Australian Journal of Legal History

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A POSTCOLONIAL UNDERSTANDING OF LAW AND SOCIETY: EXPLORING CRIMINAL TRIALS IN COLONIAL QUEENSLAND

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In the 1990s, postcolonial literary scholars energized theoretical discussions about empires. They analyzed the language and images of imperial ideologies, scrutinizing gaps between the liberal universalist values of the British imperial culture and evidence of subjugation and exclusion.[1] Exclusion was not absolute, and subjugation not always rigidly confrontational. Colonialism, as David Spurr observed, aimed ' to dominate by inclusion and domestication rather than by a confrontation which recognizes the independent identity of the Other '.[2] A few students of colonialism noted the irresolution created by exclusion and belonging, and appreciated the possibilities it provided for reconsidering the law in colonial societies. The irresolution suggested interpretations of law that, though acknowledging domination, domestication, and manipulation, recognized resistance and indeterminacy. The colonizers' promises of inclusion to the colonized could never have been wholly ignored, because the law at least had to be seen to be responsive to a variety of situations, including those involving indigenous peoples and non-white migrants. Postcolonial studies had adopted historical complexity, although more was happening, because postcolonialism devoted considerable attention to theory, notably around the concept of indeterminacy.

To see how postcolonial theory and a legal-history narrative can be associated to investigate law and society, we followed criminal justice proceedings concerning three violent deaths in Queensland. These cases had racial dimensions, and that was one reason why we selected them for analysis. They were well-documented too, and multi-layered in terms of outcomes. Before going further, we must mention an important fact about crime in Queensland. Criminal courts accorded rights to the colonized, but many violent injustices which harmed Aboriginals and Queensland's Asian and South Pacific minorities escaped punishment. One gap between the empire's promise and its operations was its failure to protect everyone, especially Aboriginals. However, when colonial officials resolved to confront felonies, the law appeared to function with equanimity. When reading a number of well-documented felony proceedings in the course of a study on violent death in colonial Queensland, we saw decent colonizers pursuing justice for non-whites. Yet, there is a core history of racism in Queensland. To explain the tension, we turned to postcolonial studies and legal history, and eventually settled on seven overlapping ideas which may offer insights into the law and colonial societies beyond Queensland.[3]

First, the law presented opportunities for authorities to assert conceits about the superiority of English justice, hence colonial rule. Satisfied that their modes of justice were superior to continental European ones, the governing class at home and abroad asserted a right to spread the rule of law, instruct in fair play, implant respectful authority, enact moral uplift, and seize and

train others for productive labour.[4] Trials gave judges openings to submit parts of this imperial bounty for public appreciation. Ruling-class manipulation, as an analytical concept, does not originate from postcolonialism. More than a quarter century ago, Douglas Hay elaborated on how eighteenth-century English courts conveyed impressions of the law's majesty, justice, and mercy, in order to legitimize the ascendancy of the gentry and aristocracy in the counties.[5] Second, some officials in the legal system treated people fairly under the rules of the common law, but restricted themselves to cases at hand, not to wider quests for justice or understanding. To see how far these latter two qualities may have penetrated the legal system, the voices of Aboriginals and minorities need to be searched for in records to ascertain under what conditions they presented their story, if at all. Third, the seemingly fair treatment of Aboriginals and minorities - once they were before the courts - occurred, in part, through due process. When crimes were serious, the process due was considerable; that meant, for example, scrupulous attention to rules of evidence. However, summary offences such as disorderly conduct, assault, and moral order infractions were expedited with slight attention to ideals. Due process allowed unequal treatment of whites and non-whites, affluent and poor, in the routines of summary justice; this topic deserves attention, and awaits a rigorous study of summary offenses and the conduct of local magistrates.

Fourth, the enforcement of the law was handled by colonizers who, though part of a system, demonstrated different levels of ability and detachment. Fifth, the colonized and the colonizers presented a mosaic of identities and moralities. Visible minorities among the colony ' s newcomers, as well as Aboriginals, were fragmented. The Chinese originated in diverse regions; some remained distrustful of countrymen; some had the resources to use the law and others did not. Tribes divided Aboriginals, and to these distinctions colonizers characterized them by degrees of assimilation. Queensland's agents of law and order and its elites included bigots, but also decent individuals. Sixth, the cultural of legality was strong among colonizers, and the colonized who realized this fact and who could pay for counsel could get a hearing and stir up a fuss. It is evident that one minority group - Queensland's Chinese - understood British cultural chauvinism and the law. Queensland's Chinese often found their voice by ' speaking back in the language of the law ' .[6] Finally, access to opaque but significant processes hinged on knowledge and money. To petition for mercy, or to plea-bargain required resources. These seven concepts connect colonial Queensland to global historical processes, a conjecture worked out in the conclusion. An introduction to the colony is now in order.

In the late nineteenth century, Queensland offered opportunities for extractive capitalism: sheep and cattle stations west of coastal mountains, mines scattered throughout, sugar plantations along the north-central coast, timber felling operations in a number of eastern locales, and a pearl fishery in the far north. Material enrichment was accompanied by ruthless exploitation and barbarism. Workers and fortune seekers came from Europe, India, China, Java, and the Malay Peninsula; plantation operators collected indentured labourers, first from South Asia and then, in substantial numbers, from the islands of the South Pacific.[7] Murderous raids on Aboriginal peoples occurred from the 1840s into the 1880s. In some regions, detachments of the Native Mounted Police engaged in shoot-first-and-answer-no-questions raids on Aboriginal people whom some graziers and miners wanted removed or eliminated.[8] Violence erupted on the gold fields as white diggers assaulted Chinese counterparts. Plantation overseers worked many South Sea Islanders to their graves.[9]

It was the only colony where pastoral, mining and plantation frontiers were being advanced simultaneously, and this occurred as western racist theories were peaking in their certitude, extremism and infiltration.[10]

At certain times and places, it was impossible to initiate a police investigation - let alone a prosecution - for murder or manslaughter arising from the death of non-whites, though some residents believed they knew the guilty parties. The ideal of inclusiveness dissipated in some regions distant from Brisbane, but inquests into violent or sudden deaths kept the government informed on suspicious incidents. On paper, Queensland was a panoptic state with a substantial network of Police Magistrates and Justices of the Peace.[11] In practice, a few biased magistrates and prejudiced witnesses obstructed, leaving an undeterminable number of murders of Aboriginals unprosecuted and a few suspicious suicides among the Chinese. The rule of law was strongest in the towns, and weakest

on the colony's resource frontiers where raw exploitation controlled social relations.

Certain inquests into the deaths of minorities in Queensland were stymied by conspiracies of silence, but other inquests probed the deaths of non-whites and threw suspicion on whites, enabling the personnel of the criminal justice system to display fairness. In a few instances, as we will show, individuals worked for the rule of law and fair play. A few judges, barristers, newspaper editors, doctors, and civil servants attempted to free the condemned, or bring malefactors to justice. The Crown law officers, police, and prosecutors acted once local silences were broken. However, while the public outcomes might include deeds and words that accorded with the ideals of English law, there were imperfections, complications, and compromises. We turn now to three cases, each involving different peoples in particular colonial locales: an Aboriginal on a grazing station, a Chinese merchant in a mining town, and a 'half-caste' child at a philanthropic mission. Each setting qualifies simultaneously as a peculiar locale and a place connected to a global empire and market economy. Each individual was enmeshed in the local and the global.

