied from careful and loving to neglectful and driven by economic imperatives. Problematic care was most likely to come to official attention, as authorities used the legislation's provisions to monitor those profiting from providing care.

To date, little attention has been paid to the history of New Zealand's private foster-care arrangements. It seems the received view is based on contemporary reports of substandard care by the likes of Frederic Truby King, Director of Child Welfare and founder of the Plunket Society, rather than on detailed research. In 1907, King lectured that even licensed homes were run by 'unsympathetic, ignorant women bent on making a profit'.[20] This type of allegation has led to generalisations, such as those made in Joyce Powell's history of the Karitane nurses. Powell states: 'Conditions in these homes were squalid and uncaring'.[21] Minnie Dean was the subject of Lynley Hood's oft-cited 1994 publication.[22] Hood described some of the circumstances surrounding paid foster care, but a larger investigation was outside her purview.[23] Similarly, Debra Powell, when writing about child homicide, included a chapter on criminal baby farmers and concluded that those thought to be involved were young single mothers and older foster

18 Joseph G. Stuart-Bennett, *Motherhood, Respectability and Baby-farming in Victorian and Edwardian London* (Abingdon, UK: Routledge, 2023), 5, 7.

19 Shurlee Swain, 'Towards a Social Geography of Baby Farming,' *The History of Family* 10 (2005): 151.

20 *Evening Star*, 24 May 1907, 4.

21 Joyce Powell, *A Suitable Job for Young Ladies: The Karitane Story 1907 to 2007* (Palmerston North: Heritage Press, 2007), 10.

22 Hood, *Minnie Dean*.

23 Hood, *Minnie Dean*, 20-21.

mothers.[24] New Zealand lacks research like that undertaken in Australia by Swain, who, in 2005, argued that the focus on the discourse surrounding baby farming obscured its social context.[25] Writing about Melbourne baby farming, her study methods exploited a hospital database, matching data with inquests and other records to unearth details of those involved in paid foster care. She showed the relevance of location and the presence of referral networks dealing with infants. Her approach is consistent with the shift away from studies of criminal baby farmers and towards child-care practices. Building on this growing work allows paid child care to be placed in the context of New Zealand's legal and judicial environment.

To study this difficult-to-research area, with its lack of official records and other sources, newspaper reports of court cases provide valuable evidence on early child-care arrangements. There are few police court records preserved in archives, when most cases appeared in this type of court. Other cases were inquests, held before a resident magistrate and a jury, with the verbal evidence preserved. Hinks, writing about England, noted that newspaper reports provide some of the only evidence about such arrangements in this period.[26] New Zealand has a similar shortage of official records of foster care, with few archival sources. In addition, arrangements driven by working-class women running informal businesses never created official records. Another limiting factor, which is a side effect of generating a moral panic, is that the commentary by official figures tended to be disapproving and focused on negative aspects. As a result, newspapers have been the main source for this research. In addition to presenting at least the basic information about a case, they might also capture perspectives, reporting on the interactions between magistrate, prosecutor, and witnesses, while offering a glimpse of the newspaper's stance. Keyword searches in the Papers Past digital collection of nineteenth- and twentieth-century New Zealand newspapers found instances of baby farming and baby farmers in court reports. Australian and British newspapers of the same period are similarly accessible, and all offer the ability to search broadly, as well as to focus on

24 Debra Powell, 'The Orgress, the Innocent, and the Madman: Narrative and Gender in Child Homicide Trials in New Zealand, 1870-1925' (PhD diss., University of Waikato, 2013), 344.

25 Swain, 'Towards a Social Geography,' 151.

26 Hinks, 'Other People's Children,' 7.

individuals. Newspaper reports and advertisements play a major role in mitigating omissions, providing otherwise undocumented details to complete or complicate a life history. The principal limitation of using predominantly digital newspaper resources is that what is found is limited by what has been digitised. For example, the focus of such collections on providing access to larger newspapers can limit the availability of smaller local titles. As Anna Blackman noted, to rely only on the larger titles 'is to neglect a wider range of perspectives and possibilities for enquiry'.[27] However, this has not prevented historians from enthusiastically adopting such facilities. The website for the Australian newspaper site Trove states that ninety-seven per cent of historians in Australia use it.[28]

After the enacting of the *Infant Life Protection Act 1893*, newspaper accounts of inquests into the deaths of boarded-out and adopted infants shed light on the practices of paid care. Archives New Zealand hold applications for licensing made under the *Infant Life Protection Act*, as well as files on associated breaches, cancellations, and exemptions. My database of those involved in undertaking paid child care shows that most carers were married women. However, a small but significant number of men also participated. This research traced these individuals in newspapers, electoral rolls, and registers of births, marriages, and deaths, supplemented with the records available on genealogical websites. I created family trees on Ancestry.com to better understand their circumstances, backgrounds, and families. This is perhaps the greatest advantage of this method—the use of reports of court cases found in newspapers, supplemented by genealogical research, gives a more comprehensive and nuanced understanding of the circumstances of those involved in paid foster care in the nineteenth century.

Both the baby-farming rhetoric and the legislation to protect infants reflected a society in which raising children was the domain of women and belonged in the home. An earlier acceptance that infants separated from their mothers might die from malnutrition shifted to blaming foster carers for improper feeding; in this, the medical profession played a critical role. Applying the baby-farming label to the problematic end of paid child care,

27 Anna Blackman, 'Going Past Papers Past: A Mass of Mastheads,' *The Hocken Blog*, https://blogs.otago.ac.nz/thehockenblog/going-past-papers-past-a-mass-of-mastheads/ (last accessed 20 October 2023).

28 'Trove,' National Library of Australia, https://trove.nla.gov.au/blog/2023/08/31/how-research-trove (last accessed 20 October 2023).

with its neglect, overcrowding, incorrect feeding, payment of premiums and child deaths in care, drew public attention and enabled calls for increased monitoring.

Legislation

Improving child welfare was not initially the focus of legislation to prevent infant death. Britain passed its *Infant Life Protection Act* in 1872, but the colonies only followed suit when a need arose. The New Zealand *Adoption of Children Act 1881* formalised arrangements for the care of some illegitimate children, setting a precedent within the British Empire. There had been informal adoption arrangements before the Act, but any contracts made between the natural and adoptive parents had not been legally binding. Introduced as a private member's Bill by George Waterhouse, one-time New Zealand Premier, the legislation's aim was legal protection for the adoptive parents from 'annoyance and blackmailing' by the natural parents, as well as to give adopted children the same legal status as a parent's natural child. Margaret Tennant has explained the small number of adoptions as reflecting the belief that illegitimate children were tainted by their parentage and the reality that infants were a financial burden.[29] This might explain the common practice of a premium being paid to the adoptive parents to defray expenses. For example, in 1882, Mr. Evenden requested £3 from Wellington's Benevolent Institute, to be spent on clothes for the little girl he wanted to adopt from them.[30] After some debate among the committee, the adoption was allowed, and the money was supplied. This shows that the practice of paying premiums was originally not questioned. However, it became less acceptable, until the transfer of large sums was outlawed by legislation in 1907.

Both Victoria (in 1890) and New South Wales (in 1892) preceded New Zealand's *Infant Life Protection Act 1893*, as antipodean infanticide cases were discovered, and baby farmer became accepted as a description of abuses in paid infant care. Despite at least one case prosecuted under New Zealand's *Children's Protection Act 1890*, some parties demanded further regulations. Baby-farming legislation was proposed in New Zealand in late August 1893, following a warning from the Commissioner of Police,

29 Margaret Tennant, 'Maternity and Morality: Homes for Single Mothers 1890–1930,' *Women's Studies Journal* 2, no. 1 (1985): 39.

30 *Evening Post*, 16 August 1882, 2.

Colonel Arthur Hume, about its undoubted presence in the colony.[31] His report suggested that 'premiums of £6 to £20 [were] being paid for the placing of children in homes, where the sooner they died the better everyone was pleased'.[32] He urged legislation to register infants and inspect foster homes. Meanwhile, interest groups, such as St. Saviour's Guild, brought government attention to their perception of an increase in infanticides. The Infant Life Protection Bill was passed with a minimum of discussion.[33] At the second reading, one politician linked the legislation with the desire of department heads to 'magnify their office', implying that they sought to expand their authority.[34] The Bill passed into law, with Colonel Hume's declaration that it had 'pretty well stamped out' a threatening social evil being widely reprinted.[35] One newspaper described the provisions as being easy to comply with and protective of infant life. New Zealand's provisions focused on registering those who nursed or informally adopted children under two years of age for payment and specifically excluded infants who had been legally adopted or were under industrial school care.[36] Registration allowed police officers to inspect the house and children, and a detailed roll had to be kept. The licence had to be renewed annually. A timely inquest was required for infant deaths in care.

Regulations tightened over time, with significant amendments being made in 1896, extending the age of infants from two to four years and making exemptions for public institutions.[37] Various practices used from 1894 were included, such as detailed forms to be filled in and the Inspector of Police overseeing enquiries into applicant suitability. Although police carried out these tasks, they had other duties with a far higher priority than regularly inspecting the increasingly numerous foster homes.[38]

31 *Otago Witness*, 31 August 1893, 27.

32 *Evening Star*, 26 August 1893, 4.

33 *New Zealand Herald* (*NZH*), 15 September 1893, 6.

34 *NZH*, 29 September 1893, 6.

35 *Evening Post*, 17 August 1894, 3.

36 *Infant Life Protection Act* 57 Vict. No. 35 (1893).

37 *Infant Life Protection Act* 60 Vict. No. 23 (1896).

38 Bronwyn Dalley, *Family Matters: Child Welfare in Twentieth-Century New Zealand* (Auckland: Auckland University Press, 1998), 52; Linda Bryder, *A Voice for Mothers: The Plunket Society and Infant Welfare 1907–2000* (Auckland: Auckland University Press, 2003), 7.

Significant numbers of foster parents complied with the regulations, with 553 houses registered for the care of 829 infants in 1898.[39] Alongside some relatively minor changes in the *Infant Life Protection Act* of 1907, such as extending the age of children to include those under six years and defining 'foster parent' and 'foster home', a larger change transferred the administration of infants to the Education Department. A welcome change was that the Education Department would use trained nurses to inspect homes.[40] In parliament, Dr. William Collins argued that an inspector should examine the room where the infant slept, as well as its clothes and bedding, and observe the infant's food and bottles. An inspector should be able to examine the physical condition of the child and perhaps even weigh it. He thought home-keepers would welcome the instruction and advice of these nurses, regarding them as kindly helpers. Such patriarchal opinions, with the implicit understanding that it was women fulfilling the role of paid carer and nurse, show that social rules around correct care for infants were being legislated to ensure that anyone violating them could be corrected. Likewise, we might also note the implication that middle-class nurses would be welcomed by the working-class carers who, allegedly, lacked knowledge of proper routines that were increasingly the domain of medical professionals.

The Court Cases

New Zealand's earliest court cases appeared in the 1880s, and those involved seem to have been treated with some tolerance. In 1880, a single woman, Johanna O'Neil, nursed her illegitimate son for three weeks before handing him to Sarah Ellen Kitto. Sarah was to be 'kind and good' to the baby and feed him 'by hand'.[41] Both parents were involved in making the arrangement and paying the fee. Three weeks later, six-week-old Joseph O'Neill died. At the inquest on 23 March 1880, the autopsy described a lack of any body fat as a result of starvation.[42] The inquest jury added a rider to their verdict, blaming the mother, rather than both parents or the nurse, for not getting urgent medical attention for the child. The police charged Sarah with manslaughter before the Kumara Resident Magistrate in April.

39 'H-16 Annual Report on the Police Force of the Colony,' in *Appendix to the Journals of the House of Representatives* (Wellington: Government Printer, 1899, Session I), 4.

40 Bryder, *A Voice for Mothers*, 7.

41 *West Coast Times*, 8 September 1880, 2.

42 *Kumara Times*, 24 March 1880, 2.

The United Press Association report was printed by a newspaper under the headline 'Baby Farming at Kumara'.[43] The case was referred to the Supreme Court, and the trial occurred in Hokitika on 7 September. Sarah was treated with leniency, and the jury was quick to find her not guilty, despite evidence of her drinking and signs that the infant had starved. She continued to work as a nurse in the area. The newspaper reporting focused on the facts. A degree of tolerance was evident through the lack of editorialising, and, perhaps consequently, the case remained one of only local interest.

Similar circumstances in the Wellington case of Christina Jansen led to nationwide publicity of her arrest on a manslaughter charge only two years later. In 1882, sixteen-year-old Christina, masquerading as Mrs. Walpole, adopted Henrietta May McCarthy, daughter of twenty-three-year-old Catharine McCarthy, and attempted to pass the child off as her 'beau's'.[44] He was not taken in. The arrangement was made by the matron of the Home for Friendless Women in Wellington, who failed to carry out a proper reference check. No money changed hands in what was supposed to be an adoption. When the baby died, the judge decided that Christina's neglect was due to lack of knowledge rather than deliberate. One newspaper published the inquest's findings under the 'Baby Farming' banner.[45] Despite testimony condemning her lifestyle and an allegedly callous attitude toward the baby, Christina was treated leniently by a court that made allowances for her youth. The *Otago Daily Times* published an editorial recapping the features of the evidence against the girl, but its main condemnation was of the actions of the matron of the Home for Friendless Women.[46]

Some cases reveal a considerable distance between the birth parents and those providing care. In May 1881, an inquest at Kaiapoi into the death of a six-month-old girl found the foster mother, Mrs. Rachel Pilcher, had been paid by a Christchurch solicitor, Alfred Thompson. Rachel got the child from Mrs. Hayman via an arrangement with Mrs. Brough, and Mrs. Hayman had been recommended to Mrs. Brough by the Kaiapoi doctor.

43 *Evening Post*, 2 April 1880, 2.

44 *New Zealand Mail*, 7 October 1882, 7; *New Zealand Times*, 6 October 1882, 2; *New Zealand Mail*, 7 October 1882, 7.

45 *Auckland Star*, 25 September 1882, 2.

46 *ODT*, 3 October 1882, 2.

Witnesses refused to reveal the child's name or her parents, which delayed the inquest verdict because the coroner would not issue a death certificate without a name.[47] The use of a solicitor and an agent and the hidden identity suggest this child most likely had middle-class origins. Rachel was reasonably respectable and had a history of taking on boarders. At the inquest, she emphasised her proactive approach and prompt medical care and that she provided the best standards of care. This was reinforced by the doctor, who noted the baby had been well cared for. There was no official comment on the arrangement, despite the payment of fifteen shillings a week for nursing care. The expansion of towns and cities allowed this distance to be used by those seeking anonymity, an increasingly common feature of child-care arrangements before baby-farming legislation. Once again, only one newspaper could be found that referred to baby farming in relation to the inquest.[48]

In the light of intense interest in international cases, it is unsurprising that there was a notable increase in the number of cases described as baby farming in the New Zealand press in the 1890s. Myra Smith came before the Dunedin City Police Court in November 1890 for allegedly ill-treating and neglecting children. Newspapers around the country were quick to report on the 'Dunedin baby-farm'. The same text about the 'baby-farming case' was printed in sixteen titles.[49] Charging her under the *Children's Protection Act*, police prosecutor Sergeant-Major Bevin provided the background facts. Mrs. Smith's husband had left her about ten years earlier.[50] She had been taking in children and adopting them for some time. He stated that the small house contained five children under the age of five years, as well as Smith's own five children. Constable Walker gave evidence that he had gone to the Smith house in Sunnydale, North East Valley, and insisted on inspecting it. Walker made contradictory statements about the number of children, once saying there were four infants in the care of Mrs. Smith's twelve-year-old son, but later testifying there were five babies in the house in addition to Smith's own children. Walker had known that Mrs. Smith had been nursing babies for eight years and that she acted as an intermediary in placing children. He (wrongly)

47 *Star* (Christchurch), 13 May 1881, 3; *Press*, 20 May 1881, 3.

48 *Evening Star*, 13 May 1881, 2.

49 See, for example, *Auckland Star*, 7 November 1890, 3; *Wairarapa Daily Times*, 7 November 1890, 2; *Poverty Bay Herald*, 7 November 1890, 2.

50 *Evening Star,* 6 November 1890, 2; *Otago Witness*, 13 November 1890, 24.

believed that if he had been allowed to search the whole house, he would have found more children. Walker suspected at least one of the children was drugged. It is significant that Walker's knowledge had not previously led to any investigation of Mrs. Smith and her situation.

The police evidence contained allegations, dressed as facts, that Mrs. Smith did not challenge, except to say the witnesses 'were making as much of things as possible' and were prejudiced against her. She admitted the house was not clean and tidy when visited, as she had been unwell, but denied having more than four babies under her paid care. She could have corrected the statement that she was a deserted wife rather than a widow, as her husband had died in the 1879 Kaitangata Mine explosion. This had left Mrs. Smith with five children. In the absence of her husband, she continued to register the births of later children: Matilda Lloyd Smith in 1881, Minetta Lloyd Smith in 1883 and Lily Butler Smith in 1885. This naming pattern is highly suggestive of adoption, where the child retained its birth surname, and the adoptive surname was added. It corresponds to the police evidence that Mrs. Smith had been taking in children and adopting them. She might also have informed them that her first name was not actually Myra; she had been born Jane Tindall Marshall. While the foster children were taken and placed in the industrial school, her adopted children remained in her care. Tracing the foster children shows that the oldest was Alice, the illegitimate daughter of Clara Rogers. She went into Caversham Industrial School aged four or five years. A few years later, she was placed with a foster family in Mosgiel. She married in 1908 and had a family of three daughters. Robert White was admitted to the industrial school as a nameless infant aged one year and three months. Roderick McAlpine was evidently adopted, as his birth was later registered by his adoptive parents, Hugh and Mary Knox. The child at the centre of the case, named as Arthur Chesterfield Hayes, seems to have been Arthur Tarrant Hayes, son of Mary Hayes, born in 1889 in Dunedin. While Mary Hayes was still engaged in domestic duties in central Dunedin in 1893, Arthur did not leave any obvious records. He might have been adopted into another family or used his mother's married surname. Although Mrs. Smith seems to have run a businesslike operation, she was never prosecuted for the death of a child she adopted or fostered.

Writing in 1890, the editor of the *Otago Witness* recalled that, in 1880, he had noted that a Mrs. Smith was advertising in the Saturday paper for the adoption of children for a moderate premium and wondered at her

motives and whether Smith was a pseudonym.[51] The Smith case in 1890 demonstrates that there were considerable differences in how fostered children were viewed, when compared with adopted children. Mrs. Smith retained custody of her three adopted daughters and, after a brief period in gaol, returned to her family. In sentencing, the resident magistrate lamented that the police had presented the case as one for summary judgment.[52] This minimised the penalty that could be inflicted at a time when there were calls for harsher punishments to curb baby farming. Framed as a way to prevent the ill-treatment of children, most of the rhetoric focused on the financial aspect, with evident suspicions of women profiting from caring for children. Was this because it was considered unnatural for women to be paid to fulfil their natural function, or because the practice confused the public sphere of business with the private sphere of home? There was no notion that women might deserve to be compensated for child care. Instead, as Hinks has noted, references to baby farming as a business and a trade allowed it to appear an unnatural activity for women to be engaged in, and as a commercial activity to be regulated.[53]

Contrary to the implication of 'farming', there are few examples of larger establishments. The evidence of the application of licensing in the wake of the *Infant Life Protection Act 1893* suggests that most providers were taking in just one child, rather than setting up for multiple babies, which is confirmed in reports on the workings of the *Infant Life Protection Act*. This contrasted with the conditions found at Fanny and John Stickley's private children's home in Auckland's Mount Eden. They took in children directly from parents and from the Charitable Aid Board, with Fanny being able to nurse and rear up to twelve children.[54] In July 1891, the death of Bella Watson, the illegitimate daughter of a domestic servant, led to an investigation of their facility. The building was described as dilapidated but clean. The couple were experienced, having run the destitute children's refuge at Fort Britomart as master and matron from 1870. This establishment later became the Howe-street Industrial School, with the Stickleys in charge until 1881. In their private facility, the Stickleys had six of thirty children die in seven years. In the Stickleys' case, the deaths and

51 *Otago Witness*, 13 November 1890, 24.

52 *ODT*, 7 November 1890, 2.

53 Hinks, 'Other People's Children,' 71.

54 *NZH*, 10 July 1891, 6.

lack of official and medical inspections caused concern in court. The couple had operated as a business caring for multiple children for seven years and were only connected to a charitable organisation by taking in some of their infants. Their previous reputation probably saved them from greater censure, although that reputation had been tarnished by an inquiry into the running of the school.[55] Generally, larger homes run by respectable people avoided official disapproval.

Police officers immediately began to enforce the regulations of the *Infant Life Protection Act 1893*, gazetted in April 1894 and widely published, as owners of houses boarding infants were urged to register promptly.[56] Many did so, with married women dominating the applications. Reportedly, one hundred and twenty people in Christchurch had been certified under the Act by September 1896.[57] The first case tried under the new statutes, in Auckland in May 1894, saw Mary Cassidy denying that she knew about the law, as her lawyer argued that she was not a baby farmer and did not have any kind of farm. She had taken in only one child, Vera, and received seven shillings a week for her care. Vera was the daughter of Martha Thompson, a Napier widow with at least seven other children. The prosecution brought attention to the new laws, so Mary Cassidy's case served as a warning to others, and she was merely cautioned. In Oamaru, an inquest led to Annie White being charged for not being registered under the Act.[58] She pleaded ignorance of the requirement, and the police sergeant explained that he considered her very incompetent to care for a child, given that she relied on charitable aid because her husband was very ill. Rebecca Halford of Dunedin was another woman charged with failure to register. Rebecca and her stone-breaker common-law husband had four children. The child involved was that of a fireman on a steamer whose wife had left him. Rebecca agreed to take the child, so the father could go to work on the boat, and received six shillings a week. The father was to make other long-term arrangements.[59] Her subsequent attempt to register was rejected, seemingly because she was not legally married to the father of

55 *Thames Star*, 1 October 1880, 2.

56 *Star*, 18 April 1894, 3.

57 *Marlborough Express*, 7 September 1896, 2.

58 *Oamaru Mail*, 3 December 1894, 4; *North Otago Times*, 4 December 1894, 2.

59 *Evening Star*, 7 February 1895, 2.

her children.[60] Rebecca's difficulties with respectability show that only the 'right type' of people were considered suitable as foster parents.

In what is generally seen as a gendered business, men did not usually instigate these arrangements. However, in some circumstances, men, like the deserted father in Rebecca Halford's case, sought care for their child. Another case resulted in a man being labelled a baby farmer. Timothy and Ann Colbridge, an older childless couple, took in an infant, Harold. The child's father, Percy Friend, paid Timothy for fostering the child. This supplemented the income that Timothy, a dock worker in his sixties, was able to earn. The arrangement had been in place for more than seven months when Timothy was brought to court and charged with not having his house properly registered. This was described as baby farming on a small scale, and, as a warning to others, Timothy was fined five shillings and costs and told to register the house. The lack of comment about men as baby farmers suggests Timothy's case was not as unusual as it might now seem. Other men applied for licences under the Act, including Gideon Brunton, a Dunedin tramcar driver. He and wife Ellen had one son, but their daughter Mona Dunne Brunton was adopted. Children awaiting adoption fell under this legislation, so the Brunton house and family were investigated, and the baby's mother was recorded as a governess at an up-country station. Gideon's good character enabled the adoption to go ahead. The way the legislation was framed meant that situations like this attracted official scrutiny.

The 1893 legislation allowed attention to move towards the perceived problems of the payment of lump sums to adopting parents. By January 1895, police in Auckland were inspecting houses that occupants wanted to be registered for boarding infants. Of about a dozen places, only one case was found in which a child had been exchanged with a lump-sum payment.[61] However, the practice continued in other places. Lizzie Ebbett took Albert Elgar to court for an affiliation order for her daughter, born in mid-1894.[62] During the same sitting of the court, Mrs. Hannah Clarkson applied to adopt Caroline Ebbett, described as the child of Albert Elgar.[63]

60 'Form of Application for Registration under "The Infant Life Protection Act, 1893" for Rebecca Halford,' Archives New Zealand, file ref R24467719.

61 *NZH*, 24 January 1895, 5.

62 *Opunake Times,* 26 February 1895, 2.

63 *Opunake Times*, 26 February 1895, 2.

The father, liable for child maintenance of five shillings a week for fourteen years, agreed to pay a lump sum of £50. Despite the growing public debate, in this case the magistrate allowed the payment, and the order was granted. However, the payment was not forthcoming, so Hannah Clarkson took Albert back to court.[64] These kinds of cases continued and attracted negative public comment, but the legislative gap prevented a cohesive rejection of the practice.

In May 1895, Minnie Dean was charged with murdering one-month-old Eva Hornsby. Her undoing was the combination of Eva's death with the death of Dorothy Edith Carter shortly beforehand, in April 1895. Dorothy's death was likely due to laudanum, used to quiet infants. Minnie reacted to this death, which occurred on the Invercargill–Kingston train, by concealing the corpse and continuing to collect her next child, Eva.[65] She returned home with two small bodies, which she buried in her own garden. She then lied to the police about the children and her actions. The police were familiar with Minnie's business, which included adoptions, fostering, and acting as an agent in the network of child carers. In October 1889, the Deans' six-month-old adopted daughter, May Irene, had died. Minnie Dean's first court appearance was before the 1893 legislation in relation to the death of an illegitimate child, Bertha Currie.[66] The inquest found that Bertha was well nourished and thus gave a verdict of death from natural causes. Minnie had been caring for ten children, aged from six weeks to eleven years, and reported that some were paid for weekly and others in a lump sum, while she received no money for a few. They were found to be happy and contented, strong, healthy, and well-fed. The good condition of the children may have prevented pejorative classification as a baby farmer despite obvious overcrowding.

Crowding ten children plus carers into a small house was the type of situation discouraged by the *Infant Life Protection Act* of 1893. Minnie never applied for registration, probably reasoning that the legal restrictions meant she would be rejected. She continued to collect children, but not at an economically viable level. The press was to speculate: 'The miserable sums she received for the upbring of children she "adopted" were terribly suspicious of a sinister object in regard to the

64 *Opunake Times*, 26 November 1895, 2.

65 A. C. Hanlon, *Random Recollections: Notes on a Lifetime at the Bar* (Dunedin: ODT and Witness Newspapers, 1939), 175.