I THE MURDER OF PATRICK MORRIS

In the mid 1870s, Patrick Morris, an Irishman resident in Australia for over twenty years, traded tobacco and victuals with settlers and Aboriginals at the Windah Station store, outside Rockhampton. Head stations like Windah were more than the residences of station managers; they maintained services that were open to white settlers as well as Aboriginal peoples. In the 1840s, Queensland station managers began a running debate about whether to drive Aboriginals off grazing lands, or to permit some to stay as cheap labour. By the 1870s, the presence of 'station blacks' was commonplace, though Aboriginal people had also been scattered and murdered by whites. On 8 June 1876, storekeeper Morris refused to trade tobacco to an Aboriginal named Sandy. A cheap escape for itinerant labourers and Aboriginal people, tobacco had an important role in the bush. 'The plaintive request "Gib 'em bacca, boss" echoes through these years [1860-1900]'.[12] Morris threatened Sandy with a double-barrelled shotgun. Upset by the threat, by the denial of tobacco, and possibly by Morris' reversing a promise to exchange fish for store goods, Sandy returned that night, broke into the station house and struck Morris over the head with a nullah nullah, a traditional weapon akin to a flail. He allegedly stole tobacco, clothing, food, and money. Regaining consciousness in the morning, Morris bandaged his head and rode to find Constable O'Reilly to report that a 'black had left him for dead'.[13]

Sandy was well known as a 'station black'. Queensland settlers distinguished between them and 'Aboriginals'. The former (sometimes called 'blacks') worked for station managers as servants, boundary riders, and shepherds, usually for nothing more than tucker, tobacco, and alcohol. 'Aboriginals' (or 'wild blacks') maintained tribal allegiances and traditional ways, only coming to the stations to trade. White settlers also spoke of 'blacks' to describe assorted groups including South Sea Islanders, and Torres-Strait Islanders. The local white community described Sandy as having 'good-looking features for a black fellow'.[14] He spoke broken English, but could understand plain conversation. He was known as an excellent shot with a rifle, and he may have been a former trooper with the Native Mounted Police. Whites who knew Sandy positioned him on the fringes of their society, and never thought it important to inquire into his Aboriginal history. The preeminence of the colonizing community was asserted by measuring Sandy as imperfectly assimilated. Morris accompanied O'Reilly to arrest Sandy. When the pair rode into Rosewood Crossing (another station), they heard that Sandy was flashing around in a new shirt, smoking opium, and stealing horses.[15] Witnesses testified that he had terrorized their homes and businesses.[16] Incidents such as these, where white colonizers believed that Aboriginals 'made a nuisance of themselves,' sometimes resulted in calls for the Native Troopers 'to settle' the problem unofficially.[17] In this instance, there had been little time for their intervention. Sandy might have had previous knowledge of their whereabouts, and decamped quickly.[18] Events showed that Sandy could run rings around adversaries; he retained a mastery of the landscape. Irresolution in the standing of the colonized peoples partly derived from an endurance of indigenous knowledge, the strength of which cannot be overstated.

Constable O'Reilly and Morris managed to track Sandy to a mining camp. A digger guided the two to the 'Chinaman's Camp' where he believed the fugitive was hiding. Sandy, who spotted the trio just

before they surrounded his hut, dashed out the door with O'Reilly in a hot pursuit which ended when the constable tumbled into a miner's hole, a hazard on Queensland's gold fields. Shaken, the constable returned to the hut and arrested Sandy's presumed accomplice, an Aboriginal woman named Mary Ann. Morris then identified his clothing, and found a tomahawk and two nullah nullahs. With Mary Ann secured by handcuffs and a saddle strap, the party headed toward Westwood.[19] About nine miles from their destination, O'Reilly was struck by a nullah nullah, knocked off his horse, and fell atop the miner. Sandy dashed from behind a tree, singing out to Mary Ann to run, which she did. Both escaped into the scrub. The officer remounted and gave chase, but eventually returned to the road where Morris was waiting. In a revealing remark, Morris said that he would have shot Sandy, but feared striking the horse. Morris wanted to stay at Westwood, but O'Reilly persuaded him that he should go to Rockhampton to lodge a formal complaint with a Police Magistrate to initiate the criminal justice process. Contrary to O'Reilly's insistence that Morris accompany him to catch the train to Rockhampton, Morris decided to rest that night and return to Windah. O'Reilly could not escort Morris back to the station, as the recent attack had bruised his arm. O'Reilly then left for Rockhampton, leaving Morris to fend for himself.[20] A few days later, the constable received a telegram reporting that Morris had been murdered at Windah.[21] Coroner Dr H Salmond noted that a blunt object, probably a nullah nullah, had caved in Morris' skull. Based on witnesses' testimony about the earlier attack, he designated Sandy as the suspect, precipitating a transfer of his inquest report to the Police Magistrate. All that is known about the arrest is that, when Sandy surrendered, he had the deceased's double-barreled shotgun.

Decisions about whether or not to proceed to trial belonged to the Attorney General or Solicitor General who performed the duties of a Grand Jury.[22] The involvement of the Crown law officers in the indictment process led to occasional sparring between the central government and local officials. Local Crown Prosecutors recommended indictments; the Attorney General's office reviewed their decisions. Both the prosecutors and the Crown law officers applied more rigorous standards of evidence than some Justices of the Peace and Police Magistrates who conducted the preliminary hearings; the prosecutors and law officers — more experienced and better educated — were opposed to wasting the time of judges and juries with cases that the prosecution could not win.[23] The legal professionals applied the rules undergirding fairness. In Sandy's case, the rules of evidence were rigorously applied at the trial. After his arrest, Sandy appeared at a preliminary hearing where a Police Magistrate heard the prosecution's case to determine if there was a case to answer. He committed Sandy for trial, and the Attorney General found a 'True Bill,' preparing the way for a trial. A community where prejudice, abuse, and exploitation ran along racial lines, and where racial killings occurred without prosecutions, Queensland nevertheless furnished rudimentary safeguards for its poor and its racial minorities in all capital cases where they were defendants and could not afford a defense counsel. In keeping with an English tradition, the bench appointed someone from the local bar.[24] In *all* felonies, at the time of Sandy's arrest, the government paid for counsel if the accused was an Aboriginal.[25] Aboriginal witnesses, in some instances, were provided with travel expenses.[26] Sandy's court-appointed attorney was a competent lawyer who was in court defending a bank official accused of embezzlement. Interventions on Sandy's behalf also came from the judge.

Ratcliffe Pring, the Crown Solicitor, had little more than circumstantial evidence against Sandy. There were no witnesses and no murder weapon, but motive and the stolen shotgun. The investigating officer, Sub-Inspector Matthew Collopy, stated during the trial that there was nothing found at Windah to give the slightest clue as to the murderer.[27] Sandy had assaulted Morris earlier, but there was no proof that he returned to murder him. Pring asked to have the case remanded to allow the police to seek additional evidence. Justice Lilley agreed. The trial was postponed, and every week, between 4 January and 12 April 1877, the court perfunctorily remanded Sandy into custody, and awaited additional evidence. At first, the court kept Sandy in heavy irons:

... round each ankle was an iron ring, which was connected by a short chain, and round each wrist were also iron rings connected in a similar manner. These rings were fastened to an iron rod which passed between the prisoner's legs, obliging him to walk with extreme care.[28]

In consequence of the hardship, the court, by the end of February — after almost two months of confinement — ordered that the prisoner might be relieved of heavy irons.[29] Perhaps a trial

should have been held in January, but the crime was serious and Sandy a plausible suspect. There is a less benign explanation. Remarks from the judge at the end of the trial suggest that the colonial community, believing Sandy guilty, would have been outraged by a quick release. The remands and irons, equivocal features of Sandy's treatment, were possibly a concession to white tempers around Rockhampton.

Unable to find additional evidence after more than three months, Pring proceeded to trial in April. The prosecution depended on so-called confessions. Three witnesses testified that Sandy admitted killing Morris. Stephen Egan, a settler near Windah, related a conversation he had with Sandy through a translator. Egan asked him if he returned to the house to kill Morris. Sandy replied that he did attack Morris the first time, taking some clothes and money, and the second time when ' me being kill him altogether I take double-barreled gun, blanket, and half-sovereign '.[30] John Stack, a labourer at Rosewood Station, stated that, during a conversation, Sandy confessed to him that ' Me been kill em old man altogether because that fellow kill me I think '.[31] Under cross-examination, from the bench, Stack admitted that Sandy ' did not make any voluntary statement to me '.[32] What Stack related was inadmissible as a confession. Another report of a ' confession ' came from the testimony of Sub-Inspector Collopy who interviewed Sandy in jail. Collopy stated that when he asked the accused why he killed the old man, Sandy related how Mary Ann was captured at the ' Chinaman 's Camp, ' and how he freed her by attacking the constable. Collopy quoted Sandy as saying next:

me watch him old Paddy, that fellow go home along of dinner twice me come behind and hit him along of nullah nullah and kill him altogether, me been take em gun, and take em altogether belonging to the old man, me go up along Danson [River].[33]

Sub-Inspector Collopy insisted he made no promises to the prisoner and that all statements were made ' in answer to questions put by me to prisoner with a view of proving his identity '.[34] Collopy 's careful phrasing was calculated to present Sandy 's tale as a voluntary statement. A freely-given confession was admissible evidence. There were safeguards, however. The court was bound to reject a confession if it believed it unreliable, or obtained under pressure, or by promise of favour. Neither the newspaper's account of the trial nor the judge 's bench book recorded his instructions to the jury regarding the first two ' confessions '. However, a comment made by the judge during the trial indicates his views on the ' confession ' adduced by the police. Before Sub-Inspector Collopy recounted his conversation with Sandy, Justice Charles Lilley noted what he thought about putting the officer on the stand to recount a ' confession '.

[I]t is most improper that any police officer should be at liberty to pump a prisoner, and he had the gravest doubt of the propriety of the evidence, but no doubt as to its admissibility. If he could reject it he thought he would have done so. Even a judge of the Supreme Court would not be permitted to question a prisoner, and yet a police officer did so. The rule of conduct for the police was to hear the charge against the prisoner and hear what he would say. He hoped the practice would not prevail again.[35]

Fairness decreed that Sandy's statement should be exposed as probably obtained improperly; the judge had no proof of that, so he could not reject the alleged statement, but he could plant suspicions. An astute judge spoke of police misconduct, but that could have been of importance to white subjects, and not just to providing fairness to an Aboriginal in the current case. However, the jury's verdict is another matter. When the jury quickly returned a verdict of not guilty, the judge applauded its courage, stating that they had returned a verdict in accordance with the evidence. He agreed with them, remarking too that they need fear no expression of feeling. That remark implied that the verdict would irritate some whites.[36]

Few if any involved in the prosecution of Sandy doubted his guilt. In a society more thoroughly corrupted by racism than Queensland, for example the slave-holding American south and parts of the *post bellum* south, the arrest might have led to a different outcome. A white-man 's death, white-man's testimony, a black's alleged history of trouble-making, and circumstantial evidence probably would have assured a conviction — that is if a lynching had not intervened.[37] The culture of the South did not extol legality, rather vigilante order and a supposed upholding of honour through

vengeance were valued. British imperial ideals were likely in line with liberal universalism found in the American north. White evidence in the trial at Rockhampton did not meet an acceptable standard of English fairness. Even though Justice Lilley anticipated the outrage that the verdict could generate in the community, he apparently instructed the jury to discount the hearsay and to treat police evidence with care. Nevertheless, the process of continually remanding the prisoner and the probable improper extraction of a confession by the police suggest that some Queensland authorities would push the law to limits, to punish informally and to try and secure a conviction by sly means. Yet, a judge rebuked the police, and the jury followed his lead. The scope of fairness, though, was restricted to the issue at trial. Sandy's story of unfair treatment by a white storekeeper was not the court's concern.

II THE MURDER OF LEE YING

Many Chinese migrants came to Queensland during a succession of gold rushes. A few prospered as merchants, and could protect their interests and persons with solicitors when need arose. More commonly, Queensland's Chinese residents worked as vegetable and fruit gardeners in towns, at mine sites, and on stations.[38] Chinese town and city dwellers lived in Chinatowns without municipal amenities. In routine civic life, there was no pretense of equality. Thus, China Gully, the small Chinatown at Mount Morgan, a gold rush community founded in 1882 near Rockhampton, consisted of a few huts amidst gardens, a dirt street, and footpaths. Here, in the early morning hours of 15 October 1891, Jim Hoy Kee who had been sleeping nearby awoke to find Lee Ying lying blood-soaked on a bed in his hut. Suffering from numerous tomahawk (hatchet) wounds to his skull, Lee Ying clung to life. After crying out to a friend, Jim Hoy Kee ran for the police, sounding the alarm: ‘Lee Ying had been attacked and was near death’. When Constable Mooney arrived, he asked the victim who had attacked him, to which the barely conscious Lee Ying replied ‘big fellow’.[39] Mooney then gathered two local gardeners and a merchant, named Hop Kee, from further down the street. Dr Arthur Colin Mackenzie arrived to treat the victim. The constable, meanwhile, brought Lee Ying's three neighbours in front of the victim to be identified. Hop Kee, who knelt at the end of the bed, was asked by the constable to move closer. He refused. The officer shouted Hop Kee's name a number of times and forced him to kneel directly in front of the victim. When asked if one of the men before him now had attacked him, Lee Ying apparently pointed at Hop Kee and said ‘big fellow’.[40] Six hours later, he died in hospital. The doctor, the constable, and Sam Cheong, who was the first person told of the assault, witnessed the supposed identification.

In addition to the identification, one other piece of evidence weighed against the accused. Jim Hoy Kee discovered Lee Ying at approximately 7:00 am, but testified that he did not tell Hop Kee about the crime until approximately 7:30. Hop Kee, however, had mentioned the crime to two other gardeners at 7:15. The prosecution insisted that Hop Kee knew of the assault, because he was the attacker. The inquest, preliminary hearing, review by the Attorney General, and the interval between circuit court sittings meant that Hop Kee waited six months for a trial. At the trial, which began on 19 April 1892, the defense counsel's questions knocked holes in the prosecution’s case. If Lee Ying was bludgeoned before 4:00 am, why did a man sleeping only three yards away not wake up? If the crime was committed later, why did two men working in the nearby garden not see or hear anything? No one recognized the murder weapon as belonging to either Lee Ying or any one living in Mount Morgan, including Hop Kee. The blows splattered blood throughout the hut and over the murder weapon, but neither Hop Kee nor any one else had blood on their clothing. The constable found no bloodstained clothes.[41]

According to *The Morning Bulletin* which openly sympathized with Hop Kee, the community expected a quick dismissal for several reasons. Lee Ying’s semi-conscious state compromised the identification. Timepieces were notoriously inaccurate and lacking in synchronization, easily accounting for Hop Kee’s apparent prescience. The failure of the prosecution to tie the tomahawk to anyone in the local Chinese community and the absence of blood on Hop Kee’s clothing also seemed to point to a quick acquittal. However, after three days of testimony and one hour of deliberation, the jury arrived at a verdict of guilty. Justice George Harding passed sentence: death by hanging. *The Morning Bulletin* led a determined campaign against the judgment. The paper's editor assumed that race played an important role in the conviction, especially considering the slim evidence. ‘Would the [verdict] have been the same if ... Hop Kee had been of European race?’ [42] Two days later the

paper raised again the issue of race, and proposed that the jury verdict should be set aside.