66 *Southland Times*, 27 March 1891, 2.

future of her charges'.[67] The small sums involved perhaps contributed to the number of transactions, as Minnie stated that twenty-seven or twenty-eight children passed through her care. Minnie's explanation that seven had been taken by families who wanted to conceal the adoptions was not accepted by the police or the public.[68] The prevailing theory favoured further murders. However, Minnie was part of a business that valued secrecy and anonymity. Minnie had attempted to work around legislative requirements and police surveillance by acting as an agent, finding children, and passing them on to adoptive parents or other fostering mothers. She was engaged in this practice when the deaths occurred. As previously noted, her charges were healthy and well-fed. Minnie's love of children and an unreasonable desire to acquire more seem to outweigh a purely financial motivation. Deaths and disappearances had occurred, and Minnie became an object lesson. Widespread condemnation of paid child care, suspicion about her motivation and an official determination to use the full force of the law enabled the Dean case to act as a deterrent to others.

This deterrent effect may be the reason for the decline in frequency of baby farming being used as a label after the Dean case, but not everyone complied with the legislation. When thirty-year-old Elizabeth Emily Candy appeared in court in 1904, she had taken in four children for money, and the judge called this baby farming on a considerable scale, despite the lack of deaths or ill-treatment of the children.[69] The local newspaper chose to emphasise the 'Astounding Revelations' and 'Wholesale Traffic in Infants'.[70] She admitted to having taken four children for money, receiving between £10 and £25 per child. Elizabeth had then handed three of the children over to her family members. The child at the centre of the case, Leslie Francis Claffey, had been taken to Wellington and was at the time in the care of Elizabeth's sister, Ellen Sarah. Leslie had been born in 1901 to Mary Ann Claffey at Kaponga. Her father, John Claffey, paid Elizabeth Candy's father, William Atkinson, £25 for the adoption. Claffey had taken out a mortgage on his property so that the child could be legally adopted

67 *Ashburton Guardian*, 14 August 1895, 2.

68 Lynley Hood, 'Dean, Williamina,' *Dictionary of New Zealand Biography* (first published 1993, updated July 2021), https://teara.govt.nz/en/biographies/2d7/dean-williamina (last accessed 16 May 2025).

69 *Patea Mail*, 11 January 1904, 2.

70 *Taranaki Daily News*, 9 January 1904, 4.

under the protection of the *Children's Protection Act*. The judge's assessment was that this was a serious breach of the Act. He was perhaps influenced by the larger amount of money involved and Elizabeth's unregistered status, as there was no convincing evidence of ill-treatment of the children. There was an implication that Elizabeth's actions had been influenced by other family members. She was fined the maximum amount, rather than gaoled, due to her recent marriage. Leslie was returned to his family, and it is likely the other children were as well. This local example of the use of the baby-farming label paled in comparison to the interest generated by headlines about a German baby farmer in October 1904, described as the 'fiendish' murderer of five infants.[71]

The cumulative effect of widespread publicity of international cases, combined with local cases like those of Minnie Dean and Elizabeth Candy, had newspaper editors rallying against paying lump sums to adopting parents, saying the practice was an incentive to murder the child. Their campaign was effective, and the practice was legislated against in the *Adoption of Children Amendment Act 1906*, which specified the adopting parent was not to receive a premium. The Mary Ann Guy case in 1906 was followed by two cases in early 1907, when police laid separate charges against Eliza Davies and Charlotte Evans. In both cases, the infants in their care died after receiving insufficient nourishment. Eliza had adopted her child, while Charlotte was fostering her charge. Both Eliza and Charlotte's cases were labelled 'Baby-Farming' by a Nelson newspaper.[72] The jury who heard both cases thought they indicated the *Infant Life Protection Act* was being worked around. These concerns were reflected in the headlines of the many newspapers reporting the cases and may have influenced the changes made to the legislation in 1907.

The 1907 decision to shift the responsibility to the Education Department brought supervision of all children under one authority. Licensed homes had been liable to inspection by medical doctors, policemen, or justices of the peace, with periodic inspection by police officers, or by police matrons in the largest cities.[73] There were only four police matrons appointed, the first in 1895 in Wellington and the fourth three years later in

71 *NZH*, 14 October 1904, 5.

72 *Nelson Evening Mail*, 21 February 1907, 2; *Nelson Evening Mail*, 22 February 1907, 4.

73 *ODT*, 9 September 1899, 4.

Christchurch.[74] There was a long history of agitation for female inspectors, with one editor claiming in 1892 that 'Nothing is more certain from the history of baby farming than that male inspectors are constantly deceived by women who board the children'.[75] Cases in Dunedin had prompted lobbying from that city.[76] The Commissioner of Police welcomed the change in 1907 but defended the department's handling of licensing and inspections. He noted that most home-keepers took in one infant, and the infants were treated with kindness and affection. He further stated that thorough investigations had disproved allegations against several Dunedin homes. In his opinion, excessive supervision would deter people from applying for licences. The move to the Education Department was supposed to provide trained nurses as inspectors. The Wanganui appointee combined her duties with work as a part-time police matron, suggesting government departments did not always carry out regulations in the manner imagined.[77]

Cooperation, Conflict, and Negotiation

The legislation attempted to counter some of the areas of conflict between care providers and authorities that were emphasised in court cases. Mrs. Smith's denial of access to all areas of her house was countered with legislated inspections. Restrictions on child numbers were in response to reports of overcrowding. A roll to allow children to be traced back to their natural parents or located with adoptive parents followed Minnie Dean's refusal to provide such information. As caregivers tried to work around regulations by using anonymity or pseudonyms, or by moving children frequently so that they did not fall under the provisions of the Act, legislative changes were urged. Presented as ways to improve child welfare, these were largely calls for more regulation and state involvement in monitoring what was a necessary service. Coroners, who were often also local magistrates, had been instrumental in providing the evidence that children were being neglected or ill-treated while in the care of paid foster parents. They encouraged juries to cooperate with their concerns by adding riders to their verdicts calling for legislation that would make it harder for illegitimate children to be disposed of. For

74 Hill, *Modernisation of Policing*, 139-40.

75 *Auckland Star*, 17 May 1892, 4.

76 *NZH*, 17 September 1907, 6.

77 Hill, *Modernisation of Policing*, 400.

example, the 1891 death of one of Minnie Dean's charges saw the coroner draw the jury's attention to the small house and large number of children. He offered to forward any recommendations they had, particularly about policing such establishments, to the government. This led to a rider which recommended legislation regarding the number of children taken in and their inspection. Supervision and inspection of foster homes was the official policy of state-run institutions, and this aspect had been missing in private arrangements. These officials also had the power to grant or refuse to grant adoptions. The impressions they formed of the people who appeared before them affected the decisions made, as seen in the comment made about Mrs. Smith being an unsuitable adoptive parent.[78] Yet, despite this magistrate's unfavourable opinion, Mrs. Smith had already managed to enlist the cooperation of the courts and adopt three children. This suggests other legislative changes were needed if magistrates were to consistently apply the law in adoption cases.

The right of government officials to enter private homes was usually restricted to the homes of those believed to be engaged in criminal activity. A man's house was, after all, considered his castle. Pearman has argued that the change in Britain's legal focus from mothers of illegitimate infants to baby farmers allowed policing of the private sphere.[79] This was justified by the perception that paid child care had taken the private and domestic into the public world.[80] Initially, police acted as the main enforcers, and, as Margaret Tennant has written, this was considered 'a sideline to their crime-fighting duties'.[81] Interested observers, such as the civil-minded community stalwarts of Dunedin's Social Reform Association, urged police into the conflict caused by inspections.[82] Although not a primary task, they were sometimes rigorous in executing their duty in the early days of the *Infant Life Protection Act*. A Christchurch woman, Charlotte Hodson, passed an inspection while caring for three infants.[83] Only two days later, another visit found that she had taken in another child, thus breaching her licence. There was a perception that

78 *Evening Star*, 6 November 1890, 2.

79 Pearman, 'Bastards, Baby Farmers, and Social Control in Victorian Britain,' 5.

80 Arnot, 'Infant Death,' 275.

81 Margaret Tennant, *The Fabric of Welfare: Voluntary Organisations, Government and Welfare in New Zealand, 1840–2005* (Wellington: Bridget Williams Books, 2007), 64.

82 *ODT*, 7 March 1894, 3.

83 *Lyttelton Times*, 27 October 1894, 3.

there was a larger problem, the true extent of which could not be determined because of inadequate police resources.

However, some police forces cooperated with public sentiment by monitoring suspected baby farmers before the legislation was in place. Minnie Dean was placed under surveillance after the Invercargill magistrate fined her for breaches of the Act, despite child deaths.[84] On the other hand, Mrs. Smith was not actively watched, despite police knowledge of her baby farm. When Arthur Darkey or D'Arcy was brought before the resident magistrate in November 1893, it was as a destitute child because his carer, Elizabeth Hiscock, said that the illegitimate one-year-old had been deserted by his parents. The case was reported under the heading 'Baby-Farming' in a Dunedin newspaper. Police requested an adjournment to make enquiries. On returning to court, police painted a picture of adoption gone wrong, as Elizabeth tried to terminate her responsibilities to the boy by having him committed to the industrial school. Her first attempt had led to police enquiries, and she then claimed the boy had been adopted and taken to Melbourne but refused to give any names. She moved house and again tried to get the boy into the industrial school, saying he had a weak spine and would never walk. Police investigations concluded that she had received £11 as a lump sum to adopt the boy. In court, Police Inspector Pardy said he 'hoped the case would have the effect of putting a stop to baby farming'. The magistrate stated, 'She and her husband had taken money for the support of the child, and they ought to keep it'. He asked the police to check on the child's welfare and was assured the police would have the child practically under surveillance.

The first prosecutions under new or amended legislation tended to be treated leniently, resulting in the offender being cautioned and the courts working with the police to publicise the new statutes. One newspaper noted it was easy for the unwary to violate the *Infant Life Protection Act*.[85] Early cases in the main centres saw George Wilson in Dunedin let off with a caution, Margaret Ryder in Christchurch fined, and Timothy Colbridge in Auckland also fined and warned to register his house.[86] Individuals being prosecuted were among those who were least able to pay a fine. The

84 Hill, *Modernisation of Policing*, 23.

85 *Feilding Star*, 16 September 1893, 2.

86 *Evening Star*, 14 June 1894, 2; *Lyttelton Times*, 1 September 1894, 2; *NZH*, 24 September 1894, 3.

Oamaru magistrate in Annie White's case noted this was a particular difficulty in dealing with this type of situation.[87] Other accommodations, seen when there was a biological connection to the child in question, might also be reached by authorities. Police, with superior knowledge of the legislation, acted to request exemptions from the minister that allowed charges to be withdrawn.[88]

In 1891, the need for paid child care in New Zealand was still being negotiated and was seen as reflecting badly on 'modern manners and modern morals'.[89] The editor of the *New Zealand Herald* seems to have been against legislating as a quick fix when what was needed was an improvement in morals. This fitted into a wider context, seen by Shurlee Swain and Renate Howe as an attitudinal change that redefined the challenging illegitimate child as a prospective citizen, which then drove the provisions of the Australian *Infant Life Protection Act*.[90] Writing about England, Hinks also noted changes in attitudes to child welfare and proposed that baby farming was only part of a more complex story, one that evolved to accept, but not encourage, paid child care. Although infanticide cases underpinned the baby-farming rhetoric, most women offering paid child care or private adoption and fostering did not kill children in their care. Even in England, the origin of the baby-farming panic, most foster parents who participated in the fostering market were 'honest and caring'.[91]

New Zealand's medical experts and the press linked the problem of infant deaths in paid care with the high death rate of illegitimate children. This issue, a common one internationally, was mainly due to digestive issues.[92] Feeding practices benefited from Frederic Truby King's interest. His experiments using modified cow's milk required test subjects. Having acquired several boarded-out infants, he placed them with a trained nurse at Karitane. When the babies became ill, the nurse resigned, and he took them back to Seacliff. A retrospective stated: 'In later years, he said that on

87 *North Otago Times*, 4 December 1894, 2.

88 *Thames Star*, 14 December 1894, 2.

89 *NZH*, 19 January 1894, 4.

90 Swain and Howe, *Single Mothers*, 112.

91 Ruth Ellen Homrighaus, 'Baby-Farming: The Care of Illegitimate Children in England 1860-1943' (PhD diss., University of North Carolina, 2003), 15.

92 Bryder, *A Voice for Mothers*, xi.

the drive back with the sick babies he felt a rope round his neck. He realised that, if the babies died, he would be condemned as a baby farmer'.[93] One can only imagine that the working-class woman felt more dread than the respected doctor when an infant in her care sickened. However, the agitation for better treatment of infants was not without some foundation. Some deaths indicate that a few women neglected children in their care and seem to have watched them starve to death. There are examples of inquest evidence from doctors that described the wasted bodies and empty digestive systems of dead babies. However, underlying medical conditions and poor-quality feeding could explain some deaths. What is known is that the traditional foster-care practices and established feeding methods continued despite the legislation and the best efforts of King and his trained Plunket nurses.

The regulation of private child-care arrangements is an indication of the value the state placed on children's lives.[94] It sharply contrasts with the vocal opposition to spending public funds on institutionalising illegitimate children, which was seen as rewarding vice by absolving parents of their financial responsibilities. By the 1910s and 1920s, the baby-farming label was less often used. The care of the illegitimate child was still an issue, and private religious institutions often continued to discriminate against such children.[95] Fostering was beginning to be regarded in a more positive light, perhaps reflecting the language used in the 1907 Amendment, which talked of foster parents and foster homes. Changes were solidified in the aftermath of the Great War, with human life being increasingly valued.[96] The closure of state institutions like the industrial schools encouraged the boarding out of as many state wards as possible, contributing to the demand for fostering families.