It is no light thing to tamper with a verdict of a jury: but neither is it a light thing to send an innocent man to the gallows. The case must by the practice of the Colony come before the Executive Council, and we trust that those who were charged with the defence of the prisoner will see that it is presented with all the fullness and force which would certainly be employed were the life or liberty of a European at stake.[43]

Hop Kee ' s solicitors, Joseph Pattison and G V Nellican, circulated a petition that outlined the lack of evidence. Signed by 1759 residents of Mount Morgan and Rockhampton within two weeks of the verdict, it called, not for a reprieve from the death sentence, but a reversal of the jury ' s decision.[44]

Echoing the criticisms in *The Morning Bulletin*, the petition questioned the quality of evidence. The most important challenge dealt with the competency of the only eyewitness, namely the deceased who was semi-conscious.[45] The three witnesses to his identification (Constable Martin Mooney, Dr Arthur Colin McKenzie, and Sam Wah) testified that Mooney yelled ' Hop Kee ' in order to get him to move in front of Lee Ying. Therefore, the identification was tainted because only Hop Kee ' s name was called out.[46] Further, these witnesses disagreed as to how Lee Ying had identified Hop Kee. Constable Mooney insisted that Lee Ying lifted his head, raised his hand, pointed a finger at Hop Kee, and stated that he was the assailant.[47] Sam Wah swore that the deceased only pointed at Hop Kee, but said nothing.[48] Dr Mackenzie stated that Lee Ying ' s head nodded towards Hop Kee, but was so weak that he could not raise it again. Mackenzie never saw Lee Ying raise his hand or point towards Hop Kee.[49]

The petition explained away Hop Kee ' s mention of the crime supposedly about fifteen minutes before the body was discovered. Sam Cheong and Hong Yeong testified that Hop Kee told them of the attack on Lee Ying at about 7:15, although Jim Hoy Kee did not discover the body until approximately 7:30.[50] Neither the prosecution nor the defence ascertained how these times were obtained. Was it by watch, sun, or merely a guess? A difference of opinion over a quarter of an hour would have been nothing extraordinary given the accuracy of nineteenth-century timepiece; if the time were guessed at, then a variation of half an hour would be quite within everyday experience. The petition insisted that Hop Kee could readily have overheard the commotion, and passed on what he heard to others.[51]

The local paper and the petition also questioned why a murderer — who could sneak into a hut, kill a man, not wake someone sleeping three yards away, and elude detection — would bring attention to himself by announcing a crime to the first people he saw.[52] The absence of blood on Hop Kee ' s clothes seemed a flaw in the prosecution's case, because Constable Mooney had thoroughly searched Hop Kee ' s hut and the surrounding area, but found no soiled clothing. Mooney produced a hat belonging to Hop Kee; it had a stain, assumed to be blood, but this discovery was made after Mooney had carried the blood soaked victim to the hospital with Hop Kee ' s assistance. The constable admitted that he did not wash his hands before gathering the evidence and conceded that his own hands might have marked the hat. The prosecution made no effort to show that Hop Kee had owned, or been seen in possession of the tomahawk.[53]

The court ' s failure to find a suitable interpreter was also raised. This difficulty haunted the trial. The prosecution first nominated a relative of the deceased who came to watch the proceedings. The judge rejected this candidate and dismissed a second because the man did not speak the same dialect as Hop Kee.[54] Eventually the judge agreed to a less than ideal person whom he repeatedly censured for uncertainty.[55] Queensland judges, as well as the Crown law officers, worried about interpreters and the ability of an indicted prisoner to understand the charges and the prosecution ' s case. There were instances of a judge discharging an accused because no satisfactory interpreter could be found.[56] These actions were assertions of fair play, but risked appearing to let suspects escape justice.

In concluding the petition to the Colonial Secretary, Hop Kee ' s solicitors emphasized his good character. The petition noted that he was a sober, hardworking, industrious, and well-behaved man,

and that members of all classes signed the plea.[57] Legal counsel organized the petitioning process. On other occasions in colonial Queensland, Chinese residents and organizations employed solicitors to deal with charges against them or even to press the government to charge those who harmed them.[58] As we noted in the previous case, the court furnished a lawyer for a destitute defendant for the duration of the trial in a capital case. However, it cost money to speak back at length in the language of the law; it required money to organize a petition.

After reviewing the petition, the Governor of Queensland, Henry Wylie, instructed Justice Harding to explain to the Executive Council the evidence that produced the conviction. Harding presented his report on 20 May 1892. He believed that two elements influenced the conviction: the death-bed identification in the presence of three witnesses, and the evidence from Sam Cheong that Hop Kee knew of the assault before its discovery.[59] With respect to the first issue, Harding believed that Lee Ying appreciated the importance of the constable's questions and was not overly influenced by hearing Hop Kee's name alone. He described his ambiguous summation to the jury, stating that he outlined deficiencies in the prosecution's case; namely, the ownership of the tomahawk, the low-calibre of police investigatory work, and lack of blood on Hop Kee's clothes. 'If the evidence going to shew murder was believed, there was sufficient to sustain the verdict.'[60] The Council commuted Hop Kee's sentence to twenty years.[61] Pressure for his release continued.

Almost a year after commutation, the Colonial Secretary asked Harding to review the case again. This time the judge added, 'I believe him to be innocent'. Racial stereotyping dominated Harding's bizarre exculpatory report. He re-examined the *post-mortem* evidence, noting numerous slight blows on the skull.[62] A sane murderer would not have inflicted many light wounds, he reasoned, when one or two heavy blows would have sufficed. In all likelihood, the victim would have awoken after one or two of the light blows and either fled or raised the alarm. Instead of murder, Harding now suggested that Lee Ying had committed suicide through a repeated series of 'trifling blows'.[63] Such blows would have put the deceased into such a confused state that his deathbed identification was worthless. Harding's suicide theory also relied on racial prejudice. An acquaintance, Police Inspector Murray, had assured him that Chinese immigrants were very similar to Aboriginals in their propensity for self-mutilation and tolerance of pain. The judge was not surprised as to the:

mutilation to which that race at times voluntarily submit themselves [and] that although suicide is not of frequent occurrence amongst them, it is highly probable that an aboriginal of Australia, or an individual of a similarly inferior intelligence though of another race, might when in a despondent frame of mind, or when under the influence of opium, inflict upon himself such injuries as resulted in the death of Lee Ying.[64]

According to Harding, the doctors who testified at the trial were short on relevant experience, lacking the understanding needed to assess non-Europeans. The perversities of alien cultures, he implied, had to be explained by the people who really knew them — the police! This suggests how non-Europeans might have been treated in the magistrates' courts which dealt with summary offenses. Harding commented on the lack of any conspicuous motive. Hop Kee had over £200 in his bank account, whereas the deceased was:

a mere peddler, in the smallest possible way of business ...[and was] of a low type of character, probably little if any superior in intelligence to the average aboriginal of Australia.[65]

He went further with his prejudiced cultural analysis. As Hop Kee was of a different region of China than most of the community — 'a tribe different to other Chinese at Mount Morgan' — Harding felt that once others named him as perpetrator, the Chinese community echoed the sentiment.[66] The Chinese, he intimated, were incapable of individualism. The Council had the right to pardon Hop Kee which it did.[67] It had another surprise for him.

The Executive Council felt that it was in Hop Kee's best interest — and that of the people of Queensland — if the recently exonerated was summarily deported. The government instructed the Sheriff to detain Hop Kee in jail until passage could be found. On the day of his release, he was escorted to a ship bound for China.[68] Unlike South Sea Islanders and Aboriginal people, Chinese

residents often dealt with abuse through solicitors. Hop Kee's orchestrated deportation denied him that opportunity. The case bares the tangled state of race and criminal justice in Queensland. Sympathetic colonists believed that race played a role in Hop Kee's conviction. Outrage against the conviction suggests that some white citizens wished, at the very least, to be seen as concerned about justice for all. But racial stereotyping reappeared in Harding's strange review. Then, despite Hop Kee's good character, savings, and a prosperous business, Queensland authorities deported him. This removal sat comfortably with Queensland's preference for restrictive immigration for Asians.[69] The case allowed the colonial government to demonstrate liberality while maintaining a sensitivity to white Australia.

III THE DEATH OF CASSEY

North Stradbroke is the largest of the sand islands in Moreton Bay. In the 1890s, there were eight families of South Sea Islanders and Aboriginals at a place on North Stradbroke the government called Myora.[70] Adults gathered oysters, fished, hunted dugong, and worked at the Dunwich Asylum. The latter institution collected in one camp about a thousand of the colony's white poor, aged, infirm, or alcoholic residents. In 1893, two new institutions — a mission and a school — entered Myora. A committee of Brisbane philanthropists opened a reformatory mission for children. Under Queensland's *Act to Provide for the Establishment of Industrial and Reformatory Schools*, magistrates could remove neglected children, including any child born of an aboriginal or half-caste mother.[71] Once removed children could be assigned to missions, or individuals could be licensed to take older children into service.[72] This measure was a chapter in the history of the 'stolen generation' of Aboriginal children who were removed from families and placed among white strangers.[73]

The Brisbane committee employed a white matron and a white supervisor, but relied on the labour of older inmates. The colonial government and the Brisbane philanthropic committee agreed to share the costs of maintaining a schoolteacher for Myora's children and those from the mission. The government paid for a school built by one William North.[74] North ran cattle on Stradbroke and served as a Justice of the Peace. Myora in 1896 was a microcosm of colonialism. It was a multi-racial settlement managed by white authorities who operated with scanty resources and justified their work as moral uplift; magistrates blended their private interests with public affairs, and reported to a central government.

On the morning of 14 September 1896, the acting matron of the mission, Marie Christensen, conducted several children to the beach to bathe them. Cassey, a five year old was singled out; Christensen plunged her roughly into the sea. When they emerged, Cassey collapsed and balked at walking up a hill. She had been sickly from the time of her placement in June. It was widely understood at Myora that Cassey was ill; however, Christensen ignored her condition. She insisted that Cassey walk up a steep hill, but Cassey wanted to sit. Christensen snapped off a green switch, and whipped the child. Over the next few minutes, Cassey suffered a series of attacks. Beatings were not unusual at the mission. Topsy McLeod, a seventeen year-old Aboriginal girl, recalled in words of self-reproach that authorities at the mission and the school applied corporal punishment: 'I have been naughty and got the stick'.[75] When the whippings failed to budge Cassey, Christensen seized her arm, and dragged her. When they reached the top of the hill, she insisted that Cassey walk. The emaciated child was unable to comply. She pleaded 'Jackie carry me'.[76] Jackie Gowrie was an Aboriginal child at the mission.[77] Christensen found another switch and thrashed Cassey, then hurried to her quarters and retrieved a cane. In a few minutes she was back, and beat Cassey's legs.[78] Christensen's shouts attracted the attention of several people. Topsy, then working in the kitchen, got up on a table and peered out a window.[79] From her humpy (a bark hut) on the edge of the settlement, Budlo Lefu saw the disturbance on the hill.[80] She hastened to the scene and picked up Cassey. Christensen told her to put the girl down, that it was none of her business. Budlo Lefu complied.

Budlo and Christensen had clashed before. Budlo's two girls attended the school and played with mission children. The acting matron disciplined Budlo's girls, inciting a furious argument several weeks before the beating of Cassey. So loud had been their disagreement that the mission's superintendent ordered Budlo to leave the grounds.[81] Mindful of this prior hostile stand of white authority, she obeyed, put down the child, and left.[82] Budlo recalled that the child was inert and gasping. Christensen took Cassey into the dormitory where she resumed caning her. Cassey did not eat

after the day's beatings. She never ate again. Schoolmaster Atkinson Dunnington recommended on 17 September that Christensen should contact a doctor at the Dunwich Asylum. 'Marie,' he said, 'if I were you I would send for the Doctor as Cassey is not well'.[83] The next day, she agreed. Doctor Joseph Patrick Maloney, Acting Medical Superintendent at the Dunwich Asylum, examined Cassey on the evening of 18 September.[84] He prescribed whiskey as a stimulant.[85] At about 11:00 the next morning, Maloney received fresh word from Christensen. Cassey had died.[86] He immediately notified Justice of the Peace North that because he had only seen the child once, he could not issue a death certificate.[87] If he had been an attending physician and there had been no suspicious circumstances, he could have issued one. Maloney's stance assured an inquest.

The same day that North received Maloney's note, he convened a magisterial inquest. In 1896 there were 469 formal inquiries into sudden and violent deaths throughout Queensland.[88] Fewer than one per cent investigated the death of Aboriginal people who also were rarely among witnesses at inquests. North accepted testimony from four non-white witnesses.[89] He also interviewed Marie Christensen, the schoolmaster, the assistant to the acting matron, the acting superintendent, and Dr Maloney. North tried to cover-up one important fact. Budlo Lefu was a key witness. North probably realized the importance of her having seen Christensen seek out the cane and forcefully apply it. When he wrote out Budlo's testimony, he omitted this feature of the attack while retaining observations about whipping Cassey with green switches, which could not be regarded as life-threatening. North read aloud to Budlo what he written, so she could confirm the deposition's correctness. She noted that he left out references to the cane. 'I asked him why he had not put it in. He did not say anything.'[90] The exchange is important. North's conduct is indicative of how biased officials could obstruct justice with little effort, while Budlo's resistance was a sign of resolve to speak through the law. Officials on-the-spot could not be depended upon to uphold the rule of the law. The omission of a detail in Budlo's statement would not have deterred a criminal action, because Maloney's testimony assured attention from the Attorney General's office; however, it could have had a bearing on the specific charge if it had gone undetected.

Maloney recounted Cassey's condition when he last saw her alive on the night of 18 September, as well as his *post mortem* findings. Cassey, he said, had about thirty contusions on the posterior aspect of the lower extremities and also lateral contusions from the buttocks to the heels, each about an inch and a half to two inches long and an eighth of an inch wide. They alone could not have killed her; she was emaciated and anaemic. North filled in the inquest form: 'Suspect: Marie Christensen. Suspicious circumstances: Flogging child in weak state of health.'[91] No one during any of the subsequent proceedings proposed aloud that Cassey's appalling state might have been a result of the mission's negligence; attention focused on an aberrant individual rather than a government approved institution which aided a colonial social control measure. This facet of Queensland's system of colonialism would not be exposed to criticism.

Received by the Attorney General's office on 25 September, the file on the inquest into the death of Cassey went to the Police Commissioner's desk the same day, along with a suggestion that the commissioner should consult with the Crown Prosecutor for Brisbane as to the appropriate action. The prosecutor settled on a charge of manslaughter.[92] The commissioner assigned the case to Sub-Inspector James Heathcote. Police officers such as Heathcote had a set of duties in these circumstances. They conducted an investigation with assistance from a constable. When satisfied they had a case, they laid the information necessary for initiating a judicial process.[93] When the case came to court, police officers also participated in questioning of prosecution witnesses. Heathcote had help from Constable Michael Toomey. Dressed in plain clothes, Constable Toomey proceeded to Dunwich aboard the government steam launch on 28 September, traveling under instructions to serve recognizances on witnesses and a warrant for the arrest of Marie Christensen. Toomey spoke to the witnesses. During a conversation with Topsy McLeod, he learned of the existence of the cane, evidence suppressed by North. Toomey sought out Christensen, but did not identify himself or caution her. He said, 'You get ready. You will have to come to Town. It is alleged that you beat a child.'[94] He then asked where she had put the cane. At first, she denied that there was one, and said she had only used a green switch. Toomey asked to see her room. When he began to search it, Christensen pulled out the cane. She insisted that she had not struck Cassey with it. It was, she alleged, 'reserved for the big ones'.[95] As Christensen's attorney pointed out, during the preliminary hearing in the Brisbane Police Magistrate's Court, Toomey had behaved improperly. He had not

identified himself; he had not warned her that she did not have to say anything.[96]

The preliminary hearing began on 29 September before Brisbane Police Magistrate Philip Pinnock. Christensen and her friends retained an attorney. The Crown called twelve witnesses. All who testified at the inquest attended the hearing and repeated what they said earlier with the notable exception of Budlo Lefu who added information about the cane. In addition, the prosecution called upon Constable Toomey who described his visit to Myora and recounted Christensen's statements. Testimony from twelve witnesses, questions from the bench, from Sub-Inspector Heathcote, and from the defense attorney assured a protracted hearing. It extended through portions of five days, and was well-covered in the press. Before the last day of the hearing, Sub-Inspector Heathcote collected additional information. He sent Toomey back to Myora to measure distances, and check sight lines in order to confirm that eyewitnesses could see what they alleged.[97] Hearings like Christensen's were significant in common law criminal justice systems because they tested the prosecution's case to make certain it merited going to trial. Police Magistrate Pinnock determined there was a case to answer. He ordered Christensen to stand trial at the next sitting of the Supreme Court. Between committal and trial, there remained opportunities for a case to be dropped. The Attorney General acting in the capacity of a Grand Jury could determine 'No True Bill' or the Crown prosecutor could decide not to pursue the case (*nolle prosequi*).