Conclusion

In the inquest court, the doctor giving evidence characterised Charlotte Redmond as ignorant rather than malicious. Ten years later, it was sensationalist newspaper *NZ Truth* that labelled Mary Ann Guy a professional baby farmer and baby trafficker when the child in her care

93 *Press*, 17 May 1948, 2.

94 Tennant, *Fabric of Welfare*, 52.

95 Tennant, *Fabric of Welfare*, 106.

96 Tennant, *Fabric of Welfare*, 70-71.

died, undernourished and dosed with opium. The new laws did not stop harmful practices. New Zealand newspapers applied the baby-farming label sparingly and were a strong influence on public opinion. As such, the label's use exposes the cultural values of New Zealand society. In investigating exchanges between those enforcing New Zealand's child welfare regulations and those providing paid foster care, the term baby farmer was important. It was used in court and reported in newspapers, to regulate people into following social dictates and, ultimately, to allow close supervision and official inspections of the business of infant care.

Legislative changes from 1881 formalised adoptions without demonising premiums, while implementing the *Infant Life Protection Act* (with subsequent changes) waited until an undeniable need arose. The changing attitudes that drove calls for legislation were indicated in reports of court cases in which the baby-farming label was applied. It was notable that both magistrates and the press treated Sarah Kitto, Christina Jansen and Rachel Pilcher leniently in the early 1880s, in cases that demonstrated the range of paid child-care situations. Attitudes became less understanding when newspapers amplified the public indignation of the 1890s that such women might profit from caring for babies and, even worse, endanger the lives of those in their care. Prosecutions of 'Myra' Smith and Fanny and John Stickley preceded New Zealand's *Infant Life Protection Act 1893*. Most care providers complied with the new regulations, and at first those who did not were used to further publicise the requirements. Attention then shifted to lump-sum premiums, before Minnie Dean was prosecuted for and found guilty of killing a child in her care. Those calling for changes succeeded in getting laws against premiums for adoptions.

Baby farming as a topic has shifted to a greater examination of the practice of paid child care. The methods used to study an industry lacking formal records involves using sources intended for other purposes. In fields such as this, using digitised newspapers is an increasingly viable research method. However, in this case, the method has some potential for selection bias, as reported cases may not be representative of the full range of attitudes and practices surrounding paid foster care. Additionally, reports of court cases often focused on the sensational, which may not accurately reflect the experiences of the majority of those involved in paid foster care. Exploring those who were labelled baby farmers found that most did not actually undertake large-scale care, and many were attempting to adopt children. Additionally, inquests into infant deaths while in care predominantly found for natural causes. Another

challenge is interpreting the attitudes and motivations of the individuals involved, as newspaper accounts of court cases do not provide a complete or unbiased account. However, this type of study attempts to consider the broader social, cultural, and legal context in which these cases occurred. This methodology allowed a focus on those cases that best illustrated attitudes toward paid care and those providing it, particularly as moral panic met legislative change.

This article has shown that, throughout this period, those charged with enforcing the legislation and those providing care continued to find ways to work within the law. As the state regulated to change behaviour, the courts mediated between legislation and moral panic. Initially, infringements of new statutes were treated with tolerance. As the regulations became more comprehensive in response to public clamour over continuing breaches, magistrates attempted to remain both sensible and sensitive as they sought pragmatic solutions to minimise harm and foster improved child care.

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John Marshall and *Lloyd's Register of Shipping*

Liz Rushen

John Julius Angerstein is regarded as 'the Father of Lloyd's', the bastion of worldwide shipping intelligence. A well-connected banker and underwriter, he was instrumental in founding the modern Lloyd's during the eighteenth century. John Marshall could equally claim the title of 'Father of Lloyd's Register', as it was he who instigated a committee of inquiry at Lloyd's that culminated in the merger of the separate Red and Green Books used by shipowners and underwriters to register information about the condition of vessels they insured or chartered. Both the register and the system of ship classification devised by Marshall's committee of inquiry are still used today. This article examines the events that led to, and the ten-year process which culminated in, the formal unification of the two registers as Lloyd's Register of British and Foreign Shipping*, and how it was that John Marshall, a relatively unknown shipowner from Yorkshire, was able to achieve dominance in the London-based world of shipping.*

Keywords: John Marshall, *Lloyd's Register of Shipping*, John Julius Angerstein, ship classification, seaworthiness

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Lloyd's Register of Shipping has long been recognised as one of the most important books in maritime history. It was first published in 1764 to provide underwriters and merchants with information on the condition of the vessels they insured and chartered.[1] By the 1820s, two registers existed—one for shipowners and one for underwriters—but the system was becoming unworkable. Scant attention has been paid to the part

1 Sam Willis, The Most Important Book in Maritime History? Lloyd's Register, 'The Mariner's Mirror Podcast,' 8 February 2021, https://shows.acast.com/the-mariners-mirror-podcast/episodes/themostimportantbookinmaritimehistory-lloydsregister (last accessed 13 May 2022).

played by John Marshall, a London-based shipowner originally from Yorkshire, in creating a register of value to both insurers and shipowners by merging the two separate registers.

Some of the major histories of Lloyd's of London and *Lloyd's Register of Shipping* fail to mention Marshall's critical role in the reform of ship survey and classification.[2] Other histories mention Marshall's input, without going into detail; for example, George Blake refers to Marshall as 'an enlightened man from Hull' and 'vigorous' in his work but only credits him with commencing the move to unite the two registers, whereas Golding and King-Page describe Marshall as the 'champion of amalgamation' without providing details to support this claim.[3]

Yet other histories of Lloyd's have confused John Marshall with another John Marshall, a shipowner of Hull, who died in 1825. For example, the beautifully produced book by Nigel Watson, *Lloyd's Register: 250 Years of Service*, published by Lloyd's Register Foundation in 2010, attributes the General Shipowners' Society, through the work of George Palmer and David Carruthers, as having more influence in the reconstitution of Lloyd's Register than John Marshall. Watson called John Marshall 'an important facilitator in the reform of the classification system', but in his only reference to Marshall (the caption under a painting of the Cooper Fleet, in 1803, by Robert Willoughby), Watson confused the two John Marshalls.[4] Similarly, Frederick Martin's scholarly work, *The History of Lloyd's and of Marine Insurance in Great Britain*, published in 1876, identifies Marshall as a delegate for Hull and describes his 'unceasing agitation' for reform, but credits Thomas Chapman as being the 'founder' of Lloyd's Register for his role in lobbying the Lloyd's members.[5] When Charles Wright and C.

2 See, for example, Raymond Flower and Michael Wynn-Jones, *Lloyd's of London: An Illustrated History* (Newton Abbot: David & Charles, 1974); D. E. W. Gibb, *Lloyd's of London: A Study in Individualism* (London: Macmillan & Co, 1957); Henry M. Grey, *Lloyd's Yesterday and Today* (London: John Haddon & Co, 1922); F. A. Mayne, *The Register Book* (London: Lloyd's Register of Shipping, 1922). This printed lecture delivered to Lloyd's Register of Shipping provides great detail on how to read the register but does not provide its history.

3 George Blake, *Lloyd's Register of Shipping, 1760-1960* (London: Lloyd's Register of Shipping, 1960), 14, 16; Antony Brown, *300 Years of Lloyd's* (London: Lloyd's List, 1988); C. E. Golding and D. King-Page, *Lloyd's* (New York: McGraw-Hill, 1952).

4 Nigel Watson, *Lloyd's Register: 250 Years of Service* (London: Lloyd's Register, 2010).

5 Frederick Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (London: MacMillan & Co, 1876).

Ernest Fayle's *A History of Lloyd's* was published in 1878, they credited John Marshall with being the 'prime mover' for the fusion of the two register societies, stating he was a London shipowner, but they incorrectly believed that his initials were J. M. Marshall.[6]

Critically, when the *Annals of Lloyd's Register* was first published in 1884 to commemorate the fifty-year anniversary of the joint committee, a photograph of Thomas Chapman, who was a successful underwriter and merchant, as well as chairman of Lloyd's Register from 1835 to 1881, was prominently displayed, but there was no portrait of Marshall, to whom so much was owed. By 1884, Marshall had died in poverty and, although the author based much of his information on Marshall's 1829 publication and referred to his 'untiring energy and sound judgment', calling Marshall a man who 'boldly advocated radical changes in the entire organization and administration of the Registries' and to whom 'the movement owed a large measure to its success', Marshall's photograph was not included in this commemorative publication. However, the role played by John Marshall in the reform of ship survey, classification, and publication of the seaworthiness of ships warrants closer examination.

Traditionally, men involved in shipping and trade had met at Lloyd's Coffee House in London to make deals, including sharing the risks and rewards of individual voyages. To seal the deal, they signed their names to the bottom of a document ('underwriting it'), agreeing to compensate a proportion of the losses if the ship was lost, in return for a proportion of the profits if the ship made it back safely. From the mid-1750s, Lloyd's Coffee House had been printing *Lloyd's List* to publicise shipping movements, but it gave no indication of the seaworthiness of vessels to enable the underwriters to assess their risk. The system was ad hoc: shipowners were expected to notify Lloyd's of changes, but in some cases ships were still listed although they had broken up.[7] Consequently, the Lloyd's Coffee House customers formed the Register Society in 1760 to fill in the gaps left by *Lloyd's List*.[8]

6 Charles Wright and C. Ernest Fayle, *A History of Lloyd's* (London: MacMillan & Co, 1878), 305. The middle initial causes confusion because John Marshall, the subject of this article, had no middle name and was always referred to simply as 'John Marshall'.

7 A. G. E. Jones, *Ships Employed in the South Seas Trade 1775–1861*, Part 3 (Canberra: Roebuck, 1986), 261.

8 Watson, *Lloyd's Register*, 11. I am grateful to Louise Sanger of Lloyd's Register Archives Foundation for assistance with research for this article.

When the Society printed its first *Register of Ships* in 1764, under leading underwriter John Julius Angerstein, it employed at least one full-time surveyor to assess the condition of ships, and this information was printed in its register.[9] Only members of the Society could look at the register, and they were fined if others were shown it. Understandably, by the end of the eighteenth century, shipowners were complaining about being excluded from accessing the information, and they published a rival register under the title *The New Register Book of Shipping*. This new register was known popularly as the 'Shipowners Register' or 'Red Book', while the older register became known as the 'Underwriters Register' or 'Green Book', named for the colour of their bindings. Inevitably, the two books battled for supremacy, with shipowners and underwriters contesting classification rights and procedures. The dispute between the Red and Green Books escalated to the point of mutual insolvency. By splitting the market between them, both registers were on the point of ruin.[10]

London shipowner John Marshall (1789–1861) made his first appearance in Lloyd's Red Book in 1820 and was listed as a subscriber the following year, together with his brother, Thomas.[11] In 1823, he was the owner of a fleet of seven ships with a combined loading of 1767 tons. He actively traded on the world markets while building up his network of contacts in the City of London. In August that year, Marshall cleared the final hurdle to become a licensed customs broker.[12] The first person to endorse his application was Thomas Wilson (c. 1767–1852), a Tory Member of Parliament for the City. The two men had much in common through their mercantile and Hackney connections, and Wilson seems to have been something of a mentor to Marshall.[13]

9 Anthony Twist, *A Life of John Julius Angerstein, 1735-1823: Widening Circles in Finance, Philanthropy and the Arts in Eighteenth-Century London* (New York: Edwin Mellen Press, 2006).

10 Watson, *Lloyd's Register*, 13-17.

11 Lloyd's of London, Minutes of the Subscribers, Guildhall Library, Ms 31570, Vol. 2, March 1822–December 1832, 17.

12 John Marshall's Application to Become a Licensed Customs House Broker, 9 August 1823, Corporation of London Bonds, London Metropolitan Archives, COL/BR/02/042/4625.

13 *The Times*, 19 April 1820. In 1796, Wilson married at St John's, Hackney, the church Marshall attended.

Other signatories to Marshall's petition included the wealthy merchant shipowner William Borradaile, a member of Lloyd's committee, the Van Diemen's Land Company and the East India Dock Company; and Jacob Montefiore, a merchant and financier who had extensive trading interests in Barbados and would, like Marshall, later come to grief in the Australian trade.[14] George Hyde Wollaston, a merchant and banker in Genoa and later chair of the Thames Tunnel Company, was also a signatory, as were John Whitmore the younger, a director of the Bank of England, and East India merchant John Plummer. It is notable that Marshall was able to attract the support of these influential men.

Three years before his application to become a licensed customs broker was submitted, Marshall attended a dinner to celebrate the re-election of Wilson, a prominent spokesman for the City's mercantile and shipping interests. Nicknamed 'Buckskin Wilson', he opposed duties, particularly on coal, wool and tea, and condemned parliamentary reform.[15] Initially a West India merchant, mainly trading between Britain and Grenada, he quickly moved into the Australian trade and in 1824, his firm was trading as Wilson and Blanchard. That year, Wilson was elected the first chairman of the newly formed National Institution for the Preservation of Life from Shipwreck (now known as the Royal National Lifeboat Institution, or RNLI), and three years later, John Marshall was one of twenty-three stewards appointed at the Institution's anniversary dinner.[16] Wilson is remembered today by Wilsons Promontory at the southern tip of the Australian mainland, named in his honour by his friend and fellow worshipper at St. John's Hackney, Governor John Hunter of New South Wales.[17]

14 Martha Rutledge, 'Jacob Levi Montefiore (1819–1885),' *Australian Dictionary of Biography* (Canberra: National Centre of Biography, Australian National University, 2006), http://adb.anu.edu.au/biography/montefiore-jabob-levi-4225/text6813 (last accessed1 June 2022).