The Crown did not drop the case. Christensen appeared for trial without her counsel and pleaded guilty. Exchanges in the court room between Mr. Justice Patrick Real and Crown Prosecutor Arthur Routledge suggest that there were out-of-court plea discussions. Christensen would admit guilt and the prosecution would speak on her behalf for sentencing. Real questioned whether Christensen knew what she was doing when she pleaded guilty. Routledge stated she had friends who advised her. Judge Real suggested that 'by appearance the woman did not seem to possess a very large amount of intelligence'. [98] He wondered if there was more about her that he ought to know. Routledge volunteered to look into it. Christensen was remanded until the following day.[99] The fruits of an out-of-court arrangement materialized when the court reconvened and heard an argument for leniency. Christensen spoke first and said she did not intend to do anything to harm the child.[100] Next, Maloney took the stand and made it clear that the injuries from the caning were not such as to affect health seriously if the child had been in ordinary health. Additionally, the Home Secretary had written a letter to the court in which he said she was a woman of character, and 'he seems to form the opinion that she is not a very strong mind'. Maloney piped up that he believed the prisoner was a woman of imperfect brain development. This led Judge Real to state, 'I think the committee [of the Myora Mission] is as much to blame as the prisoner'.[101] He was not proposing a broadcast censure of missions, which allegedly aimed to provide moral uplift and instruct in useful labor, but blaming the management for careless hiring.

What was the court to do with the prisoner? Prosecutor Routledge said that the Salvation Army would look after the woman. 'In that case,' said His Honour, 'I will give her the benefit of the *Offenders Probation Act*. I understand the Army are prepared to keep an eye on her.' Routledge confirmed this. Mr. Justice Real pronounced sentence, giving Christensen two years hard labour at the Toowoomba Gaol, but suspending that sentence on agreement that the defendant would enter a bond of £100 to be of good behaviour during the term of her sentence. Any misconduct and he would put her away for the two years without further trial.[102] Was this sentence unreasonably lenient? This is not easy to answer, because there is no parallel case of an Aboriginal woman accused of beating a white child and causing a death. A critical variable in such a hypothetical comparison would have been the quality of counsel, because Christensen's seems to have been skilled at plea-bargaining, and one wonders if court-appointed counsels for the indigent worked so effectively. Christensen's sentence may have benefitted from her position, and it is reasonable to wonder if the government wanted to avoid public exposures about a mission that a trial could force. However, the sentence was also a plausible one for the crime. Maloney's testimony at the inquest, the hearing, and sentencing at no time indicated the child had died solely from a beating. In his professional opinion, she was very ill and the cause of death complicated. Manslaughter in these circumstances was an appropriate charge. Marie Christensen was not regarded as a threat to society, and the *Offender's Probation Act* — a progressive measure for the time — recognized that vindictive sentences did not necessarily serve society. Reviewed in 1889, the act had the support of a majority of the Supreme Court and Circuit Court judges. Another review in 1893 disclosed that hundreds of offenders benefited,

including three guilty of manslaughter.[103] There were precedents for Judge Real's sentence, and Christensen was a first-time offender. Colonial authorities demonstrated in a long preliminary hearing that the death of an Aboriginal child in a mission could not be ignored, but their response focused on Christensen and that left the civilizing duty of missions intact.

The final episode in the affair projects the larger picture of colonization. The mission idea survived without public censure, because it figured so centrally in the cultural chauvinism of moral uplift. Nevertheless, the government's activities in the days following the death of Cassey denote compassion about the fate of Aboriginal and 'half-caste' children at the mission which authorities quietly closed after the hearing. Several children suffering from the poor conditions at Myora were temporarily lodged at the Brisbane Children's Hospital. Several were sent to another mission. Nellie, one of the older girls, found a place as a domestic servant with a certain Miss Atthow. Placement outside a mission required government approval. A sponsor had to agree to government conditions. Miss Atthow chaffed at the terms, for they included wages. She wrote in huffy protest to the Under Secretary, Home Secretary's Department:

If you do not see your way to license the child to me on the above conditions (food, clothes, but no wages), I would be pleased if you will make arrangements to have the child taken care of by the state.

The Home Secretary, Horace Tozer, minuted instructions: 'license her out in the conditions offered by Miss Atthow'.[104] Close-fisted charity or labour without wages — exploitation — were not unusual in Queensland and elsewhere in Australia where Aboriginals came onto white stations or missions and worked.

THE MEANINGS OF THE CASES

In each case, Queensland criminal justice conformed on the surface to ideals. The colony's judges and law officers subscribed to the ideal that fair trials be universally available. Counsel was appointed by the courts for poor individuals charged with capital offenses, and interpreters were sought who could elucidate important concepts for the benefit of accused parties.[105] In *Whigs and Hunters*, E P Thompson maintained famously that when English ruling elites in the eighteenth century arranged 'the bloody code' that protected their property with capital punishment, they sought to legitimize these laws in part through asserting a national myth of superior fairness in criminal trials. That claim, however, became a foundation for building rights and expanding the scope of justice.[106] In keeping with such optimism, we could say that it was a hopeful sign that several white Queenslanders, acting without apparent ulterior motive, helped secure justice for non-whites. Jurors followed a judge's intimations about unsuitable police tactics; a newspaper editor crusaded to free a wrongfully convicted man; a doctor refused to issue a death certificate and forced an inquest. It was a hopeful sign too that Budlo Lefu, a non-European, resisted the attempt of a Justice of the Peace to distort her story.

Many decent individuals worked within a system that alleged fairness. Of course, people like the editor of *The Morning Bulletin* at Rockhampton and Patrick Joseph Maloney, the Dunwich doctor, were not found everywhere. A few months after Christensen's day in court, the Attorney General's office received another inquest file on the death of an Aboriginal. This time it was a suspect pursued by the police. The mounted constable who located the man explained the bullet hole in his skull by alleging that he shot at the feet, but the fugitive was crouching and took a bullet in the head.[107] Besides, 'the white women seemed especially frightened of their lives'.[108] Aboriginals remained at the mercy of local settlers and supposed agents of the law. Leaving aside the larger topic of colonial-frontier violence and restricting ourselves to well-documented confines of three dramas, it is obvious that in the court rooms of Queensland — though not in the bush — there was more happening than a mere showy display of ideals from the British legal system.

Claims of fair play need to be balanced by the rest of the story, which included chapters largely hidden from or ignored by most white colonists. Barely apparent was the probability that Sandy's attack on Morris originated in unfair treatment at the store. Hop Kee was whisked away for

deportation without possibility of appeal. The practice of seizing Aboriginal children — in conjunction with a mission and placement system — was not challenged after Cassey's death. The three cases remind us that colonizers wielded power. The colonized were largely constrained to accept subjugation unless they resorted to illegality as Sandy had when he was cheated, or could hire representation as Chinese residents had often done. Accused parties who understood the law's formal and tacit operations, and had resources to work both, could make the best of due process. These background conditions were recognized by some of the colonized — the Chinese. China had a history of dealings with the British empire, and Chinese merchants had participated for centuries in a worldly culture of trade in south Asia. The hidden conditions were taken for granted by the colonizers. Christensen was helped by friends who hired a capable counsel who knew how to plea bargaining.