15 R. G. Thorne, *The History of Parliament: the House of Commons 1790–1820* (London: Secker & Warburg, 1986), entry for Wilson, Thomas II (?1767–1852), of Wood House, East Ham, Essex.

16 *The Times*, 22 May 1827, 1.

17 P. E. Gardner, *Names of South Gippsland: Their Origins, Meanings and History* (Ensay: Ngarak Press, 1992), 24. Wilsons Promontory was originally called Furneaux Land, by George Bass, after Captain Tobias Furneaux of the *Adventure*. The name was later changed to the current name by Governor Hunter, on the advice of Matthew Flinders.

The dinner held in mid-April 1820 to celebrate Thomas Wilson's re-election was organised by Joseph Marryat MP, another prominent West Indian merchant and banker, and was attended by the who's who of London shippers and merchants, 107 in all. Like Marryat and the guest of honour, Wilson, many had strong connections with Lloyd's, including Thomas Borradaile, John William Buckle, Robert Chapman, Sir John W. Lubbock and George Lyall.[18]

By this time, John Marshall was actively involved in the Merchants and Shipowners' Society (usually referred to simply as the 'Shipowners' Society', and now the London Shipowners' and River Users' Association), and it was through this platform that he pushed for reform of the dual register system. The Shipowners' Society had been formed in 1811, and by 1822, Marshall had twice been appointed a steward at the Society's annual dinners.[19] The annual meeting held on 11 December 1823 at the City of London Tavern was presided over by George Lyall, the head of a family firm engaged in the East India trade and the chair of the Society (1823–1825). This meeting was to prove a watershed moment, as a letter John Marshall had written to Lloyd's on 24 November was read to the meeting. The letter proposed radical changes to the system of ship classification and called for a joint committee of inquiry of shipowners and underwriters.

Marshall's timing was considered: although Angerstein, a supporter of the status quo as represented by the Green Book, had retired in 1811, he died in January 1823, and it seems that Marshall delayed his move for reform out of respect for Angerstein's work with the Register Society. It was perhaps significant that Marshall, the leading representative of the shippers in the Red Book, was concurrently owner of the 189-ton ship *Angerstein*.

The Register Society immediately endorsed Marshall's proposal for a committee of inquiry, but it took a great deal of lobbying by Marshall and others for Lloyd's to reach agreement on appointing a committee. Although the inquiry reported its findings on 1 June 1826, it took another eight years, until October 1834, before Lloyd's adopted the majority of its

18 *The Times*, 13 April 1820, 2.

19 Among the leading members of the Society were John William Buckle, George Lyall, George Palmer, George Frederick Young, Octavius Wigram, William Tindall, James Chapman, Henry Blanchard, Henry Buckle and Duncan Dunbar: Leonard Harris, *London General Shipowners Society, 1811–1961* (London: The Society, 1961).

recommendations. As a reaction to the lack of progress on the matter, and in an attempt to hurry them along, in 1829 Marshall published a 200-page report detailing every aspect of the inquiry's proceedings.[20]

As outlined in his report, Marshall's November 1823 letter to the Secretary of Lloyd's, and copied to Simon Cock, Secretary of the Shipowners' Society, decried 'the very erroneous system' of classification of shipping practised at Lloyd's and stated that the power exercised by the committees of the two registers was 'unconstitutional and oppressive'. Marshall asked, 'who constituted these gentlemen the regulators and arbiters of the shipping property of the realm? — and to whom are they responsible?'. He then launched into an attack on the dual system, calling for 'the removal of this most injurious, arbitrary, and unconstitutional state of things', which was 'productive of most serious injury'.[21] Marshall proceeded to argue for wholesale reform of the classification system, calling for a single register; a revised system for the classification of ships based on age, condition and the quality of construction; greater control over surveyors; and a reformed committee of management, with representation beyond shipowners and underwriters.

Although Marshall was not yet on the committee of the Shipowners' Society, he was asked to address a meeting of the Society held on 22 January 1824, chaired by Thomas Wilson. The purpose of this special meeting was to vote on Marshall's proposals, and his address to the meeting commenced:

> When I first addressed the Committee of the Ship-Owners' Society, in November … I certainly did not contemplate that I should have to stand forward, in an assembly like the present,

[20] Copies of this pamphlet can be found in the major libraries, particularly in England and Australia, but all attribute it to another John Marshall, a statistician (1783–1841), who published, among other works, *A Digest of all the Accounts relating to the Population, Productions, Revenues, Financial Operations … of Britain and Ireland* in 1834. Evidence that it was the shipowner John Marshall who instigated the reform at Lloyd's and published the pamphlet is given in his evidence to the Select Committee Appointed to Inquire into The Causes of Shipwrecks: House of Commons, *Report from the Select Committee Appointed to Inquire into The Causes of Shipwrecks* (London: Parliament, 1836), QQ.3136-226, particularly Q.3140.

[21] John Marshall, *Statement of the Various Proceedings Prior and Subsequent to the Appointment of a Committee in 1824, to Inquire into the Mode of Classing the Mercantile Marine at Lloyd's and to Report Their Opinions Thereon* (London: Longman, Rees, Orme, Brown & Green, 1829), 5-7.

> as its advocate. It is not from any overweening confidence in myself that I venture now to address this numerous and highly-respectable meeting; I should have been glad to surrender this subject to abler heads, of where there are so many here; but, having originated the measures from which this Meeting has resulted, I find it is expected that I should submit to you today.[22]

The members of the Shipowners' Society agreed with Marshall that reform was needed and passed a resolution, which stated:

> That the existing system of classing Shipping in the Register Books at Lloyd's, operates injuriously towards the Ship Owner, tends to mislead the Shipper and Underwriter, in numerous instances encourages the building of inferior Ships, and prevents essential repairs.[23]

Marshall's call for a committee of inquiry into the system of classification conducted by Lloyd's received unanimous support from the Society, and the next step was to secure support from Lloyd's itself. A meeting of underwriters held the following month, on 18 February 1824, was acrimonious. The underwriters were suspicious of a scheme proposed by a shipowner, believing that any changes made to the current system would not be beneficial to them. Marshall had to argue his case strongly, as many underwriters also failed to see the point of changing a system which they believed had served them well.[24] Finally, the subscribers agreed to put up the names of twenty-four members, so that a vote could be taken for eight of these to join the inquiry. However, opposition remained strong, and on the day of the vote, all twenty-four members withdrew their names.[25]

Another heated meeting was held on 3 March, where it was finally agreed that a vote would be taken the following week on the resolution, 'Whether Lloyd's shall, or shall not, send eight persons to represent them in the Committee'. The subscribers agreed that if this question was decided in the affirmative, then the eight men who were named at the previous

22 Marshall, *Statement of the Various Proceedings*, 57.

23 Quoted by Wright and Fayle, *A History of Lloyd's*, 305.

24 Watson, *Lloyd's Register*, 15.

25 Lloyd's Archives, 1824, Guildhall Library, SR.403. Ms 247.

meeting would be delegated to represent Lloyd's; but this still allowed wiggle room, and the naysayers were hoping to obstruct the vote. Marshall was flabbergasted at this 'disingenuous course of proceedings', a 'manoeuvre … in the hope of imparting a bias in the minds of the subscribers … to reject … my proposal for – INQUIRY!!'.[26] It was only an inquiry at this stage. If this was the resistance from Lloyd's to being part of a committee of inquiry, how difficult would it be to push through any recommendations of the inquiry? And so it proved to be.

Entrenched in their position, the committee of Lloyd's did try to influence the ballot by mailing out a report that undermined any change. Marshall considered this to be an 'unscrupulous act' and published a reply, pointing out that the Lloyd's committee wished to 'stifle inquiry … to thwart and prevent, by a course so ungenerous and vexatious, the object for which I have contended'.[27] After intense lobbying by Marshall and his colleagues, who visited almost every business and coffee house in the City and distributed Marshall's printed response, just over half of the Lloyd's members finally met on 10 March. After a close vote of 352 subscribers for and 327 against, as Marshall exclaimed, 'REASON TRIUMPHED'.[28]

Twenty years later, this extraordinary meeting was recalled by James Ballingall, the disgruntled Surveyor of Shipping and Honorary Secretary of the Port Phillip Immigration and Anti-Shipwreck Society, who fulminated against 'the determined resistance and opposition' with which Marshall was met from the Lloyd's members. He was:

> forcibly struck with the iniquity of their proceedings; the motion to allow enquiry being carried by a majority of only 25 out of 679 members of Lloyd's who voted on that occasion. An irresponsible body, the successors of that irresponsible body, are now in power, exercising an authority without responsibility over the whole mercantile marine of Britain, for their own interested purposes.[29]

26 Marshall, *Statement of the Various Proceedings*, 45.

27 Marshall, *Statement of the Various Proceedings*, 51.

28 Ralph Straus, *Lloyd's: A Historical Sketch* (London: Hutchinson & Co, 1937), 189.

29 James Ballingall, *Unsafe Ship-building: A National Sin: A Treatise in Reply to a Despatch of His Grace the Duke of Newcastle, Upon the Safe Transmission of Emigrants* (Melbourne: Argus Office, 1854).

Marshall had cleared the first hurdle at Lloyd's, and now the real work was to commence. As proposed by Marshall, the committee of inquiry comprised eight merchants, eight shipowners, eight underwriters and representatives of the 'outports', the major ports located throughout Britain. The shipowners were represented by George Lyall, George F. Young, John W. Buckle, John Dawson, Nathaniel Domett, James Greig, Thomas Spencer, and Thomas Urquhart.

John Marshall himself represented the outport of Hull; this has led to confusion over the years, as he is sometimes referred to as a shipowner of London and, at other times, of Hull. Although Marshall had many connections in Hull, including his wife's extended family businesses in shipping through the Featherstone and Earle families, he was by this stage a major shipowner of London.[30] However, he maintained strong connections to Yorkshire. In 1823, a Society of Shipowners at Kingston-Upon-Hull had been formed, and, during the progress of the committee of inquiry based in London, Marshall kept them up to date with the proceedings.[31]

The work of the committee of inquiry, under the chairmanship of James Lindsay, one of the eight underwriting delegates from Lloyd's, was exhaustive. Subcommittees considered specific aspects for reform and took evidence from an extensive range of witnesses, including the commissioners and surveyors of the navy, the master builder of the royal dockyard at Deptford, the principal surveyor to the East India Company, the surveyors of the existing register books, and the shipowners' societies in the leading outports.

In the meantime, at the 1824 annual meeting of the Shipowners' Society, Marshall accepted membership of the committee and took a leading role at the meeting.[32] He seconded the motion of William Manning that subscriptions be raised to provide relief to members after recent severe

30 Marshall was born at Ferrybridge, Yorkshire, in 1787, but he married Hull-born Betsey Featherstone at Hull's Holy Trinity Church in 1810. For Marshall's biography, see Elizabeth Rushen, *John Marshall: Lloyd's Reformer, Shipowner and Emigration Agent* (Sydney: Anchor Books Australia, 2020).

31 Society of Ship-Owners of Great Britain, *Report of the Committee of the Society of Ship Owners at Kingston-upon-Hull: Presented to the Annual General Meeting, January 2nd, 1827* (Hull, 1827).

32 Others elected that year were Richardson Borradaile, Robert Chapman, Thomas Wilson MP, Stewart Marjoribanks MP and George Lyall, the chairman of Lloyd's.

gales, and he moved the motion to thank the chair, John Clark Powell.[33] During this time, the Society was actively involved in changes relating to the improvement of the laws of shipping and the consolidation of those laws that related to trade, navigation, and revenue. The number of seamen lost each year was rising and, as shipping disasters multiplied, official concern grew about the safety of life at sea. Marshall remained on the committee the next year, as one of eight members who would regularly rotate positions; the others were H. M. Bagster, Thomas Benson, Archibald Marjoribanks, Joseph Marryat, John Nickols, William Tindall, and John Pirie. In the next decade, John Pirie (Lord Mayor of London 1840–1841) would have many business dealings with Marshall.[34]

Finally, after investigating for nearly two years, the committee of inquiry presented its report at a public meeting of the newly named Merchants, Shipowners and Underwriters Society, held at the City of London Tavern on 1 June 1826 and chaired by Thomas Wilson. With a letter of support from Thomas Lack, Secretary of the Board of Trade, James Lindsay read the report. It recommended the formation of a completely new society with a new set of rules and a large, qualified staff of competent and independent surveyors employed throughout the country. Their duties were set out in precise detail, and provision was made for the stringent inspection of ships while under construction.[35] These qualified surveyors would be properly paid, and a new and more rigorous scheme of classification would be introduced.[36] The new committee of thirty-six members would be more representative than was the case previously and would comprise eight merchants, eight London shipowners, eight Lloyd's underwriters, ten representatives from outports, and two from insurance corporations.[37] After a heated exchange between Thomas Urquhart and Marshall, the meeting voted to accept the report.

33 *The Annual Subscription Charities and Public Societies in London* (London: John Murray, 1822); *The Times*, 14 December 1824, 2.

34 *The Times*, 16 December 1825, 1. For Pirie's dealings with Marshall, see Elizabeth Rushen, *Single & Free: Female Migration to Australia 1833–1837* (Sydney: Anchor Books Australia, 2011).