The fact that the legal system had to be understood and counsel secured, in order to obtain the best results when seeking justice, indicates the type of society forming in Queensland. It was one with a culture of legality and rights-bearing subjects; it was one in which these rights perhaps only became fully operative for all races in criminal courts; it was one where justice was practiced by narrow, reactive interventions; it was one with a market economy whose values extended to the legal services that were so critical to upholding rights; it was one with a charitable sentiment that furnished a pinch of aid to those facing serious charges; it was one where urban professionals tried to do the right thing. Queensland was backward in its susceptibility to racial ideas and racist politics; it was progressive in framing a model probation system. The seven concepts that opened this article, guided us through plot turns to a realization that these cases showed a collision of broad historical forces — British imperialism and capitalism — with local cultures. Colonizers and colonized were parties to a phase of global integration in which the colonizers' law served as an instrument of integration-subjugation, but also of mediation. The antithesis between the law as an outside agent of integration-subjugation and its mediation role makes Queensland's legal history politically charged. It has to be so, because indeterminacy persists.

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[1] An example of postcolonial criticism is Thomas Richards, *The Imperial Archive: Knowledge and the Fantasy of Empire* (1993) 8. Good brief descriptions of the postcolonial position in legal studies are provided by Peter Fitzpatrick and Eve Darian-Smith, 'Laws of the Postcolonial: An Insistent Introduction' in Fitzpatrick and Darian-Smith (eds), *Laws of the Postcolonial* (1999) 1-14; Susan F Hirsch and Mindie Lazarus-Black, 'Performance and Paradox: Exploring Law's Role in Hegemony and Resistance' in Lazarus-Black and Hirsch (eds), *Contested States: Law, Hegemony, and Resistance* (1994) 1-21.

[2] David Spurr, *The Rhetoric of Empire: Colonial Discourse in Journalism, Travel Writing, and Imperial Administration* (1993) 32.

[3] The larger project involves a statistical analysis of inquests from 1840 to 1897.

[4] For a stimulating introduction to these points, and to postcolonial analysis of imperial ideals see Simon Gikandi, *Maps of Englishness: Writing Identity in the Culture of Colonialism* (1996) 1-83.

[5] Douglas Hay, 'Property, Authority and the Criminal Law' in Hay *et al*, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (1975) 17.

[6] John L Comaroff, 'Foreword' in Lazarus-Black and Hirsch (eds), above n 1, xii.

[7] For a recent survey overlaid with historical sociology, see Bill Thorpe, *Colonial Queensland: Perspectives on a Frontier Society* (1996). Two older work retain value; Noel Loos, *Invasion and*

Resistance: Aboriginal-European Relations on the North Queensland Frontier, 1861-1897 (1982); Raymond Evans, Kay Saunders, Kathryn Cronin, *Race Relations in Colonial Queensland: A History of Exclusion, Exploitation, and Extermination* (first published 1975; revised editions 1988, 1993). Hector Holthouse wrote a series of popular books that dealt with some violent chapters in the colony's history. See, eg, *Gympie Gold* (1973). For the pearl fishery, see Regina Ganter, *The Pearl-Shellers of Torres Strait: Resource Use, Development and Decline, 1860-1960s* (1994).

[8] Henry Reynolds, 'The Unrecorded Battlefields of Queensland' and Russell McGregor, 'Law Enforcement or Just Force? Police action in two frontier districts' in Reynolds (ed), *Race Relations in North Queensland* (1993) 40 and 63. Mark Finnane relates how indigenous resistance affected policing in Australia. He points out that policing the frontiers established the colonies 'as places of occupation by European settlers with limited regard for the rights or desires of the occupants'; *Police and Government: Histories of Policing in Australia* (1994) 25.

[9] The government was alarmed by the concentration of many deaths on several plantations. See Charles Jamieson, Secretary, Crown Law Offices, to Under Colonial Secretary, 11 September 1886, JUS/G11, Department of Justice, Letterbook 207, QSA.

[10] Evans, Saunders and Cronin, above n 7 (1993 ed) xvii.

[11] *An Act to Abolish Coroners' Juries and to Empower Justices of the Peace to Hold Inquests of Death* [17th July 1866], 30 Victoriae No.3. Other legislation provided a Police Magistrate, that is a salaried official, with the same authority as two Justices of the Peace. Thus, an inquest could be held by a Police Magistrate or two Justices of the Peace. *An Act to Consolidate and Amend the Statute Law of Queensland relating to Offences against the Person* [13th September 1865] 29 Victoriae No.11.

[12] Beverley Kingston, *The Oxford History of Australia Volume 3 1860-1900: Glad, Confident Morning,* (1989) 186.

[13] Deposition of Constable Patrick O'Reilly B, Coroner's Inquest into the death of Patrick Morris 15-17 June 1876, Inquests, JUS N49/76; 170, QSA.

[14] Deposition of Stephen Egan B Coroner's Inquest into the death of Patrick Morris, 15-17 June 1876, JUS N49/76; 170, QSA.

[15] Deposition of O'Reilly, above n 13.

[16] Deposition of Mary Hurley B Coroner's Inquest into the Death of Patrick Morris, 15-17 June 1876, JUS N49/76;170, QSA.

[17] There are numerous examples of the Native Troopers, under the direction of white officers, simply killing 'troublesome' aboriginals that camped too close or too long near white settlements. See, for example, the killings at Fassifern in 1860, JUS N2/60;69, QSA, Eureka Station in 1864 JUS N8/64;148, QSA and Herbert River in 1872 JUS N35/72, QSA.

[18] The evidence for Sandy's former membership in the Native Police comes from witness descriptions of him wearing a Native Trooper belt.

[19] Deposition of O'Reilly, above n 13.

[20] Ibid.

[21] Ibid.

[22] *An Act to Amend the Constitution of the Supreme Court of Queensland and to provide for the better Administration of Justice* [7th August 1861], 25 Victoriae No.13. This approach to confirming

indictments originated from the initial exclusion of civilian juries from trials during the early penal-colony era in New South Wales. Civilian juries eventually replaced military ones in the 1820s, but Grand Juries were not introduced. See David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991) 167-87.

[23] See Circular Letter to Magistrates, 1894, JUS/A, Circular Letter Book, 1884-1932, QSA.

[24] W Richard Morgan to Attorney General, undated but received 28 April 1879, JUS/A21, Department of Justice, Incoming Letters, QSA.

[25] John Keane to Messrs Hamilton and Son, Solicitors, Toowoomba, 2 November 1883, Department of Justice, Attorney General, Letterbook, JUS/G9, QSA.

[26] Memorandum from Secretary, Crown Law Offices, to Auditor General, 21 May 1885, Department of Justice, Attorney General, Letterbook, JUS/G10, QSA.

[27] Deposition of Matthew Collopy, 9 April 1877, *Regina v Sandy,* SCT7/CC22, QSA.

[28] *The Bulletin*, 14 February 1877, 5.

[29] *The Bulletin*, 22 February 1877, 5.

[30] Deposition of Stephen Egan, 9 April 1877, *Regina v Sandy,* SCT7/CC22, QSA.

[31] Deposition of John Stack, 9 April 1877, *Regina v Sandy,* SCT7/CC22, QSA.

[32] Ibid.

[33] Deposition of Collopy, above n 27.

[34] Ibid.

[35] *The Bulletin*, 13 April 1877, 6.

[36] Ibid.

[37] See Stewart E Tolney and E M Beck, *A Festival of Violence: An Analysis of Southern Lynchings, 1882-1930* (1992) 17-51; Michael Hindus, *Prison and Plantation: Crime Justice, and Authority in Massachusetts and South Carolina, 1767-1878* (1980) 85-98.

[38] Kingston, above n 12, 133-7.

[39] Deposition of Constable Mooney, 19 October 1892, *Regina v. Hop Kee,* SCT7/CC56, QSA.

[40] Ibid.

[41] Ibid.

[42] *The Morning Bulletin* (Rockhampton) 23 April 1892, 4.

[43] *The Morning Bulletin*, 25 April 1892, 4-5.

[44] Petition to Henry Wylie, Governor of Queensland, on behalf of Hop Kee, 6 May 1892, Special Subject Batch: Murders, A/19958, QSA.

[45] Ibid.

[46] Ibid.

[47] Deposition of Mooney, above n 39.

[48] Deposition of Sam Wah, 19 October 1892, *Regina v Hop Kee,* SCT7/CC56, QSA.

[49] Deposition of Dr Arthur Colin Mackenzie, 19 October 1892, *Regina v Hop Kee,* SCT7/CC56, QSA.

[50] Deposition of Jim Hoy Kee, 19 October 1892, *Regina v Hop Kee,* SCT7/CC56, QSA.

[51] *The Morning Bulletin*, 25 April 1892, 5.

[52] Petition to Henry Wylie, *The Morning Bulletin*, 25 April 1892, 5.

[53] Ibid.

[54] *The Morning Bulletin*, 21 April 1892, 4.

[55] Petition to Henry Wylie; *The Morning Bulletin*, 22 April 1892, 5-6.

[56] Report of the Attorney General upon ... 40 Victoriae No. 10 [1876], Department of Justice, Letterbook, pp. 928-9, JUS/G5, QSA; Alfred Cooling, Secretary, Crown Law Office, to the Under Secretary, 1 May 1884, Department of Justice, Letterbook, JUS/G10, QSA; W D Bowkett to Attorney General, 2 September 1889, Department of Justice, Incoming Letters, JUS/A45, QSA; *Regina v Goverra*, Circuit Court Trials, Maryborough, September 1886, CCT 3B/N30, QSA; *Regina v Pataboo* [1892], and *Regina v Ewar alias Billy Marimot* [1892], Crown Solicitor, Special Cases, 1858-1908, CRS/157, QSA.

[57] Petition to Henry Wylie, above n 55.

[58] Inquest into the Death of Wong Pow, 76/101, JUS/N49; Theosophilous Pugh to Attorney General, 3 May 1876, Justice Department, Incoming Letters, JUS/17, QSA.

[59] The arguments that Harding presented are reconstructed from the report that he forwarded in advance. Harding to Wylie, 7 May 1892, Special Batch Subjects: Murders, A/19958, QSA.

[60] Ibid.

[61] Executive Council Minutes, 20 May 1892, EXE/D66, QSA.

[62] Harding to Colonial Secretary, 21 March 1893, Special Subject Batch: Murder, A/19958, QSA.

[63] Ibid.

[64] Ibid.

[65] Ibid.

[66] Ibid.

[67] Executive Council Minutes, 6 April 1893, EXE/D68, QSA.

[68] Executive Council Minutes dated 22 April 1893, EXE/D 68, QSA.

[69] For the government's attitude on Chinese miners on the gold fields, see Report of the Attorney General on Several Acts Passed, ‘An Act to Amend the Gold Fields Act of 1874 so far as Relates to new Gold Fields,’ Justice Department, Attorney General, Letterbook, 973, JUS/G6, QSA. The rights of

Chinese settlers were increasingly restricted from the 1870s to the 1900s. In Queensland, legislation excluding Chinese from the colony was disallowed by the Colonial Office; Kingston, above n 12, 137.

[70] See Bernice Fischer *et al*, *Moongalba (Myora) Sitting Down Place* (1997). A collection of vignettes, the booklet provides a few facts pertinent to the case at hand. For an academic study of Myora, see Faith Walker, 'A Useful and Profitable: History and Race Relations at the Myora Aboriginal Mission, Stradbroke Island, Australia, 1892-1940' in *Memoirs of the Queensland Museum, Cultural Heritage Series* (1998) vol 1(1) 137. She refers to the case, but erroneously reports that Christensen was tried for murder and fined for the attack.

[71] *An Act to Provide for the Establishment of Industrial and Reformatory Schools* [31st August 1865], 29 Victoriae No 8.

[72] Rosalind Kidd, *The Way We Civilise* (1997) 20-1. See Aboriginal Mission (Myora) on Stradbroke Island, Minutes of the Executive Council Meeting, 18 November 1896, Col/E195, QSA.

[73] Inspired by Michel Foucault, Rosalind Kidd describes the expansion of government power over the lives of Aboriginals in the twentieth century; ibid.

[74] Paddy Carter *et al*, editors, *Historic North Stadbroke Island*, 63.

[75] Deposition of Topsy McLeod, 29 September 1896, *Regina v Marie Christensen,* SCT/CC 127, QSA.

[76] Deposition of Edwin Renshaw, *Regina v Marie Christensen*, 1 October 1896, SCT/CC 127, QSA.

[77] Aboriginal Mission (Myora) on Stradbroke Island, Executive Council Minutes, 18 November 1896, COL/E 195, QSA.

[78] Deposition of Eliza Parker, 29 September 1896, *Regina v Marie Christensen*, SCT/CC 127, QSA.

[79] Deposition of Topsy McLeod, above n 75.

[80] Her name suggests that she may have descended from Torres Strait pearl fishers, or from the South Sea Islands.

[81] Deposition of Edwin Renshaw, above n 76.

[82] Deposition of Budlo Lefu, 29 September 1896, *Regina v Marie Christensen*, SCT/CC 127, QSA.

[83] Deposition of Atkinson Dunnington, 15 October 1896, *Regina v Marie Christensen*, SCT/CC, 127, QSA.

[84] Government of Queensland, *Blue Book for the Year 1896* (1897) 91.

[85] Deposition of Dr Joseph Patrick Maloney, 1 October 1896, *Regina v Marie Christensen*, SCT/CC 127, QSA.

[86] Deposition of Maloney, above n 85.

[87] Dr Maloney to W R North, 19 September 1896, file 370/96, JUS/N245, Inquests, Department of Justice, QSA.

[88] Register of Coroners' Inquests, Depositions Received, Book No 6, 13 January 1893 - 6 August 1897, JUS/R5, QSA.

[89] See the depositions of Topsy McLeod, Budlo Lefu, Polly Roberts, and Evelyn Ellis in file

370/96, JUS/N245, QSA.

[90] Deposition of Budlo Lefu, above n 82.

[91] Certificate of Particulars. Inquest of Death. File 370/96, JUS/N245, QSA.

[92] Under section 3 of *An Act to Provide for the Industrial and Reformatory Schools*, the Governor in Council was ' to appoint some fit and proper person to be respectively superintendent and matron of every such school ' . The Myora Mission was a private institution, and Christensen was only an acting matron. The government was not directly responsible for her position of authority.

[93] Information Laid by Sub-Inspector of Police, James Heathcote, 26 September 1896, SCT/CC 127, QSA.

[94] Deposition of Michael Toomey, 29 September 1896, *Regina v Christensen* SCT/CC 127, QSA.

[95] Ibid.

[96] Ibid.

[97] Testimony of Michael Toomey, Recalled to Testify, 29 October 1896, *Regina v Marie Christensen*, SCR/CC 127, QSA.

[98] *Brisbane Courier*, 17 November 1896, 3.

[99] Ibid.

[100] *Brisbane Courier*, 18 November 1896, 2.

[101] Ibid.

[102] Ibid.

[103] File on the Review of the Offenders' Probation Act, JUS/W1, Papers on Bills and Acts, 1859-1892, QSA.

[104] Miss S Atthow to Under Secretary, Home Secretary, 12 November 1896, enclosed in Executive Council Minutes for 18 November 1896, COL/E 195, QSA.

[105] See for example the minute written on Davidson to Attorney General, 4 November 1873, JUS/A14, Department of Justice, Incoming Letters, QSA.

[106] E P Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975) 258-65. For a recent and sophisticated rendition of the argument see Tina Loo, *Making Law, Order, and Authority in British Columbia, 1821-1871* (1994) 159-61.

[107] Deposition of Harry Rolleston, 18 June 1897, Inquest into the Death of Charlie Morgan, JUS/N253; 251/1897, QSA.

[108] Deposition of Constable John Burke, 18 June 1897, Inquest into the Death of Charlie Morgan, JUS/N253; 251/1897, QSA.