35 Blake, *Lloyd's Register of Shipping*, 18.

36 Watson, *Lloyd's Register*, 15-17.

37 Including the Alliance Insurance Company, newly formed by Alexander Baring, Nathan Rothschild, Samuel Gurney and Moses Montefiore.

John Marshall and Urquhart had clashed two weeks previously when they attended a meeting of the Society that had been held to consider 'the present state of the representation in Parliament, as regards the shipping interest' and to plan the Society's approach to the forthcoming showdown with the underwriters. On the motion of Marshall, George Palmer was invited to take the chair, and G. F. Young spoke first, with his motion to improve the awareness of the importance of British shipping among parliamentarians seconded by John Pirie. Marshall moved the second motion, advocating free trade, to 'place them on a footing to compete with foreigners, especially with the northern states'. Urquhart angrily questioned why the meeting had been called and challenged the basis of the Society. Marshall 'repelled' Urquhart's assertions, stating that he was entitled to 'introduce the affairs of the corporation of the Trinity-house, the impressments of seamen, the constitution of the ship-owners society, the maritime code or something about the mode of curing Scotch herrings', thus diffusing the heat of the meeting with humour.[38]

Having secured the support of the Merchants, Shipowners and Underwriters Society, the next step was to have the committee of inquiry's recommendations accepted by Lloyd's. It had been difficult to get the Lloyd's subscribers to agree to be part of the inquiry, and now it was difficult to have the inquiry's findings adopted, especially as there were no finances available to fund its recommendations. According to Lloyd's historian Ralph Straus:

> Marshall did not allow himself to be discouraged: year after year he continued his agitation, interesting outsiders and winning over opponents by explaining that the *New Register of British and Foreign Shipping* which he envisaged was to be no profit-making concern: all its resources would go towards perfecting its organization.[39]

When this message finally got through, in 1833, the Lloyd's subscribers accepted that it was not practicable to continue with two register books

38 *Public Ledger and Daily Advertiser* and *Evening Mail*, 17 May 1829. See also *Public Ledger and Daily Advertiser*, 31 May 1826, for a report of the follow-up meeting, attended by John Marshall, which agreed to several resolutions regarding free trade and the representation of shipowners in parliament.

39 Straus, *Lloyd's: A Historical Sketch*, 190.

and unanimously voted £1,000 towards the new register and appointed a provisional committee.

At a meeting of the fourteen members of the *Register Book of British and Foreign Shipping* committee held at the Merchant Seamen's Office, Royal Exchange, on Thursday 14 November 1833, with George Palmer in the chair, it was resolved that the committee be extended to twenty-four members, to include George Lyall, G. F. Young MP and John Marshall. When, two days later, the secretary Thomas Chapman advised the invitees that they had all been unanimously elected to the committee, both Young and Marshall, in a somewhat surprising move, declined the invitation, with Marshall acknowledging the 'sense of the honor conferred on him by electing him a member of the Committee but begged respectfully to decline it'.[40] In the end, George Young did accept a position on the committee, but the *Annals of Lloyd's Register* notes that it is not known why Marshall, the 'mainspring of the Inquiry Committee', declined.[41] In 1833, Marshall's shipping interests had taken a turn towards emigration. In May that year, he commenced working as an agent to the London Emigration Committee and had just dispatched the second female emigrant ship on its behalf.[42] He had decided to pursue his business interests rather than deal with the frustrating work of a committee.

On 21 October 1834, Marshall finally had the satisfaction of seeing the formal unification of the two registers as *Lloyd's Register of British and Foreign Shipping*, and the new rules outlined in the register provided the framework of the new system of ship classification. The name of the register remained unchanged for eighty years, until the outbreak of the First World War, when the words 'British and Foreign' were dropped.

The *Rules and Regulations for the Classification of Ships* were derived directly from the 1824–1826 committee of inquiry instigated by John

40 The secretary for the first committee was Nathaniel W. Symonds, and the committee comprised shipowners: Thomas Benson, Nathaniel Domett, Richard Drew, B. A. McGhie, Joseph Somes, William Tindall, Thomas Ward and George F. Young MP. The underwriters were represented by George Allfrey, David Carruthers, Thomas Chapman, Henry Cheape, John Robinson, R. H. Shepard, Arthur Willis and William Marshall: Lloyd's Register Archives Foundation, Provisional Committee Minute Book, July 1833 to October 1834, 16 November 1833, 43-45.

41 *Annals of Lloyd's Register*, Centenary Edition (London: Lloyd's Register, 1934), 50.

42 Refuge for the Destitute, Committee Minutes, 29 May 1833, Hackney Archives, D/S/4/9, 346; see Rushen, *Single & Free*, 31.

Marshall and were based on the vowels (A E I O U) for the ship's hull and numerals for the equipment of masts, spars, rigging, cables, and anchors. This tightened the use of the classification 'A1', an expression still used today to denote first-class. The Rules also specified that surveys at three stages of a ship's construction were compulsory for all vessels aiming for the highest A1 classification.

Marshall's revised system not only clarified the seaworthiness of all ships built in British ports but also contributed to saving lives, as unseaworthy ships were no longer able to leave port. A decade later, when Marshall's fortunes were not so buoyant, he looked back at his work on the classification of shipping with justifiable pride, writing:

> To my individual and strenuous efforts … the great improvement which has of late been effected in the construction and efficiency of the vast mercantile marine of this country, by the adoption of a system of classification, which has the intrinsic excellence and proper equipment of ships for its basis, and the consequent annual saving of numbers of valuable lives, are to be attributed. The proceedings which led to, and the labours which laid the foundation of, and ultimately produced this great and invaluable change, were originated and carried to their completion, through much opposition and difficulty, mainly by long, painful, and gratuitous perseverance on my part. Another important consequence of the adoption of an uniform standard for the classification of shipping, has been the extension to all the outports … which, under the old fallacious and highly injurious system, were confined to the ship-builders of the River Thames.[43]

In 1833, Marshall was appointed to the committee of the Corporation for Sick and Maimed Seamen in the Merchants Service, a charity comprising the leading shipowners in London. Incorporated in 1747 and with its office in the Royal Exchange, the president was John Clark Powell, and the committee included Henry Blanchard, John W. Buckle, Robert Chapman, Jesse Curling, James Greig, George Lyall, Joseph Somes, Thomas Ward, and Thomas Wilson. It was a small world of leading shipowners in London at

43 *Sydney Herald*, 16 April 1842, 2.

the time and, while these names appear frequently in various guises, it is significant that Marshall was among this elevated company.

Marshall's position in society was also reflected in the depth of his philanthropy. In 1824, he was overly generous in his support for the formation of a Society for the Education of the Infant Children of the Poor. Well-known reforming liberals with strong mercantile interests were on the committee, including Thomas Baring, Sir John Lubbock, Dr. Lushington, Thomas Fowell Buxton, John Abel Smith, and Zachary Macaulay. Marshall donated a generous £30, in addition to Lushington's £10, banker Samuel Hoare's £21, and Dr. Malthus' more restrained £5.[44]

Although most merchants lived with their families above their counting houses, Marshall's family still lived in Hackney while he conducted his business in the East India Chambers in Leadenhall Street. In 1826, Marshall relocated his business as a ship and insurance broker to No. 26 Birchin Lane, Cornhill, where he expanded his trade and later emigration agency, conducting his business there for more than twenty years. As late as 1851, his son, Frederick, was listed in the London Directory as an emigration agent at 26 Birchin Lane.

Marshall's relocated office reflected his move up in the world. Birchin Lane was an ideal address, centrally located and at the hub of the City of London's business world. In 1748, a disastrous fire had raged through Exchange Alley, Cornhill, and Birchin Lane, destroying more than a hundred houses, many shops, and several coffee houses, so the area had been largely rebuilt. For the first two decades of the nineteenth century, Zachary Macaulay—merchant, philanthropist, and later widely respected antislavery advocate and father of Thomas Babington Macaulay—had conducted his firm of African merchants at 26 Birchin Lane.[45] Marshall did not occupy the whole building, and the other businesses at 26 Birchin Lane in 1826 included stockbrokers, merchants, lawyers, and other ship and insurance agents.[46]

Another clear signal that things were going well for John Marshall was his announcement in 1829 regarding the formation of a new trading association for the Australian colonies. With the approval of the

44 *The Times*, 8 June 1824, 2.

45 *The History of Parliament: The House of Commons 1820–1832*, ed. D. R. Fisher (London: Cambridge University Press, 2009), entry for Thomas Babington Macaulay.

46 *Robson's London Directory* for 1831.

government, in June 1824 a group of wealthy bankers and merchants had established the Australian Agricultural Company, which promised, in return for a grant of one million acres, to invest £1 million and employ 1200 convicts. Shares were rapidly bought in England and Australia. It was a good time to start such a company, as the developing wool industry was beginning to bear results. By 1826, New South Wales had sent £1,106,300 worth of wool to England, and this was dramatically increasing.[47]

Acting as the temporary secretary of the association, Marshall called for a meeting of interested merchants, parliamentarians and others to be held at the offices of the Australian Agricultural Company, 12 King's Arms Yard, London, on 22 January 1830. The notice of meeting revealed that the founders of the association saw the colonies as ideally situated to enrich the empire due to their:

> most extraordinary and gratifying picture of the rapid growth of population and wealth, and that from their rich and varied soils, and excellent climate, the security and advantages afforded by their situation, and the administration of British laws, they hold out the prospect, under the liberal and fostering care of government, of ranking at no remote period among the most valuable possessions of the crown of England.[48]

Announcing the association under the heading 'Advance Australia', the *Sydney Gazette* was delighted, noting 'we cannot doubt that much benefit will result from a judicious concentration of the influence which such a body may be supposed to possess', while the *Launceston Advertiser* was gushing in its endorsement, trilling, 'This is the most important era which we have observed in this little struggling and fast rising Colony. This society … will do more for us than we possibly could do for ourselves'.[49] While praising Marshall, the *Hobart Town Courier* was more tempered in its assessment of the project, editorialising:

> From the great respectability and influence of the Secretary, Mr. Marshall, and the interest that gentleman is known to take in British shipping generally, we doubt not the association will

47 Stephen H. Roberts, *The Squatting Age in Australia* (Melbourne: Melbourne University Press, 1964), 42.

48 *Sydney Gazette*, 19 May 1829, 2.

49 *Launceston Advertiser*, 25 May 1829, 3.

> be of the utmost consequence to these colonies … [especially to] the extension of the sperm whale fishery, and the encouragement of the wool growers. If the members apply themselves to the furtherance of these and similar grand and patriotic objects … they cannot fail with the local advantages they possess in London, to benefit very materially both themselves and the colonies.[50]

But it was not to be, and it seems that the proposed meeting did not go ahead. It is interesting to note that the meeting was to be held at the offices of the Australian Agricultural Company, but perhaps it was this organisation, or the recent granting of a Royal Charter to its southern peer, the Van Diemen's Land Association, which froze out this cheeky newcomer.

It was nearly another decade before a merchant-based association, the New South Wales and Van Diemen's Land Commercial Association, was formed at the Jerusalem Coffee House in May 1836. Chaired by Marshall's fellow shipowner J. W. Buckle, historian Frank Broeze has described it as an 'energetic lobbying group' for Australian merchants and pastoralists, British shipowners, importers, bankers, and others in the City.[51] Marshall had taken on Lloyd's, but he was not able to get his trading association off the ground. It was time to look for other avenues of trading with Australia and New Zealand.

In twenty years of owning ships, Marshall had done much to promote the Australasian colonies and had gained financially from exporting passengers and goods and importing commodities, such as wool, wheat, timber, and whale oil. He had built up a large fleet, owning and part-owning thirty ships in the years from 1814 to 1838—the year he sold the *Harmony*, the ship he owned the longest. Marshall had chartered the *Harmony* twice to the government as a convict transport and, following its 1827 voyage to Sydney with eighty female convicts, the *Harmony* then sailed for the Bay of Islands in New Zealand, where in fourteen days it loaded 'one of the most valuable cargoes ever procured from New Zealand ... the finest spars in the world'.[52] Returning to London, it was the

50 *Hobart Town Courier*, 16 May 1829, 2.

51 Frank Broeze, *Mr Brooks and the Australian Trade: Imperial Business in the Nineteenth Century* (Melbourne: Melbourne University Press, 1993), 116-22.

52 *Sydney Gazette*, 16 November 1827, and 20 and 22 February 1828; *Sydney Monitor*, 21 February 1828, 5.

first ship to land New Zealand timber there.[53] Marshall demonstrated how an entrepreneur could begin with one vessel and, with luck and good management, develop a viable fleet.

In 1835, the door was opened for large-scale emigration by section 62 of the *Poor Law Amendment Act 1834*, which enabled English and Welsh parishes to assist parishioners to emigrate. Four years later, the *Irish Poor Law Act 1838* enabled the poor law commissioners to defray the travelling expenses of emigrants.[54] Although these first regulations for poor law-funded emigration were very restrictive, they were revised in September 1837, May 1838 and March 1840, and the bounties gradually increased. In the Australian colonies, the amount realised by the sale of Crown land in 1840 was twenty-five times the figure of 1832, the first full year land sales had supported migration.[55] It was a profitable business for agents like Marshall. As the government admitted in 1841, Marshall dominated the market, having the 'virtual monopoly' of that business to New South Wales, and the work of 'other parties had been insignificant in comparison with that conducted by Mr. Marshall'.[56]

There was a huge financial advantage in sending ships full of people to the colonies—not only was the outgoing passenger freight assured through a government contract, but Marshall could add additional speculative cargo in the hold on the outward voyage and backfill the ships with lucrative cargo for the return journey.[57] Between 1833 and 1838, wool production trebled, and it became Australia's greatest single export. In 1834, the value of the export wool clip exceeded that of sperm oil for the first time since oil had been imported into Britain from Australia, and Australia never

53 Broeze, *Mr Brooks and the Australian Trade*, 36; Augustus Earle, *A Narrative of a Nine Months' Residence in New Zealand in 1827* (Christchurch: Whitecombe & Tombs Limited, 1909), chapter 1, https://www.gutenberg.org/files/11933/11933-h/11933-h.htm (last accessed 2 May 2025).

54 Margaret Ray, 'Administering Emigration: Thomas Elliot and Government-Assisted Emigration from Britain to Australia, 1831-1855' (PhD diss., University of Durham, 2001), 84-85.

55 Brian Fitzpatrick, *The British Empire in Australia: An Economic History, 1834-1939*, second edition (Melbourne: Melbourne University Press, 1949), 33.

56 T. F. Elliot, R. Torrens and E. Villiers to James Stephens, 21 April 1841, The National Archives, London, CO384/63, fo. 358.

57 John Bach, *A Maritime History of Australia* (London: Hamish Hamilton, 1976), 55.

looked back.[58] Throughout the nineteenth century, it was a case of passengers in and wool out.

In the five years to 1841, Marshall was at the centre of the group of private merchants, shipowners, shipbrokers, passenger agents, bankers, and investors who contributed significantly to the growth of assisted migration from the British Isles to Australasia.[59] He demonstrated how the 'Australasian interest' of the City of London dominated charitable institutions, controlled colonisation companies, supported passenger brokers, and continuously influenced government policies and regulations.

Through his restructuring of Lloyd's, Marshall had earned widespread respect, as seen by invitations for him to give evidence to several committees inquiring into the state of shipping. In 1836, when he appeared before a government-appointed Select Committee to inquire into the causes of the increased number of shipwrecks, he revealed that most of his observations regarding the registration of shipping had been adopted, but not all.[60] The system developed under John Marshall's leadership helped Britain to achieve the position of the world's leading maritime power.

Angerstein and Marshall were instrumental in the dominance of Lloyd's of London in the nineteenth century. They were both daring, successful businessmen and, despite their frailties and mistakes, they were remarkable men who left a permanent mark on the way business was done at Lloyd's. But, unlike Angerstein, who left his art fortune to the nation as the nucleus of the National Gallery collection and today is venerated, Marshall died in poverty in 1861 at Reading and has today been largely forgotten.

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58 Allen Mawer, *Ahab's Trade: The Saga of South Seas Whaling* (Sydney: Allen & Unwin, 1999), 161-62.

59 Frank J. A. Broeze, 'Private Enterprise and the Peopling of Australasia, 1831-50,' *Economic History Review*, 35 (1982): 235-53.

60 House of Commons, *Report from the Select Committee Appointed to Inquire into the Causes of Shipwrecks* (567), Evidence of John Marshall, QQ.3142-44.

BOOK REVIEWS

Dean Ashenden, *Telling Tennant's Story: The Strange Career of the Great Australian Silence* (Melbourne: Black Inc, 2022). Pp. 336. ISBN 9781760641757. AUD 34.99.

Driving north from Adelaide to Tennant Creek, consciously following the trails of others, Dean Ashenden describes his disconcerted puzzlement as he considered the memorial landscape through which he travelled. The public history it represents, he tells us, was the product of an ongoing history war: 'We'd won the country and then set out to win the story as well' (p.4). In *Telling Tennant's Story*, he takes this experience and sets out to think through how it might be changed—how the truth might be told about Aboriginal and Australian history. The book's central problem, which it approaches but commendably leaves unresolved, is how to represent that which has been unrepresented by settlers in the past, how to tell the stories that have been left out of national history.

Ashenden considers these questions through the history of Tennant Creek, which exists, here, in the strange dual temporality of the frontier (this 'frontier zone was another country; they did things differently there', Ashenden writes, evoking Hartley (p.41)). The frontier remains a key referent. As the anthropologist W. E. H. Stanner insisted, studies that disengage from frontiers and their persistence are inadequate. True histories ought, rather, to engage with what Stanner famously described as the 'relations between two racial groups within a single field of life'. Ashenden convincingly argues that an additive approach is also insufficient; to take 'that *part* of the story' seriously is to transform 'the *whole* story', requiring us to undertake the 'hard, slow work' of 'renovating categories of understanding' (p.162) to find space for stories of organised violence and genocide, of curiosity, friendship, incomprehension, and confusion, of the shifting balance of force and morality, of Country and relationships, and of continuities that render the past present.

To do this work, and to replace histories that diminish and do little other than celebrate settler achievement, Ashenden proposes a return to the frontier as a device for truth-telling. He emphasises the frontier as an organising metaphor for both identity and history, making a 'sustained effort to see how things might look from the other direction' (p.253nn). Moving comfortably between local and national scales, *Telling Tennant's Story* enacts a history that rests largely (though not exclusively) on non-Indigenous archives to trace a history of encounters—some brief, some

enduring—in Tennant Creek since 1860. This is an effective way of approaching the formative work of Baldwin Spencer and Frank Gillen, the often conflicting anthropological and policy approaches of Stanner, A. P. Elkin, and Paul Hasluck, the turmoil of the 1960s and the land rights movements that, eventually, transformed Tennant Creek and created new questions and problems. In so doing, this book shares with us a series of clearly written and grounded social and intellectual histories.

Despite Ashenden's interest in viewing things from the other direction, one of the consequences of a focus and reliance on non-Indigenous sources is that, until the final chapter at least, it renders Aboriginal voices marginal. In this book, Warumungu or Warlpiri people appear occasionally to correct untruths, to provide a glimpse of their presence or to hint at another, deeper, story. But their story is displaced from the centre. Stanner's Great Australian Silence, as Ashenden illustrates so well, was not a silence so much as it was a deafening noise projected from all directions (so long as they were white). From Spencer and Gillen to Elkin, Hasluck, and beyond, settlers constructed elaborate historical narratives that naturalised invasion and dispossession. These narratives crowded out Aboriginal stories; here, I wondered, does an approach that recapitulates the structure of the frontier inevitably do the same?

But *Telling Tennant's Story* also presents something of what the frontier as methodological tool offers us in the form of Stanner's conception, developed through his 1958 critique of Hasluck. These were two men of almost identical backgrounds, with similar career trajectories, yet their disagreement is representative of some of the moral and political fissures in Australian settler colonial society. Hasluck's idea of assimilation presumed Aboriginal people to be Black Australians, differing from other Australian citizens 'only in the colour of their skin' (p.102). When Stanner addressed his colleagues at a 1958 conference, he turned on this conception to criticise the idea of a future of 'former Aborigines distinguishable from us only by skin colour, if that' (p.103), and to insist instead on an inevitably entangled future of enduring difference.

It becomes clear that Stanner's model of engaged and persistent difference structures this book too. This approach, characterised by Ashenden's clear-eyed understanding of where he stands, is signalled by the repeated use of 'us' and 'them' pronouns. These remind his intended audience (his 'us', non-Indigenous people) of his project of dismantling the traces of the silence embedded in settler institutions, every one of them, from the frontier onwards.

They also signal an awareness of the problem of belonging in a settler colonial world. Although he had lived in Tennant Creek as a child, Ashenden's narration of this experience represents him as definitively not of that place; always feeling uncomfortable and wanting to be somewhere else. Tennant Creek only really comes alive for him in the final chapter, when, after faltering beginnings, he is finally able to engage seriously and meaningfully with Warumungu people of the town. There, at the annual Harmony Day parade, one catches a glimpse of possibility, of 'black and white … together on Aboriginal land, not apart in a white world' (p.228). Belonging, here, comes through both these engagements and a commitment to truth. Ashenden's fascinating effort to tease out the complexities of these interests provides all of 'us' with a way of thinking through a future on that Aboriginal land—one of continued struggle to tell true histories of place, of people, and of the nation.

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Jared Davidson, *Blood and Dirt: Prison Labour and the Making of New Zealand* (Wellington: Bridget Williams Books, 2023). Pp. 296. ISBN Hb 9781991033406. AUD 49.99.

Thoughts of nineteenth-century prisoners hard at work, transforming landscapes to establish a new society, typically conjure up stereotypically harsh images of Australia's convict chain gangs. Such visions, however, are blind to another reality: that, just across the Tasman, New Zealand faced a strikingly similar origin. In *Blood and Dirt: Prison Labour and the Making of New Zealand*, Jared Davidson uncovers in remarkable detail the little-known story of how New Zealand and its Pacific empire were made and shaped by the extensive use of prison labour throughout the country's history since European colonisation.

Unlike its western neighbour, New Zealand was not established as a penal colony; nor was it the recipient of transported convicts. As such, the country has been commonly envisioned as having arisen nobly out of the toil of its free settlers. Davidson suggests a multitude of reasons for this.

These include New Zealand's rural mythology overpowering what was a mostly urban phenomenon, the fruits of most prison labour being too obscure to visually detect, and the out-of-sight nature of prison labour being reflected in works of history. Rectifying these and other problems, Davidson admirably shows that New Zealand's seemingly untainted origins are far from the truth. Central to the construction of nearly every aspect of the country—its streets, parks, courthouses, and farms—was the labour of the unfree. This story is, as he calls it, a 'history hidden in plain sight' (p.13).

Davidson begins his story of prison labour in New Zealand with the first permanent settlement of pakeha in the country. Established in 1814 by the Reverend Samuel Marsden, Hohi Mission was intended to serve as a base for exploring what resources could potentially be exploited by the British. Central to its operation was the labour of Irish convicts who had been transported to New South Wales. Their labour prevented their idleness, an immoral mode of being and a crime against the state, the wealth of which depended on the labour of its constituents. Considered the opposite of idleness was improvement, by which the financial value or profitability of something was increased through work. In New Zealand, improvement was intimately connected to the use of labour on the land, thereby linking the histories of colonisation, dispossession, unfree labour, and capitalism.

Across the next six chapters, Davidson demonstrates the centrality of prison labour to the development of New Zealand and its empire in the Pacific, showing how prisoners transformed the environment while simultaneously being shaped by the 'coercive pressures of capital and class' (p.41). Prison labour, comprising excavation work, carting rubble, and much else, was crucial to the construction of vast quantities of roads across the New Zealand landscape. Davidson explores not only how unfree labour was crucial to the development of industry, but also how it was industrial. Prisoners went on strike, mutinied, and engaged in other forms of class struggle against their warders. Many attempted to negotiate, by various means, the conditions of their coerced labour. Others were industrious and aspired to good behaviour.

Prisoners also had an important role in New Zealand's military history, being a primary source of labour for the construction of the colony's coastal fortifications and, later, its rifle ranges. Their work in this domain highlights the links between militarism, prison labour, and state formation. All furthered the mission of settler colonialism and the

transformation of the Indigenous landscape. The latter was accelerated by the implementation of prison plantations, in which the unfree were made to plant vast swathes of trees. These plantations aimed to meet a heavy demand for timber, to transform untouched land into productive landscapes and to redeem those who worked on them.

In the Pacific, native prison labour created the basic infrastructure of empire: government buildings, residencies, courthouses, and other imperial structures. As Davidson argues, the use of such labour was responsible for 'enforcing the legal, racial and gendered order of New Zealand's empire at the expense of Indigenous systems; appropriating and transforming the extra-human environment; creating the colonial infrastructure of government and trade; and mobilising labour into plantation and extractive economies' (p.179).

In New Zealand, reform saw plantations give way to prison farms, which formed an integral part of the country's wider grasslands revolution, driven by growing exports. Prisoners were taught the skills necessary to become farmers, to their immediate and long-term benefit. Land was made farmable and therefore available to others who later wanted to work it. The establishment of prison farms, Davidson points out, brings New Zealand's history of prison labour full circle, for it most clearly shows 'the link between improvement and dispossession, colonisation and incarceration, capitalism and empire' (p.197).

A narrative history intended for the general reader, *Blood and Dirt* is richly illustrated and gorgeously designed. Its target readership should not be mistaken for a compromise in the quality of its scholarship, however. With linguistic flair and an authoritative tone, Davidson demonstrates his mastery of a wide-ranging history. The book is as conceptually rich as it is detailed, based as it is on an impressive array of archival sources, such as government archives, newspapers, and published reports.

Some readers may find its largely Marxist framework—with an emphasis on class, power, and exploitation—problematic; for instance, as concerns its treatment of individual agency (prisoners are both coerced, unfree workers and people free to act as they choose). However, as Davidson himself admits, his work is an overtly political one in which he claims neither 'to be detached or neutral' (p.251). He is an advocate of 'the idea that history should challenge norms and inspire change' (p.251). *Blood and Dirt* serves as an important reminder of the central role that prison

labour has in the built environment in which the everyday is set and that the relationship between work and prisons is an inseparable one.

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David Collins, *Fragile Foundations: The Application of English Criminal Law to Crimes Committed in Aotearoa New Zealand Between 1826 and 1907* (Wellington: Te Herenga Waka University Press, 2024). Pp. 486. ISBN Hb 978-1-776-92135-5. NZD 70.

When David Collins QC (as he was then) contacted me several years ago in relation to my research into people transported as convicts from Aotearoa New Zealand to Van Diemen's Land (lutruwita Tasmania) in the nineteenth century, I was unaware that he was working on a major historical project of his own. However, his substantial and erudite monograph exploring the introduction of English criminal law into the colonial New Zealand context has since been published by Te Herenga Waka, the university press associated with Victoria University of Wellington. In this scholarly work, Collins masterfully examines the application of English law from the early period of contact, during which England's reach stretched halfway around the globe and across the Tasman Sea from Sydney to the islands of Aotearoa, through to 1907, the year in which New Zealand became a dominion.

Collins's work is divided into five comprehensive parts, the first of which canvasses the precolonial era. This is followed by parts devoted to examining the first prosecutions of Māori under English-derived laws, the imposition of martial law and its impacts on Māori, the ways in which the law of insanity was applied in colonial New Zealand and, finally, how a variety of notorious malicious criminals were dealt with in the 'punitive and puritan society' that developed in the colony.

From the Introduction onwards, Collins's writing is captivating, commanding his readers' attention. He sets out his purpose clearly, observing how the histories with which he engages and the resultant legal

cases 'help us to understand how the indiscriminate application of English criminal law in New Zealand during the nineteenth century shaped the landscape of our current society' (p.16). He also offers several of these cases as illustrative examples that collectively go some way towards explaining 'why Māori continue to be adversely affected by [New Zealand's] criminal justice system' (p.16). As Collins points out, the violent history explored throughout *Fragile Foundations* and the forces that shaped it are 'not far from the surface of modern New Zealand society'.

One of many strengths apparent throughout this work is the way in which Collins has succinctly and accurately summarised key features of tikanga Māori, nineteenth-century English criminal law, and the law as it was applied in colonial New Zealand and in comparative contexts, particularly New South Wales. Where relevant, he traces the trajectory of English laws across many centuries, highlighting the context of their inception and the differences in application across time and place. He does not hold back when it comes to identifying and explicating instances in New Zealand's legal history of judges making errors in their application of the law, sometimes with grave consequences for defendants.

In dealing with the precolonial era, Collins deftly illustrates how and why the British began to extend English criminal law to the colonial New Zealand context, with NSW Governor Lachlan Macquarie taking steps as early as 1814 to regulate Māori being taken from the Bay of Islands by traders without consent from their chiefs. While it seems unlikely that Macquarie had the authority to intervene, he continued to make proclamations from NSW aimed at preserving the peace in the neighbouring islands of Aotearoa New Zealand. Despite Macquarie's strategy, the islands continued to be seen as a relatively lawless place, and it was not until the Crown colony was established, following the signing of te Tiriti o Waitangi/the Treaty of Waitangi, that formal law courts were established in Aotearoa New Zealand.

In the next two sections, readers learn about the first criminal cases involving Māori, as well as the declaration of martial law in parts of the North Island and resultant courts martial of Māori prisoners, one of which resulted in a group of men being transported for life as convicts to Van Diemen's Land for being in open rebellion against Queen and country. Collins provides a thorough explanation as to why these courts martial have, since the 1840s, been controversial. The final two sections of the book explore a range of fascinating and sometimes disturbing cases relating to insanity and malicious criminals. Some of the names of those

tried will be familiar to readers, particularly baby farmer Minnie Dean, about whom a podcast has recently been made and, over time, numerous books written. As well as revealing quite a lot about the evolution of New Zealand society in the period during which these prisoners offended, Collins provides significant insights into key legal personalities, some of whom are remembered as leaders in their field, whereas others engaged in questionable decision-making and, at times, dubious practices.

Fragile Foundations is essential and engaging reading for anyone seeking to understand how English-derived laws came to prevail in Aotearoa New Zealand and how the legal foundations laid throughout the nineteenth century in the colony developed into a punitive system of law with lasting legacies. As Collins has pointed out, only recently has tikanga been formally recognised as a 'third source of law' in Aotearoa New Zealand, and there is still some way to go before its precepts are fully incorporated into the nation's legal system.

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Alecia Simmonds, *Courting: An Intimate History of Love and the Law* (Melbourne: La Trobe University Press, in conjunction with Black Inc, 2023). Pp. 440. AUD 45.00.

It is said that you cannot put a price on love. Yet, Alecia Simmonds' meticulously researched and beautifully written *Courting: An Intimate History of Love and the Law* shows that, once upon a time, you could. Australia's social and legal history is littered with examples of love going wrong and its associated economic costs.

Since its publication in late 2023, *Courting* has been the deserving recipient of many accolades, including being shortlisted for the 2024 Prime Minister's Literary Awards and winning the 2024 NSW Premier's History Award for Australian History. In her acceptance speech for the latter, Simmonds described the book as 'a history of Australia told from the remains of peoples' broken hearts'. It is indeed that—and the tales of

heartbreak are told with a winning combination of sensitivity and flair—but *Courting* is also a deeply intelligent and robust analysis of how courtship and marriage have been regulated in Australia since the arrival of the First Fleet, how gender roles and expectations were upheld through legal mechanisms, and how the law gradually shifted away from treating marriage and intimate relationships as economic contracts.

Whereas today's heartbreak might lead to therapy rather than litigation, a century ago, Australian courtrooms regularly featured jilted lovers seeking compensation for their 'lacerated feelings' (p.2). Breach of promise actions peaked in Australia in the early twentieth century, with 523 cases reported in the newspapers between 1900 and 1930, compared with just 211 throughout the nineteenth century.

Today, a broken engagement is no longer considered a legal wrong for which someone can be sued. Breach of promise was determined nearly half a century ago to be 'out of step with modern intimacies' (p.260) and thus dispensed with. Simmonds argues that the disappearance of these legal protections reflects fundamental changes in how we conceptualise love and intimacy, and we may have even lost something in the process.

A multi-award-winning writer and scholar in legal history, Alecia Simmonds is Associate Professor in Law at the University of Technology Sydney and has written extensively on the relationships between law, gender, race, and intimacy, particularly on breach of promise in colonial Australia. In *Courting*, she takes 'the papery remains of blighted affections' (p.2) and transports the reader into the courtrooms of the past, revealing intimate details of the lives of ordinary people that are as heartbreaking as they are entertaining.

Of more than 1,000 cases that were tried under the Breach of Promise Act while it was in existence, Simmonds selects ten to illustrate the changing expectations in relation to courtship, romance, sex and marriage in Australia from the early days of the penal colony (*Sutton v Humphrey*, 1806) to Depression-era Perth (*Allan v Growden*, 1938). *Courting* is divided into four sections covering specific periods. 'Love in a Penal Colony, 1788–1830' examines the rise of marriage as 'the primary signifier of respectability' (p.59) after a long period of unmarried cohabitation being acceptable, while 'Geographies of Desire, 1830–1880' explores the importance of 'spaces, places and movements' (p.76) in romance and how global mobility influenced intimate relationships. 'Intimate Encounters, 1880–1914' focuses on the social upheaval during

this time, when 'traditional authority structures broke down and people looked for new models to make sense of intimate relationships' (p.164), including interracial relationships and even an unusual (and successful) case of a man bringing a breach of promise action against a woman. Finally, 'Modern Love, 1914–1939' explores how 'love and law became increasingly disentangled' due to the vast social shifts of the interwar years, the increased freedoms for women and the 'dramatic changes in how people conducted their intimate lives' (p.256). By expertly weaving together legal history, feminist theory and personal narratives, individual stories are brought vividly to life with rich detail and are also firmly situated in their broader historical, social, and economic contexts, which makes for delightful and immersive reading.

Breach of promise was an action brought by the relatively less powerful party in the arrangement, in an attempt—and, as *Courting* shows, frequently a successful one—to recognise the loss of reputation or the security (be it financial, social or both) they would have gained had the marriage taken place (or, in some cases, to recover costs they expended in the expectation of it). The injured party might have also lost opportunities to explore other marital options in the process of attaching themselves to the person who ultimately jilted them. This is an interesting quandary to consider in today's world, where the law has firmly expressed reluctance to get involved in romance; yet, with the expansion of digital technologies and online dating services, there is possibly a greater need than ever for some form of protection and regulation (p.371). Simmonds mentions that her students express consternation when she asks them to imagine suing someone over a broken engagement or romantic deceit today:

> Their response exposes a cultural assumption that love and law are opposites, conceptual antipodes, each untranslatable and hostile to the other. We think of romance as frolicsome, rebellious, impetuous and wilful, impervious to the monolithic sobriety of the law … In the nineteenth century, European people in Australia would have had no difficulty thinking of intimacy as a proper subject of legal regulation … private decisions about marriage had public consequences (p.5-6).

Ironically, although nineteenth-century society denied women many freedoms, the law did seem to protect them in their socially prescribed roles of wives and mothers. Courts recognised women's fundamental economic dependence on men and offered them recourse when courtship went wrong. As the centuries passed and women's economic and social

freedoms expanded, and it was no longer a given that a romantic relationship would end in marriage, the burden of proof, and therefore the effectiveness of the law, materially shifted until it was deemed no longer necessary at all.

With the *Marriage Amendment Act 1976*, the breach of promise action was abolished, and legal authority over love and intimacy was all but completely diminished in this country. The governance of heterosexual love, Simmonds explains, had officially moved 'from juridical judgement to therapeutic expertise' (p.354). After 1945, psychology became a more common mode of recovery from a romantic injury than the courtroom. Simmonds makes an intriguing argument that the 'coming of the counsellors' by the mid-twentieth century was not a victory but a loss, particularly for women. Responsibility for romantic injury has been 'individualised and feminised, and its pain trivialised, drained of economic meaning' (p.4).

Courting took Alecia Simmonds eight years to write, and that is evident—its research is thorough, its arguments robust, and the stories it captures are inclusive of a wide range of perspectives; albeit, Simmonds is careful to caveat, through the lens of heterosexual courtship. Most importantly, Simmonds shares life stories as well as legal stories, which serve to elevate the protagonists—mostly ordinary working-class people whose inner lives are usually not found in the archives, which are traditionally the domain of the wealthy and privileged—by giving them the dignity of historical nuance.

The cases Simmonds has chosen serve as enjoyable (and occasionally discomforting) tales in their own right, but she also sews them into the wider national fabric with skill and poignancy. The analysis is underscored by a critical feminist perspective, examining how legal structures have traditionally privileged certain types of relationships while marginalising others, particularly interracial relationships. The cases of *Lucas v Palmer* (1892) and *Zathar v Hanna* (1907) are analysed alongside the wider historical context of administration of the White Australia policy: the former is a particularly touching tale that acknowledged 'men too suffered from heartbreak' (p.211). The sexual violence case study of *Vaughan v McRae* (1891) makes the modern reader squirm in horror, but it also illustrates how the #MeToo movement is not as unprecedented as the media and cultural commentators would have it. One of Alecia Simmonds' most powerful arguments in *Courting* is that a close examination of court records shows that women, certainly in this

country, have been attempting to call out and curtail male entitlement to female bodies for two centuries.

My personal favourite was *Rodriquez v O'Mara* (1916), a case which signified 'consumer culture's colonisation of romantic love' (p.259), with the would-be bride claiming £5,000 for breach of promise of marriage. This included £180 for her trousseau, which was made up of 'sixteen hats, blouses, night-gowns, pyjamas, boots and shoes, oils, face creams, polish, perfume and lotions from Brennan's department store' (p.258), purchased even though all her letters to her beau were being met with silence. By the trial's final day, the courtroom 'looked more like a sporting event than a court hearing' (p.285), with nosy spectators blocking all the entrances. Spoiler: this was one of the cases that was not successful. Rather, in Simmonds' view, finding for the defendant was 'part of a wider judicial trend that sought to punish the perceived excesses of modern femininity' and restore the institution of marriage to one 'bound by duty rather than desire' (p.283).

Although modern sensibilities seem very much in favour of love and law being separate entities, Simmonds makes a persuasive case for their entwinement once more—or at least that the breach of promise action might have been amended rather than abolished. 'Because the stakes in love and law are high, as both change lives, they have a similar interest in evidence: "*How do I know you are who you say you are?*" and "*can I place trust in your words?*" are questions asked as anxiously in court as in courtship', Simmonds asserts (p.5-6).

The last case presented in *Courting* concludes that, unlike the applicant in that case, people who suffer severe emotional damage from their relationships today 'have no legal avenues for redress' (p.352), a statement that feels particularly poignant when considering that we know deception, fraud, and coercion still occur in intimate settings but are no longer legally compensable. Why, asks Simmonds, does the law insist that intimate harms are 'beyond legal remedies'? As the majority of cases featured in *Courting* attest, it is still women who 'bear the brunt of the law's reluctance to go beyond the front door of the house' (p.369) and, by not intervening, the law has unwittingly established a form of governance that 'ends up condoning the behaviour of liars and frauds' (p.371). Modern challenges of catfishing and online dating fraud, and the inability to litigate against such injuries, suggest we might have lost something valuable with the abandonment of legal protections for emotional injury. Despite the undeniable delights of romance, there is still a duty to take care of each

other. 'People in the past who took lacerated feelings seriously may have been wiser creatures than ourselves', Simmonds concludes (p.373).

Compelling, layered, and thorough, without ever being onerous, *Courting* is an incredible achievement. In it, Alecia Simmonds defies the long masculinist history of Australia and its various stereotypes, delivering a fascinating and immensely readable book about vulnerability, courage, and the pursuit of justice.

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